

**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.)	

**APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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October 6, 2023

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On September 6, 2023, the Public Utilities Commission of Ohio (“PUCO”) issued an order that permits Duke Energy Ohio (“Duke”) to keep \$24.6 million¹ in above-market energy prices charged to consumers in order to operate two dirty old coal plants located in Ohio and Indiana. The coal plants are owned by the Ohio Valley Electric Corporation (“OVEC”), which Duke owns along with other electric utilities and electric cooperatives. The Office of the Ohio Consumers’ Counsel (“OCC”) files this Application for Rehearing to protect over 700,000 Duke residential consumers who were overcharged by Duke through a so-called “Price Stabilization Rider” approved by the PUCO.

The PUCO hired what was purported to be an independent auditor to review Duke’s costs of operating the OVEC plants. The Auditor stated “[t]he purpose of the audit is 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 its retail ratepayers.”² Notably, however, the Auditor determined that “the OVEC plants cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale

¹ OCC Ex. 2 (Glick Direct) at p. 7:19.

² Audit of the Price Stabilization Rider of Duke Energy Ohio Final Report by London Economics International, LLC, Case No. 20-167-EL-RDR (October 15, 2020) (“Audit Report”), at 7.

markets.”³ Remarkably, though, the Auditor found no imprudence on Duke’s part and did not recommend a disallowance. The PUCO agreed.

But, charging for millions in above-market charges to subsidize Duke’s operation of the OVEC plants is *not* in the best interest of consumers. Accordingly, the PUCO should abrogate or modify its September 6, 2023 Order and require Duke to return the \$24.6 million in above-market energy prices it unfairly charged to Ohio consumers. The PUCO’s Opinion and Order allowing Duke to collect \$24.6 million from consumers to subsidize its affiliated company’s old coal plants was unreasonable and unlawful for the following reasons:

ASSIGNMENT OF ERROR 1: The PUCO erred in determining that all costs charged by Duke to consumers through the price stabilization rider for January 1, 2019 through December 31, 2019 were prudent. The PUCO’s Order allowing Duke to charge consumers \$24.6 million in above-market energy costs disregards evidence that Duke’s commitment strategy for OVEC in the PJM market was imprudent and not in the best interest of consumers in violation of R.C. 4903.13. To protect consumers, the PUCO should grant rehearing and abrogate or modify the Order.

ASSIGNMENT OF ERROR 2: The PUCO failed to follow past precedent when it did not review the coal plant subsidy costs according to its prior announced standards. The PUCO ruled that “[r]etail cost recovery may be disallowed as a result of the annual prudency review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues . . . [and] that bidding behavior is prudent and in the best interest of retail ratepayers.” *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (Mar. 31, 2016). The PUCO’s failure to follow this precedent, without providing any reason, violates R.C. 4903.09.

ASSIGNMENT OF ERROR 3: The PUCO erred by excluding relevant evidence regarding the Auditor’s conclusions in another case about another utility’s costs to operate the exact same coal plants during the same time period. The PUCO’s exclusion of evidence that the Auditor concluded in a draft audit report that operating the coal plants is not in the best interest of consumers was unreasonable. To protect consumers, the PUCO should grant rehearing and abrogate or modify the Order to include this evidence, which is directly relevant to whether Duke’s operation of the OVEC plants was prudent and in the best interest of consumers.

³ *Id.* at 9.

The Memorandum in Support gives the reasons for granting this Application for Rehearing.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case concerns the PUCO’s audit of Duke’s coal plant subsidy costs charged to Ohioans in 2019 through Duke’s PUCO-approved Price Stabilization Rider (“PSR”). In a September 6, Order, the PUCO determined that Duke properly charged Ohio consumers \$24.6 million in above-market energy costs to operate two dirty old inefficient coal plants – one of which is in Indiana. The coal plants are owned and operated by the Ohio Valley Electric Corporation (“OVEC”), which is in turn owned by Duke and other electric utilities and electric cooperatives. The PUCO should grant rehearing to abrogate or modify its Order allowing Duke to charge consumers for the \$24.6 million in above-market energy costs to operate the OVEC plants.

The Office of the Ohio Consumers’ Counsel (“OCC”) and the Ohio Manufacturers’ Association Energy Group (“OMAEG”) presented evidence that the OVEC plants are old, inefficient, and costly to maintain and operate.⁴ The OVEC plants cannot compete in the competitive market, due in large part to the entry and abundance of new renewable generation and gas facilities that are coming online.⁵ In 2019, OVEC’s costs for energy and capacity were significantly higher than market prices for energy and

⁴ OCC Ex. 2 (Glick Direct) at 10.

