

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the	:	Case No. 18-1004-EL-RDR
Power Purchase Agreement Rider of	:	
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.	:	

**INITIAL BRIEF SUBMITTED ON BEHALF OF
THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

March 18, 2022

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INTRODUCTION

This case deals with London Economics International, LLC’s (“LEI” or “Auditor”) independent audit of the Ohio Power Company’s (“AEP Ohio” or the “Company”) Purchase Power Agreement Rider (“PPA Rider”) for the period spanning January 1, 2018, through December 31, 2019. The final Audit Report for this proceeding was issued on September 16, 2020, and detailed LEI’s review of costs associated with AEP Ohio’s contractual entitlement to a share of the electrical output of generating units owned by the Ohio Valley Electric Corporation (“OVEC”). Though the Audit Report recommends continued and/or further evaluation of certain practices by the Company related to the PPA Rider, the Auditor found no instances of imprudence.

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. Despite that fact, many of the arguments made by intervenors

throughout the duration of this case (including during the evidentiary hearing) focus on the existence of the PPA Rider, and not the actual audit performed for this proceeding.

The Commission Staff (“Staff”) performed its role as it was instructed to do by the Commission, and the Auditor repeatedly testified that it was solely the Auditor’s decision as to what the contents of the final Audit Report were (and why certain statements from the draft Audit Report weren’t ultimately included). The scope of the audit and the applicable time period to be examined was clear and targeted. Staff performed its role as it was directed, and accusations to the contrary were unsubstantiated during hearing.

As will be addressed below, no intervening party presented testimony that supported the allegations made about Staff’s role (or performance of that role) in this proceeding. Quite the contrary, the witnesses presented by intervenors on this topic were unable to support their testimony implying wrong doing by Staff. These witnesses had no factual/personal knowledge to make such allegations, and there was no evidentiary basis for the testimony.

BACKGROUND

In Case No. 14-1693-EL-RDR, et al., the Commission provided for “an annual prudency audit to establish the prudency of all costs and sales flowing through the PPA Rider and to demonstrate that AEP Ohio’s actions were in the best interest of retail ratepayers.”¹ To this end, the Commission directed Staff to issue a Request for Proposals (“RFP”) for an independent audit of the PPA Rider for the period spanning January 1,

¹ Case No. 14-1693-EL-RDR, PPA Rider Case, Opinion and Order (Mar. 31, 2016) at 89-90, ¶ 6.

2018, through December 31, 2019, as contemplated by, and in compliance with, the Commission's orders.²

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, through May 31, 2018, pursuant to R.C. 4928.143.³ 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.⁴ 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.⁵

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.

² *In the Matter of the Application Seeking Approval of the Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 87-88 (March 31, 2016); Opinion and Order at 70-71 (Nov. 3, 2016).

³ *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).

⁴ *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 20-22, 25-26. ¶ 5.

⁵ *PPA Rider Case*, Opinion and Order (Mar. 31, 2016) at 89-90. ¶ 6.

LEI was selected to be the Auditor, and the final Audit Report was filed on September 16, 2020. In accordance with the Commission's directives, LEI's Audit reviews the costs associated with AEP Ohio's contractual entitlement to a share of the electrical output of generating units owned by OVEC for the period of January 1, 2018 through December 31, 2019.

ARGUMENT

A. Audit Report Summary

LEI was selected by the Commission to conduct an independent audit of the PPA Rider of AEP Ohio for power provided by OVEC for the period of January 1, 2018, through December 31, 2019.⁶ LEI prepared a report containing the results of its Audit Report that was filed on September 16, 2020. The Audit Report was admitted as evidence during the hearing as Staff Exhibit 2.

The principal author of the Audit Report was Dr. Marie Fagan, the Chief Economist of LEI. The direct testimony of Dr. Fagan was admitted into evidence as Staff Exhibit 1. Dr. Fagan holds a Ph. D. in Economics from American University and has over 30 years of experience in energy industry research and consulting.⁷

As explained in the Audit Report, AEP Ohio is a Sponsoring Company of OVEC, meaning that AEP Ohio, under a contract known as the Amended and Restated Inter-Company Power Agreement ("ICPA"), is entitled to a share of OVEC's electricity

⁶ Case No. 18-1004-EL-RDR, Entry (March 11, 2020) at 1.

