BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO POWER COMPANY'S REPLY BRIEF

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I. INTRODUCTION AND OVERVIEW

On March 18, 2022, Initial Post-Hearing Briefs were filed by AEP Ohio, Staff, the Office of the Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU), Ohio Manufacturers' Association Energy Group and The Kroger Co. (OMAEG/Kroger), and Natural Resources Defense Council supported by Sierra Club (NRDC/Sierra Club).[1] AEP Ohio was able to anticipate and address in its Initial Brief many of the arguments presented by intervenors – based on the testimony presented, arguments by counsel on the record and other comments/pleadings already submitted in this docket. And the Company's Initial Brief included significant detail regarding important context and background regarding the Ohio Valley Electric Company (OVEC); the Inter-Company Power Agreement (ICPA); the Purchased Power Agreement (PPA) Rider approved by the Commission in *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*. (*ESP III*); adoption of the OVEC-only PPA Rider in *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.* (*PPA Rider Cases*), Opinion and Order (Mar. 31, 2016) (*PPA Rider Order*) and the Second Entry on Rehearing (November 3, 2016) (*PPA Rider Rehearing*); and the Audit conducted in the current case by the London Economic International, LLC (LEI) and supported by the Auditor, Dr. Fagan.

[1] As further discussed below, while NRDC was the entity that intervened in this case, a Sierra Club employee was the NRDC's only witness and other Sierra Club employees served as legal counsel advancing arguments and cross examination. Throughout this brief, therefore, AEP Ohio will refer to that entity as NRDC/Sierra Club.

Accordingly, AEP Ohio hereby provides additional responses to Intervenor arguments in this Reply Brief, while continuing to rely on the arguments presented in its Initial Brief.

As a threshold matter, intervenors improperly seek to replace the well-established and controlling prudence standard and create a new result-oriented standard by elevating and over-interpreting select phrases from the PPA Rider decision out of context. In classic Catch-22 fashion, the standard presently advocated by the intervenors wrongly equates the phrase "best interests of retail ratepayers" to below-market prices and incorporates the fictional narrative that AEP Ohio has control over OVEC decisions but failed to control those OVEC decisions. AEP Ohio's actions regarding matters within its control during the audit period should be judged for prudence based on the facts known at the time – not speculation or hyperbole.

The Commission must reject OCC's categorical position based purely on hindsight that all above-market costs should be disallowed as imprudent. The Supreme Court recently confirmed that the prudence test examines whether an expenditure was prudent when it was made. Thus, a proper examination under the prudence test considers *only* those facts and circumstances known at the time the decision was made. The Auditor, Dr. Fagan, agreed that the prudence of a decision must be determined based upon information known to the decision-maker at the time of the decision.

As established in the Company's Initial Brief, intervenors are legally barred by collateral estoppel from relitigating matters of *res judicata*. Any 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

under R.C. 4928.143(C)(2)(a). While intervenors claim not to challenge the PPA Rider decision here, their positions belie that claim.

Intervenors ignore that the Commission already approved the Company share of the output of the OVEC plants to be used as a financial hedge during the audit period. The decision to use the Company's share of OVEC output as a financial hedge was already made by the Commission (and affirmed over OCC's challenge by the Supreme Court) – so it could not possibly be characterized as an imprudent decision of AEP Ohio during the audit period. Yet, OCC's hindsight position is that above-market costs should be disallowed (even though that result was expressly contemplated by the *PPA Rider Order*) and claims that the Company should have "managed" the ICPA to ensure it acted as a financial hedge (even though the Company had no such authority or latitude under the *PPA Rider Order*). OMAEG/Kroger – immediately after denying that they are challenging the *PPA Rider Order* – also go on to argue that the OVEC costs are imprudent because they were above market prices during the audit period and that the Commission should "disregard" additional factors discussed by the Auditor (*e.g.*, employment, fuel diversity and other societal goals), even though those are the same factors adopted in the *PPA Rider Order*. The 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 and directly undermine the entire purpose and effect of the Commission's decision to approve the ICPA for inclusion in the PPA Rider during the audit period – especially given the hindsight nature of the arguments.

Next, intervenor arguments that AEP Ohio was supposed to "manage" the financial hedge during the audit period are misguided and conflict with the *PPA Rider Order*. In making this argument, OCC and NRDC/Sierra Club rely on a recent decision by the Michigan Public Service Commission (MPSC) involving OVEC that indicated "while long-term contracts are encouraged, this does not absolve a utility from monitoring and responding to market conditions and system needs and making good faith efforts to manage existing contracts." Similarly, OMAEG/Kroger generally argues that PPA Rider's performance should have been tracked so strategies could be identified to minimize costs to customers. But these parties fail to identify what appropriate action can be taken under the ICPA to avoid net charges through the PPA Rider during the audit period. In light of the contract term extending through 2040, it is not like AEP Ohio could just terminate the contract. And in light of the fact that AEP Ohio had a minority stake in the output of the OVEC units, the Company cannot unilaterally winddown, shut down or retire the units. And the MPSC decision is otherwise easily distinguished, as further discussed below. As approved in the *PPA Rider Order*, the OVEC-only PPA Rider operates as a financial hedge that is counter-cyclical to market prices – without regard to whether the OVEC costs are below market prices or above market prices at a given point in time. As further discussed below, it does not require or contemplate (or authorize) active management of the hedge by the Company.

In a "Hail Mary" attempt that strains any remaining credibility, OCC argues that the credit commitment made by the Company as part of the settlement should be retroactively interpreted as meaning something entirely different in light of the subsequent enactment of HB 6.

OCC Br. at 32-33. Under the PPA Rider Stipulation, the voluntary credit commitment explicitly only applied to planning years 2020-2024 – all of which would have occurred after HB 6 *replaced* the PPA Rider mechanism effective as of January 2020. Fundamental due process and logic dictates that language from a Commission order cannot subsequently be reinterpreted to mean something different based on new facts and circumstances not known or in existence when the language was originally included in the original order. As a related matter, any decision by the Commission to entertain OCC's revisionist-history attempt to modify the prior ESP decision after the ESP term has ended would also violate AEP Ohio's statutory right to consent. This spurious claim – made by OCC alone and yet another attempt to undermine and retroactively modify the *PPA Rider Order* – should be rejected or ignored.

Perhaps Sierra Club present the worst example of disingenuously challenging the PPA Rider deal that they supported. Sierra Club, through the same legal counsel that now represents NRDC/Sierra Club in this proceeding, fully supported the original PPA Rider settlement that also included 2,671 MW of affiliated fossil generation as part of the package (including 440 MW of OVEC Units, the original total PPA Rider package was 3,111 MW). Obviously, Sierra Club itself could not come into this case and attack the PPA Rider decision. Using its employees and resources to support NRDC advocating that same result – through presenting testimony (Sierra Club employee Fisher), conducting adverse cross examination, signing a post-hearing brief that launches attacks on the PPA Rider – should also be prohibited. To be sure, any party from the PPA Rider cases (*i.e.*, both settling or opposing) can make imprudence arguments and claims in this audit proceeding. But attacking the PPA Rider decision, seeking total disallowance of all

costs and advocating for OVEC units to be mothballed and retired, undermines the very essence of the rider mechanism created for the purpose of flowing net costs/charge through to retail customers. That result should not be permitted by any party, but Sierra Club should be categorically estopped (including through NRDC) from making such arguments – given its support of the PPA Rider Stipulation and the fact that Sierra Club already received a bountiful harvest of benefits through its bargain with AEP Ohio.

Other intervenor arguments fare no better and should also be rejected by the Commission. First, intervenors advanced their tired rhetoric about the Auditor lacking independence – most of this flawed claims was already thoroughly rebutted by AEP Ohio's and Staff's Initial Briefs. But the additional points made by intervenors either lack any basis in the record or directly conflict with it, as further demonstrated below. Intervenors' misguided attempts to quibble with the Audit Report language and smear the Auditor's reputation and expertise – primarily because she disagrees with them in substance and defended that position – should be rejected.

Second, OVEC's must-run commitment strategy for the PJM energy market during the audit period was reasonable. Several parties take issue with OVEC's use of a must-run commitment strategy in the PJM energy markets during the audit period. Those criticisms are misguided. 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 strategy during the audit period imprudent, and the Auditor did not recommend any disallowance. And no party appears to have challenged the manner in which AEP Ohio bid capacity into the PJM. That said, going

forward, the Auditor has recommended "that OVEC carefully consider when and whether the must-run offer strategy is optimal." As stated in its Initial Brief, AEP Ohio agrees with this recommendation. The AEP companies have only one representative on the Operating Committee, but will continue to actively participate in the OVEC Operating Committee's ongoing evaluation of the must-run commitment strategy.

Third, OMAEG/Kroger's position that it was imprudent for AEP Ohio to take energy under the ICPA during the audit period and NRDC/Sierra Club's similar proposal for the OVEC units to be put on "reserve shutdown" status during the audit period are misguided. These arguments fundamentally misunderstands (or just ignores the terms of) the ICPA, and if AEP Ohio had refused OVEC energy as OMAEG/Kroger suggests, it would have been more costly for customers. Both arguments also wrongly presume that AEP Ohio can unilaterally decide to place the OVEC units on "reserve shutdown" status.

Fourth, OCC's position that AEP Ohio failed to seek pre-approval for OVEC's capital expenditures lacks merit. The only support OCC offers for this claim is a sentence from AEP Ohio's Initial Brief in the PPA Case. OCC's argument is meritless. The sentence from AEP Ohio's Initial Brief in the PPA Case is taken out of context and does not support OCC's contention. Although AEP Ohio committed to seek Commission preapproval of major capital projects at the *Affiliate PPA* units, AEP Ohio did not – and could not – commit to Commission preapproval of OVEC capital expenditures.

Fifth, OCC's position that, under a repealed and inapplicable "fuel adjustment clause" standard, OVEC costs should be considered above-market fuel prices and disallowed conflicts

with the PPA Rider decision, improperly relies on extra-record material and otherwise ignores the Attorney Examiner's ruling. Citing to the original *PPA Rider Order*, OCC argues that the Commission should employ a fuel adjustment clause analysis. But OCC cites the Commission Order out of context and without regard to interceding events.

Finally with respect to merit arguments, intervenors launch three final attacks labeled as imprudence arguments. But in addressing these matters, the Commission: (a) should not disallow costs associated with OVEC debt and interests payments because OMAEG/Kroger fundamentally misunderstands or disregards the PPA Rider, (b) should not disallow coal contract prices based upon OMAEG/Kroger's improper and incomplete analysis, and (c) should reject NRDC/Sierra Club's argument regarding O&M costs as a *non-sequitur*.

The entire second half of AEP Ohio's Reply Brief is dedicated to refuting OCC's numerous petty challenges to Attorney Examiner rulings – despite the hearing already having been unduly protracted to entertain OCC's "proffering" antics and other ghost-chasing, rhetoric-based exercises. AEP Ohio will not summarize each of the nineteen baseless squabbles raised by OCC on brief here. But as demonstrated below, each and every one utterly lacks merit and merely reflects the over-the-top litigious approach being taken by OCC in this audit proceeding.

II. THE WELL-ESTABLISHED PRUDENCE STANDARD APPLIES TO THIS AUDIT AND NOT THE CATCH-22 REVIEW STANDARD INTERVENORS ATTEMPT TO CREATE AND APPLY.

AEP Ohio understands and expects that all costs flowing through the PPA Rider are subject to a prudence audit and may be disallowed if the costs were not prudently incurred. But intervenors improperly seek to replace the well-established and controlling prudence standard

and create a new result-oriented standard by elevating and over-interpreting select phrases from the PPA Rider decision out of context. There was some additional "color commentary" in the *PPA Rider Order* – originally aimed at addressing the unique PPA for affiliate units owned and operated/controlled by AEP that was initially included in the PPA Rider (but dropped on rehearing); but the *PPA Rider Order* did not fundamentally change the traditional, well-established prudence standard for auditing utility expenses. On rehearing when adopting the OVEC-only PPA Rider, the Commission simply explained that the prudence audits would determine whether "the Company's actions were in the best interests of retail ratepayers." (*PPA Rider Rehearing* at ¶ 178.) There is no reason to believe that this statement did anything other than narrow the scope of the audit to review Company actions related to the ICPA, versus second-guessing actions of the seller of power under the ICPA (*i.e.*, OVEC); it certainly did not create a guarantee that no charges would ever flow through the PPA Rider or create an expectation that AEP Ohio would somehow cause OVEC units to retire, as intervenors now suggest. Nonetheless, in classic Catch-22 fashion, the standard presently advocated by the intervenors wrongly equates the phrase "best interests of retail ratepayers" to below-market prices and incorporates the fictional narrative that AEP Ohio has control over OVEC decisions but failed to control those OVEC decisions. AEP Ohio's actions regarding matters within its control during the audit period should be judged for prudence based on the facts known at the time – based on evidence of record and not speculation or hyperbole.

OCC's result-oriented position is transparently revealed on brief in arguing that "[i]f AEP and OVEC had managed the plants prudently in 2018-2019 and produced net credits under the

Coal Plant Charge, then 'running the plants' would have been in the best interests of ratepayers." (OCC Br. at 34 (some emphasis added).) OCC makes no attempt to conceal that it defines prudence purely by a hindsight judgment of whether OVEC costs were above market prices. (Tr. V at 1425-1426; OCC Ex. 21 at 6.) In addition to being an unlawful hindsight view of prudence, however, OCC's position that the PPA Rider should reflect market prices cannot be squared with the Commission's PPA Rider Order approving the use of OVEC as a financial hedge during the audit period. (*PPA Rehearing* at ¶ 220 (the PPA Rider "will prevent customers' total reliance on the market").)

OCC also misappropriates the original phrase "Company actions were in the best interests of ratepayers" out of context and in a way that conflicts with the original decision. Just as the Auditor did in its original draft Audit Report, OCC unilaterally transforms the notion of the Company's actions being in the best interest of ratepayers to the hindsight result being in the best interests of ratepayers based on whether market prices ended up being above OVEC costs. That was not the context or meaning of the Commission's "bests interests" commentary in the *PPA Rider Order*. Unlike the Auditor, who prudently decided to remove that sentence as being irrelevant and beyond the scope of the audit, OCC continues to push that false narrative.

More to the point here, OCC's position that the "best interests of ratepayers" means no above-market OVEC costs simply has no basis and directly conflicts with the *PPA Rider Order* since the Commission expected charges during the initial years of the PPA Rider (*i.e.*, through 2019). (*See PPA Rider Order*, Haque concurring opinion at 4 ("there is general consensus that the PPA rider will result in a charge to consumers for at least the first 2-3 years of the rider").)

There is no way to reasonably conclude that PPA Rider charges occurring during the audit period violated or conflicted with the Commission decision to adopt the OVEC-only PPA Rider. Consistent with the assumption that charges would apply in the first 2-3 years of the PPA Rider, the Commission imposed a rate cap for the first two years based on that assumption. (*PPA Rider Order* at 81.) And of course, the Commission did not condition using the ICPA during the audit period on there being a credit. More to the point here, OCC's hindsight view is based on after-the-fact market results rather than reviewing AEP Ohio's "actions" for matters within its control to determine whether the Company acted in the best interest of ratepayers. Thus, the Commission must reject OCC's categorical position based purely on hindsight that all above-market costs should be disallowed as imprudent.

OCC witness Haugh admitted during cross-examination that OCC**'**s position is based on two related arguments: (1) actual costs of the PPA Rider after the fact have been higher than the original projections, and (2) it is now clear after the fact that the PPA Rider will not be a credit over the lifetime of the rider. (Tr. V at 1425-1426; OCC Ex. 21 at 6.) Both of those points are based on after-the-fact data and both second guess the original decision to approve the ICPA for inclusion in the PPA Rider during the audit period by revisiting the decision based on after-the-fact data. The only way to know this is after-the-fact data and Mr. Haugh candidly admitted that his observation in testimony about the actual costs having been higher was "backwards from the end of the audit period" and admitted that it became clear as of **"**December 31, 2019" at the end of the audit period. (Tr. V at 1428-1429.) This kind of analysis is accurately referred to as hindsight review, which is improper under the prudence standard. Mr. Haugh's analysis of the

net credit/charge over the "lifetime of the rider" also fails to acknowledge that the PPA Rider term was retroactively cut short by four years.

The other intervenors adopted similarly flawed positions as OCC's. NRDC/Sierra Club's position is also premised on the argument that the "best interests of ratepayers" excludes above-market costs that must be disallowed. (NRDC/Sierra Club Br. at 6, 23-24.) Like the other intervenors, OMAEG/Kroger argues that running the plants at a loss is not in the best interests of ratepayers. (OMAEG/Kroger Br. at 30.) (*See also* IEU Br. at 2-3 (only costs that a competitive generator would incur can be recovered).) Because charges were expected by the Commission and the Commission held that the PPA Rider it approved would prevent total reliance on market prices, the intervenors' interpretation of best interests" language as being equivalent to no above-market prices is a *non sequitur*. In addition, intervenors' hindsight prudence review is unlawful and uses results instead of reviewing the Company's actions for matters within its control.

Just a few months ago, the Supreme Court of Ohio addressed this topic as part of its decision in *In re Application of Suburban Natural Gas Co*. (*Suburban*), Slip Opinion No. 2021-Ohio-3224 (September 21, 2021). The Court held that the prudence test examines whether an expenditure "was prudent when it was made." (*Suburban*, 2021-Ohio-3224 at ¶ 32.) Thus, a proper examination under the prudence test considers *only* those facts and circumstances known at the time the decision was made. The Auditor, Dr. Fagan, agreed that the prudence of a

decision must be determined based upon information known to the decision-maker at the time of the decision. (Tr. II at 551.)

In sum, the proper standard to use is prudence for the Company's decisions. And the Commission's RFP further provided that the purpose of the audit as ordered in the PPA Rider cases was "to establish the prudency of all costs and sales flowing through the PPA rider and to demonstrate that the Company's actions were in the best interest of retail ratepayers." (*RFP*, OMAEG Ex. 5, at § II.A.) In the *PPA Rider Order*, the Commission provided that "[a]ny 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." (*PPA Rider Order* at 25.) The Commission initiated this audit proceeding and the Company was not put on notice or given an opportunity to take a different approach in this docket other than filing comments and testimony; it should be handled like any other prudence audit, rather than using the Catch-22 standard advocated by intervenors. If there is any inkling of taking a different approach, we should be given notice and an opportunity to address that novel approach prior to changing the applicable standard.

III. INTERVENORS IMPROPERLY LAUNCH COLLATERAL ATTACKS ON THE PPA RIDER DECISION AND THE ENACTMENT OF HB 6.

As established in the Company's Initial Brief, intervenors are legally barred by collateral estoppel from relitigating matters of *res judicata*. (AEP Ohio Br. at 33.) Any 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 under R.C. 4928.143(C)(2)(a). (*Id.*) While intervenors claim not

to challenge the PPA Rider decision here, their positions belie that claim. In its Initial Brief, the Company showed in detail how the arguments of intervenor witnesses advanced improper collateral attacks on the *PPA Rider Order* that should be rejected. (*Id*. at 32-38.) AEP Ohio continues to rely on those arguments without repeating them all here, but will make additional points in response to intervenor briefs.

A. The Commission's approval of the OVEC-only PPA Rider is *res judicata* and intervenors are barred from relitigating that prior approval in this audit proceeding.

