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

POST-HEARING REPLY BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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TABLE OF CONTENTS

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I. INTRODUCTION

"Holy mackerel," the Ohio Valley Electric Corporation (OVEC) charges passed on to customers are astonishing! This sentiment was shared by one of Duke Energy Ohio's (Duke) own employees in an email he wrote about OVEC's staggering losses,[1] and encapsulates the imprudent and unreasonable costs at issue in this case—$114,879,609.[2] The Dayton Power and Light Company d/b/a AES Ohio's (AES), Ohio Power Company's (AEP), and Duke's (collectively, the Sponsoring Companies) imprudent and unreasonable actions from January 1, 2020 through December 31, 2020 (Audit Period) caused Ohioans to be charged $114,879,609 to "increase the [Sponsoring Companies'] profits at the expense of their ratepayers"[3] and subsidize the imprudent

[1] OMAEG Ex. 17 (Public) at 33 (excerpt from Duke's Response to OCC-POD-02-012 Supp (Duke Emails)).

[2] Revised OMAEG Ex. 1 at Attachment A (Direct Testimony of John Seryak (Public) (Seryak Direct)) (November 10, 2023); Revised OMAEG Ex. 1A at Attachment A (Public Errata to Seryak Direct), which contains the corrected amount to be disallowed based on Staff Ex. 8C and the revised Public Audit Report Supplements. *See also* Staff Ex. 8C at 5, Figure 13, Column C (Revised AES Audit Report Supplement (Public) (January 4, 2024) (Public AES Supplement)); Staff Ex. 4 at 28–29, Figure 9, Column H (Revised AEP Audit Report (Public) (January 4, 2024) (Public AEP Audit Report)); Staff Ex. 6 at 26, Figure 9, Column K (Revised Duke Audit Report (Public) (January 4, 2024) (Public Duke Audit Report)). Note that while OVEC charged the Sponsoring Companies $114,879,609 in 2020, only $105,524,869.53 was collected from customers during 2020 due to the statutory monthly caps. The remaining 2020 costs were carried forward and collected in 2021. OMAEG is disputing the amount incurred during 2020 for OVEC rather than the amounts collected due to the caps.

[3] Revised OMAEG Ex. 1 at 8 (Seryak Direct).

and unreasonable operations of OVEC's two 1950s-era, aging, uneconomical, dirty coal plants located in Ohio and Indiana.

Pursuant to R.C. 4928.148(A), the substantial 2020 OVEC subsidies were charged to customers through the Sponsoring Companies' and the other electric distribution utilities' non-bypassable Legacy Generation Resources Riders (LGR Riders), which were created by the tainted House Bill 6 (HB 6) to recover "the same types of costs" related to OVEC that were previously approved for recovery through the Sponsoring Companies' prior OVEC recovery mechanisms (i.e., Duke's Price Stabilization Rider (PSR), AES' Reconciliation Rider (RR), and AEP's Power Purchase Agreement Rider (Rider PPA)).[4] By law, the "same types of costs" that were previously authorized for recovery must be reasonable, prudently incurred, *and* result from the Sponsoring Companies' prudent and reasonable actions.[5] However, as explained more fully below, the $114,879,609 charged to Ohioans for the 2020 Audit Period was unreasonable, imprudent, and resulted from the Sponsoring Companies' imprudent and unreasonable actions.

As succinctly stated by the Ohio Manufacturers' Association Energy Group's (OMAEG) expert witness Seryak, "[t]he LGR Riders are a drain on both Ohio's customers and the economy," and the Commission "has a duty to act and protect customers by disallowing the imprudent and unreasonable costs recovered through the LGR Riders" for the Audit Period.[6] Unsurprisingly, considering how flagrantly imprudent and unreasonable the 2020 OVEC costs are, all of the intervening parties' initial briefs filed on February 12, 2024 in this case reached the same

[4] AES Ohio Post Hearing Brief at 1 (February 12, 2024) (hereinafter, AES Brief). *See also* Initial Brief of Ohio Power Company at 5 (February 12, 2024) (hereinafter, AEP Brief); Initial Post-Hearing Brief of Duke Energy Ohio, Inc. at 2 (February 12, 2024) (hereinafter, Duke Brief).

[5] R.C. 4928.148.

[6] Revised OMAEG Ex. 1 at 8 (Seryak Direct).

conclusion.[7] The Office of the Ohio Consumers' Counsel (OCC) concluded that the Commission "should not force Ohio consumers to subsidize the [Sponsoring Companies'] imprudent operation of the OVEC plants and pay for above-market energy costs,"[8] The Kroger Co. (Kroger) "respectfully request[ed] that the Commission exclude from recovery the $114,879,609 collected from customers for the 2020 Audit Period,"[9] the Citizens Utility Board of Ohio and Union of Concerned Scientists (CUB/UCS) determined that the LGR Riders "are a costly millstone around the necks of ratepayers, forcing Ohioans to foot the bill for millions of dollars in above-market costs"[10] incurred during the Audit Period, the Ohio Environmental Council (OEC) "ask[ed] this Commission to find the [Sponsoring Companies] failed to act prudently and reasonably to address long standing problems at the OVEC plants and adverse market conditions in 2020," and the Sierra Club urged the Commission to "enforce Ohio law and disallow costs that resulted from the imprudent and unreasonable actions of AEP, Duke, and DP&L with respect to their ownership of OVEC."[11]

Importantly, while R.C. 4928.148 (a provision in HB 6) created the nonbypassable LGR Riders to recover costs related to OVEC, it *did not* grant the Sponsoring Companies a "blank check."[12] Rather, the law only authorizes the recovery of *prudently incurred* costs.[13] Therefore,

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[7] Initial Brief of the Office of the Ohio Consumers' Counsel (February 12, 2024) (hereinafter, OCC Brief); Initial Brief of The Kroger Co. (February 12, 2024) (hereinafter, Kroger Brief); Post Hearing Brief of the Citizens Utility Board of Ohio and Union of Concerned Scientists (Public) (February 12, 2024) (hereinafter, CUB/UCS Brief); Initial Post-Hearing Brief of the Ohio Environmental Council (February 12, 2024) (hereinafter, OEC Brief); Sierra Club's Initial Post-Hearing Brief (February 12, 2024) (hereinafter, Sierra Brief). *See also* Initial Brief of The Ohio Manufacturers' Association Energy Group (Public) (February 12, 2024) (hereinafter, OMAEG Brief).

[8] OCC Brief at 1.

[9] Kroger Brief at 3.

[10] CUB/UCS Brief at 3.

[11] Sierra Brief at 4.

[12] CUB/UCS Brief at 15. *See also* OMAEG Brief at 7.

[13] R.C. 4928.148(A)(1); R.C. 4928.01(A)(42).

R.C. 4928.148(A)(1) requires the Commission to "determine . . . the prudence and reasonableness of the actions of [the Sponsoring Companies]" and to "exclude from recovery those costs that the [C]ommission determines imprudent and unreasonable."[14] In order to make those determinations, the Commission is statutorily mandated to conduct or have conducted a prudency and performance review of the costs related to OVEC that were passed on to customers for 2020.[15] More specifically, through this mandated audit, the Commission has an obligation to determine whether the Sponsoring Companies' customers are paying just and reasonable costs that were prudently incurred, and whether the Sponsoring Companies' actions were reasonable and prudent in customers' best interest.[16] The Commission also has a responsibility to protect customers from the payment of unjust and unreasonable subsidies or imprudently incurred costs, and to prevent any actions that are not in customers' best interest, through other statutory mandates.[17]

As highlighted in the initial briefs filed by OMAEG and the other intervenors, the Sponsoring Companies bear the burden of demonstrating that the costs passed through the LGR Riders were just, reasonable, and prudently incurred, and that its actions were reasonable and prudent in the best interest of customers.[18] However, all of the Sponsoring Companies failed to meet their burden in this case, and the record evidence clearly demonstrates that the costs passed

[14] Additionally, R.C. 4928.01(A)(42) states that "[p]rudently incurred . . . 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."

[15] R.C. 4928.148. *See also* Entry and Response to Proposal No. RA21-PPA-1, RFP at 2, 6 (May 5, 2021) (hereinafter, Entry and RFP); Staff Ex. 2 at 7 (Revised AES Audit Report (Public) (January 4, 2024) (Public AES Audit Report)); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report).

[16] Entry and RFP, RFP at 2, 6. *See also* Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 (Public Duke Audit Report); OCC Ex. 11 at 7 (Auditor's Response to Proposal No. RA21-PPA-1 (Auditor Response)) (June 3, 2021).

[17] R.C. 4905.22 ("All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law . . . and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law . . ."). *See also* R.C. 4928.02(A).

[18] R.C. 4928.148(A)(1). *See also* OMAEG Brief at 20; OCC Brief at 7; Kroger Brief at 4; CUB/UCS Brief at 5; OEC Brief at 7.

on to customers through the LGR Riders for the Audit Period were unjust, imprudently incurred, unreasonable, and not in the best interest of customers. Therefore, as required by law, the Commission should find that the Sponsoring Companies' actions were neither prudent nor reasonable, and should "exclude from recovery those costs" totaling $114,879,609 that were imprudently incurred during the Audit Period.[19] At a minimum, the Commission should disallow all 2020 costs passed through the LGR Riders resulting from OVEC's imprudent must-run commitment strategy, 2020 costs that are a result of imprudent and excessively priced coal purchases, and/or 2020 costs that resulted from the Sponsoring Companies' imprudent and unreasonable decisions to take title to OVEC's energy at a loss to customers.[20] As explained below, arguments to the contrary[21] are unpersuasive and should be rejected.

Pursuant to the established procedural schedule in this case, OMAEG filed its initial brief on February 12, 2024, and hereby files its reply brief in the above-captioned proceeding.

II. RESPONSIVE ARGUMENTS

A. The record demonstrates that the OVEC costs passed through the LGR Riders for the 2020 Audit Period are unreasonable and imprudent, and that the Sponsoring Companies' actions were unreasonable and imprudent in 2020 and not in the best interest of Ohio customers.

