

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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) | |

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

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I. INTRODUCTION

The evidentiary record is clear. The Public Utilities Commission of Ohio (Commission) should disallow all costs collected through Ohio Power Company's (AEP) Power Purchase Agreement Rider (PPA Rider) during the audit period in 2018 and 2019,¹ because AEP failed to demonstrate that such costs were just and reasonable and prudently incurred and failed to establish that its actions were in the best interest of customers.² As directed by the Attorney Examiner, the Ohio Manufacturers' Association Energy Group (OMAEG) and The Kroger Co. (Kroger) jointly submitted their Initial Post-Hearing Brief in the above-referenced proceeding on March 18, 2022.

As OMAEG and Kroger demonstrated in their Initial Post-Hearing Brief, the prudence and performance audit of the PPA Rider (Audit Report) filed in the above-referenced proceeding on September 16, 2020 by London Economics International LLC (LEI or the Auditor) confirmed that all costs collected through the PPA Rider during the audit period did *not* satisfy the requirements that the Commission established for cost recovery through the PPA Rider.³ Indeed, the Audit Report determined that during the audit period, the Ohio Valley Electric Corporation (OVEC) plants cost customers more than the cost of energy and capacity available on the PJM wholesale markets.⁴ Accordingly, the Commission should disallow all costs collected through the PPA Rider in 2018 and 2019.

Additionally, OMAEG, Kroger, and the other Intervening Parties⁵ explained how the imprudent must-run commitment of the OVEC units during the audit period contributed to millions

¹ Tr. Vol. VII at 1914.

² See OMAEG and Kroger's Initial Post-Hearing Brief at 9-14 (March 18, 2022).

³ *Id.* at. 8-17.

⁴ See Staff Ex. 1 at 9 (Audit Report).

⁵ The Office of the Ohio Consumers' Counsel (OCC); Industrial Energy Users- Ohio (IEU); Natural Resources Defense Council (NRDC) (collectively with OMAEG and Kroger, the Intervening Parties).

of dollars of avoidable energy market losses.⁶ Contrary to the evidentiary record, AEP inexplicably argued in its Initial Post-Hearing Brief that OVEC's must-run strategy during the audit period was reasonable.⁷ The Commission should reject AEP's argument as it relies on generalizations rather than evidence specific to the OVEC units during the audit period and is indicative of AEP's attempt to abdicate its oversight responsibilities as they relate to OVEC's operations. AEP had a responsibility to act in the best interest of its customers to mitigate costs collected through the PPA Rider. AEP clearly failed to do so during the audit period. Thus, at a minimum, the Commission should disallow all costs associated with OVEC's unreasonable and imprudent must-run strategy implemented during the audit period.

Moreover, the Commission should disallow other unreasonable and imprudent costs that were collected through the PPA Rider in 2018 and 2019. For example, Intervening Parties identified above-market coal purchases,⁸ excessive capital expenditures,⁹ and debt and interest payments¹⁰ as costs that are unreasonable, imprudent, and inappropriate for recovery through the PPA Rider.

Finally, consistent with the Auditor's initial finding,¹¹ the OVEC plants and the costs collected through the PPA Rider are *not* in AEP customers' best interest. Accordingly, the Commission should take additional steps to protect customers from these unreasonable costs going forward as customers are not a "trust account" and should not be required to insulate AEP's

⁶ See OCC's Initial Post-Hearing Brief at 22-27 (March 18, 2022); IEU's Initial Post-Hearing Brief at 5-8 (March 18, 2022); NRDC's Initial Post-Hearing Brief at 10-14 (March 18, 2022).

⁷ AEP's Initial Post-Hearing Brief at 47-49 (March 18, 2022).

⁸ OMAEG and Kroger's Initial Post-Hearing Brief at 14 (March 18, 2022).

⁹ NRDC's Initial Post-Hearing Brief at 21 (March 18, 2022).

¹⁰ OMAEG and Kroger's Initial Post-Hearing Brief at 14-15 (March 18, 2022); *see also* OMAEG Ex. 1 at 17-20 (Direct Testimony of John A. Seryak).

¹¹ See NRDC Ex. 2 at 1.

shareholders from the company's voluntary and uneconomic decision-making in regards to the OVEC plants. Simply put, if, as the Auditor's analysis showed, continuing to operate the OVEC plants is not in the best interest of customers, then it likewise cannot be in the best interest of customers to have paid for costs through the PPA Rider in 2018 and 2019 to subsidize two uneconomic, sixty-plus year old, dirty coal OVEC plants.

