BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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**AES OHIO'S REPLY BRIEF**

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## I. INTRODUCTION AND SUMMARY

As AES Ohio demonstrated in its initial brief, the Commission should conclude that AES Ohio's conduct as to OVEC during the 2020 Audit Period was prudent. Before addressing individual arguments made by the intervenors, AES Ohio has two critical points to make:

1. The Commission's Staff recommends that the Commission approve the audit: The statute in this case requires the Commission to determine "the prudence and reasonableness of the actions of the electric distribution utilities with ownership interests in the Legacy Generation Resource." R.C. 4928.148(A)(1). To assist it to make that determination, the Commission engaged an outside third-party auditor. After an extensive audit, the auditor (London Economics International, LLC ("LEI")) prepared a 107-page report that thoroughly explained LEI's findings. Staff Ex. 3C. LEI (p. 9) found "the processes, procedures and oversight were mostly adequate and consistent with good utility practice," and did not recommend any disallowances.

In its initial post-hearing brief, the Commission's Staff (p. 12) recommended that the Commission "should adopt the conclusions and recommendations made by the Auditor." Staff also did not recommend any disallowances.

2. Points the Intervenors do not Dispute: There are numerous important points that the intervenors do not contest in their briefs, including:

a. The Commission's Duke decision: As demonstrated in AES Ohio's initial brief (pp. 7-10), the Commission's decision that Duke's conduct regarding OVEC in 2019 was prudent is dispositive of the issues here, since the intervenor witnesses admitted that they were not aware of any material differences in how OVEC was operated between 2019 and 2020. In their initial briefs, none of the intervenors attempted to distinguish that *Duke* decision.

b. The ICPA: None of the intervenors contested AES Ohio's decision to sign the ICPA. As AES Ohio demonstrated in its initial brief (pp. 13-14), the ICPA effectively requires OVEC to offer its units as Must Run into PJM's day-ahead energy markets. As demonstrated below, the ICPA also requires AES Ohio to make certain payments for debt and pension expenses that OCC contests.

c. The Operating Procedures: None of the intervenors contest AES Ohio's vote to approve the Operating Procedures. As AES Ohio demonstrated in its initial brief (pp. 13-14), those Operating Procedures required that OVEC's plants be offered as Must Run.

d. Actual Revenues/Costs: None of the intervenors contested that the LGR passed on to customers the actual net amount of AES Ohio's OVEC costs and the associated PJM revenue.

e. PJM Revenues were Maximized: None of the intervenors assert that AES Ohio or OVEC could have done anything to recover more revenue from PJM.

f. Capacity Bids: None of the intervenors contest AES Ohio's decision to bid OVEC's capacity for 2020 into PJM's BRA capacity auction. That auction occurred several years before the Audit Period, and as a result of having a successful bid in that auction, AES Ohio was required to offer OVEC's generation into PJM's energy market during the Audit Period. Tr. 1094 (Crusey); 1215-16 (Glick).

## II. OVEC'S COSTS WERE PRUDENT

### A. It Was Prudent to Offer the Units as Must Run

The intervenors (OCC, pp. 10-22; OMAEG, pp. 12, 48-49, 54-55, 62-65; Kroger, pp. 9-12; CUB, pp. 17-29; OEG, pp. 14-15; Sierra Club, pp. 10-14) assert that it was not prudent for OVEC to offer the units as Must Run into PJM's day ahead energy markets. In particular, intervenors assert that it was imprudent to offer the units as Must Run during times when OVEC's variable costs exceeded the PJM energy market price. The Commission should reject their arguments for the following reasons.

