

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the OVEC Generation)
Purchase Rider Audits Required by R.C.)
4928.148 for Duke Energy Ohio, Inc., the) Case No. 21-477-EL-RDR
Dayton Power and Light Company, and AEP)
Ohio.)

**COMMENTS
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

I. INTRODUCTION

Ohio customers should not continue to pay for the imprudent and unreasonable operation of aging, uneconomical, dirty coal plants in Ohio and Indiana, and should not continue to subsidize the Ohio Valley Electric Corporation (OVEC) plants' imprudent and unreasonable operations. In 2019, the 133rd General Assembly enacted the tainted House Bill 6 (HB 6),¹ which, in addition to being part of "one of the largest public corruption cases in Ohio history,"² required the Public Utilities Commission of Ohio (Commission) to establish a replacement nonbypassable rate mechanism for the recovery of *prudently* incurred costs related to the OVEC coal plants for the period commencing January 1, 2020 and extending up to December 31, 2030.³

Currently, Duke Energy Ohio, Inc. (Duke), The Dayton Power and Light Company d/b/a AES Ohio (DP&L), and Ohio Power Company (AEP Ohio) (collectively, the Sponsoring

¹ Available at <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-6>.

² See Dan Horn, Sharon Coolidge, and Jessie Balmert, *Ohio House Speaker Larry Householder Arrested in \$60 Million Bribery Case*, The Enquirer, July 21, 2020, available at <https://www.cincinnati.com/story/news/2020/07/21/ohio-bribery-case-state-official-charged-federal-prosecutors/5477862002/>.

³ Entry at ¶ 3 (May 5, 2021) (emphasis added).

Companies) are each entitled to a share of the power generation from the OVEC coal plants, and must pay that same share of the costs associated with operating OVEC, pursuant to the Amended and Restated Inter-Company Power Agreement (ICPA).⁴ The ICPA will remain in place until June 30, 2040.⁵ The Sponsoring Companies in turn are authorized to pass reasonable and prudently-incurred costs through to customers through the utilities' Legacy Generation Resources (LGR) Riders authorized by HB 6.⁶

HB 6 has been embroiled in controversy. In addition to the well-published scandal regarding FirstEnergy, American Electric Power Company, Inc., AEP Ohio's parent company, also donated to Generation Now, a dark-money group tied to HB 6, and the Coalition for Opportunity & Growth, a political action committee supporting convicted HB 6 sponsor Larry Householder.⁷ Various coal companies, including Resource Fuels, which has supplied coal to the OVEC coal plants at above-market prices,⁸ also donated in support of HB 6.⁹

Although the corrupt HB 6 authorized a bailout for the OVEC coal plants and the Sponsoring Companies, HB 6 also required that the Commission determine the prudence and

⁴ Duke Audit Report at 7; DP&L Audit Report at 7; AEP Ohio Audit Report at 7.

⁵ *Id.* at 12.

⁶ R.C. 4928.148.

⁷ Randy Ludlow, *Columbus Utility Giant AEP Funded Dark Money Spending in HB 6 Campaign*, Columbus Dispatch (July 25, 2020), available at <https://www.dispatch.com/story/news/politics/state/2020/07/25/columbus-utility-giant-aep-funded-dark-money-spending-in-hb-6-campaign/41843419/>.

⁸ *See In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case Nos. 18-1004-EL-RDR, et al., Direct Testimony of John A. Seryak at 14-16 (Dec. 29, 2021).

⁹ Kathiann M Kowalski, *Dark Money Helped Utilities Subsidize Coal Plants, Delaying Climate Action At Ratepayers' Expense*, Ohio Capital Journal (May 3, 2022), available at <https://ohiocapitaljournal.com/2022/05/03/dark-money-helped-utilities-subsidize-coal-plants-delaying-climate-action-at-ratepayers-expense/>; Dave Anderson, *Bank Records Reveal More Secret Payments to Larry Householder's Dark Money Group from the Fossil Fuel Industry, Other Sectors*, Energy and Policy Institute (Mar. 29, 2023), available at energyandpolicy.org/larry-householder-dark-money/.

reasonableness of the actions of the Sponsoring Companies.¹⁰ *See* R.C. 4928.148. Additionally, R.C. 4928.148(A)(1) specifically prohibits the Sponsoring Companies from recovering from customers any costs that are deemed imprudent or unreasonable.

