

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>IN THE MATTER OF THE OVEC</b>	)	
<b>GENERATION PURCHASE RIDER AUDITS</b>	)	
<b>REQUIRED BY R.C. 4928.148 FOR DUKE</b>	)	<b>Case No. 21-477-EL-RDR</b>
<b>ENERGY OHIO, INC., THE DAYTON</b>	)	
<b>POWER AND LIGHT COMPANY, AND AEP</b>	)	
<b>OHIO.</b>	)	

**SIERRA CLUB’S INITIAL COMMENTS ON  
LEGACY GENERATION RIDER AUDIT REPORTS**

Sierra Club hereby submits these initial comments on the “Audit of the Legacy Generation Resource Rider of AEP Ohio Final Report,” (“AEP Ohio OVEC Audit”), “Audit of the Legacy Generation Resource Rider of Duke Energy Ohio Final Report,” (“Duke Ohio OVEC Audit”), and “Audit of the Legacy Generation Resource Rider of AES Ohio Final Report,” (“AES Ohio OVEC Audit”) (collectively, “Ohio EDU OVEC Audits”). The Commission is tasked with “determin[ing],” on the basis of the audit and record in this proceeding, “. . . the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource . . . and exclude from recovery those costs that the commission determines imprudent and unreasonable.”<sup>1</sup> A significant proportion of the costs assessed to the Ohio EDUs by OVEC during 2020 were imprudent and unreasonable and thus should be excluded from recovery.

Indeed, the decision to operate the OVEC plants at all during 2020 and the failure to retire the OVEC plants reflects imprudence on the part of OVEC’s owners, including the Ohio EDUs. If OVEC’s owners had retired Clifty Creek and Kyger Creek prior to 2020 or otherwise declined to operate them during 2020, Ohio electric customers would have been better off. The plants

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<sup>1</sup> Ohio Rev. Code § 4928.148(A)(1).

continued to lose money in the PJM markets. The Commission should enforce the plain language of H.B. 6 and disallow costs that resulted from the imprudent and unreasonable actions of AEP Ohio, Duke Ohio, and AES Ohio with respect to OVEC. Such disallowance would be in the public interest.

Under H.B. 6, the Commission must review the actions of the OVEC owners and charge Ohio electric customers with only those costs that are “prudent and reasonable.”<sup>2</sup> H.B. 6 does not shift the burden of proof to the Commission or customers and so the Ohio EDUs must prove the “prudence and reasonableness” of their actions with respect to the OVEC plants, in this instance for costs and actions during calendar year 2020.<sup>3</sup> The Ohio EDUs cannot meet this burden and so significant disallowances are warranted.

First, for all three EGUs, the Commission should disallow all costs that exceed the combined capacity and energy market value of the OVEC units. There is no evidence that AEP Ohio, Duke Ohio, or AES Ohio took any actions during 2020 to exit the Inter-Company Power Agreement (“ICPA”), file for the termination of the ICPA at FERC, retire any of the eleven coal units, or sell their share of OVEC. Given the ongoing dismal economics of the coal units, as confirmed again by London Economics International LLC (“LEI” or “the Auditor”) in these Ohio

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<sup>2</sup> Ohio. R. C. 4928(A)(1) (“The commission shall determine, in the years specified in this division, the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource, including their decisions related to offering the contractual commitment into the wholesale markets, and exclude from recovery those costs that the commission determines imprudent and unreasonable. The initial determination shall be made during 2021 regarding the prudence and reasonableness of such actions during calendar year 2020.”)

<sup>3</sup> *Id.*; see also, e.g., Opinion and Order, Case Nos. 14-1693-EL-RDR and 14-1694-EL-AAM (March 31, 2016) at 89; see also accord Second Entry on Rehearing, Case Nos. 14-1693-EL-RDR and 14-1694-ELAAM (November 3, 2016) ¶178 (“AEP Ohio will bear the burden of proof, in each annual audit, to establish the prudence of all costs and sales flowing through the PPA rider and to demonstrate the Company’s actions were in the best interests of retail ratepayers.”).