⁷ Staff Ex. 1 at 2.

generation, and must also pay that same share of OVEC's costs.⁸ AEP Ohio's net costs (its share of OVEC's costs less sales of energy and capacity) are passed on to AEP Ohio's ratepayers through the PPA Rider, established in the Commission's decision in Case No. 14-1693-EL-RDR.⁹ The purpose of the audit was to establish the prudence of all the costs and sales flowing through the PPA Rider, and to investigate whether the AEP Ohio's actions were in the best interest of its retail ratepayers.¹⁰

In the course of its audit, LEI considered the following items: industry context, OVEC bill and AEP Ohio rider reconciliation, accuracy of true up from 2016 to 2019, disposition of energy and capacity, fuel and variable costs, capital expense, environmental compliance, and power plant performance.¹¹ LEI used data obtained from AEP Ohio, as well as publicly available sources such as the Energy Information Administration (EIA).¹²

LEI concluded that, in general, the processes, procedures, and oversight applied by AEP Ohio were mostly adequate and consistent with good utility practice.¹³ LEI did make several recommendations, including:

1. Shortening the true up process between forecasted PPA charges and actual PPA charges, which currently involves a 6-month lag. Good accounting practice usually involves timely recording and charging for transactions.

⁸ Staff Ex. 2 at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Staff Ex. 2 at 7-8.

¹² *Id.*

¹³ Staff Ex. 2 at 9

LEI recommends the lag be reduced from two billing cycles (six months) to one billing cycle (three months) because actual charges and energy consumption are available within that time frame.

2. The components of fixed costs were billed properly for the most part, based on reconciliation of the OVEC bill and the PPA Riders. However, one component of fixed costs, referred to as “Component (D)” in the OVEC bill, is identified by the ICPA as a payment per common share. It is a relatively minor part of the monthly bill to the ICPA participants, though it represents a substantial share of the net profits earned by OVEC. OVEC’s capital expenditures are not part of a rate base for which they are allowed a regulated rate of return.
3. Concerning the disposition of energy and capacity, LEI recommends that OVEC re-consider its “must-run” offer strategy (offering energy irrespective of the day ahead market price, discussed in more detail in Section 5) and utilize near-term (one week to one month) demand and price forecasts to formulate offers. During some periods of time, a must-run strategy can be optimal, but at other times it may not.
4. Concerning fuel and variable expense cost, LEI noted that coal inventories were much higher than target levels in 2019. This may indicate a problem with management of contract deliveries versus projected coal burns. However, it was triggered by an event which occurred in one month (April) in 2019 and may be an anomaly.

5. Concerning capital expenses, LEI concluded that the process of planning and executing individual capital projects appears to be well-managed. However, it appears there is no cap on annual capital expenses. This could lead to over-investment in the plants, as the Commission does not review and/or approve the OVEC capital expenditures as they relate to the AEP Ohio PPA Rider filings (though the Commission does review construction through the power siting process).
6. Concerning environmental compliance activities, LEI found that OVEC complied with environmental requirements during the audit period. Management of emissions allowance inventories was reasonable and prudent.
7. Concerning power plant performance, LEI concluded that the plants performed well, with some small exceptions. Plant maintenance costs during outages were budgeted reasonably at Clifty Creek, but the budgeting for Kyger Creek needs to be improved.¹⁴

B. Staff performed its role to oversee the Audit as instructed by the Commission.

Staff appropriately performed its role per the Commission's directives. To this end, 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

¹⁴ Staff Ex. 2 at 9-10.

d/b/a AEP Ohio for the period of January 1, 2018, through December 31, 2019.”¹⁵

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. 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.¹⁶ Thus, the scope of the audit and the applicable time period to be examined was clear and targeted. Staff performed its role as it was directed, accusations to the contrary were unsubstantiated during hearing.

While LEI conducted the review as an extension of Staff, Staff performed its duty to ensure the Auditor fulfilled the terms of the contract and adhered to the scope of the audit. Staff was to ensure the audit remained on schedule (adhering to deadlines) and within the scope as defined by the Commission.¹⁷ LEI was tasked with “fulfilling the Commission’s direction to perform an audit required by Commission Order as described in Case No. 14-1693-EL-RDR, according to requests for proposal (RFPs) developed by Staff and approved by the Commission.”¹⁸ LEI was to perform this audit as directed by the Commission in the January 2020 Request for Proposal (RFP).¹⁹ Per the RFP ordered by the Commission, PUCO Staff was to oversee the project.

¹⁵ Entry at ¶1 (March 11, 2020).

¹⁶ See Case No. 18-1004-EL-RDR, Entry, at attached RFP 5-7 (January 15, 2020).

¹⁷ Case No. 18-1004- EL-RDR, Windle Direct at 3.

¹⁸ *Id.*, Windle Direct at 5.

