

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)	
Reconciliation Rider of Duke Energy)	Case No. 20-167-EL-RDR
Ohio, Inc.)	

**INITIAL BRIEF
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

Duke's bailout for its Ohio Valley Electric Corporation ("OVEC") coal plants is being exposed as more of a hoax on consumers than the purported "hedge" for alleged consumer benefits. Proper ratemaking has been left by the wayside.

PUCO Auditor London Economics International, Inc. ("LEI") performed separate, but nearly simultaneous, audits of Duke's and AEP's management of the OVEC plants.¹ Auditor LEI completed the AEP Audit Report shortly before finishing the Duke Audit Report.²

In a telling revelation of the PUCO Staff's relationship with the industry it regulates, the Staff sent Auditor LEI feedback regarding the "tone and intensity" of two summary paragraphs in the AEP Audit Report.³ The PUCO Staff suggested that the Auditor should modify what was the most important sentence in the draft AEP Audit Report, because it conveyed an inappropriate "tone and intensity" for the report. The sentence was: "Therefore, keeping the plants running does not seem to be in the best

¹ Hearing Trans. Vol. II, p. 203:11-19.

² *Id.*

³ Hearing Trans. Vol. II, p. 208:11-19.

interests of the ratepayers.”⁴ Consequently, Auditor LEI did not include this sentence in its Audit Report.⁵

In reality, Auditor LEI’s consumer-protection statement in the draft AEP Audit Report was the *understatement* of the year for OVEC auditing. In their upcoming decision for this case, the PUCO Commissioners should agree with Auditor LEI’s draft statement that the OVEC coal plants are not in consumers’ “best interests.”

It is said that “[t]he good regulator *embraces the public interest*....”⁶ Here the PUCO should embrace the public interest for protection of over 700,000 Duke Energy Ohio (“Duke”) consumers. The PUCO should protect consumers by disallowing \$24.6 million in Duke’s 2019 subsidy charges to consumers for the bailout of two dirty, uneconomic 1950s-era coal power plants. Duke is a part-owner of these outmoded coal plants, Clifty Creek in Indiana and Kyger Creek in Ohio, operated by OVEC.

This case is about the PUCO requiring a public bailout of these plants before the Ohio Legislature codified an even worse bailout in tainted House Bill 6 (“H.B. 6”) beginning in 2020. But even as former Chair Asim Haque joined other PUCO Commissioners in signing the bailout, he warned in a concurring opinion: “This should not be perceived as a blank check, and consumers should not be treated like a trust account.”⁷ And Commissioner Beth Trombold wrote that “Based on the forecasts submitted by the Company and evidence in the record, it is my clear expectation, just as it

⁴ Hearing Trans. Vol. II, p. 214:10-14.

⁵ *Id.*

⁶ J. Beecher, *The Prudent Regulator: Politics, Independence, Ethics, and the Public Interest*, 29 Energy L.J. 577 (2008) (Emphasis in original).

⁷ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Purchase Power Agreement*, PUCO Case 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Chairman Haque at p. 5 (March 31, 2016).

is Commissioner Haque's, that the PPA rider approved today will result in a credit (i.e. benefit) to ratepayers over the next eight years."⁸

The OVEC plants are old, inefficient, and costly to maintain and operate.⁹ They are uncompetitive in the market, due in large part to the entry and abundance of new renewable generation and gas facilities that are coming online.¹⁰ In 2019, OVEC's costs for energy and capacity were significantly higher than market prices for energy and capacity. These high costs were passed on to the twelve companies that own OVEC, including Duke which owns a nine percent (9.0%) share in OVEC.¹¹ More specifically, in 2019, Duke Energy incurred \$24,635,143.47 in above-market costs for power from OVEC plants and passed these incredible and unnecessary costs on to its Ohio customers. This was neither prudent nor in the consumers' best interest.

The PUCO selected LEI to conduct an independent audit of the Duke Energy's Purchase Power Agreement Rider for the period of January 1, 2019, through December 31, 2019.¹² The final Audit Report for this proceeding was issued on October 26, 2021 and detailed LEI's review of costs associated with Duke's contractual entitlement to a share of the electrical output of generating units owned by OVEC.

Despite being given clear direction by the PUCO – to establish the prudence of all costs and sales flowing through the Rider – LEI did not hold Duke to this threshold. Instead, the Auditor only determined the energy company's "processes, procedures, and

⁸ *Id.*, Concurring Opinion of Commissioner M. Beth Trombold at 2.

⁹ OCC Ex. 2 (Glick Direct) at 10.

¹⁰ *Id.*

¹¹ *Id.* at 16.