OCC starts this argument by claiming that AEP Ohio did not act prudently "in using the old, inefficient, dirty, 1950s-era OVEC plants as a financial hedge for consumers during 2018-2019." (OCC Br. at 9.) In support of this argument, OCC cites the testimony of its own witnesses who argue that OVEC plants are dirty, old and inefficient so they should be retired like some of the Company's legacy Ohio generation units. (OCC Br. at 10-11.) Obviously, this argument merely reminds everyone that OCC disagrees with the purpose of the PPA Rider as approved by the Commission. And in making those claims, OCC ignores several important and undisputed facts in making these arguments:

- AEP Ohio does not own or operate the OVEC plants
- AEP Ohio does not unilaterally control any decision involving the OVEC plants
- OVEC was lawfully exempted from AEP Ohio's divesture requirement and its corporate separation plan that addressed the Company's legacy generation assets
- The disposition of AEP Ohio's own (prior) generation plants was achieved under the Ohio restructuring law as legacy utility assets, which the OVEC units are not

But most importantly, OCC ignores that the Commission already approved the Company share of the output of the OVEC plants to be used as a financial hedge during the audit period. The decision to use the Company's share of OVEC output as a financial hedge was already made by

the Commission (and affirmed over OCC's challenge by the Supreme Court) – so it could not possibly be characterized as an imprudent decision of AEP Ohio during the audit period. Of course, OCC's idea that the OVEC plants should be retired now also cements its disagreement with the General Assembly's decision to continue retail recovery of net OVEC costs through 2030 – another fatal flaw that OCC never even bothers to try and reconcile.

Next, OCC spends several pages arguing that the PPA Rider charge for the entire audit period should be disallowed simply because the costs were above market prices. (OCC Br. at 11-16.) As discussed above, OVEC costs being above energy market prices is not the correct standard for prudence. But this claim also ignores the evidence of record that AEP Ohio's customers received a net benefit of $32 million from OVEC's participation in the PJM energy markets using a must-run commitment strategy during the audit period. (AEP Ohio Ex. 1 at 11.) For purposes of this section of the brief, however, the main point is that OCC's position conflicts with the PPA Rider Order and represents OCC's ongoing attempt to challenge the Commission's prior decision.

Disingenuously, OMAEG/Kroger starts off its entire argument on brief with a denial that it seeks to challenge the *PPA Rider Order*. (OMAEG/Kroger Br. at 8.) Predictably, OMAEG/Kroger immediately follows its emphatic denial by doing just that starting on the very next page. Like OCC, OMAEG/Kroger argues that the OVEC costs are imprudent because they were above market prices during the audit period and that the Commission should "disregard" additional factors discussed by the Auditor based on the *PPA Rider Order* (*e.g.*, employment, fuel diversity and other societal goals). (OMAEG/Kroger Br. at 9-11.) NRDC/Sierra Club

similarly claims that, in concluding that the Commission already decided whether to include ICPA in the PPA Rider, the Staff (and apparently AEP Ohio as well) confuses the existence of the rider and the amount charged under the rider. (NRDC/Sierra Club Br. at 7-8.)

All these intervenor arguments rely on data and information after the audit period and clearly show that intervenors are making improper "Monday morning quarterback" prudence arguments. More to the point, the 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* and directly undermine the entire purpose and effect of the Commission's decision to approve the ICPA for inclusion in the PPA Rider during the audit period – especially given the hindsight nature of the arguments.

Finally in this regard, OCC also attempts to use the accuracy of Company's original projections as a basis for total disallowance of net costs under the PPA Rider during the audit period. (OCC Br. at 17-22 (AEP Ohio's projections were "wrong" and the Company continues to charge customers anyway).) This provides no basis to disallow the charges during the audit period. The PPA Rider decision cannot be reasonably interpreted as requiring PPA Rider credits in the early years or as guaranteeing that the overall projection of a modest net credit over the entire subsequent 8-year period meant that every year had to be a credit. The Company's submission of those projections – and the Commission's reliance on them as the best evidence of record (*PPA Rider Order* at 38, fn.2) – cannot be transformed into something it was not: a guarantee. OCC's entire viewpoint – that the PPA Rider should be judged based on hindsight and data that materialized after the PPA Rider Order – is unfair and would represent an unlawful

prudence review. Moreover, as discussed above, the Commission indicated that it fully expected charges in the first few years of the PPA Rider (through 2019); so pretending that the Company's original projections were a guarantee that annual credits would occur in the early years is also inaccurate and disingenuous.

As a general matter, the Opinion and Order acknowledged that "the projections presented in these cases are simply predictions of future market prices and costs; thus, even the most reliable projections may be proven wrong in the future, particularly over an eight-year timeframe." *Id.* at 81. Moreover, Commissioner Trombold also observed in her concurring opinion that financial forecasts based on future market prices are inherently challenging:

> One of the challenges of utility regulation is that it is based on forecasts, and forecasts are just that: a prediction about an uncertain future. We all know there have been changes in the market in recent years caused by the weather, the economy, technological innovations, and environmental considerations that have resulted in market prices no one predicted despite our best attempts to forecast them.

(*PPA Rider Order*, Trombold concurring opinion at 2.) Obviously, the Commission did not rely on the rate impact projections as a guarantee that they would come true, but rather as the best indication at the time and based on the evidence in the record of what would happen.

More to the point of expected charges under the PPA Rider, then-Commissioner Haque acknowledged the anticipated charges based on the projections at the time:

> I think that, based upon the projections and the evidence in the record, there is general consensus that the PPA riders will result in a charge to consumers for at least the first 2-3 years of the riders. Because the Commission feels somewhat

> certain of this, we have attempted to build in certain consumer protections to ensure that bills do not increase beyond a certain limit.

(*PPA Rider Order*, Haque concurring opinion at 4.) At the time of the decision, the Commission did not anticipate PPA Rider credits in the first 2-3 years (*i.e.*, 2017-2019).

It is also disingenuous for OCC to argue that it relied on the Company's projections since OCC itself adamantly predicted charges. For example, OCC's witness had projected a $1.9 billion charge under the original version of the PPA Rider. (*PPA Rider Order* at 79.) In its sixth ground for rehearing, OCC argued that this projection by its witness was the best record evidence of the PPA Rider's future impact. (*PPA Rider Rehearing* at ¶¶ 66-71.) In the Second Entry on Rehearing, the Commission explained in detail why the OCC testimony was flawed and was being rejected in favor of the Company's projections. (*Id*. at ¶¶ 84-86.) Setting aside that OCC's projections also turned out to be wrong and were less accurate than the Company's, the OCC certainly did predict charges and it is disingenuous to now claim it anticipated credits.

The OCC also argued at the time that the PPA Rider rate impact mechanism (5% cap) is unreasonable and sought to curtail the Company's full recovery of costs – which OCC expected to exceed the rate cap. (*Id*. at ¶ 94.) The Commission disagreed and found that the cap during the first two years was "appropriate, and the parties have offered no reason for concluding that our judgment regarding the level or duration of the rate impact mechanism was unreasonable." (*Id*. at ¶ 100.) Ultimately, however, the Commission indicated that it was approving population

of the PPA Rider "as a financial hedging mechanism" and made specific findings about how it would benefit customers:

> The PPA rider will supplement the benefits derived from the staggering and laddering of the SSO auctions and protect retail customers from price volatility in the market. The record reflects that the PPA rider will provide added rate stability during periods of extreme weather, when the rider can be expected to offset severe price spikes. The different scenarios reflected in AEP Ohio's projection of the PPA rider's impact demonstrate the effect of variation in load due to severe weather or economic factors, including the asymmetric impact that such factors have on electric prices, where increases in load tend to increase prices more so than load reductions decrease prices. If load increases due to weather or economic conditions, shopping and SSO customers will be exposed to the resulting higher wholesale prices, which the PPA rider will partially offset.

(*PPA Rider Order* at p. 83.) The Commission went on to reaffirm its prior finding in *ESP III* that the PPA Rider was "an essential component of AEP Ohio's ESP" adopted under R.C. 4928.143(B)(2)(d), the ESP statute, that "provides the benefit of a more balanced hedge than relying exclusively on the market." (*Id*.) In reality, the hindsight accuracy of anyone's original PPA Rider projections is not dispositive of any issue in this audit proceeding; the projections were never offered or perceived as a guarantee and they were simply (as the Commission found) the best record evidence available at the time.

B. Intervenor arguments that AEP Ohio was supposed to "manage" the financial hedge during the audit period are misguided and conflict with the *PPA Rider Order*.

OCC argues that AEP Ohio was imprudent in failing to take appropriate action to manage charges through the PPA Rider given the performance of the OVEC plants. (OCC Br. at 30-32.) In making this argument, OCC relies on a recent decision by the Michigan Public Service Commission (MPSC) involving OVEC that indicated "while long-term contracts are encouraged,

this does not absolve a utility from monitoring and responding to market conditions and system needs and making good faith efforts to manage existing contracts." (*In the Matter of the Application of Indiana Michigan Power Company for Approval to Implement a Power Supply Cost Recovery Plan for the 12 Months Ending December 31, 2021,* Case No. U-20804 at 19 (Mich PSC) (Nov. 18, 2021) *("Michigan OVEC Order").*) NRDC/Sierra Club also relies on the same MPSC decision to support the notion that a utility has an obligation to monitor market conditions and manage its contracts accordingly. (NRDC/Sierra Club Br. at 4.) Similarly, although without attempting caselaw support, OMAEG/Kroger generally argues that PPA Rider's performance should have been tracked so strategies could be identified to minimize costs to customers. (OMAEG/Kroger Br. at 11-12.)

Of course, these parties fail to identify what appropriate action can be taken under the ICPA to avoid net charges through the PPA Rider during the audit period. In light of the contract term extending through 2040, it is not like AEP Ohio could just terminate the contract. And in light of the fact that AEP Ohio had a minority stake in the output of the OVEC units, the Company cannot unilaterally winddown, shut down or retire the units. In addition, AEP Ohio does not use the output of OVEC units to serve load, so there is no need for replacement energy or alternative supply like there would be in Michigan. (*See Michigan OVEC Order* at 16 (I&M uses the output of the ICPA to serve retail customers).) Most importantly, the MPSC had not prospectively approved the ICPA for inclusion in retail rates as a financial hedge like the Commission here approved the ICPA for inclusion in the PPA Rider as a financial hedge during the audit period knowing that the contract term already extended through 2040. (*Michigan*

OVEC Order at 13, 17 (I&M did not present the ICPA for approval in the current case or in prior cases).) The Commission in Ohio specifically approved the ICPA for inclusion in the PPA Rider and specifically held that the PPA Rider "will prevent customers' total reliance on the market" and intervenors' argument that it should equal market prices simply conflicts with that purpose. (*PPA Rider Rehearing* at ¶ 220.)

Another key distinction for the MPSC decision is that decision was also based on Sierra Club's recommended application of the so-called inverse pricing rule, where the lower of cost or market applies to restrict cost recovery. (*Michigan OVEC Order* at 5-6, 17, 22.) The inverse pricing rule does not apply in Ohio and would run directly counter to the mechanics of the PPA Rider as approved in the *PPA Rider Order*. And the MPSC case was decided under a unique provision of Michigan law known as a "Section 7 warning" regarding the MPSC's prospective view of supply contracts, which was recommended by Sierra Club in that case. (*Id*. at 3, 19-20.) Another important distinction is that the AEP affiliate in Michigan has a portfolio of generation assets to manage in serving retail load – none of which applies to AEP Ohio – and the rationale cannot be extended outside of that context. (*Id*. at 16.) In sum, there is no basis for this Commission to rely on the MPSC decision and every reason to distinguish or ignore it in this audit proceeding.[2]

[2] OCC also relied on the *FirstEnergy REC Case*, Case No. 11-5201-EL-RDR, Opinion and Order (Aug. 7, 2013) for the proposition that a utility has a duty to monitor changing market conditions and manage its regulatory commitments. (OCC Br. at 31.) The *FirstEnergy REC Case* is also easily distinguished. In that case, the utility had a statutory compliance obligation under R.C. 4928.64 to obtain RECs and it had free reign to do so based on its own management discretion; so reviewing its above-market purchases was fair game. Here, AEP Ohio's contractual commitment to OVEC through 2040 was known when the Commission approved the ICPA for use as a financial hedge during the audit period; the Company did not have the ability or discretion to bypass the ICPA or replace it with another supply source during the audit period.

The PPA Rider operates as a financial hedge that is counter-cyclical to market prices – without regard to whether the OVEC costs are below market prices or above market prices at a given point in time. This intrinsic concept is rooted in the Commission's orders and is a function of the mechanics of the rider. It does not require or contemplate (or authorize) active management of the hedge by the Company. The Auditor, Dr. Fagan, concluded that the issue of whether the PPA Rider was functioning as a financial hedge was out of scope for this audit and the Auditor did not review whether the Company was monitoring the performance of the PPA Rider as a hedge. (Tr. I at 166.)

The Commission indicated that it was approving population of the PPA Rider "as a financial hedging mechanism" and made specific findings about how it would benefit customers:

> The PPA rider will supplement the benefits derived from the staggering and laddering of the SSO auctions and protect retail customers from price volatility in the market. The record reflects that the PPA rider will provide added rate stability during periods of extreme weather, when the rider can be expected to offset severe price spikes. The different scenarios reflected in AEP Ohio's projection of the PPA rider's impact demonstrate the effect of variation in load due to severe weather or economic factors, including the asymmetric impact that such factors have on electric prices, where increases in load tend to increase prices more so than load reductions decrease prices. If load increases due to weather or economic conditions, shopping and SSO customers will be exposed to the resulting higher wholesale prices, which the PPA rider will partially offset.

(*PPA Rider Order* at p. 83.) The Commission went on to reaffirm its prior finding in *ESP III* that the PPA Rider was "an essential component of AEP Ohio's ESP" adopted under R.C.

4928.143(B)(2)(d), the ESP statute, that "provides the benefit of a more balanced hedge than relying exclusively on the market." (*Id*.)

On rehearing, the Commission made this point particularly clear when it observed that the rider's design ensures that the rider will act in a countercyclical manner to market prices and found that "[t]he PPA rider *mechanism* will *prevent* customers' total reliance on the market." (*PPA Rider Rehearing* at ¶¶ 216, 220 (emphasis added).) 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.

C. OCC's claim that the prior rate credit commitments should be prospectively revived directly strains credibility and conflicts with the enactment of HB 6.

In a "Hail Mary" attempt that strains any remaining credibility, OCC argues that the credit commitment made by the Company as part of the settlement should be retroactively interpreted as meaning something entirely different in light of the subsequent enactment of HB 6. (OCC Br. at 32-33.) Because the PPA Rider Order made a passing reference to the credit commitment as applying to "the last four years of the rider" at one point in the order as a short-hand reference to 2020-2021, OCC now argues that the subsequent premature termination of the PPA Rider as result of HB 6 should cause the same language to be retroactively "reinterpreted" to mean that last four years of the rider turned out in hindsight to be 2016-2019! It is difficult to

determine where to begin in addressing such a spurious argument. But AEP Ohio will simply point out several fatal flaws with the flimsy claim.

In the initial order, the Commission found, based upon the record evidence presented in the case, that the OVEC-only PPA Rider was projected to produce a net credit to customers of approximately $110 million over its term – through the end of 2024. (*PPA Rider Order* at 38, fn.2.) As a synonym phrase for 2020-2024, the PPA Rider Order later referred to the credits to ratepayers as being "over the last four years of the PPA term." (*PPA Rider Order* at 84.) Of course, those references mean the exact same thing – the last four years of the PPA Rider at the time of the order was 2020-2024 and nothing that happens after the decision can change the original meaning and intent.

To avoid any doubt as to the credits applying only to specified time periods, the plain language of the PPA Rider Stipulation provision that created the credit commitment can be examined and it reads as follows:

> AEP Ohio agrees to provide an additional credit to customers, not to exceed the amount set forth in the table below:
>
> Planning Year 2020/2021 – $10M
>
> Planning Year 2021/2022 – $20M
>
> Planning Year 2022/2023 – $30M
>
> Planning Year 2023/2024 – $40M
>
> In no event will AEP Ohio provide an additional credit that result in customers receiving a net credit (the sum of the unadjusted PPA Rider credit and the additional credit) that exceeds the amount set forth in the table above.

(*PPA Rider Cases,* Stipulation (Jt. Ex. 1) at 5-6.) The voluntary credit commitment only applied to planning years 2020-2024 – all of which would have occurred after HB 6 *replaced* the PPA

Rider mechanism effective as of January 2020 – and the settlement specified that "in no event" would an additional credit be applied beyond those listed in the table.

Fundamental due process and logic dictates that language from a Commission order cannot subsequently be reinterpreted to mean something different based on new facts and circumstances not known or in existence when the language was originally included in the original order. Ohio Const. Art. II, § 28 (retroactive laws impairing contracts are prohibited); State v Bruce, 170 Ohio App.3d 92 (2007) (retroactive decision making is limited by due process). The PPA Rider was the lawful rate from 2019-2019 (*i.e.*, the first four years of the PPA Rider approved in 2016 for an eight-year term) and the LGR has become the lawful rate starting in 2020 to replace the last four years of the original PPA Rider term; and retroactive ratemaking is prohibited. (*Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915); *Keco v. Cincinnati & Southern Bell Tel. Co.*, 166 Ohio St. 281, 256-57, 141 N.E.2d 465 (1957).) As a related matter, any attempt by the Commission to entertain OCC's revisionist-history attempt to modify the prior ESP decision after the ESP term ends would also violate AEP Ohio's statutory right to consent. (*In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 6-7 (2015).)

OCC's desperate argument would also violate the terms of HB 6. R.C. 4928.148 was enacted and became effective in 2019 and provided that "any mechanism authorized by the public utilities commission prior to the effective date of this section for retail recovery of prudently incurred costs related to [OVEC] shall be replaced by a nonbypassable rate mechanism established by the commission for recovery of those costs through December 31, 2030."

Consequently, the PPA Rider mechanism was repealed and replaced by the Legacy Generation Resource Rider and 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.[3]

In conclusion, the Commission should not entertain OCC's misguided claim that the 2020-2024 credit commitment should be resurrected and modified, despite the Commission's original decision and despite the General Assembly's subsequent decision.

D. Sierra Club has received, and continues to receive, substantial benefits in exchange for the deal it struck in the PPA Rider cases and it is estopped from seeking much of the relief it presently advocates through NRDC.

Perhaps Sierra Club present the worst example of unlawful collateral attacks since they are now disingenuously challenging the PPA Rider deal that they supported at the time of the *PPA Rider Order*. Sierra Club, through the same legal counsel that now represents NRDC/Sierra Club in this proceeding, fully supported the original PPA Rider settlement, which included the 2,671 MW of affiliated fossil generation as part of the package. (*PPA Rider Order* at 3, 7, 23.) Sierra Club's counsel signed the agreement that contained all the AEP commitments they supported in reaching the *quid pro quo* bargain of the expanded PPA Rider Stipulation. (*Id*. at 39.) All the benefits created by the AEP commitments – negotiated by the same Sierra Club counsel that is now arguing on behalf of NRDC – were touted by the Commission as conveying substantial ongoing benefits (despite the affiliate PPA being dropped) when it adopted the

[3] Because the first potential credit was for the 2020-2021 PJM planning year which would end after May 2021, any credit under the Stipulation would have accrued and been calculated as of June 2021 at the earliest – well after HB 6's repeal and replacement of the PPA Rider.

OVEC-only PPA Rider. (*PPA Rider Order at 82* (the Stipulation package would provide "numerous benefits for customers that are in the public interest and consistent with the policy of the state, as set forth in R.C. 4928.02.")) (*See also PPA Rehearing* at ¶¶ 57, 62-63, 141, 145, 149, 152 (numerous other provisions of Stipulation developing renewable energy, advancing grid modernization, and promoting retail competition will continue to provide substantial benefits even though affiliate PPA dropped).)

