**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 to Implement its Infrastructure Investment Rider. | )  )  )  ) | Case No. 22-477-EL-RDR |

**REPLY COMMENTS**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

1. **INTRODUCTION**

This case involves the Public Utilities Commission of Ohio’s (“PUCO”) financial audit of AES Ohio’s Infrastructure Investment Rider (“Infrastructure Charge”) for the period of December 2021 to November 2022.[[1]](#footnote-1) AES Ohio was approved to spend up to $267,600,000 on Smart Grid Phase 1 capital investments and operational expenses over a four-year term.[[2]](#footnote-2) The PUCO allowed AES Ohio to collect from its consumers a return on capital expenditures and dollar-for-dollar collection of O&M expenses through rates under the Infrastructure Charge.[[3]](#footnote-3) Residential consumers pay 66% of the costs of the Infrastructure Charge.

The PUCO approved AES Ohio’s Smart Grid Program as a two-phase program.[[4]](#footnote-4) Phase I of the program runs from 2021-2025.[[5]](#footnote-5) When AES Ohio proposed the program, it stated: “The modernization of DP&L's distribution system will have significant customer benefits, including…improving reliability for customers.”[[6]](#footnote-6) AES Ohio has failed to deliver on this promise. AES Ohio failed to meet the PUCO’s Customer Average Interruption Duration Index for the two-year periods of 2019-2020[[7]](#footnote-7) and 2021-2022.[[8]](#footnote-8) Despite AES Ohio’s failure to deliver promised benefits on Smart Grid Phase I, the PUCO is currently considering a settlement in Smart Grid Phase II that could cost up to $682 million in additional capital spending and $83 million in additional O&M expenses.[[9]](#footnote-9)

The financial audit of AES’s Smart Grid Phase 1 revealed several significant issues with AES Ohio’s Infrastructure Charge for the audit period. The PUCO Staff recommended reducing the charges to consumers by $809,374 due to incentive compensation, depreciation expenses, software that is not used or useful, lost receipts, and revenue calculation errors.[[10]](#footnote-10) To rectify these issues, the PUCO Staff recommended adjustments to the Infrastructure Charge to reduce the amount collected from consumers.[[11]](#footnote-11)

On September 16, 2024, AES Ohio filed initial comments disputing the disallowance related to software licenses as recommended by OCC and the PUCO Staff.[[12]](#footnote-12) Contrary to AES Ohio’s claims, the software licenses were not used and useful and consumers should not have to pay for those under the rider.[[13]](#footnote-13) AES Ohio’s silence on the PUCO Staff’s recommendation to remove incentive compensation should be considered acquiescence. The PUCO should adopt its Staff’s recommendations to reduce the amount to be collected from consumers for the Infrastructure Charge.

1. **CONSUMER PROTECTION REPLY COMMENTS**

OCC’s Initial Comments explained why consumers should not be charged for software licenses that were not in service during the audit period.[[14]](#footnote-14) The PUCO should reject AES Ohio’s argument that the software licenses were used or useful.[[15]](#footnote-15) AES Ohio contends the software licenses were used and useful because they were purchased as a package, thus reducing costs to consumers compared to purchasing the licenses individually.[[16]](#footnote-16) In essence AES Ohio is arguing that it was prudent for it to purchase the software licenses as a package, instead of individually. Instead of using the “used and useful” test, AES Ohio wants the PUCO to use a prudent investment test for determining whether its investment was used and useful. But that is not the law in Ohio as the Ohio Supreme Court fully explained in *Suburban Natural Gas.*[[17]](#footnote-17)

In *Suburban*, the Supreme Court rejected the use of a prudence test when considering rate base investment. There Suburban argued that its investment (a longer pipeline that was not presently needed) was prudent as it would save time and money in the future. The Court did not buy it. The problem is that such considerations go beyond the used and useful test. As the Court stated: “We have never interpreted the term ‘used and useful’ to encompass capital facilities that are not presently useful, even if it might be cheaper to construct them now.”[[18]](#footnote-18)

Similarly in this proceeding AES is arguing that it was prudent for them to purchase the software as a package and that it reduced costs compared to purchasing the individual licenses. According to AES, because it was prudent, the PUCO should allow it to be part of the investment used and useful and collected from consumers. *Suburban* makes it clear that such arguments cannot be adopted given the explicit statutory terms requiring rate base to be “used and useful.”

