IN THE SUPREME COURT OF OHIO

In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018.	)	Case No. 2024-1735
	)	On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2019.	)	Pub. Util. Comm. Case Nos. 18-1004-EL-RDR, 18-1759-EL-RDR

MERIT BRIEF OF APPELLANTS OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Maureen R. Willis
(Reg. No. 0020847)
Ohio Consumers' Counsel

John Finnigan
(Reg. No. 0018689)
Counsel of Record
Assistant Consumers' Counsel

William J. Michael
(Reg. No. 0070921)
Senior Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone [Finnigan]: (614) 466-9585
Telephone [Michael]: (614) 466-1291
john.finnigan@occ.ohio.gov
william.michael@occ.ohio.gov

Attorneys for Appellant,
Office of the Ohio Consumers' Counsel

Kimberly W. Bojko
(Reg. No. 0069402)
Counsel of Record

Emma Y. Easley

David A. Yost
(Reg. No. 0056290)
Attorney General of Ohio

John H. Jones
(Reg. No. 0051913)
Section Chief, Public Utilities Section

Thomas Lindgren
(Reg. No. 0039210)

Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-4397 - Telephone
(614) 644-8764 - Facsimile
john.jones@ohioAGO.gov
thomas.lindgren@ohioAGO.gov

Attorneys for Appellee,
Public Utilities Commission of Ohio

Steven T. Nourse
(Reg. No. 0046705)
Counsel of Record

Michael J. Schuler
(Reg. No. 0082390)

(Reg. No. 0102144)
Carpenter Lipps LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
easley@carpenterlipps.com

Attorneys for Appellant,
The Ohio Manufacturers' Association
Energy Group

American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
(614) 716-1608
(614) 716-2950 (Facsimile)
stnourse@aep.com
mjschuler@aep.com

Eric B. Gallon
(Reg. No. 0071465)

L. Bradfield Hughes
(Reg. No. 0070997)

Porter, Wright, Morris & Arthur, LLP
41 South High Street, Suite 3100
Columbus, Ohio 43215
(614) 227-2053
(614) 227-2100 (Facsimile)
egallon@porterwright.com
bhughes@porterwright.com

Attorneys for Intervening Appellee,
Ohio Power Company

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") appeal the Public Utility Commission of Ohio's ("PUCO") decision that charged Ohioans for a $74.5 million coal plant subsidy over a two-year period. The very large coal plant subsidy resulted from the coal plant owners running the plants 24/7 and bidding energy from the plants into the market when the plants were not even covering their variable costs of operation. The PUCO approved the charges to consumers despite AEP not demonstrating that its bidding behavior "is prudent and in the best interest of retail ratepayers" – the standard of review adopted by the PUCO. (R. 112, ¶ 19).

Complicating this all is the fact that the PUCO Staff improperly influenced the PUCO-appointed independent auditor's well-founded conclusion that "[K]eeping the plants running does not seem to be in the best interests of the ratepayers." (R. EX. NRDC Ex. 2). The auditor's findings in her draft report, made known at the time solely to PUCO Staff and AEP, were removed after a PUCO Staff member asked the auditor to "tone down" this conclusion. The conclusion was toned down not just once but twice before the conclusion was completely written out of the final, filed public version of the audit report. (R. 12). These interactions between the PUCO Staff and the auditor came to light only through an OCC public records request.

To make matters worse, when OCC sought to subpoena the PUCO Staff member who directed the auditor to "tone down" her findings, the PUCO denied the subpoena. And the PUCO refused to give any evidentiary weight to the draft audit reports that contained the auditor's conclusion that the operation of the plants 24/7 was not in the best interest of ratepayers. (R. 138 at ¶ 76, Appx. 7).

The PUCO's Opinion and Order (R. 138, Appx. 7) and related Orders (R. 141, 144; Appx. 49, 58) (collectively, "PUCO Orders") approving the $74.5 million subsidy are

unreasonable and unlawful and against the manifest weight of the evidence. This Court should reverse and vacate the PUCO Orders. The Court should remand the case with specific instructions to lower consumers' rates by crediting them by $74.5 million. In the alternative, the Court should reverse and remand with instructions to redo the prudence review, this time with a different auditor, untainted by the impropriety associated with the case below.

II. STANDARD OF REVIEW

R.C. 4903.13 (Appx. 106), which governs this Court's review of PUCO orders, provides: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable * * *."

Proposition of Law No. 1 concerns a question of fact: whether the PUCO's determination that AEP's charges under the coal plant subsidy rider for 2018-2019 were prudent is against the manifest weight of the evidence. The Court will not overrule an administrative agency's factual findings "when the record contains sufficient probative evidence to show that the board's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." *In re Application of Champaign Wind, L.L.C.*, 2016-Ohio-1513, ¶ 7.

Proposition of Law No. 2 involves legal issues. The issue is whether the PUCO violated OCC's and OMAEG's due process rights under the U.S. Const., amend. XIV (Appx. 144), the Ohio Const., art. I, § 16 (Appx. 124), and Ohio Adm.Code 4901-1-28(E) (Appx. 122) by rejecting OCC's motion to subpoena the PUCO Staff member who asked the auditor to change her conclusion in the draft audit report. This is a question of law to be reviewed *de novo.* The Court has "complete and independent power of review as to all questions of law." *Ohio Edison*

Co. v. Pub. Util. Comm., 78 Ohio St.3d 466, 469 (1997). The Court will use a *de novo* review of legal issues and make an independent interpretation of the issues. *Office of Consumers' Counsel v. PUC*, 58 Ohio St.2d 108, 118 (1979). No deference is given to the PUCO's rulings on questions of law. *TWISM Ents., L.L.C. v. State Bd. of Registration for Prof'l Eng'rs & Surveyors*, 2022-Ohio-4677, ¶ 3.

Proposition of Law No. 3 is a legal issue involving the proper conduct of independent prudency audits. The issue is whether the PUCO improperly used an "undue influence" standard instead of an "appearance of impropriety" standard to determine whether a new independent audit should occur. This is also a question of law to be reviewed *de novo.* The PUCO applied an "undue influence" standard at ¶ 76 of its Opinion and Order (R. 138 at ¶ 76, Appx. 7) without referencing any prior precedent where this standard originated. The "appearance of impropriety" standard arises under the codes of professional conduct for certified public accountants Am. Inst. of Certified Pub. Accountants Code of Professional Conduct (2022) (Appx. 117) and lawyers. Prof.Cond.R. 1.11 (Appx. 137)

With these standards in mind, the Court must resolve this appeal affecting AEP's 1.4 million residential consumers and Ohio manufacturers.

III. STATEMENT OF FACTS

The underlying PUCO case concerned a prudence audit of AEP's coal plant subsidy rider charges to consumers of $74.5 million. On January 15, 2020, the PUCO ordered its Staff to publish a request for proposals for an independent prudency audit of AEP's coal plant subsidy rider charges for January 1, 2018 through December 31, 2019. (R. 7). OCC and OMA filed motions to intervene. (R. 9, 23). By PUCO Entry, OCC and OMAEG were granted intervention. (R. 27, 46).