Therefore, for the reasons set forth herein and in their Initial Post-Hearing Brief, OMAEG and Kroger respectfully request that the Commission protect AEP's customers by disallowing all costs flowing through the PPA Rider during 2018 and 2019. At a minimum, the Commission should disallow the costs collected through the PPA Rider arising 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 by AEP. Instead, AEP's shareholders should be required to foot the bill for those imprudent decisions.

II. ARGUMENT

A. The Commission Should Exercise its Authority to Disallow All Costs Collected Through the PPA Rider During the Audit Period Because AEP Has Failed to Satisfy its Requisite Burden of Proof.

AEP seems to incorrectly believe that because it was authorized to recover specific costs through the PPA Rider, that neither Intervening Parties nor the Commission are allowed to question the prudence of such costs and AEP's actions during the audit period.¹² Contrary to AEP's position, it is *not* entitled to recover all of its costs associated with OVEC. Instead AEP

¹² See, e.g., AEP's Initial Post-Hearing Brief at 33, 37 (March 18, 2022) (arguing, "[a]ny attempt by the Commission to reverse its prior decision would also violate AEP Ohio's statutory right to consent to the terms of its ESP..." and that "intervenor recommendations for total disallowance of all OVEC costs during the audit period clearly represent improper collateral attacks on the Commission's decision in the PPA Rider Cases....").

must demonstrate that the costs it seeks to recover are just, reasonable, prudent, and result from actions that were in customers' best interest at the time (a standard that it clearly did not meet).

As OMAEG and Kroger explained in their Initial Post-Hearing Brief,¹³ no one is challenging the existence of the PPA Rider through this proceeding, but rather, the Intervening Parties are challenging the reasonableness and prudence of the costs collected through the established mechanism during the audit period. This position is wholly consistent with the parameters set forth in the Commission's prior orders concerning the PPA Rider, which the Commission acknowledged that AEP agreed to follow. In its March 31, 2016 Order in Case Nos. 14-1693-EL-RDR, the Commission affirmed that the PPA Rider will be subject to a "rigorous review" and further stated:

AEP Ohio agree[d] to participate in annual compliance reviews before the Commission to ensure that actions taken by the Company when selling 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 based on actions deemed unreasonable by the Commission.....*¹⁴

The Order further clarified that "AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers"¹⁵ and "[r]etail cost recovery may be disallowed as a result of the annual prudency review if the output of 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."¹⁶ The Order then acknowledged, "AEP Ohio has consented to this review as an integral part of the PPA rider under the ESP 2 pursuant to R.C.

¹³ See OMAEG and Kroger's Initial Post-Hearing Brief at 4 (March 18, 2022).

¹⁴ *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 25 (March 31, 2016) (emphasis added).

¹⁵ *Id.* at 89.

¹⁶ *Id.*

4928.143, specifically including both the costs of generating power and the transactions involving the sale of the power into the PJM market.”¹⁷ As IEU recognized in its Initial Post-Hearing Brief, federal courts have held that a “utility cannot complain about a process used by the Commission to which the utility has consented.”¹⁸ Therefore, all of the costs that AEP collected from customers through the PPA Rider in 2018 and 2019 are subject to Commission review in this proceeding and contrary to AEP’s assertions, the Commission would be well-within its authority if it decides to disallow all such costs (which it should).

As the witnesses of the Intervening Parties testified, in 2018 AEP knew that the PPA Rider was not performing consistent with its projections and AEP failed to do *anything* to respond to the existing market conditions and do anything to reduce the resulting costs of OVEC, which increased the PPA Rider charges to its customers.¹⁹ AEP could have renegotiated the terms of the Amended and Restated Inter-Company Power Agreement (ICPA),²⁰ engaged in a competitive bidding process to identify a more optimal hedging mechanism,²¹ made the decision to not avail itself of the available energy from OVEC,²² or could have requested that the Commission terminate or otherwise modify the PPA Rider to protect customers.²³ Clearly doing nothing is not in the best interest of AEP’s customers and was not a reasonable response or prudent decision at the time.

¹⁷ *Id.*

¹⁸ IEU’s Initial Post-Hearing Brief at 2 (March 18, 2022) (referencing *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm.*, 837 F.2d 600, 617 (3d Cir. 1988)).

