

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the OVEC Generation :  
Purchase Rider Audits Required by : Case No. 21-477-EL-RDR  
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. :

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**REPLY BRIEF SUBMITTED ON BEHALF OF  
THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**On Behalf of the Staff of the  
Public Utilities Commission of Ohio**

**March 5, 2024**

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**I. INTRODUCTION**

This case concerns London Economics International LLC’s (“LEI” or “Auditor”) independent audits of the prudence and reasonableness of the actions of three electric distribution utilities (“EDUs”), Duke Energy Ohio, Inc. (“Duke”), The Dayton Power and Light Company d/b/a AES Ohio (“AES Ohio”), and Ohio Power Company d/b/a AEP Ohio (“AEP Ohio”) (collectively, the “EDUs” or “Companies”), in regard to their Legacy Generation Resource (“LGR”) ownership for the period spanning January 1, 2020, through December 31, 2020.

This case stems from the General Assembly’s statutory directive found in R.C. 4928.148(A). The statute directs that, “[o]n January 1, 2020, any mechanism authorized by the [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 [C]ommission for recovery of those

costs through December 31, 2030, from customers of all electric distribution utilities in this state.” R.C. 4928.148(A). Consistent with this statutory directive, the Commission established the LGR Riders for AEP Ohio, AES Ohio, and Duke. The statute also requires the Commission “to determine . . . 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,” while also directing the Commission “to exclude from recovery those costs that [it] determines imprudent and unreasonable.” R.C. 4928.148(A)(1). The audits at issue in this case were therefore initiated, pursuant to R.C. 4928.148, for the Commission to fulfill its statutory directive to determine the prudence and reasonableness of the actions of EDUs with ownership interests in an LGR, including the Ohio Valley Electric Corporation (“OVEC”). R.C. 4928.148; R.C. 4928.01(A)(41). Consistent with the statutory requirements, the Commission issued a Request for Proposal (“RFP”), which sets forth the scope of the audits and the specific areas to be reviewed in this case.

Following a thorough audit investigation, LEI filed three separate Audit Reports in the docket on December 17, 2021. Even though the Auditor found no instances of imprudence, the intervenors in this proceeding raise numerous arguments that are inconsistent with the General Assembly’s statutory directives, entirely irrelevant, or clearly beyond the scope of the audits. These arguments are without merit and should be disregarded by the Commission. Though the Audit Reports recommend continued and/or further evaluation of certain practices by the Companies related to the LGR Riders, as well as consideration of a few specified issues by the Commission, the Auditor found that

the processes, procedures, and oversight were mostly adequate and consistent with good utility practice. *In re 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, Duke Audit Report at 9-11 (Dec. 17, 2021), AEP Ohio Audit Report at 9-11 (Dec. 17, 2021), AES Ohio Audit Report at 9-11 (Dec. 17, 2021).

After a five-day evidentiary hearing, Initial Briefs were filed by AES Ohio, Duke, AEP Ohio, and intervening parties including the Office of the Ohio Consumers' Counsel ("OCC"), The Kroger Company ("Kroger"), Ohio Manufacturers' Association Energy Group ("OMAEG"), Ohio Environmental Council ("OEC"), Sierra Club, and jointly by Citizens' Utility Board of Ohio ("CUB Ohio") and Union of Concerned Scientists. The Staff of the Public Utilities Commission of Ohio ("Staff") filed an Initial Brief on February 12, 2024. Through this Reply Brief, Staff responds to the issues raised in those briefs and Staff also maintains the positions taken in its Initial Brief.

## **II. ARGUMENT**

The Commission should find that the Auditor completed the audits as required by R.C. 4928.148 and directed by the Commission. The Commission should also adopt the Auditor's findings that the EDUs' actions during the review period were prudent and reasonable.

**A. The statutory standard of review requires the Commission, not the Auditor, to make specific determinations.**

OCC argues that the Auditor did not make determinations required under R.C. 4928.148(A)(1). OCC Initial Brief at 10. The General Assembly, however, 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 [C]ommission determines imprudent and unreasonable.” R.C. 4928.148(A)(1). It is the role of the Commission to make the appropriate determinations based on the evidence of record, including the Audit Reports.

