

In the Matter of the OVEC Generation  
Purchase Rider Audits Required by R.C.  
4928.148 for Duke Energy Ohio, Inc., the  
Dayton Power and Light Company, and  
AEP Ohio.

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Case No. 21-0477-EL-RDR

March 5, 2024:

Respectfully Submitted,

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### I. Introduction

AEP Ohio, AES Ohio, and Duke Energy Ohio (collectively, “the Utilities”) consistently try to take shortcuts to a prudence finding instead of affirmatively satisfying their burden to show prudence in all of their 2020 decisions.<sup>1</sup> The first and biggest shortcut the Utilities try to take is by arguing this case is totally controlled by an earlier Commission order in a different rider covering a different year.<sup>2</sup> The Utilities also try to take shortcuts between auditor omissions and affirmative findings. Finally, the utilities try to take a shortcut by creating a false premise to avoid scrutiny on its decision to return to an exclusively must-run commitment strategy. Each of these shortcuts expose contradictions, distractions, and post-hoc rationalizations. However, these arguments do not satisfy the Utilities' burden to demonstrate prudence in its decision making.

### II. Argument

The Utilities arguments are a series of shortcuts that never quite add up to meeting their burden to show prudence. These shortcuts consistently fail to recognize the difference in

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<sup>1</sup> The utilities bear the burden to prove its costs are prudent and reasonable. *In re Duke Energy Ohio, Inc.*, 131 Ohio St. 3d 487.

<sup>2</sup> See e.g., Case No. 21-0477, *AES Ohio's Post Hearing Brief*, 7 (Feb. 12, 2024).

circumstances in 2020 from past audit years, the different standard of review under HB6, and the full scope of options available to the utilities in 2020. These arguments are ultimately unpersuasive to show that customers should bear the sole risks and costs of the massive losses incurred by OVEC in 2020. While OVEC cost recovery riders certainly contemplate the possibility of losses, the unprecedented losses in 2020, coupled with the Utilities' decision to primarily maintain business as usual—or return to business as usual after brief adjustments—does not satisfy the statutory standard of prudence and reasonableness required for full cost recovery.

**A. The Utilities cannot rely on a past audit as a shortcut to prudence.**

While the audit in this case benefits from the context and findings of past OVEC audits, a commission order for a totally different rider in a totally different year—the Duke 2019 PSR Audit—does not control the outcome of this case. Such a finding would be an absurd result and nullify R.C. 4928.148(A)(1). The Commission's approval of utility decisions in a past case does not bind its prudency review in a future case.<sup>3</sup> However, the Utilities argue exactly that in this case. This argument is an unpersuasive shortcut which contradicts the Utilities' own position during the evidentiary hearing. While past audits are persuasive evidence and show the information available to the Utilities during the audit year, foreclosing the outcome this case based on an order for a different rider in a different year is an absurd outcome and a violation of the requirement in HB 6.<sup>4</sup>

Binding the commission to a prudency finding under a totally different rider and case is inconsistent with Supreme Court precedent.<sup>5</sup> In *Vectren*, the Ohio Supreme Court already

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<sup>3</sup> *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 2006-Ohio-1386, 113 Ohio St. 3d 180, 863 N.E.2d 599.

<sup>4</sup> R.C. 4928.148(A)(1).

<sup>5</sup> *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 2006-Ohio-1386, 113 Ohio St. 3d 180, 863 N.E.2d 599.

rejected the notion that Commission approval in a past case foretold a prudence finding in all future cases to come.<sup>6</sup> The Court specifically noted that part of what differentiates subsequent prudence reviews over similar utility decision making is “the cumulative effect” over several years of such decisions.<sup>7</sup> In that case, the court upheld the Commission’s imprudence finding, even though the Commission had approved similar decisions in the past, because the cumulative effect of these same decisions in the face of ongoing losses was a distinguishing factor leading to imprudence.<sup>8</sup>

In this case, the Utilities themselves conceded during the evidentiary hearing that this audit concerns a different year and different standard than past riders. When discussing information in an audit draft from a past AEP rider recovering OVEC costs, Duke Energy Ohio argued strongly against admitting any information related to that case.<sup>9</sup> Duke counsel even noted its earlier 2019 PSR Rider audit specifically distinguished that rider from other OVEC riders.<sup>10</sup> Counsel for AEP and AES joined Duke’s arguments.<sup>11</sup> AEP’s counsel argued that a past AEP OVEC rider was a “previous rider with a different standard and a different year.”<sup>12</sup> Attorney Examiner Addison agreed with the Utilities and ruled this case is “under a different paradigm from past riders.”<sup>13</sup> AEP Ohio’s counsel again repeated similar arguments that “[t]hose are 2019 audit reports. ... for a different rider, a different statute, different company, and a different year” later on during the hearing.<sup>14</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 607.

