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PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL

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As NRDC explained in its Initial Post-Hearing Brief, AEP Ohio has failed to meet its “burden of proof in demonstrating the prudence of all costs and sales during the review, as well as that such actions were in the best interest of retail ratepayers.”¹ Instead, the Audit conducted by London Economics International, LLC (“LEI” or “the Auditor”) and the expert testimony of Dr. Jeremy Fisher demonstrate that AEP Ohio and its fellow OVEC Sponsors adopted a must-run commitment “strategy” that bid the OVEC units into the PJM energy market without regard to market prices and thus created variable cost losses that harmed customers.

Simply put, in many months during the review period, customers would have been better off had the OVEC units not operated at all. These energy market losses were amplified by OVEC’s failure to incorporate the variable cost of increased operation into its bids, a failure that also led to artificially low estimates of these losses by the Auditor. AEP Ohio ratepayers should

¹ Opinion and Order, Case Nos. 14-1693-EL-RDR and 14-1694-EL-AAM (March 31, 2016) at 89.

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be refunded \$ [REDACTED] in excess energy charges due to imprudent energy market bidding of the OVEC units.

AEP Ohio's imprudence also extends to its responsibility for over-investing capital in plants that lose money on a variable basis. As the Auditor recognized, the OVEC units face "economic viability issues" that have led most coal-burning plants of their vintage to plan retirement in the near future. Both the Auditor and Dr. Fisher urged the Commission to impose an annual cap on capital expenditures to avoid overinvesting in plants with a limited remaining economic life.² Because AEP Ohio has the expectation that Ohio customers will cover the losses from operating the plants, the utility does not have the same incentives that a rational economic actor would for investing further capital in these plants. Commission supervision is thus necessary.

Dr. Fisher found that the capital spending recommendation from Dr. Fagan relied on an understatement of the plant's costs, and that the OVEC units cost over 50% more per year than the industry average, further strengthening the case for close scrutiny of new capital spending at the OVEC units.³ Although the Auditor and Staff have repeatedly averred that it was beyond the scope of the *audit* to opine on whether the OVEC units are in "the best interests of the ratepayers," the Commission's authority is not so limited. The Commission should 1) order a disallowance to reimburse ratepayers for the excessive fuel and operating costs incurred during the audit period and 2) direct AEP Ohio to act prudently going forward by considering whether the retirement of OVEC units is in the best interest of ratepayers because the plants are uneconomic.

² See Audit at 10, 92, 96.

³ See Initial Brief of NRDC at 21.

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Nothing in the other parties' post-hearing briefs alter this conclusion. Three other parties agree that AEP Ohio failed to demonstrate prudence and urge the Commission to disallow some or all of the OVEC costs passed through the PPA Rider. IEU-Ohio urges the Commission to disallow the difference between the total OVEC costs (the combined demand and energy charges) and the market cost of energy and capacity during the audit period, an amount estimated to be between \$69 and \$74.5 million.⁴ OMAEG asks the Commission to "disallow all costs flowing through the PPA Rider during 2018 and 2019,"⁵ as does OCC, which estimates the total above-market costs of the Rider to be \$74.5 million.⁶ Staff defends its role with respect to the final audit report but does not express an opinion as to the propriety of a disallowance.⁷

AEP Ohio opposes any disallowance, but its arguments are unavailing. First, collateral estoppel is inapplicable to the key issue here, which is the *prudence* of OVEC costs and decisions during 2018 and 2019, an issue that the Commission has never before addressed. Authorization of the Rider does not preclude parties from challenging its amount; as the Ohio Supreme Court has recognized, collateral estoppel "is inapplicable" in such a circumstance.⁸

⁴ Dr. Fisher determined that, using the Auditor's method of ascribing all revenues and costs incurred at the end of a month to the prior month, AEP Ohio customers paid for \$69,041,238 in net losses relative to the market value of energy and capacity associated with the OVEC units. Fisher Testimony at 37:6-13. Ms. Glick, expert witness for OCC, calculated these losses as \$74,515,514. OCC Ex. 14 (Glick Testimony) at 6, 7, 20, 35, 49-50.

⁵ OMAEG Initial Brief at 35.

⁶ OCC Initial Brief at 70-71.

