

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY BRIEF SUBMITTED ON BEHALF OF
THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**On Behalf of the Staff of
Public Utilities Commission of Ohio**

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INTRODUCTION

This case deals with London Economics International, LLC’s (“LEI” or “Auditor”) independent audit of the Duke Energy Ohio’s (“Duke” or the “Company”) Price Stabilization Rider (“PSR Rider”) for the period spanning January 1, 2019, through December 31, 2019. The final Audit Report for this proceeding was filed on October 21, 2020, 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 the Ohio Valley Electric Corporation (“OVEC”). Though the Audit Report recommends continued and/or further evaluation of certain practices by the Company related to the PPA Rider, the Auditor found no instances of imprudence.

After a four-day evidentiary hearing, Initial Briefs were filed by four intervening parties including: the Ohio Energy Group (“OEG”), the Office of the Ohio Consumers’ Counsel (“OCC”), and jointly by the Kroger Company and Ohio Manufacturer’s Association Energy Group (“Kroger” and “OMAEG”). The Staff of the Public Utilities

Commission of Ohio (“Staff”) filed an Initial Brief on July 28, 2022. The Company filed an Initial Brief on July 29, 2022. Through this Reply Brief, Staff responds to the issues raised in those briefs and Staff also maintains the positions taken in its Initial Brief.

A. Audit Background: Scope versus purpose.

1. The scope of the Audit.

The Commission issued an Entry directing Staff “to issue a request for proposal for audit services to assist the Commission with the prudency and performance audit of the Price Stabilization Rider of Duke Energy Ohio, Inc. for the period of January 1, 2019, through December 31, 2019.”¹ The Commission described how Staff should conduct a prudency audit.² The Commission determined it would conduct an annual prudency audit to establish the prudency of all costs and sales flowing through the PSR and to demonstrate that the Company made reasonable efforts to transfer its contractual entitlement under the Inter-Company Power Agreement.³ The Auditor was to perform the Audit as an independent contractor.⁴

As Staff noted in its Initial Brief, during the course of its audit, LEI considered the following items: industry context, OVEC bill and Duke rider reconciliation, accuracy of the true up process from 2016 to 2019, disposition of energy and capacity, fuel and variable costs, capital expense, environmental compliance, and power plant

¹ *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, Entry at 1 (Feb. 13, 2020).

² *Id.* at Entry RFP at 4.

³ *Id.* at Entry at ¶ 7.

⁴ *Id.* at ¶ 12.

performance.⁵ LEI used data obtained from Duke, as well as publicly available sources such as the Energy Information Administration (EIA).⁶ Staff maintains that the Auditor performed the Audit while adhering to the scope set-forth by the Commission in the RFP.

LEI concluded that, in general, the processes, procedures, and oversight applied by Duke were mostly adequate and consistent with good utility practice.⁷ As Staff noted in its Initial Brief, the Auditor made several recommendations for the Commission's consideration.⁸ The Auditor performed the Audit as directed by the RFP.

2. Staff's role.

The Auditor conducted the review as an extension of Staff. Staff performed its duty to ensure the Auditor fulfilled the terms of the contract and adhered to the scope of the audit. Staff must ensure an audit remains on schedule and within the scope as defined by the Commission. The RFP clearly states: "The PUCO Staff will oversee the project. Staff shall be informed of all correspondence between the auditor and Duke and/or OVEC and shall be given at least three working days' notice of all meetings and interviews with Duke and/or OVEC, to allow Staff the opportunity to attend."⁹ In addition, the RFP clearly sets forth that the Auditor was to provide Staff with a draft of the Audit Report for purposes of review.¹⁰

⁵ *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, Staff Initial Brief at 5 (July 28, 2022).

⁶ *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, Audit Report at 9 (Oct. 21, 2020).

⁷ *Id.*

⁸ Staff Initial Brief at 5-7.

⁹ Entry RFP at 4.

¹⁰ *Id.* at 7

Staff performed its role to oversee the Audit, as directed by the Commission.