Accordingly, the Commission issued an Entry on May 5, 2021, directing Staff to issue a request for proposal for audit services to assist the Commission with the audit of the LGR Rider costs for the period from January 1, 2020 through December 31, 2020 (Audit Period) to determine whether the Sponsoring Companies acted in a reasonable and prudent manner, and to determine whether the costs that the Sponsoring Companies incurred and are requesting to be recovered from customers were reasonable and prudent.¹¹ The Commission subsequently selected London Economics International LLC (LEI) as the third-party auditor to assist the Commission with the prudency and performance audit of the LGR Rider costs.¹² Staff filed audit reports for Duke,¹³ DP&L,¹⁴ and AEP Ohio¹⁵ on December 17, 2021 (collectively, the Audit Reports).

The ongoing operations and subsidization of the aging, uneconomical, and dirty OVEC coal plants are neither reasonable nor prudent. Since the Sponsoring Companies have not met their burden of proof to demonstrate that the millions of dollars in subsidies collected from customers are reasonable or prudent, the Commission should not approve the recovery of any costs from customers during the Audit Period. Instead, the Commission should set this matter for hearing,

¹⁰ Duke Audit Report at 7; DP&L Audit Report at 7; AEP Ohio Audit Report at 7.

¹¹ Entry at ¶ 1 (Apr. 7, 2021).

¹² Entry at ¶ 1 (July 14, 2021).

¹³ Audit of the Legacy Generation Resource Rider of Duke Energy Ohio Final Report, Public Version (Dec. 17, 2021) (Duke Audit Report).

¹⁴ Audit of the Legacy Generation Resource Rider of AES Ohio Final Report, Public Version (Dec. 17, 2021) (DP&L Audit Report).

¹⁵ Audit of the Legacy Generation Resource Rider of AEP Ohio Final Report, Public Version (Dec. 17, 2021) (AEP Ohio Audit Report).

and allow parties to exercise their due process rights to present evidence, examine witnesses, and file briefs on whether the Sponsoring Companies acted in a reasonable and prudent manner, and to determine whether the costs that the Sponsoring Companies incurred and are requesting to be recovered from customers were reasonable and prudent.

II. COMMENTS

A. Customers have already paid nearly \$400 million for the OVEC coal plants

Although tainted H.B. 6 created the LGR Riders, customers had already subsidized the OVEC coal plants through various mechanisms for several years prior to the corruption scandal. In 2015, Duke established its Price Stabilization Rider¹⁶ and AEP Ohio established its Power Purchase Agreement Rider,¹⁷ while DP&L established its Reconciliation Rider in 2018.¹⁸ From 2017 through 2021, the end of the Audit Period, Ohio customers have paid nearly \$400 million in subsidies through the LGR Riders and previous riders.¹⁹

As energy prices continue to fall, the annual subsidy has continued to rise. LEI noted that “[w]holesale electric energy prices have generally declined since 2013 in the PJM market, except for” brief spikes.²⁰ Prices have fallen on average 8.3% annually across the PJM footprint, including 6.5% annually in the Duke service area, 9.7% annually in the DP&L service area; and 7.1% in the AEP service area.²¹ At these lower prices, OVEC cannot make enough money to cover its debt

¹⁶ Duke Audit Report at 7.

¹⁷ AEP Ohio Audit Report at 25.

¹⁸ DP&L Audit Report at 23.

¹⁹ See John Seryak, *House Bill 6's Legacy: Utility Power Plant Subsidies Poised to Cost Ohioans Millions More*, Ohio Manufacturers' Association Energy Group at 3 (Mar. 29, 2023), available at <https://ohiomfg.informz.net/ohiomfg/data/images/OVEC%20Subsidies%20Double%20-%20209.28.21.pdf>.

²⁰ See Duke Audit Report at 17; DP&L Audit Report at 17; AEP Audit Report at 18.

²¹ *Id.*

payments, which increases the costs needed from customers through the LGR Riders to subsidize the OVEC coal plants.²² In addition to falling prices, the falling costs of building new facilities would make it cheaper to build an entirely new combined cycle gas turbine plant than to continue operating the coal plants.²³

The OVEC coal plants are simply not competitive with the market, and are getting less competitive by the year. Since the OVEC coal plants have become less competitive, the costs of operating these plants has continued to rise and are unreasonable and imprudent. Since LGR Riders recover the costs for the OVEC coal plants from customers, the subsidies paid by customers have also continued to rise in turn and are also unreasonable and imprudent. From 2017 through the end of the Audit Period, the annual subsidy paid by customers more than tripled, to a total of \$150 million in 2021 alone.²⁴

