

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

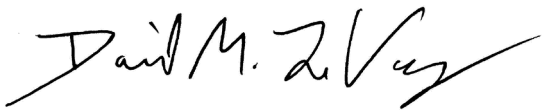
IN THE MATTER OF THE PETITION OF)
AMERICAN SUBURBAN UTILITIES, INC FOR) CAUSE NO. 45649-U
A NEW SCHEDULE OF RATES AND CHARGES.)

OUCC'S EXCEPTIONS TO ASU'S PROPOSED ORDER

The Indiana Office of Utility Consumer Counselor ("OUCC"), through its undersigned counsel and pursuant to the procedural schedule set forth at the Evidentiary Hearing, hereby submit its exceptions to American Suburban Utilities, Inc.'s September 30, 2022 Proposed Order (ASU PO) and supporting brief.

Respectfully submitted,

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INTRODUCTION

While the purpose of this filing is to provide the OUCC’s exceptions to ASU’s Brief and Proposed Order, it first must begin by addressing ASU’s assertions that were never raised before now – small utility filings. ASU began its Brief with the erroneous statement, “The post-hearing filings must be reviewed in the context of how this case began.”¹ Rather, the proposed orders must be viewed in light of evidence presented at the hearings and the law. ASU’s assertions about the meeting held in advance of the filing of its case is not evidence. But it unfortunately makes assertions that call for a response as a matter of fairness to the OUCC, reassurance to utilities that may avail themselves of the Small Utility Filing Procedure,² and candor to the tribunal.

ASU implies the OUCC had an opportunity to pursue settlement of this small utility case but declined to do so.³ To that end, ASU asserts in its Brief that, “ASU agreed to respond and did

¹ ASU Brief in Support, p. 1.

² Since the time of ASU’s filing, there were several small utilities that the OUCC has processed as small utility filings under the statute, e.g., St Anthony, 45671-U; Doe Creek, 45655-U; Tri-Township, 45563-U (sub-docket requesting more debt authority.)

³ ASU Brief in Support, p. 1.

respond to informal data requests from both the Commission and the OUCC before filing and before mailing notices.”⁴ But ASU did not provide all the information the OUCC requested. On the very day of the November 17 meeting, the OUCC’s Shawn Dellinger followed up with an email asking for information material to the OUCC’s review. On December 1, *after* ASU had filed its small utility rate application, the OUCC asked ASU’s Counsel for the status of that requested information and other information and was told it was still being pulled together.

ASU filed its application shortly after the Thanksgiving holiday, allowing only six business days between the meeting and the day ASU filed its application. If there was insufficient time to explore settlement before filing, it should be attributed to ASU. In its brief, ASU made the self-serving statement that “All of this was done in an effort to save ratepayer money.”⁵ ASU filed its case when it did, not because it wanted to “save ratepayer money” but because it wanted to avoid decreasing its tariffed rates to remove rate case expense from the last case, which the final order in Cause No. 44676 would have required it to do. ASU’s desire to continue to collect monies for an expense that had already been satisfied truncated any potential for settlement in advance of the filing of its application.

ASU asserts the OUCC turned its small utility filing into a complex case requiring multiple days of hearings and cross-examination of multiple witnesses.⁶ The OUCC did take the very unusual step, authorized by the Commission’s rules, of requesting a hearing, allowing cross-examination of ASU’s witnesses, and subjecting its own witnesses to potential cross-examination.

⁴ Id.

⁵ In its brief, ASU discussed the meeting and said it “shared its draft rate report, which was based upon the 2020 Annual Report to the Commission and showed an unsustainably low rate of return.” ASU said it “called for the meeting because it was hoping that settlement talks could commence before the case was filed, or after it had been filed but before customer notices were mailed, so that the notices would contain the agreed rate request rather than the amount in the draft report” and added “It was discussed that ASU would delay mailing the notices to allow these discussions to occur. ASU agreed to respond and did respond to informal data requests from both the Commission and the OUCC before filing and before mailing notices.”

⁶ ASU’s Brief in Support of its Proposed Order, pp. 1-2.

But it was ASU's unorthodox operations and its decision to file a small utility case that made this case *complex*. The Small Utility Filing Procedure is designed to reduce rate case expenses in the absence of complicated facts and if controversial issues do not exist. Filing a case as a small-utility case does not eliminate any issues whatsoever. In this case, the filing of a small utility application, without narrative testimony, merely obscured the facts the OUCC would need to uncover through discovery and analysis.

