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**

OPINION AND ORDER

Entered in the Journal on August 21, 2024

I. SUMMARY

{¶ 1} The Commission approves and adopts the audits performed by London Economics International LLC of the Legacy Generation Resource Riders 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 for the period of January 1, 2020, to December 31, 2020, consistent with the findings within this Opinion and Order. Further, the Commission approves the request of London Economics International LLC for additional funds.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke), The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio), and Ohio Power Company d/b/a AEP Ohio (AEP) (collectively, the Companies) are electric distribution utilities (EDUs), as defined by R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.148, which became effective on October 22, 2019, required the Commission to (1) establish a replacement nonbypassable rate mechanism for the retail recovery of prudently incurred costs related to a legacy generation resource (LGR) for the

period commencing January 1, 2020, and extending up to December 31, 2030, and (2) determine the prudence and reasonableness of the actions of EDUs with ownership interests in the LGR.

{¶ 4} By Entry issued on November 21, 2019, in Case No. 19-1808-EL-UNC, the Commission established the LGR Rider pursuant to R.C. 4928.148. *In re Establishing the Nonbypassable Recovery Mechanism for Net Legacy Generation Resource Costs Pursuant to R.C. 4928.148*. The LGR Rider replaced the existing mechanisms by which the Companies recovered the costs associated with each of the Companies' respective interest in and operation of the Ohio Valley Electric Corporation (OVEC). [1]

{¶ 5} By Entry issued on May 5, 2021, the Commission issued an Entry directing Staff to issue a request for proposals (RFP) for audit services to assist with an audit of the Companies' LGR Riders for the period from January 1, 2020, to December 31, 2020.

{¶ 6} By Entry issued on July 14, 2021, the Commission selected London Economics International, LLC (LEI) to conduct the audits, as is required by R.C. 4928.148.

{¶ 7} On December 17, 2021, Staff filed in this docket the LEI audit of the LGR Rider for each of the Companies (Audit Reports).

{¶ 8} Throughout the course of this proceeding, motions to intervene were granted for the Ohio Consumers' Counsel (OCC), The Kroger Co. (Kroger), the Ohio Manufacturers' Association Energy Group (OMAEG), the Ohio Environmental Council (OEC), , the Citizens' Utility Board of Ohio (CUB), the Union of Concerned Scientists (UCS), and Sierra Club.

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[1] Under R.C. 4928.148, the LGR Rider replaced each of Duke's Price Stabilization Rider, AEP Ohio's Power Purchase Agreement Rider, and AES Ohio's Reconciliation Rider, as further discussed below.

{¶ 9} By Entry issued April 7, 2023, the administrative law judge (ALJ) set deadlines for interested persons to file comments regarding the Audit Reports. Initial comments were due by May 8, 2023, and reply comments were due by May 23, 2023.

{¶ 10} On April 12, 2023, OCC filed a motion for certification of an interlocutory appeal of the April 7, 2023 Entry setting a comment period in this case.[2]

{¶ 11} On October 30, 2023, AEP Ohio filed a motion to strike certain portions of OMAEG witness John Seryak's testimony. Also on October 30, 2023, AEP Ohio, AES Ohio, and Duke jointly filed a motion to strike certain portions of the testimony of OCC witness Joseph Perez.

{¶ 12} The Commission received initial comments on May 8, 2023, from OCC, jointly from CUB and UCS, OEC, Sierra Club, OMAEG, AEP Ohio, AES Ohio, and Duke. On May 23, 2023, the Commission received reply comments from AEP Ohio, Duke, OEC, Sierra Club, OCC, AES Ohio, OMAEG, and jointly from CUB and UCS.

{¶ 13} The hearing was originally scheduled for October 17, 2023, but was rescheduled for good cause until October 31, 2023. The hearing commenced on that date and was completed on November 6, 2023.

{¶ 14} On February 12, 2024, Staff, Duke, AES Ohio, AEP Ohio, jointly by CUB and UCS, Sierra Club, OEC, OCC, Kroger, and OMAEG filed their initial briefs. On March 5, 2024, reply briefs were filed by Staff, Duke, AES Ohio, AEP Ohio, jointly by CUB and UCS, OEC, OCC, and OMAEG. On March 6, 2024, Kroger filed its reply brief alongside a motion to for leave to file said brief out of time.

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2 Where OCC's argument is solely concerned with the setting of a comment period precluding an eventual hearing, and such hearing has already occurred in this case, and OCC participated in that hearing, we find OCC's appeal moot and therefore deny the same.

III. Background History

{¶ 15} OVEC was formed in 1952 by regional utilities (Sponsoring Companies) [3] for the purpose of providing electric service to a uranium enrichment facility in southern Ohio (Facility) under a power supply agreement between OVEC and the federal government to serve a U.S. Department of Energy (DOE) facility (AES Ohio Ex. 4 at 3). The OVEC generation stations are Clifty Creek Station, comprising six coal-fired generating units, each with a capability of 200 MW for a site total of 1,200 MW, and Kyger Creek Station, comprising five coal-fired generating units, each with a capability of 199 MW for a site total of 995 MW. Id. On July 10, 1953, OVEC and its Sponsoring Companies signed the InterCompany Power Agreement (ICPA), in which OVEC agreed to sell and the Sponsoring Companies agreed to purchase certain power and energy produced by OVEC in excess of that required to serve the DOE facility. Under the ICPA, Duke, AES Ohio, and AEP Ohio are entitled to 9.0, 4.9, and 19.93 percent of OVEC's energy and capacity, and responsible for the same share of OVEC's costs, respectively. (Staff Ex. 2 at 12-14; Staff Ex. 4 at 12-15; Staff Ex. 6 at 12-15; AES Ohio Ex. 1, Exhibit 1at 4-5. [4]) Each successive amendment to the ICPA has been submitted to the Federal Energy Regulatory Commission (FERC) as a wholesale power sales agreement under Section 205 of the Federal Power Act. Upon DOE's termination of its power supply agreement with OVEC effective April 30, 2003, the Sponsoring Companies became entitled under the terms of the ICPA to all of OVEC's net power and energy. On March 23, 2011, OVEC filed an Amended and Restated ICPA with FERC, dated September 10, 2010, among OVEC and other parties. The only substantive change to the ICPA was to extend its term from March 13, 2026, to June 30, 2040. OVEC is governed by a Board of Directors that oversees the organization, which is comprised of representatives of

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3 There are currently 13 Sponsoring Companies under the ICPA representing nine parent companies (Staff Ex. 4 at 14; AEP Ohio Ex. 1 at 5.) Each Sponsoring Company is entitled to a share of OVEC's output under the ICPA.

4 AES Ohio Crusey's testimony contained two "exhibits" attached to his pre-filed testimony: Exhibit 1 the ICPA and Exhibit 2 is the OVEC Operating Procedures. We have cited these two "exhibits" in the same way we would cite to any other attachments to pre-fled testimony.

the owners of OVEC, many of which are Sponsoring Companies. In addition, pursuant to Section 9.05 of the ICPA, OVEC has an Operating Committee that includes ten members, one member for each parent company of a Sponsoring Company and one member from OVEC. The Operating Committee's role is to establish the necessary framework for OVEC's management to conduct its daily operations on behalf of the Sponsoring Companies, with an approval threshold of two-thirds of its members for all decisions. (Staff Ex. 2 at 7, 12-15; Staff Ex. 4 at 7, 12-16; Staff Ex. 6 at 7, 12-15.)

IV. APPLICABLE LAW

{¶ 16} As mentioned above, under R.C. 4928.148, the Commission must (1) establish a replacement nonbypassable rate mechanism for the retail recovery of prudently incurred costs related to a LGR for the period commencing January 1, 2020, and extending up to December 31, 2030, and (2) determine the prudence and reasonableness of the actions of EDUs with ownership interests in the LGR. R.C. 4928.148(A)(1). The LGR Rider replaced the existing mechanisms by which the Companies recovered the costs associated with each Company's respective interest in and operation of OVEC.

{¶ 17} R.C. 4928.01(A)(42) defines prudently incurred costs related to a legacy generation resource as "costs, including deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource, less any revenues realized from offering the contractual commitment for the power agreement into the wholesale markets, provided that where the net revenues exceed net costs, those excess revenues shall be credited to customers. Such 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. Such costs shall include any incremental costs resulting from the bankruptcy of a current or former sponsor under such power agreement or co-owner of the legacy generation resource if not otherwise recovered through a utility rate cost recovery mechanism."

{¶ 18} We note as a preface to our discussion that the purpose of this proceeding is to determine the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during the calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019. Entry (May 5, 2021) at ¶¶ 3, 5, Entry (July 7, 2023) at ¶ 33. As such, the scope of this proceeding is limited to the three Audit Reports submitted by LEI, which reviewed the prudency and reasonableness of the Companies' actions with respect to their relative ownership of OVEC for the period beginning January 1, 2020, to December 31, 2020, under the statutory scheme created by R.C. 4928.148. We acknowledge that some parties have made arguments with respect to the recovery mechanisms prior to R.C. 4928.148; however, such arguments will be given their appropriate weight in light of new statutory scheme under which we must now conduct our review.

V. Discussion

A. Audit Reports

{¶ 19} On December 17, 2021, LEI filed three Audit Reports, one for each of the three Companies. As noted in the RFP issued by the Commission, the purpose of the audits was to establish the prudency and reasonableness of all the costs and sales flowing through the LGR Riders, and to investigate whether the Companies' actions, with respect to their ownership interests in OVEC, were in the best interest of its retail ratepayers. The timeframe LEI was instructed to inspect was January 1, 2020 to December 31, 2020. In order to examine this question, the scope of the audit covered the following topics: (1) providing industry context, (2) reconciling OVEC bills, the Companies' respective accounts, and their respective LGR Riders, (3) examining the prudency of OVEC's disposition of energy and capacity, (4) assessing the prudency of fuel and variable costs incurred, (5) examining the prudency of capital expenses, (6) reviewing environmental compliance activities, and (7) reviewing power plant performance. (Staff Ex. 2 at 7; Staff Ex. 4 at 7; Staff Ex. 6 at 7.)

{¶ 20} LEI performed its audit based on information requested from the Companies, primarily via formal data requests and publicly available data, such as OVEC annual reports and other public sources of data for context and establishing benchmarks. The formal requests were made between August 2021 and November 2021, after which LEI conducted numerous conference calls and email exchanges. No in-person interviews or site visits were conducted because of COVID-19 safety protocols, but LEI did conduct one virtual site visit to inspect the environmental controls at the OVEC plants. LEI also compared and benchmarked cost and operational results against industry data from publicly available data sources, such as the Energy Information Administration. This public data provided the important context for evaluating OVEC's fuel and power procurement results, as well as results of operations. (Staff Ex. 2 at 8-9; Staff Ex. 4 at 8-9; Staff Ex. 6 at 8-9.)

{¶ 21} LEI makes several recommendations in its report, which we will discuss in depth in this Opinion and Order. LEI's recommendations, in brief, concern (1) components of fixed cost, specifically Component D, (2) disposition of energy and capacity, (3) fuel and variable cost expenses, (4) capital expenses, (5) environmental compliance activities, (6) power plant performance. (Staff Ex. 2 at 9-10, Staff Ex. 4 at 9-10, Staff Ex. 6 at 9-10.)

{¶ 22} Concerning the reconciliation of the OVEC bills and the LGR Rider, LEI explained that it used the following evaluative criteria: (1) are the Companies' journal entries consistent with OVEC monthly bills? (2) are the actual monthly LGR Rider charges in the Rider statements consistent with the OVEC monthly bills? (3) on a net basis, does the ICPA cost customers more than plants earn in the PJM markets? (4) are the under/(over) recovery balances consistent with monthly OVEC costs and revenues? LEI found that the OVEC bills, journal entries, and rider charges for the Companies are consistent where the Companies provided monthly OVEC bills and accounting entries, which LEI examined for each month in 2020. LEI determined that the Companies' fixed cost components were billed correctly. LEI questioned the payment per common share in the ICPA, called "Component (D)" in the OVEC bill, which LEI noted was a small part of the monthly bill, but a substantial part of net profits earned from OVEC. LEI did not recommend any changes to Component

(D); however, it did state that the Commission may wish to re-examine the role of Component (D). LEI concluded that the OVEC plants cost more than they earn; LEI's recommendation is that while the current ICPA does not expire until 2040, and customers could be locked into paying a premium until that time for energy and capacity from the OVEC plants, the premium could become a discount if market prices change. LEI found the LGR Rider calculations and cumulative balances to be accurate and made no recommendation. (Staff Ex. 2 at 23-31, Staff Ex. 4 at 25-35, and Staff Ex. 6 at 23-34.)

{¶ 23} LEI also reviewed the disposition of OVEC's energy and capacity looking at organizational structure and qualifications of personnel, monitoring, evaluating, and responding to developments in PJM, and offers into the PJM energy, capacity, and ancillary service markets. LEI found that overall, the OVEC energy management group organization and staffing are adequate, and that procedures are thorough and well documented. OVEC and the Companies have multiple channels to actively participate in the PJM market developments and are well informed of the PJM market. LEI makes several recommendations, the first of which concerns the must-run offer strategy. LEI believes the changes to the must-run strategy made due to low energy prices in 2020 were prudent, and that the Companies should encourage the OVEC Operating Committee to allow the option to commit available units based on must-run or economics on an ongoing basis. LEI acknowledges that committing units based on economics can be an issue for coal plants, and therefore does not expect the plants would be offered based on economics all of the time, but the option to do so provides flexibility that could reduce costs to customers. LEI next recommends that, concerning the OVEC Operating Committee, that the Companies encourage meetings to be held more frequently to receive more timely updates on each plant's performance and metrics as concern the PJM markets. Finally, LEI makes recommendations concerning OVEC's offer strategy in the PJM capacity auctions, stating that the Companies should consider developing price and volume offer pairs based on bonus payment and penalty analysis at various offer levels, and that evaluating supplying

the ancillary service market will be useful for OVEC. (Staff Ex. 2 at 32-45, Staff Ex. 4 at 36-48, and Staff Ex. 6 at 35-50.)

{¶ 24} In assessing the prudency of fuel and variable cost expenses incurred, LEI examined OVEC's coal and transportation procurement process, purchasing process oversight, actual coal burn and forecast, overall approach to procurement, and delivered coal costs. LEI states that OVEC's coal contract terms seem reasonable in terms of compliance with its coal procurement target strategy, having long- and short-term contracts in place allows for some volume flexibility. LEI believes that overall coal contracts reflect market awareness and prudency. LEI makes several recommendations, the first of which is that the Companies examine the process that creates coal burn forecasts and conduct them more frequently to reduce discrepancies between actual and estimated coal burns. LEI's second recommendation is that where the coal contract prices for Clifty Creek were higher than market prices in 2020, the Resource Fuels contract was most concerning where it was not set to expire until 2021 and LEI, therefore, assumes that future contracts will reflect lower prices currently prevailing in the market. LEI's third recommendation is that the Companies encourage OVEC via the Operating Committee, to consider requirements contracts in the future in order to keep inventories from exceeding targets. LEI's fourth recommendation is that the Companies similarly encourage OVEC to procure slightly less through long-term contracts and some through short-term contracts as needed. Finally, LEI's fifth recommendation is that the Companies should encourage OVEC to examine the process it uses to create coal burn outlooks, and its policy on taking deliveries of coal. (Staff Ex. 2 at 46-65; Staff Ex. 4 at 49-69; Staff Ex. 6 at 51-71.)

{¶ 25} LEI reviewed OVEC's environmental compliance practices, examining Ohio's air and solids regulations, OVEC's organizational structure and qualifications of personnel, status of OVEC's environmental controls, OVEC's emissions allowance management, and OVEC's preparation for compliance with proposed or newly enacted environmental regulations. LEI concluded, based on its data requests to the Companies and its virtual site visit, that OVEC's environmental equipment configuration is consistent with

the industry standard and OVEC is therefore well position to be compliant with currently applicable federal and state regulations. LEI found that OVEC has an effective management of emissions allowances given the dynamics in the market, regulatory changes, and efficiency of emission control systems. (Staff Ex. 2 at 66-79; Staff Ex. 4 at 70-83; Staff Ex. 6 at 72-85.)

{¶ 26} Regarding OVEC's capital expenses, LEI examined OVEC's decision and budgeting procedures for capital expenses, budgeted and actual capital projects over the audit period, and prudency of project planning and management. LEI states that its evaluative criteria focused on (1) were capital projects planned based on a prudent approval process, and (2) were capital projects well managed and completed within budget. LEI largely deemed OVEC to have a well-managed process for planning and executing individual capital projects, though LEI believes it should specify more clearly the personnel in charge of each step of the process. LEI also recommends OVEC make transparent the standardized criteria for evaluating and approving the proposed capital projects at each step. Further, LEI took issue with OVEC's lack of a cap or ceiling on annual capital expenses. Without such a cap, LEI stated, OVEC could over-invest in its plants without Commission review and approval. LEI recommended that the Commission establish a cap, though LEI acknowledged that OVEC is not allowed to earn a return on capital projects. LEI found that capital projects were generally completed within budget, though one minor project substantially exceeded its budget. Finally, LEI states that in general, capital projects were completed within budget and followed a prudent evaluation process, and that the investment appears to have addressed environmental issues or improved plant economics. LEI cautions that its general observation does not imply that the level of capital spending is justified by the revenues earned by the plants in the PJM market. (Staff Ex. 2 at 80-85; Staff Ex. 4 at 84-90; Staff Ex. 6 at 86-91.)