¹⁹ *Id.*

In order to ensure that the Auditor was meeting deadlines and staying within the scope of the Audit, Staff met with the Auditor.²⁰ This is a customary practice.²¹ In addition, the RFP directed the Auditor to submit a draft version of the Audit Report to Staff for purposes of review.²² Again, this is an expected practice (and was actually required by the RFP).

Staff does not dispute that it reviewed the draft Audit Report (as it was permitted and directed to do by the Commission). Staff also does not dispute that it specifically explained to the Auditor that that it was not necessarily appropriate to include the statement “running the plants is not in the best interest of rate payers” due to cost, without also acknowledging the overall context, such as the reasons for approval detailed in the Commission’s Opinion and Order (Case No. 14- 1693-EL-SSO).²³ Staff found the statement to be outside the scope of what the Auditor was asked to do.²⁴ Staff submitted all documents related to its review of the draft Audit Report in response to a public records request by OCC.²⁵

Staff does not dispute that it sought clarification from the Auditor as to why there were references to HB 6 in the draft Audit Report. And Staff also does not dispute that its concerns in this regard derived from the fact that the 2019 OVEC Rider audit was pursuant to the applicable PUCO Order, and not the legislation adopted as part of HB 6.

²⁰ *Id.*, Windle Direct Testimony at 5.

²¹ *Id.*, Windle Direct Testimony at 3.

²² Timeline at 7, and Final Report at 9 of RFP attached to Commission’s Entry (January 15, 2020).

²³ Windle Direct Testimony at 4.

²⁴ *Id.* at 3-4.

²⁵ Case No. 18-1004-EL-RDR, Transcript Volume VI at 1555.

Staff does not dispute that the draft version of the Audit Report contained certain statements by the Auditor that are not in the final version of the Audit Report. Staff has never concealed this fact. However, Staff *vehemently rejects* any arguments (or even suggestions) made by any party that Staff specifically directed or forced the removal of any statements, or overstepped its role in this proceeding by making suggestions regarding the contents of the draft Audit Report. Similarly, Staff rejects any suggestion by intervenors that Staff had a “pro-utility” stance when making suggestions to the Auditor. This is simply not the case.

Staff does not dispute that it met (via electronic telephonic conference) with the Auditor for purposes of this proceeding.²⁶ Staff Witness Windle testified that “[a]fter reviewing the draft audit report, and speaking with the Staff project lead, Staff had concerns that some portions of the draft report were outside of the scope of the audit. To this end, Staff raised concerns as to whether certain portions of the report criticizing the existence of the OVEC Riders/Plant were within the context of the Commission findings and orders, which required the audit. In addition, we discussed whether or not the environmental review section of the audit report needed more detail.”²⁷

These are facts that are undisputed by Staff – not smoking guns. Staff witness Windle testified for over eight hours regarding Staff’s involvement to oversee the audit. Staff did its job as it was instructed to do by the Commission.

²⁶ Case No. 18-1004-EL-RDR, Windle Direct Testimony at 3.

²⁷ *Id.*, Windle Direct Testimony at 4.

1. There is no evidence of improper Staff influence over the independence of Auditor, as alleged by intervening witnesses.

Intervening parties have made arguments that Staff influenced the independence of the Auditor for this proceeding by making suggestions as to certain statements contained in the draft Audit Report. Specifically, OCC Witness Haugh testified “[t]he PUCO Staff’s influence on the outcome of the audit report, regarding an ultimate issue to be determined in this proceeding, undermines what should be the independence of the auditor.”²⁸

Witness Haugh went further, stating, “[b]ut reviewing an independent audit should not include this pro-utility influence by the PUCO Staff on the opinion of the auditor.”²⁹

Natural Resources Defense Council (“NRDC”) witness Fisher testified that the final Audit Report did fully represent the findings of the Auditor. Witness Fisher went on to misrepresent a communication from Staff saying that, “PUCO Staff requested the removal of at least one key audit finding.”³⁰ Staff will address in detail the credibility of the testimony of both witnesses Haugh and Fisher below; however, it is necessary to point out that the Auditor repeatedly testified that the decision as to what was included in the final Audit Report was LEI’s. To this end, Dr. Fagan testified for purposes of this proceeding for two days, and not once did she testify that LEI’s independence was influenced by Staff.

²⁸ Case No. 18-1004-EL-RDR, Haugh Direct Testimony at 23.

²⁹ *Id.*

³⁰ Case No. 18-1004-EL-RDR, Fisher Direct at 45.