⁵ *Id.*

capacity. These high costs were passed on to the companies that own OVEC, including Duke, which owns a nine percent (9.0%) share in OVEC.⁶ In 2019, Duke incurred \$24,635,143.47 in above-market costs for power from OVEC plants. Duke passed the costs on to Ohio consumers through the PSR, an action the PUCO approved in the September 6 Order. But Duke's foisting of \$24.6 million on to Ohioans was neither prudent nor in the consumers' best interest. And the power from these coal plants was not bid into the market in manner that is consistent with how merchant coal plant operators would bid when they are seeking to maximize profits.

The PUCO selected London Economics International, LLC ("Auditor") to conduct an independent audit of Duke's Price Stabilization Rider for the period of January 1, 2019, through December 31, 2019.⁷ The final Audit Report for this proceeding was issued on October 15, 2020 and detailed the Auditor'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 – the Auditor determined that Duke's "processes, procedures, and oversight were mostly adequate."⁸ However, Duke's "mostly adequate" actions do not justify charging consumers \$24.6 million in above-market costs.

OCC presented evidence that Duke's charges to consumers for the coal plants in 2019 were imprudent, that the plants were not bid using the same practices followed by merchant plant operators and that operation of the OVEC plants is not in the best interest

⁶ *Id.* at 16.

⁷ Entry (April 8, 2020).

⁸ Audit Report, at 9.

of consumers.⁹ The PUCO's Order largely ignores this evidence ignores the "best interest of consumers" standard and failed to look at whether the bidding was done consistent with profit maximization. The PUCO's Order also excluded highly relevant evidence that the Auditor had previously determined that operation of the OVEC plants is not in the best interest of consumers.

The PUCO's Order is unreasonable and unlawful and should be abrogated or modified. To protect consumers from subsidizing imprudent operation of the OVEC plants, the PUCO should grant rehearing and disallow Duke's charges to consumers of \$24.6 million in above-market energy costs.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The PUCO erred in determining that all costs charged by Duke to consumers through the price stabilization rider for January 1, 2019 through December 31, 2019 were prudent. The PUCO's Order allowing Duke to charge consumers \$24.6 million in above-market energy costs disregards evidence that Duke's commitment strategy for OVEC in the PJM market was imprudent and not in the best interest of consumers in violation of R.C. 4903.13 To protect consumers, the PUCO should grant rehearing and abrogate or modify the Order.

The PUCO's ruling that Duke's 2019 Price Stabilization Rider charges were prudent is in error and disregards the evidence presented at the evidentiary hearing. The PUCO ignored that OVEC's use of the "must-run" commitment strategy was unreasonable and inconsistent with how merchant coal plant operators seeking to maximize profits would bid their plants. This bidding strategy was not in the best interest of retail consumers. The PUCO's ruling is against the manifest weight of the evidence, violating R.C. 4903.13.

⁹ OCC Ex. 1 (Haugh Direct) at 19-23; OCC Ex. 2 (Glick Direct) at 1-14.

Under Ohio law, a prudent decision, for purposes of evaluating utility rate-making decisions, is defined as “one which 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.” A utility company bears the ultimate burden of proving that its costs were prudently incurred. To the extent that any general presumption of prudence exists, parties claiming imprudence only need to introduce some concrete evidence that imprudence occurred. The burden then shifts to the utility to prove that its actions were prudent.

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 up to and including the 2019 audit year.¹⁰

	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 above-market electricity costs under the Price Stabilization Rider.¹¹ OCC witness Mr.

¹⁰ OCC Ex. 2 (Glick Direct) at p. 17.

¹¹ *Id.* at 17-19.

Haugh testified that Duke and OVEC imprudently committed the OVEC plants into the PJM Day-Ahead Energy Market on a “must run” basis.¹² “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 was imprudent because power plant operators, following good utility practice, do a daily financial analysis of the projected costs and projected revenues for operating their plants before deciding whether to commit the plant as must-run or economic.¹³ By imprudently failing to do this analysis, OVEC operated the plants during long periods when the plants’ revenue did not even cover variable operating costs.

The PUCO ignored this evidence. The PUCO should have disallowed 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.¹⁴

Generators, like the OVEC plants, operating within the PJM market generally commit their available units as either economic or must-run.¹⁵ 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.¹⁶

¹² OCC Ex. 1 (Haugh Direct) at 20-23.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ OCC Ex. 2 (Glick Direct) at 19.

¹⁶ *Id.* at 39.

