BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING BRIEF
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

(PUBLIC VERSION)

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I. INTRODUCTION

Ohio customers should not pay millions of dollars to subsidize imprudent and unreasonable operations of the Ohio Valley Electric Corporation's (OVEC) two 1950s-era, aging, uneconomical, dirty coal plants located in Ohio and *Indiana*. The record evidence shows that the aging plants were expected to lose between $150,000 to $175,000 a day during April 2020.[1] And for the period of January 1, 2020 through December 31, 2020 (Audit Period), Duke Energy Ohio (Duke), the Dayton Power and Light Company d/b/a AES Ohio (AES), and Ohio Power Company (AEP) (collectively, the Sponsoring Companies) charged Ohioans $114,879,609[2] to subsidize the OVEC plants. No wonder a Duke employee said: "Holy mackerel"![3] Holy mackerel is right: the

[1] OMAEG Ex. 17 (Public) at 100 (excerpt from Duke's Response to OCC-POD-02-012 Supp (Duke Emails) (attached hereto as Attachment A)) (a stunning admission by Duke witness Swez, a member on the OVEC operating committee, as he tried to explain how uneconomic the OVEC plants were being operated).

[2] Revised OMAEG Ex. 1 at Attachment A (Direct Testimony of John Seryak (Public) (Seryak Direct)) (November 10, 2023); Revised OMAEG Ex. 1A at Attachment A (Public Errata to Seryak Direct), which contains the corrected amount to be disallowed based on Staff Ex. 8C and the revised Public Audit Report Supplements. *See also* Staff Ex. 8C at 5, Figure 13, Column C (Revised AES Audit Report Supplement (Public) (January 4, 2024) (Public AES Supplement)); Staff Ex. 4 at 28–29, Figure 9, Column H (Revised AEP Audit Report (Public) (January 4, 2024) (Public AEP Audit Report)); Staff Ex. 6 at 26, Figure 9, Column K (Revised Duke Audit Report (Public) (January 4, 2024) (Public Duke Audit Report)). Note that while OVEC charged the Sponsoring Companies $114,879,609 in 2020, only $105,524,869.53 was collected from customers during 2020 due to the statutory monthly caps. The remaining 2020 costs were carried forward and collected in 2021. OMAEG is disputing the amount incurred during 2020 for OVEC rather than the amounts collected due to the caps.

[3] OMAEG Ex. 17 (Public) at 33 ((Duke Emails) (Attachment A)).

OVEC costs—all collected from customers—are astonishing . . . and unreasonable. Pursuant to R.C. 4928.148(A), the substantial subsidies were charged to customers through the Sponsoring Companies' and the other electric distribution utilities' non-bypassable Legacy Generation Resources Riders (LGR Riders), which were created by the tainted House Bill 6 (HB 6) to recover the *same* "prudently incurred costs related" to OVEC that were previously approved for recovery through the Sponsoring Companies' prior OVEC recovery mechanisms (i.e., Duke's Price Stabilization Rider (PSR), AES' Reconciliation Rider (RR), and AEP's Power Purchase Agreement Rider (Rider PPA)).[4]

The law is clear. In accordance with R.C. 4928.148(A)(1) (a provision in HB 6), the Public Utilities Commission of Ohio (Commission) is required to conduct or have conducted a prudency and performance review of the costs related to OVEC that were passed on to customers for 2020 to determine if the costs passed on to customers were prudent and reasonable and whether the Sponsoring Companies' actions were prudent and reasonable.[5] More specifically, through this mandated audit, the Commission has an obligation to determine whether the Sponsoring Companies' customers are paying just and reasonable costs that were prudently incurred, and whether the Sponsoring Companies' actions were reasonable and prudent in customers' best interest.[6] The Commission also has a responsibility to protect customers from the payment of

[4] *See* Staff Ex. 2 at 10–11, 23, 29–30 (Revised AES Audit Report (Public) (January 4, 2024) (Public AES Audit Report)); Staff Ex. 4 at 7, 10–11, 17, 25, 35, 110 (Public AEP Audit Report); Staff Ex. 6 at 7, 11, 31–33, 112 (Public Duke Audit Report).

[5] R.C. 4928.148. *See also* Entry and Response to Proposal No. RA21-PPA-1, RFP at 2, 6 (May 5, 2021) (hereinafter, Entry and RFP). *See also* Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report).

[6] Entry and RFP, RFP at 2, 6. *See also* Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report); OCC Ex. 11 at 7 (Auditor's Response to Proposal No. RA21-PPA-1 (Auditor Response)) (June 3, 2021).

unjust and unreasonable subsidies or imprudently incurred costs, and to prevent any actions that are not in customers' best interest, through other statutory mandates.[7]

Due to the imprudent business decisions and the Sponsoring Companies' failure to exercise proper oversight responsibilities over OVEC and ensure that prudent decisions are made and only prudently incurred costs are recovered from customers, an average loss of over $8.79 million per month by the OVEC plants was passed on to Ohio customers through the LGR Riders, which were a charge to customers every month of the Audit Period.[8] Simply stated:

> The LGR Riders are a drain on both Ohio's customers and the economy. About half of the costs recovered through the LGR Riders relate to a coal plant in *Indiana*. Worse, LGR Rider costs do not even improve the OVEC power plants because the EDUs must pay OVEC whether they have the LGR Riders or not. . . . As such, the LGR Riders are effectively a tool to increase the EDUs' profits at the expense of their ratepayers.[9]

While R.C. 4928.148 created nonbypassable rate mechanisms to recover costs related to OVEC, effective January 1, 2020, the law only authorizes the recovery of prudently incurred costs.[10] Additionally, the law requires the Commission to determine the prudence and

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[7] R.C. 4905.22 ("All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law . . . and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law . . ."). *See also* R.C. 4928.02(A).

[8] Tr. Vol. IV at 937 (Cross-Examination of Donlon); Tr. Vol. IV at 955–56 (Cross-Examination of Ziolkowski); Tr. Vol. IV at 1049 (Cross-Examination of Stegall). *See also* Staff Ex. 2 at 25, Figure 9, Column "Rider revenues, LGR" (Public AES Audit Report); Staff Ex. 4 at 28–29, Figure 9, Column H (Public AEP Audit Report); Staff Ex. 6 at 26, Figure 9, Column K (Public Duke Audit Report).

[9] Revised OMAEG Ex. 1 at 8 (Seryak Direct). *See also* OCC Ex. 1 at 13 (Direct Testimony of Elizabeth Stanton (Stanton Direct)) (October 10, 2023), stating that "OVEC power plants losses are subsidized by Ohio consumers. . . . The Companies have not met their burden of proof in several respects. I recommend that the PUCO disallow the collection of imprudently incurred OVEC costs from the Company's customers"; Revised CUB/UCS Ex. 1 at 11 (Direct Testimony of Devi Glick – Public Version (Glick Direct)) (October 10, 2023), stating that "The PUCO should disallow the entire [$114,879,609] in above-market energy and capacity charges collected from consumers in 2020 under the Legacy Generation Rider. These costs should be disallowed on the basis that OVEC and the Companies acted imprudently by not taking action to minimize the above-market costs incurred at the OVEC plants"; OCC Ex. 20 at 6 (Direct Testimony of Joseph Perez (Perez Direct)) (October 10, 2023), stating that "The PUCO should disallow all of the above-market Coal Plant Subsidy costs collected by the Utilities during 2020."

[10] R.C. 4928.148(A)(1); R.C. 4928.01(A)(42).

reasonableness of the actions of the Sponsoring Companies, including their decisions related to offering OVEC's energy into the wholesale markets and exclude from recovery from customers any costs that are imprudent and unreasonable.[11] Based on the record evidence in this case, the Commission must follow this statutory mandate and find that the costs passed on to customers through the LGR Riders for the Audit Period were imprudently incurred and unreasonable. The Commission must also find that the actions of the Sponsoring Companies were neither prudent nor reasonable.

Importantly, and as will be discussed more fully below, R.C. 4928.148(A) mandates that the OVEC riders in place prior to the passage of HB 6 that recovered prudently incurred costs related to OVEC be replaced by new nonbypassable rate mechanisms for recovery of those OVEC costs through December 31, 2030, from customers of all electric distribution utilities in the state.[12] R.C. 4928.148(A)(1) also requires the Commission to determine "the prudence and reasonableness of the actions of electric distribution utilities with ownership interest in the legacy generation resource, including their decisions related to offering the contractual commitment into the wholesale markets," and to exclude any costs that the Commission determines to be imprudent and unreasonable.[13] The first audit and determination was to be made during 2021 regarding the prudence and reasonableness of the Sponsoring Companies' actions during calendar year 2020.[14] Additionally, R.C. 4928.01(A)(42) defines prudently incurred costs to exclude certain costs related

[11] R.C. 4928.148(A)(1).

[12] R.C. 4928.148(A).

[13] R.C. 4928.148(A)(1).

[14] *Id.*

to "any return on investment in common equity and, in the event of a premature retirement of a legacy generation resource, shall exclude any recovery of remaining debt."[15]

As noted by the Office of the Ohio Consumers' Counsel's (OCC) witness Stanton, the LGR Riders "effectively shift[] the cost burden for operating the OVEC plants from the Companies' shareholders to [Ohio ratepayers]."[16] This results in the Sponsoring Companies having little incentive to ensure that the OVEC plants are run prudently, since any losses they incur can simply be recouped from customers.[17] But the law requires that customers only pay for costs that were prudently incurred *and* reasonable and that were the result of prudent *and* reasonable utility actions, including the decisions related to offering the contractual commitment of OVEC into the wholesale market. The Sponsoring Companies claim that it is OVEC's decision, not theirs, regarding the operations of the OVEC plants and OVEC's commitment strategy, but this claim holds no weight and must fail as a matter of law given the plain language of R.C. 4928.148.

Significantly, the Commission should note that the Sponsoring Companies have choices when deciding whether to act in a prudent manner, including the decision of whether to avail themselves of OVEC's available energy given that they are not obligated to do so if it would be imprudent and not in the customers' best interest.[18] Therefore, as the evidence demonstrates, "the

[15] R.C. 4928.01(A)(42).

[16] OCC Ex. 1 at 9 (Stanton Direct).

[17] Revised CUB/UCS Ex. 1 at 39 (Glick Direct).

[18] AES Ex. 4 at Exhibit 1, Inter-Company Power Agreement at § 4.03 (September 10, 2010) (hereinafter, ICPA) (Direct Testimony of David Crusey – Public Version) (Crusey Direct)) (October 3, 2023); Revised OMAEG Ex. 1 at 22 (Seryak Direct); Tr. Vol. III at 701–02 (Cross-Examination of Swez); Tr. Vol. IV at 1022 (Cross-Examination of Stegall).

decision of the [Sponsoring Companies] apparently to take title to available energy [during the Audit Period], knowing they were losing ratepayer money, was certainly imprudent."[19]

Given the lack of incentive to ensure that the OVEC plants run prudently and given the imprudent and unreasonable actions and decisions of the Sponsoring Companies, customers have paid and continue to pay for OVEC's poor, imprudent business decisions and the Sponsoring Companies' failure to exercise proper oversight responsibilities over OVEC. But through this audit, those unreasonable and imprudently incurred costs must be excluded from recovery pursuant to R.C. 4928.148(A)(1).

Pursuant to a request for proposal (RFP) issued by Commission Staff,[20] London Economics International, LLC (the Auditor) filed an audit report for each Sponsoring Company on December 17, 2021 (collectively, the Audit Reports).[21] The Audit Reports demonstrate that the costs passed on to customers through the LGR Riders for the 2020 Audit Period were imprudently incurred and were unjust and unreasonable charges that were not in the best interest of ratepayers. As required by law, these costs should thus be excluded from recovery.[22] Based on the record evidence presented by the parties at the evidentiary hearing in this case, the Ohio Manufacturers' Association Energy Group (OMAEG) respectfully requests that the Commission protect customers by disallowing all costs passed on to customers through the LGR Riders for the 2020 Audit Period. At a minimum, the Commission should disallow all 2020 costs passed through the LGR Riders

[19] Tr. Vol. V at 1355 (Cross-Examination of Seryak). *See also* Revised OMAEG Ex. 1 at 22–23 (Seryak Direct); OCC Ex. 1 at 5 (Stanton Direct); Revised CUB/UCS Ex. 1 at 10–11 (Glick Direct).

[20] *See* Entry and RFP.

[21] *See* Staff Ex. 2 (Public AES Audit Report); Staff Ex. 4 (Public AEP Audit Report); Staff Ex. 6 (Public Duke Audit Report).

[22] R.C. 4928.148(A)(1), stating that "The commission shall . . . exclude from recovery those costs that the commission determines imprudent and unreasonable."

resulting from OVEC's imprudent must-run commitment strategy, 2020 costs that are a result of imprudent coal purchases, and/or 2020 costs that resulted from the Sponsoring Companies' imprudent and unreasonable decision to take title to OVEC's energy at a loss to customers.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2019, the 133rd General Assembly enacted HB 6,[23] which, required the Commission to establish a replacement nonbypassable rate mechanism for the recovery of *prudently incurred* costs related to the OVEC coal plants for the period commencing January 1, 2020 and extending up to December 31, 2030.[24] Currently, the Sponsoring Companies are each *entitled* to a share of the power generation from the OVEC coal plants, and must pay that same share of the costs associated with operating OVEC, pursuant to the Amended and Restated Inter-Company Power Agreement (ICPA), which will remain in place until June 30, 2040.[25] Notably, however, the ICPA does not require or give authority to the Sponsoring Companies to pass costs associated with OVEC on to customers.[26] Rather, HB 6 provided the Sponsoring Companies' an opportunity to recover *reasonable and prudently-incurred* costs from customers through their LGR Riders if the costs were in fact reasonable and prudently-incurred.[27]

The statute authorizing the LGR Riders does not provide the Sponsoring Companies with a blank check. In fact, R.C. 4928.148(A)(1) specifically states that the Commission "shall . . .

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[23] Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report).

[24] Entry and RFP, Entry at ¶ 3.

[25] Staff Ex. 2 at 7, 12 (Public AES Audit Report); Staff Ex. 4 at 7, 12 (Public AEP Audit Report); Staff Ex. 6 at 7, 12 (Public Duke Audit Report); AES Ex. 4 at 4 (Crusey Direct); AEP Ex. 1 at 4 (Direct Testimony of Jason Stegall (Stegall Direct)) (October 3, 2023); Duke Ex. 6 at 3 (Direct Testimony of John Swez (Swez Direct)) (October 3, 2023); Tr. Vol. III at 667 (Cross-Examination of Swez); Tr. Vol. IV at 1001 (Cross-Examination of Stegall); Tr. Vol. V at 1135 (Cross-Examination of Crusey).

[26] Tr. Vol. III at 667, 775 (Cross-Examination of Swez); Tr. Vol. IV at 1001 (Cross-Examination of Stegall); Tr. Vol. V at 1135 (Cross-Examination of Crusey).

[27] R.C. 4928.148.

exclude from recovery those costs that the commission determines imprudent and unreasonable." Accordingly, R.C. 4928.148(A)(1) requires the Commission to conduct periodic audits of the LGR Riders to determine the prudence and reasonableness of the costs incurred *and* to determine the prudence and reasonableness of the actions of the Sponsoring Companies and then exclude from recovery any costs deemed imprudent and unreasonable.

According to the RFP issued in this case, the audit has two express purposes: (1) "establish[ing] the prudency of all the costs and sales flowing through [LGR] riders," *and* (2) "demonstrate[ing] that the actions of the companies . . . were in the best interest of [their] retail ratepayers."[28] Notably, the Auditor echoed this same language in both its response to Staff's RFP,[29] and in all three Audit Reports.[30]

During the evidentiary hearing held in this proceeding, OMAEG and the other intervening parties all made multiple requests to unredact portions of the Audit Reports, testimony, and other exhibits that should be made part of the public record for transparency of the audits and costs because the OVEC subsidies were being paid for by customers.[31] Additionally, OMAEG and others sought to make much of the information public under the Commission's rules given that the information was already in the public domain, as well as for consistency purposes since the same information was publicly available elsewhere.[32]

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[28] Entry and RFP, RFP at 2, 6. *See also* Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report).

[29] OCC Ex. 11 at 7 (Auditor Response).

[30] Staff Ex. 2, Public AES Audit Report at 7; Staff Ex. 4, Public AEP Audit Report at 7; Staff Ex. 6, Public Duke Audit Report at 7.

[31] *See* Tr. Vol. I at 45, 67–72; Tr. Vol. II at 367–68; 399–402, 442–43, 554–59; Tr. Vol. III at 554–55; Tr. Vol. IV at 926–27; and Tr. Vol. V at 1370–71.

[32] *Id.*

After the conclusion of the hearing, on December 22, 2023, the Attorney Examiners directed the Sponsoring Companies to reexamine and reassess the redacted information contained in the confidential versions of the Audit Reports and then file new motions for protective order by January 4, 2024.[33] The Sponsoring Companies each filed new motions for protective orders, attaching new, less redacted versions of their respective Audit Reports[34] and Staff Ex. 8C, which were Staff's supplements to the Audit Reports (collectively, Audit Report Supplements).[35] OMAEG opposed the motions, requesting that the Commission issue an order requiring the Sponsoring Companies to unredact additional portions of the Audit Reports for the sake of transparency and consistency.[36] On January 24, 2024, the Attorney Examiners granted the Sponsoring Companies' motions with the exception of certain information that the parties subsequently agreed to disclose.

In accordance with the amended briefing schedule, OMAEG hereby submits its Post-Hearing Brief consistent with the Attorney Examiners' directives.

III. APPLICABLE LAW

The Commission established the LGR Riders in accordance with a provision of HB 6, R.C. 4928.148(A), which requires the Commission to conduct an audit to determine the reasonableness

[33] Entry at ¶ 15 (December 22, 2023) (establishing an initial filing deadline of December 29, 2023). This filing deadline was later extended to January 4, 2024 by a subsequent Entry issued on December 27, 2023.

[34] *See* Staff Ex. 2 (Public AES Audit Report); Staff Ex. 4 (Public AEP Audit Report); Staff Ex. 6 (Public Duke Audit Report).

[35] *See* Staff Ex. 8C (Public AES Supplement); Staff Ex. 8C (Revised AEP Audit Report Supplement (Public) (January 4, 2024) (Public AEP Supplement)); Staff Ex. 8C ((Revised Duke Audit Report Supplement (Public) (January 4, 2024) (Public Duke Supplement)).

[36] Entry at ¶ 15 (December 22, 2023).

and prudence of the OVEC costs incurred and the Sponsoring Companies' actions during calendar years 2020, 2023, 2025, and 2029.[37]

While the Commission had a certain level of discretion in previous OVEC audits when deciding whether to disallow certain costs recovered from customers to subsidize the coal plants, what costs can and cannot be recovered through the LGR Riders, and what Sponsoring Companies' decisions the auditor *must* consider, the Commission no longer has that discretion pursuant to the plain language of the statute. As a creature of statute,[38] the Commission must give full effect to R.C. 4928.148, which states:

> (A) On January 1, 2020, *any mechanism authorized* by the public utilities commission prior to the effective date of this section *for retail recovery of prudently incurred costs* related to a legacy generation resource *shall be replaced by a nonbypassable rate mechanism established by the commission for recovery of those costs* through December 31, 2030, from customers of all electric distribution utilities in this state. The nonbypassable rate mechanism shall be established through a process that the commission shall determine is not for an increase in any rate, joint rate, toll, classification, charge, or rental, notwithstanding anything to the contrary in Title XLIX of the Revised Code. All of the following shall apply to the nonbypassable rate mechanism established under this section:
>
> > (1) The commission *shall determine*, in the years specified in this division, *the prudence and reasonableness of the actions of electric distribution utilities* with ownership interests in the legacy generation resource, *including their decisions related to offering the contractual commitment into the wholesale markets, and exclude from recovery those costs that the commission determines imprudent and unreasonable*. The initial determination shall be made during 2021 regarding the prudence and reasonableness of such actions during calendar year 2020.

