

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the	:	
Power Purchase Agreement Rider of	:	Case No. 18-1004-EL-RDR
Ohio Power Company for 2018.	:	
	:	
In the Matter of the Review of the	:	Case No. 18-1759-EL-RDR
Power Purchase Agreement Rider of	:	
Ohio Power Company for 2019.	:	
	:	

**REPLY COMMENTS SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Respectfully submitted,

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**On Behalf of the Staff of
Public Utilities Commission of Ohio**

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. BACKGROUND	2
III. REPLY COMMENTS.....	5
A. The audit is performed on behalf of the Staff of the Commission and complied with the Commission’s Orders.	5
B. OCC, OMAEG, Kroger, and NRDC have attempted to misconstrue the intentions of the Staff member who sent an email message to the Auditor with certain recommendations.	8
C. The Commission dictates how Staff should conduct a prudency audit.	9
IV. CONCLUSION	10
CERTIFICATE OF SERVICE	12

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I. INTRODUCTION

On December 7, 2020, the Attorney Examiners issued an Entry allowing for Initial Comments to be filed regarding the compliance audit report that London Economics International LLC (“LEI” or the “Auditor”) filed on September 16, 2020. In accordance with the Public Utilities Commission of Ohio’s (“Commission”) directives, LEI’s Audit reviews the costs associated with the Ohio Power Company’s (“Ohio Power”) contractual entitlement to a share of the electrical output of generating units owned by the Ohio Valley Electric Corporation (“OVEC”) for the period of January 1, 2018 through December 31, 2019.¹

On November 12, 2021, Initial Comments were filed by the Natural Resources Defense Council (“NRDC”), jointly by the Ohio Manufacturing Association Energy

¹ See Case No. 18-1004-EL-RDR, et al., (Entry) (December 7, 2020) at 2.

Group (“OMAEG”) and the Kroger Company (“Kroger”), the Office of the Ohio Consumers’ Counsel (“OCC”), and Ohio Power.² These Reply Comments by the Commission Staff address the issues raised by intervenors and Ohio Power in their respective Initial Comments.

II. BACKGROUND

As a preliminary matter, it is critical to note that the purpose of this proceeding is to *conduct review of any retail charges flowing through Ohio Power’s Purchase Power Agreement (“PPA”) Rider*. Specifically, the Commission provided, in Case No. 14-1693-EL-RDR, et al., for an annual prudency audit to establish the prudency of all costs and sales flowing through the PPA Rider and to demonstrate that the *Company’s* actions were in the best interest of retail ratepayers. The existence of the PPA Rider has already been approved by the Commission. Stated differently, whether or not there should be a PPA Rider is not up for re-litigation in this proceeding. To this end, the Initial Comments filed³ OMAEG, Kroger, and NRDC question the existence of the PPA Rider, rather than focusing on the actual prudency audit that was conducted for this proceeding. And yet another example of misstating the scope of this proceeding, OCC began its most recent filing in this docket, a December 1, 2021 motion for subpoena *duces tecum*, by

² The Ohio Energy Group filed a letter stating it would not be filing Initial Comments.

³ See, for example, OCC’s Initial Comments where it states: “These cases involve reviewing above-market costs charged by AEP to consumers in 2018 and 2019 under AEP’s Power Purchase Agreement Rider (“Coal Plant Charge”), which the Public Utilities Commission of Ohio (“PUCO”) approved in 2016. AEP uses the Coal Plant Charge to make consumers subsidize it for electricity produced by the Ohio Valley Electric Corporation (“OVEC”) that involves two 65-year-old coal plants - the Kyger Creek Generating Station in Cheshire, Ohio and the Clifty Creek Generating Station in Madison, Indiana.” OCC Initial Comments at 1.

incorrectly stating: “This case concerns consumers paying a lot of money (**projected to be \$1 billion in utility subsidies through 2030**).”⁴ *Emphasis added*. Here the OCC apparently conflates this proceeding’s stated purpose (as is explained below, a prudency audit of Ohio Power’s PPA rider during 2018 and 2019) with a broader debate on the appropriateness of public policy established by the General Assembly that took effect *after* the time encompassed by this proceeding.⁵

