**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan.  In the Matter of the Application of The Dayton Power and Light Company d/b/a  AES Ohio for Approval of Revised Tariffs  In the Matter of the Application of The Dayton Power and Light Company d/b/a  AES Ohio for Approval of Accounting  Authority Pursuant to Ohio Rev. Code  § 4905.13 | )  )  )  )  )  )  )  )  )  )  )  ) | Case No. 22-900-EL-SSO  Case No. 22-901-EL-ATA  Case No. 22-902-EL-AAM |

**MEMORANDUM CONTRA AES OHIO’S APPLICATION FOR REHEARING**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# I. INTRODUCTION

This case involves a Settlement that will cost consumers over $160 million during the next three years.[[1]](#footnote-2) AES Ohio gets to collect from its consumers over $76 million in past costs, some dating back nearly ten years. These past costs include $28 million in charges to consumers for coal plant subsidies for two 1950’s era coal plants, one of which is located in Indiana.[[2]](#footnote-3) AES Ohio also gets to collect $6.3 million in transition costs from consumers even though the time to collect those costs ended by law in 2010.

The PUCO approved the Settlement. Although the PUCO approved AES Ohio’s request to collect the $28 million for past coal subsidies, AES Ohio nevertheless filed an Application for Rehearing. In its pleading, AES Ohio argues that the PUCO should have approved these costs for the added reason that the costs acted as a “limitation on shopping” under R.C. 4928.143(B)(2)(d).[[3]](#footnote-4)

The PUCO, however, should not have approved the past coal subsidies for collection from consumers in its original Opinion and Order. Nor should it now approve the charges to consumers as a limitation on customer shopping. The past coal subsidies were incurred to provide power under earlier electric security plans (“ESPs”) and will provide no benefit – nor act as any limitation on shopping – for current AES Ohio consumers. The PUCO should therefore reject AES Ohio’s arguments and deny Assignment of Error No. 2 in AES Ohio’s Application for Rehearing.

# II. RECOMMENDATIONS

## A. The PUCO should reject AES Ohio’s Second Assignment of Error. There is no evidence to support a finding that the past coal subsidies will act as limitation on customer shopping. And it would be prejudicial to OCC to accept this new argument now without affording OCC the opportunity to prepare, explain or rebut the argument.

AES seeks rehearing asking that the PUCO find that its RCR charge satisfies Ohio law because it relates to a limitation on customer shopping under R.C. 4928.143 (B)(2)(d). Its rehearing request should be denied.

There is no evidence in the record that the coal plant subsidy costs will serve as a limitation on shopping for AES consumers. None. No witness testimony, no briefing. The first time this issue has been raised is in the utility’s application for rehearing. The PUCO cannot possibly determine that the past subsidy charges in this case will act as a limitation on shopping for consumers over the next three years of the ESP term. There is no record on the issue. The PUCO violates R.C. 4903.09 when it issues a decision without record support. The PUCO should deny DP&L’s request.

Moreover, accepting DP&L’s newly advancedl theory would be prejudicial to OCC. OCC has not been permitted the full opportunity to prepare for, explain, or rebut this argument. That violates OCC’s right to due process.

## B. Past charges to consumers for coal plant subsidies are not a limitation on customer shopping during the next three years of the ESP term.

Generation costs can act as a “limitation on customer shopping” only if the costs were incurred *for generation which is actually produced during* the electric security plan as part of the statutorily mandated standard service offer.That’s because the “limitation on customer shopping” is founded on the notion that generation charges act as a *counter-cyclical hedge to the volatility of the corresponding electric security plan prices in effect during the same period*. AES Ohio’s past coal plant costs were incurred years ago and therefore could not possibly function as a counter-cyclical hedge to current electric security plan prices. The past subsidy deferrals are merely charges added onto consumer bills. Nothing more.

AES Ohio argues that the coal plant subsidies relate to a “limitation on customer shopping” under R.C. 4928.143(B)(2)(d).[[4]](#footnote-5) In support, AES Ohio cites *In re AEP PPA Rider.[[5]](#footnote-6)* That case, however, is easily distinguishable.