As noted above, the Sponsoring Companies bear the burden of proof in this case.[22] However, contrary to the Sponsoring Companies' claims,[23] the record evidence simply does *not* demonstrate that the 2020 costs passed through the LGR Riders were just, reasonable, and

[19] R.C. 4928.148(A)(1), stating that "The commission shall . . . exclude from recovery those costs that the commission determines imprudent and unreasonable."

[20] *See* OMAEG Brief at 62–67.

[21] *See* AES Brief; AEP Brief; Duke Brief; Initial Brief of Staff (February 12, 2024) (hereinafter, Staff Brief)

[22] R.C. 4928.148(A)(1). *See also* OMAEG Brief at 20; OCC Brief at 7; Kroger Brief at 4; CUB/UCS Brief at 5; OEC Brief at 7.

[23] AES Brief at 10; AEP Brief at 10–25; Duke Brief at 3.

prudently incurred, and that the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers. In fact, the record is completely devoid of pertinent and material evidence necessary to prove that the 2020 costs were in fact reasonable and prudently incurred, and that the Sponsoring Companies' actions were reasonable and prudent.

Although the Attorney Examiners thwarted the intervenors' attempts to include additional evidence in the record that would have more clearly demonstrated the imprudence and unreasonableness of the OVEC costs and sales flowing through the LGR Riders for the Audit Period, the Sponsoring Companies, who have the burden of proof, failed to demonstrate that the LGR Rider costs were in fact reasonable and prudently incurred, and that their actions were reasonable and prudent. Pursuant to Ohio Adm.Code 4901-1-15(F), OMAEG's initial brief explained how the Attorney Examiners improperly excluded relevant and material evidence and expert testimony related to prior precedent opining on what OVEC costs are allowed to be recovered from customers as reasonable and prudent, which are the same types of costs referenced in R.C. 4928.148, the legislation that created the LGR Riders. Prior OVEC audits that would have directly responded to and rebutted the testimonies provided by the Auditor and Sponsoring Companies, and that would have demonstrated the imprudence and unreasonableness of the 2020 costs and the Sponsoring Companies' imprudent and unreasonable actions during the Audit Period should have been allowed and admitted in the record to assist the Commission in its reasonableness and prudency determinations.

For example, on the final day of the hearing, and over the objections of OMAEG and the other intervenors, the Attorney Examiners struck large portions of OMAEG's expert testimony that analyzed and relied on Ohio law and directly contradicted the Auditor's and Sponsoring

Companies' witnesses' testimonies, and that was filed in response to those testimonies.[24] Specifically, the Attorney Examiners unlawfully struck OMAEG witness Seryak's expert analysis regarding prior Commission decisions related to the same kinds of OVEC costs and the Commission's analysis and determination of the prudency and reasonableness of those costs, and his expert opinion that he formulated from that analysis. The Attorney Examiners also struck testimony regarding the legislation that was enacted by the General Assembly to create the LGR Riders—the very riders that the Commission was mandated to audit and determine the prudency and reasonableness of the costs that flowed through those riders, as well as the "prudence and reasonableness of the actions of the [Sponsoring Companies], including their decisions related to offering the contractual commitment into the wholesale markets."[25] Testimony regarding the plain language of the law that referred to the prior riders and costs and the legislative history and enactment of the bill that created the LGR Riders and that influenced the Sponsoring Companies' actions regarding the collection of OVEC costs from customers was also struck. The Attorney Examiners further struck several of OMAEG witness Seryak's expert conclusions regarding the prudency and reasonableness of the 2020 costs passed on to customers through the LGR Riders.[26]

Given that the Sponsoring Companies bear the burden of proof to demonstrate that all costs passed through the LGR Riders were just, reasonable, and prudently incurred, and that their actions were reasonable and prudent in the best interest of customers, by not allowing OMAEG and other intervenors the opportunity to rebut the assertions made by the Sponsoring Companies' witnesses and the Auditor and by not allowing OMAEG to even present expert testimony on these matters,

[24] Tr. Vol. V at 1300–14, 1316–18, 1320–23, 1326, 1328–30, 1332–35. *See also* OMAEG's Interlocutory Appeal and Application for Review at 17–27 (November 13, 2023) (hereinafter, Interlocutory Appeal).

[25] R.C. 4928.148(A)(1).

[26] *See* Tr. Vol. V at 1313–15, 1323–26, 1327–28.

the Attorney Examiners' rulings "effectively reduce[] or eliminate[] the Sponsoring Companies' burden. 'Proving' something when evidence and arguments to the contrary are silenced is hardly a burden."[27]

AES conceded in its initial brief that "the same costs and conduct that are at issue during the 2020 Audit Period in the case" were the same costs reviewed in the 2019 OVEC audit cases.[28] Duke similarly admitted that "[u]nrecovered Rider PSR balances were recovered via Rider LGR and reviewed during the 2020 audit period."[29] All three Sponsoring Companies discussed their previous OVEC recovery mechanisms *and* the Commission's past decisions regarding "the same costs . . . that are at issue during the 2020 Audit Period" in their initial briefs[30] and testimonies.[31] Therefore, OMAEG's expert witness also should have been allowed to rely on and testify about Commission precedent and past OVEC audit cases that reviewed the same costs at issue in this case to formulate and render his expert opinion and recommendation of whether the costs incurred and passed on to customers for the Audit Period were prudently incurred and reasonable. However, OMAEG was barred from doing so because the Sponsoring Companies hypocritically claimed that the Commission's past decisions regarding the previous OVEC recovery mechanisms were outside the scope of these proceedings.[32]

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[27] Interlocutory Appeal at 10.

[28] AES Brief at 8 (emphasis added).

[29] Duke Brief at 2.

[30] *See* AES Brief at 7–10; AEP Brief at 2–5; Duke Brief at 9–13.

[31] Duke Ex. 6 at 38 (Direct Testimony of John Swez (Swez Direct)) (October 3, 2023); Duke Ex. 3 at 4 (Direct Testimony of James Ziolkowski) (October 3, 2023); AES Ex. 3 at 2 (Direct Testimony of Patrick Donlon (Donlon Direct)) (October 3, 2023); AEP Ex. 1 at 6 (Direct Testimony of Jason Stegall (Stegall Direct)) (October 3, 2023); Tr. Vol. III at 738 (Cross-Examination of Swez); Tr. Vol. IV at 954–55 (Cross-Examination of Ziolkowski); Tr. Vol. IV at 1019–20, 1051–52 (Cross-Examination of Stegall).

[32] Motion to Strike the Testimony of John Seryak and Memorandum in Support at 8–10 (October 30, 2023); Tr. Vol. V at 1318–19.

Had the excluded evidence been admitted, OMAEG would have provided additional evidence to directly rebut the Sponsoring Companies' arguments,[33] and shown that the same OVEC costs being charged through the LGR Riders for 2020 were imprudent and unreasonable and that the Sponsoring Companies' actions were unreasonable and imprudent by analyzing the reasonableness and prudency of the 2020 costs and actions based on the Commission's prior precedent regarding the reasonable and prudent standard adopted by the Commission. This is exactly what the Sponsoring Companies are attempting to do now in their briefs (albeit unsuccessfully)—they are relying on a past Commission decision from a prior audit reviewing 2019 OVEC-related costs to argue that the 2020 costs are similarly reasonable and prudent.[34] The Commission cannot allow the hypocrisy to govern in this case. If the Sponsoring Companies can rely on past precedent concerning prior OVEC costs to attempt to make their arguments, so too should the intervenors.

To this end, OMAEG's expert should have been allowed to explain how, based on his understanding of the prior OVEC costs approved by the Commission and his expert opinion, the LGR Riders should function as meaningful "financial hedge[s] that mitigate price spikes in market prices" and "provide added rate stability."[35] Notably, the fact that the Commission previously determined that the prior OVEC recovery mechanisms were intended to serve as a financial hedge was directly addressed in AES' brief in this case.[36] Similarly, OMAEG's expert should have been allowed to testify that, because the LGR Riders have only resulted in net costs to customers "with little offsetting benefit from the riders' intended purpose as a hedge against market volatility," the

[33] AES Ex. 4 at 12–16 (Direct Testimony of David Crusey (Crusey Direct)) (October 3, 2023); AEP Ex. 1 at 10–17 (Stegall Direct); Duke Ex. 6 at 7–40 (Swez Direct). *See also* AES Brief; AEP Brief; Duke Brief.

[34] *See* AES Brief; AEP Brief; Duke Brief.

[35] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14 (Seryak Direct).

[36] AES brief at 5–6.

LGR Riders are not functioning as proper rate stability charges and therefore the 2020 costs are unreasonable and imprudent and should not be allowed to be recovered from customers.[37] This same conclusion was reached by CUB/UCS, which noted that because the LGR Riders were always a charge during the Audit Period, the concern that the riders would become "a blank check to [the Sponsoring Companies], with the customers treated as a "trust account" has come to pass."[38]

Correspondingly, testimony and evidence regarding the prior OVEC audits—which all three Sponsoring Companies rely on in their briefs in this case[39]—was "highly relevant evidence of the Auditor's . . . bias, prejudice and lack of independence."[40] As explained in OCC's brief, a draft of the 2019 AEP Audit Report concluded that "'keeping the plants running does not seem to be in the best interests of the ratepayers,'"[41] but Staff "asked London Economics to use 'a milder tone and intensity' in place of this language."[42] Had this information been entered into the record, it would have provided additional evidence on the ultimate questions in this case regarding whether the 2020 OVEC costs were prudently incurred and whether the Sponsoring Companies' actions were reasonable and prudent.[43] Moreover, the intervenors should have been allowed to probe into the Auditor's potential bias or prejudice, and whether the Auditor acted in an independent capacity as required by the Commission's rules, the RFP issued by the Commission, under Evidence Rule 607, which allows parties to question, probe, and challenge the credibility of a witness "by means

[37] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14–16 (Seryak Direct).

[38] CUB/UCS Brief at 15.

[39] AES Brief at 7–13; AEP Brief at 2–4; Duke Brief at 4, 12, 17.

[40] OCC Brief at 29.

[41] OCC Brief at 30, *quoting* OCC Ex. 20 at Attachment JSP-3 (Direct Testimony of Joseph Perez (Perez Direct)) (October 10, 2023).