Due to falling energy prices, the annual subsidies and the burden that these subsidies impose on customers will continue to increase and will become even more unreasonable and imprudent. By the end of 2030, the total amount customers have paid to subsidize the OVEC Coal Plants will more than double.²⁵ Based on historical and predicted future electricity prices, Ohioans will likely pay the Sponsoring Companies around \$850 million in total subsidies by 2030.²⁶ It is simply neither reasonable nor prudent to continue to charge customers for subsidizing these

²² See John Seryak, *House Bill 6's Legacy: Utility Power Plant Subsidies Poised to Cost Ohioans Millions More*, Ohio Manufacturers' Association Energy Group at 3-4 (Mar. 29, 2023), available at <https://ohiomfg.informz.net/ohiomfg/data/images/OVEC%20Subsidies%20Double%20-%209.28.21.pdf>.

²³ See Duke Audit Report at 21; DP&L Audit Report at 21; AES Ohio Audit Report at 22.

²⁴ See John Seryak, *House Bill 6's Legacy: Utility Power Plant Subsidies Poised to Cost Ohioans Millions More*, Ohio Manufacturers' Association Energy Group at 5 (Mar. 29, 2023), available at <https://ohiomfg.informz.net/ohiomfg/data/images/OVEC%20Subsidies%20Double%20-%209.28.21.pdf>.

²⁵ *Id.*

²⁶ *Id.*

uneconomic coal plants. The OVEC coal plants are becoming even less competitive by the year, and the costs of subsidizing them are increasing. Requiring customers to continue to pay these costs is unreasonable and imprudent.

B. The existence of the ICPA does not make it reasonable or prudent for the Sponsoring Companies to continue to run OVEC in the same manner and charge Ohio ratepayers for operating the uneconomic, aging, dirty OVEC coal plants.

The Audit Reports fail to address the prudence or reasonableness of the continued operation of OVEC. Instead, the Audit Reports consider it a foregone conclusion due to the existence of the ICPA. While the Sponsoring Companies may have locked themselves into an uneconomic, long-term commitment through the ICPA, this burden lies with the Sponsoring Companies, not Ohio ratepayers. Ohio law is clear that the LGR Riders cannot be used to pass through unreasonable or imprudent costs to customers.²⁷

LEI unreasonably qualified its audit statements about the reasonableness and prudence of the processes, procedures, and oversight of the OVEC coal plants “given that the ICPA is in place and customers will be charged for the cost of the plants until at least May 2024.”²⁸ The Audit Reports seem to accept the ongoing subsidization of the OVEC Coal Plants as a foregone conclusion, simply because the Sponsoring Companies agreed to a bad deal for themselves and their customers. The Commission should not do so.

Instead, the Commission should disregard the ICPA when considering whether the Sponsoring Companies can pass all costs through to customers. Pursuant to the ICPA, the Sponsoring Companies are responsible for the costs of the OVEC coal plants through 2040²⁹—

²⁷ R.C. 4928.148(A)(1).

²⁸ Duke Audit Report at 12; DP&L Audit Report at 12; AES Ohio Audit Report at 12.

²⁹ Duke Audit Report at 7, 12; DP&L Audit Report at 7, 12; AEP Ohio Audit Report at 7, 12.

regardless of whether those costs are reasonable or prudent. However, customers are only responsible for paying for the reasonable and prudent costs of the OVEC coal plants through 2030.³⁰ Just as the time frames of the LGR Riders and the ICPA differ, so to do the cost responsibilities. The fact that the ICPA locks the Sponsoring Companies in to these costs does not make these costs reasonable or prudent, and therefore, does not authorize the Sponsoring Companies to collect from customers unreasonable or imprudent costs. Just as Ohio electric distribution utilities cannot recover from ratepayers through base rates costs associated with facilities that are not used and useful, the Sponsoring Companies cannot recover for imprudent and unreasonable OVEC costs.

Although LEI seemed to consider reasonableness and prudence in light of the fact “ that the ICPA is in place,”³¹ the Commission should not do so. Instead, the Commission should recognize that the ICPA is the Sponsoring Companies’ responsibility—not ratepayers’—and consider the reasonableness and prudence of any costs accordingly as required by R.C. 4928.148.

C. The Commission should exclude costs from recovery during the Audit Period, or, at the minimum, schedule an evidentiary hearing to allow interested stakeholders to exercise their due process rights.