⁷ See Staff Initial Brief at 4-19 (defending Staff's role in the Audit and declining to assert that AEP Ohio acted prudently during 2018-2019 with respect to OVEC costs and decisions).

⁸ *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 2007-Ohio-4276, ¶ 14, 114 Ohio St. 3d 340, 343, 872 N.E.2d 269, 273 (emphasis added).

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Second, the fact that AEP Ohio shares responsibility for determining OVEC's bidding strategy with other Sponsors does not alter its burden under this Commission's prior Order to prove that *AEP Ohio* acted prudently with respect to the OVEC units. AEP Ohio presented no evidence that the OVEC bidding strategy was prudent or that it attempted to address energy market losses or incorporate market price expectations into OVEC's bidding strategy. Nor is there any evidence that AEP Ohio made any effort at stemming the losses from the plants for the benefit of their ratepayers. AEP Ohio cannot hide behind other OVEC owners when, on this record, there is no evidence that AEP Ohio even attempted to impose some market rationality on OVEC's energy market bidding. Third, Dr. Fisher's criticism of the OVEC must-run strategy does not rely on hindsight; Dr. Fisher used actual energy market prices as a proxy for the forecasts OVEC failed to create to estimate the extent of losses due to this imprudent strategy.

AEP Ohio's Initial brief also introduces two mischaracterizations of the Auditor's testimony and the record. First, AEP Ohio erroneously suggests that the Auditor made an affirmative finding that the must-run commitment strategy was prudent; in fact, the Auditor recommended it be changed. Second, AEP Ohio wrongly suggests the Auditor's errata as to the *amount* of coal oversupply undermines Dr. Fisher's conclusion that this oversupply is costly and caused by OVEC's disregard for energy market prices.

Finally, Staff challenges Dr. Fisher's credibility, alleging that Dr. Fisher lacked sufficient personal knowledge of the audit process to opine on a publicly available email from Staff to Dr. Fagan describing proposed changes to the audit, including the removal of a sentence stating that "keeping the plants running does not seem to be in the best interests of ratepayers." In fact, Dr. Fisher reproduced the email as an exhibit to his testimony, which stated, appropriately, that the email "indicate[d]" a request by Staff to remove this line. Dr. Fisher's characterization was

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consistent with both Staff witness Windle's and Dr. Fagan's testimony and, even if not, in no way undermines his credibility as an expert in coal plant economics, an expertise Staff does not challenge.

I. Collateral Estoppel Does Not Preclude the Commission from Disallowing Some or All of the PPA Rider Costs.

AEP Ohio contends that "intervenors are barred" from seeking disallowances for above-market costs by collateral estoppel.⁹ (Notably, although objecting to *intervenors'* positions generally, AEP Ohio fails to identify any portion of Dr. Fisher's testimony as an "improper collateral attack[].")¹⁰ But the Commission's approval of the PPA Rider's existence in no way precludes litigation as to the prudence of expenditures during 2018 and 2019 and thus the proper amount of that Rider. Collateral estoppel "preclude[s] the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."¹¹

But NRDC is not seeking to relitigate any point of law or fact that the Commission has previously determined. NRDC is not here challenging the existence of the PPA Rider. NRDC challenges the prudence of AEP Ohio's actions with respect to the costs and bidding strategy of the OVEC units during the audit period (2018-2019), an issue that could not possibly have been decided in Case No. 14-1693 because the decisions and costs at issue had not been made or incurred. As the Supreme Court of Ohio held in closely analogous circumstances, the doctrine of collateral estoppel "is inapplicable" where a surcharge or rider is authorized by the Commission

⁹ AEP Ohio Brief at 32-38 (emphasis added).

¹⁰ See AEP Ohio Brief at 32-38.

¹¹ *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9, 10, 16 OBR 361, 475 N.E.2d 782.

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and, in a later proceeding, the parties contest “*the amount* [a utility] may charge through that...rider.” *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 2007-Ohio-4276, ¶ 14, 114 Ohio St. 3d 340, 343, 872 N.E.2d 269, 273 (emphasis added). Thus, Ohio law is clear that the Commission could set the PPA Rider at zero dollars for the years 2018 and 2019 without relitigating the approval of the Rider.