Factors that made ASU's case both complex and inappropriate for the Small Utility Filing Procedure include:

- ASU's proposed 12% cost of equity with no support;
- Asserting a capital structure that does not reflect ASU's actual debt;
- ASU's request for salary and wages expense in excess of both its test year and the 12-month adjustment period;
- ASU's inclusion in rates of various non-recurring expenses including a civil penalty to IDEM for noncompliance;
- ASU reintroduction into UPIS of plant the Commission ordered retired from UPIS;
- ASU's inclusion in rate base of additional construction costs from projects that had been placed in service pursuant to its last rate order;
- ASU sought recovery of non-recurring expenses associated with the subdocket in Cause No. 44676-S1, which resulted in ASU issuing refunds to its customers; and
- ASU's small utility rate case generated more than 400 pages of customer comments.

In fact, by filing its request as a small utility case, ASU compounded the complexity of its rate request, requiring the OUCC to seek through discovery what might have been provided

through a well-laid out case-in-chief. Moreover, in the final order in ASU's last rate case, the Commission imposed an obligation on ASU to support its rate base additions with proof that is frankly not consistent with a small utility rate application:

Furthermore, in all future proceedings, Petitioner shall provide records sufficient to support all major plant investments, including, but not limited to a detailed project description, the basis or need for the project, cost estimates (including material quantities), bids, and invoices that are broken out in sufficient detail to allow an auditor adequate information to verify the reasonableness of the project and the amounts paid.⁷

Finally, the OUCC's request for an evidentiary hearing did not force ASU to seek legal counsel. ASU had already obtained legal counsel for this docket before its application was filed. That counsel objected to discovery and filed a motion to strike the entirety of one OUCC witness's testimony. The OUCC did not complicate a small utility rate case. ASU's rate case began that way, and it continued in that vein. As to the suggestion that the OUCC's motion caused multiple days of hearings, what turned the case into a multiple day hearing was ASU's decision to supplement its case within a week of the hearing.⁸

ASU has availed itself of the Commission's jurisdiction in several cases including Cause Nos. 44272, 44676, 44700 and its several compliance filings the last of which resulted in Cause No. 44676-S1. As a whole, these cases were controversial, and such controversies could not reasonably be eliminated by ASU's decision to file a small utility case. Moreover, in the final orders in those cases, the Commission articulated particular and special requirements for ASU with respect to its presentation of cases, record keeping, and utility operations.⁹ In this case, the

⁷ Cause No. 44676, Order at 41.

⁸ ASU filed numerous pages for the Omnibus Agreement. Also, despite providing a response to a discovery request in which ASU asserted it had no written communication before the Omnibus Agreement was executed, ASU after the evidentiary hearing supplemented the discovery response to include 939 pages of written communication between ASU and the lender.

⁹ (Cases demanding dealt in next rate case)

Commission considered ASU's initial application was lacking even for a small utility case as it notified ASU that its small-u filing was not complete in a December 20, 2021 memorandum.

For many reasons, the small utility filing procedure was not the appropriate forum for ASU to choose when it initiated this docket. And when compared to ASU's other cases, the issues of which are set forth and described by the final orders, this case has been no less complex. Practically speaking, as a matter of complexity and controversy this case may be considered to differ from those cases only in ASU not having filed a narrative testimonial case-in-chief. The Commission determined that a field hearing and an evidentiary hearing were necessary.

ASU's Brief seems to suggest that ASU views small utility rate cases as a means of avoiding having to present a prima facie case:

Ms. Stull argued that it was ASU's burden to justify its books and records. This position ignores that this case was filed as a small utility filing. It was not ASU's burden in a small utility filing to file testimony and evidence that constituted a case-in-chief.¹⁰

Thus, on the one hand, ASU suggests that the OUCC has the burden of proof in small utility cases and has no burden of its own to make a prima facie case. The statute does not eliminate a small utility's burden of proof.¹¹ ASU seems to criticize the OUCC for gathering evidence and presenting its case.

After accusing the OUCC of unnecessarily turning this matter into a complicated case, ASU rhetorically asks why any small utility would take comfort in using the Small Utility Filing Procedure allowed by Ind. Code § 8-1-2-61.5. The Commission may note how rare it is for a small utility's application to result in the OUCC requesting a formal evidentiary hearing. By finding

¹⁰ ASU Post Hearing Brief at p.6.