Consistent with precedent, the Commission “analyze[s] prudence at the time the decision was made.” *See In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order at ¶ 58 (Sept. 6, 2023) (“Duke PSR Audit”) (citing *In re Application of Suburban Natural Gas Co.*, 2021-Ohio-3224, 166 Ohio St. 3d 176). Additionally, the Commission has held that it is “not what strategy would have been the most prudent, but rather, whether the strategy deployed by [the utility] was prudent.” *See In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order at ¶ 59 (Sept. 6, 2023). Moreover, the Commission has held with respect to OVEC: “We do not find it worthwhile or necessary to parse the semantical differences between ‘prudent,’ ‘mostly prudent,’ or ‘mostly adequate.’ It is evident from the report that overall, and in regards to

each specific issue, the auditor found Duke's actions to be appropriate and sensible and, accordingly, prudent." *See In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order at ¶ 56 (Sept. 6, 2023).

As discussed below, in accordance with the statutory standard of review and prior precedent, the Commission should find that the EDUs' actions were prudent and reasonable at the time the actions were taken.

**B. The purpose of the audits is distinct from the scope of the audits.**

Some of the intervenors argue that the Audit Reports followed a limited scope compared to the overall purpose of the audits. *See* OEC Initial Brief at 9-11; OMAEG Initial Brief at 41-43; OCC Initial Brief at 9-10; Sierra Club Initial Brief at 13-17; CUB Ohio/Union of Concerned Scientists Initial Brief at 8. Staff, Duke, and AEP Ohio disagree. *See* Duke Initial Brief at 9-12; AEP Ohio Initial Brief at 7, 22. The intervenors also argue that the Auditor's decision to confine the audits to reviewing prudence is inconsistent with R.C. 4928.148. *See* OEC Initial Brief at 9-11; OMAEG Initial Brief at 41-53; Kroger Initial Brief at 4-9; OCC Initial Brief at 22; Sierra Club Initial Brief at 11; CUB Ohio/Union of Concerned Scientists Initial Brief at 13-17. They are wrong.

OCC, OEC, OMAEG, Kroger, Sierra Club, and CUB Ohio/Union of Concerned Scientists argue that the Audit Reports were insufficient because they did not expressly state a finding that the EDU's actions were in the "best interest of retail ratepayers." *See* OEC Initial Brief at 9-11; OMAEG Initial Brief at 41-53; Kroger Initial Brief at 4-9; OCC Initial Brief at 22; Sierra Club Initial Brief at 11; CUB Ohio/Union of Concerned

Scientists Initial Brief at 13-17. But these arguments are without merit. The Auditor's choice to confine audits to evaluating prudence and reasonableness is consistent with R.C. 4928.148.

The purpose of the audits is set out by the Commission in the RFP and explains *why* the audits will occur. The scope of the audits refers to what the Commission requires the Auditor to investigate. Although the scope and the purpose are distinct, the Auditor's adherence to the scope of the audits is what is important. Here, the Auditor fully complied with the "scope of investigation" section in the RFP, which details the general requirements for the audit investigation in a wide range of subject areas.

At the evidentiary hearing, Dr. Marie Fagan, the Auditor's Chief Economist, testified that: "So going into this audit, we felt that best interest of retail ratepayers, although it's part of the broader purpose that the Commission sought in the audits, it was outside the scope of the tasks that London Economics would be doing." Tr. Vol. II at 223.

R.C. 4928.148 says that *the Commission*, not the Auditor, shall determine the prudence and reasonableness of the EDU's actions. And when asked on cross-examination whether LEI provided the Commission with information in the Audit Reports to be able to make that determination, the Auditor replied "Yes." Tr. Vol. I at 108. Accordingly, it is the Commission that must make the final determination on these issues, not the Auditor. To enable the Commission to make the necessary determinations, the Audit Reports address the prudence and reasonableness of the actions of the EDUs within the areas set forth in the RFP's scope.

The Commission should find that the Audit Reports are consistent with the scope



of the audits required under R.C. 4928.148, as defined in the RFP.

