BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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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-SS0
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

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PROCEEDINGS

before Mr. Gregory A. Price and Mr. Bryce A. McKenney, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 9:00 a.m. on Wednesday, March 20, 2013.

VOLUME III

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Wednesday Morning Session,
March 20, 2013.

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EXAMINER McKENNEY: At this time the Public Utilities Commission of Ohio calls Case No. 12-426-EL-SSO, being the application of The Dayton Power & Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan.

My name is Bryce McKenney, with me is Gregory Price, we're the Attorney Examiners assigned by the Commission to hear this case.

At this time we will -- a moment ago we had a discussion off the record regarding a memorandum that was filed in this case regarding an evidentiary matter.

Mr. Darr, would you care to address that orally.

MR. DARR: Yes, your Honor. I would note for the record that we received a memorandum from Dayton Power & Light Company on the evidentiary question, which is a nice way of saying that they're responding to our motion to strike which was held over from last night.

The gist of the response, as I understand it from Dayton Power & Light, is the Commission has wide discretion in terms of deciding what it includes in its record and what it excludes from its record, and specifically with regard to the question of what an expert can rely upon, DP&L is relying on a case called Pro Se Commercial Properties versus Cleveland Electric Illuminating Company, Case No. 07-1306-EL-CSS.

Thanks to those wonderful people in Docketing, I was able to secure a copy of that decision this morning after I received the memorandum contra.

I would note for the Court that -- or, for the Bench, excuse me, that the general statements of law provided in the memorandum contra reflect our common understanding of what the Commission's authority is with regard to evidence presented to it, however, it remains up to you as the decision-makers in this case to decide whether or not that evidence which was left out is an error that should be allowed to infect this record in a way that would be inappropriate.

I would also point out to you that in the case that Dayton Power & Light cited to you some of the evidence, which was complained of as not being in the record, was, in fact, moved for admission on the basis of administrative notice and, in fact, the Bench administratively noticed the tariffs apparently that were at issue and which had not been admitted as part of the testimony of the expert in the CEI complaint case.

On that basis, your Honor, I think our motion to strike still remains on very strong grounds. First, this was information in the control of Dayton Power & Light. Second, Dayton Power & Light clearly was relying on that information to support its testimony. Third, it did not provide that information to the record as part of its prefiled testimony. And, three, the case they're relying on actually seems to hold the exact opposite, in fact, the record had been made complete by the proffer of the -- or, the request to take administrative notice of the data that was being relied upon by the expert witness in that case.

Based on that I believe that we are on strong grounds to seek and that the Bench should grant the motion to strike.

Thank you.

EXAMINER PRICE: Mr. Darr, can you confirm that the parties were provided that spreadsheet in discovery?

MR. DARR: I can't personally confirm that one way or the other, your Honor.

EXAMINER PRICE: That was Mr. Faruki's representation. I was just looking --

MR. DARR: I don't know the answer to that question. I will take his representation that it was.

EXAMINER PRICE: I am actually very leery about relying on pro se cases because I think this Commission -- by counsel, because this Commission bends over backwards when we have pro se complainants to give them their fair day in court and tends to create exceptions that we wouldn't necessarily create in a hearing.

Nonetheless, in light of the fact that this was provided to the parties in discovery, we're going to deny the motion to strike subject to any party that desires to call Mr. Jackson and cross-examine Mr. Jackson on the contents of that spreadsheet will be given that opportunity. So if you care to notify the Bench, we will re-call Mr. Jackson at a convenient time and any questions you want to ask him about the spreadsheet will be fair game.

EXAMINER McKENNEY: All right.
Mr. Sharkey, you may call your first witness.

MR. SHARKEY: Your Honors, The Dayton Power & Light Company calls Jeff Malinak.

EXAMINER McKENNEY: Mr. Malinak, please raise your right hand.

(Witness sworn.)

EXAMINER McKENNEY: Thank you. Please state your name and business address for the record.

THE WITNESS: My name is R. Jeffrey Malinak, my business address is 1899 Pennsylvania Avenue Northwest, Washington, DC 20006.

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R. JEFFREY MALINAK

being first duly sworn, as prescribed by law, was examined and testified as follows.

DIRECT EXAMINATION

By Mr. Sharkey:

Q. Good morning, Mr. Malinak. My name is Jeff Sharkey, as you know.

Do you have before you a copy of your second revised direct testimony?

A. I do.

MR. SHARKEY: And, your Honors, for the record we would designate his testimony as DP&L

Exhibit 5.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. If I asked you the questions that were contained in your testimony before you, would those answers be true?

A. Yes.

Q. Do you have any changes, revisions, or updates to your testimony?

A. I do not.

Q. Okay.

MR. SHARKEY: Your Honor, I would have no further questions for Mr. Malinak and would tender him for cross-examination, and I'd move for the admission of DP&L Exhibit 5.

EXAMINER McKENNEY: Thank you, Mr. Sharkey.

At this time we'll proceed with cross-examination. Mr. Alexander.

MR. ALEXANDER: Thank you, your Honor.

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CROSS-EXAMINATION

By Mr. Alexander:

Q. Good morning, Mr. Malinak.

A. Good morning.

Q. My name is Trevor Alexander. I'm one of the lawyers for FirstEnergy Solutions.

In your testimony at pages 3 to 4 you provide background discussion of Ohio law as it relates to the ESP versus MRO test; is that correct?

A. Yes.

Q. In your deposition we defined the term "ESP versus MRO test" as the test in 4928.143 that you reference in your testimony, and can we use that same definition again today?

A. Yes.

Q. You have read the statutes referenced in your testimony; is that correct?

A. I have.

Q. And you relied on your understanding of those statutes when drafting your testimony.

A. In part. I relied on counsel's instructions regarding those statutes and also on my own reading secondarily.

Q. And you read the Commission orders cited in your testimony.

A. Are you talking about in footnote 1?

Q. Specifically, yes, but the question was broader, it included all Commission orders cited in your testimony.

A. Yes.

Q. And I would like to define the August of 2012 decision in Case No. 11-346 that you cite in your testimony as the AEP ESP order. Is that acceptable to you?
A. Yes.
Q. You did not review the ESP versus MRO test testimony which was filed in the AEP ESP case; is that correct?
A. I did review the AEP ESP decision. The August 2012 decision?
Q. I don't believe --
A. Maybe I misunderstood your question. I'm sorry.
Q. Sure. You did not review the ESP versus MRO test testimony which was filed in the AEP ESP case; is that correct?
A. I do not recall reviewing that testimony, right.
Q. So you did not review the testimony of Staff Witness Fortney from that case?
A. That's correct.
Q. And you did not review the testimony of AEP Witness Thomas from that case.
A. That's correct.
Q. To obtain your understanding of Ohio law

as it relates to the ESP versus MRO test you relied solely on the two statutes and two Commission decisions cited in your testimony.

A. Well, I relied on counsel's interpretation and instruction as to the legal interpretation of those two statutes because I'm not an attorney. I had my own layman's reading as well on top of that, as I testified earlier, secondarily I relied on that.

Q. In addition to the two statutes and two Commission orders?

A. Well, as a general matter I relied on counsel's interpretation for legal issues. My own reading of those things, though, secondarily informed my opinion and understanding.

Q. You believe that the ESP proposed by Dayton Power & Light includes both quantifiable and nonquantifiable benefits; is that correct?

A. Yes, I believe that the ESP includes both quantifiable and nonquantifiable benefits to various stakeholders relative to an MRO.

Q. And at this point I'd like to focus our discussion on the aggregate price test portion of your testimony. Do you understand that?

A. Is that as defined in my deposition?

Q. Yes.
A. Okay, where it includes both the statutory price test and then other quantifiable differences.
Q. That's correct. We're going to discuss nonquantifiable benefits of the ESP that may or may not exist after we finish with the price test.
A. Sure.
Q. A hundred percent of the aggregate price test benefit that you identified results from the faster transition to market as compared to an MRO; is that correct?
A. Yes, that's right. The SSO, the blended SSO rate is lower under the ESP because of the faster transition to market and, based on my calculations, it produces a quantifiable benefit to the ESP.
Q. And when you calculated the purported quantifiable benefit of the ESP, you held --
(Off the record.)
Q. Would it be helpful for me to restate the question?
A. Please.
Q. When you calculated the aggregate price test benefit of the ESP, you held switching constant; is that correct?

A. Yes, I did. However, if the switching tracker is available in both the -- under both the MRO and the ESP, then you get the same result, so.

Q. And you held switching constant as of August 30th, 2012?

A. Yeah. Except, as I just described, implicitly I didn't really have to because I made the assumptions that the switching tracker would be available under both the MRO and the ESP and in that case additional switching wouldn't have changed my answer. So it implicitly incorporates additional switching.

Q. Holding all else constant, if switching increases over the ESP term, then your calculation of the ESP benefit would decrease, correct?

A. Not if the switching tracker is approved and included in both the MRO and the ESP, then additional switching would not make a difference. To the quantifiable part of things. I think that's what we're talking about, right, the quantifiable benefits at this point? Okay.

Q. We are talking about the quantifiable benefits but I'd just like to leave the switching tracker to the side for a minute.

If switching increases over the ESP term, then your calculation of the ESP benefit would decrease.

A. By leaving it aside do you mean that it would not be there in the MRO and the ESP?

Q. That's correct.

A. If it's not -- if it is not in either one of those, then yes, with increased switching the quantifiable portion of the aggregate price test would go down.

Q. Could you turn your attention to page 5 of your testimony, specifically lines 3 to 5.

A. I'm there.

Q. You believe that the ESP versus MRO test should compare the as-filed ESP with any hypothetical MRO that the EDU could file at the same time; is that correct?

A. I believe that the MRO -- that the comparison should be between the ESP and a hypothetical MRO that they would file on the same day.

Q. And the only limitation that you believe applies to the hypothetical MRO is whether the charges to be included in the hypothetical MRO are appropriate under Ohio law?

A. I'm not an expert on Ohio law, so I don't know, you know, I'm not an expert on where there are limits and where there are not limits, but it would seem logical to me that an MRO that was filed on the same day should be in compliance with the appropriate rules and regulations.

Does that answer your question?

Q. I don't think it does.

A. Okay.

Q. What limitations are there on the hypothetical MRO that you create in your testimony?

A. I guess I'm having a little bit of a problem with "limitations," but I define the MRO in my testimony, I define the important terms of it from a quantifiable and nonquantifiable basis, you know, the key assumptions are for the quantifiable side are the blending percentages over time and whether or not there would be an SSR or other nonbypassable charge in the MRO.

Q. Sure. Mr. Malinak, I'm trying to understand the legal standard that you applied rather than the specifics of Dayton Power & Light's proposal. You believe that the ESP test should compare the as-filed ESP with a hypothetical MRO that the EDU would file on the same day; is that correct?

A. That is.

Q. And when creating the hypothetical MRO, you believe that only charges which are appropriate under Ohio law should be included in that hypothetical MRO.

A. Again, I'm not an expert on Ohio law, but it seems logical to me that the MRO that would need to be filed or would be filed on the same day would need to be in compliance with applicable rules and regulations.

Q. Are there any other limitations on the hypothetical MRO other than compliance with applicable rules and limitations?

MR. SHARKEY: I'm going to object. It's a question of law.

EXAMINER McKENNEY: Overruled.

A. You know, I just don't know what the limits are. I mean, it would seem to me that -- it would seem logical to me that the limitations, if any, would come from legal issues. You know, when you use the word "limitations," I'm not sure exactly what it means, but it would seem to me that the parameters would be defined primarily by the rules and regulations, but to some extent it's also defined by what the company -- the company's situation is and what they would like to file, so.

Q. DP&L instructed you to assume that the SSR proposed by DP&L should be included on the MRO side of your test, correct?

A. Counsel -- my discussions with counsel and DP&L led to an instruction to include or a statement that if they were to file a hypothetical MRO at the same time as the ESP, that they would propose an SSR that was of the same magnitude as under the ESP.

Q. So DP&L instructed you to assume that the SSR should be included on the MRO side of the test.

A. They asked me to make that assumption, yes.

Q. And you are not offering a legal opinion in this case as to whether the SSR can be imposed in an MRO; is that correct?

A. Yes, I'm not offering a legal opinion, but I should also add that when I was asked to make the assumption that the SSR would be of the same magnitude under the MRO, I also, you know, tested that assumption, as I say in my direct testimony. I tested the reasonableness of it myself by looking at financial integrity metrics under the MRO.

MR. ALEXANDER: Your Honor, motion to strike everything after the word "but."

EXAMINER McKENNEY: Mr. Sharkey.

MR. SHARKEY: Your Honor, it was responsive to his question he asked. The question is what was he instructed to assume, and he explained what he assumed and his own reasonable test of it and so I think it was directly responsive to the question.

EXAMINER McKENNEY: Could we have the answer read back to us.

MR. ALEXANDER: The question as well, please.

EXAMINER McKENNEY: The question as well, please.

(Record read.)

EXAMINER McKENNEY: The motion to strike is denied.

EXAMINER PRICE: When you say you tested the reasonableness of the assumption, you're saying that you did an economics analysis.

THE WITNESS: That's correct.

EXAMINER PRICE: Not a legal -- you didn't research legal questions as to whether that assumption is correct, you just thought, okay, that makes sense, let's look at whether the underlying economics metrics --

THE WITNESS: That's correct, and that's why I was drawing his distinction because his question was about the legal.

EXAMINER PRICE: Okay.

Q. (By Mr. Alexander) And you relied on your view of Professor Chambers' analysis for your economics review.

A. In part, yes, but I also relied on my own knowledge and experience in making that analysis.

Q. You relied on your knowledge and experience in reviewing Witness Jackson and Witness Chambers' materials.

A. No, not exactly. I mean, I reviewed their materials and that informed my own judgment and my own analysis, but I applied my own independent analysis of the data.

Q. And by "the data," you're referring to Witness Jackson and Witness Chambers' testimony.

A. I'm referring to the, yes, the various financial projections that Dr. Chambers developed and also the underlying pro formas from Mr. Jackson and my review of other financial information regarding DP&L.

Q. And you relied on DP&L's counsel for the determination that the SSR was permissible in an MRO?

A. As I stated earlier, primarily yes, but, of course, I also read the statutes myself.

Q. There are differences between the legal standards for financial stability charges contained in the ESP and MRO statutes, correct?

MR. SHARKEY: Objection, your Honor. Calls for a question of law.

MR. ALEXANDER: Your Honor, it's in his testimony and he just testified that he personally reviewed the statute and applied it when creating the MRO side of his test.

EXAMINER McKENNEY: The objection is overruled. Please tread carefully, Mr. Alexander.

A. Again, I can't offer a legal interpretation of the statutes. I can only offer my layman's reading of the language that's included in the statutes.

Q. My question was are there differences between the legal standards for financial stability charges contained in the ESP and MRO statutes?

A. I'll say again, I don't -- I can't offer an opinion on differences in legal standards. I can offer an opinion on the actual language as a layman reading it. And I would say there is differences in the language, but I can't say whether that means there's a difference in the legal standards.

Q. And you did not consider any difference between the legal standards for financial stability charges contained in the ESP and MRO statutes when drafting your testimony, correct?

A. Not explicitly.

Q. Please turn your attention to page 12, lines 8 through 16 of your testimony.

A. I'm sorry, what page again?

Q. Page 12, lines 8 through 16.

A. I'm there.

Q. And in this section you discuss including an SSR in the same amount on both sides of the ESP versus MRO test despite the change that would cause in DP&L's revenue; is that right?

A. I discuss here the fact that I'm assuming the same -- an SSR of the same magnitude and I discuss the fact that implicitly that means that there would be more revenue under an MRO than under an ESP.

Q. And you asked to assume -- strike that.

And you were asked to make that assumption by counsel, correct?

A. I was asked to make that explicit assumption by counsel but, as I testified earlier, I checked the reasonable -- I checked the reasonableness of that myself via the financial analysis that I described earlier. And that's actually described in lines 10 through 18.

Q. DP&L has previously filed an MRO application; is that correct?

A. It is my understanding that they filed an MRO.

Q. And DP&L withdrew its MRO application in September of 2012; is that correct?

A. I can't remember the exact date, but -- and I don't know what the legal standard is for withdrawal versus -- or, what it's called, but I think they changed over to an ESP in that approximate timeframe.

Q. For the purposes of the ESP versus MRO test your testimony includes only bypassable charges in the standard service offer price, correct?

A. The rates that I use to determine -- to measure the quantifiable benefit of the ESP are bypassable charges, but my analysis includes nonbypassable charges too.

Q. And you relied on Revised Code 4928.142 to obtain the blending percentages used in the MRO portion of your test; is that correct?

A. In part, yes. And also on advice of counsel in terms of interpreting those.

Q. Is there anything you specifically relied on in 4928.142 which references including a new nonbypassable charge in the MRO portion of the plant?

MR. SHARKEY: I'm going to object, your Honor. He's asking him questions about the statute that are, one, legal conclusions, and two, a copy of the statute isn't in front of him. It's difficult for him to answer or impossible to answer things that are contained in the statute without having at least a copy.

EXAMINER PRICE: Mr. Sharkey, when you object on legal conclusion, you have to admit he cited to the statute in his testimony so he has some familiarity with the statute.

MR. SHARKEY: He certainly has some familiarity with the statute, your Honor, he's testified a number of times that he's, you know, been, he's assumed interpretations of the statute for purposes of applying his analysis, and the Bench has already ruled that Mr. Alexander's entitled to some leeway with the witness, but I would suggest if he's going to be asked questions, detailed questions about the statute, he at least ought to have a copy in front of him.

MR. ALEXANDER: I'm happy to provide the witness with a copy of the statute, Mr. Sharkey, if it would resolve your objection.

MR. SHARKEY: I think it would resolve this one.

EXAMINER McKENNEY: I think there were two parts to the objection, legal conclusion --

MR. ALEXANDER: Yes, your Honor, if I can address the first part, it was was there anything in the statute he relied on. He sites the statute in his testimony and I just want to know if there's a specific portion of the statute that he relies on in his conclusion and that's going to be the end of this series of questions.

EXAMINER McKENNEY: Objection as to legal conclusion is overruled. Please provide the witness with a copy of the statute, Mr. Alexander.

MR. SHARKEY: Thank you, your Honors.

EXAMINER PRICE: Let's go off the record.

(Discussion off the record.)

EXAMINER McKENNEY: Let's go back on the record.

Mr. Alexander, are you prepared to continue?

Q. (By Mr. Alexander) Mr. Malinak, have you been provided with a copy of Ohio Revised Code section 4928.142?

A. I have.

Q. And is there anything you specifically relied on in Revised Code Section 4928.142 which references including a new nonbypassable charge in the MRO portion of the test?

A. As I testified to earlier, I relied on counsel's instructions regarding the legal issues of the type that you're describing and I relied on my own reading of the whole statute and there are particular portions such as the portion here in (D)(4) -- first of all, just (D), the first big (D), paragraph (D), they discuss the percentages of the load during different years, and then -- and I relied in part on that. I relied on my reading of that, I relied on counsel's interpretation.

And then (D)(4), again, I may be misreferring to it, but it's (D)(4), there's some language beginning "additionally," and then it says "The Commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the Commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result directly, or indirectly, in a taking of property without compensation pursuant to Section 19 of Article 1, Ohio Constitution."

And, you know, this, again, this is my layman's reading of this, but it says that if there's an emergency that threatens the utility's financial integrity, you know, the Commission may make an adjustment, and, you know, when you're talking about financial integrity, a nonbypassable charge is an effective way to manage that problem.

And so, you know, again, I'm not offering a legal opinion, but to the extent that the PUCO has latitude to, you know, manage a financial integrity problem, this language could support the development of a nonbypassable charge under an MRO.

EXAMINER PRICE: I'm not asking if you did any legal research, but did you look at any prior Commission cases as to what circumstances the Commission defined as a financial emergency and whether those circumstances would exist with respect to Dayton if there was an MRO?