EDU Audits, failure to take steps to reduce the ongoing harm the operation of the OVEC plants causes was imprudent and unreasonable. A prudent and reasonable utility would have retired the OVEC units during or before calendar year 2020 or taken steps to exit or renegotiate the ICPA. Because the Ohio EDUs took no prudent or reasonable actions in this regard, costs for the plants that exceed their market value should be paid by the EDUs, not ratepayers, under Ohio law.

Second, for AEP Ohio and AES Ohio the Commission should disallow all costs associated with OVEC's unreasonable and imprudent "must run" commitment decisions. Due to its persistent "must run" commitment strategy, OVEC continued to incur PJM energy market losses for months at a time. Especially for coal units with such a high heat rate, like Clifty Creek and Kyger Creek,<sup>4</sup> a prudent utility would avoid any energy market losses by either utilizing an economic commitment status or by anticipating periods of low energy market prices and entering into short- to medium-term periods of economic shutdown. When using an "economic" commitment status, there is no possibility of energy market losses because PJM assures, through "make whole" payments, that no generator selected to run can incur an energy market loss. The OVEC coal-burning units hemorrhaged money in the PJM energy market during 2020 largely due to the failure to adopt a reasonable commitment strategy. There is no evidence AEP Ohio and AES Ohio took any steps to end the imprudent and unreasonable strategy of committing these units as "must run." As a result, the Commission should find AEP Ohio's and AES Ohio's actions to be imprudent and unreasonable for their failure to take appropriate steps to end the "must run" strategy and relieve their customers of the burden of paying for those unreasonably incurred losses. By contrast, Duke Ohio *did* attempt to persuade the OVEC co-owners to adopt the use of short-term economic

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<sup>4</sup> AEP Ohio Audit, p. 100 ("Nearly all the OVEC units had higher heat rates (were less efficient) than the PJM average [in 2018, 2019, and 2020.]").

shutdowns to reduce energy market losses, but was apparently rebuffed by the Operations Committee.<sup>5</sup> Duke Ohio acted prudently with respect to commitment decisions and thus should not be subject to the same disallowances.

Third, the Commission should impose a capital cost recovery cap of \$0 related to capital spending. As LEI found in these Ohio EDU OVEC Audits, this Commission has no authority to review capital spending decisions at Clifty Creek or Kyger Creek. This situation creates a moral hazard where OVEC and its owners have an incentive to over-invest capital spending in these plants, presumptively secure in their ability to recoup these costs through the ICPA and thus, ratepayers. There is no evidence in these Ohio EDU Audits that AEP Ohio, Duke Ohio, or AES Ohio attempted to restrain capital spending cap on these plants or to assess the merits or return on investment of major capital expenditures. This failure is particularly troubling because prior LEI audits have urged the EDUs to reduce capital expenditures and the Commission to exercise greater oversight. To protect customers, the Commission should adopt LEI's recommendation<sup>6</sup> and impose a cap of \$0 on capital spending at these plants that is permitted to flow through to Ohio customers. These OVEC coal units are uneconomic and thus no further customer resources should be wasted on them.

Fourth, the Commission should disallow the "Component D" costs from Ohio customers' bills. Under H.B. 6, any reasonable and prudent costs charged to Ohio customers "must exclude any return on investment."<sup>7</sup> The Auditor reasonably found that Component D costs are such a return on investment. Accordingly, those costs should be disallowed from Ohio customers' bills.

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<sup>5</sup> Duke Ohio Audit, p. 41.

<sup>6</sup> AEP Ohio Audit, p. 87; ("a cap or ceiling on annual expenditures would be prudent, to prevent over-investment. LEI recommends that the Commission consider implementing such a cap."); Duke Ohio Audit, p. 89 (same); AES Ohio Audit, p. 82 (same).

<sup>7</sup> Ohio. R. C. 4928.01(A)(42).