The Audit Reports raise a number of concerns with the Companies’ ongoing purchase of energy from the uneconomic OVEC coal plants, such as the above-market fuel costs and inflated inventories, as well as the “must-run” dispatch strategy.³² Although these questionable actions and strategies demonstrate that the charges passed through the LGR Riders to customers during the Audit Period were not prudent or reasonable, the Audit Reports fail to recommend that such costs

³⁰ R.C. 4928.148(A)(1).

³¹ Duke Audit Report at 12; DP&L Audit Report at 12; AES Ohio Audit Report at 12.

³² Duke Audit Report at 9-11; DP&L Audit Report at 9-11; AES Ohio Audit Report at 9-11.

be disallowed. The Audit Reports also leave many concerns entirely unaddressed. Since the Audit Reports fail to demonstrate that the actions of the Ohio utilities were reasonable and prudent, and since the Sponsoring Companies have not submitted additional evidence demonstrating that their actions and the costs passed onto customers were in fact reasonable and prudent, the Commission should disallow the costs and refund customers.

Alternatively, at a minimum, the Commission should set this matter for hearing, and allow parties to present evidence, examine witnesses, and file briefs regarding the reasonableness and prudence of the Sponsoring Companies' actions and the costs collected from customers. This would enable all interested stakeholders to properly exercise their due process rights on the issue.

For example, despite the nexus between the HB 6 corruption conspiracy, the LGR Riders, AEP Ohio, and various coal companies, the Audit Reports simply turn a blind eye to any potential impropriety. As discussed above, AEP Ohio's parent company, as well as various coal companies, including one that supplied above-market priced coal for the OVEC coal plants, also contributed monies in support of HB 6.³³ These companies now directly benefit from the customer-funded bailout legislatively enacted by HB 6. None of the Audit Reports even mention the bribery issues, or the fact that they may be indicative of a conflict of interest between customers on one side, and subsidized OVEC plants and coal companies on the other. While HB 6 may have required the

³³ Kathiann M Kowalski, *Dark Money Helped Utilities Subsidize Coal Plants, Delaying Climate Action At Ratepayers' Expense*, Ohio Capital Journal (May 3, 2022), available at <https://ohiocapitaljournal.com/2022/05/03/dark-money-helped-utilities-subsidize-coal-plants-delaying-climate-action-at-ratepayers-expense/>; Dave Anderson, *Bank Records Reveal More Secret Payments to Larry Householder's Dark Money Group from the Fossil Fuel Industry, Other Sectors*, Energy and Policy Institute (Mar. 29, 2023), available at energyandpolicy.org/larry-householder-dark-money/; Randy Ludlow, *Columbus Utility Giant AEP Funded Dark Money Spending in HB 6 Campaign*, Columbus Dispatch (July 25, 2020), available at <https://www.dispatch.com/story/news/politics/state/2020/07/25/columbus-utility-giant-aep-funded-dark-money-spending-in-hb-6-campaign/41843419/>.

Commission to implement the LGR Riders, it certainly is neither reasonable nor prudent to use the LGR Riders to fund a bribery-sponsored bailout for aging, dirty coal facilities.

The potential conflict of interest with the coal companies is compounded by poor coal inventory management at the OVEC coal plants. LEI noted that both of the OVEC coal plants maintained inventory levels “significantly above OVEC’s recommended seasonal inventory.”³⁴ In previous audits, LEI had recommended that OVEC adjust its coal inventories and burn forecasts to improve its inventory management; OVEC simply ignored the previous audit recommendations and declined to do so.³⁵ LEI also noted that the OVEC coal plants have locked into long-term coal supply contracts that are above current prices.³⁶ The combination of unaddressed coal inventory management procedures and long-term, above-market coal purchase contracts inflates the costs of operating the OVEC coal plants and increases the amounts passed through the LGR Riders to customers. Again, this ongoing inflation of costs—which directly benefits companies that sponsored the corrupt HB 6—is neither reasonable nor prudent and harms customers.

Additionally, the Audit Reports fail to address whether the ongoing operation of the OVEC coal plants is reasonable or prudent. As discussed above, the Audit Reports note that prices for energy have generally fallen, increasing costs to customers and making the OVEC coal plants noncompetitive compared to new builds.³⁷ As such, the Audit Reports note that the must-run, rather than economic dispatch, strategy of the OVEC coal plants is not competitive, and recommended that OVEC prudently commit its facilities on an economic basis more often.³⁸

³⁴ Duke Audit Report at 68-69; DP&L Audit Report at 63-64; AEP Audit Report at 66-67.