¹² Entry (April 8, 2020).

oversight were mostly adequate”.¹³ The PUCO should hire another auditor to conduct an audit with a proper scope for consumer protection. Duke’s “mostly adequate” actions do not justify charging consumers \$24.6 million in above-market costs.

Duke’s \$24.6 million charge to consumers is based on Duke’s flawed assumption that, “over a period of time[,] the revenues received from operations in the PJM Energy and Ancillary Services Markets are generally greater than the variable costs necessary to run the units.”¹⁴

But the promise of a new day and lower variable costs cannot be used to ignore what happened in 2019. The PUCO cannot allow Duke to kick the can down the road, waiting for the day this “hedge” will eventually save Ohio consumers money.

OCC presented evidence that Duke’s charges to consumers for the coal plant bailout in 2019 were imprudent and that operation of the OVEC plants is not in the best interest of consumers.¹⁵ Based on the evidence, the PUCO should disallow Duke’s charges of \$24.6 million for the 2019 audit period and should order Duke to return the money to consumers. The PUCO should give Duke’s consumers the benefit of Ohio’s 1999 electric deregulation law that favors markets, not bailouts and subsidies for monopolies like Duke.

¹³ Audit Report, at 9.

¹⁴ Duke Ex. 1 (Swez Direct) at p. 8:19.

¹⁵ OCC Ex. 2 (Glick Direct) at 1-14.

II. BACKGROUND

A. The OVEC Plants

OVEC is jointly owned by twelve utilities in Ohio, Indiana, Michigan, Kentucky, West Virginia, and Virginia. OVEC owns two 1950s-era, coal-fired power plants (“OVEC plants”): (1) Kyger Creek, a five-unit, 1,086 MW plant in Gallia County, Ohio, and (2) Clifty Creek, a six-unit, 1,303 MW plant, in Jefferson County, Indiana.¹⁶ The owners of OVEC, including Duke, receive the output from the OVEC plants in accordance with the terms of the Inter-Company Power Agreement (“OVEC Agreement”).¹⁷ Each participant receives output in accordance with its ownership share, and Duke has a 9% ownership share among the OVEC participants.¹⁸ Duke is also responsible for 9% of the OVEC plants’ fixed and variable costs.¹⁹

The output from OVEC *does not serve Duke’s consumers in Ohio*.²⁰ Rather, Duke sells its portion of the OVEC output into the market through PJM Interconnection, LLC (“PJM”), and Duke receives the revenues.²¹ The difference between the OVEC costs and the market price received from PJM is passed on consumers as either a charge or a credit.²² Notably, during the five years that the subsidy arrangement has been in place, there has never been an annual credit to consumers.²³ Ohio consumers are financially

¹⁶ OCC Ex. 2 (Glick Direct) at 8.

¹⁷ OCC Ex. 2 (Glick Direct) at 9.

¹⁸ OCC Ex. 2 (Glick Direct) at 10.

¹⁹ OCC Ex. 2 (Glick Direct) at 10.

²⁰ OCC Ex. 2 (Glick Direct) at 14.

²¹ OCC Ex. 2 (Glick Direct) at 14.

²² OCC Ex. 2 (Glick Direct) at 14.

²³ OCC Ex. 2 (Glick Direct) at 17

harmful by Duke and its OVEC plants, not to mention harm from the coal-fired air pollution.

B. Duke's Inaptly-Named "Price Stabilization Rider" and Audit

On June 1, 2017, Duke filed its fourth and current ESP application ("ESP IV") that, among other things, proposed an extension of the inaptly-named "Price Stabilization Rider" ("PSR") beyond May 31, 2019.²⁴ The name of Duke's rider itself forfeits truth in ratemaking for Ohio consumers.

This ratemaking relates to a Duke "electric security plan," another misnomer in regulatory naming. In ESP IV, the PUCO authorized Duke to charge or credit consumers the net proceeds of selling OVEC energy and capacity into the PJM marketplace and OVEC costs through the Price Stabilization Rider.²⁵

The Price Stabilization Rider is subject to quarterly filings starting with the first billing cycle of April 2019.²⁶ Additionally, the PUCO provided for an annual audit "*to establish the prudence of all costs and sales flowing through the PSR [Price Stabilization Rider] and to demonstrate that the Company made reasonable efforts to transfer its contractual entitlement under the Inter-Company Power Agreement.*"²⁷ To assist the PUCO with the audit of Duke's Price Stabilization Rider for the period of January 1, 2019, through December 31, 2019, the PUCO directed its Staff to issue a request for

²⁴ Entry (February 13, 2020) at ¶ 6.

²⁵ *Id.*

²⁶ *Id.* at ¶ 7.