¹¹ Ind. Code § 8-1-2-61.5 does not remove the burden on the utility requesting the rate increase, it only provides that an evidentiary hearing need not be had in some circumstances with smaller utilities. ASU ignores that the statute also allows the OUCC to request a hearing, and also allows a hearing if the utility received more than 10 complaints (which happened in this case).

that ASU's rate case is unusual and its request for relief was unduly complicated and controversial, small utilities will not be discouraged from filing small utility rate applications.

ARGUMENT

While ASU and the OUCC are far apart on many issues, the major contentions remain in five general areas: capital structure, construction and equipment, salaries and wage expense, costs exceeding Commission's granted authority, and sludge removal.

A. ASU's Capital Structure

ASU persists in asserting the OUCC asks the Commission to apply a "hypothetical capital structure," as if the OUCC argues for a hypothetical capital structure. The OUCC has repeatedly addressed this inaccurate characterization of its position. The capital structure the OUCC requested the Commission find is not hypothetical as the evidence shows and the OUCC's proposed order has explained. ASU argues that the OUCC cites no authority for its "functional" debt argument. The OUCC went into great detail providing background, case law, and direct evidence from the record showing L 3's debt is really ASU's debt. Indeed, if there is no caselaw directly addressing the facts now before the Commission, it may be attributed to no other utility having done precisely what ASU has done to structure its debt. ASU borrowed money in various names, with L 3 claiming it is the utility,¹² with general ledgers reflecting "loans from shareholders," with audited financial statements reflecting the debt amounts and *payments/dividends*,¹³ without relevant affiliate contracts being filed with the Commission, and without Commission approval of the debt.

¹² See SD-1, see also OUCC Cross Exhibit 33, See also Hearing Transcript pp. D-10 – D-17. L3 in its Indiana Finance Authority (IFA) Application for Bond Financing of \$2.98 Million states that "L3 Corp. is a privately owned public waste water treatment utility. It has been in business since 1963 and currently has 2,779 customers in West Lafayette, Indiana." In the IFA Application L3 Corp also states that the source of the repayment of the bonds is the "Revenues of the users of project." The project is ASU's Carriage Estates III wastewater treatment plant expansion from 1,500,000 gallons per day to 3,000,000 gallons per day and the construction of phosphorus removal and construction of a lab building.

¹³ See OUCC Attachment SD-7, page 14 of 19 "Report of 2019 Financial Statements, See also SD-4, SD-5, SD-6.

There has been no case like ASU's case, and therefore no direct caselaw. This case is very fact-specific, and the Commission is the finder of fact. The OUCC provided numerous pages of argument and evidence in its testimony and in its proposed order. Without desiring to repeat that evidence and argument, it is important to highlight misquotes and mistakes in ASU's proposed order and brief.

Notably, ASU and L 3 are used interchangeably in loan documents. L 3 describes itself in the application to the IFA as a sewer utility, whose address and phone number are ASU's, whose employees are ASU's, whose capital is the same as ASU's.¹⁴ L 3 states on the loan application that it will repay the loan from the rates it gets as a sewer utility.¹⁵ This alone makes ASU's case unique from any other case ever before the Commission regarding capital structure. This is not a parent-subsiary, or even an affiliate holding company. ASU and L3 are one in the same.

If ASU properly came before the Commission with any of these agreements, in which ASU encumbered its assets and made itself a guarantor on these loans, perhaps the Commission could have provided guidance on the debt and encumbrances of the utility. Instead, ASU entered into numerous contracts with banks and affiliates avoiding the application of regulatory oversight.¹⁶

ASU claimed that the negative pledges it signed are not encumbrances, arguing that a nearly hundred-year-old case says an encumbrance is a mortgage.¹⁷ That is not what Underwood found. Underwood found that the Town of Oxford, Indiana, may have encumbered its net revenues, but encumbering net revenues was not the same as encumbering its "franchise, works, or system to any other person." Underwood v. Fairbanks, Morse & Co., 205 Ind. 316, 185 N.E.

¹⁴ See OUCC Attachment SD-1, p. 436; see also Skomp Cross Exam Transcript, pp. D-11:16 - D-13:15; see also Cross Exhibit 33, the Application for Tax Exempt Volume Cap Financing to the Indiana Finance Authority pp. 208-212.)

¹⁵ Cross Exhibit 33, the Application for Tax Exempt Volume Cap Financing to the Indiana Finance Authority p. 212.

¹⁶ See Ind Code §§8-1-2-49; 8-1-2-84.