As the Auditor was asked during cross-examination many (repeated) questions on LEI's independence from Staff, Staff has provided a summary table to show the consistency of the Auditor's responses:

Table 1: Auditor's Independence in Issuing the Final Audit Report

Dr. Marie Fagan Testimony	Transcript Volume and Page
<p>The statement in the draft Audit Report (regarding best interest of customers) was too broad and outside of the Auditor's assignment for this case:</p> <p><i>"We made that as I would say a broad statement and, in the process of review with our client, came back and looked at it and said it's too broad. Best interest is the purpose of the audit. It might not have been LEI's assignment."</i></p>	Transcript Volume I at 177.
<p>All of the Auditor's intended findings are included in the final Audit Report (and the Auditor did not make any edits she did not agree with):</p> <p><i>"And the -- our client, Staff, asked us to edit, take it out, whatever, and all the rest of the audit stands without it. All the, you know, the findings, the true-up parts, our comments about the must-run offer strategy, our recommendations about perhaps capital spending, none of those things changed. It wasn't material. I think Staff referred to it as tone and intensity, so -- and we don't make any edits that we don't agree with, so, you know, upon reflection and getting the reaction back from our client, we took it out. It doesn't change the material findings of the audit." (Emphasis added).</i></p>	Transcript Volume I at 178.
<p>The draft Report contained a statement the Auditor believed to be overly broad:</p> <p>"Okay. And -- but would it be fair for us to say when you made the statement in the draft audit, you believed it to be true."</p> <p><i>"I would say it was overly broad."</i></p>	Transcript Volume I at 177.
No Imprudence Found in Auditor's Independent Opinion	Transcript Volume I at 184.

<p>Ms. Fagan, as we sit here today, do you have any opinion as to whether the OVEC costs that are flowed through the PPA Rider are in the best interest of AEP Ohio ratepayers?</p> <p><i>“In our opinion, there was no imprudency. There were areas that we would like to see examined and improved and we list those specifically.”</i></p>	
<p>Statement in draft Audit Report was overly broad:</p> <p><i>“It was too broad a statement. Where we have views, they are more specific. So the pieces of the findings and recommendations that are specific, those are our views.”</i></p>	Transcript Volume I at 188.
<p>On Staff’s suggestion to review “tone” in draft Audit Report:</p> <p><i>“In my view as a writer, a writer of audits or whatever it might be, tone isn't content. Tone isn't conclusions. Tone isn't analysis. It's kind of ephemeral. It's hard to describe, but it's clear what it isn't. It's not facts, analysis, conclusions. It's like a tone of voice. Is a tone of voice loud? Is a tone of voice soft? The same thing could be said in a -- in a pleasant tone, in an unpleasant tone, in a loud tone, in a soft tone. The content is the same. So -- -- tone writing is -- in my mind it's kind of like tone speaking, but it's -- it's writing.”</i></p>	Transcript Volume I at 203.
<p>On Staff’s suggestions with respect to the draft Audit Report, and that the Auditor ultimately made the final decision as to the contents of the final Audit Report:</p> <p><i>“In my view of this e-mail, these were not directions. They are suggestions. We -- we ultimately make the final decision about what goes in or doesn't.”</i></p>	Transcript Volume I 206-207.
<p>On Staff’s suggestions to the draft Audit Report:</p> <p>“So, did you view this statement where it said ‘Please incorporate Staff's comments as far as possible’ as any sort of direction from the PUCO Staff about what to include in the audit report?”</p> <p><i>“It's not direction. In my mind it's not direction as to what to include in the report. It's their comments. And the ultimate decision is ours.”</i></p>	Transcript Volume I at 207.
<p>“You testified a few moments ago that this statement about being "not in the best interest of retail ratepayers" when describing the OVEC costs was too broad. What do you mean "too broad"? I didn't understand what you meant by that.”</p>	Transcript Volume I at 208.