3. The purpose of the proceeding.

The scope of this proceeding has been defined by the Commission. The Commission determined it would conduct an annual prudency audit to establish the prudency of all costs and sales flowing through the PSR and to demonstrate that the Company made reasonable efforts to transfer its contractual entitlement under the Inter-Company Power Agreement.¹¹ To this end, as to the purpose of the proceeding the RFP clearly states:

“The Commission provided, in Case No. 17-1693-EL-RDR, et al., for an annual prudency audit to establish the prudency of all costs and sales flowing through the PSR and to demonstrate that the Company made reasonable efforts to transfer its contractual entitlement under the ICPA. This RFP encompasses an independent audit of the PSR for the period spanning January 1, 2019, through December 31, 2019, as contemplated by, and in compliance with, the Commission’s orders.”¹²

OMAEG and Kroger are arguing that actions/decisions that Duke took during the audit period were not in customers’ best interests.¹³ However, Staff notes, the words “best interest” do not appear in the Entry directing Staff to issue a request for proposal for audit services or the request for proposal itself.¹⁴

¹¹ Entry at ¶ 7.

¹² Entry RFP at 4.

¹³ *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, OMAEG/Kroger Initial Brief (July 29, 2022).

¹⁴ *See* Entry.

ARGUMENTS

A. The Commission should determine that the Company acted prudently.

The Commission should determine that the Company acted prudently because the Auditor did not make any finding of imprudence, and because none of the parties established otherwise.

OCC argues in their initial brief, that the Audit Report does not support a finding of prudency, and that Duke's decision to run the OVEC plants on a "must-run" basis was imprudent.¹⁵ The Auditor found, "[Duke]'s strategy of creating a process whereby OVEC re-considers its 'must-run' offer strategy...and utilize near-term demand and price forecasts to formulate energy offers is prudent. [Duke]'s capacity offers were formulated prudently."¹⁶ The Auditor explained, energy is typically offered as must run.¹⁷ The Auditor further said, she believes Duke's "efforts to modify OVEC's must-run strategy...is prudent, and has no recommendations except to continue doing so."¹⁸

Some parties attempted to establish imprudence through witnesses' testimony. For example, Haugh testified that Duke's failure to use a competitive bidding process was unjust, unreasonable, and imprudent.¹⁹ As another example, Glick testified that the above market costs associated with the Rider PSR are imprudent because Duke did not engage

¹⁵ See *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, OCC Initial Brief (July 29, 2022).

¹⁶ Audit Report at 10.

¹⁷ *Id.*

¹⁸ *Id.* at 54.

¹⁹ *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, Hearing Transcript, Volume III at page 466, lines 15-19 (May 27, 2022).

in a competitive bidding process prior to seeking approval to include OVEC in Rider PSR,²⁰ and, “There’s an imprudent process overall.”²¹

However, each of those witnesses lack credibility to support their opinions.

Haugh has never worked directly in power plant operations, never worked directly with OVEC, does not have an engineering degree, did not perform an hourly re-dispatch study under an economic dispatch model for the audit period relevant to this case, and did not perform a quantitative analysis in support of his testimony.²² Haugh’s claim to credibility is that he was previously employed in a capacity where he was involved in power plant decision making as part of a “group effort.”²³²⁴

Glick has not worked in power plant operations, at a public utility or municipal utility, and has not been responsible for making generation plant unit commitment decisions.²⁵

OCC alleges that the Auditor lowered the prudence standard to accommodate Duke’s operations, but does not provide any evidence that the Auditor changed her standards/definition of prudence for this case.

²⁰ *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, Hearing Transcript, Volume IV at page 569, lines 14-23 (May 31, 2022).

²¹ *Id.* at page 589, lines 5-20.

²² Transcript III at page 438, line 18 – page 441, line 22.

²³ *Id.* at page 441, lines 5-22.

²⁴ On the other hand, despite his testimony on pollution, Haugh does not have formal training/has never been qualified as an expert in in environmental science, air permitting, toxicology, air emissions, environmental health and safety. *Id.* at page 444, line 16 – page 445, line 22. He has not worked for the EPA, ESUPA, or in environmental permitting on behalf of a power plant. *Id.* at page 445, lines 7-16.

²⁵ Transcript IV at page 548, lines 4-13.