<sup>8</sup> *Id.*

<sup>9</sup> Tr. 189-190.

<sup>10</sup> *Id.* at 189: 24-25.

<sup>11</sup> *Id.* at 191.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 202-203.

<sup>14</sup> *Id.* at 564-565.

As the Utilities have conceded, the audit in this case covers a totally different year than the 2019 Duke PSR audit case. A key component of the prudence standard includes reviewing the “conditions and circumstances which were known or reasonably should have been known at the time the decision was made.”<sup>15</sup> Since 2020 was a different year than 2019, the conditions and circumstances before the Utilities were different. Not only did the Utilities have the benefit of the information from past audits, like the evidence of a mounting oversupply of coal, 2020 itself presented totally different circumstances than 2019.<sup>16</sup> The Utilities themselves note that 2020 was unlike any other year OVEC had faced.<sup>17</sup> These circumstances called for unprecedented decision making beyond business as usual and past prudence decisions could not reasonably be assumed to apply to such drastically different circumstances.

The Utilities’ attempt to use the 2019 Duke PSR audit as a shortcut is most glaring in their arguments regarding coal purchase contracts and coal forecasting procedures. The Utilities entered 2020 knowing they already had an oversupply of coal.<sup>18</sup> Then, electric demand dropped drastically in 2020.<sup>19</sup> OVEC also started burning less coal as it switched to a flexible must-run and economic commitment strategy to avoid losses from lower electricity prices.<sup>20</sup> All the while, coal prices also dropped and OVEC continued to be obligated to a bloated coal contract through 2021 without the ability to take on coal inventory indefinitely.<sup>21</sup> The prospect of additional inventory on top of existing 2019 oversupply put pressure on the utilities to return to an

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<sup>15</sup> See, *City of Cincinnati v. Public Utilities Commission of Ohio*, 1993-Ohio-79, 67 Ohio St. 3d 523, 620 N.E.2d 826.

<sup>16</sup> Case No. 21-477, Initial Post-Hearing Brief of Duke Energy Ohio, 38 (Feb. 12, 2024)

<sup>17</sup> *Id.*

<sup>18</sup> Case No. 18-1004-EL-RDR, *Audit of the Power Purchase Agreement Rider of Ohio Power Company from January 1, 2018 to December 31, 2019*, 10 (hereinafter “AEP PPA Audit for 2018-2019”); Case No. 20-167-EL-RDR, *Audit of the Price Stabilization Rider of Duke Energy Ohio, Final Report*, 10 (Oct. 15, 2020) (hereinafter “Duke PSR Audit”).

<sup>19</sup> Duke Exhibit 2, Direct Testimony of John D. Swez, 18 (October 2, 2023).

<sup>20</sup> Case no. 21-0477, *Ohio Power Company’s initial Brief*, 12-13 (Feb. 12, 2024) (hereinafter “AEP Brief”).

<sup>21</sup> *Id.*

exclusively must-run status despite the promise of losses in an uncertain market.<sup>22</sup> This posed totally different facts than 2019 or any year prior.

Given these circumstances and the short time remaining on the bloated contract, relative to its 20-year term, the Utilities could have discussed with OVEC the possibility of renegotiating this contract, or at least the deliveries. AEP Ohio knew from experience that renegotiating supply contracts when facing extreme losses is an available option.<sup>23</sup> However, the Utilities chose to do nothing. They did not even discuss this potential strategy with OVEC or any of the other sponsoring companies. Now, they want to rationalize this decision based solely on a Commission finding of prudence under totally different circumstances. This is an inappropriate shortcut to a prudence finding and is not persuasive.

Even if this Commission were bound by prudency determinations under a different rider, the standard in this case is different. The Commission in this case is not only tasked with a prudency finding but a prudency and reasonableness finding.<sup>24</sup> The 2019 Duke PSR audit to find prudent decision making and the Company made reasonable efforts to transfer its contractual entitlement under the ICPA.”<sup>25</sup> Consistent with the omission of a reasonableness test required for that audit, the RFP in that case also made no mention of a best interest determination.<sup>26</sup> Here, Ohio law specifically includes a prudence *and* reasonableness test.<sup>27</sup> Thus, even if this Commission were bound in all future proceedings by a past prudency finding, that would not conclude this Commission’s review in this case.