First, in the Duke audit case, the Commission has already determined that it was prudent to offer OVEC's units as Must Run during 2019. *In re Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order (Sept. 6, 2023), ¶ 58. Tr. 615 (Stanton); Tr. 1200 (Glick); Tr. 1259-60 (Perez); OMAEG Ex. 1, pp. 1-29 (Seryak). None of the intervenors attempted to distinguish that decision, and witnesses for the intervenors admitted that they were not aware of anything that Duke did in 2019 that AES Ohio should have done but failed to do in 2020. Tr. 615 ("Q. Okay. Are you aware of any differences in the way OVEC was operated in 2019, as compared to how it was operated during the Audit Period of 2020? A. I didn't review that for my testimony.") (Stanton); Tr. 1200 (agreeing that other than the OVEC units being offered Economically due to COVID during 2020, witness Glick was not aware of "[a]ny other material differences" between how the OVEC units were operated in 2019 and 2020); Tr. 1259-60 ("Q. Fair to say you are not aware of any difference between how OVEC was operated in 2019 compared to how it was operated in 2020? A. That is correct, I'm not aware.") (Perez).

Second, as AES Ohio demonstrated in its initial brief (pp. 13-14), the ICPA and the Operating Procedures mandate that OVEC's units be offered as Must Run, absent unanimous consent. Witnesses for the intervenors agreed that it was prudent for a party to comply with its contractual obligations. Tr. 616 (Stanton); Tr. 1202 (Glick); Tr. 1256 (Perez).

Third, as discussed in AES Ohio's initial brief, there was overwhelming evidence that it was prudent to offer the units as Must Run. For example, the auditor explained that the OVEC coal-fired units were "designed to operate continuously." Staff Ex. 2, p. 44. *Accord*: Tr. 361-62 ("in the case of coal plants, [offering them as economic] can cause difficulties in managing staffing and fuel delivery and repeated startup of coal plants can damage equipment") (Fagan).

The utilities also offered significant evidence that it was prudent to offer the units as Must Run. AES Ohio Ex. 4, pp. 9-10; AEP Ex. 1, pp. 11-13; Duke Ex. 1, pp. 8-10.

OCC (p. 12) and OMAEG (p. 13) argue that the auditor failed to evaluate whether OVEC acted prudently in bidding into PJM's day-ahead energy markets. However, as demonstrated above, the auditor did conclude that the plants were designed to be operated "continuously," and that there would be "difficulties" if they were not. In any event, the evidence offered by the utilities (cited above) demonstrates that it was prudent to offer the units as Must Run.

OCC (pp. 14-15, 17-18) relies upon a decision by the Michigan Public Service Commission that disallowed recovery of OVEC energy costs to the extent that those costs exceeded PJM market rates. However, in that case, the MPSC had passed a Code of Conduct that capped recovery of OVEC costs at the market rate. *In re Application of Indiana Michigan Power Co.*, Case No. U-20530, Order, pp. 3, 9. The MPSC thus disallowed recovery of a portion of the Michigan utilities' OVEC costs.

Here, in contrast, the LGR statute does not include a market-rate cap on recovery. Instead, the LGR statute requires the Commission to evaluate whether the actions of the utilities were prudent. R.C. 4928.148(A)(1). It is well settled that "the PUCO, as a creature of statute, has no authority to act beyond its statutory powers." *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 32) (alteration in original) (internal quotation marks and citation omitted). The LGR statute does not include a market rate cap, but instead, provides that the LGR can be a charge or a credit to customers depending on whether PJM revenues are greater than or less than OVEC's costs. R.C. 4928.01(A)(40). Since the LGR statute does not include a market rate cap, the Commission does not have the authority to create such a cap.

Several intervenors (OCC, pp. 19-22; OMAEG, p. 50) rely upon a table prepared by the Independent Market Monitor for MISO. The Commission should reject those arguments for the following reasons.

<u>First</u>, the intervenors have not established that MISO is a good proxy for PJM. OCC witness Perez agreed that there were material differences between the two markets. Tr. 1265-66. In particular, as discussed above, the ICPA and the Operating Procedures impose contractual requirements that OVEC's units be offered as Must Run. There is no evidence that the MISO units have a similar requirement.

<u>Second</u>, the MISO report to which they cite has data for 2017-2020 (aggregated), 2021 and 2022. OCC Ex. 20, p. 14 (Perez). The report does not contain data specific to the 2020 Audit Period.

<u>Third</u>, the MISO report shows that during 2017-2020, there were a total of 1839 coal plant starts, and that 888 (843+41+4) of those starts were Must Run. *Id*. The fact that

nearly 50% of the starts in MISO were Must Run shows that offering coal plants as Must Run is a typical and prudent practice.

