BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF
OF
DUKE ENERGY OHIO, INC.

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I. INTRODUCTION

This proceeding should be straightforward. It is not about whether the LGR Rider was ill-conceived. It is not about whether the OVEC-owned generating facilities should be shut down. It is not about whether Duke Energy Ohio failed to properly influence or control the actions of OVEC. Contrary to what certain intervenors argue, this proceeding is only about whether the amounts included in the LGR Rider were correctly calculated and whether the actions Duke Energy Ohio took regarding those amounts were prudent.

On February 12, 2024, Initial Post-Hearing Briefs were filed by Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), Staff of the Public Utilities Commission of Ohio (Staff), and intervenors.[1] The Company's Initial Brief set forth significant detail regarding background and context related to the Ohio Valley Electric Company (OVEC), the Inter-Company Power Agreement (ICPA), the Legacy Generation Resource Rider (LGR Rider), and the decisions leading up to the 2020 Rider LGR prudency audit—the subject of the underlying proceeding. In this Reply Brief, the Company therefore focuses on its responses to the arguments of opposition Intervening Parties, and continues to rely upon, and incorporate by reference, the statements and arguments presented in its Initial Brief.

Based almost entirely on the fact that the LGR Rider produced a customer charge for the 2020 Audit period, Intervenors improperly ask, among other things, that the Commission exclude all charges associated with the LGR Rider for all electric distribution utilities (EDUs) audited pursuant to this proceeding. The Intervening Parties base this recommendation on various arguments, which generally revolve around three issues: (1) the Intervening Parties' opposition to

[1] The intervenors filing initial briefs are the Office of the Ohio Consumers' Counsel (OCC), the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Co. (Kroger), the Ohio Environmental Council (OEC), the Sierra Club, and CUB-Ohio and the Union of Concerned Scientists (CUB-UCS) (collectively, the Intervening Parties or Intervenors).

the passage of Rider LGR by the Ohio Legislature, (2) the realities and nature of operation of a base-load, coal-fired generation resource, and (3) hindsight arguments related to unit commitment decisions made by OVEC during the Audit period. Contrary to those arguments, and consistent with the Commission's Request for Proposal (RFP) to conduct the Audit in this case, the scope of the Audit Report focused on the Company's actions as permitted under the ICPA during the Audit period. It was based upon a prudence standard that reviews facts and circumstances known at the time decisions were undertaken and recognizes Duke Energy Ohio's ability to exercise its rights only as one vote on the OVEC Operating Committee. The LGR Rider was created by statute, R.C. 4928.148, to recover the net costs and revenues that Duke Energy Ohio incurs and receives from its contractual entitlement to the output of the generating units of OVEC. The LGR Rider functioned as statutorily required during the Audit period. The Auditor's detailed and thorough review of Duke Energy Ohio's costs and revenues associated with its interest in OVEC should be adopted by the Commission.

The Audit Report did not make any findings of imprudence. Likewise, in its Initial Brief, Commission Staff did not make any recommendations of disallowance, and recommended adoption of the Audit Report in full.[2] The Auditor, London Economics International, LLC (LEI or the Auditor) concluded that the processes, procedures, and oversight employed by the Company and by OVEC during the 2020 Audit period were "mostly adequate and consistent with good utility practice."[3] The Intervening Parties have not raised any convincing arguments, on brief or at

[2] *See* Initial Brief of Staff of the Public Utilities Commission of Ohio at 12 ("The Auditor completed its audits as directed by the Commission and consistent with the governing law. The Commission should adopt the conclusions and recommendations made by the Auditor and, as applicable, make appropriate determinations consistent with the Auditor's recommendations and observations.").

[3] *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, Audit of the Legacy Generation Resource Rider of Duke Energy Ohio – Final Report Public Version (Audit Report or Audit) at 9 (December 17, 2021).

hearing, to overturn the Auditor's well-reasoned findings.

II. LAW AND ARGUMENT

A. The proper prudence standard of review should be applied in this proceeding, just as it was employed by the Auditor.

As a threshold matter, attempts by the Intervening Parties to improperly replace the standard of review that should be applied in this Audit proceeding with a more cumbersome version should be disregarded. The LGR statute establishes the applicable standard of review, and the Auditor did not err in her application of the same. R.C. 4928.148 directs the Commission to "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."[4] As noted by AEP Ohio in great detail in its initial brief, the General Assembly provided a definition of "[p]rudently incurred costs related to a legacy generation resource" as it relates to the "nonbypassable rate mechanism [*i.e.* the LGR Rider]," mandated by R.C. 4912.148(A):

> "Prudently incurred costs related to a legacy generation resource" means 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 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. Such costs shall include any incremental costs resulting from the bankruptcy of a current or former sponsor under such power agreement or co-owner of the legacy generation resource if not otherwise recovered through a utility rate cost recovery mechanism.[5]

[4] R.C. 4928.148(A)(1).
[5] R.C. 4928.01(A)(42).

As identified in 4928.01(A)(42), the statutory standard of review is focused on "the actions of [the EDUs] with ownership interests in the legacy generation resource." These "actions" are identified and limited by the ICPA and OVEC Operating Procedures, which also define the role that Duke Energy Ohio may have in the control and management of OVEC. As detailed in the Company's Initial Brief, this role is a limited by the Company's nine percent interest—as the Company is one of many owner-participants who may cast votes on certain issues. Duke Energy Ohio is not the operator of OVEC. The Audit Report scope and review of the Company's "actions" are of those actions of an "electric distribution utilit[y] with ownership interests" in OVEC, as set forth in 4928.01(A)(2). And pursuant to the statute, the Commission is required to undertake a review "regarding the prudence and reasonableness of such actions during the three calendar years that preceded the year in which the determination is made."[6] Pursuant to the review established by the General Assembly in R.C. 4928.148(A)(1), the scope of the Commission's review is limited to the actions taken by Duke Energy Ohio during the Audit period—not OVEC, and not other entities with ownership interests in OVEC.

Finally, aside from which or whose actions are reviewed by the underlying audit proceeding, the standard of review, as established by statute, is "prudence and reasonableness." Specifically, the Commission is tasked with determining the "prudence and reasonableness" of the "actions" taken by each EDU during the Audit period, and it must "exclude from recovery those costs that the commission determines imprudent and unreasonable."[7] This prudence standard of the review is applicable in this proceeding, and the standard has long been recognized and applied

[6] R.C. 4928.148(A)(1).
[7] *Id.*

by the Commission in many types of cases, as well as in prior OVEC-related audit proceedings.[8]

On brief and in argument, Intervenors improperly seek to replace the well-established and controlling prudence standard, attempting instead to create a new standard by taking the phrase "best interests of retail ratepayers," from AEP Ohio's PPA Rider Audit case, a case that did not involve or relate to Duke Energy Ohio and a rider that is no longer in effect.[9] Intervenors attempt to implement this language in order to inflate the statutory standard under which the audit in this case occurred, and in support of their arguments that all charges passed through Rider LGR are, by definition, not in the best interest of ratepayers. This is simply not what is set forth by the duly enacted law establishing the prudency audit for the LGR Rider. This approach, as advanced by OCC and OMAEG specifically, also misconstrues the level of control Duke Energy Ohio has over decision-making by OVEC.

It is also critical to note that the Company's actions regarding matters within its control during the Audit period should be judged for prudence based on the facts known at the time each decision was entered into, and tempered by the "actions" and level of control Duke Energy Ohio realistically has over OVEC's processes and practices. The Company's decisions cannot be evaluated based on after-the-fact speculation. In the *Suburban* decision, the Ohio Supreme Court confirmed that the prudence test applied by the Commission examines whether an expenditure was prudent at the time it was initially contemplated.[10] Thus, a proper examination under the

[8] *In re Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion & Order, at ¶¶ 58-59 (Sept. 6, 2023) (PSR Opinion and Order), *app. for reh'g granted for further consideration* by Entry on Rehearing (Nov. 11, 2022) ("Consistent with the Supreme Court of Ohio," the Commission "analyze[s] prudency at the time the decision was made" and finding that the question in a prudence analysis is "not what strategy would have been the most prudent, but rather, whether the strategy deployed by the [utility] was prudent.") (citing *In re Application of Suburban Natural Gas Co*., 2021-Ohio-3224, 166 Ohio St. 3d 176).

[9] *See, e.g.*, OMAEG Initial Brief at 53 ("The Sponsoring Companies utterly failed to meet their burden of demonstrating that their actions were reasonable and prudent in the best interest of Ohio customer . . ..").

[10] *In re Suburban Nat. Gas Co*., 2021-Ohio-3224, 166 Ohio St. 3d 176.

prudence test considers whether an expenditure "was prudent when it was made."[11] In sum, this is the proper standard to use to evaluate the prudence of the Company's actions in the underlying Audit—not the "best interests of ratepayers" standard read into the LGR statute by OMAEG, OCC, and others and evaluated based on speculation made in retrospect.

OMAEG and other Intervenors spill much ink in their initial briefs over the fact that Duke Energy Ohio "bears the burden of proof" in this proceeding to demonstrate that all costs passed through the LGR Rider were just, reasonable, and prudently incurred.[12] OCC relies on prior Commission rulings involving a different rider, AEP Ohio's PPA Rider, in an attempt to modify the controlling standard in this proceeding, arguing that the standard for this prudency audit is whether the operation of OVEC (at all) is in the "best interests of ratepayers."[13] As highlighted above, R.C. 4928.148 does not dictate such an outcome, and directs only the review of EDU owner actions when evaluating cost recovery. There is not a basis in this Audit proceeding to question the existence or application of the ICPA, and whether the EDUs complying with their contractual commitments therein is in the best interests of ratepayers, as OCC and others imply.

Finally, regarding the applicable standard, OMAEG argues that the Commission can only allow recovery of prudently incurred costs as were permitted under the AEP Ohio's prior mechanism, the PPA Rider, because R.C. 4928.148(A) contains the phrase "those costs," and OMAEG interprets that phrase to be a reference back to the costs contemplated by the prior OVEC-related riders, and OMAEG's interpretation of the Orders authorizing the same.[14] A simple reading of the statute dispatches with this argument. R.C. 4928.148(A) states that: "any mechanism

[11] *Id.*
[12] *See, e.g.*, OMAEG Initial Brief at 20.
[13] Kroger and OMAEG argue similarly, claiming that OVEC costs should be excluded because they were not in the best interests of ratepayers. *See* Kroger Initial Brief at 4-9; OMAEG Initial Brief at 53-60.
[14] OMAEG Initial Brief at 12-13.

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."[15] OMAEG argues that "those costs" does not refer back to the phrase "prudently incurred costs related to a legacy generation resource," as defined by R.C. 4928.01(A)(42) and *contained in the same statutory provision*. OMAEG strains credulity to argue that "those costs" refers to the costs authorized by AEP Ohio's PPA Rider. Pursuant to a plain reading and given that such "costs" are statutorily defined, it takes a broad leap to apply OMAEG's theory. Occam's razor suggests the simplest explanation is the best one—and that is the case here too.

As set forth by the Attorney Examiners in this case, the purpose of "this proceeding is limited to reviewing the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019."[16] The Intervenors' position, that the "best interests of ratepayers" is the applicable standard in this case and that that standard dictates that no above-market OVEC costs can pass through the LGR Rider, simply has no basis in fact or law. Put another way, though the Company may bear the burden of proof in this proceeding, the Intervening Parties cannot move the goal posts associated with the applicable standard and audit scope.

The proper prudence standard must be applied, and Intervenors' arguments to the contrary are without merit.

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[15] Emphasis added.

[16] *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, Entry at ¶ 33 (December 17, 2021).

B. The Audit Report contained all key findings necessary and required by the RFP, and the Audit Report's conclusions are supported by record evidence.

The Intervening Parties take issue with the Audit Report's well-reasoned findings: that no disallowances are merited, and that Duke Energy Ohio acted prudently during the Audit period. Yet their arguments do not rise to the level of upending the Audit Report, and do not even tackle the findings made by the Auditor head on. They are simply a rehashing or retooling of arguments made throughout this audit proceeding and others. As thoroughly detailed in Duke Energy Ohio's Initial Brief, the Audit Report closely tracks the RFP scope (as set forth by the Commission), provides a detailed and through analysis, is based upon over 100 data request responses from the Company, and is over 100 pages in length. The Auditor's analysis is not deficient, and she left no stone unturned.