²⁷ *Id.* (emphasis added).

proposal (“RFP”) for audit services.²⁸ Simply stated, the Audit was to be a performance and prudence audit for the 2019 calendar year.²⁹

The Auditor’s task was to review the prudence of unit scheduling and bidding of energy into PJM-administered wholesale markets, including day-ahead and real-time energy markets.³⁰ By its very definition, “prudence” means marked by wisdom, shrewd in the management of practical matters, even frugal.³¹ Accordingly, the Auditor had to review Duke’s decisions regarding OVEC and decide whether they were prudent or not prudent.³²

The Auditor also was tasked with determining whether all of OVEC’s fuel (i.e., coal) and variable operations and maintenance (“O&M”) related expenses were prudently incurred and properly allocated to Duke.³³ The Auditor’s investigation also needed to include a comparison between incurred fuel costs and market prices of fuel to evaluate the reasonableness of fuel expenses during the audit period³⁴ and make certain they were prudently incurred.³⁵ The Auditor also was supposed to ensure that only prudently incurred costs were included in charges to consumers, and that any and all costs that have been deemed to be ineligible for recovery by the PUCO were appropriately excluded.³⁶

²⁸ *Id.*

²⁹ Hearing Trans. Vol. II, p. 24:14 and 17.

³⁰ *Id.* at p. 24:23 and p. 25:1.

³¹ Merriam-Webster, Collegiate Dictionary, 2022.

³² Hearing Trans. Vol. II, p. 24:8.

³³ February 13, 200 Entry, Case No. 20-167-EL-RDR at RFP, p. 6.

³⁴ *Id.*

³⁵ Hearing Trans. Vol. II, p. 93:3.

³⁶ *Id.*

In other words, the purpose and scope of the audit is built upon the “prudence” standard specified by the PUCO³⁷. It’s not founded on terms like “fairly prudent”³⁸ or “mostly adequate” as cited by the Auditor.³⁹

Duke’s operations were to be evaluated according to whether they rose to the level of the PUCO’s prudence standard. But Auditor London instead lowered the prudence standard to accommodate Duke’s operations. In response, the PUCO should hire a different auditor to conduct the audit that the PUCO actually arranged for consumer protection.

III. RECOMMENDATIONS

In 2019, Duke charged Ohio consumers \$24,635,143.47 in subsidies under the so-called Price Stabilization Rider. Duke’s \$24.6 million in above-market energy charges to consumers in 2019 were imprudent. The operation of the OVEC plants was not in the best interest of consumers.

The PUCO should protect consumers by disallowing the \$24.6 million in Duke’s charges to consumers for the 2019 audit period.⁴⁰ The PUCO should also protect consumers by requiring Duke to provide documentation of the daily unit commitment decisions used for the OVEC plants.

³⁷ Entry (February 13, 2020) at ¶ 7.

³⁸ Hearing Trans. Vol. II, p. 5:17.

³⁹ *Id.* at 95:21.

⁴⁰ OCC Ex. 2 (Glick Direct) at p. 7:19.

A. Duke's operation of the OVEC units and management of their output during the 2019 audit period was imprudent. The PUCO should disallow Duke's \$24.6 million in charges to consumers during the audit period.

According to the Audit Report, Duke passed along \$24.6 million to its Ohio consumers.⁴¹ The PUCO should disallow the entire \$24.6 million in above-market energy and capacity prices related to the OVEC plants for 2019. And the PUCO should find that Duke wrongly included these costs in the Price Stabilization Rider for charging to consumers. Likewise, the PUCO should find the OVEC plants were uneconomically committed, and thus incurred additional excess costs under the Price Stabilization Rider.⁴²

Under the so-called Price Stabilization Rider, Duke provides consumers with the net costs or net revenues associated with Duke Energy's ownership share of the OVEC plants and its entitlement to nine percent (9%) of OVEC's output under the OVEC Agreement.⁴³ This means if OVEC's costs exceed market revenues in a given year, Duke's consumers pay the subsidy for the difference.⁴⁴

The false promise is that the Price Stabilization Rider should provide value and savings to Duke customers. But in practice it does not. Consumers need the public interest, not utility public relations, about these coal plant subsidies.

⁴¹ See Staff Exhibit 1, p. 26, Figure 8.

⁴² OCC Ex. 2 (Glick Direct) at pp. 37-48.

⁴³ OCC Ex. 2 (Glick Direct) at p. 11:7.

⁴⁴ *Id.* at 11:10.