{¶ 27} LEI reviewed OVEC's power plant operations under four headings: (1) organizational structure, (2) power plant operation and maintenance, (3) power plant performance tracking, and (4) emergency procedures. LEI found that organization and

staffing are reasonable at the OVEC plants, stating that the staffing at both plants declined from 2019 to 2020, primarily driven by employee retirements. LEI states that it reviewed the operations and maintenance costs for both plants and found that the share spent on labor is not unreasonable. LEI states that OVEC's plant maintenance processes are unchanged from its previous audit, for which it gives a high-level overview of OVEC plant maintenance activities. LEI opines that OVEC's planned outage process is well designed, using a comprehensive handbook that clearly delineates roles and responsibilities related to planned outages. Reviewing actual maintenance costs, LEI found that actual costs declined faster than planned costs, by which it means that ultimately, actual costs of maintenance were consistently lower than OVEC expected. LEI evaluated plant performance and made two recommendations: (1) the OVEC Operating Committee should monitor performance to ensure efficient operation of the plants where in 2020, low energy prices led to generally lower operating levels and higher heat rates in contrast to the PJM average heat rate, which declined in 2020, and (2) that the Companies, in their role on the Operating Committee, take measures to improve availability if it is cost-effective. (Staff Ex. 2 at 86-104; Staff Ex. 4 at 91-108; Staff Ex. 6 at 92-109.)

B. Summary of the Comments

{¶ 28} As noted above, the Commission received initial and reply comments regarding the three Audit Reports. These comments align with and are expanded upon in each party's position articulated in hearing and in their filed briefs, which are more fully examined below.

C. Procedural Issues

{¶ 29} Ohio Adm.Code 4901-1-15(F) provides that any party adversely affected by a procedural ruling who (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the ALJ may still raise the propriety

of that ruling as an issue for the Commission's consideration by discussing the matter as a distinct issue in its initial brief prior to the issuance of the Commission's Opinion and Order.

1. OMAEG'S APPEAL OF THE ALJ'S EVIDENTIARY RULINGS

{¶ 30} We preface our discussion by noting that OMAEG first made its appeal during the hearing in this case, and subsequently filed a motion for certification to the Commission of an interlocutory appeal concerning that same appeal, which is also detailed and argued in its initial brief. We will, therefore, discuss OMAEG's arguments as they are made in its initial brief. Accordingly, OMAEG's pending request for certification of its interlocutory appeal is hereby denied as moot.

{¶ 31} OMAEG challenges two evidentiary rulings which were issued during the hearing in response to the October 30, 2023 motion filed by AEP Ohio: (1) striking portions of testimony from OMAEG's witness, John Seryak; and (2) excluding from evidence an excerpt from the PJM Independent Market Monitor State of the Market Report (PJM Report), several e-mails, an SEC Form 10-Q, and a criminal complaint.

{¶ 32} First, OMAEG takes issue with the ALJ's striking portions of witness John Seryak's testimony (Tr. Vol. V at 1300–14, 1316–18, 1320–23, 1326, 1328–29. 1332–35). OMAEG submits that it was improper for the ALJ to strike portions of Mr. Seryak's testimony where Ohio R. Evid. 702-05 provides that an expert witness may testify to matters beyond the knowledge or experience possessed by a lay person and the expert witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony. OMAEG asserts that witness Seryak is a qualified expert where he has testified before the Commission in the past and is an expert in the energy and regulatory fields, including matters related to OVEC. Second, OMAEG avers that Ohio R. Evid. 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." OMAEG submits that, under this rule, witness Seryak

should have been allowed to offer testimony based on facts and data that he perceived when reviewing the Commission's prior decisions, among other things. Third, OMAEG cites Ohio R. Evid. 705, stating that it allows an expert to testify in terms of his opinion or inference and to give reasons for his opinions only after disclosing the underlying facts or data relied upon in forming those opinions. (OMAEG Initial Brief at 16-20.)

{¶ 33} OMAEG further argues that the stricken portions of Mr. Seryak's testimony concerned whether the Companies' actions were prudent and reasonable, and to form his opinions, he reviewed past Commission decisions, including prior OVEC audit cases that reviewed the same costs. OMAEG submits that this is precisely the type of analysis an expert witness is permitted, and should be allowed, to testify to in the hearing. OMAEG disagrees with the Companies' argument that past Commission decisions concerning prior OVEC recovery mechanisms are outside the scope of this proceeding, as such a determination would run in direct contradiction to the RFP issued by the Commission, which expressly mentions the previous proceedings. (OMAEG Initial Brief at 21-23.)

{¶ 34} OMAEG next submits that the ALJ's rulings run contrary to Commission precedent. OMAEG argues that the Supreme Court of Ohio has held that revisiting settled precedent should be done only when necessary and that here, where R.C. 4928.148 explicitly refers to the same costs as those recovered through the previous OVEC riders, then Mr. Seryak should have been permitted to discuss those prior cases. (OMAEG Initial Brief at 23-24.) OMAEG further avers that Mr. Seryak's testimony should not have been stricken where the Companies' witnesses were allowed to testify to the same topics that were subject to the motion to strike, including discussion of prior OVEC riders and prior Commission decisions related to those riders. OMAEG asserts that Mr. Seryak's testimony ultimately did not get to show the full extent to which the costs recovered under the LGR Riders were neither prudent nor reasonable. (OMAEG Initial Brief at 25-28.) Finally, OMAEG contends that the ALJ lacked an evidentiary basis for striking portions of Mr. Seryak's testimony concerning prior Commission proceedings and prior OVEC audits and, therefore, should be reversed

with respect to granting the motion to strike the portions of Mr. Seryak's testimony concerning these matters (OMAEG Initial Brief at 29-30).

{¶ 35} For similar reasons, OMAEG also disputes the ALJ's granting the motion to strike as to the portions of Mr. Seryak's testimony that pertain to the underlying legislation that required the Commission to implement the LGR.

{¶ 36} OMAEG asserts that Mr. Seryak's testimony concerning the legislation should have been allowed because it created the statutory scheme under which the LGR Rider replaced the Companies' prior mechanisms. According to OMAEG, the legislation and resulting statute reference the now replaced mechanisms, and therefore, the intent of the General Assembly is that the costs to be collected through the LGR Riders and underlying analysis to be conducted by this Commission are the same. (OMAEG Initial Brief at 28-30.)

{¶ 37} According to OMAEG, because the audits in this case are the first to be conducted pursuant to the language contained in R.C. 4928.148, LEI included detailed discussions of the underlying legislation and how it related to the creation of the LGR Riders. Moreover, OMAEG argues similar references to the legislation in LEI's testimony were not struck by the ALJ. OMAEG opines that this testimony would have developed in the record several reasons why the costs passed through the LGR Riders were not prudently incurred and, therefore, should be disallowed. Lastly, OMAEG submits that Ohio R. Evid. 401, which provides that evidence that tends to make the existence of any fact of consequence more probable than it would be without the evidence is relevant, and therefore Mr. Seryak's testimony should have been allowed into the record and the ALJ's rulings should be overturned. (OMAEG Initial Brief at 30-35.)

{¶ 38} OMAEG's second assignment of error is that the ALJ should not have ruled to exclude relevant evidence to this proceeding. Specifically, during the hearing, the ALJ excluded from evidence an excerpt from the PJM Independent Market Monitor (PJM Report), a series of three e-mails between LEI and Staff from a prior audit (Prior Audit E-

mails), cross-examination questions for witness Dr. Marie Fagan concerning the prior AEP OVEC audit (Prior Audit Questions), questions for Dr. Fagan concerning just and reasonable costs, a copy of an SEC Form 10-Q, and a copy of a criminal complaint (Criminal Complaint). (Tr. Vol. I at 143-148; Tr. Vol. II at 210-217, 226, 236; Tr. Vol. V at 1360-1369; OMAEG Initial Brief at 35-36).

{¶ 39} OMAEG argues that, concerning the PJM Report, this report would have shown that some costs passed through the LGR Riders should not have been allowed where they are associated with the premature retirement of the Clifty Creek plant, which costs would have been disallowed under R.C. 4928.01(A)(42) as a remaining debt. (OMAEG Initial Brief at 37-38). Further, according to OMAEG, the Prior Audit E-mails and the Prior Audit Questions should have been allowed into the record because Dr. Fagan referred to those prior audits in the Audit Reports, and the Prior Audit Questions specifically were intended to show and would have established whether the costs passed through the LGR Riders in 2020 were prudently incurred. Further, OMAEG submits that the Prior Audit E-mails and Prior Audit Questions would have established bias on behalf of LEI, particularly concerning the credibility of Dr. Fagan as a witness for LEI. Ohio R. Evid. 613. (OMAEG Initial Brief at 39-40.) Finally, concerning the SEC Form 10-Q and Criminal Complaint, OMAEG again asserts that these two pieces of evidence would provide key insight into the legislative history of R.C. 4928.148 and would show that the costs, or at the very least AEP Ohio's respective share, are not just and reasonable and should be disallowed. (OMAEG Initial Brief at 40-41).

{¶ 40} Staff, AEP Ohio, AES Ohio, and Duke all filed responses to OMAEG's arguments contained in its initial brief and interlocutory appeal. Staff, AES Ohio, AEP Ohio, and Duke all similarly assert that the ALJ's rulings were proper where the stricken testimony was beyond the scope of this proceeding and/or irrelevant, relating to both the creation of the legislation that would result in R.C. 4928.148 and the previous riders related to the Companies' respective ownership in OVEC. Entry (July 7, 2023). AES Ohio submits that it is not the role of the Commission in this proceeding to review the process by which a

statute was enacted, as it is not within the Commission's jurisdiction. Staff opines that the previous riders stemmed from different cases and have different standards of review, and that this case specifically calls for the Commission to review the prudence and reasonableness of the Companies with respect to their ownership interests in OVEC in calendar year 2020 under R.C. 4928.148, a new statutory scheme that did not exist during the time of the prior cases. Staff opines that R.C. 4928.148(A)'s use of the phrase "those costs" refers to the phrase "prudently incurred costs related to a legacy generation resource," as defined in R.C. 4928.148(A)(42), not any previous OVEC rider. Staff, AEP Ohio, and AES Ohio argue that this is purely a legal issue for which Mr. Seryak, as a non-lawyer, could not give appropriate testimony and, thus, it was properly excluded. Finally, AES Ohio challenges OMAEG's assertions with respect to the timing of the ALJ's granting the motion to strike Mr. Seryak's testimony, stating that the ALJ made it clear that motions to strike would be addressed as the relevant witness took the stand and , as the joint motion to strike was filed before the hearing began, OMAEG had the opportunity to file a response to the motion to strike but elected not to do so. Duke and AES Ohio also note that Mr. Seryak testified on the last day of the hearing, at OMAEG's request. Duke similarly disputes OMAEG's claim that it was prejudiced by the exclusion of portions of Mr. Seryak's testimony where OMAEG participated fully in the five days of the evidentiary hearing and had ample opportunity to cross-examine all available witnesses, including Dr. Fagan, who testified multiple days of the hearing. (Staff Reply Brief at 13-14; AES Ohio Reply Brief at 17-18; AEP Ohio Reply Brief at 41-45; Duke Initial Brief at 35-54.)

{¶ 41} We find the ALJ properly granted the motion to strike both portions of witness John Seryak's testimony and the PJM Report, Prior Audit E-mails, Prior Audit Questions, SEC Form 10-Q, and the Criminal Complaint. We disagree with OMAEG that the ALJ did not have an evidentiary basis for granting the motions to strike. The ALJ acknowledged during the evidentiary hearing that the scope of this proceeding is limited to reviewing the prudence and reasonableness of the actions of the Companies with ownership interest in OVEC during calendar year 2020, rather than the events leading up to the creation

and implementation of the LGR mechanism. See Entry (July 7, 2023) at ¶ 33. Further, the ALJ stated that this proceeding and the accompanying Audit Reports are conducted pursuant to R.C. 4928.148, which requires the Commission only to examine the prudence and reasonableness of all costs recovered under the LGR Riders created pursuant to this statutory scheme. The Commission has previously determined that an auditor's actions in a prior proceeding lack relevance even where there are "obvious similarities between the audits," such as being "conducted by the same auditor, on similar timelines, and both concern[ing] similar OVEC riders." *See In re Duke Energy Ohio, Inc.,* Case No. 20-167-EL-RDR (*2019 Duke Rider PSR Audit*), Opinion and Order at ¶ 34 (Sept. 6, 2023). The ALJ properly found that the portions struck from Mr. Seryak's testimony and the documents excluded from evidence, go well beyond the information included by the Auditor in the Audit Reports, which included mere background information on those topics as they related to previous audits of prior mechanisms which were replaced by the LGR Riders. Additionally, the Prior Audit E-mails and Prior Audit Questions are not only irrelevant to this proceeding, but would also be highly prejudicial to both AES Ohio and Duke, who were not parties to the *AEP Ohio PPA Case*. There is also no basis to support OMAEG's contention of bias on the part of the Auditor in this proceeding in the record. As expressly noted by Dr. Fagan, she ultimately decides what recommendations are set forth in the Audit Reports (Tr. Vol. II at 226-28). (Tr. Vol. I at 142-44, 147-48; Tr. Vol. V at 1313.)

{¶ 42} We reiterate that this case does not concern any previous recovery mechanism replaced by the LGR Riders pursuant to R.C. 4928.148, and where we have not, prior to this case, reviewed an audit conducted pursuant to R.C. 4928.148, decisions related to the recovery mechanisms related to the Companies' ownership of OVEC replaced by this statute are not germane to our review here. Accordingly, we affirm the ALJ's rulings that Mr. Seryak's testimony and associated attachments concerning the underlying legislation and other ongoing Commission investigations are both prejudicial and not relevant to this proceeding. Further, we agree with Staff and the Companies that, as to the issue of "those costs" as contemplated under R.C. 4928.01(A)(42), it would have been inappropriate to

receive testimony from Mr. Seryak, a non-attorney, on a purely legal issue. Moreover, OMAEG was not prejudiced by the ALJ's ruling on this particular point, as OMAEG was invited to, and did, raise these issues for our consideration in its post-hearing briefs.

{¶ 43} As a final observation, OMAEG raised on numerous occasions its objections to the ALJ's administration of the hearing and the prejudicial impact of various rulings made by the ALJs, especially in regards to timing concerns and maintaining the proposed witness schedule (See, e.g., Tr. Vol. IV at 923-25). OMAEG notes that the evidentiary hearing in Case No. 23-301-EL-SSO (*FirstEnergy ESP Case*) was recognized as one of the driving factors to intervenors "being asked to hurry up", despite the fact that they were the only parties involved in the *FirstEnergy ESP Case* and, due to the late nights of hearing in this proceeding, had no opportunity to prepare for the hearing in the *FirstEnergy ESP Case* (*Id*. at 924). However, pursuant to Ohio Adm.Code 4901-1-27, ALJs are granted ample authority to regulate the course of hearings, including taking such actions as are necessary to: avoid unnecessary delay; prevent the presentation of irrelevant or cumulative evidence; prevent argumentative repetitious, cumulative, or irrelevant cross-examination; and assure that the hearing proceeds in an orderly and expeditious manner. Upon examination of the record, it appears the ALJs were acting well within their authority in this respect. OMAEG is correct that the hearing in the *FirstEnergy ESP Case* began the day after the hearing in this proceeding ended, on November 17, 2023; however, it was for the benefit of all the intervening parties involved in both proceedings, as well as the ALJ assigned to oversee both cases, to conclude the hearing in this proceeding as expeditiously as possible. Further, consistent with our above findings, OMAEG has not shown how it was prejudiced in either proceeding. As noted above, OMAEG was afforded ample latitude with its cross-examination of various witnesses, including nearly 200 pages of the transcripts with Dr. Fagan alone. Further, nowhere in its filings in the *FirstEnergy ESP Case* did OMAEG allege it was unfairly prejudiced or somehow prevented from building its case by intervening and participating in both proceedings. *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 23-301-EL-SSO, OMAEG Initial Brief (Jan. 19,

2024), OMAEG Reply Brief (Feb. 9, 2024), OMAEG Application for Rehearing (June 14, 2024).