THE WITNESS: I have not looked at prior decisions in my analysis to set a standard.

EXAMINER PRICE: Thank you.

THE WITNESS: My standard is the one I would apply as a financial analyst.

EXAMINER PRICE: Okay. Thank you.

Q. (By Mr. Alexander) And, Mr. Malinak, I wasn't a hundred percent clear from your answer, so you referenced 4928.142(D) and 4928.142(D)(4). Was that the entirety of your answer?

A. Well, I also said I just read the -- I read the whole statute as well and so to the extent that any of that language kind of informed my understanding or, you know, again, as a layman, of these -- of this language, I should say as a layman but also as a, you know, someone who studied financial integrity issues in the electric utility industry before, and so that helped inform my reading of these specific passages that I just identified.

Q. But my question was were there any other specific passages that you relied on.

A. Again, you know, in terms of specific passages, I guess I honed in on these two. These were the two most important parts of the statute from the point of view of my analysis.

Q. Nonbypassable charges are not included in the blending conducted on the MRO side of the test; is that correct?

A. Yes. The blending that goes on to get to the standard service offer, which is a combination of the cost of service rate and the CBP rate, is -- are bypassable charges to get to that result, that's correct.

Q. And you rely on the AEP ESP decision in your testimony, correct?

A. Yes, in part. I rely on it to inform me about the way that the more favorable in the aggregate test works generally.

Q. And the Commission treated the RSR as a cost of the ESP in the AEP ESP decision.

A. That is my recollection, yes.

Q. And even though your testimony expressly relies on the AEP ESP decision, you did not review the AEP ESP decision to determine how it treated the RSR in the ESP versus MRO test.

A. You said "explicitly rely." I don't know if that characterizes my testimony or not. I mean, I relied on the AEP ESP decision, I guess you could say I relied on it explicitly to inform my understanding more generally of the way the aggregate price test

operates, and I did read the portions of that decision that related to the treatment of the RSR and the way the Commission analyzed that.
Q. Mr. Malinak, do you have a copy of your deposition in front of you?
A. I do.
Q. Do you recall being deposed on February 28th, 2013?
A. Yes.
Q. Do you recall swearing an oath to tell the truth during that deposition?
A. I do.
Q. And do you recall me asking you several questions during that deposition?
A. I do.
Q. Would you please turn your attention to page 51.
A. Yep.
Q. Please let me know if I read this correctly. Question: "Did you check" --
MS. YOST: What line, please? What line?
MR. ALEXANDER: Oh, page 51, line 15.
Q. Mr. Malinak, please let me know if I read this correctly. Question: "Did you check, when drafting your testimony, to see how the Commission

handled the RSR in this case?"

Answer: "Not specifically, no."

Did I read that correctly?

MS. YOST: I'm going to object, your Honor, it's not impeaching. The witness testified that he read the entirety of the decision in his testimony; that's not inconsistent with his answer there.

EXAMINER McKENNEY: Mr. Alexander.

MR. ALEXANDER: I believe the question I asked, the witness's answer, and then the portion of the deposition I just read speak for themselves.

EXAMINER McKENNEY: The objection's overruled.

MR. SHARKEY: Thank you, your Honor.

THE WITNESS: May I -- is there a question pending? Because right before that I --

EXAMINER McKENNEY: I believe the question was whether he read it correctly.

THE WITNESS: Okay. He read those two pieces correctly.

Q. (By Mr. Alexander) And you did not review the Duke ESP opinion and order when drafting your testimony; is that correct?

A. Yes.

Q. And you did not review any testimony filed in the Duke ESP proceeding, correct?

A. Yes.

Q. And you are not familiar with the Duke electric service stability charge, correct?

A. I would say that I'm not familiar with it, but I have read various materials that refer to it and describe it, so I don't have much of a detailed understanding of it, but I have some understanding.

Q. You don't know how the Commission treated Duke's electric service stability charge in the ESP versus MRO test, correct?

A. Not specifically, yes.

Q. If the SSR is included on the MRO side of the ESP versus MRO test, that would flip the results of your ESP versus MRO test, correct?

MR. DARR: Can I have that question read back, please?

THE WITNESS: Yeah, I don't, I think if the SSR is on the --

Q. Hold on.

EXAMINER McKENNEY: Could we have the question read back.

(Record read.)

MR. ALEXANDER: I withdraw the objection, I believe I misspoke.

Q. If the SSR is not included on the MRO side of the ESP versus MRO test, that would flip the results of your ESP versus MRO test, correct?

A. I don't think it's to define the ESP MRO test. The way we've defined the ESP versus MRO test includes both the quantifiable and nonquantifiable portions so the answer is I guess no because you'd still have to consider the nonquantifiable piece -- elements.

Q. That's a fair clarification. Let me clarify the question for you.

If the SSR is not included on the MRO side of the ESP versus MRO test, that would flip the aggregate price test portion of the ESP versus MRO test.

A. If one assumes that the SSR is zero under the MRO, in my analysis, then, it flips the quantifiable portion of the test, of the aggregate price test portion of my analysis.

Q. Please turn your attention to your exhibit --

EXAMINER PRICE: Mr. Alexander, I wanted to ask him a follow-up question before you --

MR. ALEXANDER: Yes, your Honor.

EXAMINER PRICE: Do you have a magnitude of where it was -- something more than zero but less than what was asked, where that point flips on the quantified test.

THE WITNESS: More than.

EXAMINER PRICE: If the Commission were to look at this and say no, we disagree with your assumption that it would be exactly the same --

THE WITNESS: Right.

EXAMINER PRICE: -- but it would be some other amount the Commission determines based on the evidence in this proceeding --

THE WITNESS: Right.

EXAMINER PRICE: -- do you know at what point, 60 million, 70 million, the quantified portion of the test would flip from it meeting it to it does not meet it?

THE WITNESS: Yeah, it's calculable from my spreadsheets and I mention this in my direct testimony. You can set the SSR if you want to at a level --

EXAMINER PRICE: You're not asking the Bench to do that.

THE WITNESS: I'm saying that I would

have to do the math to give you that exact number, but I've got an assumption in my testimony, when I say "assume" that the MRO was set under the, I mean, I'm sorry, the SSR was set under the MRO, revenues, total revenues exactly equal one another and then my opinion is that the ESP would still be more favorable in the aggregate because of the nonquantifiable benefits under those circumstances.

EXAMINER PRICE: Okay. Thank you.

Q. (By Mr. Alexander) Mr. Malinak, please turn your attention to your Exhibit RJM-1.

A. I'm there.

Q. The SSR is referenced on lines 21 and 22 of that exhibit, correct?

A. Yes.

Q. So if the SSR was removed from the MRO portion of your test, that would move all the allocation from line 21.

A. Yeah, if you just made all those zeros, they would be zeros.

Q. I'm not sure that answered my question.

If the SSR was removed from the MRO portion of your test, that would remove all the allocations in line 21, correct?

A. Yes. All those, if those things -- those things would all be zeros if you removed the SSR.

Q. Your Exhibit RJM-1 shows an SSR value of $137.5 million per year for a combined $687.5 million. Do you see that?

A. You know, in the version of RJM-1 that I have it's rounded to 138. This is my second revised.

MR. ALEXANDER: Your Honor, may I approach the witness?

EXAMINER McKENNEY: You may.

Let's go off the record.

(Discussion off the record.)

EXAMINER McKENNEY: Let's go back on the record.

Before we continue I'd like to ask a clarifying question of the witness. The exhibit you have before you now which is RJM-1, does the MRO state 137.5 for each of those years now?

THE WITNESS: Yes, it does.

EXAMINER McKENNEY: Is that rounded to 690?

THE WITNESS: Yeah, there were some different exhibits that were prepared over time and some of them rounded to 138, when you multiplied that by 5 you get 690, but when you multiply 137.5 by 5 you get 687.5 so there were some discrepancies in that regard, but it's de minimis, but it's a rounding issue.

EXAMINER McKENNEY: Thank you.

Mr. Alexander, you can continue.

Q. (By Mr. Alexander) Mr. Malinak, would you like to correct the $690 million value seen on lines 21 and 22 of your testimony under the total?

A. Yeah. It should be 687.5.

Q. The term of the proposed ESP is January 1st, 2013, through December 31st, 2017; is that correct?

A. I believe as filed it ends in December 31st, 2017, I think in the filing it says that, yes.

Q. However, your aggregate price test runs through May 31st, 2018, correct?

A. My test does run through May 31st, 2018, yes.

Q. And you were directed by DP&L to extend the price test until May 31st, 2018, to align with the PJM planning year.

A. Yes. We had conversations with counsel and DP&L led us to -- led me to believe that that was the appropriate thing to do because it does align with the RPM auctions and so, for example, you know, an auction would take place on, you know, May 31st, 2017, and the prices would extend through to the May 31st, 2018. So in order to have, you know, a complete five-year ESP, which was the proposed period of time, and to align with the auction years, the decision was made to extend it through 2018, through May 31st, 2018.

Q. But your price test is not a five-year price test, correct? It's a five-year and five-month price test.

A. Well, it's five years, the extra months don't matter because there's a zero impact for those first five months. So it's -- I guess technically it's an extra five months, but it's not relevant.

Q. Are you aware of any authority suggesting the price test should be expanded beyond the end of the ESP term?

A. By "authorities" I assume you mean legal authorities?

Q. Any authority.

A. Yeah, I mean just consistency and, you know, taking into consideration the realities of the auction process, it makes sense to extend it through, you know, May 31st, 2018, to me.

Q. My question was are you aware of any

authority?

A. Well, the authority would be logic and consistency. And, excuse me, I mean, again, I don't know the legal elements, but if the ESP and the MRO are five-year -- is a five-year period and legally that's permissible, then to get the full five years, you know, especially from today or from June 1st or the middle of this year, you would need to go all the way into, you know, end of May, to get five years.

MR. ALEXANDER: Your Honor, could I have that answer be reread, please?

EXAMINER McKENNEY: Please reread the answer.

(Record read.)

Q. If you align your aggregate price test with the actual ESP term, it would cut off your analysis five months earlier; is that correct?

A. I'm not sure I can answer that. I think it's at least a quasi legal kind of opinion, but if I were to just mechanically end my calculation at December 2017, it would have, you know, a mathematical impact on my answer.

Q. The end of the ESP period is December 31st, 2017, correct?

A. My issue is that I don't understand the legal end of the ESP period. I don't understand the definition of that. It's -- that's my problem. That's why I'm not answering, you know, on a legal basis, because I can't. But because the ESP period could be five years from June 1st of this year, which would take you right to May 31st, 2018, legally. I just don't know.

EXAMINER PRICE: Do you know what the company asked for?

THE WITNESS: At the time of my testimony they were asking for January 2013 through December 2017 explicitly in the application.

EXAMINER PRICE: Do you have any reason to believe that's changed?

THE WITNESS: I don't have any knowledge of that.

EXAMINER PRICE: Okay.

Q. (By Mr. Alexander) If you wanted to calculate the impact of using the end of the proposed ESP term as a stopping point in your analysis, you would reduce the last year's forecasted sales by five-twelfths, correct?

A. Yes. If mathematically if I were asked to lop it off right there, then you would get some adjustment on that order.

Q. Now I'd like to discuss the blending percentages used in your testimony. Please focus your attention at page 7, the chart on line 1.

A. I'm there.

Q. On the MRO side of the test you assumed market pricing is blended at 10 percent for an initial 17-month term, correct?

A. Yeah. The first period that I assumed, you know, it was a 17-month period, I assumed 10 percent for that period, yes.

Q. And the MRO statute provided the blending percentages on an annual basis, correct?

A. It states, the statute states that for the first five years of the market rate offer be competitively bid under Division A of this section as follows: 10 percent of the load in year 1; not more than 20 percent in year 2; 30 percent in year 3; 40 percent in year 4; and 50 percent in year 5.

Q. And you conducted the MRO blending at 10 percent in the initial 17-month period based on your understanding of the MRO statute.

A. Yeah. So, for example, it says for the first year it says 10 percent, and it says "not more than 20 percent for the second year," and 10 percent is not more than 20 percent so I thought it was consistent with the statute when I was asked to look at.

Q. And you used -- I'm sorry, was your answer completed? I didn't mean to --

A. Yes.

Q. You used a 12-month blending period after the first period; is that correct?

A. Yes, that's correct.

Q. And you were instructed by DP&L to conduct the first period blending at 10 percent for 17 months; is that correct?

A. There were discussions with counsel and with DP&L personnel about these blending percentages and so I wouldn't say I was instructed. I would say I decided to use these blending percentages based on a combination of discussions with counsel, DP&L personnel, and my own, you know, my own review of the statute.

Q. If the blending periods were conducted using 12-month periods rather than the 17-month period used in period 1, that would accelerate the blending process on the MRO side of your ESP versus MRO test.

THE WITNESS: Could I hear that back, please?

(Record read.)

A. I'm not sure that's right. I mean, the way I read the statute it says that year 1 is 10 percent, year 2 is not more than 20, and so if, you know, so I guess you would have to, you know, make your hypothetical more explicit because the first period is 10 percent and, like I said just a second ago, 10 percent is not more than 20 percent and so it could extend, you know, further than 12 months under the statute as I read it.

Q. Your testimony holds switching constant; is that correct?

A. Well, as I testified earlier, I do do that, but it also implicitly does not because I assume in my analysis that the switching tracker is there in both the MRO and the ESP. So implicitly there can be additional switching, but it won't change my answer on the quantitative side.

Q. Because you assume the switching tracker is on the MRO side of the test.

A. Yes, and on the ESP side as well.

Q. Your testimony compares the bypassable generation revenue under an MRO and an ESP, correct?

A. I compare both bypassable and nonbypassable, but bypassable is part of that, yes.

Q. And you have reviewed Witness Hoekstra's estimates of future switching over the ESP period?

A. I have.

Q. And Dayton Power & Light directed you not to use Witness Hoekstra's estimates of future switching in your testimony.

A. I would say that, again, a decision was made, counsel asked me for my analysis to, not to explicitly do it, but it would almost not make sense to because if I'm assuming the switching tracker is in place, then running a higher switching scenario, that wouldn't seem to make sense. You'd just get the same answer.

Q. Implementing Mr. Hoekstra's switching projections into your ESP versus MRO test would reduce SSO load, correct?

A. I think I may have testified to this earlier, but the answer is no, if the switching tracker's in place in each, in the MRO and the ESP, and the answer is yes, if it's not in place in either of them.

Q. My question was: Would additional switching decrease SSO load? It wasn't a question as to your analysis, it was just would additional switching decrease SSO load.

A. I apologize. I misheard the question.
Yes, additional switching reduces the load subject to SSO. It does. Sorry.
Q. And as load decreases, that would make the ESP less beneficial as compared to an MRO, correct?
A. Again, depending on your assumptions regarding the switching tracker. So we could go back to my earlier answer for this one.
Q. Please turn to page 67 of your deposition, let me know if I read this correctly, and it's line 9. Question: "As load decreases that would make the ESP less beneficial as compared to an MRO."
Answer: "Yeah. As the SSO load decreases, correct."
Did I read that correctly?
A. I'm sorry, where are you?
Q. Page 67, lines 9 through 12. Would you like me to read it again?
A. Yeah, this was -- this is where you had asked me to set aside the switching tracker, I believe, but yeah, I mean, you read that correctly.
Q. And I'm fine with that clarification, Mr. --

MR. SHARKEY: Your Honor -- your Honor, I'd like to object because on page 66 the questioner, I believe Mr. Alexander but I don't know who the questioner was, page 66, line 9 already asked Mr. Malinak to hold the switching tracker aside for the purposes of that line of questions.

So his answer that he just gave to Mr. Alexander's question was perfectly consistent with his deposition testimony.

EXAMINER McKENNEY: Mr. Alexander.

MR. ALEXANDER: I'll withdraw the question and we can do this again.

EXAMINER McKENNEY: All right. Let's withdraw the question and we'll try this again.

Q. (By Mr. Alexander) Mr. Malinak, I'd like you to set the switching tracker to the side. Do you understand that?

A. Yeah. I think so. I think if you mean assume that it would not be in place under either the MRO or ESP. Is that what you mean?

Q. Correct.

A. Yes.

Q. And SSO load decreases, that would make the ESP less beneficial as compared to an MRO, correct?

A. On an aggregate -- on an aggregate price test basis. On a quantitative price test basis. But that's leaving aside the nonquantitative benefits. So just narrowly on that mathematical calculation the answer is yes.

Q. And you mentioned the switching tracker quite a bit today. Can you describe what the switching tracker is?

A. Yes. Generally it's a mechanism that the company is proposing whereby there would be a revenue true-up process that the company would go through that if there's switching that goes beyond the base case assumed switching level, then they would recover revenue equal to the difference over time.

Q. Does your Exhibit RJM-1 reference a switching tracker?

A. I don't believe the exhibit does but I think, you know, it's discussed in the text. It may be discussed in the text referring to this exhibit, but I'd have to look back.

Q. And your Exhibit RJM-1 does not include any impact from the Yankee Solar Facility; is that correct?

A. That's correct.

Q. And your Exhibit RJM-1 does not include any impact from the rider AERN; is that correct?

A. That's correct, which I, my understanding is that that relates to the Yankee Solar Facility, the AERN.

Q. And it's your understanding as well that the AERN could include things additional to the Yankee Solar Facility.

A. I actually don't know that for sure.

Q. And since you prepared your Exhibit RJM-1 you have since learned that the Yankee Solar Facility must be included only on the ESP side of the test; is that correct?

A. I'm sorry, could you read that back very quickly, I was moving some papers.

(Record read.)

A. I actually learned about the Yankee Solar Facility, it was actually between my -- the first testimony that I filed and my second revised testimony that I found out about it, is my recollection.

Q. And adding rider AERN to your ESP versus MRO test would make the ESP comparably less favorable as compared to your projection by $3.3 million.

A. On a quantitative basis if you assume that the Yankee Solar Facility, the costs for that could not be recovered under an MRO but could be recovered under an ESP, then you're correct that it would be an additional quantifiable cost, if you will, to the -- which would offset my quantifiable calculation of the benefits of the ESP.

Q. Now I'd like to talk just a little bit about the nonquantifiable benefits that you identified. One of those nonquantifiable benefits you identify is a faster transition to market; is that correct?

A. Yes.

Q. And the quantifiable benefits of the faster transition to market are already included in your ESP versus MRO aggregate price test; is that correct?

A. Yes, I do have a -- I do calculate quantifiable benefits to SSO customers of the faster transition.

Q. So the benefits to customers associated with lower market prices are already shown in your aggregate price test.

A. No, a portion of them is shown. There would be other nonquantifiable benefits or difficult-to-quantify benefits from enhanced competition from the faster transition to market. So not all the benefits are there.

Q. My question was just on the quantifiable benefits. The quantifiable benefits associated with the faster transition to market are already shown in your aggregate price test.

A. I would say the most straightforward quantifiable benefits are included. You know, the difficult -- there are additional potentially quantifiable but, you know, I use the term "difficult to quantify" and at times "nonquantifiable," but there might be methods someone could use to try to get at some of the difficult-to-quantify benefits of additional competition.

Q. Are there any calculations in your testimony showing the difficult-to-quantify benefits you just testified about?

A. There are no calculations.

Q. And you agree with me that a faster transition to market is generally better for customers.

A. Yes, I do. I believe it's beneficial in both quantifiable and difficult-to-quantify ways.

MR. ALEXANDER: I have nothing further at this moment. Thank you very much.

EXAMINER McKENNEY: Ms. Yost?

MS. YOST: Thank you, your Honor.

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CROSS-EXAMINATION

By Ms. Yost:

Q. Good morning, Mr. Malinak.

A. Good morning.

Q. If I could have you turn to page 4 of your testimony.

EXAMINER McKENNEY: Ms. Yost, can I ask you to turn on your microphone.

MS. YOST: Oh, absolutely.