¹⁹ See OCC Ex. 14 at 58-59 (Direct Testimony of Devi Glick); NRDC Ex. 3 at 35-42 (Direct Testimony of Dr. Jeremy I. Fisher); OMAEG Ex. 1, at 3-4 (Direct Testimony of John A. Seryak).

²⁰ See OCC’s Initial Post-Hearing Brief at 31 (March 18, 2022).

²¹ *Id.* at 32.

²² OMAEG and Kroger’s Initial Post-Hearing Brief at 26 (March 18, 2022).

²³ *Id.*

Additionally, the costs collected through the PPA Rider during the audit period were clearly not the result of a generator “acting consistent with participation in the broader competitive market place.” As explained further below, a competitive generator would *not* have continuously operated its units with no regard to energy margins. Therefore, OMAEG and Kroger respectfully request that the Commission disallow all costs collected through the PPA Rider in 2018 and 2019.

1. Contrary to AEP’s Assertion, There is No Evidence that OVEC’s Must-Run Strategy During the Audit Period was Just and Reasonable, Prudent, and in the Best Interest of Customers.

The evidentiary record in the above-captioned proceeding demonstrates that: (1) the OVEC units’ must-run commitment status during the audit period was unreasonable and imprudent; and (2) AEP abdicated its oversight responsibilities in regards to OVEC’s must-run strategy in 2018 and 2019. AEP’s arguments to the contrary rely on highly generalized information that is not specific to the OVEC units’ operations during the audit period and also AEP’s claim that a single co-sponsor of OVEC, such as AEP, is unable to influence the commitment status of the OVEC units. The Commission should reject both of these contentions from AEP, as they are incorrect and misleading.

As OMAEG and Kroger explained in their Initial Post-Hearing Brief, the Auditor recommended that OVEC should reconsider its must-run strategy²⁴ and determined that based on a semi-random sample of seven months during the audit period, PJM energy prices did not cover the fuel costs of the OVEC plants during four of those months.²⁵ However, neither the Auditor

²⁴ OMAEG and Kroger’s Initial Post-Hearing Brief at 17 (March 18, 2022) (citing Staff Ex. 1 at 52-53 (Audit Report)).

²⁵ *Id.* at 18 (citing Tr. Vol. I at 264 (Cross-Examination of Fagan); Tr. Vol. II at 327 (Cross-Examination of Fagan)).

nor AEP's only witness, attempted to quantify how OVEC's must-run strategy affected the costs incurred during the audit period and the resulting customers' PPA Rider charges.²⁶

Consistent with the Auditor's finding, the Intervening Parties presented extensive evidence demonstrating that the OVEC units' must-run strategy during the audit period was unreasonable, imprudent, and not in customers' best interest. For example, NRDC witness Dr. Jeremy Fisher conducted an independent hourly analysis demonstrating that OVEC could have avoided energy market losses by relying on forecasts of energy margins that were available at the time.²⁷ The study indicated that the economically rational option based on reasonably accurate forecasts at the time would have been for OVEC to "shut down" the OVEC units or commit the units as "economic" when the forecast showed negative margins that exceeded the units' avoidable startup costs.²⁸ Alternatively, the study found that it would have been economically rational to commit the plants as must-run when the seven-day forecast indicated net energy revenues.²⁹ OCC witnesses Glick and Haugh similarly testified that based on information available at the time, "[i]n the case of OVEC in 2018 and 2019, it is clear that the Company did not evaluate the economics of operating the plants on a daily basis..."³⁰ and that "[the] continuous use of a must-run commitment status when the plants are losing substantial amounts of money is not consistent with how a competitive generator would operate the plants."³¹

²⁶ Tr. Vol. II at 449-450 (Cross-Examination of Fagan); Tr. Vol. III at 849 (Cross-Examination of Stegall).

²⁷ See NRDC's Initial Post-Hearing Brief at 13 (March 18, 2022); NRDC Ex. 3 (Direct Testimony of Dr. Jeremy I. Fisher).

²⁸ See NRDC Ex. 3 at 24-25 (Direct Testimony of Dr. Jeremy I. Fisher).

²⁹ *Id.*

³⁰ OCC Ex. 14 at 52 (Direct Testimony of Devi Glick).

³¹ OCC Ex. 21 at 29 (Direct Testimony of Michael P. Haugh).

