BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO POWER COMPANY'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is the 2020 audit of AEP Ohio's Legacy Generation Rider ("LGR"), a rate mechanism required by statute, R.C. 4928.148, to recover the net costs and revenues that AEP Ohio incurs and receives from its contractual entitlement to the output of the generating units of the Ohio Valley Electric Corporation ("OVEC"). The Auditor appointed by the Commission – London Economics International LLC ("LEI"), led by Dr. Marie Fagan ("Auditor") – undertook a detailed and thorough review of AEP Ohio's 2020 OVEC costs and revenues and produced a 111-page audit report detailing her findings. (Staff Ex. 4 (AEP Ohio Audit Report, Public Version) ("Audit Report").) With the exception of one issue the Auditor referred to the Commission for its own consideration (regarding the so-called "Component D," discussed thoroughly below), the Audit Report's conclusions were clear and correct: The Auditor found that OVEC's "processes, procedures, and oversight were mostly adequate and consistent with good utility practice," and the Auditor did not recommend any disallowances of 2020 OVEC costs included in the LGR. (*Id.* at 9.)

In its initial brief, Staff recommended that the Commission "should adopt the conclusions and recommendations made by the auditor." (Staff Br. at 12.) Staff also did not recommend any disallowances. The LGR statute establishes the standard of review and the Auditor made no error concerning the standard of review. As set forth in AEP Ohio's Initial Brief, the proper standard of review in this joint audit proceeding is defined in the controlling statute, R.C. 4928.148. (AEP Ohio Br. at 5-8.) After improperly injecting HB 6 rhetoric and relying on inapplicable precedent that predates enactment of R.C. 4928.148, Opposing Intervenors simply second-guess the OVEC decisions and make counter-factual assumptions that EDU owners can control OVEC or that OVEC could simply avoid passing any costs through the FERC-approved

ICPA to the EDU owners. Contrary to OCC's and OMAEG's repeated unsuccessful attempts to do so, the Commission's decisions for the standard of proof under AEP Ohio's prior PPA Rider are not applicable to the LGR audit for the three EDUs in this proceeding. And the Auditor's review was detailed and appropriate, and the Auditor committed no error with respect to the standard of review.

Kroger and OMAEG also offer a misguided criticism of the Auditor's prudence review – arguing that the Auditor should have examined whether the utilities have any conflicts of interest that influenced their decisions. The Auditor properly dismissed the question of whether she performed a conflict of interest review since it was not in the scope of the Audit and is more of a legal concept than accounting or operations query. (Tr. II at 311.) Ultimately, a utility's intentions (to the extent they can even be determined by an outside party) do not alter the prudence of the actions or change the outcome of the decision; therefore, they should not affect the outside prudence review of those decision. Finally with respect to the proper standard of review for this proceeding, OMAEG sets forth an additional list of "failures" by the Auditor which merely amount to a corresponding criticism for each time the Auditor did not mirror the specific arguments advanced by OMAEG. (OMAEG Br. at 43-53.)

As demonstrated in its Initial Brief and in this Reply Brief, the Auditor properly performed the audit (including the prudence review) and AEP Ohio satisfied its burden of proof through completion of the audit and presentation of its own testimony.

OVEC's mix of "must-run" and "economic" energy market commitments during the audit period was prudent.

It would have been imprudent and detrimental to customers to commit the OVEC plants as "economic" during the entire audit year, as intervenors appear to advocate. The Commission previously found the following facts in response to a nearly identical argument raised by intervenors in a previous audit year:

> [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.

Opinion & Order, *In re Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167 (Sept. 6, 2023) (audit of the prudence of 2019 OVEC revenues and costs included in Duke's Price Stabilization Rider), *app. for reh'g granted for further consideration by* Entry on Rehearing (Nov. 1, 2022) (hereinafter "*Duke 2019 PSR Audit*"), ¶ 58. As discussed in more detail below, this reality was reconfirmed by witnesses in this proceeding. (*See, e.g.*, AEP Ohio Ex. 1 (Stegall Testimony, Public Version), 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 be 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.").) The cases cited by OCC are from different jurisdictions applying different laws with different standards in different circumstances, and therefore they are inapposite here.

OCC's attempt to compare OVEC to a merchant generator is misguided and not supported by evidence. Merchant generators, which do not provide power to regulated utilities, have different goals and priorities and may adopt aggressive and risky management strategies that would be inappropriate for regulated units. As the auditor found, OVEC runs its generating units "consistent with good utility practice." That is a correct and appropriate standard for evaluating the OVEC generating units, which primarily provide power to a diverse range of regulated utilities.

OMAEG and Kroger argue that AEP Ohio and the other Sponsoring Companies should have attempted to rely on ICPA Section 4.03 to somehow refuse to accept the energy that OVEC produced and sold into the PJM energy markets during the audit year. (OMAEG Br. at 60-62, 66-67; Kroger Br. at 14-15.) As an initial matter, this argument runs counter to the LGR statute, which expressly requires that an "electric distribution utility . . . *shall bid all output from a legacy generation resource into the wholesale market*." R.C. 4928.148(B) (emphasis added). Furthermore, the misguided result advocated by OMAEG/Kroger was not possible during the Audit Period due to the binding OVEC Operating Procedures, which AEP Ohio was not able to unilaterally change. Moreover, even if AEP Ohio was able to decline its share of OVEC energy (it was not), had it done so, AEP Ohio would have been unable to realize substantial capacity revenue during the Audit Period. In addition to foregoing revenue, AEP Ohio also would have incurred substantial OVEC costs under OMAEG/Kroger's misguided proposal. In this regard, Intervenors fail to discuss the potential ramifications of likely *Minimum Loading Event* costs that AEP Ohio would have had to pay under the ICPA.

It would be unlawful and unreasonable to disallow all costs above the energy market as CUB/UCS suggests. CUB/UCS argue that the Commission should "disallow costs above the market value of OVEC's energy and capacity in PJM." (CUB/UCS Br. at 10; *see also id.* at 10-17.) CUB/UCS do not even attempt to reconcile this recommendation with the LGR statute, and cannot be reconciled. The LGR statute, moreover, does not establish a "market price" litmus test as CUB/UCS advocate but rather requires the recovery of all "prudently incurred costs" regardless of whether they are fully offset by market revenues.

OVEC appropriately conducted commitment analyses during the extraordinary conditions of the coronavirus pandemic, but a daily commitment analysis is not needed during normal market conditions. CUB/UCS and Sierra Club argue that OVEC should be compelled to conduct daily energy market commitment analyses. As an initial matter, the OVEC Energy Scheduling Department already holds a "daily call every non-holiday weekday morning to review unit status and availability, including applicable unit derates, potential unit liabilities, and outage status and expected unit return-to-service dates," and OVEC conducts a "similar, but less formal, daily meeting" on "weekdays and holidays." Additionally, CUB/UCS's proposed daily analysis requirement also ignores the basic characteristics of the OVEC coal-fired units. As shown in the audit year, during times of extraordinary market conditions, the Sponsoring Companies authorized OVEC to commit units as economic, and during these periods OVEC appropriately conducts additional analysis to determine whether to commit as must-run or economic.

OVEC's audit period fuel costs were prudent: The Resource Fuels contract was reasonable when entered into, and it would not have been prudent to breach the contract as Intervenors suggest.

Multiple intervenors challenge OVEC's audit period coal costs on the ground that one long-term coal contract from supplier Resource Fuels involved higher prices than the spot prices for coal during the audit year. The Commission already rejected essentially the same argument in the *Duke 2019 PSR Audit*, finding that the differences in prices "were attributable to, among other things, higher quality coal and existing contractual obligations with suppliers." *Duke 2019 PSR Audit* ¶ 61. Addressing the same long-term Resource Fuels coal contract, the Commission correctly concluded that OVEC's "coal procurement practices were sound." *Duke 2019 PSR Audit* ¶ 61. Intervenors merely rehash the same arguments about the same contract in this proceeding, and therefore the Commission should reject intervenors' arguments on the same grounds. Moreover, the Resource Fuels contract reflected the market conditions at the time it was entered into, and the "decision" to enter into that contract was prudent "in light of conditions and circumstances which were known or reasonably should have been known *at the time the decision was made*." *Cincinnati*, 67 Ohio St.3d at 530 (emphasis added).

Component D is not a "return on investment."

OCC argues that Component D of the ICPA demand charge is a "return on investment" and therefore should be excluded from recovery under R.C. 4928.01(A)(42). As explained in AEP Ohio's Initial Brief (at 23-25), Component D is a fixed charge, not a "return on investment." 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. The only difference between Component D and the other ICPA demand charge components is that Component D is a *fixed* monthly charge. Component D, furthermore, cannot be a "return on investment" since it is not based on OVEC's level of "investment." Component D is a fixed charge calculated based on each Sponsoring Company's ownership share. It is *not* calculated based on OVEC's invested capital or rate base.

The "advance debt repayment" was authorized by the ICPA and there is no evidence or basis supporting a finding that AEP Ohio's actions in paying a charge under the ICPA was imprudent or unreasonable.