Despite the thorough and detailed analysis undertaken by the Auditor in developing the Audit Report, Intervenors argue that the Audit Report was lacking in a number of categories, most of which can be boiled down to the Intervenors' disagreement with the Audit Report's findings. For example, OCC advocates for total disallowance of OVEC costs because it believes the Auditor's review of OVEC's dispatch and commitment practices to be insufficient. OCC argues that "[t]he Audit Reports were deficient because the Auditor only examined whether the individual actions of AEP, Duke, and DP&L were reasonable," and, in OCC's opinion, the Auditor was required to but did not also "review whether the daily commitment decisions by the OVEC Operating Committee or OVEC management were prudent."[17] OCC argues that R.C. 4928.148(A)(1) compelled the Auditor to review OVEC's decisions, based on the statutory reference to "decisions related to offering the contractual commitment into the wholesale

[17] OCC Initial Brief at 12.

markets."[18] This argument, however, fails to account for the meaning of "contractual commitment" as used in the definition of "prudently incurred costs related to a legacy generation resource," fails to demonstrate any inadequacy in the Audit Report, and misstates the role of the EDUs in OVEC management.

R.C. 4928.148(A)(1) does not require a review of OVEC's actions, but specifically requires the review of the "actions of electric distribution utilities with ownership interests in [OVEC.]" And the EDUs who have such an interest retain decision-making authority over how they offer their share of capacity into the PJM capacity revenue construct.[19] Regarding energy, however, OVEC commits and bids the OVEC units into the PJM markets, as it must do on behalf of all entities with an interest in OVEC, whether those are the EDUs, or even participants outside of PJM.[20] Control over OVEC's energy commitment decisions is limited by the Company's and the other EDUs' role and authority under the ICPA, and is limited by the OVEC Operating Procedures. The Auditor clearly undertook a thorough review of Duke Energy Ohio and the other EDUs' actions as it relates to their OVEC interest, as is required by R.C. 4928.148(A)(1). And, as discussed in Duke Energy Ohio's Initial Brief and elsewhere, the Auditor did conduct an appropriate review of the "must run" issues as it relates to the actions of the EDUs and their representation and membership on the Operating Committee.[21]

Kroger and others also argue that the Audit Report "failed to make several key findings to demonstrate that the costs passed through [Rider LGR]" were prudent.[22] Kroger and OMAEG argue that the Auditor should have reviewed "conflicts of interest" that they allege may have

[18] *Id.*
[19] *See, e.g.*, Swez Dir. Test. at 8-9 ("most of the Duke Energy share of the OVEC units typically clear the PJM capacity auctions . . . [u]nits are [therefore] counted as resources by PJM must be made available.").
[20] Swez Dir. Test. at 20 (setting forth OVEC participants that operate outside of PJM, and represent 9.63% of OVEC's generated energy).
[21] *See generally* Audit Report at Section 5.3.
[22] Kroger Initial Brief at 7-8.

guided decisions by the EDUs during the Audit period.[23] They (incorrectly) argue that the utilities do not have an incentive to insist upon changes to the ICPA, and that such insistence could amend the ICPA for all entities with an interest in OVEC. Setting aside the fact that the Ohio EDUs are unable to unilaterally amend the ICPA, this analysis is also outside the scope of the Audit review. The Auditor clarified as much at hearing, stating that she did not perform such an analysis as it was outside the scope of the prudency review.[24] There is nothing in the record to indicate that this is not the case, and this argument was raised in Duke Energy Ohio's prior OVEC-related audit, wherein the Commission did not adopt OMAEG's arguments at hearing or on brief regarding conflicts of interest.[25] It should decline to do so again here.

Finally, OMAEG also provides a laundry list of items that it believes that the Audit Report failed to properly address. OMAEG argues that the Auditor should have disallowed all OVEC costs because the overall costs of the ICPA were higher than the market revenue received, evidencing that OVEC is uncompetitive in the energy market; that costs properly assessed pursuant to Component D of the ICPA were not specifically recommended for disallowance by the Auditor; that the Auditor did not make disallowances pursuant to perceived conflicts of interest (as discussed above); that the Auditor did not recommend disallowance of energy costs and that the Auditor did not recommend a requirement that economic dispatch flexibility be permanently pursued (under threat of future disallowance); and that the Auditor reviewed coal costs, but did not find that costs associated with long-term contract prices should be disallowed.[26] Citing these

[23] *See, e.g.*, OMAEG Initial Brief at 47-48.
[24] Tr. Vol. II at 311:4-25 ("Q. Okay. And regarding the prudency of the utilities' actions and decisions with regard to the LGR Riders, would you agree with me that it would be prudent for an auditor to review any conflicts of interest that a utility may have when reviewing the prudency of its decisions? A. We didn't see that in the scope of investigation, so we didn't look at that . . . It didn't ask for investigation of conflicts of interests which perhaps is even more of a legal concept than accounting or operations.").
[25] *See generally* PSR Opinion and Order, wherein conflicts of interest were not identified or discussed, despite their being raised at hearing.
[26] *See* OMAEG Initial Brief at 43-53.

disagreements with the Audit Report findings, OMAEG argues that the Auditor fell short of the prudency review standard and RFP set forth by the Commission—arguing that the EDUs have summarily failed to establish their burden of proof, because the audit reports were deficient.[27]

OMAEG's spaghetti-on-the-wall approach to attacking the Auditor's findings, or arguing for a finding of deficiencies in the audit review process, should not be adopted by the Commission. As demonstrated in Duke Energy Ohio's Initial Brief and in this Reply Brief, the Auditor properly performed the audit and required prudence review. Duke Energy Ohio satisfied its burden of proof through completion of the audit and presentation of its own testimony in support of the Audit Report. OMAEG, Kroger, OCC, and other Intervenors critique the Auditor for not reaching the conclusion that they desired regarding the prudence of costs populated to the Rider and take issue with the Auditor's failure to find certain costs to be imprudent, as they would ultimately prefer. None of the arguments presented by the Intervening Parties, as highlighted above and in the Company's Initial Brief, should serve to overturn the Auditor's well-reasoned findings, however. Disagreement does not equal imprudence.

C. The plant commitment strategy employed by OVEC during the Audit Period was reasonable, and Intervenors fail to demonstrate that the Auditor's findings in this regard were improper or imprudent.

The Intervening Parties take issue with OVEC's commitment strategy during the Audit period. As has been discussed at length in this proceeding, OVEC employed a mix of both must-run and economic commitment strategies during the 2020 Audit period. Though Intervenors argued vigorously for an economic commitment strategy for OVEC in previous OVEC-related audit proceedings, they have still taken issue with the 2020 commitment strategy, which did employ periods of economic commitment. Intervenors now argue that the OVEC units should

[27] *Id.* at 53.

have been committed as economic *for the entire audit period*. They argue that the Auditor should have essentially found that, if the units were not committed as economic for the entire audit period, the failure to do so is imprudent.[28] These criticisms leveled by Intervenors do not account for the fact that the Auditor examined OVEC's mixed commitment strategy in great detail. And though the Auditor made observations related to commitment strategy by OVEC (as detailed in the Company's Initial Brief), the Audit Report recommended that Duke Energy Ohio continue its practice of daily monitoring and raising issues to the Operating Committee, as it did in the 2020 Audit period.[29] The Auditor did not find the use of a mixed economic/must-run strategy during the Audit period imprudent. She did not recommend disallowance of any costs associated with OVEC due to the strategy employed.[30] Instead, with certain considerations that had *already* been identified by Duke Energy Ohio and brought to OVEC and the Operating Committee's attention during the Audit period, the Auditor found that the commitment strategy was reasonable.[31] Any critique of this strategy is misguided, does not account for the Auditor's findings and the Commission's prior findings regarding unit commitment, and for the reasons highlighted below, and set forth in the Company's Initial Brief, should be rejected.

1. <u>Commitment status versus dispatch.</u>

As set forth in Company witness John Swez's testimony and in the Company's Initial Brief, "commitment is the decision or act of starting a generator that is off-line or maintaining an on-line

[28] *See, e.g.*, OMAEG Initial Brief at 54 (stating that, even though Duke Energy Ohio suggested a temporary change in response to COVID-19 driven market conditions, the fact that this change was not made permanent was imprudent).
[29] Audit Report at 54.
[30] *Id.*
[31] *Id.*

generation status for a unit that is already on-line."[32] Put more simply, commitment it is the decision to run or not run a unit.[33] OVEC itself determines the unit commitment in PJM.[34]

The dispatch of the generating units refers to the instructions for the dispatch of the OVEC units from PJM and movement of the unit to the requested setpoint.[35] These dispatch instructions for the OVEC generating units are sent by PJM and received by OVEC every five minutes.[36] Unless a unit is required to be at an exact output such as what would be required for an environmental test, the OVEC generators are dispatched based on the units' incremental cost offer between minimum and maximum available output.[37]

2. Intervenor arguments that the use of a combination of Must-Run and Economic commitment strategy during the Audit period should result in disallowance of all Rider LGR charges are without merit.

Intervenors make several arguments regarding the use of a combination of economic and must-run commitment strategy by OVEC during the Audit period. None of these arguments, however, serve to overturn the Auditor's well-reasoned findings.

First, many Intervenors argued in their initial briefs that to not commit the OVEC units as economic (versus must-run) at all times during the Audit period was imprudent and should result in disallowance of all costs populated to the LGR Rider.[38] Duke Energy Ohio witness Swez detailed the many reasons why this would be impractical for a power plant such as OVEC, and

[32] Direct Testimony of John D. Swez (Swez Dir. Test.) at 7:4-7.
[33] *Id.*
[34] PJM allows for four different commitment status offers: Not Available or Outage, Emergency, Economic, and Must-Run (sometimes referred to as self-scheduled).
[35] Swez Dir. Test. at 32:3-9.
[36] *Id.*
[37] *Id.* at 32:7-12.
[38] Ohio Environmental Council Initial Brief at 17 ("The Ohio Environmental Council requests this Commission order a disallowance of costs and credit to customers"); Sierra Club Initial Brief at 16 ("The Commission should therefore disallow costs from Ohio customers' bills."); OCC Initial Brief at 34 ("PUCO should therefore disallow the full $105 million in above-market price coal plant subsidy charges.").

these same reasons are highlighted in the Company's Initial Brief, and have been identified by other EDU witnesses at hearing and beyond. Perhaps even more importantly, the Commission has previously acknowledged the limitations of an economic-only unit commitment strategy for a baseload coal-fired generation facility such as OVEC. For example, in the Commission's decision regarding the Company's prior OVEC-related audit, the Commission acknowledged the impracticality and harm that could come from an economic-only commitment of the OVEC units at all times. In that case, the Commission determined that a must-run commitment strategy (even as the only strategy employed for that audit period) was prudent, finding:

> [T]he main reason many coal plants consistently operate under a "must-run" strategy is that there are significant costs associated with starting up and shutting down the plants. Economically, it costs approximately $22,000 to startup a single unit (OVEC has 11 units). Further, it takes significant time to ramp up a unit to get it online. Starting and stopping a unit also results in substantial wear and tear and increases the risk of a unit breaking down.[39]

Likewise, in the underlying proceeding, these same considerations were discussed by many EDU witnesses, and acknowledged by the Auditor herself in the Audit Report.[40] For example, the Auditor recommended "that [Duke Energy Ohio] and the other members of the Operating Committee allow this flexibility [for a mix of economic and must-run commitment] on an ongoing basis. Ideally, the units would be committed based on economics all or most of the time, <u>but in the case of coal plants this can cause difficulties in managing staffing and fuel deliveries, and repeated start-up of coal plants can damage equipment</u>."[41]

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[39] PSR Opinion and Order at ¶ 58.

[40] *See, e.g.*, Swez Dir. Test. at 9:16-21 ("with respect to cycling costs, OVEC, as a coal-fired generating station, is not capable of instantaneous turning on and off like a light switch . . . [s]hutting off the units, turning on the units, and ramping up the units takes time with an approximate 11-hour unit startup and notification time per unit and comes with risks and significant costs . . . any commitment decision must factor in the cycling timing, risks, and costs"); *see also* Stegall Dir. Test. at 11 ("OVEC's units, as coal-fired generating units, are not capable of instantaneous startup and shutdown and, as wet-bottom coal units, are not designed to by cycled on and off frequently. In addition, shutting off a unit, starting a unit, and ramping a unit to a higher level of output come with risks and significant costs.").

[41] Audit Report at 10 (emphasis added).

The operational details associated with the OVEC units mean that increased unit cycling on a daily basis would be impractical and harmful to the units themselves in the long run. The constructs of the PJM energy market and OVEC's inherent design similarly limit the functionality of an economic-only commitment, as Intervenors insist must be utilized for OVEC's operation during the Audit period to be considered prudent. Intervenors do not account for the potential increased costs related to maintenance, capital replacements, and forced outages, were the OVEC units operated as they urge. These added costs, furthermore, would have been borne by the EDUs and other entities with an interest in OVEC during the Audit period, as the ICPA dictates that such costs would be passed on to OVEC interest holders, and therefore on to customers via the LGR Rider.