In contrast, AEP's only witness, Jason M. Stegall, testified in support of OVEC's must-run strategy by stating "*in general*, there are many factors taken into account when determining unit commitment,"³² including cycling because "*a unit may fail to start due to thermal cycles or other cycling issues, causing potential damage, additional maintenance expense, and loss of market revenues.*"³³ However, AEP witness Stegall testified that he had no idea which factors the OVEC Operating Committee actually took into account in 2018 and 2019 when designating the units as must-run.³⁴ Nor did AEP witness Stegall attempt to quantify potential losses associated with cycling the units³⁵ or personally conduct or even know of any analysis on behalf of AEP evaluating the economic outcomes of the must-run commitment of OVEC.³⁶ The Commission should note that AEP witness Stegall averred that he did not conduct a re-dispatch analysis, did not examine any PJM demand comparison reports in preparation of his testimony,³⁷ and admitted he did not look at any predicative documents that OVEC used or could have used to make its commitment decisions during the audit period.³⁸

Indeed, despite attempting to argue that the "cost of failed start-ups, additional maintenance costs, and potentially even plant damage" would offset the benefit to customers of re-dispatching the OVEC units, AEP admits that no party, including itself, has "even attempted to provide a way of calculating these costs, so the record lacks any basis for using such an analysis."³⁹ AEP claims

³² AEP Ex. 1 at 10 (Direct Testimony of Jason M. Stegall) (emphasis added).

³³ *Id.*

³⁴ Tr. Vol. III at 898 -899 (Cross-Examination of Stegall).

³⁵ *Id.* at 863.

³⁶ *Id.* at 801.

³⁷ *Id.* at 830.

³⁸ *Id.* at 831.

³⁹ AEP's Initial Post-Hearing Brief at 8-9 (March 18, 2022).

that these “potential” costs could influence its decision to operate the OVEC units on a must-run basis,⁴⁰ but makes no attempt to quantify them. Although AEP asserts that “the must-run commitment strategy” avoided “significant lost revenue and maintenance costs,” AEP does not provide any analysis to quantify these hypothetical costs avoided, or to demonstrate they outweighed the costs of pursuing the must-run strategy. AEP also attempts to shift the blame for not calculating these costs onto other parties,⁴¹ but it is AEP’s burden to demonstrate that its current strategy is reasonable and prudent. As AEP admits, it makes no attempts to quantitatively do so.

This begs the question of how can one testify that a commitment strategy was reasonable and prudent without *any* actual quantitative analysis of the impacts of the strategy and without *any* knowledge of the factors that may have gone into selecting the strategy when compared to other viable strategies. AEP may argue that the witnesses of the Intervening Parties, just like AEP witness Stegall, did not participate on the OVEC Operating Committee during the audit period or participate in meetings as non-voting members⁴² and therefore also did not have firsthand insight into the factors affecting the commitment strategy in 2018 and 2019. However, this argument is flawed, because again, it is AEP and *not its customers* who bears the burden of proof in this proceeding. As IEU aptly stated, “[i]nstead of demonstrating that AEP Ohio employed a bidding strategy that sought to maximize costs and minimize impacts on retail ratepayers, Mr. Stegall offered testimony that AEP Ohio had no ability to [a]ffect OVEC’s bidding strategy.”⁴³

AEP also inaccurately stated in its Initial Post-Hearing Brief that:

The Auditor thoroughly examined OVEC’s must-run commitment strategy, and though she recommended that OVEC “carefully consider when and whether the must-run strategy is optimal,” the Auditor did not find the use of the must-run

⁴⁰ AEP’s Initial Post-Hearing Brief at 48-50 (March 18, 2022).

⁴¹ *Id.*

⁴² Tr. Vol. III at 900-901 (Cross-Examination of Stegall).

⁴³ IEU’s Initial Post-Hearing Brief at 3 (March 18, 2022).

strategy during the audit period imprudent, and the Auditor did not recommend any disallowance....Indeed OVEC's use of a must-run commitment strategy during the audit period was reasonable....⁴⁴

First, it is wholly inaccurate and inconsistent with the evidentiary record to characterize the Auditor's analysis of OVEC's must-run strategy as "thorough." As OMAEG and Kroger explained in their Initial Post-Hearing Brief, the Auditor did not analyze how much OVEC lost in total over the twenty-four month audit period from its units' must-run designation and the Auditor did not compare the daily net revenues received to the expected net revenues had OVEC utilized an economic offer strategy.⁴⁵ The Auditor also did not 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.⁴⁶ The Auditor also did not perform a "re-dispatching" of the OVEC units⁴⁷ or even know of whether OVEC or AEP conducted an evaluation of re-dispatching the OVEC units.⁴⁸ Contrary to AEP's characterizations, the Auditor stated that she did not ask for any data or forecasts available to OVEC or AEP during the audit period that would allow her to determine whether the must-run designation of the OVEC units was a prudent decision at the time.⁴⁹ If anything, the Auditor's evaluation of the OVEC units' commitment status during the audit period was insufficient.

