

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**JOINT APPLICATION FOR REHEARING
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP
AND
THE KROGER CO.**

The record evidence clearly demonstrated that the Ohio Valley Electric Corporation's (OVEC) outdated and uneconomical dirty coal plants located in Ohio and Indiana were not operated prudently during the audit period and the actions taken by Duke Energy Ohio (Duke) were not in the best interest of customers. Despite this clear evidence and despite Duke's failure to demonstrate that its actions and practices were prudent and that the costs it sought to collect from customers through its Price Stabilization Rider (Rider PSR) were prudently incurred, the Public Utilities Commission of Ohio (Commission) authorized Duke to collect more than \$24.6 million¹ from Ohio ratepayers in 2019 to subsidize Duke's investment in these uneconomical coal plants.²

Pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) and The Kroger Co. (Kroger) hereby respectfully request rehearing of the Commission's September 6, 2023 Opinion and Order (Audit Order) in the above-

¹ See Staff Ex. 1, Audit of the Price Stabilization Rider of Duke Energy Ohio at Figure 8, Column I (Public Version) (October 15, 2020) (Audit Report).

² Tr. Vol. III at 275 (Cross Examination of Swetz).

captioned proceeding that authorized such recovery.³ In the Audit Order, the Commission adopted without modification the recommendations set forth in the audit report filed by London Economics International, LLC (LEI or auditor), which reviewed Duke's Rider PSR for the period of January 1, 2019 to December 31, 2019 (Audit Report).⁴

Specifically, OMAEG and Kroger request that the Commission find that the Audit Order was unlawful, unjust, and unreasonable in the following four respects:

ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully finding that Duke satisfied its burden of proof to demonstrate that all costs passed through Rider PSR were just, reasonable, and prudent, and that all actions taken were in the best interests of customers.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully failing to determine that Duke's actions were in fact reasonable during the Audit Period.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully failing to consider the best interests of customers when rendering its decision.

ASSIGNMENT OF ERROR NO. 4: The Commission erred by unjustly, unreasonably, and unlawfully authorizing Duke to collect unreasonable and imprudently-incurred costs through Rider PSR that were not in the best interests of customers.

³ Opinion and Order at ¶ 1 (September 6, 2023).

⁴ Audit Report.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The Commission should grant rehearing and abrogate or modify its Audit Order as requested herein by OMAEG and Kroger.

Respectfully submitted,

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**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.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

In 2019, Duke charged Ohio ratepayers more than \$24.6 million⁵ to subsidize the two uneconomic, aging OVEC coal plants, located in Ohio and Indiana.⁶ These costs were passed on to customers through Rider PSR. On February 13, 2020, the Commission sought requests for proposals for an auditor to conduct a prudency and performance audit of Rider PSR for the period of January 1, 2019, through December 31, 2019.⁷ Through this prudency and performance review, the Commission had an obligation to determine whether Duke’s customers were paying just and reasonable costs that were prudently incurred, and “whether [Duke’s] actions were in the best interest of its retail ratepayers.”⁸ Importantly, the Commission has previously stated that cost recovery through Rider PSR is contingent on Duke demonstrating the prudency of its actions and the costs. Additionally, although it had approved Rider PSR as a placeholder, the Commission initially denied Duke’s application for cost recovery through Rider PSR because the Commission found that Rider PSR “would not provide a sufficiently beneficial financial hedge” and would instead simply create costs for customers.⁹ On April 8, 2020, the Commission selected LEI to

⁵ Audit Report at 26, Figure 8, Column I.

⁶ Tr. Vol. III at 275 (Cross Examination of Swez)

⁷ See Entry (February 13, 2020) (hereinafter, RFP Entry).

⁸ Audit Report at 7.