[42] OCC Brief at 30, *quoting* OCC Ex. 20 at Attachment JSP-3 (Perez Direct).

[43] OCC Brief at 29–34. *See also* OMAEG Brief at 38–39.

of a prior inconsistent statement," and under Evidence Rule 613, which allows parties to "examin[e] a witness concerning a prior statement made by the witness."

Additionally, as explained in OMAEG's initial brief, all evidence regarding R.C. 4928.148 should have been admitted because information about the legislative history and investigations into the law that created the LGR Riders that occurred during the Audit Period is not only within the scope of this proceeding, it also helped inform OMAEG's expert witness' opinions, determinations, and recommendations in this case. All three Sponsoring Companies' briefs filed in this case and their testimonies admitted into the record all discussed the role that HB 6 played in creating the LGR Riders,[44] and the Audit Reports referenced or cited HB 6 nearly thirty times.[45] In fairness, and as allowed by Ohio law and the Commission's rules, the relevant information that OMAEG and other intervenors sought to provide related to HB 6 also should be considered by the Commission because it would assist the trier of fact in rendering its decision and the determination of the reasonableness and prudency of the 2020 OVEC costs passed on to customers through the LGR Riders, as well as the reasonableness and prudency of the Sponsoring Companies' actions during the Audit Period. For example, the ongoing investigations into HB 6 have uncovered that Resource Fuels, LLC (Resource Fuels)—the coal company from which OVEC buys a significant amount of over-priced coal during the Audit Period—is directly linked to HB 6,[46] and that AEP

[44] AES Brief at 6; AEP Brief at 5; Duke Brief at 8–9. *See also* AES Ex. 3 at 2–3 (Donlon Direct); AEP Ex. 1 at 6 (Stegall Direct); Duke Ex. 3 at 4–5 (Ziolkowski Testimony).

[45] Staff Ex. 2 at 7, 10–11, 14, 22, n.42, 23, 29–30, 106 (Public AES Audit Report); Staff Ex. 4 at 7, 10–11, 14, 17, 24, n.46, 25, 35, 110 (Public AEP Audit Report); Staff Ex. 6 at 7, 11, 14, 22, n.42, 23, 31–33, 111, 112 (Public Duke Audit Report)

[46] Tr. Vol. IV at 1057–58 (Cross-Examination of Stegall); Tr. Vol. V at 1302. *See also* Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 11–12 (Seryak Direct); Revised OMAEG Ex. 1 at 24 (Seryak Direct).

may have been involved in the HB 6 scandal.[47] Additionally, and most recently, OMAEG witness Seryak's stated belief that former Commission Chairman Randazzo could be investigated for HB 6-related matters regarding OVEC and the LGR Riders has come to fruition through Randazzo's recent federal and state indictments. All of which may have resulted in unreasonable and imprudent costs that were passed on to customers and may have impacted the Sponsoring Companies' actions during the Audit Period.

If this evidence had been admitted, OMAEG would have argued that the excessive coal costs paid by OVEC to Resource Fuels that are ultimately recouped from Ohio customers are tied to HB 6,[48] and that AEP is also a primary beneficiary of the OVEC costs collected through the LGR Riders because AEP will receive $67,897,705.58 for its shareholders in 2020 alone from HB 6's LGR Rider mechanism.[49] OMAEG also would have more fully developed its argument that, given Randazzo's connections to the creation and passage of the law that created the LGR Riders, the Commission should demonstrate care and caution with how it proceeds in this matter and should not authorize the recovery of OVEC-related costs from customers while there are ongoing investigations into HB 6 because these investigations could conclude that inappropriate and imprudent costs were included in the LGR Riders and collected from customers.

It is clear that the intervenors' excluded evidence could have and would have directly contradicted the Sponsoring Companies' unsupported claims that the 2020 costs charged to customers through the LGR Rider were reasonable and prudent and that the Sponsoring

[47] Proffer, Tr. Vol. V at 1369, Proffer, OCC Ex. 18 at 12 (AEP, Inc., Securities and Exchange Commission Form 10-Q) (November 2, 2023); Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 11 (Seryak Direct). *See also* Tr. Vol. V at 1302–03.

[48] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 11–12 (Seryak Direct).

[49] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 10 (Seryak Direct), *citing* Staff Ex. 4 at 29, Figure 9, Column G (Public AEP Audit Report).

Companies' actions were reasonable and prudent, and this evidence would have further demonstrated that the Sponsoring Companies have not met their statutory burden of proof in this case. Therefore, the evidence should not have been excluded, and the Commission should allow it and consider it as part of the record in this case. The Commission should also conclude, based on the preponderance of the evidence, that the Sponsoring Companies have not met their burden to demonstrate that the 2020 costs passed through the LGR Riders were just, reasonable, and prudently incurred, and that their actions were reasonable and prudent in the best interest of customers during the Audit Period.

B. OMAEG is not barred by collateral estoppel as it is not seeking to relitigate previously settled issues regarding what factors should be considered in determining the prudency and reasonableness of the 2020 costs and the Sponsoring Companies' actions.

The purpose of this proceeding is for the Commission to determine whether the 2020 costs passed through the LGR Riders for the Audit Period were just, reasonable, and prudently incurred, and whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers.[50] Therefore, it is entirely proper for OMAEG and other intervenors to argue that the 2020 costs passed through the LGR Riders for the Audit Period were not reasonable and prudently incurred, and that the Sponsoring Companies' actions were unreasonable and imprudent and not in the best interest of customers. The Commission's decision in the 2019 Duke PSR Audit is not and should not be outcome determinative in this case because the 2019 OVEC audit and this 2020 OVEC audit are distinguishable for several reasons. Therefore, attempts by the Sponsoring Companies to mischaracterize OMAEG and the other intervenors' arguments as an attempt to relitigate matters already decided by the Commission are fundamentally flawed and should be

[50] R.C. 4928.148; AES Brief at 1; AEP Brief at 5; Duke Brief at 2; Staff Brief at 3; Kroger Brief at 2–3; CUB/UCS Brief at 4; OEC Brief at 7; Sierra Brief at 5. *See also* OMAEG Brief at 12–13.

rejected. Similarly, the Sponsoring Companies' arguments that the findings in the 2019 Duke PSR Audit should determine the findings for this 2020 audit also should be rejected.

1. The intervenors' arguments are not barred by collateral estoppel.

AES claims that OMAEG and others are barred from "relitigating" the prudence of the costs and conduct that are at issue in this case because these matters were supposedly settled in the 2019 Duke PSR Audit.[51] Rather inexplicably, AES argues that the Commission's findings in the 2019 Duke PSR Audit somehow mean that the Commission has already determined that the 2020 costs passed through the LGR Riders for the Audit Period were reasonable and prudent and that the Sponsoring Companies' actions in 2020 were reasonable and prudent in the best interest of customers.[52]

By AES' flawed logic, OMAEG and others are precluded from raising any arguments about the core issues in this case because the Commission recently decided to adopt the findings of a *different* audit report created after a *different* audit was performed for a *different* year under a *different* standard that reviewed *different* actions taken under *different* circumstances that incurred a *different* set of costs in *different* years that were then collected through a *different* OVEC recovery mechanism.

AES' logic makes no sense. If AES' argument prevails, then no additional audits are ever needed, and the Commission would give no meaning to the statutory requirement to conduct the triennial prudency audits.[53] The Commission is not authorized to give no meaning to a statute, and as the Supreme Court of Ohio has held, "[n]o part of the statute should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which

[51] AES Brief at 8.

[52] AES Brief at 7–10.

[53] R.C. 4928.148(A)(1).

renders a provision meaningless or inoperative."[54] Accepting AES' flawed argument would treat the entirety of R.C. 4928.148(A)(1) as superfluous and would render that provision meaningless and inoperative.

Additionally, as noted by OCC, "[i]t is well settled that a utility's obligation to analyze the prudence of an investment is not a static or "one-and-done" responsibility. Instead, the utility has an ongoing obligation to evaluate the continuation of an investment as well as its decision to enter into and remain in that particular investment. This requires the utility to respond prudently to changing circumstances or new economic or regulatory challenges that arise during the entire lifetime of a coal plant investment."[55] Moreover, the 2019 Duke PSR Audit is readily distinguishable from the audit in this case about the prudency and reasonableness of 2020 costs and the Sponsoring Companies' actions during the 2020 Audit Period.

First, unlike the 2019 Duke PSR Audit, the 2020 LGR Audit was performed under specific statutory provisions. The applicable standard in the 2019 Duke PSR Audit was determined by prior Commission decisions, which should be instructive as to how the Commission should determine the prudency and reasonableness of OVEC costs in general. However, R.C. 4928.148 set forth a specific audit process and plain language regarding the kinds of costs that must be excluded from recovery from customers—those determined to be unreasonable and imprudent—and the kinds of decisions that must be reviewed for prudence and reasonableness—such as offering the contractual commitment into the wholesale markets.[56] And as a creature of statute,[57]

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[54] *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 19.

[55] OCC Brief at 17.

[56] R.C. 4928.148(A)(1).

[57] *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 97 (1973) ("The Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute") (citations omitted). Additionally, the Supreme Court of Ohio has long held that the Commission "is a

the Commission must give full effect to R.C. 4928.148. While both riders recover "the same types of costs," as discussed previously, the LGR Riders are governed by statute.

Second, the Sponsoring Companies being audited are different. The Auditor in this case very purposefully filed separate Audit Reports for each Sponsoring Company, because the actions taken by one are not necessarily synonymous with the actions taken by the other two. The 2019 Duke PSR Audit reviewed Duke's actions alone. It did not review AES or AEP's actions. Therefore, even if the 2019 Duke PSR Audit's findings did apply to this case—which they do not—they would at most only apply to Duke's actions, not AES or AEP's. Moreover, the actions taken by the Sponsoring Companies in 2020 differ from those taken in 2019, which further distinguishes the two audits. All three Sponsoring Companies noted the impact that the COVID-19 pandemic had on OVEC's operating decisions in 2020.[58] Similarly, the costs at issue are for different years. So while the LGR Riders collect the "same types of costs" as Duke's PSR collected, the actual costs incurred in 2019 are not the same costs incurred in 2020. There is a *reason* that separate audits were performed for these two years.