Second, while the Auditor may have come short of stating that the must-run strategy was "imprudent," that was because she testified that "reasonable people can disagree on what exactly

⁴⁴ AEP's Initial Post-Hearing Brief at 46 (March 18, 2022).

⁴⁵ *Id.* at 449-450.

⁴⁶ *Id.* at 465.

⁴⁷ Tr. Vol. I at 260 (Cross-Examination of Fagan).

⁴⁸ Tr. Vol. II at 366 (Cross-Examination of Fagan).

⁴⁹ *Id.* at 436-437.

is prudent, so I wouldn't say imprudent...."⁵⁰ The Auditor's inability or unwillingness to commit to an answer on this important question does not absolve AEP of its affirmative burden of proof as it relates to the OVEC units' commitment status and the resulting charges to its customers.

In fact, the Auditor's own testimony in regards to OVEC's must-run strategy suggests the complete opposite of AEP's conclusion that the commitment status of the OVEC units during the audit period was somehow "reasonable." As explained above, the Auditor'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.⁵¹ The Auditor also testified 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 passed onto customers.⁵²

The Auditor testified that 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 The Auditor also averred that a "good utility practice" would be a utility basing its units' commitment status on the projected revenues from operating in the wholesale market against the startup, shutdown, and maintenance costs associated with decommitting the units.⁵⁴ In fact, the Auditor testified that it would be "commonsense" for the OVEC units to use profit and loss statements to anticipate energy margins.⁵⁵ That is because "a profit/loss statement can help a reasonable utility determine when to use an economic commitment status to avoid incurring

⁵⁰ *Id.*

⁵¹ Tr. Vol. I at 264 (Cross-Examination of Fagan); Tr. Vol. II at 327 (Cross-Examination of Fagan).

⁵² *Id.* at 302.

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

⁵⁴ Tr. Vol. I at 270 (Cross-Examination of Fagan).

⁵⁵ Tr. Vol. II at 313 (Cross-Examination of Fagan).

negative energy earnings by operating the plant...”⁵⁶ However, the Auditor conceded 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 to commit the OVEC units as must-run.⁵⁷ There was also no evidence cited by the Auditor or AEP that energy margins were discussed in the OVEC Energy Scheduling Department’s daily calls to review unit status and reliability.⁵⁸ In sum, the evidentiary record shows that continuously operating the OVEC units regardless of energy margins was *not* prudent or in the best interest of AEP’s customers.

In a last ditch attempt to avoid its oversight obligations, AEP argued in its Initial Post-Hearing Brief, that “even if AEP Ohio had wanted to change the must-run commitment strategy during the audit period, it could not have done so unilaterally.”⁵⁹ Neither OMAEG, Kroger, nor any other Intervening Party has argued that AEP has complete autonomy to dictate the OVEC units’ commitment status. Although, the Commission should note that AEP and its affiliates are by far the largest co-sponsors⁶⁰ of OVEC and during the audit period there was a noteworthy overlap between AEP employees and OVEC Board of Directors.⁶¹

As the Auditor recognized, ultimately the decision making is...in a group, but AEP Ohio and the other participants have input into that process....”⁶² While AEP may not be able to unilaterally alter the OVEC units’ commitment status, it has an obligation to monitor the

⁵⁶ *Id.* at 315.

⁵⁷ Tr. Vol. I at 270 (Cross-Examination of Fagan).

⁵⁸ Tr. Vol. II at 324 (Cross-Examination of Fagan).

⁵⁹ AEP’s Initial Post-Hearing Brief at 49 (March 18, 2022).

⁶⁰ *See* Staff Ex. 1 at 15, Figure 3 (Audit Report).

⁶¹ Tr. Vol. III at 764 (Cross-Examination of Stegall).