2. OCC'S APPEAL OF THE ALJ'S EVIDENTIARY RULINGS

{¶ 44} Pursuant to Ohio Adm.Code 4901-1-15(F), OCC appealed in its initial brief an evidentiary ruling issued during the hearing. Specifically, OCC contests the ALJ's ruling concerning the exclusion from evidence of certain attachments to witness Joseph Perez's testimony, which included the Prior Audit E-mails discussed above, along with Mr. Perez's testimony concerning those e-mails. OCC avers that the ALJ's ruling violated OCC's substantial rights and had a significant impact on the evidentiary record in this case. (OCC Initial Brief at 29-31.) To remedy the alleged errors, OCC asks the Commission to re-open the hearing to allow OCC to obtain the above-listed evidence and conduct reasonable follow-up questioning. (OCC Initial Brief at 34.)

{¶ 45} OCC's three allegations of error all stem from the ALJ's exclusion from evidence the Prior Audit E-mails, the testimony of witness Joseph Perez concerning those e-mails, and OCC's questions on cross-examination of Dr. Fagan about those e-mails. OCC argues that these rulings were improper according to Ohio R. Evid. 401, which states: "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In this instance, OCC claims its substantial rights were affected because the Prior Audit E-mails addressed a key evidentiary question in the case: whether Staff asked LEI to change the draft audit report in a separate proceeding, indicating bias and a lack of independence. (OCC Initial Brief at 29-34; Tr. Vol. II at 207-229.)

{¶ 46} In response, AEP Ohio and Duke argue that the Prior Audit E-mails and any related testimony or questioning about those e-mails are not relevant to this proceeding and any probative value contained therein is outweighed by the prejudice to those of the Companies who were not party to that previous audit, namely AES Ohio and Duke.

{¶ 47} In ruling on these questions during the hearing, the ALJ pointed to the lack of relevance and the potential prejudice to AES Ohio and Duke. Further, during the hearing, the ALJ posed the question to Dr. Fagan as to the ultimate decision maker with respect to feedback from Staff or the Companies with respect to the audit report, to which Dr. Fagan stated that "whether [suggestions or recommendations] are incorporated [is] my decision." (Tr. Vol. II at 202-221, 226-227.)

{¶ 48} Similar to our decision relating to OMAEG's evidentiary disputes, we find that the ALJ properly granted the motions to strike and excluded OCC's cross-examination questions in these instances. OCC does not identify an error in the ALJ's evidentiary analysis; rather, OCC believes the rulings were in error merely because it affected what OCC claims are substantial rights under Ohio R. Evid. 401 and Ohio R. Evid. 611. We agree with the ALJ's findings that the Prior Audit E-mails, Mr. Perez's testimony related to those e-mails, and OCC's proposed cross-examination questions for Dr. Fagan lack relevance in this proceeding. The evidence in question here pertains to e-mails related to a draft report, concerning a different rider, and a different EDU from two of the Companies in this case. There are obvious similarities between the LGR audits and the prior audit, as they were conducted by the same auditor, on similar timelines, and both concern OVEC riders. However, they were still completely separate audits, and this case concerns a completely different set of OVEC-related riders created by a completely different statutory scheme in R.C. 4928.148. As explained by the ALJ, the purpose of this proceeding is to review the prudence and reasonableness of the Companies' actions and the costs passed through the LGR Riders created under 4928.148. (Tr. Vol. V at 1313.) While the Commission and the ALJs are not bound by the rules of evidence, OCC has not established that any substantial right was affected. Parties were given the opportunity to explore the relevancy of the draft audit report during the cross-examination of LEI's auditor, Dr. Marie Fagan, as well as to submit arguments as to the relevancy of the audit. Parties were able to cross-examine Dr. Fagan and to explore her and LEI's determinations regarding the LGR Riders, as well as explore Staff's role in the auditing process. (*See e.g.* Tr. Vol. II at 182-215). Accordingly, we

affirm the ALJs rulings that the Prior Audit E-mails, Mr. Perez's related testimony, and OCC's related questions on cross-examination of Dr. Fagan are not relevant to this proceeding.

3. AES OHIO'S COLLATERAL ESTOPPEL ARGUMENT

{¶ 49} In its initial brief, AES Ohio submits that intervenor arguments from Kroger, OMAEG, and OCC in this case should be barred by collateral estoppel where these parties intervened in a past case involving the 2019 audit of Duke's Rider PSR. *See 2019 Duke Rider PSR Audit*, Opinion and Order (Sept. 6, 2023). AES Ohio avers that in this case, the costs are the same as those collected through the Rider PSR and involves the same OVEC plants and the same auditor, so where Kroger, OMAEG, and OCC fully participated in the previous case, they should be barred from relitigating the same costs. (AES Ohio Initial Brief at 7-10.)

{¶ 50} Similar to our findings with respect to OMAEG and OCC's arguments concerning the admissibility of evidence relating to past audits of OVEC rider mechanisms that existed before the LGR Riders were created under R.C. 4928.148, we reject AES Ohio's argument that intervenor arguments are barred by estoppel. AES Ohio provides no reasonable basis upon which such arguments would be precluded in this proceeding. The Commission has previously determined that an auditor's actions in a prior proceeding lack relevance even where there are "obvious similarities between the audits," such as being "conducted by the same auditor, on similar timelines, and both concern[ing] similar OVEC riders." *2019 Duke Rider PSR Audit*, Opinion and Order at ¶ 34 (Sept. 6, 2023). As noted numerous times during the evidentiary hearing, this audit is focused on costs incurred during the 2020 calendar year and the Commission is now acting under the new statutory paradigm enacted by the General Assembly and must evaluate and determine the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC. R.C. 4928.148. However, we note that to the extent that any value may be gleaned from those past audits that would be informative in our determination required under R.C. 4928.148 in this proceeding, including the Commission's decision in the *2019 Duke Rider PSR Audit*, we will

take that information under due consideration and afford it the appropriate weight it deserves.

D. Summary of Arguments and Commission Conclusions

{¶ 51} Below are summaries arguments raised by the parties. Some arguments made by parties were irrelevant and/or did not influence our findings in this proceeding and, accordingly, are not recounted below. While not every argument or claim made by a party is summarized in this Opinion and Order, any such argument raised at hearing or in brief that is not specifically discussed herein was nevertheless thoroughly and adequately considered by the Commission.

{¶ 52} As has been discussed numerous times throughout this proceeding, the Commission pursued this audit for the purpose of establishing the "prudence and reasonableness of the actions of EDUs with LGR ownership interests" during the 2020 calendar year, as required by R.C. 4928.148. Entry (May 5, 2021) at ¶ 5. As detailed further in the RFP issued by the Commission, this includes, but is not limited to, ensuring that accounting procedures accurately and properly allocate revenues to ratepayers and reviewing the prudency of:

- Unit scheduling and bidding of energy into wholesale markets;
- Bidding behavior in capacity markets;
- Fuel and operation and maintenance (O&M) expenses;
- Any fixed costs; and
- Environmental compliance.

(Entry (May 5, 2021), Attach. at 7-9.)

In its three Audit Reports, LEI made determinations and provided analysis as to each of those points, as well as other required determinations. LEI's ultimate conclusion for all three EDUs was that "the processes, procedures, and oversight were mostly adequate and consistent with good utility practice." (Staff Ex. 2 at 9-11; Staff Ex. 4 at 9-11; Staff Ex. 6 at 9-

11). We emphasize that, while LEI makes several recommendations and comes to several conclusions in its three Audit Reports, at no point does LEI recommend that any amount collected through the LGR Riders should be disallowed. Further, LEI makes no finding of imprudence or unreasonableness in analyzing the actions of the Companies or OVEC during the audit period.

{¶ 53} Staff submits that LEI's audit was properly conducted, and that the resulting recommendations should be adopted by the Commission. The Companies agree, noting that LEI's audit demonstrates that the Companies have prudently handled the LGR Riders. The Companies maintain that the purpose of the audit is not to relitigate the existence or creation of the rider but rather to ascertain whether the Companies prudently managed their participation in OVEC and prudently managed their entitlements. The Companies further claim that the standard for prudency, as determined by the Supreme Court of Ohio, is whether an expenditure "was prudent when it was made," citing *In re Application of Suburban Natural Gas Co.*, 2021-Ohio-3224, 166 Ohio St. 3d 176 at ¶ 32. As such, AES Ohio, AEP Ohio, and Duke contend that a review of their actions should focus on the facts and knowledge available to them at the time of their decisions, and not look back with hindsight. Further, as argued by the Companies, LEI appropriately considered their management of the LGR Riders and appropriately determined that the Companies' actions were prudent.

{¶ 54} OCC, OMAEG, Kroger, CUB/UCS, Sierra Club, and OEC argue, in sum, that the Companies mismanaged their entitlement in OVEC, to the detriment of the ratepayers, and the charges that the Companies recovered through the LGR Riders, amounting to over $100 million, should be disallowed. [5] Ultimately, these intervening parties raise many of the same issues. The first point of contention is that the Auditor's report was lacking. As discussed below, they aver that LEI failed to do a proper analysis and also did not make the

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[5] CUB/UCS witness Glick calculated a recommended disallowance amount of $117.9, alleging this amount represents a more accurate depiction of the total billed charges from the LGR Riders ratepayers paid over the than market price for the same amount of energy, capacity, and ancillary services (CUB/UCS Ex. 2C at 27).

requisite determinations. OCC, OMAEG, Kroger, CUB/UCS, Sierra Club, and OEC additionally maintain the evidence demonstrates that the Companies' handling of its OVEC entitlement was improper, largely taking issue with OVEC's ongoing utilization of a must-run commitment strategy that has repeatedly and predictably shown to be, according to these parties, an uneconomic venture that ultimately harms ratepayers. Further, Sierra Club and OEC question the capital expenditures undertaken to comply with various environmental compliance measures, arguing that the Commission should impose a cap on future capital projects.

1. THE PRUDENCY AND REASONABLENESS OF THE COMMITMENT STRATEGY

{¶ 55} As explained by the Companies, PJM operates two energy market constructs, the day ahead market and the real time market. (AEP Ohio Ex. 1 at 8.) To participate in these markets, OVEC must send PJM "a large volume of data that includes unit commitment status, offer curves that cover per-unit costs for the range of output from economic minimum to economic maximum, and market parameters." This information is determined and submitted to PJM by OVEC's Energy Scheduling Department. (*Id*. at 9-10.)

{¶ 56} The Companies explain there are four possible commitment designations in the PJM energy market: economic,[6] must-run,[7] emergency[8], or not available[9] (AEP Ohio Ex. 1 at 9; Duke Ex. 1 at 7-8). According to the Companies, the ICPA mandates that the units be operated continually, and thus effectively mandates that they be offered as must-run in PJM's day-ahead energy markets. Moreover, the Companies argue that intervenor

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6 Economic units are dispatched – i.e., told to "run" or "not run," and if told to run, at what level of output – by PJM according to its economic dispatch model.

7 Must-run units, also called "self-scheduled" units, are committed to run at least at their economic minimum output, and their level of output between economic minimum and maximum output is determined by PJM according to its economic dispatch model. In other words, must-run units are committed by the market participant and then dispatched by PJM without regard to whether the hourly energy price is high enough to cover the unit's fuel and variable costs. (Tr. Vol. III at 713-14.)

8 "Emergency indicates that a unit is available only for emergency dispatch.

9 Not available units are in an outage and incapable of delivering energy into the market.

witnesses did not contest the Companies' decision to sign the ICPA. (Tr. Vol. III at 615; Tr. Vol. V at 1202, 1256; OMAEG Ex. 1 at 1-29). By operating the units less frequently, as suggested by intervenors, the Companies argue they would be directly violating the obligation to operate the units at the "highest practicable level attainable" in Section ¶ 4.01 of the ICPA. (AES Ohio Ex. 1, Exhibit 1 at 6; Tr. Vol. III at 615-16; Tr. Vol. V at 1202, 1256-57). Moreover, the Companies claim that the OVEC Operating Procedures, which were promulgated pursuant to the ICPA, expressly provide that, when an OVEC unit is in-service and expected to be available in the day-ahead market, it will be offered by OVEC with a must-run commitment status, unless the Sponsoring Companies unanimously agree otherwise.[10] (AES Ohio Ex. 1, Exhibit 1 at 4, Exhibit 2 at 5). Witnesses for the intervenors did not contest the Companies' vote to approve the Operating Procedures (Tr. Vol. III at 614; Tr. Vol. V at 1204, 1257, 1345-47). As discussed below, the Companies aver that the Operating Committee voted to temporarily suspend the "must-run" requirement in the Operating Procedures during the 2020 audit year and delegated authority to OVEC management to make the daily commitment decisions, due to the market conditions caused by the coronavirus pandemic. (Staff Ex. 6 at 40-42.)

{¶ 57} However, according to the Companies, the must-run requirement in the ICPA and Operating Procedures simply reflects the reality of operating baseload coal-fired generation units that, under normal market conditions, were not designed to cycle on and off on a daily basis. As explained by AEP Ohio witness Stegall, if a generating unit is committed into the PJM day-ahead energy market on an economic basis, and the unit is dispatched by PJM to must-run, this is only a commitment for one day. (AEP Ohio Ex. 1 at 11.) Thus, a unit committed on an economic basis could potentially be dispatched in such a way that it is dispatched and shut down every other day of operation. According to the Companies, this daily cycling on and off may not be a problem for certain types of

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[10] The Operating Procedures provide one exception to this general rule for Clifty Creek Unit 6 during Ozone Season, which "is assigned an opportunity cost associated with its NOx emissions profile and is offered as economic." (AEP Ohio Ex. 1 at 10).

generating units which have low start-up costs and short start-up times, and whose components are designed to easily cycle on and off; however, the OVEC units were designed to operate as baseload generating units that are operating for long periods of time, only shutting down periodically for maintenance. (*Id*. at 11-12.)

{¶ 58} Additionally, Duke, AES Ohio, and AEP Ohio argue that the Commission has already determined that the general must-run commitment strategy embodied in the OVEC Operating Procedures is reasonable given the economics and design characteristics of the OVEC units. As noted above, in the *Duke 2019 PSR Audit*, the Commission recognized and accepted that the cycling of the OVEC units should be avoided for many reasons, including startup costs,[11] startup time,[12] wear and tear, and breakdown risk. *Duke 2019 PSR Audit,* Opinion and Order (Sept. 6, 2023) at ¶ 58. The Companies note that the Commission recognized that it is "typical and common for most coal plants to operate under such a [must-run] strategy," and it emphasized that the must-run commitment strategy must be evaluated based on what is known at the time of the commitment decision and without the benefit of hindsight. *Id* at ¶ 58-59. Consistent with that prior decision, Duke, AES Ohio, and AEP Ohio argue that, although the must-run commitment strategy may at times result in negative energy margins, in normal market conditions it is a prudent going-forward strategy for the OVEC units.

{¶ 59} In addition to the limitations cited by the Commission in the *Duke 2019 PSR Audit*, which the Companies note are still applicable in this proceeding, AEP Ohio and Duke add another significant component requiring commitment on a must-run basis would be underlying coal contract obligations, as OVEC must enter into coal contracts well in advance of the use of the coal in order to fulfill its role as a baseload generating facility (AEP Ohio

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[11]. The Companies cite the start up costs for a single unit is approximately $22,000 and that OVEC has 11 units.

[12]. Specifically, Duke notes that shutting off the units, turning on the units, and ramping up the units takes time with an approximate 11-hour unit startup and notification time per unit and comes with risks and significant costs.

Ex. 1 at 11; Duke Ex. 1 at 11; Staff Ex. 2 at 9-10; Staff Ex. 4 at 9-10; Staff Ex. 6 at 10). Over time, Duke and AES Ohio assert that a must-run offer, as opposed to an offer that potentially cycles the unit on and off or fails to commit the unit effectively, will typically produce the most value for a unit due to the relationship of the unit's variable costs with the PJM energy and ancillary services revenue, especially after consideration of other factors such as cycling costs, risks, and other parameters. (Duke Ex. 1 at 8-10; AES Ohio Ex. 1 at 9-10).[13] Thus, Duke asserts that even when an economic commitment status is utilized for the OVEC units and upon analyzing the variable costs taken in conjunction with the associated energy revenues, strategically using both must-run and economic commitment status offers may, nonetheless, be needed (Duke Ex. 1 at 11). The Companies claim this is exactly what the Auditor recommended in each of the Audit Reports (Staff Ex. 2 at 9-10, 38, 44; Staff Ex. 4 at 10, 48; Staff Ex. 6 at 10, 42, 50). Otherwise, an offline OVEC unit utilizing solely the economic commitment strategy would only be committed if the variable costs, including associated start-up costs and delays, would trigger their operations (Duke Ex. 1 at 12; AEP Ohio Ex. 1 at 11-12). Duke witness Swez testified that, as a base-load, coal-fired generator, OVEC cannot respond quickly enough to changes in power process on an hourly basis when a unit is cycled off as a result of an economic commitment offer and, as a result, PJM may not call upon those units in the day-ahead market given the length of time it would take for the units to come online (Duke Ex. 1 at 12.) For these reasons, the Companies argue that prices in the day-ahead-market cannot be the exclusive measure of whether OVEC's commitment strategy is considered prudent; instead, given the fact that the OVEC units are baseload coal-fired generation, the Companies allege that other factors should also be considered, such as unit start-up costs, cycling costs, risks with powering down and powering up units, such as

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13. AES Ohio adds that OVEC offers the units in the day-ahead PJM energy market as must-run; however, the OVEC units still follow PJM's economic price signals and the units are not set at a flat operating level. Instead, the must-run classification in PJM means that a unit owner is committing the unit to the day-ahead market and PJM, therefore, does not need to consider start-up costs and no-load costs in its commitment evaluation. Additionally, AES Ohio explains that OVEC's must-run classification does include an energy offer curve which allows PJM to dispatch the units economically between the units' minimum and maximum capability during the day.

unexpected outages that occur because of additional unit cycling, required operations for environmental and other testing, as well as the loss of value in the opportunity to respond to power price changes, coal procurement and transportation impacts, and other potential factors (Duke Ex. 1 at 8-10, 14; AEP Ohio Ex. 1 at 11-13; AES Ohio Ex. 1 at 8-11). The Companies state that the intervening parties' advocation for a purely economic commitment strategy ignores these critical factors completely, which would result in detrimental impacts to customers.

