BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE OVEC GENERATION PURCHASE RIDER AUDITS REQUIRED BY R.C. 4928.148 FOR DUKE ENERGY OHIO, INC., THE DAYTON POWER AND LIGHT COMPANY, AND AEP OHIO.	**))))))**	**Case No. 21-477-EL-RDR**

SIERRA CLUB'S REPLY BRIEF

The initial briefs of the Ohio electric distribution utilities ("Ohio EDUs") do not point to any evidence that the capital spending at the Ohio Valley Electric Corporation ("OVEC") plants during calendar year 2020 was prudently incurred, based on valid resource planning. Instead, the Ohio EDUs offer a host of excuses for why they should be permitted to charge Ohio customers for these capital costs anyway. The auditor correctly found that the current structure—unregulated capital spending decisions made by OVEC combined with an expectation of automatic recovery from Ohio retail customers—creates a risk of over-investment in the plants. Such over-investment is likely to occur in the face of environmental capital requirements, where a prudent utility would consider retiring coal units instead of making further investment in them. Because there is no evidence that these capital spending decisions were prudent—i.e., based on a valid retire-or-retrofit study that excludes sunk costs—and to protect Ohio customers from unreasonable actions of the Ohio EDUs, the Commission should adopt the auditor's recommendation and impose a cap on retail recovery of OVEC capital spending.

Further, the Ohio EDUs' arguments that the OVEC units are inflexible do not justify the continued practice during 2020 of committing the units as 'must run' at all times regardless of market prices. Instead of pointing to these issues as an insurmountable obstacle to an economically rational commitment strategy, the Ohio EDUs should account for startup time and costs, as well as the risk of wear and tear, in their daily commitment analysis for the OVEC units. The operating procedures for OVEC should allow for 'must run' commitment only where these analyses show that a unit's operation is likely to return a positive energy margin over a multi-day or multi-week period, when accounting for the operational inflexibility of these units. Instead, the Ohio EDUs acquiesced in OVEC's operating procedures defaulting back to a persistent 'must run' commitment strategy after spring 2020 without regard to market prices. Because the Ohio EDUs failed to seek to impose a cost-based commitment strategy on OVEC during 2020, the Ohio EDUs largely failed to take action to restrain energy market losses, and their actions should therefore be found to be unreasonable and imprudent.

I. The statute requires the Commission to decide this proceeding based on the record here and the Ohio EDUs' actions during 2020.

In its Initial Brief, AES Ohio argues that the Commission made certain findings during a previous proceeding that reviewed Duke's OVEC costs for calendar year 2019, and that therefore those findings should carry forward to this proceeding as a matter of collateral estoppel.[1] Relatedly, AEP Ohio argues that, because in a previous audit proceeding the Commission declined to follow a recommendation of the auditor, it should again do so here because, according to AEP Ohio, there is "no reason for the Commission to reach a different conclusion here."[2] AEP Ohio similarly asserts that, because the Commission found "must run" decisions in a previous case were reasonable, it must do so again here.[3]

Contrary to these points, the Commission's previous rulings on OVEC do not control or guide the Commission in this case. First, the costs and decisions at issue in 2019 were not the same

[1] AES Ohio Initial Brief at 8.

[2] AEP Ohio Initial Brief at 21.

[3] AEP Ohio Initial Brief at 2.

as those in 2020, and so AES Ohio's premise that the same decisions and costs are at issue here is wrong. Market conditions were not the same in 2019 and 2020, nor were the specific capital projects the Ohio EDUs approved in 2019 the same as those approved in 2020, among other factual differences.

Second, and more important, the Ohio statute that now governs OVEC reviews *requires* that the Commission make specific findings based on OVEC costs and decisions during 2020. In this case, the Commission is tasked with "determin[ing]," on the basis of the audit and record in this proceeding, ". . . the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource . . . and exclude from recovery those costs that the commission determines imprudent and unreasonable."[4] The "initial determination" shall be made "regarding the prudence and reasonableness of such actions during calendar year 2020," and the Commission "shall again" make these determinations in three future cases this decade.[5]

The Commission is therefore required to rule on the prudence and reasonableness of actions of the Ohio EDUs based on the evidence in this proceeding for calendar year 2020. Previous rulings of the Commission do not discharge this statutory mandate.

II. The Ohio EDUs do not defend their actions with respect to capital spending at OVEC during 2020, but instead offer a series of invalid legal arguments.

In its Initial Brief, AEP Ohio does not defend any specific capital spending decisions at OVEC during calendar year 2020 as reasonable or prudent, but instead argues that the auditor's recommended cap on capital spending would "conflict with the LGR statute" and hamper OVEC's

[4] Ohio Rev. Code § 4928.148(A)(1).