¹⁷ ASU's Proposed Order at 15, citing Underwood v. Fairbanks, Morse & Co., 205 Ind. 316, 185 N.E. 118, 124 (Ind. 1933).

118, 124 (1933). The Court actually found that a negative pledge could be an encumbrance, but the encumbrance was on net revenues and not on the utility's assets. The underlying facts of this case are entirely different, ASU and L 3 did pledge ASU's rates to repay the loans, but L3/ASU also specifically encumbered ASU's assets in the negative pledge. Even under ASU's cited case, the negative pledges ASU entered into are encumbrances.

Indiana Statute establishes that no public utility shall encumber its used and useful property or business or any part thereof without the approval of the Commission.¹⁸ The negative pledges themselves specify the encumbrance.¹⁹ ASU had guaranteed the payments "absolutely and irrevocably." ASU encumbered its assets by agreeing "it will not assign, transfer or convey any of the property, and it will not pledge, assign or grant a security interest in, or lien on, any of the property" without the prior written consent of the bank.²⁰ Clearly, ASU encumbered its assets.

Moreover, ASU's recent release from certain guaranties, which it transacted and filed in its rebuttal case, does not change ASU's relationship to the debt. In its own general ledger ASU calls the capital infusions a "loan from shareholder"²¹ ASU's audited and unaudited statements reflect the debt as the responsibility of ASU. It *is* the debt of ASU.

ASU's proposed order argues that no evidence exists that ASU dividends have been the source of the payments of debt service on this debt.²² That is simply not the case. The audited financial statements of ASU and the general ledger show explicitly that ASU transfers money to Scott Lods for payment of the debt used to finance ASU's improvements.²³ ASU's 2017-2019

¹⁸ Ind. Code §8-1-2-84.

¹⁹ See SD-3.

²⁰ Id.

²¹ See SD-13, ASU's 2020 General Ledger; see also Shafer Rebuttal Attachment, KS-R6 (2015 General Ledger).

²² ASU proposed order at p. 15.

²³ See Attachments SD-4, p. 14, "In order for L3 to service its debt, the Company [ASU] pays dividends to Scott Lods, who then makes capital contributions to L3 which are used to pay interest, principal and other expenses on the debt." See also SD-5, SD-6, and SD-7.)

Audited Statements and the 2020 Unaudited Statements explain that ASU uses the money borrowed to construct its plant, and L 3 services its debt by the process of ASU issuing "dividends" to Scott Lods, who then makes "capital contributions to L 3".²⁴ Indeed, ASU's confusing business practices lead to the Commission issuing a docket entry on these "shareholder dividends."²⁵ ASU stated it was unfortunate wording.²⁶ Yet, in spite of its general ledger and audited statements, ASU claims it cannot be shareholder dividends because Mr. Lods did not pay taxes on it.²⁷ Mr. Lods' taxes are not the issue being addressed at the Commission today. The OUCC again points to the debt being reflected in ASU's general ledger and auditing financial reports. Indeed, ASU never explains what these amounts are if not shareholder dividends or debt repayments. ASU never describes what this money is, but merely claims what it is not: dividends, loan repayments, salary, or loans to shareholders. ASU's description of these transactions does not make sense. An auditor would not unilaterally describe how ASU will get the cash to L 3 to pay the \$12.7 million of debt, based only on seeing some "unfortunate wording" in a general ledger.²⁸ This process is reflected in audited reports prepared over multiple years. The Commission should focus on the evidence in the record, the general ledger and audited statements show this is for debt service. This is backed up by the loan applications showing that L 3/ ASU would use rates to repay the debt.²⁹ ASU treating this debt as equity leads to unjustly higher rates.

ASU stated that in 2017-2020 more money flowed from L3 to ASU to support its argument

²⁴ See OUCC Attachment SD-7, page 14 of 19 "Report of 2019 Financial Statements, See also SD-4, SD-5, SD-6.

²⁵ Commission's Docket Entry Request dated July 1, 2022.

²⁶ OUCC's Cross-Exhibit No. 23, ASU's Response to OUCC DR-22-2.

²⁷ Applicant's Ex. No. 1-R, at pp. 17-19.

²⁸ OUCC's Cross-Exhibit No. 23, ASU's Response to OUCC DR-22-2.