{¶ 60} The Companies note it is this myriad of factors that they and OVEC consider while monitoring the OVEC units and PJM day-ahead market to evaluate commitment strategy and determine if modifications are necessary. For instance, Duke incorporates the OVEC units into its Energy Management System (EMS) to monitor the output of the units through generation dispatch management. According to Duke, for every business day, for each hour of the upcoming 21-day period, Duke forecasts the expected energy market revenues from the OVEC units in PJM, including the associated variable costs, and the resulting hourly energy margin. Moreover, using these same inputs, Duke forecasts OVEC unit generation, energy revenue, variable costs, and energy margin for a longer-term basis. Duke will then create a preliminary profit and loss report after PJM publishes the units' day ahead awards, which allows Duke to monitor OVEC's generation revenue received from PJM against the units' expected variable costs. Additionally, Duke creates a total profit and loss statement for all Sponsoring Companies located in PJM's footprint, which is periodically provided to OVEC's management to examine the units' energy margin. (Duke Ex. 1 at 32-33.)

{¶ 61} Additionally, the Companies point to various measures that OVEC itself has undertaken to oversee the operation of the units, including providing access to view the output of units in real time along with forecasted costs and generating an internal report that includes a unit-by-unit hourly comparison of actual net generation versus PJM demand. Additionally, Duke cites to the fact that OVEC sends various reports to the Sponsoring Companies every business day to provide information on the availability and capability of

the available OVEC generating units. (Duke Ex. 1 at 28.) Using these various types of analysis, according to the Companies, allows them to continue to monitor their respective interests in OVEC, as well as identifying any issues to raise to OVEC's Operating Committee, as Duke did in 2020.

{¶ 62} While there are abundant reasons for operating on a must-run basis, AEP Ohio, Duke, AES Ohio concede that there may be circumstances in which OVEC should evaluate changing to an economic commitment status, such as the circumstances arising during the 2020 audit year due to the coronavirus pandemic (AES Ohio Ex. 1 at 10-11; Duke Ex. 1 at 15-18; AEP Ohio Ex. 1 at 13-14). It was uncontested at hearing that during the second quarter of 2020, energy demand in PJM was considerably diminished due to the coronavirus pandemic (AEP Ohio Ex. 1 at 11, 14). In fact, the Companies allege that PJM energy market prices fell so sharply during that time that it resulted in "market conditions [that] were at a level never seen before." (*Id*. at 11.) Due to these unforeseeable market conditions, the OVEC Operating Committee, at the request of Duke witness Swez, unanimously authorized a temporary change in the Operating Procedures to give OVEC the flexibility to offer its units as economic. (AEP Ohio Ex. 1 at 14; Duke Ex. 1 at 15-16; Staff Ex. 6 at 42.) According to the Companies, the Operating Committee originally authorized this change from April 14 to May 31, 2020, but later extended the change through June 30, 2020. (AEP Ohio Ex. 1 at 14.) The Companies claim this temporary change in the OVEC Operating Procedures allowed OVEC to avoid running units when PJM energy markets were at the lowest of their historically low levels, thereby avoiding significantly negative energy margins.[14] AEP Ohio, AES Ohio, and Duke note that the Auditor also found the temporary transition to an economic commitment strategy for the period in 2020 was prudent, as was its must-run commitment status employed during the remainder of the audit period (Staff Ex. 6 at 50). In the Audit Reports, the Auditor found that the commitment strategy in 2020 was reasonable and consistent with past recommendations from prior audits. (Staff Ex. 4 at 11);

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14. In fact, Duke noted that around-the-clock PJM energy prices dropped below $20/MWh for the first time since 2005 (Duke Ex. 1 at 17).

see also *Duke 2019 PSR Audit*, Opinion and Order (Sept. 6, 2023). In fact, the Companies note that the Auditor's only notable recommendation in this proceeding as to this issue was that the Companies and the other members of the Operating Committee should "allow this flexibility on an ongoing basis" while keeping in mind that "coal plants are generally not designed for this kind of operation, and repeated start-up of coal plants can damage equipment [and] [p]eriods of non-operation also cause difficulties in managing staffing and fuel deliveries." (Staff Ex. 2 at 10, 38; Staff Ex. 4 at 10; Staff Ex. 6 at 10, 42). Moreover, the Companies point to the Auditor's additional concession that "LEI would not expect to see the plants committed based on economics all the time." (Staff Ex. 2 at 44; Staff Ex. 4 at 48; Staff Ex. 6 at 50). Duke, AES Ohio, and AEP Ohio agree with the Auditor's findings, explaining that the 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." According to the Companies, before the pandemic, OVEC had procured coal sufficient for its units' design as baseload generators that are on for extended periods of time. These "existing coal contracts required the facilities to accept a minimum amount of coal," and during the temporary change in the OVEC Operating Procedures that allowed economic commitment, the required minimums were "increasing the amount of coal in storage at the facilities." (AEP Ohio Ex. 1 at 14.) AEP Ohio further alleges that, in order to "keep 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." AEP Ohio adds that the payments required under those contracts that the Companies would have had to pay regardless of delivery would have been substantial, given the low demand for coal in the market during the audit period. (AEP Ohio Ex. 1 at 14-15.). Accordingly, as summer began and PJM energy prices recovered, the Companies note the temporary period authorized for economic dispatch expired, and OVEC returned to the must-run commitment strategy provided for in the Operating Procedures. Duke witness Swez testified that the system operated appropriately when the Operating Committee voted to approve the temporary modification to the commitment strategy (Duke Ex. 1 at 30). The Companies, therefore, assert that the energy market

commitment strategy in the 2020 audit year was reasonable, as the Auditor found. (Staff Ex. 4 at 48.)

{¶ 63} Staff similarly recommends that the Commission adopt the Audit Reports as well as LEI's resulting recommendations. According to Staff, LEI considered and evaluated all of the subject areas as required by the RFP. Furthermore, Staff found that the audit was conducted "appropriately and consistent with the Commission's directives." Essentially, Staff maintains that, although some intervening parties would like a different outcome, the Audit Reports do not conclude that the Companies acted imprudently with respect to their involvement with OVEC, including the use of the must-run commitment strategy and the temporary transition to the economic commitment strategy (Staff Ex. 2 at 9; Staff Ex. 4 at 9; Staff Ex. 6 at 9). Instead, Staff agrees that these intervening parties are attempting to argue the issue of whether the rider should exist, instead of the prudency of its costs and the Companies' participation with OVEC, as required by statute.

{¶ 64} OCC, OMAEG, Kroger, OEC, and CUB/UCS initially claim that the Auditor failed to conduct the audit as directed, noting that the Commission issued an RFP which expressly required that "the audit shall investigate the prudency of all costs and sales flowing through the EDU riders and demonstrate that the Companies' actions were in the best interest of retail ratepayers." Entry (May 5, 2021), Attach. at 2. As the Auditor recognized determining whether the Companies' actions was a part of the audit in its bid and there was no explicit finding that the Companies' actions were in the best interest of retail ratepayers, OCC, OMAEG, Kroger, and CUB/UCS argue that the Commission should disallow the entire $105 million in alleged overcharges, as noted below.[15] (Staff Ex. 2 at 25; Staff Ex. 4 at 28-29; Staff Ex. 6 at 26; Tr. Vol. I at 76-78, 135–36). OCC also suggests that the Auditor failed to abide by R.C. 4928.148(A)(1), which requires the Auditor to determine the prudence of "decisions related to offering the contractual commitment into the wholesale

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15. Kroger notes this amount equates to Ohio customers being charged an average of $8.79 million per month through the LGR Riders (Tr. Vol. IV at 937; Tr. Vol. IV at 955–56; Tr. Vol. IV at 1049).

markets." As such, OCC advocates for the disallowance of the entire $105 million because the Companies failed to meet their burden to prove that such decisions were prudent.

Utility	Amount of Charges
Duke	$29,974,510.91
AES Ohio	$7,652,653.04
AEP Ohio	$67,897,705.58
Total	$105,524,869.53 [16]

{¶ 65} Specifically, OCC, CUB/UCS, Kroger, and OMAEG claim that the Audit Reports failed to address how OVEC's must-run commitment strategy resulted in higher costs to customers and what actions the Sponsoring Companies could have taken to limit the costs passed through the LGR Riders to customers. (Tr. Vol. I at 134-36; Tr. Vol. II at 177; OCC Ex. 11 at 4, 7; OMAEG Ex. 1 at 26; CUB/UCS Ex. 1 at 10–11.) OCC goes even farther to allege that the Auditor failed to review whether the daily commitment decisions by the OVEC Operating Committee or OVEC management were prudent, even though R.C. 4928.148(A)(1) requires the Commission to determine the prudence of "decisions related to offering contractual commitment into the wholesale markets." (Tr. Vol. I at 130-31). As such, these parties argue that the Audit Reports lack the requisite analysis or conclusions to meet the Companies' burden in this case.

{¶ 66} Even in the event the Commission finds that the Auditor's review is sufficient and complied with the directives set forth in the RFP, OCC, Kroger, OEC, Sierra Club, OMAEG, and CUB/UCS argue that the record evidence demonstrates that the costs

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16 OMAEG observes 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. (OMAEG Ex. 1A, Attach. A; Staff Ex. 8C at 5; Staff Ex. 4 at 28-29; Staff Ex. 6 at 26.)

charged to customers and passed through the LGR Riders during the audit period are unreasonable, imprudent, and not in the customers' best interest (Staff Ex. 2 at 9; 27, 54; Staff Ex. 4 at 9, 31, 57; Staff Ex. 6 at 9, 29, 59; OMAEG Ex. 1 at 27; OCC Ex. 1 at 21-22; CUB/UCS Ex. 1 at 33; Tr. Vol. II at 414-15). As such, these parties recommend that the Commission disallow the entirety of the costs passed on to customers for the 2020 audit period. Initially, OCC, Kroger, and OMAEG contend that the mere fact that the LGR Riders consistently resulted in a charge to customers should be enough to demonstrate that the costs were imprudent (Tr. Vol. II at 416, 419; Staff Ex. 2 at 27; Staff Ex. 4 at 31; Staff Ex. 6 at 29; OCC Ex. 20 at 9; CUB/UCS Ex. 1 at 13, 51–52). OCC raises that this fact alone runs contrary to the Commission's historical review of prudency in the context of the OVEC plants, in which the Commission utilized the following test: "Retail cost recovery may be disallowed as a result of the annual prudency review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues." *In re the Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR (*AEP Ohio PPA Case*), Opinion and Order (Mar. 31, 2016) at 86-89. Similarly, CUB /UCS suggests that the Commission should disallow costs above the market value of OVEC's energy and capacity in PJM, alleging that the total billed charges from the LGR Riders cost ratepayers $117.9 million more than the market price for the same amount of energy, capacity, and ancillary services, or approximately $37.92 more on a per MWh basis (CUB/UCS Ex. 2C at 27). Citing to projections utilized in previous cases, CUB/UCS argues that there has been a clear pattern of excessive, above-market costs associated with these OVEC units (CUB/UCS Ex. 1 at 25).[17] *In re Duke Energy Ohio, Inc.*, Case No. 17-32-EL-AIR, et al., Opinion and Order (Dec. 19, 2018) at ¶ 283(where Duke projected energy and demand charges to exceed forecasted market revenue by $77 million on a NPV basis); *In re The Dayton Power and Light Co. d/b/a AES Ohio*, Case No. 16-395-EL-

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17. CUB/UCS claim that the losses paid under the OVEC operating agreement have resulted in above-market costs from 2015-2020 at over $1.245 billion (CUB Ohio/UCS Ex. 1 at 25).

SSO, Direct Testimony of Jeffrey Malinak (Mar. 22, 2017)(where, according to CUB/UCS, AES Ohio projected costs for its Reconciliation Rider to cost $49 million more over the period from 2017-2021); *AEP Ohio PPA Case*, Second Entry on Rehearing (Nov. 3, 2016) at ¶¶ 50, 63 (where AEP Ohio projected $110 million in credits through its PPA Rider over 2015-2024); *In re the Review of the Power Purchase Agreement Rider of Ohio Power Co. d/b/a AEP Ohio*, Case No. 18-1004-EL-RDR, et al., Direct Testimony of Devi Glick (Dec. 29, 2021) at 6 (where Ms. Glick testified that the PPA rider actually resulted in $74.5 million in net losses over 2018 and 2019 review period). In fact, CUB/UCS witness Glick noted that recent audits of those riders for calendar years 2018 and 2019 identified actual losses of $74.5 million for AEP Ohio, $24.6 million for Duke, and $14.9 million for AES Ohio (CUB/UCS Ex. 1 at 21).

{¶ 67} Similarly, OCC, OMAEG, CUB/UCS, and Kroger argue that the Audit Reports show that not all of the actions taken by the Sponsoring Companies were reasonable and prudent in the best interest of customers (Staff Ex. 2 at 10, 27–28, 43–44; Staff Ex. 4 at 10, 31–32, 47–48; Staff Ex. 6 at 10, 29–30, 49–50; Tr. Vol. II at 331, 347, 362; CUB/UCS Ex. 1 at 33–34. For example, the Auditor admitted that she thought some OVEC operations could have been improved upon if the Sponsoring Companies performed some analysis (Tr. Vol. I at 123). OMAEG argues that the audit "only evaluated OVEC's energy and capacity revenue verses total cost on a monthly basis;" however, an hourly or daily redispatch analysis would have provided a more comprehensive view as to whether OVEC would have produced savings for customers by utilizing economic commitment (OMAEG Ex. 1 at 22-23.) At a minimum, OMAEG and CUB/UCS suggest that a daily unit commitment analysis, utilizing known day-ahead market prices, would be necessary for the Companies to determine whether and how to commit the OVEC units into the market.[18] (CUB/UCS Ex. 1 at 42-43, 45). According to CUB/UCS, OCC, and OMAEG, this lack of a full analysis is borne out in the fact that nowhere does the Auditor state that the commitment actions in making energy market offerings was prudent or whether OVEC acted imprudently and did not look into

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[18]. These parties concede that this analysis is currently conducted by Duke; however, it appears the actual reports and underlying analyses are not shared with OVEC management (CUB/UCS Ex. 1 at 43).

whether the Companies' actions were in the best interest of customers (Tr. Vol. I at 125, 136). These parties note that OVEC's failure to act on feedback from the market on the economic competitiveness of its plants, including long-term patterns of losses without any effort to correct operations, demonstrates imprudence.

{¶ 68} While primarily advocating that all charges passed through the LGR Riders to customers for the audit period be disallowed, OMAEG, OCC, Kroger, and CUB/UCS alternatively suggest that the Commission should find that operating under a solely must-run commitment strategy was unreasonable and imprudent. As explained by CUB/UCS witness Glick, "OVEC's and the Companies' continuous use of must-run commitment status at the OVEC plants . . . and their failure to perform a daily financial review to determine whether to use economic commitment status was not consistent with a least-cost approach and this directly resulted in their Ohio consumers paying above-market charges." (CUB/UCS Ex. 1 at 36; OMAEG Ex. 1 at 23; OCC Ex. 1 at 14; OCC Ex. 20 at 3).

{¶ 69} These intervening parties cite to portions of the Audit Reports that indicate that there were times in 2020 when the PJM day-ahead prices did not cover the variable costs of running the OVEC plants, meaning that the must-run units "incur[ed] losses for their owners," which would then be passed on to customers through the LGR Riders (Staff Ex. 2 at 43; Staff Ex. 4 at 47; Staff Ex. 6 at 49). In fact, OCC argues that witness Stanton's analysis concluded that OVEC operated the plants up to 88 percent of the time during 2020 when costs exceeded the PJM energy revenues (OCC Ex. 1 at 16-18). OCC advocates for a disallowance of such costs, consistent with the Michigan Public Service Commission's treatment of similar 2020 coal plant costs. *In re the Application of Indiana Michigan Power Co. for Approval to Implement a Power Supply Cost Recovery Plan for the 12 Months Ending December 31, 2021*, Michigan Pub. Serv. Comm., Case No. U-20804, Order (Nov. 18, 2021) at 12, 26[19]. OCC and OMAEG also raise that, by opting out of an economic commitment status, the

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19. This Order is available at: https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y000001Cgb0AAC.