<p><i>“So what we mean is what we said in the final which is that at this time the OVEC plants cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets. And that's a key conclusion and finding. And it's concrete and well defined. It's not overly broad.”</i></p>	
<p>“As an auditor, do you feel it is up to you to determine the tone and intensity of your audit report, or other people?”</p> <p><i>“It's up to me.”</i></p>	Transcript Volume I 221.
<p>The Auditor agreed with Staff’s suggestions (and maintained independence):</p> <p>“Well, you must have agreed with their view because you adopted those suggestions.”</p> <p><i>“That's right. I didn't disagree with it. Adopting the suggestion, again, it's at our discretion. So that sentence down in the bottom where it says, you know, "please take a look and incorporate Staff's comments as far as possible." So, if -- if it had been comments that I couldn't live with, I wouldn't adopt them. But the material that they pointed out here, I said, fine, the audit report still says what we need it to say. It still says the analysis shows that the plants cost the customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets. That's the bottom line.</i></p> <p><i>And our require -- recommendations and findings, none of that changed. So to adjust the tone I had, I didn't have a problem with that.”</i></p>	Transcript Volume I at 223.
<p>On interference with independence:</p> <p>“Ms. Fagan, did you feel that the Staff's comment about using a milder tone and intensity of language was interfering with your independence as an auditor?”</p> <p><i>“No, it was not.”</i></p>	Transcript Volume I at 224.
<p>Staff provided suggestions for the Auditor’s consideration:</p> <p>“And while LEI was drafting the audit report, LEI did receive suggestions from Staff; is that fair?”</p> <p><i>“We provided a draft and they made suggestions. Obviously, according to the RFP, there is a date we provide a draft, they review, make suggestions, and then we created the final report.”</i></p>	Transcript Volume II at 474.

<p>On incorporating Staff's suggestions to the extent the Auditor accepts them:</p> <p><i>"They see a revised draft. We incorporate Staff's comments to the extent we accept them. So I guess it is a revision and then that goes to the Company."</i></p>	Transcript Volume II 481.
<p>On who removed the sentence "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers" from the draft Audit Report:</p> <p>"And that was removed by you or someone at LEI; is that correct?"</p> <p><i>"By me."</i></p>	Transcript Volume II at 497.
<p>On the statement in the draft Audit Report being overbroad:</p> <p><i>"So as I said yesterday, the statement I took it out, it's too broad. What we believe is the bottom line of our analysis, it's not that we -- you know, it's not an issue of truthfulness. It's an issue of a precise and accurate statement. And the plants costing more than the cost of energy and capacity that could be bought is a precise and accurate statement."</i></p>	Transcript Volume II at 512-513.
<p>On the statement in the draft Audit Report being overbroad, and that a draft Audit Report may contain statements that ultimately not what the Auditor wants to say in a final report:</p> <p><i>"I think the answer is more nuanced because there's levels of -- I mentioned before like the breadth of a statement, how it can be interpreted, et cetera. So I'm sure lawyers do this too. You draft materials, you read them over, is that really what we wanted to say. That was the first pass at something. It's not that you are doing something untrue. It's that it doesn't suit, so you edit it."</i></p>	Transcript Volume II at 514.
<p>The Statement in the draft Audit Report regarding customers' best interests was overbroad:</p> <p><i>"The statement refers to the sentence afterward. The sentence afterward is "the OVEC plants cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets." So that was our specific conclusion. The statement before that, the best interest statement, it was sort of an overly broad summary of the audit conclusion which was the specifics about the cost of energy and capacity in PJM."</i></p>	Transcript Volume II at 515.
<p>On the Auditor's independence:</p>	Transcript Volume II at 517.

<p>We talked about three different versions of the draft of the audit report 6 to the final. We talked about a 9-1 version, we talked about a 9-9 version, and then the 9-16 final. And the sentence we have been talking about I asked if it was changed based on Staff's recommendation in its 9-8 e-mail.</p> <p><i>“Based on Staff's recommendation and my own judgment.”</i> <i>(Emphasis added).</i></p>	
<p>On the statement in the draft Report being overly broad:</p> <p><i>“Well, as I mentioned before, the statement in the draft was overly broad. Our finding is actually the second sentence which is about the costs of -- the costs flowing through OVEC versus PJM costs, prices.”</i></p>	<p>Transcript Volume II at 520.</p>

The twenty excerpts included³¹ in the table above demonstrate that, despite significant efforts and repeated questioning by Counsel to create an alternative narrative, the Auditor consistently testified that she retained independence in issuing the final Audit Report, and that the statements in the draft Audit Report regarding the “best interest of customers” were ultimately too broad to be included in the final Report. The Auditor’s independence was never affected or threatened by Staff’s oversight of the Audit. The Auditor never felt that LEI was required by Staff to make edits to the draft Audit Report. The Auditor felt that the conclusions she made are in the Audit Report. The evidence shows that Staff made suggestions to the Auditor, and the Auditor issued the final Audit Report as she saw appropriate. Any narrative to the contrary is simply unsupported by the *actual evidence and testimony*. The fact that Staff made an observation, and suggestion, and the Auditor, in her independent discretion and judgment, agreed with Staff, and then

³¹ Table 1 includes examples, and is not intended to be an exhaustive list of each instance the Auditor testified on these topics.

made the decision to edit the draft Audit Report does not prove that independence was somehow lost, or even influenced. Those dots simply cannot be connected.