OCC argues that an unspecified amount of prepaid debt should be disallowed and credit ratepayers with the total amount paid to date by the EDUs. Instead of timely raising the issue in its comments or testimony, OCC is raising new issues on brief based on scant information in the record and no witness sponsored (or was able to defend) this new claim. The undeveloped claim should be dismissed because it lacks merit and any adequate basis in the record. The advance debt charge was authorized by the ICPA and was a cost to AEP Ohio during 2020. The OVEC debt reserve is similar to a tax escrow on a home mortgage: it is prudent and helps ensure that unavoidable upcoming costs get paid on time; the difference here is that the OVEC debt reserve actually lowered the ongoing expense (versus just ensuring timely payment is made) which makes it even more reasonable and prudent. In short, there is no basis to conclude that AEP Ohio's payment of the billed debt service charge was an unreasonable or imprudent action for purposes of R.C. 4928.148(A).

The "advance post-retirement benefit payments" were prudent and authorized by the ICPA.

Like the meritless claim regarding the prepaid debt reserve, OCC raises another undeveloped issue for the first time on brief – recommending that the Commission require the EDUs to credit to retail customers the advance postretirement benefit payments collected during 2020 and the aggregate amount collected to date. Had OCC mentioned this claim in a timely manner through its multiple sets of comments filed in this docket, through expert testimony or through subpoenaed witnesses or information, the parties could have presented additional information or testimony so the Commission could fully consider the matter based on record evidence. But instead of any of those timely methods for raising issues in this case, OCC is raising new issues on brief based on scant information in the record and no witness sponsored (or was able to defend) this new claim. OCC's factual basis for the claim is also erroneous. OVEC's 2020 Annual Report indicates that the balance was \$76.1 million at the end of 2019 and \$64.4 million at the end of 2020. (OCC Ex 7 at 10.) That suggests that the prior reserve was partially depleted during the audit period, not increased. This untimely and undeveloped argument should be dismissed because it lacks merit and any adequate basis in the record.

OVEC's capital planning process and audit period capital costs were prudent.

CUB/UCS argues that certain environmental capital costs should be disallowed, but CUB/UCS's argument on this point is difficult to parse. Insofar as CUB/UCS is relying on an OCC witness's now-debunked assertion that the OVEC plants will be forced to close due to the U.S. EPA's Coal Combustion Residual ("CCR") rule and Effluent Limitations Guidelines ("ELG"), the Commission can easily dispose of this claim for reasons explained in AEP Ohio's Initial Brief. Insofar as CUB/UCS is making some other argument against the environmental investments to comply with the CCR and ELG rules, CUB/UCS itself admits that the costs associated with compliance with the revised CCR and ELG rules are not included in the 2020 audit period. CUB/UCS merely repeats its well-worn claim that the OVEC plants should have simply shut down but that outcome is not at issue in this proceeding and is at odds with the LGR statute. Finally in this regard, A capital cost cap would be unreasonable and contrary to statute. Sierra Club makes various statements about OVEC's capital expenditures and endorses a "cap" on capital spending. As with CUB/UCS's claims about shutting down, Sierra Club's arguments are really an attack on the existence of the LGR and the LGR statute, which Sierra Club clearly opposes. The Commission correctly declined to order a cap in the *2019 Duke PSR Audit* and the Commission should do the same thing here.

CUB/UCS's proposed early retirement of the OVEC units is not within the scope of this proceeding and not within the utilities' control.

The idea of categorically signaling the future disallowance of "any environmental capital costs" is patently unreasonable and unlawful – not to mention being perverse request coming from environmental advocates. In addition, the request should be ignored or rejected because it lacks any substantive analysis or support in the record. From a more general procedural perspective of R.C. 4903.09, the Commission cannot just take the word of CUB/UCS on brief that they believe the plant retirements make sense economically. It must have expert analysis and evidence based on facts. As a related matter, the CUB/UCS request is premature and inappropriate because it seeks an advisory opinion about the prudency of unspecified future environmental investments that necessarily have not yet been made.

The Attorney Examiners' evidentiary arguments were sound.

OCC and OMAEG also ask the Commission to overturn certain evidentiary rulings during the hearing and "re-open the evidentiary hearing" so that OCC and OMAEG can introduce the excluded evidence and cross-examine witnesses on the excluded topics. The Commission should deny OCC and OMAEG's request and affirm the Attorney Examiner's rulings. As detailed below, the testimony and other evidence that OCC and OMAEG seek to add to the evidentiary record is entirely irrelevant to the factual and legal issues that are before the Commission in this audit proceeding and were properly excluded at hearing.

STANDARD OF REVIEW

The LGR statute establishes the standard of review and the Auditor made no error concerning the standard of review. As set forth in AEP Ohio's Initial Brief, the proper standard of review in this joint audit proceeding is defined in the controlling statute, R.C. 4928.148. (AEP Ohio Br. at 5-8.) Opposing Intervenors in this case continue to ignore the proper standard of review and attempt to effectively override the General Assembly's provision for cost recovery of prudent costs associated with legacy generation resources. AEP Ohio will briefly review the correct standard and apply it to Opposing Intervenors' arguments for disallowance of OVEC costs in this proceeding.

The Ohio General Assembly enacted R.C. 4928.148 in 2019, which required that "any mechanism authorized by the public utilities commission prior to the effective date of this section for retail recovery of prudently incurred costs related to a legacy generation resource shall be replaced by a nonbypassable rate mechanism established by the commission for recovery of those costs through December 31, 2030, from customers of all electric distribution utilities in this state." R.C. 4928.148(A). Specifically, the General Assembly has directed 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." R.C. 4928.148(A)(1). The General Assembly directed that the first such review take place "during 2021 regarding the prudence and reasonableness of such actions during calendar year 2020." *Id*. That is this case, the review of actions during calendar year 2020.

Additionally, 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" mandated in R.C. 4912.148(A). It provides in full:

> "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.

R.C. 4928.01(A)(42).

As discussed in AEP Ohio's Initial Brief (at 5-8), there are three notable components of the statutory standard of review – all of which are ignored by Opposing Intervenors. First, although Opposing Intervenors want to fully review and second-guess the actions of OVEC itself, the review here should be focused on "*the actions of electric distribution utilities* with ownership interests in the legacy generation resource." R.C. 4912.148(A) (emphasis added). The second notable component of the statutory standard of review is that it identifies one specific item for the Commission's review – namely, AEP Ohio's "decisions related to offering the contractual commitment into the wholesale markets." By contrast, for example, Opposing Intervenors seek to review OVEC's actions in dispatching the units in the energy market. Finally, the statutory standard of review establishes a particular standard, "reasonableness and prudence," as the yardstick by which AEP Ohio's "actions" and "decisions" must be evaluated. Specifically, the Commission must determine "the prudence and reasonableness" of AEP Ohio's "actions," and it must "exclude from recovery those costs that the commission determines imprudent and unreasonable." R.C. 4928.148(A)(1).

After improperly injecting HB 6 rhetoric and relying on inapplicable precedent that predates enactment of R.C. 4928.148, Opposing Intervenors simply second-guess the OVEC decisions and make counter-factual assumptions that EDU owners can control OVEC or that OVEC could simply avoid passing any costs through the FERC-approved ICPA to the EDU owners. The Auditor conducted a rigorous prudence review and properly found that OVEC's "processes, procedures, and oversight were mostly adequate and consistent with good utility practice," and the Auditor did not recommend any disallowances of 2020 OVEC costs included in the LGR. (Staff Ex. 4 at 9.)

A. Contrary to OCC's and OMAEG's repeated unsuccessful attempts to do so, the Commission's decisions for the standard of proof under AEP Ohio's prior

PPA Rider are not applicable to the LGR audit for the three EDUs in this proceeding.

On brief, OCC again relies on prior Commission rulings involving a different rider, AEP Ohio's PPA Rider, in an improper attempt to modify the controlling standard in this proceeding. In particular, OCC argues that the Commission's prior ruling in Case No. 14-1693-EL-RDR under the PPA Rider that the OVEC units should be bid into the market and run consistently with a merchant coal plant owner's decisions in the competitive market. (OCC Br. at 7-10.) In those 3 ½ pages, for example, OCC mentions the "best interests of ratepayers" standard no less than 10 times. Similarly, Kroger and OMAEG argue extensively that the OVEC costs should be excluded because they were not in the best interests of ratepayers. (Kroger Br. at 4-9; OMAEG Br. at 53-60.) By contrast, R.C. 4928.148 accurately accepts the fact that the OVEC units are "legacy resources" and seeks only to review EDU owner actions when allowing net cost recovery; unlike the prior Commission precedent involving the prior recovery mechanism based on a different statute, there is no basis in R.C. 4928.148 for continuing to ask whether the ICPA overall is in the best interests of ratepayers.

As a related matter, OMAEG alone argues that the Commission may only allow the Sponsoring Companies to recover the same prudently incurred costs as were permitted under the prior mechanism because R.C. 4928.148(A) uses the phrase "those costs." (OMAEG Br. at 12-13.) OMAEG misapprehends the statute, which reads as follows:

> On January 1, 2020, any mechanism authorized by the public utilities commission prior to the effective date of this section for retail recovery of prudently incurred costs related to a legacy generation resource shall be replaced by a nonbypassable rate mechanism established by the commission for recovery of those costs through December 31, 2030, from customers of all electric distribution utilities in this state.