OMAEG (p. 49) quotes the audit report as stating "[i]deally, the units would be committed based on economics all or most of the time." However, OMAEG failed to quote the remainder of that sentence, which was "but LEI is aware that this can be an issue for coal plants, which are designed to be operated continuously." Staff Ex. 2, p. 44. At the hearing, the auditor explained that the "ideally" comment in the audit applied to an "ideal world" but that coal plants are not designed to operate that way. Tr. 361-62.

OMAEG (p. 55) relies upon testimony from Duke witness Swez that operating the units "solely" as Must Run may not be in the best interest of customers. OMAEG ignores the fact that the units are not operated "solely" as Must Run during the Audit Period. The evidence shows that with unanimous consent, some of the units were offered as Economic during the audit period when market prices were very low during COVID. AES Ohio Ex. 4, pp. 10-11.

### B. <u>OVEC's Fuel Costs Were Prudent</u>

As AES Ohio demonstrated in its initial brief (pp. 20-21), OVEC's fuel costs were prudent. The Commission should reject the intervenors' arguments regarding fuel costs for the following reasons.

Several intervenors (OMAEG, pp. 51-53, 65-66; Kroger, pp. 8-9; CUB, pp. 30-32) assert that a contract that OVEC signed with Resource Fuels was at above-market costs. However, the auditor explained that the contract was signed in 2012 and that "entering into a contract at that time would probably have involved higher prices." Tr. 402-03. The auditor specifically stated that "[w]e did not find that contract was imprudent." Tr. 402. *Accord*: Tr.

1156 (Crusey). Indeed, in the *Duke* case, the Commission expressly rejected the argument that OVEC's fuel contract with Resource Fuels was imprudent. *In re Duke Energy Ohio*, Case No. 20-167-EL-RDR, Opinion & Order (Sept. 6, 2023), ¶ 61.

Several intervenors (OMAEG, p. 59; Kroger, p. 13; CUB, pp. 29-30; OEC, pp. 11-14) argue that the evidence shows that OVEC ordered too much coal for 2020, which contributed to OVEC's decision to offer the units as Must Run. The Commission should reject that argument because demand was at historic lows during 2020 due to the economic downturn associated with COVID. AES Ohio Ex. 4, p. 11 (Crusey). OVEC could not have foreseen that economic downturn, so it was reasonable for OVEC to order coal based upon historic needs.

OMAEG (p. 58) argues that OVEC could have terminated its contract with Resource Fuels. However, the contract clause to which OMAEG cites would allow OVEC to terminate the contract if a change in law "makes economically unfeasible . . . [OVEC's] use of the coal." OMAEG Ex. 1, pp. 24-25. OMAEG has not explained how a change in law has made it economically unfeasible for OVEC to use coal from Resource Fuels.

### C. <u>Component D Costs Should be Recovered Through the LGR</u>

Several intervenors (OCC, pp. 22-23; OMAEG, pp. 45-46; Kroger, pp. 6-7; and OEC, p. 15) assert that Component D constitutes a "return on investment in common equity" that cannot be recovered through the LGR pursuant to R.C. 4928.01(A)(42). The Commission should reject that argument because it is based upon a mistake of fact.

Specifically, the ICPA requires the Sponsoring Companies to pay an Energy Charge (¶ 5.02) and a Demand Charge (¶ 5.03). AES Ohio Ex. 4, Ex. 1. The Demand Charge has a series of components (<u>e.g.</u>, debt, operating expense, taxes, <u>etc</u>.). *Id*. at pp. 8-11. One of those components is Component D, which states:

> "(d) Component (D) shall consist of an amount equal to the product of $2.089 multiplied by the total number of shares of capital stock of the par value of $100 per share of Ohio Valley Electric Corporation which shall have been issued and which are outstanding on the last day of such month."

*Id*. at p. 10.