The coal plant subsidy rider collects AEP's share of costs from two Ohio Valley Electric Corporation ("OVEC") coal plants: (1) Kyger Creek, a five-unit, 1,086 MW coal plant in Gallia County, Ohio, and (2) Clifty Creek, a six-unit, 1,303 MW coal plant in Jefferson County, Indiana. Both coal plants were built in the 1950's and are partially owned by AEP. (R. 12 at 12-13).

The OVEC coal plants do not supply electricity to AEP's consumers. (R. 12 at 13). Instead, the coal plants were intended to act as "a financial hedge against fluctuating prices in the wholesale power market in order to stabilize retail-customer rates." *In re Application of Ohio Power Co*., 2018-Ohio-4698, ¶ 3. When wholesale power prices exceed OVEC's costs, the rider is a credit to consumers. *Id.*, ¶ 4. Conversely, when OVEC's costs exceed wholesale power prices, the rider is a charge to consumers. *Id.* This Court affirmed prior PUCO orders allowing AEP to collect OVEC costs through the coal plant subsidy rider, subject to a prudency review. *Id.*

The coal plants are bid into the competitive PJM wholesale markets. (R. 1218-24). PJM "conducts a competitive auction to set wholesale prices for electricity. These wholesale auctions serve to balance supply and demand on a continuous basis, producing prices for electricity that reflect its value at given locations and times throughout each day." *FERC v. Elec. Power Supply Ass'n,* 577 U.S. 260, 268 (2016). The daily competitive PJM auctions "accept the generators' bids in order of cost (least expensive first) until they satisfy the LSEs' [load-serving entities] total demand. The price of the last unit of electricity purchased is then paid to every supplier whose bid was accepted, regardless of its actual offer; and the total cost is split among the LSEs in proportion to how much energy they have ordered." *Id.* at 268.

AEP chose the OVEC plants for the coal plant subsidy rider without any competitive bidding process to determine whether other less costly generation owners would supply electricity at a lower price. (R. 1242-44). When the coal plant subsidy rider was initially approved, AEP claimed the OVEC costs "are relatively stable, in comparison to the wholesale power market, and rise and fall in a manner that is counter-cyclical to the market, thereby creating the PPA [R]ider's hedging effect for ratepayers." *In re AEP ESP 3,* PUCO No. 13-2385-EL-SSO, 2015 Ohio PUC LEXIS 161 at 17 (Feb. 25, 2015). AEP also claimed the rider "was projected to provide ratepayers with a net credit of $110 million over the life of the rider." *In re Application of Ohio Power Co*., 2018-Ohio-4698*,* ¶ 59.

The coal plant subsidy rider, however, produced zero credits and produced $135.4 million in charges during the first four years it was in effect, as shown below:

Table 1: Coal Plant Subsidy Rider Rate Credits and Charges 2016-2019

Year	Credit	Charge
2016	0	($21.7 million)
2017	0	($39.2 million)
2018	0	($25.4 million)
2019	0	($49.1 million)
Total:	0	($135.4 million)

2016 – R. 12 at 32, Fig. 13; 2017 - *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company*, Case No. 18-1003-EL-RDR, Audit Report at 37 (Aug. 8, 2019); 2018 – R. Trans. Hearing Transcript at Vol. V, p. 44:8 – 21; and 2019 – R. Trans. Hearing Transcript at Vol. V, p. 44:8 – 21.

The two main PJM energy market bidding strategies are known as "economic" or "must-run" ("must-run" is sometimes called "self-scheduled" or "self-committed"). (R. 12 at 44, 52-53). OCC witness Devi Glick explained: "A plant committed as 'economic' will operate only if it is the least-cost option available to the market… A unit designated as must-run will operate with

a power output no less than its minimum operating level. The unit receives market revenue (and incurs variable operational costs) but does not set the market price of energy. If the market price of energy falls below its operational cost, a must-run unit will not turn off and can incur losses that a utility often seeks to collect from consumers." (R. 83 at 51: 8-10, R. EX. OCC Ex. 14).

The PUCO hired London Economics International LLC to perform an independent audit of "the prudency of all costs and sales flowing through the PPA Rider and to demonstrate that the Company's actions were in the best interest of ratepayers." (R. 7, Attch. RFP No. RA20-PPA-1 at 4). At the outset, the independent auditor noted the OVEC plants' built-in competitive disadvantage: "It's cheaper to build a new CCGT [Combined Cycle Gas Turbine power plant] to meet demand in PJM than to have the OVEC plants going forward." (R. Trans. Hearing Transcript Vol. II at 383: 2-4).

The independent auditor stated that the OVEC plants used a "must-run" bidding strategy at all times, except for one unit: "OVEC self-schedules all but one of the units (i.e., it offers them as 'must run') in accordance with the OVEC Operating Committee procedures, as approved by the Operating Committee." (R. 12 at 44). The independent auditor concluded that: "Because the OVEC plants are offered into the PJM DA [Day-Ahead] market as 'must-run,' there are times during which the PJM DA prices do not cover the variable costs of running the plants." (R. 12 at 52). OCC witness Glick stated: "During 2018 and 2019, OVEC's variable costs exceeded [PJM Day-Ahead Energy Market] market locational marginal prices over half the time the units were online." (R. 83, OCC Ex. 14 at 49:18-20).

The independent auditor stated that using a daily profit-and-loss report to decide whether to commit the plants as "economic" versus "must-run" is "commonsense." (R. Trans. Hearing Transcript Vol II at p. 312: 6). The independent auditor agreed "that a profit/loss statement can

help a reasonable utility determine when to use an economic commitment status to avoid incurring negative energy margins by operating the plant." (R. Trans. Hearing Transcript Vol. II at p. 315: 16-23).

The independent auditor concluded that the OVEC plants were committed as "must-run" without using a daily financial forecast to determine whether the projected PJM revenues would cover the projected plant costs: "We looked at their operating procedures. I don't think that included specific forecasts of PJM costs." (R. Trans. Hearing Transcript Vol. II at p. 436: 21-23). The independent auditor stated that AEP should "…have a careful look at when you are offering must run or economic commitment." (R. Trans. Hearing Transcript Vol. II at p. 329:19-20). The independent auditor also stated that the impact on ratepayers "weighs against [the OVEC plants] operating in the way they have been. (R. Trans. Hearing Transcript Vol. II at 342:12-17). The independent auditor filed the final version of her audit report in the PUCO's docket on September 16, 2020. (R. 12).