²⁹ See Attachments SD-4, p. 14, "In order for L3 to service its debt, the Company [ASU] pays dividends to Scott Lods, who then makes capital contributions to L3 which are used to pay interest, principal and other expenses on the debt." See also SD-5, SD-6, and SD-7; see also Skomp Cross Exam Transcript, pp. D-11:16 - D-13:15; see also Cross Exhibit 33, p. 212.)

that “dividends” could not be used to make the debt payments.³⁰ This actually supports the OUCC’s argument. If a twenty-year loan is taken out in 2017, the borrower does not make more payments to the bank by 2020 than it borrowed. The borrower receives a large amount in the short-term and pays it back over the long-term. In the short term more money would naturally flow to ASU from L3.

ASU claimed in its proposed order that the OUCC did not ask the simple question of how ASU made loan repayments. However, that is not true, the OUCC asked for L 3 audited statements and combined financial statements. ASU objected to providing such information.³¹

Finally, ASU misstates Mr. Dellinger’s recommended weighted average cost of capital (WACC) proposal. ASU does not represent the WACC used by Mr. Dellinger based on the confidential data.³² Mr. Dellinger actually testified that ASU has a WACC of 3.87%. ASU additionally misstates the Return on Equity (ROE) recommendation by Mr. Dellinger.³³ ASU incorrectly stated Mr. Dellinger recommended a 9.75% ROE if the Commission adopts ASU’s actual capital structure as identified by Mr. Dellinger.³⁴ Mr. Dellinger testified that if the Commission does not adopt the OUCC’s recommended findings with respect to ASU’s capital structure, the ROE should be substantially lower.³⁵

B. Salary and Wages.

As in other issues to be addressed by the Commission in its order, ASU’s proposed Commission findings and discussions for Salary and Wages expense do not deal with or address the OUCC’s evidence and arguments. ASU only recounts portions of Mr. Mix’s rebuttal testimony

³⁰ ASU PO at p. 16.

³¹ OUCC’s Cross Exhibit No. 26, ASU’s Response to OUCC DR 22-5.

³² ASU Proposed Order at p. 13.

³³ ASU Proposed Order at p. 3.

³⁴ Public’s Ex. 1, Testimony of Shawn Dellinger at pp. 40-42.

³⁵ Id.

on the subject. ASU makes no reference to the fact that after ASU's last rate case, employee hours decreased from 2015 and did not reach or exceed that level until 2019. In addition, ASU asserts an evidentiary burden the OUCC must meet to overcome a "rebuttable presumption" that the amounts on its books and records are reasonable. Thus, ASU's proposed order asserts a presumption the OUCC must rebut without addressing or acknowledging the evidence the OUCC offered to rebut the presumption that ASU asserts.

ASU asserts the OUCC must show that not all employees are reasonably needed or that the wage levels are too high. Importantly, the OUCC did not assert ASU's wages were too high. Rather, it accepted the 5% increase to wages ASU indicated in its Small U application (Schedule 6) but based the application of those wages by considering the average number of employee hours in the years 2015 through 2022, which reflect ASU's practice between rate cases of not maintaining the level of equivalent full-time employees. Moreover, ASU's proposed level of salary and wage hours (totaling 30,108 regular hours plus 338 overtime)³⁶ exceeds what Mr. Mix represented for the adjustment period of 28,198 in his rebuttal testimony. Finally, assuming the burden is on the OUCC to show that not all employees are reasonably needed, the OUCC met this burden by showing ASU's past practice of reducing its Salary and Wage hours between rate cases, for which ASU had no explanation in its rebuttal case.

ASU suggested the Commission is not free to conclude that ASU's *pro forma* salaries and wages expense should be based on anything other than what ASU put down on Schedule 6 of its small-u rate application. ASU's requested revenue requirement was not based on historical fact. Schedule 6 asks for approval in rates of "Regular hours *proposed* for subsequent year" and

³⁶ See Schedule 6 ASU's application for small utility rate increase, which sets for ASU's proposed revenue requirement for salaries and wages as "Regular hours proposed for subsequent year" and "Overtime hours proposed for subsequent year."