**C. OVEC's 2020 coal procurement strategy was both prudent and reasonable.**

OVEC's 2020 coal procurement strategy was both prudent and reasonable. The Audit Reports in this case concluded that: "Coal contract terms seem reasonable in terms of compliance with the coal procurement target strategy. Having long- and short-term contracts in place allowed for some flexibility. LEI believes the overall coal contracts reflect market awareness and prudence." *See* AEP Ohio Audit Report at 64; AES Ohio Audit Report at 60; Duke Audit Report at 65. But the intervenors assert that a coal contract between OVEC and Resource Fuels that was in effect during the audit period included pricing that was above market rates. OCC Initial Brief at 13; OMAEG Initial Brief at 57-60; OEC Initial Brief at 12; Kroger Initial Brief at 12-13; CUB Ohio/Union of Concerned Scientists Initial Brief at 17.

The Auditor explained that the coal contract between OVEC and Resource Fuels was signed in 2012, and that "entering into a contract at that time would probably have included higher prices." Tr. Vol. III at 402-03. The Auditor specifically stated that "[w]e did not find that contract was imprudent." *Id.* at 402. "[T]he Resource Fuels contract, which is a very large contract and the one which is most out of line with the current market, is set to expire in 2021. LEI assumes that future contracts will reflect the lower prices currently prevailing in the market." AEP Ohio Audit Report at 65; AES Ohio Audit Report at 60; Duke Audit Report at 66.

Similarly, in the Duke PSR Audit, the Commission rejected the argument that OVEC’s fuel procurement was imprudent, stating that differences in prices “were attributable to, among other things, higher quality coal and existing contractual obligations with suppliers.” *See In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order ¶ 61 (Sept. 6, 2023). These same contractual obligations exist in this audit period; thus, the Commission should come to the same conclusion.

Further, the prudence standard requires the Commission to evaluate a decision “at the time the decision was made.” Duke PSR Audit, Opinion and Order at ¶ 58. Consistent with the findings in the Audit Reports, the Commission should determine, consistent with R.C. 4928.148, that OVEC’s contractual coal prices and inventory were prudent and reasonable.

**D. The “must-run” commitment strategy was prudent and reasonable.**

The intervenors in this case, including OMAEG, Kroger, OEC, Sierra Club, CUB Ohio/Union of Concerned Scientists, and OCC, argue that OVEC’s and the EDUs’ “must-run” commitment strategy for most of the audit period was not prudent or reasonable. OMAEG Initial Brief at 54; Kroger Initial Brief at 9; Sierra Club Initial Brief at 10; CUB Ohio/Union of Concerned Scientists Initial Brief at 17; OCC Initial Brief at 13. But the Commission recently found that using a “must-run” commitment strategy was prudent in the prior Duke OVEC audit. *See In re the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order at ¶ 58 (Sept.

6, 2023). The Commission should also find, in accordance with R.C. 4928.148(A)(1), the “must-run” commitment strategy was prudent and reasonable for these audits.

There are reasons coal plants normally operate under a “must-run” strategy. For example, (1) there are significant costs associated with starting up and shutting down the plants; (2) it takes significant time to ramp up a unit to get it online; and (3) starting and stopping a unit also results in substantial wear and tear and increases the risk of a unit breaking down. These are risks that are factored into unit commitment decisions. *See* AES Ohio Ex. 1 at 9-10; Duke Ex. 1 at 1-2, 8-10.

In general, the Commission recognized this reality in the Duke PSR Audit, when it determined that the OVEC “must-run” strategy was prudent during that audit period. *See* Duke PSR Audit, Opinion and Order at ¶ 58. What is at issue here is not what would have been the “most prudent,” but whether the actions of the EDUs were prudent.

The intervenors argue that because the OVEC Operating Committee authorized the option for the OVEC units to offer with an “economic” commitment status from April 14 to June 30, 2020, due to the impact of the COVID-19 pandemic on energy prices, then it should have continued to do so. OMAEG Initial Brief at 49-50; OEC Initial Brief at 14; Kroger Initial Brief at 9-12; Sierra Club Initial Brief at 10; OCC Initial Brief at 13. But the Commission has already decided that a “must-run” commitment strategy was prudent. *See* Duke PSR Audit, Opinion and Order at ¶ 58. Here, the Auditor properly found OVEC’s changes to the “must-run” strategy were prudent. *See* AEP Ohio Audit Report at 48; AES Ohio Audit Report at 44; Duke Audit Report at 50. Similarly, OVEC’s decision to offer the units as “must-run” in PJM’s day-ahead energy market for the rest of the

audit period was also prudent.