Moreover, some Intervenors contend that OVEC's use of economic commitment during certain portions of the Audit period, particularly, those associated with the start of the COVID-19 pandemic, shows that it is "physically possible to run the plants economically," and therefore the units should be committed as economic *at all times*.[42] Intervenors resort to this reasoning, when in prior audit proceedings, Intervenors pointed to the mixed commitment strategy in 2020 to demonstrate that a mixed strategy should be pursued over must-run.[43] However, the change in commitment status in 2020 does not mean that the OVEC units should have been committed economically for the entire Audit period; nor does it mean that the commitment strategy that was employed was imprudent. What it does mean is that, at Duke Energy Ohio's request, the OVEC Operating Committee appropriately authorized a temporary economic commitment strategy in response to market conditions observed during the early days of the COVID-19 pandemic.

[42] CUB-Ohio Initial Brief at 21; *see also* Seryak Dir. Test. (Public) at 21.
[43] *See* PSR Opinion and Order at 10 (finding OMAEG and Kroger "largely take issue with OVEC's ongoing commitment, with Duke's consent, to a "must-run" strategy that has repeatedly and predictably shown to be, according to OCC and OMAEG/Kroger, an uneconomic venture that ultimately harms ratepayers.").

As detailed by Company witness Swez and AEP Ohio witness Stegall, pandemic-related policies, coupled with mild weather, caused PJM energy prices to reach *unprecedented*, 70-year lows in 2020.[44] As demonstrated during the Audit period, it was therefore possible for OVEC to commit units as economic without associated risk of cycling, given that energy prices consistently dipped over an extended period of time, and were expected to remain as such. During the conditions present for the remainder of the audit year, however, the risk of cycling, impacts of coal contract liquidated damages, and other factors informed the decision to pursue a must-run offer.

3. Intervenor arguments in favor of disallowance of all costs above "market price" are not persuasive.

As discussed in Duke Energy Ohio's Initial Brief, there was overwhelming evidence that it was prudent to offer the OVEC units as must-run during the Audit period. And, as explained by the Auditor herself, and other testimony in this proceeding, the OVEC units were "designed to operate continuously" and offering them with an economic commitment "can cause difficulties in managing staffing and fuel delivery and repeated startup of coal plants can damage equipment."[45] In arguing that the use of must-run commitment *at all* during the Audit period was imprudent, OCC relies on cases from jurisdictions outside of Ohio. These cases, however, are inapposite and should not serve to overturn the Auditor's well-founded determinations.

For example, OCC relies upon a decision by the Michigan Public Service Commission (MPSC) that disallowed recovery of OVEC energy costs to the extent that those costs exceeded

[44] *See* Swez Dir. Test. at 25:1-5 ("According to statistic and projection data from the International Energy Agency (IEA), the shock to energy demand in 2020 was the largest in the last 70 years. Global energy demand in 2020 declined by 7.6% compared to 2019, a fall seven times greater than during the 2009 financial crisis."); *see also* Direct Testimony of AEP witness Jason Stegall (Stegall Dir. Test.) at 11 and 14.

[45] *See* Audit Report at 42; *see also* Tr. Vol. I at 361-62 (responding to questions regarding challenges with economic commitment for baseload generation units such as OVEC, the Auditor found that "in the case of coal plants, [economic offering] can cause difficulties in managing staffing and fuel delivery and repeated startup of coal plants can damage equipment").

PJM market rates.[46] This is not the first time that OCC has cited this MPSC proceeding in an OVEC-related audit proceeding, and its arguments should be rejected again here. The MPSC case involves a separate and distinct statutory scheme as compared to that at issue in this case. For example, the MPSC stated in the case cited by OCC that it had not previously approved the ICPA as a generation resource for inclusion in the utility's rates—a hugely distinguishable fact pattern from that set forth in the LGR statute. Additionally, the AEP affiliate at issue in the MPSC has a suite of generation assets, managed for the benefit of retail ratepayers, that it can use to serve retail load in that state.[47] That is certainly not the case for OVEC and Duke Energy Ohio in this state. The MPSC decision was also based upon an "inverse pricing rule," *i.e.*, the lowest price (market or actual cost) controls what recovery can be sought.[48] There is no comparable policy in the state of Ohio for many reasons that will not be elaborated here. However, in this proceeding the inverse pricing rule does not apply and would run counter to the rate design for the LGR, as established by the Ohio General Assembly. Additionally, it is important to note that the AEP affiliate in Michigan has a portfolio of generation assets to manage and use to serve retail load. This regime does not represent how the regulatory scheme in Ohio functions, and the Michigan case's rationale is apples to oranges when attempted to be compared to the Ohio regime. Finally, even given all of those constraints and regime differences, the MPSC still disallowed only a portion of the Michigan utilities' OVEC costs, not all of them. There is no basis for the Commission to rely on the MPSC decision in this audit proceeding.[49] The LGR statute does not include a market

[46] *See generally* OCC Initial Brief at 14-15 and 17-18 citing *In the Matter of the Application of Indiana Michigan Power Company for Approval to Implement a Power Supply Cost Recovery Plan for the 12 Months Ending December 31, 2021*, Case No. U-20804 at 19 (Mich. PSC) (Nov. 18, 2021) (Michigan Order).
[47] Michigan Order at 16.
[48] Michigan Order at 5-6, 17, 22.
[49] *In re Ohio Power Co.*, 2015-Ohio-2056 at ¶ 32 (finding that "the PUCO, as a creature of statute, has no authority to act beyond its statutory powers.").

rate cap, and specifically provides that the LGR Rider can be a charge or a credit to customers.[50] It would not be appropriate for the Commission to institute such a cap, as OCC suggests.

Likewise, CUB-Ohio argues that the Commission should "disallow costs above the market value of OVEC's energy and capacity in PJM."[51] It is unclear upon what CUB-Ohio bases its argument, aside from its clear preference that the LGR statute not exist. This is certainly not a topic up for debate or review in this audit proceeding, however. As has been made clear in this proceeding, the LGR statute does not establish a test as to what is or is not associated with current PJM market prices. The LGR statute, instead, requires the recovery of "prudently incurred costs," regardless of whether they are fully offset by market revenues.[52] The statute defines "prudently incurred costs" as costs "allocated pursuant to [the ICPA] . . . less any revenues 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."[53] This definition is not tied to a comparative market rate, but rather indicates that there could be times that "revenues exceed net costs" or do not do so. The LGR statute, which governs this entire process, does not leave room for CUB-Ohio's interpretation of what the statutory regime should be.

4. <u>It was not imprudent for Duke Energy Ohio to "avail" itself of available energy from OVEC during the Audit period.</u>

In their initial briefs, OMAEG and Kroger argue that the EDUs should not have "avail[ed] themselves of available energy from OVEC," arguing that the EDUs would have saved on variable costs if they had adopted this approach.[54] OMAEG and Kroger rely upon Section 4.03 of the ICPA

[50] R.C. 4928.01(A)(40).
[51] CUB-Ohio Initial Brief at 10.
[52] *See* R.C. 4928.148(A), (A)(1).
[53] R.C. 4928.01(A)(42).
[54] OMAEG Initial Brief at 66-67, Kroger Initial Brief at 14.

in making this argument, stating that it somehow provides an opportunity for Duke Energy Ohio or the other EDUs to simply refuse to accept the energy that OVEC produced and sold into the PJM markets during the audit period.[55] This argument is unsound for the reasons identified below.

First, this argument is counterintuitive to the LGR statute, which requires that an "electric distribution utility . . . bid all output from a legacy generation resource into the wholesale market."[56] Energy is unquestionably the main "output" from OVEC, and OVEC is a "legacy generation resource" under the statute.

Second, even if prescribed under the statute (and it is not), OMAEG and Kroger's concept does not account for the realities of the PJM capacity market for the 2020 Audit period. The auction for the 2020 audit occurred 12-24 months prior to 2020, and bids for all the EDUs were accepted in that timeframe. Once accepted, the bidder is obligated to offer its share of OVEC's generation into the PJM energy market during the corresponding 2020 time period. This is pursuant to PJM's business rules. Duke Energy Ohio would be required to revisit 2018-2019 decision making in order to even begin to unravel whether or not OMAEG and Kroger's concept should be applied. Because by the time the audit period arose, the Company had specific obligations to satisfy, it could not simply "un-avail" itself at that time.[57]

Third, OVEC's Operating Procedures would require a unilateral change by Duke Energy Ohio in order to adopt OMAEG and Kroger's recommendations. Under the Operating Procedures, OVEC's energy output was committed and dispatched in the PJM day-ahead and hourly energy markets by the OVEC Energy Scheduling Department.[58] According

[55] OMAEG Initial Brief at 60-62 and 66-67; Kroger Initial Brief at 14-15.
[56] R.C. 4928.148(B)
[57] Tr. Vol. V at 1094:7-15 (Crusey); Tr. Vol. V at 1215:13-1216:20 (Glick).
[58] Swez Dir. Test. at 7:7-12 ("OVEC itself determines the unit commitment in PJM. OVEC's commitment starts with the OVEC Energy Scheduling department that has an internal daily call every non-holiday weekday morning to review unit status and availability . . . OVEC then uses this information to formulate and submit the day-ahead unit offers into the PJM market."); *see also* Stegall Dir. Test. at 9-10.

to the Operating Procedures, the Energy Scheduling Department submits information to PJM for all OVEC units jointly.[59] OMAEG/Kroger does not explain how any EDU could have had its entitlement to OVEC energy bid differently than the other PJM Sponsors. Nor do they address whether or not there is any opportunity for an EDU to simply opt out of the OVEC energy scheduling protocol (there is not).

Fourth, even if Duke Energy Ohio, or another EDU, were able to decline its share of OVEC energy, this would mean that such EDU would not be able to realize substantial capacity revenue during the Audit Period, as, under the capacity construct, to bid into the PJM capacity auctions and receive revenue for capacity during the Audit Period, one must offer one's share of OVEC into PJM. Additionally, pursuant to the ICPA, Duke Energy Ohio would have been required to pay its share of all OVEC demand charges even if it declined its share of OVEC energy.[60] It would have been nonsensical for the Company to incur charges, while simultaneously foregoing revenues from sales of energy or capacity.

Finally, OMAEG and Kroger fail to address costs associated with Minimum Loading Events under the ICPA,[61] whereby the EDUs are required to pay costs incurred by OVEC if it suffers a Minimum Loading Event due to an EDU's failure to take its share of OVEC's "Total Minimum Generating Output" in any hour.[62] Such charges would be levied in addition to other non-energy charges, and the failure to accumulate any offsetting revenues from the sale of energy or capacity.

[59] Swez Dir. Test., Attachment JDS-1 at 5.
[60] Exhibit 1 to Direct Testimony of David Crusey (Crusey Dir. Test.) (ICPA) at §§ 8.04, 8.04(a) (imposing an "unconditional obligation" on each Sponsoring Company to pay "its specified portion of the Demand Charge under Section 5.03, the Transmission Charge under Section 5.04, and all other charges under Article 7 . . . whether or not any Available Power or Available Energy are accepted by any Sponsoring Company during such calendar month.").
[61] ICPA at § 5.05.
[62] *Id.*

For all of these reasons, OMAEG and Kroger's argument is impractical and counterproductive and should be rejected.

5. Comparisons by OCC between OVEC and a hypothetical merchant generator are red herrings.

In its initial brief, OCC seeks to compare OVEC to merchant generators, arguing that OVEC is not behaving similarly to merchant generators and that this difference establishes imprudence.[63] Such a comparison is certainly not the standard by which the underlying audit proceeding has been or should be conducted. And as the Auditor found, Duke Energy Ohio's management of its OVEC entitlement during the audit period was "consistent with good utility practice."[64] The comparison to merchant generators is discordant, and OCC's punches on this topic do not land as they believe they do.

To start, merchant generators have different priorities and management strategies that may be ineffective for the operation of regulated units. Setting aside these inherent differences, OCC's argument also fails to show that OVEC's energy dispatch strategy was actually out-of-step with other coal-fired generators in PJM. OCC presents no evidence from PJM at all, for example. It relies upon one study of generator commitments for its entire argument, and that study is not even from PJM, it is in the Midcontinent Independent System Operator (MISO) Independent System Operator.[65] Moreover, the study only addresses economic versus must-run commitments when a generator is offline and makes a day-ahead energy commitment in anticipation of coming online the next day—otherwise known as a start.[66] Intervenor criticism of unit commitment during the audit period does not focus on "starts," but instead generally disagrees with the commitment

[63] *See generally* OCC Initial Brief at 19-22.
[64] Audit Report at 9.
[65] OCC Initial Brief at 20.
[66] *Id.*

of OVEC *on the whole*, including all aspects of its strategy. Finally, this study cited by OCC does not even support its own argument. Instead, the study shows that it is appropriate and not at all uncommon that "regulated" generators, whose costs and revenues are reflected in retail rates for the benefit of customers, adopt different strategies than merchant generators, who are not as focused on long-term customer impacts.[67] As shown in the study, during the 2020 audit year, over a quarter of merchant generator starts and nearly sixty percent of regulated generator starts involved *must-run* commitments. This puts OVEC's commitment strategy for 2020 well within range for the norms discussed therein.

