BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE KROGER CO./THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

The statutory representative of residential customers in southwestern Ohio, together with a large commercial customer and a group of large commercial customers, have sought rehearing in this proceeding, in spite of a well-reasoned, thoughtful, and clear Opinion and Order issued by the Public Utilities Commission of Ohio (Commission). The Applications for Rehearing should be denied.

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) is the owner of a small percentage (nine percent) of the stock in an entity that owns and operates two coal-powered generating facilities. That entity, Ohio Valley Electric Corporation (OVEC), is owned by numerous electric companies in various states and its operations are controlled by a contract approved by and subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). The Company, along with the other owners of OVEC, are parties to the Amended and Restated Inter-Company Power Agreement (ICPA), which sets forth the various contracting parties' rights and obligations regarding capacity, generation, and the costs thereof. The ICPA represents a long-term contract among OVEC's utility counterparties to pay all of OVEC's costs and to be entitled

to utilize the power and energy from OVEC. The ICPA remains in place, as approved by FERC, outside of and regardless of any state regulatory proceedings.

In its Fourth Electric Security Plan proceeding (ESP IV),[1] the Commission authorized Duke Energy Ohio to recover or credit the net proceeds of selling OVEC energy, capacity, and ancillary services into the PJM Interconnection, L.L.C., (PJM) marketplace via the Price Stabilization Rider (Rider PSR).[2] Duke Energy Ohio is authorized, through Rider PSR, to provide customers the net benefit of all revenues accruing to the Company as a result of its ownership interest and contractual entitlement in OVEC, as well as to collect the net charge or credit from Duke Energy Ohio's share of OVEC costs, less market revenues received for liquidating the output into the market. Periodic updates to the rates under Rider PSR are subject to Commission audit, pursuant to the terms agreed upon and approved in ESP IV and as set forth in the Commission's instructions to the independent auditor selected to the audit Rider PSR via a Request for Proposal (RFP).[3]

In this case, the independent auditor, London Economics International, LLC (the Auditor), performed its work and filed its Audit Report as instructed by the Commission,[4] and the Commission agreed with and adopted the Auditor's conclusions. Applications for Rehearing were filed by the Office of the Ohio Consumers' Counsel (OCC)[5] and, jointly, by the Ohio Manufacturers' Association Energy Group and the Kroger Co. (jointly, OMAEG/Kroger).[6] There

[1] *In the Matter of the Application of Duke Energy Ohio, Inc*., *for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al*., Opinion and Order (December 19, 2018) (ESP IV Order).
[2] *Id.*, pp. 45-47.
[3] Entry directing issuance of Request for Proposals (February 13, 2020).
[4] Audit of the Price Stabilization Rider of Duke Energy Ohio Final Report (October 21, 2020) (Audit Report).
[5] Application for Rehearing by Office of the Ohio Consumers' Counsel, October 6, 2023 (OCC Application for Rehearing).
[6] Joint Application for Rehearing by The Ohio Manufacturers' Association Energy Group and The Kroger Co., October 6, 2023 (OMAEG/Kroger Application for Rehearing).

is no legally justifiable rationale for reconsidering the Commission's reasoned and well-supported Opinion and Order.

II. LAW AND ARGUMENT

A. As Found by the Auditor, and Supported by the Case Record, the Commitment Strategy for OVEC During the Audit Period was Prudent.

For its first assignment of error, OCC claims that the Commission erred by allowing cost recovery under Rider PSR in spite of OCC's evidence that supposedly showed that Duke Energy Ohio had a commitment strategy "for OVEC" that was imprudent and not in the best interest of consumers.[7] Of course, as this Commission is well aware, Duke Energy Ohio is an entirely separate legal entity from OVEC and has limited control over OVEC's decisions and management approaches. Duke Energy Ohio certainly has no "commitment strategy for OVEC," as OCC asserts. Furthermore, as explained in testimony, previously argued at great length, and determined on the basis of evidence, OVEC's commitment strategy was reasonable and prudent.

i. Duke Energy Ohio maintains little control over OVEC's commitment strategy, and prudently exercised what control it does have through its interest in OVEC.

In its Application for Rehearing, OCC unreasonably seeks to expand Duke Energy Ohio's burden in these proceedings by overstating the Company's role in the management of OVEC and its ability to determine when and whether the OVEC units operate. Aware of the ICPA and its terms, OCC even posits that "Duke cannot escape responsibility by arguing that the OVEC Operating Committee is responsible for the daily unit commitment decisions."[8] As support for this erroneous statement, OCC relies on two arguments, the first of which is not relevant to the Company's "escaping responsibility" and the second of which is entirely wrong.

[7] OCC Application for Rehearing, Assignment of Error 1.
[8] *Id.*, p. 6.

First, OCC claims that neither the Auditor nor the Commission reviewed the "must-run commitment designation" and the "actual bidding practices [of OVEC], regardless of who was responsible for deciding them."[9] The Auditor was well aware that Duke Energy Ohio had no ability to determine or alter the commitment of the OVEC units, and that the scope of the audit review did not include the prudence of OVEC's decisions. The Audit Report did, however, include the Auditor's recommendation with regard to Duke Energy Ohio's involvement in commitment of the plants, whereby the Auditor found that "DEO's strategy of creating a process whereby OVEC re-considers its 'must-run' offer strategy . . . and utilize[s] near-term demand and price forecasts to formulate energy offers is prudent."[10] For its part, the Commission discussed the issue at length and agreed with the Auditor, concluding that the commitment strategy was indeed prudent.[11] Thus, OCC's protest that the Auditor and the Commission failed to review the commitment strategy is incorrect, as well as not supporting OCC's original claim that Duke Energy Ohio should be held responsible for that strategy even though it does not single-handedly control OVEC's commitment strategy.