This is not merely a case of outside legal counsel representing different clients; rather, the three attorneys representing NRDC here are Sierra Club employees – and the only expert witness presented by NRDC is also a Sierra Club employee. (NRDC/Sierra Club Br. at 25; NRDC/Sierra Club Ex. 3 at 1.) Sierra Club is not a law firm representing multiple clients with different interests but is a public interest advocacy group with a singular purpose and mission. The same Sierra Club counsel that signed the PPA Rider Stipulation also signed a post-hearing brief in this case arguing that all PPA Rider costs flowed through should be disallowed; that AEP Ohio should not continue to remain a party to the ICPA; and that the Company should seek to wind down the OVEC units and urges *retirement* of OVEC units in order to protect ratepayers.[4] (NRDC/Sierra Club Br. at 5, 25 (emphasis added).) All those ideas directly undermine the operation of the OVEC-only PPA Rider as approved in the *PPA Rider Order*. Similarly, through his testimony, Sierra Club employee Fisher advocated for a total disallowance of net OVEC

[4] As NRDC/Sierra Club is well aware, the ICPA requires agreement among sponsors and Board action in order to support a retirement decision. (Stegall Test., AEP Ohio Ex. 1, at 4-5.) Thus, AEP Ohio cannot unilaterally decide or force retirement of OVEC units. More to the point, Sierra Club agreed for OVEC costs to be recovered through the PPA Rider during the Audit Period and it cannot now argue that the units should have been winded down or retired when it comes time to pay those net costs, especially given that Sierra Club has already received the benefit of its original bargain – plus more.

costs during the audit period. (NRDC/Sierra Club Ex. 3 at 8.) In contrast to the surreptitious approach used in this case, Sierra Club is back to intervening directly as a party on OVEC issues now that HB 6 has replaced the PPA Rider (and the underlying settlement). (*See Legacy Generation Rider Audit for 2020*, Case No. 21-477-EL-RDR, Sierra Club Motion to Intervene (July 16, 2021).)

Obviously, Sierra Club itself could not come into this case and attack the PPA Rider decision. Using its employees and resources to support NRDC advocating that same result – through presenting testimony, conducting adverse cross examination, signing a post-hearing brief that launches attacks on the PPA Rider – should also be prohibited. (*See Hortman v. Miamisburg*, 110 Ohio St.3d 194, 198-199 (2006) (party that supports an earlier position or promise is thereafter estopped from denying the same position after the second party relies to his detriment on the promise or position).) Here, AEP Ohio relied upon Sierra Club's agreement to support the PPA Rider and undertook several commitments in exchange for that agreement – even after the bulk of the PPA Rider was stripped out and only the OVEC PPA remained.

From Sierra Club's perspective, all the benefits it bargained for relative to the expanded PPA Rider have become much more valuable because they got to retain them even though the additional 2,671 MW of fossil generation that Sierra Club expected to be part of the PPA Rider was dropped on rehearing (resulting in less than 15% of the original fossil generation units from the original settlement). Moreover, Sierra Club continues to receive even greater environmental benefits than it originally bargained for through an agreement filed with the Commission on September 21, 2021. (*In the Matter of the Application of Ohio Power Company for an Update to*

its Environmental Commitment, Case No. 21-978-EL-UNC (*Environmental Commitment Case*), October 6, 2021 Entry.) That agreement swapped the original commitment to retire, refuel or repower Cardinal Unit 1 (590 MW) by 2030 with an agreement to either retire Unit 1 or Unit 3 (620 MW) by 2028. (*Id*. at 2.) Sierra Club entered into a separate enforcement contract to ensure that AEP Ohio and its affiliates would fully comply with each and every commitment. *Environmental Commitment Case*, Application (September 21, 2021) at Attachment. This new agreement presents the opportunity to retire the unit two years earlier than original agreed and for a larger unit (30 MW larger) to be retired. This was filed at the same time Sierra Club was marshalling its legal resources to oppose implementation of the PPA Rider decision in the case at bar.

To be sure, any party from the PPA Rider cases (*i.e.*, both settling or opposing) can make imprudence arguments and claims in this audit proceeding. So normal prudence claims that were within the scope of the audit are fair game by any party. But attacking the PPA Rider decision, seeking total disallowance of all costs and advocating for retirement of the OVEC units undermines the very essence of the rider mechanism created for the purpose of flowing net costs/charge through to retail customers. That result should not be permitted by any party. But it is especially true for Sierra Club since they *already received all the benefits* of their original bargain when they agreed to OVEC 400 MW plus the additional 2,671 MW of fossil generation to be part of the PPA Rider; and Sierra Club was still able to further extract additional benefits during this audit case by getting swapping up to a large unit retirement two years ahead of the

agreed schedule. Consequently, Sierra Club should be categorically estopped (including through NRDC) from making such arguments.

IV. OTHER INTERVENOR ARGUMENTS LACK MERIT

A. There is no record basis to conclude that the Auditor lacked independence or was subject to undue influence favoring AEP Ohio.

OCC claims on brief, as it did in testimony, that the Staff and AEP Ohio interfered with the Auditor's independent audit and caused the Auditor to remove a sentence from the draft Audit Report that OCC wants to force the Auditor to adopt; OCC then concludes that the entire net charge during the audit period should be disallowed. (OCC Br. at 33-39.) In support of this argument, OCC witness Haugh initially treads the same ground that it did in testimony that the Staff's communications with the Auditor raised concerns about the Auditor's independence and should not have resulted in removal of the "best interests" sentence it decided to remove in the final Audit Report. (Haugh Test., OCC Ex. 21, at 23-24.)

Likewise, OMAEG/Kroger argue that the Auditor "improperly conducted the audit" and question the Auditor's independence based on removal of the "best interests" sentence. (OMAEG/Kroger Br. at 28-34.) OMAEG/Kroger also superficially quibble with the Auditor's testimony and second-guessed the wording of her answers in defense of the prudence of OVEC costs during cross examination. (OMAEG/Kroger Br. at 11-13 (critiquing the Auditor for not agreeing with the way they questions were phrased by counsel, for not comparing the PPA Rider rate impact to the original projection the way counsel wanted, criticizing the phrase "mostly adequate" procedures, the phrase "generally prudent," and her disagreement with the characterization of costs as imprudent, etc.).) OMAEG/Kroger ultimately attempted to dismiss

the Auditor's views by smearing Dr. Fagan's testimony as being equivalent to "a lay person's view of prudence" instead of "an expert auditor." (*Id*. at 13.)

There was no undue influence on the Auditor by AEP Ohio, and intervenors' rhetorical concerns about the Auditor are misguided and lack any basis in reality, as already demonstrated in AEP Ohio's Initial Brief. (*See* AEP Ohio Br. at 42-46.) And the Staff's Initial Brief did a thorough and persuasive job of explaining all the flaws with intervenor claims in this regard. For this Reply Brief, the Company would like to further address OCC's second point made to try and support its claim that the Auditor lacked independence. Specifically, after admitting that "it is generally acceptable for the utility to review the draft report to identify any confidential information and to correct any errors," OCC claims without basis that "the Auditor went beyond this by allowing AEP [Ohio] to make substantive changes to the report beyond the mere correction of a factual error." (OCC Br. at 37 (citing OCC Ex. 27; Tr. VI at 1578:23- 1579:14; OMAEG/Kroger Ex. 9 and 12).) Upon cursory examination, it is evident that the cited record evidence simply does not support OCC's claim.

Regarding OCC Ex. 27, Staff witness Windle reviewed the unredacted version of the same email thread (AEP Ohio Ex. 30A) and affirmatively testified that none of the three changes were substantive. (Tr. VI at 1588, Tr. VII at 1883.) And nothing in the cited transcript reference "Tr. VI at 1578:23- 1579:14" supports a conclusion that AEP Ohio impacted a substantive change to the Audit Report. Similarly, with respect to OMAEG Exhibits 9 and 12 (cited generally by OCC without reference to any specific passage), there is nothing in those email

threads that support the claim that AEP Ohio impacted a substantive change to the Audit Report. In sum, none of the record citations made by OCC support its claims.

Contrary to OCC's claims, however, the record is clear that AEP Ohio had zero influence on the Auditor's decision to delete the sentence. Dr. Fagan testified, in connection with AEP Ohio Ex. 29 showing an email she had sent concerning the draft report, that she had already decided to delete the sentence in question when she sent a communication that first informed AEP Ohio of the language and before she received any feedback from AEP Ohio. (Tr. II at 638, 644; AEP Ohio Ex. 29.) Staff witness Windle also confirmed his understanding based on overseeing the audit and reviewing all the correspondence that there was no substantive change recommended to the Auditor by the Company regarding the draft Audit Report. (Tr. VII at 1883.) OCC's assertion conflicts with the record. And Dr. Fagan testified that independence in this context means that the Auditor is ultimately responsible for the contents of the Audit Report – regardless of what recommendations the Auditor may receive from stakeholders – and she took full ownership of the contents of the final Audit Report. (Tr. I at 58, 60; Tr. II at 506.)

B. OVEC's must-run commitment strategy for the PJM energy market during the audit period was reasonable.

As noted in AEP's Initial Brief, several parties take issue with OVEC's use of a must-run commitment strategy in the PJM energy markets during the audit period. (AEP Ohio Br. at 46-56.) Those criticisms are misguided. 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 <u>not</u> find the use of the must-run

strategy during the audit period imprudent, and the Auditor did not recommend any disallowance. (*See* Tr. II at 568-69 (Auditor agrees that she "did not conclude that must run was an imprudent action during the audit period").) For the reasons provided in AEP Ohio's Initial Brief and below, OVEC's use of a must-run commitment strategy during the audit period was reasonable, and the parties' criticisms of the must-run strategy should be rejected.

1. The Intervenors incorrectly apply the prudency standard set out by the Commission for reviewing AEP Ohio's *capacity* bidding behavior to OVEC's *energy* market strategy.

The intervenors misinterpret the standard that the Commission said it would apply in its annual prudency reviews. IEU and OCC note that in the *PPA Rider* case, the Commission held that "[r]etail cost recovery may be disallowed * * * 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." (*PPA Rider Rehearing* at 89.) In this passage, the Commission was referring to *AEP Ohio's* bidding of *capacity.* The intervenors, however, incorrectly interpret this language to be applying to *OVEC's* offering of *energy*.[5] For instance, IEU interprets this passage to mean that AEP Ohio was required to prove "that the must-run commitment strategy was * * * consistent with what a competitive market generator would do to maximize revenues" (*id.* at 5). NRDC/Sierra Club similarly argues that OVEC's "must-run bidding strategy" during the audit period violated the same holding, and that AEP Ohio failed to

[5] As AEP Ohio witness Stegall explained, AEP Ohio is responsible for bidding its share of OVEC's capacity into the PJM capacity construct, whereas OVEC is responsible for offering OVEC's energy into the PJM energy markets on behalf of all Sponsoring Companies. (Stegall Test., AEP Ohio Ex. 1, at 7, 9-10.)

meet its "'burden of proof to demonstrate that bidding behavior is prudent and in the best interests of retail ratepayers.'" (NRDC/Sierra Club Br. at 6, quoting *PPA Rider Rehearing* at 89.) Both IEU and NRDC/Sierra Club have misread the Commission's orders in the *PPA Rider* case. In context, the cited standard is clearly referring to *AEP Ohio's* capacity bidding, not *OVEC's* energy offering.

First, IEU and NRDC/Sierra Club are confusing "bidding" and "offering." As the Auditor explained, "in PJM, load is *bid*, and generation is *offered* on a wholesale market." (Tr. I at 84; *see also id.* at 103 ("in a wholesale market, * * * [t]he owner is bidding its load into the power market and its offering its generation into the power market"); *see also* Tr. II at 441 ("load gets bid into the grid, generation gets offered to the grid".) NRDC/Sierra Club also appears to be confusing "revenues" with "impacts on retail ratepayers." "Revenues" are the amounts "the Company receives from selling the associated energy, capacity, and ancillary services into the PJM market." (Stegall Test., AEP Ohio Ex. 1, at 6.) The language IEU cited from page 89 of the Second Entry on Rehearing (that was originally referenced on page 73 of the same order) is discussed by the Commission in connection with capacity output "bidding"; it has no application to the "offering" of energy or the must run commitment strategy for the energy market.

Second, the *PPA Rider Order* made clear that the Commission's concerns about OVEC's "bidding behavior" were a response to specific "issues raised by PJM in its brief" regarding the PJM *capacity* market. (*PPA Rider Order* at 89.) Generally speaking, PJM was worried that providing price support for the OVEC units through the PPA Rider would lead AEP Ohio to bid its *capacity* into the PJM market "at a level * * * lower than their 'actual costs,' as that term is

understood by PJM and applied consistent with its tariff and manuals * * * ." (*Id.* at 73.) PJM opined that doing so could "artificially suppress [capacity] prices in a manner that would hurt the development of new generation in Ohio." (*Id.)* AEP Ohio responded that it would "fully comply with all PJM tariff requirements and any other applicable rules in bidding the PPA units' capacity." (*Id.* at 74.) In its holding, the Commission noted its appreciation for "the continued investments in generation in our region by merchant generators" but rejected PJM's proposed modification to the stipulation, stating that it was "not persuaded that the PPA plants should be held to different [capacity bidding] standards than other generation plants * * * ." (*Id.* at 89.) It then went on to say that the Commission may disallow cost recovery in its "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." (*Id.* at 89.)

OCC raised similar concerns on rehearing. In the *PPA Rider Order*, the Commission had modified the parties' stipulation to prohibit AEP Ohio from "seek[ing] to recover, through the PPA rider, any costs associated with Capacity Performance penalties," while allowing AEP Ohio to retain "all Capacity Performance bonuses * * * ." (*Id.* at 88.) On rehearing, OCC argued that "customers should be entitled to any Capacity Performance bonuses." (*PPA Rider Rehearing* at ¶ 183.) OCC further argued that "the PPA units should be required to clear PJM's annual base residual auction as a price taker, as a means to maximize revenues to the benefit of consumers." (*Id.)* The Commission declined OCC's proposed modification to its prior order. (*Id.* ¶ 185.) And "[w]ith respect to OCC's concerns about bidding behavior and disincentives to maximize

revenues," the Commission noted its prior holding "that retail cost recovery may be disallowed, following the annual prudency review, if the output from the PPA units was not bid in a manner consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues." (*Id.)*

In this context, it is clear that the cited Commission standards applied only to AEP Ohio's bidding of capacity, not the offering of energy in the PJM energy markets. Therefore, it is incorrect for intervenors to apply these standards to OVEC's use of the "must-run" strategy, since that is an *energy* market strategy. As to AEP Ohio's capacity bidding behavior – the proper application of the cited passages –the Auditor concluded that the price at which AEP Ohio bid capacity from the OVEC units into PJM's capacity auctions was "prudent." (Tr. I at 394-395, quoting Staff Ex. 1A at 50.) And no party appears to have challenged the manner in which AEP Ohio bid capacity into the PJM. Accordingly, the Commission's holdings in the *PPA Rider* case regarding AEP Ohio's "bidding behavior" provide no basis for disallowing cost recovery in the current audit proceedings.

2. The fact that OVEC may not have performed daily financial analyses to determine its must-run commitment strategy does not require the Commission to disallow cost recovery.

Next, OCC argues that OVEC should have done "a daily financial analysis of the projected costs and projected revenues for operating their plants before deciding whether to commit the plant[s] as must-run or economic," and that its failure to do so requires disallowing all PPA Rider charges. (OCC Br. at 22; *see also* NRDC/Sierra Club Br. at 11.) IEU agrees, asserting that the fact that "AEP Ohio did no such analysis" means that "AEP Ohio had failed to

meet its burden of proof that the must-run commitment strategy was prudent * * * and in the best interest of retail ratepayers." (IEU Br. at 5.) Yet OCC witness Haugh conceded that he did not know what daily information, data, or criteria OVEC uses when participating in the PJM market. (Tr. V at 1462.) And IEU failed to offer any witness testimony to support the opinions it offers in its Brief.

Regardless, the Auditor disagreed with the premise of OCC's and IEU's argument, testifying at hearing that she "wouldn't say that was imprudent if" OVEC did not do a financial analysis of projected revenues, startup costs, and shutdown costs to use in making its unit commitment decisions. (Tr. I at 270-271.) She testified that whether a coal plant would want to run weekly profit-loss analyses would "depend[ ] on the plant, where it is, its circumstances, the other plants that are on the grid, what the supply curve looks like." (Tr. II at 313.) She explained that such an analysis would not necessarily be needed for must-run offers, and that concerns over the impact of cycling on physical plant may make such financial analyses irrelevant. (Tr. I. at 271.)

On that latter point, the Auditor explained that "coal plants * * * are not easy to turn off and turn on * * * ." (*Id.* at 266; *see also* Tr. II at 563.) Instead, "[o]lder coal plants * * * are designed to run baseload" (Tr. II at 561) and are not typically used as peaking plants (*see id.* at 392-393). The Auditor further explained that operating a plant under an economic commitment status will likely result in more cycling of the plants compared to a must-run commitment status, although "how much cycling depends on market conditions like prices and the cost of the plant and all the considerations." (Tr. II at 563-564, 565.) And she testified that it was her

understanding that increased cycling can increase wear and tear, which could increase maintenance expenses and eventually cause something to break, which would ultimately decrease revenues. (*See id.* at 566.)

AEP Ohio witness Stegall supported the Auditor's opinions. Stegall testified that OVEC's generating facilities were built to provide baseload generation. (Stegall Test., AEP Ohio Ex. 1, at 10.) This means that they were designed to start up and stay on for a long time. (*Id*.) As wet-bottom coal-fired generators, the OVEC units are not capable of instantaneous startup and shutdown and were not designed to be cycled on and off frequently. (*Id*.) OVEC's must-run commitment ensured that the OVEC units would operate as designed – *i.e.*, as base load units – because it required the PJM dispatch model to keep the units on at their economic minimum and not cycle the units on and off. (*Id*.) Committing the OVEC units, instead, as economic during the audit period could have caused them not to start due to thermal cycling or other cycling issues, causing potential damage, additional maintenance expense, and the loss of market revenues. (*Id.* at 10). Ensuring that the OVEC units continued to run as designed – *i.e.*, as base load units – was an appropriate long-term economic strategy.

Thus, the evidentiary record demonstrates that AEP Ohio and/or OVEC did not need to perform a daily accounting of startup and shutdown costs and expected revenues during the audit period to determine that a "must-run" commitment strategy was appropriate for the OVEC units. The OVEC units were designed to operate as baseload units, and Stegall's and the Auditor's testimony demonstrated that operating them as baseload units was prudent because of the wear and tear and possible damage that operating them as peaking units could have caused.

NRDC/Sierra Club asserts that "[b]y relying on market forecasts and incorporating the cost of start-up and shut-down, a prudent coal plant operator can avoid both excessive cycling and persistent energy market losses by selectively operating the coal units only when they are anticipated to earn net revenue." (NRDC/Sierra Club Br. at 11-12, citing Tr. II at 315.) But the transcript provision they cite says nothing about coal plants *or* excessive cycling. (*See* NRDC/Sierra Club Br. at 12 n.28.) Nor, for that matter, does NRDC/Sierra Club explain what level of cycling would be considered "excessive," or why. NRDC/Sierra Club's suggestion that it is possible to avoid damage from cycling at a coal-fired power plant while committing the plant economically is entirely unsupported.