³⁵ Duke Audit Report at 11, Figure 1; AEP Audit Report at 11, Figure 1.

³⁶ Duke Audit Report at 59; DP&L Audit Report at 54; AEP Audit Report at 57.

³⁷ Duke Audit Report at 17; DP&L Audit Report at 17; AEP Audit Report at 18.

³⁸ Duke Audit Report at 50; DP&L Audit Report at 44; AEP Audit Report at 48.

However, LEI also noted that the OVEC coal plants may not be capable of full-time economic dispatch due to shortcomings in their design.³⁹ Nonetheless, LEI's Audit Reports fail to address the next logical question: if economic dispatch is prudent and reasonable, and the OVEC coal plants are incapable of operating with increased economic dispatch, is the ongoing operation of the OVEC coal plants even prudent and reasonable? At a minimum, it is clear that operating the OVEC plants with a must-run strategy is not reasonable or prudent. Again, like with the ICPA, the Audit Reports simply treat the shortcomings of the OVEC coal plants as a foregone conclusion.

The Commission should therefore find that the Audit Reports fail to demonstrate that the costs passed through to customers during the Audit Period were prudent and reasonable. The Sponsoring Companies have simply failed to satisfy their burden that their actions were reasonable and prudent, and that the costs that were recovered from customers were similarly reasonable and prudent. At the very least, in order to address these shortcomings, the Commission should set this matter for hearing, and allow parties to introduce evidence, examine witnesses, and file briefs regarding the reasonableness and prudence of the Sponsoring Companies' actions and the costs collected from customers.

III. CONCLUSION

Overall, the Audit Reports fail to demonstrate the reasonableness or prudence of forcing customers to pay \$850 million to subsidize the dirty, aging, OVEC coal plants. Customers have already paid \$400 million, and this burden will only continue to grow. The Audit Reports fall short of meeting the burden required by R.C. 4928.148(A)(1) by failing to address certain issues and by considering the prudence or reasonableness of the costs in the context of the ICPA. The

³⁹ *Id.*

Commission should not do so, and should disallow all of the OVEC costs during the Audit Period as unreasonable and imprudent. Alternatively, the Commission should set this matter for hearing to determine the reasonableness and prudence of the Sponsoring Companies' actions and the costs collected from customers.

Ohio ratepayers have gotten a bad deal from the corrupt HB 6. The Sponsoring Companies, coal suppliers (some of whom sponsored the corrupt legislation), and OVEC have received a windfall. It is not reasonable or prudent for the Commission to continue to put the burden of this windfall on consumers.

Respectfully submitted,

/s/ Kimberly W. Bojko

Kimberly W. Bojko (0069402) (Counsel of Record)

Jonathan Wygonski (0100060)

Carpenter Lipps & Leland LLP

280 North High Street, Suite 1300

Columbus, Ohio 43215

Telephone: (614) 365-4100

bojko@carpenterlipps.com

wygonski@carpenterlipps.com

(willing to accept service by e-mail)

*Counsel for the Ohio Manufacturers' Association
Energy Group*

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on May 8, 2023 upon the parties listed below.

/s/ Kimberly W. Bojko

Kimberly W. Bojko (0069402) (Counsel of Record)
Jonathan Wygonski (0100060)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
wygonski@carpenterlipps.com
(willing to accept service by e-mail)

*Counsel for the Ohio Manufacturers' Association
Energy Group*

Rocco.DAscenzo@duke-energy.com
Jeanne.Kingery@duke-energy.com
Larisa.Vaysman@duke-energy.com
Elyse.akhbari@duke-energy.com
Thomas.Lindgren@ohioattorneygeneral.gov
sarah.feldkamp@ohioAGO.gov
John.finnigan@occ.ohio.gov
william.michael@occ.ohio.gov
rdove@keglerbrown.com
ctavenor@theOEC.org
trent@hubaydougherty.com
paul@CarpenterLipps.com
amy.botschner.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
stnourse@aep.com
mjschuler@aep.com

christopher.hollon@aes.com
randall.griffin@aes.com
tallexander@beneschlaw.com

Attorney Examiners:
megan.addison@puco.ohio.gov
jesse.davis@puco.ohio.gov

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

5/8/2023 5:13:40 PM

in

Case No(s). 21-0477-EL-RDR

Summary: Comments OMAEG Comments, OVEC Generation Purchase Rider Audits Case (21-477-EL-RDR) electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Manufacturers' Association Energy Group.