EXAMINER McKENNEY: Thank you.

Q. Starting on line 20 you state that "It is assumed that this hypothetical MRO would be similar to DP&L's ESP in every material respect, except that the ESP involves a faster transition to market generation rates and the ESP includes certain new programs aimed at enhancing retail markets."

So just to clarify, this assumption that the SSR and switching tracker would also be available under an MRO was provided to you by the company; is that correct?

A. Not exactly. I mean, there was discussion with counsel and company and then I also did my own analysis, as I described earlier, to check the reasonableness of that assumption, and that involved looking at the financial integrity metrics under an MRO and what it showed is that without an MRO and a switching track -- I'm sorry, without an SSR and a switching tracker in the MRO, you would have a significant financial integrity issue under an MRO, and so it made a lot of sense to me that there would be an SSR and a switching tracker under the MRO because otherwise you would have a financial integrity issue which would -- which would create a lot of nonquantifiable costs or difficult-to-quantify costs under an MRO.

MS. YOST: Your Honor, I'll ask that the witness's statements be stricken from the record as nonresponsive beyond the first answer there.

MR. SHARKEY: Your Honor, I believe it's perfectly responsive. He began by disagreeing with the question explaining his reasons why he disagreed.

EXAMINER McKENNEY: Motion to strike is denied.

Q. And could I have you turn to -- so then it's your testimony that -- so the company never told you to make the assumption that the SSR and the switching tracker would be available under the MRO; is that your testimony, sir?

A. My testimony is that I relied on counsel and the company for the assumption that it would be legal to have those kinds of charges under the MRO. But from my own economic and financial analysis perspective these were reasonable assumptions to be making.

Q. Could you turn to page 7 of your testimony, sir.

A. I am there.

Q. In regards to your chart at the top of page 7 of your testimony would you agree with me that in determining the amount of any stability charge, all else being equal, you would need a smaller charge with a slower transition to market? Correct?

A. A smaller charge with a slower transition under which one? Under ESP or MRO?

Q. Well, comparing the blend periods under the ESP versus the MRO, you would need a lesser amount of a stability charge if one was permitted under a slower transition to market than a faster transition to market under the ESP.

MR. SHARKEY: Object, your Honor. It's not clear whether she's asking slower transition to market under the ESP, MRO, or both. I don't think the witness can fairly answer the question.

EXAMINER McKENNEY: Ms. Yost, can you rephrase the question?

MS. YOST: Sure.

Q. I'll just say in general, if there's a transition to market, a slower transition to market would have a smaller negative impact on the financial integrity of a company; would you agree with that?

MR. SHARKEY: Same objection, your Honor. I can't tell whether it's a slower transition to market under the ESP or the MRO or both.

EXAMINER McKENNEY: I think she's asking just generally, so the objection's overruled. The witness can answer the question if he can.

A. As a general matter, a faster transition to market in terms of blending a market rate in with the cost of service rate would lead to lower revenues and you may, like back when you said "all else equal," okay, obviously there are a lot of issues, a lot of factors that go into determining what the right level of the SSR is that could extend beyond this narrow -- this narrow question, okay.

But sort of all else equal, which is a big assumption, if, you know, a faster transition to market results in lower revenues, it would -- that factor would tend to lead to, all else equal, point to a higher SSR.

Q. And then all else equal, a slower transition to market would result in a smaller stability charge, correct?

A. I'm not sure if I misspoke on the last answer. A faster transition to market leads to lower revenue, I hope I said higher SSR would be required. All else equal.

And now, I'm sorry, please ask your next question.

MS. YOST: Could you please read the question back.

(Record read.)

A. Again, all else equal, a slower transition to market means some incremental -- generally means some incremental amount of more revenue, kind of depends on, you know, a variety of other factors but, again, all else equal, greater levels of revenue coming from a slower transition to market might result in a, or tend to result in a lower SSR.

Q. And, in fact, you have not done a calculation to determine the amount of the SSR to maintain the financial integrity of the company under an MRO, correct?

A. Actually, I have done an analysis of that type.

Q. Okay.

A. That I've already described.

Q. Could I have you get your deposition transcript, sir.

MS. YOST: Your Honors, do you have a copy of it?

A. I do.

Q. And could I have you turn to page 91. Please let me know when you are there.

A. I am there.

Q. Line 24, question: "Okay. Let me -- have you done a calculation to determine the amount of the SSR to maintain the financial integrity of the company under an MRO?"

Answer: "Not specifically, no."

Did I read that correctly, sir?

A. You did.

Q. Thank you.

A. But I --

Q. You've answered the question.

A. I have to just answer that? Okay.

Q. And you are aware that the company filed an MRO application in 2012, correct?

A. Yeah, I -- my understanding is that they filed it or they had one in -- they were working on I think.

Q. And you are aware that they requested a nonbypassable charge, correct, in that MRO application?

A. My general recollection is that they were -- at least in the things I saw, they were requesting a nonbypassable charge, yes.

Q. And do you recall the charge being approximately 70 to 80 million dollars in that case?

A. The things that I saw, materials that I saw, had a nonbypassable charge in that range.

Q. Mr. Malinak, the company never indicated to you that they had done a calculation to determine the amount of a service stability charge under an MRO application, correct?

A. My understanding was that they did calculate a nonbypassable charge as part of their MRO analysis. We just discussed it.

Q. Yes, I'm sorry. I wasn't referencing the application. When they hired you to do your analysis in this case, we were talking about the assumptions made and one of the assumptions you indicated was that the SSR would be at the same level that they are requesting in their ESP application. Do you recall stating that, sir?

A. Yeah. As I stated earlier, there were discussions with counsel and with the company and a decision was made to assume the same level of SSR and, as I've said several times, I also checked that for reasonableness myself.

Q. Right. And they indicated to you that the amount of the SSR they were seeking in the ESP application was the $137.5 million per year, correct?

A. That's the level of SSR that they -- that I knew they were asking for under the ESP and that they would have asked for under a hypothetical MRO filed on the same day.

Q. And but the company never did indicate to you that they had conducted a analysis of an SSR under an MRO and determined that the proper charge would be $137.5 million per year, did they?

A. By "proper charge," what do you mean by proper?

Q. I'll strike the word "proper." Let me rephrase that.

The company never indicated to you that they had done an analysis of a -- excuse me.

The company did not indicate to you that they had done a calculation to determine that the charge for the service stability rider would be $137.50 million under an MRO, correct?

A. They never referenced any specific calculations that they had done but, of course, I knew they, you know, from their earlier filing that that was, you know, they were analyzing nonbypassable charges in connection with an MRO.

Q. And the original filing you're talking about, you indicated that range was 70 to 80 million dollars, correct?

A. I indicated that materials I saw had a number in that range.

Q. And you can agree that if a service stability rider is not authorized or allowed under Ohio law for an MRO, then the ESP would fail your aggregate price test, correct?

A. If the -- if an SSR or other nonbypassable charge is not allowed under an MRO, then it would fail the aggregate price test component of my analysis, but -- which is the quantitative part, but it would have a major impact on the nonquantitative part.

Q. So the answer to my question was yes?

A. Yes, and then with the explanation.

Q. You consider one of your nonquantifiable benefits of the ESP a faster transition to market-based rates than could be achieved under an MRO, correct?

A. Yes.

Q. And you believe that this faster transition supports a more favorable climate for business, correct?

A. Yes.

Q. And you believe a faster transition to market improves the business climate because it produces lower SSO rates to customers from DP&L since the calculation of an SSO, that's a combination of the cost of service rate and the competitive bid rate, produces a lower offering from DP&L, correct?

A. Yes, that's the primary mechanism by which the faster transition to market will have a pro competitive impact.

Q. So it is the resulting lower SSO rates for customers, both business and residential, that you consider will improve the business climate, correct?

A. And we're just focusing on the faster transition to market piece because there's some other nonquantifiable benefits like the retail enhancements that could potentially affect the business climate, but the primary -- the primary impact of faster transition to market will happen by having -- through the mechanism of having a lower SSO rate out there.

Q. And do you agree that the faster the transition to market due to the competitive bid process, then SSO prices will decrease?

A. Could you read the question back, please?

Q. Sure. I'll go ahead and read it, if that makes it easier.

Do you agree that the faster the transition to market due to the competitive bid process, then SSO prices will decrease?

A. I agree the SSO prices will decrease the higher percentage of market rates. CBP rates that are blended in with the cost of service, that automatically produce as lower, you know, SSO rate which can -- which has the pro competitive impacts that we've been discussing.

Q. And you would agree that a transition to market price that is faster than what DP&L proposes would result in even lower SSO prices than DP&L's proposal.

A. Mathematically I believe that that's true. The fact that if you're blending in market rates at higher percentage you're going to get a lower SSO rate.

MS. YOST: Thank you, Mr. Malinak. I have no further questions at this time.

EXAMINER McKENNEY: Thank you, Ms. Yost.

Mr. Darr, I believe you are next. As we indicated -- let's go off the record real quick.

(Discussion off the record.)

EXAMINER McKENNEY: We'll take a 20-minute recess. Be back at 10 after 11.

(Recess taken.)

EXAMINER McKENNEY: Let's go back on the record at this time.

Mr. Darr.

MR. DARR: Thank you, your Honor.

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CROSS-EXAMINATION

By Mr. Darr:

Q. I want to follow up on a question that Attorney Examiner Price asked you earlier this morning. He asked whether or not you had investigated or studied Commission decisions with regard to Commission's emergency authority. Do you remember that line of questions or that questioning?

A. Yes, I do, generally.

Q. And you have not done any independent analysis on the effect of a disallowance of the SSR on Dayton Power & Light's ability to render service to its customers, correct?

A. You know, I'm having a little bit of trouble, yeah, I've done no independent analysis, but, you know, I have analyzed the impact on DP&L's financial integrity of not having an SSR switching tracker.

MR. DARR: Move to strike everything after the beginning of his answer.

MR. SHARKEY: Your Honor, it was clarifying, there's an obvious connection between financial integrity and ability to render service, it's just clarifying his response.

MR. DARR: That is not a clarification of my question. I asked whether or not he had analyzed rendering service. He answered that and then he chose to add to his answer which was not responsive to my question.

EXAMINER McKENNEY: Can I have the answer read back to me?

(Record read.)

EXAMINER McKENNEY: The motion to strike is denied.

Q. (By Mr. Darr) You have not done any independent analysis as to any of the cost cutting DP&L could undertake to avoid a financial emergency or financial integrity concern for this proceeding; is that correct?

A. I've done no independent analysis of that outside of what I have done in terms of looking at the financial metrics for the company under different scenarios.

Q. And would it be fair to say that you have not addressed any alternative sources of revenue that DP&L might secure to improve its financial ability to provide service if it did not secure the SSR or the other nonbypassable riders? Is that fair?

A. I've done no specific analysis of potential revenue enhancements.

Q. As part of your ESP versus MRO calculation you did also -- you also did not include the costs of the competitive retail enhancements as a cost of the ESP, correct?

A. Based on our earlier definitions you said ESP versus MRO. Just to be clear, we're talking about the quantitative part of the ESP versus MRO test, correct?

Q. Yes. With that qualification am I

correct that you did not include the cost of the competitive retail enhancements as part of your analysis of the enhancements?

A. I included it in the text of my report, I did not put it specifically in my RJM-1.

Q. So the answer to my question is it's not in the quantitative analysis, correct?

A. Actually, I wouldn't agree with that. It is in the quantitative analysis in the sense that it's in the text of my report and the amount of money associated with it is identified in my report, but it's not -- it's not in my RJM-1.

Q. Thank you.

You also indicate that, in your testimony, that as we discussed -- as you discussed earlier, one of the benefits of the -- or one of the qualitative or non -- or difficult-to-quantify benefits is this faster transition to market, correct?

A. The faster transition to market creates certain non or difficult-to-quantify additional benefits, yes, I do say that.

Q. And you're familiar with the percentage of load that has already switched to a CRES provider, correct?

A. I'm familiar with Mr. Hoekstra's testimony on the levels of switching for different -- for both residential and nonresidential customers.

Q. And at page 14, line 13 of your testimony, you state that you anticipate more choices for customers as a benefit of the proposed ESP, correct?

A. Yes. The faster transition to market creating a more competitive SSO I would expect would produce not only lower priced offerings from CRES providers but likely competition on quality as well.

Q. And it would be fair to say that you have not identified or analyzed a change in the product mix in any of the other Ohio electric distribution utility service territories as a result of those EDUs moving to a fully competitive bidding process, correct?

A. That's correct, I have not done that particular analysis.

Q. And for those customers that are already shopping, some part of those benefits, whatever they are, are already being realized, correct?

A. I'm not sure I would agree with that because under the ESP -- actually, some benefits of shopping are obviously being created, however, with a faster transition to market, more of those types of benefits will occur.

Q. And is it fair to say that you did not explicitly carve out the shopping customers and analyze how they would be impacted by this proposed ESP?

A. No. I followed the definition of the test which was to analyze the effect on ratepayers, consumers in the aggregate as opposed to individual groups of customers.

MR. DARR: Thank you, that's all I have.

EXAMINER McKENNEY: Thank you, Mr. Darr.

Are there other intervenors that have cross-examination for the witness?

MS. BOJKO: No.

MS. PETRUCCI: No.

MR. SINENENG: No, your Honor.

MR. WILLIAMS: I have some questions.

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CROSS-EXAMINATION

By Mr. Williams:

Q. Good morning, Mr. Malinak. My name is Gregory Williams and I'm here on behalf of Interstate Gas Supply.

A. Good morning.

Q. I have just a few clarifying questions for you.

Mr. Alexander earlier asked you some questions about whether a faster transition to market is better for customers. Do you remember that?

A. Generally, yes.

Q. Okay. And your answer was yes. Do you remember that?

A. I don't remember my specific answer, but in general a faster transition to market will have certain benefits but there can be some costs associated with that too. A faster transition to market will have a quantifiable effect but then, to the extent that it affects financial integrity, it could have substantial nonquantifiable costs as well.

Q. Okay. My clarifying question is by "faster transition" do you mean as compared to an MRO? As compared to the transition that would be required by statute under an MRO?

A. I mean, I don't remember the exact context of Mr. Alexander's question, but my analysis in general is comparing the ESP to the MRO and so I wouldn't be surprised if in responding to his question that was the context for it.

Q. Okay. Within the context of an ESP,

however, Ms. Yost asked you some questions about whether a faster transition to a competitive auction is better for customers. Do you remember her asking you that question?

A. I remember her asking questions about faster transition to market, yes.

Q. Okay. And in response to that question you answered yes. Do you recall that?

A. Again, I can't recall exactly what my answer was, but hopefully was the one I just gave which is yes, it would, assuming that it didn't create, you know, certain nonquantifiable costs. You know, a faster transition to market is going to result in a, you know, better for ratepayers in terms of quantifiable rates, okay, or amounts they pay, but it could have impacts on financial integrity that could offset that.

Q. Okay. I have a hypothetical question about a potential quantifiable effect of a faster transition to a competitive auction. Hypothetically, within the context of an ESP, if a faster transition to a competitive auction results in a larger nonbypassable charge being passed to customers, would you still consider that transition to be better for customers?

A. So if there's a faster transition to market --

Q. Well, not market, specifically to a competitive auction. I want to be clear about that.

A. Yeah, which would produce a faster transition to a more fully market-based SSO rate, and if across all customers one increased the nonbypassable charge to offset that, then there would be, from the customer perspective -- from a quantifiable perspective from the customer perspective in the aggregate there would be a wash.

Q. A wash.

A. Yeah, because -- it depends on how much you were going to increase the nonbypassable charge by, but I thought the context of your question was that, you know, if you go to a faster transition to market, revenues are going to fall, the amount that ratepayers pay is going to fall.

If you raise -- if you created an increase in the nonbypassable charge that offset that exactly, then there would be a wash; customers in the aggregate would pay less because of the faster transition to market but would pay more because of the higher nonbypassable charge. If I understand your question.

Q. Yes. Let's assume, then, hypothetically that instead of a wash it results in a net increase in the overall cost.

A. Are we talking about relative to an MRO at this point?

Q. No, no, within the context of the ESP.

A. So you're saying, just focusing right on the ESP now, if the faster transition to market resulted, just for sake of argument, in a hundred dollars less, lower rates for ratepayers to pay, again we're just talking about the quantitative element now, right?

Q. Right.

A. And then you raised the nonbypassable charge by $110, then relative to the case that we started from, which is before the hundred and the 110 --

Q. Right.

A. -- okay, mathematically in the aggregate there will be an increase of $10 in the aggregate.

Q. And depending upon --

A. An increased cost to ratepayers, it's almost like a tautological mathematical result.

Q. And so depending on the amount of the increase is it your opinion that the higher nonbypassable charge -- strike that.

Depending upon the size of the increase of the nonbypassable rider, is it your opinion that the net increase in the bypassable rider would result in a better result for customers as compared with the wash scenario that you mentioned earlier?

A. It would depend on the magnitude of the difference because the faster transition to market -- I'm sorry, are we talking -- well, let me finish my answer.

Okay. So a faster transition to market creates, you know, a savings for the ratepayers who are paying those rates that are affected by it, and then there are some nonquantifiable benefits of a faster transition to market as well that would be enjoyed.

Q. But my question is specifically in the context of an ESP with regard to the quantifiable effects of a net increase in the nonbypassable charge as the result of a faster transition to a competitive auction.

A. Okay, you said "as a result of," but is it the -- it seems to me like a nonbypassable charge would be set independently from the, what was going on with the bypassable. So it's not an automatic result. Just because you have a -- you have a faster transition to market, you don't automatically have an increase in the nonbypassable charge.

Q. Right. Which is why I was asking hypothetically.

A. Okay, so hypothetically if the nonbypassable charge were set, you know, at $110 and the savings on the bypassable side for ratepayers was a hundred, then there would be a $10 increase in cost to the ratepayers relative to the situation that prevailed before.

Q. And, depending upon the size of that difference, so your difference is, you know, as -- 110 as compared to 100.

A. Right.

Q. Let's just for the sake of argument assume it was 150 as compared to 100 or whatever the case may be, would the $150 scenario be a better result as compared to the $100 scenario for ratepayers?

A. And we're talking just about just the math.

Q. Yes.

A. The quantifiable --

Q. The quantifiable.

A. -- piece of my analysis because, of course, the size of the nonbypassable charge relative to the potential losses on the transition to market side has a big -- could have a potentially huge impact on the financial integrity analysis and the impact and results on the non or difficult-to-quantify side.

But just on the quantifiable side, the way my analysis is set up mathematically, you know, if you increased the nonbypassable charge by more than the savings from the faster transition, then you -- then in the aggregate on a quantitative basis ratepayers would be worse off.

MR. WILLIAMS: Nothing further.

EXAMINER McKENNEY: Mr. Williams.

Redirect, Mr. Sharkey.

MR. SHARKEY: Thank you, your Honors.

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REDIRECT EXAMINATION

By Mr. Sharkey:

Q. Mr. Malinak, I want to start by focusing solely on the aggregate price test. Do you recall that in response to questions from Mr. Alexander that you stated that it would be reasonable to conclude that an SSR would be included in an MRO on an economic basis?

A. Yes, I remember saying that.

Q. Can you explain the reason that you said that?

A. Yeah. Because it's very important to consider the size of the SSR in light of the financial integrity of the firm under an MRO, and that was the analysis that I did here is I looked at what would be the financial integrity metrics for the firm if you assume an SSR equal to the SSR in the ESP and concluded that it was reasonable to make that assumption, and again, that's by looking at the ratios that would prevail under the MRO and those were higher than under the ESP and, you know, but coming out of that analysis, you know, maybe the MRO was ahead of the ESP by about 120 million bucks or $120 million when you assume the SSR is the same, it kind of suggests almost that the company could have asked for a higher SSR under the -- under the ESP because the ratios under the MRO are not significantly higher than under the ESP.