That said, going forward, the Auditor has recommended "that OVEC carefully consider when and whether the must-run offer strategy is optimal." (Audit Report, Staff Ex. 1, at 53.) As stated in its Initial Brief, AEP Ohio agrees with this recommendation. The AEP companies have only one representative on the Operating Committee. (*See* AEP Init. Br. at 50.) However, AEP Ohio will continue to actively participate in the OVEC Operating Committee's ongoing evaluation of the must-run commitment strategy and will encourage the Operating Committee to undertake the "careful[] consider[ation]" of the must-run strategy that the Auditor recommends.

3. The fact that the PPA Rider resulted in charges during the audit period, rather than credits, does not demonstrate that the must-run commitment strategy was imprudent.

As discussed in AEP Ohio's Initial Brief, the economic benefits of OVEC's must-run commitment strategy were realized during the audit period. AEP Ohio witness Stegall calculated that AEP Ohio's customers received a net benefit of $32 million from OVEC's participation in

the PJM energy markets using a must-run commitment strategy during the audit period. (AEP Ohio Ex. 1 at 11). This $32 million benefit, moreover, does not include all the maintenance and repair costs that the OVEC units *avoided* by running as designed.

Nonetheless, IEU appears to argue that the Commission should disallow the entirety of the PPA Rider charges, or at least the charges "for the final 6 quarters of the audit period," because the must-run commitment strategy purportedly caused those PPA Rider charges. (IEU Br. at 8-9.) In particular, IEU suggests that "the Commission adopt a disallowance within the range identified by" OCC, OMAEG, and NRDC/Sierra Club's "independent expert witnesses" as a result of "the imprudent bidding behavior of the OVEC units * * * ." (*Id.*)

None of the witnesses whose testimony IEU cites actually said that all, or even most, of the charges under the PPA Rider should be disallowed because of OVEC's adoption of a must-run commitment strategy. OCC witness Glick testified that "OVEC's variable costs exceeded market locational marginal prices over half the time the units were online" during the audit period, and that that "contributed to" the total charges under the PPA Rider. (OCC Ex. 14 at 49-50.) But at hearing, Glick said that it would be "impossible to say what portion [of the PPA Rider costs] was actually avoidable" because "AEP Ohio did not * * * track or project the costs to operate the plant on a daily basis * * * ." (Tr. IV at 1062.) (As AEP Ohio witness Stegall testified, OVEC "does not share" much of its cost information with sponsoring companies like AEP Ohio. (*See, e.g.*, Tr. III at 931.)) OMAEG witness Seryak did opine that the Commission "should disallow the collection of costs through Rider PPA" (Seryak Test., OMAEG Ex. 1, at 27), but his opinion had nothing to do with OVEC's adoption of a must-run commitment

strategy. And although NRDC/Sierra Club witness Fisher did ultimately recommend disallowing approximately $69 million in PPA Rider charges, as IEU states (*see* IEU Br. at 9), that opinion related to the OVEC contract's purported failure to "provide an efficient hedge against market prices or products[,]" not OVEC's must-run commitment strategy. (Fisher Test., NRDC Ex. 3, at 39.) Fisher actually recommended that only a small fraction of the PPA Rider charges (less than $5 million) be "return[ed] * * * to retail customers due specifically to uneconomic commitment and dispatch practices." (*Id.* at 28.) And Fisher's analysis was based on "actual energy prices" for the audit period, which is information OVEC would not have had at the time it was making commitment decisions. (Tr. IV at 1164-1165).

Moreover, no intervenor witness presented an analysis that would allow the Commission to conclude that the must-run strategy led to lower net energy revenue during the Audit Period because all of intervenors' accounts lack a key consideration: avoided costs. Even accepting OCC witness Glick's assertion that there were times when OVEC incurred negative energy margins (*i.e.*, when "OVEC's variable costs exceeded market locational marginal prices"), an important reason for adopting the must-run strategy is to avoid potential damage and costs from cycling the OVEC units contrary to their design. As AEP Ohio witness Stegall explained, it is often reasonable for coal-fired baseload units to accept short-term negative energy margins if they avoid significant costs and thereby allow higher net margins in the long-run. (Stegall Test., AEP Ohio Ex. 1, at 10.)[6] To support intervenors' point, therefore, OCC witness Glick would

[6] "Consequently, it may be more economical in the long run to keep these units on even if they lose money in the short run. As an example, it may be cheaper to keep OVEC units online during a weekend even though prices are generally lower and OVEC may appear to be selling at a loss, because the expense

have needed to provide *some* account of the costs of cycling the OVEC units contrary to their design, and compare these costs against the short-term negative energy margins. But neither Glick nor any other witness did this analysis. Instead, they engaged in incomplete, after-the-fact speculation about the financial impact of the must-run strategy. This speculation was neither supported by sufficient analysis nor consistent with the prudence standard, which prohibits hindsight review and examines whether an expenditure "was prudent when it was made." (Suburban, 2021-Ohio-3224 at ¶ 32.)

For its part, IEU seems to believe that the existence of PPA Rider charges (rather than credits) during the audit period is proof that OVEC's must-run commitment strategy was imprudent. IEU also seems to believe that the imprudence of the must-run commitment strategy is responsible for the *entirety* of the PPA Rider charges. But IEU did not present a witness to support those opinions. And the expert witness testimony it does cite, from other intervenors' witnesses, does not support its argument. For this reason alone, IEU's recommendation to reject cost recovery for all or most of the PPA Rider charges should be rejected.

4. An hourly dispatch model was not required to demonstrate that OVEC's must-run commitment strategy was reasonable during the audit period.

Alternatively, OCC and Kroger/OMAEG argue that "an hour-by-hour re-dispatching study" (OCC Br. at 27) should have been conducted to determine whether "the OVEC units' commitment status during the audit period was reasonable or only resulted in prudent costs"

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to restart units Monday morning is greater than the loss that would be realized by keeping the units on." (Stegall Test., AEP Ohio Ex. 1, at 10.)

(Kroger/OMAEG Br. at 19), and AEP Ohio's failure to conduct such a study meant that AEP Ohio had failed to prove that its PPA Rider costs were prudently incurred.

But *no* witness conducted such a study. OCC witness Haugh did not perform one. (*See* Tr. V at 1419.) OCC witness Glick testified that she did not perform an hourly re-dispatch study either, and could not do so without the information OVEC "had available at the time it made its [daily] unit commitment decisions * * * ." (Tr. IV at 1066.) NRDC/Sierra Club witness Fisher asserts that a "gold standard" redispatch analysis "would entail a large system model * * * that replicates the entirety of the PJM system" and that he did not "have the resources, nor [the] information available, to conduct that type of full re-dispatch analysis." (Tr. IV at 1141.) And the Auditor did not conduct such analysis either. (*See* Tr. II at 334-336.) Like Fisher, the Auditor testified that running an hourly dispatch model to evaluate re-dispatching the OVEC units would require "data on energy prices in PJM on an hourly basis, plant costs[,] * * * good information about startup costs, * * * a whole supply curve full of power plants and their variable costs, fuel costs, assumptions for costs of fuel, minimum run times, startup times, et cetera." (Tr. II at 364-365.)

An hourly re-dispatch analysis would have been unworkable and unwise, for the reasons explained in AEP Ohio's Initial Brief. (*See* AEP Ohio Init. Br. at 52-54.) Accordingly, the Commission should reject OCC and Kroger/OMAEG's argument that an hourly re-dispatch analysis was required for AEP Ohio to demonstrate that OVEC's must-run commitment strategy was prudent.

C. OMAEG/Kroger's position that it was imprudent to take energy under the ICPA during the audit period and NRDC/Sierra Club's similar proposal for the OVEC units to be put on "reserve shutdown" status during the audit period are misguided.

OMAEG/Kroger contends that AEP Ohio is "not required to avail itself of energy from OVEC under the ICPA" and that during the Audit Period, AEP Ohio should have "made the decision to not avail itself of the available energy from OVEC." (OMAEG/Kroger Br. at 25-26.)[7] In the same vein, NRDC/Sierra Club also argues that the rider should "be set at zero" and the OVEC units should have been "put on reserve shutdown for the entirety of the 2018-2019 audit period." (NRDC/Sierra Club Br. at 8.) These arguments fundamentally misunderstand (or just ignore) the terms of the ICPA, and if AEP Ohio had tried to refuse OVEC energy as OMAEG/Kroger suggests, it would have been more costly for customers. Both arguments also wrongly presume that AEP Ohio can unilaterally decide to place the OVEC units on "reserve shutdown" status.

As an initial matter, the result advocated by OMAEG/Kroger and NRDC/Sierra Club was not feasible during the Audit Period due to the binding OVEC Operating Procedures, which AEP Ohio was not able to unilaterally change. Under the Operating Procedures, the share of OVEC output for "PJM Sponsors" (*i.e.*, Sponsoring Companies such as AEP Ohio that are members of PJM) is jointly committed and dispatched in the PJM day-ahead and hourly energy markets by the OVEC Energy Scheduling Department. (Stegall Test., AEP Ohio Ex. 1, at 9.) The OVEC

[7] It is notable that OMAEG/Kroger did not make this argument in its testimony, which is apparently why OMAEG/Kroger chose to quote at length from its own witness's cross-examination in their Initial Brief (at 27-28) – omitting, of course, OMAEG witness Seryak's key admission that AEP Ohio would still have to pay the OVEC demand charge even if it refused energy, as discussed further below.

Energy Scheduling department "has an internal daily call every non-holiday weekday morning to review unit status and availability, including applicable unit derates, potential unit liabilities, and outage status and expected unit return-to-service dates. OVEC then uses this information to formulate and submit the day-ahead unit offers into the PJM market." (*Id.*) According to the Operating Procedures, the Energy Scheduling Department submits information to PJM for all OVEC units jointly; unit commitments and other submitted information such as price curves do not differ for the different PJM Sponsors. (*Id.* At 8-9.)

Neither OMAEG/Kroger nor NRDC/Sierra Club explains how AEP Ohio could have somehow had its entitlement to OVEC energy bid differently than the other PJM Sponsors. Under the energy scheduling methodology discussed above, which was required by the OVEC Operating Agreement, all PJM output was jointly committed and was jointly subject to real-time PJM dispatch in the energy markets. There was no mechanism (and intervenors do not identify one) for AEP Ohio to somehow opt out of this procedure, and AEP Ohio cannot unilaterally dictate OVEC energy scheduling decisions.

Even if there were some way for AEP Ohio to decline to take its share of OVEC energy consistent with the OVEC Operating Procedures (there was not), this decision would have been more costly to AEP Ohio's customers. AEP Ohio earned $32 million in net revenue from the sale of its share of OVEC energy during the audit period. (Stegall Test., AEP Ohio Ex. 1, at 11 ("This benefit is the result of $146.5 million of energy market revenues earned from selling the energy into PJM netted against the $114.8 million of energy charges billed under Section 5.02 of the ICPA.").) This net energy revenue flowed directly to the benefit of customers through the

PPA Rider and would have been lost if AEP Ohio had declined to take its share of OVEC energy. That is, if AEP Ohio had followed OMAEG/Kroger's misguided suggestion, PPA Rider rates would presumably have been $32 million higher during the Audit Period.

Moreover, if AEP Ohio had declined its share of OVEC energy output by somehow successfully mandating that OVEC withdraw its share of capacity from participating in the PJM energy markets, AEP Ohio would have been unable to realize the capacity revenue gained during the Audit Period. AEP Ohio received $40.2 million in capacity revenue during the Audit Period. (Stegall Test., AEP Ohio Ex. 1, at 15.) Under the PJM RPM capacity construct, for AEP Ohio to bid into the PJM capacity auctions and receive revenue for capacity during the Audit Period, AEP Ohio had to offer its share of OVEC into PJM, ensuring that its OVEC capacity resource would participate in the PJM energy markets. (Stegall Test., AEP Ohio Ex. 1, at 15.) AEP Ohio could not have made this commitment if it had refused its share of OVEC's energy output. Furthermore, as a PJM capacity resource, AEP Ohio's share of OVEC "is subject to capacity performance penalties should a performance event occur and the Company's capacity is not able to perform." (*Id*. at 16.) It would have been impossible for AEP Ohio to fulfill these capacity performance obligations if it had refused its share of OVEC energy. Therefore, AEP Ohio would have lost capacity revenue if it had refused to take OVEC energy, as intervenors propose. This would have caused PPA Rider rates to be $72.2 million higher during the Audit Period, due to the loss of both energy revenues ($32 million) and capacity revenues ($40.2 million).[8]

[8] For similar reasons, the Commission should reject the argument of OMAEG/Kroger (Brief at 21) that OVEC should have engaged in "seasonal operation." As AEP Ohio explained in its Initial Brief (at 54-55), had OVEC engaged in seasonal operation, it would have lost out on all capacity revenue during the Audit Period, and there is no demonstration in the record that OVEC would have saved any costs by operating seasonally.

In addition to foregoing revenue, AEP Ohio also would have incurred substantial OVEC costs under OMAEG/Kroger's misguided proposal. Under the ICPA, AEP Ohio would have been required to pay its share of all OVEC demand charges even if it somehow declined its share of OVEC energy, *as OMAEG's witness admitted on cross-examination*.[9] (Tr. V at 1333; *see also* ICPA, AEP Ohio Ex. 7 at §§ 8.04, 8.04(a) (imposing an "unconditional obligation" on each Sponsoring Company to pay "its specified portion of the Demand Charge under Section 5.03, the Transmission Charge under Section 5.04, and all other charges under Article 7 . . . *whether or not any Available Power or Available Energy are accepted by any Sponsoring Company during such calendar month*." (emphasis added).) The demand charge and other non-energy charges that AEP Ohio would have been required to pay were approximately $147 million during the Audit Period.[10] It would have made no sense for AEP Ohio to incur these charges while foregoing any revenues from sales of energy or capacity.

In addition, intervenors fail to discuss the potential ramifications of likely *Minimum Loading Event* costs that AEP Ohio would have had to pay under the ICPA. Under ICPA Paragraph 5.05, AEP Ohio is required to pay costs incurred by OVEC if it suffers a "Minimum Loading Event" due to AEP Ohio's failure to take its share of OVEC's "Total Minimum

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[9] "Q. Are you aware of the financial consequences under this ICPA if a company decides not to avail itself [of energy] under that provision [ICPA Section 4.03]? [OMAEG witness Seryak:] I am aware that there are not – there is not necessarily any financial consequences. Q. Are you aware that the sponsoring company still has to pay the demand charge? A. Okay. Yes." (Tr. V at 1333.)

[10] Net energy revenues during the Audit Period were $32 million and capacity revenues were $40.2 million for a total of $72.2 million. (Stegall Test., AEP Ohio Ex. 1, at 11, 15.) Total PPA Rider charges were $74.5 million. (Tr. I, at 44-45.) The difference of $146.7 million represents demand charges, transmission-related charges, and PJM fees.

Generating Output" in any hour. (ICPA, AEP Ohio Ex. 7, at § 5.05.) If AEP Ohio had adopted OMAEG/Kroger's misguided proposal to refuse OVEC energy, AEP Ohio could have incurred these Minimum Loading Event charges in addition to the other non-energy charges discussed immediately above – all without any offsetting revenues from sales of energy or capacity.

In summary, if AEP Ohio had adopted the proposal of OMAEG/Kroger and NRDC/Sierra Club and refused its share of OVEC energy during the Audit Period, AEP Ohio would have lost $32 million in net energy revenues and $40.2 million in capacity revenues, all while still incurring $147 million in required demand and other non-energy charges and potentially additional charges from a Minimum Loading Event. There is no question that this would have caused the PPA Rider charges to increase during the audit period. Yet OMAEG's witness, incredibly, claimed on cross-examination that "there is not necessarily any financial consequences" of his recommendation, even as he admitted that AEP Ohio would still have to pay the demand charge. (Tr. V at 1333.) Intervenors' recommendation is based on a misunderstanding of the ICPA and the economics of AEP Ohio's OVEC entitlement, and it was prudent for AEP Ohio to accept its share of OVEC energy during the audit period and thereby earn energy and capacity revenue for customers' benefit.

D. OCC's position that AEP Ohio failed to seek pre-approval for OVEC's capital expenditures lacks merit.

OCC argues that the Commission should "disallow the entire $74.5 million in above market charges" because, in OCC's view, AEP Ohio committed to seek preapproval of all OVEC capital projects. (OCC Br. at 29.) The only support OCC offers for this claim is a sentence from

AEP Ohio's Initial Brief in the PPA Case. (*Id.* at 29 n.134.)[11] OCC's argument is meritless. The sentence from AEP Ohio's Initial Brief in the PPA Case is taken out of context and does not support OCC's contention. Although AEP Ohio committed to seek Commission preapproval of major capital projects at the *Affiliate PPA* units, AEP Ohio did not – and could not – commit to Commission preapproval of OVEC capital expenditures.

To understand how AEP Ohio did not commit to Commission preapproval of OVEC capital investments, some review of the PPA Case is necessary. As the Commission is aware, the Stipulation in the PPA Case originally recommended (and the Commission initially approved) the inclusion in the PPA Rider of an Affiliate PPA as well as the OVEC ICPA. Under this Affiliate PPA, AEP Ohio would purchase the output (2,671 MW) of certain generating facilities owned by AEP Ohio affiliate AEP Generation Resources (AEPGR). As AEP Ohio explained in the PPA Brief, the Affiliate PPA contained special contractual rights called "buyer's prudence" provisions that permitted AEP Ohio, as "buyer" under the Affiliate PPA, to review and approve decisions concerning capital investments at AEPGR's generating facilities. (*See PPA Rider Cases*, AEP Ohio Br., Ad. Noticed OCC Ex. 15, at 62-63 (citing AEP Ohio Ex. 10 at 10 in the PPA Case).[12] These buyers' prudence provisions facilitated a high level of review of Affiliate PPA costs by the Commission, as AEP Ohio noted in its PPA Brief:

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[11] Citing Initial Brief of Ohio Power Company at 65 (Feb. 1, 2016), *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 No. 14-1693-EL-RDR. This brief was administratively noticed during the hearing as OCC Ex. 15 (Ad. Noticed OCC Ex. 15).

[12] These buyers' prudence provisions addressed provided AEP Ohio oversight of "(1) 'the retirement dates of the Facilities,' (2) 'annual budgets,' (3) 'capital expenditures,' (4) 'procedures and systems for dispatch and notification of dispatch," (5) "procedures for communication and coordination with respect to Facility capacity availability,' (6) 'scheduling of outages for maintenance, as well as the return to availability following an unplanned outage,' (7) 'approval of material contracts for Fuel,' (8) 'establishment of specifications for Fuels,' and (9) 'other duties as

> These [Affiliate PPA buyers' prudence] provisions are critical to the Commission's ability, under the PPA Proposal, to continue to review the prudence of PPA costs before permitting recovery of those costs in retail rates. Each of the provisions conveys a contractual right or obligation on the buyer, AEP Ohio, such that the Company's actions and decisions will trigger a prudence review for retail cost recovery by the Commission. Wherever AEP Ohio is given authority to review and exercise oversight over PPA Unit costs, the Commission will be able to review the prudence of AEP Ohio's use of that oversight authority. If the Commission believes that AEP Ohio has acted imprudently in exercising its contractual oversight rights, it may disallow retail recovery of the associated costs in the PPA Rider.

(PPA Rider Cases, AEP Ohio Br., Ad. Noticed OCC Ex. 15, at 63.)