Companies also forgo the collection of uplift, or "make whole," payments that would compensate them if they were market committed by PJM and did not recover their energy costs for that day (OCC Ex. 1 at 18). According to OCC and OMAEG, these uplift payments minimize the financial risk of offering units on an economic basis, but are not available to must-run units (Staff Ex. 2 at 17-18, 38; Staff Ex. 4 at 18-19, 47; Staff Ex. 6 at 17-18, 42, 49; Tr. Vol. II at 363). Further, CUB/UCS and OMAEG argue that the costs paid by the Companies to OVEC should not be passed on to ratepayers; instead, these parties advocate that the Companies should have only passed on costs related to the entitlement of available power. (Tr. Vol. III at 775; Tr. Vol. IV at 1051; Tr. Vol. V at 1202, 1354-55). OCC argues that, even if the ICPA dictates that these units be offered on a must-run basis, that does not equate to prudency. As a result, CUB/UCS contends that the record demonstrates that OVEC is not acting to limit incurring negative energy margins at its plants, and instead is operating its plants even when it projects that doing so will incur negative margins (CUB/UCS Ex. 1 at 34).

{¶ 70} While OCC, OEC, OMAEG, CUB/UCS all agree with the Auditor's finding that "the change to OVEC's operating strategy [for part of 2020] . . . was prudent compared with allowing must-run commitment only," these parties advocate that this strategy should have been implemented all or most of the time during the audit period, rather than limited to this short timeframe (Staff Ex. 2 at 44; Staff Ex. 4 at 48; Staff Ex. 6 at 50.) [20] The intervening parties cite the Auditor's testimony, in which she noted that "we believe that the flexibility [of choosing between commitment strategies based on economics] could be valuable." (Tr. Vol. II at 361). Moreover, these parties contend that the temporary transition demonstrates that it is physically possible to run the OVEC units on an economic basis (OMAEG Ex. 1 at 21). Kroger, CUB/UCS, and OMAEG argue that, as part owners of the OVEC

[20]. CUB/UCS takes issue with the fact that, even during the temporary transition, OVEC opted to apply an economic commitment status to only three of the 11 OVEC units, and only for a total of 631 hours (CUB/UCS Ex. 1 at 37).

entitlements,[21] the Companies have influence as to what the ultimate governing unit commitment strategy looks like and they could have utilized that influence to extend OVEC's temporary transition or amend the Operating Procedures to allow a permanent transition to an economic commitment. Their failure to do so, according to these parties, was imprudent, especially given Duke witness Swez's admission that "running the units solely as 'must run' without consideration of market forecasts and unit limitations, may not be in the best interests of customers." (Staff Ex. 2 at 44, 65; Staff Ex 4 at 48, 69; Staff Ex. 6 at 50, 71; Duke Ex. 6 at 12; Tr. Vol. II at 361-62; Tr. Vol. III at 745; Tr. Vol. IV at 991-92, 1032, 1063; Tr. Vol. V at 1147, 1152, 1158, 1207). In fact, CUB/UCS claim the fact that Duke advocated for the temporary transition demonstrates the considerable influence these Companies may have on the OVEC Operating Committee's decisions (See, e.g., CUB/UCS Ex. 1 at 41-42). Kroger also questions the Auditor's failure to perform any additional analyses regarding the uneconomic nature of the plants, for instance, determining how much OVEC lost or gained during the brief period when some units could be offered as must-run or economic, quantifying the costs to ratepayers of OVEC's must-run strategy, and performing a re-dispatching analysis (Tr. Vol. II at 385, 410, 386-90). Kroger, OCC, and OMAEG all claim that these types of analyses would confirm that costs incurred utilizing only a must-run commitment status should be considered imprudent and, consequently, disallowed (OMAEG Ex. 1 at 26; OCC Ex. 20 at 3-4). CUB/UCS and Sierra Club even propose that the Commission require that OVEC conduct a daily unit commitment analysis, consistent with industry best practices, and such an analysis be reviewed in all future LGR dockets (OCC Ex. 20 at 12-13). OCC witness Perez specifically recommends that, when choosing between a must-run and an economic commitment status, the owner should do a "daily analysis of the costs and expected revenues from participating in the Day-Ahead Energy Market" and that this analysis "should cover not only that day, but the next several

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[21]. CUB/UCS and Kroger emphasized that, in the aggregate, the Companies own approximately 34 percent of OVEC and they believe that if the Companies were to present prudent recommendations for the OVEC Operating Committee to consider, those recommendations would be taken seriously by other members (Tr. Vol. V at 1207; CUB/UCS Ex. 1 at 42).

days ahead for units that are not easily turned on and off." (OCC Ex. 20 at 3, 9-10, 12). CUB/UCS and OCC suggest that, if such an analysis demonstrates that the units cannot be operated economically due to their operational characteristics, it may be a more prudent decision to retire them rather allow customers to continue to pay these costs (Tr. Vol. V at 1217). Additionally, OCC, OMAEG, and CUB/UCS allege that the Auditor's initial conclusion that the units should be committed based on economics all or most of the time is more consistent with other merchant coal operators, as well as with past Commission standards (Staff Ex. 2 at 10; Staff Ex. 4 at 10; Staff Ex. 6 at 10; OCC Ex. 20 at 15; CUB/UCS Ex. 1 at 40, 47). *AEP Ohio PPA Case*, Opinion and Order (Mar. 31, 2016) at 89.[22]

{¶ 71} More simply, OMAEG, Kroger, OCC, and CUB/UCS note that the Companies could have avoided a negative margin scenario by choosing not to take title of OVEC's output. OMAEG witness Seryak testified that "[t]he costs recovered through the LGR Riders were not in the best interest of customers" because the Sponsoring Companies' "decision to take their share of their entitlement to OVEC's energy under a must-run strategy is imprudent, as are decisions to run OVEC at losses in the energy market." (OMAEG Ex. 1 at 7; OCC Ex. 1 at 11; OCC Ex. 20 at 9; CUB/UCS Ex. 1 at 49). As explained by Kroger and OMAEG, under the ICPA, the Companies are each entitled to a share of the OVEC plants' generated power, and they must pay that same share of the costs associated with operating OVEC (Staff Ex. 2 at 7, 12; Staff Ex. 4 at 7, 12; Staff Ex. 6 at 7, 12; AES Ohio Ex. 4 at 4; AEP Ohio Ex. 1 at 4; Duke Ex. 6 at 3; Tr. Vol. III at 667; Tr. Vol. IV at 1001; Tr. Vol. V at 1135). However, Kroger and OMAEG advocate that the ICPA does not require the Companies to actually take title to their share of OVEC's power (AES Ex. 4 at Exhibit 1, ICPA at § 4.03.) By choosing to take title to OVEC's available energy at a loss to customers,[23]

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22. In fact, OCC witness Perez cites to a MISO analysis that shows that only three percent of merchant coal generators utilized must-run status in 2017-2020 (OCC Ex. 20 at 14).

23. OCC and OMAEG further note that, if the Companies chose not to take title, they would not be subject to the marginal cost of energy from OVEC, amounting to approximately $13,078,383, and their entitled allotment of energy would instead be offered to the other Sponsoring Companies. In the event no Sponsoring Company would take title to the energy, OCC and OMAEG claim OVEC would then need to

Kroger, CUB/UCS, and OMAEG argue that the Companies engaged in unreasonable behavior and should not be allowed to recover those costs now, as they could have been mitigated (OMAEG Ex. 1 at 22; CUB/UCS Ex. 1 at 11, 34; OCC Ex. 1 at 5).

{¶ 72} As an alternative measure, OMAEG and CUB/UCS argue that all of the unconditional obligated demand charges[24] should be excluded from the LGR Riders, as those costs were not prudently incurred OVEC costs. In addition to the 2020 OVEC costs related to the Sponsoring Companies' contractual entitlements, or variable costs, the Sponsoring Companies passed on to customers OVEC costs related to "unconditional obligations." Unconditional obligations differ from contractual entitlement charges, as evidenced by the two separate sections of the ICPA describing these kinds of charges. As such, OMAEG witness Seryak recommends that the Commission disallow all unconditional obligation charges collected from customers for the 2020 Audit Period, which these parties note equal $102,280,428.183 (OMAEG Ex. 1 at 17-18; OMAEG Ex. 1A at 1; CUB/UCS 1 at 50-52.)

{¶ 73} Finally, OMAEG, Kroger, and CUB/UCS question how the Companies could have possibly acted in the best interest of ratepayers, given the inherent conflict of interest for the Sponsoring Companies and their OVEC entitlement. As explained by the intervenors, the Companies owe a fiduciary responsibility to their shareholders, who consequently benefit from the LGR Riders at the expense of customers and, thus, they lack any true incentive to manage OVEC unit commitment strategy to operate more economically. (OMAEG Ex. 1 at 19; CUB/UCS Ex. 1 at 39.)

{¶ 74} In response, the Companies mainly reiterate their agreement with the Auditor's ultimate findings on this issue. Additionally, the Companies argue that

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produce less energy or could alternatively decide to choose a different commitment strategy. (OMAEG Ex. 1 at 7, 23, Attach. B; OCC Ex. 1 at 5; Tr. Vol. V at 1344, 1355).

24. OMAEG characterizes these charges as "flat charges to ratepayers that subsidize the Sponsoring Companies' debt payments through OVEC at a constant rate no matter the current market prices."

Intervenors unfairly focus on the fact that OVEC realized negative energy margins at various points in 2020, as the coronavirus pandemic created unforeseeable market conditions. Furthermore, the Companies again emphasize that OVEC ultimately chose to transition to an economic commitment strategy based on then-current state of the market. As recognized by the Commission before, the Companies point out that the prudence standard requires the Commission to evaluate a decision "at the time the decision was made." *2019 Duke Rider PSR Audit* ¶ 58. Rather than anticipating unprecedented market conditions, AEP Ohio adds that the OVEC units, and underlying processes and protocols, were all designed to operate in normal market conditions, in which the units stay online as much as possible and allow for positive net energy margins in the long-run (AEP Ohio Ex. 1 at 16).

{¶ 75} AES Ohio also contends that, while arguing that it was imprudent to offer OVEC's units as must-run, none of the intervenor witnesses had any experience relating to the operations or dispatch of a generating facility. Further, AES Ohio notes that these same witnesses admitted that other owners of coal-fired plants also offer their units as must-run into the day-ahead energy markets operated by PJM and MISO, which AES Ohio argues demonstrates that this strategy is reasonable and prudent. (Tr. Vol. III at 578; Tr. Vol. V at 1198-99, 1208-09, 1255, 1267.)

{¶ 76} The Companies also question OMAEG and Kroger's argument that the Companies could have refused to accept the energy that OVEC produced and sold into the PJM markets during the audit period. As an initial matter, the Companies note this argument runs counter to R.C. 4928.148, which expressly requires that an "electric distribution utility . . . shall bid all output from a legacy generation resource into the wholesale market." R.C. 4928.148(B). Furthermore, the Companies aver this option was simply not possible during the audit period due to the OVEC Operating Procedures, which none of the Companies have the ability to unilaterally change. Under those procedures, OVEC's energy output was committed and dispatched in the PJM day-ahead and hourly energy markets by the OVEC Energy Scheduling Department. (AEP Ohio Ex. 1 at 9-10.)

Thus, the Companies maintain that, according to the Operating Procedures, the Energy Scheduling Department submits information to PJM for all OVEC units jointly and OMAEG and Kroger have failed to explain how the Companies could have possibly had its OVEC energy entitlement bid differently than the other Sponsoring Companies' share. (Duke Ex. 6, Attach. JDS-1 at 5.) Finally, the Companies acknowledge that, in addition to foregoing revenue the Companies would have incurred substantial OVEC costs as they would have been required to pay their share of all OVEC demand charges regardless if they declined their respective shares of OVEC energy, pursuant to the ICPA (AES Ohio Ex. 1, Exhibit 1at 14) [25]. As such, the Companies argue it would not have been prudent to incur these charges while foregoing any possible revenues from the sale of energy or capacity.

{¶ 77} Pursuant to R.C. 4928.148, the Commission must determine "the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource, including their decisions related to offering the contractual commitment into the wholesale markets, and exclude from recovery those costs that the commission determines imprudent and unreasonable." As agreed to by all parties to this proceeding, the Companies, as the entities seeking cost recovery, bear the burden of proof in demonstrating that the costs passing through the LGR Riders are just, reasonable, and prudently incurred. *In re Application of Duke Energy, Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 8. In that case, the Supreme Court of Ohio held that "[t]he commission did not have to find the negative: that the expenses were imprudent" and that "if the evidence was inconclusive or questionable, the commission could justifiably reduce or disallow cost recovery." *Id.* Further, the Court has held that a prudent decision by an EDU is a decision "which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at

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[25]. Specifically, these sections of the ICPA impose an "unconditional obligation" on each Sponsoring Company to pay "its specified portion of the Demand Charge under Section 5.03, the Transmission Charge under Section 5.04, and all other charges under Article 7 . . . whether or not any Available Power or Available Energy are accepted by any Sponsoring Company during such calendar month."

the time the decision was made." *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999), citing *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826 (1993). Additionally, the Commission has previously found that "[p]rudence should be determined in a retrospective, factual inquiry." *In re Syracuse Home Util. Co.*, Case No. 86-12-GA-GCR, Opinion and Order (Dec. 30, 1986) at 10. Therefore, the Commission will examine the conditions and circumstances which were known to the Companies at the time the decisions were made. Nonetheless, the Commission also notes that, although the Companies ultimately bear the burden of proof in this proceeding, the Commission should presume that the Companies' management decisions were prudent. *Id*. We emphasize, however, that, as discussed in *Syracuse*, the presumption that a utility's decisions were prudent is rebuttable, and evidence produced by Staff or intervenors may overcome that presumption.

{¶ 78} Initially, the Commission agrees with Staff and the Companies and finds that the audit was conducted appropriately and consistent with the Commission's directives. Dr. Fagan provided extensive and thorough testimony over the course of supporting the processes utilized during the audit and the ultimate conclusions contained in the Audit Reports, including prudency determinations regarding the disposition of energy and capacity. Likewise, we are unpersuaded by the arguments of intervening parties that LEI did not make proper conclusions or conduct sufficient analysis as to this issue during its review. It is evident from the reports that overall, the Auditor found the Companies' actions relating to the disposition of energy and capacity to be appropriate and reasonable and, accordingly, prudent. (Staff Ex. 2 at 10; Staff Ex. 4 at 9-10; Staff Ex. 6 at 9-10.) We observe that, when considering the Companies' actions related to the utilized commitment strategy, no disallowances were recommended and no findings of imprudence were alleged. The function of this review, as originally stated in the Entry opening this proceeding, is to determine whether the costs and sales associated with the Companies' OVEC entitlements that flow through the LGR Riders were prudently managed, as required by R.C. 4928.148. We find LEI achieved this task and emphasize that they were not, nor is this Commission,

responsible for critiquing the creation or continuation of the LGR Rider, which has been expressly established by statute. As a creature of statute, the Commission can only exercise the authority conferred upon it by the General Assembly. *Tongren v. Pub. Util. Comm., 85 Ohio St.3d 87,88, 706 N.E.2d 1255 (1999); In re Application of Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196, 139 N.E.3d 875, ¶ 17. For this reason, beyond contextual references and factual operational constraints of the OVEC units, we find little value relying on Commission orders or underlying frameworks that dealt with the prior recovery mechanisms in place before the LGR Riders came into existence.

{¶ 79} In evaluating the arguments presented in this proceeding, it is essential to note what is required by the statute, but also just as important to acknowledge what is not included in the statute. Despite several intervening parties highlighting what they believed to be a deficiency in the Audit Reports, the Commission observes there is no express language in R.C. 4928.148 that requires the Commission to find that the costs passed through the LGR Riders are in the best interests of retail ratepayers before the Companies are entitled to recover them. However, even if we were required to make such a finding, we are not persuaded by arguments that LEI failed to determine if the actions of the Companies were in the best interests of retail ratepayers. The Audit Reports expressly concluded that the Companies' actions were prudent (Staff Ex. 2 at 10; Staff Ex. 4 at 9-10; Staff Ex. 6 at 9-10). Although LEI did not make a separate, explicit finding that the Companies' actions were "in the best interests of retail ratepayers," the testimony in the record provides that LEI, having reviewed the underlying processes and costs, determined that the Companies acted prudently and that their prudent actions were in the best interests of ratepayers (Duke Ex. 1 at 19-21). Further, the evidence supports that a finding that the Companies acted in the best interests of ratepayer was implicit in the determination that their actions were prudent. (Tr. Vol. I at 135-36.) We find LEI's approach to be reasonable and, accordingly, adopt the implicit findings in the Audit Reports that the Companies' actions were in the best interests of retail ratepayers, which is nonetheless consistent with the objectives identified in the RFP.