In fact, as shown in the following chart (which represents OVEC's total output for each year), OVEC's costs were consistently above market prices in the four years preceding the 2019 audit year.⁴⁵

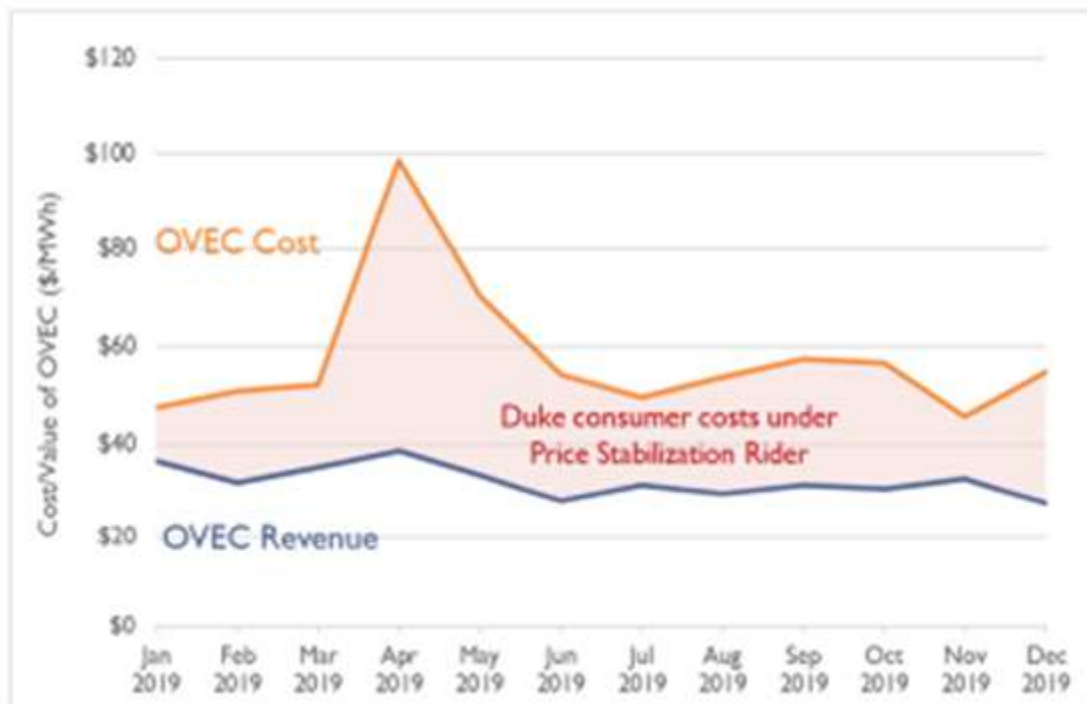
		Total OVEC		Energy and capacity market value*	Total above-market costs
	MWh Electricity	Charges (\$Million)	OVEC (\$/MWh)	(\$/MWh)	(\$Million)
2015	8,681,829	\$559.1	\$64.40	\$47.02	\$150.84
2016	9,745,956	\$571.7	\$58.66	\$38.50	\$196.50
2017	11,724,662	\$636.3	\$54.27	\$37.85	\$192.47
2018	11,863,505	\$644.1	\$54.29	\$44.28	\$118.75
2019	11,234,353	\$640.8	\$57.04	\$35.91	\$237.36

OCC witness Ms. Glick testified that in 2019, Duke collected \$24.6 million in excess costs under the Price Stabilization Rider while providing consumers the needed value.⁴⁶ Duke charged customers substantial above-market subsidies under the Price Stabilization Rider.⁴⁷ That should not be a surprise.

⁴⁵ *Id.* at 17.

⁴⁶ OCC Ex. 2 (Glick Direct) at p. 17:19.

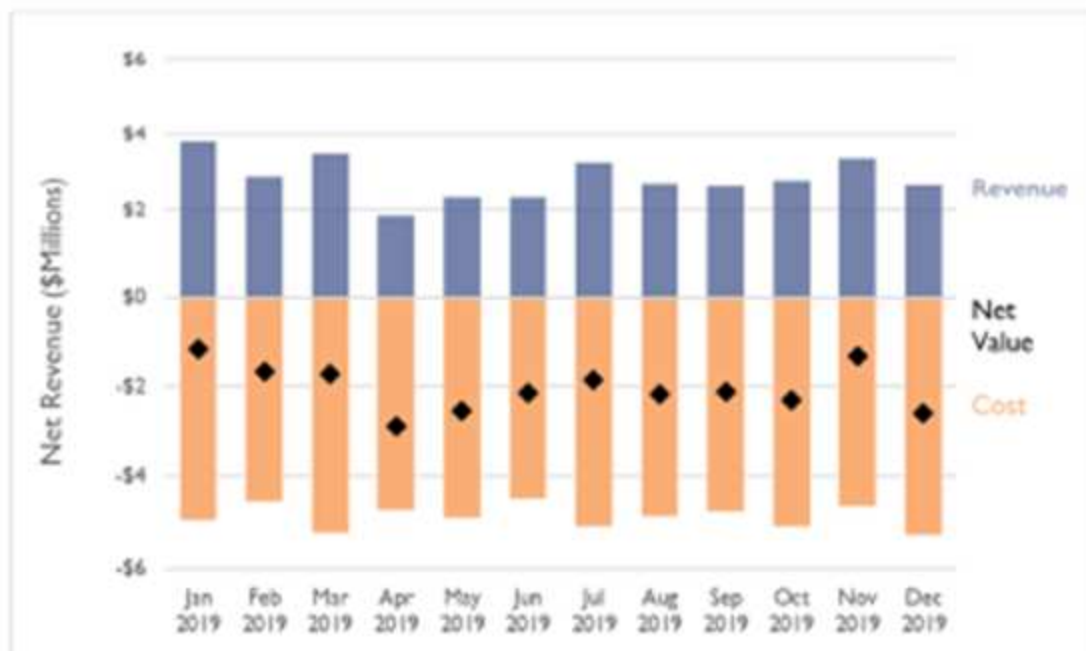
⁴⁷ *Id.* at pp. 17 – 18.



