

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

REPLY COMMENTS OF AES OHIO

Pursuant to the April 7, 2023 Entry in this proceeding, The Dayton Power and Light Company d/b/a AES Ohio files these Reply Comments regarding the December 17, 2021 Audit of the Legacy Generation Resource Rider of AES Ohio – Final Report (“AES Ohio LGR Audit Report”) prepared by London Economics International LLC (“LEI”).¹

LEI was tasked with reviewing the actions of AES Ohio, AEP Ohio, and Duke Energy Ohio with respect to their interest in the Ohio Valley Electric Corporation (“OVEC”) in 2020.² See R.C. 4928.148(A)(1) (requiring the Commission to determine, in certain years, “the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource,” *i.e.* OVEC). After an extensive review, LEI concluded that AES Ohio’s “processes, procedures, and oversight were mostly adequate and *consistent with good utility practice.*”³ AES Ohio has only a 4.90% interest in OVEC.

¹ Initial comments were filed on May 8, 2023 by AES Ohio, Ohio Power Company (“AEP Ohio”), Duke Energy Ohio, Inc. (“Duke Energy Ohio”), Sierra Club, Ohio Environmental Council (“OEC”), Citizens Utility Board and Union of Concerned Scientists (“CUB & UCS”), and Ohio Manufacturers’ Association Energy Group (“OMAEG”).

² Entry (July 14, 2021), ¶ 6.

³ AES Ohio LGR Audit Report, p. 9 (emphasis added).

General Matters

In their initial comments, many parties directed their ire toward the LGR itself and the policy determination by the legislature to allow recovery of prudently-incurred net OVEC costs, as allocated by the FERC-approved Amended and Restated Inter-Company Power Agreement (“ICPA”).⁴ The Commission should reject the parties’ arguments attacking the LGR and the ICPA because as a creature of statute, the Commission must apply statutes, not rewrite them.⁵ The requirement of R.C. 4928.148 to review “the prudence and reasonableness” of utilities’ actions with respect to their OVEC interests is not an invitation to second guess the notion of cost recoverability or the ICPA itself, which was both known to the legislature and expressly contemplated in R.C. 4928.01(A)(42).

The Commission should likewise reject OCC’s attempt to graft onto R.C. 4928.148 a “heightened” standard of review that is inconsistent with the statute’s text. The Ohio Supreme Court has long held that a “prudent decision” is one that “reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made.”⁶ OCC ostensibly seeks to apply a “best interest” standard that has been mentioned in other rider proceedings involving net OVEC costs.⁷ However, as further shown below, the arguments asserted by OCC and other parties in this case lean into the hindsight-informed assessment that the Supreme Court rejected when it explained the nature of a prudence review, *i.e.* a “retrospective, factual inquiry, ***without the use***

⁴ *E.g.*, OCC, p. 1; OMAEG Comments, pp. 1-3; OEC Comments, pp. 1-2; CUB & UCS Comments, pp. 2-4.

⁵ *E.g.*, *Disc. Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 51 (“The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.”)

⁶ *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 528 (1993).

⁷ OCC Comments, p. 5.

of hindsight judgment, into the decisionmaking process of the utility’s management.”⁸ Nothing in R.C. 4928.148 suggests that the legislature intended to depart from that well-established standard.

Commitment of Energy and Capacity

Turning to other issues raised in this case, various parties criticized OVEC’s practice to self-schedule all but one of its units pursuant to procedures approved by the OVEC Operating Committee.⁹ As LEI explained:

OVEC typically self-schedules its units in the PJM day-ahead market (in other words, OVEC informs PJM that a unit’s availability status is “must run”). The alternative to must-run availability status for a unit which is not on outage is to offer the unit so that it may be committed by PJM (in other words, OVEC would inform PJM that a unit’s availability status is “economic”). Must-run units are committed by the market participant and then dispatched by PJM without regard to whether the hourly energy price is high enough to cover the unit’s fuel and variable costs.¹⁰

LEI did not find that OVEC’s commitment strategy in 2020 was imprudent; however, it recommended that the OVEC Operating Committee allow units to be committed either as must-run or based on economic commitment on an ongoing basis.¹¹ LEI acknowledged that while it may be ideal, in theory, to commit units “based on economics all or most of the time . . . coal plants are generally not designed for this kind of operation, and repeated start-up of coal plants

⁸ *Cincinnati*, 67 Ohio St.3d at 528.

⁹ *E.g.*, OCC Comments, pp. 5-11; OEC Comments, pp. 5-6; Sierra Club Comments, pp. 7-8; CUB & UCS Comments, pp. 6-7; OMAEG Comments, pp. 7-10.

¹⁰ AES Ohio LGR Audit Report, p. 44.

¹¹ *Id.* at 38.

can damage equipment. Periods of non-operation also cause difficulties in managing staffing and fuel deliveries.”¹²

Given cycling, timing, risk, and cost considerations, day-ahead and real-time market prices on a given day are not dispositive of economic usage. Over the long-term, OVEC serves as a hedge during times of volatile and high energy prices, as happened in 2022.¹³ OVEC’s commitment strategies in 2020 were prudent and reasonable, and the parties’ hindsight assessments do not demonstrate otherwise.

