BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

JOINT POST-HEARING BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP AND THE KROGER CO.

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I. INTRODUCTION

The above-captioned proceeding concerns approximately $74.5 million that Ohio Power Company (AEP) has charged its customers through its Power Purchase Agreement Rider (PPA Rider) in 2018 and 2019 to subsidize the uneconomic, aging Ohio Valley Electric Corporation (OVEC) dirty coal plants, one of which is in Indiana.[1] Through its annual prudency and performance review, the Public Utilities Commission of Ohio (Commission) has both an opportunity and obligation to ensure that AEP's customers are only paying just and reasonable costs that were prudently incurred and result from actions of AEP that were in customers' best interest.

When the Commission authorized AEP to charge its customers for OVEC expenses, former Chair Asim Haque stated that the OVEC rider "should not be perceived as a blank check, and consumers should not be treated like a trust account."[2] Former Chair Haque also stated:

> After a period of charges, I expect to see credits from the PPA riders. I'm not going to give definitive timelines, but that is my expectation. If this mechanism is truly a hedge, wherein consumers will pay when market prices are low, but will be credited money back when market prices are high, then *what exactly is the point of the hedge if ratepayers never experience the credits*? If ratepayers never experience the credits, then the PPA rider mechanism would then act as a somewhat illusory insurance policy.[3]

Unfortunately for AEP's customers, former Chair Haque's concerns are playing out in real time and his fears are coming to fruition. During the audit period, AEP's customers have almost never experienced credits and the trend is not expected to change any time in the conceivable

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1 *See* Tr. Vol. I at 44-45 (Cross-Examination of Fagan) (at the evidentiary hearing Dr. Fagan accepted these figures subject to check and did not present any alternative calculations of the PPA charges during the audit period).

2 *In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR, et al., Opinion and Order, Concurring Opinion of Chairman Haque at 5 (March 31, 2016).

3 *Id.* at 4.

future.[4] The PPA Rider is not a true hedge and it continues to provide no benefits for customers. Instead, customers have paid and continue to pay for OVEC's poor, imprudent business decisions and AEP's failure, as a co-sponsor of OVEC, to exercise proper oversight responsibilities of OVEC and ensure that prudent decisions are made, and to make prudent business decisions themselves.

It is foreseeable that in an attempt to justify the OVEC subsidies that customers have paid in 2018 and 2019, AEP will continue to incorrectly argue that intervening parties seek a reversal of the Commission's decisions to implement the PPA Rider and to allow AEP to collect costs through the mechanism.[5] The argument is a red herring and the Commission should not be misled by this fallacy, which was refuted at the evidentiary hearing in the above-captioned proceeding. A review of the evidence in the record will demonstrate that the intervening parties, including the Ohio Manufacturers' Association Energy Group (OMAEG) and The Kroger Co. (Kroger), are not challenging the Commission's previous approval of the implementation of PPA Rider and the authorization for AEP to collect certain costs from customers through the rider. But, those costs must be just and reasonable and prudently incurred. To be clear, no intervening party seeks to "relitigate" or otherwise undermine the Commission's prior decisions. No one is challenging the existence of the rider. Instead, intervenors have demonstrated that certain costs should be disallowed because they are either unreasonable or were imprudently incurred.[6] The whole point

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[4] *See* Tr. Vol. II at 378 (Cross-Examination of Fagan) (stating that during audit period, only one of the twenty-four months resulted in a PPA Rider credit while the other twenty-three months resulted in charges); *see* Staff Ex. 1 at 21 (LEI Audit Report) (stating, "in a competitive context, the OVEC plants would not be viable on a going-forward basis.").

[5] *See, e.g.*, Tr. Vol. I at 87 (Cross-Examination of Fagan).

[6] *See, e.g.*, OMAEG Ex. 1 at 3-4 (Direct Testimony of John A. Seryak) (recommending the disallowance of unreasonable and imprudent costs passed through the PPA Rider during the audit period that are unrelated to its intended function as a "hedging mechanism" or that result from above-market coal purchases) ; OCC Ex. 21 at 6 (Direct Testimony of Michael P. Haugh) (recommending the disallowance of all costs flowing through the PPA

of an audit is to determine whether costs are just and reasonable and prudent.[7] If the Commission intended all costs to be passed through the rider, without ascertaining whether they were reasonable or prudently incurred, there would be no need for the Commission to require an audit and no need for this proceeding.

Accordingly, the focus of the above-captioned proceeding should not be on the existence of the PPA Rider but rather on the burden of proof that AEP bears in establishing the reasonableness and prudency of all costs flowing through the PPA Rider in 2018 and 2019 and in demonstrating that its actions were in the best interest of customers, and AEP's complete inability to meet such a burden.

The prudency and performance audit (Audit Report) filed in the above-captioned proceeding by London Economics International, LLC (LEI or the Auditor) established that the costs flowing through the PPA Rider during the audit period were imprudent and that AEP's actions were not in the best interest of its customers.[8] However, sections of the Audit Report used a lesser standard than what is required by the Commission to assess the costs recovered through the PPA Rider and AEP's actions and at times the Audit Report was otherwise devoid of any meaningful analysis that could justify the above-market costs to customers. For example, the Audit Report did not examine why debt and interest costs were included in the PPA Rider during the audit period, which are wholly unrelated to the rider's supposed function as a "rate stabilization charge". The Audit Report also did not analyze whether customers were charged for imprudent

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Rider during the audit period due to OVEC's imprudent must-run strategy and the Auditor's finding that the plants cannot be expected to produce a credit for customers).

7 *See* OMAEG Ex. 1 at 13-14 (Direct Testimony of John A. Seryak) (explaining that the Commission "has made it clear that it may disallow OVEC-related costs in PPA Rider based on 'facts and circumstances' in the record.").

8 *See* OMAEG Ex. 5 at 4 (PUCO Request for Proposal No. RA20-PPA-1).

coal purchases by OVEC, even though LEI recommended that OVEC reconsider such purchases in a related Commission audit of another OVEC co-sponsor.

Moreover, neither LEI nor AEP performed *any* quantitative analysis to determine the impact of the OVEC units' "must-run" commitment status on AEP's customers. In fact, AEP, as a co-sponsor of OVEC with oversight responsibilities, made no effort during the audit period to evaluate or reconsider how OVEC could have operated to reduce PPA charges to AEP customers by using an alternative commitment strategy.

The Commission should note that AEP is not obligated to avail itself of OVEC's available energy or populate the PPA Rider. Therefore, it would have been prudent for AEP to have taken action during the audit period to mitigate the substantial charges to its customers once it became evident that the PPA Rider was not performing as a financial hedge as AEP had initially projected.

Lastly, an earlier version of the Audit Report concluded that keeping the OVEC plants running was *not* in the best interest of customers.[9] The evidence demonstrates that this initial conclusion was removed by LEI at the request of Staff.[10] The Commission should consider this evidence and question whether the audit was truly independent when it issues a decision in the above-captioned proceeding. If continuing to operate the plants is not in the best interest of customers, as LEI's analysis showed, then it cannot be said to be in the best interest of customers to have paid charges through the PPA Rider in 2018 and 2019 to subsidize the two uneconomic, sixty-plus year old, dirty coal OVEC plants.