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<sup>22</sup> *Id.*

<sup>23</sup> *In re Fuel Adjustment Clauses for Columbus S. Power Co.*, 140 Ohio St. 3d 352 (AEP Ohio renegotiated a coal contract with a supplier after prices rose well above the agreed amount in the 20-year fixed price contract).

<sup>24</sup> R.C. 4928.148(A)(1).

<sup>25</sup> Case no. 20-167-EL-RDR, *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Entry Ordering a Request for Proposals, 4 (Feb. 13, 2020).

<sup>26</sup> *Id.*

<sup>27</sup> R.C. 4928.148(A)(1).

**B. The Utilities and PUCO Staff cannot rely on auditor omissions as a shortcut to prudence.**

Throughout Staff's and the Utilities' initial briefings, each often rely on omissions of an imprudence finding rather than an affirmative prudence finding. While the auditor does make affirmative prudence findings in several sections of the audit, it leaves some glaring holes the Utilities and Staff never address. The Utilities again rely almost entirely on the 2019 Duke PSR audit order to justify its shortcuts between auditor omissions and their burden to establish prudence. However, this case is distinguishable from the 2019 Duke PSR audit. Especially given the severe losses in this case, these omissions cannot be ignored.

This Commission has in the past been willing to look at an omission in an overall prudence finding when each individual section of the audit found "appropriate and sensible" behavior.<sup>28</sup> As the Utilities' noted in their initial briefs, this Commission declined to "parse the semantical differences between 'prudent' ... or 'mostly adequate,'" in the 2019 Duke PSR Rider order.<sup>29</sup> The Commission also found that the mere presence of \$24 million in losses passed to customers was not enough to establish imprudence.<sup>30</sup> The Commission anticipated some losses when it approved the rider, and losses in themselves were not controversial.<sup>31</sup>

This case is distinguishable from the 2019 Duke PSR audit because the omissions and the losses only increase. In the Duke PSR audit, the Commission was reviewing \$24 million in losses. Here, the Commission is reviewing over \$100 million in losses. In the Duke PSR audit, the auditor found an oversupply of coal, but concluded it may just be an "anomaly." In this case,

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<sup>28</sup> Case no. 20-167-EL-RDR, *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Opinion and Order, 21 (Sept. 6, 2023).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

the auditor again found oversupplies of coal, disproving the earlier “anomaly” theory. Like the 2019 Duke PSR audit, the auditor omitted an overall finding of prudence, instead finding the Duke’s actions “mostly adequate.” However, the auditor in this case also made omissions in affirmative prudence findings in specific sections of its audit as well.<sup>32</sup>

The difference in omissions between the Duke PSR audit and this audit is most glaring in its assessment of the Utilities’ energy disposition strategy. In the 2019 Duke PSR case, the auditor made affirmative prudence findings with respect to commitment strategies.<sup>33</sup> The auditor also affirmatively found the Utilities’ plans to continue evaluating these strategies were prudent.<sup>34</sup> Its only recommendation was to continue this evaluation and consider flexibility between must-run and economic. In this case, the auditor made no finding at all regarding the prudence of the Utilities’ decision to return to an exclusively must-run offer.<sup>35</sup> It only recommended that keeping flexibility between must-run and economic is prudent.<sup>36</sup>

In this case, the Utilities cannot rely on auditor omissions as a shortcut to prudence. While this Commission has declined to disallow costs in past overall audit findings based on “mostly adequate” decision-making rather than actual prudence, this case is distinguishable from those past findings. The losses in this case are much higher. The bad decision making on supply contracts went from a potential “anomaly” to a trend. Also, the omissions in affirmative prudence findings increased. These are significantly different circumstances that require disallowances in this case.

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<sup>32</sup> For example, the auditor found only that OVEC organization and staffing are adequate, with no mention of prudence under the disposition of energy capacity. As another example, under the section for OVEC bill and rider reconciliations, the auditor notes that while the amounts of the losses were billed properly, it gives no prudency or reasonableness determination with regard to the losses themselves.

<sup>33</sup> Case no. 20-167-EL-RDR, *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Opinion and Order (Sept. 6, 2023).