Ultimately, as counsel for Staff argued at several points during the evidentiary hearing, no weight should be given to the draft Audit Report. As with any piece of writing, there is a reason there is a *draft* and a *final*. There is a reason for a drafting and review process. An audit report is no exception. Dr. Fagan explained this point when she testified that “[s]ometimes when you are drafting things, you have your -- your initial take on things. I'm sure as a lawyer you drafted materials, come back, you know, edit, et cetera. So it was just part of that process.”³² To this end, the Ohio Power Siting Board has previously held that that drafts of audit reports are not relevant.³³ The Commission should conclude the same.

2. Staff had concerns certain statements in the draft Audit Report were outside of the scope of the proceeding, and made suggestions in that regard.

Staff Witness Windle explained that Staff had concerns that certain statements included in the draft Audit Report appeared to be outside the scope of this proceeding.

“This proceeding is an opportunity for the Commission to make sure that the decisions

³² Transcript Volume I at 178.

³³ See Case No. 12-160-EL-BGN, where the Ohio Power Siting Board held: “[t]he Board finds that UNU's request to remand the application for further discovery should be denied. While UNU is correct that Section 4903.082, Revised Code, provides parties with ample rights of discovery, under Ohio Civ.R. 26(B)(1), these rights extend only to matters that are relevant to the subject matter involved in the pending action. As Section 4906.10, Revised Code, sets forth, **the Board's responsibility is to render a decision upon the record either granting or denying the application as filed, or modifying and granting the application. The sole consideration of the Board is on the application, as filed. Accordingly, the admission of any drafts, whether it be an application or staff report, will not make it more or less probable that Champaign's application meets or does not meet the requirements of Section 4906.10, Revised Code.** Therefore, UNU's requests to be provided with drafts of the Staff Report and the application should be denied.” (Opinion Order and Certificate) (May 28, 2013) at 11-12 (emphasis added).

AEP Ohio made regarding OVEC were in the best interest of ratepayers. My understanding is that questions as to whether there should be a Rider or the cost benefit metrics of the OVEC plants were litigated and resolved in Case No. 14-1693-EL-SSO and are outside of the scope of this audit.”³⁴ Further, Witness Windle explained that “[t]he actions that AEP took with regard to costs and sales that were balanced into the rider were to be examined and to be opined upon in a way as to whether or not AEP's actions in that regard were the best they could be for ratepayers.”³⁵ Staff Witness Windle was consistent in his testimony as to why Staff made the suggestions it did to the Auditor regarding the draft Audit Report. Staff was also consistent in that it never instructed the Auditor to remove any statements, only provided suggestions.³⁶

Table 2: Staff’s Rationale for Suggestions to Draft Audit Report

Staff Witness Rodney Windle Testimony	Transcript Volume and Page
<p>So, Mr. Windle, you were saying that the reason that you were concerned about the statement in the draft report about running the plants not being in the best interests of retail ratepayers, your concern was that it was attacking the Commission's original approval of the rider in 2016, right?</p> <p>A. “Yes.”</p>	<p>Transcript Volume IV at 1522-1523.</p>
<p><i>“Okay. Those are two different statements so I will try to address the first one that we haven't read and that basically gets to why did I feel as though this could be attacking the PUCO decision, their finding and order, and that is because AEP alone doesn't run these plants. They are run by, I believe, a collective board. And any decision to run or not run them kind of gets back to their actions and with regard to the Company's actions, what you are looking at is whether or not they sought approval of a rider to begin with, which they did, and it was</i></p>	<p>Transcript Volume VI at 1525.</p>

³⁴ Case No. 18-1004-EL-RDR, Windle Direct Testimony at 7.

³⁵ Transcript Volume VII at 1775.

³⁶ This is not intended to be an exhaustive list, but an example.

<i>approved, and in my mind that -- that approval was already granted so it didn't make sense to go rehash that case." (Emphasis added).</i>	
Are you saying that the scope of this audit only has to do with what AEP's actions were? A. "Yes."	Transcript Volume VI at 1525.
Okay. And you never told her to take out the language in the report about the -- what's in the best interest of ratepayers. You just said let's give it some balance, right? A. "Correct."	Transcript Volume VI 1700-1701
Didn't the auditor back up her statement about the plants -- running the plants not being in the best interest of retail ratepayers with actual facts? A. "So No. 1 is your -- your question posits what she wrote as wrong to begin with. She wrote "Therefore, keeping the plants running do not seem," very operative word there, "to be in the best interest of ratepayers." No. 2 is that "keeping the plants running" in our opinion once again might be alluding to criticism of the Commission decision which we do not believe that the auditor had done an adequate job of demonstrating why the Commission order was in flaw. " (Emphasis added).	Transcript Volume VI 1725-1726

In summary, Staff had the authority (from the Commission) to oversee the Audit.

