

**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    ) Case No. 21-477-EL-RDR  
Light Company d/b/a AES Ohio, and Ohio    )  
Power Company d/b/a AEP Ohio.                    )

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**REPLY BRIEF  
OF  
THE KROGER CO.**

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**I. INTRODUCTION**

The record evidence is clear. The \$114,879,609<sup>1</sup> collected from Ohio customers for the period of January 1, 2020 through December 31, 2020 (“Audit Period”) through the non-bypassable Legacy Generation Resource Riders (“Riders LGR”) was unreasonable and imprudent, and resulted from the Ohio Power Company’s (“AEP”), Duke Energy Ohio’s (“Duke”), and the Dayton Power and Light Company d/b/a AES Ohio’s (“AES”) (collectively, “the Utilities”) unreasonable and imprudent actions concerning their ownership interests in the Ohio Valley Electric Corporation (“OVEC”), which owns and operates two old, outdated, uneconomic coal-fired plants located in Ohio and Indiana. While OVEC owns these two plants, under the Amended and Restated Inter-Company Power Agreement (“ICPA”), the Utilities are each entitled to a share of the power generation from the OVEC plants, and they must pay that same share of the costs

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<sup>1</sup> Revised OMAEG Ex. 1 at Attachment A (Direct Public Testimony of John Seryak) (November 10, 2023); Revised OMAEG Ex. 1A at Attachment A (“Public Errata to Seryak Testimony”). *See also* Staff Ex. 8C (AES Motion for Protective Order, Exhibit 2 at 5, Figure 13, Column C (“Public AES Audit Report Supplement”)); Staff Ex. 4 at 28–29, Figure 9, Column H (Unredacted Revised AEP Audit Report (Public) (“Public AEP Audit Report”)) (January 4, 2024); Staff Ex. 6 at 26, Figure 9, Column K (Unredacted Revised Duke Audit Report (Public) (“Public Duke Audit Report”)) (January 4, 2024).

associated with operating OVEC.<sup>2</sup> Collectively, the Utilities have a 33.83% ownership interest in OVEC.<sup>3</sup>

On May 5, 2021, the Public Utilities Commission of Ohio (“Commission”) directed Staff to issue a Request for Proposal (“RFP”)<sup>4</sup> for audit services to assist the Commission with determining “the prudence and reasonableness of the actions of electric distribution utilities with ownership interests” in OVEC, and whether the OVEC costs passed onto customers for 2020 were prudently and reasonable incurred.<sup>5</sup> The selected auditor, London Economics International, LLC (“LEI” or “the Auditor”) filed a separate audit report for each of the Utilities (“Audit Reports”) on December 17, 2021.<sup>6</sup> Numerous parties, including The Kroger Co. (“Kroger”), intervened and participated in an evidentiary hearing on the approximately \$115 million in 2020 OVEC-related costs at issue in this case.

Pursuant to the established briefing schedule, Kroger and the other parties involved in this case, including the Utilities, Staff, the Office of the Ohio Consumers’ Counsel (“OCC”), the Ohio Manufacturers’ Association Energy Group (“OMAEG”), the Citizens Utility Board of Ohio and

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<sup>2</sup> Initial Brief of The Ohio Manufacturers’ Association Energy Group (Public) (February 12, 2024) (hereinafter, “OMAEG Brief”); Post Hearing Brief of the Citizens Utility Board of Ohio and Union of Concerned Scientists (Public) (February 12, 2024) (hereinafter, “CUB/UCS Brief”).

<sup>3</sup> AES has a 4.90% interest, AEP has a 19.93% interest, and Duke has a 9.00% interest. AES Ohio Post Hearing Brief at 22 (February 12, 2024) (hereinafter, “AES Brief”); Initial Brief of Ohio Power Company at 9 (February 12, 2024) (hereinafter, “AEP Brief”); Initial Post-Hearing Brief of Duke Energy Ohio, Inc. at 1 (February 12, 2024) (hereinafter, “Duke Brief”); OMAEG Brief at 66; Initial Brief of the Office of the Ohio Consumers’ Counsel at 4 (February 12, 2024) (hereinafter, “OCC Brief”); CUB/UCS Brief at 6–7.