Q. My next question, do you remember when Mr. Alexander asked you some questions about whether the SSR should be -- should be bypassable or nonbypassable under an MRO?

A. I do remember that.

Q. Okay. Is it reasonable on an economic basis to conclude that the SSR should be nonbypassable under an MRO?

A. It is.

Q. And why is that?

A. Well, because bypassable revenues have a tendency to be bypassed and if you have a financial integrity issue, then a nonbypassable charge is a much more effective economic way to handle that issue.

Q. My next question, do you recall that Mr. Alexander also asked you a question about whether the results of your ESP versus MRO test would flip if the SSR was excluded from an MRO?

A. Yes, I remember talking about that in the context of the quantitative side of the analysis.

Q. Okay. My recollection, tell me if you have a different recollection, is that you said that yes, the results would flip on a purely price test but they would not flip if you considered nonquantifiable attributes.

A. That's true. In particular, under an MRO if an SSR or switching tracker were not available and the SSR is about $700 million, you're talking about now, when you look at the ESP with an SSR, you're talking about financial ratios, especially the ROE, that are right at the borderline, and if you take away $700 million, even on an after-tax basis, you have an MRO or you have a situation under the MRO in which the viability of the company would be really greatly threatened and that would, under an MRO without an SSR ST, switching tracker, you're talking about severe financial distress which could lead to significant difficult-to-quantify costs.

Q. If you would, please, turn to page 7 of your testimony.

A. I'm there.

Q. Do you recall whether -- do you recall Mr. Alexander asking you some questions about whether the 10 percent in the first 17-month period under the MRO complied with the MRO statute?

A. I do.

Q. Okay. Under your chart, is the competitive bid percentage 10 percent during the first 12 months of your hypothetical MRO?

A. Yes.

Q. Is the competitive bid percentage not more than 20 percent in the next 12 months of your MRO?

A. Yes.

Q. Do you recall also that Mr. Alexander asked you some questions about whether or not you considered the effect of the Yankee facility and the associated rider in your RJM-1?

A. I do remember that, yes.

Q. And it's true, isn't it, that you did not include the effect of the Yankee facility in RJM-1?

A. Yes, I did not include it in RJM-1 but it's discussed, included, and quantified in the text of my direct testimony.

Q. And is it your understanding that the Yankee facility and associated rider would be available under an ESP but not an MRO?

A. That's my current understanding.

Q. So do you agree that in the price test aspect of your analysis that you would need to include those dollars?

A. Yes.

Q. Why didn't you include those dollars on RJM-1?

A. Well, because, you know, RJM-1 is a pretty pure kind of spreadsheet analysis that looks at just the bypassable component. It has the nonbypassable SSR in there too, and so it seemed like a more efficient treatment to put it in my text.

And also, you know, I actually learned about the AERN and the Yankee Solar Facility after I had initially put together my RJM-1 so it was just easier to put it in the text.

Q. Last topic I have for you. Do you recall when Miss Yost asked you about whether or not you had considered whether DP&L needs an SSR under the MRO to maintain its financial integrity?

A. I do remember some questions along those lines.

Q. If I recall correctly, you had answered that yes, you had considered that, and then she asked you to look at pages of your deposition that she purported were inconsistent with your answer. Do you recall that?

A. I do.

Q. Turn, if you would, back to the same pages she was referring to, it was page -- the bottom of page 91 stretching onto 92.

A. Uh-huh.

Q. I believe that Miss Yost asked you about, starting on line 24, the portion that says: "Okay, let me -- have you done a calculation to determine the amount of the SSR to maintain the financial integrity of the company under an MRO?"

And then you answered: "No, not specifically, no."

Do you remember Miss Yost asking you about that?

A. Yes.

Q. Further down on the page there's an answer that you have, it starts on line 10, where you describe having done an implicit calculation. Do you see that?

A. I do.

Q. Did Miss Yost ask you about that portion of your deposition testimony?

A. She did not.

Q. Okay. Can you describe for the Attorney Examiners why it is that when you were under oath here today you told Miss Yost that you had, in fact, done a comparison of whether or not the company needs the SSR under an MRO to maintain its financial integrity?

A. I'm sorry, I was reviewing my answer here. Could you please have that question read back.

Q. I'll just repeat it.

A. Okay, sorry.

Q. Can you explain why today you told

Miss Yost that the company needs an SSR under an MRO to maintain financial integrity and that's something you analyzed?

A. Yes. I talked a little bit about this before, but it's important to analyze financial integrity under the MRO in order to have a realistic comparison between the ESP and the MRO and, you know, what I did is just -- my implicit analysis here in my deposition, what I was talking about was having looked at the financial metrics under an MRO and having determined that, you know, without an SSR, you know, approximately equal to the one under the ESP, the company would be in severe financial distress and would create very large nonquantifiable benefits.

So my approach was to, or it made sense to me to put in an assumption that held that important element constant, in essence, and that's what -- that was the analysis that I've been describing all day about checking the reasonableness of the assumption that there would be a charge like the SSR under an MRO.

MR. SHARKEY: Thank you, Mr. Malinak.

Your Honors, I've got no further questions for him.

EXAMINER McKENNEY: Recross,

Mr. Alexander?

MR. ALEXANDER: Very, very briefly, your Honor.

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RECROSS-EXAMINATION

By Mr. Alexander:

Q. Mr. Malinak, Mr. Sharkey asked you about some financial analysis that you did in connection with the SSR. Do you recall those questions?

A. Yes.

Q. Can you tell me where that financial analysis that you testified about can be found in your testimony?

A. It's not provided explicitly, it's implicitly provided in the place in my testimony where -- that I'm currently having trouble finding, where I talk about -- it's on page, I believe page 12, pages 10 to 18 [verbatim] where I talk about why it is reasonable to assume an SSR of the same magnitude. And I talk about the fact that an MRO -- or, an SSR of the same magnitude under an MRO, that the improvement would not be sufficient to eliminate the financial risks that DP&L was projected to experience in the out years as determined by Company Witness Chambers.

Q. And was your answer complete, Mr. Malinak?

A. Yeah. I mean, it was in -- this is describing the analysis that I did and I've talked about where I was looking at financial metrics under an MRO.

Q. Sure. I'm moving on to another topic.

A. Okay.

Q. Mr. Sharkey also asked you about the CBP -- strike that.

Mr. Sharkey also asked you about MRO blending percentages; do you recall that conversation?

A. I do.

Q. And Mr. Sharkey asked you about blending percentages in year 1. Did you understand him to be referring to the period from January 1st, 2013, through December 31st, 2013?

A. Yeah, he referred to the first 12 months and the second 12 months, and I did understand him to be talking about the first 12 months of what I have in my testimony which is starting in January 2013.

Q. And ending on December 31st, 2013?

A. Yes, that's right.

Q. Okay. So Mr. Sharkey asked you about

calendar years 1 and 2. In the third calendar year of the MRO blend which is located on page 7, line 1 of your testimony, do you apply a 30 percent blend for the entire calendar year 2015?

A. No, because, I mean, for the first part of 2015 it's 20 percent and then for the second part of 2015 -- or 20 -- yeah, for the second part of 2015 it's 30 percent.

Q. And do you apply --

A. This is under the MRO. Go ahead. I'm sorry. Under the MRO, yeah.

Q. Is your answer complete?

A. It is.

Q. And do you apply a 40 percent blend for the entire year 2016?

A. No. The blend is 30 for the first five months and then 40 for the next period of time, so seven months.

Q. And do you apply a 50 percent blend for the entire year 2017?

A. Talking calendar year again, right?

Q. That's correct.

A. No, calendar year, again, for the first part of it the blending percent is 40 percent and then for June 2017 forward to the end of the year it's 50 percent.

MR. ALEXANDER: I have no further questions, your Honor.

Thank you, Mr. Malinak.

EXAMINER McKENNEY: Ms. Yost?

MS. YOST: No questions, your Honor.

EXAMINER McKENNEY: Mr. Darr?

MR. DARR: Thank you, your Honor.

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RECROSS-EXAMINATION

By Mr. Darr:

Q. As part of your testimony for today you provided us the scope of your testimony would be specifically related to the ESP versus MRO test, correct?

A. Yes, that's the primary focus of my testimony.

Q. And in your redirect you were offering an opinion as to the economic basis for the Commission to adopt the stability rider. Am I understanding that correctly?

A. No. I don't think so. Not exactly. In those -- in my answers to Mr. Sharkey's questions I was discussing the basis for why I believed it was reasonable to assume an SSR under the MRO that's of the same magnitude as under the ESP.

Q. So you're not offering an opinion as to the economic reasonableness of it being bypassable versus nonbypassable; is that correct?

A. Oh, no, I'm sorry, I did -- I do have an opinion about it being nonbypassable in that with respect to financial integrity it doesn't make much sense to have a bypassable charge because bypassable revenues tend to be bypassed.

Q. Yeah, that's kind of in their nature, isn't it?

A. Yes.

Q. Now, the shortfall that we're talking about here that's being made up by the SSR, you've reviewed Mr. Jackson and Mr. Chambers' testimony I believe, correct?

A. I mean, "the shortfall"? I'm not sure I understand what you mean.

Q. The reason for the SSR is due to a perceived shortfall in revenue, correct?

A. In part I think so. I mean, it's really the point of the SSR is actually, you know, to maintain profitability and profits are a function of revenue and cost.

Q. So would you agree with me that, well, by its terms it's a charge designed to generate $137-1/2 million, correct?

A. Yeah, it's a charge that is, being nonbypassable, is designed to produce that much revenue for the company.

Q. And based on your familiarity with Mr. Jackson's testimony, you understand that the reason why there's a financial integrity problem is that there is a problem with customer migration and a concern with the decline in energy prices and capacity prices, correct?

A. It's been a while since I reviewed his direct testimony and I wasn't here for his testimony in this room, but accepting your representations that those were some of the elements that he referred to, then those elements would contribute to the financial integrity of DP&L.

Q. So if I understand it correctly, the point of making the rider nonbypassable is basically it's more effective in terms of raising this revenue to tax all customers than to have the company respond to the economic downturn that's led to the need for the SSR.

A. It's actually not a tax. If the payment would -- if the payment helps the company maintain its financial integrity and stability, then ratepayers are enjoying the benefit to go along with that --

Q. Have you --

A. -- those rates.

Q. I'm sorry, I didn't mean to interrupt.

A. I just finished up by saying: Paying that rate.

Q. And have you looked at whether or not the affiliate transfer pricing that the company has adopted would be a means of remedying the financial impairment that the company seems to have found itself in?

MR. SHARKEY: Object, your Honor, he's straying well beyond the scope of my rebuttal testimony here.

MR. DARR: I believe not, your Honor. He has opined that there is a reason for the nonbypassable -- the rider to nonbypassable. The rider's based on his economic justification and I'm asking whether or not he's looked into all the other ways that the shortfall could have been made up.

EXAMINER McKENNEY: I think the objection's overruled. Please try to be careful not to get too much further outside, not to get outside

the scope --
MR. DARR: I understand, your Honor.
EXAMINER McKENNEY: -- of redirect.
Q. (By Mr. Darr) And my question, just to clarify --
A. Please.
Q. -- have you looked at whether or not a change in the affiliate transfer pricing rules would be a means of making up the shortfall?
A. Not explicitly, no.
Q. And you understood my question referred to the affiliate transfer pricing rules; is that correct?
A. My understanding was -- by "affiliate" could you, just to make sure we're on the same page, what do you mean by "affiliate pricing rules"?
Q. Sure. Do you understand that DP&L provides wholesale services to DPLER? Correct?
A. They sell energy to -- capacity and energy to DPLER at a market rate.
Q. And you understand that market rate to be their transfer price, correct?
A. That's correct.
Q. And my question, again, is did you look at whether or not that -- whether or not as an

alternative to the SSR the company could make any changes to its transfer pricing policy.

A. I did not because I, in part because it doesn't make much sense because an appropriate transfer price should be market.

Q. So your answer to my question is no, you did not look at that, correct?

A. No, I didn't -- I didn't explicitly analyze that, like I said, because it would not naturally occur to me to do so.

MR. DARR: Thank you. I have nothing further.

EXAMINER McKENNEY: Thank you.

Mr. Williams?

MR. WILLIAMS: No questions, your Honor.

EXAMINER McKENNEY: Other intervenors?

(No response.)

EXAMINER McKENNEY: Sorry.

MR. SHARKEY: No questions, your Honor.

EXAMINER McKENNEY: Mr. Malinak, you're excused.

THE WITNESS: Thank you, your Honor.

MR. SHARKEY: And, your Honors, we move the admission of DP&L Exhibit 5.

EXAMINER McKENNEY: Any objection?

MR. DARR: No objection, your Honor.

MR. ALEXANDER: No objection.

EXAMINER McKENNEY: It will be so admitted.

(EXHIBIT ADMITTED INTO EVIDENCE.)

EXAMINER PRICE: Mr. Faruki?

MR. FARUKI: Our next witness is Mr. Rice. As I recall, we're breaking at 12:30.

EXAMINER PRICE: Yes.

Mr. Rice.

(Witness sworn.)

EXAMINER PRICE: Would you please state your name and business address for the record.

THE WITNESS: My name is Timothy Rice, and my business address is 1065 Woodman Drive, Dayton, Ohio, 45432.

EXAMINER PRICE: Please proceed, Mr. Faruki.

MR. FARUKI: Thank you, your Honors. I'd like to designate his prefiled direct testimony as DP&L Exhibit 6.

EXAMINER PRICE: So marked.

(EXHIBIT MARKED FOR IDENTIFICATION.)

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TIMOTHY RICE

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Faruki:

Q. Mr. Rice, you have a copy of your prefiled direct that has been designated as Exhibit 6 before you?

A. I do.

Q. If I were to ask you each of the questions contained in that testimony, would your answers be as shown there?

A. They would.

Q. Would they be true?

A. They would.

MR. FARUKI: Your Honor, I offer Exhibit 6 and tender the witness for cross.

EXAMINER PRICE: We'll defer ruling on the admission of Exhibit 6 until after cross-examination.

Mr. Lang?

MR. LANG: Thank you, your Honor.

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CROSS-EXAMINATION

By Mr. Lang:

Q. Good morning, Mr. Rice, I'm Jim Lang on behalf of FirstEnergy Solutions.

A. Good morning.

Q. It's good to see you in person. We talked on the phone.

A. We did.

Q. Now, you are for DP&L both an assistant general counsel and a corporate secretary, correct?

A. That is correct.

Q. And you are corporate secretary to the boards of both DP&L and DPL, Inc.; is that right?

A. That's correct.

Q. Now, your testimony here relates to your role as an assistant general counsel not as a corporate secretary; is that fair?

A. That's correct.

Q. And your knowledge regarding DP&L's corporate separation plan is based on your, say long history serving as an attorney for DP&L, correct?

A. Also correct.

Q. You've been with them since 1985; is that right?

A. That's correct.

Q. Now, in your role as an attorney for the company staff members of DP&L, staffers at DP&L will consult with you regarding the corporate separation plan and the code of conduct; is that right?

A. That's correct.

Q. And you also assist with code of conduct training.

A. That's correct.

Q. And on an annualized basis you estimate that you spend about 2 percent of your time on corporate separation and code of conduct issues; is that fair?

A. That's correct.

Q. Then the other 98 percent of your time is, as referenced in your testimony on page 1, line 17 and 18, would relate to legal services for finance, SEC compliance, tax, and ERISA; is that right?

A. That's correct.

Q. Now, are you a, what they would call a shared employee of DP&L?

A. I provide services to DPL and to affiliated companies under the DPL, Inc. family of companies.

Q. And in that role you allocate your time to DP&L or the affiliate; is that right?

A. That's correct.

Q. You provide legal counsel both to DP&L employees and employees of affiliates such as D-P-L-E-R, or DPLER.

A. That's correct.

Q. So with regard to corporate separation or code of conduct issues, you get those questions from DP&L or from DPLER or another DP&L affiliate.

A. That's correct. It could come from anywhere.

Q. With regard to the allocation of your time between DP&L and the affiliates, that's an allocation that you perform on an annual basis; is that right?

A. That's correct.

Q. And what happens is each year the general accounting office asks you to allocate your time, correct?

A. That's correct.

Q. And that allocation is done between the noncompetitive and the competitive operations; is that what you do?

A. Well, we're looking at all of our operations so it's really a form that is provided by our corporate accounting office by which we then fill out and determine the amount of time that we spend doing these functions and working for -- and part of those functions would be working for separate affiliates.

Q. So with regard to DP&L with its T and D function and generation function, do you allocate time to those functions or would DP&L be one -- DP&L as a whole be one function?

A. It would be separated by function so part of my time would be for generation, could be for generation, and part of my time could be for T and D.

Q. Now, as an outside counsel I have the burden of keeping hourly time sheets I think every six minutes, something like that, but that's not something that you do, correct?

A. That's correct.

Q. So the allocation that you perform at the end of each year is based on your experience and your reference to your calendars; is that correct?

A. That and looking at the projects that we do for the year. I also look at other sources, I look at my staff meeting notes with regards to where we're meeting and how often so I get a feel for the amount of time we're spending on the projects we're working on.

Q. Now, as part of your testimony is it fair to say that DP&L is asking this Commission to approve functional separation through the end of 2017?

A. We're asking -- that's correct. I mean, that's generally correct. Obviously, we will be looking to make an application later on outside of this proceeding for the -- which will be made by the end of this year, in there we have stated that it is our target that we would complete separation by the end of December 2017.

Q. We had mentioned earlier that you advise employees with regard to the cost allocation manual, or the CAM. Can you tell me when the last time was that you reviewed the cost allocation manual?

A. I would say about two-and-a-half years ago.

Q. And can you give us a general idea of what sections are included in the cost allocation manual?

A. In glowing generalities only. Obviously, there is a host of materials associated with how we allocate costs amongst our T and D function and our generation functions. There are provisions associated with keeping a log associated with complaints that come in, there are provisions associated that the corporate minutes must be kept as part of the CAM.

There's provisions associated with making sure there are shared employees, that there's a log associated with those employees that are shared and how we track that in case there would be a question as to who's working for who and those types of things are in there.

Q. Okay. And does -- part of the cost allocation manual would relate to the relationship between DP&L employees and DPLER employees; is that fair?

A. Yes.

Q. And you are generally aware of how DPLER makes purchases of generation from DP&L?

A. Generally, yes.

Q. Is it fair to say that you do not know how those transactions between DP&L and DPLER are tracked and accounted for under the corporate separation plan?

A. That's correct.

Q. And so I guess you would not be the person to talk to about how the cost of a sale to DPLER is allocated in the cost allocation manual; is

that fair?
A. That's correct.
Q. You had said -- part of your testimony is that DP&L intends to make a filing later this year that would address future corporate separation, right?
A. That's correct.
Q. And the commitment that's in the ESP is to make the filing later this year and not specifically with regard to an end date or a drop-dead date for when the corporate separation itself would be achieved; is that right?
A. I believe that's generally what we have stated so far, yes.
Q. Now, you do believe that full structural separation would make it easier for you to advise your clients with regard to corporate separation requirements, correct?
A. I believe in some respects, yes, ultimately it may do so, but I don't believe that -- I believe the functional separation gives us substantially the same impact. I still have the same types of questions whether it's legal separation or functional separation.
Q. Well, with regard to structural

separation, you would agree that it would make it easier to identify and provide counsel to employees with regard to cross-subsidy issues, right?

A. Again, the types of questions are the same. You know, knowing where people are at in the organization may make it a little simpler but the end result is the same. I'm still able to ferret out and resolve questions whether we stay in the functional format or whether in the structural format.

Q. Now, you have, as part of your testimony do you have the third amended corporate separation plan with you?

A. I do.

Q. If I could ask you to turn to page, I guess it's page 2 of that third amended corporate separation plan right after the table of contents.

A. I'm there.

Q. I wanted to ask you about, it's the third paragraph where it says "DP&L," we'll ignore the apostrophe S, "DP&L has not yet applied to the Commission for authority pursuant to RC 4928.17(E) to sell or transfer DP&L's generating assets...."