For these reasons and as explained further below, OMAEG and Kroger respectfully request that the Commission protect customers by disallowing all costs flowing through the PPA Rider

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[9] *See* NRDC Ex. 2 at 1.

[10] Tr. Vol. II at 496 (Cross-Examination of Fagan).

during 2018 and 2019. At a minimum, the Commission should disallow all costs passed through the PPA Rider resulting from OVEC's imprudent must-run commitment strategy, that are unrelated to the intended function as a rate stabilization charge, that are a result of imprudent coal purchases, and that are otherwise the result of imprudent decision-making.

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 15, 2020, the Commission directed the Staff of the Commission to issue a request for proposal (RFP) for audit services to assist the Commission with its prudency and performance audit of AEP's PPA Rider for the period of January 1, 2018 through December 31, 2019.[11] On September 16, 2020, LEI filed the Audit Report. Dr. Marie Fagan of LEI was the main point of contact with the Commission Staff and AEP and served as the lead author of the Audit Report.[12]

On December 7, 2020, the Commission directed stakeholders to intervene by January 15, 2021, file comments by January 22, 2021, and file reply comments by February 12, 2021.[13] On January 11, 2021, OMAEG and Kroger intervened in the above-captioned proceeding. On November 12, 2021, stakeholders, including OMAEG and Kroger, OCC, and NRDC submitted initial comments in the above-referenced proceeding regarding the prudency and performance Audit Report of AEP's PPA Rider. On December 3, 2021, OMAEG and Kroger, and other stakeholders submitted reply comments.

On January 12, 2022, an evidentiary hearing commenced in the above-captioned proceeding, which concluded on February 9, 2022. Upon the conclusion of the hearing, the

[11] Entry at ¶ 1 (January 15, 2020).

[12] Tr. Vol. I at 36 (Cross-Examination of Fagan).

[13] Entry at ¶ 8 (December 7, 2020).

Attorney Examiner directed parties to file initial post-hearing briefs by March 18, 2022 and post-Hearing reply briefs by April 8, 2022, respectively.[14]

In accordance with the Attorney Examiner's directive, OMAEG and Kroger hereby jointly submit their Post-Hearing Brief.

III. ARGUMENT

A. The Commission Should Disallow All Costs Passed Through the PPA Rider During the Audit Period Because AEP Has Failed to Satisfy its Burden of Proof in Demonstrating That Such Costs Were Just and Reasonable and Prudently Incurred and That its Actions Were in Customers' Best Interest.

As a threshold issue, OMAEG and Kroger affirm that they are not challenging the existence of the PPA Rider or any of the related orders in Case Nos. 14-1693-EL-RDR, et al. Rather, OMAEG and Kroger seek to ensure that AEP's customers are not charged for any costs passed through the PPA Rider during the audit period that were unreasonable, imprudent, or resulted from actions of AEP that were not in customers' best interest. AEP bears the burden of proof to demonstrate that all costs it seeks to recover through the PPA Rider during 2018 and 2019 satisfy this standard (which it cannot).[15]

LEI's analysis in the Audit Report filed in the above-captioned proceeding on September 16, 2020 did *not* establish that all costs that AEP seeks to recover during the audit period satisfy the requisite standard. At times, the Audit Report did not engage in meaningful analysis or used less stringent standards than what was required by the Commission, as specifically set forth in the RFP and Commission orders, to assess the PPA Rider costs and AEP's actions during the audit

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[14] Tr. Vol. VII at 1914.

[15] *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 Nos. 14-1693-EL-RDR, et al., Opinion and Order at 89 (March 31, 2016) ("Consistent with Commission precedent, AEP Ohio will bear the burden of proof in demonstrating the prudency of all costs and sales during the review, as well as that such actions were in the best interest of retail ratepayers.").

period. Additionally, while the Audit Report flagged the OVEC units' "must-run" strategy as a cause for concern and a factor that may have contributed to the plants' sustained losses during the audit period,[16] neither LEI nor AEP provided any analysis or evidence in the case record to demonstrate how much money customers could have saved if a different commitment strategy was used.[17] For these reasons and as explained further below, OMAEG and Kroger respectfully request that the Commission disallow all costs passed through the PPA Rider during the audit period.

1. The Audit Report Demonstrates That the Costs Passed Through the PPA Rider in 2018 and 2019 Were Unreasonable and Imprudent and That AEP's Actions During this Period Were Not in Customers' Best Interest.

LEI's analysis demonstrates that all costs and sales flowing through the PPA Rider in 2018 and 2019 were not in fact reasonable and prudently incurred and that AEP's actions during this period were not in customers' best interests. In various sections of the Audit Report, LEI did not engage in a thorough analysis and used broad generalizations seemingly to justify the uneconomic performance of the OVEC plants during the audit period. For example, the Audit Report determined that during the audit period, the OVEC plants cost customers more than the cost of energy and capacity available on the PJM wholesale markets but then broadly stated, "there may be other considerations, such as providing employment at the plants, or the plants' contributions to fuel diversity in the State, that outweigh the impact on ratepayers, which the Ohio legislature takes into consideration."[18]

When asked at the evidentiary hearing, Dr. Fagan of LEI declined to take any position on whether any of these "other considerations" outweigh the cost impact of the PPA Rider on AEP's

[16] Staff Ex. 1 at 53 (LEI Audit Report).

[17] *See, e.g.*, Tr. Vol. II at 465 (Cross-Examination of Fagan); Tr. Vol. III at 801 (Cross-Examination of Stegall).

[18] Staff Ex. 1 at 9 (LEI Audit Report).

customers.[19] Dr. Fagan also stated that LEI did not conduct any analysis in regards to these other considerations but chose to include them for "context."[20] However, when looking at the "other considerations" listed in the Audit Report, it is clear that none are applicable. First, it was established that OVEC is not run for reliability purposes. Second, as a sixty-plus year old coal plant, the OVEC plants clearly do not provide renewable power or create additional fuel diversity than what exists today.[21] Third, Dr. Fagan could not answer whether LEI's recommendation regarding employment at the OVEC plants would change if the Amended and Restated Inter-Company Power Agreement (ICPA) requires the plants to remain open until June 30, 2040 regardless of whether customers are paying of the cost of OVEC.[22] Clearly, this consideration is also not applicable as the ICPA provides that the plants will operate through June 30, 2040. Importantly, LEI did not do any analysis to determine the cost to customers for the plants to remain open and operating versus the salaries of the employees at the plants.[23] Nor did LEI examine the impact on customers related to fuel diversity with and without the coal units running.[24] In fact, data from the U.S. Energy Information Administration (EIA) indicates that Ohio's utility-scale energy sources for electricity generation have significantly diversified over the last two decades,[25] suggesting that the closure of the OVEC plants would not materially impact the state's fuel diversity.

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19 Tr. Vol. II at 461 (Cross-Examination of Fagan).

20 *Id.* at 461.

21 *Id*. at 441-442.

22 *Id*. at 446.

23 *Id*. at 451.

24 *Id*. at 452.