Second, OCC argues that Duke Energy Ohio must be held responsible if OVEC's commitment strategy was imprudent. OCC claims that, in a 1985 decision, "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 cause by the plant operator or an outside contractor."[12] Setting aside the vastly different regulatory landscape in 1985 compared with that

[9] OCC Application for Rehearing, p. 6.
[10] Audit Report, p. 10.
[11] Opinion and Order, ¶¶ 58-60.
[12] OCC Application for Rehearing, p. 6.

faced by the state today, the *Zimmer* case cited by OCC[13] only addressed the reasonableness of a stipulation, based on three then-new criteria that are familiar to all involved in Ohio regulatory issues today. The opinion in *Zimmer* did not even mention the potential imprudence of any particular actions or any entity's responsibility therefor; it addressed **only** the now-standard criteria for consideration of stipulations.[14]

Furthermore, even if this opinion had addressed the principle for which OCC cited it, which it does not, the circumstances posited by OCC—that an "outside contractor" had been responsible for mismanaging the project but that the company had nevertheless been held responsible—are not even remotely similar to the present case. Here, the Commission is considering decisions having been made by a corporation in which Duke Energy Ohio owns only a nine percent interest, with OCC claiming that Duke Energy Ohio should or does exert total control over those decisions. OCC's claim of controlling precedence as it relates to *Zimmer* is inapposite and should be ignored.

In reality, as the Commission is aware, OVEC's decision-making is controlled through a process established in the ICPA, as approved by FERC. Duke Energy Ohio is but one of many so-called Sponsoring Companies under the ICPA, with only a nine percent interest in OVEC. Duke Energy Ohio does not operate OVEC, and the Company's personnel do not participate in OVEC's day-to-day operational decision-making. At best, Duke Energy Ohio has only a nine percent "vote" in matters that are brought to the attention of the OVEC board of directors and the OVEC Operating Committee. Moreover, three of the Sponsoring Companies for OVEC operate outside of the PJM marketplace, in the Midcontinent Independent System Operator (MISO) Regional Transmission Organization (RTO), or outside of an RTO altogether. This fact offers an additional

[13] *In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, 1985 Ohio PUC LEXIS 9 (Nov. 26, 1985).
[14] *Id.* at 19, 20-25.

layer of complexity to the decision-making process as it relates to OVEC and brings operational decisions further outside the Company's control. Operationally, it is simply not possible to split one physical OVEC unit into smaller segments of a unit for each sponsor to individually manage. Thus, for example, there is no such thing as a Duke Energy Ohio-specific commitment for Clifty Creek 1 or Kyger Creek 2. There is only one offer made to PJM for each OVEC unit. The Company's influence in "all actions" is limited to its nine percent interest, as is the scope of this audit proceeding. The Company cannot be held responsible for actions over which it has little or no control, and the Audit Report demonstrated that Duke Energy Ohio prudently managed the aspects of OVEC's operation that it was able to act upon during the audit period. No issues raised by OCC in its Application for Rehearing demonstrate otherwise.

ii. <u>OVEC's internal commitment strategy was prudent.</u>

OCC further claims that the Commission should not only be auditing the prudence of OVEC's commitment strategy, but also should determine whether "the charges are in the best interest of retail ratepayers."[15] OCC claims that the source of this requirement is the Opinion and Order issued in AEP Ohio's 2016 PPA Rider proceeding,[16] even though a review of that order indisputably demonstrates that the Commission's actual language required an audit of "the prudency of all costs and sales" and "that such actions [the costs and sales] were in the best interest of retail ratepayers."[17] Note the difference: OCC claims that <u>charges</u> must be in ratepayers' best interest; the Commission actually required that <u>actions</u> be in their best interest.

[15] OCC Application for Rehearing at p. 7.
[16] *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 No. 14-1693-EL-RDR, *et al.,* Opinion and Order (March 31, 2016).
[17] *Id.*, p. 89.

After confusing the applicable standard, OCC goes on to reason that the Order should be reheard because OCC's witnesses "established" imprudence in the operation of the plants and that the plants' operation was not consistent with the expected operations by a merchant operator.[18] On this topic, OCC fails to provide any citations to the record or even to its own briefs. Nevertheless, a review of the evidence in this case and the language of the Order reveals that OCC's witnesses "established" nothing of the kind.