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).¹⁷ However, a unit designated as “must-run” will operate with a power output no less than its minimum operating level.¹⁸ 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.¹⁹ Duke/OVEC were imprudent because they operated the plants as must-run continuously and did not use daily financial analysis to guide their decision-making.

Duke cannot escape responsibility by arguing that the OVEC Operating Committee is responsible for the daily unit commitment decisions. The auditor failed to review whether the OVEC Operating Committee’s use of the must-run commitment designation was reasonable. The PUCO should have reviewed the actual bidding practices, regardless of who was responsible for deciding them. If the OVEC Operating Committee’s use of must-run commitment was imprudent, then the PUCO should have held Duke responsible for such imprudence. In past cases, the PUCO found that minority owners of Ohio nuclear plants were responsible for imprudence in the plants’ operation, regardless of whether the imprudence was directly caused by the plant operator or an outside contractor.²⁰

¹⁷ *Id.*

¹⁸ *Id.* at 40.

¹⁹ *Id.*

²⁰ *In re Zimmer Nuclear Power Plant*, Case No. 84-11870EL-UNC, 1985 Ohio PUC LEXIS 9 (November 26, 1985).

The PUCO previously adopted this rule for reviewing Coal Plant Subsidy costs:

Retail cost recovery may be disallowed as a result of the annual prudency review *if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues.*²¹

The PUCO has also stated that it will not approve Coal Plant Subsidy costs unless the utility meets its burden of proof to establish that the charges are in the best interest of retail ratepayers.²²

OCC's witnesses established not only that the OVEC plants were operated imprudently, but also that the plants were not operated consistently with how a merchant coal plant operator seeking to maximize profits would have done it. In addition, the OCC witnesses' testimony discussed above also established that it was not in the best interest of retail consumers to run the plants in this manner. The PUCO's ruling ignores this evidence. The PUCO's ruling was against the manifest weight of the evidence, violating R.C. 4903.13. Rehearing should be granted.

²¹ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (March 31, 2016).

²² *Id.*

ASSIGNMENT OF ERROR 2: The PUCO failed to follow past precedent when it did not review the coal plant subsidy costs according to its prior announced standards. The PUCO ruled that “[r]etail cost recovery may be disallowed as a result of the annual prudency review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues . . . [and] that bidding behavior is prudent and in the best interest of retail ratepayers.” In re Ohio Power PPA Rider, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (Mar. 31, 2016). The PUCO’s failure to follow this precedent, without providing any reason, violates R.C. 4903.09.

The PUCO ruled that Duke’s \$24.6 million in above-market electricity costs were prudent.²³ The PUCO did not, however, make any finding as to whether the bidding practices were “consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues” or “in the best interest of retail ratepayers.” These findings are required under existing PUCO precedent. The PUCO’s failure to follow this precedent, without explanation, violates R.C. 4903.09.

The PUCO established this precedent in *In re Ohio Power PPA Rider*,²⁴ the first case when it approved Coal Plant Subsidy costs. The PUCO’s ruling states:

Retail cost recovery may be disallowed as a result of the annual prudency review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues. As noted above, AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers.²⁵

In the present case, the PUCO made no findings on these issues. It did not find that it was in consumers’ best interests to pay for \$24.6 million in above-market energy costs coming from the two dirty coal plants. Nor did the PUCO find that the bidding of the

²³ Opinion and Order at ¶ 55 (September 6, 2023).

²⁴ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (March 31, 2016)

²⁵ *Id.* at 89.

units as must run was “consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues.”

The PUCO departed from its precedent when it failed to follow these more protective standards for review.

The Supreme Court of Ohio has instructed the PUCO to “respect its own precedent in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.”²⁶ If the PUCO departs from precedent it must explain why the new course also must be substantively reasonable and lawful.²⁷

The PUCO’s failure to review the coal plant subsidies under the standard previously adopted violated PUCO precedent. And the PUCO did not explain why it did not follow its precedent. Additionally, the use of “prudence” alone, defined without reference to what is in consumers’ best interest and without reference to a more objective merchant standard, was not substantively reasonable. The PUCO’s actions violated R.C. 4903.09. The PUCO should grant rehearing to re-evaluate the evidence in light of these previously established standards for review.

²⁶ *Cleveland Elec. Illum. Co. v. Public Util. Comm.*, 42 Ohio St.2d 403, 431.

²⁷ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 523.

ASSIGNMENT OF ERROR 3: The PUCO erred by excluding relevant evidence regarding the Auditor’s conclusions in another case about another utility’s costs to operate the exact same coal plants during the same time period. The PUCO’s exclusion of evidence that the Auditor concluded in a draft audit report that operating the coal plants is not in the best interest of consumers was unreasonable. To protect consumers, the PUCO should grant rehearing and abrogate or modify the Order to include this evidence, which is directly relevant to whether Duke’s operation of the OVEC plants was prudent and in the best interest of consumers.