The January 15, 2020 Entry in this docket states: “[t]he Commission directs Staff to issue a request for proposal for audit services to assist the Commission with the prudency and performance audit of the Power Purchase Agreement Rider of Ohio Power Company d/b/a AEP Ohio for the period of January 1, 2018, through December 31, 2019.” Further, the RFP attached to the Commission’s January 15, 2020 Entry contains a section entitled, “Scope of Investigation” with six specific operational items listed for review by the auditor.⁶ These include (1) disposition of energy and capacity, (2) fuel and variable cost expenses, (3) capital expenses, (4) environmental compliance, (5) power plant performance, and (6) utility industry perspective.⁷ Thus, the scope of the audit and the applicable time period to be examined was clear and targeted.

In Case No. 13-2385-EL-SSO, et al., the Commission modified and approved Ohio Power’s application for an Electric Security Plan for the period of June 1, 2015,

⁴ See Case No. 18-1004-EL-RDR, OCC Motion for Subpoenas at 1 (December 1, 2021).

⁵ See Case No. 18-1004-EL-RDR, Entry, at attached RFP 3 (January 15, 2020), which states ““Effective October 22, 2019, Ohio’s legislature approved HB6 which directly affects the OVEC units in part. The period for this audit precedes the effective date of HB6.”

⁶ See Case No. 18-1004-EL-RDR, Entry, at attached RFP 5-7 (January 15, 2020).

⁷ Id.

through May 31, 2018, pursuant to R.C. 4928.143.⁸ Among other matters, the Commission authorized Ohio Power to establish a placeholder Power PPA Rider and required Ohio Power to justify any future request for cost recovery in a separate proceeding.⁹ In Case No. 14-1693-EL-RDR, et al., the Commission modified and approved a Stipulation and Recommendation pertaining to Ohio Power's proposal to populate the placeholder PPA Rider approved in the ESP 3 Case. The Commission also directed that the PPA Rider be subject to an annual audit.¹⁰

In Case No. 16-1852-EL-SSO, et al., the Commission modified and approved a Stipulation and Recommendation, which authorized AEP Ohio to implement an ESP for the period of June 1, 2018, through May 31, 2024, and provided for the continuation of the PPA Rider. Subsequently, the General Assembly eliminated the PPA Rider and replaced it with a different mechanism. The existence of Ohio Power's PPA Rider during the period of the audit is not in question.

Notably, the OCC and OMAEG challenged the Commission's Order in the PPA Rider case, challenging the approval of the cost recovery through the PPA Rider.¹¹ And the Ohio Supreme Court affirmed the Commission's decision.¹² OCC later challenged the PUCO's jurisdiction to approve Ohio Power's PPA Rider at the Ohio Supreme Court. This argument was also unsuccessful. The Ohio Supreme Court Supreme Court found the

⁸ *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (ESP 3 Case), Opinion and Order (Feb. 25, 2015), Second Entry on Rehearing (May 28, 2015), Fourth Entry on Rehearing (Nov. 3, 2016), Seventh Entry on Rehearing (Apr. 5, 2017).

⁹ *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 20-22, 25-26. ¶ 5

¹⁰ *PPA Rider Case*, Opinion and Order (Mar. 31, 2016) at 89-90. ¶ 6

¹¹ *See In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698.

¹² *Id.*

“PUCO had subject-matter jurisdiction to approve the Power Purchase Agreement Rider.”¹³ Ultimately, the Ohio Supreme Court dismissed OCC’s argument on PPA Riders because OCC failed “to raise a federal-preemption challenge in an application for rehearing deprives this court of jurisdiction to consider this issue in the first instance.”¹⁴

This background is critical and necessary to recognize OCC cannot challenge the lawful existence of the PPA Rider - only its implementation. In addition, it is important to note the intervenors did not seek rehearing on the scope of the audit for this proceeding, nor the Request For Proposal (“RFP”) orders indicating the scope and review of the audit. Thus, the time for challenges on the scope of the audit has passed.