<sup>4</sup> See Entry and Response to Proposal No. RA21-PPA-1, RFP (May 5, 2021) (hereinafter, “Entry and RFP”).

<sup>5</sup> R.C. 4928.148(A)(1).

<sup>6</sup> See Staff Ex. 2 (Unredacted Revised AES Audit Report (Public) (“Public AES Audit Report”)) (January 4, 2024); Staff Ex. 4, Public AEP Audit Report; Staff Ex. 6, Public Duke Audit Report.

Union of Concerned Scientists (“CUB/UCS”), the Ohio Environmental Council (“OEC”), and the Sierra Club all submitted initial briefs on February 12, 2024.<sup>7</sup>

Under R.C. 4928.148, which created Riders LGR to recover reasonable and prudently incurred OVEC-related costs, the Utilities must demonstrate to the Commission that their actions and practices during the Audit Period were reasonable and prudent *and* that the 2020 costs they seek to collect from customers were reasonable and prudently incurred. However, as demonstrated by Kroger and the other intervening parties in this case, the Utilities have failed to meet their burden. For example, the Auditor failed to make several requisite findings—including one expressly required by R.C. 4928.148(A)—and what findings were made demonstrate that the 2020 costs passed on to customers through Riders LGR were unjust, unreasonable, and imprudently incurred. According to one intervenor, “[d]ue to the imprudent business decisions and the [Utilities’] failure to exercise proper oversight responsibilities over OVEC and ensure that prudent decisions are made and only prudently incurred costs are recovered from customers, an average loss of over \$8.79 million per month by the OVEC plants was passed on to Ohio customers through the LGR Riders, which were a charge to customers every month of the Audit Period.”<sup>8</sup> Similarly, another intervenor explained in its initial brief that the Utilities “failed to operate the coal plants prudently, in the best interest of consumers and consistent with practices followed by merchant coal plant owners seeking to maximize revenues.”<sup>9</sup> Therefore, the Commission should disallow

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<sup>7</sup> See AES Brief; AEP Brief; Duke Brief; Initial Brief of Staff (February 12, 2024) (hereinafter, “Staff Brief”); OMAEG Brief; OCC Brief; Initial Brief of The Kroger Co. (February 12, 2024) (hereinafter, “Kroger Brief”); 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”).

<sup>8</sup> OMAEG Brief at 3.

<sup>9</sup> OCC Brief at 34.

the entire amount of approximately \$115 million in “above-market price coal plant subsidy charges.”<sup>10</sup>

R.C. 4928.148(A) explicitly requires the Commission to “exclude from recovery those costs that the [C]ommission determines imprudent and unreasonable,” and R.C. 4928.01(A)(42) further defines “prudently incurred costs related to a legacy generation resource” to exclude costs related to “any return on investment in common equity.” Through the statutorily mandated audit process, the Commission must determine whether the Utilities’ customers are paying just and reasonable OVEC costs that were prudently incurred, and whether the Utilities’ actions were reasonable and prudent during the Audit Period.<sup>11</sup> The Commission also has a statutory obligation to protect customers from the payment of unjust and unreasonable or imprudently incurred costs.<sup>12</sup>

For all the reasons set forth in Kroger’s initial brief and herein, Kroger urges the Commission to find that the Utilities did not meet their burden of proof to demonstrate the prudence and reasonableness of their actions or their incurred OVEC-related costs in 2020. Kroger further requests that the Commission, as required by law, exclude from recovery the \$114,879,609 collected from customers for the 2020 Audit Period. Alternatively, at minimum, the Commission should disallow the 2020 costs related to the Utilities’ unreasonable and imprudent must-run commitment strategy, the 2020 costs related to unreasonably and imprudently purchasing overpriced coal, and/or the 2020 costs related to taking title to OVEC’s available energy at a loss.<sup>13</sup>

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<sup>10</sup> *Id.*

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

<sup>12</sup> 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).