Prudence can be a continuum.²⁶ The Auditor, an expert on prudence, found areas where improvements could be made, but did not make any findings of imprudence.²⁷

B. OCC's appeals should be denied.

1. The Attorney Examiners properly struck portions of Mike Haugh's testimony.

OCC appeals the Attorney Examiner's ruling to strike portions of witness Mike Haugh's testimony, but the appeal should be denied. Haugh's was improper; it is hearsay, irrelevant, unfairly prejudicial, and confuses the record.²⁸ Also, Haugh lacked personal knowledge about matters in his testimony. Haugh's testimony continuously referenced an entirely different proceeding for a different and unrelated utility company. The Attorney Examiners properly struck Haugh's testimony.

2. The Attorney Examiners properly excluded from evidence an audit report not relevant to this case.

OCC attempted to introduce into evidence an audit report for another company from another case. That audit report is not relevant to this case. The Attorney Examiners ruled correctly by excluding irrelevant documents from evidence. The Commission is not stringently confined by the Rules of Evidence, but is granted very broad discretion in the conduct of its hearings to determine relevance.²⁹

²⁶ *In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, Hearing Transcript, Volume II at page 31, line 22 (May 26, 2022).

²⁷ *Id.* at page 28, lines 20-24; *See also* Audit Report.

²⁸ *See In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Pub. Util. Comm. No 20-167-EL-RDR, Staff Motion to Strike (May 24, 2022).

²⁹ 1987 Ohio PUC LEXIS 107, *33 (Ohio P.U.C. Feb. 18, 1987) *citing Greater Cleveland Welfare Rights Organization, Inc. et al., v. Public Utilities Commission of Ohio et al.*, 2 Ohio St. 3rd 62, at 68 (1982), *citing The Elyria Telephone Co., Appellant, v. Public Utilities Commission of Ohio, Appellee*, 158 Ohio St. 441, at 444 (1953).

3. Other parties’ allegations that Staff interfered with the Auditor’s independence is unsupported by the record. Allegations that Staff asked the Auditor to revise her ultimate recommendation are also unsupported by the record.

Based on an unsupported claim in another case, OCC and OMAEG/Kroger contend that the Audit was not performed in an independent manner, and they go on to question the Auditor’s conclusion of Duke’s prudence in this case. OCC appeals the Attorney Examiners’ decision to exclude Haugh’s testimony that “PUCO Staff interfered with the Auditor’s independence by asking her to modify her ultimate decision in the case – whether the plants were operated prudently.”³⁰ This is a mischaracterization of the case and events that actually occurred.

OCC also appeals the Attorney Examiners’ decision to grant the “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.’”³¹ These claims are unsupported, irrelevant, and mischaracterize events.³² Haugh’s testimony refers to the AEP case, and testimony regarding AEP is irrelevant because this is Duke’s case. The AEP case has been litigated, this is not the appropriate forum for parties to continue arguing the AEP case.

In addition, although the parties questioned the Auditor for nearly a full day, no one asked why this language was not included in the Duke Audit Report. The

³⁰ OCC Initial Brief at 21.

³¹ *Id.* Emphasis added.

³² OMAEG/Kroger Initial Brief at 3-4.

Commission should not rely on mere conjecture or timing to determine why this language was not included. The parties could have asked the witness, but they didn't.

In both cases (Duke and AEP), the Auditor maintained ultimate discretion on what to include in the audit reports for both companies.³³ Staff takes these allegations of interference seriously. Staff never required nor forced the Auditor to make changes to the Audit Report. Any suggestion that Staff interfered with the Auditor's independence is as much an attack on Staff's alleged actions as it is an assault on the character and ethics of the individuals. No objective facts were removed from the audit reports. Staff had the authority from the Commission to oversee the Audit.³⁴ The Commission should focus on the facts and legal issues of this case and rely on the Audit Report for this case. Staff and the Auditor each did their jobs as directed.

CONCLUSION

The Audit was conducted pursuant to the Commission's Order. The Auditor did not make any finding of imprudence, and the Commission should rely on the Audit Report on findings of prudence and imprudence. Staff did not interfere with the Auditor's independence, nor her ultimate recommendation. Any contrary allegation is unsupported by the record.

³³ Transcript II at page 68, line 22 – page 69, line 2.

³⁴ Entry RFP at 4.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Reply Brief**, on behalf of the Staff of the Public Utilities Commission of Ohio, has been served upon the below-named counsel via electronic mail, this 19th day of August, 2022.

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