[37] R.C. 4928.148(A).

[38] *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 97 (1973) ("The Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.") (citations omitted). Additionally, the Supreme Court of Ohio has long held that the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

> The commission shall again make the determination in 2024, 2027, and 2030 regarding the prudence and reasonableness of such actions during the three calendar years that preceded the year in which the determination is made.
>
> (2) The commission shall determine the proper rate design for recovering or remitting *the prudently incurred costs* related to a legacy generation resource, provided, however, that the monthly charge or credit for those costs, including any deferrals or credits, shall not exceed one dollar and fifty cents per customer per month for residential customers. For all other customer classes, the commission shall establish comparable monthly caps for each class at or below one thousand five hundred dollars per customer. Insofar as the *prudently incurred costs* related to a legacy generation resource exceed these monthly limits, the electric distribution utility shall defer the remaining *prudently incurred costs* as a regulatory asset or liability that shall be recovered as determined by the commission subject to the monthly caps set forth in this division.
>
> (3) The commission shall provide for discontinuation, subject to final reconciliation, of the nonbypassable rate mechanism on December 31, 2030, including recovery of any deferrals that exist at that time.
>
> (4) The commission shall determine the manner in which charges collected under this section by a utility with no ownership interest in a legacy generation resource shall be remitted to the utilities with such ownership interests, in direct proportion to each utility's sponsorship interest.
>
> (B) An electric distribution utility, including all electric distribution utilities in the same holding company, shall bid all output from a legacy generation resource into the wholesale market and shall not use the output in supplying its standard service offer provided under section 4928.142 or 4928.143 of the Revised Code.[39]

Additionally, R.C. 4928.01(A)(42) defines "prudently incurred costs related to a legacy generation resource" as:

> Costs, including deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource, less any revenues

[39] R.C. 4928.148 (emphasis added).

> realized from offering the contractual commitment for the power agreement into the wholesale markets, provided that where the net revenues exceed net costs, those excess revenues shall be credited to customers. Such costs shall exclude any return on investment in common equity and, in the event of a premature retirement of a legacy generation resource, shall exclude any recovery of remaining debt."

The plain language of R.C. 4928.148 and 4928.01(A)(42) is clear, and as a creature of statute, the Commission is required by law to follow it. R.C. 4928.148(A) requires the Commission to establish a nonbypassable rate mechanism to *replace* the previous OVEC riders, to recover "those costs through December 31, 2030."[40] Based on a plain reading of the statutory language, "those costs" clearly refers to the "prudently incurred costs related to a legacy generation resource" that the Commission previously authorized for recovery. In other words, R.C. 4928.148(A) only allows the Sponsoring Companies to recover the *same* "prudently incurred costs related" to OVEC through the LGR Riders that they were authorized to recover through their "replaced" OVEC recovery mechanisms. Consequently, in accordance with the plain language of R.C. 4928.148(A), the Commission may *only* allow the Sponsoring Companies to recover the same prudently incurred costs. The Commission should, therefore, follow its precedent when determining what is deemed to be a prudently incurred cost.[41]

Furthermore, pursuant to R.C. 4928.148(A)(1), the Commission must also (1) "determine . . . the prudence *and* reasonableness of "the Sponsoring Companies' actions, (2) evaluate and

[40] R.C. 4928.148(A).

[41] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975) (holding that the Commission should "respect its own precedents in its decisions to assure the predicability [*sic*] which is essential in all areas of the law, including administrative law"); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134 at ¶ 15 (stating that "the commission should respect its own precedents in its orders to assure predictability in the law"); *In the Matter of the Complaint of Suburban Nat. Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425 at ¶ 29 (noting that the Court has previously "instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law").

determine "their decisions related to offering the contractual commitment into the wholesale markets," and (3) "exclude from recovery those costs that the commission determines imprudent and unreasonable."[42] This language makes clear that, by law, customers are *only* required to pay for OVEC-related costs that were prudently incurred and reasonable, and that were the result of prudent and reasonable Sponsoring Companies' decisions, including the decisions related to offering the units' contractual commitment into the wholesale market under a must-run strategy.

As explained more fully below, the record evidence in this case fails to demonstrate that the costs charged to customers through the LGR Riders were prudent and reasonable. For example, in blatant disregard for the statutory requirement in R.C. 4928.148(A)(1), the Auditor admitted that she did not include "anything" in the Audit Reports about whether the Sponsoring Companies "acted prudently in making energy market offers," or about whether the Sponsoring Companies "acted imprudently in making energy market offers."[43] Similarly, the Sponsoring Companies failed to provide sufficient evidence demonstrating that their actions were reasonable and prudent, and, in fact, a number of their actions were flagrantly imprudent. Intervenors were also prevented from establishing through the questioning of certain witnesses regarding whether "those costs" passed on to customers through the LGR Riders were reasonable and prudently incurred because evidence relating to that matter was systematically excluded during the hearing.

Under Ohio law, the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute."[44] As such, the Commission is prohibited from

[42] R.C. 4928.148(A)(1) (emphasis added).

[43] Tr. Vol. I at 124–25 (Cross-Examination of Fagan).

[44] *Penn Central Transportation Co. v. Pub. Util. Comm.* at 97 (citations omitted).

adding or removing words or meanings from statutes.[45] Furthermore, the Supreme Court of Ohio has held that "[n]o part of the statute should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative."[46] R.C. 4928.148 distinctly establishes the kinds of costs that may be recovered, the kinds of decisions that must be reviewed, and the kinds of actions that would not allow for recovery of costs related to those actions.

The record evidence in this case demonstrates that the costs passed on to customers through the LGR Riders for the Audit Period were imprudently incurred, unjust, unreasonable, and not in the best interest of ratepayers. Therefore, as required by law, the Commission should find that the actions of the Sponsoring Companies were neither prudent nor reasonable, and it should "exclude from recovery those costs" totaling $114,879,609 that were imprudently incurred during the Audit Period.[47]

IV. ARGUMENT

A. The Commission should reverse the Attorney Examiners' rulings to exclude relevant and material evidence.

Throughout the evidentiary hearing in this case, and over the objections of the intervenors, the Attorney Examiners improperly excluded no fewer than eleven pieces of relevant and material evidence offered by the intervenors. In contrast, the Attorney Examiners admitted competing testimony of the Sponsoring Companies, including the direct testimony of one Sponsoring Company's witness despite that witness not being fully subject to cross-examination to test his

[45] *See, e.g.*, *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 45; *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, (1948); *see also Tongren v. Pub. Util. Comm.* at 88.

[46] *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.,* 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 19.

[47] R.C. 4928.148(A)(1), stating that "The commission shall . . . exclude from recovery those costs that the commission determines imprudent and unreasonable."

assertions because the intervenors' attempts to cross examine the witness were thwarted time and again.[48] By allowing the Sponsoring Companies to testify about these matters while precluding intervenors from cross examining the same witnesses on said testimony or offering testimony themselves on the same issues to refute the witnesses' testimony, the Attorney Examiners unreasonably prevented the Commission from hearing both sides of the argument and then making a decision based on a full and complete record and the weight of the evidence presented as required by R.C. 4903.09. Ohio Adm.Code 4901-1-15(F) allows a party who was adversely affected by the ruling to raise the propriety of that ruling and seek reversal of the ruling by "discussing the matter as a distinct issue in its initial brief." Accordingly, OMAEG seeks reversal of the unlawful, unreasonable, and/or prejudicial rulings described herein that were issued during the hearing.

1. The Commission should reverse the Attorney Examiners' rulings to exclude OMAEG's expert testimony directly responsive to the Sponsoring Companies' and Auditor's testimonies.

The Attorney Examiners incorrectly excluded evidence offered by OMAEG that is directly relevant to the prudency and reasonable of the OVEC costs and sales flowing through the LGR Riders. Such exclusions adversely affected OMAEG's right to participate in this case and was prejudicial. More specifically, on the final day of the hearing, and over the objections of OMAEG and the other intervenors,[49] the Attorney Examiners struck large portions of the testimony that directly contradicted the Auditor's and Sponsoring Companies' witnesses' testimonies, and that was filed in response to those testimonies.[50] The Attorney Examiners' actions on the last date of hearing significantly altered the filed testimony that rebutted arguments to the contrary,

[48] Tr. Vol. IV at 920–25.

[49] *See* Tr. Vol. V at 1300–14, 1316–18, 1320–23, 1326, 1328–29. 1332–35.

[50] Tr. Vol. V at 1330. *See also* OMAEG's Interlocutory Appeal and Application for Review at 17–27 (November 13, 2023) (hereinafter, Interlocutory Appeal).

significantly changing the filed testimony, and eliminating all opportunities to supplement the record with different evidence or by further attempts to rebut prior witnesses' testimony on cross-examination. The striking of the testimony that resulted in a significant alteration and reduction in testimony that contravened the Auditor and other witnesses on the last day of hearing was unjust and unreasonable and in contravention to Ohio law, resulting in a very different evidentiary record. The Attorney Examiners chose to alter the record on the last day of hearing even though the testimony had been filed months prior, on October 10, 2023, and even though the Sponsoring Companies filed a motion to strike the testimony prior to the start of the hearing. Delaying the ruling that resulted in a significant reduction in record evidence that contradicted prior witnesses' statements in testimony and at the hearing on the last day of the hearing was not only unjust and unreasonable, but it was also prejudicial to OMAEG and other parties.

Among the stricken portions were excerpts of the testimony of an expert witness where the expert explained what he reviewed and relied on to formulate his expert opinion.[51] First, Ohio Evid.R. 702 allows a witness to testify as an expert if the witness' testimony relates to matters beyond the knowledge or experience possessed by a lay person and if the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, and if the testimony is reliable.[52] The standard is whether an expert's testimony will "assist the trier of fact."[53] OMAEG witness Seryak regularly testifies before the Commission and is clearly a qualified expert in the energy and regulatory fields, including on

[51] Evid.R. 702–05.

[52] Evid.R. 702. *See also State v. Koss* (1990), 49 Ohio St. 3d 213, 216 (expert testimony is not admissible "when such knowledge is within the ken of the jury"); *State v. Buell* (1980), 22 Ohio St. 3d 124, 131 (expert testimony is admissible if the subject is "sufficiently beyond common experience"), cert denied, 479 U.S. 871 (1986); *State v. Thomas* (1981), 66 Ohio St. 2d 518, 521 (expert testimony is inadmissible if the subject is not "beyond the ken of the average lay person").

[53] Evid.R. 702.

OVEC, OVEC costs, and on past and current OVEC rider mechanisms, and his pre-filed expert testimony that was stricken regarding his opinion on what OVEC costs were prudently incurred would have assisted the trier of fact in determining the prudency and reasonableness of the OVEC costs.[54] Second, Ohio Evid.R. 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert *or* admitted in evidence at the hearing."[55] The Court has clarified that this means experts may offer testimony based upon facts and data *not admitted* into evidence.[56] Under this rule, OMAEG witness Seryak should have been allowed to offer testimony based on the facts and data that he perceived when reviewing, among other things, the Commission's prior decisions. As stated in OMAEG witness Seryak's testimony, the past Commission decisions defining "those costs" that are to be reviewed under R.C. 4928.148(A) are directly on point as the Commission is reviewing the same OVEC costs in the audit of this case.[57] Finally, Ohio Evid.R. 705 allows an expert to testify in terms of his opinion or inference and to give the expert's reasons for his opinions only *after* the expert discloses the underlying facts or data that he relied upon to formulate his opinion.[58] This is exactly what OMAEG witness Seryak's testimony did that the Attorney Examiners' struck—the expert explained Ohio law, including prior case law (i.e., prior Commission decisions), regarding how the Commission determined what OVEC costs were prudent or imprudent, and then the expert

[54] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 9–16, 19–20, 27 (Seryak Direct).

[55] Evid.R. 703 (emphasis added).

[56] *State v. Solomon*, 59 Ohio St.3d 124, 570 N.E.2d 1118 (1991) (allowing doctors to offer testimony based on reports not in evidence that they previously consulted/"perceived" when forming their opinions) (also noting that "Evid.R. 703 is written in the disjunctive," meaning that "[o]pinions may be based on perceptions *or* facts or data admitted in evidence"); *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621 at ¶ 77 ("Expert opinions may be based on perceptions *or* facts or data admitted in evidence" (internal quotations omitted)).

[57] Revised OMAEG Ex. 1 at 5 (Seryak Direct).

[58] Evid.R. 705 ("The expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise").

applied the Commission's prudency rulings in those cases to the facts of the current case to formulate and present his expert opinion and recommendations on the audit and the reasonableness and prudency of the costs incurred, as well as the prudency and reasonableness of the Sponsoring Companies' actions. All which is not only permitted, but required under the Ohio Rules of Evidence.

But the Attorney Examiners ignored the Ohio Rules of Evidence and past Commission practices and unlawfully struck the expert witness' expert analysis regarding prior Commission decisions related to the same OVEC costs and the Commission's determination of the prudency and reasonableness of those same OVEC costs, and his expert opinion that he formulated from that analysis. The Attorney Examiners also unlawfully struck testimony regarding the legislative bill, HB 6, that was enacted by the General Assembly to create the LGR Riders—the very riders that the Commission was mandated to audit and determine the prudency and reasonableness of the costs that flowed through those riders, as well as the "prudence and reasonableness of the actions of the [Sponsoring Companies], including their decisions related to offering the contractual commitment into the wholesale markets."[59] The Attorney Examiners also unlawfully struck testimony regarding the legislative history and enactment of the bill that created the LGR Riders and that influenced the Sponsoring Companies' actions regarding the collection of OVEC costs from customers.[60] Even more egregious, the Attorney Examiners struck several of the expert's conclusions regarding the prudency and reasonableness of the costs passed on to customers through the LGR Riders.[61]

[59] R.C. 4928.148(A)(1).

[60] *See* Tr. Vol. V at 1313–15, 1323–26, 1327–28.

[61] *See* Tr. Vol. V at 1313–15, 1323–26, 1327–28.

As explained in OMAEG's proffer, interlocutory appeal, and more fully below, "the Attorney-Examiner's [*sic*] ruling was prejudicial and very inappropriate, and violates many rules of the Commission and the Commission's prior orders themselves."[62] OMAEG's expert testimony expounded upon concerns that parties had previously raised in comments filed with the Commission in this proceeding per the Commission's procedural schedule,[63] and further discussed the same kinds of issues presented and discussed in all of the Audit Reports[64] and the testimonies of the Sponsoring Companies' own witnesses.[65] By granting the Sponsoring Companies' overbroad and improper Motion to Strike,[66] OMAEG was unreasonably barred from presenting expert testimony and other evidence regarding the prudency and reasonableness of the costs that the Sponsoring Companies charged to customers through the LGR Riders and whether the Sponsoring Companies' actions were prudent and reasonable in the best interest of customers.[67] OMAEG was also unreasonably precluded from directly responding to and rebutting the testimonies provided by the Auditor and Sponsoring Companies in this case.[68] Such testimony

[62] Proffer, Tr. Vol. V at 1331, Proffer, Revised OMAEG Ex. 1 (Seryak Direct). *See also* Interlocutory Appeal at 13–14.

[63] For example, *see* OMAEG Comments on OVEC Audits (May 8, 2023); OMAEG Reply Comments on OVEC Audits (May 23, 2023).

[64] Staff Ex. 2 at 7, 10–11, 14, 22 fn. 42, 23, 29–30, 106 (Public AES Audit Report); Staff Ex. 4 at 7, 10–11, 14, 17, 24 fn. 46, 25, 35, 110 (Public AEP Audit Report); Staff Ex. 6 at 7, 11, 14, 22 fn. 42, 23, 31–33, 111, 112 (Public Duke Audit Report).

[65] *See, e.g.*, Duke Ex. 3 at 4–5 (Direct Testimony of James Ziolkowski (Ziolkowski Direct)) (October 3, 2023), discussing the history of the PSR and citing the prior OVEC audit, Case No. 20-167-EL-RDR; AEP Ex. 1 at 6–7 (Stegall Direct), describing the history of the LGR Rider and citing the R.C. 4928.148.

[66] Motion to Strike the Testimony of John Seryak and Memorandum in Support (October 30, 2023) (hereinafter, Motion to Strike).

[67] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 6–7 (Seryak Direct). *See also* Interlocutory Appeal at 15–16.

[68] Tr. Vol. V at 1304–05; Proffer, Tr. Vol. V at 1330, Proffer, Revised OMAEG Ex. 1 (Seryak Direct); Interlocutory Appeal at 1, 7.

and evidence directly contradicted the Auditor and Sponsoring Companies' testimony and Audit Reports.

The Sponsoring Companies bear the burden of proof to demonstrate that costs passed through the LGR Riders were just, reasonable, and prudently incurred, and that their actions were reasonable and prudent in the best interest of customers. By not allowing OMAEG the opportunity to rebut the assertions made by the Sponsoring Companies' witnesses and the Auditor and by not allowing OMAEG to even present expert testimony on these matters, the Attorney Examiners' rulings "effectively reduce[] or eliminate[] the Sponsoring Companies' burden. 'Proving' something when evidence and arguments to the contrary are silenced is hardly a burden."[69]

Moreover, the Attorney Examiners' rulings were patently unfair and prejudicial because they prohibited OMAEG's witness's from testifying about the same matters that the Auditor and the Sponsoring Companies' witnesses were permitted to discuss at length—over OMAEG and other intervenors' objections. OMAEG proffered the entirety of its expert witness' testimony into the record,[70] and also filed an interlocutory appeal requesting that the appeal be immediately taken to the Commission for a decision in the public interest, or, alternatively, that the appeal be certified to the Commission for review, and that the Commission reverse the Attorney Examiners' rulings in keeping with Commission precedent and the interest of fairness to customers.[71] To date, no such certification or ruling has been issued by the Commission.

[69] Interlocutory Appeal at 10.

[70] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 (Seryak Direct).

[71] Interlocutory Appeal.

a. Striking OMAEG's expert testimony regarding prior OVEC costs allowed to be recovered from customers that are the same costs referenced in R.C. 4928.148 improperly eliminated contrary evidence regarding whether the OVEC costs collected through the LGR Riders were reasonable and prudent and whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers.

The Attorney Examiners' ruling struck references to Ohio law and prior Commission orders that OMAEG's expert relied upon when providing his expert opinion as to whether the 2020 OVEC costs were prudent and reasonable and whether charging customers $114,879,609 was in their best interest, and whether the Sponsoring Companies' actions were reasonable and prudent.[72] This ruling contravenes both long-standing Commission precedent *and* the Ohio Rules of Evidence. Previously, the Commission has afforded expert witnesses the opportunity to review, interpret, and rely on past Commission decisions in offering their expert opinions and allowed intervenors to present their cases to the Commission through expert testimony and other evidence. Additionally, Ohio Rule of Evidence 702 explains that an expert may rely upon specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, as well as reliable technical or other specialized information, when forming his or her opinion, and Rule 703 states that the facts or data upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing. As noted in OMAEG's Interlocutory Appeal, "the matters to which Mr. Seryak testified were all based on the same kinds of evidence and information relied upon by other experts and *admitted into evidence at the hearing*."[73]

As explained by OMAEG witness Seryak, to form his expert opinion and provide his regulatory analyses of what is prudent and reasonable with regard to OVEC costs charged to

[72] Tr. Vol. V at 1321–23.