Moreover, and as a separate issue, although “[c]ollateral estoppel has been applied to commission proceedings,”¹² the Ohio Supreme Court has also held that, “[t]he commission may change or modify earlier orders as long as it justifies any changes.”¹³ Ample evidence was presented to the Commission that the OVEC units have not functioned as the hedge they were intended to be, and that AEP Ohio has treated the units as a “blank check,” continuing to expend capital and operate the plants without regard to energy market prices well after it became apparent the units were not economical and should be retired.¹⁴ Separate from any disallowance due to imprudent *operations* during the 2018-19 audit period, the Commission would be justified in finding that AEP Ohio was imprudent in maintaining its participation in the ICPA and capping capital recovery under the PPA Rider accordingly.

Rather than defend its OVEC costs and actions, AEP Ohio seeks to distract the Commission with this erroneous legal argument. The Commission should reject AEP Ohio’s estoppel legal theory.

¹² *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 2007-Ohio-4276, ¶ 11, 114 Ohio St. 3d 340, 342, 872 N.E.2d 269, 273.

¹³ *Id.* at ¶ 14, 343, 273 (citing *Off. of Consumers' Couns. v. Pub. Utilities Comm'n of Ohio*, 10 Ohio St. 3d 49, 51, 461 N.E.2d 303, 304–05 (1984)).

¹⁴ *See, e.g.* Fisher Testimony at 32:18-39:25.

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II. AEP Ohio Was Obligated by the Commission's Order Authorizing The PPA Rider to Protect Ratepayers from Excessive Costs.

That AEP Ohio shares responsibility for OVEC's operating procedures with other Sponsors does not excuse its imprudence or failure to prove prudence. According to the Inter Company Power Agreement (an agreement to which AEP Ohio is a party), modifying the Operating Procedures to incorporate energy market price considerations as part of the OVEC bidding strategy would have required a two-thirds vote.¹⁵ AEP Ohio argues that because the Order authorizing the PPA Rider stated that the purpose of the audit is to “review the accuracy and appropriateness of the rider's accounting and the prudence of *AEP Ohio's decisions*” and because AEP Ohio could only decide to alter OVEC's commitment strategy in conjunction with other Sponsors, the must-run bidding strategy set forth in the Operating Procedures is outside the scope of the audit.

This argument is at odds with the Order authorizing the PPA Rider and this audit. As the Commission stated, “AEP Ohio...bear[s] the burden of proof in demonstrating all costs and sales during [this] review.”¹⁶ AEP Ohio's burden extends to “*all costs and sales*”—not just those for which AEP Ohio is unilaterally responsible. The Commission was clear that if OVEC incurred costs imprudently, AEP Ohio would bear those costs; AEP Ohio assumed this risk, and this responsibility, in adopting a pass-through mechanism with an affiliate entity. Indeed, in the RFP that *AEP Ohio itself quotes at length* in its Initial Brief and relies on to argue that certain issues are *outside* the scope of the audit, one of the categories is “OVEC's ‘unit scheduling,’ ‘bidding behavior and/or participation.’”¹⁷ There would be no point to the auditor examining OVEC's

¹⁵ AEP Ohio Initial Brief at 49-50.

¹⁶ See Opinion and Order, Case No. 14-1693 (March 31, 2016) at 89.

¹⁷ AEP Ohio Initial Brief at 24.

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bidding strategy if the Commission could not order a disallowance for findings of imprudence, notwithstanding AEP Ohio's lack of unilateral control.

AEP Ohio also asserts that the PPA Rider did not “contemplate (or authorize) active management of the hedge”—*i.e.* the OVEC plants—“by the Company.”¹⁸ This assertion is flatly contradicted by AEP Ohio's own stipulation establishing the Rider that states that AEP Ohio will be responsible for costs associated with unreasonable operation of the OVEC units:

Rigorous Review of PPA Rider: AEP Ohio agrees to participate in annual compliance reviews before the Commission to ensure that actions taken by the Company when selling the output from generation units included in the PPA Rider into the PJM market were not unreasonable. AEP Ohio, not its customers, would be responsible for the adjustments made to the PPA Rider based on actions deemed unreasonable by the Commission, including any costs (after proper consideration of such costs and netting of any bonus payments) associated with performance requirements in PJM's markets. Any determination that the costs and revenues included in the PPA Rider are unreasonable shall be made in light of the facts and circumstances known at the time such costs were committed and market revenues were received. In addition, the calculation of PPA Rider will be based on the sale of power into PJM.¹⁹