For all of the above reasons, OCC's comparison is not an apt one, and certainly does not justify overturning the Auditor's well-reasoned findings.

6. The Auditor found that Duke Energy Ohio's involvement and monitoring of plant commitment strategy for OVEC was prudent.

The Auditor examined OVEC's employment of a combination of economic and must-run commitment strategy during the 2020 Audit period and determined that the practice was not imprudent and that no disallowances were warranted.[68] The Auditor also discussed at length Duke Energy Ohio's efforts on the Operating Committee to ensure that commitment practices and strategies optimized OVEC's capabilities and outcomes. These efforts were detailed in Section 5.3 of the Audit Report and are further highlighted in the Company's Initial Brief.[69] Based on the Auditor's observations and Duke Energy Ohio's Operating Committee involvement, the Auditor ultimately found that Duke Energy Ohio's efforts to manage and to modify OVEC's must-run strategy during the Audit period were prudent.

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[67] *Id.*
[68] Audit Report at 54.
[69] Initial Brief of Duke Energy Ohio at 30.

Intervenors make it clear that their ultimate goal in this litigation is to challenge, not the discrete findings of the Audit Report, or even the commitment status employed, but the General Assembly's decision to enact the statute that created the LGR Rider. None of the arguments or "support" offered by Intervenors rise to the level of detailed review performed by the Auditor in the Audit Report. Moreover, none of these supporting citations are sufficient for the Commission to rely on in upending the Audit Report's findings. Indeed, Intervenors cherry pick citations and details in an attempt to manufacture a set of circumstances where Duke Energy Ohio can be shown to have failed to properly manage its interest in OVEC. While these arguments fundamentally misunderstand (or just ignore) the terms of the ICPA, they also wrongly presume that Duke Energy Ohio can unilaterally decide to place the OVEC units on indefinite shutdown status at its own will. As found in the Audit Report, Duke Energy Ohio has properly managed its interest in OVEC to the best of its ability, and nothing raised by the Intervenors at this time has refuted that finding.

D. The Commission should not disallow costs associated with "advance debt repayment" or "advance post-retirement benefit payments;" both of these payments are authorized by the ICPA and their payment was not imprudent or unreasonable.

1. Advance Debt Repayment.

In its post-hearing brief, OCC raises, for the first time throughout the pendency of this entire case, the question of "advance debt repayment."[70] OCC argues that some unspecified amount of prepaid debt should be disallowed in the underlying docket, as well as credited to ratepayers over presumably any period of time in which it was collected prior to the audit period in 2020. Because this issue was not raised by OCC in comments or testimony, was not actually mentioned in the Audit Report, and was not otherwise addressed in this case, the record in support

[70] OCC Initial Brief at 23-24.

of OCC's argument is nonexistent.[71] Based upon the information that can be reviewed regarding this topic, it is clear that OCC's arguments are meritless.

First, Component A of the ICPA permits debt prepayments and, thus, the charges are properly billed under the ICPA and incurred by Duke Energy Ohio and the other EDUs in 2020.[72] Component A charges, pursuant to the ICPA, may include "the interest component of any purchase price, interest, rental or other payment under an installment sale, loan, lease or similar agreement relating to the purchase, lease or acquisition by Corporation of additional facilities and replacements (whether or not such interest or other amounts have come due or are actually payable during such Month)[.]"[73] Charges associated with advance debt payments are thus authorized by the ICPA, and indeed were a charge to Duke Energy Ohio in 2020. Likewise, there is no basis to conclude that this payment of the debt service charge was an unreasonable or imprudent action for purposes of R.C. 4928.148(A).

Second, a benefit was in fact conveyed for this payment in the form of lower debt costs. This is demonstrated by OCC's own witness Stanton. Ms. Stanton included as part of her testimony the Fitch credit rating report that confirmed OVEC's credit rating, demonstrating a stable outlook.[74] This report *specifically* cited the debt service reserve of $122 million as a positive liquidity factor.[75] And in a separate docket filing made by OVEC, the Commission has already reviewed and approved OVEC's debt refinancing for the period covering 2020.[76] There

[71] The Company notes that OCC's citation to the Audit Report regarding this topic does not actually mention the concepts raised by OCC in its brief, further demonstrating that OCC is introducing novel concepts for the first time post-hearing and on brief.
[72] For the purposes of R.C. 4928.148, these are "costs" incurred by the EDUs regarding a "legacy resource."
[73] ICPA at § 5.03(a).
[74] Direct Testimony of Elizabeth Stanton (Dir. Test. Stanton), Attachment EAS-2.
[75] Dir. Test. Stanton at 56-58.; *see also* Tr. Vol. III at 623 (demonstrating that Dr. Stanton agreed that Fitch considered the debt reserve as favorable to OVEC's credit rating).
[76] *See In the Matter of the Application of Ohio Valley Electric Corporation for Authority to Issue Long-Term Notes and Enter into Interest Rate Management Agreements*, Case No. 19-763-EL-AIS.

is no basis to conclude that either OVEC or the EDUs did anything imprudent or unreasonable regarding debt payments under Component A. OVEC's reduction in debt costs and development of a reserve is prudent and ensures that costs are paid timely. Moreover, the payment lowered ongoing expense, thus making it reasonable, and as OCC witness Stanton's own cited materials demonstrate, beneficial for OVEC and therefore for customers.

Third, regardless of whether reserve funds "could be" used for something, the advance debt charge was not used to pay debt "in the event of premature retirement" and therefore does not violate R.C. 4928.01(A)(42), as OCC claims in its initial brief.[77] As demonstrated by OVEC's 2020 Annual Report, entered into evidence by OCC, an offset in the form of a regulatory liability was entered on OVEC's books, and will therefore be credited to customer bills on a long-term basis.[78] (OCC Ex. 7 at 11.) The debt reserve is used to lower carrying costs billed to customers and was recorded during the audit period.

For all of these reasons, OCC's arguments on this topic are meritless.

2. Advance Payment of Post-Retirement Benefits.

Similar to OCC's claims related to a prepaid debt reserve, OCC raises the issue of advance payment of post-retirement benefits also for the first time on brief—despite the fact that the underlying case has been ongoing for three years. OCC argues that the Commission should require the EDUs to credit customers the advance postretirement benefit payments collected during 2020 and any amount otherwise collected to date.[79] OCC offered no witnesses regarding this topic and did not otherwise present record evidence in support of its underdeveloped arguments. The argument also lacks merit as Component E of the ICPA permits payment of postretirement

[77] OCC Initial Brief at 26.
[78] OCC Exhibit 7 (OVEC 2020 Annual Report) at 11.
[79] OCC Initial Brief at 27-29.

benefit funding costs and, thus, the charges are properly billed under the ICPA and incurred by the EDUs in 2020, pursuant to R.C. 4928.148. Per Component E, "postretirement benefits other than pensions attributable to the employment and employee service of active employees, retirees, or other employees, including without limitation any premiums due or expected to become due[.]"[80]

OCC bases its argument again only upon its own reading of OVEC's 2020 Annual Report, that indicates a balance was $76.1 million in 2019 and only $64.4 million at the end of 2020.[81] As OCC itself states, and as the Annual Report sets forth, "The regulatory liability for postretirement benefits recorded at December 31, 2020 and 2019, represents amounts collected in historical billings . . . including a termination payment from the DOE in 2003 for unbilled postretirement benefit costs[.]"[82] Pursuant to this narrative explanation, it is clear at the Department of Energy provided postretirement funding long ago, and those reserves are drawn over time. There is no reason to find these charges imprudent. They were properly incurred pursuant to the ICPA and are therefore properly included in the 2020 LGR Rider.

These collective commitments represent the "contractual entitlement" contemplated by the ICPA. Failure to make these payments would constitute a contractual violation by Duke Energy Ohio. It is uncontested that debt, interest, and return charges are properly included in payments made by the Company in 2020, as they are certainly part of the obligations flowing to Duke Energy Ohio from the ICPA.

[80] ICPA) at § 5.03(e).
[81] OVEC 2020 Annual Report at 10.
[82] *Id.*

E. The proposed early retirement of the OVEC units, as discussed and advocated by certain Intervenors, is not within the scope of the underlying Audit proceeding.

Where other Intervenors are more covert about their ultimate goal, in its initial brief CUB-Ohio expresses its desire to force the retirement of OVEC's facilities. CUB-Ohio suggests that the Commission should put the EDUs "on notice that it will disallow in future Riders [ ] any environmental capital costs incurred without robust forward-going analysis to justify the investment over retirement and replacement with alternatives."[83] Of course the "alternatives" advocated by CUB-Ohio would not be the OVEC units, but some other generation resource more aligned with CUB-Ohio's interests. And the concept of disallowing any future spending on "environmental capital costs" would certainly result in the retirement of the OVEC units, as those costs are required by law for the units to operate and maintain continued environmental compliance. There is no support in the record for this request by CUB-Ohio and it should be rejected as it lacks analysis or support from the administrative record in this case. The question of OVEC's retirement or non-retirement is not within the scope of this proceeding, and moreover, Duke Energy Ohio has no control, other than its one Operating Committee vote, regarding when, where, or if OVEC were to retire its facilities. CUB-Ohio cites no justification for its recommendation, and the Commission cannot rely upon the passing opinion of CUB-Ohio that they believe the plant retirements are necessary. This recommendation also amounts to an advisory opinion, as it seeks establishment of a course of action for future costs not yet incurred or passed through the LGR Rider.

For all of the reasons above, CUB-Ohio's recommendation regarding forced retirement of OVEC should be disregarded.

[83] CUB-Ohio Initial Brief at 34-35.

F. Capital Costs incurred by OVEC during the Audit period were prudent, and a capital cost cap would be unreasonable.

The various environmental group intervenors in this case argue that environmental capital costs should be subject to disallowance during the Audit period, and that on a going-forward basis those costs should be capped entirely.[84] CUB-Ohio appears to rely upon OCC witness Stanton's testimony regarding OVEC's compliance with U.S. EPA's Coal Combustion Residual Rule (CCR Rule) and Effluent Limitations Guidelines in making this argument.[85] AEP Ohio dealt with this argument in its Initial Brief, and dispatched with this claim, demonstrating that OCC's witness made an error in her assessment of this topic, and that OVEC has completed required demonstrations for CCR compliance and has done so ahead of the required deadlines.[86]

CUB-Ohio otherwise does not dispute that the investments are necessary to comply with US EPA rules or argue that the amount spent to comply was somehow flawed.[87] CUB-Ohio simply again repeats its argument that OVEC should retire, shut down, etc. This argument is covered above, and the reasoning as to why it is not a part of this case, not in the control of Duke Energy Ohio, and not proper for scope consideration, still stands.[88]

Finally, Sierra Club makes various statements about OVEC's capital expenditures and argues that a cap on capital spending should be implemented by the Commission.[89] These claims are likewise without merit. Sierra Club does not take issue with any particular capital project but argues that the OVEC units should have shut down entirely.[90] Again, these attacks, and those like them made across this docket, are simply an attack on OVEC's continued existence, and the

[84] CUB-Ohio Initial Brief at 32; Sierra Club Initial Brief at 6-10.
[85] Stanton Dir. Test. at 24.
[86] Stegall Dir. Test. at 19:17-20:4 and 20:8-11.7
[87] CUB-Ohio Initial Brief at 32-34.
[88] *See supra* Section E.
[89] Initial Brief of Sierra Club at 6-10.
[90] *Id.* at 6-7.

establishment by the General Assembly of Rider LGR. Neither of these questions are at issue in this case. Regarding a capital expenditure cap of some kind, the Commission has previously dispatched with this concept in the decision on Duke Energy Ohio's prior PSR audit, where the Commission noted that the Auditor had recommended a cap, but did not take up or approve this recommendation in its findings.[91] The Commission should do the same here.