[73] Interlocutory Appeal ay 5 (emphasis added).

customers for this Audit Period, he relied upon Commission precedent and past OVEC audit cases that reviewed the same costs to formulate and render his expert opinion and recommendation of whether the costs incurred by the Sponsoring Companies and passed on to customers for the Audit Period were prudently incurred and reasonable.[74] OMAEG's expert also utilized the Commission's past decisions to inform his analysis and recommendation as to whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers.[75] This is the exact type of review and analysis that experts are supposed to complete to provide expert conclusions, opinions, and recommendations. This is also the exact type of review and analysis the Auditor *should* have done in this case.

The Sponsoring Companies claimed that the Commission's past decisions regarding the previous OVEC recovery mechanisms were outside the scope of these proceedings,[76] but that is patently false, as evidenced by the governing law itself,[77] the Commission's RFP in this case,[78] the Audit Reports,[79] and the testimonies provided by the Sponsoring Companies' own witnesses.[80] For example, the Introduction section of the RFP explicitly references the prior OVEC riders by name, discusses the audits of those riders, and explains the riders' specific mechanisms and the

[74] *See* Revised OMAEG Ex. 1 (Seryak Direct).

[75] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 13–20 (Seryak Direct).

[76] Motion to Strike at 8–10; Tr. Vol. V at 1318–19.

[77] R.C. 4928.148(A).

[78] Entry and RFP, RFP at 2–3, 5.

[79] Staff Ex. 2 at 7, 10–11, 14, 22, fn. 42, 23, 29–30, 106 (Public AES Audit Report); Staff Ex. 4 at 7, 10–11, 14, 17, 24, fn. 46, 25, 35, 110 (Public AEP Audit Report); Staff Ex. 6 at 7, 11, 14, 22, fn. 42, 23, 31–33, 111, 112 (Public Duke Audit Report).

[80] Duke Ex. 6 at 38 (Swez Direct); Duke Ex. 3 at 4 (Ziolkowski Direct); AES Ex. 3 at 2 (Direct Testimony of Patrick Donlon (Donlon Direct)) (October 3, 2023); AEP Ex. 1 at 6 (Stegall Direct); Tr. Vol. III at 738 (Cross-Examination of Swez); Tr. Vol. IV at 954–55 (Cross-Examination of Ziolkowski); Tr. Vol. IV at 1019–20, 1051–52 (Cross-Examination of Stegall).

kinds of charges to be collected through them.[81] This information would not have been included if it was, as the Sponsoring Companies claimed, outside the scope of these proceedings.

The Supreme Court of Ohio has held on numerous occasions that "'[i]t is the policy of courts to stand by precedent and not to disturb a point once settled.'"[82] Similarly, the Court has noted that "we should be careful to revisit settled precedent only when necessary."[83] While the doctrine of stare decisis "is limited to circumstances where the facts of a subsequent case are substantially the same as a former case,"[84] the doctrine most certainly applies to this case given the similar facts and R.C. 4928.148's explicit reference to the same costs recovered from customers through previous OVEC riders. Additionally, as noted above, the Court has previously "instructed the [C]ommission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law."[85] Therefore, the Commission should be allowed to consider, and OMAEG's expert should have been allowed to testify about prior Commission decisions regarding the collection of the same kinds of costs at issue in this case.

Moreover, the Auditor clearly did not consider the LGR Riders in a vacuum (as the Sponsoring Companies insisted that OMAEG's expert must do) as evidenced by the fact that,

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[81] Entry and RFP, RFP at 2–3, 5.

[82] *Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176 at ¶ 30, *quoting Clark v. Snapper Power Equip., Inc.*, 21 Ohio St.3d 58, 60, 488 N.E.2d 138 (1986).

[83] *Dayton v. State* at ¶ 30.

[84] *Acuity, A Mut. Ins. Co. v. Progressive Specialty Ins. Co.*, 2023-Ohio-3780 at ¶ 21, *citing Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007 Ohio 6948, 880 N.E.2d 420, ¶ 23; *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 5, 539 N.E.2d 103 (1989).

[85] *Suburban Nat. Gas Co. v. Columbia Gas of Ohio, Inc.* at ¶ 29. *See also Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* at 431 (holding that the Commission should "respect its own precedents in its decisions to assure the predicability [*sic*] which is essential in all areas of the law, including administrative law"); *Ohio Consumers' Counsel v. Pub. Util. Comm.* at ¶ 15 (stating that "the commission should respect its own precedents in its orders to assure predictability in the law").

collectively, the Audit Reports contain over *thirty* references to the OVEC Riders.[86] For example, the Audit Reports all include sections detailing the background of the LGR Riders within the context of the OVEC Riders,[87] and the Auditor included Figures 1 in all three reports that discuss the recommendations contained in the prior audits.[88] Most importantly, the Audit Reports explain that the LGR Riders *all* included true-ups from the previous OVEC riders, thereby recovering the exact *same costs* through the LGR Riders.[89] But for the enactment of HB 6, the costs collected through the LGR Riders would have been collected through the prior OVEC riders.[90] Therefore, OMAEG's expert testimony opinion on the same OVEC costs recoverable through the OVEC riders could not be more relevant to this proceeding and whether the same OVEC costs passed through the LGR Riders were reasonable and prudently incurred.

The stricken portions of OMAEG witness Seryak's testimony also should have been admitted in the interest of fairness. As noted above, the Sponsoring Companies' witnesses were all allowed to discuss the same matters that Mr. Seryak wished to opine on. For example, one of Duke's witnesses and one of AES' witnesses both provided detailed testimony regarding the prior OVEC riders, including the prior Commission decisions related to the creation of those riders,[91]

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[86] Staff Ex. 2 at 7, 10–11, 14, 22 fn. 42, 23, 29–30, 106 (Public AES Audit Report); Staff Ex. 4 at 7, 10–11, 14, 17, 24 fn. 46, 25, 35, 110 (Public AEP Audit Report); Staff Ex. 6 at 7, 11, 14, 22 fn. 42, 23, 31–33, 111, 112 (Public Duke Audit Report).

[87] Staff Ex. 2 at 23 (Public AES Audit Report); Staff Ex. 4 at 25 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report).

[88] Staff Ex. 2 at 11 (Public AES Audit Report); Staff Ex. 4 at 11 (Public AEP Audit Report); Staff Ex. 6 at 11 (Public Duke Audit Report).

[89] Staff Ex. 2 at 29 (Public AES Audit Report); Staff Ex. 4 at 35 (Public AEP Audit Report); Staff Ex. 6 at 31 (Public Duke Audit Report).

[90] *See also* Interlocutory Appeal at 18–19, further elaborating that elements of the prior audit cases, such as OVEC's management practices, costs to customers, coal purchases, and the auditors' analyses, process, evaluations, and recommendations were directly relevant to this proceeding.

[91] Duke Ex. 3 at 4 (Ziolkowski Direct); AES Ex. 3 at 2 (Donlon Direct). *See also* Tr. Vol. III at 736–38 (Cross-Examination of Swez).

and Duke's other witness and AEP's witness both cited the same law and definitions that the Attorney Examiners struck from OMAEG's expert testimony.[92] And similarly to the Audit Reports' recognition that the LGR Riders collected costs that would have otherwise been collected through the prior OVEC riders, Duke's witness stated that "Unrecovered Rider PSR balances were recovered via the Part B portion of Rider LGR."[93] Notwithstanding all of this evidence allowed in the record to support the Auditor's and the Sponsoring Companies' expert testimony, OMAEG's witness was prohibited from responding and analyzing how those prior orders impacted his expert opinions and recommendations in this case.

Had OMAEG witness Seryak's testimony been admitted, it would have demonstrated that the same OVEC costs being charged through the LGR Riders in 2020 were imprudent, unreasonable, and the Sponsoring Companies' actions were unreasonable and imprudent and not in customers' best interest. He would have explained that Ohio law explicitly describes "prudently incurred costs" that may be recovered through the LGR Riders as *the same costs* that the Commission previously authorized the Sponsoring Companies to recover through their old OVEC recovery mechanisms.[94] Given this language, the Commission's prior decisions regarding what costs were reasonable and prudent and, therefore, could be collected through the old OVEC riders *should* inform the Commission as to what costs are reasonable and prudent and, therefore, are recoverable through the replacement mechanisms, the LGR Riders. Certainly, as explained above,

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[92] Duke Ex. 6 at 38 (Swez Direct); AEP Ex. 1 at 6 (Stegall Direct). *See also* Tr. Vol. III at 249–54, 774–95 (Cross-Examination of Swez); Tr. Vol. IV at 1050–54 (Cross-Examination of Stegall); Tr. Vol. V at 1163–66 (Cross-Examination of Crusey).

[93] Duke Ex. 3 at 5 (Ziolkowski Direct). *See also* Tr. Vol. IV 959–60 (Cros-Examination of Ziolkowski).

[94] R.C. 4928.148(A); Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 5, 13–20 (Seryak Direct). *See also* Motion to Stike at 9, acknowledging that R.C. 4928.148(A) states that the former OVEC riders will be replaced by a new mechanism to recover "those same costs" that the Commission previously authorized for recovery.

the Commission is bound by its prior decisions to inform its current decisions and thus "assure the predictability which is essential in all areas of the law, including administrative law."[95]

Had OMAEG witness Seryak's testimony not been struck, the pre-filed testimony would have stated and OMAEG witness Seryak would have testified to and provided his opinion that, based on prior Commission decisions, the charges and credits collected through the LGR Riders for 2020 must constitute a rate stability charge in order to allow recovery of "those costs."[96] He would have explained how, based on his understanding of the prior OVEC recovery mechanisms and the costs approved by the Commission, that the LGR Riders should function as meaningful "financial hedge[s] that mitigate price spikes in market prices" and "provide added rate stability."[97] And he would have noted that, in his opinion, the Commission's prior orders consistently determined that OVEC recovery mechanisms are required to stabilize rates.[98] And he would have concluded that the LGR Riders are not functioning as proper rate stability charges because the "LGR Riders *have* resulted in net costs to customers with little offsetting benefit from the riders' intended purpose as a hedge against market volatility."[99]

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[95] *Suburban Nat. Gas Co. v. Columbia Gas of Ohio, Inc.* at ¶ 29. *See also Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* at 431; *Ohio Consumers' Counsel v. Pub. Util. Comm.* at ¶ 15.

[96] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14 (Seryak Direct).

[97] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14 (Seryak Direct).

[98] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14 (Seryak Direct), *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 Nos. 14-1693-EL-RDR, et al., Opinion and Order at 102 (March 31, 2016) (hereinafter, AEP PPA Rider Order); *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 (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 ¶ 119 (October 20, 2017).

[99] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14–16 (Seryak Direct).

His testimony would have also cited to Commissioner Trombold's statement regarding the prudency and reasonableness of the OVEC costs, noting that "it [was her] clear expectation, just as it is Commissioner Haque's, that [AEP's] PPA rider approved today will result in a credit (i.e. benefit) to ratepayers over the next eight years,"[100] and Commissioner Haque's explanation that a rate stability charge can cease being a rate stability charge/financial hedge and instead become an "illusory insurance policy" if "ratepayers never experience the credits."[101] OMAEG witness Seryak would have discussed how the Audit Reports demonstrated that the LGR Riders are not producing net credits to customers, nor are they expected to, and that fact results in the OVEC costs not being prudent or reasonable as they are not stabilizing rates.[102] Given this, he would have further concluded that the OVEC costs are not reasonable and prudent in the best interest of customers, and he would have advocated for disallowing and refunding to customers all OVEC costs incurred in 2020 and passed on to customers.[103]

There is no Commission rule or other provision—indeed, the Sponsoring Companies did not cite any—preventing OMAEG's expert from referencing and relying upon relevant information and analyses issued by the Commission in another Commission proceeding to inform his expert opinion, including an OVEC-related proceeding. In fact, a witness' expert opinion *requires* him to do so.[104] Understanding the Commission's prior decisions regarding what

[100] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14 (Seryak Direct), *citing* AEP PPA Rider Order, Concurring Opinion of Beth Trombold at 2.

[101] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14 (Seryak Direct), *citing* AEP PPA Rider Order, Concurring Opinion of Asim Haque at 4.

[102] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 16 (Seryak Direct). *See also* Staff Ex. 2 at 27 (Public AES Audit Report); Staff Ex. 4 at 31 (Public AEP Audit Report); Staff Ex. 6 at 29 (Public Duke Audit Report). *See also* Tr. Vol. II at 415 (Cross-Examination of Fagan).

[103] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 16, 20 (Seryak Direct).

[104] *See* Evid.R. 702–05.

constitutes prudent costs and "reasonableness" of the costs in the context of an audit of OVEC costs being collected from customers informed OMAEG witness Seryak's expert opinion regarding which same costs are eligible for recovery and which costs should be disallowed by the Commission as unreasonable or imprudent in a subsequent proceeding. The Auditor and the Sponsoring Companies' experts were allowed to review, interpret, rely upon, and testify about these relevant prior Commission decisions, but when OMAEG's expert attempted to do the same, his testimony was struck from the record. The Attorney Examiners lacked a legitimate evidentiary basis for excluding OMAEG's expert testimony, and their rulings ignored the Commission's precedent and Ohio Rules of Evidence of allowing expert witnesses to review, interpret, and rely on past Commission decisions when analyzing the facts of a current case and making determinations and recommendations and of allowing intervenors to present their cases to the Commission through testimony and other evidence. Therefore, the Attorney Examiners' rulings were improper and should be reversed and the complete testimony of OMAEG witness Seryak should become a part of the record as relevant and material evidence and should be considered by the Commission.

b. Striking OMAEG's expert testimony regarding the legislation that created the LGR Riders improperly eliminated contrary evidence regarding whether the OVEC costs collected through the LGR Riders were reasonable and prudent and whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers.

Similar to the arguments in the section above, although the Auditor and the Sponsoring Companies' witnesses explicitly referenced Ohio law and the legislation that created the LGR Riders (HB 6), the Attorney Examiners struck OMAEG's witness' quotes of, citations to, and references to the law that created the LGR Riders and all mention of HB 6 and the ongoing investigations into the corruption behind the law that enacted the LGR Riders, including the

legislative history.[105] Information about the legislative history and investigations into the law that created the LGR Riders that occurred during the Audit Period is not only within the scope of this proceeding, it also helped inform OMAEG witness Seryak's expert opinions, determinations, and recommendations in this case. Striking those portions of his testimony eliminated OMAEG witness Seryak's ability to testify about these matters and eliminated OMAEG's ability to challenge the prudency and reasonableness of the OVEC costs incurred in 2020 and passed on to customers through the LGR Riders, as well as the prudency and reasonableness of the Sponsoring Companies' actions during the Audit Period.[106]

The law that created the LGR Riders to collect prudently incurred OVEC costs (HB 6) is inextricably linked with the LGR Riders and this audit for several reasons.[107] First, HB 6 *created* the LGR Riders and specifically referenced the past recovery mechanisms that also collected OVEC costs.[108] Nonetheless, given that the Attorney Examiners appear to have a difference of opinion regarding what one of the HB 6 provisions states; specifically, the interpretation of R.C. 4928.148 and the meaning of the reference in the statute to "those costs" and what is being replaced,[109] evidence of the legislative intent should have been allowed into the record because the Commission has long recognized that "[i]n construing a statute, our paramount concern is legislative intent. If the meaning of the statute is unambiguous and definite, it must be applied as

[105] Tr. Vol. V at 1314–15.

[106] *See* Interlocutory Appeal at 24–27.

[107] *See* Tr. Vol. V at 1302–03; Interlocutory Appeal at 24–27.

[108] Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report).

[109] R.C. 4928.148(A) ("*any mechanism authorized by the public utilities commission prior* to the effective date of this section *for retail recovery of prudently incurred costs* related to a legacy generation resource *shall be replaced* by a nonbypassable rate mechanism established by the commission for recovery of *those costs* through December 31, 2030, from customers of all electric distribution utilities in this state.") (emphasis added).

written and no further interpretation is necessary."[110] But, if the statute is ambiguous, the Commission should take into consideration (1) the General Assembly's objective in enacting the statute; (2) the circumstances surrounding the enactment of the statute; (3) legislative history; (4) common law or earlier statutes on a similar subject; (5) consequences of a particular interpretation; and (6) the administrative construction of a statute.[111] These factors all favor allowing information regarding the law that created the LGR Riders and the audit process to be included in OMAEG witness Seryak's testimony. His testimony on the legislative history of HB 6 provided valuable information and insights on the meaning of the words utilized in the statute and an expert's interpretation of those words based upon his knowledge, training, and experiences (to recover the same kinds of costs as were authorized for recovery through prior OVEC riders).[112] OMAEG witness Seryak also provided valuable information and insights regarding the circumstances surrounding the enactment of R.C. 4928.148 and the legislative history.[113] This is particularly important given that this is the first time the Commission has conducted an audit of the OVEC costs pursuant to the new statutory language created by HB 6 that established the audit and LGR Riders. Moreover, as mentioned above, the Supreme Court of Ohio prohibits administrative agencies from adding or removing words from statutes that do not exist.[114]

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[110] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Decoupling Mechanism*, Case Nos. 19-2080-EL-ATA, et al., Order at ¶ 25 (January 15, 2020), *citing WorldCom, Inc. v. City of Toledo*, Case Nos. 02-3207-AU-PWC, 02-3210-EL-PWC, Opinion and Order (May 14, 2003); *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Ed.*, 74 Ohio St. 543, 660 N.E.2d 463 (1996); *Akron Management Corp. v. Zaino*, 94 Ohio St.3d 101, 760 N.E.2d 405 (2002).

[111] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Decoupling Mechanism*, Case Nos. 19-2080-EL-ATA, et al., Order at ¶ 26 (January 15, 2020) (*citing State ex. rel. Fockler v. Husted*, 150 Ohio St.3d 422, 82 N.E.3d 1135, 2017-Ohio 224).

[112] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 9–16, 19–20, 27 (Seryak Direct).

[113] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 5–6, 9–13, 26 (Seryak Direct).

[114] *State ex rel. Colvin v. Brunner* at ¶ 45 (holding, "[w]e cannot generally add a requirement that does not exist in the Constitution or a statute"); *Wachendorf v. Shaver* at 237 (holding, "[i]t is a general rule that courts, in the

Second, because this is the first audit conducted pursuant to the HB 6 language, the Auditor also included detailed discussions of HB 6 and how it related to the creation of the LGR Riders in all three Audit Reports and cited articles regarding HB 6 and the repeal of some of the HB 6 provisions.[115] Collectively, the three Audit Reports referenced or cited HB 6 nearly thirty times.[116] For example, all three Audit Reports cited a law firm article on the enactment of HB 6,[117] all three reports *quote* language from HB 6 and provide a direct link to the law,[118] and all three reports discussed HB 6 to provide background for the LGR Riders.[119] All of these references and testimony, as well as the remaining thirty references, were included as part of the record evidence of the case and allowed to remain as part of the Auditor's testimony and Audit Reports in this case (i.e., the Attorney Examiners did not strike any of the HB 6 references or testimony discussing HB 6).

Third, Duke witness Ziolkowski also included in his testimony an entire section on the creation of the LGR Rider and the history of Duke's predecessor rider, Rider PSR,[120] and other witnesses touched on it as well. All of these references and testimony were included as part of the

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interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom"); *see also Tongren v. Pub. Util. Comm.* at 88.