When looking at Duke's share of the 2019 monthly OVEC billing versus Duke's share of the revenue that OVEC obtained from selling the energy, ancillary services capacity into PJM, one thing is clear. In every month, Duke was billed substantially more by OVEC for the costs to operate the plants than the PJM market price for equivalent levels of services paid in revenues to Duke.⁴⁸

Duke then turned around and charged its consumers for its OVEC losses, under the Price Stabilization Rider. Lucky for Duke, it wins; consumers lose.

⁴⁸ OCC Ex. 2 (Glick Direct) at 19.



The bottom line (literally) is this. Duke’s own data show that the Price Stabilization Rider cost Duke’s customers \$24.6 million more than the market price for the same amount of energy, capacity, and ancillary services.⁴⁹

B. Duke’s decision to run the OVEC plants on a “must-run” basis was imprudent.

OCC witness Mr. Haugh testified that Duke and OVEC imprudently committed the OVEC plants into the PJM Day-Ahead Energy Market on a “must run” basis.⁵⁰ Must-run means that the OVEC plants were committed to run regardless of whether the plants’ operating costs exceeded the expected PJM revenues. That means the plants are a money loser and burden on consumers, for Duke’s benefit.

This violated good utility practice, where operators do a daily financial analysis of the projected costs and projected revenues for operating their plants before deciding

⁴⁹ *Id.* at 20:10.

⁵⁰ OCC Ex. 1 (Haugh Direct) at 20-23.

whether to commit the plant as must-run or economic. As a result, OVEC operated the plants during some months when the plants' revenue did not even cover variable operating costs. The PUCO should disallow the \$24.6 million in above market costs charged to consumers. The management practices leading to the charges and the charges themselves are unreasonable and imprudent.⁵¹

Generators, like the OVEC plants, operating within the PJM market generally commit their available units as either economic or must-run.⁵² For units committed economically, the market operator (PJM) has the responsibility for unit commitment and dispatch decisions. Those decisions prioritize reliability for the system as a whole, but then select plants to commit and dispatch based on short-term economics to ensure consumers are served by the lowest-cost resources available to the system.⁵³ A plant committed as “economic” will operate only if it is the least-cost option available to the market (*i.e.*, has a lower average commitment period cost than other resources available at the time).⁵⁴

However, a unit designated as “must-run” will operate with a power output no less than its minimum operating level.⁵⁵ The unit receives market revenue (and incurs variable operational costs), but does not set the market price of energy. If the market price of energy falls below its operational cost, a must-run unit will not turn off and can incur losses that a regulated utility often seeks to collect from consumers.⁵⁶

⁵¹ OCC Ex. 1 (Haugh Direct) at 23.

⁵² OCC Ex. 2 (Glick Direct) at 19.

⁵³ OCC Ex. 2 (Glick Direct) at 39.

⁵⁴ *Id.*

⁵⁵ *Id.* at 40.

⁵⁶ *Id.* at 40.

Duke is a Sponsoring Company of OVEC, and as such, it has one member on the Board of Directors and is allowed to appoint one member to OVEC's Operating Committee.⁵⁷ In 2019, OVEC (and consequently Duke) did not conduct analysis on a daily basis to inform its unit commitment process.⁵⁸ Instead, the available OVEC plants (except Clifty Creek Unit 6 during summer ozone non-attainment periods) were committed into the PJM day-ahead market with a "must-run" status at all times. An exception is when units were unavailable due to scheduled maintenance or forced outages regardless of economics.⁵⁹

Adequate effort was lacking to reduce⁶⁰ the costs. Instead Duke charged Ohio consumers \$24.6 million in above-market costs. If only everyone could have a "Price Stability Rider" in their lives.