G. Fuel costs incurred during the Audit period were prudently incurred and properly included in the LGR Rider.

A host of Intervenors grab on to the Auditor's review of coal purchasing decisions for OVEC in 2020 to demonstrate imprudence.[92] But the Auditor herself thoroughly reviewed the fuel pricing and found that no disallowance was warranted.[93] In light of her thorough and well-reasoned findings, the Auditor recommended that OVEC re-examine its process for coal forecasting and conduct the forecast more frequently to reduce discrepancies between actual and estimated coal burns.[94] The Auditor did not make a finding of imprudence, and though OMAEG/Kroger states that Duke Energy Ohio should be penalized for not performing a fuel procurement audit[95] (as if Duke Energy Ohio alone could even undertake such an audit without the agreement of all parties with an interest in OVEC), the Auditor recommended that "OVEC [not Duke Energy Ohio, with its 9% OVEC interest] conduct an internal audit" to evaluate and improve coal procurement management.[96] For the below reasons, Intervenor arguments on

[91] In the Company's prior PSR Audit, the Commission noted that the Auditor had recommended such a cap, however the Commission did not adopt this recommendation or take it up for consideration. *See* PSR Opinion and Order at ¶ 22.
[92] OMAEG Initial Brief at 57-60, 65-66; CUB-Ohio Initial Brief at 29-32; Kroger Initial Brief at 12-13.
[93] *See generally* Audit Report at Section 6 (Fuel and Variable Costs).
[94] Audit Report at 71.
[95] As noted above, OMAEG/Kroger also claims that the Auditor should have undertaken its own fuel procurement audit as part of the audit process.
[96] Audit Report at 71.

this topic are meritless. Fuel procurement was thoroughly reviewed by the Auditor and only recommendations were made (not disallowances).

To start, Intervenors challenge OVEC's coal costs during the Audit period on the grounds that one long-term coal contract was priced higher than market spot prices during the audit period.[97] The Commission, however, has already rejected functionally the same argument in the Company's prior PSR Rider decision, where it found that differences in pricing were in fact "attributable to, among other things, higher quality coal and existing contractual obligations with suppliers."[98] Addressing the same long-term coal contract, the Commission concluded that OVEC's "coal procurement practices were sound."[99] Intervenors relitigate the same arguments about the same contract in the underlying proceeding, and the Commission should reject these arguments on the same grounds.

Even if this issue had not been previously addressed by the Commission, it is also true that the long-term coal contract in question was aligned with market rates and prudent at the time it was entered into, and this is in line with the function of a prudence analysis. Regarding actual 2020 decisions made regarding coal contracts, there were "no RFP solicitations issued for coal supplies" during the Audit period, as acknowledged in the Audit Report.[100] And even if the issue of the long-term coal contract were presented for review in this audit year, there is no basis to fault OVEC for its decision to enter into the long-term, market-based, RFP-initiated long-term contract at the time it did so. Arguments by the Intervenors that Duke Energy Ohio or other EDUs should have single handedly voided these contracts are likewise without merit and should be ignored by the Commission, as should OMAEG witness Seryak's argument that the LGR statute's passage could

[97] OMAEG Initial Brief at 57-60, 65-66; CUB-Ohio Initial Brief at 29-32; Kroger Initial Brief at 12-13.
[98] PSR Opinion and Order at ¶ 61.
[99] *Id.*
[100] Audit Report at 56.

have supported some sort of contract reopener to review all coal contracts in place at that time, pursuant to a change of law provision in at least one long-term contract.[101]

These arguments are red herrings. The Auditor thoroughly reviewed and made recommendations regarding fuel procurement practices of OVEC. She did not recommend disallowance, and there is no reason to adopt the Intervenors' arguments on this topic.

H. Component D is not a return on investment, nor is its recovery precluded by the LGR Statute.

Various Intervenors argue that Component D of the ICPA demand charge should be excluded from recovery pursuant to Rider LGR as it represents a return on investment.[102] As detailed in Duke Energy Ohio's Initial Brief, incorporated by reference herein, Component D is not a return on investment, and did not function as such during the Audit period.[103] As with the other components of the ICPA demand charge, Component D is a charge that is used to cover OVEC's costs of operating on a fixed basis.[104]

I. As identified in the Audit Report and outlined in its Initial Brief, Duke Energy Ohio properly managed its interests in OVEC to the best of its ability.

As was highlighted in Duke Energy Ohio's Initial Brief, and further expanded upon herein, Duke Energy Ohio's actions regarding matters within its control during the audit period were in fact prudent. Those actions should be judged for prudence based on the facts known at the time – based on evidence of record and not speculation. As highlighted in Duke Energy Ohio's Initial

[101] Seryak Dir. Test. (CONF) at 24-25.
[102] OCC Initial Brief at 22-23.
[103] Duke Energy Ohio Initial Brief at 39-42.
[104] Tr. Vol. III at 790:13-17 (Cross Examination of John Swez: "A: [OVEC] use it to pay operating costs, and therefore it's not being used as a dividend or some sort of return on common equity or anything like that.); *see also* Stegall Dir. Test. at 21:3-6 ("The amounts that AEP Ohio and other Sponsoring Companies pay to OVEC under Component D are used by OVEC to pay its various costs of operation . . . ."). Stegall Dir. Test. at 21:3-6 ("The amounts that AEP Ohio and other Sponsoring Companies pay to OVEC under Component D are used by OVEC to pay its various costs of operation and are not returned to its shareholders, further evidenced by the fact that OVEC has not issued dividends since 2013.").

Brief, and as this Commission knows, OVEC is a separate corporation and Duke Energy Ohio is one of many co-sponsoring companies under the ICPA. Under the ICPA, Duke Energy Ohio has a nine percent interest in OVEC, meaning that Duke Energy Ohio is entitled to nine percent of OVEC's energy and capacity and is responsible for the same nine-percent share of its costs. Duke Energy Ohio does not operate OVEC, and its personnel do not participate in OVEC's day-to-day operational decisions. OVEC's commitment strategy, fuel procurement practices, and general management during the audit period were reasonable; however, even if Duke Energy Ohio had wanted to change any of these aspects of OVEC during the audit period, it could not have done so unilaterally, as has been demonstrated. And the purpose of the Audit was to review the prudency of Duke Energy Ohio's actions during the 2020 Audit period.[105] This prudency standard requires focusing on how Duke Energy Ohio managed *its own* interest in OVEC during the audit period.

This has been stated many times in this litigation, but based upon Intervenor arguments on brief, it bears repeating: OVEC manages and operates the OVEC facilities; Duke Energy Ohio does not operate either the OVEC generating stations or its transmission facilities and Duke Energy Ohio personnel do not participate in OVEC's day-to-day operational decisions.[106] Duke Energy Ohio has one representative and a nine-percent "vote" on matters that are brought to the Board of Directors.[107] As testified to by Mr. Swez, Mr. Swez is Duke Energy Ohio's lone representative on the OVEC Operating Committee.[108] Certain decisions, including those regarding procedures for scheduling delivery of available energy, and recommendations as to scheduling, operating, testing and maintenance procedures, and other related matters, are delegated by the

[105] RFP Entry at 1.
[106] Swez Dir. Test. at 5.
[107] *See* ICPA.
[108] Swez Dir. Test. at 2.

Board of Directors to the Operating Committee.[109] The procedures for the scheduling of available energy are set by the Operating Committee. Again, Duke Energy Ohio has only one vote on this committee and, pursuant to Section 9.05 of the ICPA, "[t]he decisions of the Operating Committee, including the adoption or modification of any procedure by the Operating Committee pursuant to this Section 9.04, must receive the affirmative vote of at least two-thirds of the members of the Operating Committee present at any meeting."[110] The unanimous approval of the Operating Committee (excluding OVEC's representative) is required to change the commitment status and other key determinations.[111] Neither Duke Energy Ohio, nor any other OVEC sponsor, makes any unit offers to PJM for the OVEC units.[112]

However, as the LEI Audit Report explains, Duke Energy Ohio does monitor OVEC's offers and, at times, requests a change, as was done during the spring of 2020 due to lower energy prices as a result of the COVID-19 pandemic and its effect on energy demand.[113] Duke Energy Ohio is actively engaged in the management of its own entitlement percentage, actively participates in various committees, and may make recommendations to the OVEC personnel who are responsible for day-to-day decisions with the goal of increasing the value of OVEC for Duke Energy Ohio's customers.[114] Additionally, Duke Energy Ohio, outside of the OVEC Operating Committee, has discussions with OVEC staff on an as-needed basis, as was also demonstrated during the Audit period.[115]

Given the structure of the OVEC relationship, the Company's influence in "all actions" is limited to its nine-percent interest, and recommendations that it can make to the Operating

[109] *Id.* at 5.
[110] ICPA § 9.05.
[111] Swez Dir. Test. at 12.
[112] *Id.* at 7.
[113] Audit report at 44-45.
[114] *Id.*
[115] *Id.*

Committee based upon the Company's management of its own interests.[116] This is the lens through which the Company's actions in the 2020 Audit period should be evaluated, and the consideration of actions over which it has little or no control (*e.g.*, day-to day operations, fuel contracts, inventory targets, etc.) should not be, and is not, within the Audit scope.

The Audit Report confirmed that Duke Energy Ohio is actively engaged in the management of its entitlement, actively participates in various committees, and periodically makes recommendations to the OVEC personnel who are responsible for day-to-day decisions that are aimed at increasing the value of OVEC to customers.[117] LEI reviewed the Company's processes, procedures, and oversight and found they were consistent with good utility practice.[118] Intervenor arguments to the contrary are without merit and are not based in the reality of the relationship between OVEC and Duke Energy Ohio, as dictated by the ICPA.

III. INTERVENOR APPEALS OF EVIDENTIARY RULINGS AT HEARING ARE WITHOUT MERIT

Pursuant to O.A.C. 4901-1-15(F), "[a]ny party that is adversely affected by a ruling issued [in the course of a formal proceeding before the Commission] or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief[.]" Moreover, Rule 4901-1-34 authorizes an attorney examiner to "reopen a proceeding at any time prior to the issuance of a final order."[119] However, the party moving to reopen the proceeding must show "good cause" for doing so.[120] Specifically,

[116] *Id.*
[117] *Id.* at 10.
[118] *Id.* at 9.
[119] Ohio Adm. Code 4901-1-34(A).
[120] *Id.*

if the movant seeks to reopen the proceeding to present "additional evidence" that "could not, with reasonable diligence, have been presented earlier in the proceeding," the movant must "specifically describe the nature and purpose of [the] evidence" sought to be introduced.[121] The Commission has repeatedly denied motions to reopen where the evidence or arguments the movant seeks to raise are irrelevant to the issues before the Commission in the proceeding.[122] The Commission should decline to overturn the Attorney Examiners' reasoned evidentiary rulings, as argued by Intervenors in their initial briefs. The Attorney Examiners provided thorough reasoning for their evidentiary rulings, were fully aware of and had reviewed briefing and arguments regarding the same, and were more than generous in allowing the Intervenors broad latitude in their cross examination and presentation of *relevant* evidence during the extensive hearing proceedings.

Various parties, including OMAEG and OCC, included in their Initial Briefs many evidentiary rulings by the Attorney Examiner in the underlying hearing that they request be reconsidered and reversed by the Commission. For example, OMAEG has already attempted to certify an interlocutory appeal on the same evidentiary rulings it raises in its Initial Brief. For the reasons summarized below, the Attorney Examiners' evidentiary findings throughout the weeklong hearing were proper, well-supported, excluded only irrelevant, prejudicial evidence, and should not be overturned.

[121] Ohio Adm. Code 4901-1-34(B).

[122] *See, e.g.*, *In the Matter of the Commission's Consideration of Matters Related to the Stipulation Approved in Recent Cases Involving The Cleveland Electric Illuminating Co. and The Toledo Edison Co*., Case No. 89-498-EL-COI, Opinion and Order, 1991 Ohio PUC LEXIS 106, *19-20 (Jan. 24, 1991) (denying a motion to reopen where the movant's "arguments are not relevant to this proceeding"); *see also In the Matter of the Joint Application of SBC Communications Inc. and AT&T Corporation for Consent and Approval of a Change of Control*, Case No. 05-269-TPACO, Entry ¶ 3 (Oct. 12, 2005) (denying a motion to reopen to present new survey evidence, where the movant "failed to establish a nexus between the survey and the Commission's consideration in this proceeding").

A. The Attorney Examiner's Evidentiary Findings Regarding OMAEG witness Seryak were Proper, Well-Supported, and Should Not Be Overturned.