The LEI audit claims that Component D is "similar to a dividend" and that "Component D is itself a return to the owners of OVEC." Staff Ex. 2, p. 9. Similarly, at the hearing, the auditor explained her belief that "[i]f you own the shares [in OVEC] you get $2.089." Tr. 484. Based upon the belief that Component D was "similar to a dividend" that was being paid to the owners of OVEC, the auditor concluded that Component D "seems to be" a "return on common equity" under R.C. 4928.01(A)(42).

However, that is not how Component D worked during the Audit Period. As a party to the ICPA, AES Ohio was required monthly to pay to OVEC $2.089 multiplied by the number of shares that AES Ohio owned in OVEC. AES Ohio Ex. 4, Ex. 1, p. 10. OVEC used those amounts to pay its operating costs. AEP Ohio Ex. 1, p. 21 (Stegal); Duke Ex. 1, p. 39 (Swez); Tr. 790 (Swez).

In addition to being a signatory to the ICPA, AES Ohio is also a shareholder in OVEC. AES Ohio Ex. 4, p. 4. However, OVEC has not made a dividend payment to its shareholders since 2013. AES Ohio Ex. 4, p. 5 (Crusey); AEP Ohio Ex. 1, p. 21 (Stegal); Duke Ex. 1, p. 39 (Swez).

The auditor is thus mistaken in concluding that Component D is "similar to a dividend," that "Component D is itself a return to the owners of OVEC," and that "[i]f you own shares [in OVEC], you get $2.089." Given the auditor's incorrect conclusion that OVEC paid Component D amounts to its shareholders, the Commission should reject the auditor's statement that Component D "seems to be" a return on equity.

Significantly, the intervenors make the same mistake as the auditor—they believe that Component D is a return that was paid to the utilities. OCC, p. 22 (pursuant to Component D, "[d]uring the audit period, AEP, Duke and DP&L collected $2.51 million as a return on equity (or profit)"); OMAEG, p. 46 ("Component D 'is itself a return to the owners of OVEC'" (quoting audit reports)); Kroger, p. 7 (same). The intervenors' arguments are thus based upon the same mistake of fact as the auditor, and their arguments should be rejected for the same reasons.

### D. It Was Prudent for OVEC to Maintain a Debt Reserve

OCC (pp. 23-27) asserts that the three utilities paid their proportionate share of OVEC's $30 million "[a]dvanced billing of debt reserve" (OCC Ex. 7, p. 10) in 2020, and that those amounts are not eligible for recovery under the LGR. Specifically, OCC (pp. 24-25) asserts that the advanced billing of OVEC's debt reserve does not constitute a "prudently incurred cost" under the LGR statute, R.C. 4928.148(A).

The Commission should reject that argument for the following reasons.

First, OCC did not raise this issue in its testimony. It thus has no facts to explain why it purportedly was not prudent to maintain a debt reserve.

Second, the LGR statute defines "prudently incurred costs" as costs "allocated pursuant to [the ICPA]." R,C. 4928.01(A)(42). The ICPA, in turn, specifically authorizes

OVEC to bill the utilities for amounts associated with debt "whether or not such interest or other amounts have come due or are actually payable during such Month." AES Ohio Ex. 4, Ex. 1, ¶ 5.03(a) (emphasis added).

The ICPA thus authorizes OVEC to bill utilities for debt in advance. The debt reserve bills were thus "allocated pursuant to [the ICPA]" under the LGR statute and can be recovered through the LGR.

OCC (pp. 24-26) asserts that "OVEC 'has not yet incurred the related costs'" and argues that the debt reserve would not constitute a "cost" if that type of cost was at issue in a rate case. However, that argument focuses on the wrong entity.

Specifically, while it is true that OVEC has not paid those amounts to its creditors, OCC's argument overlooks the fact that the utilities have paid those amounts to OVEC. The LGR statute allows the utilities to recover their prudently incurred costs. R.C. 4928.148(A)(1). OCC does not dispute that the utilities did pay their shares of the debt reserve to OVEC during the Audit Period, so those costs qualify for recovery under the statute.