Conversely, AEP Ohio elsewhere implies that it was engaged in active management of OVEC's bidding strategy, stating that “[t]he Operating Committee regularly examines and discusses OVEC's operating status, including the must-run strategy.”²⁰ Tellingly, AEP Ohio offers no support for this claim except a hypothetical assertion by AEP Ohio witness Stegall that the Operating Committee “*would* change” the commitment status if circumstances warranted.²¹ As NRDC described in its initial post-hearing brief, there is no evidence of such “regular” discussion. The OVEC Operating Committee met in person only twice during the audit period

¹⁸ AEP Ohio Initial Brief at 39.

¹⁹ Joint Stipulation and Recommendation, Case No. 14-1693 (December 14, 2015) at 7.

²⁰ AEP Ohio Initial Brief at 51.

²¹ *Id.* (citing AEP Ohio Ex. 1 at 12) (emphasis added).

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and conducted six conference calls.²² No agendas were prepared for the calls, which were of “limited scope.”²³ The agenda for the 2019 in-person meeting of the Operating Committees does not include any discussion of the must-run strategy.²⁴

AEP Ohio failed to produce any evidence, either to the Auditor or otherwise in this proceeding, that the Company took any steps to improve OVEC’s bidding strategy. Had AEP Ohio been outvoted by other Sponsors on the Operating Committee, the Company could argue that any imprudence with respect to the energy market was outside of its best efforts. No such evidence was introduced. To the contrary, as Mr. Stegall testified, the Operating Committee is capable of altering OVEC’s commitment strategy in response to economic conditions and did so in 2020.²⁵ AEP Ohio’s failure to take steps to address ongoing negative energy margins at the OVEC units was imprudent.²⁶ Because the OVEC units are jointly operated, the Commission must judge AEP Ohio’s actions and inactions within that context, but here the Commission’s task is simple: there is no evidence that AEP Ohio took any actions to protect customers from OVEC’s failed “must run” commitment strategy. The Commission should thus reject AEP Ohio’s attempt to blame its own inattention to OVEC energy market interactions on the OVEC ownership structure.

²² Audit at 46 (Figure 21).

²³ Audit at 45

²⁴ See Audit at 47 (Figure 22).

²⁵ Tr. 883:21-884:2.

²⁶ See *In Re Ne. Ohio Nat. Gas Corp.*, No. 12-209-GA-GCR, 2013 WL 7929890 (F.E.D.A.P.J.P. Nov. 13, 2013) (inaction when faced with increased prices was imprudence on the part of utility).

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III. Dr. Fisher's Recommended Disallowance Does Not Rely on Hindsight Analysis.

NRDC agrees with AEP Ohio that “the prudence test examines whether an expenditure ‘was prudent when it was made.’”²⁷ But AEP Ohio is wrong that NRDC’s criticism of AEP Ohio rests on hindsight analysis. NRDC presented ample evidence that AEP Ohio’s inaction with respect to energy market bidding and capital expenditures at the OVEC units was imprudent based on information available (or that should have been available) to AEP Ohio at the time.

AEP Ohio mischaracterizes NRDC’s requested disallowance as based on “retroactive” reasoning.²⁸ First, AEP Ohio is conflating a finding of imprudence and the calculation of a disallowance. The Commission must decide if AEP Ohio’s actions around the OVEC energy market strategy were reasonable or not, based on information that was known or that should have been known during 2018 and 2019, including the fact that AEP Ohio should have known that the must run strategy was increasing customers’ costs. To calculate a disallowance, the Commission necessarily must rely on information that was created after the fact: a total accounting of the impact of the must run strategy on customers. Dr. Fisher’s testimony is relevant to both questions, though neither of them relies on “retroactive” analysis.

Second, as Dr. Fisher readily acknowledged in his direct testimony, he could not use forward-looking projections to determine exactly how OVEC would have committed its units if they had been committed prudently.²⁹ This was precisely *because* neither AEP Ohio nor OVEC

²⁷ AEP Ohio Initial Brief at 26 (quoting *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224 (Sept. 21, 2021).