[115] Staff Ex. 2 at 7, 10–11, 14, 22, n.42, 23, 29–30, 106 (Public AES Audit Report); Staff Ex. 4 at 7, 10–11, 14, 17, 24, n.46, 25, 35, 110 (Public AEP Audit Report); Staff Ex. 6 at 7, 11, 14, 22, n.42, 23, 31–33, 111, 112 (Public Duke Audit Report). *See also* Tr. Vol. II at 336–39 (Cross-Examination of Fagan); Tr. Vol. V at 1302.

[116] Staff Ex. 2 at 7, 10–11, 14, 22, n.42, 23, 29–30, 106 (Public AES Audit Report); Staff Ex. 4 at 7, 10–11, 14, 17, 24, n.46, 25, 35, 110 (Public AEP Audit Report); Staff Ex. 6 at 7, 11, 14, 22, n.42, 23, 31–33, 111, 112 (Public Duke Audit Report).

[117] Staff Ex. 2 at 7, n. 2 (Public AES Audit Report); Staff Ex. 4 at 7, n.2 (Public AEP Audit Report); Staff Ex. 6 at 7, n.2 (Public Duke Audit Report).

[118] Staff Ex. 2 at 14 (Public AES Audit Report); Staff Ex. 4 at 14 (Public AEP Audit Report); Staff Ex. 6 at 14 (Public Duke Audit Report).

[119] Staff Ex. 2 at 23 (Public AES Audit Report); Staff Ex. 4 at 25 (Public AEP Audit Report); Staff Ex. 6 at 23 (Public Duke Audit Report).

[120] Duke Ex. 3 at 4–5 (Ziolkowski Testimony).

record evidence of the case and allowed to remain as part of the Auditor's testimony and Audit Reports in this case. The Attorney Examiners did not strike any of the HB 6 references or testimony discussing HB 6 for any other witness other than OMAEG witness Seryak.

For reasons two and three alone, OMAEG witness Seryak's testimony regarding HB 6 should have been allowed since the Auditor and Sponsoring Companies opened the door to these issues in their testimony and Audit Reports.[121] Additionally, for the sake of completeness of the record and fairness, those pieces of OMAEG's expert's testimony should not have been stricken, because while the Auditor provided many details about HB 6, there was additional information provided by OMAEG witness Seryak's testimony that the Commission should also consider as it would assist the trier of fact in rendering its decision and the determination of the reasonableness and prudency of the 2020 OVEC costs passed on to customers through the LGR Riders, as well as the reasonableness and prudency of the Sponsoring Companies actions during the Audit Period.

Evidence related to the legislative history of HB 6 and related investigations and audits of costs collected from customers for the Audit Period related to the legislative history is also relevant and material to the LGR Riders because the ongoing investigations have uncovered that Resource Fuels, LLC (Resource Fuels), the coal company from which OVEC buys a significant amount of over-priced coal during the Audit Period, is directly linked to HB 6.[122] These investigations also found a connection between AEP and HB 6, and that connection has been made public, and AEP

[121] Under Ohio law, when a party presents evidence and testimony about an issue, that party opens the door for opposing parties to present evidence and testimony on that same issue in response. *See, e.g.*, *Sheets v. Norfolk S. Corp.*, 109 Ohio App.3d 278, 286 (3rd District 1996) (holding that based on the totality of the opening statement and trial testimony, "defendants clearly opened the door" to competing evidence and testimony); *see also State v. Johnson*, 2003-Ohio-3241, ¶ 33 (holding that "[h]aving opened the door, the defense waived any right to object to the admission of the witness' testimony regarding those photos on redirect") (in criminal context).

[122] Tr. Vol. IV at 1057–58 (Cross-Examination of Stegall); Tr. Vol. V at 1302. *See also* Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 11–12 (Seryak Direct); Revised OMAEG Ex. 1 at 24 (Seryak Direct).

Inc. (AEP's parent company) itself disclosed in a recent SEC filing that "AEP and the SEC are engaged in discussions about a possible resolution of the SEC's investigation and potential claims under the securities laws" regarding AEP's involvement in HB 6, which created the LGR Riders.[123] Additionally, and most recently, OMAEG witness Seryak's stated belief that former Commission Chairman Randazzo could be investigated for HB 6-related matters has come to fruition through Randazzo's recent indictment.

Had OMAEG witness Seryak been allowed to testify on these matters (all items that formed the basis of his expert opinions and recommendations regarding the reasonableness and prudency of the OVEC costs proposed to be recovered in this case and the Sponsoring Companies actions during the Audit Period), and had OMAEG been permitted to question witnesses on these matters, all of these items and the resulting impact on the prudency and reasonableness of the 2020 OVEC costs being passed on to customers through the LGR Riders would have been developed on the record. For example, OMAEG witness Seryak would have explained how Resource Fuels—whose overpriced coal is the primary reason why OVEC's "coal purchase prices in 2020 [for Clifty Creek] were significantly higher (44%) than the spot prices from SNL"[124]—made a payment to Generation Now, which supported former House Speaker Larry Householder's rise to power and funded the passage of the legislation that created the LGR Riders and mandated audits of those riders.[125] He also would have discussed the fact that, *as noted in the Audit Reports*, fuel and

[123] Proffer, Tr. Vol. V at 1369, Proffer, OCC Ex. 18 at 12 (AEP, Inc., Securities and Exchange Commission Form 10-Q (Form 10-Q)) (November 2, 2023); Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 11 (Seryak Direct). *See also* Tr. Vol. V at 1302–03.

[124] Staff Ex. 2 at 54 (Public AES Audit Report); Staff Ex. 4 at 57 (Public AEP Audit Report); Staff Ex. 6 at 59 (Public Duke Audit Report).

[125] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 11–12 (Seryak Direct).

variable cost expenses comprise "a significant portion of OVEC's costs to customers."[126] In other words, the excessive coal costs paid by OVEC to Resource Fuels are ultimately recouped from Ohio customers. Through Generation Now, Resource Fuels funded, in part, the passage of the very law that it would directly benefit from as the coal supplier to OVEC (i.e., a continuation of the collection of OVEC costs, including coal purchases, from customers).[127] This information is directly related to whether the high-priced coal purchases are reasonable and should be deemed to be a prudently incurred cost that is allowed to be recovered under the HB 6 created LGR Riders. In fact, the Auditor found that there were excessive coal costs paid by OVEC to Resource Fuels during the Auditor Period that were passed on to customers,[128] an exact issue the Auditor should be auditing to determine whether the costs were prudently incurred pursuant to R.C. 4928.148.

Additionally, OMAEG witness Seryak would have explained how AEP is also a primary beneficiary of the OVEC costs collected through the LGR Riders as AEP will receive $67,897,705.58 for its shareholders in 2020 alone from HB 6's LGR Rider mechanism.[129] He would have also discussed how AEP donated a total of $700,000 to Generation Now concealed through 501c4s.[130] And he would have opined that since AEP is a primary financial beneficiary of the LGR Rider mechanism, and thus HB 6, and since its parent company is under SEC investigation, the Commission should consider whether all of the 2020 OVEC costs are reasonable and should be deemed prudently incurred or whether the Commission should delay authorization

[126] Staff Ex. 2 at 46 (Public AES Audit Report); Staff Ex. 4 at 49 (Public AEP Audit Report); Staff Ex. 6 at 51 (Public Duke Audit Report).

[127] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 11–12 (Seryak Direct).

[128] Staff Ex. 2 at 54 (Public AES Audit Report); Staff Ex. 4 at 57 (Public AEP Audit Report); Staff Ex. 6 at 59 (Public Duke Audit Report).

[129] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 10 (Seryak Direct), *citing* Staff Ex. 4 at 29, Figure 9, Column G (Public AEP Audit Report).

[130] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 10 (Seryak Direct).

of the recovery of costs through the LGR Riders until such investigations conclude, which may impact the reasonableness and prudency determination of the Sponsoring Companies' actions during the Audit Period. This information is directly related to whether all of the 2020 OVEC costs are reasonable and should be deemed to be a prudently incurred cost that is allowed to be recovered under the HB 6 created LGR Riders, and whether at least one Sponsoring Company acted prudently and reasonable in the best interest of customers during the Audit Period.

As for Randazzo's role in the legislation that created the LGR Riders, OMAEG witness Seryak would have discussed the facts that Randazzo was paid a bribe of $4.3 million for favorable official actions, and that he likely played a significant role in drafting HB 6 and creating the OVEC mechanisms.[131] As noted above, Randazzo's recent indictment has further confirmed his connections to the creation and passage of the law that created the LGR Riders. Therefore, as would have been explained by OMAEG witness Seryak, the Commission should demonstrate care and caution with how it proceeds in this matter and should not authorize the recovery of OVEC-related costs from customers while there are ongoing investigations into HB 6 and the costs collected under the LGR Riders and/or the Commission should consider this information as it is directly related to whether all of the 2020 OVEC costs are reasonable and should be deemed to be a prudently incurred cost that is allowed to be recovered under the HB 6 created LGR Riders.

Under Ohio Evid.R. 401, relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. OMAEG witness Seryak's testimony regarding all of these issues, including Randazzo's involvement with HB 6, and AEP and Resource Fuels' ties to HB 6 is relevant to this case because it has a tendency to make the existence of imprudent and

[131] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 12 (Seryak Direct).

unreasonable costs and imprudent and unreasonable actions by the Sponsoring Companies during the Audit Period that are not in the best interest of Ohio customers more probable than it would be without the evidence. By striking OMAEG witness Seryak's testimony regarding the legislative history and related matters concerning the law that created the LGR Riders and the ongoing investigations and costs collected from customers, OMAEG was denied the right to present contrary and contravening evidence as to how the 2020 OVEC costs passed through the LGR Riders and charged to customers were unjust, unreasonable, and imprudently incurred, and how the Sponsoring Companies' actions during the Audit Period were not reasonable and prudent in the best interest of customers.

Therefore, for the reasons discussed above, the Attorney Examiners' rulings excluding expert testimony related to the legislative history and related matters concerning the law that created the LGR Riders and definition of prudency and ongoing HB 6 investigations, and related past Commission decisions on the previous OVEC recovery mechanisms and the kinds of OVEC costs deemed to be prudently incurred and recoverable through those mechanisms were unjust, unreasonable, and improper, and should be reversed and the complete testimony of OMAEG witness Seryak should become a part of the record as relevant and material evidence and should be considered by the Commission.

2. The Commission should reverse the Attorney Examiners' rulings to exclude other evidence that is relevant and material to this proceeding.

In addition to striking and thus significantly modifying OMAEG witness Seryak's testimony, the Attorney Examiners also incorrectly excluded additional exhibits and evidence that is relevant and has a direct bearing on this case. This evidence included an excerpt from the PJM

Independent Market Monitor State of the Market Report (PJM Report),[132] a series of three emails between the Auditor and Staff relating to the OVEC costs in the prior AEP case (Prior Audit Emails),[133] cross-examination questions for the Auditor regarding the prior AEP OVEC audit,[134] cross-examination questions for the Auditor regarding just and reasonable costs,[135] SEC Form 10-Q,[136] and the criminal complaint against Householder.[137] All of this evidence, which was proffered into the record by the offering intervenors, contains important information regarding the reasonableness and prudency of the 2020 OVEC costs being collected from customers through the LGR Riders, and whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers during the Audit Period.

As explained by OCC, the PJM Report contained information about the likelihood that the Clifty Creek plant would be prematurely retired before the next audit of the LGR Riders, which is relevant to the OVEC costs that can be collected through the LGR Riders because Ohio law requires that "if there is any premature retirement of a legacy generation resource, from that point forward the rider shall exclude any recovery of remaining debt."[138] Specifically, R.C. 4928.01(A)(42) defines "Prudently incurred costs related to a legacy generation resource," stating that "[s]uch costs shall exclude any return on investment in common equity and, in the event of a premature retirement of a legacy generation resource, shall exclude any recovery of remaining

[132] Proffer, Tr. Vol. I at 143–48, Proffer, OCC Ex. 3 (PJM Independent Market Monitor State of the Market Report (PJM Report)).

[133] Proffer, Tr. Vol. II at 210–17, Proffer, OCC Ex. 10 (emails between the Auditor and Staff regarding the 2019 AEP OVEC audit (2019 Emails)).

[134] Proffer, Tr. Vol. II at 226, Proffer, 2019 Audit Cross Questions.

[135] Proffer, Tr. Vol. II at 236, Proffer, Debt Cross Questions.

[136] Proffer, Tr. Vol. V at 1360–69, Proffer, OCC Ex. 18 (Form 10-Q).

[137] Proffer, Tr. Vol. V at 1360–69, Proffer, OCC Ex. 19 (Criminal Complaint by United States of America against Larry Householder (Householder Complaint)).

[138] R.C. 4928.01(A)(42); Proffer, Tr. Vol. I at 143–48, Proffer, OCC Ex. 3 at 49–50 (PJM Report).

debt." Had this evidence been admitted, OCC stated that it (and others) could have argued that, given the amount of debt owed on the OVEC plants and the likelihood of premature retirement, "the Commission should order immediately at that point that the utilities no longer collect any debt service costs under this rider."[139] OMAEG also noted that the Auditor was supposed to determine whether there was any expectation of early retirement in order to determine if the Sponsoring Companies acted prudently and/or whether the 2020 OVEC charges were prudently incurred and should continue to be collected from customers pursuant to R.C. 4928.01(A)(42). The intervenors "have a right to probe that as an expert and the auditor in this case to determine whether she did, in fact, do that in the audit."[140] Relatedly, OCC stated that its second set of cross-examination questions would have probed into the Sponsoring Companies' payment to OVEC regarding "some advanced billing of debt reserve of $30 million." [141] These questions were also relevant because "it wouldn't be just and reasonable to allow the utilities to include that in the OVEC rider," and the issue of what 2020 OVEC costs can or should be included in and recovered through the LGR Riders is the subject of the audit and this proceeding.

The Prior Audit Emails and cross-examination questions regarding the prior audit findings and conclusions also all should have been admitted/allowed because the Auditor referred to the prior audits and audit findings in the Audit Reports, the information and testimony would have provided evidence on the ultimate questions in this case regarding whether the 2020 OVEC costs were prudently incurred and whether the Sponsoring Companies' actions were reasonable and prudent, the Auditor's potential bias or prejudice, and whether the Auditor acted in an independent

[139] Proffer, Tr. Vol. I at 143, Proffer, OCC Ex. 3 at 49–50 (PJM Report).

[140] Proffer, Tr. Vol. I at 144, Proffer, OCC Ex. 3 at 49–50 (PJM Report).

[141] Proffer, Tr. Vol. II at 236, Proffer, Debt Cross Questions.

capacity as required by the RFP.[142] Specifically, the Prior Audit Emails would have established that in a previous audit regarding the same OVEC plants and the same OVEC costs that are at issue in this case, the Auditor submitted a draft audit report stating that "keeping the plants running does not seem to be in the best interest of the ratepayers."[143] The emails would have further established that Staff instructed the Auditor to use "a milder tone and intensity of language," which led to the Auditor removing that sentence from the audit report regarding the reasonableness and prudency of the OVEC costs and the operations of the OVEC plants.[144] This information would have demonstrated that the continued operation of the OVEC plants during the Audit Period and the associated operational costs are unreasonable and imprudent and not in the best interest of customers—a question that is at the very heart of this audit proceeding.

Similarly, OCC's proffered cross-examination questions also went to "the credibility of [the Auditor's] testimony as a witness, and they all relate[d] to her experience with the prior audit as reflected in the e-mails" that were also excluded.[145] Evidence Rule 607 allows parties to question, probe, and challenge the credibility of a witness "by means of a prior inconsistent statement," and Evidence Rule 613 allows parties to "examin[e] a witness concerning a prior statement made by the witness." As explained by several parties, the Auditor's prior statements in the previous audit—that continuing to run the plants was unreasonable and imprudent and not in the best interest of customers—are relevant to this case because "the conditions affecting the audit in 2020 were quite a bit more unfavorable for consumers in terms of the OVEC costs and ended up being higher and the PJM revenues being lower, so . . . it would seem that if her opinion

[142] Proffer, Tr. Vol. II at 214, Proffer, OCC Ex. 10 (2019 Emails).

[143] Proffer, Tr. Vol. II at 213, Proffer, OCC Ex. 10 (2019 Emails).

[144] Proffer, Tr. Vol. II at 213, Proffer, OCC Ex. 10 (2019 Emails).

[145] Proffer, Tr. Vol. II at 226.

is that the OVEC costs are not in the best interest of retail ratepayers in 2019, it would also be true that they wouldn't be in the best interest of retail ratepayers in 2020. It's just a matter of logic."[146] By excluding this evidence, the intervenors were prevented from challenging the Auditor's credibility as allowed by Evidence Rule 607.

Lastly, AEP Inc.'s SEC Form 10-Q and Householder Complaint should have been admitted because, as discussed above, the law that created the OVEC recovery mechanisms (i.e., HB 6) is inextricably linked with those recovery mechanisms (i.e., the LGR Riders). AEP Inc.'s SEC Form 10-Q revealed AEP's and AEP's parent company's connection to the legislative history of HB 6, as well as information about the expenditures by AEP to assist in the passage of HB 6, which AEP directly benefited from.[147] Similarly, the Householder Complaint sets forth the legislative history behind the creation of the LGR Riders.[148] As noted by OCC in its proffer of these exhibits, "at the end of the day what the Commission must decide is whether any of these charges are just and reasonable. And if AEP had any involvement in the events that led to the passage of House Bill 6, we would submit that maybe the charges are not just and reasonable as to AEP. At the end of the day there would be a question as to whether they come into this with unclean hands."[149] OMAEG, the Kroger Co. (Kroger), the Ohio Environmental Council (OEC), and Citizens Utility Board of Ohio and Union of Concerned Scientists (CUB/UCS) all supported admitting, or, at minimum, taking administrative notice of these documents.[150] However, as happened with all of

[146] Tr. Vol. II at 196 (arguments on allowing the 2019 Cross Questions).

[147] Proffer, Tr. Vol. V at 1362–63, Proffer, OCC Ex. 18 at 12 (Form 10-Q).

[148] Proffer, Tr. Vol. V at 1363, Proffer, OCC Ex. 19 (Householder Complaint).

[149] Proffer, Tr. Vol. V at 1363–64, Proffer, OCC Exs. 18 and 19 (Form 10-Q) and (Householder Complaint).

[150] Tr. Vol. V at 1364–65.

the other pieces of evidence discussed above, the Attorney Examiners chose to improperly exclude these informative and relevant documents from the evidentiary record.

For the sake of transparency and completeness of the record and for all of the reasons explained above, the Attorney Examiners' various rulings to exclude relevant and material evidence offered by the intervenors should be reversed and the evidence should become a part of the record and considered by the Commission.

B. The Commission should disallow all OVEC costs passed through the LGR Riders for the Audit Period because the Sponsoring Companies failed to demonstrate that such costs were prudently incurred, that the actions of the Sponsoring Companies were prudent and reasonable, and that operating the OVEC plants in 2020 was reasonable and prudent, and therefore, in the best interest of customers.

As explained above, the purpose of this audit was for the Commission to determine if the costs related to OVEC in 2020 were prudently incurred and whether the actions of the Sponsoring Companies, including their decisions related to offering the output of the OVEC plants into the wholesale markets, were prudent and reasonable during 2020.[151] As further explained in the Commission's entry issuing the request for proposal and in the request for proposal itself, the purposes of the audit were to "establish the prudency of all the costs and sales flowing through [LGR] riders," *and* (2) "to demonstrate that the actions of the companies . . . were in the best interest of [their] retail ratepayers."[152] As noted above, the Sponsoring Companies bear the burden of proving that the 2020 OVEC costs they charged customers through the LGR Riders were reasonable and prudently incurred and that their actions were reasonable and prudent in the best interest of Ohio customers.[153] However, the Audit Reports did not establish the prudency of these

[151] R.C. 4928.148.