Third, the 2019 Duke PSR Audit reviewed the actions and costs of *2019* not 2020. By the Sponsoring Companies' own admission, 2020 was an unusual year due to COVID-19,[59] and for that reason alone, the two audits are readily distinguishable since the actions taken in 2020 were most certainly different from those taken in 2019. But even discounting the pandemic, the different years alone would be sufficient to distinguish the two audits. The plain language of R.C. 4928.148(A) *requires* the Commission to determine "in the *years* specified" the prudence and

creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

[58] AES Brief at 19; AEP Brief at 13; Duke Brief at 27.

[59] AES Brief at 19; AEP Brief at 13; Duke Brief at 27.

reasonableness of the Sponsoring Companies' actions and whether costs were reasonable and prudently incurred,[60] which demonstrates a clear intention that the findings for one year do not necessarily apply to every subsequent year. R.C. 4928.148 also specifies that the *first* LGR Rider audit should consider the prudence and reasonableness of actions taken during 2020, which further indicates that the General Assembly did not intend for the findings of a 2019 audit to forever determine whether the Sponsoring Companies' actions were reasonable and prudent. Moreover, arguing that costs incurred in 2020 are somehow reasonable and prudent because costs incurred in 2019 were found to be reasonable and prudent is nonsensical. The General Assembly provided for multiple audits to review multiple different years because it understood that circumstances, actions, and costs do not remain stagnant from one year to the next. As a creature of statute, the Commission must determine whether the costs incurred in 2020 were reasonable and prudent and whether the Sponsoring Companies' actions during *that year* were reasonable and prudent in the best interest of customers. These are the central issues of this case, and raising arguments of collateral estoppel to bar discussion of these issues is a red herring and should be rejected.

The doctrine of collateral estoppel provides that a "fact or point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different."[61] "Essentially, collateral estoppel prevents parties from relitigating facts and issues that were fully litigated in a previous case."[62] However, AES cannot meet all of the elements required to establish

[60] R.C. 4928.148(A)(1) (emphasis added), specifically in 2021, 2024, 2027, and 2030.

[61] *Fort Frye Teachers Association, OEA/NEA v. State Employment Relations Board*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998).

[62] *Glidden Company v. Lumbermens Mutual Casualty Company*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶ 46.

the applicability of collateral estoppel. As stated above, the 2019 Duke PSR Audit and the audit of 2020 costs and actions of the Sponsoring Companies in this case are readily distinguishable. Therefore, AES' argument that OMAEG, OCC, and Kroger are barred from contesting the prudence of the Sponsoring Companies' actions in 2020 and the 2020 costs passed through the LGR Riders should be rejected.

a. The Duke Order did not decide the contested matters in this case.

The Commission did not decide the contested issue of "establish[ing] the prudency of all the costs and sales flowing through [LGR] riders," and "demonstrate[ing] that the actions of the companies . . . were in the best interest of [their] retail ratepayers . . . for the period spanning January 1, 2020 through December 31, 2020."[63] Rather, the Commission's ruling in the 2019 Duke PSR Audit (Duke Order) "determine[d] that all costs and sales flowing through Rider PSR for the period of January 1, 2019, to December 31, 2019, are prudent."[64] As discussed above, the two audits concern different years, different costs, different actions, different riders, and different utilities. Simply because the Commission found that Duke met its burden of proof in the 2019 PSR Audit does not mean that Duke, AES, or AEP have met their respective burdens of proof of demonstrating that the costs and sales flowing through the LGR Riders for the 2020 Audit Period were prudent and reasonable, and that their 2020 actions were prudent and reasonable in the best interest of customers.

Collateral estoppel prevents the relitigation of issues that were "litigated and decided" in a prior case.[65] However, the issues of whether the costs and sales flowing through the LGR Riders

[63] Entry and RFP, RFP at 2, 6. *See also* Staff Ex. 2 at 7 (Public AES Audit Report); Staff Ex. 4 at 7 (Public AEP Audit Report); Staff Ex. 6 at 7 Public Duke Audit Report; OCC Ex. 11 at 7 (Auditor Response).

[64] *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 ¶ 55 (September 6, 2023) (2019 Duke PSR Audit).

[65] *In the Matter of the Application of Ohio Power Company*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 40.

and whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers for the 2020 Audit Period were neither litigated nor decided in the 2019 Duke PSR Audit. The Duke Order only considered the 2019 costs and sales flowing through the *PSR* and whether *Duke's* 2019 actions were reasonable and prudent for the period of *2019*. The Commission made no determination about the LGR Riders or the Sponsoring Companies' actions for the 2020 Audit Period.

The law is clear. The Sponsoring Companies bear the burden of proof in this case, and the Commission must determine the prudence and reasonableness of the Sponsoring Companies' actions during 2020 and whether the OVEC costs charged to customers for the 2020 Audit Period were reasonable and prudent. The Commission should not allow AES or the other Sponsoring Companies to sidestep their respective burdens of proof by nonsensically relying on the Duke Order's findings about a single utility's actions and incurred costs for a completely different year. Accordingly, collateral estoppel does not apply, and AES' argument should be rejected.

b. The Duke Order is not final.

Moreover, the Duke Order is not final because it is currently pending rehearing. Specifically, in its November 1, 2023 Entry on Rehearing in Case No. 20-167-EL-RDR (Rehearing Entry), the Commission granted OMAEG, Kroger, and OCC's applications for rehearing, explaining "that sufficient reason has been set forth to warrant further consideration of the matters specified in the applications for rehearing."[66] Since the Duke Order may be subject to further Commission modifications on rehearing, including as to whether Duke's rider and the 2019 Rider PSR costs were reasonable and prudently incurred, AES cannot point to a final appealable order barring OMAEG's arguments. Therefore, collateral estoppel does not apply because the contested

[66] 2019 Duke PSR Audit, Entry on Rehearing at ¶ 14 (November 1, 2023).

"issues must have been determined by a final appealable order," and the doctrine "cannot be invoked when there is no final order."[67]

c. OMAEG did not have a full and fair opportunity during the 2019 Duke PSR Audit to litigate the key matters raised in the current audit about the Sponsoring Companies' actions and incurred costs for 2020.

AES' collateral estoppel argument is also flawed because OMAEG and others did not have a full and fair opportunity to litigate the prudency and reasonableness of the Sponsoring Companies' 2020 LGR Rider charges, and whether the Sponsoring Companies' actions in 2020 were reasonable and prudent in the best interest of customers in the 2019 Duke PSR Audit. Collateral estoppel does not apply if a party did not have a full and fair opportunity to litigate the issue in the first action,[68] and as discussed above, the 2019 Duke PSR Audit is readily distinguishable from the audit in this case due to the different years, riders, utilities, actions, costs, and applicable law. Therefore, OMAEG did not have a full and fair opportunity to litigate the 2020 issues in that prior case regarding 2019 issues.

The Supreme Court of Ohio has held that the interests of "fundamental fairness" should be considered when evaluating the doctrine of collateral estoppel.[69] To hold that OMAEG and others are barred from raising arguments about the core matters at issue in this case would make a mockery of the "full and fair opportunity to litigate" prong of the collateral estoppel test. As discussed above, the General Assembly plainly intended for the Sponsoring Companies to demonstrate the prudency and reasonableness of their respective LGR Rider costs, and whether their individual and independent actions were reasonable and prudent in the best interest of their respective customers, on multiple occasions for several different years. Allowing a finding on the

[67] *Glidden Company*, 2006-Ohio-6553 at ¶¶ 45–46.

[68] *State ex. rel. Fraternal Order of Police v. Tegreene*, 58 Ohio St.2d 235, 236, 389 N.E.2d 851 (1979).

[69] *Jacobs v. Teledyne, Inc.*, 39 Ohio St.3d 168, 170–71, 529 N.E.2d 1255 (1988).

prudence and reasonableness of Duke's 2019 PSR costs and actions to also determine the prudence and reasonableness of all three Sponsoring Companies' 2020 LGR costs and actions flies in the face of fundamental fairness and common sense. Therefore, it is just and reasonable to permit OMAEG to raise arguments in this proceeding about the prudence and reasonableness of the 2020 costs charged to customers through the LGR Riders and about whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers during 2020.

2. The Duke Order is not outcome-determinative for this audit case.

In addition to AES' flawed collateral estoppel argument, AEP attempts to argue that the Commission should reject the intervenors' arguments in this case simply because of the decision in the 2019 Duke PSR Audit.[70] However, for all the reasons discussed previously, this argument should be rejected. This audit case is readily distinguishable from the 2019 Duke PSR audit given the different time periods, decisions, and costs being reviewed, the new statute governing this audit, and R.C. 4928.148's clear directive for the Commission to make a prudence and reasonableness determination for *each* statutorily specified year. The statute requires the Commission to "determine, in the years specified in this division, the prudence and reasonableness of the [Sponsoring Companies'] actions . . . and exclude from recovery those costs that the commission determines imprudent and unreasonable."[71] Nothing in the statute indicates that the Commission can or should take the findings of a 2019 Duke audit and necessarily reach those same conclusions in this case, and as a creature of statute, the Commission is required to give full effect to the statutory language.

[70] AEP Brief at 3–5.

[71] R.C. 4928.148(A)(1).

3. OMAEG is not relitigating the existence of the LGR Riders.

AEP appears to be under the mistaken impression that OMAEG and the other parties are attempting to relitigate the existence of the LGR Riders.[72] However, this argument is incorrect, a red herring, and should be rejected. A review of the record evidence demonstrates that the intervenors, including OMAEG, are not challenging the General Assembly's creation of the LGR Riders through R.C. 4928.148 and the statutory authorization for the Sponsoring Companies to seek to collect *reasonable and prudently incurred* OVEC costs through the LGR Riders. Rather, OMAEG contests whether the costs actually charged to customers for the Audit Period were reasonable and prudently incurred, as well as whether the Sponsoring Companies' actions were reasonable and prudent in the best interest of customers during the same period.