The PUCO upheld two crucial evidentiary rulings by the Attorney Examiner that excluded highly relevant evidence of the Auditor’s bias or lack of independence.²⁸ Those underlying rulings violated OCC’s substantial rights.

The PUCO’s ruling incorporates the following two erroneous rulings from the Attorney Examiner. First, the PUCO approved the Attorney Examiner’s improper exclusion of parts of OCC witness Mike Haugh’s testimony discussing how PUCO Staff asked the same auditor to change her findings in a draft audit report. The PUCO improperly upheld this ruling. Specifically, the auditor was asked to change her conclusion in a draft AEP audit report that “keeping the plants running does not seem to be in the best interests of the ratepayers.”²⁹ Second, the PUCO also improperly upheld the Attorney Examiner’s erroneous exclusion from evidence of the draft AEP audit report itself. The PUCO’s Opinion and Order upheld these evidentiary rulings. Under O.A.C. 4901-1-15(F), OCC preserved its right to appeal these rulings by “discussing the matter as a distinct issue in its initial brief....”³⁰

These evidentiary rulings violated OCC’s substantial rights.³¹ The PUCO’s ruling had a significant impact on the outcome of the case, which led to an unjust and

²⁸ Staff Ex. 1, Audit Report at ¶¶ 27-34.

²⁹ Opinion and Order at ¶ 34 (September 6, 2023).

³⁰ O.A.C. 4901-1-15(F). *See* OCC Initial Brief at 20-24 (July 29, 2022).

³¹ Ohio R.Evid. 103(A).

unreasonable result. Had the PUCO allowed evidence into the record, it would have been cause for the PUCO to question its wholesale reliance on the auditor's findings. Based on its heavy reliance on the auditor's findings, the PUCO concluded that "the audit report, including all its recommendations, should be adopted" and "the audit was conducted appropriately and consistent with our directives."³² But the excluded evidence would have established that the auditor's actual opinion was that "keeping the plants running does not seem to be in the best interests of the ratepayers."

The PUCO should grant rehearing and reconsider its decision that the plants were operated prudently, based on the PUCO's reliance on the auditor's report and without considering the excluded evidence. The PUCO should weigh the excluded evidence as part of the reconsideration process and rule that the entire \$24.6 million in above-market costs should be disallowed, based on the testimony of OCC's witnesses and the excluded evidence that the auditor's true opinion was that "keeping the plants running does not seem to be in the best interests of the ratepayers."

The PUCO upheld the rulings on the grounds that the draft audit report and Mr. Haugh's related testimony were not relevant.³³ The PUCO was wrong.

The audit report in the present case and the excluded AEP audit report had many similarities. Both audits involved the same Coal Plant Subsidy costs from the OVEC plants for 2019.³⁴ Both audits were performed by the same auditor.³⁵ Both audits

³² Opinion and Order at ¶¶ 55-56 (September 6, 2023).

³³ *Id.* at ¶ 34.

³⁴ Staff Ex. 1, Audit Report; *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR, et al., Audit Report (September 16, 2020).

³⁵ *Id.*

involved the same PUCO Staff audit supervisor.³⁶ Both audit contracts were awarded at about the same time.³⁷ Both audits were performed at the same time.³⁸ Both audit reports were filed at about the same time.³⁹ Both audit reports are nearly identical in wording.

The first evidentiary ruling occurred when the Attorney Examiner granted a Motion to Strike OCC witness Mike Haugh's testimony 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."⁴⁰ This portion of Mr. Haugh's testimony gave a detailed explanation of the communications between PUCO Staff and the auditor, which OCC learned of 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 independent judgment by asking her to modify her ultimate conclusion in the case – whether the plants were operated in the best interest of retail ratepayers.⁴¹ The Attorney Examiner 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. That draft contained

³⁶ Pre-filed Testimony of Rodney P. Windle (May 18, 2022); *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR, et al., Pre-filed Testimony of Rodney P. Windle (December 29, 2021).

³⁷ Entry (April 8, 2020); *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR, et al., Entry (March 11, 2020).

³⁸ *Id.*

³⁹ Staff Ex. 1, Audit Report; *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR, et al., Audit Report (September 16, 2020).

⁴⁰ Hearing Transcript Vol. III, p. 426:14-428:3.