[5] *Id*.

ability to operate.[6] AES Ohio also argues that a cap on retail recovery of capital spending might somehow impact OVEC's operations.[7] Both arguments are wrong.

As to AEP Ohio's statutory argument, the Company asserts that the "statute clearly contemplates a *case-by-case* analysis of the particular costs incurred in each of the audit years specified in the statute," and that a "cap on capital expenditures would conflict with this statutory requirement for a case-by-case analysis."[8] These observations do not support the Commission declining to impose a cap on capital recovery through the LGR Rider here. As a preliminary point, the statute merely states that the Commission must review the "actions" of the Ohio EDUs—it does not follow that the Commission *must* review each capital spending on a case-by-case basis. But if the Ohio EDUs or OVEC had carefully studied the economics of making environmental capital spending decisions, for example, AEP Ohio would have a point. A prudent utility would study the net present value—excluding sunk costs such as debt—of making capital spending decisions such as those to comply with environmental regulations. Here, OVEC itself and the Ohio EDUs either failed to perform valid retire-or-retrofit decisions associated with these capital spending requirements or such decisions were performed but never produced to the auditor or the parties in this proceeding. Thus, while case-by-case study of capital spending decisions is often preferable in determining whether a specific capital retrofit project is prudent, the Ohio EDUs have either failed to study the case-by-case economics of making long-term investments in the OVEC plants to extend their lives, or have not provided that information. In this context, the Commission

[6] AEP Ohio Initial Brief at 21.

[7] AES Ohio Initial Brief at 22.

[8] AEP Ohio Initial Brief at 22.

cannot defer to AEP Ohio's theory that only case-by-case review is permissible, especially where the LGR statute offers no such requirement.

Next, the Ohio EDUs' arguments that a retail recovery cap would somehow impact OVEC's operations or violate the Inter-Company Power Agreement ("ICPA") is wrong. The Commission has no power over OVEC, as the auditor's recommendation on this point observed. The Commission could not place a cap on OVEC spending even if it thought such a cap desirable. Nor can the Commission impact the payments that the utilities must make to OVEC under the ICPA. The Commission is required, however, to exclude from retail recovery costs associated with actions of the Ohio EDUs that it deems unreasonable. It does not harm OVEC, or violate the ICPA, if a percentage of AEP Ohio's costs are ultimately borne by AEP shareholders and not Ohio customers. OVEC can continue to make whatever investments it deems reasonable and AEP Ohio can continue to make its payments under the ICPA. The issue here is how much of the OVEC charges to AEP Ohio should ultimately be borne by Ohio customers. Here, the record supports a cap on the amount of capital spending that flows through to Ohio customers.

During 2020, OVEC spent capital to comply with the ELG and CCR rules, rather than retire these plants by the end of this decade. Such a retire-or-retrofit decision should have been accompanied by valid studies of the economics of that decision that exclude sunk costs. No such evidence has been presented in this proceeding. Failure to even produce such evidence is an imprudent action of the Ohio EDUs. The Commission should adopt the auditor's recommendation and impose a cap on the retail recovery through Ohio customers' bills of capital spending at OVEC.

III. The Ohio EDUs' strategy of ignoring energy market conditions is unreasonable and imprudent.

In their briefs, the Ohio EDUs continue to make their strawman arguments that because the OVEC units are inflexible, it is not possible to make economically rational arguments when committing units into the PJM energy markets.[9] AEP Ohio asserts that because the coal units have startup costs and risk of wear and tear when cycled, the units must be operated essentially without regard to prevailing market prices.[10] This is not true.

Instead of relying on an operating procedure that assumes "must run" operations at all times, OVEC and each of the Ohio EDUs should conduct a daily economic analysis of the commitment of units into the PJM energy market, that includes analysis of the costs and expected revenues from participating in the day-ahead energy market. The analysis should include not only that day, but the next several days and weeks ahead for units that are not easily turned on and off, such as the OVEC coal units. The analysis should include consideration of startup and shutdown costs, and any operational limitations that apply in the given time period, such as the need to keep a particular unit online for testing. If the analysis shows that the expected market revenues will cover a unit's variable operating cost, then the operator can commit the unit as "must run" into the day-ahead market. If the unit's variable operating costs, including shutdown and startup costs, are projected to exceed expected revenues for several days or longer, then the operator should either designate the plant as "economic" or "not available" until prices rise.[11]

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[9] AES Initial Brief at 13; AEP Ohio Initial Brief at 12.

[10] AEP Ohio Initial Brief at 12.

[11] Perez Direct at 12-13.

IV. Conclusion

The Audits and the evidence in this record show that the Ohio EDUs failed to take reasonable actions with respect to their OVEC ownership or contract. The Commission should therefore disallow those costs from Ohio customers' bills.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on this 5th day of March, 2024.

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Case No. 21-477-EL-RDR

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