By the same token, the PUCO should reject AES Ohio’s claim that the surplus software licenses “as a package” are used and useful in this case.

Finally, AES Ohio failed to address the PUCO Staff’s recommendation to remove $26,908 in incentive compensation charged through the Infrastructure Charge. By not challenging this recommended disallowance, AES Ohio has acquiesced and waived any

right to challenge this recommendation. The PUCO should disallow that amount as well for the reasons explained in OCC’s Initial Comments.[[19]](#footnote-19)

1. **CONCLUSION**

The PUCO should disallow AES Ohio’s charges to consumers for software licenses that were not used and useful during the audit period. In addition, consumers should not be responsible to pay for expenses towards incentive compensation which is not an ordinary and necessary expense of providing utility service to consumers. The PUCO should adopt OCC’s and the PUCO Staff’s recommendation to reduce the revenue requirement of the Infrastructure Charge by $809,374. The PUCO should also adopt OCC’s recommendation to conduct an audit of AES Ohio’s non-financial metrics report.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Reply Comments by OCC was served upon the persons listed below via electronic transmission this 30th day of September 2024.

*/s/ John Finnigan*

John Finnigan

Assistant Consumers’ Counsel

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1. Staff Review and Recommendations (May 8, 2024). [↑](#footnote-ref-1)
2. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Plan to Modernize its Distribution Grid,* Case No. 18-1875-EL-GRD, Opinion and Order (June 2, 2021). [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. *Id.* at ¶ 42. [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. *Id.,* Application at 6 (Dec. 21, 2018). [↑](#footnote-ref-6)
7. *In the Matter of The Commission’s Investigation into AES Ohio’s Compliance with the Ohio Administrative Code and Potential Remedial Action*, Case No. 21-1220-EL-UNC, Joint Stipulation and Recommendation (Dec. 9, 2021). [↑](#footnote-ref-7)
8. *In the Matter of The Commission’s Investigation into AES’s Compliance with the Ohio Administrative Code and Potential Remedial Action*, Case No. 24-7-EL-UNC, Settlement Agreement (Jan. 2, 2024). [↑](#footnote-ref-8)
9. *In the Matter of the Application of The Dayton Power and Light Company for Approval of Phase 2 of Its Smart Grid Plan*, Case No. 24-112-EL-GRD, Stipulation and Recommendation (Sept. 13, 2024). [↑](#footnote-ref-9)
10. Staff Review and Recommendation (May 8, 2024). [↑](#footnote-ref-10)
11. *Id.* [↑](#footnote-ref-11)
12. *In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio to Implement Its Infrastructure Investment Rider,* Case No. 22-477-EL-RDR, OCC Initial Comments (Sept. 16, 2024). [↑](#footnote-ref-12)
13. Staff Review and Recommendations (May 8, 2024); *In re Application of Suburban Natural Gas Co*., 166 Ohio St.3d 176, 2021-Ohio-3224. [↑](#footnote-ref-13)
14. *In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio to Implement Its Infrastructure Investment Rider,* Case No. 22-477-EL-RDR, OCC Initial Comments at 2-3 (Sept. 16, 2024). [↑](#footnote-ref-14)
15. *Id.*, AES Ohio Initial Comments (Sept. 16, 2024). [↑](#footnote-ref-15)
16. *Id.*at 2. [↑](#footnote-ref-16)
17. *In re Application of Suburban Natural Gas Co*., 166 Ohio St.3d 176, 2021-Ohio-3224. [↑](#footnote-ref-17)
18. *Id.* at ¶ 30. [↑](#footnote-ref-18)
19. *In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio to Implement Its Infrastructure Investment Rider,* Case No. 22-477-EL-RDR, OCC Initial Comments at 4 (Sept. 16, 2024). [↑](#footnote-ref-19)