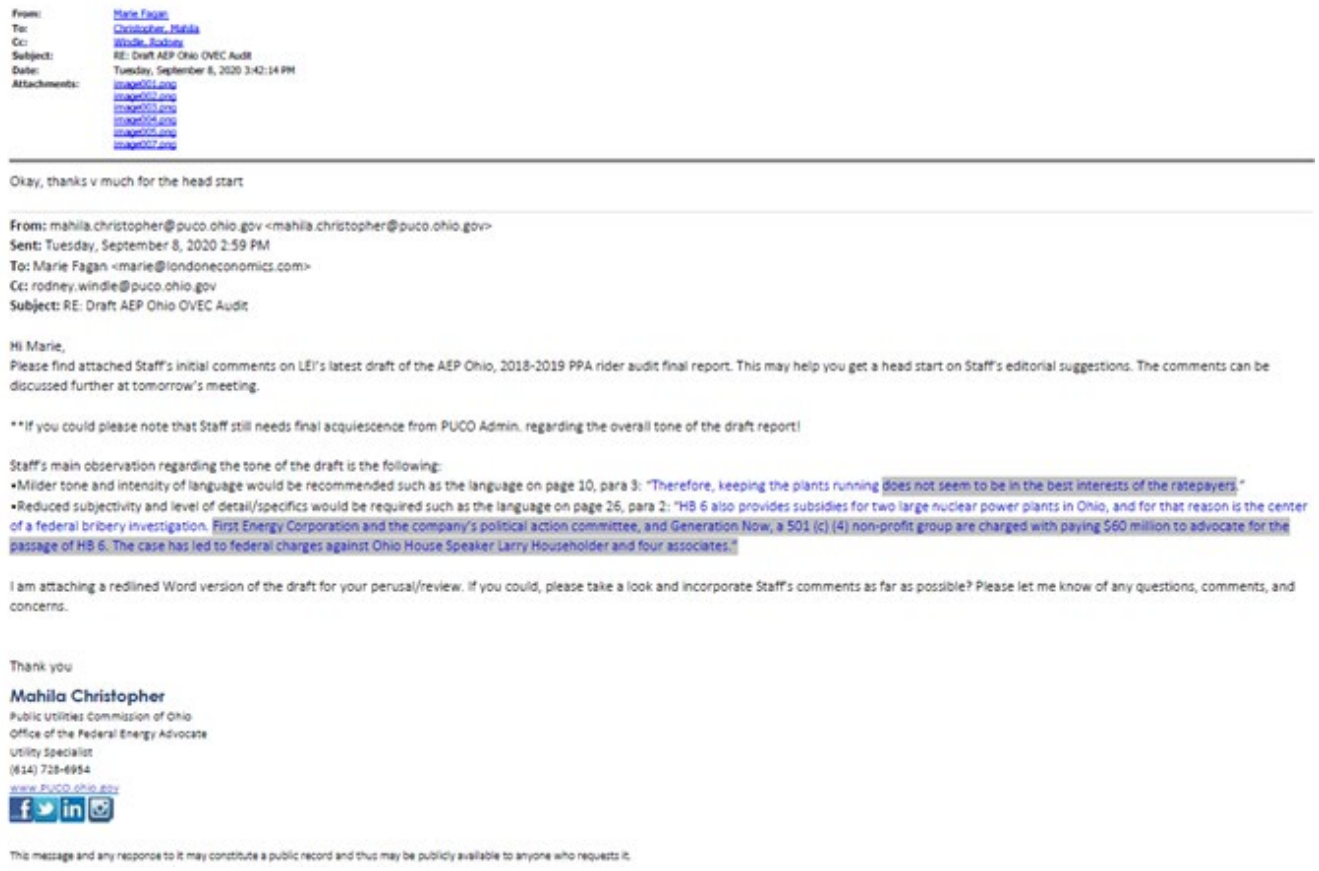
The PUCO's response to a public records request revealed some disturbing communications between the independent auditor and PUCO Staff relating to draft versions of the audit report. The independent auditor concluded in her September 8, 2020 draft audit report (submitted only to PUCO Staff): "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers," (R. EX. NRDC Ex. 2). On the same day, Mahila Christopher of PUCO Staff sent the auditor this email that highlighted the auditor's objectionable conclusion and stated:

> If you could please note that Staff still needs final acquiescence from PUCO Admin regarding the overall tone of the draft report…
>
> Staff's main observation regarding the tone of the draft report is the following: Milder tone and intensity of language would be recommended such as the language on page 10, para. 3:

> ‘Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers.’

R. EX. NRDC Ex. 2

The email is shown below:[1]



From: Marie Fagan
To: Christopher, Mahila
Cc: Windle, Rodney
Subject: RE: Draft AEP Ohio OVEC Audit
Date: Tuesday, September 8, 2020 3:42:14 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image007.png

Okay, thanks v much for the head start

From: mahila.christopher@puco.ohio.gov <mahila.christopher@puco.ohio.gov>
Sent: Tuesday, September 8, 2020 2:59 PM
To: Marie Fagan <marie@londoneconomics.com>
Cc: rodney.windle@puco.ohio.gov
Subject: RE: Draft AEP Ohio OVEC Audit

Hi Marie,
Please find attached Staff's initial comments on LEI's latest draft of the AEP Ohio, 2018-2019 PPA rider audit final report. This may help you get a head start on Staff's editorial suggestions. The comments can be discussed further at tomorrow's meeting.

**If you could please note that Staff still needs final acquiescence from PUCO Admin. regarding the overall tone of the draft report!

Staff's main observation regarding the tone of the draft is the following:
•Milder tone and intensity of language would be recommended such as the language on page 10, para 3: "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers."
•Reduced subjectivity and level of detail/specifics would be required such as the language on page 26, para 2: "HB 6 also provides subsidies for two large nuclear power plants in Ohio, and for that reason is the center of a federal bribery investigation. First Energy Corporation and the company's political action committee, and Generation Now, a 501 (c) (4) non-profit group are charged with paying $60 million to advocate for the passage of HB 6. The case has led to federal charges against Ohio House Speaker Larry Householder and four associates."

I am attaching a redlined Word version of the draft for your perusal/review. If you could, please take a look and incorporate Staff's comments as far as possible? Please let me know of any questions, comments, and concerns.

Thank you

Mahila Christopher
Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov

This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

After receiving the above email request to tone it down, the auditor revised her conclusion again. The revised conclusion was contained in another draft of the audit report that she sent to AEP on September 9, 2020. Her revised opinion in the September 9, 2020 draft stated: “However LEI’s analysis shows that the OVEC contract overall is not in the best interest of AEP Ohio ratepayers.” (R. Trans. Hearing Transcript Vol. II at p. 477-482). Once again, this

[1] The email (R. EX. NRDC Ex. 2) is shown in the same font size as it was received from the PUCO in response to OCC’s public records request.

conclusion does not appear in the final version of the audit report filed with the PUCO on September 16, 2020. (R. 12).

At the hearing, the auditor was asked why her conclusion: "Therefore keeping the plants running does not seem to be in the best interests of the ratepayers"-- was not included in the final version of the audit report. The auditor admitted: "[O]ur client, Staff, asked us to edit, take it out whatever…" (R. Trans. Hearing Transcript Vol. I at p. 177: 10-12).

This language from the draft audit reports, along with Mahila Christopher's email asking the auditor to change her conclusion, were admitted into evidence at the evidentiary hearing. (R. EX. NRDC Ex. 2). In deciding the case, however, the PUCO refused to give any evidentiary weight to the draft audit reports or the auditor's conclusions before they were changed at the request of her client, the PUCO Staff. The PUCO ruled that "[r]egardless, to rely upon draft language that was not included in the final audit report would be irresponsible"). (R. 138 at ¶ 76, Appx. 7).

