

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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The record and Initial Briefs in this case demonstrate that AEP Ohio failed to meet its burden of proof to demonstrate that it operated its entitlement of the OVEC units in a manner that was consistent with a competitive seller attempting to maximize revenues or in the best interest of retail ratepayers.¹ The Commission found when it authorized the PPA Rider:

“Retail 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 marketplace comprised of sellers attempting to maximize revenues. As noted above, AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers.”²

A competitive generator seeking to maximize revenues and minimize costs to ratepayers would have conducted an analysis of market prices and unit costs, and then bid the OVEC units on an economic basis. AEP Ohio did neither. Accordingly, because AEP Ohio did

¹ *In re 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 (PPA Case), Case No. 14-1693-EL-RDR et al., Opinion and Order (Mar. 31, 2016) at 89.*

² *Id.*

not act prudently and in the best interest of retail ratepayers, the Commission should either disallow all costs flowed through the PPA Rider during the 2018-2019 audit period or issue a Request for Proposal (“RFP”) for an independent auditor to complete the audit that was started in this case.

As noted in its Initial Brief, IEU-Ohio does not contest the Commission’s authorization of the PPA Rider or intend to relitigate the Commission’s prior decisions. However, when the Commission established the PPA Rider, the Commission upheld a Stipulation in which AEP Ohio consented to annual prudency reviews of the PPA Rider and the bidding of its OVEC entitlement into the PJM markets.³ Instead of bidding the OVEC units on an economic basis or comparing market prices to unit costs, as a competitive market generator would have, the OVEC units were bid on a must-run basis in which they ran all-out, all-the-time. That was imprudent. Because AEP Ohio acted imprudently, the Commission should either disallow all costs charged to customers under the PPA Rider during the audit period or issue an RFP for a new independent auditor to conduct a complete prudency audit so that the Commission can determine a more appropriate disallowance.

I. ARGUMENT

A. AEP Ohio did not meet its burden of proof to demonstrate that its bidding behavior was prudent and in the best interest of retail ratepayers.

The record and Initial Briefs in this case support a Commission determination that AEP Ohio did not act prudently and in the best interest of retail ratepayers. While the Commission has defined and applied prudence in numerous cases, when it authorized

³ *Id.*

the PPA Rider, the Commission found that the annual prudency reviews of the PPA Rider would determine whether “the output from the units was [] bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues.”⁴

AEP Ohio did not provide evidence in this case that it evaluated market prices or unit costs to establish a prudent bidding strategy. Similarly, AEP Ohio did not present the facts or circumstances at the time that led it to believe a must-run commitment strategy was prudent and in the best interest of retail ratepayers. Throughout its Initial Brief, AEP Ohio argues that intervenor arguments rely upon hindsight, but that “the scope of this audit should focus on the Company’s actions in implementing the ICPA during the audit period (2018-2019), based on a prudence standard that reviews facts and circumstances known at the time.”⁵ IEU-Ohio does not disagree with focusing on the facts and circumstances known at the time during the audit period, but it is AEP Ohio’s burden to present those facts and circumstances. AEP Ohio is responsible for demonstrating to the Commission that it acted as a reasonable competitive generator during the audit period. AEP Ohio did not present market forecasts, financial analysis, unit cost analysis, projections of shutdowns and restarts under an economic commitment, projected maintenance costs of shutting down and restarting, forecasted day-ahead energy prices, forecasted capacity prices, or any other analysis that a competitive generator would have done to establish a unit bidding strategy.

⁴ *In re 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 (PPA Case)*, Case No. 14-1693-EL-RDR et al., Opinion and Order (Mar. 31, 2016) at 89.

⁵ AEP Ohio Initial Brief at 4-5, 23-27.

Further, AEP Ohio argues in its Initial brief that intervenors fail to recognize that AEP Ohio could not unilaterally change OVEC's must-run strategy during the audit period.⁶ However, if true, then any prudency audit of AEP Ohio's bidding strategy during the audit period is illusory and inconsistent with the Commission's finding in the PPA Rider case. As noted above, the Commission specifically found in the PPA Rider case 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 marketplace comprised of sellers attempting to maximize revenues."⁷ IEU-Ohio is not seeking to relitigate the PPA Rider case, but instead seeking for the Commission to uphold the standard which it already established in that case.