Third, it is prudent for OVEC to have a debt reserve, since having such a reserve mitigates risks. Indeed, corrected Ex. 2 to OCC witness Stanton's testimony is a Rating Action Commentary by Fitch, which affirmed a "BBB-" issuer rating for OVEC. OCC Ex. 1, corrected EAS 2, p. 1. Fitch (p. 1) listed certain "Key Rating Drivers" and discussed (p. 2) the reserve:

> "**Liquidity Enhancements:** OVEC began funding a debt service reserve in 2017, in anticipation of FES's bankruptcy filing. At that time, OVEC stated its intention to build the reserve by $30 million per year to $120 million, which the company achieved by Dec. 31, 2020. OVEC anticipates maintaining the collected reserve at the current level, representing approximately one year's worth of debt

> service, to enhance OVEC's credit and to provide future financial flexibility."

OCC witness Stanton conceded that Fitch concluded that the debt reserve was "a driver that Fitch considered favorable." Tr. 622-23. She also agreed that improving a utility's credit rating, all else equal, will lower the utility's cost of debt. Tr. 622.

OVEC bills its debt costs to the utilities pursuant to the ICPA (AES Ohio Ex. 4, Ex. 1, ¶ 5.03(a)), which costs are then recovered through the LGR. The debt reserve thus improved OVEC's credit rating, which lowered OVEC's costs of debt, which lowered costs to customers. The debt reserve is thus prudent.

OCC (p. 26) also argues that the debt reserve is prohibited by R.C. 4928.01(A)(42) ("in the event of a premature retirement of a Legacy Generation Resource, [such clauses] shall exclude any recovery of remaining debt."). The Commission should reject that argument because that clause would be applicable only if there was a "premature retirement." The OVEC units have not been retired.

OCC (pp. 26-27) also argues that the debt reserve violates the principle of "intergeneration equity." The Commission should reject that argument for two reasons. First, that argument has no basis in the LGR statute. As demonstrated above, the LGR statute allows recovery of the debt reserve. Second, current customers do get the benefit of lowering OVEC's cost of debt.

### E. The Commission Should Reject OCC's Postretirement Benefit Arguments

OCC (pp. 27-29) argues that the Commission should credit to customers their share of postretirement benefits collected during the audit period. OCC (p. 28) relies upon a statement in OVEC's annual report that OVEC's regulatory liability for postretirement benefits represents amounts collected in excess of GAAP requirements for net periodic benefit costs. The Commission should reject that argument for the following reasons.

First, postretirement benefits are a complex and are governed by ERISA and accounting requirements. When OCC asked the Auditor about pension and benefit costs, the auditor explained that "pensions and benefits have to do with the previous makeup of the workforce, salaries, the age of the workforce, whose retired, so I think you would have to look at that very carefully on a case-by-case basis." Tr. 241. OCC does not cite to any expert testimony regarding what the postretirement benefit is or how it was calculated. OCC has thus failed to provide the "case-by-case" analysis that the Auditor testified would be necessary.

Second, OCC ignores the governing statute. The LGR statute defines prudently incurred costs as "costs, including deferred costs, allocated pursuant to [the ICPA]." R.C. 4928.01(A)(42). The ICPA specifically authorizes OVEC to bill the Sponsoring Companies for pension costs, including for postretirement benefits. AES Ohio Ex. 4, Ex. 1, p. 10. The regulatory liability associated with postretirement benefits thus constitutes "costs, including deferred costs allocated pursuant to [the ICPA]" and were appropriately recovered through the LGR.

Third, the 2020 OVEC Annual Report reflects that "Other Postretirement Benefits" were underfunded by $11,995,106 at the end of 2020. OCC Ex. 7, p. 24. The

Commission thus should not conclude that the utilities have made excessive payments to OVEC for postretirement benefits.

<u>Fourth</u>, the Commission has allowed utilities to include prepaid pension assets in rate base on at least two occasions. *In the Matter of the Application of The Ohio Edison Co., The Cleveland Electric Illuminating Co. and The Toledo Edison Co. for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 07-551-EL-AIR, *et al*., Opinion and Order (Jan, 21, 2009), p. 16; *In the Matter of the Commission Review of Capacity Charges of Ohio Power Co. and Columbus S. Power*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012), p. 34. Staff has recognized that prepaying pension amounts benefits customers by reducing future pension costs. *In the matter of the Application of Columbus S. Power*, Case No. 11-351-EL-AIR, Staff Report (Sept. 15, 2021), pp. 7-8 ("The additional [pension] contributions represent cash investments above the amount of the pension cost included in the cost of service or the income statement. The additional contributions benefit customers by reducing future pension costs through increased earnings.").