As we sit here today is it fair to say DP&L is still continuing to look at how this will be accomplished?

A. That's correct.
Q. And is this also something that DP&L has been looking at since 1999?
A. Off and on since then, yes.
Q. And your testimony here is that there are impediments to achieving corporate separation that exist today, correct?
A. That's correct.
Q. And the prior impediment is the first mortgage lien pursuant to which first mortgage bonds are issued by the company, correct?
A. That is the primary impediment.
Q. And that same impediment also existed in 1999, correct?
A. Yes, it did.
Q. And I guess that impediment would have existed in 2005 and 2010, correct?
A. Since 1935.
Q. Now, if I can ask you to turn to page 16 of the third amended corporate separation plan.
A. Yes.
Q. And at the top of the page there under the heading of Functional Separation at the end of the second line it says "The obstacles to legal separation are described below." And is it fair to

say that the reference there to the obstacles to legal separation being described below is actually what is immediately below in the section 3 that's headed Indenture and Related Issues?

A. That is correct.

Q. And at the very end of that paragraph it's in bold type, there's a, I guess a formatting error where it says "B. Sharing of Employees, Facilities and Services," that's actually the heading for the next section; is that right?

A. I believe that's correct.

Q. So as described in section 3, the obstacles to full structural separation is that substantially all of the assets of DP&L are encumbered by a first mortgage lien; is that right?

A. That is correct.

Q. And, as you said, that goes back to the 1930s.

A. It does.

Q. And DP&L is currently exploring how to remove the generation property from the indenture; is that right?

A. We're looking at a host of different ways in order to complete corporate separation, one of which would be the, certainly the splitting off the generation properties into an affiliated company.

Q. And is that also something that you've been looking at since 1999?

A. Again, off and on.

Q. Now, is it correct that DP&L contemplates that some level of financing will be allocated to the new generating company and then some level of financing would be allocated to the, what -- the DP&L that would become a wires company?

A. I would answer that by saying we're looking at a host of different alternatives and that is part of the exploration process is how we will restructure the balance sheet post legal separation.

Q. Now, there are some of the -- are you aware that some of the outstanding long-term debt issuances are pollution control bonds?

A. I am.

Q. Is it your understanding that the pollution control bonds, because they relate to the generating facilities, would follow the generating facilities in a -- as part of a corporate separation?

A. I would not necessarily agree with that conclusion, no.

Q. Do you know whether a determination has been made at this point with regard to what will be done with the pollution control bonds?

A. There has been no determination made.

Q. Now, one of the issues that DP&L has been analyzing is the fact that some of the bonds issued during the last ten years have no-call provisions; is that right?

A. That's correct.

Q. And a no-call provision is, as it says, an agreement as part of the issuance of the bond documents that the issuer, DP&L, will not call the bonds before a specified time; is that right?

A. That's correct.

Q. And if DP&L were interested in calling those bonds prior to the end of that no-call period, then DP&L would have to pay a premium to the bondholders to convince them to redeem the bonds; is that right?

A. One of the things we're exploring is that very alternative, the issue being, of course, is even if you could tender and pay a premium, whether we would even get all the bonds back. In many cases that does not occur and that's part of the controversy and part of the issue under exploration.

Q. For the bonds that are no-call bonds, has DP&L yet identified who the bondholders are?

A. We have over time historically. I don't know if it's been done recently, but we have attempted to try to identify some of the bondholders. In some case it's very difficult.

Q. Do you know when the last time was that effort was made?

A. The end of 2011.

Q. Have you developed an analysis of what cost or range of costs would be incurred if paying the premium to the bondholders of the no-call bonds would be required?

A. I don't know if I'm aware of any specific analysis associated with the tender premium, what that would be, or just that our history tells us that no matter what the premium is, many times we're not successful getting all of them anyway.

So it becomes even more expensive; you pay money for the bonds to be re-tendered and you don't get them all and you're still subject to the lien on the first mortgage. So unless you get them all, it's a risky proposition.

Q. Do you have in front of you the exhibits from the first day that were used with Mr. Jackson?

A. I have in front of me, sir, my deposition testimony and my direct filed testimony including the corporate separation plan. I don't have any other exhibits.

Q. Okay. That's no problem.

MR. LANG: May I approach, your Honor? I'd like to give him a copy of FirstEnergy -- FES Exhibit No. 5 that was used with Mr. Chambers.

EXAMINER PRICE: You may approach.

MR. LANG: I'm sorry, I'm getting the names confused. Used with Mr. Jackson.

Q. Mr. Rice, Exhibit FES No. 5 that I put in front of you was discussed with Mr. Jackson on Monday. Have you actually seen this specific workpaper before?

A. I have not.

Q. With regard to the bonds that are listed on this document under the First Mortgage Bond category, there are certain bonds that show Face Amount Outstanding in Column F. Do you see that?

A. I do.

Q. And on lines 7, 8, and 9, that shows pollution control bonds with face amounts outstanding. Do you see that?

A. I do.

Q. And with regard to the no-call bonds that we've been discussing, do you know whether or not --

whether those bonds we've been discussing are the pollution control bonds referenced here on lines 7, 8, and 9?

A. The pollution control bonds referenced on lines 7, 8, and 9 indeed have no-call provisions.

Q. And, to your knowledge, are the -- is the long-term debt that's listed here under first mortgage bonds that shows that it has face amount outstanding, is that the debt to which you are involved in the process as described in the corporate separation plan of analyzing the complex indenture-related issues?

A. Yes. All of the indebtedness which shows under Face Amount Outstanding would be debt we're looking at to potentially restructure as a result of corporate separation.

Q. And where it says in the corporate separation plan that there are a large number of complex indenture-related issues that have to be analyzed and resolved, are there any of those issues that DP&L has managed to resolve as of today?

A. The answer's no.

Q. Now, the first mortgage bonds that are identified here, is it your understanding that the principal amount of what's outstanding, that you're dealing with as part of corporate separation plans, would be a little over $900 million, 904 million?

A. That's correct.

Q. Have you or anyone at DP&L, to your knowledge, consulted with -- let me back up.

Mr. Jackson mentioned that DP&L has discussions with a group of banks with regard to financing issues; are those discussions that you are involved in with that group of banks?

A. Some of those meetings, yes.

Q. Is there a particular lead bank that is -- that would be heading the corporate restructuring effort with regard to these indenture issues?

A. I'm not sure there's a lead bank involving the indenture issues themselves, no.

Q. Is there a particular bank that you specifically would be dealing with with regard to these corporate separation and indenture issues?

A. The only bank that would come to mind that particularly was involved with the indenture issues would be the bank that holds -- serves as their trustee and that would be the Bank of New York Mellon.

Q. Does DP&L have or has DP&L retained the services of outside legal counsel with regard to resolving these indenture-related issues that I referenced in the corporate separation plan?

A. Yes, we have.

Q. Who is that?

A. That's Skadden Arps.

Q. For the -- I'm sorry, strike that.

When these issues first arose or when these corporate separation issues, indenture issues were identified back in 1999, was the outside legal counsel also Skadden Arps?

A. It was not.

Q. Was the trustee for the indenture the -- was it the Bank of Mellon that you said?

A. Bank of New York Mellon, yes.

Q. So the trustee is still the same?

A. Yes. They've changed names but it's still the same bank, yes.

Q. Do you understand that functional separation as DP&L has existed in since the year 2000 is authorized for an interim period and for good cause shown?

A. Yes, I am.

Q. Now, the maturity dates of the debt identified on FES Exhibit No. 5 run out through, well

certainly into the 2030s; is that correct?
A. That's correct, as late as '40.
Q. As late as 2040. Was it DP&L's understanding in -- between 2003 and 2007 when those debt -- when that debt was issued, that the interim period for functional separation would extend until sometime after 2040?
A. I don't think there was a specific understanding one way or the other. I don't think anyone was trying to prophesy what the future might bring. I think at the time we were looking at functional separation as appropriate because there was no market at that time and no one was doing -- no one was really pursuing structural separation because the market just wasn't there and we were looking primarily at how to refinance this debt and try to do it at a cost with the lowest amount of interest so that ultimately ratepayers pay the least amount of money.
Q. Now, with regard to the bonds issued in 2005, 2006, and 2007, by the time those were issued the FirstEnergy utilities had gone through corporate separation; isn't that right?
A. I believe that's correct.
Q. Now, you were a witness in the, I'm going

to take you back in time a little bit, in the DP&L electric transition plan case, correct?

A. I was a witness.

Q. And I'm always impressed by people that remember this, but do you remember that the case number was 99-1687?

A. I remember it was 99.

Q. All right. That's good.

And you were a witness on the corporate separation plan in that case, correct?

A. I was.

MR. LANG: Your Honor, if I could have, actually ask to have two exhibits, we'll have them marked together because they go together, as FES No. 11 will be the application itself and the legal notice that was filed in 99-1687, and then the second exhibit, FES No. 12, if I can find it, will be the corporate separation part -- it should be here -- will be the corporate separation part of the application which was part B.

EXAMINER PRICE: Both documents will be so marked.

(EXHIBITS MARKED FOR IDENTIFICATION.)

MR. LANG: For the parties in the room, I did not have -- did not have enough copies made of the part B, it's actually a little long, but if anyone would like a copy, just send me an e-mail and I will send it electronically.

MR. McNAMEE: So which one, this is --

MR. LANG: The application itself would be FES No. 11.

Q. (By Mr. Lang) Mr. Rice, with regard to the electric transition plan, I think, as we discussed at the beginning, you were part of the DP&L Legal Department at the time this was filed; is that right?

A. That's correct.

Q. And as in your role with the Legal Department you worked on the -- well, let me ask you more generally.

In your role with the Legal Department what parts of the application did you work on?

A. I don't remember.

Q. Okay. But you do remember working on the electric transition plan case?

A. I would have had some input, but we would have had other staff counsel that would have been primary lead in this case, so I would have had input but not necessarily leading the effort.

Q. Do you remember at some point in time reading the application that was filed for the electric transition plan case?

A. I'm sure I read the application, but I have no independent memory.

Q. Now, you were a witness on the corporate separation plan that was part of the application, correct?

A. That's correct.

Q. And on the page 3 of the application that is FES No. 11 do you see that the, about halfway down it says that the corporate separation plan is part B of the application?

A. Yes.

Q. And do you recognize the Revised Code section -- the Administrative Code section following that that relates to the corporate separation plan requirements?

A. I do recognize it.

Q. Now, after the application itself, which you can see on page 7 was signed by your counsel, Mr. Faruki, do you see what's on the following pages?

A. Yes, I do.

Q. And can you tell me what these following pages are?

A. The following pages constitute a notice, a public notice as to the filing of the application and then providing a, what appears to be, although I've not read it in detail the minute I've had to look at it, the generalized description of the overall electric transition plan.

Q. Is it your understanding that's what we call the legal notice that's required of a, or that was required of the transition plan filing?

A. That's what this appears to be, yes.

Q. Now, the reference to the corporate separation plan contained in part B, if I could ask you to turn to what's been marked as FES No. 12, and you see there on the very first page it says, references part B, C, D, and E, part B is the corporate separation plan. Do you see that?

A. I'm sorry, what page are we on, please?

Q. On the very front page of this exhibit.

A. Where it says part B, yes. Yes. Oh, yes, sir.

Q. And then on the second page would be the cover page of the corporate separation plan itself; is that right?

A. That's correct.

Q. And do you recognize that this was the original corporate separation plan that was filed with the application as part of Case No. 99-1687?

A. I recognize it but I did not review this in preparation for my testimony today.

Q. That's fine.

If I could ask you to turn to page -- well, before we do that, looking at this corporate separation plan, it is quite similar in structure, isn't it, to the third amended corporate separation plan?

A. In some respects, yes, very similar.

Q. And if we turn to page 15 and if we actually compare that to page 16 of the third amended corporate separation plan that's filed with your testimony here, you'll see that in both locations we're discussing functional separation at the top of those pages, correct?

A. Yes.

Q. And then the next heading, No. 3, in both sections is Indenture and Related Issues. Correct?

A. Yes.

Q. And, in fact, then the text, at least the text that's in the third amended corporate separation plan and the text that is in the original filing from 1999, at least the first paragraph thereof, is nearly identical, correct?

A. They're nearly identical, yes, sir.

Q. And, in fact, in the very first corporate separation plan it's also referencing the large number of complex indenture-related issues that must be analyzed and resolved in order for DP&L to achieve corporate separation; is that correct?

A. That's correct.

Q. And that's the same language from the corporate separation, the third amended corporate separation plan that's part of your testimony, correct?

A. Yes, that's correct.

Q. Now, in this original corporate separation plan which is marked as FES No. 12 there's additional text that discusses the indenture and related issues; is that right?

A. There is additional wording, again, I've not read it here, but that appears to talk in more detail about some of the specific problems about the outstanding indentures that were outstanding at that time.

Q. And, in fact, in the first sentence there of that second paragraph it says that DP&L at that time had six series of debt issuances outstanding under the first mortgage bonds for a total of a

little over 552 million; is that correct?
A. If you're looking at the first plan, that's absolutely correct. From the detailed language beginning on page 16, uh-huh.
Q. And, in fact, five of those six series of bonds also had no-call provisions; is that right?
A. That's correct.
Q. And those -- now, all of these six series of first mortgage bonds that are discussed in this paragraph, they have all either been called or matured as we sit here today, right?
A. They have either been matured or refinanced.
Q. Or refinanced.
So there's none of these bonds that are referenced here that -- none of these bonds that were outstanding as of 1999 that remain outstanding.
A. That's correct.
Q. Now, at this time in 1999 one of the complex indenture-related issues was specific to the no-call status of the five of these six series of bond issuances; is that fair?
A. Yes.
Q. And, in fact, the corporate separation plan as originally filed discussed that, you'll see

at the very bottom of page 16, that DP&L anticipated that the bondholders would demand additional -- substantial additional compensation to consent to a release. Is that fair?

A. That's a summary but, yes, that's it.

Q. And that's in fact, well, and then it says at the top of page 17 that that would substantially increase the company's transition costs, correct?

A. That's what it states, yes.

Q. Now, in the -- I guess the second full paragraph on page 17 that starts "Therefore, until DP&L is able," there is a discussion of how DP&L intended to achieve corporate separation while addressing the issue with regard to the indenture and the outstanding bonds; is that right?

A. There is discussion there, yes.

Q. And what was under consideration at the time was a transfer of beneficial ownership; is that right?

A. That term is used in this -- on page 17, yes.

Q. So in 1999 when this first corporate separation plan was developed, DP&L had about $550 million in debt that was tied to the first mortgage lien and five of the six series of bonds had no-call provisions, correct?

A. Some are based off of what's in the electric transition plan, that's correct, again, I haven't had a chance to review that plan document.

Q. And as we sit here today the issues with corporate separation that DP&L is facing is $904 million of debt with, looks like six series of bonds outstanding; is that right? Specific to the first mortgage bonds.

A. Six is correct.

Q. So $904 million of debt, six series, several of them, again, with no-call provisions even though these are all different bonds than the ones that you had no-call problems with in 1999, correct?

A. That's correct.

Q. You're aware that Duke and AEP have committed to achieve corporate separation of their generation assets by the end of next year; 2014?

A. I don't know the exact date, but I am aware they've made those types of commitments, yes.

EXAMINER PRICE: Mr. Lang, it is just about time for us to take our lunch break.

MR. LANG: Actually, I have one more question.

EXAMINER PRICE: That's what I was going to ask you, you looked like you were winding down.

Q. Have you or, to your knowledge, anyone from DP&L consulted with anyone at Duke or AEP with regard to whether they're facing the same issues with regard to first mortgage liens and how they're addressing those issues?

A. I am unaware if there's been any conversations, but I'm not sure they would be relevant even if we did because the indentures themselves can be -- are so drastically different.

MR. LANG: That was my last question, your Honor. Thank you.

EXAMINER PRICE: Thank you.

MR. LANG: Thank you, Mr. Rice.

EXAMINER PRICE: At this time we will take our lunch break and we will resume at 2 o'clock with Mr. Oliker's cross-examination. Thank you.

EXAMINER McKENNEY: Off the record.

(Lunch recess taken.)

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Wednesday Afternoon Session,

March 20, 2013.

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EXAMINER PRICE: Let's go back on the record.

IEU-Ohio.

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CROSS-EXAMINATION

By Mr. Oliker:

Q. Good afternoon, Mr. Rice. My name is Joel Oliker. I represent the Industrial Energy Users of Ohio. How are you?

A. I'm fine. Good afternoon. Thank you.

Q. I'm going to try to not repeat any of Mr. Lang's questions, but it might be difficult, he did such a good job.

I believe you said this earlier, but you're a lawyer for DP&L that is responsible for assisting the company work through corporate separation issues?

A. That is correct.

Q. And you're admitted to the practice of law in Ohio.

A. Yes.

Q. Would you agree that one of the purposes of corporate separation was to prevent incumbent utilities from favoring or providing an advantage to their generating assets?

A. I would restate that as saying the purpose of corporate separation is to provide customers an opportunity to receive their generating service from other than their traditional utility.

Q. Could you please turn to your deposition at page 12. Do you have that information?

A. I do.

Q. And could you please look to line 5. Tell me if I read this correctly.

Question: "Would you agree that the purpose of corporate separation and having a corporate separation plan is to prevent an incumbent utility from favoring or providing advantage to its generating assets?" And then there's an objection from Mr. Faruki. And I believe on line 18 you said "I believe that's one purpose."

Did I read that correctly?

A. You did read that correctly.

Q. Thank you.

You're familiar with Senate Bill 3, Mr. Rice, correct?

A. Generally, yes.

Q. One of the purposes of Senate Bill 3 was to unbundle distribution, transmission, and generation rates, and I believe this ties to your previous answer so that customers can choose a generation supplier.

A. That's correct.

Q. And you would agree that the unbundling of rates separated competitive and noncompetitive services.

A. The unbundling of rates had that result, yes.

Q. Would you agree that the generation business within DP&L is not regulated by the Public Utilities Commission of Ohio?

A. Yes, I would.

Q. Would you agree that Commission rules provide that the internal merchant function of a utility is subject to the same corporate separation rules that apply to affiliates?

A. I'm not sure I understand your question. I'm not sure what you mean by "internal merchant function."

Q. Mr. Rice, you reviewed the Commission rules regarding transition plans and corporate separation?

A. I have reviewed those plans, yes. Some of them in anticipation of this testimony today.

Q. Would you agree you do not understand the meaning of "internal merchant function" as it's described in the Commission's rules?

A. I can't answer that question, I'd have to see the rules. If you'll show me the rule, I'll be glad to try to show you whether I understand it or not.

Q. I'm just asking if you understand the word as I've just used it.

A. The answer is in the context you just used it I don't understand your question, but I'm sure if you give me the rule, I certainly would give it a shot.

Q. Do you understand the meaning of "internal merchant function" in the context of corporate separation rules?

A. Because I failed to understand what you mean by "internal merchant function," I'm not sure the context of how you're using that term in your question.

MR. OLIKER: Could I have that answer read back, please, along with the question?

EXAMINER PRICE: You may.

(Record read.)

Q. Would you agree that utilities -- strike that.

Would you agree that the generation business is a competitive service?

A. The generation business is a competitive service under Ohio law.

Q. Would you agree that that is a merchant function?

MR. FARUKI: I'll object now. He keeps asking the witness and the witness keeps saying the same thing about his not understanding that concept.

EXAMINER PRICE: Overruled, he asked a different question, Mr. Faruki. I believe he asked just the merchant function.

Can we have the question back?

MR. OLIKER: Thank you, your Honor.

(Record read.)

EXAMINER PRICE: Overruled. Please answer the question.

A. Generically speaking, yes.

Q. Thank you.

Mr. Rice, you're familiar with the differences between functional separation and legal separation, correct?