²⁸ AEP Ohio uses the term “redispatch analysis” with respect to Dr. Fisher’s testimony. As Dr. Fisher testified, that the term “redispatch analysis” can describe a number of different assessments designed to understand whether a utility could have improved its energy market margin through a different bidding strategy. *See* Tr. 1140:19- 1141:13.

²⁹ Fisher Testimony at 21:11-13.

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made any effort to forecast energy market prices as a basis for commitment decisions (contrary to reasonable utility practice) at the time these decisions were made. Instead, Dr. Fisher produced seven-day forecasts based on actual energy market prices and then compared the net energy revenue at the start of that seven-day period to the cycling costs to determine whether it would have been more economic to turn a unit off (or leave it off) than run it during the subsequent seven-day period.³⁰ As Dr. Fisher describes, not only does this methodology *not* use an economic status and limit cycling by considering week-long look-ahead periods, it incorporates precisely those increased maintenance costs and the increased likelihood of forced outages due to cycling that Mr. Stegall identifies.³¹

Dr. Fisher's proposed disallowances are thus based on a forward-looking counterfactual that reasonably includes actual energy market prices in lieu of a forecast that AEP Ohio and OVEC imprudently failed to perform. As Dr. Fisher explained, the use of actual LMPs is unbiased; using *projected* LMPs instead would not have resulted in systematically higher or lower calculated losses.³² Dr. Fisher's analysis mimicked how a prudent utility would use a must-run commitment status with a slow-ramping coal unit to maximize net energy market revenues, while taking the costs associated with cycling the units into account. Dr. Fisher's proposed disallowance is an estimate, but it is as likely to be an *underestimate* of OVEC's actual imprudently incurred energy market losses as it is an *overestimate*.

Ironically given its argument, it is *AEP Ohio* that attempts to introduce a *post-hoc* justification of the Operating Committee's must-run strategy during the audit period that has no

³⁰ Fisher Testimony at 22:8-23:7.

³¹ See JIF-10 at 00022 (describing "cycling costs components") and Fisher Testimony at 23 n. 38; cf. AEP Ohio Initial Brief at 53.

³² Fisher Testimony at 23:19-24:6.

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basis in contemporaneous evidence. AEP Ohio asserts that committing the units differently in 2018 and 2019 could have caused physical issues with the generation units.³³ AEP Ohio lists a litany of potential costs OVEC *could have* incurred if the units were cycled during the audit period. But AEP Ohio admits that it does not have any evidence that these issues existed at the time or that any of the issues were in fact considered when bidding OVEC into the energy market.

AEP Ohio does not attempt to quantify these cycling costs nor—crucially—compare them to either the avoidable losses the units incurred *or* the variable and incremental O&M costs incurred by operating the plants during this period.³⁴ When asked on cross-examination whether he knew “how long it takes to restart the OVEC units” as he used that term, Mr. Stegall admitted he did not have access to information about how long it takes the units to ramp up.³⁵ AEP Ohio’s argument boils down to the evidence-free assertion that *if* the Sponsoring Companies had implemented a reasonable commitment strategy in 2018 and compared energy market margins to the costs of cycling the units, it *may have been* more prudent to operate the units as must run as often as they did. There is no evidence whatsoever in the record that AEP Ohio, OVEC Sponsors, or OVEC itself took any of these costs into account. AEP Ohio’s justification of the

³³ AEP Ohio Initial Brief at 48. Dr. Fisher readily acknowledged these physical limitations on coal-fired units and NRDC never suggested that the units be cycled on-and-off on a daily or that the Sponsoring Companies use “a single day” as their planning horizon. *Cf.* AEP Ohio Initial Brief at 48. Dr. Fisher testified that good utility practice is to look at energy prices a week or more ahead and to consider cycling costs when deciding whether to turn a unit on or off based on those prices. Fisher Testimony at 16:8-17:8. As Dr. Fagan found that in four out of the seven *months* she examined the fuel used in the OVEC units cost more than the average PJM energy prices that month, meaning the plant could have been shut off for the entire *month* and reduced ratepayers’ bills. Audit at 52-53; Tr. 264:1-3.

³⁴ See AEP Ohio Initial Brief at 49 (citing Stegall Testimony at 10-11).

³⁵ Tr. 879:13-22.