On October 30, 2023, the EDUs filed a joint motion to strike certain portions of the testimony of OMAEG witness Seryak. In their Motion, the EDUs argued that "Mr. Seryak's prefiled testimony attempts to offer opinions beyond the scope of this purpose, including commentary regarding the House Bill 6 (H.B. 6) investigations and previous Commission decisions that relate to charges collected by different rider mechanisms than the subject of this proceeding: 2020 net costs recovered through the Legacy Generation Rider (LGR)."[123] The EDUs argued, and the Attorney Examiners found, that "Mr. Seryak's testimony includes topics that are not relevant topics for testimony in this proceeding" and that "[b]oth subjects fall well outside the scope of the audit period, and each has nothing to do with the Companies' actions in regard to their LGR ownership interest for the 2020 calendar year."[124]

In its Initial Brief, like its Interlocutory Appeal, OMAEG argues that, despite a six-day hearing, two full days of cross examination of the Auditor, as well as unlimited access to various EDU witnesses in order to make its case, "the Attorney Examiners excluded no fewer than eleven pieces of relevant and material evidence offered by the intervenors" resulting in prejudice to OMAEG.[125] After filing an interlocutory appeal on nearly all of the same topics, OMAEG dedicates approximately twenty pages of its Initial Brief to perceived evidentiary wrongdoing on the part of the Attorney Examiners. Ultimately, OMAEG seeks reversal of various rulings made by the Attorney Examiners throughout the hearing. Contrary to its assertions—OMAEG's participation in the underlying proceeding has been extensive, exhaustive, and voluminous, and

[123] Joint Motion to Strike Specified Intervenor Testimony at 4.
[124] *Id.*
[125] OMAEG Initial Brief at 14.

the Attorney Examiners rulings fair and concise. As detailed below, on the merits of the evidentiary decisions made at hearing, the Attorney Examiners correctly found and properly supported their decisions regarding the irrelevant and inflammatory portions of Mr. Seryak's testimony, as well as the other evidentiary items identified for Commission reconsideration by OMAEG.

1. OMAEG's Complaints Regarding the Procedural Aspects of the Attorney Examiners' Decision, and this Proceeding, are Without Merit.

At the outset, in its brief OMAEG raises a number of complaints about the procedural aspects of the hearing, and the specific timing and consideration of the Attorney Examiners' decision on the EDUs' Motion to Strike Mr. Seryak's testimony. For example, on pages 14 and 15 of its Initial Brief, OMAEG states that "on the final day of the hearing, and over the objections of OMAEG and the other intervenors, the Attorney Examiners struck large portions of [OMAEG witness Seryak's] testimony that directly contradicted the Auditor's and Sponsoring Companies' witnesses' testimonies, and that was filed in response to those testimonies . . . [t]he Attorney Examiners' actions on the last date of hearing significantly altered the filed testimony that rebutted arguments to the contrary . . . eliminating all opportunities to supplement the record with different evidence or by further attempts to rebut prior witnesses' testimony on cross-examination." OMAEG states that the "Attorney Examiners chose to alter the record on the last day of hearing even though the testimony had been filed months prior . . . even though the Sponsoring Companies filed a motion to strike the testimony prior to the start of the hearing . . . [d]elaying the ruling that resulted in a significant reduction in record evidence."[126]

This argument is without merit and strains credibility. To start, it was clearly stated by the

[126] OMAEG Initial Brief at 16.

Attorney Examiners at the initiation of the hearing on October 31, 2023, that motions to strike, pre-filed or otherwise, would be addressed upon each witness taking the stand.[127] OMAEG made no attempt at that time to argue that they preferred to discuss the *already pending* Motion to Strike Seryak's testimony—in fact, they did not respond to the plan for handling motions to strike at all.[128] OMAEG was instead silent on the topic, and proceeded to offer (clearly pre-written but not pre-filed) motions to strike for every EDU witness thereafter, and deal with each motion as that witness took the stand. Not only did OMAEG not oppose the Attorney Examiners approach to hearing motions to strike, OMAEG insisted that Mr. Seryak was *unavailable* during the first week of the hearing, choosing instead a date certain for Mr. Seryak on the very last day of hearing, knowing already at that time that motions to strike would be considered on a witness-by-witness basis, and that one was pending as it relates to Mr. Seryak. For OMAEG to now argue that the Attorney Examiners had a surreptitious motive to thwart the administrative record at the hearing by ruling upon the pending Motion to Strike Seryak's testimony on the *date upon which he appeared* simply does not align with the reality of the proceeding. It is meant to sensationalize the routine process that was followed at the hearing, and in nearly all hearings before the Commission.

Likewise, OMAEG agreed with OCC and the other Intervenors to have witness Seryak be the last witness in the weeklong hearing proceeding, and indeed did not make Mr. Seryak available for cross examination at all until the very last day of hearing, as a date certain witness due to his own travel schedule. OMAEG knew its witness would appear last (as was its preference) and already had the motion regarding Mr. Seryak's testimony in hand for seven days at the time

[127] Tr. Vol. I at 9:2-7 (statement by the Attorney Examiner, without objection or response by OMAEG, that "[i]n response to some conversations that we had before we went on the record this morning, the Bench does observe that we have had a couple motions to strike various witnesses' prefiled testimony filed in the docket. Consistent with other proceedings, we will take those up as the witness takes the stand.").
[128] *Id.*

Mr. Seryak finally did take the stand. Yet, on brief OMAEG argues that the Attorney Examiners "delay[ed] the ruling that resulted in a significant reduction in record evidence[.]"[129] However, the seven days afforded OMAEG to respond to the EDUs' arguments was more than enough time to prepare its opposition, and more than most parties ever receive.[130] Contrast this with OMAEG's oral motion to strike Duke Energy Ohio's testimony on behalf of Mr. Swez, which was argued by OMAEG, not in a pre-filed manner, but by OMAEG reading an equivalently detailed motion orally into the record and forcing counsel to respond on the spot.[131] No responding parties complained about that fact or argued procedural impropriety, however. Moreover, OMAEG could have easily filed a written response for the Attorney Examiners' consideration to the motion to strike Mr. Seryak's testimony at any point in the week between October 30th and November 6th. In fact, as mentioned above, OMAEG did read into the record a lengthy pre-written response at the time it was called upon to respond to the Motion to Strike Seryak's testimony.[132] OMAEG declining to file a formal written response and then claiming some sort of prejudice as a result of timing of consideration of the EDUs' Motion to Strike is a baffling approach.

The timing associated with the EDUs' Motion to Strike did not prejudice OMAEG, as alleged in their Initial Brief. On the contrary, it is a well-established practice for Attorney Examiners to decide on motions to strike testimony through oral rulings at the time the witness appears at the hearing. If anything, OMAEG benefitted from having an entire week to craft its

[129] OMAEG Initial Brief at 16.
[130] As an example, in the 2019 Duke Energy Ohio PSR Audit, Case No. 20-167-EL-RDR, Duke Energy Ohio filed a similar Motion to Strike that covered portions of Mr. Seryak's pre-filed testimony in that case, and did so on the day before the hearing, May 24, 2022. *See* Duke Energy Ohio, Inc.'s Motion to Strike Specific Intervenor Pre-Filed Testimony and Memorandum in Support (May 24, 2022). In that instance, OMAEG filed a written, 34-page memorandum contra Duke Energy Ohio's Motion to Strike on May 27, 2022, just three days later. OMAEG had more than twice that amount of time to file a written response in this case but chose not to.
[131] *See* Tr. Vol. III at 633-655, covering argument on just one of OMAEG's motions to strike Mr. Swez's testimony.
[132] Tr. Vol. IV at 1300:6-1308:22 ("Yes, your Honor, I would like to respond to the 12-page motion that was filed [seven days ago at that point] orally, since we have not had an opportunity to respond in writing.")

arguments in response to the pre-filed motion to strike, a benefit no EDU witnesses were afforded by OMAEG or others. OMAEG has participated in a huge number of proceedings before the Commission and should know that the practice of considering motions to strike as they arise and by witness is commonplace and not by any means prejudicial. These arguments are without merit.

2. The Attorney Examiners properly excluded irrelevant, prejudicial testimony from OMAEG witness Seryak's testimony at the evidentiary hearing.

As discussed above, prior to the start of the evidentiary hearing, the EDUs moved to strike certain irrelevant, prejudicial testimony from OMAEG witness Seryak. As detailed in the EDUs' Motion to Strike certain portions of Seryak's testimony, Mr. Seryak's pre-filed direct testimony attempted to offer opinions regarding both the enactment of and investigations regarding House Bill (H.B.) 6 as well as previous Commission decisions regarding charges collected by different rider mechanisms than those which are the subject of this proceeding. The Attorney Examiners agreed, and found such testimony outside the scope, irrelevant, and prejudicial. This finding was consistent with other rulings that had already taken place in the underlying case and cases prior, and well within the Attorney Examiners' duties and responsibilities during the hearing.

Through its Initial Brief, OMAEG fails to demonstrate prejudice or error sufficient to justify overturning the Attorney Examiner's reasoned findings in the underlying matter. The Attorney Examiners are tasked at hearing with determining what information will be relevant, useful, or prejudicial to the Commission's decision in this case, and to the record. Moreover, the striking of Mr. Seryak's testimony was measured, pointed, and related only to testimony well outside the parameters of the objective of the underlying audit proceeding—the population of 2020 Rider LGR costs by the EDUs. This ruling is not a departure from past Commission precedent and aligns with other scope rulings that took place during the hearing in this matter. The

Attorney Examiner's evidentiary findings as it relates to Mr. Seryak's testimony were proper and well-supported and should not be overturned.

a. OMAEG was afforded vigorous hearing and proceeding participation, even without Mr. Seryak's irrelevant, inflammatory testimony.

As all parties present at the hearing can attest, and as the hearing transcript volumes demonstrate, OMAEG was granted wide latitude to cross examine the Auditor for nearly a dozen hours and all EDU witnesses for as long as it preferred. And OMAEG made its own motions to strike (orally) for nearly every EDU witness, one of which covered all of Company witness Swez's pre-filed direct testimony – in total. OMAEG's participation in the underlying docket can only be described as maximum. Additionally, Mr. Seryak's testimony was not stricken in full. Far from it. Mr. Seryak was permitted to testify on all *relevant* portions of his testimony, as defined by the Attorney Examiners in their reasoned ruling. This includes Mr. Seryak's arguments related to the ICPA and its relation to the LGR statute, the commitment status of the OVEC plants during the audit period, fuel costs during the audit period, and the like. OMAEG retained full ability to address the issues *germane to the underlying case*.

The Attorney Examiners' rulings regarding Mr. Seryak's testimony are consistent with rulings in the underlying case, as well as past precedent in prior dockets considering OVEC-related audits. For example, regarding testimony offered by OCC witness Perez in the underlying matter, as further discussed below, the Attorney Examiners also struck direct testimony during the course of the hearing from Mr. Perez regarding references to irrelevant emails, communications, and the audit report from AEP Ohio's PPA Rider, Case No. 18-1004-EL-RDR, holding that such testimony was beyond the scope of the proceeding. Likewise, by ruling in partial favor of a motion to quash a subpoena by OCC in the underlying case, the Attorney Examiner partially quashed the subpoena,

finding that "this proceeding is limited to reviewing the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019."[133]

Moreover, per past precedent, in the 2019 audit of Duke Energy Ohio's Rider PSR, the Commission upheld a similar decision by Attorney Examiner, striking certain testimony that related to "a different rider, and a different EDU," AEP Ohio's PPA Audit.[134] The Commission determined as follows: "We find that the attorney examiner properly granted the motions to strike in both instances . . . We agree with the attorney examiner's findings that the draft audit report [in AEP Ohio's PPA Audit], and [OCC's expert's] testimony related to that report, lack relevance in this proceeding . . . [a]s explained by the attorney examiner, the purpose of this proceeding is not to relitigate another EDU's rider.[135] Given the scope of limiting rulings in this docket and others, the Attorney Examiners' rulings regarding Mr. Seryak's testimony were consistent with the hearing itself, and past scope rulings.

The Attorney Examiners in this case partially granted the EDUs' Motion to Strike certain portions of OMAEG witness Seryak's testimony. In doing so, the Attorney Examiners struck two distinct categories of testimony, both of which were improper for consideration in the underlying matter, and both of which are addressed by OMAEG in its Initial Brief. The first type of testimony related to Mr. Seryak's lengthy testimony on the topic of H.B. 6 and federal investigations into the same. This information covered nearly four pages of Mr. Seryak's testimony and contained Mr. Seryak's personal opinions regarding H.B. 6, the investigation's trajectory and Mr. Seryak's own findings. The second type of testimony struck from Mr. Seryak's

[133] July 7, 2023, Entry ¶ 33.
[134] *Id.*
[135] *See* PSR Opinion and Order.

pre-filed direct was that addressing the Commission's rationale for approving prior OVEC-related riders, which are no longer in effect. The Attorney Examiners found that neither of these types of testimony were sufficiently related to the question at the heart of this proceeding, as dictated by R.C. 4928.148(A)(1). These irrelevant, confusing, and inflammatory portions of Mr. Seryak's testimony were properly stricken from the record in this case. For the reasons further highlighted below, and in contrast to OMAEG's argument on Initial Brief, the Attorney Examiners' decision on these topics was reasoned and supported.

b. Contrary to OMAEG's Claims, the Auditor and EDUs did not Testify Regarding Matters Covered by Mr. Seryak's Stricken Testimony.