Duke's approach to committing its plants to a "must-run" status was not even supported by its own data. In 2019, Duke Energy prepared a daily profit-and-loss report that showed a 21-day forecast of OVEC unit participation in the PJM Day-Ahead Energy Market.⁶¹ These three hundred twenty-five (325) profit-and-loss forecast sheets clearly showed there were extended periods of time when the plants were projected to experience consistent losses.⁶² In fact, Duke had negative margins during five of the twelve calendar months.⁶³

⁵⁷ *Id.* at 41.

⁵⁸ *Id.* at 42.

⁵⁹ *Id.*; *see also* OCC Ex. 1 (Haugh Direct) at 21.

⁶⁰ OCC Ex. 2 (Glick Direct) at 47 – 48.

⁶¹ *Id.* at 43; *see also Id.* at 44.

⁶² *Id.* at 44.

⁶³ *Id.* at 45.

OVEC's (and subsequently Duke's) above-market costs in 2019 did not result from any unusual conditions.⁶⁴ OVEC's above-market costs for 2015-2018 show that losses from the competitive market were foreseeable in 2019.⁶⁵ In practice, the Price Stabilization Rider operates as a government-sanctioned device for subsidizing Ohio utilities, like Duke. Consumers have become the "blank check" that former Chair Haque warned about.

From 2010 to 2019, five hundred forty-six (546) coal-fired power plants nationwide closed.⁶⁶ This was mostly because of the stagnant demand and increasing competition from lower-priced natural gas-fired power plants.⁶⁷

Duke could have avoided these costs if it only shut down the plants during these months, consistent with its own profit-and-loss analysis reports.⁶⁸ However, Duke chose to not contact OVEC and request a change in its Day-Ahead scheduling decisions or practice.⁶⁹ Duke did not attempt to limit the uneconomic commitment practices which were driving the high variable costs at OVEC.⁷⁰ That is all classic behavior of a utility monopoly that the people's government (PUCO) left undisciplined by the market for consumer protection.

Duke did not take planning steps to limit costs passed on to consumers through the Price Stabilization Rider by:

⁶⁴ OCC. Ex. 1 (Haque Direct) at 11.

⁶⁵ *Id.* at 11.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.*

⁶⁸ OCC Ex. 2 (Glick Direct) at 45.

⁶⁹ *Id.* at 45.

⁷⁰ *Id.* at 48.

1. Attempting to renegotiate or terminate the OVEC Agreement;
2. Conducting a retirement analysis that evaluated the going-forward cost to Duke's consumers of the OVEC Agreement;
3. Evaluating the cost of the option of early termination of the OVEC Agreement; or
4. Evaluating the economics of operational changes at the OVEC plants, including seasonal operation and lower each unit's minimum operating level.⁷¹

If Duke acted prudently with respect to the OVEC plants in 2019, it would (and should) have assured that the plants did not operate at a loss relative to expected PJM revenues or other supply alternatives available in the market.⁷²

Simply stated, Duke failed to manage costs incurred at the OVEC units.⁷³ Duke did not attempt to reduce, or even minimize, its uneconomic commitment practices.⁷⁴ Duke never re-evaluated the prudence of using the OVEC units as a hedge on the SSO price.⁷⁵ Duke did not act on the knowledge of its negative margins and failed to exercise oversight over unit operations. Duke failed to act in consumers' best interest even though its own data supported moving away from a must-run commitment strategy.

In short, Duke failed to prudently manage the OVEC plants because it can charge Ohio consumers for OVEC costs under the Price Stabilization Rider. Ohio consumers paid the price for Duke's and OVEC's decision to pay more for electricity than they otherwise would have paid if an economic commitment strategy was used.⁷⁶

⁷¹ *Id.* at 48 – 49.

⁷² *Id.* at 47.

⁷³ OCC Ex. 2 (Glick Direct) at 48.

⁷⁴ *Id.*

⁷⁵ *Id.* at 49.

⁷⁶ OCC Ex. 1 (Haugh Direct) at 22.

The total cost for electricity produced by the OVEC plants was \$237 million above the market price for electricity in 2019 (of which Duke's share was \$24.6 million).⁷⁷ Duke passed this loss on to Ohio consumers.

The PUCO should disallow the entire \$24.6 million in above-market electricity costs because running the OVEC plants was not reasonable, not prudent, and not in the consumers' best interests.⁷⁸ A contrary PUCO decision will just add to the undisciplined and anti-consumer behavior of the OVEC owners.⁷⁹

C. The Audit Report does not support a finding of prudence.

Duke's operations were to be evaluated according to whether they rose to the level of the PUCO's prudence standard. But Auditor London instead lowered the prudence standard to accommodate Duke's operations. In response, the PUCO should hire a different auditor to conduct the audit that the PUCO actually arranged for consumer protection.