**I. The Commission Should Disallow Costs that Exceed Market Value Because None of The Ohio EDUs Took Any Steps To Limit Ongoing Harm to Their Customers from OVEC’s Continued Operation.**

There is no evidence AEP Ohio, Duke Ohio, and AES Ohio took any steps to retire OVEC coal units or otherwise exit the ICPA in 2020. A prudent utility would retire a generator when its going forward-value is negative and has been for years. A prudent utility would seek ways to exit or limit the term of an agreement that had persistently negative value.

The Ohio EDU OVEC Audits confirmed that the OVEC plants have negative value. Specifically, the Auditor found that:

- From 2019 to 2020, “the average power cost (total power cost divided by net generation) increased by 17.54% from \$57.04/MWh to \$67.00/MWh.”<sup>8</sup>
- “LEI’s analysis indicates that a new combined cycle gas turbine (“CCGT”) has an estimated levelized cost of energy (“LCOE”) of \$35.9/MWh for PJM West and \$42.2/MWh for PJM East in 2021.”<sup>9</sup>
- “The reported cost of the OVEC plants, at \$67.00/MWh, is higher than the levelized cost of building a new CCGT. The LCOE analysis implies that the OVEC plants are not competitive with a new CCGT based on full-cycle costs.”<sup>10</sup>
- “The OVEC plants cost more than they earn,” which the Auditor referred to as “obvious.”<sup>11</sup>

The Auditor’s conclusion that the OVEC plants have negative value is unequivocal. And yet none of the Ohio EDUs took any documented steps to seek to retire an OVEC coal unit or to amend or terminate the ICPA. As such, their actions were unreasonable and imprudent. The

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<sup>8</sup> AEP Ohio Audit, p. 13; Duke Ohio Audit, p. 13; AES Ohio Audit, p. 13.

<sup>9</sup> AEP Ohio Audit, p. 22; Duke Ohio Audit, p. 21; AES Ohio Audit, p. 21.

<sup>10</sup> AEP Ohio Audit, p. 23; Duke Ohio Audit, p. 21; AES Ohio Audit, p. 21.

<sup>11</sup> AEP Ohio Audit, p. 31; Duke Ohio Audit, p. 29; AES Ohio Audit, p. 27.

Commission should therefore disallow each EDU's share of the overall net margin incurred during the review period. Specifically, the Commission should disallow each EDU's share of the calculation: total OVEC revenues (PJM energy, capacity, and ancillary services) minus total OVEC costs (energy, demand, and any other charges) because each EDU failed to take any documented action to reduce or eliminate these ongoing economic losses as required by Ohio law.

## **II. The Commission Should Disallow AEP Ohio's And AES Ohio's Costs Associated with Imprudent Self-Scheduling of OVEC Units.**

The Ohio EDU OVEC Audits found that the OVEC incurred net energy market losses during 2020.<sup>12</sup> The Auditor also found that "OVEC typically self-schedules its units in the PJM day-ahead market."<sup>13</sup> While arguably downplaying the extent of the losses,<sup>14</sup> the Auditor's "analysis (based on monthly average PJM prices) shows that some of the time, the PJM energy price did not cover fuel and variable costs."<sup>15</sup> In other words, if Clifty Creek and Kyger Creek had not generated at all for significant parts or, arguably, at all during the entire year of 2020, the Ohio EDUs would have saved money. In fact, because the audits acknowledged OVEC incurred a net annual energy loss<sup>16</sup>, OVEC would have lost less money and the Ohio EDU customers would have been better off even if the Commission still required them to pay the EDU's fixed OVEC (demand charge) costs. If OVEC had instead used an economic commitment, PJM's "make whole"

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<sup>12</sup> AEP Ohio Audit, p. 32; Duke Ohio Audit p. 30; AES Ohio Audit, p. 28.

<sup>13</sup> AEP Ohio Audit, p. 9; Duke Ohio Audit, p. 10; AES Ohio Audit, p. 9.

<sup>14</sup> Although the auditor describes PJM energy prices as not covering fuel and variable costs "some of the time," the monthly net energy results show fuel and variable costs exceeding variable revenue the vast majority of the time. *See* AEP Ohio Audit, pp. 11, 48; Duke Ohio Audit, pp. 10, 50; AES Ohio Audit, pp. 10, 44.