25 OMAEG. EX. 6 (U.S. EIA, Ohio Electricity State Profile).

Dr. Fagan stated that she may have included these additional factors to be weighed against the cost impact of the OVEC plants on customers because they are general "societal goals" that she was asked to consider during a conversation with Staff.[26] To be clear, none of these considerations are within the scope of the RFP or in any of the Commission's orders issued in Case Nos. 14-1693-EL-RDR, et al., which established the parameters of the prudency and performance audit of AEP's PPA Rider.[27] Additionally, LEI did not provide any substantive analysis of these issues that would allow the Commission to make an informed decision regarding the PPA Rider and the costs passed through the mechanism during the audit period. Accordingly, the Commission should disregard these unsubstantiated considerations when it considers the reasonableness and prudency of the costs in the above-captioned proceeding.

In addition to the foregoing issues, LEI used less stringent standards in the Audit Report than what was required by the Commission's orders in Case Nos. 14-1693-EL-RDR, et al., or than what was required by the RFP. Moreover, LEI declined to state whether certain PPA Rider costs were prudent or resulted directly from AEP's actions that were in customers' best interest.

For instance, when asked at the evidentiary hearing, Dr. Fagan could not or would not offer an opinion as to whether it would have been prudent for AEP to have monitored the expected performance of the PPA Rider as a financial hedge as compared to the rider's actual performance during the audit period.[28] Comparing the PPA Rider's projected performance versus its actual performance during the audit period would have been useful in determining whether the PPA Rider was on track to perform as a financial hedge. Once it became clear that the PPA Rider's performance during the audit period was inconsistent with the initial projections, OVEC and AEP

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[26] Tr. Vol. II at 443-445 (Cross-Examination of Fagan).

[27] *Id.* at 449-450; *see* OMAEG Ex. 5 (PUCO Request for Proposal No. RA20-PPA-1).

[28] Tr. Vol. I at 166-167 (Cross-Examination of Fagan).

could have identified strategies to minimize costs to customers. Without tracking the performance of the PPA Rider as compared to its anticipated performance, how could OVEC or AEP demonstrate with certainty that their actions, or lack thereof, did not contribute to the significant costs to customers that were passed through the PPA Rider during the audit period?

The Audit Report also found that "the processes, procedures, and oversight were *mostly adequate* and consistent with good utility practice" with the qualifier "given that the ICPA is in place and customers will be charged for the cost of the plants until at least May 2024."[29] At the evidentiary hearing, Dr. Fagan stated that if the ICPA was not in place or if customers were not to be charged for the costs of the plants through at least 2024, the conclusion regarding the reasonableness or prudency of OVEC's operations may change.[30]

Dr. Fagan could not or was unwilling to testify as to whether the Audit Report affirmatively demonstrates that all of the costs that were passed through the PPA Rider during the audit period were prudent.[31] Dr. Fagan testified that the costs were "*generally* prudent" and that "[t]here were parts that could be improved upon,"[32] which is why LEI made various recommendations to improve the operations of the OVEC plants. Dr. Fagan did not, however, directly answer whether the areas LEI identified as needing improvement implied a finding of imprudence.[33] Instead she stated that "reasonable people can disagree on what exactly is prudent, so I wouldn't say imprudent…."[34]

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29 Staff Ex. 1 at 9 (LEI Audit Report) (emphasis added).

30 Tr. Vol. I at 218 (Cross-Examination of Fagan).

31 Tr. Vol. II at 438 (Cross-Examination of Fagan).

32 Tr. Vol. I at 218 (Cross-Examination of Fagan).

33 *Id.* at 216.

34 *Id.*

Dr. Fagan's foregoing statements underscore the inability of AEP to satisfy its burden of proof in the above-captioned proceeding that the costs that it passed through to customers were in fact reasonable and prudent. "Generally prudent" is insufficient. As explained above, the RFP and, underlying orders, and directives contained therein expressly set forth that the purpose of annual prudency audit is to "establish the prudency of *all* costs and sales flowing through the PPA rider and…demonstrate that [AEP's] actions were in the best interest of retail ratepayers."[35] Therefore, the phrases "mostly adequate", "generally" prudent, "mostly" prudent, or "not imprudent" as used by Dr. Fagan and LEI are not the same as establishing the prudency of all costs and sales flowing through the PPA Rider during the audit period and fall woefully short of the Commission's directives. As such, the Audit Report fails to conclude that all of the OVEC costs passed on to customers were prudent, and therefore, should be disallowed.

Additionally, Dr. Fagan's response that reasonable people could have different interpretations of prudence in regards to the aspects of the OVEC plants identified as needing improvement does little to alleviate customers' concerns regarding their substantial PPA Rider charges during the audit period. LEI was retained by the Commission because the Commission determined that "LEI has the necessary experience to complete the required work."[36] If the Commission simply wanted a "reasonable person" or a lay person's view of prudence as it relates to the OVEC plants' operations and PPA Rider's costs during the audit period, there would be no need to retain LEI as an expert auditor. The whole point of the audit was to determine whether the costs passed on to customers were reasonable and prudent. LEI appears to not be able to do the

[35] OMAEG Ex. 5 at 4 (PUCO Request for Proposal No. RA20-PPA-1) (emphasis added).

[36] *See* Entry at ¶ 8 (March 11, 2020).

job it was hired to do and simply cannot confirm the reasonableness or prudency of the costs that AEP passed on to its customers.

Accordingly, the Commission should determine that LEI's analysis did not establish that costs flowing through the PPA Rider during the audit period satisfy the requisite standard, and thus, should be disallowed in their entirety. Additionally, the Commission should carefully consider how the various aspects of the OVEC plants' operations that were marked for improvement by LEI impacted customers during the audit period, including, but not limited to, the OVEC units' must-run designation.

2. At a Minimum, the Commission Should Disallow All Costs Passed Through the PPA Rider During the Audit Period That Are Unrelated to its Intended Function as a Rate Stabilization Charge or That Result From Imprudent Coal Purchases.

While the record evidence dictates that the Commission should disallow all costs passed through the PPA Rider during the audit period as explained above, at a minimum and in order to protect customers, the Commission should disallow all costs flowed through the PPA Rider during the audit period that are unrelated to the intended function as a rate stabilization charge or are otherwise the result of imprudent decision-making (i.e., above market coal purchases). When the Commission approved cost recovery through the PPA Rider, it specifically determined:

> that the record in these proceedings demonstrates a projected net credit to customers of $37 million over the current ESP term through May 31, 2018, or $214 million through May 31, 2024, under the term of the PPA rider. Further, we find that the stipulation as modified, will protect consumers against rate volatility and price fluctuations by promoting retail rate stability for all ratepayers in this state....[37]

[37] *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 Nos. 14-1693-EL-RDR, et al., Opinion and Order at 77 (March 31, 2016).

The Commission also clarified that the costs flowing through the mechanism were to be subject to a "rigorous review" and that "AEP Ohio, not its customers, would be responsible for the adjustments made to the PPA rider based on any actions deemed unreasonable by the Commission, including any cost...associated with performance requirements in PJM's markets."[38] The time is now for the Commission to exercise its rigorous review of the PPA Rider and address the intended purpose of the PPA Rider as the PPA Rider is not functioning as the rate stabilization charge that it was initially presented as, and, therefore, is unreasonable and not in the best interest of customers.