As noted above, R.C. 4928.148 requires the Commission to make a reasonableness and prudence determination in 2021, 2024, 2027, and 2030 regarding the costs and the Sponsoring Companies' actions for the previous calendar year.[73] OMAEG and the other intervenors have demonstrated that certain 2020 costs should be disallowed because they were unreasonable, imprudently incurred, and resulted from the Sponsoring Companies' unreasonable and imprudent actions during 2020.[74] While the existence of the LGR Riders is a matter of law, and therefore, a settled issue, the passing-through of unreasonable and imprudently incurred costs is plainly not, otherwise, the legislature would not have included a requirement that those costs be audited every three years.

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[72] AEP Brief at 2 (stating that "Intervenors, however, continue to oppose the very concept of the statutory LGR and have recommended various disallowances in an effort to undermine it").

[73] R.C. 4928.148(A)(1).

[74] OMAEG Brief at 41–67; OCC Brief at 9–34; Kroger Brief at 4–15; CUB/UCS Brief at 10–36; OEC Brief at 7–17; Sierra Brief at 6–16.

While OMAEG and other intervenors sought to discuss the previously authorized OVEC costs and Commission decisions and were denied—despite the Sponsoring Companies and Auditor being allowed to testify about such matters—they did so in order to explain how those prior orders *inform* their arguments and expert testimony that the 2020 costs charged to customers through the LGR Riders for the Audit Period were unreasonable and imprudent and the Sponsoring Companies' actions were similarly unreasonable and imprudent during that same period.[75] For example, had OMAEG's expert's testimony on the matter not been struck, he would have explained how, based on prior Commission decisions, the charges and credits collected through the LGR Riders for 2020 must constitute a rate stability charge in order to allow recovery of "those same costs."[76] OMAEG's expert would have explained—as AES did in its own brief—how the prior OVEC recovery mechanisms were intended to "benefit customers because [they] will act as a hedge which will mitigate spikes in market prices."[77] Given this and the fact that the Commission's prior orders consistently determined that OVEC recovery mechanisms are required to stabilize rates, OMAEG's expert would have argued that the LGR Riders are not functioning as proper rate stability charges because the "LGR Riders have resulted in net costs to customers with little offsetting benefit from the riders' intended purpose as a hedge against market volatility."[78]

Contrary to what AEP seems to be implying, attempts to reference and discuss the origin of the LGR Riders are not attempts to "relitigate" whether the LGR Riders should exist, but rather serve as a way to analyze whether the charges for 2020 and the Sponsoring Companies' actions were reasonable and prudent as intended by the General Assembly when it created the LGR Riders.

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[75] *See* OMAEG Brief at 14–41.

[76] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14 (Seryak Direct).

[77] AES Brief at 5. *See also* OMAEG Brief at 26–27.

[78] Proffer, Tr. Vol. V at 1330–31, Proffer, Revised OMAEG Ex. 1 at 14–16 (Seryak Direct).

The existence of the LGR Riders and authorized cost recovery through the LGR Riders are two separate issues, and OMAEG can contest one without contesting the other.

Recovery mechanisms or riders, such as the LGR Riders, are not blank checks for the Sponsoring Companies. Hence why audits are conducted to ensure that unreasonable and imprudent costs are not collected from customers. R.C. 4928.148 makes clear that the General Assembly does not intend for *all* OVEC costs to be passed through the LGR Riders without ascertaining whether those costs were reasonable or prudently incurred. The statute explicitly *requires* the Commission to "exclude from recovery those costs that the commission determines imprudent and unreasonable." Accordingly, OMAEG disputes AEP's mischaracterization of its arguments as somehow being attempts to relitigate the existence of the LGR Riders, which are creatures of statute. OMAEG's focus throughout this proceeding has always been on the prudence and reasonableness of the Sponsoring Companies' actions in 2020 and whether the 2020 costs recovered through the LGR Riders are imprudent and unreasonable.

Contrary to AEP's claims, OMAEG and the other intervenors are not seeking to "undermine" the LGR Riders, nor are they challenging the existence of the LGR Riders to the Commission. OMAEG and others are well aware of the principle of separation of powers and know that the Commission is not the proper forum to challenge the existence of the LGR Riders as the General Assembly has been vested with the exclusive power to repeal or amend the LGR statute. Both in their initial briefs and during the hearing, the intervenors have focused their arguments on (1) the many deficiencies of the 2020 Audit Report filed in this case, (2) the 2020 OVEC-related costs charged to customers through the LGR Riders that were unreasonable and imprudently incurred, and (3) the Sponsoring Companies' actions in 2020 that were imprudent and unreasonable and therefore not in the best interest of customers. As recognized by every party in

this case, these are exactly the matters that the parties are *supposed* to focus on.[79] Therefore, AEP's incorrect assertion that OMAEG's and other intervenors' arguments are challenging the existence of the LGR Riders should be rejected.

C. The Commission should disallow all OVEC costs passed through the LGR Riders for the Audit Period because the Sponsoring Companies failed to demonstrate that such 2020 costs were reasonable and prudently incurred, that the actions of the Sponsoring Companies were prudent and reasonable, and that operating the OVEC plants in 2020 was reasonable and prudent, and therefore, in the best interest of customers.

As discussed above and extensively by the intervenors in their initial briefs, the Sponsoring Companies failed to satisfy their burden of proof.[80] This was in part due to the Auditor failing to make several key findings that demonstrated that the OVEC costs passed through the LGR Riders for the 2020 Audit Period were unreasonable and imprudent and that the Sponsoring Companies' actions were neither reasonable nor prudent and were, therefore, not in the best interest of customers.[81] Rather notably, the Auditor failed to determine the prudence of "decisions related to offering the contractual commitment into the wholesale markets," which is statutorily required by R.C. 4928.148(A)(1).[82] This deficiency directly contradicts Staff's assertion that the "Auditor completed its audits as directed by the Commission and consistent with the governing law."[83] Additionally, the Sponsoring Companies failed to offer any additional evidence to supplement the deficient Audit Reports. Since the Sponsoring Companies failed to satisfy their respective burdens of proof to establish the reasonableness and prudence of the over $114,879,609 million charged to

[79] AES Brief at 7; AEP Brief at 5–8; Duke Brief at 2; Staff Brief at 3–4; OMAEG Brief at 2–3; OCC Brief at 5; Kroger at 2–3; CUB/UCS Brief at 4–5; OEC Brief at 7; Sierra Brief at 5. *See also* R.C. 4928.148; Entry and RFP, RFP at 2, 6.

[80] OMAEG Brief at 41–67; OCC Brief at 9–34; Kroger Brief at 4–15; CUB/UCS Brief at 10–36; OEC Brief at 7–17; Sierra Brief at 6–16.

[81] OMAEG Brief at 41–53; OCC Brief at 9–13; Kroger Brief at 4–9; CUB/UCS Brief at 9; OEC Brief at 10–11.

[82] OCC Brief at 10. *See also* OMAEG Brief at 4–18.

[83] Staff Brief at 12.

customers for 2020 and to demonstrate that their actions were reasonable and prudent in the best interest of customers, the Commission should disallow all costs passed through the LGR Riders for the Audit Period.

1. The Sponsoring Companies failed to satisfy their burden of proof to demonstrate that the OVEC costs passed through the LGR Riders for the 2020 Audit Period were reasonable and prudent.

Contrary to the Sponsoring Companies' assertion, the Audit Reports did not establish that the 2020 OVEC-related costs passed through to customers were reasonable and prudent.[84] Rather, as explained by the intervenors, the Audit Reports show that not all OVEC costs passed through the LGR Riders to customers for the 2020 Audit Period satisfied Ohio law or the Commission's directives to be just, reasonable, and prudently incurred.[85] For example, OCC concluded that "evidence in this case established that the coal plant subsidy costs in 2020 were not prudent, not in the best interests of consumers and not consistent with how a merchant coal plant owner seeking to maximize profits would have operated the plants."[86] Similarly, CUB/UCS argued that "[i]n each of the three Audits in this case, the Auditor's conclusions show that the legacy generation rider neither now nor in the future provides value to customers."[87] Consequently, because the Sponsoring Companies failed to demonstrate that the costs passed on to customers through the LGR Riders were reasonable and prudently incurred, the Commission should disallow all 2020 costs charged to customers through the LGR Riders for the Audit Period.

[84] AES Brief at 10; AEP Brief at 1–2; Duke Brief at 42.

[85] OCC Brief at 2; Kroger Brief at 2; CUB/UCS Brief at 9; OEC Brief at 2; Sierra Brief at 4. *See also* OMAEG Brief at 43.

[86] OCC Brief at 2.

[87] CUB/UCS Brief at 9.

a. The OVEC plants cost more than they earn.

One of the few definitive findings that the Audit Reports made was that "[t]he OVEC plants cost more than they earn."[88] Consequently, customers paid a charge under the LGR Rider every month of the Audit Period and never received a credit.[89] According to CUB/UCS, given this lack of credits—or any other benefit to customers—the LGR Riders "failed to act as a hedge to mitigate spikes in market prices, and instead acted as a tool to increase the [Sponsoring Companies'] profits at the expense of their ratepayers."[90] OCC similarly noted that the OVEC coal plants "do[] not provide any economic benefits for Ohioans,"[91] and Kroger argued that this finding "*should* have led to the logical conclusion that the OVEC costs passed through Riders LGR were unjust, unreasonable, and imprudently incurred."[92]

The Sponsoring Companies attempt to use the Auditor's failure to affirmatively state that the 2020 OVEC costs passed through the LGR Riders were unjust, unreasonable, and imprudently incurred as evidence that the costs were actually just, reasonable, and prudently incurred.[93] However, this argument should be rejected because, as explained by CUB/UCS, "just because the Auditor chose not to recommend the Commission . . . require disallowance, should not, and cannot, alleviate the Commission from its responsibility to make that determination itself, as required by law."[94]

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[88] Kroger Brief at 9; OCC Brief at 4; CUB/UCS Brief at 9; Sierra Brief at 7, *quoting* Staff Ex. 2 at 27 (Public AES Audit Report); Staff Ex. 4 at 31 (Public AEP Audit Report); Staff Ex. 6 at 29 (Public Duke Audit Report). *See also* OMAEG Brief at 44; Tr. Vol. II at 415 (Cross-Examination of Fagan).