<sup>15</sup> AEP Ohio Audit, p. 10; Duke Ohio Audit, p. 10; AES Ohio Audit, p. 11.

<sup>16</sup> AEP Ohio Audit, p. 32; Duke Ohio Audit p. 30; AES Ohio Audit, p. 28.

payments processes would have insulated the Ohio EDUs from energy market losses.<sup>17</sup> As the Auditor explained:

There were times in 2020 during which PJM DA prices did not cover the variable cost of running the plants. Under such circumstances, units which are self-scheduled incur losses for their owners; but economically committed units would receive an uplift payment to cover costs if day ahead prices do not cover variable costs. LEI examined all twelve months in 2020; on a monthly average basis, PJM prices at the AEP GEN hub were lower than OVEC energy charges for all months in 2020 (see Figure 25).<sup>18</sup>

For much of the year, the OVEC units were forced to operate if available regardless of the economic margin they expected to earn by doing so. However, from mid-April through June, the OVEC co-owners “unanimously” authorized the use of short-term economic shutdowns or economic commitment status in response to the collapse in energy demand due to the COVID-19 public health emergency.<sup>19</sup> The Auditor found that this “temporary permission” to allow economic commitment for a period during 2020 was “prudent” and “recommends” that the Ohio EDUs “allow this flexibility on an ongoing basis.”<sup>20</sup> OVEC’s co-owners’ failure to continue to utilize economic commitment strategies *after* June 30, 2020 reflects imprudence. H.B. 6 therefore directs the Commission to disallow any excessive costs incurred as a result of this imprudence because such costs (*i.e.*, the fuel and variable costs spent in excess of PJM energy prices) could have easily been avoided merely by committing the units economically.

Neither AEP Ohio nor AES Ohio took any documented action to seek to end the “must run” scheduling process either before the onset of the COVID-19 crisis (despite significant energy

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<sup>17</sup> AEP Ohio Audit, p. 19; Duke Ohio Audit, p. 18; AES Ohio Audit, p. 17.

<sup>18</sup> AEP Ohio Audit, p. 47; Duke Ohio Audit, p. 49 (substantially similar except for months July and December.); AES Ohio Audit, p. 43 (substantially similar except for months July and December).

<sup>19</sup> Duke Ohio Audit, p. 43.

<sup>20</sup> AEP Ohio Audit, p. 10; Duke Ohio Audit, p. 10; AES Ohio Audit, p. 10.

market losses from the beginning of 2020) or to continue it past the end of June. Other than attending meetings and taking good notes,<sup>21</sup> there is no evidence that AEP Ohio or AES Ohio took any action at all with respect to OVEC's energy market scheduling, and certainly not any evidence that AEP Ohio sought to end "must run" scheduling.<sup>22</sup> Because AEP Ohio and AES Ohio took no documented steps to end OVEC's wasteful "must run" strategy and because the Commission is required to determine the reasonableness of their actions, their customers cannot be charged for these losses under Ohio law.

Further, the Commission should remove confidential protections for AEP Ohio Audit, p. 48, CONF Figure 29; Duke Ohio Audit, CONF Figure 30, p. 50; AES Ohio Audit, Figure 24, p. 44, which show overall monthly net energy margins for each utility's OVEC entitlement. While OVEC has legitimate reasons to protect the confidentiality of its actual daily incremental bids into the PJM market, the aggregated information provided in these Figures could not be legitimately

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<sup>21</sup> AEP Ohio Audit, p. 42 ("AEP Ohio appointed representatives to participate in all the meetings."), p. 43 ("meeting notes that were appropriately documented"); AES Ohio Audit, p. 38 ("AES Ohio appointed representatives to participate in all the meetings"), p. 39 ("meeting notes that were appropriately documented.).