⁶² Tr. Vol. II at 575 (Cross-Examination of Fagan).

performance of the plants and the impacts of the operating decisions, including the commitment strategy, on its customers. AEP has not presented any evidence that during the audit period it ever attempted to monitor, re-consider, analyze, evaluate, or discuss the units' must-run strategy internally or with the OVEC Operating Committee. Contrastingly, OCC witness Glick explained how in 2019, another co-sponsor of OVEC conducted a daily analysis to monitor and project energy market revenues from the operation of the OVEC units.⁶³ Accordingly, OMAEG and Kroger respectfully request that, at a minimum, the Commission disallow all costs collected through the PPA Rider in 2018 and 2019 that can be attributed to the unreasonable and imprudent must-run strategy.

2. The Commission Should Adopt Intervening Parties' Recommendation to Disallow Additional Unreasonable and Unjust and Imprudent Costs Collected Through the PPA Rider During the Audit Period.

In their respective Initial Post-Hearing Briefs, the Intervening Parties identified costs that were unreasonable, imprudent, or otherwise inappropriate for recovery through the PPA Rider during the audit period. As such, OMAEG and Kroger respectfully request that the Commission adopt the Intervening Parties' recommendations to disallow those cost collected through the PPA Rider during the audit period.

For example, 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

⁶³ OCC Ex. 14 at 55 (Direct Testimony of Devi Glick).

with good quality but at more competitive prices.”⁶⁴ 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.⁶⁵ 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.⁶⁶

Likewise, during the audit period, the evidence demonstrates that AEP collected unreasonable costs through the PPA Rider including debt and interest payments for OVEC and OVEC shareholder profits.⁶⁷ 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.⁶⁸ 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.”⁶⁹ Moreover, as set forth in OMAEG and Kroger’s Initial Post-Hearing Brief, 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 marketplace

⁶⁴ OMAEG Ex. 1 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)).

⁶⁵ *Id.* at 16.

⁶⁶ *Id.* (\$24,316,087 x .01993 = \$4,846,196).

⁶⁷ *Id.* at 17.

⁶⁸ *Id.*

⁶⁹ *Id.* at 17-18.

comprised of sellers attempting to maximize revenues.”⁷⁰ 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.⁷¹ Simply put, debt repayment should be the responsibility of AEP’s shareholders, *not* its customers.

Finally, as detailed in NRDC’s Initial Post-Hearing Brief, there is a significant discrepancy in AEP’s reporting of capital and operation and maintenance expenditures during the audit period.⁷² That discrepancy, as detailed in NRDC’s Initial Post-Hearing Brief, leads one to question the validity of the audit process. Moreover, as a result, the Commission should question whether the spending was prudent. Indeed, the Auditor even questioned whether “the level of capital spending” was “justified by the revenues earned by PJM.”⁷³ The Auditor ultimately concluded that a cap on annual expenditures “would be prudent.”⁷⁴ Thus, OMAEG and Kroger support NRDC’s request that the Commission adopt the Auditor’s recommendation of a cap on annual expenditures.

Accordingly, OMAEG and Kroger respectfully request that, at a minimum, the Commission disallow all costs collected through the PPA Rider in 2018 and 2019 that are attributed to the unreasonable and imprudent costs identified above.

⁷⁰ *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).

⁷¹ OMAEG Ex. 1 at 20 (Direct Testimony of John A. Seryak).

⁷² NRDC’s Initial Post-Hearing Brief at 20-22 (March 18, 2022).

⁷³ Staff Ex. 1 at 96 (Audit Report).

⁷⁴ *Id.* at 92.

B. Continuing to Operate the OVEC Plants is Not in Customers' Best Interest.

The Auditor in the above-captioned proceeding was acting as an agent of the Commission and indeed, Staff witness Windle testified that the Auditor “conducted the review as an extension of Staff....”⁷⁵ In a recent entry, the Commission affirmed that auditors may be “afforded the same investigatory authority possessed by Staff and [be] held to the same applicable nondisclosure provisions during its audit.”⁷⁶

Ohio law prohibits consultants from divulging information learned in the course of their investigation. More specifically, R.C. 4901.16 states:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, 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.

The record evidence shows that during the course of the Auditor’s investigation of AEP’s PPA Rider, the Auditor shared information with AEP regarding its ongoing audit of the costs and operation of the OVEC plants. Therefore, not only did the Auditor’s actions undermine the final Audit Report filed in the above-captioned proceeding on September 16, 2020, but it also violated Ohio law and Commission precedent. The Commission should not take this violation lightly as the audit process and “rigorous review” to which AEP committed is one of the only safeguards

⁷⁵ Staff Ex. 3 at 3 (Direct Testimony of Rodney P. Windle).