In *In re AEP PPA Rider,* the PUCO approved AEP’s electric security plan rider to collect coal plant subsidy costs through a power purchase agreement. Notably, the coal subsidies were created during the period when the electric security plan was in effect and consumers were being charged for the standard service offer. Under such a scenario, the charges would satisfy the R.C. 4928.143(B)(2)(d) requirement that the costs must “have the effect of *stabilizing or providing certainty* regarding retail electric service.”[[6]](#footnote-7)

The leading case for “limitation on customer shopping” charges is *In re AEP ESP 3.*[[7]](#footnote-8) There the PUCO approved a rider allowing AEP to collect coal plant subsidy costs incurred through a power purchase agreement during the same period of time when AEP’s electric security plan would be in effect. The fact that the coal plant subsidy costs would be incurred while the electric security plan would be in effect was essential.

It is the only way the costs could satisfy R.C. 4928.143(B)(2)(d) and “have the effect of stabilizing or providing certainty regarding retail electric service.”[[8]](#footnote-9) (Note the statute is written in present tense, not past tense.)

In *In re AEP ESP 3,*[[9]](#footnote-10)the coal plant subsidy costs under the power purchase agreement purportedly “provide certainty” because these costs moved in an opposite direction (“counter-cyclical”) from the costs for the competitively bid standard service offer.[[10]](#footnote-11) Hence the costs purportedly acted as a “financial hedging mechanism” which would mitigate volatility in the competitively bid standard service offer auctions.[[11]](#footnote-12) The PUCO explained as follows:

Taking the requirements of R.C. 4928.143(B)(2)(d) somewhat out of turn, the Commission will next address the third criterion, which is whether the PPA charge would have the effect of stabilizing or providing certainty regarding retail electric service. We find that the PPA rider, as a financial hedging mechanism, is proposed to have the effect of stabilizing or providing certainty regarding retail electric service. AEP Ohio witness Vegas explained that the PPA rider would smooth out fluctuations in market prices, because the rider would rise or fall in a way that is opposite of the wholesale market. Specifically, because AEP Ohio claims that OVEC's mostly fixed costs are relatively stable in comparison to market based costs, the PPA rider would produce a credit when OVEC's costs are below wholesale market prices, while the rider would produce a charge when OVEC's costs are above wholesale market prices. The PPA rider, therefore, is intended to mitigate, by design, the effects of market volatility, providing customers with more stable pricing and a measure of protection against substantial increases in market prices.[[12]](#footnote-13)

In the present case, AES Ohio’s coal subsidy costs do not “stabilize or provide certainty regarding retail electric service” because the costs were incurred during a prior period. There is simply no way that “the rider would rise or fall in a way that is opposite of the wholesale market” because the costs have already been incurred and were part of providing service to consumers under earlier electric security plans. At this point in time the coal subsidies are only charges on customers ‘bills that do not have anything to do with customers’ shopping for power.

The past coal subsidy costs (also referred to as “OVEC deferral”) consists of past fuel costs from AES Ohio’s share of two coal plants (one in Indiana) which were incurred but not collected from customers during prior electric security plans.[[13]](#footnote-14) The costs were incurred during two time periods: October 1, 2014 through October 31, 2017 and December 19, 2019 through December 31, 2019.[[14]](#footnote-15)

Throughout the October 1, 2014 through October 31, 2017 time period, either AES Ohio’s ESP I or AES Ohio’s ESP II was in effect. The PUCO approved AES Ohio’s ESP II on September 4, 2013.[[15]](#footnote-16) The Supreme Court of Ohio reversed the PUCO’s approval of AES Ohio’s ESP II on June 20, 2016.[[16]](#footnote-17) On remand, the PUCO issued an August 26, 2016 Order modifying AES Ohio’s ESP II per the Supreme Court’s ruling and then granted AES Ohio’s motion to withdraw from its ESP II, thus terminating it.[[17]](#footnote-18) After AES Ohio’s ESP II was terminated, the PUCO granted AES Ohio’s application to revert to ESP I.[[18]](#footnote-19) AES Ohio’s ESP I remained in effect until the PUCO approved AES Ohio’s third ESP, effective November 1, 2017.[[19]](#footnote-20)

The PUCO’s approval of AES Ohio’s ESP III included a Reconciliation Rider which allowed AES Ohio to collect past coal plant subsidy costs from consumers beginning on November 1, 2019.[[20]](#footnote-21) However, AES Ohio withdrew from ESP III on December 18, 2019.[[21]](#footnote-22) The coal plant costs in the present case also include past fuel costs from December 19, 2019 through December 31, 2019. Effective January 1, 2020, AES Ohio has been collecting coal plant subsidy costs from consumers through the legacy generation rider.[[22]](#footnote-23)