R.C. 4928.148(A). Nothing in this statute can be read to import the former rationale or reasoning behind the PPA Rider to this proceeding.

The words "those costs" are not referring to any prior expectation, explanation, or justification the Commission may have had for originally approving the PPA Rider. Rather, "those costs" in the above-quoted passage plainly refers back to the statutory phrase "prudently incurred costs related to a legacy generation resource" – recovery of "those costs" simply refers to "prudently incurred costs related to a legacy generation resource" which itself is defined in the new legislation that created R.C. 4928.148. In particular, R.C. 4928.01(A)(42) defines the phrase "prudently incurred costs related to a legacy generation resource" as meaning "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." Nothing in the statutory definition of "prudently incurred costs related to a legacy generation resource" shows any intent by the General Assembly to incorporate prior Commission precedent regarding previous riders.

Earlier in this proceeding, the Attorney Examiner clearly articulated 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*." Entry ¶ 33, *In re OVEC Generation Purchase Rider Audits Required by R.C. 4928.148*, Case No. 21-477-EL-RDR (July 7, 2023) (emphasis added). Further, in Case No. 20-167-EL-RDR, which addressed Duke's 2019 OVEC audit, the Commission broadly upheld the exclusion of evidence concerning "a different rider, and a different EDU," since the evidence concerned "completely separate audits." Opinion & Order ¶ 34, *In re Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-

167-EL-RDR (Sep. 16, 2023). Undaunted by the proper scope of this proceeding and the unequivocal rulings made by the Examiners and the Commission, OCC's, OMAEG's and Kroger's continued reliance on "the events leading up to the creation and implementation of the LGR mechanism" violates the previously articulated rule that the scope of this case does not include such matters. *Id.* Those positions should be rejected in favor of the Auditor's more objective and principled conclusions that OVEC costs incurred during 2020 were prudent and reasonable.

B. The Auditor's review was detailed and appropriate, and the Auditor committed no error with respect to the standard of review.

The OCC advocates for a full disallowance of OVEC costs based on its allegation that the Auditor's review of unit dispatch issues was deficient in reviewing information relied upon by OVEC in making daily dispatch decisions; specifically, OCC claims that R.C. 4928.148(A)(1) requires a review of OVEC's daily dispatch decisions involving the energy market. (OCC Br. at 10-12.) In reality, the statute does not require a review of OVEC's actions, but requires review 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." R.C. 4928.148(A)(1) (emphasis added). As discussed below, AEP Ohio has contractual discretion and decision-making authority over how it offers its share of *capacity* into the PJM capacity revenue construct. With respect to *energy*, however, it is OVEC (not AEP Ohio or the other EDU owners) which commits and bids the OVEC units into the PJM energy markets, and AEP Ohio's ability to influence OVEC's energy commitment decisions is limited by its role and authority under the ICPA and operating procedures. Therefore, in reviewing AEP Ohio's "decisions related to offering the contractual commitment" of OVEC "into the wholesale markets," R.C. 4928.148(A)(1), the Commission should continue to be mindful of the limited scope of AEP Ohio's "decisions" with respect to "offering" OVEC energy "into the wholesale market." Regardless, as discussed in more detail in its Initial Brief and additionally below in this Reply Brief, the Auditor did conduct an appropriate review of the "must run" issues as it relates to the actions of the EDUs as owners that are represented on the Operating Committee.

Kroger also offers a misguided criticism of the Auditor's prudence review – arguing that the Auditor should have examined whether the utilities have any conflicts of interest that influenced their decisions. (Kroger Br. at 7-8.) Relying on testimony of witnesses for other intervenors (OMAEG witness Seryak and CUB/UCS witness Glick), Kroger argues that utilities have no incentive to demand changes to the ICPA and instead have a responsibility to their shareholders to obtain financial benefits. Predictably, OMAEG also parrots this same concern. (OMAEG Br. at 47-48.) In addition to being inaccurate (the EDU's have a responsibility to act prudently but lack the ability individually or collectively to change the FERC-approved ICPA at this point), these points are simply irrelevant to any prudence review. The Auditor properly dismissed the question of whether she performed a conflict of interest review since it was not in the scope of the Audit and is more of a legal concept than accounting or operations query. (Tr. II at 311.) Ultimately, a utility's intentions (to the extent they can even be determined by an outside party) do not alter the prudence of the actions or change the outcome of the decision; therefore, they should not affect the outside prudence review of those decision.

Finally with respect to the proper standard of review for this proceeding, OMAEG sets forth an additional list of "failures" by the Auditor which merely amount to a corresponding criticism for each time the Auditor did not mirror the specific arguments advanced by OMAEG. (OMAEG Br. at 43-53.) The primary points along these lines were that the Auditor failed to disallow all of the OVEC costs because the overall costs of the ICPA were higher than the market revenue received and the legacy asset has become increasingly uncompetitive in the market (pp. 44-45); component D costs were not disallowed in accordance with OMAEG's theory (pp. 45-46); there were no disallowances based on utility conflicts of interest (pp.47-48); no disallowance of energy costs even though the Auditor failed to require that economic dispatch flexibility be made permanent (pp. 49-50); and no coal costs excluded even though some of the long-term contract prices exceed short-term market prices (pp. 50-51). From this self-serving point of view, OMAEG concludes that the Auditor fall short of the standard established by the Commission and the Companies failed to meet their burden of proof. (OMAEG Br. at 52-53.) The Auditor's disagreement with OMAEG's misguided arguments and refusal to incorporate them into the Audit Report presents no reasonable basis for concluding that the audit or prudence review were flawed or otherwise inadequate. On the contrary, as demonstrated in its Initial Brief and in this Reply Brief, the Auditor properly performed the audit (including the prudence review) and AEP Ohio satisfied its burden of proof through completion of the audit and presentation of its own testimony.

ARGUMENT

I. OVEC's mix of "must-run" and "economic" energy market commitments during the audit period was prudent.

A. It would have been imprudent and detrimental to customers to commit the OVEC plants as "economic" during the entire audit year, as intervenors appear to advocate.

Several intervenors argue that the OVEC units should have been committed as *economic* for the entire audit year (or at least some large percentage of the audit year; intervenors' exact proposed alternative course of action is unclear). Such an *all economic, all the time* strategy would have been imprudent and detrimental to customers' long-term benefit from the OVEC units' output.

As the Commission has previously concluded and multiple witnesses have testified, it would have been impracticable and harmful to the OVEC units – and therefore detrimental to customers – for the OVEC units to be committed as *economic* for the entire audit year or a large portion of the year. The Commission previously found the following facts in response to a nearly identical argument raised by intervenors in a previous audit year:

> [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.

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The practical, technical constraints on the OVEC units mean that it would have been impossible for them to be committed as economic all year, since they cannot be cycled on and off on a daily basis, as the PJM energy market construct assumes. If OVEC had attempted to cycle the units on and off (as if they were a combustion turbine unit or other unit designed to cycle), the units would have experienced "substantial wear and tear" and there would have been an "increase[d] risk of a unit breaking down." *Duke 2019 PSR Audit* ¶ 58. This would have led to increased costs related to maintenance, capital replacements, and forced outages. These added costs, furthermore, would have been borne by AEP Ohio through the ICPA and reflected in the LGR, thereby substantially decreasing the value provided to customers. Intervenors make almost no attempt to account for these added risks, costs, and customer harm.

Some intervenors contend that OVEC's temporary, limited use of economic commitment during the beginning of the coronavirus pandemic shows that it is "physically possible to run the plants economically," and therefore the units should be committed as economic all the time. (CUB/UCS Br. at 21; *see also, e.g.*, OMAEG Ex. 1 (Seryak Testimony, Public Version), at 21.) That reasoning is unsound. The OVEC Operating Committee appropriately authorized a temporary economic commitment strategy at the start of the coronavirus pandemic because the work-from-home and social distancing policies, plus mild weather, caused PJM energy prices to reach *unprecedented* lows. (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 11, 14.) During these extraordinary times, it was possible for OVEC to commit units as economic without significant risk of cycling, since energy prices were consistently depressed. During the market conditions present for the rest of the audit year, however, the risk of cycling reached unacceptable levels.

Additionally, as explained by multiple witnesses, OVEC coal contract commitments meant that OVEC could not engage in an extended period of economic commitment without unsafely exceeding its coal storage capacity or incurring substantial contractual fees from not accepting required coal deliveries. (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 11.) Intervenors incorrectly criticize OVEC's coal procurement practices (discussed in detail below). But OVEC entered into its coal contracts long before the pandemic, and its fuel procurement strategy reflected OVEC's multidecade role in providing base load generation, where unit up time is maximized for customers' benefit. (Indeed, had OVEC failed to procure sufficient coal to maximize unit up time, intervenors certainly would have criticized that decision in audits for past and future audit years where energy prices were higher and keeping the units online was more profitable.) But neither OVEC nor anyone else could have predicted the coronavirus pandemic or the unprecedented market conditions it caused, and OVEC prudently managed multiple risk factors in engaging in temporary economic commitment during the worst of the energy market price dip and returning to its usual must-run commitment once prices recovered.