[152] Entry and RFP, RFP at 2, 6. *See also* Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 Public Duke Audit Report; OCC Ex. 11 at 7 (Auditor Response).

[153] *See* R.C. 4928.148; OCC Ex. 1 at 13 (Stanton Direct).

costs, and at times failed to reach the requisite conclusions, or even perform the underlying, thorough analysis necessary to reach those conclusions. For example, the Audit Reports failed to address how OVEC's "must-run" commitment strategy, or how OVEC's fuel procurement process resulted in higher costs to customers, and the Auditor failed to properly analyze actions that the Sponsoring Companies could have taken to limit the OVEC costs passed through the LGR Riders to customers.[154] The Audit Reports also failed to even make a determination on whether the Sponsoring Companies' actions during 2020 were reasonable and prudent in the best interest of customers.[155]

Additionally, many of the Audit Reports' conclusions actually demonstrated the *unreasonableness and imprudence* of the OVEC costs and the *unreasonableness and imprudence* of the Sponsoring Companies' actions during 2020. For example, the Auditor found that the OVEC plants cost more than they earn and thus cost customers more than they are worth, that certain fixed costs were not properly excluded, and that OVEC was paying more for coal than it should be.[156]

All of these findings and/or lack of findings support OMAEG witness Seryak's testimony that the costs charged to customers and passed through the LGR Riders for the Audit Period are unreasonable, imprudent, and not in customers' best interest.[157] He concluded: "Accordingly, the Commission should order that the unreasonable and imprudent costs collected [for] the Audit

[154] *See* Revised OMAEG Ex. 1 at 26 (Seryak Direct); OCC Ex. 1 at 4 (Stanton Direct); Revised CUB/UCS Ex. 1 at 10–11 (Glick Direct).

[155] *See* Staff Ex. 2 (Public AES Audit Report); Staff Ex. 4 (Public AEP Audit Report); Staff Ex. 6 (Public Duke Audit Report). *See also* Tr. Vol. I at 135–36 (Cross-Examination of Fagan).

[156] Staff Ex. 2 at 9, 27, 54 (Public AES Audit Report); Staff Ex. 4 at 9, 31, 57 (Public AEP Audit Report); Staff Ex. 6 at 9, 29, 59 (Public Duke Audit Report). *See also* Tr. Vol. II at 414–15 (Cross-Examination of Fagan); R.C. 4928.01(A)(42).

[157] Revised OMAEG Ex. 1 at 27 (Seryak Direct).

Period be disallowed and refunded to customers."[158] Other intervenors concurred. OCC witness Stanton concluded that the "evidence in this case suggests that OVEC's above-market charges to consumers through the Coal Plant Charge in 2020 were imprudently incurred and should be disallowed,"[159] and CUB/UCS witness Glick concluded that "[t]he PUCO should disallow this entire amount [billed to customers] because the OVEC plants were not operated prudently or in the best interest of retail ratepayers."[160]

Overall, the Audit Reports are devoid of the requisite analysis to demonstrate that the 2020 OVEC costs included in the LGR Riders were just, reasonable, and prudently-incurred, and that all actions taken were reasonable and prudent in customers' best interest in compliance with R.C. 4928.148 and 4928.01(A)(42). Since the Sponsoring Companies bear the burden of proving these findings, and have not presented sufficient evidence to meet that burden, the Commission should disallow the $114,879,609 of costs passed on to customers for the 2020 Audit Period.

1. The Audit Reports failed to make several key findings to demonstrate that the OVEC costs passed through the LGR Riders for the 2020 Audit Period were unreasonable and imprudent and that the Sponsoring Companies' actions were neither reasonable nor prudent and were, therefore, not in the best interest of Ohio customers.

The Audit Reports show that not all OVEC costs passed through the LGR Riders to customers for the 2020 Audit Period satisfied Ohio law or the Commission's directives to be just, reasonable, and prudently incurred.[161] Likewise, the Audit Reports show that not all of the actions taken by the Sponsoring Companies were reasonable and prudent in the best interest of

[158] *Id.*

[159] OCC Ex. 1 at 21–22 (Stanton Direct).

[160] Revised CUB/UCS Ex. 1 at 33 (Glick Direct).

[161] *See e.g.*, Staff Ex. 2 at 9, 27, 54 (Public AES Audit Report); Staff Ex. 4 at 9, 31, 57 (Public AEP Audit Report); Staff Ex. 6 at 9, 29, 59 (Public Duke Audit Report). *See also* Tr. Vol. II at 414–15 (Cross-Examination of Fagan); *See also* R.C. 4928.01(A)(42) and 4928.148.

customers.[162] For example, the Auditor admitted that she thought some OVEC operations could have been improved upon if the Sponsoring Companies performed some analysis,[163] and she raised significant concerns with decisions and actions taken related to the OVEC plants and the OVEC costs passed through to customers. However, large sections of the Audit Reports lack the requisite analysis or conclusions to meet the Sponsoring Companies' burden in this case.

The Audit Reports found that "[t]he OVEC plants cost more than they earn,"[164] and that they "cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets."[165] Additionally, the Auditor admitted during the hearing that the OVEC plants costing more than they earn "is obvious . . . because the rider is a charge rather than a credit,"[166] and she conceded that "customers pay all the costs of OVEC regardless of the revenues that it receives."[167] Despite these astonishing admissions, the Auditor inexplicably still does not affirmatively find that the 2020 OVEC costs passed through the LGR Riders were unjust, unreasonable, and imprudently incurred. But, notably, the Auditor did not even attempt to claim that the costs *were* in fact just, reasonable, or prudently incurred.

In contrast, the intervenors' witnesses all concur that this evidence indicates that keeping the plants running at a consistent loss is unreasonable, imprudent, and not in customers' best

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[162] *See e.g.*, Staff Ex. 2 at 10, 27–28, 43–44 (Public AES Audit Report); Staff Ex. 4 at 10, 31–32, 47–48 (Public AEP Audit Report); Staff Ex. 6 at 10, 29–30, 49–50 (Public Duke Audit Report). *See also* Tr. Vol. II at 331, 347, 362 (Cross-Examination of Fagan); R.C. 4928.01(A)(42); Revised CUB/UCS Ex. 1 at 33–34 (Glick Direct).

[163] Tr. Vol. I at 123 (Cross-Examination of Fagan).

[164] Staff Ex. 2 at 27 (Public AES Audit Report); Staff Ex. 4 at 31 (Public AEP Audit Report); Staff Ex. 6 at 29 (Public Duke Audit Report). *See also* Tr. Vol. II at 415 (Cross-Examination of Fagan).

[165] Staff Ex. 2 at 9 (Public AES Audit Report); Staff Ex. 4 at 9 (Public AEP Audit Report); Staff Ex. 6 at 9 (Public Duke Audit Report). *See also* Tr. Vol. II at 414–15 (Cross-Examination of Fagan).

[166] Tr. Vol. II at 416 (Cross-Examination of Fagan). *See also* Staff Ex. 2 at 27 (Public AES Audit Report); Staff Ex. 4 at 31 (Public AEP Audit Report); Staff Ex. 6 at 29 (Public Duke Audit Report); OCC Ex. 20 at 9 (Perez Direct); Revised CUB/UCS Ex. 1 at 13, 51–52 (Glick Direct).

[167] Tr. Vol. II at 419 (Cross-Examination of Fagan).

interest. OMAEG witness Seryak testified that "[t]he costs recovered through the LGR Riders were not in the best interest of customers" because the Sponsoring Companies' "decision to take their share of their entitlement to OVEC's energy under a must-run strategy is imprudent, as are decisions to run OVEC at losses in the energy market."[168] Similarly, OCC witnesses explained that the OVEC "plants are also increasingly uncompetitive in the market . . . As a result, OVEC's costs for energy and capacity are significantly higher than PJM market prices for energy and capacity,"[169] so "it's not surprising that the LGR Rider is a charge and not a credit to customers."[170] And CUB/UCS witness Glick stated that the Sponsoring Companies' "imprudence and failure to act in the retail ratepayers' best interest is evident from the ten months during 2020 where the OVEC plants incurred variable net losses relative to the market, which were avoidable by following prudent market commitment practices."[171]

Additionally, the Auditor failed to affirmatively find that, as a matter of law, Component D of the fixed costs of the OVEC bill should be excluded. As stated in the Audit Reports, Component D of the demand charge totals "$2.51 million per year, which is ultimately paid by ratepayers,"[172] and significantly "amounted to *nearly all* of OVEC's $2.81 million of net income in 2020."[173] R.C. 4928.01(A)(42) *requires* that "[p]rudently incurred costs . . . must exclude any

[168] Revised OMAEG Ex. 1 at 7 (Seryak Direct).

[169] OCC Ex. 1 at 11 (Stanton Direct).

[170] OCC Ex. 20 at 9 (Perez Direct).

[171] Revised CUB/UCS Ex. 1 at 49 (Glick Direct).

[172] Staff Ex. 2 at 27 (Public AES Audit Report); Staff Ex. 4 at 31 (Public AEP Audit Report); Staff Ex. 6 at 28 (Public Duke Audit Report)

[173] Staff Ex. 2 at 9–10 (Public AES Audit Report) (emphasis added); Staff Ex. 4 at 9–10 (Public AEP Audit Report) (emphasis added); Staff Ex. 6 at 9–10 (Public Duke Audit Report) (emphasis added).

return on investment in common equity,"[174] and "Component D seems to be a such a return."[175] In fact, the ICPA itself describes Component D as a payment per common share, similar to a dividend,[176] and the Auditor admitted that Component D "is itself a return to the owners of OVEC."[177] As noted by OCC witness Stanton, "OVEC began to retain a $2.5 million annual equity return in 2018, which it expects to continue for the foreseeable future. The [Sponsoring Companies] are not permitted to collect costs for a return on equity to OVEC, so the PUCO should require the [Sponsoring Companies] to refund their share of the $2.5 million return on equity for OVEC."[178] By the plain reading of R.C. 4928.01(A)(42), Component D should be excluded from the LGR Riders, and the Auditor's failure to make this affirmative finding is yet another example of the Audit Reports' deficiency and the Auditor's failure to lawfully determine that the costs passed on to customers through the LGR Riders for the Audit Period were unlawful, unjust, and unreasonable. Nonetheless, despite the Auditor's failure, the Commission should determine as a matter of law that Component D should be excluded from the OVEC costs collected from customers as those costs were not prudently incurred and are the types of costs explicitly excluded from collection through the LGR Riders.

Additionally, as explained by OMAEG witness Seryak and CUB/UCS witness Glick, *all* of the unconditional obligated demand charges should be excluded from the LGR Riders as those

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[174] R.C. 4928.01(A)(42). *See also* Staff Ex. 2 at 9, 27 (Public AES Audit Report); Staff Ex. 4 at 9, 31 (Public AEP Audit Report); Staff Ex. 6 at 9, 28 (Public Duke Audit Report), which all note the same.

[175] Staff Ex. 2 at 9, 27 (Public AES Audit Report); Staff Ex. 4 at 9, 31 (Public AEP Audit Report); Staff Ex. 6 at 9, 28 (Public Duke Audit Report).

[176] AES Ex. 4 at Exhibit 1, ICPA at § 5.03 (Crusey Direct); Staff Ex. 2 at 9 (Public AES Audit Report); Staff Ex. 4 at 9 (Public AEP Audit Report); Staff Ex. 6 at 9 (Public Duke Audit Report); Tr. Vol. II at 394 (Cross-Examination of Fagan).

[177] Tr. Vol. II at 394 (Cross-Examination of Fagan). *See also* Staff Ex. 2 at 9 (Public AES Audit Report); Staff Ex. 4 at 9 (Public AEP Audit Report); Staff Ex. 6 at 9 (Public Duke Audit Report).

[178] Staff Ex. 2 at 9–10 (Public AES Audit Report); Staff Ex. 4 at 9–10 (Public AEP Audit Report); Staff Ex. 6 at 9–10 (Public Duke Audit Report).

costs were not prudently incurred OVEC costs.[179] In addition to the 2020 OVEC costs related to the Sponsoring Companies' contractual entitlements—the marginal costs of energy and capacity, which are also called variable costs—the Sponsoring Companies passed on to customers OVEC costs related to "unconditional obligations."[180] Unconditional obligations differ from contractual entitlement charges, as evidenced by the two separate sections of the ICPA describing these kinds of charges.[181] As OMAEG witness Seryak testified, because unconditional obligation charges are flat charges to ratepayers that subsidize the Sponsoring Companies' debt payments through OVEC at a constant rate no matter the current market prices, "[a]llowing the [Sponsoring Companies] to recover these kinds of charges through the LGR Riders creates a clear conflict of interest for the [Sponsoring Companies] because it incentivizes them to act in the best interests of their shareholders rather than the best interests of their customers."[182] As such, OMAEG witness Seryak recommends that the Commission disallow all unconditional obligation charges collected from customers for the 2020 Audit Period, which equals $102,280,428.[183]

During the hearing, the Auditor also admitted to failing to perform a significant amount of analysis necessary to reach a determination as to whether 2020 OVEC costs passed through the LGR Riders were just, reasonable, and prudently incurred, or whether the actions taken were reasonable and prudent in the best interest of customers. For example, when considering the prudency of the Sponsoring Companies' actions and decisions with regard to the LGR Riders, the

[179] *See* Revised OMAEG Ex. 1 at 17–18 (Seryak Direct); Revised CUB/UCS Ex. 1 at 50–52 (Glick Direct).

[180] Revised OMAEG Ex. 1 at 17 (Seryak Direct).

[181] Revised OMAEG Ex. 1 at 17 (Seryak Direct); Revised OMAEG Ex. 1A at 1 (Public Errata to Seryak Direct) (correcting a reference); AES Ex. 4 at Exhibit 1, ICPA at Article 4, §§ 5.02, 8.04 (Crusey Direct); Tr. Vol. V at 1342 (Cross-Examination of Seryak).

[182] Revised OMAEG Ex. 1 at 18 (Seryak Direct). *See also* Tr. Vol. V at 1342 (Cross-Examination of Seryak).

[183] Revised OMAEG Ex. 1 at 18, Attachment C (Seryak Direct).

Auditor failed to review any conflicts of interest that the Sponsoring Companies may have and how those might influence their decisions.[184] As such, the Auditor did not consider whether the Sponsoring Companies' actions regarding the operations of OVEC during 2020 were reasonable and prudent in the best interest of customers, or whether those actions were in the best interest of some third party.

Had the Auditor performed this important analysis, she may have reached the same conclusions that the expert witnesses for OMAEG and CUB/UCS did. OMAEG witness Seryak testified that the Sponsoring Companies "have a fiduciary responsibility to their shareholders that creates a conflict of interest with their customers with regard to the LGR Riders . . . Because they are OVEC shareholders and have unconditional financial obligations to OVEC as sponsoring companies, the [Sponsoring Companies] all financially benefit from the LGR Riders at the expense of customers."[185] Similarly, CUB/UCS witness Glick concluded that, "[i]n the absence of action by utility commissions to disallow recovery of the full Rider, [Sponsoring Companies] have no incentive to demand that the OVEC units change their practices and operate more economically. And the resulting costs will continue to be passed on to Ohio ratepayers."[186]

Notably, one conclusion the Auditor *did* make was that "the change to OVEC's operating strategy [for part of 2020] . . . was prudent compared with allowing must-run commitment only."[187] The Auditor went on to recommend that the Sponsoring Companies "encourage the Operating Committee to allow OVEC the option to commit available units based on must-run or

[184] Tr. Vol. II at 311–13 (Cross-Examination of Fagan).

[185] Revised OMAEG Ex. 1 at 19 (Seryak Direct).

[186] Revised CUB/UCS Ex. 1 at 39 (Glick Direct).

[187] Staff Ex. 2 at 44 (Public AES Audit Report); Staff Ex. 4 at 48 (Public AEP Audit Report); Staff Ex. 6 at 50 (Public Duke Audit Report).

economics on an ongoing basis" because "[i]deally, the units would be committed based on economics all or most of the time."[188] During the hearing, the Auditor confirmed that "we believe that the flexibility [of choosing between commitment strategies based on economics] could be valuable."[189]

And yet, despite recognizing the benefit to customers of commitment flexibility, the Auditor failed to conclude that OVEC's decision to not make this optionality permanent—and the Sponsoring Companies' decisions to not "encourage" such a change—was imprudent and unreasonable and therefore not in the best interest of customers. Moreover, the Auditor failed to perform additional analyses regarding the uneconomic nature of the plants. At the hearing, the Auditor admitted that she "did not ask" for projections or data to determine whether "there was some economic analysis that OVEC or the Sponsoring Companies were performing to decide whether to make commitments as economic or must-run during [the] April through June time period" when some units were given optionality.[190] The Auditor did not analyze how much OVEC lost or gained as a result of switching commitment strategies for several months during the Audit Period either.[191] This is despite the fact that "all costs associated with the must-run commitment strategy were passed on to customers as OVEC costs,"[192] even though those costs were not

[188] Staff Ex. 2 at 44 (Public AES Audit Report); Staff Ex. 4 at 48 (Public AEP Audit Report); Staff Ex. 6 at 50 (Public Duke Audit Report).

[189] Tr. Vol. II at 361 (Cross-Examination of Fagan).

[190] Tr. Vol. I at 130 (Cross-Examination of Fagan). *See also* Tr. Vol. III at 708–10, 712 (Cross-Examination of Swez), admitting that he did not know what if anything OVEC considered; Tr. Vol. IV at 988–89, 1027–28 (Cross-Examination of Stegall), confirming that AEP has not performed any economic analysis related to the OVEC Operating Committee's decision to allow optionality; OCC Ex. 14 at OCC-INT-02-005 (AEP's Responses to OCC's Second Set of Discovery Requests); Tr. Vol. V at 1146 (Cross-Examination of Crusey), confirming that AES did not perform any daily economic analysis to inform its recommendations to the Operating Committee regarding how OVEC committed its units; OMAEG Ex. 15 at INT-02-018 (AES' Responses to CUB/UCS's Second Set of Discovery).

[191] Tr. Vol. II at 385 (Cross-Examination of Fagan).

[192] Tr. Vol. II at 385 (Cross-Examination of Fagan).

prudently incurred. Nor did the Auditor attempt to quantify the cost to ratepayers of OVEC's must-run strategy,[193] or perform a re-dispatching analysis to determine whether OVEC acted prudently with its always-must-run commitment strategy (which it did not).[194] The Auditor did not even consider the offer strategies of competitive generators as a benchmark for comparison to help determine the reasonableness of OVEC's must-run strategy, despite admitting that "you would want to make sure you looked at . . . what they are doing."[195]

Had the Auditor looked at what merchant plants did in 2020, she would have found, as OCC witness Perez did, that "OVEC's actions were not consistent with how merchant coal plant operators attempting to maximize revenues would bid their plant into the PJM Day-Ahead Energy Market. This is not in the best interest of ratepayers."[196] As noted by CUB/UCS witness Glick, the "data shows that when generators do not have ratepayers to cover their losses, the operators tend to make fundamentally different, and more profitable, operational decisions."[197]

Furthermore, the RFP directed the Auditor to ensure that all fuel costs were prudently incurred,[198] because as noted above, fuel and variable cost expenses comprise "a significant portion of OVEC's costs to customers."[199] The Auditor found that OVEC's "[c]oal inventories were much higher than target levels,"[200] that "the coal purchase prices in 2020 were significantly

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[193] Tr. Vol. II at 410 (Cross-Examination of Fagan).