OCC filed a motion to subpoena the Staff member, Mahila Christopher, for cross-examination at the evidentiary hearing to ask about the changes she asked the auditor to make to the draft audit report. (R. 51). The PUCO denied OCC's motion for subpoena. (R. 103). The PUCO's Opinion and Order simply concluded that the Administrative Law Judges acted properly in denying the subpoena, based on their general discretionary authority to conduct hearings. (R. 138 at ¶ 46, Appx. 7).

Following the PUCO's approval of AEP's coal plant subsidy charges (R. 138, Appx. 7), OCC and OMAEG sought rehearing (R. 139, Appx. 66). The PUCO issued a rehearing order. (R. 141, Appx. 49). OCC and OMAEG sought rehearing once again. (R. 142, Appx. 87). The PUCO

issued a second rehearing order. (R. 144, Appx. 58). The OCC and OMAEG appealed these PUCO Orders. (R. 145, Appx. 1).

IV. ARGUMENT

PROPOSITION OF LAW NO. 1: The Commission's order is against the manifest weight of the evidence when it ignores evidence of imprudence by the utility and conclusions rendered by the independent auditor in a draft audit report.

The PUCO unreasonably concluded that AEP's $74.5 million in coal plant subsidy rider charges were prudent and "in the best interest of retail ratepayers." (R. 141 at ¶ 18, Appx. 49). The PUCO's ruling was against the manifest weight of the evidence.

The PUCO did not give sufficient weight to the plain fact that the OVEC plants were bid into the wholesale market without using daily financial data to determine whether the expected wholesale market revenues would cover the plants' variable operating costs. The PUCO also completely ignored evidence that the independent auditor, in a draft audit report, concluded that the 24/7 running of the plants was not in the best interest of consumers. And the PUCO ignored or downplayed its PUCO Staff's interference with the independent auditor's ultimate findings.

In *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 530 (1993), this Court explained that a prudent utility decision is one that a reasonable person would have made at the time, without the benefit of hindsight judgment. When the PUCO approved the coal plant subsidy rider, many parties objected that this might allow AEP to bid the OVEC plants into the PJM market in a non-competitive manner, which would harm consumers and would also harm retail competition. In *In re AEP PPA Rider,* PUCO No. 14-1693-EL-RDR, 2016 Ohio PUC LEXIS 269 at 89 (Mar. 31, 2016), the PUCO responded to these objections by requiring AEP to meet this burden of proof in the coal plant subsidy rider prudency reviews:

> 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. As noted above, AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers.

In re AEP PPA Rider, PUCO No. 14-1693-EL-RDR, 2016 Ohio PUC LEXIS 269 at 89 (Mar. 31, 2016).

When the PUCO opened the present case, it ordered PUCO Staff to issue a Request for Proposals ("RFP"), approved by the PUCO, to hire an independent auditor. The RFP stated that the independent audit's purpose was "to establish the prudency of all costs and sales flowing through the PPA Rider and to demonstrate that the Company's actions were in the best interest of ratepayers." (R. 7, Attch. RFP No. RA20-PPA-1 at 4).

The OVEC coal plants operated under a built-in competitive disadvantage. The OCC witness Michael P. Haugh testified: "Often these older coal plants have higher operating costs than newer more efficient plants. Older plants use less efficient technology and similar to old cars, tend to break down more often and require higher maintenance costs to keep them running. These older coal plants have been displaced by newer, lower cost and more efficient natural gas generation along with wind and solar plants." (R. 84 at 16, R. EX. OCC Ex. 21, M. Haugh Test.). As proof of this competitive disadvantage, "From 2010 to 2019, 546 coal-fired power plants nationwide closed. This was primarily due to the stagnant demand and increasing competition from lower-priced natural gas-fired power plants." (*Id.* at 17).

The OCC witnesses Haugh and Glick and Natural Resource Defense Counsel ("NRDC") witness Fisher all testified that a reasonable plant operator in a competitive marketplace seeking to maximize revenues will use a daily financial report to decide whether to commit the plant as

"economic" or "must-run." (R. 84 at 28, R. EX. OCC Ex. 21, M. Haugh Test.; R. 83 at 51-52, R. EX. OCC Ex. 14, D. Glick Test.; R. 97 at 16, R. EX. NRDC Ex. 3, J. Fisher Test.) A prudent operator does this daily financial analysis to see whether the expected PJM wholesale market revenues will cover a plant's expected variable operating costs and, if so, will submit an economic bid. The OCC witness Haugh explained: "The plant operator should do a daily analysis of the costs and expected revenues from participating in the [PJM] Day-Ahead Energy Market. (R. 84 at 28, R. EX. OCC Ex. 21, M. Haugh Test.). The analysis should cover not only that day, but the next several days ahead for units that are not easily turned on and off. *Id*. If the analysis shows that the expected revenue will cover the plant's variable operating costs, then the operator can commit the plant to the Day-Ahead Energy Market. *Id*. If the plant's variable operating costs, plus shut-down and start-up costs, are projected to exceed expected revenues for a few days or longer, then the operator should either designate the plant as economic or shut down the plant until prices recover." *Id*.

The OCC witness Glick explained: "Because units operated by the market follow short-term economic signals, they tend to cycle off when market prices are low and therefore do not generally incur significant operational losses. The OVEC units, on the other hand, stayed online for the vast majority of 2018 and 2019, despite incurring significant net revenue losses. This is because the plants were predominantly self-committed with a must-run status whenever they were available, without regard for the impact on AEP Ohio's consumers' interests. OVEC used no daily analysis to drive its unit commitment decisions during 2018 and 2019…." (R. 83 at 51, R. EX. OCC Ex. 14, D. Glick Test.).

The NRDC witness Jeremy Fisher testified: "Prudent operation requires that operators do a proactive assessment asking if the plant is expected to be profitable over a period of days, or if

it will lose money in the energy market…" (R. 97 at 16, R. EX. NRDC Ex. 3, J. Fisher Test.). The AEP witness Stegall admitted that AEP does this type of daily financial analysis when making commitment decisions for all of its other plants (except for the OVEC plants) and that this is good utility practice. (R. Trans. Hearing Transcript Vol III at p. 782:9 – 783:23).

The auditor found that the OVEC plants did not follow this standard industry practice. The auditor stated that the OVEC plants (except for one unit) were bid into the PJM market as "must-run" at all times they were available. (R.12 at 44). As a result, the PJM revenue failed to cover the OVEC plants' variable operating costs for over one-half of the time during the audit period. *Id.* at 25. This imprudent management resulted in $74.5 million in coal plant subsidy rider charges. *Id*. This demonstrates that the OVEC plants "…were not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues." *In re AEP PPA Rider,* PUCO No. 14-1693-EL-RDR, 2016 Ohio PUC LEXIS 269 at 89 (Mar. 31, 2016).

The PUCO stated: "AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers." *Id.* AEP failed to meet this required burden of proof.