## III. <u>AES OHIO CANNOT CONTROL OVEC</u>

Even if the Commission were to conclude that OVEC acted imprudently, the LGR statute requires the Commission to evaluate "the prudence and reasonableness of the actions of the electric distribution utilities." R.C. 4928.148(A)(1). That distinction is important because AES Ohio has only a 4.9% ownership interest in OVEC (AES Ohio Ex. 4, p. 3 (Crusey)), and has only 1 seat on OVEC's 15-person Board (CUB Ex. 1, p. 41 (Glick)).

OMAEG (p. 55) and CUB (p. 24) assert that the three utilities in this case should work together. The Commission should reject that argument for three reasons. <u>First</u>, the utilities do regularly work together through OVEC's Operating Committee. E.g., Staff Ex. 2, p. 39. Second, as demonstrated above, the ICPA and the Operating Procedures mandate several of the items that the intervenors challenge here. The three utilities do not individually or collectively have the ability to change those contracts. Third, in any event, the three utilities own a minority interest in OVEC (AES Ohio Ex. 4, Ex. 1, p. 5) and have only 3 of 15 seats on OVEC's Board (CUB Ex. 1, p. 41 (Glick)). Thus, even collectively, they do not have the ability to control OVEC.

## IV. OTHER ISSUES

### A. "Best Interest of the Customer" is Not the Statutory Standard

Several intervenors (OCC, pp. 8-10; OMAEG, pp. 53-54; Kroger, p. 4; CUB, p. 22; OEC, p. 10) criticize the auditor because the audit does not address whether the utilities' actions were in the "best interest of customers." OCC witness Stanton quotes a definition of prudence from the Supreme Court of Ohio and asserts "The PUCO adopted an even higher standard for the prudence review in the OVEC rider cases—the utility has the burden of proof to establish that the plants were operated 'in the best interest of retail ratepayers.'" OCC Ex. 1, pp. 13-14. *Accord*: Tr. 618-19 ("best interest of customer" is a "higher standard" than prudence).

The Commission should reject the intervenors' arguments for two reasons.

First, the LGR statute requires a finding that the utilities acted prudently, but does not include a "best interest of customers" standard. R.C. 4928.148(A)(1). The Supreme Court of Ohio has defined the term prudence, and the Commission does not have jurisdiction to impose a "higher standard."

Second, in any event, the auditor concluded that OVEC was operated "consistent with good utility practice" (Staff, Ex. 2, p. 9) and did not recommend any disallowances. Further, the remaining parts of the audit and testimony from the utilities show that the utilities acted prudently. Staff Ex. 2, pp. 1-107; AES Ohio Ex. 4, pp. 5-16; Duke Ex. 1, pp. 5-40; AEP Ohio Ex. 1, pp. 7-21. That evidence demonstrates that the utilities acted in the "best interest of customers."

## B. The Attorney Examiner's Evidentiary Rulings Were Correct

### 1. Emails From AEP Ohio's 2019 Audit Case Were Properly Excluded From Evidence

OCC (pp. 29-34) asserts that the Attorney Examiners erred in excluding certain emails and related testimony from AEP Ohio's 2019 OVEC Audit case. OCC asserts that members of the Commission's Staff asked LEI to make several changes to the draft LEI audit report in that case. In particular, OCC asserts that at Staff's request, LEI removed a statement from its audit report that running the plants was not in the best interest of customers. According to OCC (p. 31), if admitted, that evidence would establish that there was a "bias" or "lack of independence" by the auditor. The Commission should reject that argument for the following reasons.

First, the Commission has already affirmed the exclusion of similar evidence in the audit of Duke's 2019 OVEC costs. *In re Duke Energy*, Case No. 20-167-EL-RDR, Opinion & Order (Sept. 6, 2023), ¶ 34.