[89] OCC Brief at 16; Kroger Brief at 6; CUB/UCS Brief at 8; Sierra Brief at 4. *See also* OMAEG Brief at 44.

[90] CUB/UCS Brief at 15 (internal quotations omitted).

[91] OCC Brief at 1.

[92] Kroger Brief at 6.

[93] AES Brief at 7; AEP Brief at 2; Duke Brief at 13.

[94] CUB/UCS Brief at 9.

Moreover, while the Auditor failed to find that the 2020 OVEC costs passed through the LGR Riders were unjust, unreasonable, and imprudently incurred, the Auditor also failed to find that the 2020 OVEC costs were in fact just, reasonable, and prudently incurred. Additionally, the intervenors provided ample evidence supporting a determination that the 2020 OVEC costs were unjust, unreasonable, and imprudently incurred at both the hearing and in their briefs. For example, OCC explained how the Sponsoring Companies "had no disincentive to incur above-market costs" because they can "impose those above-market costs on consumers, who [cannot] take their business to a more efficient provider."[95] Consequently, the Sponsoring Companies "ignored the consumer impacts from running the coal plants" and incurred "a massive loss" by running "the coal plants without any regard for the fair value of the electricity generated by the coal plants."[96] In other words, rather than seeking to maximize profits like a merchant coal plant, the Sponsoring Companies "ran the plants in a manner which allowed them to meet operating expenses, [and] pay the interest on its obligations and declare a dividend to stockholders."[97] CUB/UCS similarly noted that "[t]he losses the [Sponsoring] Companies' incurred . . . in 2020 continued a pattern of exceptionally high prices paid under the [Amended and Restated Inter-Company Power Agreement (ICPA)] (relative to market value) since at least 2015," which "resulted in total above-market costs from 2015-2020 at over $1.245 billion."[98]

[95] OCC Brief at 21 (internal quotations omitted).

[96] OCC Brief at 19.

[97] OCC Brief at 19 (internal quotations omitted).

[98] CUB/UCS Brief at 13 (internal quotations omitted)

b. The costs incurred from OVEC's must-run commitment strategy were unreasonable and imprudent.

For the majority of the Audit Period, all of OVEC's units, excluding Clifty Creek No. 6, were required to operate as must-run in the PJM Day-Ahead market.[99] The one exception was a brief period spanning from April 14, 2020 through June 30, 2020 when the Operating Committee unanimously decided to provide flexibility and offer some units as must-run *or* economic.[100] OVEC's mandatory must-run commitment strategy ensured that the OVEC units would run—regardless of whether they operated at a loss—and that customers would continue to pay the costs associated with these financial losses.[101]

Notably, the Auditor lauded the change to allow for flexibility in commitment strategies, finding that the "change to OVEC's operating strategy . . . was prudent compared with allowing must-run commitment only."[102] If changing the commitment strategy to allow for flexibility in commitment strategies was prudent compared to only a must-run strategy, then it follows that having only a must-run commitment strategy was imprudent. In fact, the Auditor went so far as to say that "[i]deally, the units would be committed based on economics all or most of the time" because "the flexibility [of choosing between commitment strategies based on economics] could be valuable" to customers.[103] Therefore, the Sponsoring Companies' argument that it was prudent to offer the units as only must-run for the majority of 2020 should be rejected.[104]

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[99] AES Brief at 4; AEP Brief at 11; Duke Brief at 22–23; Staff Brief at 8; OCC Brief at 4; Kroger Brief at 10; CUB/UCS Brief at 17–18.

[100] AES Brief at 11; AEP brief at 13; Duke Brief at 27; OCC Brief at 4–5.

[101] OCC Brief at 4; Kroger Brief at 10; CUB/UCS Brief at 17–18. *See also* OMAEG Brief at 63–64.

[102] Staff Ex. 2 at 44 (Public AES Audit Report); Staff Ex. 4 at 41 (Public AEP Audit Report); Staff Ex. 6 at 50 (Public Duke Audit Report).

[103] Staff Ex. 2, Public AES Audit Report at 44; Staff Ex. 4, Public AEP Audit Report at 48; Staff Ex. 6, Public Duke Audit Report at 50.

[104] AES Brief at 12–20; AEP Brief at 2–3; Duke Brief at 27.

Moreover, the intervenors all provided ample evidence during the hearing and in their initial briefs supporting their position that the must-run commitment strategy was imprudent, and that the 2020 costs incurred because of that strategy should be disallowed. Operating the OVEC units as must-run resulted in sustained, *foreseeable* losses to OVEC and its Sponsoring Companies, and thus to Ohio customers, who were forced to subsidize the OVEC plants through the LGR Riders.[105]

Emails between Duke employees revealed that the OVEC plants were expected to lose between $150,000 to $175,000 a day during April 2020,[106] and OCC's witness determined that OVEC's costs were about 20% higher than the PJM energy market price for the entire Audit Period, and that, up to 88% of the time during 2020, OVEC operated the coal plants when their costs exceeded PJM energy market revenues.[107] This trend of continuously operating at a loss was reflected in the monthly LGR Rider charges, and these sustained losses alone should have informed the Sponsoring Companies that the perpetual must-run strategy was imprudent. CUB/UCS argued that the Sponsoring Companies' "failure to act on feedback from the market on the economic competitiveness of [the] plants demonstrates imprudence" because "[l]ong-term patterns of losses, as seen here from OVEC, without efforts to correct operations, demonstrate imprudent business behavior."[108] As such, in accordance with R.C. 4928.148(A), the 2020 costs incurred as a result of this unreasonable and imprudent business decision and behavior in 2020 should be disallowed.

[105] OCC Brief at 13; Kroger Brief at 9–12; CUB/UCS Brief at 22–23; OEC Brief at 14; 12–13. *See also* OMAEG Brief at 63–65.

[106] OMAEG Ex. 17 (Public) at 100 (Duke Emails).

[107] OCC Brief at 13–14.

[108] CUB/UCS Brief at 23.

The Sponsoring Companies' attempts to justify OVEC's imprudent must-run strategy using the ICPA and OVEC's Operating Procedures should be rejected.[109] While the current operating procedures may require offering the OVEC units as must-run, "the existence of the contract does not 'absolve a utility from monitoring and responding to market conditions.'"[110] As noted in OMAEG's initial brief, "while AEP Ohio, Duke Energy Ohio, and AES Ohio are all obligated to pay OVEC for the costs billed under the ICPA, ratepayers and customers are not obligated to cover these costs."[111] CUB/UCS similarly explained that the intervenors are not challenging the Sponsoring Companies' contractual obligations, but rather "whether those [contractually-incurred] costs, when based on a lack of prudent mitigation tactics and unreasonable decisionmaking, should be passed on to ratepayers."[112] Moreover, the Sponsoring Companies' own witnesses admitted that the ICPA does not require or give authority to the Sponsoring Companies to pass OVEC-related costs onto its customers.[113]

The Sponsoring Companies' attempt to hide behind the operating procedures must also fail because those procedures can be permanently amended with a two-thirds majority.[114] As noted by CUB/UCS witness Glick, "the [Sponsoring] Companies represent three rather sophisticated parties out of the 15-person Board and a very large percentage of the ownership share, and if these three very relatively sophisticated utilities formulated combined, prudent recommendations to the

[109] AES Brief at 12–20; AEP Brief at 11; Duke Brief at 7.

[110] OCC Brief at 15, *quoting In the Matter of the Application of DTE ELECTRIC COMPANY for Reconciliation of Its Power Supply Cost Recovery Plan for the 12 Months Ended December 31, 2018*, Michigan PSC Case No. U-20203, Order at 26 (December 9, 2020).

[111] OMAEG Brief at 65.

[112] CUB/UCS Brief at 37.

[113] Tr. Vol. III at 775 (Cross-Examination of Swez); Tr. Vol. IV at 1051 (Cross-Examination of Stegall).

[114] AEP Brief at 10; Duke Brief at 7.

OVEC Board, those recommendations would be taken seriously by the other members."[115] Duke's success at unilaterally persuading the other Sponsoring Companies to offer some units as economic *or* must-run in 2020 proves that the influence of an individual or a subset of companies is not as limited as the Sponsoring Companies would like this Commission to believe.[116] The Sponsoring Companies could have made further efforts to change OVEC's commitment strategy, but they failed to do so, and as a result, OVEC unreasonably and imprudently incurred millions of dollars in 2020 costs that were passed on to customers.

c. The 2020 costs incurred from OVEC's fuel procurement practices were unreasonable and imprudent.

As explained by OMAEG and other intervenors, OVEC has been purchasing over-priced coal from Resource Fuels for years due to entering into an unreasonable coal contract.[117] OMAEG's and OCC's experts each independently determined that OVEC purchased 1,016,071 tons of over-priced coal from Resource Fuels during the Audit Period, which resulted in OVEC incurring costs totaling $12,465,618 above what it could have purchased from another supplier for the exact same coal from the exact same mine.[118] As calculated by OMAEG's expert, based on AEP's 19.93%, Duke's 9.00%, and AES' 4.90% entitlement to OVEC's available energy, the Sponsoring Companies passed on an aggregate of $4,217,118 of the $12,465,618 in imprudent coal purchases to Ohio customers through the LGR Riders for the Audit Period.[119]

[115] CUB/UCS Brief at 24.

[116] CUB/UCS Brief at 24. *See also* OMAEG Brief at 56.

[117] OMAEG Brief at 57–58; Kroger Brief at 8–9; CUB/UCS Brief at 30–31.

[118] Revised OMAEG Ex. 1 at Attachment D (Seryak Direct); OCC Ex. 1 at 22 (Direct Testimony of Elizabeth Stanton) (October 10, 2023).

[119] Revised OMAEG Ex. 1 at Attachment D (Seryak Direct).