The Operating Committee acted prudently by designating the OVEC units as “must-run” in PJM’s day-ahead energy market for part of the audit period under review. The Commission should therefore adopt the Auditor’s conclusions that the sale of OVEC’s output in the energy market was prudent and that the EDUs should encourage the Operating Committee to allow OVEC the option to commit available units based on a “must-run” or “economic” status on an ongoing basis.

**E. The Commission should disallow recovery of “Component D” because it represents a return on equity to OVEC during the audit period.**

“Component D” is identified in the Amended and Restated Inter-Company Power Agreement (“ICPA”): “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.”

The EDUs argue that Component D is a cost, not a dividend. *See* Duke Initial Brief at 39; AEP Ohio Initial Brief at 23; AES Ohio Initial Brief at 21. OEC, on the other hand, argues that it is unreasonable for ratepayers to cover the costs of “Component D” because it is a return. OEC Initial Brief at 15-16. Component D is a return on investment in common equity per the ICPA. Staff agrees with the Auditor and OEC that all costs passed through the LGR Riders are subject to the limitation against collecting returns on investment.

R.C. 4928.01(A)(42) defines “prudently incurred costs related to a legacy

generation resource” as those “allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource.”

However, “such costs”—prudently incurred costs—exclude “any return on investment in common equity.” *Id.* Thus, while a cost must be included in the ICPA to be recovered, that is only a threshold condition. “Such costs” are still subject to the exemptions in R.C. 4928.01(A)(42). And the fact that Component (D) is a return on investment to OVEC does not exempt it from the limitations in R.C. 4928.01(A)(42)—even if prudently incurred. OEC Initial Brief at 15-16. Ohio customers should not pay a return to OVEC.

The Commission should adopt the Auditor’s recommendation that Component D seems to be a return on investment in common equity—a dividend—and should be disallowed as a cost pursuant to R.C. 4928.01(A)(42).

**F. There is no requirement or statutory authorization that enables the Commission to place a cap on capital costs.**

The Audit Reports state that the Commission should “consider” imposing a “cap” or “ceiling” on OVEC’s capital investments. AEP Ohio Audit Report at 87; AES Ohio Audit Report at 82; Duke Audit Report at 89. Although Staff agrees that the Commission should consider this issue as recommended by LEI, Staff believes that the Commission should review the recommendation based on the requirements of R.C. 4928.148.

Although capital spending is something that the Commission should carefully assess in this case, there is nothing in the LGR statute authorizing the Commission to pre-set caps on OVEC’s capital spending. Indeed, there is only a cap on the ultimate charge to customers. R.C. 4928.148(A)(2). The statute authorizes the Commission to review for

recovery of prudently incurred costs related to a legacy generation resource that have been made—but not to establish a cap on capital spending. *See* R.C. 4928.148(A)(1).

**G. Advance debt repayment and postretirement benefit costs are allowed for recovery.**

OCC argues that the Commission should disallow “advance debt repayment” costs and “postretirement benefit” costs recovered during the audit period. *See* OCC Initial Brief at 23-29. However, OCC’s arguments are at odds with R.C. 4928.148.

R.C. 4928.148(A) required the Commission to implement a rider for the recovery of “prudently incurred costs related to a legacy generation resource,” which R.C. 4928.01(A)(42) defines, in part, as “costs, including deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource....” The costs at issue here are costs which were allocated to the EDUs pursuant to the ICPA. Thus, the statute allows for their recovery.

In addition, OCC argues that the “advance debt repayment” costs should be disallowed because they *could* be used improperly to pay down debt in the event of the OVEC plant’s early retirement, which, OCC argues, would be unlawful. OCC Initial Brief at 26. This argument is also without merit. R.C. 4928.01(A)(42) states, in part, that prudently incurred costs related to a legacy generation resource “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.” Clearly, this provision only applies *if* there is a premature retirement. Since premature retirement has not occurred, OCC’s argument is without merit.