Second, over the objection of the utilities in this case, the Attorney Examiners allowed the Auditor to answer the following question:

> "Q. Did you submit a draft report on the AEP OVEC costs in 2019 stating that the running of the plants was not in the best interest of retail ratepayers?
>
> * * *
>
> A. So we submitted a draft report of the 2019 audit. I would have to look back at the text as to exactly how we said that. But we decided ultimately that it was too broad of a statement for the scope of the audit, so we didn't say it in the final audit report."

Tr. 177-78, 185.

OCC entirely ignored that evidence in its brief.

Third, even if admitted, the proffered evidence does not show that the auditor had a "bias and lack of independence" as OCC (p. 31) claims. OCC's argument assumes that the Commission's Staff was biased against customers and in favor of utilities. However, OCC has not proffered any evidence that that is true. Staff is charged with balancing the interests of all parties, and the fact that Staff made a recommendation that OCC did not like does not establish that Staff or the Auditor was biased or lacked independence.

Fourth, AES Ohio was not a party to the 2019 AEP OVEC audit case, and it would be unfairly prejudicial to admit evidence from that case into this case. Ohio Evid.R. 403.

### 2. The Attorney Examiners Properly Struck Testimony by OMAEG's Witness

The utilities jointly moved to strike two types of evidence from the pre-filed testimony of OMAEG witness Seryak: (1) evidence relating to the passage of HB6, including that HB6 was the result of a "corrupt" legislative process; and (2) testimony regarding legal standards that the Commission created in OVEC cases before the LGR was passed. Oct. 20, 2023 Motion, pp. 1-12. The Attorney Examiners granted that Motion in substantial part. Tr. 1299-1335.

OMAEG (pp. 14-36) challenges those evidentiary rulings. The Commission should affirm those rulings for the following reasons.

**a. <u>Evidence Regarding How HB6 was Passed is Irrelevant</u>**

As an initial matter, the Commission does not have jurisdiction to review the process by which a statute was passed. It is well settled that "the PUCO, as a creature of statute, has no authority to act beyond its statutory powers." *In re Ohio Power Co.*, 2015-Ohio-2056 at ¶ 32 (alteration in original) (internal quotation marks and citation omitted).

The LGR statute required the Commission to evaluate "the prudence and reasonableness of the actions of the electric distribution utilities." R.C. 4928.148(B). The process by which HB6 was passed is irrelevant to whether the utilities acted prudently as to OVEC during the Audit Period.

OMAEG (pp. 5-36) also argues that its evidence regarding the process by which HB6 was enacted was offered to respond to the testimony of other witnesses. However, none of the other witnesses in the case offered testimony regarding the legislative process leading to HB6. For example, OMAEG (p. 24) claims that proffered testimony regarding passage of the LGR statute was responsive to "detailed testimony" from AES Ohio witness Donlon "related to the creation of those riders." However, witness Donlon's testimony does not even mention the subject. AES Ohio Ex. 3.

### b. <u>Past Commission Precedent is no Longer Relevant</u>

OMAEG (p. 17) also complains that the Attorney Examiners struck evidence from its witness that "explained Ohio law, including prior caselaw (i.e., prior Commission decisions.)" OMAEG (p. 26) in particular complained about the Attorney Examiners' decision to strike testimony "that the LGR Riders should function as meaningful 'financial hedges that mitigate price spikes in market prices' and 'provide added rate stability'" (quoting OMAEG's proffer). The Commission should reject OMAEG's arguments for the following reasons.

First, as OMAEG admitted (p. 17), the purpose of the testimony was to "explain[ ] Ohio law." It is well settled that testimony as to the law is irrelevant and should be excluded. *Woods v. Capital Univ.*, 10th Dist. Franklin No. 09AP-166, 2009-Ohio-5672, ¶ 71 ("Questions of law are outside of the realm of firsthand knowledge, and thus, a lay witness may not offer legal conclusions."). OMAEG was free to make its legal arguments on brief.

Second, there is no requirement in the statute that the LGR act as a financial hedge or a rate stability charge. Those are items that the Commission may have considered when it was evaluating recovery of OVEC costs under prior statutes. However, the testimony of OMAEG's witness "explain[ing] Ohio law" misstated Ohio law because the LGR statute does not include those standards.