Staff Witness Windle succinctly explained that understanding of the phrase "best interest of ratepayers" in context to Case No. 18-1004-EL-RDR, (the AEP Ohio OVEC Rider audit) refers to the following statement found within the Commission's November 3, 2016 Entry on Rehearing in Case No. 14-1693-EL-SSO on page 71: "the company's [AEP Ohio] actions must be in the best interest of retail ratepayers." (emphasis added). This proceeding is an opportunity for the Commission to make sure that the decisions AEP Ohio made regarding OVEC were in the best interest of ratepayers. Questions as to whether there should be a Rider or the cost benefit metrics of the OVEC plants were

litigated and resolved in Case No. 14-1693-EL-SSO and are outside of the scope of this audit.

C. Intervenor testimony on Staff's role in this proceeding not only was improper (as these witnesses lacked personal knowledge), but also undermined their overall credibility as experts.

Two intervening parties provided expert witness testimony that opined on Staff's role in overseeing the audit for this proceeding. These witnesses were/are not members of the PUCO Staff, have never actually worked for the PUCO as Staff, or otherwise,³⁷ and admittedly had no direct knowledge of the issues they testified about with respect to Staff's oversight of the Audit. Perhaps if these witnesses had previously worked for the PUCO Staff in some capacity, they *arguably* would have some insight as to whether Staff's review and oversight with respect to the audit was consistent with the Commission's order and past practice. But this is not the case.

1. NRDC Witness Jeremy Fisher

Witness Fisher stated in prefiled expert testimony that the audit does not fully represent the findings of the Auditor.³⁸ Specifically, witness Fisher testified “[a]ccording to email communications made public, a draft of the audit report was provided to both AEP Ohio and PUCO Staff prior to its finalization. ... an email indicates that PUCO Staff requested the removal of at least one key audit finding.”³⁹ However, on cross-examination, it was confirmed that Witness Fisher had no direct personal knowledge of

³⁷ See, 18-1004-EL-RDR, Fisher Direct at 1-2; Haugh Direct Testimony at 2-3.

³⁸ Case No. 18-1004-EL-RDR, Fisher Direct at 45.

³⁹ *Id.*, Fisher Direct at 45.

those issues included in his testimony. To this end, witness Fisher admitted the following on the stand: (1) he was not the auditor for the proceeding,⁴⁰ (2) never reviewed a draft of the Audit Report,⁴¹ (3) had no conversations with Dr. Fagan during the drafting phase of the Audit Report,⁴² (4) had no direct knowledge and/or communication from Dr. Fagan whether or not the final Audit Report fully represents her findings,⁴³ (5) has never actually corresponded with Dr. Fagan before (conversation or otherwise),⁴⁴ (6) had no discussions with the PUCO Staff about its involvement with regard to overseeing the audit,⁴⁵ (7) had no discussions with the PUCO Staff regarding any PUCO any recommendations/suggestions they may have made to the Auditor regarding the draft Audit Report,⁴⁶ (8) was not involved in any way with the finalization of the Audit Report,⁴⁷ (9) had no direct knowledge as to Staff's intent with respect to suggestions Staff made to finalize the Audit Report,⁴⁸ and agreed that (10) Staff never used the word "remove" in its email with suggestions to the Auditor (nor was he a recipient of that email), but that his understanding was that it was implied.⁴⁹

The lack of personal knowledge and credibility is clear. Witness Fisher provided his opinion on what Staff's intention was with respect to suggestions it made on the draft Audit Report. Further, Witness Fisher has never worked for the PUCO as a Staff

⁴⁰ Case No. 18-1004-EL-RDR, Transcript Volume IV at 1125.

⁴¹ *Id.* at 1126.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1130.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1131.

⁴⁹ *Id.* at 1134.

member, or otherwise to understand how the PUCO Staff approaches an audit and whether the approach here was consistent with the Commission's order and past practice.⁵⁰

Witness Fisher also provided his opinion as to how Dr. Fagan interpreted those suggestions. This is improper, and this testimony should not be given any weight by the Commission. Witness Fisher explained his expertise as related to this proceeding as "I think I've been in this situation often enough to be able to understand how these at least core economic principles operate with respect to power plants."⁵¹ But he does not have the expertise to opine on the interpretation of messages, as to their intent, or otherwise.