The Sponsoring Companies' arguments that the Resource Fuels contract has been in place for many years and the time to question the prudence of the contract has thus expired,[120] and that the intervenors' arguments should be dismissed based on the Duke Order should be rejected.[121] The age of the Resource Fuels contract cannot excuse its unreasonableness during the Audit Period, and according to OMAEG's expert, the contract itself "is evidence that OVEC made poor decisions when entering into its coal contract, and the [Sponsoring Companies] are using the LGR Riders to cover losses incurred as a result of this bad contract."[122] That said, even assuming the contract was reasonable when first entered into, it has plainly since become unreasonable and imprudent. As noted by several intervenors and admitted by the Sponsoring Companies, "the coal purchase prices in 2020 were significantly higher (44%) than the spot prices from SNL" for Clifty Creek and "higher (16%) than the S&P Physical Markets Survey prices" for Kyger Creek in large part because of the expensive coal that OVEC purchased from Resource Fuels.[123]

OMAEG explained in its initial brief that the Resource Fuels contract could have—and should have—been terminated or renegotiated to protect customers,[124] and other parties concurred.[125] For example, CUB/UCS argued that since OVEC had the ability and opportunity to renegotiate or terminate its higher-than-market contract with Resource Fuels, "prudency would require action to mitigate the impacts of these above-market contracts" during the Audit Period.[126]

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[120] AEP Brief at 19. *See also* AES Brief at 20; Duke Brief at 36–39.

[121] AES Brief at 20. *See also* AEP Brief at 18; Duke Brief at 36–39.

[122] Revised OMAEG Ex. 1 at 24 (Seryak Direct).

[123] Staff Ex. 2 at 54 (Public AES Audit Report); Staff Ex. 4 at 57 (Public AEP Audit Report); Staff Ex. 6 at 59 (Public Duke Audit Report). *See also* AEP Brief at 18; Duke Brief at 16; Kroger Brief at 8–9; CUB/UCS Brief at 30–31; OEC Brief at 13–14; Staff Brief at 9; OMAEG Brief at 50–51.

[124] OMAEG Brief at 58.

[125] *See* Kroger Brief; CUB/UCS Brief; OEC Brief.

[126] CUB/UCS Brief at 31.

OEC similarly argued that the Sponsoring Companies "should have at least prompted OVEC to investigate whether they could renegotiate or delay some coal purchases," but they "have provided no evidence in this case that they attempted to investigate alternatives to the issue of oversupply and above market prices" during the Audit Period.[127]

The Sponsoring Companies' arguments based on the Duke Order, should also be rejected because, as discussed at length above, the determinations made in the 2019 Duke PSR Audit about 2019 costs and actions should not control the outcome of this audit concerning 2020 costs and actions.

d. Component D should be disallowed as a matter of law.

The Commission should reject the Sponsoring Companies' assertion that 2020 costs associated with Component D should be authorized to be recovered through the LGR Riders.[128] R.C. 4928.01(A)(42) *requires* that "[p]rudently incurred costs . . . must exclude any return on investment in common equity," and as recognized by nearly every party that mentioned this cost, "Component D seems to be a such a return."[129] Based on a plain reading of R.C. 4928.01(A)(42), Component D should be excluded from the LGR Riders. Additionally, as noted by OCC "to add on a profit margin [through the LGR Riders], in direct violation of Ohio law, is unconscionable."[130] OEC similarly argued that "Ohio law does not allow ratepayers to foot the bill for returns on investment to any party." Therefore, as a matter of law, the Commission should exclude Component D from the OVEC costs that are authorized to be collected from customers as those

[127] OEC Brief at 13–14.

[128] AES Brief at 21–22; AEP Brief at 23–25; Duke Brief at 39–42.

[129] AES Brief at 21–22; AEP Brief at 23–25; Duke Brief at 39–42; Staff Brief at 7; OMAEG Brief at 45–46; OCC Brief at 22–23; Kroger Brief at 6–7; CUB/UCS Brief at 9; OEC Brief at 15–16.

[130] OCC Brief at 23.

costs were not prudently incurred and are the types of costs explicitly excluded from collection through the LGR Riders by R.C. 4928.01(A)(42).

For all the reasons discussed above, the record evidence clearly demonstrates that the costs passed through the LGR Riders for the 2020 Audit Period were not reasonable and prudently incurred. Therefore, as a matter of law, the Commission should find that the Sponsoring Companies failed to satisfy their burden of proof to demonstrate the prudency and reasonableness of all costs passed through the LGR Riders for the Audit Period and should disallow those costs, which total $114,879,609.

2. The Sponsoring Companies failed to satisfy their burden of proof to demonstrate that their actions were reasonable and prudent, and therefore in the best interest of customers.

As discussed at length by the intervenors, the Sponsoring Companies failed to demonstrate that their actions were in fact reasonable and prudent during the Audit Period as required by Ohio law.[131] Specifically, the Sponsoring Companies' actions were not reasonable and prudent and were, therefore, not in the best interest of customers because (1) they failed to advocate for a change in OVEC's commitment strategy, (2) they failed to advocate for more prudent fuel procurement practices, and (3) they chose to take title to OVEC's available energy at a loss to customers and made no efforts to mitigate the negative financial impacts to customers caused by the OVEC costs passed through the LGR Riders.

Additionally, contrary to Staff's assertion that the Auditor "completed its audits as directed by the Commission and consistent with the governing law," the Auditor failed to follow R.C. 4928.148(A)(1) *and* the Commission's RFP. OMAEG, OCC, and Kroger all explained in their

[131] OMAEG Brief at 41–67; OCC Brief at 9–34; Kroger Brief at 4–15; CUB/UCS Brief at 10–36; OEC Brief at 7–17; Sierra Brief at 6–16.

initial briefs how the Auditor failed to make a statutorily required determination on the prudence and reasonableness of "decisions related to offering the contractual commitment into the wholesale markets," and how the Auditor failed to follow the Commission's RFP and determine whether the coal plants were operated "in the best interest of retail ratepayers."[132] As noted by OCC, the statutory requirement to determine the prudence of decisions related to offering the contractual commitment into the wholesale markets "can neither be waived nor excused," yet the Auditor still failed to examine the prudency of the daily commitment decisions because she did not examine the economic analysis (or lack thereof) underpinning such decisions.[133] The Sponsoring Companies also failed to offer evidence during the hearing that they or OVEC conducted daily economic forecasts to help decide how to commit its units.[134] As for the RFP, it explicitly states that one purpose of this audit is "demonstrating that the actions of the [Sponsoring C]ompanies . . . were in the best interest of their retail ratepayers."[135] Despite recognizing and acknowledging this express audit purpose in both her response to the RFP and the Audit Reports, the Auditor failed to even *mention* the best interest of customers aside from when the Audit Reports listed the RFP's requirements.[136]

[132] OMAEG Brief at 53–62; OCC Brief at 9–13; Kroger Brief at 4–5.

[133] OCC Brief at 12.

[134] Tr. Vol. I at 130 (Cross-Examination of Fagan); Tr. Vol. III at 708–10, 712 (Cross-Examination of Swez); Tr. Vol. IV at 988–89, 1027–28 (Cross-Examination of Stegall); Tr. Vol. V at 1146 (Cross-Examination of Crusey). *See also* OCC Ex. 14 at OCC-INT-02-005 (AEP's Responses to OCC's Second Set of Discovery Requests); OMAEG Ex. 15 at INT-02-018 (AES' Responses to CUB/UCS's Second Set of Discovery).

[135] Kroger Brief at 4 (internal quotations omitted).

[136] Kroger Brief at 4–5. *See also* OCC Brief at 9–10; OMAEG Brief at 53–54.

a. The Sponsoring Companies' decisions to not advocate to change OVEC's unit commitment strategy were unreasonable, imprudent, and not in the best interest of customers.

Contrary to the Sponsoring Companies' assertions,[137] the decision to return to an inflexible, mandatory must-run commitment strategy after June 2020 was imprudent and unreasonable because it resulted in sustained losses to OVEC and its Sponsoring Companies, and thus to Ohio customers, who were forced to subsidize the OVEC plants by paying all of OVEC's costs through the LGR Riders.[138] As noted by CUB/UCS, the brief switch to allowing the option of economic commitment demonstrates that it *is* physically possible to run the plants economically.[139] Moreover, while the Sponsoring Companies argue factors such as start-up costs make offering the units as economic or must-run economically unfeasible,[140] this ignores the existence of uplift, or make-whole payments, which "ensure that [utilities] recover their total offered costs when market revenues are insufficient or when their dispatch instructions diverge from their dispatch schedule."[141] In other words, the startup and shutdown expenses that the Sponsoring Companies are so concerned about would be covered, which is why, according to the Auditor, offering units as economic has "minimal financial risk."[142]

As explained by OCC, OVEC's mandatory must-run commitment strategy stands in stark contrast to the behavior exhibited by merchant plants, which must consider economic factors when

[137] AES Brief at 12–20; AEP Brief at 10–17; Duke Brief at 20–33.

[138] OCC Brief at 10–22; Kroger Brief at 9–12; CUB/UCS Brief at 13–17; OEC Brief at 14–15; Sierra Brief at 11–13. *See also* OMAEG Brief at 54–57.

[139] CUB/UCS Brief at 21.

[140] AES Brief at 12; AEP Brief at 12; Duke Brief at 26.

[141] Staff Ex. 2 at 17–18 (Public AES Audit Report); Staff Ex. 4 at 18–19 (Public AEP Audit Report); Staff Ex. 6 at 17–18 (Public Duke Audit Report).

[142] Staff Ex. 2 at 38 (Public AES Audit Report); Staff Ex. 6 at 42 (Public Duke Audit Report); Tr. Vol. II at 363 (Cross-Examination of Fagan).

deciding whether to commit units as must-run or economic in order to maximize revenues.[143] This is because "'[i]f a competitive enterprise tried to impose on its customers costs from imprudent actions, the customers could take their business to a more efficient provider. A utility's ratepayers have no such choice.'"[144] In fact, because the LGR Riders shift the cost burden for operating the OVEC plants from the Sponsoring Companies' shareholders to Ohio ratepayers, the Sponsoring Companies actually have a *disincentive* to ensure that the OVEC plants are run prudently, since any losses they incur can simply be recouped from customers.[145] The Sponsoring Companies could have and should have advocated for a permanent change in the commitment strategy to allow for flexibility in 2020, just as was done for a few months in 2020. But they chose not to, which was an imprudent business decision in 2020 that customers should not have to pay for.