OMAEG claims that the Attorney Examiners' determinations regarding Mr. Seryak's testimony should be overturned for what OMAEG believes is inconsistency between treatment of testimony regarding prior OVEC riders by the Auditor and EDUs, and that of Mr. Seryak. For example, OMAEG argues that its expert testimony merely "expounded upon concerns that parties had previously raised in comments filed with the Commission in this proceeding."[136] OMAEG skips over the fact that the "parties" it references in the footnote supporting this argument is merely itself—OMAEG.[137] OMAEG also argues that the Auditor's mere acknowledgement of the existence of H.B. 6 opens the door to Mr. Seryak's extensive testimony regarding investigations of the same. OMAEG argues that the "Attorney Examiners [ ] 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

[136] OMAEG Initial Brief at 19.
[137] *Id.* at FN 63.

to offering the contractual commitment into the wholesale markets."[138] OMAEG argues that it was "unreasonably precluded from directly responding to and rebutting the testimonies provided by the Auditor and Sponsoring Companies in this case" and that "the Attorney Examiners' rulings were patently unfair and prejudicial because they prohibited OMAEG's witness 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."[139] OMAEG argues that Seryak's testimony was simply meant to "rebut the assertions made by the Sponsoring Companies' witnesses and the Auditor" and stayed within the same scope set forth in the Audit Report and in the testimony of the various EDUs.[140]

Upon closer review of Mr. Seryak's testimony, however, these arguments are without merit and do not demonstrate that OMAEG should succeed in upending the Attorney Examiners' evidentiary rulings on these issues.

i. Seryak's H.B. 6-related testimony goes well beyond any mere reference to the law by the Auditor.

In its Initial Brief, OMAEG argues that "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 hearing."[141] OMAEG claims that Mr. Seryak's testimony simply sets forth what he "reviewed . . . to formulate and render his expert opinion and recommendation," that this testimony was not "outside the scope of these proceedings," and that the Auditor and "Sponsoring Companies' own witnesses" testified to the same information.[142] OMAEG's arguments on this topic significantly understate the testimony set forth by Mr. Seryak, and overstate the depth of

[138] OMAEG Initial Brief at 18.
[139] *Id.* at 20.
[140] *Id.* at 20.
[141] *Id.* at 21 (emphasis not added).
[142] *Id.* at 22.

discussion set forth by the Auditor and the EDUs. For example, where OMAEG argues that 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," what it is really referring to is one sentence and one footnote (at least in Duke Energy Ohio's Audit Report), as follows:

Paragraph:

> In 2019, House Bill 6 ("HB 6") defined a legacy generation resource ("LGR") in a way which encompassed the OVEC plants (RC 4928.01(A)(41)). New riders were needed to replace existing OVEC riders, starting on January 1, 2020.[2] DEO's Legacy Generation Resource Rider ("LGR") became effective January 1, 2020.[3]

Footnote:

> [2] Dickinson Wright PLLC. *Ohio Enacts Sweeping Energy Legislation: HB 6 Bails Out Nuclear, Coal; Rolls Back Renewables and Energy Efficiency*. September 2019. <https://www.dickinson-wright.com/news-alerts/ohio-enacts-sweeping-energy-legislation>

The above excerpts represent the full extent of reference to H.B. 6 in the Audit Report.[143] Likewise, OMAEG's references to Duke Energy Ohio witnesses discussing H.B. 6 fall flat. Company witness Ziolkowski's testimony sets forth only the fact that prior riders were replaced by Rider LGR, stating, "in 2019, the Ohio legislature defined a legacy generation resource [ ] in a way that encompassed [the OVEC] plants via R.C. 4928.01(A)(41) . . . [n]ew riders were therefore required to replace the existing OVEC riders for the various electric distribution utilities (EDUs), starting on January 1, 2020."[144]

On brief, OMAEG makes much of these factual references, but Mr. Seryak's stricken testimony regarding H.B. 6 went well beyond the Auditor's mere acknowledgement of the existence of H.B. 6, like that which was present in the Audit Report and in the testimony of

[143] Audit Report at 7.
[144] Ziolkowski Dir. Test. at 4:19-5:1.

Duke Energy Ohio witness Ziolkowski, and others. According to OMAEG, these limited, factual acknowledgments regarding the mere existence of H.B. 6 amounted to the Auditor discussing H.B. 6 in "multiple places throughout all three Audit Reports" and (according to OMAEG's Interlocutory Appeal) H.B. 6 was discussed "*at length* in the Audit Reports."[145] As demonstrated above, this is simply not the case. From these unannotated references to H.B. 6, OMAEG took the opportunity in Mr. Seryak's stricken testimony to present approximately four pages of testimony regarding "open federal investigations," responding to salacious questions such as "Is there any indication that OVEC sponsors or supporters could be part of the HB6 investigation?" and "Is there any indication that the former Chairman of the Commission could be investigated for HB6-related matters?"[146]

Neither the Auditor nor any Utility witness discussed the H.B. 6 allegations, investigations, or claims, or in any way linked those investigations to the prudence of the EDUs' 2020 OVEC costs. This approach was Mr. Seryak's alone. OMAEG's arguments attempting to conflate the Auditor's factual statements regarding H.B. 6 with those set forth in Seryak's stricken testimony represent a false equivalence and should not be given weight in this proceeding. The Attorney Examiners rightfully struck this portion of Mr. Seryak's testimony as beyond the scope of the underlying proceeding, irrelevant, and meant to obfuscate the purpose of the LGR Audit itself, as discussed above.

[145] OMAEG Interlocutory Appeal at 2.
[146] *See generally* Seryak Direct Testimony.

ii. There is no equivalence between Seryak's testimony regarding former OVEC riders and the mention of such riders by the Auditor.

Regarding Mr. Seryak's testimony related to former OVEC riders, there is again no equivalence between EDU or Auditor testimony mentioning this topic and Mr. Seryak's testimony. Mr. Seryak quotes at length, for example, from the Commission order approving AEP Ohio's former PPA Rider, even attempting to apply the Commission's prior reasoning for approving the PPA Rider to the evaluation of the prudence of LGR Rider costs. Mr. Seryak goes into detail about how the former riders were approved as "rate stability charges," and he quotes at length from former Commissioner Haque's concurring opinion about his expectations for the former riders.[147] This testimony goes far beyond what any Utility witness did, and raises irrelevant passages from a prior decision that are not applicable or at issue in this case.[148] None of the EDU witnesses quoted from the original orders approving the former OVEC Riders, and they certainly did not attempt to apply the now-inapplicable standards from those cases to the one at hand.[149]

Likewise, OMAEG's argument that the Auditor and the EDUs mentioned previous, specific categories of OVEC costs, in previous riders, and therefore Mr. Seryak should be allowed to bring any information OMAEG so chooses to the underlying proceeding regarding past riders or audits is without merit.[150] OMAEG claims that the "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.[151] OMAEG argues that Mr. Seryak should be

[147] Seryak Dir. Test. at 14-16.
[148] *Id.*
[149] Company witness Ziolkowski, for example, simply states that "Duke Energy Ohio's LGR Rider became effective January 1, 2020, and supplanted Rider PSR as the OVEC rider mechanism." Ziolkowski Dir. Test. at 5:5-6.
[150] OMAEG argues that "[t]he 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[.]" *See* OMAEG Initial Brief at 28.
[151] OMAEG Initial Brief at 17.

permitted to reference and rely upon "relevant information submitted in another Commission proceeding, including an OVEC-related proceeding."[152] OMAEG conflates "relevant information and analysis issued by the Commission in another Commission proceeding"[153] however, with what Mr. Seryak's testimony really attempted to do—incorporate and conflate rationale and reasoning from the Commission's decisions approving prior OVEC riders, and commingle the two standards by which costs are to be reviewed under the current riders and the former.[154] Mr. Seryak's attempt to rely upon replaced standards, reasoning, and dicta is unconnected to the statutory question in this proceeding: "the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource" during the 2020 audit year.[155] This type of testimony was *not* present in other EDU witness testimony or Auditor testimony, and there is nothing for Mr. Seryak to "respond to" on this topic. It was entirely within the Attorney Examiner's purview to strike this type of testimony and doing so was appropriate and supported.

OMAEG likewise argues in its Initial Brief that Mr. Seryak's testimony should not be stricken because R.C. 4928.148(A) references "those costs," which are, in OMAEG's interpretation, costs associated with or described by prior OVEC riders. This tortured reading of 4928.148(A), made at hearing also by OMAEG in arguing the Motion to Strike, as well as in OMAEG's interlocutory appeal, is not supported by a simple review of the language and should not be used to overturn the Attorney Examiners' reasoned rulings regarding Mr. Seryak's testimony. Regarding R.C. 4928.148(A), the relevant language reads as follows: "any mechanism authorized by the public utilities commission prior to the effective date of this section for retail

[152] *Id.*
[153] OMAEG Initial Brief at 27.
[154] *See, e.g.*, Mr. Seryak's attempt to bring in testimony related to Commissioner Haque's concurrence in approving AEP Ohio's former, now discontinued PPA Rider.
[155] R.C. 4928.148(A)(1).

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 . . . from customers of all electric distribution utilities in this state." OMAEG argues that the phrase "those costs" reads the former rationale supporting AEP Ohio's PPA Rider into the statute, and likewise the discussion of the same into Mr. Seryak's testimony.[156] While Duke Energy Ohio argues that "those costs" in R.C. 4928.148(A) refers only to the phrase "prudently incurred costs related to a legacy generation resource," as defined in R.C. 4928.01(A)(42), ultimately this argument is a strictly legal one, not appropriate for non-lawyer expert testimony—or expert testimony at all. Striking Mr. Seryak's testimony regarding the former OVEC-related riders as outside the scope of the underlying proceeding should not be overturned by OMAEG's strictly legal argument related to "those costs" and the meaning of that language in the statute. OMAEG has argued much elsewhere in this case, but Mr. Seryak should not be permitted to introduce irrelevant information or conflate these separate, distinct OVEC audits in his expert testimony.

iii. The Ohio Rules of Evidence do not require or dictate the overturning of the Attorney Examiners' evidentiary findings.

OMAEG argues that the Ohio Rules of Evidence, particularly Ohio Evid. R. 401, 702, and 703, require that Mr. Seryak's stricken testimony be revisited, and the Attorney Examiners' evidentiary rulings overturned. However, these rules of evidence do not dictate that Mr. Seryak be permitted to opine in his testimony outside the bounds of this discrete audit proceeding, and upon matters that would not make the existence of any fact that is of consequence more or less probable.

[156] *See, e.g.*, Seryak Dir. Test. at 5.

OMAEG states that 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."[157] Therefore, in OMAEG's opinion, "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."[158] Regarding relevancy, under Ohio Evid. R. 401, OMAEG is correct that relevant evidence is that which has any tendency to make the existence of any fact that is of consequence more or less probable. What OMAEG fails to account for, however, is the fact that the stricken Seryak testimony—covering the history of H.B. 6, Seryak's conjecture about anticipated investigative results, Seryak's hypotheses on the topic of H.B. 6's enactment, and so on—does not make it more or less likely that the 2020 Rider LGR costs were prudently incurred and were accounted for and populated accurately. This is the actual subject matter of the underlying proceeding, as set forth in the RFP and as dictated by the scope of the audit. Getting far afield from the purpose of the audit is where the Seryak testimony reaches the bounds of relevancy.

Likewise, Ohio Evid. R. 702 and 703 do not dictate that the Attorney Examiners cannot find portions of an expert's testimony outside the scope and bounds of a proceeding and prejudicial to the record. Here again, OMAEG gets the standard correct, "whether an expert's testimony will assist the trier of fact," but fails to acknowledge what the Attorney Examiners found at hearing—

[157] *Id.* at 35.
[158] OMAEG Initial Brief at 28.

that the stricken Seryak testimony will *not* assist the trier of facts, because the matters referenced and relied upon in that testimony are outside the scope of the underlying proceeding and prejudicial to the consideration of the record.[159] OMAEG also argues that Ohio Evid. R. 703 dictates that Mr. 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."[160] Reading those decisions into the record and stating that they are controlling to the underlying proceeding, however, is not an expert merely relying upon particular evidence. It is, instead, an expert attempting an end run around the scope of the proceeding. The Ohio Rules of Evidence do not dictate that the Attorney Examiners cannot opine upon and enforce the scope in a complicated, lengthy, multi-party, audit proceeding. And Mr. Seryak's reference to and incorporation of prior rider proceeding findings into his expert testimony should not serve as a method by which OMAEG can bootstrap otherwise irrelevant and prejudicial information into this case. That outcome is certainly not dictated by the Ohio Rules of Evidence.

c. The Attorneys Examiners' Decision Regarding the EDUs' Motion to Strike was Reasoned, Restrained, and Supported.

