

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**JOINT REPLY COMMENTS  
OF  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP  
AND  
THE KROGER CO.**

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**I. INTRODUCTION**

On November 12, 2021, stakeholders, including the Ohio Manufacturers' Association Energy Group (OMAEG), The Kroger Co. (Kroger), the Office of the Ohio Consumers' Counsel (OCC), and the Natural Resources Defense Council (NRDC) submitted initial comments in the above-referenced proceeding regarding the prudency and performance audit (Audit Report) of Ohio Power Company's (AEP Ohio) Power Purchase Agreement Rider (Rider PPA).<sup>1</sup> The comments largely advocated that AEP Ohio could not meet its burden of proof in demonstrating that the costs associated with the Ohio Valley Electric Corporation (OVEC) recovered through Rider PPA for years 2018 and 2019 were in the best interests of customers. The comments further advocated that AEP Ohio's customers should not be required to subsidize the aging and

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<sup>1</sup> See OMAEG and Kroger's Joint Comments at 2 (November 12, 2021), OCC's Comments at 6 (November 12, 2021), and NRDC's Comments at 3 (November 12, 2021).

uneconomic OVEC coal plants or imprudent business decisions regarding the operations of OVEC.<sup>2</sup>

AEP Ohio's initial comments, however, provided little to no evidence that the costs it recovered through Rider PPA during the audit period were prudently incurred and in the best interests of customers. The comments further attempted to justify OVEC's uneconomic business decisions by stating, "[o]verall, AEP Ohio notes that the Auditor found no instances of imprudence and recommends continuation of many practices and activities already being implemented by OVEC."<sup>3</sup> Not only is this statement inaccurate in regards to the findings in the Audit Report but it is also telling of AEP Ohio's apathy towards customers who have been and, without action from the Commission, will continue to be stuck footing the bill to subsidize the unprofitable coal plants. For these reasons and in accordance with the procedural schedule set forth by the Public Utilities Commission of Ohio's (Commission) December 7, 2020 Entry, as modified on October 5, 2021,<sup>4</sup> OMAEG and Kroger hereby jointly submit reply comments.

As set forth more fully in OMAEG and Kroger's Joint Comments, it has come to light that, at the direction of a Commission Staff member, the auditor in the above-referenced proceeding, London Economics Institute, LLC (LEI or the Auditor) eliminated from the draft Audit Report references to the Am. Sub. H.B. 6 scandal and LEI's conclusion that continuing to run the OVEC plants is not in customers' best interest. The Commission should adopt OMAEG and Kroger's, OCC's, and NRDC's recommendations and restore the Audit Report to its original form, which included the stricken information and conclusion. This will not only promote transparency but

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<sup>2</sup> See OMAEG and Kroger's Joint Comments at 5-7 (November 12, 2021), OCC's Comments at 12-16 (November 12, 2021), and NRDC's Comments at 5-7 (November 12, 2021).

<sup>3</sup> AEP Ohio's Initial Comments at 1 (November 12, 2021).

<sup>4</sup> Entry at ¶ 24 (October 5, 2021).

also ensure that pertinent information in the above-referenced proceeding is included in the case record.

Additionally, the public version of the Audit Report filed in the above-referenced proceeding afforded confidential treatment to various information that cannot reasonably be deemed to be protected information under Ohio law. Thus, the Commission should order the Audit Report to be re-filed, this time unredacting information that is already in the public domain.

Finally and most importantly, the Commission should find that AEP Ohio has not provided any evidence that OVEC's must-run strategy is prudent or in the best interest of customers. Given that AEP Ohio bears the ultimate burden of proof in this proceeding, the Commission should disallow all OVEC costs recovered through Rider PPA for years 2018 and 2019 as AEP Ohio has not sustained its burden to prove that the costs collected from customers were prudent, just, reasonable, and in the best interest of customers.

## **II. REPLY COMMENTS**

### **A. The Commission Should Adopt the Recommendations to Restore the Audit Report's References to the H.B. 6 Bribery Scheme and the Auditor's Conclusion that Operating the OVEC Plants is "Not in the Best Interest of Ratepayers."**

All of the stakeholders' initial comments, except those of AEP Ohio, acknowledged that the Commission ordered this audit to determine whether Rider PPA and AEP Ohio's oversight responsibilities of the OVEC plants were prudent and in the best interest of ratepayers.<sup>5</sup> Indeed, when the Commission initially authorized AEP Ohio to recover OVEC costs through Rider PPA, the Commission established an annual audit requirement and further stated: "AEP Ohio will bear the burden of proof in demonstrating the prudence of all costs and sales during the review, as well

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<sup>5</sup> See OMAEG and Kroger's Joint Comments at 1-2 (November 12, 2021), OCC's Comments at 6 (November 12, 2021), and NRDC's Comments at 2 (November 12, 2021).

as such actions that were in *the best interest of retail ratepayers....*”<sup>6</sup> Again, when issuing the request for proposal (RFP) for the 2018 and 2019 Rider PPA audit in the above-referenced proceeding, the Commission affirmed that the purpose of the audit was to “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.*”<sup>7</sup>

Shockingly, it has been established that LEI’s initial conclusion that “keeping the [OVEC] plants running *does not seem to be in the best interest of ratepayers*” was eliminated from the as-filed Audit Report at the direction of a Commission Staff member.<sup>8</sup>

As recognized in all of the stakeholders’ initial comments but those of AEP Ohio, the Staff member also encouraged LEI to remove language in the draft report regarding H.B. 6, the bribery-tainted law which, in part, expanded the OVEC subsidies.<sup>9</sup> Thereafter, a Commission spokesperson publicly claimed that “unnecessary items [that] were not germane to the purposes of the audit” were removed.<sup>10</sup>

It is indisputable that the Commission’s Opinion and Order and RFP discussed above state that the purpose of the audit is to determine whether costs recovered through Rider PPA and AEP Ohio’s actions were prudent and in the best interests of retail ratepayers. The Commission also placed the burden of proof on AEP Ohio to demonstrate that this was in fact the case. LEI’s initial

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<sup>6</sup> See *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (March 31, 2016) (emphasis added).

<sup>7</sup> See Commission’s Request for Proposal No. RA-20-PPA-1 at 4 (January 15, 2020) (emphasis added).

<sup>8</sup> See OMAEG and Kroger’s Joint Comments at 5 (November 12, 2021).

<sup>9</sup> See OMAEG and Kroger’s Joint Comments at 5-6 (November 12, 2021), OCC’s Comments at Attachment A (November 12, 2021), and NRDC’s Comments at 4 (November 12, 2021).

<sup>10</sup> Jeremy Pelzer, *PUCO Staffer Pushed to Soften Criticism of Coal-Plant Customer Charges in State-Commissioned Audit*, CLEVELAND.COM (October 22, 2021), <https://www.cleveland.com/open/2021/10/puco-staffer-pushed-to-soften-criticism-of-coal-plant-customer-charges-in-state-commissioned-audit.html>.

conclusion that continuing to run the OVEC plants was not in the best interests of ratepayers is not only germane to the stated purposes of the audit, it is dispositive of the central issues because it demonstrates that AEP Ohio cannot meet its burden of proof in this proceeding.

Moreover, the references to H.B. 6 should not have been removed from the Audit Report. As explained in NRDC's initial comments, the decisions to remove the H.B. 6 references from the Audit Report occurred under former Commission Chair Sam Randazzo's tenure, who FirstEnergy Corp. admitted to bribing in exchange for favorable regulatory treatment, including the implementation of H.B. 6 (which also included OVEC provisions).<sup>11</sup> As part of the ill-gotten favorable regulatory treatment, former Chair Randazzo also ensured that a Distribution Modernization Rider (DMR) audit report was "burned."<sup>12</sup> In addition to ultimately expanding the OVEC subsidies, H.B. 6 also included a \$1.1 billion nuclear bailout of FirstEnergy Solutions (now Energy Harbor after emerging from bankruptcy). The Audit Report has an entire section entitled, "FirstEnergy Solutions bankruptcy impacted OVEC and AEP Ohio charges."<sup>13</sup> Therefore, not only are factual statements regarding H.B. 6 germane to the above-captioned proceeding but the removal of such statements calls into question the legitimacy and completeness of the Audit Report.

Accordingly, OMAEG and Kroger respectfully request that the Commission adopt their recommendations, and those of OCC and NRDC, to restore the Audit Report's H.B. 6 references and the conclusion that continuing to operate the OVEC plants would not be in the best interest of ratepayers. Doing so will promote transparency, fulfill the Audit Report's purpose, and help

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<sup>11</sup> *United States v. FirstEnergy Corp.*, 1:21-CR-86, Deferred Prosecution Agreement (July 20, 2021).

<sup>12</sup> Jeremy Pelzer, *Sam Randazzo Overruled PUCO Commissioners, Staff to Help FirstEnergy, According to Company's Ex-CEO*, CLEVELAND.COM (October 20, 2021), <https://www.cleveland.com/open/2021/10/sam-randazzo-overruled-puco-commissioners-staff-to-help-firstenergy-according-to-companys-ex-ceo.html>.

<sup>13</sup> See Audit Report at 16.

protect AEP Ohio's customers against any unjust, unreasonable, or unlawful costs associated with the uneconomic and aging OVEC plants.

**B. The Commission Should Adopt the Recommendations to Disallow OVEC Costs Recovered Through Rider PPA.**

The initial comments of all of the stakeholders, except AEP Ohio, in the above-referenced proceeding extensively discussed the Audit Report's recommendation that OVEC should "reconsider its 'must-run' offer strategy..."<sup>14</sup> For example, NRDC's initial comments explained how the Audit Report examined seven months at random and found that in four of those months OVEC incurred significant losses in the PJM market.<sup>15</sup> NRDC then recommended that the Commission disallow OVEC's self-scheduling costs and that the "Commission Staff should calculate Ohio Power's share of this self-scheduling disallowance starting from a thorough review of all months during the review period."<sup>16</sup>

While OMAEG and Kroger support NRDC's recommendation to exclude self-scheduling costs, OMAEG and Kroger aver that NRDC's initial comments do not go far enough as all of the costs associated with OVEC should be disallowed. The burden of proof in a prudency review is on AEP Ohio. Yet, AEP Ohio has failed to provide proof that a "must-run" strategy is reasonable, in the interest of ratepayers, and is better suited as a financial hedging strategy as compared to other dispatch strategies.

It is clear that customers would have been better off if the OVEC plants had not operated at all during these periods when the PJM energy revenues did not cover the variable costs of

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<sup>14</sup> *Id.* at 9; *see also* OMAEG and Kroger's Joint Comments at 5-6 (November 12, 2021), OCC's Comments at 12-16 (November 12, 2021), and NRDC's Comments at 6-7 (November 12, 2021).

<sup>15</sup> NRDC's Comments at 6 (November 12, 2021).

<sup>16</sup> *Id.* at 7.

running the plants.<sup>17</sup> What is not known, however, is how much less money OVEC would have lost by using an economic dispatch strategy and the resulting impact on customers' Rider PPA charges.

In fact, a recent order from the Michigan Public Service Commission (MPSC) further supports the argument that the OVEC plants were not and continue to not be operated prudently or in customers' best interests.<sup>18</sup> The MPSC Order placed the Indiana Michigan Power Company (I&M), an affiliate of AEP Ohio, on notice that MPSC is unlikely to allow I&M to recover uneconomic OVEC costs from customers and capped I&M's recovery and compensation at the lesser of the market price or 10% over the fully allocated embedded costs.<sup>19</sup> MPSC also stated in its Order that it, "agrees with the Staff's assertion that I&M's decision to commit the Rockport units as must run is uneconomic and warrants additional review in the reconciliation of this plan case."<sup>20</sup> Finally, the MPSC Order stated:

The Commission finds that I&M shall document, and make available to the Staff upon request, the basis for the company's decision to designate a generating unit as must run when the company's forecast demonstrates that the decision to do so will result in marginal costs to operate the generating unit that would exceed the revenue attributed to supplying that power to the PJM market. The Commission may disallow fuel portions of all net revenue losses incurred as a result of imprudent unit commitment decisions at the Rockport units.<sup>21</sup>

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<sup>17</sup> *Id.* (citing Audit Report at 53).

<sup>18</sup> *See In the Matter of the Application of Indiana Michigan Power Company for Approval to Implement a Power Supply Cost Recovery Plan for the 12 Months Ending December 31, 2021*, MPSC Case No. U-20804, Order) (November 18, 2021) (hereinafter, MPSC Order).

<sup>19</sup> *Id.* at 22 and 26.

<sup>20</sup> *Id.* at 25.

<sup>21</sup> *Id.*

Given the MPSC’s findings, OMAEG and Kroger urge the Commission to adopt the recommendation in their initial joint comments and order AEP Ohio to produce a retroactive analysis of OVEC’s hourly operations as if it had operated as an economic dispatch unit for parties to review, for the years in consideration.<sup>22</sup> And, if AEP Ohio cannot do so, an automatic and full refund of Rider PPA charges from 2018 and 2019 should be ordered.

**C. The Commission Should Find that AEP Ohio has Failed to Demonstrate that its Must-Run Strategy Avoided “Adverse Impacts” on the Units.**

AEP Ohio’s initial comments claimed, “OVEC generating units are designed to operate as ‘base load’ generation and any dispatch procedure that would cause the units cycle on and off based on scheduling and dispatch would have an adverse impact on the units.”<sup>23</sup> Yet, AEP Ohio provides no proof of this purported “adverse impact,” even though AEP Ohio is the party that bears the burden of proof in this prudence review.

Moreover, AEP Ohio’s description of OVEC’s inflexibility should not be considered by the Commission as a positive attribute to a financial hedging mechanism, nor as an excuse that somehow justifies the must-run strategy. Rider PPA does not exist to serve as a subsidy mechanism for inflexible generating assets – it was approved as a purported financial hedging mechanism to benefit ratepayers. As NRDC noted in its initial comments, in an order approving AEP Ohio’s OVEC cost recovery through Rider PPA, then Commission Chairman Asim Haque stated:

Surely, it is fair to ask how much all of this will cost. Much of these costs will be determined in future proceedings before the Commission, and so we will find out if the perceived present benefits are actually worth the costs. That question, however, sheds light on the very difficult balance between a current financial impact to ratepayers, and future benefits (and even savings) for those same

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<sup>22</sup> See OMAEG and Kroger’s Joint Comments at 3-4 (November 12, 2021).

<sup>23</sup> AEP Ohio’s Comments at 4 (November 12, 2021).



ratepayers after this initial investment. I save this conundrum for another day, however.<sup>24</sup>

“Another day” has come, and it is now clear that AEP Ohio views Rider PPA as a base-load power plant subsidy, instead of as a financial hedge.

**D. The Commission Should Adopt the Recommendations to Remove Confidential Protections from Information in the Audit Report that is Already Publicly Available.**

All the stakeholders, except again AEP Ohio, requested in their initial comments that the Commission remove confidential protection from certain information in the public version of the Audit Report. For instance, NRDC’s initial comments observed that information in Figure 26 of the Audit Report was afforded confidential treatment.<sup>25</sup> However, this information concerns OVEC’s energy revenue and costs, which are already in the public domain. Similarly, OMAEG and Kroger’s initial comments explained how significant details of OVEC’s coal purchases, suppliers, and prices are already public, yet they were treated as confidential and redacted in the public version of the Audit Report.<sup>26</sup>

Ohio Adm. Code 4901-1-24(D) provides that the Commission or certain designated Commission employees “may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information.” Ohio law protects trade secrets by not considering them public records and exempting them from public disclosure.<sup>27</sup>

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<sup>24</sup> See NRDC’s Comments at 3 (November 12, 2021) (citing *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 6 (March 31, 2016)).

<sup>25</sup> See NRDC’s Comments at 7 (November 12, 2021).

<sup>26</sup> See OMAEG and Kroger’s Joint Comments at 8-10 (November 12, 2021).

<sup>27</sup> See R.C. 149.43 (A)(1)(v); *State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*, 80 Ohio St.3d 513, 530 (1997).

Under R.C. 1333.61(D),

"Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.**
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>28</sup>**

It is unclear why publicly available information is being afforded confidential treatment when it clearly cannot meet the standards for protection under Ohio law. Accordingly, OMAEG and Kroger respectfully request that the Commission release in the public domain a version of the Audit Report that includes information already publicly available or that cannot reasonably constitute a trade secret.

**E. The Commission Should Reject AEP Ohio's Assertion that the Terms of the ICPA Are Not Relevant to the Audit Report.**

AEP Ohio's initial comments stated, "[n]either the Auditor nor the intervenors can selectively challenge individual components or the ICPA payment terms approved by the FERC."<sup>29</sup> First, it should be noted that according to the recent MPSC Order, the OVEC Inter-Company Power Agreement (ICPA) was never approved by the Federal Energy Regulatory Commission (FERC).<sup>30</sup> The MPSC Order explicitly states, "[t]he ICPA has thus not been

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<sup>28</sup> R.C. 1333.61(D) (emphasis added).

<sup>29</sup> AEP Ohio's Comments at 3 (November 12, 2021).

<sup>30</sup> See MPSC Order at 18.

approved at the state level by [MPSC] nor at the federal level by FERC”<sup>31</sup> and that “the ICPA...remains unapproved by FERC.”<sup>32</sup>

Second, the terms of the ICPA are relevant to a prudency review. For example, under the terms of the ICPA, AEP Ohio as a sponsoring company is given entitlement to its share of OVEC’s energy output – but AEP Ohio is not obligated to take title to this energy. According to the OVEC ICPA, “[n]o Sponsoring Company, however, shall be obligated to avail itself of any Available Energy.”<sup>33</sup> Thus, it is through the unambiguous terms of the ICPA that AEP Ohio is given the choice on whether to avail itself of OVEC’s Available Energy. And, given that AEP Ohio is not obligated to avail itself, AEP Ohio’s voluntary choices under the terms of the ICPA are exceedingly relevant to any prudency review.

**F. AEP Ohio Has Not Provided Additional Proof of Long-Term Hedging Value of Rider PPA.**

AEP Ohio’s initial comments remarked that for OVEC, “PJM is...not evaluating economics in the long-term.”<sup>34</sup> Yet, neither is AEP Ohio, apparently. The burden of proof is on AEP Ohio to establish long-term benefits of Rider PPA as a financial hedge, yet AEP Ohio is silent on the long-term economic outlook for OVEC. The long-term outlook of OVEC, however, is part and parcel of why Rider PPA was approved, and thus germane to this prudency review. In approving Rider PPA to primarily include OVEC, the Commission stated in its reasoning, “only over a longer timeframe, would customers perhaps benefit from a credit under the rider....”<sup>35</sup>

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<sup>31</sup> *Id.* at 19.

<sup>32</sup> *Id.* at 18.

<sup>33</sup> *See* Amended and Restated Inter-Company Power Agreement Dated as of September 10, 2010, Section 4.03.

<sup>34</sup> AEP Ohio Comments at 5 (November 12, 2021).

<sup>35</sup> Second Entry on Rehearing, 14-1693, Page 30.

While AEP Ohio claims that PJM has not evaluated OVEC's long-term economics for them, neither has AEP Ohio provided proof of Rider PPA being in customers' best interest in the long term. As such, any costs associated with OVEC collected through Rider PPA should be disallowed as AEP Ohio has failed to sustain its burden that the costs are just, reasonable, prudent, and in the best interest of customers.

### **III. CONCLUSION**

In limiting an AEP Ohio affiliate's ability to recover OVEC costs from customers, the MPSC recently stated:

[MPSC] does not control the business judgment or decisions of utilities, but the Commission has a duty to customers to assure utilities are not subsidizing uneconomic, unreasonable, and imprudent decisions through customer rates. [MPSC]'s decision does not prevent the company from fulfilling their contractual duties under the ICPA, but establishes what costs are appropriate to recover from ratepayers.<sup>36</sup>

Here, the Commission has a similar opportunity and obligation to ensure that AEP Ohio's customers are only being charged reasonable, just, and lawful costs through Rider PPA. In order to do so, the Commission should restore the draft Audit Report's references to H.B. 6 and the Auditor's conclusion that continuing to operate OVEC is not in the best interest of ratepayers. Additionally, filing a public version of the Audit Report that does not afford confidential treatment to information that is already in the public domain will promote transparency. Finally, the Commission should find that AEP Ohio has not provided any proof that OVEC's must-run strategy is reasonable or in the best interest of customers. Because the burden of proof is on AEP Ohio to demonstrate the prudence and reasonableness of the costs collected from customers through Rider

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<sup>36</sup> MPSC Order at 19.

PPA, and no such proof has been provided by AEP Ohio, the Commission should disallow all of the costs collected from customers through Rider PPA.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on December 3, 2021 upon the parties listed below.

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Commission of Ohio Docketing Information System on**

**12/3/2021 5:20:22 PM**

**in**

**Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR**

Summary: Comments Joint Reply Comments electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group and The Kroger Co.