AEP did not introduce any evidence to show that it used daily financial reports to decide how to bid the OVEC plants into the PJM market. The auditor stated: "We looked at their operating procedures. I don't think that included specific forecasts of PJM costs." (R. Trans. Hearing Transcript Vol. II at 436: 21 -23). AEP witness Stegall testified that AEP uses daily financial reports in deciding how to bid all of its coal plants across the country except for the OVEC plants. (R. 112; R. Trans. Hearing Transcript Vol III at 782:9–783:23). Simply put, AEP failed to carry its burden of proof that the "must-run" bidding strategy is in the best interest of

retail ratepayers and that the "must-run" bidding "is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues." *In re AEP PPA Rider,* PUCO No. 14-1693-EL-RDR, 2016 Ohio PUC LEXIS 269 at 89 (Mar. 31, 2016).

The Michigan Public Service Commission disallowed costs from the same OVEC plants, involving the same "must-run" bidding strategy, for AEP's affiliated Indiana/Michigan utility company. *In re Indiana Michigan Power Co. Power Supply Plan,* MPSC No. U-20530, 2023 MICH PSC LEXIS 12 (Feb. 2, 2023).

The Michigan Commission "recognized the value of long-term contracts, but also that decisions to enter into the contract did not 'absolve a utility from monitoring and responding to market conditions and system needs and making good faith efforts to manage existing contracts.'" *Id.* at 11. The Commission further stated that proper management "may entail meaningful attempts to renegotiate contract provisions to ensure continued value for ratepayers as market conditions change." *Id.* at 11. Just as AEP failed to do in the Michigan case (involving the same OVEC plants and the same must-run bidding strategy), AEP in the present case failed to present evidence that it responded to market conditions by changing the bidding strategy or taking other action to manage the contract to avoid PJM wholesale market losses.

Despite all this evidence of imprudence, the PUCO found that AEP's coal plant subsidy rider charges were prudent. The PUCO's orders are manifestly against the weight of the evidence in the record. *Ohio Consumers' Counsel v. Pub. Util. Comm*., 2007-Ohio-4276, ¶¶ 26, 41.

All of the above evidence led the auditor to conclude in her draft report: "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers." (R. EX. NRDC Ex. 2). Mahila Christopher of PUCO Staff asked the auditor to "tone down" this

conclusion. *Id.* The auditor deleted this conclusion from the final version of the audit report. (R. 12).

At the evidentiary hearing, the PUCO totally disregarded the draft audit reports ("[T]o rely upon draft language that was not included in the final audit report would be irresponsible"). (R. 138 at ¶ 76, Appx. 7). Only by ignoring the draft audit reports and Staff's actions was the PUCO able to reach the exact opposite conclusion: "[T[he actions taken by [AEP] were in the best interest of retail ratepayers." (R. 141 at ¶ 18, Appx. 49). The PUCO's Orders are against the manifest weight of the evidence.

The PUCO never explained how it reached its conclusion that the coal plant subsidy rider charges were "in the best interest of ratepayers." Evidence in the record proved otherwise. The PUCO just ignored the evidence produced and took affirmative measures to limit other evidence that helped to prove imprudence. It did that by refusing to issue a subpoena for the staff member who interfered with the independent auditor's prudence investigation. And it ruled that the conclusions of the auditor in the draft audit deserved no weight.

The PUCO's Orders should be reversed. The PUCO's Orders were against the manifest weight of the evidence.

PROPOSITION OF LAW NO. 2: The Commission violates the U.S. Const., amend. XIV (Appx. 144) and the Ohio Const., art. I, § 16 (Appx. 124) by denying a party's subpoena for a PUCO Staff member to testify at an evidentiary hearing where the PUCO Staff member asked the independent auditor to change her opinion on the ultimate issue in the case.

The ultimate issue in this case was whether the "bidding behavior is prudent and in the best interest of retail ratepayers." *In re AEP PPA Rider,* PUCO No. 14-1693-EL-RDR, 2016 Ohio PUC LEXIS 269 at 89 (Mar. 31, 2016). PUCO Staff member Mahila Christopher asked the independent auditor to change her opinion in the draft audit report: "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers." (R. EX. NRDC Ex. 2).

OCC subpoenaed Ms. Christopher for cross-examination at the evidentiary hearing (R. 56) but the PUCO denied the motion. (R. 103 at ¶ 14). This violated OCC and OMAEG's due process rights under the federal and Ohio constitutions.

The Fourteenth Amendment to the U.S. Constitution extended due process requirements to state governments and provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law…" U.S. Const., amend. XIV, § 1 (Appx. 144). The Ohio Constitution provides that every person "shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const., art. I, § 16 (Appx. 124). These constitutional provisions guarantee procedural due process, which includes the right to a fair hearing. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272 (1856).

The U.S. Supreme Court discussed the procedural due process right to a fair hearing in the context of an appeal from a PUCO ruling. *Ohio Bell Tel. Co. v. Public Utilities Com*., 301 U.S. 292 (1937). There the U.S. Supreme Court stated: "All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." *Id.* at 304.

In another procedural due process case involving an appeal of a PUCO order, the U.S. Supreme Court stated: "the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co*.

v. *Public Utilities Comm'n (No. 1),* 294 U.S. 63, 69 (1935). In the same case, the U.S. Supreme Court also found: "There was no suitable opportunity through evidence and argument . . . to challenge the result." *Id.* at 90.

Here the PUCO concluded that the coal plant subsidy rider charges were in the best interest of consumers (R. 141, at ¶ 18, Appx. 49), but it did not adequately explain how it reached this conclusion when a mountain of evidence, including the draft audit report, pointed otherwise. Without Ms. Christopher's testimony, "There was no suitable opportunity through evidence and argument . . . to challenge the result." *West Ohio Gas Co*. v. *Public Utilities Comm'n (No. 1),* 294 U.S. 63, 90 (1935). By depriving OCC and OMAEG of the opportunity to cross-examine PUCO Staff member Ms. Christopher, OCC and OMAEG were deprived of their due process rights. They were deprived of their due process right to a fair hearing.

The PUCO's orders also violated Ohio Adm.Code 4901-1-28(E). (Appx. 122). Under this rule, any person "making or contributing" to the audit report may be subpoenaed to testify at the hearing. Ms. Christopher's request that the auditor change the statement "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers" language shows that she "contributed" to the report. In fact, far from being just a contributor, this Staff member appeared to be directing the "independent" auditor what to say in her report. One can presume from what occurred – a request, followed by compliance from the auditor, that Ms. Christopher knew more than anyone else. The PUCO should have allowed OCC and OMAEG to bring her in through a subpoena to testify and be subject to cross-examination.

Cross-examination is often called "the greatest legal engine ever invented for the discovery of truth." *State v. Reiner*, 2001-Ohio-1800 at 608 (Cook, J., dissenting), *quoting California v. Green,* 399 U.S. 149, 158 (1970), *quoting* 5 Wigmore, Evidence (3 Ed.1940),

Section 1367. Instead of allowing cross-examination, the PUCO effectively shut down "the discovery of the truth" by denying the subpoena and ruling that no weight should be given to the auditor's conclusions in her draft report.

Ironically, the PUCO did not allow a party to influence the auditor's findings in another case. The PUCO recently ruled that it is "improper" and "inappropriate" for a utility to ask an independent auditor to change the auditor's opinion on a legal issue in a draft audit report. *In re Duke Energy Ohio's Distribution Capital Investment Rider,* PUCO No. 23-549-EL-RDR, 2025 Ohio PUC Lexis 24 at ¶¶ 39-40 (Jan. 8, 2025). (In that case, the auditor did change her wording but not her ultimate opinion.) *Id.* at ¶ 40.