A. I am.

Q. And legal separation involves the transfer of the generation business to a separate affiliate or the transfer of the distribution and transmission business to a separate affiliate, correct?

A. Not necessarily, no. I don't agree with that.

MR. OLIKER: Could I have the question and answer read back again, please?

EXAMINER PRICE: You may.

(Record read.)

Q. Would you agree that the examples I just provided would be examples of legal separation?

A. The examples you provided would indeed constitute a legal separation. One example anyway.

Q. Whereas functional separation involves DP&L maintaining its legal status as one company but operating its transmission, distribution, and generation business as separate entities, correct?

A. I don't know as separate entities but I would say as separate lines of business, yes.

Q. DP&L first submitted a corporate separation plan in its electric transition plan case, correct?

A. In 1999, that's correct.
Q. I believe you talked about this subject with Mr. Lang. You testified in that case, correct?
A. I did provide testimony in that case, yes.
Q. Would you agree that DP&L proposed an interim period of functional separation followed by the transfer of its transmission and distribution businesses to a separate entity?
A. I believe the Dayton Power & Light Company in that plan proffered a corporate separation plan which was approved by the Commission as a -- in compliance with the code and that it provided for functional separation.
Q. Did DP&L also propose legal separation by transferring its distribution and transmission assets to a separate affiliate?
A. We did at the time but, again, the marketplace was significantly different than it is now and times have changed. And with that we amended that plan later in 2008 to basically call for functional separation and that's what we're currently working with now.
MR. OLIKER: Your Honor, I would move to strike everything after "we did at that time."

EXAMINER PRICE: Let's have the question back, please. Question and answer, I'm sorry.

(Record read.)

EXAMINER PRICE: We're going to deny the motion to strike this time but we're going to ask the witness to listen carefully to counsel's question and answer the question fully and only the question that's being asked.

THE WITNESS: Thank you, your Honor.

Q. Would you agree that the Commission approved DP&L's proposal to transfer its distribution and transmission assets to a separate affiliate?

A. At what time?

Q. In DP&L's electric transition plan.

A. That was approved in that plan, yes.

Q. Would you agree that the Commission also approved DP&L reclassifying the affiliate which held the distribution and transmission assets as the electric distribution utility?

A. I'm sorry, I misunderstood your question. Could you say it again, please?

Q. Would you agree that the affiliate that was to hold the distribution and transmission assets was going to be reclassified as the electric distribution utility?

A. I believe that's correct.
Q. Would you agree that the opinion and order approving the transition plan required DP&L to maintain separate accounting?
A. No, I do not agree.
MR. OLIKER: Your Honor, I'd like to mark an exhibit. Your Honor, I'd like to mark IEU-Ohio Exhibit 14.
EXAMINER PRICE: So marked.
(EXHIBIT MARKED FOR IDENTIFICATION.)
Q. Mr. Rice, do you see the document that I have placed in front of you as IEU-Ohio Exhibit 14?
A. It's not marked as 14, but I do have the exhibit you gave me, yes.
Q. Earlier there was some discussion about DP&L's electric transition plan. Do you remember the case number?
A. 99-1687?
Q. Does that match the case number on the document in front of you?
A. It does.
Q. Does that appear to be the opinion and order that approved DP&L's electric transition plan?
A. I have not had the opportunity to read this opinion and order but it does appear to be that,

yes.

Q. Sorry to interrupt you. Would you agree that it looks like -- you can take a moment to familiarize yourself with it just to make sure.

MR. FARUKI: Your Honors, we'll accept his representation that that's what it is.

Q. Could you please turn to page 17, Mr. Rice.

A. Okay.

Q. And do you see during the first paragraph where it says "...DP&L will keep its books, records, and accounts separate from those of its affiliates pursuant to Rule 4901:1-20-16...." It "will also follow the Commission's rules on financial arrangements to preserve the financial independence of DP&L from its affiliates pursuant to 4901:1-20-16(G)(3)"?

A. I'm not seeing that. I apologize. You're on page --

Q. On page 17. In the first paragraph.

A. First paragraph.

EXAMINER PRICE: The last sentence of the first paragraph.

A. Yes, I see it now.

Q. Now, would you agree that the opinion and order required DP&L to maintain separate accounting?

A. DP&L does maintain separate accounts for its utility business from its other affiliated companies.

Q. Would you please explain what you mean by "its other affiliated companies," Mr. Rice?

A. These would be other companies under the DPL, Inc. holding company system, DPLER has been mentioned earlier here today in testimony, and other companies, other affiliated companies, those accounts -- those companies' accounts are kept separately from the Dayton Power & Light Company.

EXAMINER PRICE: So when you testified earlier that Dayton Power & Light was not required to maintain separate accounting, you're distinguishing accounting from the phrase "books, records, and accounts."

THE WITNESS: I guess I presumed the question to be, or at least implied in the question that I was asked whether we kept separate accounting from our distribution and transmission business from our generation business and I'm saying that The Dayton Power & Light Company keeps its own records completely and that its affiliated companies under DPL, Inc. holding company system also maintain their books separate.

EXAMINER PRICE: Okay.

MR. OLIKER: I'm sorry, that was a little muffled. Could I hear his response read back again.

EXAMINER PRICE: Yes.

(Record read.)

Q. I'm not sure I understood that. Maybe, Mr. Rice, did you just testify that you don't believe the distribution and transmission and generation businesses maintain separate accounting?

A. That's correct.

Q. And you do not define "affiliates" to include DP&L's generation business.

A. That's correct.

I'd like to offer one other piece, though, in explaining why I meant that.

Q. I think the question was done, Mr. Rice.

A. That's fine.

EXAMINER PRICE: I'm sure Mr. Faruki will give you an opportunity to explain later.

MR. FARUKI: You are so right, your Honor.

Q. Could you please turn to page 11 of the opinion and order. Could you review paragraph 16, please. Let me know when you're done.

A. I've completed my review.

Q. Would you agree that paragraph 16 obligates DP&L to provide the Commission staff information regarding sales of power and ancillary services from DP&L to an affiliate for review and auditing to determine if DP&L's in compliance with corporate separation requirements?

A. I believe the order speaks for itself and certainly was in effect, you know, under this transition plan up until the next case. It does have the fact that information will be provided, whether that's still the case now, I don't know the answer.

Q. So the answer to my question was yes?

A. With my explanation, yes.

Q. Would you agree that Ohio law and Commission rules require transactions between DP&L and its affiliates to be priced at fully embedded costs, also referred to as fully allocated costs?

MR. FARUKI: I'll object, your Honors, most of the questions thus far have asked for legal opinions or conclusions but there are multiple grounds for this objection, one is that when he uses "Commission rules," he's not specifying anything.

Mr. Rice has reviewed some things, but he is not a walking Lexis library of all Commission rules. If there's something specific they want to address him to, that's fine.

Second, this is asking purely for a legal conclusion based on undefined Commission rules and regulations.

EXAMINER PRICE: I think it's a standing objection.

If you can rephrase, Mr. Oliker.

MR. OLIKER: Okay.

Q. Mr. Rice, as an attorney for DP&L you are relied upon to interpret corporate separation rules, correct?

A. Yes.

Q. And are you aware of whether corporate separation rules define "fully allocated costs"?

A. I'm aware that the corporate separation rules do discuss the concept of fully allocated costs.

Q. You would agree that the corporate separation rules require fully allocated costs -- strike that.

EXAMINER PRICE: Mr. Murray, no hearing is worth breaking your leg over. Seriously.

MR. OLIKER: He is a runner, too.

I think I'll just give the witness two of the Commission's rules on this subject, your Honor, if I may approach.

EXAMINER PRICE: You may.

Q. Turning first to 4901:1-20-16, would you agree that that's the corporate separation rule that was implemented in the electric transition plan time?

MR. FARUKI: Your Honor, is there a copy for us?

EXAMINER PRICE: Yes.

Q. Could you please turn to -- could you turn to (B)(3) under fully allocated costs.

MR. FARUKI: I'm sorry, which rule are we in now?

MR. OLIKER: We are in 20-16.

A. Okay, I'm there.

Q. Would you agree that this rule defines fully allocated costs?

MR. FARUKI: Your Honor, I don't think I was given 20-16. I was given three copies of --

MR. OLIKER: Sorry, Charlie. It's on the way.

MR. FARUKI: Thank you, your Honors.

EXAMINER PRICE: Do we have a question pending?

MR. OLIKER: I can't remember, to be

honest.

EXAMINER PRICE: Would you read the pending question back, please.

(Record read.)

A. Yes, this rule defines fully allocated costs.

Q. Would you agree that this rule controls the pricing of transactions between affiliates?

A. In some respects.

Q. Can you point me to another rule that would dictate?

A. Well, when I say "in some respects" --

MR. FARUKI: Wait. Wait. Tim, hold up a minute. Give me a chance to object.

When you say "point me to another rule" -- your Honor, what he's done is give him six pages of rules which are not all of the rules and then he says point me to another one. As I argued a minute ago, if they want to give him the entirety of the rules, that's one thing, but requiring him to recite from memory or identify from memory a provision of a rule is not a proper question. That's basis one.

Basis two, these are all asking for legal opinions.

EXAMINER PRICE: Overruled on both bases, the witness can answer if he knows. If he doesn't know, then he will tell us.

THE WITNESS: Could I hear the question again, please?

EXAMINER PRICE: You may.

(Record read.)

A. I apologize, I'm not sure I can answer unless I'm given more context. I forget what the question was before that so I can give context in my response.

EXAMINER PRICE: In your response you said "in some respects." Can you just explain to the Bench what you mean by "in some respects"?

THE WITNESS: Yes, I can. As I interpret the corporate separation rules I look at fully allocated costs as part of how you solve the problem, in other words you cannot -- no party can subsidize -- no utility company can subsidize its affiliated companies, and the way to solve that in most cases with things like the use of facilities, the use of personnel, and those matters that are covered in the CAM is use fully allocated costs as a way to level the playing field.

However, there are other circumstances

when it just doesn't apply; looking at nondiscrimination and undue preference issues are not necessarily solved by fully allocated costs.

EXAMINER PRICE: Thank you.

THE WITNESS: You're welcome.

MR. OLIKER: Thank you.

Q. (By Mr. Oliker) Mr. Rice, you're aware that DP&L currently sells power to its affiliate DPLER, correct?

A. Yes, I am.

Q. Mr. Rice, you do not know whether DP&L makes sales of power to DPLER at fully embedded costs, correct?

A. I didn't know at the time of my deposition. I know now.

Q. What is your answer now?

A. My answer is that they sell power to DPLER at market.

EXAMINER PRICE: Mr. Rice, are you aware, is DP&L required to obtain FERC approval for wholesale sales into the market?

THE WITNESS: My generalized understanding, I'm not a FERC attorney, is that the FERC has to approve the tariff by which we sell power into the wholesale market, which would include types of sales you're talking about.

EXAMINER PRICE: Have you obtained FERC approval for your wholesale sales tariff?

THE WITNESS: Yes, we have.

EXAMINER PRICE: Are your affiliate -- are your transactions with your affiliate governed by your FERC-approved wholesale tariff?

THE WITNESS: I don't know the answer.

EXAMINER PRICE: Do you have separate approval from FERC for sales with your -- wholesale sales to your affiliates?

THE WITNESS: To the best of my knowledge, no.

EXAMINER PRICE: Thank you.

Q. (By Mr. Oliker) Mr. Rice, just one more question on that. Assuming DP&L does not make sales to DPLER at fully embedded costs, you have no opinion of whether DP&L's in violation of corporate separation requirements, correct?

A. I do have an opinion.

Q. Could I turn you to your deposition.

Mr. Rice, I asked you a question on page 43, line 7, could you please turn there. Let me know when you're there.

A. I'm there. Go ahead.

Q. On page 43, line 7, question: "Mr. Rice, assuming that DP&L makes electricity sales to DPLER that are not based upon fully loaded embedded costs, would you agree that DP&L is in violation of corporate separation requirements?"

Answer, after Mr. Faruki's objection: "I don't know the answer to that."

MR. FARUKI: Your Honor, I renew my objection.

EXAMINER PRICE: At the moment the only question is "Did I read that correctly?"

MR. FARUKI: Yes, and I object to that question for the reasons stated in the transcript, but I don't know if you have the transcript.

EXAMINER PRICE: I don't have the transcript.

MR. FARUKI: My objection was partly on the basis of an incomplete hypothetical, partly to the lack of foundation, and partly because it calls for a legal opinion.

MR. BERGER: Your Honor, if I may, I have a couple extra copies of the transcript, if you like.

EXAMINER PRICE: That would be very helpful, thank you.

As to the portions of the objection

regarding requesting a legal opinion, we've given everybody a lot of latitude on regulatory matters and we'll put that underneath that umbrella. As to the objection, parts of the objections were overruled as to that argument. As to the portions of the objection related to incomplete hypothetical, the witness clearly expressed, perhaps too hastily, that he does have an opinion, so he certainly had some understanding in his head and he can answer the question to the extent he understands the question and knows the answer.

Overruled.

Q. (By Mr. Oliker) Would you like me to read the deposition again?

A. I have it here in front of me and I believe you read it correctly. But since then I have --

Q. That's all I asked, Mr. Rice.

EXAMINER PRICE: The Bench would like to know the answer to the question. Mr. Rice, what is your opinion?

THE WITNESS: My opinion is, is that to the extent that DP&L is selling power at other than fully loaded costs is not a violation of the corporate separation plan and not a violation of the state statute.

And the reason I say that is, is that the state statute is designed to determine if there is an undue preference first and foremost, and since DPL -- DP&L sells energy to DPLER and to other nonassociated -- nonaffiliated companies at market, there is no undue preference.

Until you reach the threshold question of undue preference, you don't have to worry about finding a way to make it appropriate and under the market to find a way to make up for it.

I believe the statute states clearly that the purpose of the -- in this situation the purpose of the section associated with fully loaded costs has to do in those circumstances where DP&L would loan facilities or give DPLER facilities, people, resources and not fully charge DPLER that, in that situation you're looking at fully embedded, fully loaded costs.

In the situation where you're looking at power, you first have to look at whether there's an undue preference, and because DP&L sells power at market, just like it would sell to a third-party provider, just like it would sell into PJM, there is no -- there is no violation of it, everyone stays on the same competitive level.

That's my opinion.

EXAMINER PRICE: Thank you.

THE WITNESS: You're welcome.

Q. Could you please turn to page 8 of your proposed corporate separation plan, Mr. Rice.

A. Okay. I'm there.

Q. You would agree that the corporate separation plan uses the term "business unit," correct?

A. The plan does have that -- those words in there, yes, it does.

Q. You do not believe the term "business unit" refers to distribution, transmission, and generation segments of your business, correct?

A. That's correct. I believe that statement refers to a vestige from the 2008 ESP in which the company was looking to do behind-the-meter services and as a result of the stipulation in that case we withdrew the offer to -- or withdrew the provision to provide such behind-the-meter services and it is that use of the word "business," in this case that is where that term was being used as a result of the 2008 plan.

Q. And you do not believe that DP&L

previously accounted separately for its regulated business, the distribution and transmission, using unit 2 on the general ledger.

A. I believe you're confusing what is fully -- what is accounting records and what we did in order to satisfy our obligations under the cost administration manual. The CAM itself, those are accounting records and certainly we did track accounting records for distribution, transmission, and generation in order to satisfy our obligations under the CAM.

We did not provide fully blown or audited financial statements and we did not account for those parts of the business nor have we ever accounted for those businesses as fully blown audited financial statements under those parts of the company.

Q. And you do not believe that DP&L previously accounted separately for its unregulated business unit of -- on the general ledger.

A. Again, as I just testified, the company has never provided full-blown accounting for those various divisions of the company. We have tracked our costs and expenses so that we can comply with the cost allocation manual under the corporate separation plan.

MR. OLIKER: Your Honor, I'd like to mark an exhibit as IEU-Ohio Exhibit 15.

EXAMINER PRICE: So marked.

MR. OLIKER: And I would say this document is probably highly confidential.

EXAMINER PRICE: Okay. At this time we will go to the confidential portion of our transcript to the extent necessary. Anybody who has not signed a protective agreement with the company should excuse themselves at this time.

(Confidential portion excerpted.)

(Open record.)

MR. OLIKER: Just to clarify, this has been marked as IEU-Ohio Exhibit 16.

Q. Now, do you recognize the document that's been placed in front of you, Mr. Rice?

A. Yes.

Q. Would you agree that this is an application to issue and assume liability and short-term notes in Case No. 04-1557-EL-AIS?

A. Yes, it is.

Q. And you are listed as trial counsel, correct?

A. That is correct.

Q. Would you agree that DP&L amended this application?

A. It very well could have. I have no idea.

MR. OLIKER: Your Honor, I'd like to mark another Exhibit as IEU-Ohio Exhibit 17.

EXAMINER PRICE: So marked.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. Mr. Rice, do you recognize the document that has been marked as IEU-Ohio Exhibit 17?

A. I do.

Q. Would you agree that DP&L amended its application to add the following statement: "Applicant's short-term debt including RLA loans will be in compliance with Applicant's electric transition plan as approved by this Commission in Case No. 99-1687-EL-ETP"?

A. That's correct.

Q. Would you agree that the Commission approved your application upon condition of this commitment in your amendment?

A. I don't have an independent memory of the order itself, but I don't think I would dispute it.

MR. OLIKER: I'd like to mark another exhibit, your Honor. I'd like to mark IEU-Ohio Exhibit 18.

EXAMINER PRICE: So marked.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. Mr. Rice, do you recognize the document

that's been marked as IEU-Ohio Exhibit 18?
A. Yes, I do.
Q. Would you agree this is the finding and order approving DP&L's application for short-term notes and to assume liabilities?
A. Yes, it is.
Q. Turn to page 2.
A. Okay.
Q. Would you agree that the Commission, looking at paragraph 7, conditioned approval of your application on DP&L maintaining compliance with DP&L's electric transition plan commission -- commitments?
A. Yes.
Q. Thank you.
If you know, Mr. Rice, didn't the Commission require this commitment in all of your applications to issue new notes?
A. I don't know that.
Q. Moving to a different topic. Would you agree that a large part of corporate separation is preventing subsidies?
A. I would not characterize it that way, no.
Q. Would you agree that's part of it?
A. I believe that's a part.

Q. Generally you would define a subsidy as a benefit, correct?

A. That's correct.

Q. And in the electric utility industry a subsidy would exist if DP&L would guarantee the debt of an affiliated company, correct?

A. Yes, it would be.

Q. And would you agree that a subsidy would exist if DP&L's noncompetitive business provided a benefit to DP&L's unregulated business that the unregulated business could not otherwise obtain in the market?

MR. FARUKI: May I hear that back, please?

EXAMINER PRICE: You may.

(Record read.)

MR. FARUKI: Object, it calls for a legal conclusion.

MR. OLIKER: Would you like me to respond, your Honor?

EXAMINER PRICE: Sure.

MR. OLIKER: For one, he's an attorney testifying about corporate separation which are the issues before him and so I think it's fair game.

EXAMINER PRICE: I understand that, but I would prefer to keep the legal arguments on brief and not in testimony; however, we will grant you some leeway, although Mr. Faruki is probably correct, we will grant you a little bit of leeway at this time on this line of questioning.

You can answer the question.

MR. FARUKI: Is that a Pirik victory for me, your Honor?

EXAMINER PRICE: I won't let him go on too long so if you want to claim victory on that one.

THE WITNESS: Could I hear the question again, please?

EXAMINER PRICE: Certainly. Say the question again.

(Record read.)

A. Yes.

Q. Okay. And this will be my last question in this area, Mr. Rice, you agree that if the SSR was designed to provide financial support to DP&L's generation business, that it would be a subsidy due to its nonbypassable nature.

MR. FARUKI: Object. Foundation as to this witness, certainly, as well as calling for a legal conclusion.

MR. OLIKER: I can ask it as a

hypothetical, your Honor.