B. The cases cited by OCC are from different jurisdictions applying different laws with different standards in different circumstances, and therefore they are inapposite here.

OCC cites cases from other jurisdictions, but each of these cases involved different circumstances or statutory regimes (or both), and not one of the cases is relevant here. OCC first cites a 25-year-old case from Louisiana. (OCC Br. at 17 (citing *Gulf States v. Pub. Serv. Comm'n*, 578 So. 2d 71 (1991).) That case addressed the prudence of a utility's investment to *restart a nuclear generator*, which obviously has little factual bearing here. *See id.* at 74. The case also involved a completely different statutory scheme with nothing like the LGR, through which the General Assembly has already expressly authorized the recovery of the net costs and revenues of OVEC. Also, OCC's *Gulf States* case is about a utility's decision to invest *capital* in generation, yet OCC cites *Gulf States* not to attack OVEC's audit year capital investment (which the auditor correctly found was prudent) but rather OVEC's *must-run* commitment. The case is simply inapposite.

OCC also cites a Michigan Public Service Commission ("MPSC") case that it has cited in previous OVEC audits, but as AEP Ohio has explained before, this case is inapplicable on numerous grounds. (OCC Br. at 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 OVEC Order*").) As an initial matter, the MPSC stated that it had not previously approved the ICPA as a generation resource for inclusion in the utility's rates, which is the exact opposite of the situation here, where the General Assembly has expressly approved the inclusion of the net costs and revenues of OVEC in the utilities' rates through the LGR. *See Michigan OVEC Order* at 13, 17. Another key distinction is that the Michigan decision was based on Sierra Club's recommended application of the so-called inverse pricing rule, where the lower of cost or market applies to restrict cost recovery. *Michigan OVEC Order* at 5-6, 17, 22. The inverse pricing rule does not apply in Ohio and would run directly counter to the mechanics of the LGR. Another important distinction is that the AEP affiliate in Michigan has a portfolio of generation assets to manage and use to serve retail load – none of which applies to AEP Ohio – and thus the case's rationale cannot be extended outside of that context. *Id*. at 16. Accordingly, there is no basis for the Commission to rely on the MPSC decision, and every reason to distinguish or ignore it in this audit proceeding.

C. OCC's attempt to compare OVEC to a merchant generator is misguided and not supported by evidence.

OCC makes a lengthy attempt (OCC Br. at 19-22) to unfavorably compare OVEC to merchant generation, but this argument is based on a false premise and unsupported by evidence. As the auditor found, OVEC runs its generating units "consistent with good utility practice." That is a correct and appropriate standard for evaluating the OVEC generating units, which primarily provide power to a diverse range of regulated utilities. Merchant generators, which do not provide power to regulated utilities, have different goals and priorities and may adopt aggressive and risky management strategies that would be inappropriate for regulated units.

Regardless of the appropriateness of the comparison, moreover, OCC's evidence fails to show that OVEC's energy dispatch strategy was out-of-step with other coal-fired generators in PJM. For one thing, OCC presents no evidence at all from PJM, relying instead on a single study of generator commitments in the Midcontinent Independent System Operator (MISO) Independent System Operator (ISO). (*See* OCC Br. at 20.) The MISO energy construct is different from PJM's, with different generating assets, load, transmission congestion, weather, and numerous other factors, and thus not comparable.

Furthermore, OCC's cited study only addresses economic versus must-run commitments on "*starts*" (*i.e.*, when a generator is offline and makes a day-ahead energy commitment in anticipation of coming online the next day). (*See id.*) Yet OCC's criticisms of OVEC's energy commitments are not focused on starts but rather the general strategy throughout the year (*i.e.*, commitments for both starts and "non-starts"), and OCC identifies no single OVEC "start" that OCC specifically criticizes. As discussed above, moreover, OVEC attempts to minimize the number of "starts" of its baseload coal-fired generating units do avoid the costs and risks of cycling, and the so-called "profitability" of a start does not necessarily correlate with the profitability of the units once they have started and are continuing to generate.

Additionally, even if it were applicable to OVEC (it is not), OCC's cited study actually undermines its argument. The cited study shows that it is appropriate and well-accepted that "regulated" generators whose costs and revenues are reflected in retail rates for the benefit of customers adopt different strategies than merchant generators, which are able to adopt more aggressive and risky strategies without regard to customer impact. (*See* OCC Br. at 20, tbl. 8.) The study also shows that a must-run commitment strategy in 2020 was well within the bounds of reasonableness. During the 2020 audit year, 30% of merchant generator starts (3%+27%) and

61% of regulated generator starts (48%+13%) involved *must-run* commitments. Thus, OVEC's audit-year must-run commitment strategy (combined with temporary economic commitment during the worst of the pandemic) was well within the utility norm.

D. OMAEG's and Kroger's "take title" argument with respect to energy is meritless.

OMAEG and Kroger argue that AEP Ohio and the other Sponsoring Companies should have attempted to rely on ICPA Section 4.03 to somehow refuse to accept the energy that OVEC produced and sold into the PJM energy markets during the audit year. (OMAEG Br. at 60-62, 66-67; Kroger Br. at 14-15.) As an initial matter, this argument runs counter to the LGR statute, which expressly requires that an "electric distribution utility . . . *shall bid all output from a legacy generation resource into the wholesale market*." R.C. 4928.148(B) (emphasis added). Energy is unquestionably an "output" of OVEC, which is a "legacy generation resource" under the statute. Therefore, the General Assembly has required that AEP Ohio "bid all" energy from OVEC into the PJM wholesale energy market. This makes since the LGR was designed to "replace[]" the PPR Rider, *see* R.C. 4928.148(A), which was a nonbypassable rate stability mechanism that operated countercyclically to the PJM wholesale markets.

Furthermore, the misguided result advocated by OMAEG/Kroger was not possible during the Audit Period due to the binding OVEC Operating Procedures, which AEP Ohio was not able to unilaterally change. 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. (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 9-10.) According to the Operating Procedures, the Energy Scheduling Department submits information to PJM for all OVEC units jointly. (*See* Duke Ex. 6 (Swez Testimony, Revised Public Version), Attachment JDS-1, at 5.) OMAEG/Kroger does not explain how AEP Ohio could have had its entitlement to OVEC energy bid differently than the other PJM Sponsors. Nor was there any mechanism for AEP Ohio to opt out of the OVEC energy scheduling procedures, and AEP Ohio cannot unilaterally dictate OVEC energy scheduling decisions.

Moreover, even if AEP Ohio was able to decline its share of OVEC energy (it was not), had it done so, AEP Ohio would have been unable to realize substantial capacity revenue during the Audit Period. Under the PJM RPM capacity construct, for AEP Ohio to bid into the PJM capacity auctions and receive revenue for capacity during the Audit Period, AEP Ohio had to offer its share of OVEC into PJM, ensuring that its OVEC capacity resource would participate in the PJM energy markets.

In addition to foregoing revenue, AEP Ohio also would have incurred substantial OVEC costs under OMAEG/Kroger's misguided proposal. Under the ICPA, AEP Ohio would have been required to pay its share of all OVEC demand charges even if it declined its share of OVEC energy. (*See* AES Ohio Ex. 1 (Crusey Testimony, Public Version), Ex. 1, ICPA, §§ 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*." (emphasis added).) It would have made no sense for AEP Ohio to incur these charges while foregoing any possible revenues from sales of energy or capacity.

In addition, intervenors fail to discuss the potential ramifications of likely *Minimum Loading Event* costs that AEP Ohio would have had to pay under the ICPA. Under ICPA Paragraph 5.05, AEP Ohio is required to pay costs incurred by OVEC if it suffers a "Minimum Loading Event" due to AEP Ohio's failure to take its share of OVEC's "Total Minimum

Generating Output" in any hour. (AES Ohio Ex. 1 (Crusey Testimony, Public Version), Ex. 1, ICPA, § 5.05.) If AEP Ohio had adopted OMAEG/Kroger's misguided proposal to refuse OVEC energy, AEP Ohio could have incurred these Minimum Loading Event charges in addition to the other non-energy charges discussed immediately above – all without any offsetting revenues from sales of energy or capacity.

E. It would be unlawful and unreasonable to disallow all costs above the energy market as CUB/UCS suggests.

CUB/UCS argue that the Commission should "disallow costs above the market value of OVEC's energy and capacity in PJM." (CUB/UCS Br. at 10; *see also id.* at 10-17.) CUB/UCS do not even attempt to reconcile this recommendation with the LGR statute, and it cannot be reconciled. CUB/UCS's real argument is that the LGR should not exist, but the existence of the LGR is required by statute and not open for second-guessing in this proceeding.

The LGR statute, moreover, does not establish a "market price" litmus test as CUB/UCS advocate but rather requires the recovery of all "prudently incurred costs" regardless of whether they are fully offset by market revenues. *See* R.C. 4928.148(A), (A)(1). The statute mandates that AEP Ohio and the other utilities sell the output of OVEC in the PJM wholesale markets, *see* R.C. 4928.148(B), and it 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." R.C. 4928.01(A)(42). That definition shows that the General Assembly contemplated that there would be times where the costs would exceed revenues, as well as times where the "revenues exceed net costs." Accordingly, the "market price" litmus test advocated by CUB/UCS is expressly foreclosed by the statute, which mandates recovery of prudently incurred costs even when they are not fully offset by market revenues.