The Auditor LEI understood it was supposed to "establish the prudence of all the costs and sales flowing through the PSR, and to investigate whether [Duke's] actions were in the best interest of [consumers]."⁸⁰ Despite this, LEI did not measure Duke's acts or omissions by the yardstick of prudence. Instead, LEI concluded the following:

Overall, LEI found that [Duke Energy's] *processes, procedures, and oversight were mostly adequate* and consistent with good utility practice, given that the ICPA is in place and customers will be charged for the cost of the plants until at least May 2024 * * * [T]he OVEC plants

⁷⁷ *Id.* at p. 10.

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 10.

⁸⁰ *Id.* at p. 8.

cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets.⁸¹

For reasons never discussed, Auditor LEI gave Duke the benefit of the doubt by considering prudence “as a continuum,”⁸² a sliding scale, so to speak, with large areas of gray to hide in. According to Auditor LEI, in 2019 OVEC power cost consumers about \$25/MWh more than energy and capacity purchased in the PJM market!⁸³

For Duke’s Ohio consumers, this translated into \$24.6 million in additional (but unnecessary) energy costs.⁸⁴ Although Auditor LEI found that Duke’s and OVEC’s practices were “mostly” adequate, Duke acted imprudently by not following profit-and-loss reports and not taking action to stem the bleeding from OVEC’s massive losses.

Auditor LEI acknowledged the practice of self-committing coal plants has been under discussion among stakeholders in the United States because “self-commitment of coal-fired power plants is costing consumers millions of dollars annually across wholesale power markets.”⁸⁵ Nevertheless, the Auditor found Duke’s acts “mostly adequate.”

Here, that meant a loss every month in 2019, except January.⁸⁶ Despite being “out of the money” month after month, the Auditor LEI found no evidence that Duke ever brought these dire figures to the attention of anyone on the OVEC Operating

⁸¹ *Id.* at p. 9 (emphasis added).

⁸² Hearing Trans. Vol. II, p. 31:22.

⁸³ Staff Exhibit 1, p. 17.

⁸⁴ *Id.* at p. 26; *see also* Hearing Trans. Vol. II, p. 45:20.

⁸⁵ Staff Exhibit 1, p. 18.

⁸⁶ *Id.* at Figure 8; *see also* Hearing Trans. Vol. II, p. 49:18.

Committee.⁸⁷ Duke used a daily profit-and-loss report for its other plants so that it wouldn't designate its other plants as must-run if the plants were expected to lose money.⁸⁸ Duke didn't use daily profit-and-loss reports for the OVEC plants, or require OVEC to do so.⁸⁹ The Auditor acknowledged that this "probably was not" in the consumers' best interest for a "regulated utility [Duke] that . . . provide[s] favorable treatment to its affiliates over a provision that would lower costs to its customers. "⁹⁰

The Auditor found other troubling issues with Duke's operations in 2019, but seemingly avoided or excused it. For example, the Auditor noted the Clifty Creek Plant was purchasing coal at seventeen percent (17%) more than the spot prices from the S&P Global Market Intelligence (f.n.a. SNL).⁹¹ The Auditor also noticed Duke performed no fuel procurement audits in 2019.⁹² The Auditor also mentioned the number of employees at Kyger Creek was ten percent (10%) higher than the average for coal plants in PJM.⁹³ At Clifty Creek, it was twelve percent (12%) higher.⁹⁴

For Duke's Ohio customers, this translated into \$24.6 million in additional (but unnecessary) energy costs. The PUCO should deny Duke recovery of the entire \$24.6 million charged to Ohio consumers under the Price Stabilization Rider.

⁸⁷ Hearing Trans. Vol. II, p. 53:5.

⁸⁸ OCC Ex. 2 (Glick Direct) at 43 – 44.

⁸⁹ OCC Ex. 1 (Haugh Direct) at 20-23.

⁹⁰ *Id.* at 91:24.

⁹¹ Staff Exhibit 1, p. 63.

⁹² *Id.* at p. 71.

⁹³ *Id.* at p. 98.

⁹⁴ *Id.*

D. OCC Appeals Attorney Examiner Mathew Sandor’s rulings under O.A.C. 4901-1-15(F) that struck portions of OCC witness Mike Haugh’s testimony and excluded from evidence a nearly identical draft AEP Audit Report showing language the PUCO Staff asked the Auditor to remove from its report stating that “keeping the plants running does not seem to be in the best interests of the ratepayers.”