MR. FARUKI: Well then it's an incomplete hypothetical.

EXAMINER PRICE: Let's have the question back again.

(Record read.)

EXAMINER PRICE: The witness can answer if he knows.

A. I don't know the answer.

Q. Can I turn you to your deposition. Could you please look at page 52. Particularly line 16, and tell me when you're there.

MS. YOST: Joe, what page was that?

MR. OLIKER: Page 52.

A. Which line, please?

Q. Line 16, and tell me if I read this correctly: Question: "Would you agree that the SSR was designed to provide financial support to DP&L's generation business that it would be a subsidy due to its nonbypassable nature?" And Mr. Faruki's objection, your answer: "Yes, it would."

Did I read that correctly?

MR. FARUKI: I'll renew my objection.

EXAMINER PRICE: Thank you. Overruled.

A. You read it correctly, yes.

MR. OLIKER: If I could have just one minute to review my notes, your Honor.

EXAMINER PRICE: You may.

MR. OLIKER: Thank you.

Your Honor, I don't believe I have any further questions but I would like to offer, because there's no numbers on IEU-Ohio Exhibit 15, would it be possible for us to offer a hand-numbered exhibit for the court reporter? Would DP&L object to that?

MR. FARUKI: I'm not sure what the question is. 15 is the --

MR. OLIKER: CAM Rates Manual, I think it would be very difficult to refer to this document and maybe if we could just write in the page numbers.

MR. FARUKI: Oh, write the page numbers. Certainly, that's fine.

EXAMINER PRICE: That would work. Thank you.

MR. OLIKER: Thank you, your Honor.

EXAMINER PRICE: And you have no more questions?

MR. OLIKER: Mr. Rice, no more questions, thank you.

EXAMINER PRICE: Mr. Berger.

MR. BERGER: Thank you, your Honor.

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CROSS-EXAMINATION

By Mr. Berger:

Q. Mr. Rice, is it possible you can move the podium?

A. I can sure try.

Q. Or stand so I can see you.

A. That help?

Q. Yes. My name is Tad Berger, I'm with the Office of the Ohio Consumers' Counsel, we previously spoke during your deposition, so good afternoon.

Just following up from a couple of questions from Mr. Oliker there, would you turn to IEU-Ohio Exhibit No. 14 at page 17 where he previously referenced you.

A. Unfortunately, the versions I have don't have numbers so you're going to have to describe the document so I can find the right one.

Q. Right. It's the Commission's opinion and order from the 1999 ETP case.

A. I have that available, yes.

Q. And he previously referenced you to this page discussing with you the corporate separation plan and the manner in which it was to work. Would you look at the last paragraph on that page and can you tell me whether you would agree that at the time the Commission issued this order it believed that DP&L would structurally separate by the end of calendar year 2000, this order was issued in September of 2000?

MR. FARUKI: Is this a question asking what the Commission believed or what the company believed?

EXAMINER PRICE: Mr. Berger.

MR. BERGER: I'm asking whether it's your understanding of this language that the Commission was expecting the company to structural separate.

EXAMINER PRICE: I don't think he can testify as to the Commissioners' expectation.

MR. FARUKI: That was the basis of my objection.

Q. (By Mr. Berger) Well, let me ask you about the language here because this language here says by December 31, 2000, this corporate separation plan achieves structural separation contemplated by the statute.

A. Yes. That's what it says. Can you point me exactly to the page, please, so I can make sure. I'm not sure I'm on the right page.

Q. It's on page 17. The last paragraph on that page.

A. I'm there now, Mr. Berger. Please, go ahead.

Q. Yes. Would you agree with me that this indicates the Commission's understanding that the company was going to -- that this language indicates that the Commission's understanding that the company was going to structurally separate by December 31, 2000?

MR. FARUKI: Same objection to him testifying about the Commission's understanding.

MR. BERGER: I'm just asking him what the language says.

MR. FARUKI: Your Honor, it doesn't matter. He's asking what -- he's not asking what the language says. His question was is this the Commission's understanding. He's asking a witness what someone else's understanding was.

EXAMINER PRICE: Sustained.

Q. Well, let me ask you, does the language say that the company is going to structurally separate by the end of calendar year 2000?

MR. FARUKI: Your Honor, the language speaks for itself and he's already answered that question.

EXAMINER PRICE: We'll give him some leeway and allow him to --

MR. BERGER: Thank you, your Honor.

EXAMINER PRICE: -- get an answer to this question.

You can answer if you know.

A. I believe the language is intended to state that the company is fully compliant with the statute involving corporate separation because that sort of language is in the statute itself, that we are indeed compliant with this Section 4928.17(A)(1).

Q. Does Section 4928.17(A)(1) require structural separation, to your understanding?

MR. FARUKI: I'll object, legal opinion again.

MR. BERGER: Your Honor, I'm just asking for a little leeway on this, I'll show him the statute if that will help him interpret it.

EXAMINER PRICE: Very little leeway, Mr. Berger.

Go ahead and answer the question, if you know.

MR. BERGER: Your Honor, before he answers the question would you let me mark the 4928.17?

EXAMINER PRICE: Yes.

MR. BERGER: As OCC Exhibit No. 3.

EXAMINER PRICE: We have a 3 already. Mr. Berger, you can't have 3, Ms. Grady took 3 yesterday after Ms. Yost took 2 from her.

MR. BERGER: She didn't mark it down, I apologize. What number are we on?

EXAMINER PRICE: 6.

MR. BERGER: Well, that's what happens when you don't have assistants.

If I may approach, your Honor.

EXAMINER PRICE: You may.

MR. BERGER: Thank you.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. Mr. Rice, let me know when you've had a chance to look that over, especially (A)(1).

MR. FARUKI: Is there a question pending?

EXAMINER PRICE: Yes. Can we have the question read back, please?

(Record read.)

A. I believe that 4928.17(A)(1) does speak to the issue of providing competitive services through a fully separated affiliate. But reading the entire statute, however, I believe compliance with (A)(1) is satisfied by functional separation if you look later on in the same statute under subsection (C).

Q. Mr. Rice, subsection (C) specifically requires a showing of good cause and approval by the Commission for functional separation as opposed to a fully separated affiliate; is that right?

A. Generally, yes.

Q. And looking again at (A)(1) -- strike that.

Looking back at the ETP order, Mr. Rice, the sentence following the sentence I previously reviewed with you states that "The plan provides for competitive retail electric service through a fully separated affiliate of the utility...."

Did the company begin -- has the company begun to provide competitive retail electric service at any point through a fully separated affiliate of the utility?

A. If you mean by "fully separated" through a legally separate entity, I would say the answer is no. We are providing that service, obviously, on a functional basis.

Q. But you're not doing it through a separate affiliate; is that correct?

A. We are not providing some generation

service -- The Dayton Power & Light Company is still providing generation services through its generation division, not through a fully separated entity, in compliance with our '08 corporate separation plan.

Q. The company, however, is not providing competitive retail electric service which includes all generation services through a fully separated affiliate; is that correct?

A. Again, if you mean by the company The Dayton Power & Light Company, that we are providing, The Dayton Power & Light Company is not a CRES provider, we are generating -- we are providing generation services under the name of the Dayton Power & Light Company in accordance with our corporate separation plan as approved by the Commission.

We also have, as you know, a separate affiliated company, a CRES provider, in the name of DPL Energy Resource, Inc. That entity is providing competitive electric retail service to customers in Ohio and elsewhere.

EXAMINER PRICE: And that is a fully legally separate entity; is that correct?

THE WITNESS: That is correct.

MR. BERGER: I'm sorry, I didn't hear

your question, your Honor.

EXAMINER PRICE: I said "That is a fully legally separate entity, isn't it?" And he said "That's correct."

MR. BERGER: But, Mr. Price, doesn't this language say that the company is to provide all competitive retail electric services through a fully separated affiliate?

EXAMINER PRICE: Mr. Berger, I think your leeway is up on legal arguments. There are a host of legal questions in that question you just asked.

MR. BERGER: Thank you, your Honor.

EXAMINER PRICE: I think we need to move on.

MR. FARUKI: You did record my objection, did you not?

EXAMINER PRICE: I promised you only a little leeway and I fulfilled my promise.

Q. (By Mr. Berger) Would you agree with me that the Revised Code defines competitive retail electric services as including all generation services?

MR. FARUKI: Objection.

EXAMINER PRICE: Grounds?

MR. FARUKI: Asking for a legal

conclusion and --

EXAMINER PRICE: Sustained.

MR. BERGER: Your Honor, this is in a different area. I'm trying to get a definition from him of a term, "competitive retail electric service," and whether he interprets it in a way that's consistent with the statute.

EXAMINER PRICE: You're just saying, your defense of asking for a legal conclusion is you're asking him for a legal conclusion.

Q. You said The Dayton Power & Light Company is not a CRES provider. What does that mean to you?

A. The Dayton Power & Light Company, the CRES provider is a defined term under Ohio rules and regulations. "CRES" means competitive retail electric supplier, and our CRES services are being provided through DPL Energy Resources, Inc., what we commonly know as DPLER.

Q. Mr. Rice, I'm talking about competitive retail electric services --

MR. BERGER: And, your Honor, I'm not going to ask him -- I'm just going to ask him whether he knows if that's defined in the statute, I'm not asking him a legal question.

EXAMINER PRICE: Okay.

A. I believe it is.

Q. And does your definition of competitive retail electric services as you've used it include all generation services?

A. I'm not sure I understand your question.

Q. Is there something about the question that you don't understand?

A. I perhaps am looking at the question differently than you, but I look at CRES providers as affiliated -- as separately affiliated companies from The Dayton Power & Light Company providing retail electric service to customers in Ohio. And I understand that The Dayton Power & Light Company is providing noncompetitive retail electric service as part of its utility business and it's also providing generation services, but -- and generation is a nonregulated portion of our business, but I still fail to grasp your question. I may be missing something.

Q. Okay. Would you agree with me that Senate Bill 3 provided that generation services were now -- were competitive? I think you already agreed with one of the other counsel about that.

MR. FARUKI: Objection.

MR. BERGER: For competitive retail

electric services.

EXAMINER PRICE: We'll allow this one question. Overruled.

A. I think, as I stated previously, I believe generation is a competitive service under Ohio law.

Q. Okay. And my question to you before was your terminology for competitive retail electric services, not providers, services, does that include generation? I'm talking about your definition of competitive retail electric services.

A. Under my definition the answer is no.

Q. So what competitive retail electric services -- what services would be included in your definition in competitive retail electric services? It would not include generation according to you so what would it include?

A. Well, they do include generation but I guess it's how they're being provided. I guess I'm focusing on the fact that we have this separate affiliated company that is providing those services. So, I look at it as CRES providers providing retail generation services to customers and being able to sell those services to anyone within the state of Ohio.

Q. So do I understand your opinion is that as long as some generation or competitive generation services are provided through an affiliate, other generation services are noncompetitive -- that are non -- that you define as noncompetitive can be provided from -- through DP&L itself?

A. No. I don't believe that at all. I believe DP&L is providing generation services in accordance with this corporate separation plan as a part of its functional separation. Generation is retail. I mean, generation retail services is a part of what we sell, but it's pursuant to our corporate separation plan as approved by the Commission.

Q. And those generation services that Dayton Power & Light is providing, is it your opinion that those are competitive retail electric services or noncompetitive services?

A. I believe they're competitive services.

Q. Okay. And would you agree with me that the Commission's order said in September of 2000 that competitive retail electric services will be provided through a separate affiliate and it didn't separate out any specific competitive -- any particular competitive retail electric services from any others, did it?

MR. FARUKI: Can I hear that back, please?

EXAMINER PRICE: Yes. Please.

(Record read.)

A. I believe it does require us to do so, but it also states that we're compliant with the Ohio Revised Code Section 4928.17(A)(1) because we are functionally addressing that issue.

Q. And where does it say that?

A. Well, I think you have to look at the entire history of the proceeding. In this case --

MR. BERGER: Your Honor, move to strike the answer.

MR. FARUKI: Well, your Honor, he doesn't have an answer yet.

MR. BERGER: Talking specifically about the order. If he doesn't have an order, I can provide it to him.

MR. FARUKI: He's trying to cut him off and if you ask the question, you have to at least listen to the answer.

EXAMINER PRICE: I agree. The witness should have a chance to answer the question, nonetheless, the order speaks for itself. I don't see the purpose in having him trace through 50-some pages to look for the answer to your question. He can give you his understanding of what the order was, but the order says what it says and you can all argue on brief what the order says.

MR. BERGER: Well, all I'm asking, your Honor, if he knows where the order would say what he just said it says.

MR. FARUKI: I'll object.

EXAMINER PRICE: Do you have a specific cite to where you believe you inferred that from or was that just your overall understanding of the order?

THE WITNESS: It's my general understanding.

EXAMINER PRICE: He doesn't have a specific cite.

MR. BERGER: Thank you.

Q. (By Mr. Berger) Mr. Rice, the third amended corporate separation plan that is the subject of this proceeding would you agree with me that in your testimony on page 3, lines 51 and following, you basically say that this is a continuation of the second amended corporate separation plan? Is that right?

A. Generally that's correct.

MR. BERGER: Your Honor, can I have marked Mr. Rice's testimony in the ESP I proceeding as OCC Exhibit 7.

EXAMINER PRICE: You may.

(EXHIBIT MARKED FOR IDENTIFICATION.)

MR. BERGER: If I may approach.

EXAMINER PRICE: You may.

MR. BERGER: Thank you.

Q. (By Mr. Berger) Mr. Rice, I would refer you to pages 3 and 4 of your testimony, those are the pages I have a brief question or two about.

A. Yes, please proceed.

Q. Would you agree with me that on page 3 and 4 of this testimony you basically indicated that the second amended corporate separation plan was basically a continuation of the first in that it maintained functional separation?

MR. FARUKI: Your Honor, I'll ask that he be given a chance to read these two pages first before he answers.

EXAMINER PRICE: Take your time to read it.

THE WITNESS: Thank you.

I've completed my review.

Q. And would you agree with what I just

indicated, that the second amended corporate separation plan was basically a continuation of the first with some minor changes, and maintained functional separation?

A. Yes, I would.

MR. BERGER: Your Honor, if I could have marked the company's second amended corporate separation plan as OCC Exhibit 8.

EXAMINER PRICE: You may.

(EXHIBIT MARKED FOR IDENTIFICATION.)

MR. BERGER: If I may approach.

EXAMINER PRICE: You may.

MR. BERGER: Thank you.

Q. (By Mr. Berger) Mr. Rice, would you turn to page 14 to 15 where it says "Indenture and Related Issues."

A. Yes.

Q. And do you see the paragraph -- would you just read that paragraph to yourself there for a minute?

A. That would be paragraph 3 at the bottom of page 14?

Q. Yes.

A. Okay. I've completed that review.

Q. Now, Mr. Rice, this second corporation --

corporate separation plan was submitted to the Commission in the company's 2008 ESP I proceeding; is that correct?

A. That's correct.

Q. It's dated October 1, 2008.

A. That is correct.

Q. And this was submitted after all of the refinancings of the first mortgage bonds occurred between the first amended corporate separation plan and this filing; is that correct?

A. There was refinancing activity between the first corporate separation plan and this one.

Q. Okay. And all of the non-callable bonds were refinanced between the year 2000 and the year 2008; is that correct?

A. That's correct.

Q. Would you agree with me that there's no reference in this paragraph to the refinancings that occurred during that timeframe?

A. There's no specific mention of the refinancing activity, that's correct.

Q. Thank you.

Now, would you pull up Exhibit FES 5 that Mr. Lang previously referred you to.

A. I have it.

Q. I'm just not sure on there which -- he indicated the pollution control bonds on lines 7, 8, and 9, and you indicated that those were all non-callable bonds; is that right?

A. They have certain no-call provisions, yes.

Q. All of them have certain no-call provisions.

A. Yes. Of the ones he mentioned, 7, 8, and 9, he mentioned those specifically and those specifically have no-call provisions.

Q. And does line No. 16 that was financed in September of 2006, does that have no-call provisions in it?

A. It does.

Q. Do any of the other bonds have no-call provisions?

A. They do not.

Q. And I think during your deposition you indicated that in total there were approximately 315 million out of that total $904 million bond indebtedness that was subject to no-call provisions; is that right?

A. That's correct.

Q. And you'd agree that all of these bonds were entered into after the General Assembly of Ohio mandated that competitive retail electric services were to be provided through a fully separated affiliate of the utility in the Section 4928.17(A)(1) that we previously referenced. Would you agree with that?

A. I would agree with that with the exception of stating that, again, you'd have to look at the entire statute including subsection (C) which permits the company to provide this -- to provide and satisfy sections (A)(1) by functionally separating by order of the Commission.

MR. BERGER: Can I just have a minute, your Honor?

EXAMINER PRICE: Sure. I have a follow-up question.

Are you familiar with the case you testified in 08-1094-EL-SSO? Mr. Berger referenced it earlier, where the Commission adopted your second amended corporate separation plan.

THE WITNESS: I certainly remember I did provide testimony in that case, your Honor.

EXAMINER PRICE: If you could remind me, did any party contest the adoption of the second amended corporate separation plan in that proceeding?

THE WITNESS: To the best of my knowledge, no.

EXAMINER PRICE: Thank you.

MR. FARUKI: Your Honor, I can assist. There was a stipulation that most of the parties signed in that case, no party contested the adoption of the second amended plan, and the stipulation that the Commission accepted and approved in that case, when you look at it, the stipulation provides that unless otherwise modified by this stipulation, the company's filing is accepted and approved, and that was the stipulation that was accepted in the case and the stipulation was signed, among others, by Industrial Energy Users --

EXAMINER PRICE: Uh-uh. You can't hold that against them. There is a term in the stip.

MR. OLIKER: Thank you.

MR. BERGER: Your Honor, we would move to strike Mr. Faruki's testimony.

EXAMINER PRICE: He was just refreshing my recollection. It happened three years ago.

MR. BERGER: Thank you, your Honor.

Q. (By Mr. Berger) Mr. Rice, do you know what the net book value of the company's generating plant that would have to be transferred to a separate affiliate to comply with the terms of 4928.17(A)(1) would be if structural separation were to be implemented?

A. I do not know.

Q. Now, is it your position that the company received a waiver of the requirement for structural separation as part of the stipulation in the ETP proceeding?

A. I will state that the company received, basically received an order of the Commission stating that we were in compliance with 1428.17(A)(1) [verbatim]. I don't know whether that constitutes a waiver but it certainly was their order saying that that plan, that we were in compliance with the plan and approved.

Q. And was there anything in the stipulation itself between the parties that you were relying on for that conclusion?

A. Which conclusion are you talking about? I want to make sure I answer your question.

Q. For the conclusion that the company was in compliance with the requirements of 4928.17.

A. Are we talking about the '08 case? Or are we talking about the '99 case? Which case are we talking about?

Q. I'm talking about the '99 case.
A. In that case there's nothing in the stipulation per se, I'm going off the order of the Commission itself stating that we're in compliance.
MR. BERGER: Your Honor, at this time I'd like to have marked as an exhibit OCC Exhibit No. 9 the parties' stipulation in the '99 electric transition plan proceeding.
EXAMINER PRICE: It is so marked.
(EXHIBIT MARKED FOR IDENTIFICATION.)
MR. BERGER: Just one minute, your Honor.
So, your Honor, may I approach, please?
EXAMINER PRICE: You may.
Let's go off the record briefly while you look through this.
(Off the record.)
EXAMINER PRICE: Let's go back on the record.
Q. Actually, I'm not going -- as it turns out I'm not going to ask you a question at this time about that document so let's move on to another area.
Looking at the company's first -- I do want to mark the company's --
MR. BERGER: Your Honor, let me mark as OCC Exhibit No. 10 the company's first amended

corporate separation plan.

EXAMINER PRICE: It will be so marked.

(EXHIBIT MARKED FOR IDENTIFICATION.)