The OVEC ICPA, by contrast, contains no such buyers' prudence provisions for AEP Ohio. Rather, as explained previously, the OVEC ICPA contains governance provisions that reflect the joint ownership of several OVEC Sponsoring Companies that all have an interest in OVEC's operation. Specifically, under the ICPA, each OVEC Sponsoring Company is entitled to appoint one member to the OVEC Operating Committee, except that Sponsoring Companies that are affiliates are entitled to only one member. (ICPA, AEP Ohio Ex. 7, at ¶ 9.05.) This means that AEP Ohio and its affiliates Appalachian Power Company and Indiana Michigan Power Company together share one member on the OVEC Operating Committee. Furthermore, the decisions of the OVEC Operating Committee require "the affirmative vote of at least two-thirds of the members of the Operating Committee." *Id.* In addition, OVEC is governed by a

assigned by agreement of the Representatives.'" (*PPA Rider Cases,* AEP Ohio Br., Ad. Noticed OCC Ex. 15, at 63-64.) The main purpose was to provide some regulatory oversight for decisions of AEP Ohio's competitive generation affiliate that would not otherwise be subject to the Commission's jurisdiction; the ICPA contains no such comparable provisions.

Board of Directors, on which AEP Ohio and its affiliates have representation alongside other OVEC Sponsoring Companies. (Stegall Test., AEP Ohio Ex. 1, at 5.)

Due to this OVEC governance structure, which provides shared authority among multiple Sponsoring Companies, AEP Ohio cannot exercise unilateral oversight of OVEC's capital projects, as AEP Ohio would have been able to do under the Affiliate PPA buyers' prudence provisions. Accordingly, AEP Ohio has *never* suggested – let alone "committed" – that AEP Ohio would seek preapproval from the Commission for OVEC capital projects. That simply would not make sense. AEP Ohio does not have the contractual authority under the OVEC ICPA to make such a commitment.

With this background, it should be obvious that the single sentence in AEP Ohio's PPA Brief that OCC cites describes AEP Ohio's commitment to Commission pre-approval of capital projects under the Affiliate PPA, but does not (and could not) commit to Commission pre-approval of capital projects under the OVEC ICPA. The cited sentence is the first sentence of a paragraph in the middle of a long discussion of prudence. The entire paragraph reads as follows:

> Critically, moreover, AEP Ohio has committed that it will obtain prudence "preapproval" from the Commission for substantial capital expenditures at a PPA Unit or other major PPA Unit decisions that would affect the level of costs that AEP Ohio will incur under the PPA. For example, if AEP Ohio is asked to exercise its contractual authority to approve (or veto) a significant environmental-compliance capital investment at a PPA Unit, AEP Ohio will not give its approval (or veto) until it first requests a finding from the Commission that AEP Ohio's approval of the project, and recovery from the retail ratepayers of the costs of that project, would be prudent. In addition, AEP Ohio has committed to seeking a Commission prudence determination before exercising any contractual rights with respect to the retirement of a PPA Unit. (Tr. XX at 4997-98.) Thus, although the prudence of the exercise of AEP Ohio's approval rights over many PPA Unit costs will be reviewed (and allowed or disallowed) by the Commission after they are incurred and reflected in the PPA Rider, the costs of any significant PPA Unit

> capital expenditures or other major decision such as a Unit closure will not be included in the PPA Rider until the Commission first "pre-approves" the prudence of the cost in question.

(*PPA Rider Cases*, AEP Ohio Br., Ad. Noticed OCC Ex. 15, at 65-66.) In this context, it is clear that AEP Ohio was referring to the *Affiliate PPA units*, not OVEC. In the second sentence of the paragraph, AEP Ohio provides an "example" illustrating the sentence cited by OCC. This "example" is "if AEP Ohio is asked to exercise its contractual authority to approve (or veto) a significant environmental-compliance capital investment at a PPA Unit." That example only makes sense in the context of the Affiliate PPA, where the Affiliate PPA buyers' prudence provisions gave AEP Ohio the "contractual authority to approve (or veto)" capital investments. Plainly, AEP Ohio has no contractual authority to unilaterally "approve (or veto)" capital investments under the OVEC ICPA.[13] The subsequent sentences again refer to AEP Ohio's "contractual authority" and "contractual rights," and they make clear that it is the exercise of this "contractual authority" that will be the scope of a "Commission prudence determination." In this light, the paragraph cannot be committing to pre-approval of OVEC capital projects since AEP Ohio does not have "contractual authority" or "contractual rights" under the ICPA necessary to make this commitment.

In a footnote, OCC points out that earlier in the PPA Brief, AEP Ohio had defined the term "PPA Unit" to include both the Affiliate PPA units and the OVEC units. (OCC Br. at 29 n.134.) This does not help OCC's argument. The cited sentence does not state that AEP Ohio

[13] That OCC is taking AEP Ohio's statement in its PPA Brief out of context is confirmed by the Stipulation in the PPA Case. Notably, OCC does *not* cite the PPA Stipulation in its argument about capital project pre-approval. (*See* OCC Br. at 29.) That is because the PPA Stipulation contains no such pre-approval commitment from AEP Ohio.

commits to preapproval for capital expenditures at *all PPA Units* but rather "a PPA Unit." In context, this reference could only be to an Affiliate PPA unit. Moreover, even if the cited sentence could have been more precise in referring specifically to an Affiliate PPA unit, there is no question that AEP Ohio lacks the contractual authority to commit to preapproval of OVEC capital expenditures and therefore could not possibly have meant to include the OVEC units in the statement. OCC's entire argument here relies on a single sentence in a brief, not a provision of a Stipulation or other binding agreement. Surely a minor definitional ambiguity in a brief – which is easily resolved by examining the context – should not form the basis of a $74.5 million disallowance.

The Commission can only review the prudence of decisions that AEP Ohio has the ability and contractual authority to control or impact. Under the Affiliate PPA, AEP Ohio would have had broad control over AEPGR's generating facilities. Thus, AEP Ohio was able to commit to broad Commission prudence oversight of the Affiliate PPA units, including pre-approval of major capital projects. Under the OVEC ICPA, by contrast, AEP Ohio's contractual authority is far more limited, AEP Ohio cannot unilaterally control OVEC capital expenditures. Therefore, AEP Ohio did not – and, contractually, could not – commit to Commission pre-approval of OVEC capital projects.

In sum, OCC's result-oriented argument in this regard is merely another misguided attempt to avoid the entire impact of the PPA Rider as approved by the Commission. OCC makes no attempt to connect the net PPA Rider charges to capital projects that were deployed during the audit period. Although the Auditor did review capital investments made during the

2018-2019 period and make some prospective suggestions for capital project approval process for OVEC to consider going forward, it found none of the projects imprudent. (Audit Report, Staff Ex. 1C, at 90-91.) OCC's claim should be rejected or ignored.

E. OCC's position that, under a repealed and inapplicable "fuel adjustment clause" standard, OVEC costs should be considered above-market fuel prices and disallowed conflicts with the PPA Rider decision, improperly relies on extra-record material and otherwise ignores the Attorney Examiner's ruling.

Consistent with its approach to the hearing and throughout much of its Initial Brief, OCC fundamentally misunderstands and disregards the procedural history of this matter and the establishment of the PPA Rider. Citing to the original *PPA Rider Order*, OCC argues that the Commission should employ a fuel adjustment clause analysis. (OCC Brief at 27). But OCC cites the Commission Order out of context and without regard to interceding events.

In the original Opinion and Order, the Commission stated that it "expects that the ***process*** will be carried out in a manner that is consistent with the process for AEP Ohio's prior fuel adjustment clause (FAC) mechanism." (*PPA Rider Order* at 89 (emphasis added).) But a process is different than the outdated and repealed FAC standard of review that is ultimately employed – and OCC attempts to selectively gloss over that important distinction. Indeed, as cogently stated by the Attorney Examiner during the evidentiary hearing in this case, in using that language "the Commission is focused on ***how*** the process for the PPA Rider quarterly filings will work, how, in these audit cases, parties would be afforded the opportunity to participate and so forth; and that the scope of this auditor proceeding, though, is set by RFP what was issued in these cases by the Commission." (Tr. I at 112) (emphasis added). Moreover, the original *PPA Rider Order* was a fundamentally different rider than the OVEC-only PPA Rider at issue in this

case (as adopted on rehearing in the PPA Rider Cases). As conceded by OCC, prior to the Second Entry on Rehearing, the PPA Rider was approved to collect/credit net charges/revenues resulting from a power purchase agreement between AEP Ohio and its Affiliate AEP Generation Resources for generation from nine units at four different generation plants as well as the OVEC units. (*PPA Rider Order* at 21-23.) In its Second Entry on Rehearing, however, the Commission substantively changed the PPA Rider where it no longer included an affiliate contract and only included the contractual obligations of OVEC as established by the ICPA. (*PPA Rider Rehearing* at ¶ 63.)

Undeterred by this procedural history and legal understanding of the Commission's Opinion and Order, OCC then describes its preferred audit by citing a 2015 law review article and a 1983 Cincinnati Gas and Electric case, which utilized the (now repealed) fuel adjustment clause statute. (OCC Brief at 28.) In doing so, however, OCC seeks to implement a review standard that is simply not applicable nor consistent with the Second Entry on Rehearing nor the Entries establishing this audit. The fundamental problem with OCC's argument is that this Commission issued Entries in these cases which laid out, in great detail, the purpose, role of the auditor, and scope of the investigation of the PPA Rider as it existed in 2018 and 2019. This is consistent with the Second Entry on Rehearing, the controlling Entry establishing the PPA Rider as it existed during the audit period, which made clear that there would be "an annual prudency review of any retail charges flowing through the PPA Rider." (*PPA Rider Rehearing* at ¶ 178.) Nowhere in the Second Entry on Rehearing, or the Entries establishing this audit, did the Commission order an investigation to determine whether the "total energy charge for purchased

power if that total charge is less than the fuel cost of self-generation." (OCC Brief at 28). In its quest to impose a fuel adjustment clause audit, OCC ignores and fails to even acknowledge the existence of the Entries establishing the audit in this case.

F. Other OVEC costs are reasonable and prudent despite unfounded attacks by intervenors.

1. The Commission should not disallow costs associated with OVEC debt and interest payments because OMAEG/Kroger fundamentally misunderstands or disregards the PPA Rider.

OMAEG/Kroger argues, alternatively, that the Commission should disallow debt and interest payments for OVEC and OVEC shareholder profits, "because they have no relation to how much revenue a power plant generates and therefore not part of a market hedge." (OMAEG/Kroger Brief at p. 15, citing Seryak Test., OMAEG Ex. 1, at 17). This argument, however, demonstrates a fundamental misunderstanding of the PPA Rider and is directly contrary to the ICPA and the Commission rulings approving the PPA Rider. Moreover, while the Commission approved the PPA Rider as a market hedge, OMAEG/Kroger is attempting to foist an unquantifiable responsibility onto AEP Ohio that was not approved as part of the PPA Rider – for AEP Ohio to somehow monitor whether the PPA Rider was continuing to operate as a market hedge.

In approving the PPA Rider, the Commission allowed AEP Ohio to "flow through to customers the net impact of the Company's contractual entitlement associated with Ohio Valley Electric Corporation (OVEC)." (*PPA Rider Rehearing* at ¶ 4 (internal citations omitted).) OMAEG/Kroger's misunderstanding is undoubtedly founded in witness Seryak's erroneous assumption that the Commission's use of the term "contractual entitlement" is a reference to only

the energy entitlement but not a reference to the entire ICPA that would include all other costs and revenues such as fixed costs and demand revenues. (Tr. V at 1339.) This misguided myopic focus on energy margins leads OMAEG witness Seryak to provide a red herring analysis of whether "rational bidders" factor debt and interest costs into their market bids. (OMAEG/Kroger Brief at 16; OMAEG Ex. 1 at 20.) The Commission was fully aware of all contractual commitments associated with OVEC via the ICPA when it approved the OVEC-only PPA Rider. Indeed, the PPA was actually an exhibit that was part of the record in AEP Ohio's standard service offer case that established the PPA Rider as well as the subsequent rider case that populated the PPA Rider. (*ESP III*, IEU Exhibit 1A at KMM-2; *PPA Rider Cases*, Sierra Club Ex. 3.) Most importantly, the Commission approved the PPA Rider to flow through all contractual obligations, not just the energy charges and revenues.

Once beyond this misunderstanding, it is uncontested that debt, interest, and return charges are properly included as part of the PPA Rider. Debt service and interest payments are clearly set forth as part of demand Component A charges that AEP Ohio and other sponsoring companies are contractually obligated to pay pursuant to the ICPA. (AEP Ohio Exhibit 7 at 189-190.) OMAEG Witness Seryak even admits that "according to the ICPA, sponsoring companies are required to pay debt obligation no matter if the company takes entitlement to the available power." (Seryak Test., OMAEG Ex. 1, at 26.) And Component D charges contractually require member companies to pay an amount that "shall consist of an amount equal to the product of $2.089 multiplied by the total number of shares of capital stock of the part value of $100 per share of Ohio Valley Electric Corporation which shall have been issued and which are

outstanding on the last day of such month." (ICPA, AEP Ohio Exhibit 7, at § 5.03(d), PDF p. 120.) The ICPA also establishes, however, that OVEC does not earn a return on capital projects. (Audit Report, Staff Ex. 1, at 92.) These collective commitments represent the "contractual entitlement" referenced by the Commission in approving the PPA Rider. Failure to make these contractually required payments would constitute a contractual violation by AEP Ohio and certainly not something contemplated by the Commission in approving the PPA Rider.

Thus, OMAEG/Kroger unapologetically advocates for something directly contrary to the PPA decisions approving net charges/credits associated with the ICPA – which the Commission should reject or ignore.

2. The Commission should not disallow coal contract prices based upon OMAEG/Kroger's improper and incomplete analysis.

OMAEG/Kroger also alternatively argues that the Commission should disallow $4,846,196 in what OMAEG Witness Seryak has calculated as "imprudent coal purchases." (OMAEG/Kroger Brief at 16, citing Seryak Test., OMAEG Ex. 1, at 16.) To support this argument, OMAEG trolls for favorable auditor language by citing to the LEI audit report in the audit of Duke's PSR. (*Id*.) The Duke PSR audit report, however, is not part of the record in this case nor did the Commission take administrative notice of that audit report. OMAEG/Kroger undoubtedly looks outside the record in this case because in this matter LEI expressly disavowed its analysis and conclusions regarding excessive coal inventories. (Audit Report Errata, OCC Ex. 2.) As discussed in AEP Ohio's Initial Brief (see AEP Ohio Brief at 59), LEI filed an Errata on December 29, 2021, explaining that LEI "incorrectly calculated the monthly average days of coal

inventory for the Clifty Creek and Kyger Creek plants" on pages 73-74 of the Audit Report, but "there is no material impact on LEI's audit results." (*Id*.)

Nevertheless, OMAEG witness Seryak calculates that OVEC paid $24,316,087 in "above-market" coal purchased from Resource Fuels, $4,846,196 of which was assigned to AEP Ohio per its PPR. (OMAEG/Kroger Brief at 16; Seryak Test., OMAEG Ex. 1, at 16.) But as explained in AEP Ohio's Initial Brief, OMAEG Witness Seryak's analysis is incomplete and inapplicable because he bases his analysis exclusively on comparing the Resource Fuels, LLC ("Resource Fuels") coal to the coal provided by Alliance Coal, LLC (Alliance). (AEP Ohio Br. at 57-59; Seryak Test., OMAEG Ex. 1, at 14-16.) More importantly, OMAEG Witness Seryak does not appear to directly rely upon the contracts themselves, rather, choosing to rely upon EIA data. (Id.) In doing so, OMAEG Witness Seryak paints an overly simplistic picture in an attempt to establish OVEC overpaid Resource for "essentially the same coal." (Seryak Test., OMAEG Ex. 1, at 15.)

As explained in more detail in the Company's Initial Brief, a large portion of the coal delivered by Resource Fuels and Alliance came from separate sources. (AEP Ohio Brief at 58, citing AEP Ohio Exhibit 13A). Thus, OMAEG/Kroger assertions that the Resource Fuels coal is "the same or almost identical coal from the same mine" are just simply incorrect. (OMAEG/Kroger Br. at 16; *see also*, Seryak Test., OMAEG Ex. 1, at 15). OMAEG/Kroger also disregard the different products at issue in the respective contracts that vary in length, price, and location. The coal provided by Resource Fuels is the product of a single long-term contract executed in 2012 while the coal provided by Alliance is the product of a series of short-term

contracts executed throughout the audit period of 2018 and 2019. (LEI-DR-1.2.5, AEP Ohio Exhibit 13A). The Commission should not disallow costs based upon inventory levels based upon OMAEG/Kroger's incomplete and inaccurate analysis that seemingly treats these widely varying products as one in the same.

3. The Commission should reject NRDC/Sierra Club's argument regarding O&M costs as a *non-sequitur*.

NRDC/Sierra Club makes a nonsensical argument conflating O&M costs with capital expenditures in an attempt to discredit and cast a shadow on the audit process to meet its goal of limiting OVEC's future capital expenditures. Citing to page 100 of the Audit Report, NRDC/Sierra Club witness Fisher claims that AEP Ohio reported less than half the amount of O&M expenses reported in OVEC's annual reports. (NRDC/Sierra Club Br. at 20-21; Fisher Test., NRDC/Sierra Club Ex. 3.) AEP Ohio's response to data request LEI 1.5.2 is the source of the information cited on page 100 of the Audit Report, which NRDC/Sierra Club witness Fisher conceded only sought "labor and non-labor costs for non-outage maintenance activities for all units." (Tr. IV at 1201.) As further admitted by NRDC/Sierra Club witness Fisher, that request is different than a request for total O&M. (Id.) Thus, it is disingenuous for NRDC/Sierra Club to now insinuate that AEP Ohio provided inaccurate information or otherwise misrepresented information to the Auditor. This is particularly egregious given the vast amount of information that AEP Ohio provided in this case, including every OVEC billing statement from January 2017 through December 2019, which were attached to NRDC/Sierra Club witness Fisher's testimony. (Fisher Test., NRDC/Sierra Club Ex. 1, at Att. JIF-6).

Despite this embellishment on O&M expenses, NRDC/Sierra Club then confusingly draws the conclusion that "either AEP Ohio misrepresented the true extent of OVEC's ***capital*** expenditures, or the Auditor misstated those costs." (NRDC/Sierra Club Br. at 21). This is the first in a series of *non-sequitur* conclusions where NRDC/Sierra Club conflates and confuses the concept of O&M costs with capital expenditures. After arguing that OVEC's ***O&M*** expenses were 50% higher than the industry average, NRDC/Sierra Club immediately pivots to the auditor's findings about ***capital*** expenses. (NRDC/Sierra Club Br. at 21-22.) NRDC/Sierra Club goes on to argue that "the Auditor raised concerns about the magnitude of ***capital*** spending at the OVEC units based on a dramatic understatement of the true costs." (NRDC/Sierra Club Br. at 22.) But the "true costs" to which NRDC/Sierra Club refers are ***O&M*** costs.

Candidly, AEP Ohio struggles to understand the entire premise of NRDC/Sierra Club Argument III other than to advocate for adopting the Auditor recommendation of implementing a prophylactic cap on OVEC's annual capital expenditures well beyond the audit period. But it would be inappropriate to require AEP Ohio to categorically limit capital expenditures on OVEC going forward. First, AEP Ohio does not have the ability to limit capital expenditures of OVEC because such decisions would be subject to unanimous agreement of the numerous owners. Second, the Commission-issued RFP in this matter specifically addressed capital costs charging the Auditor with "ensur[ing that any fixed cost incurred by OVEC are properly allocated to AEP Ohio, including depreciation, debt service, and plan maintenance expenses." (RFP Entry, OMAEG Ex. 5, at 6.) The Audit was designed to analyze and ensure the prudency of actions

taken during the audit period of 2018-2019, not what actions should or could be taken in future time periods.