“Overtime hours *proposed* for subsequent year.” (Emphasis added.) Thus, the number of hours stated on Schedule 6 is only aspirational as it exceeds the number of hours in the adjustment period.³⁷

While ASU’s Mr. Mix suggested the existence of ASU’s new plant coupled with its original plant justified its increase in personnel, the argument is not backed by specific and convincing explanations as to why building new plant has made ASU’s operations more difficult and costly. OUCC witness Mr. Parks testified that the original “CE-II plant is no longer treating wastewater.”³⁸ As to why the test year should be disqualified as a representative test year, the Commission may recall that ASU had a higher number of full-time equivalent employment in the test year than any other year preceding it. And as to the fact that some employees were laid off for a time during Covid, ASU has not disclosed in any of its filings who the employees were, what function they performed, how long they were laid off, whether they were paid to any extent with accrued vacation time or most importantly, what aspect of ASU’s operations they were not performing. No conclusion can be reached as to how and even whether that affected ASU’s reasonable employment costs. The OUCC submits that the Commission may properly consider the absence of that information in determining whether the test year should be considered representative of ASU’s ongoing operations. That ASU was able to send its non-essential employees home (Mr. Mix rebuttal testimony, p. 28) without any evidence of any incident or failure in its operations supports the adequacy and reasonableness of ASU’s test year level of personnel.

In its brief in support of its proposed order, ASU’s counsel essentially inserted testimony into ASU’s brief stating that “in decades of practice, the undersigned does not recall ever seeing a

³⁷ Mix at p. 9.

³⁸ Public Exhibit No. 4, p. 5, line 3.

rate order from the commission that fails to allow recovery of the actual wage rates for the actual Employees as of the end of the adjustment period.” ASU’s counsel added “That is all ASU included in its request.” Thus, ASU’s brief mischaracterized both the OUCC’s case and its own. First, ASU did not ask the Commission to base its salary and wages expense on the number of hours ASU’s (non-director) employees actually worked in the adjustment period. Schedule 6 of ASU’s application shows that, exclusive of Mr. Lods’ salary, ASU has requested the pay for 30,108 regular hours plus 338 overtime hours. However, ASU’s rebuttal witness Mr. Mix provided a table showing that ASU had total “Man Hours” in the adjustment period of only of 28,198. (Mix Rebuttal, p. 9, Table 2.)

The OUCC based *its* recommended *pro forma* revenue requirement on the 5% increase shown on Schedule 6. The OUCC applied that rate of pay to the seven-year average (2015 through 2022) of ASU’s number of full-time equivalent employees. Only then did the OUCC propose rates be based on the slightly higher test year amount. (Note: In the OUCC’s proposed order, the OUCC increased its recommended revenue requirement by asking the Commission to find that Ms. Sullivan’s analysis established that the test year is representative of ASU’s prospective operations and adding to that the 5% wage increases established in the 2021 adjustment period.)

ASU’s Brief implied the OUCC’s position required it to identify employees that are unnecessary or overpaid. The relative burdens of proof among the parties does not require the OUCC to have a knowledge of ASU’s operations that is greater than what ASU seems to possess. The OUCC’s case identified the fact that ASU’s personnel numbers have decreased between rate cases, which should call into question whether ASU will repeat that practice.

C. Sludge Removal.

Through its proposed order, ASU asks the Commission to find the OUCC is attempting to reach an unreasonable result. On the subject of sludge expense, ASU proposes the Commission *observe* that all operating expenses are to some degree non-recurring and find “The OUCC is attempting to narrow this view in order to produce an unreasonable result.” ASU’s proposed order, p. 18-19. ASU seems to suggest that ratemaking is simply a function of the Commission attributing less than good faith to this or that party. It is not. Again, it is the facts presented to the Commission in evidence that should form the basis of its findings. Indiana Courts have found that the Commission’s order should make specific findings as to determinations material to the ultimate conclusions and the Courts will look to whether substantial evidence within the record as a whole supports the findings of fact. Off. of Util. Consumer Couns. v. Citizens Tel. Corp., 681 N.E.2d 252, 255 (Ind. Ct. App. 1997) citing *Citizens Action Coalition v. Public Serv.*, 612 N.E.2d 199, 201 (Ind.Ct.App.1993).

But ASU’s proposed finding on sludge removal expense does not have the Commission address any of the particular facts the OUCC presented in its testimony or admitted at the hearing. These include the fact that most years ASU has not incurred the expense of having its sludge hauled to a biosolids center but has been able to land apply its sludge and that ASU has significant sludge holding capacity at its two plants. Rather, without addressing the forgoing facts, ASU asks the Commission to merely rely on the vague and general assertions of its witness Mr. Mix that the expense the OUCC considered to be non-recurring “were incurred during the test year and are reasonably predicted to occur again.” Furthermore, ASU’s explanation as to why it incurred sludge hauling expense in the test year was vague and inconsistent, and ASU did not explain why it will need to incur that expense on an ongoing basis when it has largely managed to avoid that

expense in the years between rate cases.