<sup>34</sup> *Id.* 5, ¶ 20.

<sup>35</sup> See, Staff Exhibit 4, Audit Report of AEP Ohio, at 10.

<sup>36</sup> *Id.*



**C. The utilities cannot rely on a false premise of must-run versus economic status as a shortcut to prudence.**

The Utilities fail to meet their burden to show that an exclusively must-run strategy is prudent because they never actually argue that the alternative—giving OVEC staff flexibility between these two commitment strategies—is imprudent. The Utilities bear the burden to show that their decision making was prudent.<sup>37</sup> In this case, the Utilities try to sidestep this burden by creating a false decision matrix. They argue that operating exclusively on an economic status is imprudent, but never actually argue against maintaining a flexible status between both economic and must run.<sup>38</sup>

The burden to prove prudent and reasonable decision making is an affirmative burden on the Utilities. “[I]f the evidence [is] inconclusive or questionable, the commission [can] justifiably reduce or disallow cost recovery.”<sup>39</sup> In that 2012 *Duke* case, Duke appealed a disallowance of various labor costs.<sup>40</sup> The Commission disallowed such costs because while Duke explained the importance of these labor costs generally, it failed to explain how it determined the specific amounts they paid to its employees in bonuses.<sup>41</sup> The Supreme Court upheld the Commission’s disallowances because it found these arguments missed the point.<sup>42</sup> The utility never actually pointed to any evidence that contradicted the Commission’s finding.<sup>43</sup>

Here, the Utilities generally argue a must-run status is best given the constraints of operating a Cold-War era coal plant, but never argue against giving OVEC flexible authority

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<sup>37</sup> The utilities bear the burden to prove its costs are prudent and reasonable. *In re Duke Energy Ohio, Inc.*, 131 Ohio St. 3d 487.

<sup>38</sup> See e.g., AEP Ohio Brief, 2.

<sup>39</sup> *In re Duke Energy Ohio, Inc.*, 131 Ohio St. 3d 487.

<sup>40</sup> *Id.* at 204.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

between must-run and economic. This false premise the utilities create between exclusively must-run or exclusively economic ignores the auditor's actual recommendation for ongoing flexibility to operate between the two commitment strategies.

Instead, the facts in this audit suggest that it is imprudent to operate exclusively on a must-run status. Even ignoring the unprecedented drop in energy prices during 2020, day-ahead energy prices from 2013-2020 have consistently declined.<sup>44</sup> Thus, OVEC is likely trending towards more losses as the cost to maintain these 60- year-old coal plants and comply with tightening environmental regulations stays steady or rises,<sup>45</sup> and prices trend down.

As the market becomes less favorable for OVEC profits, the Operating committee procedures to authorize an economic commitment status do not allow OVEC to react nimbly to market trends. The Utilities concede that changing commitment strategies takes time, and they have limited influence over the Operating Committee. In 2020, it took Duke "internal deliberation and discussion" from discovering the losses, and then an additional two weeks of discussion with OVEC and the sponsoring companies to authorize the flexibility to operate on an economic status.<sup>46</sup> Then, presumably, it took OVEC time to create additional analyses and processes to determine whether to utilize must-run or economic at any given time. All the while, OVEC was incurring massive losses.

While the Utilities thoroughly explain the benefits of a must-run strategy, usually not preferred but necessary for such old equipment owned by OVEC, they never explain why they cannot allow *flexibility* between must-run and economic. That attempted shortcut is where the Utilities fail to show all of their decisions related to energy disposition and capacity in 2020 were

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<sup>44</sup> See, Staff Exhibit 4, Audit Report of AEP Ohio, 18: Fig. 5.

<sup>45</sup> OCC Exhibit 1, Direct Testimony of Elizabeth Stanton (Oct. 10, 2023)

<sup>46</sup> Duke Exhibit 2, Direct Testimony of John D. Swez, 16-17 (Oct. 2, 2023).

prudent. They provide no evidence as to why they needed to return to exclusively must run operations following a successful pilot under more flexibility.

#### **IV. Conclusion**

The attempted shortcuts the Utilities take in this case to satisfy their burden to show prudence are not enough to justify absolutely no disallowances of OVEC costs in 2020. OVEC faced massive losses, and the utilities took few steps to address these market changes. The steps they did take were limited, and they quickly returned back to business as usual. Ohio consumers cannot be on the hook for these imprudent and unreasonable decisions.

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