In the *Duke Energy* case, the PUCO sternly criticized the utility for asking the auditor to change her opinion in a draft audit report: "Duke is a sophisticated utility that appears before us regularly and has participated in countless third-party audits of its riders and should know not to raise a legal issue such as this at a meeting of this type. We should not have to advise the Company—like we are currently doing—on how to conduct itself during proceedings before us." *Id.*at ¶ 40. In contrast, in the case below, the PUCO's Orders are completely silent on whether its Staff member's actions were improper.[2]

Instead of admonishing PUCO Staff for improperly influencing an independent audit (to the utility's benefit), the PUCO's ruling ducked the issue by treating it as a non-event: "Long stretches of hearing time and countless pages of filings have been devoted to arguing about a statement in a draft audit report which indicated that continued operation of the OVEC units

[2] The PUCO routinely permits utilities to review unfiled draft audit reports, to the exclusion of other parties. In the case below, the draft audit report was shared with AEP, but no other parties. While we do not have evidence of what influence AEP may have exerted on this matter, the PUCO's practice of sharing its draft audit reports with utilities seems highly questionable, unreasonable, and likely illegal (R.C. 4901.16) (Appx. 104). That practice must stop.

'would not be in the best interests of ratepayers' and which was not included in the final report filed with the Commission.'" (R. 138 at ¶ 76, Appx. 7). The PUCO swept the issue under the rug by concluding: "Regardless, to rely upon draft language that was not included in the final audit report would be irresponsible." *Id*.

Our system of justice should require more. The PUCO hired the auditor to perform an independent audit and "to establish the prudency of all costs and sales flowing through the PPA Rider and to demonstrate that the Company's actions were in the best interest of ratepayers." (R. 7, Attch. RFP No. RA20-PPA-1 at 4). Ms. Christopher's actions improperly interfered with the auditor's independence.

This Court has "consistently refused to substitute [its] judgment for that of the commission on evidentiary matters." *In re Champaign Wind, L.L.C.*, 2016-Ohio-1513, ¶ 30. The issue here does not involve the admissibility of evidence. Instead, the issue is whether the PUCO violated Ohio Adm.Code 4901-1-28(E) (Appx. 122) and whether OCC and OMAEG received a fair hearing where they were denied the right to cross-examine Ms. Christopher at the evidentiary hearing.

An administrative agency's order is void if based on a hearing that is "inadequate or manifestly unfair." *Interstate Commerce Com. v. Louisville & N. R. Co*., 227 U.S. 88, 91 (1913). The PUCO's actions upon review were manifestly unfair and designed to produce one result – a finding of prudent utility behavior. Denying OCC and OMAEG the opportunity to cross-examine Ms. Christopher violated Ohio Adm.Code 4901-1-28(E) (Appx. 122) and deprived OCC and OMAEG of their due process right to a fair hearing. And giving the auditor's draft report statements no weight allowed the PUCO to neatly come to its unsupported findings. This is the definition of a proceeding being manifestly unfair. The Court should reverse.

PROPOSITION OF LAW NO. 3: The Commission errs by failing to order a new independent audit when it improperly applies an "undue influence" standard instead of an "appearance of impropriety" standard to determine whether a PUCO Staff member improperly interfered with the audit.

The PUCO erred by applying an incorrect "undue influence" legal standard to decide whether PUCO Staff improperly influenced the auditor's report. PUCO Staff member Ms. Christopher emailed the auditor, asking her to "tone down" language from the draft audit report that running the OVEC plants was "not in the best interests of the ratepayers." (R. EX. NRDC Ex. 2). The PUCO applied an incorrect legal standard – whether there was any undue influence in preparing the audit report. (R. 138 at ¶ 76, Appx. 7). The correct legal standard, however, is whether the facts show any appearance of impropriety as to whether the auditor's objectivity was impaired.

The correct legal standard arises from the American Institute of Certified Public Accountants Code of Professional Conduct, which states:

> 0.300.050 Objectivity and Independence
>
> .01 Objectivity and independence principle. A member should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities. A member in public practice should be independent in fact and appearance when providing auditing and other attestation services.
>
> .02 Objectivity is a state of mind, a quality that lends value to a member's services. It is a distinguishing feature of the profession. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest. *Independence precludes relationships that may appear to impair a member's objectivity in rendering attestation services.* (Appx. 117).

This "appearance of impropriety" standard is similar to Prof.Cond.R. 1.11 (Appx. 137).

The PUCO erred by incorrectly requiring proof of actual undue influence over the audit process. By requiring proof of actual undue influence while at the same time denying a subpoena of the Staff member involved, the PUCO made it nearly impossible for OCC and OMAEG to

prevail. This is a *Tongren* issue. In, In *Tongren v. Pub. Util. Comm.,* 1999-Ohio-2006, the Court, based on R.C. 4903.09 (Appx. 105), reversed a PUCO order that relied on information that was not publicly available and not part of the record in the case. *Id.*

Here the PUCO found that undue influence had not been proven, but the PUCO deprived OCC and OMAEG of their right to question Ms. Christopher at the evidentiary hearing. OCC and OMAEG could not prove undue influence without access to her as evidence. As the *Tongren* Court stated: "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *Id.* at 17 OCC and OMAEG were prejudiced by this ruling because it deprived them of access to perhaps the most important witness in the case – the person who asked the auditor to alter her opinion in the draft audit report.

Moreover, the PUCO should have applied an "appearance of impropriety" standard. Clearly this audit failed to meet the "appearance of impropriety" standard.

The U.S. Supreme Court discussed an auditor's responsibility to uphold the public trust in *United States v. Arthur Young & Co*., 465 U.S. 805 (1984). The issue was whether the Court should recognize an accountant-client privilege to shield a public corporation's independent auditor's workpapers from discovery by the Internal Revenue Service. *Id.* The U.S. Supreme Court described the auditor's responsibility to the public as follows:

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial

> statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

Id. at 817-818. (Emphasis in original).

Independent auditors in PUCO cases should be held to the same standard. The PUCO's independent auditors must maintain their total independence from all parties, including PUCO Staff, to serve as a "public watchdog." Maintaining this total independence requires that the auditor avoid even the appearance of impropriety.

OCC and other intervenor witnesses provided substantial evidence that the coal plants were not bid into the PJM market in the same manner as a merchant operator would have acted and that the plants were not operated in the best interest of ratepayers. (R. 84 at 28, R. Ex. OCC Ex. 21, M. Haugh Test.; R. 83 at 51-52, R. Ex. OCC Ex. 14, D. Glick Test.; R. 97 at 16, R. Ex. NRDC Ex. 1, J. Fisher Test.). The auditor's statement in her draft audit report concurred with this evidence. (R. Ex. NRDC Ex. 2). PUCO Staff's email asking the auditor to "tone down" her audit report – and the auditor's acquiescence by removing the statement from her audit report – undoubtedly created an appearance of impropriety.

The PUCO erred by improperly using an undue influence standard instead of an appearance of impropriety standard. The Court should reverse.