For example, during the audit period, the evidence demonstrates that AEP collected unreasonable costs through PPA Rider including debt and interest payments for OVEC and OVEC shareholder profits.[39] As OMAEG witness Seryak explained in his direct testimony, debt and interest payments are fixed costs, do not have an impact on electricity market prices, and are unrelated to the amount of revenue generated by a power plant in the electric market.[40] Regardless of whether OVEC is operating or not, AEP is obligated to make the debt and interest payments and, therefore, such costs are not part of a wholesale electric market transaction and are inappropriate to be included in a supposed "market hedge."[41]

In its approval of cost recovery through the PPA Rider, the Commission also specified that "[r]etail cost recovery may be disallowed as a result of the annual prudency review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive

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38 *Id.* at 25.

39 OMAEG Ex. 1 at 17 (Direct Testimony of John A. Seryak).

40 *Id.*

41 *Id.* at 17-18.

marketplace comprised of sellers attempting to maximize revenues."[42] Given that rational bidders in a competitive market do not factor in debt and interest costs in their market bids, the Commission should disallow any debt and interest costs that AEP seeks to recover through the PPA Rider during the audit period.[43] Simply put, debt repayment should be the responsibility of AEP's shareholders, *not* its customers.

Similarly, AEP's customers should not be required to pay any costs resulting from OVEC's imprudent coal purchasing decisions. LEI recognized in a Commission audit of another sponsoring company of OVEC that OVEC's Clifty Creek unit paid above-market prices for coal, and "recommend[ed] [that] OVEC negotiate with the coal suppliers to ensure the delivery of coal with good quality but at more competitive prices."[44] As calculated by OMAEG witness Seryak, during the audit period, OVEC purchased 1,999,361 units of coal at $24,316,087 above what it could have purchased from another supplier for comparable (if not the same) coal from the same mine.[45] The Commission should deem the above-market purchase of the same or almost identical coal from the same mine to be an imprudent purchase and disallow recovery of such costs. Based on AEP's 19.93% entitlement to OVEC's available energy, the Commission should disallow $4,846,196 in imprudent coal purchases from recovery through the PPA Rider.[46]

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42 *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 Nos. 14-1693-EL-RDR, et al., Opinion and Order at 20 (March 31, 2016).

43 OMAEG Ex. 1 at 20 (Direct Testimony of John A. Seryak).

44 *Id.* at 14-15 (Direct Testimony of John A. Seryak) (quoting *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Rider PSR Audit Report at 64, 71 (October 21, 2020)).

45 *Id.* at 16.

46 *Id.* ($24,316,087 x .01993 = $4,846,196).

3. At a Minimum, the Commission Should Disallow All Costs Passed Through the PPA Rider Resulting From OVEC's Imprudent Must-Run Strategy in 2018 and 2019.

While the record evidence dictates that the Commission should disallow all costs passed through the PPA Rider during the audit period as explained above, at a minimum and in order to protect customers, the Commission should disallow all costs passed through the PPA Rider resulting from OVEC's imprudent must-run commitment strategy. In 2018 and 2019, OVEC operated all of its units as must-run units in the PJM Day Ahead market except for times when there was scheduled maintained or forced outages, and excluding Clifty Creek No. 6.[47] LEI has described "must-run" or self-scheduling units as when "the market participant schedules the unit to run regardless of energy prices."[48] The OVEC Operating Procedures specify that the OVEC units, with the exception of Clifty Creek No. 6, are to be designated as must-run units.[49] OVEC's Operating Committee, which includes representatives from AEP,[50] has complete discretion over how it chooses to commit its units and OVEC was not required by any other entity to designate its units as must-run during the audit period.[51]

LEI correctly recommended that OVEC should reconsider its must-run strategy because a must-run strategy could result in financial losses and "there are times during which the PJM DA prices does [sic] not cover the variable cost of running the plants."[52] Additionally, LEI stated that

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47 Tr. Vol. I at 274 (Cross-Examination of Fagan).

48 Staff Ex. 1 at 21 (LEI Audit Report).

49 *Id*. at 44.

50 Tr. Vol. III at 925 (Cross-Examination of Stegall).

51 Tr. Vol. II at 376 (Cross-Examination of Fagan).

52 Staff Ex. 1 at 52-53(LEI Audit Report).

OVEC should reconsider its must-run strategy because increased flexibility allows for more opportunities to react to circumstances in ways that can reduce costs.[53]

In fact, LEI's analysis demonstrated that of the seven months that they examined during the twenty-four month audit period, during four of the months PJM energy prices did not cover the fuel costs of the OVEC plants.[54] This indicates that during these times when the energy charge exceeded the market price for electricity on the PJM market, a sponsor essentially paid more per Mwh for electricity that it "purchased" from OVEC than it would have cost to purchase the electricity from the PJM market.[55] LEI also stated that by not running the plants during months where OVEC had negative energy earnings, the OVEC sponsors could have reduced their respective energy charges, which are ultimately passed onto customers.[56]

Although OVEC's must-run offer strategy was a cause of concern for LEI and LEI stated that OVEC should reconsider it and that it could save customers money, LEI did not analyze how much OVEC lost in total over the twenty-four month audit period from its units' must-run designation and LEI did not compare the daily net revenues received to the expected net revenues had OVEC utilized an economic offer strategy.[57] Nor did LEI evaluate quantitatively whether it would have been more prudent during the audit period for OVEC to have an economic strategy rather than a must-run one.[58] Simply stated, OVEC lost money during the audit period.

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53 Tr. Vol. II at 371 (Cross-Examination of Fagan).

54 Tr. Vol. I at 264 (Cross-Examination of Fagan); Tr. Vol. II at 327 (Cross-Examination of Fagan).

55 Tr. Vol. II at 299 (Cross-Examination of Fagan).

56 *Id.* at 302.

57 *Id.* at 449-450.

58 *Id.* at 465.

LEI also did not evaluate a re-dispatching of the OVEC units.[59] LEI stated that the dispatch model is a "more precise analysis [, when compared to LEI's selected methodology,] of the revenue from an hour of operations at any given time."[60] LEI further stated that a dispatch model would determine the exact impact that the must-run strategy had on OVEC earnings as the costs passed through the PPA Rider.[61] Dr. Fagan also stated that LEI is capable of evaluating a re-dispatching of the OVEC units and confirmed that "it's work that LEI does."[62] But, for some unexplained reason, the Auditor did not perform such analysis.[63]

Dr. Fagan testified that to her knowledge, neither OVEC nor AEP conducted an evaluation of re-dispatching the OVEC units.[64] In fact, Dr. Fagan stated that LEI did not even ask for any data or forecasts available to OVEC or AEP during the audit period that would allow it to determine whether the must-run designation of the OVEC units was a prudent decision at the time.[65] Without conducting a dispatch model or evaluating relevant data available at the time to OVEC and/or AEP, one cannot possibly conclude that the OVEC units' commitment status during the audit period was reasonable or only resulted in prudent costs.[66] In fact, the evidence set forth by the auditor herself, LEI, and other witnesses suggests that the must-run strategy was not prudent or reasonable and contributed to substantial losses during the audit period.[67] The evidence also

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59 Tr. Vol. I at 260 (Cross-Examination of Fagan).

60 *Id.*

61 Tr. Vol. II at 303 (Cross-Examination of Fagan).

62 *Id.* at 364.