More importantly, no party has shown that *AES Ohio* acted imprudently or unreasonably in exercising its 4.90% interest as to OVEC’s commitment decisions. As AEP Ohio explained, any change in the bidding procedure requires the unanimous approval of the OVEC Operating Committee, since such a change would impact the availability of OVEC generating units to all Sponsoring Companies, including two Sponsoring Companies that do not allocate their share of OVEC’s available energy for bids in PJM’s energy market. As one of many members, AES Ohio can only make recommendations to other OVEC sponsors and cannot control their decisions.

Fuel Purchasing

Some parties also criticized OVEC’s fuel purchasing decisions.¹⁴ Their analyses, however, is again merely hindsight comparison to market results in 2020, during the seismic impact of COVID-19. As explained by LEI, AEP Ohio, and Duke Energy Ohio, OVEC’s contracts for coal delivery are typically entered months or years in advance of when the coal is

¹² *Id.*

¹³ Notably, AES Ohio’s LGR rate has been a credit to customers since July 2022.

¹⁴ *E.g.*, OCC Comments, pp. 11-12; CUB & UCS, pp. 13-14.

needed for consumption.¹⁵ Such contracts prudently seek to diversify coal providers, promote innovation, reduce supply chain risk, and drive competition. Not a single party has shown that any of OVEC's coal contracts were not what "a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made."¹⁶

While LEI identified steps to improve the procurement and delivery of fuel,¹⁷ it did not find that OVEC's policies and procedures (or AES Ohio's exercise of its 4.90% interest) in this regard were imprudent or unreasonable.

Environmental Compliance

Parties have also attempted to shoehorn various out-of-period environmental grievances into this proceeding. For instance, OCC seeks to disallow costs relating to the Clifty Creek plant incurred since the U.S. EPA issued a *proposed* denial of a compliance plan for coal combustion residuals in **January 2022**, more than a year after the audit period ended.¹⁸ CUB and UCS similarly seek to disallow costs that OVEC incurred during the audit period to comply with then-current environmental regulations merely because those regulations later changed – the very essence of hindsight review. CUB and UCS even admit that "the Companies arguably did not have sufficient knowledge [in the audit period] about potential future EPA regulations," but then go on to claim that OVEC should not have invested in environmental compliance measures because "there was a possibility" that the environmental regulations could change. CUB and UCS completely ignore the risk of OVEC not attempting to comply with regulations. Again,

¹⁵ AES Ohio LGR Audit Report, p. 49; AEP Ohio Comments, p. 7; Duke Energy Ohio Comments, p. 10.

¹⁶ *Cincinnati*, 67 Ohio St.3d at 528.

¹⁷ OCC Comments, pp. 13-14;

¹⁸ CUB & UCS Comments, pp. 10-13.

rather than assessing prudence and reasonableness, the parties inappropriately rely on hindsight to support their arguments.

Based on its review of the facts, LEI found that “OVEC’s environmental equipment configuration is consistent with the industry standard, and therefore, OVEC is well positioned to comply with environmental rules and regulations at federal and state levels.”¹⁹ LEI further found that “OVEC has an effective management of emissions allowances given the dynamics in the market, regulatory changes, and efficiency of emission control system.” The Commission should accordingly find that OVEC (and AES Ohio in exercising its 4.90% interest) acted prudently and reasonably in this regard.

Capital Expenses

Some parties have argued that the Commission should disallow various costs relating to capital expenses.²⁰ However, those costs are costs of OVEC ownership under the ICPA, which was FERC approved and known at the time the legislature enacted R.C. 4928.148. Such costs should not be capped or categorically disallowed, particularly when ICPA contemplated such costs at the time R.C. 4928.148 was passed. Moreover, arbitrary limits are inconsistent with the statutory standard of “prudence and reasonableness.”²¹

Reconciliation Rider Audit

Finally, OEC demands an evidentiary hearing, in part, because LEI supposedly did not sufficiently address the recommendations in AES Ohio’s Reconciliation Rider audit.²² That audit

¹⁹ AES Ohio LGR Audit Report, p. 79.

²⁰ *E.g.*, OCC Comments, pp. 14-15; Sierra Club, pp. 9-10; CUB & UCS, pp. 9-10

²¹ R.C. 4928.148(A)(1).

²² OEC Comments, p. 4.

concerned a different rider that recovered net OVEC costs before 2020.²³ Issues relating to that audit are better addressed in that proceeding and not under the statute-based audit at issue here.

Conclusion

AES Ohio asks that the Commission address LEI's recommendations as set forth in its comments. If the Commission concludes that there is any basis to support material changes in practices or procedures of AES Ohio or OVEC during the audit period, then AES Ohio requests an evidentiary hearing to address those matters prior to an adverse finding.

Respectfully submitted,

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²³ See generally Case No. 20-165-EL-RDR.

CERTIFICATE OF SERVICE

I certify that the foregoing document was e-filed with the Public Utilities Commission of Ohio on May 23, 2023. The PUCO's e-filing system will electronically serve notice of the filing of this document.

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Summary: Comments Reply Comments of AES Ohio electronically filed by Mr.
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AES Ohio.