V. RELIEF REQUESTED

OCC and OMAEG respectfully request that the Court reverse the PUCO's Orders with instructions to refund the $74.5 million in improper coal plant subsidy charges because the coal plant subsidy rider is subject to reconciliation. Alternatively, if the Court finds that a refund is barred by *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co*., 166 Ohio St. 254 (1957), OCC and OMAEG ask for that ruling to be overturned. As a third alternative if the Court rejects the

first two, the Court should reverse and remand with an instruction for the PUCO to perform a new audit by an independent auditor who is untainted by the appearance of impropriety.

A. Where rates have not been fully collected and there is a means to adjust existing rates, without balancing one set of rates against the other, there is no prohibited retroactive ratemaking.

Generally, refunds in the post-appellate process are not ordered in Ohio. This can be attributed to a 1957 holding of this Court, *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co*., 166 Ohio St. 254 (1957). The ruling in *Keco* prevented customers from seeking restitution for a rate increase originally approved by the PUCO but later found unlawful by the court. *Keco* at 259.

But *Keco* should not preclude the Court from prospectively adjusting AEP's charges for coal subsidies. In 2019, the Legislature transformed the coal plant subsidy rider into a new Legacy Generation Rider that will continue through 2030. R.C. 4928.148(A) (Appx. 108). The fact that AEP will continue collecting these OVEC costs through 2030 is an important point. That revenue stream provides the Court with the tool it needs to discretely adjust the rates without running afoul of *Keco*. It is a distinguishing factor which the Court can use to address the no-refund rule of *Keco* and prevent a windfall to the utility.

Following the *Keco* decision, the Court issued a ruling in 1999 expounding upon *Keco* in a case called *Lucas County Comm. v. Pub. Util. Comm*., 80 Ohio St.3d 344 (1999). *Lucas County Comm.* narrows the *Keco* decision by acknowledging a de facto exception that allows prospective rate adjustments when rates are continuing or where there is an adjustment mechanism built into the rates. *Id.* at 348.

In *Lucas County Comm.*, the rates that the appellant sought to remedy, through a refund or credit, had expired. *Id.* at 349. The rates appealed *in Lucas County Comm.* stemmed from an experimental mechanism called a "weather normalization adjustment program." *Id*. The weather

normalization program was agreed to in a stipulation and was a pilot program effective for a limited time — December 1994 through April 1995. *Id.* at 344. After the pilot expired, Lucas County filed a complaint with the PUCO alleging that the weather normalization adjustment mechanism was unjust and unreasonable, and caused customers to overpay the utility by $8.5 million. *Id*. Lucas County sought an $8.5 million refund, through a rebate or service credit. *Id.* The utility, Columbia Gas, moved to dismiss the complaint, claiming that such a refund would violate *Keco*. *Id.* The PUCO granted the motion to dismiss, and Lucas County appealed. *Id.*

The Court noted that the weather normalization program was an experimental program. *Id*. at 348. The Court observed that the PUCO had not approved any mechanism for adjusting the rates of the weather normalization program. Additionally, the Court emphasized that Lucas County failed to seek relief during the time that the weather normalization program (and the rates) was in effect. *Id.* Instead, Lucas County filed its complaint after the weather normalization program had been discontinued. *Id*.

The Court affirmed the PUCO, concluding that "there simply was no revenue from the challenged program against which the utilities commission could balance alleged overpayments, or against which it could order a credit. *Absent such revenue*, the commission would be ordering Columbia Gas to balance a past rate with a different future rate and would thereby be engaging in retroactive ratemaking, prohibited by *Keco*." *Id.* at 348-349 (Emphasis added).

Under the reasoning set forth in *Lucas County Comm.,* if there is revenue against which the PUCO could order a credit, then there would be no retroactive ratemaking. So if the rates sought to be prospectively adjusted continue and are not yet fully collected, a refund or credit could be issued without engaging in retroactive ratemaking. Such an adjustment would not be

balancing past rates with future rates — which is impermissible under *Keco.* Instead, rate adjustments would be occurring within the same continuing, existing rates.

The Court's ruling in *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, is consistent with the *Lucas County Comm*.: that where rates are still being collected, adjustments can be made prospectively to those rates to account for past over-collection, without violating any prohibition against retroactive ratemaking.

And the PUCO, as well, has embraced the notion that it can reset or prospectively adjust rates to make up for past under-collection, so long as the rates remain yet to be collected. In *In re Application of Ohio Power Co.*, 2015-Ohio-2056, the Court found that the PUCO had wrongfully reduced the interest rate that customers paid to the utility (from 2012 to 2015) on certain electric security plan costs (deferred charges). *Id.* at ¶ 3 On remand from the Court, the PUCO approved AEP's proposal to increase prospective rates to customers to make up for the lower interest rates the utility received during the past three-year period. *See In the Matter of the Application of Columbus Southern Power for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144*, *Ohio Revised Code,* PUCO No. 11-4920-EL-RDR, *et al.*, 2016 Ohio PUC LEXIS 608 at ¶¶ 8-9 (June 29, 2016). The PUCO's ruling had permitted AEP to collect more money ($130 million) from consumers in prospective rates to correct for the lower interest rates the PUCO had authorized for AEP in the previous three-year period.

Prospective adjustments would not cause the PUCO to balance past rates with future rates as the rates continue through 2030. As such, there is no retroactive ratemaking under *Keco.* There is no balancing of one set of rates against another. Rather the rates are continuing, allowing them to be prospectively adjusted without engaging in retroactive ratemaking.

B. *Keco* should be overruled.

This Court has held that its prior decisions may be overruled where "(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 48. Under these standards, the Court could and should overrule *Keco*.

1. Changed circumstances no longer justify continued adherence to Keco.

a. The statutory balance between customers and utilities that was the cornerstone of Keco has been impaired by barriers to obtaining stays, which creates inequities for utility consumers that the Court should overcome.

A key to the *Keco* rule was the Court's statutory analysis showing a balance between consumers and the utilities regarding remedies for rates that are later determined to be unlawful. *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co*., 166 Ohio St. 254, 259 (1957). The Court discussed the statutory balance between consumers and utilities under these Ohio statutes that "keep the equities between the utility and the consumer in balance." *Id.* at 259. It explained that a utility may not charge increased rates during proceedings before the PUCO to increase rates, while a consumer seeking a reduction in rates is not entitled to a refund of excessive rates paid. "Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance***." *Id*. at 259.

But the equities that existed in 1957 between the utility and the consumer are out of balance 60 years later for a number of reasons. These reasons include changes in the law under 2008 Am.Sub.S.B. 221, and the difficulties with posting a bond in cases involving hundreds of

millions of dollars. In practice, given these factors, the justice that the General Assembly envisioned is far from being achieved.

Justice, though, can be restored in part if the Court overturns *Keco*, as Justice Pfeifer urged, several years ago, after a utility received a $368 million ”windfall” because of *Keco*. *In re Columbus S. Power Co.*, 2014-Ohio-462, ¶¶ 61-67. (Pfeifer J., dissenting) (urging that *Keco* be overturned, after finding it ”unconscionable” for the public utility to retain $368 million from consumers). *Id.* The OCC urges the Court to overturn *Keco* and allow customers the remedy they are entitled to and stop these windfalls to utilities.

b. Barriers to obtaining a stay.