F. OVEC appropriately conducted commitment analyses during the extraordinary conditions of the coronavirus pandemic, but a daily commitment analysis is not needed during normal market conditions.

CUB/UCS and Sierra Club argue that OVEC should be compelled to conduct daily energy market commitment analyses. (CUB/UCS Br. at 25-29; Sierra Club Br. at 14-15.) Such a formal requirement is unnecessary and unreasonable. As an initial matter, the OVEC Energy Scheduling Department already holds a "daily call every non-holiday weekday morning to review unit status and availability, including applicable unit derates, potential unit liabilities, and outage status and expected unit return-to-service dates," and OVEC conducts a "similar, but less formal, daily meeting" on "weekdays and holidays." (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 9-10.) OVEC then "uses this information to formulate and submit the day-ahead unit offers into the PJM market." (*Id.* at 10.) Additionally, as described above, from April 14 to June 30 of the audit period, the Operating Committee provided OVEC temporary authority to commit the units as economic, and thus OVEC analyzed and made unit commitment offers pursuant to that authority. (*Id.* at 10-11.)

CUB/UCS's proposed daily analysis requirement also ignores the basic characteristics of the OVEC coal-fired units. As discussed above and throughout these proceedings, the OVEC units were designed to operate as baseload generators, and cycling them on and off is difficult and risky. Given these design characteristics, the OVEC Operating Procedures (which AEP Ohio does not unilaterally control) require OVEC to commit available units as must-run. This procedure "allowed OVEC to manage its units in a way that balanced . . . the operating characteristics of the units as well as OVEC's provision of contracted energy and capacity for all of its sponsors, ranging from utilities not participating in regional transmission organizations, fully integrated utilities, and its Ohio-based members." (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 13.) It would have been unnecessary and wasteful of resources for OVEC to conduct more detailed daily energy market analyses during the ordinary times in which the OVEC Operates Procedures stipulate must-run commitment for available units. Yet as shown in the audit year, during times of extraordinary market conditions, the Sponsoring Companies authorized OVEC to commit units as economic, and during these periods OVEC appropriately conducts additional analysis to determine whether to commit as must-run or economic. (*See id.* at 12.)

II. OVEC's audit period fuel costs were prudent: The Resource Fuels contract was reasonable when entered into, and it would not have been prudent to breach the contract as OMAEG suggests.

Multiple intervenors challenge OVEC's audit period coal costs on the ground that one long-term coal contract from supplier Resource Fuels involved higher prices than the spot prices for coal during the audit year. (OMAEG Br. at 57-60, 65-66; CUB/UCS Br. at 29-32; Kroger Br. at 12-13.) As AEP Ohio explained in its initial brief, these arguments are meritless for several reasons. For one thing, the Commission already rejected essentially the same argument in the *Duke 2019 PSR Audit*, finding that the differences in prices "were attributable to, among other things, higher quality coal and existing contractual obligations with suppliers." *Duke 2019 PSR Audit* ¶ 61. Addressing the same long-term Resource Fuels coal contract, the Commission correctly concluded that OVEC's "coal procurement practices were sound." *Duke 2019 PSR Audit* ¶ 61. Intervenors merely rehash the same arguments about the same contract in this proceeding, and therefore the Commission should reject intervenors' arguments on the same grounds.

Even if the Commission had not already rejected intervenors' arguments (it has), the evidence in this case shows that the Resource Fuels contract was market-based and prudent when entered into, and that is the key point for a prudence analysis. As OCC itself acknowledges, the prudence standard requires the Commission to determine "what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known *at the time the decision was made*." (OCC Br. at 7 (quoting *Cincinnati v. Pub. Util. Comm'n*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826, 830 (1993)) (emphasis added).) *See also* R.C. 4928.148(A)(1) (requiring the Commission to "determine, *in the years specified* in this division, the prudence and reasonableness of the actions of electric distribution utilities." (emphasis added)). With respect to OVEC's fuel procurement, there were no contracts entered into during the audit year and thus no "decisions" presented for review in this proceeding. (*See* Staff Ex. 4 (AEP Ohio Audit Report, Public Version), at 54 (confirming that there were "no RFP solicitations issued for coal supplies" during the 2020 audit year).)

The Resource Fuels contract, moreover, has been in place for many years. OVEC uses RFPs to ensure competitive prices for fuel contracts (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 17), and thus the Resource Fuels contract reflected the market conditions at the time it was entered into, and the "decision" to enter into that contract was prudent "in light of conditions and circumstances which were known or reasonably should have been known *at the time the decision was made*." *Cincinnati*, 67 Ohio St.3d at 530 (emphasis added). It was impossible for anyone to anticipate the global coronavirus pandemic and the unprecedented PJM energy price conditions it caused. Therefore, even if the issue were presented for review in this audit year (it is not), there is no basis to fault OVEC for its decision to enter into the long-term, market-based Resource Fuels contract at the time it did so.

OMAEG's argument that OVEC should have terminated the Resource Fuels contract during the audit year is likewise meritless. (*See* OMAEG Br. at 58; *see also* CUB/UCS Br. at 31 (parroting this argument).) According to OMAEG, "OMAEG witness Seryak explained" that "the Resource Fuels contract contains a clause allowing OVEC to terminate the contract," and thus OMAEG contends that "the contract could have – and should have – been terminated or renegotiated." (*Id.* (citing Revised OMAEG Ex. 2C (Seryak Testimony, Confidential Version), at 24-25.) That claim does not withstand scrutiny. The "clause" OMAEG witness Seryak refers to is a boilerplate "change of law" provision, but the only "change of law" that OMAEG witness Seryak (who is not a lawyer) identifies is House Bill 6, which enacted the LGR. (*Id.*) The LGR enacted by House Bill 6 addresses the retail rate treatment of the utilities' net costs and revenues from their OVEC entitlements. It does not directly regulate OVEC at all, nor does it in any way impede or affect OVEC's ability to accept and use coal from the Resource Fuels contract. Therefore, the contract termination proposed by OMAEG likely would have led to costly litigation with the contract counterparty and potentially contractual damages, all of which would have increased OVEC's costs and therefore harmed customers. It was prudent for OVEC to fulfil its contractual obligations during the audit year.

III. Component D is not a "return on investment."

OCC argues that Component D of the ICPA demand charge is a "return on investment" and therefore should be excluded from recovery under R.C. 4928.01(A)(42). (OCC Br. at 22-23.) As explained in AEP Ohio's Initial Brief (at 23-25), Component D is a fixed charge, not a "return on investment." 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. (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 21 ("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 . . . ."). The only difference between Component D and the other ICPA demand charge components is that Component D is a *fixed* monthly charge.

Component D, furthermore, cannot be a "return on investment" since it is not based on OVEC's level of "investment." Component D is a fixed charge calculated based on each Sponsoring Company's ownership share. It is *not* calculated based on OVEC's invested capital or rate base, and in fact the Auditor acknowledged that OVEC does not earn any return on its plant-in-service. (*See* Staff Ex. 4 (AEP Ohio Audit Report, Public Version), at 9 ("OVEC's capital expenditures are not part of a rate base for which they are allowed a regulated rate of return . . . .").) Since Component D does not vary based on OVEC's level of investment, Component D is not a "return on investment."

Critically, moreover, Component D cannot be a "return on investment" since it is not "returned" to OVEC's equity holders, *i.e.*, the Sponsoring Companies. On this point, the Auditor made a factual error. The audit report states that "Component D is itself a *return to the owners of OVEC*." (Staff Ex. 4 (AEP Ohio Audit Report, Public Version), at 9 (emphasis added).) As AEP Ohio witness Stegall explained, however, the Component D charges "are not returned to its shareholders" but rather used to pay OVEC's expenses, and this is "evidenced by the fact that OVEC has not issued dividends since 2013." (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 21; *see also* AES Ex. 1 (Crusey Testimony, Public Version), at 5.) A charge used to pay expenses that is not paid to shareholders cannot be a "return on investment."

IV. The "advance debt repayment" was authorized by the ICPA and there is no evidence or basis supporting a finding that AEP Ohio's actions in paying a charge under the ICPA was imprudent or unreasonable.