AEP Ohio relies extensively on the Audit Report as support for its arguments that it acted reasonably. However, the Auditor neither found that AEP Ohio acted prudently nor imprudently. The Auditor described the must-run commitment strategy as a generator self-scheduling its units to run all-out, all-the-time, regardless of energy prices, and the OVEC units were designated as must-run units during the entirety of the audit period.⁸ After reviewing the units' operations, the Auditor recommended that OVEC reconsider its must-run commitment strategy because "there are times during which the PJM [Day Ahead] prices do not cover the variable cost of running the plants."⁹ By running the plants all-out, all-the-time, without conducting any analysis of PJM prices and unit costs, AEP

⁶ AEP Ohio Initial Brief at 8.

⁷ *In re 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 (PPA Case)*, Case No. 14-1693-EL-RDR et al., Opinion and Order (Mar. 31, 2016) at 89.

⁸ *Staff Ex. 1* (Audit Report) at 21, 44 (all units were committed as must-run units with the exception of Clifty Creek Unit No. 6).

⁹ *Staff Ex. 1* (Audit Report) at 52-53.

Ohio failed to meet the standard of acting like a competitive generator attempting to maximize revenues.

Further, AEP Ohio witness Stegall testified that the must-run commitment of the OVEC units was reasonable because generators *may* evaluate positive economics over the longer term, coal-fired units have obligations under their fuel contracts that *may* require them to run, environmental testing and PJM Interconnection, LLC (“PJM”)-mandated testing *may* require units to be online and performing, and coal-fired generating units have operating limitations and requirements for shut-downs and restarts.¹⁰ None of these generalized assertions about why a generator *may* commit on a must-run basis were tied specifically to the OVEC generating units. For AEP Ohio to meet its burden of proof, more is required than vague assertions about why a hypothetical generator might commit on a must-run basis. Instead, AEP Ohio must provide data and analysis demonstrating that it evaluated PJM market prices and unit costs, and then operated the plants prudently based upon the information and data available at the time. AEP Ohio did not provide that data and analysis, and therefore it failed to meet its burden of proof to demonstrate that it acted like a competitive generator attempting to maximize revenues and minimize costs.

B. The Commission should either disallow all costs during the Audit Period or direct a new independent auditor to finish the audit that was started in this case.

The Commission should either disallow all costs during the Audit Period or direct a new independent auditor to finish the audit so that the Commission can determine a more appropriate disallowance. The Auditor in this case reviewed just 7 months of the

¹⁰ AEP Ohio Ex. I (Direct Testimony of Jason M. Stegall) at 9.

audit period and found that in 4 of those months, PJM energy prices did not cover the fuel costs of the OVEC units.¹¹ A complete audit analysis would look at all 24 months of the audit period. This is what the Auditor in this case should have done in the first place. Upon finding that energy prices did not cover the OVEC unit costs in 4 of the 7 months, the Auditor should have then analyzed all 24 months of the audit period. And, even with the analysis for just those 7 months, the Auditor found that if the OVEC units had chosen not to run during the months when it had negative energy earnings, the OVEC sponsors could have reduced their respective energy charges.¹² A complete audit analysis would have looked at market prices, unit costs, and bidding behavior for the entirety of the audit period. Accordingly, the Commission should direct a new independent auditor to identify precisely which months the OVEC units had negative energy earnings, how much such negative energy earnings cost customers, and what the energy earnings would have been under a prudent economic bidding strategy. The Commission can then rely upon a complete audit analysis to determine an appropriate disallowance.

Further, there should be no doubt that the Auditor did not conduct a complete analysis. The Audit Report itself notes that “LEI’s analysis showed that some of the time, the PJM energy price did not cover fuel and variable cost, *though LEI’s analysis did not fully evaluate a re-dispatching of the OVEC units.*”¹³ In fact, the Auditor did not even ask AEP Ohio for any financial analysis of projected revenues from the PJM market, startup costs, or shutdown costs:

¹¹ Tr. Vol. I at 264; Tr. Vol. II at 327.

¹² Tr. Vol. II at 299.

¹³ Audit Report at 9.

Q: Did you see any evidence during 2018 to 2019 where OVEC ever did any kind of financial analysis of things like project revenues from the PJM market, startup costs, shutdown costs, to use in making its unit commitment decision?

A. We didn't ask for that information, so they may have or may not have.

This is fundamental information that should have been requested by the Auditor before issuing any final analysis of the prudence of unit scheduling and bidding in PJM markets.

While AEP Ohio opposes a so-called redispatch analysis, this is not necessarily a redispatch analysis, but instead the very prudence analysis that should have been conducted in this case in the first place. The RFP specifically directed the Auditor to review the prudence of unit scheduling and bidding in PJM markets:

- a. The Auditor shall review the prudence of unit scheduling and bidding of energy into PJM administered wholesale markets, including day ahead and real time energy markets, and shall ensure that accounting procedures accurately and properly allocate revenues to ratepayers. The auditor is expected to possess a familiarity with all rules and regulations governing the rights and responsibilities of generating asset owners in PJM, including but not limited to PJM Manual 11.
- b. The Auditor shall review the prudence of bidding behavior in PJM administered capacity markets, including the annual Base Residual Auction (BRA), and ensure that accounting procedures accurately and properly allocate revenues to ratepayers. The auditor is expected to possess a familiarity with all rules and regulations governing the rights and responsibilities of capacity providers in PJM, including but not limited to PJM Manual 18.
- c. The Auditor shall review the prudence of bidding behavior and/or participation in any other market that may provide revenue above and beyond that which is received in energy and capacity markets, including, but not limited to, PJM administered ancillary services markets.¹⁴

¹⁴ Entry (Jan. 15, 2020) at ¶ 14, Attached RFP; Entry (Mar. 11, 2020) at ¶ 9.

The Auditor did analyze some of the bidding and scheduling of the OVEC units, but only for 7 of the 24 months of the audit period, and only for a semi-random sample. While the Auditor noted that it would be possible to conduct a “more precise analysis . . . of the revenue from an hour of operations at any given time,” the Auditor did not conduct that analysis.¹⁵ The PUCO Staff even noted on the first page of its Initial Brief that “the Audit Report recommends continued and/or further evaluation of certain practices by the Company related to the PPA Rider.”¹⁶

AEP Ohio argues in its Initial Brief that any additional analysis would be inconsistent with the prudence standard because it would not “focus on what OVEC knew at the time it made unit commitments. That is, [a retroactive analysis would] not look at whether a must-run commitment was reasonable given forward-looking energy forecasts and other market forces available at the time.”¹⁷ This argument has no merit because every audit is a retrospective analysis. A complete audit analysis would provide valuable data and information to the Commission on the costs of AEP Ohio’s actions, and the difference between what those costs are and what the costs to customers would have been if AEP Ohio had acted like a reasonable competitive market generator. Because AEP Ohio failed to meet its burden of proof, the Commission should either disallow all of the PPA Rider charges or direct a new independent auditor to finish the analysis started in this case so that the Commission can determine an appropriate disallowance.

¹⁵ Tr. Vol. I at 260.

¹⁶ PUCO Staff Initial Brief at 1.

¹⁷ AEP Ohio Initial Brief at 53.

C. The Commission should reject AEP Ohio's attempts to shift the burden of proof to intervening parties and the Auditor.

The independent Auditor and intervening parties do not carry the burden of proof in this case. AEP Ohio has sought to convince the Commission that the Auditor and intervening parties failed to demonstrate that the costs to operate the OVEC units were imprudent or should be disallowed.¹⁸ In its Initial Brief, AEP Ohio argued that the "Audit Report did not make any findings of imprudence" and the Auditor's failure to state that AEP Ohio acted imprudently "supports the Company's position that the intervenors' claims lack a basis in the record."¹⁹ The Commission should not be swayed, that is not the burden of the Auditor or intervening parties. Instead, the burden rests squarely with AEP Ohio to demonstrate that its actions were prudent and in the best interest of retail ratepayers. The Audit Report did not find that AEP Ohio acted prudently or imprudently. It was an incomplete Audit Report that found, at most, that AEP Ohio's bidding strategy "could be improved upon."²⁰ The findings by the Auditor alone do not provide the evidentiary justification for the Commission to find that AEP Ohio met its burden of proof.

The prudence standard does not permit AEP Ohio to bury its head in the sand and ignore market prices and unit costs so that it can subsequently argue that it was unaware that its must-run commitment strategy was costing more (potentially substantially more) than an economic commitment strategy. This is not an after-the-fact "Monday morning quarterback" argument, but instead an argument that *at the time* during the audit period, AEP Ohio did not conduct the analysis and bid the OVEC units in the same manner that

¹⁸ AEP Ohio Initial Brief at 4, 9.

¹⁹ *Id.*

²⁰ Tr. Vol. I at 218 (Cross-Examination of Fagan).

a reasonable competitive generator would have. The only after-the-fact determination is how much AEP Ohio's actions ultimately cost customers. To this end, the Commission should determine whether to disallow the entirety of the PPA Rider charges during the audit period or direct that a full independent audit be conducted.

II. CONCLUSION

The Commission should find that AEP Ohio did not meet its burden of proof that the costs charged to customers from the OVEC units were prudently incurred or in the best interest of retail ratepayers. The Commission should then either disallow all costs charged to customers under the PPA Rider during the audit period or direct an independent auditor to finish the analysis that was started in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Ohio Adm.Code 4901-1-05, 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 Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio, April 8, 2022.

/s/ Matthew R. Pritchard
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