Finally, as this Commission is well-aware, the PPA Rider is no longer in effect as it has been replaced by a new statutory mechanism – the Legacy Generation Resource Rider. (*See* R.C. 4928.148.) The new law does not impose any requirements on OVEC's capital expenditures and that fact ultimately defeats the prospective recommendation of NRDC/Sierra Club in this regard.

V. OCC'S BROAD-BASED ATTACKS ON THE ATTORNEY EXAMINERS' RULINGS IS UTTERLY MISGUIDED

The hearing in this matter continued for seven full days, with many hours of OCC cross-examination on matters of little to no relevance to the legal and factual issues actually before the Commission in these proceedings. OCC now asks the Commission to re-open the proceeding and allow its irrelevant cross-examinations to continue. Rule 4901-1-34 authorizes an attorney examiner to "reopen a proceeding at any time prior to the issuance of a final order." Ohio Adm.Code 4901-1-34(A). However, the party moving to reopen the proceeding must show "good cause" for doing so. *Id.* In particular, if the movant seeks to reopen the proceeding to present "additional evidence" that "could not, with reasonable diligence, have been presented earlier in the proceeding," the movant must "specifically describe the nature and purpose of [the] evidence" sought to be introduced. Ohio Adm.Code 4901-1-34(B).

The Commission has repeatedly denied motions to reopen where the evidence or arguments the movant seeks to raise are irrelevant to the issues before the Commission in the proceeding. *See In the Matter of the Commission's Consideration of Matters Related to the*

Stipulation Approved in Recent Cases Involving The Cleveland Electric Illuminating Co. and The Toledo Edison Co., Case No. 89-498-EL-COI, Opinion and Order, 1991 Ohio PUC LEXIS 106, *19-20 (Jan. 24, 1991) (denying a motion to reopen where the movant's "arguments are not relevant to this proceeding"); *In the Matter of the Joint Application of SBC Communications Inc. and AT&T Corporation for Consent and Approval of a Change of Control*, Case No. 05-269-TP-ACO, Entry ¶ 3 (Oct. 12, 2005) (denying a motion to reopen to present new survey evidence, where the movant "failed to establish a nexus between the survey and the Commission's consideration in this proceeding"). The Commission should do so again here, since the Attorney Examiners were already more than generous in allowing OCC the broad latitude it already had in the 7-day hearing..

Incredibly, OCC's post-hearing brief lists almost two-dozen evidentiary rulings that it believes the Commission should reverse, most of which relate to the Auditor's decision to remove an out-of-scope opinion from a draft of the Audit Report, and asks that the Commission reopen the proceeding and allow even *more* cross-examination on the referenced issues. (*See* OCC Initial Brief at 39.) But, as discussed in the prior sections of this Brief, the Auditor's opinions on the continued operation of the OVEC plants, or the inclusion of the ICPA in the PPA Rider, or AEP Ohio's ability to collect above-market costs through the Rider are not relevant to this proceeding. Moreover, the majority of OCC's voluminous objections misconstrue the basis for the Attorney Examiners' evidentiary rulings and ignore the testimony on those topics that they already allowed OCC to elicit. For all of the reasons that follow, OCC should not be

permitted to lengthen what has already been a painfully long and inefficient hearing by reopening it and extending OCC's prior cross-examinations on irrelevant issues.

A. The Attorney Examiner correctly declined OCC's request for communications from the Auditor's file.

OCC's first request for relief from the Attorney Examiners' evidentiary rulings faults the Commission for not providing OCC access to a document that OCC in fact possesses, and which was the subject of extensive cross-examination at hearing. OCC claims that it "subpoenaed the Auditor's file"; that the Attorney Examiners denied OCC's motion for subpoena before hearing, because Staff had already pre-filed testimony for the Auditor (indicating Staff's intent to call the Auditor as a witness at hearing); and that the Attorney Examiner improperly denied OCC's renewed request for the Auditor's file at hearing. (OCC Br. at 40-41.) OCC further asserts that it needed that file to determine "who asked the Auditor to change her conclusion that running the OVEC plants was 'not in the best interests of the ratepayers.'" (*Id.* at 40.) Staff (and agents of Staff like the Auditor) are not subject to pre-hearing discovery, per Ohio Admin. Code 4901-1-10(C) and 4901-1-16(I), which is essentially what OCC sought to conduct against the Auditor. Like other parties, Staff should get to select their own witnesses to be presented for given topics; they take the risk that the selected witness does not have adequate knowledge or basis to defend their positions. For these reasons, the Attorney Examiner properly declined to sign the proffered subpoena.

OCC did not subpoena "the Auditor's file." OCC subpoenaed three categories of documents from the Auditor: (1) any draft audit reports in these proceedings "containing any statement to the effect that running the OVEC plants was not in the best interest of ratepayers";

(2) documents and communications between Marie Fagan and either the Commission or AEP Ohio relating to any such statement in a draft audit report; and (3) documents and communications between Marie Fagan and any other LEI employee relating to any such statement in a draft audit report. OCC Motion for Subpoena *Duces Tecum* for Auditor *et al.*, Attached Subpoena Duces Tecum (Dec. 1, 2021). This is the motion that Attorney Examiner Parrot denied (*see* Tr. III at 663), not a broader motion to subpoena the Auditor's "file."

The communication that was the subject of OCC's subpoena, moreover, did not "ask" Dr. Fagan "to change her conclusion that running the OVEC plants was 'not in the best interests of the ratepayers[,]'" as OCC asserts. (OCC Initial Brief at 40.) The e-mail, dated September 8, 2020, "recommended" a "[m]ilder tone and intensity of language" and offered that phrase as an example. (NRDC/Sierra Club Ex. 2 at 1.) Dr. Fagan testified that she did not view the communication as "direction as to what to include in the report," but rather "[Staff's] comments" (Tr. I at 207), and that LEI adopted Staff's suggestion "at [LEI's] discretion" (*id.* at 223).

That aside, the subpoena was unnecessary. OCC knows exactly what was said, and who said it, because the communication regarding the continued "running" of the OVEC plants was attached to OCC's motion for subpoena and OCC witness Haugh's testimony and also introduced as an exhibit at the hearing. OCC knows that the communication was from Mahila Christopher, a utility specialist in the Commission's Office of the Federal Energy Advocate. OCC Motion for Subpoena *Duces Tecum* for Auditor *et al.*, Attachment A. It was admitted as NRDC/Sierra Club Exhibit 2 and attached to OCC Exhibit 21 as Attachment MPH-3. And there is no reason to question the conclusion that Mahila Christopher is the Staff member who raised

this point. Not only does NRDC/Sierra Club Exhibit 2 make that clear, Ms. Christopher raised the same point in an email to other Staff members four hours before she raised it an email to Dr. Fagan. (OCC Ex. 34 at 1.) OCC also knows why Dr. Fagan removed the language in question before finalizing the Audit Report. OCC cross-examined Dr. Fagan about it at length (*see* Tr. I at 199-208, 219-227), as did OMAEG (*see, e.g.,* Tr. II at 496). Dr. Fagan explained that the phrase in question was in a draft report circulated to Staff more than two weeks before the report was finalized. (*See* Tr. II at 498 (phrase was in the September 1, 2020 draft).) And as already extensively discussed, Dr. Fagan explained why she removed the line in question from the draft Audit Report. (*See* Tr. II at 489-505.) OCC had more than ample opportunity at hearing to examine the Auditor regarding the draft statement.

Regardless, the phrase in question is not relevant to these proceedings. As Attorney Examiner Parrot ruled at hearing, statements in the draft audit reports are not "relevant to the proceedings as [they do] not reflect the final views of the auditor in these matters." (Tr. III at 682-683.) Moreover, as discussed in the Company's Initial Brief and above, these proceedings are a prudency review of the PPA Rider charges for 2018 and 2019. Determining whether OVEC should "*keep*[ ] the plants running" (emphasis added) – *i.e.*, whether the OVEC plants should continue running *now* – is not the point of these proceedings, no matter how much OCC wants it to be.

Under the Commission's procedural rules, an attorney examiner will sign a subpoena only "if appropriate," and "may quash a subpoena if it is unreasonable * * * ." Ohio Adm.Code 4901-1-25(A)(1) and (C). Because the Staff (and Auditor) are not subject to discovery under the

Commission's rules and since the subject of OCC's subpoena duces tecum is not relevant to these proceedings, the Attorney Examiner acted appropriately in not signing the subpoena. *See also* Ohio Adm.Code 4901-1-27(B)(7)(b) (authorizing attorney examiners to "[t]ake such actions as are necessary to * * * [p]revent the presentation of irrelevant or cumulative evidence"); Ohio Admin. Code 4901-1-10(C) and 4901-1-16(I) (Staff not generally a party for purposes of pre-hearing discovery). And because OCC and other parties had ample opportunity to cross-examine Dr. Fagan on the communication in question, the Commission should not reopen these proceedings to allow even more cross-examination on this point.

B. The Attorney Examiner correctly denied OCC's motion to subpoena Staff member Mahila Christopher.

OCC's second objection asserts that the Attorney Examiners should have granted OCC's motion to subpoena Mahila Christopher. As discussed above, Christopher e-mailed the Auditor regarding a statement in the draft audit report that originally opined that "keeping the plants running does not seem to be in the best interests of the ratepayers." (NRDC/Sierra Club Exhibit 2 at 1.) OCC argues that, by recommending that LEI employ a "[m]ilder tone and intensity of language" (*id.*), Christopher "made or contributed" to the Audit Report and, thus, may be subpoenaed under Ohio Adm.Code 4901-1-28(E). (OCC Initial Brief at 44.) OCC asserts that, because Christopher "sent the email to the Auditor" regarding the "keeping the plants running" language in the draft audit report, Christopher's testimony might shed light on "who at the PUCO initially decided to ask the Auditor to make the change, who else was consulted about the decision, why Staff asked the Auditor to make the change and how the change was implemented." (*Id.*) OCC further suggests that Christopher's testimony would not have been

duplicative, because Staff witness Windle's hearing testimony showed that Christopher possessed knowledge that Windle did not have. (*Id.* at 45-46, citing, *e.g.*, Tr. VII at 1805-1806.)

Again, as discussed above, Commission rules intentionally prevent Staff from being subjected to pre-hearing discovery, which is what OCC sought here; that approach is consistent with R.C. 4901.16 and is a practical and fair result, given Staff's unique role in Commission proceedings. There is no Commission rule that contemplates the subpoenaing of Staff witnesses to discuss editing recommendations for draft reports of investigation. The rule on which OCC primarily relies, Ohio Adm.Code 4901-1-28(E), states that "any person *making or contributing to* [a Staff report of investigation] may be subpoenaed to testify at the hearing in accordance with paragraph (A) of rule 4901-1-25 of the Administrative Code * * * ." (Emphasis added.) When the Commission adopted this provision, it explained that the provision's purpose is "to provide [an] opportunity for interested persons to address the *contents* of the report * * * ." *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶ 54 (Dec. 6, 2006) (emphasis added). The Commission further explained that its "intent is that an opportunity will always be provided after the filing of a staff report * * * to present testimony and to cross-examine the *authors* of the report if the Commission schedules a hearing * * *." *Id.* (emphasis added). But Mahila Christopher was not one of the "authors" of the Staff Report. And OCC did not seek to examine Christopher regarding the *contents* of the report, but rather language that the report's authors chose to *omit* from the report. For both of these reasons, Ohio Adm.Code 4901-1-28(E) does not support OCC's motion to subpoena Christopher.

Moreover, as noted above, an attorney examiner will sign a subpoena under Ohio Adm.Code 4901-1-25(A) only "if appropriate;" "may quash a subpoena if it is unreasonable"; and may "[t]ake such actions as are necessary to * * * [p]revent the presentation of irrelevant or cumulative evidence." Ohio Adm.Code 4901-1-25(A)(1), (C), and (B)(7)(b). For the same reasons discussed in part III.A. above, allowing OCC to subpoena Christopher to provide testimony about her recommendations regarding the tone of a statement in an early draft of the Auditor's Report would not have been "appropriate," because the topic of that statement was not relevant to these proceedings.

Any further testimony from Christopher would also have been cumulative. OCC had ample opportunity at hearing to explore the questions that it claims Christopher should now answer. Staff witness Windle explained, in his pre-filed testimony, why Staff expressed concerns with certain portions of the draft audit report. (*See* Staff Exhibit 3 at 3-4.) OCC cross-examined Windle extensively about that pre-filed testimony (*see* Tr. VI at 1518-1528 and 1698-1699) and about the e-mails marked as NRDC/Sierra Club Exhibit 2 (*see id.* at 1692-1696). Windle testified that he and Christopher were the only Staff members involved in providing the initial comments on the draft audit report that were included in NRDC/Sierra Club Exhibit 2 (*see* Tr. VII at 1808) and that it was his decision to approach LEI with those concerns (Tr. VI at 1507). And while OCC suggests Christopher's testimony would not have been duplicative of Windle's, the only "unique knowledge" that Christopher purportedly had related to the existence of an even *earlier* draft audit report (*see* OCC Initial Brief at 45) – a "rather incomplete" and even more irrelevant draft that Staff "didn't really take time to review" (Tr. VII at 1805).

For all of these reasons, the Attorney Examiner properly denied OCC's motion to subpoena Christopher.

C. The Attorney Examiner correctly denied OCC's motion to subpoena Staff member Lori Sternisha.

OCC's third objection to the Attorney Examiners' evidentiary rulings asserts that the Attorney Examiners erred when they denied OCC's last-minute, oral motion for a subpoena to have Staff witness Windle's supervisor Lori Sternisha testify at hearing. (*See* OCC Initial Brief at 46.) OCC speculates that Windle and Christopher lacked "the authority to ask the Auditor to change her conclusion in the Audit Report" and asserts that Sternisha's testimony regarding "the limits of her authority" would be "relevant to the issue of who 'made or contributed' to the Audit Report * * * ." (*Id.* at 47.)

Under the Commission's procedural rules, motions for subpoena must be either filed with the docketing division or submitted to the assigned attorney examiner or the legal director in person. Ohio Adm.Code 4901-1-25(A). Moreover, "all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the commission no later than ten days prior to the commencement of the hearing" unless "otherwise ordered for good cause shown * * * ." Ohio Adm.Code 4901-1-25(E). OCC did not comply with either of these requirements. OCC moved to subpoena Sternisha orally, rather than in writing. (*See* Tr. VII at 1912.) And OCC waited until the end of a seven-day hearing to move for the subpoena (*id.*), without any showing of good cause for the delay.

Sternisha's service as the Commission's Federal Energy Advocate (and, thus, her status as Windle's supervisor) is a matter of public record. *See* Ohio Secretary of State, *Official Roster*

of Federal, State and County Officers (Ed. 2019-2020), Public Utilities Commission of Ohio, https://ohioroster.ohiosos.gov/executive.aspx?TYPE=0&ID=12824&SRC=1&range=2019-2020). OCC could have moved to subpoena Sternisha in advance of the hearing, but failed to do so. Regardless, Sternisha's testimony, moreover, would have been cumulative and irrelevant, for the reasons discussed above. OCC's request was frivolous and based on pure speculation that Ms. Sternisha could provide relevant testimony. For all of these reasons, the Attorney Examiners correctly denied OCC's untimely oral motion to subpoena Sternisha.

D. The Attorney Examiner properly sustained objections to OCC's questions regarding policies followed in Fuel Adjustment Clause (FAC) cases.

In its fourth request for relief from the Attorney Examiners' evidentiary rulings, OCC argues that the *PPA Rider Order* requires the Commission to "apply an FAC analysis" to its audit of the PPA Rider. (OCC Initial Brief at 48.) Accordingly, OCC argues that it should have been permitted to cross-examine the Auditor and Staff witness Windle on whether the existence of "an affiliate relationship" between OVEC and AEP Ohio was relevant, or whether recovery of OVEC-related costs should be denied because AEP Ohio "could have purchased power from the PJM wholesale market" at lower cost. (*Id.* at 49.) Additionally, OCC argues it should have been permitted to question the Auditor and Staff witness Windle regarding three FAC-related exhibits:

- Exhibit 18: "[A] law review article by [Kevin] Duffy * * * that explains how a fuel adjustment clause audit is performed in Ohio" (Tr. I at 111);
- Exhibit 19: "[A]n FAC decision by the Commission" (Tr. I at 112); and
- Exhibit 20: [A] copy of an audit report performed by LEI * * * before the Louisiana Public Service Commission" (*id.* at 33) in a "fuel adjustment clause" proceeding (*id.* at 111).

OCC asserts that the Attorney Examiners prohibited OCC from asking FAC-related questions to the Auditor, but the transcript shows otherwise. OCC asked the Auditor whether she approached her audit in "the same way as the traditional fuel adjustment clause audit." (Tr. I at 79.) The Attorney Examiners overruled objections to that question. (*Id.* at 80.) OCC asked whether the Auditor used the same criteria that she would use for a fuel adjustment clause analysis. (*Id.* at 81.) The Attorney Examiners overruled objections to that question as well. (*Id.* at 82.) OCC asked whether the Auditor was familiar with the concept of "economy purchased power" in fuel adjustment clause audits, and whether that concept has any bearing on the costs a utility may recover under a fuel adjustment clause. (*Id.* at 102-104.) The Attorney Examiners overruled objections to those questions too. (*Id.*) In response, the Auditor testified that, "[d]uring * * * the PPA audit, I had nothing in my mind about FAC audits or what's allowed or not allowed." (*Id.* at 104.) That was for the Attorney Examiners to sustain an objection to OCC's later question regarding the relevance of "an affiliate relationship between the utility and the company that it purchases power from" in a fuel adjustment clause analysis. (*Id.* at 108-109.)

The Attorney Examiners did not prohibit OCC from asking FAC-related questions to Staff witness Windle, either. OCC asked Windle whether it was his "understanding that this audit had to include a review that was carried out in a manner consistent with a fuel adjustment clause mechanism analysis" (Tr. VI at 1645) and Windle responded (*see id.* at 1646-1647). OCC asked Windle whether he had "any understanding as to whether the audit was supposed to include an FAC-type analysis," and Windle responded. (*Id.* at 1647.) When OCC tried to ask the question *again*, and Staff's counsel objected, Attorney Examiner Parrot sustained the

objection. (*Id.* at 1648.) OCC's disagreements with the Examiners' rulings on this front is petty and inconsequential.

As discussed in Section III.F., *supra*, moreover, none of these questions is relevant to these proceedings. OCC's position is that the Commission's *PPA Rider Order* requires the Commission to "apply an FAC analysis" and that, in an FAC proceeding, the Commission will not allow an electric utility to recover the costs of above-market power purchases from the utility's affiliate. (OCC Initial Brief at 48.) That position, quite simply, makes no sense. The initial *PPA Rider Order* explicitly contemplated that AEP Ohio would purchase power from affiliates (*i.e.*, units owned entirely or partly by AEP Generation Resources, Inc.) and would also charge customers for prudently-incurred costs of that power, including any above-market costs. *See PPA Rider Order* at 21-24. OCC's argument assumes that the Commission approved AEP Ohio's purchase of power from an affiliate *and* its collection of above-market costs through a rider charge, yet simultaneously adopted an audit framework that requires the Commission to disallow cost recovery because AEP Ohio purchased power from an affiliate and collected above-market costs through a rider charge.