III. REPLY COMMENTS

A. The audit is performed on behalf of the Staff of the Commission and complied with the Commission’s Orders.

OCC asserts Staff’s communications with the Auditor regarding the scope of the audit compromised the auditor’s independence. In making this assertion, OCC misapprehends the nature of the relationship between the auditor and Staff. While the auditor conducted the review as an extension of Staff, Staff performed its duty to ensure the auditor fulfilled the terms of the contract and scope of the audit. Staff must ensure an audit remains on schedule and within the scope as defined by the Commission. It is

¹³ *In re Application of Ohio Power Co.*, 159 Ohio St.3d 326, 2018-Ohio-4698 at ¶ 23

¹⁴ *Id.* at ¶24.

misleading to suggest a Commission-selected auditor should be walled off from contact with Staff until the audit report is filed.

NRDC claimed that the audit was somehow “not independent as intended by the Commission Order.”¹⁵ NRDC further accused Staff of making edits to the audit report that were “unacceptable and undermine the credibility of the audit.”¹⁶ NRDC’s accusation is seriously flawed. In an Entry dated March 11, 2020, the Commission selected London Economics International LLC (LEI) to “assist the Commission with the prudence and performance audit of the Power Purchase Agreement Rider of Ohio Power Company d/b/a AEP Ohio for the period of January 1, 2018 through December 31, 2019.”¹⁷ LEI was not to conduct the audit while completely cut off from contact with Staff. The Commission stated it “would direct the work of the auditor.”¹⁸ The only logical way the Commission could feasibly direct the work of the Auditor was through its Staff.

OMAEG/Kroger argued that “The Commission Staff should not have directed the independent Auditor to modify the language in the Audit Report.”¹⁹ But LEI was conducting the audit as an extension of Staff, and a review of the authority cited in the Entry and RFP demonstrate this. The Commission delegated to LEI the same authority given to Staff, stating that “LEI will execute its duties pursuant to the Commission’s statutory authority to investigate and acquire records, contracts, reports, and other

¹⁵ NRDC Initial Comments at 2.

¹⁶ *Id.* at 3.

¹⁷ Entry at ¶1 (March 11, 2020).

¹⁸ Entry at ¶10 (March 11, 2020).

¹⁹ OMAEG/Kroger Initial Comments at 6.

documentation under R.C. 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16.”²⁰

Furthermore, LEI was made subject to the same restrictions as Staff. The same Entry states that “LEI is subject to the Commission’s statutory duty under R.C. 4901.16, which provides:

‘Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission.’”²¹

The RFP explicitly states that the “PUCO staff will oversee the project.”²² In furtherance of Staff’s oversight, the Staff is given notice of meetings with the utility and an opportunity to attend²³ and Staff is given an interim report at the midterm of the audit of the progress and any initial/tentative findings and conclusions.²⁴

The Entry provided that a draft audit report be provided to Staff prior to the release of the final report.²⁵ LEI was thus operating as an extension of the Commission Staff under Staff’s supervision. There was nothing improper, and in fact required Staff to review the Auditor’s work and offer suggestions to ensure LEI was fulfilling its duties.

²⁰ Entry at ¶11 (March 11, 2020).

²¹ *Id.*

²² PUCO Staff Supervision, 4 of RFP attached to Commission’s Entry (January 15, 2020).

²³ PUCO Staff Supervision, 4 of RFP attached to Commission’s Entry (January 15, 2020).

²⁴ Interim Reporting, 8 of RFP attached to Commission’s Entry (January 15, 2020).

²⁵ Timeline at 7, and Final Report at 9 of RFP attached to Commission’s Entry (January 15, 2020).

Finally, it is worth noting that the Commission's order and RFP issued in this proceeding clearly communicated the scope and involvement of Staff. If any party had an issue with the involvement of Staff or the scope of the audit they should have raised the issue on rehearing. But that time has now passed.