Moreover, ASU's proposed order incorrectly indicated "the OUCC recommended a reduction to operating expenses of \$68,564 in sludge removal expense." (ASU's proposed order, p. 17.) The OUCC did not make a \$68,564 reduction to test year. Rather, as the OUCC noted in its proposed order, the OUCC recommended a \$24,654 decrease to \$68,564 of test year sludge removal expense, resulting in *pro forma* sludge removal expense of \$43,910.³⁹ (Sullivan, pp. 13-16.) (OUCC's proposed order, p. 12.)

D. Construction and Other Equipment.

ASU disagreed it was ASU's burden to justify its books and records and asserted that Ms. Stull's disallowance of more than "\$1 million in equipment owned by ASU was without any evidence to support, that similar utilities do not own such equipment and that it is cheaper to rent the equipment rather than own." ASU's reference to an OUCC data request response inaccurately stated "Ms. Stull admitted she performed no analysis in support of this claim. (Pet. Ex. 3, Attachment AAM-R30)." In fact, Ms. Stull *only* acknowledged she had not made a determination of equipment rental costs.

In AAM-R30, Ms. Stull was asked *only* whether she knew the cost to rent the equipment discussed in her statement that "If a piece of specialized equipment is needed, it would be more cost effective for ASU to rent the equipment rather than purchase it." Ms. Stull acknowledged she did "not do a cost analysis of any of the construction equipment that ASU would be able to rent." That was the extent of any admission by Ms. Stull. However, Ms. Stull added that "she did not

³⁹ Ms. Sullivan explained, during the test year, ASU hauled sludge to Merrell Bros. regional biosolids center, which cost 144% more than land application. In response to OUCC data request, ASU stated weather conditions prevented land application. The OUCC calculated *pro forma* sludge removal expense by taking a four-year average of the amount of sludge removed from ASU's system and multiplying the value by the amount Merrell Bros. charges for land application, thus eliminating the high cost of storage. *Pro forma* sludge removal expense also includes Merrell Bros. charges for testing and pumping. (Sullivan, pp. 13-16.) (OUCC's proposed order, p. 12.)

detect in her review that ASU itself performed any such analysis.” She also repeated what she said in her testimony, that “ASU has not demonstrated it uses the specialized equipment it has purchased to perform sewer utility related work on any consistent or regular basis that would justify the purchase of the various construction equipment,” and she added that she “based her opinion in part on her observation over many years that utilities roughly the size of ASU do not typically include in utility plant in service the level of construction equipment ASU has included in its proposed rate base finding.” Ms. Stull further added that she was “also aware that ASU relies on outside contractors to perform construction and repair work making the necessity of purchasing such equipment more unnecessary.” Finally, Ms. Stull noted she had not removed from her proposed rate base finding equipment that replaced equipment that was in service before Petitioner's last rate case, nor did she remove equipment in service before ASU's last rate case.⁴⁰

The OUCC takes exception to ASU’s proposed order in this regard because it inaccurately asserts Ms. Stull performed no analysis. In addition to the explanation Ms. Stull provided in her response to discovery, Ms. Stull described her analysis in her several pages of her testimony on the subject. In contrast, ASU could not meaningfully explain in response to the OUCC’s data request how each item covered under its insurance policy as “contractor’s equipment” was used to provide sewer utility service, what circumstances required the use of the equipment, and the amount of time each piece of equipment was used from 2018 through 2021. ASU could not explain why ASU needed so much specialized equipment or provide any information on how often the equipment was used as it “does not keep track of this.”⁴¹ ASU only performed an internal study before its rebuttal case to support its litigation position culminating in nine or ten pages of testimony, most of which focused on comparing the cost of renting to the cost of owning

⁴⁰ Pet. Ex. 3, Attachment AAM-R30

⁴¹ See OUCC Attachment MAS-13. See also Testimony of Stull at p. 14.

equipment.⁴² A reading of these pages show scant explanation as to whether and why the type of equipment acquired since ASU's last rate case is actually needed by ASU to operate its system. For instance, in his rebuttal testimony, Mr. Mix provided no explanation how and why ASU uses a 2019 Mack Semi with a purchase price of \$122,023, a '66 Straight Boom with a purchase price of 115,700, the Cat Telehandler at a purchase price of \$156,000, the CAT Mini Excavator at a purchase price of \$106,000, or the JD 210 Excavator at a purchase price of \$130,000. Mr. Mix did provide as an attachment to his testimony a data request response providing very brief explanations as to how insured equipment is used. For instance, it states that the 2018 66' Straight Boom is used to place "staff in hard to get to locations for maintenance on buildings, tanks, and treatment equipment."⁴³ Mr. Mix does not explain why a sewer utility would need to place its employees in locations nearing '66 feet above ground.