As explained above, other language in the *PPA Rider Order* directly disproves OCC's interpretation. As Attorney Examiner Parrot held, the *PPA Rider Order* did not transform these audit proceedings into FAC cases; it simply "focused on how the process for the PPA Rider quarterly filings will work" and the opportunities that "parties would be afforded * * * to participate" in audit proceedings. (Tr. I at 111-112.) The *PPA Rider Order* was not ambiguous on this point. Immediately after directing that the "ongoing Staff review and annual audits of the

PPA rider * * * be carried out in a manner that is consistent with the process for AEP Ohio's prior fuel adjustment clause (FAC) mechanism" (*PPA Rider Order* at 89), the Commission explained exactly what it meant:

> Accordingly, with respect to AEP Ohio's quarterly PPA rider filings, which should include appropriate work papers, Staff should review each such filing for completeness, computational accuracy, and consistency with any prior Commission determinations regarding the adjustments. If Staff raises no issues prior to the billing cycle during which the quarterly adjustments are to become effective, the adjusted PPA rider rates shall become effective for that billing cycle. The PPA rider, however, remains subject to adjustment during the annual audit and reconciliation, through which Staff, or another auditor selected by the Commission, *will review the accuracy and appropriateness of the rider's accounting and the prudency of AEP Ohio's decisions and actions as set forth in the stipulation.* In order to facilitate the audit of AEP Ohio's PPA rider filings, the Company should open a new case each year in which the Company should file its quarterly PPA rider adjustments and in which the audit report for that year should also be filed. * * * We also note that, as with AEP Ohio's FAC mechanism, interested stakeholders may seek to intervene and participate in the annual audit process, consistent with any established procedural schedule.

Id. at 89-90 (emphasis added). OCC's position that the Commission's adoption of an FAC-like "process" for these audit proceedings also entailed the adoption of FAC-like policies for cost-recovery is contrary to the plain language of the *PPA Rider Order* and nonsensical on its own terms.

Regardless, the arguments that OCC sought to make through its cross-examinations of the Auditor and Windle were legal arguments, as OCC made clear in the first half of its initial post-hearing brief. (*See id.* at § III.A.5.) Indeed, OCC relied on two of the exhibits it sought to use with the Auditor – Exhibits 19 and 20 – by citing them to support the legal arguments in its initial post-hearing brief. (*See* OCC Initial Brief at 28.) The Commission was not required to allow OCC to elicit legal opinions from the Auditor or from Staff's fact witness, and OCC has

failed to demonstrate why re-opening the hearing to allow such cross-examination would serve any beneficial purpose. Accordingly, the Commission should affirm the Attorney Examiner's evidentiary ruling.

E. The Attorney Examiner did not sustain any objection to questions by OCC regarding whether the Auditor believed that "keeping the [OVEC] plants running" was "in the best interests of the ratepayers."

OCC's fifth request to reverse the Attorney Examiners' rulings asserts that the Attorney Examiners wrongfully prevented OCC from asking the Auditor about a statement, in an early draft of the final Audit Report, that "*keeping the plants running* does not seem to be in the best interests of the ratepayers." (*See* OCC Initial Brief at 35 (emphasis added), citing OCC Ex. 21, Attachment MPH-3 at 1.) OCC claims that the Auditor testified that she removed that phrase from the Audit Report because it was "too broad" and that the Attorney Examiners refused to allow OCC to probe whether the Auditor "believed the statement to be true at the time she made it" and "at the time of hearing * * * ." (OCC Initial Brief at 49, citing Tr. I at 176-195.)

OCC is mistaken. In the section of the transcript that OCC cites, OCC questioned the Auditor about a different statement removed from the draft Audit Report, which said: "LEI's analysis shows that *the OVEC contract overall* is not in the best interest of AEP Ohio ratepayers." (Tr. I at 176-177 (emphasis added).) That was the statement that the Auditor described as "overly broad." (*Id.* at 177.) OCC's counsel did not ask the Auditor about the statement, in the draft Audit Report, that "keeping the plants running does not seem to be in the best interests of the ratepayers." Accordingly, the Commission should reject OCC's fifth request to reverse the Attorney Examiners' rulings.

F. The Attorney Examiner properly sustained objections to OCC's repeated question regarding whether it would be reasonable for OVEC to study seasonal operation.

OCC's sixth request to reverse the Attorney Examiners' rulings asserts that the Attorney Examiner improperly forbid OCC from cross-examining the Auditor regarding "whether * * * OVEC should * * * perform a study of switching to seasonal operation." (OCC Initial Brief at 51.) But the Attorney Examiner did not say OCC could not ask the Auditor about this topic. On the first day of hearing, OCC's counsel asked the Auditor: "would it be reasonable for OVEC to do a study about going to seasonal operations?" (Tr. I at 260.) The Auditor responded: "I don't have an opinion." (*Id.* at 261.) OCC's counsel then asked: "Can you think of any such factors that would dictate that it *wouldn't* be reasonable for OVEC to do a study of going into the seasonal operation?" (*Id.* (emphasis added).) The Auditor noted that OCC's counsel was simply repeating his prior question, "only with negatives instead of positives * * * ." (*Id.*) Accordingly, AEP Ohio's counsel objected that the question was "[a]sked and answered[,]" and Attorney Examiner Parrot sustained the objection. (*Id.* at 261.) In so ruling, the Attorney Examiner simply prevented OCC from repeating the same question in a slightly different way. The Attorney Examiner was well within her authority to do so. *See* Ohio Adm.Code 4901-1-27(B)(7)(c) (authorizing the presiding hearing officer to "[t]ake such actions as are necessary to * * * [p]revent * * * repetitious * * * cross-examination.").

G. The Attorney Examiner properly sustained objections to OCC's repeated question regarding whether it would be reasonable for OVEC to study

environmental compliance costs, and properly excluded an AEP investor presentation post-dating the audit period.

OCC's seventh objection to the Attorney Examiners' evidentiary rulings relates to two sets of rulemakings by the United States Environmental Protection Agency ("EPA") – the Coal Combustion Residuals ("CCR") Rule and the Effluent Limitations Guidelines ("ELG") for Steam Electric Plants. OCC asserts that the Attorney Examiner erred by "prevent[ing] OCC from asking the Auditor * * * why it would not be prudent for OVEC to do a study comparing the compliance costs for these rules as against the value of the plants." (OCC Initial Brief at 53.) OCC further asserts that the Attorney Examiner erred when she declined to admit an AEP investor presentation from 2020 that referenced the costs to comply with the CCR and ELG Rules. (*Id.*) Neither of the Attorney Examiner's rulings was in error.

With regard to the first purported error, OCC *again* mischaracterizes the transcript. The Attorney Examiner did not prevent OCC's counsel from asking his question. She sustained an objection because OCC's counsel attempted to ask his question twice. OCC's counsel asked the Auditor whether it would be "prudent for an operator to analyze the compliance costs with the CCR and ELG rules as against the value of the plant." (*Id.* at 277.) The Auditor responded that "it would be prudent under some circumstances * * * ." (*Id.*) OCC's counsel then simply rephrased the same question, asking whether the Auditor could provide "any reasons why it would *not* be prudent for OVEC to do a study of the * * * costs * * * for complying with these rules as against the value of the plants?" AEP Ohio's counsel objected, and Attorney Examiner Parrot sustained, stating that this question was "already covered." (*Id.* at 278.) As discussed above, it was fully within Attorney Examiner Parrot's authority to sustain an objection to a

repetitive question. *See* Ohio Adm.Code 4901-1-27(B)(7)(c) (authorizing the presiding hearing officer to "[t]ake such actions as are necessary to * * * [p]revent * * * repetitious * * * cross-examination.").

With regard to the second purported error, OCC argues that the AEP investor presentation from 2020 was relevant and that the Commission has admitted other investor presentations in other proceedings. (*See* OCC Initial Brief at 53.) But neither argument addresses the basis for the Attorney Examiner's ruling. Attorney Examiner Parrot denied OCC's request to admit OCC Exhibit 13 not on relevance grounds, but for lack of foundation, because the Auditor "had not seen this document before." (Tr. III at 690.) The Commission has declined to admit evidence where the sponsoring party failed to establish a proper foundation, and it should affirm the Attorney Examiner's ruling to do so here. *See, e.g.*, *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion and Order at ¶ 16 (Nov. 21, 2019) (affirming an attorney examiner ruling denying admission of certain exhibit for lack of foundation, where "[t]he witness had not previously reviewed the individual documents and the information used by the witness contained in the documents was obtained from a secondary source.").

However, the Attorney Examiner would have been justified in denying OCC's motion to admit OCC Exhibit 13 on relevance grounds, too. OCC Exhibit 13 was an "AEP investor study" from November 2020. (Tr. I at 275-276.) The Attorney Examiner had previously held, twice, that "reports * * * and other information that pertains to 2020 and 2021 * * * is beyond the

period under review in these proceedings – January 1, 2018, through December 31, 2019. The Attorney Examiner finds that such information is not relevant to the subject matter of these cases or reasonably calculated to lead to the discovery of admissible evidence." Entry ¶ 15 (Dec. 23, 2021); *see also* Entry ¶ 18 (Dec. 21, 2021) (same). The Attorney Examiner subsequently affirmed that holding, in rejecting an interlocutory appeal from OCC. *See* Entry ¶ 18 (Jan. 5, 2022). Moreover, at hearing, the Attorney Examiners struck portions of OCC witness Glick's testimony that "focused on issues or matters or offer[ed] recommendations to the Commission that * * * are beyond the scope of the audit period" (Tr. IV at 1019) and/or "focused on issues * * * after the audit period under review" (Tr. IV at 1021), specifically including those portions relating to or referencing OVEC's future costs to comply with EPA's CCR and ELG rules and the resulting impact on rider charges. (*See* Tr. IV at 1018, striking OCC Ex. 14 at 7:13-20 and 61:7 – 62:4.) The Attorney Examiner's rulings were correct, given the retrospective nature of a prudence review, and would have independently warranted the exclusion of OCC Exhibit 13 even if OCC had been able to establish a foundation for the document.

H. The Attorney Examiners properly permitted AEP Ohio witness Stegall to testify regarding the reasonableness of OVEC's must-run commitment strategy.

OCC's eighth objection to the Attorney Examiners' evidentiary rulings relates to AEP Ohio witness Stegall's testimony that OVEC's use of a must-run commitment was a reasonable market commitment strategy. (*See* AEP Ohio Exhibit 1 at 9-10.) OCC argues that the Attorney Examiner should have struck Stegall's testimony on this point because Stegall could not say whether OVEC considers startup costs, shutdown costs, and expected revenues over time when it

makes its daily commitment decisions. (*See* OCC Initial Brief at 55.) OCC's implication is that Stegall was not qualified to testify because he could not explain why OVEC offers its units as must-run (with the exception of Clifty Creek Unit 6).

But Stegall explained, at hearing, that OVEC commits its units as must-run "because the operating procedures say if the unit is available, you will commit it as must run." (Tr. III at 822.) Those operating procedures are set by the Operating Committee under the ICPA. (*Id.* at 821.) And Stegall's pre-filed testimony provides a detailed explanation for Stegall's opinions. To support his opinion that OVEC's use of a must-run commitment strategy was reasonable, Stegall explained that commitment strategies require consideration of long-term economics; the effects of fuel contracts; whether environmental testing or PJM mandates require operation on a given day; startup and shutdown times; and possible wear-and-tear and other operational risks from unit cycling. (*See* AEP Ohio Exhibit 1 at 10.) AEP Ohio witness Stegall concluded that OVEC's must-run commitment status "allowed OVEC to manage its units in a way that balanced its provision of economic value to its sponsors and the operating characteristics of the units as well as OVEC's provision of contracted energy and capacity for all of its sponsors." (*Id.* at 11.) Stegall then elaborated on these opinions, at length, under cross-examination.

The Commission has noted that "Ohio Adm.Code 4901-1-29 does not enumerate what qualifies as expert testimony; therefore, the Commission may look to the Ohio Rules of Evidence for guidance in making that determination." *Forest Hills Supermarket, Inc. d/b/a Konnis Family Foods v. The Cleveland Electric Illuminating Co.*, Case No. 18-785-EL-CSS, Opinion and Order ¶ 35 (Apr. 8, 2020). And under the Ohio Rules of Evidence, Stegall's

testimony was admissible as expert testimony. It is true that courts will not accept "conclusory" opinions that lack "specific foundational testimony" to support the expert's conclusions. *See State v. Abner*, 2d Dist. Montgomery No. 20661, 2006-Ohio-4510, ¶ 38; *see also Mynes v. Brooks*, 4th Dist. Scioto No. 08CA3211, 2009-Ohio-5017, ¶ 48; *Holliday v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86069, 2006-Ohio-284, ¶ 43 ("It is improper for an expert's affidavit to set forth conclusory statements * * * without sufficient supporting facts."). But Stegall's testimony was not conclusory. Stegall offered specific reasons to support his opinion that OVEC's must-run commitment strategy was reasonable and defended the assertion under cross examination.

OCC further suggests that Stephen McKee, OVEC's representative on the OVEC Operating Committee, would have been a better witness. (*See* OCC Initial Brief at 56.) But even assuming for sake of argument that McKee would have had more direct knowledge of certain OVEC decisions than Stegall did, that would not be a legal basis for striking Stegall's testimony. An expert witness need not be the most qualified expert available. *See State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 78. The witness "need not have a complete knowledge of the field in question * * *." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 54. Instead, "if a person has information which has been acquired by experience * * * which would assist the trier of fact in understanding the evidence or a fact in issue and the information is beyond common experience, such person may testify." *State v. Boston*, 46 Ohio St.3d 108, 118, 545 N.E.2d 1220 (1989), *overruled in part by, State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.3d 944 (2007). As American Electric Power Service Corporation's Manager of Regulatory Pricing & Analysis, with responsibility for all

purchased power-related filings for the AEP System operating companies (AEP Ohio Exhibit 1 at 1-2), Stegall had the experience and information necessary to qualify as an expert witness on the topics he addressed. And striking Mr. Stegall's testimony after the hearing has ended and after the Company waived its opportunity to file rebuttal testimony would be procedurally unfair to AEP Ohio. The Commission should deny OCC's renewed motion to strike Stegall's testimony on the reasonableness of OCC's must-run commitment.

I. The Attorney Examiner properly sustained objections to OCC's attempt to elicit opinion testimony from Windle, a Staff fact witness, on a study of Texas electricity prices that was outside the scope of his testimony.

OCC's ninth objection to the Attorney Examiners' evidentiary rulings relates to a passing comment by Staff witness Windle in his hearing testimony. OCC asked Windle what reports he does "besides forecast reports[.]" (Tr. VI at 1487.) Windle mentioned that his office's energy forecasting group had "studied electricity prices in Texas versus Ohio." (*Id.*) OCC asked Windle when he performed that analysis, and Windle responded, "We performed that analysis twice, and to be honest, I can't remember the years." (*Id.* at 1487-1488.) OCC then asked Windle who had requested the report. (*Id.* at 1488.) Staff's counsel objected that the question was outside the scope of Windle's testimony, and the Attorney Examiner sustained the objection. (*Id.*)

OCC now asserts that it was prohibited from asking Windle "about the background of this report" and asserts that, had its counsel been allowed to ask that question, it would have produced testimony "relevant to how energy prices are calculated[,]" which "could have shed light on how average hourly capacity prices are calculated" that "would have been relevant to the

issue of whether the Auditor's errata filing [on capacity price calculations] was a pretext." (OCC Initial Brief at 56-57.) But the Attorney Examiner did not prohibit Windle from testifying about the background of the energy forecasting group's study of Texas and Ohio electricity prices. She simply sustained an objection to a question about the identity of the person who had requested the analysis. OCC did not even establish that the Texas report touched on the calculation of capacity prices. OCC's assertion that asking Windle a question about a topic completely *unrelated* to the issues in this proceeding (who asked Windle's group to analyze Texas energy prices) could have led to testimony *related* to this proceeding (how are average hourly capacity prices calculated) is based on nothing but pure speculation.

Yet again, moreover, OCC ignores the actual basis for the Attorney Examiner's ruling. Windle's filed testimony had nothing to do with the calculation of capacity prices. The purpose of Windle's testimony, as explained in that testimony, was "to describe Staff's participation and role with respect to the audit conducted by [LEI] for this proceeding * * * and to offer insight into Staff's recommendations that were made during the audit process." (Staff Ex. 3 at 2-3.) Windle was, in other words, a fact witness. OCC attempted to enlist Windle to testify on its behalf as an expert witness. OCC should have presented its own testimony through its own witness if it wanted to cover this topic – and had every opportunity to but chose not to do so. Accordingly, OCC's proffered questions were clearly outside the scope of his testimony. The Attorney Examiner was correct to sustain the objection to OCC's question, and OCC has failed to demonstrate good cause to reopen the proceeding.

J. The Attorney Examiner properly sustained objections to OCC's attempt to elicit testimony from Windle on the development of Ohio's competitive retail electricity market that was outside the scope of his testimony.

OCC's tenth objection to the Attorney Examiners' evidentiary rulings again mischaracterizes the transcript of these proceedings and speculates regarding the testimony that OCC *might* have elicited had it been given the opportunity to ask questions on seemingly irrelevant topics. OCC asserts that it was prohibited from asking Windle "background questions about the development of [the] competitive wholesale electricity market in PJM and the competitive retail electricity market in Ohio" and that, as a result, OCC was prevented from asking Windle's opinion on the prudence of OVEC's investments in its coal plants and its must-run commitment status. (OCC Initial Brief at 58-59.)

But OCC did not ask Windle any questions about the development of PJM's competitive wholesale electricity market. Windle testified that he had "followed the PJM wholesale electricity market" and OCC's counsel asked no further questions about it. (Tr. VI at 1495.) Nor, for that matter, did OCC ask Windle's opinion about the prudence of OVEC's investments in its coal plants or its must-run commitment status. OCC simply asked Windle to "describe for us at a high level how [the Ohio retail electricity market] has progressed since 2009." (*Id.*) AEP Ohio objected that the question was outside the scope of Windle's testimony, and Attorney Examiner Parrot sustained the objection. (*Id.*)

OCC asserts that Windle's opinions on the prudence of OVEC's investments in its coal plants and its must-run commitment status would have been relevant and thus admissible under

Ohio R. Evid. 402 and 611(B). But "[a]s an administrative body, the Commission is not 'inhibited by the strict rules as to the admissibility of evidence which prevails in courts.' *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 263, 126 N.E.2d 314 (1955). Instead, 'with respect to its hearing process, the [Commission] "is a body vested with broad discretionary powers"' as to the conduct of its hearings. *Elyria Telephone Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 444, 110 N.E.2d 59 (1953)." *Forest Hills Supermarket, Inc. d/b/a Konnis Family Foods v. The Cleveland Electric Illuminating Co.*, Case No. 18-785-EL-CSS, Opinion and Order ¶ 33 (Apr. 8, 2020). Here, the Attorney Examiners reasonably decided that OCC should not be permitted to convert a Staff fact witness, appearing to testify on behalf of Staff on limited procedural matters only, into an expert witness on the ultimate issues in these proceedings. The Commission should exercise the "very broad discretion" that Ohio law affords it "in the conduct of [its] hearings" (*In re Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan Pursuant to R.C. 4929.05 for an Accelerated Service Line Replacement Program*, Case No. 14-1622-GA-ALT, Opinion and Order ¶ 20 (Oct. 26, 2016)) and affirm the Attorney Examiners' ruling.

This is yet another petty, inconsequential disagreement that OCC now wishes to recast as unfair – when it had every opportunity to present such information through its own witness had it chose to do so.

K. The Attorney Examiner properly sustained objections to OCC's attempt to elicit testimony from Windle on AEP Ohio's collection of charges under the PPA Rider.