<sup>22</sup> Unlike AEP Ohio and AES Ohio, Duke Ohio appears to have at least attempted to convince the Operations Committee to consider economic shutdowns during prolonged periods of low energy prices. Specifically, Duke Ohio performed forward-looking market analysis and produced Profit and Loss statements that, if acted upon, could have prompted economic shutdowns to avoid periods of significant energy market losses. *See* Duke Ohio Audit, p. 42 ("Every business day, for each hour for the next 21-day period, DEO independently projects the expected energy market revenues from units operating in the PJM market, the variable costs to operate the unit at the forecasted unit hourly loading, as well as the resulting hourly energy margin, all of which is summarized in the Daily Profit and Loss Analysis report (see Figure 22).") However, it does not appear that OVEC's Operations Committee routinely acted on these findings or attempted to avoid the losses projected by DEO. *See id.* ("If DEO observes a period in which the units are expected to be out of the money and therefore should not be committed, DEO informs OVEC, and this option is then discussed in the Operations Committee.").

protected as a trade secret. The fact that OVEC's owners have lost customers money in the energy market is evidence of their imprudent actions but is not itself a trade secret.

### **III. The Commission Should Impose a Cap on Capital Spending That Flows Through the Legacy Generation Rider.**

The Commission should impose a cap of \$0 for capital spending that is permitted to flow through to Ohio customers' bills. As the Auditor found:

[T]he review and approval of the Commission is not needed for OVEC to engage in capital spending projects. Under such circumstances, a cap or ceiling on annual expenditures would be prudent, to prevent over-investment. LEI recommends that the Commission consider implementing such a cap.<sup>23</sup>

Sierra Club agrees. Both Clifty Creek and Kyger Creek face significant compliance costs associated with U.S. EPA's coal ash, surface water discharge requirements, and, potentially, the cross-state ozone rule.<sup>24</sup> Most of these costs could be avoided by a 2028 retirement of these plants. But because the OVEC owners appear to believe that they have a presumption of recovery and thus a strong incentive to continue to invest capital in the OVEC plants, as the Auditor concludes, there is no incentive for OVEC to avoid incurring this capital spending. Because OVEC can recoup these costs through its fixed charge to its members which is in turn could be passed onto customers via the HB 6 Rider, all without seeking project-specific approval as most utilities with captive ratepayers must do, a forward-looking cap on capital investments is appropriate and necessary to protect Ohio customers. The Commission should adopt the recommendation of the Audit Report and impose a price cap of \$0 on all capital spending that would be permitted to flow

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<sup>23</sup> AEP Ohio Audit, p. 87; ("a cap or ceiling on annual expenditures would be prudent, to prevent over-investment. LEI recommends that the Commission consider implementing such a cap."); Duke Ohio Audit, p. 89 (same); AES Ohio Audit, p. 82 (same).

<sup>24</sup> AEP Ohio Audit, pp. 70-78; Duke Ohio Audit, pp. 72-80; AES Ohio Audit, pp. 66-74.

through to Ohio customers. The OVEC plants are aging, deeply uneconomic, and no prudent owner would waste capital resources on them.

#### **IV. The Commission Should Exclude All “Component D” Costs from Ohio EDU Customers’ Bills.**

Under H.B. 6, any reasonable and prudent costs charged to Ohio customers through this rider “must exclude any return on investment.”<sup>25</sup> The Auditor found that a cost called “Component D” is “identified by the ICPA as a payment per common share (similar to a dividend),”<sup>26</sup> and that, in LEI’s judgement “Component D seems to be a such a return.”<sup>27</sup> Accordingly, the Commission should hold that Component D costs must be excluded from Ohio customers’ bills.

#### **V. Conclusion**

For the foregoing reasons, the Commission should protect Ohio customers by disallowing the specified OVEC costs from customers’ bills.

Dated: May 8, 2023

Respectfully submitted,

/s/ Robert Dove

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<sup>25</sup> Ohio. R. C. 4928.01(A)(42).

<sup>26</sup> AEP Ohio Audit, p. 9; Duke Ohio Audit, p. 9; AES Ohio Audit, p. 9.

<sup>27</sup> AEP Ohio Audit, p. 9; Duke Ohio Audit, p. 9; AES Ohio Audit, p. 9.

## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on this 8<sup>th</sup> day of May, 2023.

/s/ Robert Dove  
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