⁹ OMAEG Ex. 4, *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case Nos. 17-32-EL-AIR, et al., Opinion and Order at 26 (December 19, 2018) (hereinafter, Authorizing

perform the prudence audit to determine whether Duke's customers were paying just and reasonable costs that were prudently incurred, and "whether [Duke's] actions were in the best interest of its retail ratepayers."¹⁰ LEI filed its Audit Report in this proceeding on October 21, 2020.¹¹

OMAEG and Kroger both intervened, and pursuant to the Entry issued on November 25, 2020, filed joint reply comments on January 8, 2021.¹² The Office of the Ohio Consumers' Counsel (OCC) filed initial comments,¹³ and Duke filed its own reply comments on January 8, 2021.¹⁴ In their reply comments, OMAEG and Kroger urged the Commission to find that Duke had failed to meet its burden to demonstrate the prudence of costs collected through Rider PSR. After a hearing, the Commission issued its Audit Order on September 6, 2023, adopting the auditor's recommendations without the requisite prudence determinations.¹⁵

In accordance with R.C. 4903.10 and Ohio Adm. Code 4901-1-35, OMAEG and Kroger hereby file their joint application for rehearing of the Commission's September 6, 2023 Audit Order.

Order), citing *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO, et al., Opinion and Order at 46-47 (April 2, 2015); see also OMAEG Ex. 1, Direct Testimony of John Seryak at 8 (October 27, 2021) (Public Version) (Seryak Testimony).

¹⁰ See Entry (April 8, 2020).

¹¹ See Audit Report.

¹² See Joint Reply Comments of The Ohio Manufacturers' Association Energy Group and The Kroger Company (January 8, 2021).

¹³ See Initial Comments by the Office of the Ohio Consumers' Counsel (December 18, 2020).

¹⁴ See Reply Comments of Duke Energy Ohio (January 8, 2021).

¹⁵ See Audit Order.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully finding that Duke satisfied its burden of proof to demonstrate that all costs passed through Rider PSR were just, reasonable, and prudent, and that all actions taken were in the best interests of customers.

Duke had the burden of proving that all costs passed through Rider PSR were just, reasonable, and prudently incurred, and that all actions taken were in the best interests of customers. When the Commission initially approved Rider PSR, it provided for prudency and performance reviews to be conducted similarly to audits established for the other Ohio electric distribution utilities with similar OVEC riders.¹⁶ Specifically, in its order authorizing Rider PSR (Authorizing Order), the Commission adopted the following language:

The Signatory Parties recommend that the Commission approach the determination of prudently incurred costs and the reasonableness of the generation revenue for all three jurisdictional EDUs, Duke, The Dayton Power and Light Company, and AEP Ohio, in a uniform manner, pursuant to controlling law, which affords parties of interest with due process.¹⁷

As noted above, the Commission had previously approved an OVEC rider for the Ohio Power Company (AEP), and in the order approving AEP's OVEC rider, the Commission held that "consistent with Commission precedent, [the utility] will bear the burden of proof in demonstrating the prudency of all costs and sales during the review, as well as that such actions were in the best interest of retail ratepayers."¹⁸

¹⁶ Authorizing Order at 46.

¹⁷ *Id.*

¹⁸ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, et al., Opinion and Order at 89 (March 31, 2016).

Therefore, consistent with Commission precedent, including Case Nos. 14-1693-EL-RDR, et al., and pursuant to the Authorizing Order,¹⁹ Duke had the burden of proof of demonstrating that costs passed through Rider PSR were just, reasonable, and prudently incurred, and that its actions were in the best interests of customers. Duke also had the burden of proof to demonstrate that Duke made reasonable efforts to transfer its contractual entitlement under the Inter-Company Power Agreement (ICPA).²⁰

However, Duke failed to meet its burden in this case. Throughout the Audit Report, the auditor failed to reach the requisite conclusions, or even perform the underlying, thorough analysis necessary to reach those conclusions. For example, the Audit Report adopted by the Commission failed to address how various factors, such as the OVEC facilities' "must-run" commitment strategy or OVEC's fuel procurement procedures, resulted in higher, unreasonable costs to customers.²¹ The Audit Report also failed to analyze actions that could have been taken to limit or reduce the costs passed through Rider PSR, resulting in the collection of unjust and unreasonable costs from customers. What the Audit Report *did* show was that not all costs passed through Rider PSR to customers during the Audit Period met the Commission's requirement to be just, reasonable, and prudently incurred.²²

Overall, the Audit Report adopted by the Commission lacked the requisite analysis demonstrating that Rider PSR costs were just, reasonable, and prudently-incurred, and that all actions taken were in customers' best interests. As noted previously, Duke had the burden of

¹⁹ Authorizing Order at 46.