B. OCC, OMAEG, Kroger, and NRDC have attempted to misconstrue the intentions of the Staff member who sent an email message to the Auditor with certain recommendations.

There has been much attention brought by OCC, OMAEG, Kroger, and NRDC to an email sent by a PUCO Staff member to the auditor during the drafting phase of the Audit Report. Specifically, focus has been brought to one correspondence from a PUCO Staff member. The content of the message under scrutiny is: “[m]ilder tone and intensity of language would be recommended such as the language on page 10, para 3: “Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers.” However, the conversation between Staff and the Auditor represents nothing more than the routine, iterative process of drafting the audit report. The discussion involved language and subjective opinion only. No objective facts were removed from the report.

In addition, the Auditor (Marie Fagan of LEI) has not had the opportunity to testify regarding why the final Audit Report contains the conclusions and statements it does, and why she may have removed or revised others. The Commission has evidentiary proceedings, to allow expert witnesses the chance to testify about its recommendations and conclusions. Neither Staff nor the Auditor has had the opportunity to testify. It is

unfair for OCC and others to assign meaning to the Staff's recommendation and the Auditor's actions prior to the evidentiary hearing.

OCC seeks to "restore LEI's full audit report containing the auditor's original recommendations that the OVEC plants are "not in the best interests of the ratepayers,"²⁶ yet, the Auditor has not had the opportunity to testify as to the Audit Report. OCC will have a full and fair opportunity at hearing to cross-examine the Auditor on this phrase. Thus, modifying the Audit Report would serve no purpose.

C. The Commission dictates how Staff should conduct a prudence audit.

The Commission explained in detail how Staff should conduct an annual prudence audit.²⁷ The Commission emphasized, in the PPA Order, that it would "conduct an annual prudence review of any retail charges flowing through the PPA rider."²⁸ The Commission also addressed the annual audit process and set forth clear expectations, in response to certain interveners' concerns, regarding a number of specific issues related to retail cost recovery, such as Capacity Performance penalties and bonuses, forced outages, and bidding behavior.²⁹ The Commission directed that Ohio Power would bear the burden of proof in each annual audit, to establish the prudence of all costs and sales flowing through the PPA rider **and to demonstrate that the Company's actions were in the best interest of retail ratepayers.** (Emphasis added).³⁰ With respect to bilateral transactions

²⁶ See OCC Initial Comments at 2.

²⁷ See Case No. 14-1693 at 87 (March 31, 2016 Order); see also, 71 of the Order (November 2, 2016).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 89.

between Ohio Power and affiliates, the Commission instructed that any such transactions would be stringently reviewed and that no presumption of management prudence will apply to any bilateral sales by the Company to affiliates.³¹

OCC and others seem to confuse the Commission's directive of determining whether the Company's actions were prudent with whether the PPA Rider should have been established.³² That would enter the realm of relitigating the Commission's decision in Case No. 14-1693-EL-RDR, and all other related cases and decisions that followed. Certainly, the purpose of this audit was not to determine whether or not the Commission, or the Ohio legislature for that matter, made the right or wrong decision based upon the narrow metric of prudence that the intervenors seem to be attempting to use.

IV. CONCLUSION

The scope of this proceeding has been defined by the Commission. The Commission determined that the Audit would review any retail charges flowing through Ohio Power's PPA rider. The purpose is not to relitigate the existence of the PPA rider. No objective facts were removed from the Audit Report. It is unfair to assign meaning to the Auditor's actions or statements of Staff without providing them the opportunity to testify at hearing. As described in law, Entry, and RFP, the Auditor is an extension of Staff. In addition, Staff must ensure that an audit remains on schedule and within the scope as defined by the Commission.

³¹ *Id.*

³² See OCC Initial Comments at 6 where it states: "This statement goes to the root of whether the OVEC units should even be run let alone charged to consumers."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Foregoing **Reply Comments Submitted on Behalf of The Staff of The Public Utilities Commission of Ohio**, was served via electronic mail upon the following parties of record, this 3rd day of December 2021.

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Summary: Reply Comments Submitted on Behalf of the Staff of the Public Utilities
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