Ultimately, the Attorney Examiners provided a reasoned, restrained, and specific approach to striking portions of Mr. Seryak's testimony that were inflammatory, irrelevant, and outside the scope of the underlying proceeding. The Attorney Examiners also entertained on the spot clarifying motions and responded to OMAEG's arguments throughout their ruling on Mr. Seryak's testimony.[161] The Attorney Examiners provided reasoning, listened to counter arguments, and ultimately made a decision. The same is demonstrated by the transcript for the hearing, where the

[159] OMAEG Initial Brief at 16.
[160] OMAEG Initial Brief at 17.
[161] *See generally* Transcript Vol. V at 1315-1323.

Attorney Examiners found, in part, that:

> [I]n our July 7th, 2023 Entry we acknowledged . . . this proceeding is limited to reviewing the prudence and the reasonableness of the actions of EDUs with ownership interest in OVEC during calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019. RC 4928.148 is still the existing law under which we're operating in this proceeding. It is the Commission's role to effectuate laws passed by the General Assembly. So I agree that this goes well beyond -- in addition to the arguments raised by the Companies, I agree Mr. Seryak's testimony goes well beyond what was noted in the audit report as mere background information regarding earlier audits conducted by the Commission for riders that were not implemented pursuant to 4928.148. It is also -- to my knowledge, the U.S. Attorney has not made a similar request to stay this proceeding as it has done so in four other Commission proceedings. So, for those reasons we will be granting the motion to strike[.]"[162]

The decision to strike portions of Mr. Seryak's pre-filed direct testimony, as set forth by the Attorney Examiners, does not demonstrate a departure from past hearing precedent (in this case or other cases), and OMAEG has not demonstrated that these findings should be set aside in favor of its arguments. Rather, Mr. Seryak's testimony went "well beyond what was noted in the audit report as mere background information regarding earlier audits conducted by the Commission for riders that were not implemented pursuant to 4928.148."[163]

B. The Commission Should Not Reverse the Attorney Examiners' Rulings Regarding Other Excluded Evidence Identified by OMAEG in its Initial Brief.

In its Initial Brief, OMAEG also identifies "additional exhibits and evidence" that was excluded by the Attorney Examiners during the hearing, and that OMAEG believes should be revisited and the Attorney Examiners' findings overturned in briefing. OMAEG identifies approximately six items it believes should fall into this category. For the reasons discussed below, the Commission should decline to revisit these evidentiary findings, as they were properly determined by the Attorney Examiners during the pendency of the hearing.

[162] *Id.* at 1313-1314.
[163] *Id.* at 1313.

To start, as detailed elsewhere, OMAEG's arguments regarding the "Prior Audit Emails" and cross-examination of the Auditor regarding the same are without merit, as further explained in Subpart C below.[164] The PJM Independent Market Monitor State of the Market Report, as identified by OMAEG, was not admitted into the record not because of scope, prejudice, relevance, or other reasons. It was not admitted because the Auditor *did not use it in her audit*, and likewise could not be questioned about it effectively, had not read the entire document, the information was not from or addressing the audit period, and could not be verified by the Auditor.[165] Moreover, the Intervenors could have discussed this document and introduced it under a witness with knowledge of the same had they chosen to do so in their own testimony. They did not, and the Auditor was not familiar with the document, had not used it as a reference guide in preparing the Audit Report, and so on. The Attorney Examiner excluded it because the Intervenors failed to establish a foundation, and this deficiency led to its exclusion.[166] There is no reason for the Commission to revisit this decision, based upon the hearing record.

The same goes for OMAEG's arguments regarding cross examination of the Auditor on the topic of "early retirement" of OVEC, as well as charges Intervenors allege are related to future retirement costs.[167] The Auditor indicated that she had not evaluated or reviewed information on the topic, and OMAEG and OCC failed to establish the requisite foundation to probe the topic further.[168]

Finally, OMAEG argues that an October 2023 Form 10-Q associated with AEP Inc. should have been admitted to the record because, in OMAEG's opinion, it is relevant to the question of

[164] OMAEG Initial Brief at 37.
[165] *See* Tr. Vol. I at 142-43.
[166] Tr. Vol. I at 144:1-5.
[167] OMAEG Initial Brief at 38-39.
[168] *See generally* Tr. Vol. I at 147-48 ("The only possible proffer there is that she doesn't know anything about it.").

whether or not OVEC-related charges were prudently incurred by the three EDUs during the 2020 Audit period. The Attorney Examiner likewise dispatched with this argument and prevented its introduction into evidence, finding that she "fail[ed] to find how taking administrative notice of [OCC Proffered Ex. 18 was] relevant to this proceeding before us" as the underlying case is "limited to reviewing the prudence and reasonableness of the actions of EDUs with ownership interest in OVEC during calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019."[169] OMAEG's arguments in its Initial Brief do not rise to the level of overturning the Attorney Examiner's reasoned review and findings regarding OCC's proffered Exhibit.

For all of the above reasons, the evidentiary rulings identified in OMAEG's Initial Brief were based upon reasoned review of the record and testimony, and OMAEG's opinion of admissibility should not be used to supplant that of the Attorney Examiner's in this case.

C. The Attorney Examiner's Evidentiary Findings Regarding OCC's Proffered Evidence were Proper, Well-Supported, and Should Not Be Overturned.

OCC included in its Initial Brief particular evidentiary rulings by the Attorney Examiner in the underlying hearing that OCC requests be reconsidered and reversed by the Commission. For the reasons summarized below, the Attorney Examiner's evidentiary findings were proper, well-supported, and should not be overturned.

In its Initial Brief, OCC seeks review of "three areas of rulings on the admissibility of [ ] emails and related cross-examination," made during the course of the hearing, that OCC alleges were "improperly excluded."[170] However, these evidentiary rulings, as detailed below, both made by Attorney Examiner Addison during the course of the hearing, were based upon careful review

[169] Tr. Vol. V at 1368:23-1369:15.
[170] OCC Initial Brief at 31.

of both motion practice and extensive argument by the Parties. Moreover, in its Initial Brief, OCC does not present good cause for exactly *why* the Attorney Examiner's well-reasoned review of the admissibility of the evidence presented at hearing should be disregarded in favor of OCC's request. And in fact, in Duke Energy Ohio's Rider PSR proceeding, OCC attempted to enter into evidence nearly identical exhibits and testimony and was likewise precluded from doing so. There, the Commission upheld the Attorney Examiner's findings, and determined that the 2019 PPA Rider emails and testimony OCC sought to introduce properly excluded. The Commission determined that:

> OCC does not identify an error in the attorney examiner's evidentiary analysis; rather, OCC believes the rulings were in error merely because it affected what OCC claims is a substantial right. We agree with the attorney examiner's findings that the draft audit report, and Mr. Haugh's testimony related to that report, lack relevance in this proceeding. There are obvious similarities between the audits, as they were conducted by the same auditor, on similar timelines, and both concern similar OVEC riders. However, they were still completely separate audits. The evidence in question here pertains to a draft report, concerning a different rider, and a different EDU. As explained by the attorney examiner, the purpose of this proceeding is not to relitigate another EDU's rider. (Tr. Vol. III at 427.) While the Commission and the attorney examiners are not bound by the rules of evidence, OCC has not established that any substantial right was affected . . . we affirm the attorney examiner's rulings that the draft audit report and Mr. Haugh's related testimony are not relevant to this proceeding.[171]

Like its arguments in the PSR proceeding, OCC's post-hearing brief lists three evidentiary rulings that it believes the Commission should reverse, each of which essentially relate to the Attorney Examiner preventing OCC from introducing evidence in the underlying case that was both prejudicial and irrelevant. This included draft documents, emails, and testimony covering the 2019 audit of AEP Ohio's PPA Rider—a separate and distinct proceeding from the one at hand. Namely, OCC sought to introduce record evidence of the Auditor's decision to remove an out-of-scope opinion from a draft of the PPA Rider Audit of AEP Ohio—not Duke Energy Ohio.

[171] PSR Opinion and Order at 8-9.

In its Initial Brief, OCC asks that the Commission reopen the underlying proceeding and allow even more cross-examination on the AEP Rider PPA Draft Audit Report, which the Attorney Examiner prevented from being entered into evidence[172] The three specific areas of testimony and/or attachments are, according to OCC, as follows:

1. OCC Exhibit 10 (copies of emails from the AEP Ohio 2019 PPA Audit Proceeding).

2. Testimony from OCC witness Perez discussing the same, and recommending that the Commission give the audit reports in the underlying proceeding *no* weight at all.

3. Anticipated cross-examination from OCC asking the Auditor in the LGR proceeding questions related to the 2019 PPA Audit.[173]

All of these issues can be evaluated concurrently and be boiled down to the same question—is an email exchange from AEP Ohio's 2019 Audit Proceeding of its PPA Rider relevant, germane, or within the scope of the underlying proceeding. This question was fully briefed in motions to strike and/or argued live to the bench at the week-long hearing in this case—and answered with a resounding "no." OCC offers no reason to revive these items in its Initial Brief, and the Commission should decline to do so.

Regarding the stricken testimony of Mr. Perez, the EDUs filed an extensive Motion to Strike the testimony of Perez. In that motion, writing on behalf of the EDUs, the Company argued, and the Attorney Examiner ultimately agreed, that Perez's testimony contained hearsay, summarized the AEP PPA Rider Audit and its findings, and was prejudicial and confusing to the Audit of Rider LGR. For example, in the portion of Perez's testimony that OCC seeks to revive, Mr. Perez incorporates into his testimony emails and the draft report from the AEP PPA Rider Audit, wholesale. Additionally, in portions of the stricken testimony, Mr. Perez quotes for multiple

[172] OCC Initial Brief at 30.
[173] OCC Initial Brief at 31.

paragraphs from an email exchange between the Auditor's staff, PUCO Staff, and AEP Ohio—offering his own commentary every step of the way. This exchange, and the attached stricken exhibit, were clearly hearsay offered for the truth of the matter asserted in Perez's pre-filed testimony—with no exception to save their inadmissibility. As set forth in the Company's Motion to Strike, this testimony and documentation was also highly prejudicial to the underlying proceeding, serving to conflate the two separate OVEC-based audit proceedings of AEP Ohio's PPA Rider and the EDUs' Rider LGR Proceeding (and Duke Energy Ohio's Rider PSR proceeding, even).

In its Initial Brief, OCC does not provide good cause rationale for why the testimony should be revived or provide sufficient explanation as to why it believes Mr. Perez's testimony should not have been stricken at hearing. Moreover, OCC's own brief provides a snapshot of why this evidence and testimony is highly prejudicial, meant to conflate, and beyond the scope of this proceeding. Speaking of AEP Ohio's 2019 PPA Rider audit, OCC argues that the excluded emails related to that *separate, distinct* audit proceeding—that were not exchanged or even addressing or contemplating the underlying proceeding, "prove three key points" in this case. OCC goes on to argue that these PPA Rider audit emails show *in the underlying proceeding* that the Auditor was "biased and prejudiced" and that the 2020 Rider LGR audit reports "were not independent audits."[174] It does not require a great leap to understand the intent OCC has in introducing this irrelevant, prejudicial material. It is laid out in OCC's own brief—and it exemplifies why the Attorney Examiners struck this information from Perez's testimony and limited cross examination on the same topic, against the protests of OCC.

Moreover, OCC's statements about what the AEP PPA Rider emails (and discussion of the

[174] OCC Initial Brief at 32-33.

same) would have shown does not represent good cause, identify any error on the part of the Attorney Examiner, and does not even indicate the grounds upon which OCC believes it should succeed on its appeal of these evidentiary decisions. OCC simply states that the Commission could have weighed the evidence as it saw fit. But the Attorney Examiner's findings on this topic were reasoned, based upon written and oral argument, and should not be overturned. Because OCC has not provided sufficient reasoning upon which the Commission could find that the Attorney Examiner's evidentiary rulings were improper or inaccurate, the Commission must dismiss OCC's requests to admit this previously denied evidence into the record, including OCC's request to reopen the hearing for questioning on these topics.

IV. CONCLUSION

Duke Energy Ohio respectfully requests that the Commission uphold the Auditor and Staff's findings in the underlying matter, and adopt each of the Company's positions, as outlined above and in its Initial Brief, as its decision in these proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served via electronic mail on the 5th day of March, 2024, upon the persons listed below.

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Summary: Brief Reply Brief of Duke Energy Ohio, Inc. electronically filed by Ms. Emily Olive on behalf of Duke Energy Ohio and D'Ascenzo, Rocco O. Mr. and Kingery, Jeanne W. Ms. and Vaysman, Larisa M. Ms. and Akhbari, Elyse H. Ms..