²⁰ RFP Entry, Request for Proposal at 4.

²¹ See Audit Report.

²² See, e.g., Audit Report at 9 (finding that "OVEC plants cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets") and 98 (finding that both coal plants had more employees than the average coal plant in PJM).

proving these findings, but it failed to present sufficient evidence beyond the deficient Audit Report. The Commission should not find that Duke met its burden of proof without actually receiving that proof from Duke and confirming such proof through the audit.

Additionally, while the Audit Report noted that Duke's efforts to *modify* OVEC's must-run commitment strategy in 2020 were prudent, it failed to provide evidence or analysis that OVEC's then-*current* must-run commitment strategy, which was in place during the Audit Period (2019), was in fact prudent. If the must-run commitment strategy was imprudent in 2020, and therefore modified, then it stands to reason that the same strategy was or may have been imprudent in 2019. At the very least, the Commission should require Duke to demonstrate how or why operating the OVEC units on a must-run basis, without regard to whether the units are economically viable, is prudent and in the best interests of customers.

At the hearing, the auditor stated that she did not know if Duke performed any analysis of the potential benefits to customers from switching to an economic dispatch strategy or a seasonal commitment strategy.²³ Nor did the auditor examine whether the uneconomic nature of the OVEC plants is likely to change going forward.²⁴ The auditor also did not attempt to quantify the costs to customers for OVEC's chosen commitment strategy.²⁵

For all the foregoing reasons, Duke failed to satisfy its burden of proof of affirmatively establishing the prudence of the OVEC costs passed through Rider PSR and that its actions were in the best interests of customers. Without sufficient record evidence, the Commission's Audit Order is unlawful pursuant to R.C. 4903.09.²⁶ Therefore, OMAEG and Kroger respectfully request

²³ Tr. Vol. II at 169 (Cross Examination of the Auditor).

²⁴ *Id.* at 144.

²⁵ *Id.* at 177.

²⁶ R.C. 4903.09 ("In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file,

that the Commission grant rehearing and modify its September 6, 2023 Audit Order to find that Duke failed to sustain its burden of proof.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully failing to determine that Duke’s actions were in fact reasonable during the Audit Period.

The Audit Order failed to address the reasonableness of Duke’s actions during the Audit Period.²⁷ Per the RFP issued in this case, the auditor was required to evaluate the reasonableness of Duke’s actions with respect to such matters as transferring its contractual entitlement under the ICPA,²⁸ incurred fuel expenses during the Audit Period,²⁹ and the performance of power plants.³⁰

Although Duke attempted to shirk responsibility for its share of operating the OVEC facilities despite having a representative on the OVEC Operating Committee and a vote on the OVEC Board of Directors,³¹ the Audit Report was deficient as the auditor failed to establish that Duke’s actions were reasonable and prudent during the Audit Period. For example, the auditor failed to find that Duke made reasonable efforts to transfer its contractual entitlement,³² and failed to determine whether Duke performed any analysis of the potential benefits to customers from switching to an economic dispatch strategy or a seasonal commitment strategy.³³

with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact”).

²⁷ See Audit Order.

²⁸ RFP Entry, Request for Proposal at 4.

²⁹ *Id.* at 6.

³⁰ *Id.*

³¹ Duke Ex. 1, Direct Testimony of John D. Swez at 5 (October 19, 2021) (Public Version) (“Duke Energy Ohio has one representative and has a 9 percent ‘vote’ on matters that are brought to the Board of Directors. In addition, I am Duke Energy Ohio’s representative on the OVEC operating Committee”).

³² See OMAEG-Kroger Post-Hearing Brief at 7 (July 29, 2022); Audit Report.

³³ Tr. Vol. II at 169 (Cross Examination of the Auditor).

The reasonableness of these matters was not properly addressed in the Commission’s Audit Order. By not addressing the reasonableness of Duke’s actions, the Commission’s Audit Order failed to consider in its ruling a necessary part of the analysis for whether Duke’s actions were prudent *and* reasonable.