63 Tr. Vol. I at 263 (Cross-Examination of Fagan).

64 Tr. Vol. II at 366 (Cross-Examination of Fagan).

65 *Id.* at 436-437.

66 *Id.* at 309 (stating that LEI did not assess whether OVEC's bidding strategy minimized ratepayer costs.).

67 *Id.* at 305.

demonstrates that AEP did not conduct any analysis or otherwise take appropriate steps to minimize the resulting costs to its customers.

For example, Dr. Fagan conceded that it would have been good utility practice for a utility to base its decision on whether to use a must-run commitment status by comparing the projected revenues from operating in the wholesale market against the startup, shutdown, and maintenance costs associated with shutting down the plants.[68] Dr. Fagan also testified that it would be "commonsense" for the OVEC units specifically to use profit and loss statements to anticipate energy margins.[69] The Auditor concluded that "a profit/loss statement can help a reasonable utility determine when to use an economic commitment status to avoid incurring negative energy earnings by operating the plant…"[70] However, the Auditor testified that she did not ask for or know of any evidence that showed that during 2018 and 2019 OVEC or its Operating Committee conducted any such financial analyses in making its unit commitment decisions for must-run.[71] There was also no evidence that energy margins were discussed in the OVEC Energy Scheduling Department's daily calls to review unit status and reliability.[72] The Auditor also confirmed that overall the negative financial impact on AEP's customers "weighs against operating [the OVEC units] in the way they have been [operated] which is why [the Auditor is making] recommendations."[73]

Given the OVEC plants' ages and that they cost approximately $74.5 million above PJM market prices during the audit period, it would have also been reasonable for OVEC, its Operating

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68 Tr. Vol. I at 270 (Cross-Examination of Fagan).

69 Tr. Vol. II at 313 (Cross-Examination of Fagan).

70 *Id.* at 315.

71 Tr. Vol. I at 270 (Cross-Examination of Fagan).

72 Tr. Vol. II at 324 (Cross-Examination of Fagan).

73 *Id.* at 342.

Committee, Board, or sponsoring companies to conduct a study to determine whether it would be optimal to shift the OVEC plants from a must-run unit strategy to a seasonal operation strategy.[74] In the Audit Report, the Auditor acknowledged that some utilities "have begun shifting away from self-committing and towards economic dispatch and seasonal commitments in response to increased regulatory scrutiny."[75] One measure of prudence regarding the OVEC's commitment status could have been comparing the OVEC units' must-run designation to the commitment status of other coal plants of a similar age within PJM to determine if OVEC plants' losses could have been minimized by shifting to seasonal operations like their peers. The Auditor, however, did not conduct this analysis or otherwise review any information concerning a potential shift to seasonal operations as part of its audit in the above-captioned proceeding.[76] Therefore, it is unknown how much customers may have saved in PPA Rider charges if the OVEC units were seasonally operated during the audit period.

The Commission should not be misled by AEP's after-the-fact attempt to justify OVEC's imprudent must-run strategy and its failure to exercise adequate oversight in regards to the OVEC units' commitment status. Even a cursory review of the evidentiary record shows that AEP and its witness did not conduct any quantitative analysis of the financial impact that the must-run strategy had on customers' PPA Rider charges during the audit period. Instead, AEP unreasonably relies on general considerations and anecdotal evidence that are not specific to the OVEC units at issue in the above-captioned proceeding to make its case.

It is important to note that the AEP witness who AEP relies upon does not hold a degree in economics, has never worked in power plant operations, and has never been responsible for

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74 *See* Tr. Vol. I at 258-259 (Cross-Examination of Fagan).

75 Staff Ex. 1 at 21 (LEI Audit Report).

76 Tr. Vol. I at 260 (Cross-Examination of Fagan).

making unit commitment decisions.[77] AEP witness Stegall was not on the OVEC Operating Committee during the audit period or during any other time and did not participate in the OVEC Operating Committee meetings as a non-voting member during the audit period.[78] Given AEP witness Stegall's lack of qualifications and specific knowledge in regards to OVEC units' commitment status, it is unsurprising that AEP did not offer any substantive analysis on the issue for the Commission's consideration.

AEP witness Stegall testified that, to his knowledge, AEP never conducted any analysis of whether customers would benefit by converting the OVEC plants to a seasonal operation.[79] Nor was he aware of any analysis that AEP may have done to assess the economic outcomes of the commitment decisions of OVEC.[80] When asked, AEP witness Stegall testified that he did not know which specific factors that the OVEC Operating Committee may have taken into account during the audit period when determining to commit all of the units, but one, as must-run,[81] whether they used a profit and loss statement to inform the units' commitment status,[82] or whether they conducted any economic analysis to that matter.[83] AEP witness Stegall did not conduct a re-dispatch analysis, as described above, did not examine any PJM demand comparison reports in preparation of his testimony,[84] and admitted he did not look at any predicative documents that OVEC used or could have used to make its commitment decisions.[85]

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77 Tr. Vol. III at 898 -899 (Cross-Examination of Stegall).

78 *Id.* at 900-901.

79 *Id.* at 797-798.

80 *Id.* at 801.

81 *Id.* at 803.

82 *Id.* at 822-823.

83 *Id.* at 822.

84 *Id.* at 830.

85 *Id.* at 831.

In AEP witness Stegall's pre-filed testimony, he averred that going forward OVEC "would change to an Economic commitment status if there was a substantial change in the market and there was a sustained period of low prices or other circumstances that warranted consideration of an Economic commitment."[86] Interestingly, when asked if he ever determined if there was a sustained period of time during the audit period that would have warranted an economic commitment of the units, he stated he did not do that analysis.[87]

AEP's improper reliance on generalizations, instead of specifically analyzing the OVEC units' must-run commitment status and resulting costs during the audit period, should be rejected:

- AEP's Counsel (Q): And let's unpack that a little. A coal plant *generally* has a slower startup time than a gas peaking plant, correct?
- Dr. Fagan (A): I don't know the exact times but *generally*, yes.
- AEP's Counsel (Q): And coal plants can *often* have more expensive startup costs than a peaker plant like a gas peaking plant, correct?
- Dr. Fagan (A): Again, I don't know the actual numbers but – but *generally* I would say yes.

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- AEP's Counsel (Q): You would also agree that baseload units *often* operate as must-run commitment status, correct?
- Dr. Fagan (A): I think it probably depends on the market, but they would maybe—what can we say? I mean, do you have a nuclear plant? They *usually* run baseload….[88]

Similarly, any arguments by AEP that it is just a single co-sponsor of OVEC and it cannot unilaterally require the OVEC Operating Committee to change the OVEC units' commitment status, should also be rejected. As Dr. Fagan correctly stated, "ultimately the decision making

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86 AEP Ex. 1 at 12 (Stegall Testimony).