[194] Tr. Vol. II at 386–90 (Cross-Examination of Fagan).

[195] Tr. Vol. II at 381 (Cross-Examination of Fagan).

[196] OCC Ex. 20 at 3–4 (Perez Direct).

[197] Revised CUB/UCS Ex. 1 at 40 (Glick Direct).

[198] Entry and RFP, RFP at 8, stating that "The auditor shall ensure that all of OVEC's fuel (i.e., coal) and variable operations and maintenance (O&M) related expenses were prudently incurred."

[199] Staff Ex. 2 at 46 (Public AES Audit Report); Staff Ex. 4 at 49 (Public AEP Audit Report); Staff Ex. 6 at 51 (Public Duke Audit Report).

[200] Staff Ex. 2 at 10 (Public AES Audit Report); Staff Ex. 4 at 10 (Public AEP Audit Report); Staff Ex. 6 at 10 (Public Duke Audit Report).

higher (44%) than the spot prices from SNL" for Clifty Creek and "higher (16%) than the S&P Physical Markets Survey prices" for Kyger Creek,[201] and that these significantly higher coal prices were mainly due to the expensive coal that OVEC purchased from Resource Fuels.[202] Despite these findings, which can only lead to one reasonable conclusion, the Auditor neither attempted to quantify the cost of excess coal purchases to Ohio customers, nor conducted a fuel procurement audit to determine the reasonableness and prudency of these excessive coal prices.[203]

By contrast, after analyzing the data available, OMAEG's and OCC's witnesses both concluded that for the Audit Period, the Sponsoring Companies charged unreasonable costs through the LGR Riders that resulted from OVEC's unreasonable and imprudent coal purchasing decisions and unreasonable and imprudent oversight by the Sponsoring Companies. OCC witness Stanton's analysis determined that the "coal purchased through Resource Fuels was at a higher price than the coal purchased through Alliance Coal, despite having the same average heat content," and had OVEC "paid the same per MMBtu price for coal from Resource Fuels as they had for Alliance Coal in 2020, the total cost for coal supplied from Resource Fuels would have been $47.5 million compared to $60.1 million (*a difference of $12.6 million*)."[204] According to OMAEG witness Seryak, the contract with Resource Fuels "is evidence that OVEC made poor decisions when entering into its coal contract, and the [Sponsoring Companies] are using the LGR Riders to cover losses incurred as a result of this bad contract."[205] As such, OMAEG witness

[201] Staff Ex. 2 at 54 (Public AES Audit Report); Staff Ex. 4 at 57 (Public AEP Audit Report); Staff Ex. 6 at 59 (Public Duke Audit Report).

[202] Staff Ex. 2 at 54 (Public AES Audit Report); Staff Ex. 4 at 57 (Public AEP Audit Report); Staff Ex. 6 at 59 (Public Duke Audit Report). *See also* Revised OMAEG Ex. 1 at 24 (Seryak Direct); OCC Ex. 1 at 23 (Stanton Direct).

[203] Tr. Vol. II at 410 (Cross-Examination of Fagan).

[204] OCC Ex. 1 at 22–23 (Stanton Direct). *See also* Revised OMAEG Ex. 1 at Attachment D (Seryak Direct).

[205] Revised OMAEG Ex. 1 at 24 (Seryak Direct).

Seryak recommended that "the Commission disallow the excessive costs associated with the coal purchased from Resource Fuels at significantly above-market prices, as the cost of this coal is unreasonable and the decision to maintain this highly-priced coal contract was imprudent."[206]

The Auditor's testimony at the evidentiary hearing also reveals that the analysis performed by the Auditor, and the conclusions the Auditor reached based on this analysis, fall significantly short of the standard established by the Commission.[207] Based on the Audit Reports, the Sponsoring Companies are unable to satisfy their burden of proof in the above-captioned proceeding to demonstrate the prudency of all 2020 OVEC costs passed through the LGR Riders, including the high-priced and unreasonable coal purchases. The Auditor admitted that the audit "found there w[ere] areas that could be improved upon,"[208] but, again, the Auditor inexplicably did not recommend disallowing the Sponsoring Companies' estimated share of the $12.6 million in excessive coal costs passed on to customers. Regardless of the perplexing findings or lack thereof by the Auditor, the bottom line is that the Sponsoring Companies did not satisfy their burden to demonstrate that the OVEC costs associated with the high-priced coal purchases passed through the LGR Riders to customers were reasonable and prudently-incurred, and therefore, in the best interest of customers. As such, the Commission should determine that the Auditor's analysis failed to establish and the Sponsoring Companies failed to meet their burden that the costs associated with the coal purchases flowing through the LGR Riders for the Audit Period were reasonable and prudent. Rather, the Commission should find that the excessive coal purchase costs associated with Resource Fuels were unreasonable and imprudent and should be disallowed.

[206] Revised OMAEG Ex. 1 at 26 (Seryak Direct).

[207] *See* Entry and RFP.

[208] Tr. Vol. II at 413 (Cross-Examination of Fagan).

For the aforementioned reasons, the Commission should determine that the Auditor's analysis failed to establish, and the Sponsoring Companies failed to meet their statutory burden, to demonstrate that all of the OVEC costs flowing through the LGR Riders for the Audit Period were reasonable and prudent. Accordingly, the Commission should disallow the 2020 OVEC costs collected through Rider LGR in their entirety.

2. The Audit Reports failed to find that the Sponsoring Companies' actions were unreasonable and imprudent, and therefore, not in the best interest of Ohio customers.

The Sponsoring Companies utterly failed to meet their burden of demonstrating that their actions were reasonable and prudent in the best interest of Ohio customers. During the hearing, the Auditor admitted on the stand that she "did not look at whether the Companies' actions were in the best interests of utility ratepayers."[209] This is despite the fact that the Commission's RFP specifically states that one purpose of the audit is "demonstrate[ing] that the actions of the companies were in the best interests of its retail ratepayers."[210] Similarly, the Auditor's written response/proposal to the RFP, which was submitted to win the bid to provide auditor services, explicitly stated that making a best interest determination was part of the audit's purpose.[211] Had the intervenors been able to question her on these matters, they could have impeached the Auditor and perhaps gleaned additional insight into why the Audit Reports failed to even *mention* the best interest of customers, aside from acknowledging that demonstrating best interest was one of the

[209] Tr. Vol. I at 135–36 (Cross-Examination of Fagan).

[210] Entry and RFP, RFP at 2, 6.

[211] OCC Ex. 11 at 7 (Auditor Response).

audit's purposes.[212] However, these attempts were thwarted at hearing and important testimony and evidence was excluded.[213]

While the Auditor and the Sponsoring Companies failed to put forth evidence demonstrating that the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers, the record evidence is clear that continued operation of the OVEC plants is uneconomic, unreasonable, and imprudent. Therefore, the Commission should conclude that the Sponsoring Companies' actions were not reasonable and prudent and were, therefore, not in the best interest of customers because (1) they failed to advocate for a change in OVEC's commitment strategy, (2) they failed to advocate for more prudent fuel procurement practices, (3) they chose to take title to OVEC's available energy at a loss to customers and made no efforts to mitigate the negative financial impacts to customers caused by the OVEC costs passed through the LGR Riders.

a. The Sponsoring Companies' decisions to not advocate to change OVEC's unit commitment strategy were unreasonable, imprudent, and not in the best interest of customers.

As discussed above, OVEC's must-run commitment strategy was imprudent and unreasonable because it resulted in sustained losses to OVEC and its Sponsoring companies, and thus to Ohio customers, who were forced to subsidize the OVEC plants by paying all of OVEC's costs through the LGR Riders. AES witness Crusey,[214] Duke witness Swez,[215] and AEP witness

[212] Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report).

[213] *See* Tr. Vol. II at 193–203.

[214] AES Ex. 4 at 4 (Crusey Direct); Tr. Vol. V at 1137 (Cross-Examination of Crusey). *See also* AES Ex. 4 at Exhibit 1, ICPA at § 9.05 (Crusey Direct); Staff Ex. 2 at 38 (Public AES Audit Report).

[215] Duke Ex. 6 at 4–5 (Swez Direct); Tr. Vol. III at 670 (Cross-Examination of Swez). *See also* AES Ex. 4 at Exhibit 1, ICPA at § 9.05 (Crusey Direct); Staff Ex. 6 at 42 (Public Duke Audit Report).

Stegall[216] all explained in both their direct testimonies and on cross that the Sponsoring Companies are all members of the OVEC Operating Committee and therefore each has a vote regarding the Operating Committee's decisions such as OVEC's commitment strategy and fuel practices.[217] However, even after the brief period from April to June in 2020, which provided data that the Sponsoring Companies could have used, none of them recommended a permanent change or made efforts to determine whether permanently switching to allow the OVEC plants to be offered into the markets on an economic commitment basis would provide benefits to customers.[218] The Sponsoring Companies also failed to offer evidence that they or OVEC conducted daily economic forecasts to help decide how to commit its units.[219] This is all despite the fact that, as admitted by Duke's own witness, "running the units solely as 'Must Run' without consideration of market forecasts and unit limitations, may not be in the best interest of customers."[220]

While the Sponsoring Companies all hide behind their claim that they lack the ability to unilaterally make decisions for the Operating Committee,[221] this argument is without merit and should be rejected. As noted by CUB/UCS witness Glick, "AES, Duke, and AEP together, that's

[216] AEP Ex. 1 at 5 (Stegall Direct); Tr. Vol. IV at 1032 (Cross-Examination of Stegall). *See also* AES Ex. 4 at Exhibit 1, ICPA at § 9.05 (Crusey Direct); Staff Ex. 4 at 42 (Public AEP Audit Report).

[217] Tr. Vol. IV at 1032, 1063 (Cross-Examination of Stegall); Tr. Vol. V at 1147, 1158 (Cross-Examination of Crusey); Staff Ex. 2 at 65 (Public AES Audit Report); Staff Ex. 4 at 69 (Public AEP Audit Report); Staff Ex. 6 at 71 (Public Duke Audit Report).

[218] Tr. Vol. III at 740 (Cross-Examination of Swez); Tr. Vol. IV at 991–92 (Cross-Examination of Stegall); Tr. Vol. V at 1147, 1152 (Cross-Examination of Crusey).

[219] Tr. Vol. I at 130 (Cross-Examination of Fagan); Tr. Vol. III at 708–10, 712 (Cross-Examination of Swez); Tr. Vol. IV at 988–89, 1027–28 (Cross-Examination of Stegall); Tr. Vol. V at 1146 (Cross-Examination of Crusey). *See also* OCC Ex. 14 at OCC-INT-02-005 (AEP's Responses to OCC's Second Set of Discovery Requests); OMAEG Ex. 15 at INT-02-018 (AES' Responses to CUB/UCS's Second Set of Discovery).

[220] Duke Ex. 6 at 12 (Swez Direct). Swez agreed on cross that it is in the best interest of customers for Duke to pursue strategies or options that would reduce the cost to customers or maximize the value of the OVEC plants for its customers. Tr. Vol. III at 745 (Cross-Examination of Swez).

[221] Duke Ex. 6 at 18 (Swez Direct); AEP Ex. 1 at 5–6 (Stegall Direct); AES Ex. 4 at 5 (Crusey Direct); Tr. Vol. IV at 1032–33 (Cross-Examination of Stegall).

three parties out of the 15-person board, also a very large percentage of the ownership share . . . and so I do believe that if these three very relatively sophisticated utilities got together and made prudent recommendations to the OVEC Board, those would be taken seriously by the other members."[222] In fact, during early 2020, Duke *did* manage to use its influence as one member of the Operating Committee to unilaterally persuade the other Sponsoring Companies to offer some units as economic or must run.[223] Emails presented during the hearing revealed that Duke pushed for this change in part because "the units lost $4.5 Mil for the month of March," meaning that "[Duke] customers lost $450K in energy."[224] As noted by Swez in these emails, "[o]bviously [these losses were] why we were so vocal to get OVEC to change its commitment."[225] These same emails revealed that, while Swez claimed in his prefiled testimony that the change in commitment strategy was due to COVID,[226] Swez was advocating for a change well before that.[227] In fact, at hearing, Duke witness Swez admitted that he began advocating for a change in the commitment strategy back in January.[228]

Duke recognized the importance of having unit commitment flexibility, as did the Auditor, who recommended that the Sponsoring Companies "and the other members of the Operating Committee allow this flexibility on an ongoing basis"[229] because such flexibility "could reduce

[222] Tr. Vol. V at 1207 (Cross-Examination of Glick). *See also* Revised CUB/UCS Ex. 1 at 42 (Glick Direct).

[223] Duke Ex. 6 at 15 (Swez Direct); Tr. Vol. III at 724 (Cross-Examination of Swez).

[224] OMAEG Ex. 17 (Public) at 33 ((Duke Emails) (Attachment A)). *See also* Tr. Vol. III at 742 (Cross-Examination of Swez); Tr. Vol IV at 883–917 (Cross-Examination of Swez).

[225] OMAEG Ex. 17 (Public) at 33 ((Duke Emails) (Attachment A)).

[226] Duke Ex. 6 at 15 (Swez Direct).

[227] OMAEG Ex. 17 (Public) at 100 ((Duke Emails) (Attachment A)).

[228] Tr. Vol. III at 742 (Cross-Examination of Swez); Tr. Vol. IV at 883, 888 (Cross-Examination of Swez).

[229] Staff Ex. 2 at 38 (Public AES Audit Report); Staff Ex. 4 at 10 (Public AEP Audit Report); Staff Ex. 6 at 42 (Public Duke Audit Report).

costs for customers."[230] As such, all three Sponsoring Companies advocating in 2020 for a permanent change to OVEC's commitment strategy would have been prudent (the Auditor actually made this recommendation to Duke and AEP in their prior OVEC audits (which AEP ignored)),[231] and unlike changing the daily commitment of OVEC units into the wholesale markets, permanently amending the operating procedures only requires a two-thirds majority.[232] Had the Sponsoring Companies been acting reasonably and prudently in the best interest of Ohio customers, they would have advocated for more prudent management of the OVEC plants. But this clearly was not the case during the Audit Period. Therefore, the Commission should conclude that the Sponsoring Companies' actions were not reasonable and prudent and were, therefore, not in the best interest of customers because they failed to advocate for a change in OVEC's unit commitment strategy. As such, the Commission should disallow the collection of 2020 OVEC costs through the LGR Riders associated with the unreasonable and imprudent operations of the OVEC plants.

b. The Sponsoring Companies' decisions to not advocate to improve OVEC's fuel procurement practices were unreasonable, imprudent, and therefore, not in the best interest of customers.

The Sponsoring Companies did not perform any independent analyses of the prudency and reasonableness of OVEC's fuel contracts or its fuel procurement practices,[233] even though OVEC has been purchasing over-priced coal from Resource Fuels for years as a result of entering into an

[230] Staff Ex. 2 at 44 (Public AES Audit Report); Staff Ex. 4 at 48 (Public AEP Audit Report); Staff Ex. 6 at 50 (Public Duke Audit Report). *See also* Tr. Vol. II at 361–62 (Cross-Examination of Fagan); Tr. Vol. III at 745 (Cross-Examination of Swez).

[231] Staff Ex. 4 at 11, Figure 1 (Public AEP Audit Report); Staff Ex. 6 at 11, Figure 1 (Public Duke Audit Report).

[232] AES Ex. 4 at 4–5, Exhibit 1, ICPA at §§ 9.04–9.05, Exhibit 2, Operating Procedures at 8 (Crusey Direct); AEP Ex. 1 at 5 (Stegall Direct); Duke Ex. 6 at 18–19, Attachment JDS-1, Operating Procedures at 8 (Swez Direct); Tr. Vol. III at 723–24 (Cross-Examination of Swez).

[233] Tr. Vol. IV at 869 (Cross-Examination of Swez); Tr. Vol. IV at 1065–66 (Cross-Examination of Stegall); Tr. Vol. V at 1154 (Cross-Examination of Crusey).

unreasonable coal contract.[234] As OMAEG witness Seryak noted, the Sponsoring Companies "are using the LGR Riders to cover losses incurred as a result of this bad contract."[235] On its face, this is not reasonable and prudent in the best interest of ratepayers, and worse yet, the Sponsoring Companies may have the option to terminate or renegotiate this contract but are choosing not to at the expense of Ohio customers. As OMAEG witness Seryak explained, the Resource Fuels contract contains a clause allowing OVEC to terminate the contract [redacted].[236] As such, the contract could have—and should have—been terminated or renegotiated based on [redacted] in order to protect customers.[237] The Sponsoring Companies' decision to do neither was unreasonable, imprudent, and not in the best interest of customers.

The consequences of OVEC's bad coal contracts cannot be denied. The Auditor found that 2020 coal inventory levels averaged about 57 days for Clifty Creek,[238] which is "significantly above OVEC's recommended seasonal inventory of [redacted] for the fall and winter seasons, and [redacted] for the spring and summer seasons."[239] Similarly, the 2020 inventory levels for Kyger Creek averaged about 66 days,[240] which is also "significantly above OVEC's recommended

[234] Staff Ex. 2 at 54 (Public AES Audit Report); Staff Ex. 4 at 57 (Public AEP Audit Report); Staff Ex. 6 at 59 (Public Duke Audit Report). *See also* Revised OMAEG Ex. 1 at 24 (Seryak Direct); OCC Ex. 1 at 23 (Stanton Direct).

[235] Revised OMAEG Ex. 1 at 24 (Seryak Direct).

[236] Revised OMAEG Ex. 2C at 24–25 (Direct Testimony of John Seryak – Confidential Version (Confidential Seryak Direct)) (October 10, 2023).

[237] Revised OMAEG Ex. 2C at 25 (Confidential Seryak Direct).

[238] Staff Ex. 8C at 6 (Public AES Supplement); Staff Ex. 8C at 2 (Public AEP Supplement); Staff Ex. 8C at 9 (Public Duke Supplement).

[239] Staff Ex. 3C at 63 (Confidential AES Audit Report); Staff Ex. 5C at 66 (Confidential AEP Audit Report); Staff Ex. 7C at 68 (Confidential Duke Audit Report).

[240] Staff Ex. 8C at 6 (Public AES Supplement); Staff Ex. 8C at 2 (Public AEP Supplement); Staff Ex. 8C at 9 (Public Duke Supplement).

seasonal inventory of [redacted] for the fall and winter seasons, and [redacted] for the spring and summer seasons."[241]

Even more egregious, AEP's testimony revealed that OVEC's bad coal contracts are why the Sponsoring Companies chose to return to an always-must-run commitment strategy, despite the increased costs to customers that this commitment strategy would incur. More specifically, AEP witness Stegall admitted that OVEC switched back to a must-run-only commitment strategy because "[c]ontinuation of operating in this manner [allowing economic dispatch] was not feasible."[242] Evidently, contrary to what is in the best interest of customers, the Sponsoring Companies believed that having the valuable option to offer units as must run *or* economic "was not feasible . . . due to obligations under OVEC's coal contracts and the potential consequences for violations of those contracts."[243] Specifically, OVEC's coal contracts require the plants to "accept a minimum amount of coal," even if that minimum amount is above and beyond what OVEC actually needs/can feasibly use.

During the months when OVEC was offering some units as economic, Kyger Creek [redacted],[244] [redacted].[245] Similarly, Clifty Creek [redacted][246] [redacted]

[241] Staff Ex. 3C at 64 (Confidential AES Audit Report); Staff Ex. 5C at 67 (Confidential AEP Audit Report); Staff Ex. 7C at 69 (Confidential Duke Audit Report).

[242] AEP Ex. 1 at 14 (Stegall Direct).

[243] AEP Ex. 1 at 14 (Stegall Direct).