⁷⁶ *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry at ¶ 32 (March 9, 2022).

against the PPA Rider becoming the “illusory insurance policy” against which former Chair Haque cautioned.⁷⁷

Unfortunately, AEP does not seem to share the same concerns as its customers in regards to the deletion and/or modification of the Auditor’s initial conclusion⁷⁸ that continuing to operate the OVEC plants is *not* in customer’s best interest. In its Initial Post-Hearing Brief, AEP represented that, “[t]he record is clear that AEP Ohio had zero influence on the Auditor’s decision to delete the sentence.”⁷⁹ However, the evidentiary record actually shows 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.”⁸⁰

As OMAEG and Kroger explained in their Initial Post-Hearing Brief, the Auditor testified 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 overall is not in the best interest of AEP Ohio ratepayers.”⁸¹ The Auditor further testified that after AEP received the September 9, 2020 draft, AEP may have provided comments on the sentence that she removed.⁸² Contrary to AEP’s

⁷⁷ *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)

⁷⁸ *See* NRDC Ex. 2.

⁷⁹ AEP’s Initial Post-Hearing Brief at 6 (March 18, 2022).

⁸⁰ Tr. Vol. I at 226 (Cross-Examination of Fagan).

⁸¹ Tr. Vol. II at 500, 504 (Cross-Examination of Fagan) (Q. “The e-mail . . . that is in front of you, NRDC Exhibit 2, contains a sentence, and I will read it again so we are all clear what sentence I am talking about, ‘Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers.’ Was that sentence changed after receiving Staff’s comments on September 8, to be, ‘However, LEI’s analysis shows that the OVEC contract overall is not in the best interest of AEP Ohio ratepayers,’ when you created the 9-9 draft audit report? . . . [objections overruled] . . . A. Yes.”).

⁸² Tr. Vol. II at 507 (Cross-Examination of Fagan).

assertion that the record shows that it had zero influence over the editing process, the Auditor averred that she could not remember if she received a redline or PDF markup of the draft Audit Report from AEP.⁸³ In fact, correspondence between the Auditor and AEP suggests that AEP actually provided redlines and suggested modifications to the Audit Report in addition to confidential markings.⁸⁴ Indeed, instead of only reviewing the draft Audit Report for confidentiality purposes, a September 11, 2020 email from AEP’s counsel to the Auditor makes it clear that AEP intended to request the deletion of the Auditor’s conclusion that “However, LEI’s analysis shows that the OVEC contract overall is not in the best interest of AEP Ohio ratepayers.”⁸⁵ AEP then argued in that email that such a conclusion was beyond the scope of the audit.⁸⁶ Such request and argument from AEP were not proper or allowed under Ohio law. Additional correspondence between the Auditor and AEP revealed that there was an additional draft Audit Report dated September 15, 2020 that was shared with AEP for its review and edit prior to the final Audit Report being filed with the Commission on September 16, 2020.⁸⁷ Regardless of the Auditor’s intent, it should be concerning to the Commission that the regulated entity being audited had ample opportunity to provide comments or suggested edits on the draft Audit Report before any other party to the proceeding (e.g. AEP’s customers) had *any* opportunity to review or provide input on the Auditor’s findings.

⁸³ *Id.* at 506.

⁸⁴ 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).

⁸⁵ See AEP Ex. 29 at 1 (“Glad to hear you are deleting that sentence because we had a similar comment – such an observation is beyond the scope of the audit . . .”).

⁸⁶ *Id.*

⁸⁷ *Id.* at PDF pages 9-10.

Again, AEP downplays the improper modification of the Audit Report by stating, “[b]ut if the Auditor had decided to actually retain the draft ‘best interest’ statement in the final report (which it did not), it would have exceeded the scope of the Audit and improperly encouraged re-litigation of the PPA Rider decision.”⁸⁸ It is not the Auditor or AEP or even Staff’s job to determine the scope of the Commission’s audit. That is a legal question for the Commission. The Commission is more than capable of evaluating whether a finding has probative value or is within the scope of its inquiry. While Staff argues that its own role in the proceedings was proper, it does not provide any explanation as to AEP’s efforts to modify the Audit Report or its own efforts to “tone” down the Audit Report by having the Auditor remove the conclusion that keeping the OVEC plants running “does not seem to be in the best interests of the ratepayers.”⁸⁹ Although Staff states it “had the authority (from the Commission) to oversee the Audit,” it does not make the same assertion regarding AEP having any authority to approve or modify the Audit Report.⁹⁰