OMAEG (pp. 15-16) also repeatedly complains that testimony of its witness was struck on the "last day" of the hearing. However, that witness was called on the last day of the hearing as an accommodation to OMAEG because the witness was not available earlier. The motion to strike was filed before the hearing started, so OMAEG had ample time to prepare a response. *Compare:* Tr. 633 (oral motion to strike filed by OMAEG after witness was sworn).

### C. <u>It Was Prudent for AES Ohio to "Avail" Itself of Available Energy</u>

OMAEG (pp. 66-67) and Kroger (p. 14) assert that the utilities should not have "avail[ed]" themselves of available energy from OVEC, and that they would have saved variable costs if they had done so. The Commission should reject that argument for the following reasons.

<u>First</u>, the LGR statute provides that the utilities "shall bid all output from a legacy generation resource into the wholesale market." R.C. 4928.148(B). The statute thus precludes the utilities from refusing to avail themselves of OVEC generation.

<u>Second</u>, OMAEG's witness did not contest the decision of AES Ohio to bid into PJM's capacity market for the 2020 Audit Period. OMAEG Ex. 1, p. 29. That auction occurred 1-2 years before 2020, and as a result of its bid being accepted, AES Ohio was obligated by PJM's business rules to offer OVEC's generation into PJM's energy market during 2020. Tr. 1094 (Crusey); 1215-16 (Glick). AES Ohio could not satisfy that obligation if it elected not to avail itself of OVEC's generation.

<u>Third</u>, if AES Ohio did not avail itself of OVEC's generation, then it would become responsible for "Minimum Loading Event Costs," which could be substantial. AES Ohio Ex. 4, Ex. 1, pp. 3, 11.

### D. <u>The Utilities Do Not Have a Conflict of Interest</u>

OMAEG (pp. 47-48) and Kroger (pp. 7-8) argue that the utilities have a conflict of interest with their customers because (according to them) the utilities have "no incentive to demand that OVEC . . . operate more economically." That is plainly incorrect. Under the LGR statute, the utilities cannot recover costs unless they act prudently. The utilities thus have a strong incentive to act to make sure that OVEC is operated economically.

### E. The LGR is a Hedge

CUB (pp. 13-14) argues that the LGR did not act as a hedge during the audit period since the LGR was a charge every month during the period. As an initial matter, CUB does not dispute that the LGR has been implemented exactly as required by the statute.

Further, before the LGR statute was enacted, intervenors appealed the Commission's decision approving an OVEC rider for AEP, and on appeal, the Supreme Court of Ohio explained that the "intended purpose of AEP Ohio's rider was to provide a *financial hedge* against fluctuating prices in the wholesale-power market in order to stabilize retail-customer rates." *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agreement*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, ¶ 3 (emphasis added). The Court explained that the "[OVEC] Rider works as *either a charge or a credit* to [AEP Ohio's] retail customers, depending on how OVEC's costs compare to the market rate." *Id*. at ¶ 4 (emphasis added). In rejecting the legal challenges to AEP Ohio's OVEC rider, the Court reiterated that "the [OVEC] Rider was designed to act as a financial hedge against market volatility," and the Court upheld the approval of the OVEC rider because the OVEC rider "retained value as a financial hedge." *Id*. at ¶ 59.

Here, the LGR will be a charge or a credit to customers depending on whether market prices are higher or lower than OVEC's costs. R.C. 4928.01(A)(42). The LGR is thus a hedge.

### F. Environmental Upgrades Were Not Recovered During the Audit Period

CUB (pp. 32-33) challenges certain environmental upgrades that were approved by OVEC's Board during the Audit Period. The Commission should reject those arguments for two reasons. First, the costs of those upgrades were not recovered during the 2020 Audit Period. OCC Ex. 1, p. 50 (Glick). Second, in any event, CUB does not dispute that those upgrades were necessary to comply with federal law.

## V. CONCLUSION

The evidence—including the audit by the third-party auditor—demonstrates that the utilities acted prudently.

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**CERTIFICATE OF SERVICE**

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