The Supreme Court of the United States long ago stated that "consumer rights are violated when a utility operates its business for the purpose of covering operating expenses and paying shareholder dividends, without regard to the impact on consumers."[146] Yet this is exactly what the Sponsoring Companies are doing. Both OMAEG and Kroger noted that the Sponsoring Companies "have a fiduciary responsibility to their shareholders that creates a conflict of interest with their customers with regard to the LGR Riders" since they "financially benefit from the LGR Riders at the expense of customers."[147] OCC similarly concluded that the Sponsoring Companies "ran the plants in a manner which allowed them to meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders," rather than in a manner that considered the

[143] OCC Brief at 15.

[144] OCC Brief at 18, *quoting In the Matter of Long Island Lighting Co.*, Case No. 27563, 71 PUR 4th 262 (N.Y. Pub. Serv. Comm'n) (November 16, 1985).

[145] *See* OCC Brief at 19–22; Kroger Brief at 8; CUB/UCS Brief at 37. *See also* OMAEG Brief at 5–6.

[146] OCC Brief at 18.

[147] OMAEG Brief at 48; Kroger Brief at 8, *quoting* Revised OMAEG Ex. 1 at 19 (Seryak Direct).

impact on customers.[148] And CUB/UCS noted that "[t]he data and evidence supplied by the intervenors in this case show that when generators do not have ratepayers to cover their losses, the operators tend to make fundamentally different, and more profitable, operation decisions."[149]

As discussed above, the Sponsoring Companies attempt to justify their imprudent and unreasonable actions by hiding behind their contractual obligations under the ICPA. However, "while the OVEC sponsoring companies . . . are obligated to pay the OVEC bills, their ratepayers should not be obligated to pay for the net revenue losses."[150]

Had the Sponsoring Companies been acting reasonably and prudently in the best interest of Ohio customers rather than their shareholders, they would have advocated for more prudent management of the OVEC plants. But this clearly was not the case during the Audit Period, as evidenced by the lack of effort to even consider permanently allowing OVEC the flexibility to offer units as must-run or economic. Therefore, the Commission should conclude that the Sponsoring Companies' 2020 actions were not reasonable and prudent and were, therefore, not in the best interest of customers. As such, the Commission should disallow the collection of 2020 OVEC costs through the LGR Riders associated with the unreasonable and imprudent operations of the OVEC plants.

b. The Sponsoring Companies' 2020 decisions to not advocate to improve OVEC's fuel procurement practices were unreasonable, imprudent, and therefore, not in the best interest of customers.

As discussed above, OVEC has been purchasing over-priced coal from Resources Fuels for over a decade. That said, its other coal contracts are replete with their own issues, particularly the provisions requiring the plants to "accept a minimum amount of coal," even if that minimum

[148] OCC Brief at 19 (internal quotations omitted).

[149] CUB/UCS Brief at 36.

[150] CUB/UCS Brief at 37.

amount is above and beyond what OVEC actually needs/can feasibly use.[151] As noted by Staff, both AEP and Duke were advised as part of their 2019 OVEC audits that OVEC's coal inventories were higher than target.[152] Despite this recommendation, neither Sponsoring Company "appear[s] to . . . addressed" this issue.[153] OVEC's overabundance of coal became a significant issue during the Audit Period when OVEC temporarily allowed some of its units the valuable flexibility of being offered as must-run or economic.

AEP admitted that "[t]he temporary change in OVEC's commitment status could not . . . continue past June 2020 due to obligations under OVEC's coal contracts and the potential consequences for violations of these contracts."[154] Because OVEC was required to continue accepting more and more coal—even though it was burning significantly less—"[t]o keep the coal piles from reaching maximum safe storage levels and to satisfy existing coal contracts by paying for contractually committed coal deliveries, the plants needed to operate" as must-run because that would ensure that the coal was being burned.[155] In other words, OVEC returned to an imprudent and unreasonable mandatory must-run commitment strategy because "[o]perating with a Must-Run commitment status allowed the units to remain online and consume coal."[156]

As noted by CUB/UCS, "[t]hat statement speaks volumes."[157] Rather than considering the consumer impacts of running the coal plants, the Sponsoring Companies "ran the plants in a

[151] AEP Brief at 14. *See also* OMAEG Brief at 59; Kroger Brief at 13; CUB/UCS Brief at 29.

[152] Staff Brief at 11.

[153] Staff Brief at 11.

[154] AEP Brief at 14 (internal quotations omitted).

[155] AEP Brief at 14 (internal quotations omitted).

[156] AEP Ex. 1 at 14 (Stegall Direct).

[157] CUB/UCS Brief at 29.

manner which allowed them to meet operating expenses"[158] and "satisfy existing coal contracts."[159] Such behavior cannot be considered reasonable or prudent. The Sponsoring Companies' "decision not to push for more prudent coal contracts, or even conduct any analysis to determine how imprudent the current contracts are was not reasonable or prudent."[160] Therefore, the Commission should disallow the collection of 2020 OVEC costs through the LGR Riders associated with the unreasonable and imprudent fuel procurement practices.

c. The Sponsoring Companies' decisions to take title to OVEC's energy at a loss were unreasonable, imprudent, and not in the best interest of customers.

Contrary to the Sponsoring Companies' assertions,[161] the decisions to take title to OVEC's energy at a loss to customers were not reasonable or prudent.[162] As calculated by OMAEG's expert, the Sponsoring Companies incurred $13,078,383 in variable cost expenses because of their imprudent and unreasonable decisions to take title to OVEC's energy at a loss.[163] According to CUB/UCS, "[f]or a plant to incur significant variable losses, it must be committed into the market with a complete disregard of economics."[164] OCC's expert testified that "OVEC's energy costs were higher than PJM energy market prices, on average, for ten out of twelve months during 2020."[165] As such, OVEC lost money by offering its units as must-run for the majority of the year.

[158] OCC Brief at 19 (internal quotations omitted).

[159] AEP Brief at 14.

[160] Kroger Brief at 13.

[161] AES Brief at 24; AEP Brief at 7, 16; Duke Brief at 3.

[162] OCC Brief at 15–19; Kroger Brief at 14–15; CUB/UCS Brief at 16–17. *See also* OMAEG Brief at 60–62.

[163] Revised OMAEG Ex. 1 at 7, Attachment B (Seryak Direct); Revised OMAEG Ex. 1A at 1, Attachment B (Public Errata to Seryak Direct), which contains the corrected amount of the imprudent charges based on Staff Ex. 8C and the revised Public Audit Report Supplements.

[164] CUB/UCS Brief at 17.

[165] OCC Brief at 16.

Under the ICPA, while the Sponsoring Companies are each *entitled* to a share of OVEC's electricity generation output, pursuant to Section 4.03 of the ICPA, "[n]o Sponsoring Company, however, shall be obligated to avail itself of any Available Energy."[166] Given this language, the Sponsoring Companies were not obligated to avail themselves of OVEC's energy output under the ICPA in 2020. Consequently, not only could OVEC have avoided the $13,078,383 in variable cost expenses simply by following a more prudent commitment practice,[167] the Sponsoring Companies (and thus customers) could have avoided these costs by not taking title to OVEC's available energy.[168] Therefore, the Sponsoring Companies' actions were unreasonable, imprudent, and not in the best interest of customers because they chose to take title to OVEC's available energy at a staggering loss to customers and made no efforts to mitigate the negative financial impacts to customers caused by the 2020 OVEC costs passed through the LGR Riders.

The Sponsoring Companies had a duty to act reasonably and prudently in the best interest of customers and to make efforts to ensure that only prudent and reasonable costs were passed on to customers through the LGR Riders. But instead of abiding by these duties, the Sponsoring Companies chose to act in an imprudent manner or not act at all. Therefore, the Commission should find that the Sponsoring Companies' actions and inactions during the Audit Period while customers were accumulating millions in charges were imprudent, unreasonable, and not in the best interest of customers, and should disallow all costs passed on to customers through the LGR Riders for the Audit Period.

[166] AES Ex. 4 at Exhibit 1, Inter-Company Power Agreement at § 4.03 (September 10, 2010) (Crusey Direct).

[167] CUB/UCS Brief at 28.

[168] Kroger Brief at 14–15. *See also* OMAEG Brief at 61.

III. CONCLUSION

The astonishing OVEC losses and the manner that the plants are being operated are unreasonable and imprudent. For the 2020 Audit Period alone, customers were charged $114,879,609 to subsidize the pair of dirty, uneconomic, and imprudently run coal plants—one of which is located in Indiana. The Commission cannot allow Ohioans to foot the bill for the imprudent and unreasonable costs associated with OVEC in 2020 or the unreasonable and imprudent decisions of the Sponsoring Companies in 2020. In accordance with the law, the Commission should find that all or some of the 2020 OVEC costs were imprudently incurred and that the Sponsoring Companies' actions in 2020 were imprudent and unreasonable, including their decisions related to offering the OVEC plants into the wholesale markets in 2020 as must-run units, their decisions to take title to OVEC's energy at a loss, and the unreasonable and imprudent coal purchases. The Commission should then "exclude from recovery those costs that the [C]omission determines imprudent and unreasonable."

As demonstrated herein and in the other intervenors' briefs, the Sponsoring Companies have utterly failed to meet their burden of demonstrating that 2020 costs passed through the LGR Riders were just, reasonable, and prudently incurred, and that their 2020 actions were reasonable and prudent in the best interest of customers. Therefore, for all the reasons stated herein, as well as those articulated in OMAEG's initial brief, OMAEG respectfully requests that the Commission disallow all costs flowing through the LGR Riders for the 2020 Audit Period. At a minimum, the Commission should disallow all 2020 OVEC costs resulting from OVEC's unreasonable and imprudent must-run commitment strategy, OVEC's unreasonable and imprudent coal purchases, and that are otherwise the result of unreasonable and imprudent decisions by the Sponsoring Companies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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