Finally, and significantly, as it pertains to both advance debt repayment and postretirement benefits, OCC does not explicitly argue that the EDU's actions were imprudent. Neither did the Auditor raise any concerns with the prudence or reasonableness of these costs. The Commission must make its determination based on the relevant law and, therefore, OCC's arguments should be denied.

**H. The evidentiary rulings were proper and should be affirmed.**

The attorney examiners made several evidentiary rulings that some of the intervenors disagree with. OMAEG and OCC argue that the Commission should reverse several attorney examiners' rulings to exclude OMAEG's testimony in response to the EDUs' and Auditor's testimonies. OMAEG Initial Brief at 14; OCC Initial Brief at 29.

The Auditor factually acknowledged HB 6 a limited number of times in the audits. Tr. Vol. V at 1291. But this does not open the door to the type of testimony presented as intervenors argue. OMAEG Initial Brief at 14. Instead, the testimony was beyond the scope of the underlying proceeding and is irrelevant. The attorney examiner was also right to exclude testimony related to pre-HB 6 OVEC riders because they are different riders from different cases with different standards of review. This proceeding is limited by statute to reviewing the prudence and the 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. Accordingly, R.C. 4928.148 is the existing law under which this proceeding is operating. *See* Tr. Vol. V at 1313-1314. Issues with the law's implementation, however, are beyond

the scope of this proceeding.

Moreover, the R.C. 4928.148(A) reference of “those costs” refers only to the phrase “prudently incurred costs related to a legacy generation resource,” as defined in R.C. 4928.01(A)(42), not costs associated with prior OVEC riders as OMAEG argues. Regardless, this is a purely legal issue that is not appropriate for non-lawyer expert testimony. Accordingly, the testimony excluded is outside the scope of this proceeding and not relevant. The Commission should uphold the attorney examiners’ exclusion of this testimony.

OCC argues that the attorney examiners erred by excluding evidence relating to an earlier audit involving the same Auditor. OCC Initial Brief at 29. The evidence cited pertains to a different proceeding, a different rider, a different audit period, and a different standard of review—it is not relevant or within the scope of this proceeding. Additionally, similar evidence has been excluded from prior OVEC proceedings. *See* Duke PSR Audit, Opinion and Order ¶ 56 (Sept. 6, 2023).

OCC’s argument that there was inappropriate direction given to the Auditor by Staff is incorrect. OCC Initial Brief at 29. The Commission should not be persuaded by OCC’s continued attempts to undermine the Commission and its Staff with false allegations. It is neither relevant nor appropriate. Accordingly, the Commission should uphold the attorney examiners’ evidentiary decisions to exclude irrelevant testimony.



### **III. CONCLUSION**

The audits in this case were conducted as directed by the General Assembly in R.C. 4928.148(A), which requires the Commission to establish a replacement nonbypassable rate mechanism for the retail recovery of prudently incurred costs related to an LGR and to determine the prudence and reasonableness of the actions of EDUs with ownership interests in an LGR, including OVEC. Additionally, the scope of this proceeding was clearly defined by the Commission in the RFP. The Commission determined that the audits would review the prudence and reasonableness of the actions of the EDUs with LGR ownership for the period from January 1, 2020, through December 31, 2020.

The Auditor completed its audits as directed by the Commission and consistent with the governing law. The Audit Reports prepared by LEI accomplished the Commission's directives and have provided the necessary information for the Commission to carry out its statutory obligations under R.C. 4928.148. The Commission should adopt the conclusions and recommendations made by the Auditor and, as applicable, make appropriate determinations consistent with the Auditor's recommendations and observations. Accordingly, the Commission should adopt the Audit Reports.

Respectfully submitted,

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**On Behalf of the Staff of the  
Public Utilities Commission of Ohio**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Reply Brief**, on behalf of the Staff of the Public Utilities Commission of Ohio, has been served upon the below-named counsel via electronic mail, this 5<sup>th</sup> day of March 2024.

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Summary: Reply Brief Submitted on Behalf of the Staff of the Public Utilities  
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