[244] OMAEG Ex. 14C at Confidential Attachment 1 (AEP's Response to LEI-DR-02-006).

[245] OMAEG Ex. 13C at Confidential Attachment 1 (AEP's Response to LEI-DR-02-21).

[246] OMAEG Ex. 14C at Confidential Attachment 2 (AEP's Response to LEI-DR-02-006).

[redacted].[247] As such, during the months when OVEC was offering some units as economic, it had a total [redacted]. As explained by AEP witness Stegall, "[t]o keep the coal piles from reaching maximum safe storage levels and to satisfy existing coal contracts by paying for contractually committed coal deliveries, the plants needed to operate" as must-run because that would ensure that the coal was being burned.[248]

Had they wanted to, the Sponsoring Companies could have sought another extension to continue allowing the option of economic commitment, but instead—under the direction of its Sponsoring Companies—OVEC returned to offering all of its units as must-run—regardless of whether this resulted in financial losses—because continuing to offer some units as economic was "unfeasible" due to OVEC's "need" to burn excess coal.[249]

Therefore, the Commission should conclude that the Sponsoring Companies' actions were not reasonable and prudent and were, therefore, not in the best interest of customers because they failed to advocate for more prudent fuel procurement practices. Accordingly, the Commission should disallow the collection of 2020 OVEC costs through the LGR Riders associated with the unreasonable and imprudent fuel procurement practices.

c. The Sponsoring Companies' decisions to take title to OVEC's energy at a loss were unreasonable, imprudent, and not in the best interest of customers.

The Sponsoring Companies were not obligated to avail themselves of OVEC's energy output under the ICPA.[250] As Sponsoring Companies, AES, AEP, and Duke are *entitled* to a share

[247] OMAEG Ex. 13C at Confidential Attachment 1 (AEP's Response to LEI-DR-02-21).

[248] AEP Ex. 1 at 14–16 (Stegall Direct).

[249] *See* AEP Ex. 1 at 14–16 (Stegall Direct).

[250] Tr. Vol. V at 1355 (Cross-Examination of Seryak). *See also* Revised OMAEG Ex. 1 at 22–23 (Seryak Direct); OCC Ex. 1 at 5 (Stanton Direct); Revised CUB/UCS Ex. 1 at 10–11 (Glick Direct).

of OVEC's electricity generation output, but pursuant to Section 4.03 of the ICPA, "[n]o Sponsoring Company, however, shall be obligated to avail itself of any Available Energy."[251] Given this language, the Sponsoring Companies' decision to take title to OVEC's available energy when doing so resulted in a loss to customers was an imprudent action plainly not in the best interest of Ohio customers.[252] As explained by OMAEG witness Seryak, "If the EDUs chose not to take title, they would also not be subject to the marginal cost of energy from OVEC. Their entitled allotment of energy would instead be offered to other OVEC sponsoring companies. If no sponsoring company takes title to the energy, then OVEC would need to produce less energy or could decide to choose a different commitment strategy."[253] Therefore, "the decision of the [Sponsoring Companies] apparently to take title to available energy, knowing they were losing ratepayer money, was certainly imprudent" and not in the best interest of customers.[254] CUB/UCS witness Glick similarly testified that "[t]hese additional costs, which [the Sponsoring Companies] seek[] to pass on to consumers, could have been mitigated with more prudent unit commitment practices."[255]

Therefore, the Commission should conclude that the Sponsoring Companies' actions were not reasonable and prudent and were, therefore, not in the best interest of customers because they chose to take title to OVEC's available energy at a loss to customers and made no efforts to mitigate the negative financial impacts to customers caused by the OVEC costs passed through the LGR Riders. As such, the Commission should disallow the collection of 2020 OVEC costs

[251] AES Ex. 4 at Exhibit 1, ICPA at § 4.03 (Crusey Direct).

[252] Revised OMAEG Ex. 1 at 23 (Seryak Direct); Revised CUB/UCS Ex. 1 at 34 (Glick Direct); OCC Ex. 1 at 5 (Stanton Direct).

[253] Revised OMAEG Ex. 1 at 22 (Seryak Direct).

[254] Tr. Vol. V at 1355 (Cross-Examination of Seryak). *See also* Tr. Vol. V at 1344 (Cross-Examination of Seryak).

[255] Revised CUB/UCS Ex. 1 at 11 (Glick Direct).

through the LGR Riders associated with the unreasonable and imprudent decision to take title to OVEC's available energy at a loss.

For all of the forementioned reasons, the Commission should find that the Sponsoring Companies' actions and inactions during the Audit Period while customers were accumulating millions in charges cannot possibly be said to be prudent, reasonable, or in the best interest of customers. As OMAEG witness Seryak testified, "[b]ecause [the Sponsoring Companies] are OVEC shareholders . . . [they] all financially benefit from the LGR Riders at the expense of customers."[256] For 2020, the benefit to the Sponsoring Companies provided by the LGR Riders was over $114 million. The Sponsoring Companies could have taken actions to mitigate costs to customers, but they chose not to because doing so would have cost *their shareholders*. The record evidence plainly demonstrates that the Sponsoring Companies were not acting reasonably and prudently in the best interest of customers during the Audit Period. Accordingly, the Commission should disallow all costs passed on to customers through the LGR Riders.

C. Alternatively, at a minimum, the Commission should disallow all costs passed through the LGR Riders resulting from OVEC's imprudent must-run strategy during the Audit Period.

The Commission should disallow all charges passed through the LGR Riders to customers for the Audit Period because they were unreasonable, imprudently-incurred, and not in the best interest of ratepayers. Alternatively, at a minimum, the Commission should disallow all 2020 OVEC costs passed through the LGR Riders that result from imprudent decision-making, in order to protect customers.

As explained previously, for the majority of the Audit Period, and in accordance with OVEC's operating procedures, all of the OVEC units—except Clifty Creek No. 6—were required

[256] Revised OMAEG Ex. 1 at 19 (Seryak Direct).

to be designated as must-run.[257] The one exception was a brief period spanning from April 14, 2020 through June 30, 2020 when the Operating Committee unanimously decided to offer some units as must-run *or* economic.[258] Notably, the Auditor found that this "change to OVEC's operating strategy . . . was prudent compared with allowing must-run commitment only."[259] If changing the commitment strategy to allow for flexibility in commitment strategies was prudent compared to only a must-run strategy, then it follows that having only a must-run commitment strategy was imprudent. Accordingly, the Commission should find that operating under a must-run-only commitment strategy was unreasonable and imprudent.

This is exactly what intervenors have been arguing for years. As explained by CUB/UCS witness Glick, "OVEC's and the Companies' continuous use of must-run commitment status at the OVEC plants . . . and their failure to perform a daily financial review to determine whether to use economic commitment status was not consistent with a least-cost approach and this directly resulted in their Ohio consumers paying above-market charges."[260] The Audit Reports noted that there were times in 2020 when the PJM day-ahead prices did not cover the variable costs of running the OVEC plants, meaning that the must-run units "incur[ed] losses for their owners," which would then be passed on to customers through the LGR Riders.[261] While the Sponsoring Companies

[257] AES Ex. 4 at Exhibit 2, Operating Procedures at 8 (Crusey Direct); Duke Ex. 6 at Attachment JDS-1, Operating Procedures at 8 (Swez Direct); Staff Ex. 2 at 35 (Public AES Audit Report); Staff Ex. 4 at 39 (Public AEP Audit Report); Staff Ex. 6 at 38 (Public Duke Audit Report).

[258] Staff Ex. 2 at 38 (Public AES Audit Report); Staff Ex. 4 at 48 (Public AEP Audit Report); Staff Ex. 6 at 42 (Public Duke Audit Report).

[259] Staff Ex. 2 at 44 (Public AES Audit Report); Staff Ex. 4 at 41 (Public AEP Audit Report); Staff Ex. 6 at 50 (Public Duke Audit Report).

[260] Revised CUB/UCS Ex. 1 at 36 (Glick Direct). *See also* Revised OMAEG Ex. 1 at 23 (Seryak Direct); OCC Ex. 1 at 14 (Stanton Direct); OCC Ex. 20 at 3 (Perez Direct).

[261] Staff Ex. 2 at 43 (Public AES Audit Report); Staff Ex. 4 at 47 (Public AEP Audit Report); Staff Ex. 6 at 49 (Public Duke Audit Report).

attempted to defend the must-run commitment strategy by citing "startup/shutdown expenses,"[262] the Auditor Reports go on to explain that "economically committed units would receive an uplift payment to cover costs if day-ahead prices do not cover variable costs."[263] These uplift, or "make-whole" payments "ensure that [utilities] recover their total offered costs when market revenues are insufficient or when their dispatch instructions diverge from their dispatch schedule."[264] As such, the startup and shutdown expenses the Sponsoring Companies are so concerned about would be covered.[265] According to the Audit Reports, these uplift payments are why the financial risk of offering units as economic has "minimal financial risk."[266] These uplift payments are not available to must-run units.[267]

Similarly, the Sponsoring Companies' attempt to defend their decisions to charge customers unreasonable and imprudently incurred costs by asserting that the ICPA requires them to make certain payments to OVEC,[268] also has no merit and should be rejected. As explained by CUB/UCS witness Glick, "I never challenged that the Companies should pay the cost to OVEC, what I challenge in my testimony is whether those costs should be passed on to ratepayers."[269] Similarly, OMAEG witness Seryak testified that the Sponsoring Companies "should have only

[262] Duke Ex. 6 at 12, 23 (Swez Direct); AEP Ex. 1 at 11 (Stegall Direct); AES Ex. 4 at 9–10 (Crusey Direct).

[263] Staff Ex. 2 at 17 (Public AES Audit Report); Staff Ex. 4 at 47 (Public AEP Audit Report); Staff Ex. 6 at 49 (Public Duke Audit Report).

[264] Staff Ex. 2 at 17–18 (Public AES Audit Report); Staff Ex. 4 at 18–19 (Public AEP Audit Report); Staff Ex. 6 at 17–18 (Public Duke Audit Report).

[265] Staff Ex. 2 at 43 (Public AES Audit Report); Staff Ex. 4 at 47 (Public AEP Audit Report); Staff Ex. 6 at 49 (Public Duke Audit Report).

[266] Staff Ex. 2 at 38 (Public AES Audit Report); Staff Ex. 6 at 42 (Public Duke Audit Report); Tr. Vol. II at 363 (Cross-Examination of Fagan).

[267] Staff Ex. 2 at 17 (Public AES Audit Report); Staff Ex. 4 at 19 (Public AEP Audit Report); Staff Ex. 6 at 17 (Public Duke Audit Report).

[268] AES Ex. 4 at 12 (Crusey Direct); AEP Ex. 1 at 15 (Stegall Direct); Duke Ex. 6 at 39 (Swez Direct).

[269] Tr. Vol. V at 1202 (Cross-Examination of Glick).

passed on costs related to . . . the entitlement to available power."[270] Moreover, the Sponsoring Companies' witnesses admitted that the ICPA does not require or give authority for the Sponsoring Companies to pass OVEC-related costs onto its customers.[271] As noted by CUB/UCS witness Glick, "[w]hile AEP Ohio, Duke Energy Ohio, and AES Ohio are all obligated to pay OVEC for the costs billed under the ICPA, ratepayers and customers are not obligated to cover these costs."[272]

For all the reasons discussed above, OVEC's must-run commitment strategy was imprudent and not in the best interest of customers. Therefore, at minimum, the Commission should disallow all OVEC costs passed through to customers through the LGR Riders incurred as a result of the must-run commitment strategy.

D. Alternatively, at a minimum, the Commission should disallow all OVEC costs passed through the LGR Riders resulting from OVEC's imprudent coal purchases during the Audit Period.

As discussed at length above, the Sponsoring Companies' imprudent and unreasonable actions and inactions regarding OVEC's coal procurement strategies and contracts resulted in Ohio customers unreasonably paying for OVEC's [redacted] and over-priced coal through the LGR Riders. One Sponsoring Company witness even admitted that OVEC returned to a must-run-only commitment strategy *because* OVEC needed to "keep the coal piles from reaching maximum safe storage levels," never mind that such action meant customers would pay more.

According to the publicly available 2020 EIA-Form 923 (Attachment D of OMAEG witness Seryak's testimony), OVEC purchased 1,016,071 tons of over-priced coal from Resource Fuels during the Audit Period.[273] Consequently, OVEC incurred costs totaling $12,465,618 above

[270] Tr. Vol. V at 1354–55 (Cross-Examination of Seryak)

[271] Tr. Vol. III at 775 (Cross-Examination of Swez); Tr. Vol. IV at 1051 (Cross-Examination of Stegall).

[272] Revised CUB/UCS Ex. 1 at 16 (Glick Direct).

[273] Revised OMAEG Ex. 1 at Attachment D (Seryak Direct); OCC Ex. 1 at 22 (Stanton Direct). The Audit Reports list the quantity of coal as 955,438 tons, which is [redacted], while 1,016,071 tons is the

what it could have purchased from another supplier for the exact same coal from the same mine.[274] At minimum, the Commission should deem the above-market purchase of identical coal from the same mine an unreasonable and imprudently incurred cost, and the Commission should exclude from recovery all costs resulting from the Sponsoring Companies and OVEC's unreasonable and imprudent fuel procurement practices for the Audit Period. As calculated by OMAEG witness Seryak, based on AEP's 19.93%, Duke's 9.00%, and AES' 4.90% entitlement to OVEC's available energy, the Commission should disallow $4,217,118 in imprudent coal purchases from recovery through the LGR Riders.

E. Alternatively, at a minimum, the Commission should disallow all costs passed through the LGR Riders resulting from the Sponsoring Companies' decisions to avail themselves of OVEC's energy at a loss.

As discussed above, the Sponsoring Companies are not obligated to avail themselves of OVEC's available energy under the ICPA or any other authority.[275] While the Sponsoring Companies all have a contractual *entitlement* to take title to OVEC's available energy, they do not have a contractual *obligation*. In addition to advocating for allowing OVEC the optionality to commit units as must-run *or* economic, the Sponsoring Companies also had the option to simply not avail themselves of their contractual entitlement. Had they foregone taking title to their entitlements, "they would also not be subject to the marginal cost of energy from OVEC," and, therefore, those marginal costs would not have been passed on to customers.[276]

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amount of coal purchased in 2020. *See* OMAEG Ex. 14C at Confidential Attachment 1 (AEP's Response to LEI-DR-02-006); Staff Ex. 2 at 52 (Public AES Audit Report); Staff Ex. 4 at 55 (Public AEP Audit Report); Staff Ex. 6 at 57 (Public Duke Audit Report).

[274] Revised OMAEG Ex. 1 at Attachment D (Seryak Direct). *See also* OCC Ex. 1 at 22–23 (Stanton Direct).

[275] AES Ex. 4 at Exhibit 1, ICPA at § 4.03 (Crusey Direct); Revised OMAEG Ex. 1 at 22 (Seryak Direct); Tr. Vol. III at 701–02 (Cross-Examination of Swez); Tr. Vol. IV at 1022 (Cross-Examination of Stegall).

[276] Revised OMAEG Ex. 1 at 22 (Seryak Direct).

OMAEG witness Seryak explained that the costs incurred from a contractual entitlement are the same as costs incurred in a wholesale market transaction—marginal costs of energy and capacity, also called the variable cost.[277] As noted in the Audit Reports, variable cost expenses (along with fuel costs) comprise "a significant portion of OVEC's costs to customers."[278] As estimated by OMAEG witness Seryak by using information from the Audit Reports, the marginal cost of energy from OVEC to the Sponsoring Companies was about $13,078,383 more than what OVEC was paid by PJM for this same energy.[279] These costs should be borne by the Sponsoring Companies' shareholders, not by captive utility customers. Therefore, at minimum, the Commission should deem the Sponsoring Companies' decisions to avail themselves of OVEC's energy at a loss as imprudent and unreasonable, and, as required by law, the $13,078,383 of costs incurred because of those imprudent and unreasonable decisions should be excluded from recovery through the LGR Riders.

V. CONCLUSION

Ohioans have been subsidizing a pair of dirty, uneconomic, and imprudently run coal plans—one of which is located in Indiana—for over a decade, and for 2020 alone, the Sponsoring Companies charged Ohio ratepayers $114,879,609[280] for imprudent and unreasonable OVEC costs. This staggering amount was recovered through their non-bypassable LGR Riders, which were created by the tainted HB 6 back in 2019. The Duke employee said it best: "Holy

[277] Revised OMAEG Ex. 1 at 16 (Seryak Direct).

[278] Staff Ex. 2 at 46 (Public AES Audit Report); Staff Ex. 4 at 49 (Public AEP Audit Report); Staff Ex. 6 at 51 (Public Duke Audit Report).

[279] Revised OMAEG Ex. 1 at 7, Attachment B (Seryak Direct); Revised OMAEG Ex. 1A at 1, Attachment B (Public Errata to Seryak Direct), which contains the corrected amount of the imprudent charges based on Staff Ex. 8C and the revised Public Audit Report Supplements.

[280] Revised OMAEG Ex. 1 at Attachment A (Seryak Direct); Revised OMAEG Ex. 1A at Attachment A (Public Errata to Seryak Direct)

mackerel"![281] The astonishing OVEC losses and the manner that the plants are being operated must end. The Commission cannot allow Ohioans to foot the bill for the imprudent and unreasonable costs associated with OVEC in 2020 or the unreasonable and imprudent decisions of the Sponsoring Companies. The Commission should follow the law and specifically find that all or some of the 2020 OVEC costs were imprudently incurred and that the Sponsoring Companies' actions were imprudent and unreasonable, including their decisions related to offering the OVEC plants into the wholesale markets in 2020 as must-run units, their decisions to take title to OVEC's energy at a loss, and the unreasonable and imprudent coal purchases. The Commission should then "exclude from recovery those costs that the [C]omission determines imprudent and unreasonable."[282]

It is clear from the record, that the Sponsoring Companies cannot satisfy their respective burdens of proof in demonstrating that all OVEC costs flowing through the LGR Riders for the Audit Period were prudently incurred, reasonable, or that their actions were reasonable and prudent and in the best interest of customers. Instead, record evidence demonstrates that the 2020 costs charged through LGR Riders were not prudently incurred, were unreasonable, and the Sponsoring Companies' actions were not reasonable or prudent or in the best interest of customers. The OVEC's plants' voluntary and imprudent must-run strategy, overpriced coal purchases, and the Sponsoring Companies' decisions to avail themselves of OVEC's energy at a loss should be the responsibility of shareholders, not captive utility customers.

For the aforementioned reasons, OMAEG respectfully requests that the Commission disallow all costs flowing through the LGR Riders for the 2020 Audit Period. At a minimum, the

[281] OMAEG Ex. 17 (Public) at 33 ((Duke Emails) (Attachment A)).

[282] R.C. 4928.148.

Commission should disallow all 2020 OVEC costs passed through the LGR Riders resulting from OVEC's unreasonable and imprudent must-run commitment strategy, that are a result of unreasonable and imprudent coal purchases, and that are otherwise the result of unreasonable and imprudent decision-making.

Respectfully submitted,

/s/ *Kimberly W. Bojko*
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bojko@carpenterlipps.com
easley@carpenterlipps.com
(willing to accept service by email)

Counsel for the Ohio Manufacturers' Association Energy Group

ATTACHMENT A

OMAEG Ex. 17 (Public)

From:	Swez, John </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=83170A49A56C423297C1A270501778AE-JN6 (015512>
To:	Daniel, Brad <Brad.Daniel@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>; Verderame, John A <John.Verderame@duke-energy.com>; Tuschong, Andy <Andy.Tuschong@duke-energy.com>
Subject:	RE: OVEC Request for Extension
Sent:	2020/05/27 20:33:47 (UTC +00:00)
Task Status:	NotStarted
Priority:	Normal

You know, that didn't even dawn on me, but it might be related. Interesting.