87 Tr. Vol. III at 849 (Cross-Examination of Stegall).

88 Tr. Vol. II at 562 (Cross-Examination of Fagan) (emphasis added).

is…in a group, but AEP Ohio and the other participants have input into that process…."[89] AEP and its affiliates are by far the largest co-sponsors[90] of OVEC and during the audit period there was a noteworthy overlap between AEP employees and OVEC Board of Directors,[91] so it is inaccurate or, at best, misleading for AEP to imply that it was powerless as it relates to OVEC's operations and the management thereof. To date, AEP has presented no evidence that it even attempted to re-consider, analyze, evaluate, discuss, or take any other actions within its authority in regards to the OVEC units' must-run strategy at a time when utilities "have begun shifting away from self-committing and towards economic dispatch and seasonal commitments in response to increased regulatory scrutiny."[92] In fact, AEP should have been on notice of potential issues with the OVEC units' must-run strategy during the audit period because as stated in the Audit Report:

> The previous auditor noted that OVEC OC meetings should be held more frequently to deal with updates on each plant's operating performance, cost of serve or profit/loss statements for market-based revenues derived from the PJM markets in a more timely manner. AEP Ohio's response for the current audit indicated that they felt the current meeting schedule was adequate and do not plan to make any changes. LEI recommends more frequent meetings to discuss energy offer strategies. This could help prevent plants running when energy prices are too low to cover variable costs.[93]

Regardless, AEP had an obligation to its customers to ensure that the costs that it was passing on to its customers were just and reasonable,[94] and prudently incurred. And that its actions were in the best interests of its customers.[95] It is now clear that the OVEC units' imprudent must-run

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89 *Id.* at 575.

90 *See* Staff Ex. 1 at 15, Figure 3 (LEI Audit Report).

91 Tr. Vol. III at 764 (Cross-Examination of Stegall).

92 Staff Ex. 1 (LEI Audit Report) at 21.

93 *Id.* at 10.

94 *See* R.C. 4905.15(A) (obligating the Commission to fix and determine just and reasonable rates).

95 *See* OMAEG Ex. 5 at 7 (PUCO Request for Proposal No. RA20-PPA-1) (directing the Auditor to ensure the reasonableness of AEP/OVEC's actions regarding the power plants' performance or to recommend whether further review is necessary to do so).

strategy and AEP's acquiescence of such a strategy cannot satisfy the rigorous review that the Commission envisioned when it initially authorized cost recovery through the PPA Rider.[96]

For the foregoing reasons, OMAEG and Kroger respectfully request that the Commission disallow any costs passed through the PPA Rider in 2018 and 2019 that resulted from the OVEC units' must-run strategy.

B. The Commission Should Find That AEP's Actions Were Imprudent and Not in the Best Interest of Customers as AEP is Not Obligated to Avail Itself of OVEC's Energy Output.

The Commission should conclude that AEP's actions were imprudent and not in the best interest of customers as AEP is not obligated to avail itself of OVEC's energy output. When evaluating whether the costs flowing through PPA Rider for 2018 and 2019 were prudent and whether AEP has demonstrated that its actions were in the best interest of customers, it is imperative that the Commission account for the fact that AEP is not required to avail itself of energy from OVEC under the ICPA.

As the Commission is aware, AEP is a sponsoring company of OVEC and under the ICPA AEP is entitled to a share of OVEC's electricity generation output and is required to pay the same share of OVEC's costs.[97] Pursuant to Section 4.03 of the ICPA, the "Corporation shall make Available Energy available to each Sponsoring Company in proportion to said Sponsoring Company's Power Participation Ratio" and "[*n*]*o Sponsoring Company, however, shall be obligated to avail itself of any Available Energy*."[98]

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[96] *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 Ride.*, Case Nos. 14-1693-EL-RDR, et al., Opinion and Order at 25 (March 31, 2016).

[97] Staff Ex. 1 at 7 (LEI Audit Report) (citing LEI-DR-1.6.1 Composite Copy of Inter-Company Power Agreement. Ohio Power Company).

[98] AEP Ex. 7 at 35 (ICPA Section 4.03, Available Energy) (emphasis added).

Upon approving cost recovery through the PPA Rider, the Commission stated that it "finds that rate stability is an important consideration, we agree that a rate stability proposal, such as the PPA rider, must not impose unreasonable costs on customers…"[99] and that "AEP Ohio will bear the burden of proof in demonstrating the prudency of all costs and sales during the review, as well as that such actions were in the best interest of retail ratepayers…."[100] The unequivocal meaning of the Commission's Order is that the PPA Rider was supposed to function as a rate stabilization charge and that the recovery was contingent on AEP's actions being in the best interest of its customers.

Once AEP learned that their projections of credits through the PPA Rider were way off and that its customers were being charged many millions of dollars above market for costs associated with OVEC, it would have been in the best interest of its customers for AEP to take action to mitigate the impacts of the OVEC costs and associated PPA Rider.[101] AEP could have made the decision to not avail itself of the available energy from OVEC or could have requested to terminate or otherwise modify the PPA Rider.[102] However, there is no evidence that AEP was actively monitoring the PPA Rider during the audit period to determine whether the PPA Rider was serving the best interest of its customers or producing the credits as projected. AEP's actions or inactions during the audit period while customers were accumulating charges that were vastly different from the anticipated credits presented to the Commission cannot possibly be said to be prudent or in the best interest of customers.

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99 *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 Nos. 14-1693-EL-RDR, et al., Opinion and Order at 78 (March 31, 2016).

100 *Id.* at 89.

101 Tr. Vol. V at 1334-1335 (Cross-Examination of Seryak).

102 *Id.* at 1336-1337.

As demonstrated in the excerpt below from AEP's cross-examination of OMAEG witness Seryak, AEP made a series of choices that resulted in its customers being assessed, unjust, unreasonable, and imprudent costs during the audit period.

- AEP's Counsel (Q): Okay. So let's follow up on the statement you made. Could you please show me in the ICPA what you were referring to when you said AEP Ohio did not have to take title to the power from OVEC.

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- OMAEG witness Seryak (A): Just a minute. Okay. Page 35 of the PDF. Section 4.03, Available Energy. The "Corporation shall make Available Energy available to each Sponsoring Company in proportion to said Sponsoring Company's Power Participation Ratio." And then it says, "No Sponsoring Company, however, shall be obligated to avail itself of any Available Energy."

- AEP's Counsel (Q): Are you aware of the financial consequences under this ICPA if a company decides not to avail itself under that provision?

- OMAEG witness Seryak (A): I am aware that there are not -- there is not necessarily any financial consequences.

- AEP's Counsel (Q): Are you aware that the sponsoring company still has to pay the demand charge?

- OMAEG witness Seryak (A): Okay. Yes.

- AEP's Counsel (Q): Okay. Let's go back. The -- we talked about the taking title part of your answer. The other decision of AEP Ohio that you identified was propagating the rider. Could -- I'm sorry. Could you remind me what you mean by that when you say AEP Ohio decided to propagate the PPA Rider?

- OMAEG witness Seryak (A): Yes. I think, again, understanding that the approval of PPA Rider, my understanding from reading the order is it was not a mandate or directive, I believe that the court used. And I think, given the high costs that were being populated in PPA Rider, that AEP Ohio, on behalf of its customers, could have shown the prudent judgment to halt PPA Rider in its entirety, understanding that it was creating unreasonable costs and not functioning as a financial hedge.

- AEP's Counsel (Q): So let me make sure I understand. You are saying, correct me if I am wrong, that AEP Ohio should have incurred the costs and gotten the revenues from its OVEC entitlement but simply not reflected those in its PPA Rider filing? Is that what you are suggesting?