OCC argues that an unspecified amount of prepaid debt[1] should be disallowed and credit ratepayers with the total amount paid to date by the EDUs. (OCC Br. at 23-24.) Had OCC

[1] Although OCC references the total 2020 debt prepayment, it does not mention any specific figure that applies to AEP Ohio. Moreover, the total amount paid to date referenced in the OVEC Annual Report is also unavailing because it likewise lacks specificity as to AEP Ohio. Of course, the latter claim regarding payments "to date" also goes well beyond the audit period and lies well beyond the scope of this case.

mentioned this claim in its multiple sets of comments filed in this docket, the parties could have presented additional information or testimony so the Commission could fully consider the matter based on record evidence. Had the Auditor raised the issue[2] or found that the prepaid debt was imprudent, the parties could have cross-examined the Auditor or presented additional information or testimony so the Commission could fully consider the matter based on record evidence.[3] Had OCC's expert witness raised this matter, the parties could have dispelled the false premises underlying the claims and fully explored on the record all the facts and circumstances related to the debt prepayment. Had OCC not pulled back the subpoena for OVEC Justin Cooper to testify before the Commission during the hearing based on its own eleventh-hour strategy to avoid Mr. Cooper testifying, the parties could have fully explored the basis and support (or lack thereof) of OCC's claim and the Commission could have had a full record upon which to consider the matter. But instead of any of those timely methods for raising issues in this case, OCC is raising new issues on brief based on scant information in the record and no witness sponsored (or was able to defend) this new claim. The undeveloped claim should be dismissed because it lacks merit and any adequate basis in the record.

Component A of the ICPA permits the debt prepayments and, thus, the charges are properly billed under the ICPA and incurred by AEP Ohio in 2020 for purposes of R.C. 4928.148. Under the ICPA, "Component A" charges 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

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[2] OCC does cite the Audit Report in the section of its brief raising this issue (OCC Br. at 23), but that reference (footnote 95) is completely erroneous.

[3] This practice began in 2017, as reflected in OCC Ex. 7 at 11, and should have been audited during that prior audit; it is untimely to do so now. Regardless, anything aside from 2020 payments are beyond the scope of this case.

and replacements (*whether or not such interest or other amounts have come due or are actually payable during such Month*)…" AES Ohio Ex. 1 (Crusey Testimony, Public Version), Ex. 1 (a copy of the current Sept. 10, 2010 ICPA) at 9 (§ 5.03(a) (emphasis added).) Hence, the advance debt charge was authorized by the ICPA and was a cost to AEP Ohio during 2020. There is no basis to conclude that AEP Ohio's payment of the billed debt service charge was an unreasonable or imprudent action for purposes of R.C. 4928.148(A).

A benefit was conveyed for this payment in the form of lower debt costs going forward, as evidenced by OCC's own witness Stanton included as part of her testimony the Fitch credit rating report affirming OVEC's credit rating and giving it a stable outlook, which report (Attachment EAS-2) cited the debt service reserve of $122 million as a positive liquidity factor. (OCC Ex. 1, at 56-58.) *See also* Tr. III at 623. (Dr. Stanton agreed that Fitch considered the debt reserve as favorable to OVEC's credit rating). The Commission also reviewed and approved OVEC's debt refinancing for the period covering 2020. *See* Case No. 19-763-EL-AIS. Again, there is no basis to conclude that either OVEC or the EDUs did anything imprudent or unreasonable – on the contrary, OVEC was reducing debt costs by development of the reserve. The OVEC debt reserve is similar to a tax escrow on a home mortgage: it is prudent and helps ensure that unavoidable upcoming costs get paid on time; the difference here is that the OVEC debt reserve actually lowered the ongoing expense (versus just ensuring timely payment is made) which makes it even more reasonable and prudent.

OCC alleges without support that the payment somehow "could be used improperly to pay down debt in the event of the coal plants' early retirement." (OCC Br. at 26). Regardless of whether the 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 indicated in OVEC's 2020 Annual Report (OCC's own evidence), an offsetting regulatory liability has been entered on OVEC's books which will be credited to customer bills on a long-term basis. (OCC Ex. 7 at 11.) The debt reserve is being used to lower carrying costs that are billed to customers and a utility is not expected to fund such matters independent of rates or ratepayer support. The funds are being held and have not been used to support early retirement – so OCC's speculation is premature, unwarranted and counter-factual.

OCC's proposed remedy is to credit retail consumers for the entire debt reserve – but that would negate the entire benefit created by the debt payment reserve (*i.e.*, lowering debt costs that are ultimately passed on the retail customers). In addition, the proposal is an improper attempt to recapture costs outside of the audit period and rehash the prudency of actions from prior years dating back to 2017. Disingenuously, OCC's proposal also violates its own principle of intergenerational equity (OCC Br. at 26-27).

Finally, OCC's analogy to R.C. 4909.15 is inapt. (OCC Br. at 24-25.) There is no test period under R.C. 4928.148 as in traditional ratemaking. Rather this is an alternative regulation mechanism under R.C Chapter 4928 and the General Assembly provided that the Commission "shall determine the proper rate design for recovering or remitting the prudently incurred costs related to a legacy generation resource," as long as the rider incorporated the mandatory monthly rate caps and other directives set by the statute. R.C. 4928.148(A)(2).

In short, there is no record basis to conclude that AEP Ohio did anything improper or imprudent by paying the charges properly billed under the ICPA in 2020 and passing them on to retail customers.

V. The "advance post-retirement benefit payments" were prudent and authorized by the ICPA.

Like the meritless claim regarding the prepaid debt reserve, OCC raises another undeveloped issue for the first time on brief – recommending that the Commission require the EDUs to credit to retail customers the advance postretirement benefit payments collected during 2020 and the aggregate amount collected to date. (OCC Br. at 27-29.) Similarly, OCC claims that the postretirement benefit payments were "advance billed" improperly and collected in violation of R.C. 4928.148 and the regulatory principle of intergenerational equity. Had OCC mentioned this claim in a timely manner through its multiple sets of comments filed in this docket, through expert testimony or through subpoenaed witnesses or information, the parties could have presented additional information or testimony so the Commission could fully consider the matter based on record evidence. But instead of any of those timely methods for raising issues in this case, OCC is raising new issues on brief based on scant information in the record and no witness sponsored (or was able to defend) this new claim. This untimely and undeveloped argument should be dismissed because it lacks merit and any adequate basis in the record.

Component E of the ICPA permits payment of postretirement benefit funding costs and, thus, the charges are properly billed under the ICPA and incurred by AEP Ohio in 2020 for purposes of R.C. 4928.148. Under the ICPA, "Component E" charges include "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…*" AES Ohio Ex. 1 (Crusey Testimony, Public Version), Ex. 1 (a copy of the current Sept. 10, 2010 ICPA) at 10 (§ 5.03(e) (emphasis added).) There is no basis to conclude that AEP Ohio's payment of the billed postretirement benefit funding charge was an unreasonable or imprudent action for purposes of R.C. 4928.148(A). Indeed, there is no evidence to support a conclusion that AEP Ohio was billed such costs in the audit period or that they were passed through in 2020.

In reality, OCC's factual basis for the claim is also erroneous. OVEC's 2020 Annual Report indicates that the balance was $76.1 million at the end of 2019 and $64.4 million at the end of 2020. (OCC Ex 7 at 10.) That suggests that the prior reserve was partially depleted during the audit period, not increased. Such a conclusions fits with the accompanying narrative statement in the report, as quoted ion OCC's own brief (at 28):

> The regulatory liability for postretirement benefits recorded at December 31, 2020 and 2019, represents *amounts collected in historical billings in excess of the accounting principles generally accepted in the United States of America (GAAP)* net periodic benefit costs, including a termination payment from the DOE in 2003 for unbilled postretirement benefit costs, and incremental unfunded plan obligations recognized in the balance sheets but not yet recognizable in GAAP net periodic benefit costs.

OVEC 2020 Annual Report (OCC Ex. 7) at 10. In other words, the USDOE provided postretirement funding long ago and those reserves are being used over time but not yet depleted. Why should retail customers get a windfall for funding they did not provide and which is needed by the employer to pay its employees and retirees their earned post-retirement benefits? It would be irresponsible to avoid funding those obligations or to undermine and punish OVEC's prudent actions in doing so.

VI. OVEC's capital planning process and audit period capital costs were prudent.

A. OVEC environmental costs during the audit period were prudently incurred.

CUB/UCS argues that certain environmental capital costs should be disallowed (CUB/UCS Br. at 32), but CUB/UCS's argument on this point is difficult to parse. Insofar as CUB/UCS is relying on an OCC witness's now-debunked assertion that the OVEC plants will be forced to close due to the U.S. EPA's Coal Combustion Residual ("CCR") rule and Effluent

Limitations Guidelines ("ELG"), the Commission can easily dispose of this claim. (*See* OCC Ex. 1 (Stanton Testimony), at 24.) As AEP Ohio explained in its Initial Brief, OCC's witness made a factual error. OVEC has completed required demonstrations for CCR compliance and has completed its "construction efforts to meet the requirements to cease receipt of CCR and non-CCR waste streams" ahead of the deadlines mandated in the rule. (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 19:17-20:4; 20:8-11.7)

Insofar as CUB/UCS is making some other argument against the environmental investments to comply with the CCR and ELG rules, CUB/UCS itself admits that "the costs associated with compliance with the revised CCR and ELG rules are not included in the 2020 audit period." (CUB/UCS Br. at 33.) Moreover, CUB/UCS does not appear to dispute that the investments are necessary to comply with the EPA's rules, and CUB/UCS does not argue that the level of costs were too high or that there was any flaw in OVEC's plan for compliance. Rather, CUB/UCS merely repeats its well-worn claim that the OVEC plants should have simply shut down. (*Id.* at 32-34.) As discussed above, that outcome is not at issue in this proceeding and is at odds with the LGR statute.