JV – for your benefit, Brad sent OVEC the PJM settlements statement today. This showed the units PJM revenue at just a hair over $16/MWh. Good timing we had on going to EC offer....

From: Daniel, Brad <Brad.Daniel@duke-energy.com>
Sent: Wednesday, May 27, 2020 4:29 PM
To: Eckstein, Jim <Jim.Eckstein@duke-energy.com>; Swez, John <John.Swez@duke-energy.com>; Verderame, John A <John.Verderame@duke-energy.com>; Tuschong, Andy <Andy.Tuschong@duke-energy.com>
Subject: Re: OVEC Request for Extension

Agree as well. Do you think the proposal timing has anything to do with us sending them the $/ MWh results through April today?

Get Outlook for iOS

From: Eckstein, Jim <Jim.Eckstein@duke-energy.com>
Sent: Wednesday, May 27, 2020 4:17:59 PM
To: Swez, John <John.Swez@duke-energy.com>; Daniel, Brad <Brad.Daniel@duke-energy.com>; Verderame, John A <John.Verderame@duke-energy.com>; Tuschong, Andy <Andy.Tuschong@duke-energy.com>
Subject: RE: OVEC Request for Extension

Absolutely.

From: Swez, John <John.Swez@duke-energy.com>
Sent: Wednesday, May 27, 2020 4:08 PM
To: Daniel, Brad <Brad.Daniel@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>; Verderame, John A <John.Verderame@duke-energy.com>; Tuschong, Andy <Andy.Tuschong@duke-energy.com>
Subject: OVEC Request for Extension

I am good with this, but wanted to see if you all had any different opinion? Honestly, eventually, I think we'd all like to see OVEC have the ability to manage both an EC and MR offer, just like we do, moving back and forth to maximize the value of the unit within the constraints of the DA market.

I think it's a good thing for OVEC to ask and suggest this extension to June 30.

Thanks
Swez

From: scunning@ovec.com <scunning@ovec.com>
Sent: Wednesday, May 27, 2020 3:25 PM
To: cgrooms@ohioec.org; Swez, John <John.Swez@duke-energy.com>; dsensius@firstenergycorp.com; charlie.martin@lge-ku.com; erin.spence@centerpointenergy.com; zanderson@wpsci.com; sbmckee@aep.com; dave.crusey@aes.com
Cc: jcooper@ovec.com; MBrown@ovec.com; raosborne@aep.com; Brian Chisling <bchisling@stblaw.com>
Subject: Request for extension

Committee Members,

Due to the continued volatility and COVID-19 related impacts on energy prices, OVEC is requesting the Sponsors approve an extension of the ability for OVEC to offer units into the PJM Market as either "Economic" or "Must Run" to June 30, 2020. Attached is the prior proposal which was approved on April 14th, and would be extended to June 30th.

(See attached file: Sponsor Proposal for COVID-19 Dispatch.pdf)

As required in the OVEC Operating Committee Rules of Procedure, a seven-day notification period is required for any voting matter brought before the Operating Committee. OVEC is also requesting your vote to waive this requirement.

From:	swez, john
To:	Daniel, Brad <Brad.Daniel@duke-energy.com>
CC:	Verderame, John A <John.Verderame@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>
Subject:	FW: Total OVEC PJM Energy Settlement Statement.xlsx
Sent:	2020/04/24 12:47:32 (UTC +00:00)
Attachments:	Total OVEC PJM Energy Settlement Statement.xlsx
Task Status:	NotStarted
Priority:	Normal

Holy mackerel. Please go ahead and send to OVEC. If you need a copy of the email I've used in the past, just let me know. I usually just try to point out anything interesting. I know this report doesn't include the variable costs, so I'd definitely point

So I say holy mackerel because:

- The energy revenue paid by PJM for the month of March was $10.54 Mil to all the PJM participants for an average revenue price of $18.17/MWh.
- I looked up the March bill and OVEC spent $17 Mil on coal, but of course some was for LGE, KU, and SIGE. Subtracting their shares out, it appears that the coal cost for the PJM Sponsors share was $15 Mil (average cost of energy at $26.73/MWh)
- Thus, the units lost $4.5 Mil for the month of March in PJM. Obviously why we were so vocal to get OVEC to change its commitment.
- So at ~10% PJM share belonging to Duke, our customers lost $450K in energy to PJM in this month.

From: Daniel, Brad <Brad.Daniel@duke-energy.com>
Sent: Thursday, April 23, 2020 3:37 PM
To: Swez, John <John.Swez@duke-energy.com>
Subject: Total OVEC PJM Energy Settlement Statement.xlsx

Updated through March.

From:	Verderame, John A </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=4DFEF487624D44D789BA03AFC51C7243-I27383 (329>
To:	Swez, John <John.Swez@duke-energy.com>
CC:	Garnett, Bryan L <Bryan.Garnett@duke-energy.com>
Subject:	RE: OVEC
Sent:	2020/04/15 20:51:33 (UTC +00:00)
Task Status:	NotStarted
Priority:	Normal

Great
Thanks

From: Swez, John
Sent: Wednesday, April 15, 2020 3:53 PM
To: Verderame, John A <John.Verderame@duke-energy.com>
Cc: Garnett, Bryan L <Bryan.Garnett@duke-energy.com>
Subject: RE: OVEC

Sorry, I meant to update you and Garnett (Eckstein, Andy T., and I were on the call)

The call went great. The motion passes 100%. OVEC is starting asap. They will have restrictions, which is understandable, like how many units need to be on-line to support the scrubber, etc. However, it gets OVEC calculating a daily margin, which is a good first step.

They won't use EC on every unit, but do expect a gradual change to EC on many of the units over time. Maybe half. Anyway, for right now, they are easing into it which I appreciated.

Finally, it was passed as a temporary change to the operating procedure until 5-31. However, if we get close to that date and it still makes sense, you know we will ask to extent, make it permanent, etc.

Thanks

From: Verderame, John A <John.Verderame@duke-energy.com>
Sent: Wednesday, April 15, 2020 10:39 AM
To: Swez, John <John.Swez@duke-energy.com>
Subject: OVEC

How did that meeting go yesterday?

John A. Verderame
VP Fuels & Systems Optimization
Duke Energy Center | 526 S. Church Street | Mailcode:EC12H
Charlotte, NC 28202
Office: 980.373.7521 | Fax: 980.373.7515 | Cell: [redacted] | john.verderame@duke-energy.com

From:	Swez, John </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=83170A49A56C423297C1A270501778AE-JN6 (015512>
To:	jcooper@ovec.com
CC:	Verderame, John A <John.Verderame@duke-energy.com>; Robert A Osborne <raosborne@aep.com>; Scott R. Cunningham (OVEC) <scunning@ovec.com>
Subject:	RE: OVEC Energy Offer During Pandemic
Sent:	2020/04/09 01:57:28 (UTC +00:00)
Task Status:	NotStarted
Priority:	Normal

Thanks Justin. The only times that line up are 10:45 to 11. I'll send a meeting request. Thanks

From: jcooper@ovec.com <jcooper@ovec.com>
Sent: Wednesday, April 8, 2020 4:31 PM
To: Swez, John <John.Swez@duke-energy.com>
Cc: Verderame, John A <John.Verderame@duke-energy.com>; Robert A Osborne <raosborne@aep.com>; Scott R. Cunningham (OVEC) <scunning@ovec.com>
Subject: Re: OVEC Energy Offer During Pandemic

*** Exercise caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. ***

John,

Let me know when you are available tomorrow morning, we can be available at 8-9, or 10:30-11:30 or 3-4.

Justin J. Cooper MAcc, CPA
CFO, Secretary and Treasurer

Ohio Valley Electric Corporation
Desk: (740) 289-7215
Cell [redacted]
Fax: (740) 289-7294
Email: jcooper@ovec.com

From: "Swez, John" <John.Swez@duke-energy.com>
To: Robert A Osborne <raosborne@aep.com>, "jcooper@ovec.com" <jcooper@ovec.com>
Cc: "Verderame, John A" <John.Verderame@duke-energy.com>, "Scott R. Cunningham (OVEC)" <scunning@ovec.com>
Date: 04/08/2020 03:36 PM
Subject: OVEC Energy Offer During Pandemic

Hi All,

I know I reached out a little while back about the possibility of offering some OVEC units into the PJM Day-Ahead Market energy market with a commitment status of Economic as opposed to the typical offer of Must Run. At the time we discussed this, the timing wasn't right for this consideration. However, since we talked, due to reasons such as the COVID-19 pandemic and its effects on demand and low natural gas prices, PJM Day-Ahead energy prices have moved significantly lower, typically clearing around $18/MWh for the 16 hour on-peak market and $12/MWh for the 8 hour off-peak market. With the upcoming holiday weekend, we are expecting even lower energy prices of $14/MWh on-peak and $10/MWh off-peak. At the these exceptionally low energy prices, we expect that the OVEC units have a combined energy margin of a loss of approximately $150,000 to $175,000 per day.

Per the Operating Procedure, I was going to send an email to Scott requesting that a vote be sent out to the sponsors, but wanted to start with both of you since this is not a standard request. My proposal is to offer approximately half of the units with a commit status of Economic starting with this Friday, April 10, with OVEC choosing units that perhaps have some light maintenance needs that could be accomplished during the time they are on reserve shutdown. We would re-evaluate this strategy later next week.

Both John Verderame and myself are available today or tomorrow if you'd like to discuss further on a conference call.

Thank you for your consideration,
John Swez

From:	Verderame, John A </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=4DFEF487624D44D789BA03AFC51C7243-I27383 (329>
To:	Eckstein, Jim <Jim.Eckstein@duke-energy.com>; Swez, John <John.Swez@duke-energy.com>
Subject:	RE: OVEC DA Awards for 4/9/2020
Sent:	2020/04/08 18:44:20 (UTC +00:00)
Task Status:	NotStarted
Priority:	Normal

That a lot different. Thanks
Whats the average cost at min?

From: Eckstein, Jim
Sent: Wednesday, April 8, 2020 2:41 PM
To: Verderame, John A <John.Verderame@duke-energy.com>; Swez, John <John.Swez@duke-energy.com>
Subject: RE: OVEC DA Awards for 4/9/2020

I calculate a $200K lose for both units based upon the DA awards.

OVEC P&L Report
April 9, 2020

[redacted]

From: Verderame, John A <John.Verderame@duke-energy.com>
Sent: Wednesday, April 8, 2020 2:36 PM
To: Swez, John <John.Swez@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>
Subject: RE: OVEC DA Awards for 4/9/2020

Of course you can. What are the average costs again? $22. At $16, 8 units lose almost $100K a day.

From: Swez, John
Sent: Wednesday, April 8, 2020 2:34 PM
To: Verderame, John A <John.Verderame@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>
Subject: RE: OVEC DA Awards for 4/9/2020

Give me one more chance, then I agree. I hope that the pandemic provides the reasons needed.

From: Verderame, John A <John.Verderame@duke-energy.com>
Sent: Wednesday, April 8, 2020 2:21 PM
To: Eckstein, Jim <Jim.Eckstein@duke-energy.com>; Swez, John <John.Swez@duke-energy.com>

Subject: RE: OVEC DA Awards for 4/9/2020

Maybe time to have a Board call?

From: Eckstein, Jim
Sent: Wednesday, April 8, 2020 2:20 PM
To: Verderame, John A <John.Verderame@duke-energy.com>; Swez, John <John.Swez@duke-energy.com>
Subject: RE: OVEC DA Awards for 4/9/2020

Minimum load all hours, except during testing at 90 MWs.
CC4 is starting a MO tomorrow night so one CC and one KC offline.
So, the other owners support the action to leave the units online?
I can send an e-mail to the joint owners, if you'd like me too.
You have much more clout than I do though.

From: Verderame, John A <John.Verderame@duke-energy.com>
Sent: Wednesday, April 8, 2020 2:02 PM
To: Swez, John <John.Swez@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>
Subject: FW: OVEC DA Awards for 4/9/2020

Really,
Still?

From: BPM_Notifications
Sent: Wednesday, April 8, 2020 2:00 PM
To: REG GenDispatch <DLREGGenDispatch@duke-energy.com>
Cc: Zhang, Stella <Stella.Zhang@duke-energy.com>; Rangarajan, Kishan <Kishan.Rangarajan@duke-energy.com>; Dyer, Weston <Weston.Dyer@duke-energy.com>
Subject: OVEC DA Awards for 4/9/2020

OVEC DA Awards

4/9/2020

Hour Ending	Energy Price	CC1 Energy Amount	CC2 Energy Amount	CC3 Energy Amount	CC4 Energy Amount	CC5 Energy Amount	CC6 Energy Amount
[redacted]							

[redacted]

Hour Ending	Energy Price	KC1 Energy Amount	KC2 Energy Amount	KC3 Energy Amount	KC4 Energy Amount	KC5 Energy Amount
[redacted]						

From:	Swez, John </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=83170A49A56C423297C1A270501778AE-JN6 (015512>
To:	Verderame, John A <John.Verderame@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>
Subject:	RE: OVEC DA Awards for 4/9/2020
Sent:	2020/04/08 18:04:57 (UTC +00:00)
Task Status:	NotStarted
Priority:	Normal

This is going to be a hard thing to change, but I am trying...

From: Verderame, John A <John.Verderame@duke-energy.com>
Sent: Wednesday, April 8, 2020 2:02 PM
To: Swez, John <John.Swez@duke-energy.com>; Eckstein, Jim <Jim.Eckstein@duke-energy.com>
Subject: FW: OVEC DA Awards for 4/9/2020

Really,
Still?

From: BPM_Notifications
Sent: Wednesday, April 8, 2020 2:00 PM
To: REG GenDispatch <DLREGGenDispatch@duke-energy.com>
Cc: Zhang, Stella <Stella.Zhang@duke-energy.com>; Rangarajan, Kishan <Kishan.Rangarajan@duke-energy.com>; Dyer, Weston <Weston.Dyer@duke-energy.com>
Subject: OVEC DA Awards for 4/9/2020

OVEC DA Awards

4/9/2020

Hour Ending	Energy Price	CC1 Energy Amount	CC2 Energy Amount	CC3 Energy Amount	CC4 Energy Amount	CC5 Energy Amount	CC6 Energy Amount
[redacted]							

Hour Ending	Energy Price	KC1 Energy Amount	KC2 Energy Amount	KC3 Energy Amount	KC4 Energy Amount	KC5 Energy Amount

From:	Swez, John </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=83170A49A56C423297C1A270501778AE-JN6 (015512>
To:	Verderame, John A <John.Verderame@duke-energy.com>
Subject:	RE: OVEC Morning Generation Report for Wednesday, 04/01/20
Sent:	2020/04/01 13:51:37 (UTC +00:00)
Task Status:	NotStarted
Priority:	Normal

I'll call

From: Verderame, John A <John.Verderame@duke-energy.com>
Sent: Wednesday, April 1, 2020 9:50 AM
To: Swez, John <John.Swez@duke-energy.com>
Subject: RE: OVEC Morning Generation Report for Wednesday, 04/01/20

Sounds good.
What were their reasons?

From: Swez, John
Sent: Wednesday, April 1, 2020 9:48 AM
To: Verderame, John A <John.Verderame@duke-energy.com>
Subject: RE: OVEC Morning Generation Report for Wednesday, 04/01/20

Funny, I've been thinking about this a lot lately.

I don't know if you remember, but I requested a meeting with OVEC last month on this topic (Justin and Rob) and showed them the impact of running…that conversation didn't go anywhere, but I understood their reasons (but they aren't correct of course). So my plan is to (1) calculate the total OVEC energy P&L over the first 3 months of 2020 (for all OVEC PJM participants, not just duke) – I just asked Brad to do that after we receive the March statements, so in about 1 week, and (2) present this at the OVEC May operating committee meeting, and if that doesn't work (3) have you discuss at the board level.

Sounds good?

From: Verderame, John A <John.Verderame@duke-energy.com>
Sent: Wednesday, April 1, 2020 9:34 AM
To: Swez, John <John.Swez@duke-energy.com>
Subject: FW: OVEC Morning Generation Report for Wednesday, 04/01/20

Seems like a lot of OVEC units online.

From: ovecpsg@ovec.com [mailto:ovecpsg@ovec.com]
Sent: Wednesday, April 1, 2020 8:05 AM
To: Mok, Alan <Alan.Mok@duke-energy.com>; Fesperman, Andy Lynn <Andy.Fesperman@duke-energy.com>; bpi-operations@ohioec.org; Ben.Turpin@Duke-Energy.com; Bid_Development@aep.com; Pritchett, Bill <Bill.Pritchett@duke-energy.com>; Daniel, Brad <Brad.Daniel@duke-energy.com>; BBaylor@ovec.com; BHornsby@ovec.com; BFennig@ovec.com; cgrooms@buckeyepower.com; CGuillen@ovec.com; cvaughn@ovec.com; Charlie.Freibert@lge-ku.com; Charlie.Martin@lge-ku.com; CVoss@ovec.com; cwoolcoc@ovec.com; ccarnes@ovec.com; Corey.Locher@Duke-Energy.com; CYarbrou@ovec.com; dgerickson@aep.com; Duke_Ovec_Offer <Duke_Ovec_Offer@duke-energy.com>; dgeyman@ovec.com; DHerald@ovec.com; DRankin@ovec.com; Schmitt, Doug W <Doug.Schmitt@duke-energy.com>; etaylor@ovec.com; ehelton@ovec.com; gnewman@ovec.com; AHope@ovec.com; Generation.dispatch@lge-ku.com; gbrady@ovec.com; GMacKnig@ovec.com; Cecil, Greg <Greg.Cecil@duke-energy.com>; hstewart@ovec.com; jadams@ovec.com; jasherwood@aep.com; jfoster@ovec.com; MBrown@ovec.com; JWell@ovec.com; JSimms@ovec.com; jgoebel@ovec.com; JMahoney@ovec.com; JEpperso@ovec.com; Swez, John <John.Swez@duke-energy.com>; Verderame, John A <John.Verderame@duke-energy.com>; Wilkins, John A <John.Wilkins2@duke-energy.com>; ksmith@buckeyepower.com; kzemanek@buckeyepower.com; LPhillip@ovec.com; msimpson@ovec.com; msmith@ovec.com; Chen, Michael <Michael.Chen@duke-energy.com>; Michael.Willbur@lge-ku.com; Mthomas@ovec.com; ngarrett@ovec.com; OVEC, OVEC -ovec <oveclco@ovec.com>; OVEC Scheduling -ovec <ovecpsg@ovec.com>; powergen@ohioec.org; PMcAllis@ovec.com; ProdOps%OVEC@ovec.com; rwaugh@ovec.com; RBurress@ovec.com; raosborne@aep.com; RDavis@ovec.com; rtaylor@ovec.com; scheduling@lge-ku.com; scunning@ovec.com; SWhite@ovec.com; SWathen@ovec.com; Tim.bockhorn@aes.com; TFulk@ovec.com; TSchwall@ovec.com; bsquibb@ovec.com; zanderson@wpsci.com
Subject: OVEC Morning Generation Report for Wednesday, 04/01/20

Elliott Egbert

Energy Scheduling
Ohio Valley Electric Corporation
Piketon, OH.
740-289-7227

Work SAFE today, someone will need you tomorrow!

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 February 12, 2024 upon the parties listed below.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Counsel for Ohio Manufacturers' Association Energy Group

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