- OMAEG witness Seryak (A): AEP Ohio had permission to run a rate stabilization charge for the best interests of its ratepayers. So I don't think AEP's judgment on what's good for

> them comes -- should have come in here if -- it received permission to run a rates stabilization charge to benefit its ratepayers. So they should have made judgment -- AEP Ohio should have made judgment in the best interests of its ratepayers, not for itself.
> ***
> Given that, they should have come in and said it looks like our estimate of significant credits was way off and we are charging our customers many millions of dollars. Yeah, that's a fair expectation for AEP Ohio.[103]

Through its own volition, AEP subjected itself to a rigorous review process and was supposed to act in the best interest of its customers. As OMAEG witness Seryak testified, AEP had the opportunity to mitigate costs to customers and reassess the PPA Rider when it became evident during the audit period that the mechanism was not functioning as the Commission intended. AEP's customers should *not* be penalized for AEP's failure to do so. Accordingly, the Commission should determine that AEP failed to satisfy its burden of proof in the above-captioned proceeding and disallow all costs flowing through the PPA Rider during 2018 and 2019.

C. Operating the OVEC Plants is Not in the Best Interest of Ratepayers.

The Commission should consider the Auditor's initial conclusion that operating the OVEC plants is not in the best interest of ratepayers, as well as other factors that undermine the validity of the Audit, to determine that AEP acted imprudently and that the costs passed through the PPA Rider were unjust, unreasonable, and not prudently incurred. The Commission should also determine that the Auditor improperly conducted the audit, undermining the validity of the audit.

The evidence in the record,[104] refutes that the PPA Rider Audit was conducted in an independent manner or consistent with the Commission's orders in Case Nos. 14-1693-EL-RDR, et al., as required.

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[103] *Id.* at 1332-1335.

[104] *See, e.g.*, NRDC Ex. 2 (e-mail correspondence between LEI and Commission Staff and between LEI and AEP); NRDC Ex. 3 at 48-49 (Direct Testimony of Jeremy I. Fisher, PhD).

Staff witness Windle testified that at some point before September 1, 2020, possibly in August 2020, the Auditor provided Staff an incomplete "complimentary" draft of the Audit Report[105] even though that was not contemplated as a deliverable in the timeline set forth in the RFP.[106] Per the Auditor's testimony, LEI sent another draft version of the Audit Report to Staff on September 1, 2020.[107] Due to a public records request submitted to the Commission, intervening parties learned that a September 8, 2020 draft of the Audit Report included the audit conclusion that "[t]herefore keeping the plants running does not seem to be in the best interests of the ratepayers."[108] This audit finding, however, does not appear anywhere in the final Audit Report filed in the above-captioned proceeding on September 16, 2020.[109] When questioned about this discrepancy between the reports at the hearing, the Auditor averred that "our client, Staff asked us to edit, take it out whatever…." The Auditor's testimony is consistent with e-mail correspondence between her and Staff dated September 8, 2020 where Staff highlighted the sentence stating that keeping the plants running does not seem to be in the best interests of the ratepayers and recommended that the audit contain a "milder tone and intensity of language."[110] In the e-mail, a Staff member asked Dr. Fagan to "[p]lease incorporate Staff's comments as far as possible."[111] Although it is still unclear why Staff made the substantive recommendation without the benefit of

105 Tr. Vol. VII at 1804-1806 (Cross-Examination of Stegall).

106 OMAEG Ex. 5 at 7 (PUCO Request for Proposal No. RA20-PPA-1).

107 Tr. Vol. II at 473 (Cross-Examination of Fagan).

108 Tr. Vol. I at 176-177 (Cross-Examination of Fagan) (emphasis added).

109 Tr. Vol. II at 496 (Cross-Examination of Fagan).

110 NRDC Ex. 2. At 1.

111 Tr. Vol. I at 207 (Cross-Examination of Fagan); *see also* NRDC Ex. 2 (e-mail correspondence between LEI and Commission Staff and between LEI and AEP).

conducting the Audit itself or preparing any analysis on the issue,[112] by altering the substance of the Audit, the Auditor's independence is questioned.

The RFP that the Auditor was supposed to follow makes it clear that all costs and sales flowing through the PPA Rider during the audit period are subject to the Commission's review in this proceeding as is the issue of whether AEP's actions "were in the *best interest* of retail ratepayers."[113] The RFP also required the Auditor to review the OVEC's plants performance, including the impact on ratepayers, and state whether additional review is necessary if a reasonableness determination regarding OVEC's and/or AEP's actions cannot be made.[114] It follows that if that keeping the plants running is not in the best interest of AEP's customers, AEP's actions taken during the audit period to keep the OVEC plants running at a loss and passing the related costs through the PPA Rider to AEP customers pursuant to the OVEC contract during the audit period are also not in the best interest of AEP's customers. Accordingly, at the direction of Staff, the Auditor removed a sentence from the draft Audit Report that was based on the Auditor's analysis and directly responsive to the Commission's inquiry in the above-captioned proceeding as set forth in the RFP.

Both the Auditor's and Staff's attempts to downplay the removal of the sentence as a mere "tone issue" is unpersuasive. Dr. Fagan, testified at the hearing that, "[i]n [her] view as 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 kind of like a tone of voice."[115] The sentence stating that keeping the plants

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112 *See* TR. Vol. VII at 1761 (Cross-Examination of Windle).

113 OMAEG Ex. 5 at 4 (PUCO Request for Proposal No. RA20-PPA-1).

114 *Id.* at 7.

115 Tr. Vol. I at 203 (Cross-Examination of Fagan).

running is not in the best interests of AEP ratepayers is a conclusion based on the facts that the Auditor analyzed as part of its audit of the PPA Rider and the costs flowing through the rider during the audit period (and was a determination that was required to be made by the Auditor per the RFP and Commission's orders). The sentence in question is substantive and clearly does not comport with Dr. Fagan's own definition of "tone." Additionally, when asked what aspects of the September 8 draft made its tone objectionable, Dr. Fagan asserted, "[i]t was not in my view. It was in the reader's view, the Staff…."[116] The Auditor further clarified that she "did not feel that these [sentences] had to be taken out. But taking them out to accommodate this request from Staff was acceptable to [her] because it didn't change our results."[117] LEI did not conduct any additional or different analysis after receiving Staff's email on September 8, 2020.[118] These statements by the Auditor are disturbing because they demonstrate that Staff asked or directed her to modify a substantive conclusion in the report that she otherwise would not have changed or removed. The Commission should also note that when asked whether AEP also requested that the same language be removed from the draft report concerning the operation of the OVEC plants not being in the best interests of customers, Dr. Fagan stated, "I don't recall."[119]

At some time after September 8, 2020, the Auditor sent a draft version of the Audit Report to AEP, presumably another, additional draft dated September 9, 2020.[120] The draft that AEP received reportedly was revised and had already incorporated Staff's comments (i.e., the above sentence was revised).[121]

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116 *Id.* at 223.

117 *Id.* at 225.

118 Tr. Vol. II at 516 (Cross-Examination of Fagan).

119 Tr. Vol. I at 226 (Cross-Examination of Fagan).

120 Tr. Vol. II at 477-482 (Cross-Examination of Fagan).

121 *Id.* at 481.

On September 11, 2020, Dr. Fagan contacted Staff via e-mail and stated she wanted to delete another sentence from the draft report that she missed in her review of the prior version: "However LEI's analysis shows that the OVEC contract is overall in is not in the best interest of AEP Ohio ratepayers." [122] The evidence indicates that in the September 9, 2020 draft, the following sentence "[t]herefore keeping the plants running does not seem to be in the best interests of the ratepayers" appears to have been revised to: "However LEI's analysis shows that the OVEC contract is overall in is not in the best interest of AEP Ohio ratepayers."

But, the foregoing sentence from the September 9, 2020 draft is also not in the final Audit Report that was filed with the Commission on September 16, 2020.[123] At the hearing, The Auditor testified that after AEP received the September 9, 2020 draft AEP may have provided comments on the sentence that she removed.[124] The Auditor further testified that she could not remember if LEI received a redline or PDF markup of the draft Audit Report from AEP.[125] Correspondence between the Auditor and AEP suggests that AEP did in fact provide redlines and suggested modifications to the Audit Report in addition to confidential markings.[126] Further correspondence between the Auditor and AEP also reveals that there was an additional draft Audit Report dated September 15, 2020 that was shared with AEP for its review and edits prior to the final Audit Report being filed with the Commission on September 16, 2020.[127]

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122 NRDC Ex. 2 at 3.

123 Tr. Vol. II at 497 (Cross-Examination of Fagan).

124 *Id.* at 507.

125 *Id.* at 506.

126 *See* OMAEG Ex. 12 at PDF page 2 (correspondence from AEP to Staff and the Auditor discussing a markup of confidential information "and other inaccuracies" of the September 9, 2020 draft Audit report); *id*. at pdf page 6 (correspondence from AEP to Staff and the Auditor discussing comments it provided throughout a draft version of the Audit Report).

127 *Id.* at pdf pages 9-10.

For clarity, the timeline of events concerning the drafting and modifications to the Audit Report in the above-captioned proceeding is as follows:

- **Undetermined date in August 2020:** Staff received a "complimentary" draft Audit Report from the Auditor.
- **September 1, 2020:** Staff received the September 1st Audit Report from the Auditor.
- **September 8, 2020**: Staff e-mailed the Auditor requesting the removal or modification of the sentence "[t]herefore, keeping the plants running does not seem to be in the best interests of the ratepayers."
- **September 9, 2020:** AEP received the September 9th draft from the Auditor, which presumably addressed Staff's concerns from September 8, 2020.
- **September 11, 2020:** The Auditor e-mails Staff stating that she wants to delete the sentence "[h]owever LEI's analysis shows that the OVEC contract is overall in is not in the best interest of AEP Ohio ratepayers. Per the Auditor, AEP may have provided the Auditor comments on this sentence sometime after receiving the September 9th draft.
- **September 14, 2020:** AEP sends markup and comments of draft report to Staff and the Auditor.
- **September 15, 2020:** The Auditor sends AEP and Staff the September 15th draft for review.
- **September 16, 2020:** The Auditor files the final Audit Report with the Commission.

Moreover, while the RFP required Staff to be informed of all communications between the Auditor and AEP,[128] there were instances where the Auditor appeared to be communicating unilaterally with AEP about the audit, both orally and electronically.[129] Again, all of these facts

[128] OMAEG Ex. 5 at 4 (PUCO Request for Proposal No. RA20-PPA-1).

[129] *See, e.g.*, Tr. Vol. III at 893-994 (Cross-Examination of Stegall); OMAEG Ex. 12; *see also* R.C. 4901.16 (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).

raise concerns about the independence of the audit and whether AEP as the subject of the audit had an opportunity to influence or otherwise inform the Auditor's conclusions.

The Auditor also testified that LEI's analysis on September 9, 2002 was truthful[130] and that neither her nor LEI routinely puts statements in its reports, drafts, or otherwise that it knows to be untruthful.[131] The Auditor then testified that she has never intentionally put an untrue statement about an LEI analysis in an Audit Report.[132] The evidence demonstrates that LEI did not conduct any additional analysis between the September 9, 2020 version and the final September 16, 2020 version.[133] Again, it appears that the Auditor deleted or modified a truthful statement that was supported by its analysis regarding the PPA Rider and the costs flowing through it during 2018 and 2019 because the statement was unfavorable to the subject of the audit, AEP.

The RFP issued in the above-captioned proceeding set forth that in Case Nos. 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 the Company's actions were in the best interest of retail ratepayers."[134] The RFP then clarified, "[t]his RFP encompasses an *independent* audit of the PPA rider for the period spanning January 1, 2018, through December 31, 2019, as contemplated by, and in compliance with the Commission's orders."[135]

The Auditor attested that she reviewed the RFP issued in this case and it is her understanding the RFP called for an independent audit.[136] The Auditor, however, admitted that

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130 Tr. Vol. II at 511 (Cross-Examination of Fagan).

131 *Id.* at 513.

132 *Id.* at 514.

133 *Id.* at 515.

134 OMAEG Ex. 5 at 4 (PUCO Request for Proposal No. RA20-PPA-1).

135 *Id.* (emphasis added).

136 Tr. Vol. I at 58 (Cross-Examination of Fagan).

she has never reviewed the orders referenced in the RFP, despite the Commission's directive that the audit of the PPA Rider must be conducted "as contemplated by, and in compliance with" such orders.[137]

In addition, the Auditor's approach towards the audit did not fully contemplate whether AEP's actions during the audit period were in the best interest of its customers. For example, when faced with the question of whether a utility's potential bias in taking actions that benefit its shareholders over its customers could constitute imprudence, Dr. Fagan admitted, "[w]e didn't contemplate the issue of bias."[138] Accordingly, when issuing a decision in the above-captioned proceeding, the Commission should contemplate whether the audit was conducted in a manner that comports with the Commission's precedent and from a truly independent perspective.

IV. CONCLUSION

AEP cannot satisfy its burden of proof in demonstrating that all costs flowing through the PPA Rider during the audit period were prudent or that its actions were in the best interest of customers. Customers should *not* be required to insulate AEP and OVEC from OVEC's imprudent must-run strategy, overpriced coal purchases, or debt payments, when all of these decisions were voluntary and should be the responsibility of shareholders, not captive utility customers. As the Auditor's analysis initially concluded, continuing to operate the OVEC plants is not in customers' best interest nor is the excessive charges that customers were assessed in 2018 and 2019 through the PPA Rider. For the aforementioned reasons, OMAEG and Kroger respectfully request that the Commission disallow all costs flowing through the PPA Rider during 2018 and 2019. At a minimum, the Commission should disallow all costs passed through the PPA Rider resulting from

[137] *Id.* at 77; Tr. Vol. II at 427-428 (Cross-Examination of Fagan).

[138] Tr. Vol. I at 147 (Cross-Examination of Fagan).

OVEC's imprudent must-run commitment strategy, disallow all costs passed through the PPA Rider during the audit period that are unrelated to the intended function as a rate stabilization charge, disallow all costs passed through the PPA Rider that are a result of imprudent coal purchases**,** and disallow all costs passed through the PPA Rider that are otherwise the result of imprudent decision-making.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Brief Joint Post-Hearing Brief electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group and The Kroger Co.