The Attorney Examiner made two erroneous evidentiary rulings that violated OCC’s substantial rights. The first ruling struck parts of OCC witness Mike Haugh’s testimony discussing how PUCO Staff asked the Auditor to change language in a draft AEP Audit Report stating that “keeping the plants running does not seem to be in the best interests of the ratepayers.” The second ruling excluded from evidence the draft AEP Audit Report itself. Under Ohio Adm. Code 4901-1-15(F), OCC respectfully requests that the PUCO reverse these rulings and re-open the hearing to allow OCC to present the evidence that the Attorney Examiner excluded from the hearing.

A party may seek reversal of an Attorney Examiner’s ruling by “discussing the matter as a distinct issue in its initial brief....”⁹⁵ Below is a discussion of the two evidentiary rulings OCC seeks to be reversed. As required by the rule, OCC discusses each ruling separately and explains how the Attorney Examiner’s rulings violated OCC’s substantial rights.

Under Ohio R. Evid. 103(A), “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.” Here OCC’s substantial rights were affected because these evidentiary rulings go to a key issue – that the PUCO Staff asked the Auditor to change the draft AEP Audit Report (filed a

⁹⁵ Ohio Adm. Code 4901-1-15(F).

few weeks before the Duke Audit Report) to remove the conclusory statement that “keeping the plants running does not seem to be in the best interests of the ratepayers.”⁹⁶

OCC offers this as proof that the Auditor initially concluded that the OVEC costs were imprudent but did not include this statement in the Duke Audit Report. It is speculated this occurred because PUCO Staff asked the Auditor to omit it from the (nearly identical) AEP Audit Report filed a few weeks earlier. These rulings violated OCC’s substantial right to present evidence that Duke acted imprudently. The PUCO should re-open the hearing to allow OCC to obtain this evidence and to conduct reasonable follow-up questioning.

1. Attorney Examiner Sandor unreasonably and unlawfully granted a Motion to Strike portions of OCC Witness Haugh’s testimony.

The first ruling occurred when Attorney Examiner Mathew Sandor granted a Motion to Strike portions of the testimony of OCC witness Mike Haugh discussing PUCO Staff’s request to the Auditor in the AEP case to eliminate her statement that “keeping the plants running does not seem to be in the best interests of the ratepayers.”⁹⁷ The portions of Mr. Haugh’s testimony that were struck presented a detailed explanation of the communications between PUCO Staff and the Auditor, which OCC learned about through a public records request in the AEP case. Mr. Haugh also explained how PUCO Staff’s actions prejudiced consumers because the PUCO had ordered an “independent” audit but PUCO Staff interfered with the Auditor’s independence by asking her to modify her ultimate conclusion in the case – whether the plants were operated prudently.

⁹⁶ Hearing Trans. Vol. II, p. 214:10-14.

⁹⁷ Hearing Trans. Vol. III, p. 426:14 – 428:3.

2. Attorney Examiner Sandor unreasonably and unlawfully denied the admission of a copy of the draft AEP Audit Report into evidence.

The second ruling occurred when the Attorney Examiner precluded intervenors from introducing into evidence a draft copy of the AEP Audit Report containing the Auditor's statement that "keeping the plants running does not seem to be in the best interests of the ratepayers."⁹⁸ As noted earlier, the Auditor prepared the AEP and Duke Audit Reports at the same time and the summary section of the reports are essentially identical. She finished the AEP Audit Report shortly before the Duke Audit Report, so when preparing the Duke Audit Report, apparently she had already been coached-up by PUCO Staff that they didn't want her to conclude that the plants were operated imprudently.

The draft AEP Audit Report with the statement "keeping the plants running does not seem to be in the best interests of the ratepayers"⁹⁹ is the best evidence that the Auditor originally concluded it was imprudent to operate the plants as must-run at all times. The intervenors should have had the opportunity to present the draft AEP Audit Report containing the Auditor's original conclusion that the plants were operated imprudently.

These two evidentiary rulings violated OCC's substantial rights because they precluded OCC from introducing material evidence on the ultimate issue in the case. As a result, the PUCO should re-open the hearing to allow OCC to obtain this evidence and to conduct reasonable follow-up questioning.

⁹⁸ Hearing Trans. Vol. II, p. 214:10-14; Hearing Trans. Vol. II, p. 222:20 – 223:20.

⁹⁹ Hearing Trans. Vol. II, p. 214:10-14.

IV. CONCLUSION

The evidence demonstrates that Duke's charges to consumers through the so-called Price Stabilization Rider in 2019 were imprudent and operation of the OVEC plants is not in the best interest of consumers. Therefore, the PUCO should adopt OCC's recommendations and deny Duke's charges to consumers for \$24.6 million in above-market energy charges for running the OVEC plants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief was served on the persons stated below via electric transmission this 29th day of July 2022.

/s/ Angela D. O'Brien

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