OCC's eleventh objection to the Attorney Examiners' evidentiary rulings, like the ninth and tenth objections, mischaracterizes the transcript and speculates regarding the testimony that OCC might have elicited had it been given the opportunity to ask questions on seemingly irrelevant topics. This time, OCC asserts that the Attorney Examiner prevented it from asking Windle "whether the $74.5 million in Coal Plant Charge costs collected by AEP Ohio in 2018-2019 were contrary to the best interest of ratepayers and inconsistent with state energy policy articulated by R.C. 4928.02." (OCC Initial Brief at 59.) In truth, OCC's counsel only asked Windle what "the concept of subsidizing generation units" meant to him. (Tr. VI at 1498-1499.) AEP Ohio's counsel objected that the question went beyond the scope of Windle's testimony, and the Attorney Examiner sustained. (*Id.* at 1499.) OCC's counsel then immediately proffered the opinion testimony that he believed Windle might have offered had OCC been permitted to ask questions that OCC never even tried to ask. (*See id.* at 1499-1500.)

For the same reasons discussed in the prior sections, the Attorney Examiners were justified in sustaining AEP Ohio's objection to this line of questioning. The questions that OCC sought to ask Windle are irrelevant to this proceeding – yet OCC already got to present these ideas through their own witnesses (over the Company's objection). As explained earlier in this Brief and in AEP Ohio's initial brief, the Commission has already approved the PPA Rider. Whether the collection of costs under the Rider is "in the best interest of ratepayers" or "inconsistent with state energy policy" are issues that were resolved in the *PPA Rider Case* and

subsequent proceedings. And the scope of Windle's testimony was limited to matters involving the management of the audit. Again, it was appropriate to limit Windle's cross-examination to the matters in his pre-filed testimony, and not to allow OCC to press Windle into serving as an expert witness on the legal and policy issues OCC attempted to raise through his cross-examination.

L. The Attorney Examiner properly sustained objections to OCC's repeated question to Staff witness Windle regarding the persons to whom his supervisor spoke about the Audit Report.

OCC's twelfth objection to the Attorney Examiners' evidentiary rulings asserts that the Attorney Examiners erred by not allowing Staff witness Windle to identify the persons to whom his supervisor, Sternisha, spoke regarding Windle's concerns about the draft audit report. (*See* OCC Initial Brief at 60.) Windle responded that he could not "say for certain who my boss speaks to" – *i.e.*, that the question called for speculation. (Tr. VI at 1514.) OCC nonetheless asked the question again, and Staff's counsel objected. (*Id.*) Attorney Examiner Parrot sustained that objection. (*Id.*) That was an appropriate ruling since Mr. Windle had already indicated the extent of his knowledge.

OCC asserts, without explanation, that the ruling "deprived OCC of the opportunity to obtain additional evidence supporting its case that the Auditor's original statement in the draft report established that, in her opinion, the [PPA Rider] costs were imprudent." (OCC Initial Brief at 60.) But OCC fails to explain the connection between the question its counsel wanted to ask a second time (to whom did Sternisha speak about Windle's concerns about the draft audit report) and the evidence OCC hoped to obtain (evidence that the Auditor actually believed the

PPA Rider costs were imprudent). The Attorney Examiners were justified in sustaining the objection to OCC's repeated question (*see* Ohio Adm.Code 4901-1-27(B)(7)(c)), and the Commission should affirm that ruling. After seven days of hearing and thousands of pages of exhibits and testimony, the fact that every single one of OCC's questions is not fully answered to its complete and total satisfaction is not a conspiracy, a scandal, need for alarm or a legal error that OCC can blame someone else for or spew rhetoric about; OCC had several months of discovery, audit responses, depositions and public record requests to gather all of the information nit desired to present in this hearing – and it did so freely and extensively and whatever evidentiary shortcomings exist belong at OCC's own doorstep.

M. The Attorney Examiner properly sustained objections to OCC's attempt to elicit testimony from Staff witness Windle interpreting the credit commitments discussed in the Commission's *PPA Rider Rehearing*.

OCC's thirteenth objection to the Attorney Examiners' evidentiary rulings asserts that the Attorney Examiners erred by not allowing OCC to question Staff witness Windle about the $15 million credit commitment that AEP Ohio made in the *PPA Rider* case. *See PPA Rider Rehearing* at ¶ 50. OCC asserts that Windle "had important knowledge of the rate credit feature of the [PPA Rider]" and that "[h]is testimony would have provided relevant information about whether and how the rate credit feature was addressed in the Audit Report." (OCC Initial Brief at 62.)

OCC's argument makes no sense. Whether the credit commitment in the Amended PPA Rider proposal applied to the audit period is a legal issue to be determined by reviewing the *PPA Rider Rehearing* and HB 6, not a factual dispute to be resolved through witness testimony or

cross examination. OCC provides its legal arguments on this point in Section III.A.8. of its Initial Brief, and AEP Ohio provides its response to those legal arguments above. *See* Section III.C *supra*. Further testimony, from a Staff fact witness, interpreting that Second Entry on Rehearing will not help the Commission resolve this legal dispute. Moreover, whether and how the Audit Report addressed the credit commitment can be determined by *reading* the Audit Report. For that matter, it can also be determined by reading the hearing transcript. Kroger's counsel asked the Auditor whether LEI "look[ed] at any docket or any entries that imposed obligations on AEP Ohio to make certain credits to the PPA Rider[,]" and the Auditor responded: "That was out of scope, so, no, we did not." (Tr. II at 363.) No conceivable purpose would be served by re-opening the hearing to allow additional questioning on this point. The Commission should affirm the Attorney Examiner's ruling sustaining objections to OCC's questions about the credits.

N. The Attorney Examiner did not err by declining to take administrative notice of OVEC's FERC Form 1s for 2016 through 2019.

OCC's fourteenth objection to the Attorney Examiners' evidentiary rulings asserts that the Attorney Examiners erred by declining to take administrative notice of OVEC's FERC Form 1s for 2016 through 2019. OCC argues that AEP Ohio "promised to obtain PUCO pre-approval for significant capital expenditures at the OVEC plants" and that OCC needed the information from the FERC Form 1s to demonstrate that there were significant capital expenditures at the OVEC plants for which AEP Ohio failed to obtain pre-approval. (OCC Initial Brief at 62-64.)

As OCC likely knows, there is "neither an absolute right to nor prohibition against the commission's authority to take administrative notice. Each case has been resolved based on the

particular facts presented. * * * For purposes of [the Ohio Supreme Court's] review, the factors [it deems] significant include whether the complainant party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed. Moreover, prejudice must be shown before [the Court] will reverse an order of the commission." *Allen v. Pub. Util. Comm.*, 40 Ohio St. 3d 184, 185-186, 532 N.E.2d 1307 (1988). Thus, the fact that a different attorney examiner took administrative notice of a FERC Form 1 in a different case (*see* OCC Initial Brief at 62 n. 266) does not mean that the Attorney Examiners were required to take administrative notice of four of OVEC's FERC Form 1's in this case.

Here, OCC failed to demonstrate that AEP Ohio had prior knowledge of, or an adequate opportunity to rebut, the facts that OCC would have had the Commission administratively notice from the FERC Form 1s. To the contrary; OCC circulated these FERC Form 1s as part of a "data dump of over a thousand pages before the last scheduled day of the hearing." (Tr. VI at 1605-1606 (Nourse).) Nor has OCC demonstrated any prejudice from the Attorney Examiner's ruling. The "budgeted and actual costs of OVEC's capital projects in 2018 and 2019" (the audit period in these proceedings) are set out in Confidential Figures 51 and 52 of the Audit Report. (*See* Staff Exhibit 1A at 92-93.) OCC has not explained why it could not have relied on that confidential capital project information in the Audit Report. Regardless, OCC ultimately supports its legal arguments on this point by referencing information on OVEC's capital expenditures in 2019 from OVEC's 2020 Annual Report. (*See* OCC Initial Brief at 29, citing OCC Exhibit 21 at Attachment MPH-2 at 8.) OCC has not explained why its inability to rely on the FERC Form 1s *as well* prejudiced its ability to make its case. Once again, OCC attempts to

blame someone else for its own lack of planning and effort, since it had the opportunity to present such pertinent information through its own witnesses.

Because OCC cannot demonstrate that it gave AEP Ohio prior notice of and the opportunity to respond to the capital expenditure information it intended to take from the FERC Form 1s, and also cannot demonstrate prejudice from the Attorney Examiners' ruling declining to take administrative notice of those forms, the Commission should affirm the Attorney Examiners' ruling.

O. The Attorney Examiner properly sustained an objection to OCC's question to Staff witness Windle regarding AEP Ohio's obligation to monitor the PPA Rider charges and mitigate costs in 2018.

OCC's fifteenth objection to the Attorney Examiners' evidentiary rulings asserts that OCC should have been permitted to ask Staff witness Windle "whether AEP Ohio should have monitored the performance of the rider and taken action to mitigate costs in 2018[,]" such as "seeking approval to terminate the Coal Plant Charge or conducting a competitive bidding process to obtain other offers for a financial hedge to replace the OVEC plants." (OCC Initial Brief at 64.) OCC asserts that this line of questioning was appropriate because "Mr. Windle was the Staff witness in charge of the audit's scope." (*Id.* at 65, citing Staff Ex. 3 at 3.)

Needless to say, Windle was not "in charge of the audit's scope." The scope of the audit was set out in the Commission's Request for Proposal. And Windle's pre-filed testimony says nothing different. That testimony simply says that Staff's duty was "to ensure the Auditor fulfilled the terms of the contract and adhered to the scope of the audit." (Staff Exhibit 3 at 3.) And it also says that it was Windle's "understanding * * * that questions as to whether there

should be a Rider or the cost benefit metrics of the OVEC plants were litigated and resolved in Case No. 14-1693-EL-SSO and are outside of the scope of this audit." (*Id.* at 7.) Moreover, CC's viewpoint on this issue is based on a misguided interpretation/application of the PPA Rider Order. *See* Section III.B, *supra*.

That aside, "whether AEP Ohio should have monitored the performance of the rider and taken action to mitigate costs in 2018" is not a question for which Windle's responses would have provided "relevant information." (OCC's Initial Brief at 65.) It is a legal question, grounded in the language of the *PPA Rider Order* and the *PPA Rider Rehearing*, not a factual dispute And OCC, in the first half of its post-hearing brief, presents its legal argument on this point. (*See id.* at 30-32.) Further testimony on this issue from Staff's fact witness would not have been, and would not be, helpful to the Commission. The Commission should deny OCC's request to re-open the evidentiary hearing to elicit testimony from Staff's fact witness on this purely legal argument.

P. The Attorney Examiner properly sustained objections to OCC's questions to Staff witness Windle regarding whether the prudency audit included analyzing whether the PPA Rider acted as a financial hedge.

OCC's sixteenth objection to the Attorney Examiners' evidentiary rulings asserts that OCC should have been permitted to ask Staff witness Windle whether the prudency audit "should have included a review of how the [PPA Rider] functioned as a financial hedge." (OCC Initial Brief at 66.) OCC further asserts that Windle's "testimony would have provided relevant information about whether and how this feature was addressed in the Audit Report." (*Id.*)

As with so many of OCC's evidentiary objections, OCC has mischaracterized the transcript. OCC asked Windle whether "the RFP said that the audit had to be conducted in conjunction or in compliance with this March 31, 2016, Order" in the *PPA Rider* case. (Tr. VI at 1636.) Windle answered the question affirmatively. (*See id.*) OCC then followed up, asking whether the *PPA Rider Order*'s reference to bill credits "over the life of the rider" meant that it was "important for the audit to examine whether the PPA Rider was resulting in those credits?" (*Id.* at 1637.) Windle answered that question too, stating his view that "if that was something to be examined directly, the Commission would have said so" in the RFP. (*Id.* at 1638.) Sometime later, OCC's counsel asked Windle whether it was "important for the audit to review whether [the PPA Rider] was acting as a financial hedge" given that the *PPA Rider Order* also mentioned "financial hedge." (Tr. VI at 1677.) Windle answered, as before, that the RFP did not include "specific language * * * where the auditor was requested to look to see if an adequate financial hedge is being demonstrated, whatever that means." (*Id.* at 1677-1678.) When OCC's counsel asked Windle "again" to confirm that the RFP said it was "to be conducted in compliance with the March 31, 2016, Order," AEP Ohio and Staff then objected that the question was "asked and answered," and Attorney Examiner Parrot sustained the objection. (*See id.* at 1678-1679.) The Attorney Examiner was correct to do so. The question *had* been asked and answered.

The Commission also did not need further testimony from Windle to determine "whether and how [the financial hedge issue] was addressed in the Audit Report." (OCC Initial Brief at 66.) The Auditor had previously testified that LEI "didn't think about that one way or the other." (Tr. I at 166; *see also* Tr. II at 379 ("We didn't examine hedging.").) Because OCC's question

was repetitious and Windle's testimony on this point would have been cumulative, the Attorney Examiner was correct to sustain the objections to OCC's question. *See* Ohio Adm.Code 4901-1-27(B)(7)(c) (authorizing the attorney examiner to "[t]ake such actions as are necessary to * * * [p]revent argumentative, repetitious, cumulative, or irrelevant cross-examination."). Further, as demonstrated above, OCC's concept of confirming that the PPA Rider acted as a financial hedge during the audit report is a collateral attack on the PPA Rider Order – which is another reason that it need not be further explored in the evidentiary record. *See* Section III.B, *supra*; AEP Ohio Initial Br. at 38-42.

Q. The Attorney Examiner properly sustained objections to OCC's attempt to elicit testimony from Staff witness Windle regarding coal plant retirements after the audit period.

OCC's seventeenth objection to the Attorney Examiners' evidentiary rulings asserts that OCC should have been permitted to ask Staff witness Windle regarding a purported "wave of early retirements of coal plants during the past two years" (*i.e.*, between 2020 and 2022) "due to the high cost of complying with new environmental regulations." (OCC Initial Brief at 66-67.) For many of the same reasons provided above, OCC's question was improper and Attorney Examiner Parrot was correct to sustain the objections to that question. Windle was a fact witness, not an expert witness, and the topic was well beyond the scope of his testimony. His limited pre-filed testimony said nothing about coal plant retirements. And coal plant retirements *after* the audit period are not relevant to the prudence of AEP Ohio's actions *during* the audit period. For all of these reasons, the Attorney Examiners were justified in sustaining Staff and AEP Ohio's objections to this question.

R. The Attorney Examiner did not prevent OCC from asking Staff witness Windle about Christopher's comments about the "tone" of the draft audit report.

OCC's eighteenth objection to the Attorney Examiners' evidentiary rulings asserts that the Attorney Examiner prevented Staff witness Windle from testifying "why, knowing the facts as they existed at the time of the audit, he did not ask the Auditor to adopt a more critical tone" in her report. (OCC Initial Brief at 68, citing Tr. VI at 1697-1698.) OCC asserts that it "had a right to cross-examine Mr. Windle on why Staff recommended that the Auditor adopt a milder tone." (OCC Initial Brief at 69.)

But OCC asked that *exact* question – "what * * * was the reason you decided that [a] milder tone and intensity was needed?" – and Windle answered it. (*See* Tr. VI at 1695.) The question that Windle did not answer, because the Attorney Examiner sustained Staff's objection to it, was this one: "given the facts and circumstances that we knew as of 2020 in September when *you were preparing the audit report*, why didn't those factors lead you to conclude that there should have been stronger and more critical tone and intensity based on the Company's inaction?" (*Id.* at 1697 (emphasis added).) And the transcript makes clear that Staff objected to that question because "Windle did not prepare the audit report. He *oversaw* the preparation of the audit report." (*Id.* at 1698 (emphasis added).) Attorney Examiner Parrot correctly sustained that objection, and the Commission should affirm.

S. The Attorney Examiner properly sustained Staff's objection when OCC's counsel asked a question that assumed, without foundation in the testimony, that Staff

witness Windle had advised the Auditor to add references to fuel diversity and jobs to the Audit Report.

OCC's nineteenth and final objection to the Attorney Examiners' evidentiary rulings fails to cite the specific ruling that OCC is challenging. But, assuming it is the ruling in which Attorney Examiner Parrot sustained an objection to OCC's question to Staff witness Windle at page 1709 of the transcript, OCC is *yet again* grossly mischaracterizing the transcript.

OCC's nineteenth objection has four parts. According to OCC, Windle testified at hearing that: (1) "he advised the Auditor to balance her statement [about 'keeping the plants running'] with the factors the PUCO relied on in approving the [PPA Rider]" and (2) Windle believed the Commission relied on "benefits such as jobs and fuel diversity provided by the OVEC plants" when it approved the PPA Rider. (OCC Initial Brief at 69, citing Tr. VI at 1702-1703.) OCC then asserts that (3) "[t]his led the Auditor" to remove her statement about "keeping the plants running" with a statement about the "jobs and fuel diversity benefits" from the OVEC plants. (OCC Initial Brief at 69.) Finally, OCC asserts that (4) the Commission did *not* rely on jobs or fuel diversity in approving the PPA Rider. (*Id.*, citing *PPA Rider Opinion* at 86.) OCC concludes that the Attorney Examiner erred when she prevented OCC from cross-examining about the fact that "he counseled the Auditor to change her conclusion by supplying her with incorrect information." (OCC Initial Brief at 70.)

Parts (1) and (2) of OCC's argument are supported by the transcript. (*See* Tr. VI at 1699.) But OCC cites no testimony that *connects* parts (1) and (2). In other words, there is no testimony suggesting that the Auditor mentioned jobs and fuel diversity in the Audit Report

because Windle believed the Commission had relied on those factors in approving the PPA Rider. But OCC never asked Windle whether Windle *told* the Auditor that the Commission had relied on jobs and fuel diversity benefits when it approved the PPA Rider. Instead, Windle testified that he "asked [the Auditor] to take into consideration the Commission's findings and orders" and that he expected "the auditor would go back and read through the Commission order and make sure that she properly characterized what the Commission made their decision on." (Tr. VI at 1702-1703; *see also id.* at 1709.) Nor is there any support for part (3) of OCC's argument. The Audit Report does not *assert* that the Commission relied on jobs and fuel diversity when it approved the PPA Rider. Instead, it says that "there may be other considerations, such as providing employment at the plants, or the plants' contributions to fuel diversity in the State, that outweigh the impact on ratepayers, which the *Ohio legislature* takes into consideration." (Staff Exhibit 1 at 9 (emphasis added).) And it is certainly true, as the Commission found, that the PPA Rider Stipulation as a whole contained extensive fuel diversity/renewable benefits, which was ultimately part of the OVEC-only PPA Rider bargain. PPA Rider Order at 77, 82-83; *See also* PPA Rider Stipulation (Ad. Noticed OCC Ex. 10) at Section III.A.3, III.I, III.F, etc.

In any case, Staff's counsel objected when OCC's counsel asked Windle, "But you said that your * * * suggestion to her was to add balance by considering factors of fuel diversity and jobs, right?" (Tr. VI at 1709.) Staff's counsel objected that the question "mischaracterizes the testimony," and Attorney Examiner Parrot sustained the objection. (*Id.*) That ruling was correct -- OCC's question *did* mischaracterize the testimony. The Commission should affirm that ruling.

VI. CONCLUSION

For the reasons provided above, AEP Ohio respectfully requests that the Commission adopt each of the Company's positions, as outlined above, as its decision in these proceedings.

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 *Ohio Power Company's Reply Brief* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 8th day of April, 2022, via e-mail.

/s/ Steven T. Nourse
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