<sup>13</sup> *See* Kroger Brief at 9–15.

## II. ARGUMENT ON REPLY

### A. Kroger's arguments are not barred by collateral estoppel.

AES' baffling assertion that the doctrine of collateral estoppel applies to this 2020 audit case and, therefore, precludes Kroger from arguing against the prudence of the Utilities' actions during the 2020 Audit Period and the 2020 costs incurred simply because Kroger participated in Duke's 2019 PSR Audit ("2019 Audit"), which reviewed Duke's 2019 costs and actions, should be rejected.<sup>14</sup> To make a collateral estoppel argument, a party must establish the following elements: (1) the issue was actually and directly litigated in the prior action; (2) the issue was passed upon and determined by a tribunal of competent jurisdiction; and (3) the party against whom collateral estoppel is asserted was a party (or in privity with the party) to the prior action.<sup>15</sup> AES cannot demonstrate these elements concerning Kroger.

First, the issues in this case were not "actually and directly litigated" in the 2019 Audit, which is readily distinguishable from this 2020 audit. The two audits reviewed the costs incurred and the actions taken for two different years. The actions taken by Duke in 2019 were not identical to the Utilities' actions in 2020—as all three Utilities concede.<sup>16</sup> And even if the actions were identical, the circumstances were not, and what is prudent in one year is not automatically prudent in the next. There is a reason that the governing LGR statute provides for multiple audits over multiple different years.<sup>17</sup> Similarly, while the "same types of costs" were reviewed in both audits, the costs incurred in 2019 are not identical to those incurred in 2020, as further evidenced by the

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<sup>14</sup> AES Brief at 8.

<sup>15</sup> *Id.*, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994).

<sup>16</sup> AES Brief at 19; AEP Brief at 13; Duke Brief at 27.

<sup>17</sup> See R.C. 4928.148.

fact that there are different amounts at issue in this 2020 audit as compared to the 2019 Audit.<sup>18</sup> The Utilities involved in the two different audit cases are also distinguishable, since the 2019 Audit only reviewed Duke’s actions and incurred costs, while this 2020 audit reviews all three Utilities’ actions and incurred costs.

Second, the issues in this case were not “passed upon and determined by a tribunal of competent jurisdiction” because the 2019 Audit order is still pending. On November 1, 2023, the Commission granted applications for rehearing,<sup>19</sup> and, therefore, the 2019 Audit order is not yet final.

Third, while Kroger participated in the 2019 Audit, it has not “had [its] day in court on the specific issue brought into litigation within the later proceeding.”<sup>20</sup> As discussed above, the issues in this 2020 case are distinguishable from those in the 2019 Audit. The 2019 Audit provided Kroger the opportunity to argue the prudence of Duke’s actions and incurred costs for 2019, but that case did not examine the three Utilities’ actions and incurred costs for 2020. As such, Kroger has not had its “day in court on the specific issue brought into litigation within [this] proceeding.” Therefore, AES’ collateral estoppel argument should be rejected out of hand.

**B. The Commission Should Disallow All 2020 OVEC Costs Because the Utilities Failed to Satisfy Their Statutory Burden.**

The Utilities have not met their burden of proof.<sup>21</sup> Under the Riders LGR enabling statute, the Commission must determine “the prudence and reasonableness of the actions of [the Utilities]

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<sup>18</sup> See Kroger Brief at 1 (stating that the costs at issue total \$114,879,609 for all three Utilities); *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Joint Post-Hearing Brief of The Ohio Manufacturers’ Association Energy Group and The Kroger Co. at 1 (July 29, 2022) (stating that the costs at issue total over \$24 million for *Duke*) (hereinafter, “2019 Duke PSR Audit”).

<sup>19</sup> 2019 Duke PSR Audit, Entry on Rehearing (November 1, 2023).

<sup>20</sup> *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 200, 443 N.E.2d 978 (1983).

<sup>21</sup> Kroger Brief at 4–15. See also OCC Brief at 7–34; OMAEG Brief at 41–62; CUB/UCS Brief at 13–17; OEC Brief at 9–17; Sierra Brief at 6–16.



with ownership interests in [OVEC], . . . and exclude from recovery those costs that the [C]ommission determines imprudent and unreasonable.”<sup>22</sup> Therefore, the Utilities must prove that their 2020 actions were prudent and reasonable, and that the 2020 costs they charged to customers were reasonable and prudently incurred. The Utilities have failed to do so.

While the Utilities attempt to use the Auditor’s failure to recommend disallowances or affirm findings of imprudence and unreasonableness as evidence that they have met their burden,<sup>23</sup> this is not the case. The governing statute states that the Commission “shall determine” the prudence and reasonableness of the Utilities’ actions and whether the costs passed through Riders LGR were reasonable and prudently incurred.<sup>24</sup> As such, “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.”<sup>25</sup> And based on the record evidence presented during the hearing, and as explained in Kroger’s and the other intervenors’ initial briefs, it is clear that the Utilities’ 2020 actions were imprudent and unreasonable, and that the approximate \$115 million collected from customers for the Audit Period was unreasonable and imprudently incurred.

### **1. Must-Run Commitment.**

Among the most glaring of the Utilities’ imprudent and unreasonable actions was the decision to offer all of OVEC’s units—aside from Clifty Creek No. 6—as must-run for the majority of the Audit Period.<sup>26</sup> As explained by OCC, OVEC’s mandatory must-run policy “directly led to

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<sup>22</sup> R.C. 4928.148(A)(1).

<sup>23</sup> AES Brief at 7; AEP Brief at 2; Duke Brief at 13.

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

<sup>25</sup> CUB/UCS Brief at 9.

<sup>26</sup> AES Brief at 4; AEP Brief at 11; Duke Brief at 22–23; Staff Brief at 8; OCC Brief at 4; OMAEG Brief at 62–63; CUB/UCS Brief at 17–18.

the overcharges and was imprudent and not in consumers' best interest" because the coal plants were running even when the "variable operating costs (fuel and variable O&M) exceeded the market price of the electricity generated by the fuel."<sup>27</sup> Running the plants at a continuous financial loss is neither reasonable nor prudent, as evidenced by the fact that merchant coal plant operators, who "act to attempt to maximize revenue,"<sup>28</sup> "rarely run their plants when costs exceed energy market prices."<sup>29</sup> Whereas merchant coal plant operators do not have "captive utility customers . . . to foot the bill for the imprudent and unreasonable costs associated with OVEC in 2020 or the unreasonable and imprudent decisions of the [Utilities]," the Utilities have both captive customers and a statutorily authorized recovery mechanism.<sup>30</sup> Consequently, the Utilities have no disincentive to incur above-market costs.<sup>31</sup> In fact, the Utilities "all financially benefit from the LGR Riders at the expense of customers."<sup>32</sup> The Utilities should not be allowed to reap the benefits of imprudent and unreasonable actions that result in millions of dollars in imprudently incurred costs that are later recovered from customers. Disallowing recovery of those unreasonable and imprudently incurred costs would provide an actual incentive for the Utilities to finally advocate for the implementation of more prudent and reasonable unit commitment strategies.

The Utilities' attempts to justify their unreasonable and imprudent actions by referencing the ICPA and OVEC's operating procedures are unpersuasive for several reasons. Most notably,

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<sup>27</sup> OCC Brief at 13.

<sup>28</sup> CUB/UCS Brief at 20. *See also* OMAEG Brief at 50.

<sup>29</sup> OCC Brief at 20.

<sup>30</sup> OMAEG Brief at 68. *See also* OCC Brief at 21, noting that "[i]n a competitive market, the owner of an unprofitable coal plant would be unable to impose those above-market costs on consumers, who 'could take their business to a more efficient provider,'" *quoting In re Long Island Lighting Co.*, Case No. 27563, 71 PUR 4th 262 (N.Y. Pub. Serv. Comm'n) (November 16, 1985).

<sup>31</sup> OCC Brief at 21; OMAEG Brief at 5; CUB/UCS Brief at 37. *See also* Kroger Brief at 8.

<sup>32</sup> OMAEG Brief at 48 (internal quotations omitted). *See also* Kroger Brief at 8; CUB/UCS Brief at 33–34; OEC Brief at 16.

OVEC's operating procedures, which require offering almost all of the units as must-run, can be changed—temporarily or permanently. During the Audit Period, Duke persuaded the other OVEC owners to temporarily allow some units to be offered as either must-run or economic.<sup>33</sup> The Auditor explicitly found that this temporary change “was prudent compared with allowing must-run commitment only.”<sup>34</sup> While the Auditor failed to affirmatively conclude that the Utilities' failure to encourage OVEC to adopt a flexible commitment strategy for the majority of the Audit Period was imprudent and unreasonable, the fact remains that such inaction was imprudent and unreasonable. Moreover, the temporary change in commitment strategy “proves that th[e] influence of individual or a subset of companies is not as limited as the [Utilities] claim,”<sup>35</sup> and that it is physically possible to run the plants economically, despite the Utilities' claims otherwise. While temporary unit commitment changes require unanimous approval from the operating committee—on which all three Utilities sit—amendments to the operating procedures only require a two-thirds majority.<sup>36</sup> Duke alone was able to persuade the operating committee to temporarily change the unit commitment strategy in 2020. Had all three Utilities advocated for a permanent change, such a recommendation “would be taken seriously by the other members” of the committee.<sup>37</sup>

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<sup>33</sup> AES Brief at 11; AEP brief at 13; Duke Brief at 27; OCC Brief at 4–5; OMAEG Brief at 63; OEC Brief at 2.

<sup>34</sup> OMAEG Brief at 63, *quoting* 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

<sup>35</sup> CUB/UCS Brief at 24.

<sup>36</sup> AEP Brief at 10; Duke Brief at 7.

<sup>37</sup> OMAEG Brief at 56, *quoting* Tr. Vol. V at 1207 (Glick Cross-Examination). *See also* CUB/UCS Brief at 24; Kroger Brief at 11.

## 2. Coal Procurement.

As members of the operating committee, the Utilities also had the ability to advocate for more prudent and reasonable fuel procurement strategies, but once again failed to do so. Instead, the Utilities allowed OVEC to incur at least \$12,465,618 in unnecessary coal costs by purchasing coal through Resource Fuels.<sup>38</sup> As calculated by one intervenor's witness, based on the Utilities' combined total entitlement to OVEC's available energy (33.83%),<sup>39</sup> of the \$12,465,618, \$4,217,118 was recovered from Ohio customers through Riders LGR.<sup>40</sup> As explained in the intervenors' initial briefs, the Auditor found that "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, and that these significantly higher coal prices were mainly due to the expensive coal that OVEC purchased from Resource Fuels under a long-term contract.<sup>41</sup> As explained by OEC, the Utilities were aware that OVEC was facing an oversupply of coal—given that past Audit Reports had found as much<sup>42</sup>—and yet they made no effort to renegotiate these contracts or deliveries.<sup>43</sup> This failure to act resulted in an "increasing oversupply of coal at above market prices," which customers had to pay for through Riders LGR.<sup>44</sup>

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<sup>38</sup> OMAEG Brief at 65–66; CUB/UCS Brief at 31; Kroger Brief at 9.

<sup>39</sup> The Utilities' entitlement to OVEC's available energy individually is as follows: AEP's share = 19.93%; Duke's share = 9.00%; and AES' share = 4.90%.

<sup>40</sup> As calculated by OMAEG witness Seryak, \$4,217,118 represents the share of the imprudent coal purchase costs passed on to Ohio customers for 2020. This number was calculated using AEP's 19.93%, Duke's 9.00%, and AES' 4.90% ownership of OVEC. OMAEG Brief at 65–66. *See also* CUB/UCS Brief at 31; Kroger Brief at 9.

<sup>41</sup> OMAEG Brief at 50–51 (internal quotations omitted). *See also* CUB/UCS Brief at 30–32; OEC Brief at 11–14; Kroger Brief at 8.

<sup>42</sup> Staff Brief at 10–11; OEC Brief at 13.

<sup>43</sup> OEC Brief at 11.

<sup>44</sup> *Id.* at 12. *See also* OMAEG Brief at 65–66; Kroger Brief at 8–9.

Even more egregious, this oversupply of coal was apparently why the Utilities made no efforts to extend OVEC's temporary authorization to offer some units as either must-run or economic.<sup>45</sup> As explained by Kroger and other parties in their initial briefs—including AEP's—OVEC's coal contracts require the plants to accept a minimum amount of coal, meaning that even if OVEC does not need additional coal, it still has to accept and pay for the coal delivered.<sup>46</sup> Consequently, during the months when some of the units were running less frequently, the coal was piling up and OVEC "needed" to burn the excess by switching back to a mandatory must-run strategy, since that guaranteed that the plants were always running and consuming coal.<sup>47</sup> In other words, the OVEC plants were essentially "just vehicles for burning more and more coal."<sup>48</sup> Burning coal simply to satisfy bad coal contracts that should have and could have been renegotiated during the Audit Period is neither reasonable nor prudent, and the 2020 costs incurred as a result of these bad coal contracts should not be passed on to customers because such costs are neither prudent nor reasonable.

### **3. Component (D).**

Among the Auditor's troubling findings that demonstrate imprudence was that certain fixed costs were not properly excluded from the Riders LGR calculations.<sup>49</sup> Specifically, Component (D) of OVEC's fixed costs should be excluded from recovery as a matter of law.<sup>50</sup> While the Utilities insist that Component (D) should be included in Riders LGR,<sup>51</sup> Ohio law mandates

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<sup>45</sup> OMAEG Brief 65–66; CUB/UCS Brief at 29. *See also* Kroger Brief at 13.

<sup>46</sup> Kroger Brief at 13; AEP Brief at 14; OMAEG Brief 65–66; CUB/UCS Brief at 29.

<sup>47</sup> Kroger Brief at 13; AEP Brief at 14; OMAEG Brief 65–66; CUB/UCS Brief at 29.

<sup>48</sup> CUB/UCS Brief at 29.

<sup>49</sup> OCC Brief at 22–23; OMAEG Brief 45–46; CUB/UCS Brief at 9; OEC Brief at 15–16.

<sup>50</sup> OCC Brief at 22–23; OMAEG Brief 45–46; OEC Brief at 15–16.

<sup>51</sup> AES Brief at 21–22; AEP Brief at 23–25; Duke Brief at 39–42.

otherwise. R.C. 4928.01(A)(42) requires that “[p]rudently incurred costs . . . must exclude any return on investment in common equity.”<sup>52</sup> The Auditor specifically flagged this issue because “Component D seems to be such a return,”<sup>53</sup> and the ICPA itself describes Component (D) as a payment per common share, similar to a dividend.<sup>54</sup> As explained in Kroger’s initial brief, the plain language of R.C. 4928.01(A)(42) requires that Component (D) be excluded, and as a creature of statute,<sup>55</sup> the Commission must give effect to the plain meaning of the law. Therefore, “the Utilities are not permitted to collect costs for a return on equity to OVEC, so the PUCO should require the Utilities to refund their share of the \$2.5 million return on equity for OVEC.”<sup>56</sup> The other intervenors concurred. OCC urged the Commission to disallow Component (D) because its collection “directly violates R.C. 4928.148,”<sup>57</sup> and OMAEG similarly argued “that Component D should be excluded from the OVEC costs collected from customers as those costs were not prudently incurred and are the types of costs explicitly excluded from collection through the LGR Riders.”<sup>58</sup> OEC further asserted that “[e]ven if the definition of prudently incurred costs did not exclude returns on investment, such a cost would not be reasonable.”<sup>59</sup> Therefore, even if the

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<sup>52</sup> R.C.4928.01(A)(42). *See also* Staff Ex. 2, Public AES Audit Report at 9, 27; Staff Ex. 4, Public AEP Audit Report at 9, 31; Staff Ex. 6, Public Duke Audit Report at 9, 28; Staff Brief at 7; Kroger Brief at 6–7; OCC Brief at 22–23; OMAEG Brief at 45–46; CUB/UCS Brief at 9; OEC Brief at 15–16.

<sup>53</sup> AES Brief at 21–22; AEP Brief at 23–25; Duke Brief at 39–42; Staff Brief at 7; Kroger Brief at 6–7; OCC Brief at 22–23; OMAEG Brief at 45–46; CUB/UCS Brief at 9; OEC Brief at 15–16.

<sup>54</sup> AES Ex. 4 at Exhibit 1, Inter-Company Power Agreement at § 5.03 (September 10, 2010) (Direct Public Testimony of David Crusey) (October 3, 2023).

<sup>55</sup> *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 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).

<sup>56</sup> OCC Ex. 1 at 29 (Direct Testimony of Elizabeth Stanton) (October 10, 2023).

<sup>57</sup> OCC Brief at 22.

<sup>58</sup> OMAEG Brief at 46.

<sup>59</sup> OEC Brief at 16.

Commission accepted the Utilities' arguments (which it should not) that Component (D) is not a return on investment in common equity, the cost should still be excluded because it is unreasonable.

### III. CONCLUSION

The record evidence in this case clearly demonstrates that the entire amount of approximately \$115 million<sup>60</sup> collected from customers through Riders LGR were imprudently incurred in 2020 and therefore unjust, unreasonable, and not in the best interest of customers. Additionally, the record demonstrates that the Utilities' actions in 2020 were unreasonable and imprudent. Because of the Utilities' imprudent business decisions—several of which benefited shareholders rather than ratepayers—and failures to use their influence as part owners to change OVEC's bad policies or at least push for more prudent decisions, Ohio customers were charged an average of \$8.79 million per month through Riders LGR to cover OVEC's substantial 2020 losses.<sup>61</sup>

As outlined in the initial briefs filed by Kroger and the other intervenors, the Utilities failed to satisfy their burden of proof in this case. Therefore, for all the reasons discussed above and in Kroger's initial brief (as well as other intervenors' briefs), Kroger respectfully requests that the Commission "exclude from recovery those costs" passed through Riders LGR for 2020 that are unreasonable and imprudent, as required by law. Alternatively, at minimum, the Commission

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<sup>60</sup> See Staff Ex. 2, Public AES Audit Report at 25, Figure 9, Column "Rider revenues, LGR"; Staff Ex. 4, Public AEP Audit Report at 28–29, Figure 9, Column H; Staff Ex. 6, Public Duke Audit Report at 26, Figure 9, Column K; Tr. Vol. I at 65, 76–78 (Fagan Cross-Examination).

<sup>61</sup> Tr. Vol. IV at 937 (Donlon Cross-Examination); Tr. Vol. IV at 955–56 (Ziolkowski Cross-Examination); Tr. Vol. IV at 1049 (Stegall Cross-Examination). See also Staff Ex. 2, Public AES Audit Report at 25, Figure 9, Column "Rider revenues, LGR"; Staff Ex. 4, Public AEP Audit Report at 28–29, Figure 9, Column H; Staff Ex. 6, Public Duke Audit Report at 26, Figure 9, Column K.

should exclude from recovery the costs incurred from offering the OVEC plants as must-run units, paying unreasonably high prices for coal, and/or taking title to OVEC's energy at a loss.

Respectfully submitted,

/s/ Angela Paul Whitfield  
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