B. A capital cost cap would be unreasonable and contrary to statute. (Sierra Club Br. at 6-10.)

Sierra Club makes various statements about OVEC's capital expenditures and endorses a "cap" on capital spending. (Sierra Club Br. at 6-10.) All of Sierra Club's claims are meritless. As an initial matter, Sierra Club does not take issue with any specific capital project but rather argues that the OVEC units should have shut down. (*See, e.g.*, Sierra Club Br. at 6-7.) As with CUB/UCS's claims about shutting down, Sierra Club's arguments are really an attack on the existence of the LGR and the LGR statute, which Sierra Club clearly opposes. That is not at issue in this case.

Insofar as Sierra Club suggests a "cap" on capital expenditures, this suggestion should be denied. As AEP Ohio explained in its Initial Brief (at 20-22) in response to the Auditor's proposal for a capital expenditure cap, the Commission correctly declined to order a cap in the *2019 Duke PSR Audit*,[4] and the Commission should do the same thing here. A capital cap interferes with OVEC management's ability to manage their generating units, and it could cause "unnecessary delay that could result in unnecessary, preventable equipment failure or unsafe operating conditions." (AEP Ohio Ex. 1 (Stegall Testimony, Public Version), at 19.) A capital cap would also be contrary to the ICPA, which contains no cap, and the LGR statute, which requires recovery of all "prudently incurred costs" related to OVEC, *see* R.C. 4928.148(A), and the definition of "prudently incurred costs" does not contain any concept of an outright cap on capital (or any other) expenditures, *see* R.C. 4928.01(A)(42).

VII. CUB/UCS's proposed early retirement of the OVEC units is not within the scope of this proceeding and not within the utilities' control. (CUB/UCS Br. at 34-35.)

CUB/UCS suggest in passing that the Commission should force retirement of the OVEC units by putting the Companies "on notice that it will disallow in future Riders dockets (sic) any environmental capital costs incurred without robust forward-going analysis to justify the investment over retirement and replacement with alternatives." (CUB/UCS Br. at 34-35.) The idea of categorically signaling the future disallowance of "any environmental capital costs" is patently unreasonable and unlawful – not to mention being perverse request coming from environmental advocates. In addition, the request should be ignored or rejected because it lacks any substantive analysis or support in the record.

[4] In the *Duke PSR Audit*, the Commission noted that the Auditor had recommended a cap, *see Duke PSR Audit* ¶ 22, and the Commission did not take up this recommendation in its decision.

As discussed above, the General Assembly has directed the Commission to only exclude any costs incurred under the ICPA based on imprudent actions by the EDUs. Retirement of the OVEC units is not within AEP Ohio's control and there literally is no action by AEP Ohio that could support the finding requested by CUB/UCS – it would be unlawful to adopt such a finding. On a more logical level, categorically excluding any future environmental capital cost is also unreasonable and unfair, since such investments are typically made due to a legal/regulatory requirement imposed on the generator. Finally, the failure to make such an environmental investment could end up harming the environment for which CUB/UCS claims to be advocating.

From a more general procedural perspective of R.C. 4903.09, the Commission cannot just take the word of CUB/UCS on brief that they believe the plant retirements make sense economically. It must have expert analysis and evidence based on facts. As a related matter, the CUB/UCS request is premature and inappropriate because it seeks an advisory opinion about the prudency of unspecified future environmental investments that necessarily have not yet been made.

In sum, the request should be ignored or rejected as unlawful and unreasonable.

VIII. The Attorney Examiners' evidentiary arguments were sound.

OCC and OMAEG also ask the Commission to overturn certain evidentiary rulings during the hearing and "re-open the evidentiary hearing" so that OCC and OMAEG can introduce the excluded evidence and cross-examine witnesses on the excluded topics. (*See* OCC Brief at 29.) The Commission should deny OCC and OMAEG's request and affirm the Attorney Examiner's rulings. The testimony and other evidence that OCC and OMAEG seek to add to the evidentiary record is entirely irrelevant to the factual and legal issues that are before the Commission in this audit proceeding and were properly excluded at hearing.

A. The Attorney Examiners correctly excluded from evidence draft audit reports and email communications from previous OVEC audits.

As discussed above, the purpose of these proceedings was limited to "review[ing] the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during the calendar year 2020" (July 7, 2023 Entry at ¶ 33), as required by R.C. 428.148 (*id.* at ¶ 3). Yet at hearing, OCC and OMAEG sought leave to interject evidence from a prior proceeding that had an entirely different purpose: auditing AEP Ohio's recovery of OVEC-related costs under its PPA Rider. *See*, *e.g.*, *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Co. for 2018*, Case Nos. 18-1004-EL-RDR *et al.* ("*AEP Ohio PPA Rider* Case"), Entry at ¶ 7 (Mar. 11, 2020). OCC and OMAEG assert that LEI removed a comment ("keeping the [OVEC] plants running does not seem to be in the best interests of the ratepayers") from a preliminary draft of LEI's audit report in the *AEP Ohio PPA Rider* Case, after receiving an email about the draft from PUCO Staff. (OCC Brief at 30; OMAEG Brief at 39.)

At hearing, OCC sought to enter the emails between PUCO Staff and LEI into evidence as an exhibit (OCC Exhibit 10) and as an attachment to OCC witness Joseph Perez's testimony (Attachment JSP-3). The Attorney Examiner sustained objections to questions relating to those emails, holding that "any probative value from" allowing such questioning "would be highly outweighed by [the] prejudicial effect" such questioning "may have on AES Ohio and Duke[,] who were not participants in the 2019 audit of AEP's PPA Rider * * * ." (Tr. Vol. II at 202:10 - 21.) The Attorney Examiner added: "I just don't see the relevance in allowing these types of questions to proceed * * * ." (*Id.* at 203:8-9.) When OCC's counsel continued to attempt to cross-examine LEI's auditor about those emails, despite the Attorney Examiner's ruling, the Attorney Examiner sustained objections to those additional questions as well. (*See id.* at 207-

210.) The Attorney Examiner also struck the portions of Perez's testimony relating to the emails. (*See* Tr. Vol. V at 1253:20 – 1255:1.)

OCC and OMAEG assert that evidence about the emails, and about the language in the preliminary draft of the LEI audit report in the *AEP Ohio PPA Rider Case*, would have been relevant and admissible because it would have helped prove four things: (1) that "the Auditor's real opinion was that operating the plants was not in the best interests of consumers"; (2) that the Audit was biased in favor of the EDUs and against consumers; (3) that the Audit Reports were not independent; and (4) that Dr. Fagan was not credible. (OCC Brief at 32-33; OMAEG Brief at 38-40.) None of OCC and OMAEG's arguments justifies reopening the hearing to allow the introduction of the excluded evidence.

Dr. Fagan's comments about the continued operation of the OVEC plants in 2020 are irrelevant. The Ohio General Asasembly and Governor DeWine chose to allow EDUs with an ownership interest in OVEC plants to recover their "prudently [and reasonably] incurred costs"; directed this Commission to establish "a nonbypassable rate mechanism" to recover those costs; directed those EDUs to bid "all output from … [OVEC] into the wholesale market"; and warned those EDUs that they cannot recover "remaining debt" if they "premature[ly] retire[ ]" any OVEC generating facilities. R.C. 4928.148(A)(1) and (B); R.C. 4928.01(A)(41) and (42). These statutes do not ask the Commission to determine whether it is prudent or reasonable to continue running the OVEC plants. The statutes *presume* that the EDUs will continue running the OVEC plants, and direct the Commission to determine the prudence and reasonableness of their actions in doing so. Whether the *auditor* believes it is in the best interest of consumers to "keep the plants running" is irrelevant to the Commission's review.

OCC next asserts that it was entitled to cross-examine Dr. Fagan regarding the emails relating to Staff's review of the preliminary draft of LEI's audit report in the *AEP Ohio PPA Rider Case*, and introduce direct testimony on that same topic, because those emails show that "the Auditor was biased and prejudiced in AEP, Duke[,] and DP&L's favor * * * ." (OCC Brief at 32.) OCC's Brief does not explain *why* OCC believes the emails are evidence of bias in favor of AEP Ohio. Nor does it explain how emails from the *AEP Ohio PPA Rider Case* could demonstrate bias in favor of EDUs that were not even parties to that proceeding. At hearing, however, OCC's counsel explained that he believed cross-examination would elicit evidence that Dr. Fagan "approached [the] audit report [in this case] with a bias or prejudice in favor of the utilities because she knew from her prior experience with the Commission Staff that Staff would not approve any final audit report language * * * that Staff deemed as too harsh or too critical of the utilities' actions." (Tr. Vol. II at 226:9-18.) But that argument incorrectly assumes that Staff had final authority to dictate the contents of the audit report. The Attorney Examiner questioned Dr. Fagan on that point. And Dr. Fagan made clear that *she* decides what goes into her audit reports, not Staff: "in the final analysis, what goes in or doesn't is up to the auditor. It's up to me." (*Id.* at 228:1-2.)