ASU's proposed order cited the Commission's 1993 I&M Order in Cause No. 39314 at 5-6, 1993 WL 602559 (IURC 11/12/1993) to support the idea that ASU's rate base additions must be presumed to be correct because they are on ASU's books. ASU quoted that part of the order stating that "In the absence of a showing of inefficiency or improvidence, either by direct or circumstantial evidence, actual historic or specifically identified future expenditures by a utility cannot be merely disregarded for ratemaking purposes." *Id.* Thus, this order acknowledges any such presumption can be overcome by a showing of inefficiency and improvidence. The OUCC provided such evidence through the testimony of Ms. Stull, which looked at ASU's own historical operations more specifically what equipment it owned as of its last rate order. Importantly, in the I&M case the Commission addressed a ratemaking issue involving undisputed evidence from the utility and dismissed the idea that a utility had to prove its case with clear and convincing evidence

⁴² See Rebuttal Testimony of Mix, pp. 36 – 45.

⁴³ See Attachment AAM-R29. See also OUCC Attachment MAS-13.

or beyond a reasonable doubt. Those are not the evidentiary standards on which the OUCC has based its proposed findings in this case. Moreover, in I&M the Commission prefaced its discussion of the standard of review by noting that it was “incumbent upon [the utility] to furnish some data supporting the propriety of a given level of revenue or expense, particularly with [utility] specific information.” Id. (emphasis added.) The evidence presented by the OUCC must be weighed against the evidence presented by ASU, which failed to explain why it now needs construction equipment it did not need before.

Ms. Stull accepted the \$171,182 in utility plant in service for a Case tractor, a scissor lift, and an extended hoist, among other things. She also accepted a “jet vac” truck acquired from FTDC at a cost of \$50,000. Finally, the OUCC did not recommend the removal of construction and other equipment purchased before March 31, 2015.⁴⁴ But ASU has not adequately explained why it needed to acquire more than \$1 million of equipment not typically owned by utilities of its size. Nor did ASU explain in its rebuttal case how it operated before it acquired that equipment. ASU’s unsupported new equipment should be disallowed.

E. Major Project Costs in Excess of Rate Base Findings.

ASU’s Proposed Order and supporting Brief perpetuate ASU’s misunderstanding or mischaracterization of the OUCC’s disallowance of additional rate base associated with the projects authorized to be placed in service in ASU’s last rate case (Final Order, Cause No. 44676, November 2016). ASU misidentifies this issue in its proposed order as “Costs in Excess of the Preapproval Case.” ASU inaccurately asserts the OUCC’s position is that ASU is limited to rate base amounts determined in the preapproval case (Cause No. 44272). This is inconsistent with a

⁴⁴ See OUCC Attachment MAS-14.

plain reading of Margaret Stull's testimony and the OUCC's schedules.

While Ms. Stull noted projects were preapproved for expenditures in Cause No. 44272, she did not assert that those orders independently limited the amount of rate base that could be included for those projects. Ms. Stull has not disregarded the plain language of those orders, as Ms. Shafer's testimony suggested. In fact, Ms. Stull explicitly acknowledged that ASU was not limited to the preapproval amounts established in Cause No. 44272.⁴⁵ Ms. Stull relied on the final orders in Cause Nos. 44676 and 44676-S1 for the OUCC's position that the final rate base amounts of those projects have been established. The entirety of ASU's brief on the subject should be disregarded because it is based on a faulty premise. Moreover, through its apparent misunderstanding of Ms. Stull's testimony, ASU provided no meaningful response to the OUCC's position, which is based on the plain language of the final orders in Cause Nos. 44676 and 44676-S1.⁴⁶

CONCLUSION

For the foregoing reasons, the OUCC requests the Commission adopt the OUCC's proposed order.

⁴⁵ Stull Testimony, p.8.

⁴⁶ Stull Testimony, pp. 8-11.

CERTIFICATE OF SERVICE

This is to certify that a copy of the *OUCC's Exceptions to ASU's Proposed Order* has been served upon the proceeding by electronic service on October 14, 2022.

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