To the extent that the Commission failed to address or make a finding on reasonableness and set forth the reasons for that finding, the Audit Order is unlawful pursuant to R.C. 4903.09.³⁴ Therefore, OMAEG and Kroger respectfully request that the Commission grant rehearing and modify its September 6, 2023 Audit Order to find that Duke’s actions during the Audit Period were unreasonable.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully failing to consider the best interests of customers when rendering its decision.

As with reasonableness, the Commission’s Audit Order did not include a finding on whether Duke’s actions were in the best interest of its retail ratepayers, despite an earlier acknowledgment that making such a determination was among the purposes of the audit.³⁵

The best interests of customers has been an important standard for the recovery of OVEC-related costs.³⁶ In fact, when the Commission originally approved Rider PSR, it repeatedly stated that Rider PSR was to benefit customers “by serving as a cyclical hedge against generation

³⁴ R.C. 4903.09 (“In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact”).

³⁵ Audit Order at ¶ 16. *See also* Audit Report at 7.

³⁶ *See In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 17-1263-EL-SSO, et al., Opinion and Order at ¶¶ 265, 294 (December 19, 2018); *In the Matter of the Application of Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Opinion and Order at ¶ 63 (October 20, 2017); Case Nos. 14-1693-EL-RDR, et al., Opinion and Order at 83, 102 (March 31, 2016).

costs.”³⁷ However, the findings in the Audit Report and the record evidence plainly demonstrated that Rider PSR was not in the best interests of customers. By the admission of Duke’s own witness, on average, Duke passed a loss of some \$2 million per month to its customers through Rider PSR in 2019, for a total cost to customers of approximately \$24.6 million in 2019 alone.³⁸ This \$24.6 million in 2019 is notably higher than the \$18 million per year that Duke initially predicted would be charged to customers through Rider PSR.³⁹ And according to Staff’s witness, the auditor failed to perform a review for conflicts of interest between Duke and its affiliates to consider whether Duke’s actions regarding the operations of OVEC were in the best interests of customers, or whether those actions were in the best interests of some third party.⁴⁰

While the Audit Report failed to make a final conclusion on the best interests of customers as it was required to, the evidence provided on the record—including the Audit Report—demonstrates that Duke’s actions during the Audit Period were not in the best interests of customers. For example, the auditor found that “there were times during which the PJM [day-ahead] prices did not cover the variable cost of running the plants,”⁴¹ that “OVEC plants cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets,”⁴² that the OVEC facilities cost customers about \$25 more per megawatt-hour than energy and capacity purchased in the PJM market,⁴³ that the OVEC plants lost money every month

³⁷ Authorizing Order at 60, 98–99, 102, 107–09.

³⁸ Tr. Vol. III at 249 (Cross Examination of Swez).

³⁹ Authorizing Order 103 (“Duke projected an impact on customer rates of \$18 million per year”).

⁴⁰ Tr. Vol. II at 80–83 (Cross Examination of the Auditor).

⁴¹ Audit Report at 53.

⁴² *Id.* at 9; Tr. Vol. II at 31 (Cross Examination of the Auditor).

⁴³ Tr. Vol. II at 45 (Cross Examination of the Auditor); Audit Report at 17, 26.

during the audit period except for January,⁴⁴ and that “the coal purchase prices [for Clifty Creek] were about 17% higher than” spot market prices.⁴⁵

The best interests of customers standard has long been applied when evaluating OVEC-related riders, but in its Audit Order, the Commission failed to address the standard, thereby failing to consider a necessary part of the analysis required for this audit.

To the extent that the Commission failed to address or make a finding on whether Duke’s actions were in the best interest of its customers and set forth the reasons for that finding, the Audit Order is unlawful pursuant to R.C. 4903.09.⁴⁶ Therefore, OMAEG and Kroger respectfully request that the Commission grant rehearing and modify its September 6, 2023 Audit Order to make a finding that Duke’s actions during the Audit Period were not in the best interest of its customers.