The Auditor did not find the use of a must-run strategy during the Audit period to be imprudent. She did not recommend disallowance of any costs associated with OVEC due to the use of a must-run strategy.[19] Instead, with certain considerations that had *already* been identified by Duke Energy Ohio and brought to OVEC and the Operating Committee's attention, the Auditor found that the commitment strategy was reasonable.[20]

Duke Energy Ohio witness John Swez testified that Duke Energy Ohio's customers received a net benefit of $33 million in 2019 (revenues greater than variable costs) as a result of plant operation.[21] Mr. Swez also testified, with respect to cycling costs, OVEC, as a coal-fired generating station, is not capable of instantaneous turning on and off like a light switch.[22] Shutting off the unit, turning on the unit, and ramping up the unit take time and come with risks and significant costs.[23] As a result, as explained by Mr. Swez, any commitment decision must factor in the cycling timing, risks, and costs.[24] Mr. Swez further clarified this at hearing, explaining that, when a power plant has revenues that are greater than its variable costs, there are not economic

[18] OCC Application for Rehearing, p. 7.
[19] Audit Report, pp. 9-10.
[20] *Id.*, p. 10.
[21] Direct Testimony of John D. Swez, pp. 14:10-15:1.
[22] *Id*.
[23] *Id.*, p. 9:5-6.
[24] *Id.*, p. 9:6-7.

benefits to economic commitment. Rather, there is only the risk in that situation, resulting from the "additional cycling, additional wear and tear, and higher forced outage rates."[25] The must-run commitment strategy resulted in approximately $33 million of net benefits to customers[26] while avoiding significant lost revenue and maintenance costs that would have been incurred if the plants had been run contrary to their design.

The Commission's Order in this case reviewed the evidence before it in detail.[27] The Commission "recognize[d] that what is at issue here is not what strategy would have been the most prudent, but rather, whether the strategy deployed by Duke was prudent." Further, regarding this topic, the Commission stated that it was not ultimately "persuaded by the arguments of OMAEG/Kroger and OCC that the recoverable amount should be disallowed" and that those parties "have not demonstrated that OVEC's strategy was imprudent."[28] In doing so, the Commission repeatedly expressed its conclusion that the must-run commitment was prudent, given the various factors raised both by Duke Energy Ohio and the Auditor, as well as the realities of operation of plants such as OVEC.[29] OCC's witnesses did not prove any imprudence with regard to commitment strategy, and OCC fails to demonstrate such in its Application for Rehearing. The Commission already fully considered the arguments raised by OCC in its Application for Rehearing. OCC does not raise any new arguments that were not already considered and rejected by the Commission following thorough consideration.

OCC's first assignment of error must be denied.

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[25] Tr. Vol. III, p. 345:2-15.
[26] Direct Testimony of John D. Swez, p. 14:10-15:1.
[27] *See, e.g.*, Opinion and Order, ¶¶ 57-60 (discussing unit commitment practices during the Audit period in great detail).
[28] *Id.*, ¶¶ 60.
[29] *Id.*, ¶¶58-60.

B. The Commission Correctly Determined that Duke Energy Ohio's Bidding Behavior Regarding its Share of OVEC Output was Prudent and that such Actions Were in the Best Interests of Ratepayers.

For its second assignment of error, OCC falsely claims that the Commission failed to make a finding as to the prudence of Duke Energy Ohio's bidding behavior with regard to the output of the OVEC plants. OCC argues, and Duke Energy Ohio does not disagree, that the Company bears "the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers."[30] OCC inexplicably states that the Commission did not address this issue. A quick perusal shows, undeniably, that it did so.

The Auditor in this proceeding addressed the issue of Duke Energy Ohio's strategy for bidding the output of the OVEC plants into the market, finding that such strategy was prudent.[31] No party disagreed with this conclusion or raised any arguments in opposition in their initial briefs or reply briefs. And no party suggested that Duke Energy Ohio's prudent bidding behavior with regard to the output from the units was anything other than in the ratepayers' best interest. Indeed, it is incomprehensible how a prudent bidding strategy could not be in ratepayers' best interest.

The Commission included two paragraphs specifically adopting the Audit Report's conclusions in this regard:

> The Commission finds that the audit report, including all recommendations, should be adopted. In doing so, we determine that all costs and sales flowing through Rider PSR for the period of January 1, 2019, to December 31, 2019, are prudent.
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> . . . .
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> As to Duke's management of Rider PSR, the Commission affirms the findings of the audit report that the Company has prudently handled its OVEC entitlement, subject to the recommendations described in the report. Initially, we observe that the audit report generally found that Duke's Rider PSR accounting was prudent. The true-up process was determined to be accurate and timely. (Staff Ex. 1 at 9.)

[30] OCC Application for Rehearing, p. 8 (*citing 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 No. 14-1693-EL-RDR, *et al.*, Opinion and Order, p. 89 (March 31, 2016)).
[31] Audit Report, p. 54.

> The components of fixed costs were found to be properly billed (Staff Ex. 1 at 9-10). These aspects were not disputed by any party. The Commission affirms these findings of the audit report and adopts the associated recommendations.[32]

It is worth noting that OCC may be conflating the issues of bidding behavior concerning the output of the plants, and commitment strategy concerning the operation of the plants. Although the words in OCC's second assignment of error are entirely focused on "bidding strategy," the section includes discussion of commitment strategy, as was argued at length in OCC's first assignment of error. It is unclear which of these topics was the intended focus of OCC's Assignment of Error No. 2. If bidding strategy was the intent, then the above discussion addresses this issue. If commitment strategy was the intent, then it is duplicative of OCC's Assignment of Error No. 1 and the discussion above thoroughly addresses this issue.

OCC's second assignment of error should be denied.

C. Duke Energy Ohio Met its Burden of Proof in the Underlying Case through the Audit Report and Testimony of its Witness(es).