⁴¹ *Id.*

the auditor's statement that "keeping the plants running does not seem to be in the best interests of the ratepayers."⁴² Given the similarities between the two audits, it is extremely unlikely the auditor would have come to a different conclusion about what was in utility consumers' best interests.

The PUCO's Opinion and Order erred in upholding these evidentiary rulings. The PUCO simply concluded that the excluded evidence "lack relevance."⁴³ This ruling was incorrect. The evidence was both relevant and it was admissible for impeachment purposes.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁴⁴ In complex business matters, courts should grant wide latitude in admitting evidence which might prove a party's intent.⁴⁵ Draft documents can be relevant to show a party's intent.⁴⁶

The excluded evidence was probative of the auditor's true opinion as to whether running the plants was in the best interests of consumers. The evidence showed that PUCO Staff expressed concern that this finding was too critical of the utility. The evidence further showed that the auditor eliminated this sentence from her final report after PUCO Staff expressed this concern.

⁴² Hearing Transcript Vol. II p. 214:10-14; Hearing Transcript Vol. II, p. 222:20-223:20.

⁴³ Opinion and Order at ¶ 34.

⁴⁴ Ohio R.Evid 401.

⁴⁵ *Colony by the Mall v. Duckro*, 2d Dist. Mont. No. CA 6169, 1979 Ohio App. LEXIS 8802 (June 29, 1979).

⁴⁶ *State ex rel. Mohr v. Colerain Twp.*, 2022-Ohio-1109, 1st Dist.; *Shore v. Best Cuts, Inc.*, 8th Dist. Cuyahoga No. 77340, 2000 Ohio App. LEXIS 5553, 2000 WL 1754007 (November 30, 2000); *Colony by the Mall v. Duckro*, 2d Dist. Mont. No. CA 6169, 1979 Ohio App. LEXIS 8802 (June 29, 1979).

The excluded evidence was therefore highly relevant to prove three key points: (1) the auditor's real opinion was that operating the plants was not in the best interests of the ratepayers; (2) both the PUCO Staff witness and the auditor were biased and prejudiced in Duke's favor and against consumers' interests; and (3) the audit was not an independent audit, as required by PUCO precedent.

Relevant evidence is generally admissible.⁴⁷ Relevant evidence can be excluded if it causes confusion of the issues, but only if the probative value is substantially outweighed by the danger of confusion.⁴⁸ This case was decided by PUCO Commissioners who are experts in utility regulation and who have decided many cases relating to OVEC over the years. It cannot reasonably be argued that any danger of confusion would substantially outweigh the probative value of the excluded evidence.

The PUCO ordered an independent audit in this case.⁴⁹ The evidence was also admissible for impeachment purposes, to show that both the auditor and PUCO Staff witness were biased and prejudiced in favor of the utility and that they both lacked independence.⁵⁰ Ohio R.Evid. 611(B) states that "cross-examination shall be permitted on all relevant matters and matters affecting credibility." Ohio R.Evid. 616(A) provides that a witness can be impeached with evidence of bias, prejudice, or motive to misrepresent. The excluded evidence therefore should have been admitted for impeachment purposes.⁵¹

⁴⁷ Ohio R.Evid. 402.

⁴⁸ Ohio R.Evid. 403.

⁴⁹ Entry (February 13, 2020).

⁵⁰ *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 2001-Ohio-248, 743 N.E.2d 890.

⁵¹ *Id.*

The excluded evidence was admissible because it was highly relevant. It was also admissible for impeachment purposes. The probative value of the evidence greatly outweighed any risk of confusion, given the fact that the PUCO Commissioners are experienced in these matters. Under the circumstances, the Attorney Examiners violated OCC's substantial rights by excluding this evidence. The PUCO should sustain OCC's Second Assignment of Error.

III. CONCLUSION

OCC requests that the PUCO grant rehearing on these matters. When the PUCO initially approved collection of Coal Plant Subsidy costs, it stated that “[r]etail cost recovery may be disallowed as a result of the annual prudency review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues . . . [and] that bidding behavior is prudent and in the best interest of retail ratepayers.”⁵² These are important consumer protections which must be applied to this case. The Coal Plant Subsidy costs in this case clearly fail to meet this standard. In addition, the PUCO evidentiary rulings harmed consumers substantial rights because the evidence was admissible and highly probative of imprudence.

On rehearing, the PUCO should evaluate the excluded evidence, apply the correct legal standard and abrogate or modify its decision to disallow the entire \$24.6 million in Coal Plant Subsidy costs.

⁵² *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (March 31, 2016).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electric transmission this 6th day of October 2023

/s/ John Finnigan

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Finnigan, John.