{¶ 80} While intervening parties take issue with the fact that the LGR Riders resulted in charges to customers, rather than credits, and point to the various predecessor recovery mechanisms before the LGR Riders were created, we agree with the Companies that R.C. 4928.148 has no requirement that the rider should function as a financial hedge by recovering or crediting the net proceeds of selling OVEC's energy and capacity into the PJM markets. *In re the Application of The Dayton Power and Light Co. to Establish a Std. Serv. Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, et al., Opinion and Order (Oct. 20, 2017) at ¶ 14, 63, 119; *AEP Ohio PPA Case,* Opinion and Order (Mar. 31, 2016); *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320. We again note that the scope of this proceeding is statutorily set, with R.C. 4928.148(A)(1) directing the Commission to review "the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource . . . during calendar year 2020,"rather than the events leading up to the creation and implementation of the LGR Rider mechanism. See *In re the Review of the Power Purchase Agreement Rider of Ohio Power Co. for 2018*, Case No. 18-1004-EL-RDR, Entry (Dec. 23, 2021) at ¶ 15; Entry (July 7, 2023) at ¶ 33. As such, the fact that the LGR Riders resulted in charges, as opposed to credits, for the duration of the audit period does not, in of itself, constitute imprudence, especially given the historical market conditions faced during 2020 (OCC Ex. 7 at 3-4; AEP Ohio Ex. 1 at 16; Staff Ex. 2 at 27-29, 44; Staff Ex. 4 at 31-32; 41-42; Staff Ex. 6 at 29-30). We cannot question the statutory framework under which we are now operating; rather, we must act within our authority to effectuate the General Assembly's intent.

{¶ 81} This same reasoning must apply to OMAEG's arguments that the Commission may only allow the Sponsoring Companies to recover the same prudently incurred costs as were permitted under the prior mechanisms due to the reference in R.C. 4928.148(A) to "those costs."[26] Again, the General Assembly made no such limitation in

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[26]. R.C. 4928.148(A) provides "[o]n January 1, 2020, any mechanism authorized by the public utilities commission prior to the effective date of this section for retail recovery of prudently incurred costs related to a legacy generation resource shall be replaced by a nonbypassable rate mechanism established by the

R.C. 4928.148 that would require this Commission to utilize the former framework behind those prior mechanisms to this proceeding. As such, we must effectuate the plain language of the statute.

{¶ 82} Recognizing the established scope of this proceeding, we find that the record clearly demonstrates that the commitment strategy employed by OVEC was not the decision of AEP Ohio, Duke, or AES Ohio or any other of the individual Sponsoring Companies of OVEC. Instead, the commitment strategy was based upon an established policy of OVEC which could only be changed with the consent of the Sponsoring Parties. OVEC agreed to sell power and the Companies agreed to purchase power pursuant to a wholesale power sales agreement approved by FERC. OVEC is a separate corporate entity from the Companies and is governed by a Board of Directors and an Operating Committee, the latter of which requires two-thirds majority of all members for decisions to pursuant to Section 9.05 of the ICPA.[27] However, the unanimous approval of the Operating Committee, excluding OVEC's representative, is required to change the commitment status and other key determinations (Duke Ex. 1 at 19). The Companies each have a representative, and consequently one vote, on the OVEC Operating Committee. (Staff Ex. 2 at 9-10, 33-34, 37-38; Staff Ex. 4 at 9-10, 38, 41-42; Staff Ex. 6 at 10, 37-41; AES Ohio Ex. 1, Exhibit 1 at 17, Exhibit 2 at 5.) As the OVEC commitment strategy was not a management decision by any of the individual Companies, the Commission finds that they cannot be found to have acted imprudently. Nor can we speculate, as suggested by Kroger, CUB/UCS, and OMAEG, how much control the Companies' entitlement in the aggregate could exert over the OVEC Operating Committee, which still only amounts to an approximate 34 percent ownership share (Tr. Vol. V at 1207; CUB/UCS Ex. 1 at 42). Despite this inability to ultimately control the commitment strategy, the record does demonstrate that the Companies take steps to

commission for recovery of *those costs* through December 31, 2030, from customers of all electric distribution utilities in this state." (emphasis added).

[27]. Pursuant to Section 9.05 of the ICPA, "[t]he decisions of the Operating Committee, including the adoption or modification of any procedure by the Operating Committee [ ] must receive the affirmative vote of at least two-thirds of the members of the Operating Committee present at any meeting."

ensure that OVEC's costs are reasonable, including monitoring performance data, submitting suggestions for the Operating Committee's consideration, and maintain an active role in participation and discussions at Operating Committee deliberations. (Staff Ex. 2 at 38-40; Staff Ex. 4 at 42-44; Staff Ex. 6 at 41-45; Duke Ex. 1 at 5, 15-17.)

{¶ 83} Nonetheless, the Commission finds that, even if the Companies could somehow be held responsible for the OVEC commitment strategy, OVEC's combined must-run and economic commitment strategy utilized during the 2020 calendar year was prudent at that time. Consistent with the Supreme Court of Ohio, we analyze prudency at the time the decision was made. *In re Application of Suburban Natural Gas Co.*, 166 Ohio St. 3d 176, 2021-Ohio-3224, 184 N.E.3d 44. LEI found that OVEC maintains a comprehensive set of operating procedures for daily energy market procedures. LEI noted that OVEC's operating procedures reflect a diligent approach to operational decision-making and market scheduling. Further, upon the unforeseeable market conditions experienced during 2020, OVEC employed use of an economic commitment offer and scheduled additional maintenance outages during that time in order to avoid as many losses as possible. LEI further found that the operational processes and procedures undertaken by OVEC on behalf of Companies and the other Sponsoring Companies to be prudent. (Staff Ex. 2 at 38, 42-45, 50; Staff Ex. 4 at 37-45, 48; Staff Ex. 6 at 33-45; Duke Ex. 1 at 19-20.)

{¶ 84} OCC, OMAEG, Kroger, CUB/UCS, Sierra Club, and OEC dispute whether it was prudent to offer the OVEC plants under a must-run strategy for the majority of the year, as identified in the Audit Reports.[28] However, the preponderance of evidence in the record does not support the arguments of these intervening parties. The evidence demonstrates that the main reason many coal plants consistently operate under a must-run strategy is that there are significant costs associated with starting up and shutting down the plants. AEP Ohio witness Stegall testified that operating the plants on a must-run basis

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[28]. These parties agree that it was prudent for the Companies to advocate and vote to temporarily transition OVEC's commitment strategy to an economic one in the spring of 2020.

aligns with the design of the coal plants because the OVEC plants are designed to be base load generation plants which are not meant to be cycled on and off on a frequent basis (AEP Ohio Ex. 1 at 11-12). Duke witness Swez further explained that cycling a unit designed to provide base load generation will incur significant additional maintenance, capital, and other costs associated with the stress on the equipment because the equipment was not designed to cycle, adding that the units must be cycled on and off independently, rather than simultaneously (Duke Ex. 1 at 12, 14). AES Ohio witness Crusey testified that "OVEC's units, as coal-fired generating units designed for baseload generation, are not capable of instantaneous startup and shutdown and are not designed to be cycled on and off frequently. In addition, shutting off a unit, starting a unit, and ramping a unit to a higher level of output each come with risks and significant costs." Mr. Crusey also observed that base load units are designed to run as a "base" resource and are not designed to be cycled on and off or started and ran infrequently like peaking units. (AES Ohio Ex. 1 at 9-10.) Moreover, the review of power plant operations by LEI also supports the use of the must-run commitment. While recognizing that the coronavirus pandemic led to plant dispatch at levels below optimal operating levels, LEI specifically found that the plants performed reliably in 2020, with forced outage rates generally better than PJM averages (Staff Ex. 2 at 10; Staff Ex. 4 at 10; Staff Ex. 6 at 10). Accordingly, the evidence demonstrates that, while it may appear in hindsight that, on some days, it would have been more optimal for OVEC to have implemented an economic strategy, the consideration of other necessary factors demonstrate that it was prudent for OVEC to go forward with a must-run commitment for the majority of the calendar year. The same can be said of the uplift payments cited by OCC and OMAEG. While the Auditor acknowledges that uplift payments would allow the units to "recover their total offered costs when market revenues are insufficient or when their dispatch instructions diverge from their dispatch schedule", there would still remain the risk of equipment damage from repeated start-ups, as well as difficulty in managing consistent staffing and fuel deliveries (Staff Ex. 2 at 38; Staff Ex. 6 at 42; AES Ohio Ex. 1 at 10; AEP Ohio Ex. 1 at 12). Recognizing the balancing of various factors discussed above, OVEC currently employs a process in which the Operating Committee maintains the

flexibility to change the commitment strategy of its units if upon determining the existing strategy is no longer reasonable, which is precisely what was done in April of 2020. (Duke Ex. 1 at 15-17; AEP Ohio Ex. 1 at 12-13). Moreover, this process was in place well before the audit period or the effective date of R.C. 4928.148. If the General Assembly had intended for a certain commitment strategy to be considered imprudent pursuant to the statute, it could and would have expressly indicated so. We also find the decision to revert back to the must-run commitment strategy after June 30, 2020 was prudent. We agree with AEP Ohio witness Stegall's assessment that "obligations under OVEC's coal contracts and the potential consequences for violations of these contracts" rendered it necessary to operate the plants and return to a must-run commitment strategy. (AEP Ohio Ex. 1 at 14-15; Duke Ex. 1 at 30.)

{¶ 85} The Commission recognizes that what is at issue here is not what strategy would have been the most optimal, but rather, whether the strategy deployed by OVEC was prudent. R.C. 4928.148. Thus, the Commission determines that, based upon the record evidence in this proceeding, the combination of the must-run and economic commitment strategies during 2020 was prudent. We note OVEC, through its Operating Committee, continues to review the commitment strategy and, in fact, offered the OVEC plants into the energy markets as economic rather than must-run due to the loss of demand for electricity between April 14, 2020, and June 30, 2020, due to the significant change in market conditions caused by the coronavirus. (Staff Ex. 2 at 37-39; Staff Ex. 4 at 41-42; Staff Ex. 6 at 41-43; Duke Ex. 1 at 15-17; AEP Ohio Ex. 1 at 12-13).

{¶ 86} Accordingly, having determined that the combination of a must-run commitment and economic strategy utilized in 2020 was prudent, we are not persuaded by the arguments of OMAEG, Kroger, CUB/UCS, Sierra Club, OEC, and OCC that any recoverable amount should be disallowed. While in hindsight utilizing an economic strategy more than the time period between April 14, 2020, and June 30, 2020 may have been more optimal, as discussed above, the evidence demonstrated that OVEC's strategy was prudent. However, we do agree with recommendations in the Audit Reports regarding the

disposition of energy and capacity, namely that the Companies should continue to consider, in terms of the disposition of capacity, developing price and volume pairs based on analysis of bonus payments and penalties at various MW offer levels (Staff Ex. 2 at 9-10; Staff Ex. 4 at 9-10). We also find reasonable LEI's recommendation for the Companies to encourage the OVEC Operating Committee meetings to be held more frequently, as this will foster more timely updates on each plant's operating performance and serve as a forum to raise concerns regarding commitment strategy in the short and long-term (Staff Ex. 2 at 44; Staff Ex. 4 at 48; Staff Ex. 6 at 50). As such, these recommendations are adopted.

{¶ 87} In summary, we make the following determinations, consistent with the findings of the Auditor: (1) the governing contractual documents require that OVEC offer its units as must-run, absent unanimous consent by the Sponsoring Companies; and (2) it was prudent to offer the OVEC units as must-run and temporarily transition to offering them economically due to market conditions during the 2020 calendar year.

2. The Prudence and Reasonableness of OVEC's Fuel Procurement Strategy

{¶ 88} As we discussed previously, the Audit Reports produced by LEI conclude that OVEC's fuel procurement strategy was ultimately prudent and reasonable, stating that coal contract terms seem reasonable, that having long- and short-term contracts in place allows for flexibility, and that overall coal contracts reflect market awareness and prudency (Staff Ex. 2 at 60; Staff Ex. 4 at 64; and Staff Ex. 6 at 65).

{¶ 89} Intervenors OCC, OMAEG, OEC, Kroger, Sierra Club, and CUB/UCS argue that OVEC's fuel procurement strategy was neither prudent nor reasonable, citing a specific coal contract between OVEC and Resource Fuels that was in effect during the audit period included above market rate pricing. OCC argues that OVEC's coal costs were higher than the market price on average, and that in fact, OVEC's coal costs were higher than the market price for most of 2020. OMAEG avers that the Companies did not perform any independent analyses of the prudency and reasonableness of either OVEC's fuel contracts or its fuel

procurement practices. OMAEG opines that OVEC has been purchasing over-priced coal from Resource Fuels for many years as part of a long-term contract entered in 2012. OMAEG suggests that the Companies may have an option to disengage OVEC from the contract, but simply have not, costing retail ratepayers. OMAEG reiterates OCC's arguments that at various points in 2020, OVEC's coal costs were above the market price, and coal inventories at the two plants were too high. According to OEC, where the OVEC plants were over-supplied with coal, above their seasonal forecasts, the prudent and reasonable action for OVEC to take would have been to either renegotiate its existing coal contracts, or to seek new suppliers, but instead, OVEC took no action and the Companies took no steps to remedy this lack of action. Kroger, Sierra Club, CUB/UCS make similar arguments to both OEC and OMAEG.

{¶ 90} Staff and the Companies dispute the intervenors' arguments that OVEC's fuel procurement strategy was imprudent and unreasonable. Staff argues that, in a prior case concerning Duke's pre-LGR Rider mechanism, we rejected similar arguments concerning the very same Resource Fuels contract, finding that the differences in prices were attributable to higher quality coal and existing obligations, among other factors. *See 2019 Duke Rider PSR Audit*, Opinion and Order ¶ 61 (Sept. 6, 2023) Staff avers that the same contractual obligations that existed in the Duke case during the audit period in this case. Again, citing the Duke case, Staff submits that the prudency standard requires the Commission to evaluate a decision at the time it was made. The Companies all make very similar arguments to those of Staff, adding that LEI did not recommend any disallowance after evaluating OVEC's fuel procurement strategy, and that no party, including both OVEC and the Companies, could have anticipated the coronavirus pandemic and the resulting economic conditions when the Resource Fuels contract was entered into in 2012.

{¶ 91} We find that OVEC's fuel procurement strategy during the audit period was prudent and reasonable. As part of its audit, LEI noted that it obtained extensive data from the Companies regarding their coal purchases (Staff Ex. 2 at 46-57; Staff Ex. 4 at 49-60; Staff Ex. 6 at 51-62). In the Audit Reports, LEI stated that it found overall, OVEC's fuel

procurement strategy was reasonable and prudent, but made a recommendation that OVEC conduct an internal audit to evaluate and improve its procurement management. Further, LEI opined that the Resource Fuels contract was not imprudent, and LEI assumes that a future contract after the Resource Fuels contract expires in 2021 will reflect the lower prices currently prevailing in the market. LEI's auditor, Dr. Fagan, also testified at the hearing that LEI did not, after its extensive review, find that the Resource Fuels contract was imprudent. (Staff Ex. 2 at 46-65; Staff Ex. 4 at 49-69; Staff Ex. 6 at 51-71; Tr. Vol. III at 402-403.)

{¶ 92} We reiterate that in the *2019 Duke Rider PSR Audit*, we rejected very similar arguments from some of the same intervenors about this same contract, finding that the contract was prudently made at the time it was entered into, as discussed above. Again, consistent with the *2019 Duke Rider PSR Audit* and our earlier findings in this Opinion and Order, we note that prudency should be evaluated based on conditions at the time the decision was made. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999), citing *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826 (1993). We find that that the evidence presented by the intervening parties does not overcome the rebuttable presumption that the Company's management decisions were prudent. *Syracuse* at 10. It is not at all unusual or surprising that, where a utility uses a strategy of diversifying coal providers, utilizing varying commencement dates and contract lengths, as is the case here, it is possible to identify different prices for different coal contracts with the same delivery period. As we found previously, the differences in pricing between the audit period in this case and when the contract was entered into can be attributed to many factors, including the existence of higher quality coal and existing contractual obligations with suppliers. *2019 Duke Rider PSR Audit*, Opinion and Order (Sept. 6, 2023) at ¶ 61. Additionally, we find convincing the testimony of witness Jason Stegall, who testified that the Resource Fuels contract was competitively bid at the time it was entered in 2012, supporting the notion that at the time the contract was signed, it was for a competitive offer, reflecting varying market conditions and thus having a different price than other contracts. (AEP Ex. 1 at 18.) Further, we reject the intervenors' argument that OVEC could

have modified or terminated the contract under a provision that allows it to do so if a change in law makes it economically unfeasible for OVEC to use the coal; intervenors have furnished no evidence that such conditions existed during the audit period and likewise have failed to produce any evidence of the prevailing market conditions for coal at the time the contract was entered into by OVEC and Resource Fuels. We, therefore, find that OVEC's fuel procurement strategy was prudent and reasonable during the audit period. *2019 Duke Rider PSR Audit*, Opinion and Order (Sept. 6, 2023). However, we agree with the Auditor's recommendation that all three Companies continue, through their roles on the OVEC Operating Committee, to encourage ongoing review and improvement to OVEC's coal burn forecasting methods and coal procurement practices (Staff Ex. 2 at 10; Staff Ex. 4 at 10; Staff Ex. 6 at 10).