OMAEG/Kroger assert, in their first assignment of error, that the Commission should not have found that the Company adequately demonstrated that the costs passed through Rider PSR were just, reasonable, and prudent, and that all actions taken were in the best interests of customers.[33] As correctly stated by OMAEG/Kroger, Duke Energy Ohio bears "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."[34] Unfortunately, in evaluating whether Duke Energy Ohio met that burden, OMAEG/Kroger misreads and misunderstands the import of the

[32] Opinion and Order, ¶¶ 55, 57.

[33] OMAEG/Kroger Application for Rehearing, Assignment of Error No. 1.

[34] *Id.*, p. 6 (quoting *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, p. 89 (March 31, 2016)).

Audit Report, and fails to account for the evidence placed into the record through Duke Energy Ohio witness John Swez.

With regard to the Audit Report, OMAEG/Kroger asserts that the Auditor failed to reach the necessary conclusions and failed to perform the needed analyses.[35] OMAEG/Kroger claims that the Auditor failed to analyze how the must-run commitment strategy and OVEC's fuel procurement procedures resulted in inflated costs.[36] OMAEG/Kroger also suggest that the Auditor failed to analyze actions that could have reduced such costs.

These arguments are without merit. The Audit Report looked into OVEC's use of must-run commitment as well as Duke Energy Ohio's internal evaluation of market factors. The Auditor concluded, after this work, that Duke Energy Ohio "is well positioned in the energy offering process to help OVEC make informed decisions, and therefore, their practice is prudent."[37] The Auditor also analyzed OVEC's coal procurement strategy, noting the strategic differences between procurement for Kyger Creek and procurement for Clifty Creek, based on the lack of competition among coal suppliers for the former.[38] The Audit Report also explained the Auditor's review of coal offers pursuant to requests for proposals issued by OVEC during the audit period, confirming that the lowest priced offer was selected.[39] The Audit Report goes on to discuss the Auditor's evaluation of supplier diversity and its impacts on supply and cost,[40] as well as OVEC's hedging policies[41] and transportation costs.[42] The Auditor concluded that "[c]oal contract terms seem

[35] OMAEG/Kroger Application for Rehearing, p. 6.
[36] *Id.*
[37] Audit Report, p. 45.
[38] *Id.*, p. 58.
[39] *Id.*, p. 60.
[40] *Id.*, p. 61.
[41] *Id.*, pp. 65-66.
[42] *Id.*, pp. 67-70.

reasonable" and that "coal contracts reflected market awareness and prudency,"[43] following up its conclusions with recommendations for future cost-related improvements.[44]

Duke Energy Ohio also met its burden of proof through the presentation of testimony, namely that of its witness, John Swez. Mr. Swez discussed, in great detail, why Duke Energy Ohio's actions were reasonable and prudent and in the best interests of retail ratepayers. Mr. Swez's direct testimony addressed the rationale behind the must-run commitment, explaining why that approach produces the highest value for the OVEC units, which of course is in the ratepayers' best interests.[45] The parties to this proceeding had an opportunity to cross-examine Mr. Swez on these topics and, indeed, did so.[46] Mr. Swez opined that, for 2019, a must-run commitment status was not only reasonable and prudent, but in the customers' best interests, creating a positive margin of approximately $33 million in 2019.[47]

Between the Audit Report and the testimony of Duke Energy Ohio witness Swez, it is indisputable that the Company met its burden of proof. The Commission rightly relied upon and cited to both in its Opinion and Order.

OMAEG/Kroger go on to suggest, without support, that a commitment strategy that was appropriate for modification in 2020 must also have needed to be modified in 2019. This is not only out of scope of the present proceeding but patently unreasonable. As we are all aware, 2020 was the time period during which the impacts of the COVID-19 Pandemic were most dramatic. The concern around the commitment approach in 2020 was a result of outside factors that were not present in 2019.

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[43] *Id.*, p. 71.
[44] *Id.*
[45] Direct Testimony of John D. Swez, pp. 8-11.
[46] *See, e.g.*, Transcript, Vol. III, pp. 241-246, 256-259, 325-332, 343-361, 379-384.
[47] Direct Testimony of John D. Swez, pp. 12-15.

Finally, Duke Energy Ohio notes the argument by OMAEG/Kroger that the Auditor should have examined whether the "uneconomic nature of the OVEC plants is likely to change going forward."[48] OMAEG/Kroger include this statement in their argument that the Company failed to meet its burden of proof. However, any uneconomic nature of the plants would be irrelevant to the recovery of OVEC-related costs through Rider PSR. Indeed, such a statement seems to imply that OMAEG/Kroger oppose the very existence of Rider PSR, in spite of the fact that each of them signed the stipulation establishing Rider PSR as non-opposing parties.[49]

OMAEG/Kroger fail to support their first assignment of error and fail to demonstrate that the Opinion and Order in the underlying matter merits rehearing. Their first assignment of error should be denied.

D. The Company's Actions Regarding its Entitlements and Responsibilities Related to OVEC were Reasonable and the Commission Correctly so Found.