AES Ohio did not fully collect its coal plant subsidy costs under ESP I and ESP II because it reached a settlement agreement whereby it agreed to phase in a competitive bid process. That competitive bid process did not include a mechanism for AES Ohio to fully collect the past coal plant subsidies.[[23]](#footnote-24) AES Ohio explained this in an internal accounting memo:

Until 2014, all the energy bought was considered retail and both energy and demand charges were fully recovered through DP&L's fuel rider. As part of our implementation of DP&L's 2013 Electric Security Plan ("ESP") order, we began excluding a non-retail portion of the demand charge from DP&L's fuel adjustment clause ("FAC") and expensing it.[[24]](#footnote-25)

To sum up this important point, the past coal plant costs in the present case covers AES Ohio’s share of past coal plant fuel costs which were *incurred* but not collected from consumers during October 1, 2014 through October 31, 2017 and December 19, 2019 through December 31, 2019, when either ESP I or ESP II was in effect. They are not costs related to the current standard service offer. They do not function as a limitation on shopping.

# III. CONCLUSION

The puco should reject AES’s Second Assignment of Error. There is no record evidence to support the utility’s claim that past coal subsidy costs will serve as a limitation on customer shopping during the next three years of the electric security plan. Accepting AES Ohio’s argument at this time would be prejudicial to OCC as it deprives OCC of the opportunity to prepare for, rebut, or explain the argument. Rehearing should be denied.

Respectfully submitted,

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*/s/ Maureen R. Willis*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra AES Ohio’s Application for Rehearing was served on the persons stated below via electronic transmission, this 18th day of September 2023.

*/s/ Maureen R. Willis*

Maureen R. Willis

Acting Legal Director

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. *See* OCC Ex. 8. [↑](#footnote-ref-2)
2. OVEC Annual Report at 2 (2022). [↑](#footnote-ref-3)
3. AES Ohio Application for Rehearing at 1-2 (September 8, 2023). [↑](#footnote-ref-4)
4. AES Ohio Application for Rehearing at 3-4 (September 8, 2023). [↑](#footnote-ref-5)
5. *In re AEP PPA Rider,* 155 Ohio St.3d 326, 2018-Ohio-4698. [↑](#footnote-ref-6)
6. *In re AEP ESP 3,* Case No. 13-2385-EL-SSO, Opinion and Order at 20 (February 25, 2015). [↑](#footnote-ref-7)
7. Case No. 13-2385-EL-SSO, Opinion and Order (February 25, 2015). [↑](#footnote-ref-8)
8. *In re AEP ESP 3,* Case No. 13-2385-EL-SSO, Opinion and Order at 20 (February 25, 2015). [↑](#footnote-ref-9)
9. Case No. 13-2385-EL-SSO, Opinion and Order (February 25, 2015). [↑](#footnote-ref-10)
10. *Id.* at 20-21. [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *Id.*  [↑](#footnote-ref-13)
13. AES Ohio Ex. 2 at 5 (Donlon). [↑](#footnote-ref-14)
14. *Id.* [↑](#footnote-ref-15)
15. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order (September 4, 2013). [↑](#footnote-ref-16)
16. *In re Application of Dayton Power & Light Co*., 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. [↑](#footnote-ref-17)
17. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan,* Case No. 12-426-EL-SSO, Finding and Order (August 26, 2016). [↑](#footnote-ref-18)
18. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Third Entry on Rehearing (December 14, 2016). [↑](#footnote-ref-19)
19. *In the Matter of the Application of The Dayton Power and Light for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Second Finding and Order (October 20, 2017). [↑](#footnote-ref-20)
20. *Id.*; *see also, In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company*, Entry (January 29, 2020). [↑](#footnote-ref-21)
21. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (December 18, 2019). [↑](#footnote-ref-22)
22. R.C. 4928.148. [↑](#footnote-ref-23)
23. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order at 12 (September 4, 2013) (the competitive bid process was to be phased in using the following increments: 10%, 40%, 70% and 100%). [↑](#footnote-ref-24)
24. OCC Ex. 3 at 17, Attachment LM-3 at 1 (Morgan). [↑](#footnote-ref-25)