A bond is intended to compensate the prevailing party for the harm associated with staying implementation of the PUCO’s order that would otherwise have been in effect while the appeal is pending. R.C. 4903.16 (Appx. 107) speaks to the bond being posted ”conditioned for the prompt payment by appellant of all damages caused by the delay in the enforcement of the order.” In today’s public utility cases, the issues appealed involve millions of dollars, if not hundreds of millions of dollars. Thus, ”all damages” caused by the delay of the enforcement of an order can themselves require a bond of several millions of dollars. *See, e.g.*, *In re Duke Energy Ohio Inc.*, 2017-Ohio-5536, Decision (Nov. 5, 2014) (requiring bond in the amount of $2,506,295, which appellants were unable to post).

This Court has recognized that it is difficult, if not virtually impossible, for consumer parties to secure a stay by posting a bond. *See In re Application of Columbus S. Power Co*., 2011-Ohio-1788, ¶ 20 (ruling that the PUCO unlawfully granted the utility a retroactive rate increase, but denying a refund to consumers, acknowledging the difficulty a public agency faces in dealing with the bond requirement). The remedy the Court spoke of in *Keco* is, for consumers, illusory at best. Indeed, commentators have noted that the possibility of a stay as an effective

remedy may be more illusory than real when dealing with consumer's claims, because of the difficulties in posting a bond. *See* E. Levin, *Illinois Public Utility Law and the Consumer: A Proposal to Redress the Imbalance*, 26 DePaul L. Rev. 259, 268-269 (1977).

2. There would be no undue hardship to the utilities if Keco were overturned.

There would not be undue hardship for utilities relying upon the *Keco* doctrine if *Keco* was overruled. There will be no ensuing chaos. Although utilities have relied upon *Keco* in traditional ratemaking context, there has always been a question of whether *Keco* applies under Ohio's 2008 energy law.

Various parties, including the PUCO, utilities, and consumers have argued that *Keco* does not apply to proceedings under the new regime of 2008 Am.Sub.S.B. 221. *See*, *e.g., In re Columbus S. Power Co.,* 2011-Ohio-1788, ¶ 12 ("The appellees [AEP and PUCO] respond by arguing that *Keco*'s rule does not apply in proceedings under the statute of 2008 Am.Sub.S.B. 221. We need not decide whether *Keco* continues to apply, as the ruling also violates ****").

And the Court has also considered creating exceptions to *Keco*. *See, e.g., Indus. Energy Users-Ohio v. PUC*, 2008-Ohio-990, ¶¶ 43-46 (declining to deviate from *Keco* to create an exception based on the facts presented). And the Court has on occasions limited *Keco*, finding that there must be "ratemaking" for *Keco* to apply. *River Gas v. Public Utilities Co*., 69 Ohio St.2d 509, 512 (1982).

The PUCO also has on occasion ruled that *Keco* does not preclude rate adjustments under certain circumstances. *See In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, PUCO No. 09-872-EL-FAC, 2012 Ohio PUC LEXIS 69 at 33 (Jan. 23, 2012) (holding *Keco* does not apply to credits made against a deferral balance). *In re the Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, PUCO No. 16-

576-EL-POR, 2017 Ohio PUC LEXIS 819 at 63 (Sept. 27, 2017) (*Keco* does not apply to Duke's energy efficiency/peak demand reduction rider mechanism); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand reduction Program Portfolio Plan for 2017 through 2019,* PUCO No. 16-649-EL-POR, 2017 Ohio PUC LEXIS 830 at ¶ 51 (Sept. 27, 2017) (*Keco* does not apply to costs collected under R.C. 4928.66 (Appx. 110), where there is an established recovery mechanism allowing the utility to pass variable costs directly to the consumers and does not apply to deferrals); *In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, PUCO No. 08-917-EL-SSO, 2009 Ohio PUC LEXIS 210 at 62 (Mar. 18, 2009) (holding that collecting carrying charges on prior years' investments was not retroactive ratemaking).

Most recently, both the Court and the PUCO have created exceptions to *Keco*, allowing prospective adjustments to rates for over- or under-collections in the past. *In re Application of Columbus S. Power Co.,* 2016-Ohio-1608 at ¶ 40; *In the Matter of the Application of Columbus Southern Power for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144*, *Ohio Revised Code,* PUCO. No. 11-4920-EL-RDR *et al.*, 2016 Ohio PUC LEXIS 608 at ¶¶ 8, 9 (June 29, 2016).

Thus, any reliance on *Keco* that has occurred over the years has been moderated by the many rulings distinguishing *Keco* or applying *Keco* with flexibility. There would be no undue hardship on the utilities if *Keco* is overturned. To the contrary, if *Keco* is not overruled, it would cause undue hardship for consumers and create a windfall for AEP in this case. This is the type of unfair result the Court can and should prevent.

VI. CONCLUSION

Running these coal plants 24/7 and bidding energy from the plants into the market when the plants were not even covering their variable costs of operation clearly was not prudent or in the best interest of consumers. The independent auditor agreed, based on her statement in the draft audit report. A PUCO Staff member asked the auditor to change her opinion, but the PUCO deprived OCC and OMAEG of the right to call the PUCO Staff member as a witness at the evidentiary hearing. The PUCO's ruling is against the manifest weight of the evidence and deprived OCC and OMAEG of a fair opportunity to develop an adequate evidentiary record.

AEP's 1.4 million residential consumers and businesses deserve just and reasonable rates that are set by PUCO orders. The $74.5 million coal plant subsidy to AEP for OVEC costs was not just and reasonable. The Court should not permit the unreasonable PUCO Orders to stand. The Court should protect AEP consumers by crediting the $74.5 million coal plant subsidy to consumers.

Respectfully submitted,

/s/ *Kimberly W. Bojko*
Kimberly W. Bojko (0069402)
(Counsel of Record)
Emma Y. Easley (0102144)
Carpenter Lipps LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
easley@carpenterlipps.com

Attorneys for Appellant,
The Ohio Manufacturers' Association Energy Group

Maureen R. Willis (0020847)
Ohio Consumers' Counsel

/s/ John Finnigan
John Finnigan (0018689)
Counsel of Record
Assistant Consumers' Counsel
William J. Michael (0070921)
Senior Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone [Finnigan]: (614) 466-9585
Telephone [Michael]: (614) 466-1291
john.finnigan@occ.ohio.gov
william.michael@occ.ohio.gov

Attorneys for Appellant,
Office of the Ohio Consumers' Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief by Appellants Office of the Ohio Consumers' Counsel and The Ohio Manufacturers' Association Energy Group, was served upon all parties of record via electronic transmission this 17th day of March 2025.

/s/ John Finnigan
John Finnigan
Assistant Consumers' Counsel

PARTIES OF RECORD

john.jones@ohioAGO.gov
thomas.lindgren@ohioAGO.gov

stnourse@aep.com
mjschuler@aep.com
egallon@porterwright.com
bhughes@porterwright.com
bojko@carpenterlipps.com
easley@carpenterlipps.com