Contrary to AEP’s claims, the sentence that was removed *was* directly responsive to the scope of the Audit (e.g. what was in the best interest of customers) and included a finding based on the Auditor’s analysis that continuing to operate the plants and the OVEC contract overall were not in customers’ *best interest*. Consistent with OMAEG and Kroger’s arguments in their Initial Post-Hearing Brief, if continuing to operate the plants and the OVEC contract are not in customers’ best interest, the logical conclusion is that the above-market charges that were collected through the PPA Rider in 2018 and 2019 to sustain the plants are likewise not in customers’ best interest.

⁸⁸ AEP’s Initial Post-Hearing Brief at 5 (March 18, 2022).

⁸⁹ See Initial Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 7-18 (March 18, 2022); see also NRDC Ex. 2 at 1.

⁹⁰ *Id.* at 19.

AEP unconvincingly attempts to argue that its continued operation of the OVEC plants and the resulting above-market charges are in the best interest of customers based on decisions rendered regarding a prior statutory scheme that no longer exists. AEP cites to decisions by the Commission⁹¹ and the Supreme Court of Ohio⁹² which approved the PPA Rider as reasonable, largely based on its function as a “financial hedge and rate stability mechanism” that could provide credits to customers.⁹³ The idea that the Rider PPA could function as such a hedge was rooted in the possibility of credits to customers in the event that the OVEC plants provide power at a cost below market rates.⁹⁴

However, AEP admits that “R.C. 4928.148 was enacted and became effective in 2019” and that therefore, “all aspects of the PPA Rider were superseded going forward as of January 1, 2020 – including the PPA Rider credits that might have otherwise been triggered starting in 2021.”⁹⁵ By AEP’s own acknowledgment, the PPA Rider, therefore, no longer “operates as a financial hedge that is counter-cyclical to market prices”⁹⁶ since the current statutory scheme appears to preclude the possibility of credits to customers. As noted by AEP, approval of the PPA Rider and its operation of the OVEC plants were largely rooted in this function that no longer exists.

⁹¹ AEP’s Initial Post-Hearing Brief at 12-15 (March 18, 2022), citing *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015) and *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 6 (Mar. 31, 2016).

⁹² AEP’s Initial Post-Hearing Brief at 20-22 (March 18, 2022), citing *In re Application of Ohio Power Co.*, 155 Ohio St. 3d 320, 2018-Ohio-4697, and *In re Application of Ohio Power Co.*, 155 Ohio St. 3d 326, 2018-Ohio-4698.

⁹³ AEP’s Initial Post-Hearing Brief at 12-13, 17, and 20-22 (March 18, 2022).

⁹⁴ AEP’s Initial Post-Hearing Brief at 40 (March 18, 2022) (“By its structure, if market prices are up, the PPA Rider becomes a credit; when market prices are down, the rider becomes a charge. Either way, the rider acts to stabilize volatile market prices. And as the Commission found, the PPA Rider “prevents” customers from totally relying on market prices – which is exactly what the revisionist intervenors now argue is required.”).

⁹⁵ AEP’s Initial Post-Hearing Brief at 16 (March 18, 2022).

⁹⁶ See *id.* at 39.

Nonetheless, regardless of why or how the PPA Rider was created, the point of this proceeding is to determine whether the costs associated with the OVEC plants are reasonable and were prudently incurred during the audit period and, therefore, are recoverable from customers. During the audit period, the record evidence demonstrates that all of the costs associated with the operation of the OVEC plants and the commitment status strategy were unreasonable and imprudent, and, thus, should be disallowed and not recovered from customers.

III. CONCLUSION

In sum, 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 purchase, debt payments, or capital expenditures, when all of those 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 foregoing reasons and for the reasons set forth in their Initial Post-Hearing Brief, OMAEG and Kroger respectfully request that the Commission disallow all costs collected through the PPA Rider during the audit period. At a minimum, the Commission should disallow all costs collected through the PPA Rider resulting from imprudent must-run commitment strategy and other imprudent decision-making.

Respectfully submitted,

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Association Energy Group and The Kroger Co. electronically filed by Mrs. Angela
Whitfield on behalf of The Kroger Co. and OMAEG