ASSIGNMENT OF ERROR NO. 4: The Commission erred by unjustly, unreasonably, and unlawfully authorizing Duke to collect unreasonable and imprudently-incurred costs through Rider PSR that were not in the best interests of customers.

Despite Duke failing to sustain its burden of proof, the Commission failed to require Duke to exclude imprudently-incurred costs from recovery through Rider PSR. During the Audit Period, Duke collected more than \$24.6 million in above-market costs through Rider PSR.⁴⁷ These unreasonable and/or imprudently incurred costs should be disallowed and not recovered from customers through Rider PSR. The entire purpose of an audit is to determine whether costs are just, reasonable, prudent, and in the customers’ best interest. If the Commission intended all costs

⁴⁴ Tr. Vol. II at 49 (Cross Examination of the Auditor).

⁴⁵ Audit Report at 63; Tr. Vol. III at 390 (Cross Examination of Swez).

⁴⁶ R.C. 4903.09 (“In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact”).

⁴⁷ Audit Report at 26, Figure 8, Column I.

to be passed through Rider PSR, without ascertaining whether they were reasonable or prudently incurred, there would have been no need for the Commission to require an audit and no need for this proceeding.

As discussed above, Duke had a burden of proof to demonstrate that *all* of the costs passed through to customers through Rider PSR are just, reasonable, prudent, and in the best interest of customers. However, Duke failed to meet that burden as demonstrated in both the Audit Report itself and the record evidence. For example, as explained in OMAEG and Kroger’s Brief and Reply Brief, the collection of debt payments and funds unrelated to Rider PSR’s intended function as a financial hedge was unreasonable and imprudent,⁴⁸ the collection of costs related to imprudent coal inventory management was unreasonable and imprudent,⁴⁹ the collection of costs related to above-market coal prices,⁵⁰ the collection of costs resulting from the imprudent must-run commitment strategy for the OVEC plants was unreasonable and imprudent,⁵¹ and the collection of outage maintenance costs for Kyger Creek was unreasonable and imprudent as the auditor specifically found that outage maintenance costs for Kyger Creek “need[] to be improved.”⁵² Moreover, the auditor did not conduct a fuel procurement audit during the audit to help determine whether incurred fuel expenses were reasonable. For these reasons, OMAEG and Kroger respectfully request that the Commission grant rehearing and modify its September 6, 2023 Audit Order to prohibit Duke from recovering unreasonable and imprudently-incurred costs that were not in the best interests of customers through Rider PSR.

⁴⁸ OMAEG-Kroger Brief at 15–16; OMAEG-Kroger Reply Brief at 7–9.

⁴⁹ OMAEG-Kroger Brief at 17–18; OMAEG-Kroger Reply Brief at 7–9.

⁵⁰ *Id.*

⁵¹ OMAEG-Kroger Brief at 18–23; OMAEG-Kroger Reply Brief at 7–9.

⁵² Audit Report at 103.

III. CONCLUSION

The Commission erred in adopting the Audit Report and authorizing Duke to collect its OVEC-related costs through Rider PSR. Duke has the burden of proof to demonstrate that all costs flowing through Rider PSR during the audit period were prudently incurred and reasonable, and that the actions taken by Duke were in the best interest of customers. Based on the information contained within the Audit Report and the evidence presented, Duke did not satisfy its burden. Instead of acting as a financial hedge to benefit ratepayers, Rider PSR serves to subsidize Duke's imprudent must-run strategy, overpriced coal purchases, and debt payments. The Commission failed to address the central issue in this case: that cost recovery through Rider PSR is expressly conditioned on a demonstration that *all* costs recovered are prudent. No such demonstration was made. The Commission also failed to address the fact that operating OVEC's outdated and uneconomical coal plants in the manner that they were in 2019 was imprudent and not in the best interest of customers. Since Duke failed to demonstrate the prudence of its OVEC-related costs, the Commission should modify its Audit Order and disallow recovery.

For the aforementioned reasons, OMAEG and Kroger respectfully request that the Commission grant this application for rehearing and modify its Audit Order as set forth herein.

Respectfully submitted,

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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 October 6, 2023 upon the parties listed below.

/s/ Kimberly W. Bojko

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