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use of non-stop must-run commitment is not even *post-hoc* rationalization, it's *post-hoc* hypothesizing. This is not enough to carry a utility's burden of proof.

AEP Ohio accuses intervenors of seeking to have insurance premiums returned after the term ends with their house intact. But NRDC is proposing accountability for an insurance broker (AEP Ohio) who selected an overpriced and mismanaged insurer (OVEC) for captive ratepayers.

IV. AEP Ohio Mischaracterizes the Auditor's Findings and Record Evidence.

In its post-hearing brief, AEP Ohio misrepresents the record evidence in several important respects. Most significantly, AEP Ohio states that "the Auditor found that AEP Ohio's capacity 'offer price was prudent,'" and that, "[t]he Auditor made similar findings on other aspects as discussed below."³⁶ AEP Ohio is correct the Auditor stated that the *capacity* price offered into the PJM market was prudent.³⁷ However, the Auditor did not make affirmative findings of prudence with respect to OVEC's energy market bidding strategy or capital expenditures. Rather, the Auditor repeatedly reaffirmed that LEI had identified "areas of improvement" where AEP Ohio's actions could be improved.³⁸

Q: And you would agree with me that there were areas where AEP's practices were not adequate and consistent with good utility practice, correct?

A: So the reason we use the term 'mostly' is because we have those recommendations below.

Q: So you would agree with me that there were areas where the practices, procedures, and oversight were not adequate and consistent with good utility practice, correct?

A: We felt they could be improved.³⁹

³⁶ AEP Ohio Initial Brief at 29 (quoting Staff Ex. 1 at 50; Tr. II at 394-96).

³⁷ Tr. At 394-95.

³⁸ See Tr. 296:6-14.

³⁹ Tr. 439:7-11.

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This room for improvement was a theme of the Auditor's testimony on cross-examination:

- With respect to “must run versus economic commitment”: “that kind of thing could be improved.”⁴⁰
- With respect to PPA Rider costs as a whole: “There were parts that could be improved upon.”⁴¹
- “[W]e found is that there could be room for improvement in perhaps, you know, not just sort of defaulting to the must run strategy all the time.”⁴²
- “We had some findings for improvement...[W]e recommend reconsideration, careful reconsideration [of OVEC's commitment strategy], based on the numbers we saw.”⁴³
- “There were areas we would like to see examined and improved and we list those specifically.”⁴⁴
- “We made findings of, you know, ways to improve things.”⁴⁵
- “We found things that we think should be improved.”⁴⁶

Although the Auditor declined to use the word “imprudence” with respect to OVEC's energy market bidding strategy, the Auditor similarly declined to make an affirmative finding of prudence. AEP Ohio improperly suggests that the Auditor's endorsement of the OVEC *capacity* market bidding strategy is “similar” to LEI's findings with respect to the energy market. In fact, the Auditor was clear in urging AEP Ohio to improve OVEC's energy market bidding process.

AEP Ohio also claims that Dr. Fisher's conclusions about the impact of OVEC's must run commitment strategy on coal over-procurement are undermined because the Auditor “disclaimed as part of the Errata” the finding that coal inventory levels “significantly

⁴⁰ Tr. 216:25-217:1.

⁴¹ Tr. 218:25.

⁴² Tr. 266:6-9.

⁴³ Tr. 95:9-19.

⁴⁴ Tr. 184:7-9.

⁴⁵ Tr. 214:6-7.

⁴⁶ Tr. 318:24-25.

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exceed[ed]’ OVEC’s recommended inventory.”⁴⁷ This is wrong for two reasons. First, contrary to AEP Ohio’s mischaracterization, Dr. Fisher did not rely “exclusively upon Auditor analysis.”⁴⁸ Dr. Fisher independently examined information provided *to* the Auditor by AEP Ohio to assess whether OVEC had reasonably forecasted its coal use in making procurement decisions.⁴⁹ Based on this independent analysis, Dr. Fisher concluded that OVEC failed to incorporate energy prices into its forecasts and may have used a fixed annual capacity factor rather than adjusting coal purchases in anticipation of periods of reduced generation as a result of lower energy prices.⁵⁰ Although Dr. Fisher relied on Dr. Fagan’s findings for the resulting excess *inventory*, his conclusions about OVEC’s unreasonable *forecasts* are unaffected by the Audit errata.

Second, AEP Ohio mispresents the errata themselves, which did not alter Dr. Fagan’s ultimate conclusion that coal inventory at the OVEC plants was excessive in 2019. Dr. Fagan clarified on cross-examination that the calculations as to the total days of coal inventory were “not as precise as they ought to be” because LEI relied on average burns rather than full load, but reaffirmed that the imprecise results were “still indicative” and that the correction “doesn’t change materially the results of the audit.”⁵¹ She also stated that although the numbers—*i.e.*, the days of coal inventory at Kyger and Clifty Creek—would change, she did not “think the conclusions would change much.”⁵² The errata also left untouched Dr. Fagan’s conclusion that,

⁴⁷ AEP Ohio Initial Brief at 60 (citing Staff Ex. 1 at 74).

⁴⁸ *See id.*

⁴⁹ Tr. 1198:16-23; Fisher Testimony at 31 fns. 58 & 59.

⁵⁰ Fisher Testimony at 31:5-22.

⁵¹ Tr. 410:25-411:4.

⁵² Tr. 413:2-7.

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“in 2019, the [coal] inventory levels in both power plants were substantially higher than the inventory targets.”⁵³ Although Dr. Fagan corrected the Audit to acknowledge the precise extent of the coal oversupply may have been misstated in the Audit, her qualitative conclusion that the supply was well in excess of OVEC’s targets stands; as does Dr. Fisher’s incorporation of that conclusion in his own analysis.

V. Dr. Fisher’s Opinion on the Audit and OVEC Units Is Credible and Compelling.

Dr. Fisher provided pre-filed testimony based on the Audit, materials provided to the Auditor, and materials provided in response to NRDC’s discovery requests. Based on his review of these materials, Dr. Fisher concluded that:

- (1) OVEC commits the coal units into the PJM energy market “without including variable operation and maintenance (“O&M”) costs[, which] has the effect of offering the units at an artificially low cost,” likely increasing costs during the audit period.⁵⁴
- (2) OVEC’s reliance on a must-run commitment strategy without regard to forward-looking economic projections resulted in prolonged periods of net negative energy margins and millions of dollars in excess losses.⁵⁵
- (3) This reliance on must-run commitment carried over to OVEC’s coal forecasts, resulting in over-procurement and additional costs.⁵⁶

⁵³ Audit at 75.

⁵⁴ Fisher Testimony at 5:8-16.

⁵⁵ *Id.* at 5:17-6:2.

⁵⁶ *Id.* at 6:3-12.

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(4) OVEC units' true fixed costs are more than double what the Auditor found and, as passed through to AEP Ohio ratepayers through the demand charge of the ICPA, significantly exceeded market capacity prices during the audit period.⁵⁷

(5) The Auditor initially and correctly found that the OVEC units did "not seem to be in the best interests of the ratepayers," but removed that finding upon Staff recommendation from the final report.⁵⁸

Neither AEP Ohio nor Staff challenge Dr. Fisher's first or fourth findings on cross-examination or in their initial briefs. AEP Ohio attempted to defend its reliance on a must-run commitment strategy (*contra* Dr. Fisher's second finding), but, as discussed above in Section III, both Mr. Stegall's testimony and AEP Ohio's briefing relied solely on *post-hoc* justifications for which there is no contemporaneous evidence in the record and mischaracterize Dr. Fisher's methodology for determining the appropriate disallowance. And, as discussed above, AEP Ohio's claim that Dr. Fisher's third finding, as to coal over-procurement, is undermined by the Auditor's Errata misstates both the scope of the Errata and the basis of Dr. Fisher's testimony.

Staff argue that Dr. Fisher's final finding was inappropriate because Dr. Fisher lacked personal knowledge of the process by which the Audit came to be finalized and what Staff and Dr. Fagan intended with respect to their publicly disclosed email communication and subsequent changes to the Audit.⁵⁹ But Staff do not dispute that "a draft of the audit report was provided to both AEP Ohio and PUCO Staff prior to its finalization," that the draft audit report included the finding that "keeping the plants running does not seem to be in the best interest of ratepayers,"

⁵⁷ *Id.* at 6:13-27.

⁵⁸ *Id.* at 7:9-13.

⁵⁹ Staff Brief at 20-21.

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that Staff sent an email to Dr. Fagan, that the email highlighted this phrase as an example of changes to be made to the draft audit, or that the phrase was, in Dr. Fagan's words, "removed" from the Audit.⁶⁰ Staff directed Dr. Fagan to "Staff's initial comments on LEI's latest draft of the" audit, stated that, "This may help you get a head start on Staff's editorial suggestions," that "Staff still needs final acquiescence from PUCO Admin. regarding the overall tone of the draft report!" and "[m]ilder tone and intensity of language would be recommended such as the language...: 'Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers.'"⁶¹

The only factual disagreement between Dr. Fisher and Staff is whether this email "indicates that PUCO Staff requested the removal" of Dr. Fagan's finding about "keeping the plants running."⁶² Staff goes on at length about Dr. Fisher's lack of personal knowledge, arguing this undermines his claim. But Dr. Fisher never claimed personal knowledge either of Staff's intent in sending the email or Dr. Fagan's reaction, only that the email provides evidence ("indicates") that Staff asked Dr. Fagan to remove this finding. Indeed, Staff witness Windle testified that he explained to Dr. Fagan in a meeting the next day that "it was not appropriate to include [this] statement" without additional language,⁶³ thus confirming Dr. Fisher's testimony. And Dr. Fagan also testified that she understood the emails to convey a *request* from Staff as to

⁶⁰ Tr. 337-38.

⁶¹ NRDC Exhibit 2.

⁶² Fisher Testimony 45:14-15. Staff also claims in its brief that "Witness Fisher also provided his opinion as to how Dr. Fagan interpreted those suggestions." However, Staff does not provide any citation or quotation to where Dr. Fisher purportedly offered such an opinion.

⁶³ Windle Testimony at 4:7-11.

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changes in the final audit,⁶⁴ again confirming the credibility of Dr. Fisher’s testimony. Dr. Fisher’s opinion as to what the September 8 email “indicates” is well-founded and uncontradicted by any of the evidence introduced by Staff or testimony elicited at the hearing. Moreover, Staff does not challenge (and implicitly acknowledges) Dr. Fisher’s credibility as an experienced analyst of power plant economics. Staff’s attack on his credibility is therefore a baseless distraction contradicted by Staff’s own witness and Dr. Fagan herself.⁶⁵

VI. Conclusion

All four intervenors (NRDC, OCC, IEU-Ohio, and OMAEG) that filed post-hearing briefs agree, based on independent expert analysis: AEP Ohio did not meet its burden to show that the OVEC units were operated prudently during the 2018-19 audit period. As the Auditor found, AEP Ohio and its fellow Sponsors directed the OVEC units to be operated as “must run” whenever available, without regard to energy market prices. The result was excessive charges for AEP Ohio customers, who paid for overpriced energy from OVEC. OVEC’s losses were amplified by a bidding strategy that fails to include marginal O&M expenses. And there is no sign that ratepayers will benefit from the OVEC units: As the Auditor and all intervenor experts testified, Clifty Creek and Kyger Creek are no longer economically viable, and AEP Ohio should protect its ratepayers by considering retirement of units instead of further capital spending.

In response to this testimony and evidence, AEP Ohio offered only *post-hoc* hypothetical explanations for OVEC’s must-run strategy and an insistence that any disallowance would be inconsistent with the Commission’s authorization of the Rider. But this collateral estoppel

⁶⁴ On cross-examination Dr. Fagan characterized the sentence at issue as “requesting that the audit, at least the provision given here, be given a milder tone,” and that the next bullet point of the email conveyed “request from Staff” to remove a sentence. Tr. 492:24-493-2; 225:1-4.

⁶⁵ See Staff Initial Brief at 22.

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argument is flatly wrong: The very purpose of the audit is to hold AEP Ohio accountable for this type of uneconomic operation of the OVEC units. The Commission should follow through on its commitment in Case No. 14-1693 and disallow the imprudently incurred costs associated with the OVEC units.

Dated: April 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties.

In addition, I hereby certify that a service copy of the foregoing *Reply Brief of the Natural Resources Defense Council* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 8th day of April, 2022, via electronic transmission.

/s/Robert Dove

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Summary: Reply Brief (Redacted Public Version) electronically filed by Mr. Robert
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