OMAEG/Kroger claim, as their second joint assignment of error, that "[b]y not addressing the reasonableness of Duke's actions [in its Opinion and Order], 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."[50] OMAEG/Kroger argues that the Company's actions with regard to its entitlements and responsibilities during the audit period were not reasonable, pointing specifically to performance of the units, fuel costs, and transferring its entitlement under the ICPA. OMAEG/Kroger go on to accuse Duke Energy Ohio of attempting 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[.]"[51] OMAEG/Kroger offer zero evidence,

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[48] OMAEG/Kroger Application for Rehearing, p. 8.
[49] *See 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*., Stipulation and Recommendation (April 13, 2018).
[50] OMAEG/Kroger Application for Rehearing, p. 10.
[51] *Id.*, p. 9.

beyond these accusations, to demonstrate that the Company attempted to "shirk" anything at all during the audit period. Likewise, OMAEG/Kroger focus solely on the word "reasonable" while ignoring the many findings that demonstrate reasonableness on the part of the Company during the audit period. For example, the Commission found in its Opinion and Order:

- The audit was conducted appropriately and consistent with the Commission's directives.[52]
- LEI's nearly 120-page analysis was thorough and detailed.[53]
- The Auditor reviewed several specific issues associated with Rider PSR and Duke's OVEC entitlements and made determinations of prudency as to each issue, including the OVEC bill and Rider PSR reconciliation, *e.g.*, ensuring OVEC bill, journal entries and rider charges are consistent, and analyzing over/under recovery; disposition of energy and capacity (*i.e.* the commitment strategy); fuel and variable costs (*e.g.* coal procurement and coal inventory management); environmental compliance; capital expenses; and power plant operations (*e.g.* organizational staffing and plant maintenance costs).[54]
- No disallowances were recommended, and no findings of imprudence were recorded by the Auditor.[55]
- There was no evidence of undue influence in the creation of the audit report or any reason to consider that the Auditor was prevented from conducting an independent review.[56]

[52] Opinion and Order, p. 20.
[53] *Id*., p. 20.
[54] *Id*., pp. 20-22.
[55] *Id*., p. 21.
[56] *Id.*

The Commission specifically stated in its Opinion and Order that it was not persuaded "by the arguments of OCC and OMAEG/Kroger that LEI did not make proper conclusions or conduct sufficient analysis."[57] It also found that "[i]t is evident from the report that overall, and in regards to each specific issue, the auditor found Duke's actions to be appropriate and sensible and, accordingly, prudent."[58] All of these findings demonstrate reasonableness, and OMAEG/Kroger's argument that absence of the use of the word "reasonable" merits rehearing or represents clear error should prove unpersuasive.

Likewise, OMAEG/Kroger accuse the Auditor of preparing a "deficient" Audit Report, based on OMAEG/Kroger's argument that the Audit Report did not include a finding regarding Duke Energy Ohio's efforts to transfer its interest in OVEC[59] or a finding about the Company's internal analyses of dispatch strategies.[60] What OMAEG/Kroger fail to mention in their Application for Rehearing is that the Commission did not ask the Auditor to look into either the Company's effort to transfer its interest or the Company's internal analyses of dispatch strategies via the RFP. These issues are simply not relevant to the audit proceeding or the sufficiency of the Auditor's review thereof.

The second assignment of error by OMAEG/Kroger should be rejected.

E. <u>The Commission Appropriately Considered the Best Interests of Customers.</u>

OMAEG/Kroger's third assignment of error posits that the Commission did not consider the best interests of customers in rendering its decision in this proceeding.[61] Without a full or

[57] *Id.*
[58] *Id.*
[59] As required, Duke Energy Ohio did file proof that it attempted, without success, to transfer its interest in OVEC during the audit period. *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer*, Case No. 17-1263-EL-SSO, *et al*. (June 28, 2019).
[60] OMAEG/Kroger Application for Rehearing at p. 9.
[61] OMAEG/Kroger Application for Rehearing at p. 10.

accurate quote, they say that the Commission had previously acknowledged "that making such a determination was among the purposes of the audit."[62] OMAEG/Kroger go on to argue about whether Rider PSR itself is in the best interest of customers,[63] despite having been non-opposing parties to the stipulation that authorized Rider PSR.[64]

A quick glance at the sources cited by OMAEG/Kroger shows the fallacy of this argument: At the cited page in the Order in this proceeding, the Commission stated that "[t]he purpose of the audit was to establish the prudency 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." And at the cited page in the Audit Report, the Auditor stated that "The purpose of the audit is to establish the prudency of all the costs and sales flowing through the PSR, and to investigate whether **DEO's actions** were in the best interest of its retail ratepayers."[65] Duke Energy Ohio's actions related to its rights and responsibilities under the ICPA are at issue; the existence of Rider PSR is not.

OMAEG/Kroger do go on in their discussion to reference the concept of looking at the Company's actions rather than the merit of the rider. However, even in their explanation of what are supposedly problems related to the Company's actions, they revert to talking only about OVEC's actions and financial results—again taking issue with the existence of Rider PSR.[66]

This assignment of error should be denied.

F. The Costs Allowed by the Commission Were Correctly Found To Be Reasonable and Prudent, and Actions Related to the Same Were in the Best Interests of Customers.

[62] *Id.*
[63] *Id.*, p. 11.
[64] *See supra*, p. 13.
[65] OMAEG/Kroger Application for Rehearing, p. 10 (*citing* Audit Report at p. 7).
[66] OMAEG/Kroger Application for Rehearing, pp. 11-12.