3. Whether Component (D) of the LGR Was a Return on Investment for the Companies

{¶ 93} Under R.C. 4928.01(A)(42), "'[p]rudently incurred costs related to a legacy generation resource' . . . shall exclude any return on investment in common equity. . . . " In the Audit Reports, LEI noted for the Commission that Component (D) of OVEC's fixed costs appears to be a return on investment in common equity. Citing the ICPA, LEI states that Component (D) is identified as a payment per common share. LEI notes that the annual amount of Component (D) at $2.51 million constituted nearly all of OVEC's $2.81 million net income for 2020. LEI highlighted this issue and advised that the Commission may wish to examine Component (D) to determine if it is indeed a return on investment in common equity. (Staff Ex. 2 at 9, Staff Ex. 4 at 9, and Staff Ex. 6 at 9-10.)

{¶ 94} During the hearing, LEI's auditor, Dr. Marie Fagan testified that, per the ICPA, Component (D) is a payment per share of common equity. When asked on cross-examination if Component (D) is then, in Dr. Fagan's opinion, a return on investment in common equity, she responded that it is a return to the owners of OVEC, but that she did not know and merely flagged it for the Commission to examine. Dr. Fagan later testified

that LEI did not necessarily see Component (D) as a disallowance to be excluded, but wanted to raise it for the Commission's attention and review. (Tr. Vol. I at 150-155; Tr. Vol. II at 240-244, 390, 394-396.)

{¶ 95} Staff submits that Component (D) seems to be such a return to the owners of OVEC. Specifically, Staff states that the ICPA provides that "Component (D) shall consist of an amount equal to the product of $2.089 multiplied by the total number of shares of capital stock of the par value of $100 per share of Ohio Valley Electric Corporation which shall have been issued and which are outstanding on the last day of such month." According to Staff, Component (D) is a return on investment in common equity per a reading of the ICPA and that all costs associated with it are subject to the limitation specified in R.C. 4928.01(A)(42). Staff avers that Component (D) being a return on investment to OVEC, does not exempt it from the limitations in R.C. 4928.01(A)(42), even if prudently incurred. OEC makes similar arguments to Staff with respect to Component (D), arguing that it is unreasonable for ratepayers to cover the costs of Component (D) because it is a return. OEC also encourages the Commission to find it a return on investment in common equity and therefore exclude it from recovery through the LGR Riders. OCC, Kroger, and OMAEG make similar arguments to both Staff and OEC. (Staff Initial Brief at 7; Staff Reply Brief at 10-11; OEC Initial Brief at 15-16; OCC Initial Brief at 22-23; OMAEG Initial Brief at 45-46; Kroger Initial Brief at 6-7.)

{¶ 96} The Companies dispute Staff's and the intervenors' arguments that Component (D) is a return on investment in common equity and, instead, avers that Component (D) is a cost, rather than a dividend. Duke, citing the testimony of witness John Swez, submits that Component (D) is a charge that is used to cover OVEC's costs of operating on a fixed basis, the same as the other components of the ICPA demand charge. AEP Ohio argues that the only difference between Component (D) and the other ICPA demand charge components is that it is a fixed monthly charge, and therefore, cannot be a return on investment since it is not based on OVEC's level of investment. AEP Ohio avers that Component (D) is instead a fixed charge calculated based on each of the Companies'

ownership share and is not calculated on either OVEC's invested capital or rate base. AEP Ohio notes that LEI acknowledged in its report that OVEC earns no return on its plant-in-service. According to AEP Ohio, Component (D) cannot be a return on investment in common equity because it is not returned to OVEC's equity holders, and that LEI made a factual error in stating that Component (D) is a return to the owners of OVEC. Finally, AEP Ohio states that OVEC has not issued dividends since 2013, and that Component (D) charges are not returned to OVEC's shareholders, but instead used to pay OVEC's expenses. AES Ohio generally shares the same arguments as Duke and AEP Ohio but emphasizes that both Staff and intervenor arguments should be rejected where they are based on LEI's mistake of fact with respect to Component (D). (AES Ohio Initial Brief at 21; AEP Ohio Initial Brief at 23; Duke Initial Brief at 39-42; Duke Reply Brief at 31. AES Ohio Reply Brief at 7-9; AEP Ohio Reply Brief at 28-29; AEP Ohio Ex. 1 at 21; Tr. Vol. I at 150-155; Tr. Vol. II at 240-244, 390, 394-396; Tr. Vol. III at 790.)

{¶ 97} We first acknowledge that LEI did not recommend that Component (D) be disallowed under R.C. 4928.148(A)(42); rather, LEI felt Component (D) should be brought to our attention for our review and consideration, as discussed above. We disagree with intervenor arguments, which all stem from the Auditor's statement that Component (D) is possibly a return on investment in common equity. LEI did not state, either at the hearing or in its reports, that Component (D) should be disallowed or that it actually was a return on investment in common equity. LEI's statement and testimony is that it did not know if Component (D) was a return, but that it wanted to bring the issue to the Commission's attention, which was done in the Audit Reports. As noted above, intervenor arguments all stem from LEI merely suggesting the Commission examine Component (D) because of the definition provided for it in the ICPA. (Staff Initial Brief at 7; Staff Reply Brief at 10-11; OEC Initial Brief at 15-16; OCC Initial Brief at 22-23; OMAEG Initial Brief at 45-46; Kroger Initial Brief at 6-7; Tr. Vol. III at 790.)

{¶ 98} We agree with the Companies that Component (D) is not a return on investment in common equity where the amount collected for Component (D) during the

audit period was not returned to the Companies or their shareholders. Notably, Component (D) is a fixed charge and is not calculated based on OVEC's invested capital or rate base. LEI's auditor, Dr. Marie Fagan testified that she did not know that Component (D) was a return on equity, only that it was a possibility (Tr. Vol. I at 150-155; Tr. Vol. II at 240-244, 390, 394-396). Witnesses Swez, Crusey, and Stegall testified that OVEC has not issued dividends since 2013, and that Component (D) represents a fixed monthly charge used to cover OVEC's monthly operating costs. (AES Ohio Ex. 4 at 5; AEP Ohio Ex. 1 at 21; Duke Ex. 1 at 39.) Further, witness Stegall testified that the costs calculated through Component (D) represent neither a return to AEP Ohio of its investment in common equity, nor its cost of capital. Stegall states that the amounts paid by the Sponsoring Companies to OVEC under Component (D) are used by OVEC to pay various costs of operation and are not returned to shareholders. (AEP Ex. 1 at 20-21.) Witness Swez also testified that Component (D) is a cost allocated pursuant to the ICPA in 1953 and has not been challenged in that time and does not result in any return on investment to Duke. Swez further testified that Component D is an allocation of the totality of costs based on the ICPA and do not, directly or indirectly, via a dividend or otherwise, represent any return to Duke or the sponsoring Companies. (Duke Ex. 1 at 39-40.) We, therefore, find that Component (D) is not a return to be disallowed pursuant to the limitation set in R.C. 4928.01(A)(42).

4. Whether Costs Associated with Advance Debt Repayment or Advance Post-Retirement Benefit Payments Should be Disallowed

a. Advance Debt Repayment

{¶ 99} During the audit period, AEP Ohio, Duke and AES Ohio collected their respective share of a $30 million "advance debt repayment" for the coal plants (Staff Ex. 2 at 25, 80-81; Staff Ex. 4 at 29, 84-85; Staff Ex. 6 at 27, 86-87). Not only does OCC advocate for the disallowance of the Companies' share of the $30 million collected during 2020, it also suggests the Commission should require these utilities to credit consumers for the entirety of the $120 million in advance debt repayment allegedly collected to date. In support of its

request, OCC initially argues that the advance debt payment does not qualify as a "cost," as defined in R.C. 4928.01(A)(42), and consequently violates R.C. 4928.148. Citing the framework for allowable costs to be recovered during a rate case pursuant to R.C. 4909.15, OCC asserts that, because the Companies have not yet incurred the costs for the amount collected during 2020, the Companies should not be allowed to recover them (OCC Ex. 7 at 11).[29] Second, OCC argues that these payments could be improper repayments of debt in the event of an early retirement.[30] Recognizing the plants were constructed in 1955, OCC opines that that it is plausible the plants could retire before anticipated timeframe laid out in the ICPA, at which point the plants would be 85 years old. OCC asserts paying down OVEC's debt through advance debt repayment essentially eliminates the risk for OVEC to be able to collect those amounts it would otherwise forego in the event the plants announce an early retirement, in violation of R.C. 4928.01(A)(42). Finally, OCC asserts that this advance debt repayment creates inequity where current consumers are burdened by paying for the debt repayment that benefits future consumers. *In re the Application of Portland General Electric Co. for an Investigation into Least Cost Plan Plant Retirement*, Oregon Pub. Util. Comm., Docket Nos. DR 10, et al., Order No. 08-487 (Sept. 30, 2008) at 66, 70-72, 82.[31]

{¶ 100} Initially, Duke and AEP Ohio argue that OCC raises this issue for the first time in their brief and, thus, it should be denied for that reason alone. Second, the Companies contend that the advance debt repayment was authorized by the ICPA and the intervenors provide no basis supporting their contention that the Companies' paying such an authorized charge was imprudent or unreasonable. Moving to the substance of OCC's

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29. The annual report provides that "[i]n January 2017, the Companies started advance billing the Sponsoring Companies for debt service as allowed under the ICPA. As of December 31, 2020 and 2019, $120 million and $90 million, respectively, had been advance billed to the Sponsoring Companies. As the Companies have not yet incurred the related costs, a regulatory liability was recorded which will be credited to customer bills on a long-term basis."

30. R.C. 4928.01(A)(42) provides that" in the event of a premature retirement of a legacy generation resource, [such costs] shall exclude any recovery of remaining debt."

31. A copy of the order is available at https://apps.puc.state.or.us/orders/2008ords/08-487.pdf.

argument, the Companies first allege that Component A of the ICPA[32] permits debt prepayments and, thus, the charges were properly billed under the ICPA and incurred by the Companies in 2020 (AES Ohio Ex. 1 at 12, Exhibit 1 at 8-9). The Companies next dispute OCC's third point, arguing that a benefit was conveyed for this payment in the form of lower debt costs, which has been recognized in the financial industry as favorable to OVEC's credit rating (OCC Ex. 1 at 56-58, Attach. EAS-2; Tr. Vol. III at 623). Further, Duke notes that the Commission has already reviewed and approved OVEC's debt refinancing for the period encompassing 2020. *In re the Application of Ohio Valley Electric Corporation for Authority to Issue Long-Term Notes and Enter into Interest Rate Management Agreements*, Case No. 19-763-EL-AIS Finding and Order (June 19, 2019), Second Finding and Order (May 20, 2020). As such, the Companies aver that OVEC's reduction in debt costs and development of a reserve is prudent and ensures that costs are paid timely. Finally, the Companies quickly dismiss OCC's concerns regarding premature retirement by noting their speculative nature and point out that that an offset in the form of a regulatory liability was entered on OVEC's books, and will, therefore, be credited to customer bills on a long-term basis. (OCC Ex. 7 at 11.) Accordingly, the Companies urge the Commission to find that there is no basis to conclude that these charges were unreasonable or imprudent for purposes of R.C. 4928.148.

{¶ 101} While the Commission finds that OCC did, indeed, raise this improperly for the first time in its brief, we will speak to the substance of the argument. The Commission disagrees with OCC's assertion that advanced debt payments should be disallowed from recovery, finding that this claim lacks evidentiary support. R.C. 4928.01(A)(42) defines "prudently incurred costs related to a legacy generation resource" as "costs, including deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource, less any revenues

[32]. Component A charges, pursuant to the ICPA, may include "the interest component of any purchase price, interest, rental or other payment under an installment sale, loan, lease or similar agreement relating to the purchase, lease or acquisition by Corporation of additional facilities and replacements (whether or not such interest or other amounts have come due or are actually payable during such Month)[.]"

realized from offering the contractual commitment for the power agreement into the wholesale markets . . ..” As noted above, the ICPA is such a power agreement and it specifically permits debt prepayments (AES Ohio Ex. 1 at 12, Exhibit 1 at 8-9). As the statute is designed to flow through to customers the net impact of the Companies’ contractual entitlement in OVEC, it would certainly include such expenses as debt payments. We also agree that current ratepayers benefit in the form of lower debt costs (OCC Ex. 1 at 56-58, Attach. EAS-2; Tr. Vol. III at 623). Further, while R.C. 4928.01(A)(42) does note that any further recovery of remaining debt shall be excluded in the event of premature retirement of the LGR, there is no evidentiary basis in the record to demonstrate this will be the case for the OVEC units, beyond OCC’s speculative concerns. Additionally, the Companies point out, as these costs have not yet been incurred, a regulatory liability was recorded which will be credited to customer bills on a long -term basis (OCC Ex. 7 at 11). Consistent with the Auditor’s findings, we find that the no portion of the advance debt repayment should be disallowed.

b. Advance Post-Retirement Benefit Payments

{¶ 102} OCC argues, similar to the advance debt repayment, that the advance post-retirement benefit payments should likewise be disallowed and that OVEC and the Companies should be required to credit ratepayers for their share of the payments collected to date, which totals approximately $64 million. OCC submits that the Companies advance-billed for postretirement benefits even though those costs were not yet incurred, in violation of R.C. 4928.148 and R.C. 4928.01(A)(42). According to OCC, OVEC’s 2020 balance sheet lists a “regulatory liability” of approximately $64 million for postretirement benefits in 2020. OCC avers that this amount was not a true regulatory liability because it was not yet owed for postretirement benefits and was instead advance-billed. Citing the OVEC Annual Report of 2020, OCC states that it is a violation of both the Commission’s policy for postretirement benefit ratemaking and accounting, and Generally Accepted Accounting Principles, as set forth in FASB 106. It is OCC’s contention that it was unjust and

unreasonable for the Companies to collect a future postretirement benefit cost which they have not yet incurred. (OCC Initial Brief at 27-29; OCC Ex. 7 at 10-11.)

{¶ 103} Staff and the Companies submit that OCC is incorrect with respect to the advance postretirement benefit payments, which should not be disallowed. According to Staff, OCC's arguments are at odds with R.C. 4928.148 where the LGR Rider is required to allow for the recovery of prudently incurred costs related to a LGR, which R.C. 4928.01(A)(42) defines, in part, as "costs, including deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource…." Staff avers that the costs subject to OCC's argument are costs which were allocated to the Companies pursuant to the ICPA and are, therefore, recoverable under R.C. 4928.148. Lastly, Staff notes that OCC does not argue that the Companies' actions with respect to the advance postretirement benefit payments were in any way imprudent, and that LEI did not raise any concerns with respect to these payments. AEP Ohio submits that OCC's argument should be dismissed where it was not raised until briefing and is a new issue, and lacks merit where there is no basis in the record evidence to support it, including witness testimony. Further, AEP states that, under the ICPA, Component (E) charges include "postretirement benefits other than pensions attributable to the employment and employee service of active employees, retirees, or other employees, including without limitation to any premiums due or expected to become due." AEP Ohio avers that there is no evidence to support a conclusion that it was billed such costs in the audit period or that they were passed through in 2020, or that its payment of the billed postretirement benefit funding charge was imprudent or unreasonable. Finally, AEP Ohio submits that OCC's factual basis for its argument is erroneous where OVEC's 2020 annual report indicates that the balance was $76.1 million at the end of 2019 and $64.4 million at the end of 2020, which suggests that the prior reserve was partially depleted during the audit period, not increased. According to AEP Ohio, this reserve is being used over time but is not yet depleted, adding that retail consumers should not get a windfall for funding they did not provide and which is needed by the Companies to pay employees and retirees their

earned benefits. AES Ohio and Duke make similar arguments to AEP Ohio. (Staff Reply Brief at 12-13; AEP Reply Brief at 33-34; AES Ohio Reply Brief at 12-13; Duke Reply Brief at 25-26; AES Ohio Ex. 1 at 10; OCC Ex. 7 at 10.)