2. OCC Witness Michael Haugh

OCC witness Haugh also provided direct expert testimony as to what Staff's intentions were, and the Auditor's independence with regard to Staff's suggestions to the draft Audit Report. Witness Haugh stated: "[t]he PUCO Staff's influence on the outcome of the audit report, regarding an ultimate issue to be determined in this proceeding, undermines what should be the independence of the auditor."⁵² Witness Haugh further alleged that "[t]his PUCO process described above, that would have remained secret but for OCC's public records request, is unfair to consumers and consumer parties. I will note that the PUCO Staff and the Auditor did not include other parties (such as OCC) on the circulation list for any draft audit reports nor for any invitation to comment."⁵³ This

⁵⁰ See, 18-1004-EL-RDR, Fisher Direct at 1-2.

⁵¹ Case No. 18-1004-EL-RDR, Transcript Volume IV at 1128.

⁵² Haugh Direct Testimony at 23.

⁵³ *Id.*

testimony was improper, especially given that OCC witness Haugh has never worked for the PUCO Staff and thus has no independent understanding as to how the PUCO Staff approaches an audit.

Witness Haugh admitted that: (1) he was not the auditor for this proceeding,⁵⁴ (2) he has never had a discussion with Dr. Fagan (during the course of this Audit or otherwise),⁵⁵ (3) never reviewed any drafts of the Audit Report,⁵⁶ (4) he had no direct personal knowledge from Dr. Fagan as to why certain statements from the draft Audit Report are not in the final audit report,⁵⁷ (5) is not a member of the PUCO Staff,⁵⁸ (6) had no discussions with the PUCO Staff during the course of the audit regarding its management of the audit,⁵⁹ (7) had no direct personal knowledge from the PUCO Staff regarding its management of the audit performed for this proceeding,⁶⁰ (8) the PUCO Staff never used the word “delete” in its suggestions to the Auditor regarding the draft Audit Report,⁶¹ (9) *he interpreted* Staff’s language “milder tone and intensity” to mean deleting the phrase of “not in the best interests of ratepayers,” but that the alleged directive to delete language appears nowhere in Staff’s email to the Auditor,⁶² (10) there was actually no directive by Staff to the Auditor to delete statements in the draft Audit Report,⁶³ (11) the RFP did not require circulation of the draft Audit Report to OCC or

⁵⁴ Case No. 18-1004-EL-RDR, Transcript Volume V at 1385.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1385-1386.

⁵⁷ *Id.* at 1386.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1387.

⁶⁰ *Id.* at 1387-1388.

⁶¹ *Id.* at 1390.

⁶² *Id.* at 1389.

⁶³ *Id.* at 1390.

other parties,⁶⁴ (12) there was no obligation on the part of the Auditor to circulate the draft Audit Report to OCC or other parties,⁶⁵ (13) it would be reasonable for the Company to review a draft Audit Report for purposes of identifying confidential information,⁶⁶ (14) had no conversations with Dr. Fagan to conclude that her independence was influenced in some way by Staff,⁶⁷ and assigned intention (and provided expert testimony) to Staff's suggestions/observations regarding the draft Audit Report by simply reading emails.⁶⁸

Counsel for Staff stresses these points because it is improper for an expert witness to provide testimony that is both outside the witness' expertise, and about a topic of which that witness has no personal knowledge. The fact of the matter is, having the ability to read email communications does not make one an expert on the meaning or intention behind those messages (or how the recipient of the messages interpreted them).

CONCLUSION

The scope of this proceeding was clearly 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. As described in law, Entry, and RFP, the Auditor is an extension of Staff. In addition, Staff must ensure that an audit

⁶⁴ *Id.* at 1393.

⁶⁵ *Id.* at 1394.

⁶⁶ *Id.* at 1397-1399.

⁶⁷ *Id.* at 1404.

⁶⁸ *Id.* at 1404-1405.

remains on schedule and within the scope as defined by the Commission. That is what Staff did. There is no evidence of any wrong-doing by Staff. The Auditor testified repeatedly that it was her decision as to the final contents of the Audit Report. The Commission should adopt the recommendations made by the Auditor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Initial Brief**, on behalf of the Staff of the Public Utilities Commission of Ohio, has been served upon the below-named counsel via electronic mail, this 18th day of March, 2022.

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Commission of Ohio Docketing Information System on**

3/18/2022 4:13:18 PM

in

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

Summary: Brief Initial Brief Submitted on Behalf of the Staff of the Public Utilities
Commission of Ohio electronically filed by Mrs. Kimberly M. Naeder on behalf of
PUCO