In its fourth and final assignment of error, OMAEG/Kroger argue that "[t]he 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."[67] Specifically, OMAEG/Kroger argue that "[i]f the Commission intended all costs 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."[68] This argument is without merit. As thoroughly detailed in Duke Energy Ohio's Initial Brief and the Commission's Opinion and Order, the Audit Report closely tracked the RFP scope (as set forth by the Commission), provided detailed and thorough analysis, was based upon upwards of 100 data request responses from the Company, and is nearly 120 pages in length. OMAEG/Kroger's argument that the Audit Report, including all of its analysis, investigation, and reasoning, did not "ascertain[ ] whether [charges to Rider PSR] were reasonable or prudently incurred" is clearly unsupported by the record in this case. The audit process was extensive, thorough, and detailed. OMAEG/Kroger's Application for Rehearing does little to demonstrate otherwise.

Later, in this assignment of error, OMAEG/Kroger go on to rehash their arguments on brief, which were fully addressed by the Commission in its Opinion and Order. OMAEG/Kroger raise no new arguments regarding why exactly the Commission should revisit its findings in its Opinion and Order. OMAEG/Kroger argue that "the collection of debt payments and funds unrelated to Rider PSR's intended function as a financial hedge was unreasonable and imprudent, the collection of costs related to imprudent coal inventory management was unreasonable and

[67] *Id.*, p. 12.
[68] *Id.*, pp. 12-13.

imprudent, the collection of costs related to above-market coal prices, the collection of costs resulting from the imprudent must-run commitment strategy for the OVEC plants was unreasonable and imprudent, [ ] 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," [and] the auditor did not conduct a fuel procurement audit during the audit to help determine whether incurred fuel expenses were reasonable."[69]

Each of these arguments has been raised in this proceeding previously by OMAEG/Kroger and was addressed by the Commission in its Opinion and Order and by the Auditor in the Audit Report. For example, in its post-hearing briefing, as described and addressed by the Commission in its Opinion and Order, "OMAEG/Kroger assert[ed] that the fixed costs associated with OVEC, such as debt payments, should not be recoverable by Duke."[70] The Commission expressly rejected these arguments in its Opinion and Order, however, and OMAEG/Kroger's list of "issues" in assignment of error number four does nothing to demonstrate *why* the Commission's reasoned findings on this topic should be overturned: "The Commission also disagrees with OMAEG/Kroger's assertion that debt payments and other fixed costs should be disallowed from recovery. Rider PSR, as approved, allows Duke to "flow through to customers the net impact of the Company's contractual entitlement" in OVEC and would, therefore, include such expenses as debt payments."[71] Likewise, the Commission already considered and rejected OMAEG/Kroger's remaining arguments in assignment of error number four related to coal inventory management,[72]

[69] *Id.*, p. 13.
[70] Opinion and Order, p. 19.
[71] *Id.*, p. 24.
[72] *Id.* (regarding coal procurement and coal inventory management, "[w]e are, thus, unpersuaded by the arguments of OCC and OMAEG/Kroger that LEI did not make proper conclusions or conduct sufficient analysis").

commitment strategy,[73] coal procurement costs,[74] and outage maintenance for Kyger Creek during the audit period, among others.[75] OMAEG/Kroger cannot even be bothered to expand on why it specifically believes each item in its list merits rehearing. They simply call out particular arguments already made in initial and reply briefing and indicate that the Commission considered and rejected them (rightfully so). This certainly does not rise to the level of argument necessary to demonstrate that rehearing is merited when it comes to the Commission's thorough and reasoned Opinion and Order. OMAEG/Kroger merely expresses its disagreement with the Commission's findings, which disagreements were certainly evident prior to their Application for Rehearing.

OMAEG/Kroger's "kitchen sink" approach to its fourth assignment of error is a last-ditch attempt to throw a laundry list of grievances into reconsideration on rehearing. As demonstrated above, the Commission already fully considered and rejected these arguments. OMAEG/Kroger offers nearly no argument, let alone new information, as to why the Commission's findings should be reconsidered on rehearing. Assignment of error number four must be denied.

G. Proffered Evidence Related to a Draft Audit Report in a Separate Unrelated Proceeding, and Testimony Regarding the Same, was Properly Excluded.

Finally, and separately from the arguments above, in its third assignment of error, OCC asks that the Commission overturn particular evidentiary rulings by the Attorney Examiner that OCC requests be reconsidered and reversed by the Commission on rehearing. For the reasons summarized below, the Attorney Examiner's evidentiary findings were proper and well-supported. OCC fails to demonstrate why the Commission's reliance upon them should be overturned.

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[73] *Id.*, p. 23 ("we are not persuaded by the arguments of OMAEG/Kroger and OCC that the recoverable amount [related to a must-run commitment] should be disallowed . . . [w]hile in some instances an "economic" path may have been more beneficial, as discussed above, they have not demonstrated that OVEC's strategy was imprudent.").

[74] *Id.*, p. 24 ("We, thus, affirm the auditor's findings that OVEC's actions were prudent, but also adopt the recommendations to continue negotiations with coal suppliers and conduct an internal audit to improve coal procurement management.").

[75] *Id.*, p. 6 (discussing the Auditor's findings, which were adopted in full, regarding "budgeting at Kyger Creek . . . to minimize forced outages.").

In its Application for Rehearing, OCC argues that "[t]he PUCO upheld two crucial evidentiary rulings by the Attorney Examiner that excluded highly relevant evidence of the Auditor's bias or lack of independence" thus "violat[ing] OCC's substantial rights."[76] OCC then goes a step further, and tells the Commission what it would have found if it had overturned the Attorney Examiner's evidentiary rulings, divining that "[h]ad 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."[77] OCC's arguments are a full rehashing of those set forth in its Initial Brief in the underlying case, and OCC offers no new information or support for why the Commission should revisit its findings on rehearing.

OCC argues that the Commission should have rejected the Attorney Examiner's rulings on issues of relevance and admissibility of evidence, namely where the Attorney Examiner found it appropriate to strike portions of OCC witness Haugh's testimony regarding the draft audit report of another electric distribution utility with an interest in OVEC, the Ohio Power Company (AEP Ohio), as well as where the Attorney Examiner excluded the draft audit report from AEP Ohio's PPA Audit Case No. 18-1004 from admission in Duke Energy Ohio's Rider PSR Audit proceeding. In the underlying Opinion and Order, the Commission dedicated ample attention to OCC's arguments regarding both of these evidentiary rulings. It simply found them unavailing. Because OCC did not get the result it desired, does not mean that these are appropriate topics for rehearing. As already found by the Commission in its Opinion and Order, "[b]eyond identifying a substantial right impacted by the ruling [the bare minimum threshold], [ ] OCC's appeal does not discuss any evidentiary grounds which should have supported the testimony's admissibility."[78]

[76] OCC Application for Rehearing, p. 10.
[77] *Id.*, p. 11.
[78] Opinion and Order, p. 7.

These two evidentiary rulings, both made by the Attorney Examiner during the course of the hearing, were based upon careful review of both motion practice and extensive argument by the Parties. Moreover, and again, in its Application for Rehearing OCC does not present good cause for exactly why the Attorney Examiner's well-reasoned review of the admissibility of the evidence presented at hearing should be disregarded in favor of OCC's request. The Commission thoroughly addressed OCC's arguments, and the findings of the Attorney Examiner, in its Opinion and Order:

> We find that the attorney examiner properly granted the motions to strike in both instances. OCC does not identify an error in the attorney examiner's evidentiary analysis; rather, OCC believes the rulings were in error merely because it affected what OCC claims is a substantial right. We agree with the attorney examiner's findings that the draft audit report, and Mr. Haugh's testimony related to that report, lack relevance in this proceeding. There are obvious similarities between the audits, as they were conducted by the same auditor, on similar timelines, and both concern similar OVEC riders. However, they were still completely separate audits. The evidence in question here pertains to a draft report, concerning a different rider, and a different EDU. **As explained by the attorney examiner, the purpose of this proceeding is not to relitigate another EDU's rider.** (Tr. Vol. III at 427.) While the Commission and the attorney examiners are not bound by the rules of evidence, OCC has not established that any substantial right was affected. **Parties were given the opportunity to explore the relevancy of the draft audit report during the cross- examination of LEI's auditor, Dr. Marie Fagan, as well as to submit arguments as to the relevancy of the audit. Parties were able to cross-examine Dr. Fagan and to explore her and LEI's determinations regarding Duke's rider, as well as explore Staff's role in the auditing process.** *See e.g.*, Tr. Vol. II at 182-215. Accordingly, we affirm the attorney examiner's rulings that the draft audit report and Mr. Haugh's related testimony are not relevant to this proceeding.[79]

As demonstrated by the Commission's reasoned and thorough explanation in its Opinion and Order, OCC had ample opportunity to explore during the hearing and in briefing the various topics it wished to address with the Auditor as it relates to Duke Energy Ohio's Rider PSR Audit. OCC's continued efforts to incorporate and adopt wholesale from another company's audit proceeding is

[79] *Id.*, pp. 8-9 (emphasis added).

down to the fact that OCC did not get the answers it so desired in its cross examination of Ms. Fagan and wishes to supplant and adopt its arguments in the PPA Rider case. As the Commission clearly lays out, these are "completely separate audits" and the evidence OCC seeks to still admit "pertains to a draft report, concerning a different rider, and a different EDU . . . [a]s explained by the attorney examiner."[80] There is no error in the Commission's consideration of these topics in its Opinion and Order, and it has already given OCC's identical arguments nearly two and a half pages of attention.

In its Application for Rehearing, OCC does nothing but rehash its post-hearing brief in the underlying matter and raises no new arguments in support of its assertion that the Attorney Examiner or Commission's findings were in error. Even now, OCC does not parse where the Attorney Examiner's decision to strike portions of Mr. Haugh's testimony was improper or point to the specific lines or sections that merit revival and rehearing. The Commission's reference to and adoption of the Attorney Examiner's evidentiary determinations is based in sound legal principles. In practice, the trier of fact is routinely accorded deference regarding its decision on the admission or exclusion of evidence.[81] And subsequent adjudicatory bodies should not disturb such evidentiary rulings unless they find an abuse of discretionary authority in the admission or exclusion of evidence from consideration.[82] OCC's Application for Rehearing does not demonstrate an abuse of discretion, lack of consideration, or incomplete record on the part of the Commission. OCC simply disagrees with the Commission's findings—however, this does not demonstrate a need for rehearing.

[80] *Id*.
[81] *State v. Sage*, 31 Ohio St. 3d 173, 510 N.E. 2d 343 (1987).
[82] *State v. Adams*, 62 Ohio St. 2d 151, 157, 404 N.E.2d 144 (1980).

Finally, considering the Attorney Examiner's findings regarding admissibility in earnest, and the Commission's reliance upon and adoption of those findings, OCC still fails to demonstrate that preventing the admissibility of another EDU's draft audit report, and communications and testimony regarding the same, is somehow improper in the underlying case. As discussed above, OCC's Application for Rehearing lists two evidentiary rulings that it believes the Commission should reverse, each of which essentially relate to the Attorney Examiner preventing OCC from introducing evidence in the underlying case that was both prejudicial and irrelevant. This included draft documents, emails, and testimony covering the audit of AEP Ohio's PPA Rider. Namely, OCC sought to introduce record evidence of the Auditor's decision to remove an out-of-scope opinion from a draft of the PPA Rider Audit of AEP Ohio—not Duke Energy Ohio. In its Initial Brief, OCC asked that the Commission reopen the underlying proceeding and allow even more cross-examination on the AEP Rider PPA Draft Audit Report, which was prevented from being entered into evidence. By its Initial Brief, and on rehearing, OCC seeks to restore extensive stricken testimony of its witness, Michael Haugh, on the topic of AEP Ohio's PPA Rider Audit. This includes witness Haugh's personal commentary on the draft PPA Rider Audit Report, attachment of emails to his direct testimony, and his personal opinions on those emails. Both issues (draft audit report and Haugh testimony) were fully briefed in motions to strike and/or argued live to the bench at the three-day hearing in this case.

Regarding the testimony of Mr. Haugh, the Company filed an extensive Motion to Strike the testimony of Haugh. In that motion, the Company argued, and the Attorney Examiner ultimately agreed, that Haugh's testimony contained hearsay, summarized the AEP PPA Rider Audit and its findings, and was prejudicial and confusing to the Audit of Rider PSR. For example, in a portion of Haugh's testimony that OCC seeks to revive, Haugh incorporates into his testimony

emails and the draft report from the AEP PPA Rider Audit, wholesale. Additionally, in portions of the stricken testimony, Haugh quotes for nearly two pages from an email exchange between the Auditor's staff, PUCO Staff, and AEP Ohio—offering his own commentary every step of the way. This exchange, and the associated stricken documents, were clearly hearsay offered for the truth of the matter asserted in Haugh's pre-filed testimony—with no exception to save their inadmissibility. As set forth in the Company's Motion to Strike filed in this case, this testimony and documentation was highly prejudicial to the underlying proceeding, serving to conflate the two separate OVEC-based audit proceedings of AEP Ohio and the Company. The Commission agreed in its Opinion and Order, finding Mr. Haugh's testimony related to that report[ ] lack[ed] relevance in this proceeding" and the "evidence in question here pertains to a draft report, concerning a different rider, and a different EDU."[83]

In its Application for Rehearing, OCC does not provide good cause rationale for why the testimony should be revived or provide sufficient explanation as to why it believes Haugh's testimony should not have been stricken at hearing. Instead, it simply states why it disagrees with the Commission's findings, as is evident in its argument: "The PUCO's Opinion and Order erred in upholding these evidentiary rulings. The PUCO simply concluded that the excluded evidence "lack relevance." This ruling was incorrect. The evidence was both relevant and it was admissible for impeachment purposes."[84] OCC also argues generically on rehearing that that "In complex business matters, courts should grant wide latitude in admitting evidence which might prove a party's intent. Draft documents can be relevant to show a party's intent."[85] The question of the

[83] Opinion and Order, p. 8.
[84] OCC Application for Rehearing, p. 13. It is also noteworthy that OCC argues the excluded evidence should have been admitted for "impeachment purposes" but does not point to testimony from the Auditor that was incongruous or impeachment worthy. OCC fails to apply the concept of "impeachment" as it should be properly used in a hearing process.
[85] *Id.*

Auditor's "intent" as it relates to a statement which does not exist in Duke Energy Ohio's draft or filed Audit Report demonstrates why relevancy should be questioned regarding the testimony about which OCC complains. Moreover, OCC had the opportunity to question the Auditor regarding the PSR Audit Report and its drafting process in the underlying proceeding, to which Duke Energy Ohio is actually a party. OCC had access to the Auditor for a full day of questioning at the hearing, was able to question her regarding every aspect of her development of Duke Energy Ohio's Rider PSR Audit Report and had every opportunity to pursue its theories in that manner. Precluding OCC's full sale incorporation of AEP Ohio's draft PPA Audit Report, and hearsay communications relevant to that separate, distinct proceeding, is not in error. And OCC has made no demonstration, in any of its briefing in this case or on rehearing, to the contrary.

OCC has not provided a single shred of reasoning upon which the Commission could find that rehearing on the topic of these evidentiary rulings is necessary. The Commission must deny rehearing on this subject matter and deny OCC's request to reopen the hearing for questioning on these topics.

OCC's third ground for rehearing must be denied.

III. CONCLUSION

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission deny rehearing in the underlying matter.

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 is also being served via electronic mail on the 16th day of October, 2023,

upon the persons listed below.

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Summary: Memorandum Memo Contra electronically filed by Mrs. Debbie L. Gates on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco O. Mr. and Kingery, Jeanne W and Akhbari, Elyse and Vaysman, Larisa.