{¶ 104} Similar to the advance debt payments, we find that the advance post-retirement benefit payments were proper and should be allowed. We disagree with OCC that OVEC and the Companies run afoul of R.C. 4928.148 with respect to the advance post-retirement benefit. We first note that OCC did not raise this argument during the hearing or in its initial or reply commentary, and LEI did not make any particular findings regarding the advance post-retirement benefit payments. Notably, in past cases, we have allowed utilities to include prepaid pension assets in its rate base. *See In re the Application of The Ohio Edison Co., The Cleveland Electric Illuminating Co., and the Toledo Edison Co. for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals,* Case No. 07-551-EL-AIR, *et al.,* Opinion and Order (Jan., 21, 2009) at 16; *In re the Commission's Review of Capacity Charges of Ohio Power Co. and Columbus S. Power,* Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012), at 34. More importantly, however, we agree with Staff and the Companies that the ICPA allows for this payment and do not find that it runs afoul of R.C. 4928.148. When queried on cross-examination about pension and benefit costs, Dr. Fagan stated that "pensions and benefits have to do with the previous makeup of the workforce, salaries, the age of the workforce, whose retired, so I think you would have to look at that very carefully on a case-by-case basis." (Tr. Vol. II at 241). Unfortunately, OCC provided no such analysis in its brief or elsewhere in the record and does not cite to any expert testimony concerning either the definition of the postretirement benefit or how it is calculated. Finally, we find that, under R.C. 4928.01(A)(42), prudently incurred costs includes deferred costs allocated pursuant to the ICPA, which itself authorizes OVEC to bill the Sponsoring Companies for pension costs, including postretirement benefits. (AES Ohio Ex. 1, Exhibit 1 at 10.) We, therefore, find that the Companies and OVEC did not act unreasonably or imprudently with respect to the advance post-retirement benefit payments and that those amounts should not be disallowed.

5. OVEC's Capital Costs

{¶ 105} As noted above, the Auditor conducted a review of OVEC's capital investment approval process and 2020 capital costs. Following this review, the Auditor concluded that "capital projects at OVEC were completed within budget and followed a prudent evaluation process," and that "capital investment appears to have addressed environmental issues or improved plant economics." (Staff Ex. 2 at 85; Staff Ex. 4 at 90; Staff Ex. 6 at 91.) Based on LEI's virtual site visit, LEI found that OVEC complied with environmental requirements during the audit period and that management of emissions allowance inventories was reasonable and prudent (Staff Ex. 2 at 10: Staff Ex. 4 at 10; Staff Ex. 6 at 10). Although the Auditor did not recommend any disallowances related to capital investment in 2020, the Auditor did propose a "cap" on capital expenditures, noting that a cap was similarly recommended for capital investments in the *AEP Ohio PPA Case* and the *2019 Duke Rider PSR Audit*. (Staff Ex. 2 at 10-11, 82; Staff Ex. 4 at 10-11; Staff Ex. 6 at 10-44.) The Auditor's also noted that her findings on capital expenditures "does not imply that the level of capital spending is justified by the revenues earned by the plants in the PJM market." (Staff Ex. 2 at 85; Staff Ex. 4 at 90; Staff Ex. 6 at 91.) Staff agrees with the findings of the Auditor and recommends the Commission adopt those recommendations.

{¶ 106} CUB/UCS initially takes issue with the Companies' assertions that they have imposed robust processes in place to demonstrate that investing in additional capital upgrades at the plants is reasonably and prudently undertaken. While AES Ohio witness Crusey noted that there is an internal OVEC Board review for capital projects over $750,000, CUB/UCS contends that there are no policies in place to guide the Board when making that decision (AES Ohio Ex. 1 at 15; Tr. Vol. V at 1162-63). As such, CUB/UCS suggests that the Commission disallow the inclusion of these costs from the LGR Riders given the Companies have failed to conduct the proper analyses to warrant additional investment when faced with negative operating margins. CUB/UCS further allege that the Companies should have also utilized such analyses relative to the alternative of retiring the plants. (CUB/UCS Ex.

1 at 52.) Given the age of the plants, CUB/UCS assert prudency should include a discussion of whether retirement, instead of additional capital expenditures such as environmental upgrades, would be the most beneficial course forward for ratepayers (CUB/UCS Ex. 1 at 17-18, 49). Specifically, CUB/UCS points to the effluent limitation guidelines (ELG) rule. OVEC expects to have until no later than December 31, 2025, to modify how it manages both bottom ash transport wastewater and flue gas desulfurization wastewater at the Clifty Creek and Kyger Creek plants, with construction beginning in 2021 and continuing over the next few years (CUB/UCS Ex. 1 at 50). However, CUB/UCS question why these costs were not included in the 2020 audit period.

{¶ 107} Sierra Club urges the Commission to adopt a capital cost recovery cap of $0 related to capital spending. According to Sierra Club, the inability to review capital spending decisions at Clifty Creek or Kyger Creek, as these plants are unregulated merchant generators, creates an incentive to over-invest capital spending in these plants, along with other financial advantages. In order to protect customers, Sierra Club argues the $0 cap on capital spending should be implemented, especially given the negative values noted in the Audit Reports. (Staff Ex. 2 at 13, 21, 27; Staff Ex. 4 at 13, 23, 31; Staff Ex. 6 at 13, 21, 29.)

{¶ 108} First and foremost, the Companies assert that R.C. 4928.148 provides no latitude for the Commission to impose a cap on capital expenditures; instead, argue the Companies, the statute requires recovery of all "prudently incurred costs" related to OVEC, and the definition of "prudently incurred costs" does not contain any concept of an outright cap on capital expenditures. R.C. 4928.01(A)(42). As such, the only limiting threshold for recovery is whether the expenditures are prudently incurred. The Companies assert that an outright cap, as suggested by the Auditor and supported by some intervenors, would conflict with the statute.

{¶ 109} Additionally, AEP Ohio and AES Ohio argue that, while LEI is correct that a cap on capital expenses has been recommended to the Commission in the past, the Commission has previously rejected this recommendation. *2019 Duke Rider PSR Audit* at ¶

22. As the Auditor has produced no additional reasoning beyond what was provided in that proceeding, AEP Ohio and AES Ohio contend that the recommendation should likewise be rejected in this proceeding. Moreover, AEP Ohio strongly disagrees with the recommendation for a cap on capital expenditures for the same reason AEP Ohio opposed such a cap in its previous audit. As AEP Ohio witness Stegall explained, "OVEC management should be able to make investments necessary to maintain their generating units. Setting a cap on capital expenditures may cause unnecessary delay that could result in unnecessary, preventable equipment failure or unsafe operating conditions." (AEP Ohio Ex. 1 at 19.) Additionally, AEP Ohio observes that a cap on capital expenditures would conflict with the ICPA, which includes no such cap. AEP Ohio also emphasizes that a cap on capital expenditures would be unnecessary under the ICPA, as the Auditor found that OVEC's capital investment proposals "followed a prudent evaluation process." (Staff Ex. 2 at 85; Staff Ex. 4 at 11, 90; Staff Ex. 6 at 91.) Furthermore, AEP Ohio again reiterates that the Auditor failed to identify any costs that were imprudent, which is the only grounds for a disallowance under R.C. 4928.148. In response to arguments related to analyzing whether the plants should be retired, the Companies note that is not within the scope of this proceeding and runs contrary to the statute. Similarly, the Companies argue this point when addressing the environmental investments needed to comply to comply with the CCR and ELG rules, which CUB/UCS admit are not included in the 2020 audit period.

{¶ 110} As noted previously, this proceeding is meant to determine the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during the calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019. Entry (May 5, 2021) at ¶¶ 3, 5, Entry (July 7, 2023) at ¶ 33. It is our objective to effectuate the intent of the General Assembly when it passed R.C. 4928.148. As to the Companies' management of their respective LGR Riders, the Commission affirms the findings of the Audit Reports that the Companies have properly allocated and billed the capital expenses incurred during the audit period (Staff Ex. 2 at 80-85; Staff Ex. 4 at 84-90; Staff Ex. 6 at 86-91). In total, OVEC capital spending in 2020 was

$8.55 million (Staff Ex. 2 at 81; Staff Ex. 4 at 85; Staff Ex. 6 at 87). We disagree with the Auditor, however, that a cap on capital expenditures should be set primarily because the statute does not authorize the Commission to set such a cap, as doing so may preclude otherwise prudently-incurred costs from recovery. Additionally, even if we could impose a cap, we find it unnecessary in this proceeding, as the Auditor determined the process of planning and executing individual capital projects appears to be well-managed. (Staff Ex. 2 at 82; Staff Ex. 4 at 87; Staff Ex. 6 at 89.) Further, we agree that the environmental upgrades cited by CUB/UCS are outside the scope of this proceeding, which was limited to costs incurred during the 2020 calendar year. Therefore, the Commission affirms these findings of the Audit Report and adopts the associated recommendations, except for a cap on capital expenditures, consistent with this Opinion and Order.

E. Summary of Commission Conclusions

{¶ 111} The Commission finds that the Audit Reports, including all recommendations, except for a cap on capital expenditures, should be adopted. In doing so, we determine that all costs and sales flowing through the Companies' LGR Riders for the period of January 1, 2020, to December 31, 2020, are prudent and reasonable.

{¶ 112} As noted above, we find the audit was conducted appropriately and consistent with our directives, as well as R.C. 4828.148. The Commission notes that LEI's analysis in each of the three reports was thorough and detailed. While the focus of the hearing and the briefs was on LEI's general overall conclusions, we recognize that the Auditor reviewed several specific issues associated with the LGR Riders and the Companies' respective OVEC entitlements and made determinations of prudency as to each issue. This includes: OVEC bill and LGR Rider reconciliation (e.g., ensuring OVEC bill, journal entries and rider charges are consistent, and analyzing over/under recovery); disposition of energy and capacity (i.e., the commitment strategy); fuel and variable costs (e.g. coal procurement and coal inventory management); environmental compliance; capital expenses; and power plant operations (e.g., organizational staffing and plant maintenance

costs). (Staff Ex. 2 at 7-11; Staff Ex. 4 at 7-11; Staff Ex. 6 at 7-11.) It is evident from the Audit Reports that overall, and in regards to each specific issue, the Auditor found the Companies' actions to be appropriate and sensible and, accordingly, prudent. We observe that no disallowances were recommended and no findings of imprudence were made. The Commission additionally does not find any evidence of undue influence in the creation of the Audit Reports or any reason to believe that LEI was prevented from conducting an independent review. The function of this review, as originally stated in the Entry opening this proceeding, is to determine the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during the calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019. Entry (May 5, 2021) at ¶¶ 3, 5, Entry (July 7, 2023) at ¶ 33. We find the Auditor competently completed that task and emphasize that LEI was not responsible for adjudicating the existence or continuation of the statutorily imposed rider. On this point, we also note that it was very telling by the fact that intervenors cited to other state public utility commissions for supportive case law in their briefs when those other states do not have a similar statutory scheme in place.

{¶ 113} As to Companies' management of the LGR Riders, the Commission affirms the findings of the Audit Reports that the Companies prudently handled their OVEC entitlements, subject to the recommendations described in each respective report. We also uphold the Auditor's findings that OVEC's commitment strategy was prudent at the time. Consistent with the Supreme Court of Ohio, we analyze prudency at the time the decision was made. *In re Application of Suburban Natural Gas Co.*, 2021-Ohio-3224, 166 Ohio St. 3d 176. Largely at issue in this case is whether it was prudent to offer the OVEC plants under an economic strategy during April and June of 2020, and a must-run strategy for the remainder of the year. In hindsight, it is possible utilizing an economic commitment strategy beyond the temporary time period may have been more profitable; however, the main reason many coal plants consistently operate under a must-run strategy is that there are significant costs associated with starting up and shutting down the plants. As described above, R.C. 4928.148

requires the recovery of "prudently incurred costs," regardless of whether they are fully offset by market revenues. To find otherwise would run contrary to the plain language of the law. Accordingly, while it may retroactively appear that, in some months, it would have been more prudent for OVEC to have implemented an economic strategy, other factors come into play to demonstrate that it was still prudent to go forward with a must-run commitment. Nonetheless, we agree with the Auditor's recommendation that the Companies should advocate to allow this flexibility authorizing OVEC plants to be committed either as must-run or based on economic commitment on an ongoing basis (Staff Ex. 2 at 10; Staff Ex. 4 at 10; Staff Ex. 6 at 10).

{¶ 114} Though the Audit Reports recommend continued and/or further evaluation of certain practices by the Companies related to the LGR Riders, the Auditor found "[o]verall, . . . the processes, procedures, and oversight were mostly adequate and consistent with good utility practice, given that the [ICPA] is in place and customers will be charged for the cost of the plants until at least May 2024." (Staff Ex. 2 at 9-11; Staff Ex. 4 at 9-11; Staff Ex. 6 at 9-11). We agree with the Auditor's findings and, thus, find that the recommendations should be adopted, unless specifically rejected in this Opinion and Order,

F. LEI's Request for Additional Funds

{¶ 115} As a final matter, on March 26, 2024, and again on April 10, 2024, Dr. Marie Fagan, on behalf of LEI, filed correspondence requesting a change order for this engagement. Dr. Fagan states that it now understands that the Commission intends that LEI's preparation and testimony budget must also include reimbursable expenses, where it previously understood that budget could only account for professional fees. Dr. Fagan states that LEI's estimated hours of preparation required for the hearing in this case was originally 44.5 hours, but the actual figure was slightly over 60 hours, as LEI had spent an additional day in Columbus providing testimony. Dr. Fagan submits that the net impact of the above change was 15.81 additional hours billed at $450/hour, as well as reimbursable expenses of $2,971, totaling $10,083.

{¶ 116} OCC and OMAEG jointly filed a response to LEI's request on April 4, 2024, in response to LEI's first filed correspondence, which had various figures redacted from it, including the requested increase in LEI's budget for this engagement. OCC and OMAEG recommend that, if the Commission grants LEI's request, that residential consumers and Ohio manufacturers not pay for the additional cost. Citing to the Commission's May 5, 2021 RFP, OCC and OMAEG assert that LEI knew what the Commission's budgeting and billing practices were well ahead of the hearing in this case, and point to previous cases in which LEI performed similar work and provided testimony before the Commission.

{¶ 117} On April 19, 2024, Staff filed correspondence in which it recommends that the Commission approve payment of the added expenses for the reasons outlined in LEI's correspondence.

{¶ 118} The Commission's RFP states that for each audit, the actual costs associated with preparing and presenting expert testimony before the Commission during the applicable hearing will include time and materials not to exceed $20,000 without approval. Here, LEI's correspondence states that its costs associated with preparing and presenting expert testimony totaled $30,083, which exceeds the budget allotted by $10,083. We note this request is substantially similar to an unopposed request made by LEI, and subsequently granted by the Commission, in the *2019 Duke Rider PSR Audit*. *2019 Duke Rider PSR Audit*, Entry (Mar. 22, 2023); see also *In re the Application of Duke Energy Ohio, Inc.*, Case No. (where the Commission granted the auditor's request for an additional $7,780 above the contract's specified total of $119,795 to cover additional hearing expenses). Despite the ALJs' best efforts to conduct the hearing in this proceeding in a timely fashion, the cross-examination of Dr. Fagan lasted over the span of three days, which required her to make additional arrangements to stay in Columbus for an extra night. It is not surprising that this resulted in additional unanticipated expenses. Additionally, OMAEG and OCC do not provide any basis for the additional $10,083 not to be recovered similarly to other costs incurred during the course of the audit. Upon review of the filings, the Commission finds LEI's request for

additional funds, as filed on April 10, 2024, to be reasonable, and therefore, approves the request.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 119} The Companies are electric distribution utilities and public utilities as defined in R.C. 4928.01(A)(6) and R.C. 4905.02, respectively. As such, the Companies are subject to the Commission's jurisdiction.

{¶ 120} On July 14, 2021, the Commission selected LEI to complete the audit.

{¶ 121} On December 17, 2021, LEI filed its Audit Reports.

{¶ 122} The ALJ granted motions to intervene filed by OCC, Kroger, OMAEG, OEC, CUB, UCS, and Sierra Club.

{¶ 123} An evidentiary hearing commenced on October 31, 2023, and continued until it was adjourned on November 6, 2023.

{¶ 124} On July 28, 2022, Staff filed its initial brief. Duke, OEG, OCC, and jointly, OMAEG and Kroger filed their initial briefs on July 29, 2022. On August 19, 2022, reply briefs were filed by Duke, Staff, OCC, and jointly by OMAEG and Kroger.

{¶ 125} Based on the record, we find that LEI's Audit Reports of the Companies' LGR Riders for the period of January 1, 2020, to December 31, 2020, should be approved and adopted, subject to the findings discussed herein.

{¶ 126} The Commission finds that LEI's request for additional funds should be approved.

VII. ORDER

{¶ 127} It is, therefore,

{¶ 128} ORDERED, That, LEI's audits of the Companies' LGR Riders for the period of January 1, 2020 to December 31, 2020, including its accompanying recommendations, be adopted, except for the cap on capital expenditures, as set forth in this Opinion and Order. It is, further,

{¶ 129} ORDERED, That LEI's request for additional funds be approved. It is, further,

{¶ 130} ORDERED, That all pending requests for ceritification of interlocutory appeals be denied as moot. It is, further,

{¶ 131} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

MJA/JMD/dmh

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Case No(s). 21-0477-EL-RDR

Summary: Opinion & Order that the Commission approves and adopts the audits performed by London Economics International LLC of the Legacy Generation Resource Riders 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 for the period of January 1, 2020, to December 31, 2020, consistent with the findings within this Opinion and Order. Further, the Commission approves the request of London Economics International LLC for additional funds electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio.