

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	: : : :	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	: : : :	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	: : : :	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	: : : :	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	: : : :	Case No. 12-672-EL-RDR

**MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO
STRIKE TESTIMONY OF INDUSTRIAL ENERGY USERS-OHIO WITNESSES
KEVIN M. MURRAY, J. EDWARD HESS, AND JOSEPH G. BOWSER**

The Dayton Power and Light Company moves the Commission for an order to strike portions of the testimony of Industrial Energy Users-Ohio witnesses Kevin M. Murray, J. Edward Hess, and Joseph G. Bowser. The Commission should issue the requested order because the testimony at issue contains numerous statements that are not based on personal knowledge, that do not set forth facts that would be admissible in evidence, and that are conclusions of law (not statements of fact).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION OF
THE DAYTON POWER AND LIGHT COMPANY TO STRIKE TESTIMONY OF
INDUSTRIAL ENERGY USERS-OHIO WITNESSES KEVIN M. MURRAY, J.
EDWARD HESS, AND JOSEPH G. BOWSER**

I. INTRODUCTION AND SUMMARY

On March 1, 2013, Industrial Energy Users-Ohio ("IEU") filed the direct testimony of IEU witnesses Kevin M. Murray, J. Edward Hess, and Joseph G. Bowser (collectively, the "Testimony"). The Testimony of IEU's witnesses contains numerous statements that are not based on personal knowledge, that do not set forth facts that would be admissible in evidence, and that are conclusions of law (not statements of fact).

Specifically, the Commission should issue an order to strike the following portions of the Testimony:

<u>Witness</u>	<u>Page and Line Numbers</u>
Kevin M. Murray	page 9, lines 1-22; page 10, lines 1-6, 8-12; page 12, lines 1-3; page 22, lines 19-21; page 23, line 1; page 24, lines 17-21; page 25, lines 1-18; page 26, lines 1-23; page 27, lines 1-4; page 31, lines 12-22; page 32, lines 2-5
J. Edward Hess	page 4, lines 1-3; page 6, lines 6-23; page 7, lines 7-12; page 8, lines 18-24, 27-30; page 9, lines 1-9; page 11, lines 18-20; page 12, lines 5-10; page 14, lines 8-15; page 18, lines 6-11; page 19, lines 1-21; page 20, lines 5-15, 18-23; page 21, lines 1-5
Joseph G. Bowser	page 9, lines 3-5, 10-12; page 10, lines 14-19, 22-23; page 11, lines 1-4, 9-12; page 12, lines 6-8; page 14, lines 15-23; page 15, 1, 7-16; page 17, lines 4-8

**II. PORTIONS OF THE TESTIMONY CONTAINING STATEMENTS ON
SUBSTANTIVE LAW ARE IMPROPER AND SHOULD BE STRICKEN**

IEU has attempted to instruct the Attorney Examiners on the law to be applied to the ESP Application filed by The Dayton Power and Light Company ("DP&L"). The

inadmissible portions of the Testimony identified above are wholly improper under decades of well-settled precedent, and must be stricken from the evidentiary record. By opining on substantive law, IEU in effect seeks to offer expert testimony on the law.

Legal testimony as to the law is inadmissible, particularly where (as here)¹ the witnesses are not legal experts. Camp St. Marys Ass'n of the W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes, 176 Ohio App. 3d 54, 2008-Ohio-1490, 889 N.E.2d 1066, ¶40 (3d Dist.) (rejecting testimony because witness "was not qualified as a legal expert, and his opinions concerning superiority, influence, and fiduciary duties are legal conclusions rather than statements of fact"); Niermeyer v. Cook's Termite & Pest Control, Inc., 10th Dist. No. 05AP-21, 2006-Ohio-640, ¶34 (affirming trial court's granting motion to strike testimony because "it stated only legal conclusions, and failed to outline any facts supporting such conclusions"); Molecular Tech. Corp. v. Valentine, 925 F.2d 910, 919 (6th Cir. 1991) ("it is impermissible for a trial judge to delegate his duty to determine the law of a case to an expert") (citations omitted); Smith v. United States, No. 3:95cv445, 2012 U.S. Dist. LEXIS 58623, at *53 (S.D. Ohio Apr. 26, 2012) ("It is axiomatic that a court must determine the law which is applicable in a particular suit. In other words, the applicable law is not a matter about which the parties present evidence.").²

¹ There is no evidence that Messrs. Murray, Hess, and Bowser are lawyers, let alone legal experts.

² Ohio courts may look to federal case law as persuasive authority in interpreting an Ohio rule. Industrial Risk Insurers v. Lorenz Equip. Co., 69 Ohio St. 3d 576, 579, 635 N.E.2d 14, 17 (1994). Thus, the Commission should consider the federal cases cited in this memorandum as persuasive authority.

This prohibition of testimony concerning substantive law has been applied to both lay and expert witnesses. United States v. Kingston, 971 F.2d 481, 486 (10th Cir. 1992) ("[L]ay witnesses and even expert witnesses are not permitted to give opinions as to what the law is.").

Here, IEU has attempted to define the substantive law for DP&L's ESP Application. The portions of the Testimony outlined above are improper because IEU has crossed the line between witness and legal advocate. Indeed, the Testimony is further flawed because significant portions of it are written in the form of a legal brief, with citation to Ohio law and Commission precedent. G.F. Co. v. Pan Ocean Shipping Co., Ltd., 23 F.3d 1498, 1507 (9th Cir. 1994) (striking witnesses' testimony because "[e]ach is written in the form of a legal document, complete with subdivisions for discussion of the issues, the law, and the conclusions"); In re McKesson HBOC, Inc. Secs. Litig., 126 F. Supp. 2d 1239, 1246-47 (N.D. Cal. 2000) (granting motion to strike when expert testimony was written in form of legal brief because "[t]hese declarations offer few facts or any admissible expert opinions, instead proffering various and sundry conclusions of law.").

III. CONCLUSION

Based on these severe defects in the Testimony, the Commission should issue an order to strike portions of the Testimony of Industrial Energy Users-Ohio witnesses Kevin M. Murray, J. Edward Hess, and Joseph G. Bowser.

Respectfully submitted,

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I certify that a copy of the foregoing Motion of The Dayton Power and Light Company to Strike Testimony of Industrial Energy Users-Ohio Witnesses Kevin M. Murray, J. Edward Hess, and Joseph G. Bowser has been served via electronic mail upon the following counsel of record, this 7th day of March, 2013:

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**DIRECT TESTIMONY OF KEVIN M. MURRAY
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

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March 1, 2013

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PUBLIC

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**DIRECT TESTIMONY OF KEVIN M. MURRAY
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

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CERTIFICATE OF SERVICE

EXHIBITS

EXHIBITS KMM-1 THROUGH KMM-19

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**DIRECT TESTIMONY OF KEVIN M. MURRAY
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

1 I. INTRODUCTION

2 Q1. Please state your name and business address.

3 A1. My name is Kevin M. Murray. My business address is 21 East State Street, 17th
4 Floor, Columbus, Ohio 43215-4228.

5 Q2. By whom are you employed and in what position?

1 A2. I am employed as a Technical Specialist by McNees Wallace & Nurick LLC
2 ("McNees") and serve as the Executive Director of the Industrial Energy Users-
3 Ohio ("IEU-Ohio"). I am providing testimony on behalf of IEU-Ohio.

4 **Q3. Please describe your educational background.**

5 A3. I graduated from the University of Cincinnati in 1982 with a Bachelor of Science
6 degree in Metallurgical Engineering.

7 **Q4. Please describe your professional experience.**

8 A4. I have been employed by McNees for 15 years where I focus on helping
9 IEU-Ohio members address issues that affect the price and availability of utility
10 services. I have also been actively involved, on behalf of commercial and
11 industrial customers, in the formation of regional transmission operators ("RTOs")
12 and the organization of regional electricity markets from both the supply-side and
13 demand-side perspective. I serve as an end-use customer sector representative
14 on the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO"
15 or "MISO") Advisory Committee and I have been actively involved in MISO
16 working groups that focus on various issues since 1999. Prior to joining McNees,
17 I was employed by the law firm of Kegler, Brown, Hill & Ritter ("KBH&R") in a
18 similar capacity. Prior to joining KBH&R, I spent 12 years with The Timken
19 Company, a specialty steel and roller bearing manufacturer. While at The
20 Timken Company, I worked within a group that focused on meeting the electricity
21 and natural gas requirements for facilities in the United States. I also spent

1 A10. The separation of ownership and control objective can be seen in numerous
2 aspects of Ohio's approach to restructuring the retail electric market so that retail
3 customers can exercise "customer choice" for the services or functions declared
4 by the law or found by the Commission to be "competitive retail electric services."
5 For example, Amended Substitute Senate Bill 3 ("SB 3") requires entities owning
6 or operating transmission facilities to participate in RTOs like PJM that separate
7 ownership and control of transmission functions from generation functions and
8 maintain reliability within a broad region including Ohio.² As I understand SB 3,
9 the provision of generation supply to retail customers was declared to be and is a
10 competitive service and the Commission has authority to declare that other
11 services are competitive. For services which are non-competitive, the
12 Commission retained traditional ratemaking authority to authorize utilities to bill
13 and collect for non-competitive services unless the Commission's authority is
14 preempted.

15 In the case of competitive services, it is my understanding that SB 3 preserved
16 the Commission's ability to approve prices for default service provided by an
17 EDU such as DP&L through the SSO but precludes the Commission from
18 regulating rates and charges for competitive services provided by competitive
19 retail electric service ("CRES") providers based on the traditional rate base, rate
20 of return model. It is also my understanding that SB 3 precludes an EDU from
21 providing a competitive and non-competitive service unless the competitive
22 service is provided through a structurally separated affiliate. In addition to

² Section 4928.12, Revised Code.

1 essentially separating the distribution, transmission and generation functions of a
2 vertically-integrated investor-owned electric utility, it is my understanding that SB
3 3 requires EDUs to implement corporate separation plans approved by the
4 Commission to guard against the challenges associated with the vertically-
5 integrated and anticompetitive industry structure that predated electric industry
6 restructuring.

7 **Q11. What type of corporate separation plan was approved for DP&L?**

8 A11. It is my understanding that SB 3 made the corporate separation requirements
9 effective prior to the January 1, 2001 effective date of customer choice. It also
10 required the Commission to review and address the EDU's corporate separation
11 plan as part of the service and rate unbundling process that took place in the
12 electric transition plan ("ETP") process.

13 DP&L filed its ETP in Commission Case No. 99-1687-EL-ETP. That case was
14 resolved through a Stipulation and Recommendation accepted by the
15 Commission. DP&L's proposed corporate separation plan was not opposed by
16 any party in the ETP proceeding. DP&L's corporate separation plan called for it
17 to transfer its distribution business and assets and transmission business and
18 assets to an affiliate by January 1, 2001. DP&L generating assets would remain
19 with DP&L, which would become an exempt wholesale generator. The
20 Commission approved the corporate separation plan in its Finding and Order
21 approving the ETP Stipulation and Recommendation.

1 result of its improper business relationship with DPL Retail, which violates both
2 the letter and spirit of Ohio's corporate separation requirements governing the
3 business relationships between a regulated EDU and its non-regulated affiliates.

4 **Q15. What has been the trend of customer switching to CRES providers within**
5 **DP&L's service area?**

6 A15. As of August 30, 2012, approximately 62% of DP&L's retail load has switched to
7 a CRES provider. DP&L has provided a forecast of incremental switching in
8 response to interrogatories. As shown on Exhibit KMM-2, DP&L has forecasted
9 switching will [REDACTED]

10 [REDACTED]
11 **Q16. What portion of the switched load has been retained by DPLER?**

12 A16. The majority of the switched load has been retained by DPLER. As shown in
13 Exhibit KMM-3, in a November 2012 presentation at the 47th Annual Edison
14 Electric Institute ("EEI") Financial Conference, AES Corporation reported that
15 DPL (the parent company of DPLER) had retained 73% of switched load. DPL
16 has a business strategy to expand its retail customer base.

17 **Q17. Where does DPL Retail obtain generation supply to provide service to the**
18 **retail customers it serves?**

19 A17. DPL Retail has been [REDACTED]
20 [REDACTED]
21 [REDACTED]

1 multiplying the incremental switched load by the difference between the blended
2 SSO generation rate and the generation rate established through the competitive
3 bidding process.

4 **Q34. Has DP&L provided any estimate of revenue to be collected through the**
5 **ST?**

6 A34. Yes. As shown on Exhibit KMM-2, based upon assumed switching levels and
7 the forecast results of the proposed CBP, DP&L has estimated the ST will
8 produce [REDACTED] in revenue through May 2016, when the proposed ST
9 would terminate.

10 **Q35. Should the Commission approve the proposed SSR and ST?**

11 A35. No. There are multiple reasons why approval of the proposed SSR and ST in
12 this proceeding would result in unreasonable if not unlawful outcomes and, more
13 broadly speaking, go against the structural reforms and policy objectives that are
14 part and parcel of the effort to remedy an anticompetitive electric industry
15 structure.

16 First, both the SSR and ST are contrary to the state's policies and would provide
17 an unwarranted subsidy to DP&L's generation business, to the detriment of its
18 competitors and shopping and non-shopping customers alike.

19 Second, as IEU-Ohio witness J. Edward Hess explains in his testimony, DP&L's
20 proposed SSR and ST is really a belated, and as I understand it based on the
21 advice of counsel, illegal request to obtain "transition revenue" well after the

1 opportunity to submit such a claim expired. I also understand that this "transition
2 revenue" claim was submitted by DP&L long after it surrendered its right to
3 submit such a claim and to impose a transition charge on shopping customers.

4 Third, DP&L's financial integrity claims are the result of [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 **Q36. Does Ohio prohibit subsidies between an electric utility's regulated and**
16 **non-regulated businesses?**

17 **A36. Yes.** Section 4928.02 (H), Revised Code, states that it is the policy of the state
18 to:

19 Ensure effective competition in the provision of retail electric
20 service by avoiding anticompetitive subsidies flowing from a
21 noncompetitive retail electric service to a competitive retail electric
22 service or to a product or service other than retail electric service,
23 and vice versa, including by prohibiting the recovery of any
24 generation-related costs through distribution or transmission rates.

1 **Q37. Would the SSR and ST provide DP&L an anticompetitive subsidy?**

2 A37. Yes. Both the SSR and ST are structured as non-bypassable charges that would
3 be levied on DP&L's distribution customers. They are designed to provide DP&L
4 revenues to prop up the earnings associated with its generation business.

5 **Q38. Are the proposed SSR and ST a request for an additional source of**
6 **transition revenues?**

7 A38. Yes. It may be helpful to provide some additional context to help explain my
8 answer.

9 Ohio made the move to "customer choice" in 1999 with the passage of SB 3. At
10 the time, there were parallel federal efforts to restructure the wholesale electric
11 market and address the anticompetitive electric industry structure. These
12 initiatives were rooted in the view that competitive markets could do a better job
13 of advancing the public interest in reasonable prices, reliable service and
14 innovation than traditional regulation.

15 SB 3 contained policy objectives and established the process by which the
16 evolution to reliance upon competitive markets would occur for competitive
17 services such as generation supply.

As discussed earlier, Ohio's implementation
18 of SB 3 required the unbundling or separation of the three major functions
19 (generation or production, transmission and distribution) associated with retail
20 electric service into separate competitive and non-competitive service
21 components with separate prices for such unbundled components.

1 SB 3 established a "transition period" beginning on January 1, 2001 and ending
2 on December 31, 2010. Within the transition period, SB 3 created a five-year
3 market development period ("MDP") during which incumbent investor-owned
4 utilities and customers had the opportunity to prepare for and transition to a
5 competitive market. SB 3 directed the Commission to structure transition plans
6 with the objective of obtaining at least 20% customer switching by the mid-point
7 of the MDP, which could end no later than December 31, 2005.

8 The evolutionary approach to restructuring the retail investor-owned electric
9 industry in Ohio, accompanied by the completion of the transitional tasks, served
10 two important objectives. The first objective was to provide customers with
11 certain price protections from the dysfunction that is often associated with new
12 and immature markets until such time as the retail market was mature enough to
13 produce "reasonable" prices. The General Assembly protected customers by
14 specifying that the total price of electricity in effect in October 1999 would define
15 the total price envelope within which the individual or unbundled generation,
16 transmission and distribution prices would be established through the transition
17 plan process.⁵ SB 3 also provided residential customers an immediate benefit in
18 the form of a five percent discount.

⁵ The total bundled price for each electric rate schedule established the total rate cap, which is then divided between the functional components (generation, transmission, and distribution). Ohio provided, in Section 4928.34(A)(6), Revised Code, that such rate cap was subject to adjustment for changes in taxes, costs related to the establishment of a universal service fund ("USF"), and a temporary rider established by Section 4928.61, Revised Code. Thus, the rate cap was not an absolute cap on the total charges paid by customers during the MDP.

1 The second consequence of the SB 3 structure protected incumbent EDUs
2 during the MDP (and the balance of the transition period) from potential revenue
3 loss that might otherwise be caused by an abrupt exposure to a new and
4 immature market. In 2001, price offers for competitive retail service were
5 relatively low and the transition structure protected EDUs from revenue and
6 earnings erosion. Each EDU was also provided an opportunity to protect itself in
7 the event the EDU judged the revenue from unbundled generation prices to be
8 above the revenue that it could obtain from providing generation services in the
9 competitive market. The right to pursue this protection required an EDU to file a
10 claim with the Commission for "transition revenue" (i.e., the positive difference
11 between the unbundled default supply generation prices and prices available to
12 the EDU for generation services provided in the market — sometimes called
13 "stranded costs") as part of the ETP filings. If the EDU's unbundled default
14 supply generation service prices yielded revenue less than that available in the
15 market, this "stranded benefit" was netted against the transition revenue claim.
16 The net, legitimate and verifiable amount of any allowable generation-related
17 transition revenue claim had to be collected by December 31, 2010. DP&L's
18 ETP case was ultimately resolved through a stipulation approved by the
19 Commission. In the stipulation, the maximum allowable amount of transition
20 revenue for DP&L was capped at \$699.2 million during DP&L's market
21 development period. DP&L agreed to forego recovery of all transition costs after
22 December 31, 2003. *In the Matter of the Application of the Dayton Power and*
23 *Light Company for Approval of its Transition Plan Pursuant to Section 4928.31,*

1 *Revised Code and for the Opportunity to Receive Transition Revenues as*
2 *Authorized Under Sections 4928.31 to 4928.40, Revised Code, Case No. 99-*
3 *1687-EL-ETP, Opinion and Order at 29 (September 21, 2000). IEU-Ohio witness*
4 *J. Edward Hess also discusses this history.*

5 **Q39. Are DP&L's financial integrity claims self-inflicted?**

6 **A39.** Yes. As discussed above, the [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 **Q40. What are your conclusions regarding the SSR and ST?**

18 **A40.** The proposed SSR and ST are designed to provide DP&L an anticompetitive
19 subsidy to prop up the earnings associated with its generation related business
20 and should not be approved. DP&L's financial integrity claims are the result of

21 [REDACTED]
22 [REDACTED]

1 that assumption is not correct. Additionally, Mr. Malinak overlooks the projected
2 impact of the ST in his analysis. When these flaws in Mr. Malinak's analysis are
3 corrected, the ESP is less favorable than an MRO.

4 **Q45. Why is Mr. Malinak's assumption regarding the level of SSR charge under**
5 **an MRO incorrect?**

6 **A45.** Mr. Malinak's assumption results in an increase in the legacy SSO price that
7 would be blended with the results of a competitive bid under an MRO. DP&L
8 currently collects a non-bypassable charge (the² RSC) as part of its current ESP.
9 The RSC collects approximately \$73 million annually in revenues. DP&L's
10 proposed SSR would increase the level of non-bypassable charges to collect
11 \$137.5 million annually.

12 It is my understanding that the law allows the Commission to adjust the legacy
13 SSO price to be blended under an MRO in certain limited circumstances. As
14 previously noted, those circumstances only contemplate adjusting the legacy
15 SSO price to reflect any of the circumstances described below:

- 16 • changes in the EDU's prudently incurred costs of fuel used to produce
17 electricity; or
- 18 • changes in the EDU's purchased power costs; or
- 19 • changes in the EDU's costs to comply with energy efficiency, peak
20 demand reduction and renewable portfolio requirements; or
- 21 • changes in the EDU's costs to comply with environmental laws and
22 regulations.

1 None of those circumstances is applicable to DP&L's proposed SSR.

2 Additionally, it is my understanding that the Commission may adjust the legacy
3 SSO price to be blended under an MRO if necessary to address an EDU's
4 financial emergency, or to prevent a taking of property without compensation
5 pursuant to Section 19 of Article I, Ohio Constitution. As discussed in the direct

6 testimony of IEU-Ohio witness Joseph G. Bowser, DP&L has not provided the
7 necessary information to demonstrate its financial integrity is threatened.

8 Because none of the circumstances to adjust the legacy SSO price exists, Mr.
9 Malinak's assumed increase in the SSO price that would be blended with the
10 results of a CBP is incorrect. In fact, as discussed below, Mr. Malinak's
11 assumption is inconsistent with positions DP&L itself has argued in this
12 proceeding. It is also inconsistent with an initial determination of the Commission
13 on DP&L's current RSC.

14 As the Commission is aware, in this proceeding a dispute has arisen between the
15 parties regarding whether continuation of DP&L's current ESP permits continued
16 collection of the RSC after December 31, 2012. As a result of that dispute,
17 several parties (including IEU-Ohio) filed a motion on September 26, 2012
18 requesting that the Commission enforce the stipulation and recommendation
19 approved by the Commission in Case No. 08-1094-EL-SSO, establishing DP&L's
20 current ESP. The parties argued that the stipulation, by its terms, required the
21 RSC to terminate on December 31, 2012.

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

PUCO

**In the Matter of the Application of
The Dayton Power and Light Company
for Approval of Its Market Rate Offer.**

Case No. 12-426-EL-SSO

In the Matter of the Application of
The Dayton Power and Light Company
for Approval of Revised Tariffs.

Case No. 12-427-EL-ATA

**In the Matter of the Application of
The Dayton Power and Light Company
for Approval of Certain Accounting
Authority.**

Case No. 12-428-EL-AAM

**In the Matter of the Application of
The Dayton Power and Light Company
for Waiver of Certain Commission Rules.**

Case No. 12-429-EL-WVR

In the Matter of the Application of
The Dayton Power and Light Company
to Establish Tariff Riders.

Case No. 12-672-EL-RDR

**DIRECT TESTIMONY OF J. EDWARD HESS
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO
[PUBLIC VERSION]**

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March 1, 2013

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer.)))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.)))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.))))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.)))	Case No. 12-672-EL-RDR

**DIRECT TESTIMONY OF J. EDWARD HESS
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO
[PUBLIC VERSION]**

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer.)))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.)))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.))))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.)))	Case No. 12-672-EL-RDR

**DIRECT TESTIMONY OF J. EDWARD HESS
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO
[PUBLIC VERSION]**

1 I. INTRODUCTION

2 Q1. Please state your name and business address.

3 A1. J. Edward Hess, 21 East State Street, 17th Floor, Columbus, Ohio 43215

4 Q2. By whom are you employed and in what position?

5 A2. I am a Technical Specialist for McNees Wallace & Nurick LLC ("McNees"),
6 providing testimony on behalf of Industrial Energy Users-Ohio ("IEU-Ohio").

7 IEU-Ohio is an association of commercial and industrial customers and functions

1 to address issues that affect the price and availability of energy its members
2 need to operate their Ohio plants and facilities.

3 **Q3. Please describe your educational background.**

4 A3. I received a Bachelor of Business Administration degree from Ohio University in
5 1975 majoring in accounting. I completed the majority of Capital University's
6 Master of Business Administration program and I have completed many
7 regulatory training programs. I am a certified public accountant.

8 **Q4. Please describe your professional experience.**

9 A4. I have been employed by McNees since October 2009. In March 2009, I retired
10 from the Public Utilities Commission of Ohio ("Commission") after 30 years of
11 employment. My last position with the Commission was as the Chief of the
12 Accounting and Electricity Division of the Utilities Department. My duties
13 included ensuring statutory compliance with state and federal laws, rules,
14 regulations, and procedures governing utility regulation with the majority of that
15 responsibility in the electric industry. I was also responsible for the operating
16 income and rate base portions of base rates and general accounting matters in
17 all of the utility industries.

18 **Q5. Have you previously testified before the Commission?**

19 A5. As part of my responsibilities as a Commission employee, I have provided expert
20 testimony in numerous Commission proceedings. I began testifying in the early
21 1980's. More recently I provided written testimony in Case Nos. 09-872-EL-FAC

1 competitive assets or affiliated lines of competitive business which I understand
2 to be a violation of corporate separation law and rules, and contrary to Ohio's
3 policies. This recommendation is also supported by the testimony of IEU-Ohio
4 witnesses Kevin M. Murray and Joseph G. Bowser.

5 I further recommend that the Commission not approve either the SSR or the ST
6 because they amount to an untimely request for transition revenue. DP&L was
7 provided an opportunity by statute to request the recovery of generation-related
8 transition revenue; that issue was resolved by a Commission-approved
9 stipulation, and DP&L has recovered all allowable transition costs authorized
10 through those stipulations. Additionally, the period during which transition
11 revenue could be requested and collected ended long ago.

12 **III. SERVICE STABILITY RIDER AND SWITCHING TRACKER**

13 **Q8. Will you describe DP&L's request for an SSR?**

14 A8. DP&L, the EDU, is seeking Commission approval to recover \$137.5 million per
15 year through a non-bypassable charge levied on all distribution customers for the
16 term of the proposed ESP (2013-2017). DP&L claims that the approval of the
17 SSR is appropriate to allow it to maintain a total company return on equity
18 ("ROE") that it says is in line with comparable firms' ROEs. DP&L claims the
19 SSR is necessary to protect its total company financial integrity. That claim is
20 based upon projected earnings for DP&L as though it is still a vertically integrated

1 combined generation function, the transmission function, and the distribution
2 function.

3 **IV. CORPORATE SEPARATION**

4 **Q11. Will you briefly describe the role of the SSO as part of Ohio's electric**
5 **restructuring and adoption of a "customer choice" regulatory model?**

6 A11. With the enactment of Amended Substitute Senate Bill 3 ("SB 3") in 1999, the
7 structure of the vertically integrated industry changed significantly in part to break
8 the link between ownership and control of assets within such an industry
9 structure. With regard to competitive retail electric service such as generation
10 supply and effective January 1, 2001, the EDU was confined to the role of a
11 default supplier to customers not receiving competitive service from a competitive
12 retail electric service ("CRES") provider. This default supplier status currently
13 allows the EDU to obtain market-based or tested compensation for default supply
14 SSO through the ESP or the market rate offer ("MRO") options.

15 In addition to the default supply role of an EDU, SB 3 imposed numerous
16 requirements on an EDU to make sure that retail customers as well as CRES
17 providers are not subjected to an EDU's discretion in ways that would allow the
18 EDU to favor its owned or controlled assets or affiliated lines of business. I do
19 not believe that these requirements can be ignored. When taken into
20 consideration, these requirements act as barriers to the type of proposals that
21 DP&L is advancing in these proceeding. In 2008, Amended Substitute Senate
22 Bill 221 ("SB 221") altered the means by which an EDU could be compensated
23 for its default generation supply service, but SB 221 did not change the core

1 elements of the electric restructuring architecture contained in SB 3 and
2 specifically the requirements that an EDU cannot operate to favor its non-
3 regulated affiliates or use its non-competitive lines of business to provide
4 anticompetitive subsidies to its competitive lines of business.

5 **Q12. Has Ohio adopted laws and regulations governing the relationship between**
6 **a regulated EDU and its affiliates providing competitive services?**

7 A12. I am advised by counsel that Section 4928.17, Revised Code, requires a
8 corporate separation plan and defines many of the requirements of that plan. I
9 am also aware that the PUCO adopted rules for these plans originally as a part of
10 the standard filing requirements for electric transition plans [Rule 4901:1-20-16,
11 Ohio Administrative Code ("O.A.C")] and later adopted a more permanent set of
12 rules (Rule 4901:1-37, O.A.C.).

13 **Q13. Will you explain the Ohio restrictions?**

14 A13. SB 3 required the vertically integrated utility companies to unbundle generation,
15 transmission, and distribution services and operate under corporate separation
16 plans to maintain walls between competitive and non-competitive services
17 including a Code of Conduct. These separation plans were filed as a part of the
18 ETP as required by Section 4928.17, Revised Code, and in the format required
19 by Rule 4901:1-20-16, O.A.C. The purpose of the corporate separation plan was
20 described in the filing requirements for the ETP under Rule 4901:1-20-16(A),
21 O.A.C., which states:

22 Purpose and scope Electric utilities are required by section
23 4928.17 of the Revised Code, to file with the commission an
24 application for approval of a proposed corporate separation plan.

1 The rule provides that all the state's electric utility companies must
2 meet the same standards so a competitive advantage is not gained
3 solely because of corporate affiliation. This rule should create
4 competitive equality, preventing unfair competitive advantage and
5 prohibiting the abuse of market power. Generally, this rule applies
6 to the activities of the regulated utility and its transactions with its
7 affiliates. However, to ensure compliance with this rule,
8 examination of the books and records of other affiliates may be
9 necessary. Compliance with paragraph (G)(4) of this rule shall
10 begin immediately. Compliance with the remainder of this rule shall
11 coincide with the start date of competitive retail electric service,
12 January 1, 2001, unless extended by commission order for an
13 electric utility pursuant to division (C) of section 4928.01 of the
14 Revised Code.
15

16 **Q14. As you understand it, did SB 3 require the vertically integrated electric**
17 **utilities to structurally separate the unbundled functions of the utility?**

18 A14. Yes. That is my understanding. It is generally referred to as legal separation.
19 However, it is also my understanding that the Commission had some ability to
20 permit the use of functional separation on an interim basis until structural
21 separation could be completed. Nonetheless, any use of functional separation
22 still had to provide for ongoing compliance with the policy specified in Section
23 4928.02, Revised Code, and meet other requirements of SB 3 and the
24 Commission's rules.

25 **Q15. When establishing the SSO, should legal separation and functional**
26 **separation be treated any differently?**

27 A15. No. Functionally separated companies should be held to the same standards as
28 a legally or structurally separated company. As stated in the separation rule
29 above, "The rule provides that all the state's electric utility companies must meet
30 the same standards so a competitive advantage is not gained solely because of

1 corporate affiliation.”³ Additionally, it is my understanding that the definition of
2 affiliates in the corporate separation rules includes business functions of the
3 same company.⁴ It is also my understanding that the Commission’s rules
4 explicitly hold DP&L’s business functions to the same rules as affiliates.
5 Separate accounting of the distribution, transmission, and generation functions is
6 required, communication between these functions should be at arm’s length, and
7 there should be no competitive advantage provided to the competitive generation
8 business by the non-competitive business functions (distribution and
9 transmission).

10 **Q16. Did DP&L file a corporate separation plan with its ETP filings?**

11 A16. Yes. The plan was originally filed in its ETP case (Case Nos. 99-1687-EL-ETP,
12 *et al.*). The final version was filed on February 28, 2000 and was eventually
13 supported by DP&L witness Timothy G. Rice. DP&L’s proposed corporate
14 separation plan was approved by the Commission as part of the ETP settlement.

15 **Q17. Did the original corporate separation plan include a plan to move the**
16 **generation assets to an affiliated subsidiary?**

17 A17. No. The original plan was to move the distribution and transmission assets to
18 one or more direct subsidiaries of DPL Inc. The plan allowed DP&L to continue
19 to own and operate the generation assets and businesses as an exempt
20 wholesale generator pursuant to the Public Utilities Holding Company Act of
21 1935.

³ Rule 4901:1-20-16(A), O.A.C.

⁴ Rule 4901:1-37-01(A), O.A.C.

1 of DP&L's combined generation function, transmission function and distribution
2 function based on a set of assumptions and forecasts. His evaluation was for the
3 period 2013 through 2017. He concluded that the SSR is important to maintain
4 DP&L's financial integrity (even with no additional switching) and that the ST is
5 critical to reduce the financial impact of increased customer switching. He made
6 no attempt to quantify which business function is at risk or responsible for the
7 decline in financial integrity. However, in his testimony Dr. Chambers identifies
8 the loss of generation and transmission revenue as the factor that is expected to
9 create financial risk and drive DP&L's proposed SSR and ST. DP&L has
10 admitted that the SSR and the ST may provide compensation for generation
11 function costs.⁵

12 **Q21. Should the financial integrity of DP&L's transmission business impact the**
13 **EDU's proposed SSO?**

14 A21. No. It is my understanding that DP&L's transmission rates remain subject to
15 cost-based economic regulation under the supervision of the Federal Energy
16 Regulatory Commission ("FERC"). To the extent that a lack of transmission
17 revenue is negatively affecting DP&L's financial performance, it may seek an
18 increase in transmission rates from FERC at any time. It is my understanding
19 that Ohio law requires the Commission to pass through any FERC-approved
20 transmission charges to customers that obtain transmission service from DP&L.

21 Therefore, I believe it is inappropriate to consider the financial performance of
22 DP&L's FERC-regulated transmission business segment for purposes of

⁵ Attachment A (DP&L's Responses to IEU-Ohio's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, October 23, 2012, ESP INT 1-39).

1 potentially subjecting all distribution customers to non-bypassable charges
2 unrelated to the distribution function.

3 **Q22. Should the financial integrity of DP&L's generation business impact the**
4 **EDU's proposed SSO?**

5 A22. No. Increasing revenues to offset lost generation revenue of the generation
6 business segment or function would be a misuse of the EDU's status and
7 responsibility as the SSO default supplier, and would unlawfully subsidize its
8 generation functions. It is my understanding that this is in direct violation of Ohio
9 statutes and Commission rules. Additionally, this result would be inconsistent
10 with the policies of the State of Ohio.⁶

11 **Q23. Did DP&L make any attempt to separate the financial impact of the**
12 **distribution, transmission, and generation functions in this proceeding?**

13 A23. No. DP&L did not provide financial information by business function either in its
14 application or when asked, through discovery, by several different parties in
15 several different ways. IEU-Ohio requested functionally separated accounting
16 information in its first set of interrogatories but used the term "segment" which
17 DP&L stated was unclear.⁷ DP&L did provide its Business Unit Report for the
18 years 2009-2010 when asked specifically about the distribution function.
19 However, DP&L stated that it discontinued maintenance of these reports and that
20 the financial results of the report were not exact and could not be relied upon to

⁶ Section 4928.02(H), Revised Code.

⁷ Attachment B (DP&L's Responses to IEU-Ohio's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, October 23, 2012, ESP INT 1-21 and ESP INT 1-22).

1 As noted above, separate unit accounting is required for the separate business
2 units. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]¹⁴

6 **Q25. Do you believe that not maintaining separate accounting is a violation of**
7 **the corporate separation rules of the state of Ohio?**

8 A25. Yes. I believe that not maintaining separate accounting is a violation of
9 4901:1-37-04(B), O.A.C. This accounting requirement requires separate
10 accounting between "affiliates" where the term "affiliates" is defined as
11 "companies that are related to each other due to common ownership or control.
12 The affiliate standards shall also apply to any internal merchant function of the
13 electric utility whereby the electric utility provides a competitive service."¹⁵ Based
14 on advise on counsel, not maintaining separate accounting also violates Section
15 4928.17(A)(1), Revised Code.

16 **Q26. Why should DP&L be required to maintain separate accounting between**
17 **the distribution function, transmission function and its unregulated**
18 **generation function?**

19 A26. Without separate functionalized business unit accounting and financial data,
20 DP&L cannot demonstrate that there is no unlawful cross-subsidization occurring

¹⁴ [REDACTED]

¹⁵ Rule 4901:1-37-01(A), O.A.C.

1 related cost that was accounted for as some type of transition costs or stranded
2 costs, SB 3 did not do so.

3 **Q32. What is your understanding of the SB 3 criteria that were applied to**
4 **determine how much, if any, transition revenue could be approved by the**
5 **Commission and collected through transition charges?**

6 A32. It is my understanding that Section 4928.39, Revised Code, specified these
7 criteria. These criteria were applied to determine the total amount of generation-
8 related transition revenue that was eligible for collection through transition
9 charges if an EDU submitted a claim for transition revenue. SB 3 did not require
10 transition revenue to be addressed unless the EDU submitted a claim for
11 transition revenue.

12 **Q33. Which EDUs submitted a claim for transition revenues?**

13 A33. All of the EDUs, including DP&L, submitted a claim with their ETP applications
14 which also contained the plans by which the formerly vertically integrated electric
15 utility would separate, either structurally or functionally, into distribution,
16 transmission and generation business units (or affiliates) subject to important
17 requirements to facilitate "customer choice" and avoid differentiation or
18 discrimination by the EDU as a consequence of a customer's choice of a supplier
19 of generation service.

20 **Q34. More specifically, what is your understanding of the criteria that were used**
21 **to determine how much, if any, of a particular transition revenue claim was**
22 **eligible for collection through transition charges?**

1 A34. It is my understanding that Section 4928.39, Revised Code, contains the criteria
2 used to determine the total allowable transition revenue claim. A transition
3 revenue claim was eligible for collection through transition charges if the revenue
4 claim was limited to:

- 5 (1) Costs that were prudently incurred;
- 6 (2) Costs that were legitimate, net verifiable, and directly assignable or
7 allocable to retail electric generation service provided to electric
8 consumers in this state;
- 9 (3) Costs that were unrecoverable in a competitive market; and
- 10 (4) Costs that the utility would otherwise have been entitled an
11 opportunity to recover.

12 All four of the criteria had to be satisfied for the transition revenue claim to be
13 recoverable. With these criteria and the firm service nature of the default
14 generation supply obligation of the EDU, the Commission evaluated transition
15 revenue claims based on a comparison of the revenue produced by the EDU's
16 unbundled and capped default generation supply price and a revenue stream
17 computed based on assumed market prices for the entire range of generating
18 services and fixed and variable costs used in Ohio's prior cost-based ratemaking
19 system. Since generation service was the only service declared to be
20 competitive by SB 3, the transition revenue evaluation process focused
21 exclusively on the generation function.

22 Q35. Was the amount of a total generation-related transition revenue claim
23 potentially separated into different components?

1 A35. Yes. The total allowable amount of any generation-related transition revenue
2 claim was separated if a portion of that total claim was based on a claim for
3 regulatory assets. The total transition charge resulting from any allowable
4 transition revenue claim was also separated to show a separate regulatory asset
5 charge. It is my understanding that SB 3 limited the Commission's ability to
6 make adjustments to the regulatory asset portion of an allowed transition charge
7 and also required the regulatory asset portion of a transition charge to end no
8 later than December 31, 2010. It is also my understanding that under SB 3, the
9 non-regulatory asset portion of any transition charge which was associated with
10 above-market generating plants had to end by no later than December 31, 2005
11 or the end of the market development period ("MDP"), whichever occurred first.
12 Based on the advice of counsel, I also understand that Section 4928.141,
13 Revised Code, which was added after SB 3, excluded any previously authorized
14 allowances for transition costs, with the exclusion becoming effective on and
15 after the date the allowance was scheduled to end under the prior rate plan.

16 **Q36. Generally, how was the amount of generation-related transition revenue**
17 **associated with above-market generating plants measured?**

18 A36. If an EDU wanted to make a claim for transition revenue, it had to include the
19 claim in its proposed ETP. A proposed ETP had to be filed 90 days after the
20 effective date of SB 3. The statutory criteria discussed above were then used to
21 determine how much of the generation-related transition revenue claim was
22 eligible for collection through transition charges. For the generation plant-related
23 portion of the transition revenue claim, the Commission's Staff used the net book

1 value of generating assets at December 31, 2000 as the baseline to determine
2 how much, if any, of the net, verifiable, prudently incurred book value of the
3 EDU's generation assets (including generation-related regulatory assets) would
4 not be recoverable in the market. In this context, the market included the entire
5 market, including the wholesale and retail segments.

6 **Q37. Please describe the generation plant-related transition revenue claim made**
7 **by DP&L in its proposed ETP.**

8 A37. DP&L filed its proposed ETP on December 20, 1999. As a part of its proposed
9 ETP, DP&L submitted a claim for transition revenue that included both above-
10 market generation plant costs (consumer transition charge or "CTC") and a
11 regulatory asset component (regulatory transition charge or "RTC"). DP&L relied
12 upon witness Ralph L. Luciani to estimate the extent to which they had a basis
13 for claiming generation plant-related transition revenue. DP&L witness Richard
14 D. Reid estimated the regulatory assets that DP&L was requesting to be
15 recovered as a portion of the transition costs.

16 **Q38. How did DP&L value its above-market generation plant costs?**

17 A38. Mr. Luciani used a lost book value under a continued ownership-based
18 approach. Generally, this approach produces a present value of the future
19 market-based after-tax cash flows for the various generating plants minus the net
20 book value of the generating plants as they were valued at December 31, 2000.
21 Generation plant-related transition costs were deemed to be positive (and
22 potentially eligible for recovery through transition charges) if the present value of
23 the projected cash flow was, in the aggregate, less than the net book value of the

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-426-EL-SSO
for Approval of Its Electric Security Plan)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-427-EL-ATA
for Approval of Revised Tariffs)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-428-EL-AAM
for Approval of Certain Accounting)	
Authority)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-429-EL-WVR
for Waiver of Certain Commission Rules)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-672-EL-RDR
to Establish Tariff Riders)	

**DIRECT TESTIMONY OF JOSEPH G. BOWSER
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

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**DIRECT TESTIMONY OF JOSEPH G. BOWSER
ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

1 **I. INTRODUCTION**

2 **Q1. Please state your name and business address.**

3 A1. My name is Joseph G. Bowser, 21 East State Street, 17th Floor, Columbus, Ohio
4 43215.

5 **Q2. By whom are you employed and in what position?**

6 A2. I am a Technical Specialist for McNees Wallace & Nurick LLC ("McNees"),
7 providing testimony on behalf of the Industrial Energy Users-Ohio ("IEU-Ohio").

Q3. Please describe your educational background.

A3. In 1976, I graduated from Clarion State College with a Bachelor of Science degree in Accounting. In 1988, I graduated from Rensselaer Polytechnic Institute with a Master of Science degree in Finance.

Q4. Please describe your professional experience.

A4. I have been employed by McNees for over seven years where I focus on assisting IEU-Ohio members address issues that affect the price and availability of utility services. As part of my responsibilities, I provide IEU-Ohio members assistance as they evaluate and act upon opportunities to secure value for their demand response and other capabilities in the base residual auction ("BRA") and incremental auctions conducted by PJM Interconnection LLC ("PJM") as part of the Reliability Pricing Model ("RPM"). Prior to joining McNees, I worked with the Office of the Ohio Consumers' Counsel ("OCC") as Director of Analytical Services. There I managed the analysis of financial, accounting, and ratemaking issues associated with utility regulatory filings. I also spent ten years at Northeast Utilities, where I held positions in the Regulatory Planning and Accounting Departments, provided litigation support in regulatory hearings and assisted in the preparation of the financial/technical documents filed with state and federal regulatory commissions. I began my career with the Federal Energy Regulatory Commission ("FERC"), where I led and conducted audits of gas and electric utilities in the Eastern and Midwestern regions of the United States.

Q5. Have you previously submitted expert testimony before the Public Utilities Commission of Ohio ("Commission" or "PUCO")?

1 RPM Rider would have triggered the RR circuit breaker mechanism, thereby
2 including these costs for recovery on a non-bypassable basis through the RR.

3 Further, it is my understanding, based upon the advice of counsel that Section
4 4928.143, Revised Code, does not authorize a rider such as the RR to be
5 recovered on a non-bypassable basis.

6 **Q14. What is your recommendation with respect to DP&L's proposed RR?**

7 A14. I recommend that the Commission reject DP&L's proposal to include the RR in its
8 ESP as a non-bypassable charge. It would not be sound regulatory policy to
9 approve the RR as a non-bypassable charge as it would result in an
10 inappropriate shifting of costs to shopping customers and it is my understanding
11 that such a non-bypassable charge is not permissible under Section 4928.143,
12 Revised Code.

13 **III. NON-BYPASSABLE ALTERNATIVE ENERGY RIDER**
14 **(RIDER AER-N)**

15 **Q15. What has DP&L proposed for Rider AER-N?**

16 A15. DP&L has proposed Rider AER-N as a non-bypassable placeholder rider with the
17 amount of the charge initially set at zero. DP&L plans to file cost support for the
18 rider within 6 months of the Commission order approving the proposed ESP.
19 The costs that DP&L is proposing to recover under the rider at this time are costs
20 associated with the Yankee Solar Generating Facility ("Yankee 1") and the rider
21 would be in effect for the life of that facility. Yankee 1 is a 1.1 Megawatt ("MW")
22 solar generation facility that was placed in service in 2010. Per DP&L's 2011

1 FERC Form 1 Report at page 410, Yankee 1 was built at an original cost of
2 approximately \$3.3 million.

3 **Q16. What rationale has DP&L offered for the recovery of the Yankee 1 costs**
4 **through a non-bypassable rider?**

5 A16. DP&L witness Seger-Lawson testifies on page 15 of her Second Revised
6 Testimony that Yankee 1 meets the requirements set forth in Section
7 4928.143(B)(2)(c), Revised Code, for the establishment of a non-bypassable
8 charge for the life of an electric generating facility owned or operated by an EDU.
9 It is my understanding that those requirements are that the facility was sourced
10 through a CBP, is newly used and useful on or after January 1, 2009, and that
11 the Commission must have determined that there is a need for the facility based
12 on resource planning projections in the proceeding.

13 **Q17. In your opinion, is the proposed Rider AER-N appropriate?**

14 A17. No. It is my understanding, based upon the advice of counsel, Ohio law
15 specifically requires that the cost of compliance with Ohio's renewable portfolio
16 mandates must be bypassable by shopping customers. More specifically, it is
17 my understanding that Section 4928.64(E), Revised Code, states that all costs
18 incurred by an EDU in complying with these requirements shall be bypassable by
19 any customer that has exercised choice of supplier.

20 Further, I disagree with witness Seger-Lawson's assertion that there is
21 significance to the Commission's finding in DP&L's Long Term Forecast Report
22 case that there was a need for Yankee 1. On the advice of counsel, according to
23 Section 4928.143(B)(2)(c), Revised Code, the finding of need must be satisfied in

1 an ESP case. Moreover, it is my understanding that a finding of need cannot be
2 made regarding a solar generating facility in an ESP because, as noted above,
3 Ohio law prohibits recovery of all renewable benchmark compliance costs
4 through a non-bypassable charge (Section 4928.64(E), Revised Code).

5 **Q18. What is your specific recommendation with respect to DP&L's proposed**
6 **Rider AER-N?**

7 A18. I recommend the Commission not approve the proposed placeholder Rider AER-
8 N as part of an ESP for the reasons set forth above. Alternatively, if the

9 Commission approves a rider for recovery of the costs of Yankee 1, the
10 Commission should order that the rider be bypassable for shopping customers to
11 comply with the Ohio Revised Code requirements that prohibit a non-bypassable
12 charge for recovery of the costs of renewable benchmark compliance.

13 **IV. DP&L'S FINANCIAL INTEGRITY CLAIMS**

14 **Q19. Besides your specific recommendations on the RR and Rider AER-N above,**
15 **are there any other perspectives that you believe need to be considered by**
16 **the Commission relative to the issues associated with the amount and**
17 **nature of the charges requested by DP&L in this proceeding?**

18 A19. Yes, I believe that the recovery of charges in this case must also be considered
19 in the context of an equity and fairness perspective. The larger picture in this
20 proceeding includes DP&L's request for authorization of various mechanisms
21 that will provide the EDU with cash-flow support associated with generation-
22 related functions. In at least two instances (the SSR proposal, and the ST), the
23 request for enhanced generation function-related cash flow takes the form of

1 earnings protection and revenue enhancements funded by shopping and non-
2 shopping customers alike. The result is an anticompetitive subsidy flowing from
3 non-competitive retail electric service to a competitive retail electric service
4 through charges levied on DP&L's distribution customers. (The SSR and ST are
5 addressed in more detail in the testimonies of IEU-Ohio witnesses Kevin Murray
6 and J. Edward Hess). Based on advice from counsel, such an anticompetitive
7 subsidy would violate Section 4928.02(H), Revised Code, and DP&L's corporate
8 separation plan.

9 DP&L is advancing its ESP proposals based on a claim that it will experience
10 financial problems that are associated with the generation business segment, in
11 the form of low returns on equity, if the Commission does not approve these
12 mechanisms to enhance earnings relative to what the earnings would be without
13 these items.

14 However, my review of the supporting testimony and other documents submitted
15 by DP&L did not identify any proactive consideration by DP&L of the abundant
16 opportunities that it has had since January 1, 2001 to get its financial house in
17 order. These opportunities include numerous rate increases, and very healthy
18 returns on common equity, as discussed below.

19 **Q20. How do DP&L's claims regarding its future financial integrity relate to its**
20 **profitability in recent years?**

21 **A20.** Exhibit JGB-4 provides the earned returns on equity ("ROE") for DP&L, on a total
22 company basis, for the years 2001 through 2011. I calculated ROEs for each of
23 these years by dividing net income before extraordinary items by the average

1 **Q22. Are there other indicators of DP&L's strong financial performance?**

2 A22. Yes. Exhibit JGB-4 contains a summary of the common stock dividend
3 payments by DP&L to its parent company for each year for the period 2001-
4 2011. Dividends are paid out of retained earnings and therefore do not affect the
5 computation of net income. Over the period 2001-2011, DP&L paid dividends on
6 common stock to its parent company totaling \$2.26 billion, representing
7 approximately 86% of DP&L's total net income over that period.

8 Further evidence of DP&L's financial strength is provided by its capital structure
9 as published in its 2011 FERC Form 1, with a strong debt to total capital ratio of
10 38.7% as of December 31, 2011. A debt to total capital ratio at this level is
11 considered to be quite strong, signifying lower leverage and, all other things
12 being equal, an opportunity to obtain debt financing at attractive interest rates.

13 **Q23. Has the Commission provided guidance on when relief may be appropriate**
14 **based on concerns related to the financial integrity of the EDU?**

15 A23. Yes. Generally speaking, rate relief related to allegations of financial harm, such
16 as DP&L is making in this case, is the type of rate relief that is addressed by the
17 Commission in response to applications for emergency rate relief. The General
18 Assembly also provided the Commission limited authority to address transition
19 revenue claims arising from the enactment of Amended Substitute Senate Bill 3
20 ("SB 3"). The Commission was provided with a limited window of time to permit
21 electric utilities to recover transition revenue to address issues tangentially
22 related to potential financial harm claims. After electric restructuring's market
23 development period ended, the generation side of the business was on its own in

1 the competitive market. Mr. Hess's testimony addresses the Commission's role
2 in setting transition revenue and the transition revenue claims that the
3 Commission addressed at the request of DP&L in 2000 and thereafter.

4 **Q24. Does the Commission's authority to provide relief to meet financial**
5 **integrity claims apply to the competitive side of an EDU's financial**
6 **performance?**

7 A24. No. On the advice of counsel, Section 4909.16, Revised Code, applies only to
8 the non-competitive side of an EDU's financial performance. This view is
9 consistent with the Commission's determination that a company's earnings are
10 not relevant when establishing generation rates.

11 In the Commission's Opinion and Order dated January 26, 2005 in Case No. 04-
12 169-EL-UNC (Rate Stabilization Plan for Columbus Southern Power Company
13 and Ohio Power Company), the Commission found that under Section
14 4928.05(A)(1), Revised Code, generation rates are subject to the market and
15 "company earnings levels would not come into play for establishing generation
16 rates—market tolerances would otherwise dictate."¹

17 **Q25. What criteria has the Commission applied to address a claim for additional**
18 **revenue based on an allegation that an EDU needs Commission assistance**
19 **to maintain financial integrity?**

20 A25. The Commission has developed long-standing criteria to determine when and
21 how much rate relief may be appropriate to avoid a financial problem. These

¹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 18 (Jan. 26, 2005).

1 A26. No. For several reasons, I conclude that DP&L's assertion that its financial
2 integrity will be threatened if the Commission does not grant the requested relief
3 fails to satisfy the procedural and substantive requirements for relief, based on
4 the claim that its financial integrity is imperiled.

5 First, on the advice of counsel,
6 the Application's assertion of threatened financial integrity is not one which the
7 Commission may consider or act upon unless and until the procedural and
8 substantive requirements of Section 4909.16, Revised Code, (as applied by the
Commission) are satisfied.

9 Second, DP&L has not identified the minimum level of financial support that is
10 necessary to address the alleged financial problem or the extent to which the
11 financial problem could have been avoided or mitigated through actions other
12 than actions to increase electric rates. DP&L witness Chambers indicated at
13 page 2 of his Second Revised Direct Testimony that a ROE range of 7.7% to
14 10.4% is a reasonable ROE for DP&L to maintain its financial integrity, but he did
15 not specify a minimum level of financial support that would avoid, as Mr.
16 Chambers noted at page 1 of his testimony, a severe impact on DP&L's survival
17 probability.

18 Third, DP&L has not demonstrated that the problems it is facing, if they exist, are
19 anything other than a problem created by the choices that DP&L or its affiliates
20 have made. In response to IEU-Ohio Interrogatory 3-1, which is attached to my
21 testimony as Exhibit JGB-5, the Company indicated that it has performed
22 analyses on potential cost savings measures from the reduction or elimination of
23 expenses, but that it has not made any final decisions to act, because the

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Summary: Motion of The Dayton Power and Light Company to Strike Testimony of Industrial Energy Users-Ohio Witnesses Kevin M. Murray, J. Edward Hess, and Joseph G. Bowser electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company