Dr. Fagan's testimony also rebutted OCC's theory that her audit reports are not truly independent. Again, the Attorney Examiner's questions, and Dr. Fagan's answers to those questions, made this point clearly:

> EXAMINER ADDISON: * * * And just briefly, Dr. Fagan, when you indicated that you provide draft reports to both Staff as well as the three EDUs that are the subjects of this proceeding and you solicit specifically recommendations from Staff, those are recommendations, correct? Ultimately you hold the ability to take recommendations as suggestions and incorporate them into your Staff Report, do you not?
>
> THE WITNESS: That's correct. Whether they are incorporated are my decision.

(Tr. Vol. II at 226:22 – 227:8.)

Finally, OMAEG suggests that OCC should have been permitted to ask Dr. Fagan about the preliminary draft 2019 report in the *AEP Ohio PPA Rider Case* because the "best interests" language in that draft report is a "prior inconsistent statement." (OMAEG Brief at 39.) But the "best interests" language in the 2019 draft report could not be inconsistent with any "best interests" statements in the 2020 audit report because LEI "*didn't have* a conclusion on best interest in the 2020 audit [report]." (Emphasis added.) (Tr. Vol. II at 229:18-19.)

The Commission has previously determined that an auditor's actions in a prior proceeding lack relevance even where there are "obvious similarities between the audits," such as being "conducted by the same auditor, on similar timelines, and both concern[ing] similar OVEC riders." *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order at ¶ 34 (Sept. 6, 2023). In the Commission's recent review of Duke Energy's Reconciliation Rider, the Commission affirmed the Attorney Examiner's decision to strike evidence regarding the draft report in the *AEP Ohio PPA Rider Case* because the audit at issue in the Duke Energy Case and the draft audit in the AEP Ohio case, while similar, "were still completely separate audits." (*Id.*) The Commission should reach the same result here. The purpose of this proceeding is not to relitigate the auditor's conclusions in the *AEP Ohio PPA Rider Case*. Thus, even assuming, *arguendo*, that it was inappropriate for Staff to communicate with the auditor during that case, whether the auditor acted independently in a *different* proceeding has no relevance to *this* proceeding.

B. The Attorney Examiners correctly struck portions of OMAEG witness Seryak's testimony.

OMAEG also challenges the Attorney Examiner's orders striking portions of the testimony of OMAEG witness John Seryak. Mr. Seryak's prefiled testimony attempts to offer opinions outside 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 costs recovered through the LGR. These topics were irrelevant to this proceeding.

Well before hearing, the Attorney Examiner held that information regarding the H.B. 6-related investigations was beyond the scope of these proceedings. In particular, the Attorney Examiner rejected OCC's attempt to retrieve copies of "subpoenas received by any AEP entity relating to [H.B. 6] from the [SEC]" because "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*." (Emphasis added.) July 7, 2023 Entry at ¶ 33. In that same Entry, the Attorney Examiner also found that "reports, forecasts, policies, and other information that pertains to years falling beyond the period under review in these proceedings – January 1, 2020, through December 31, 2020" are "not relevant to the subject matter of these cases or reasonably calculated to lead to the discovery of admissible evidence." July 7, 2023 Entry at ¶ 29. Accordingly, Seryak's opinions regarding the older rider mechanisms that the LGR Rider replaced had no bearing on this case. The Attorney Examiner properly struck Seryak's opinions on both irrelevant matters.

Much of OMAEG's post-hearing brief defends the struck portions of Seryak's testimony at a meaningless level of generality – arguing, for example, that "the legislative history of HB 6" is relevant to interpreting its meaning (OMAEG Brief at 30), and that Seryak should have been permitted to testify about the governing statutes and prior OVEC-related riders because the audit report and other parties' testimony referenced the same topics. (*See*, *e.g.*, OMAEG Brief at 22-25.) A closer look at the specific testimony clearly reveals its irrelevance.

The Seryak testimony that the Commission struck opines that, for various reasons, "the Commission should not allow the EDUs to continue to recover costs through the LGR Riders until all HB6-related investigations have concluded * * * ." (OMAEG Exhibit 1 at 5-6, 9-13, and 26-27 (stricken). But OMAEG has identified no legal principle that would permit the Commission to follow Seryak's suggestion. R.C. 4928.148 directs the Commission to establish "a nonbypassable rate mechanism * * * for recovery of [prudently incurred costs related to a legacy generation resource] through December 31, 2030 * * * ." R.C. 4928.148(A). It further directs the Commission to determine, in 2021, "the prudence and reasonableness of the actions of [EDUs] with ownership interests in [OVEC] * * * during calendar year 2020." R.C. 4928.148(A)(1). These statutory mandates remain in effect. Seryak's filed testimony advises the Commission to ignore its statutory mandates. The Attorney Examiner was right to strike testimony recommending that the Commission ignore (or worse, violate) the law.[5]

The stricken Seryak testimony also suggests that the Commission should deny cost recovery under the LGR Riders because the EDUs have historically collected millions of dollars under their prior OVEC-related riders and would likely recover additional millions of dollars between 2023 and 2023. (*See* OMAEG Exhibit 1 at 8, 19 (stricken).) Under the Attorney Examiner's prior entry, information on past collections under other riders or future collections under the LRG Riders, outside the audit year, are irrelevant to an audit of 2020 Rider charges.

[5] OMAEG similarly argues that the Commission should have allowed OCC to introduce a copy of AEP Inc.'s SEC Form 10-Q and the complaint in the criminal action against ex-Ohio Speaker Larry Householder, because those documents discuss AEP's alleged "connection to the legislative history of HB 6" and may show that AEP Ohio "'come[s] into this with unclean hands.'" (Footnote omitted.) (OMAEG Brief at 40.) For the reasons provided above, the history of HB 6 is irrelevant to this proceeding and the Attorney Examiner was correct to exclude those documents.

See July 7, 2023 Entry at ¶ 29. Again, OMAEG cites no precedent, legal principles, or statutory text that would allow the Commission to disallow cost recovery under R.C. 4928.148 for 2020 based on a witness's personal opinion that the total OVEC-related cost recovery over time will ultimately be higher than he would like.[6]

Finally, the stricken Seryak testimony argues that that the "LGR Rider costs should be disallowed in their entirety" because, based on his "understanding of prior Commission orders, the OVEC Riders were intended to function as meaningful 'financial hedge[s] that mitigate price spikes in market prices' and 'provide added rate stability.'" (OMAEG Exhibit 1 at 14, citing *In the Matter of the Application of Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 16-369-EL-SSO, Opinion and Order at ¶ 14 (October 20, 2017) and *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.,* Opinion and Order at 21 (March 31, 2016) (stricken).) He quotes Commissioners Trombold and Haque's concurring opinions in the *AEP Ohio Rider PPA Case*, in which they articulated their thoughts regarding the purpose of AEP's PPA Rider. (OMAEG Exhibit 1 at 14 – 15 (stricken).) And he opines that LGR Rider costs are "required to be related to a contractual entitlement" because of the Commission's holdings in prior OVEC-related proceedings for AEP Ohio, Duke, and AES Ohio. (*See id.* at 16 (stricken).)

[6] OMAEG also argues that the Commission should have allowed OCC to introduce an excerpt from a 2023 PJM Report, which OMAEG asserts "contained information about the likelihood that the Clifty Creek plant would be prematurely retired before the next audit of the LGR Riders * * * ." (OMAEG Brief at 37; *see also* Tr. Vol. II at 139:4-8 ("This is dated 2023 and the audit report was in 2021.").) Because that document post-dated the audit period, the Attorney Examiner's ruling excluding the document was consistent with the Commission's prior rulings (*see* July 7, 2023 Entry at ¶ 29). Additionally, because OCC and OMAEG offered no evidence that Clifty Creek *has* been retired, the Attorney Examiner correctly held that OCC had failed to lay a foundation for the report's relevance. (*See* Tr. Vol. I at 142:4-9 and 144:1-5.)

As the Attorney Examiner correctly recognized at hearing, those are all *legal* arguments, which OMAEG was free to – but, for some reason, chose not to – make in its post-hearing brief. (*See* Tr. Vol. V at 1322:20-21.) More importantly, they are clearly *incorrect* legal arguments, as the Attorney Examiner also recognized at the hearing. (*See id.* at 1323:13-19.) AEP Ohio's PPA Rider, Duke's Price Stabilization Rider ("PSR") and AES Ohio's Reconciliation Rider ("RR") are not the subject of these proceedings. Those rider mechanisms were "replaced" as of January 1, 2020, by the LGR Riders. R.C. 4928.148(A). The Commission was correct to conclude that there should be no consideration of the prior mechanisms created under a different statute, or of Commission decisions implementing those prior mechanisms.

For all of these reasons, the Attorney Examiner was justified in striking Seryak's irrelevant testimony.

CONCLUSION

For the foregoing reasons, the Commission should find that AEP Ohio's actions with respect to OVEC in the 2020 audit year were prudent and reasonable in accordance with R.C. 4928.148(A)(1), and the Commission should adopt the Auditor's recommendation of no disallowances to the costs included in the LGR related to the 2020 audit year.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 5th day of March 2024, via electronic transmission.

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