MR. BERGER: If I may approach.

EXAMINER PRICE: You may.

MR. BERGER: Thank you.

MR. OLIKER: Tad, is this the amended plan?

MR. BERGER: This is the first amended plan.

MR. OLIKER: Thank you.

Q. (By Mr. Berger) Mr. Rice, would you agree with me that this was the first corporate separation plan actually approved by the Commission. I think the one that Mr. Lang provided as an exhibit earlier was the one that was filed with the application but this one is February 28th, 2000, and I think that date's referenced in your testimony in the second -- in the ESP I case.

A. I haven't had a chance obviously to read the entire plan document, but from appearances and from what I'm seeing here, I believe it is the plan.

Q. Would you turn to page 17 of that plan.

A. Yes, I'm there.

Q. And would you agree with me that that section basically says that after the company completes -- that the company would complete corporate separation after it resolved the issues with its first mortgage bonds that were then not callable and did not begin to become callable until August 2002?

MR. FARUKI: I'll object. He needs time to read this. It's three pages long. And he's trying to summarize an entire section in one sentence.

EXAMINER PRICE: Take as much time as you need to answer the question.

THE WITNESS: Thank you.

Could I ask for the question again, please?

EXAMINER PRICE: Could I have the question read back.

(Record read.)

A. I believe this section is just talking about the issues that we face to address corporate separation including specifically the fact that certain of the bonds -- certain of those bonds were not callable at that particular time.

Q. Now, on page 18, and I'm referring to the last paragraph on that page, and I think you indicated this in response to a question from Mr. Lang, that the company would transfer beneficial ownership of these assets to an affiliate along with full operational control until it was cost-effective -- up to the point that it was cost-effective to transfer full legal ownership. Do you see that?

A. I see the section that you're talking about, yes.

Q. And did that -- did that transfer of beneficial interest actually occur, to your understanding?

A. It did not.

Q. Did the Commission ever grant a waiver or an exception to this provision of the first amended corporate separation plan that was approved in its July 2000 order -- I'm sorry, September 2000 order.

A. It provided an order to us approving our corporate separation plan and stating that we were in compliance with Revised Code Section 4928.17(A)(1). The plan was approved.

Q. But when the company did not proceed with transferring beneficial ownership, did it ever request a waiver or an exception to the provisions of this first amended corporate separation plan informing the Commission that it was not going to go -- going to go forward with this provision? Did it ever do that?

A. No, it did not, but instead it, in '08 obviously it filed for another electric security plan in which it received the specific authority to continue to operate in a functional fashion.

Q. And it did not file that second amended corporate separation plan for another eight years; is that right?

A. In 2008, that's correct.

Q. Thank you.

This plan also says that the, quote, on-going obligations as well as existing liabilities relating to such assets will be appropriately assumed by the transferring affiliate including assuming ongoing operation and maintenance expenses, taxes, and other capital expenditure obligations relating to the generation assets. Do you see that?

A. I do not. Can you tell me what page we're on, please?

Q. It's a continuation of that same paragraph at the bottom of page 18. Continuing onto page 19.

A. Yes, I see it now.

Q. Did those assumptions of liabilities ever occur?

A. No, they did not.

Q. And did the company ever seek a waiver or exception from this provision of the first amended corporate separation plan?

A. No, it did not, except in the context of once it filed its second amended plan in 2008 we received the order of the Commission approving our ability to continue to functionally operate as we had up until then.

EXAMINER PRICE: Mr. Rice -- pardon the interruption, Mr. Berger.

MR. BERGER: Oh, please.

EXAMINER PRICE: Do we even address corporate separation in Dayton's rate stabilization plan?

THE WITNESS: I didn't hear the whole question.

EXAMINER PRICE: If the Commission did not address -- do you recall if the Commission addressed corporate separation in Dayton's rate stabilization plan in 2005? 2003.

THE WITNESS: I don't remember.

EXAMINER PRICE: Do you recall if we

addressed it in Dayton's rate stabilization extension plan in 2005?

THE WITNESS: I don't remember.

EXAMINER PRICE: Me neither.

Thank you.

MR. BERGER: Thank you, your Honor.

Q. (By Mr. Berger) And looking at the last sentence there in that paragraph, Mr. Rice, it says "In addition, DP&L and its affiliates will determine an appropriate principal amount of the first mortgage bonds and other indebtedness of DP&L to be assumed by such affiliate." Do you see that?

A. I do.

Q. And did those assumptions of indebtedness ever occur?

A. Well, I think the statement says we will determine an appropriate amount. It doesn't say we will transfer them. So we did review at that time what might have been possible, but there was no specific assumption of that indebtedness.

Q. Thank you.

Would you agree with me that the reason that the company determined to enter into the $315 million, approximately, in bonds with non-callable provisions during the years 2005 and

2006, the bonds that Mr. Lang previously referred to, was for economical reasons?

A. Primarily, yes.

Q. And would that have been because of the interest rate?

A. That's correct. By using a no-call provision in the bond itself we're able to lower the overall interest rates which overall means less cost to ratepayers.

Q. But you don't know what the difference in interest rates between what the non-callable and the callable provisions were.

A. I don't remember off the top of my head what the difference was except I will tell you to the extent we did not include a no-call provision, interest rates would have been higher.

MR. BERGER: Your Honor, move to strike the last portion of his response as nonresponsive to the question.

EXAMINER PRICE: Could I have the question and answer back, please?

(Record read.)

EXAMINER PRICE: And you objected to his response?

MR. BERGER: I move to strike the last

portion of his response after --

EXAMINER PRICE: Denied.

MR. BERGER: -- he said he didn't remember.

EXAMINER PRICE: Thank you. Denied.

MR. BERGER: Thank you.

Your Honor -- strike that.

Q. (By Mr. Berger) Mr. Rice, the third amended corporate separation plan provides for separate accounting; does it not?

A. If you would like to point me to a provision that you're looking to, I would be happy to provide a response to that, but as I stated in earlier testimony, the third amended plan continues functional separation which includes a CAM which means we will have separate accounting, if you will, associated with the expenses of the various divisions of the company so that we can be compliant with the CAM.

Q. Thank you.

Looking at the Revised Code provision that I earlier provided you, which is OCC Exhibit 6 --

A. And this is Revised Code Section 4928.17?

Q. Yes.

A. Yes, I have it here.

Q. -- am I correct that that provision, 4928.17(A)(1) provides for separate accounting requirements for competitive retail electric services from other services provided by the company?

MR. FARUKI: I'll object.

EXAMINER PRICE: Grounds?

MR. FARUKI: Asking for a legal opinion and he's added words to the statute. When he adds words to the statute, he's asking for the lawyer to interpret the statute.

EXAMINER PRICE: Let's have the question back again, please.

(Record read.)

EXAMINER PRICE: Overruled. You can answer if you know.

THE WITNESS: I apologize, I'm going to ask it be read one more time because there was a part of the question I was not sure I picked up on I want to make sure I understand. Can I ask it be read one more time?

EXAMINER PRICE: Please.

(Record read.)

A. Yes, it does.

Q. And would you agree with me, Mr. Rice, that there are no -- the company does not have any audited books for its generation business?

A. The company does not have audited books for its generation business, rather it satisfies this requirement, as I stated before in previous testimony, by separately tracking expenses of the generation business from the distribution and transmission business so that we can satisfy our requirements under the CAM.

Q. Would you agree with me that the company does not have any separate audit, independent audit, of cost allocations by an outside auditor?

MR. FARUKI: May I hear that again, please?

EXAMINER PRICE: Reread the question, please.

(Record read.)

A. While the company does not have a specific independent auditor to audit the CAM, the CAM has been audited and reviewed by the Public Utilities Commission of Ohio staff.

Q. Is there anywhere that you can show me in any of the Commission's orders or stipulations between parties where there was a specific waiver or an exception to the separate accounting requirement required by the Section 4928.17(A)(1) that I earlier referred you to?

MR. FARUKI: Objection, your Honor. There's been no showing of a violation or potential violation and, hence, no need for a waiver.

In addition, he's apparently asking the witness to sort through all of the exhibits that have been designated today to find something. On both grounds the question is objectionable.

EXAMINER PRICE: Sustained.

Q. Mr. Rice, are you aware of any waiver that has ever been specifically granted to the separate accounting requirement of the code?

MR. FARUKI: Same objections, your Honor.

EXAMINER PRICE: Sustained.

Q. Mr. Rice, I think you earlier answered a question from Mr. Lang that you devote only 2 percent of your time to corporate separation and code of conduct issues; is that correct?

A. That's correct.

Q. And if you work a 2,000-hour year, that would be 40 hours or one week of time; is that correct?

A. I haven't done the math, but I'll trust you.

Q. Am I correct that if the generation portion of the business was operated by a separate affiliate, you're not aware of any provision of the law that would allow that separate affiliate to recover a regulated rate?

MR. FARUKI: I'll object.

EXAMINER PRICE: Grounds?

MR. FARUKI: Asking for a legal opinion again without -- and it's phrased in terms of something you would ask someone to go out and research.

EXAMINER PRICE: Could I have the question back again?

(Record read.)

EXAMINER PRICE: Are you asking a hypothetical or are you asking something based upon the record of this proceeding?

MR. BERGER: No; I'm asking a hypothetical, your Honor. Certainly if these facilities, the generation facilities, had been transferred to an affiliate, whether there could be any recovery of a charge like the service stability rider from that affiliate.

EXAMINER PRICE: That certainly is asking for a legal opinion. Overruled.

MR. FARUKI: You meant, I think you meant not that I was correct --

EXAMINER PRICE: No, you're right. You're correct. Thank you. The objection is sustained.

MR. FARUKI: I didn't want to be editing your ruling.

EXAMINER PRICE: Mr. McKenney was on top of it.

MR. BERGER: Well, he is a -- all right. Thank you.

Q. (By Mr. Berger) Would you agree with me that the company does not currently prepare operating statements separately for its generation function and its transmission and distribution function?

MR. FARUKI: Object. Asked and answered.

EXAMINER PRICE: We'll allow it.

A. That's correct, we do not -- we do not prepare financial statements audited or unaudited associated with our generation, transmission, and distribution functions.

Q. And when the company was deciding how to do functional separation, Mr. Rice, you were involved in those discussions; is that correct?

A. I was involved with some of those

discussions, certainly.

Q. And do you recall discussion of whether there should be separate bookkeeping and accounting for generation versus transmission and distribution as part of functional separation?

A. I don't recall. I mean, there are probably lots of discussions on how to best do the business. It could have been discussed, I just don't remember specifically.

MR. BERGER: Thank you, Mr. Rice, that's all I have.

EXAMINER PRICE: Ms. Bojko?

MS. BOJKO: No questions, your Honor.

EXAMINER PRICE: Ms. Petrucci?

MS. PETRUCCI: No questions.

EXAMINER PRICE: Mr. Boehm?

MR. BOEHM: No questions, your Honor.

EXAMINER PRICE: Mr. Williams, Mr. Whitt?

MR. WHITT: Yes, your Honor. May I relocate?

EXAMINER PRICE: You may. Near a working microphone?

MR. WHITT: Yeah.

EXAMINER PRICE: It's easier said than done.

(Discussion off the record.)

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CROSS-EXAMINATION

By Mr. Whitt:

Q. Good afternoon, Mr. Rice. My name is Mark Whitt, I represent Interstate Gas Supply, which is a CRES supplier.

A. Good afternoon.

Q. I want to ask you a few questions about shared services at DP&L. And as I understand it, you provide legal services to both DP&L as well as certain affiliates, correct?

A. That's correct.

Q. Are there any other employees similarly situated to yourself that provide shared services among DP&L, Inc. [verbatim] affiliates?

A. Sure, there are several.

Q. Why does DP&L have separate employees -- why doesn't DP&L have separate employees for the utility and various affiliates of the utility?

A. That's a policy question. I'm not sure I can answer except to say that by being -- by having a corporate separation plan and functional separation in place we're able to allocate the time of certain employees that perform certain functions, which is a more effective and more efficient way to spread that cost amongst various companies.

Q. Okay. So we can agree that it is, in fact, more efficient to share personnel among the affiliates when it's feasible to do so and obviously consistent with the code of conduct and cost allocation manual, correct?

A. That's correct.

Q. I assume that DP&L also shares facilities and equipment among its affiliates.

A. There is some sharing, yes.

Q. Okay. For example, at the Woodman Drive address, the company's headquarters, who works there? I don't need an employee list, but in terms of companies. Is it just the utility or are there some shared services?

A. There are shared services.

Q. Okay. And in talking about the sharing of facilities and equipment, would you agree that there are instances where it makes sense for the DP&L entities to share billing systems?

A. I don't know if I have a strong feeling either way with that, but to the extent there is an effective way to use the system for both companies, that's fine. Or for affiliate companies, I think that's fine. As long as it would be compliant.

Q. Do you know whether DPLER has its own billing system or does it use the same system as DP&L?

A. I believe it has a separate billing system.

Q. Okay. But to the extent DPLER and DP&L can share personnel, facilities, and equipment in a manner consistent with the cost allocation manual and code of conduct, that is beneficial to customers ultimately, would you agree, because of spreading costs among more people?

A. For the economic reason that you just discussed, I would say generally yes.

Q. And then it would be inefficient to duplicate resources where existing resources could be shared.

A. Generally speaking, again, as long as we stayed compliant with the code of conduct and in accordance with our cost allocation manual.

Q. Okay. Now, speaking of the cost allocation manual, I'm going to try not to plow some of the same fields here, but as you point out in your testimony, the whole point of having a cost allocation manual and code of conduct is to make sure that there are no cross-subsidies among DP&L affiliates, correct?

A. That's one -- that's one desired goal, but there are several. But yes, that's one of them.

Q. It's an important goal; would you agree?

A. It's very important.

Q. And would you agree that we can't know whether there are subsidies unless DP&L is recording costs and revenues separately for each of its businesses?

A. I believe it's important, and to be compliant with the CAM that DP&L and its affiliated -- and affiliated companies comply with the CAM itself so we allocate costs and we know exactly what costs are being incurred by what part of The Dayton Power & Light Company.

Q. Okay. And just to be clear, when you use the term "businesses" in your testimony, I think what I've heard this afternoon is that what you're really referring to are legal entities. In other words, you would track costs and expenses for DP&L the utility, DP&L, Inc., DPLER, whomever, correct?

A. Well, we track costs for purposes of the CAM, we would also track generation costs versus transmission and distribution costs, because there are certain shared costs that are charged to the generation side of our business, there might be certain shared costs that might be charged and allocated to the distribution side of our business, but generally speaking, most of my discussion today is compliant to what you said. But, to be fair, the CAM also allocates costs amongst the divisions of the Dayton Power & Light Company.

Q. So are you saying then, that it would be possible to go back and create financial data showing costs and expenses for transmission, distribution, generation separately?

A. What I'm saying is, is that we track those expenses for CAM purposes, but we do not do it as a full-blown financial statement. We don't have the capacity nor do we track the information in the manner and the fashion that we would need to in order to generate full-blown accounting statements.

Q. Why don't you do that?

A. Because we don't need to.

Q. Is there a reason, technically or otherwise, why you can't do that?

A. It would be extraordinarily costly and expensive to do so.

Q. Well -- I'm sorry, were you finished?

EXAMINER PRICE: Mr. Whitt, I have a question.

Did you do it in the past?

THE WITNESS: No.

EXAMINER PRICE: Mr. Whitt, thank you.

MR. WHITT: You threw me off. Can I have the last question and answer.

EXAMINER PRICE: I said did they do it in the past.

MR. WHITT: My last question and answer.

EXAMINER PRICE: Oh.

(Record read.)

Q. Okay. Well, when you say those costs are recorded for, I believe you said for CAM purposes, what does that mean?

A. Well, I'm not the accountant, obviously, so I'm not going to be able to give you specifics. But my generalized understanding of that is that we track costs and expenses so that they can be properly allocated under the CAM those that we should be borne by the generation side of our business and those that should be borne by the T and D side of our business.

And obviously we track, again, separately -- separate accounting books for our affiliated companies like DPLER and other companies like that.

Q. Okay. And I take it that your testimony, and I'm not intending to put words in your mouth, but from what I understand, DP&L intends to continue to observe the cost allocation manual and code of conduct in the same manner that it has in the past; is that fair?

A. That's correct.

Q. And I take that to mean that DP&L does not have any plans to create financial statements or data separately recording revenue and expense for generation, transmission, distribution separately.

A. At this time based on this application under this ESP, the answer to that is correct. We will continue functional separation and we would not create separate accounting statements for the various divisions of The Dayton Power & Light Company.

Q. Okay. Now, when you say that it would be expensive to separately track transmission, generation, distribution, how do you know that?

A. 28 years with The Dayton Power & Light Company working with our financial and corporate accounting types and SEC reporting purposes where we actually are dealing with audited financial statements associated with The Dayton Power & Light

Company, DPL, Inc., and other affiliated companies and dealing with transactional matters involving the company as a whole. I mean understand -- my general overall understanding of the company.

Q. Are you aware of any specific undertaking to investigate what it would cost to separately track generation, transmission, distribution?

A. I know that when corporate separation rules, the 2000 plan, was being contemplated and ultimately approved, we were exploring several different options of how we should be proceeding from here and I'm sure those areas were being discussed.

Q. Well, when you say "I'm sure," do you know that to be the case or are you guessing?

A. I'm not really guessing. I guess I'm really surmising that we would have looked at several alternatives at that point in time including separate accounting.

Q. When you say "I'm surmising," is that something the company did or not, do you know?

A. I don't know.

Q. Okay. Let me ask you about the company's plans for structural separation, and I believe the testimony has been that DP&L is looking at structurally separating by the end of 2017, correct?

A. What we said is we'll be filing an application, not part of this proceeding, but a separate application in which we expect to request structural separation at that time and we have, in that notice we've stated that our target date of that would be to separate by the end of '17.

Q. Okay. Do you know whether any of DP&L's generating plants were fully depreciated as of the end of 2012?

A. I don't have specific knowledge on depreciation issues.

Q. Do you know whether DP&L has calculated what the net book value of its generation assets are as of the end of 2012?

A. I don't know the answer to that.

Q. Okay. Do you know whether DP&L has projected what the net book value of its generation fleet will be at the end of 2017?

A. I don't know the answer to that.

Q. Can we agree that the net book value of DP&L's generation at the end of 2017 will be lower than whatever the net book value is today just as a matter of accounting?

MR. FARUKI: I'll object to lack of foundation. He's elicited three times that he doesn't know the answers in that area and then he asks for a conclusion. There's no foundation for this witness to answer that.

EXAMINER PRICE: Well, I have to admit, the witness earlier testified that he had 28 years of working with accountants at The Dayton Power & Light Company so I think that sort of a general question Mr. Whitt asked is something well within his 28 years of experience.

You can answer if you know.

A. I don't know.

Q. Are you familiar with the general concept of depreciation -- depreciation accounting for a utility plant?

A. Sure.

Q. And that when I used the term "net book value," I assume you understood that to mean the original cost of the asset minus depreciation. Are we on the same page there?

A. Yes, we are.

Q. Can you agree, then, that as a function of how depreciation accounting works that DP&L's generation fleet will have a lower net book value in 2017 than it does today simply by virtue of passage of time?

A. If you make the assumption that there's no difference, no adds, no additional to the fleet, this fleet you're talking about is static today as it will be in '17, I would generally agree as a matter of accounting process that that's the case, but I don't know what our fleet's going to look like in 2017.

Q. Okay. And is it correct that DP&L's ratepayers pay depreciation expense for plant investment?

A. You're beyond my area of expertise. I don't know the answer.

Q. Will DP&L seek to maximize the value of its generation fleet when it divests it?

A. I'm not sure what you mean by the word "maximize." Can you explain what you mean by that?

Q. Get the most money for it.

A. To be honest, we have not completely finalized exactly how that transfer will occur, if that will be done pursuant to a bill of sale, whether that will be done by dividending. There are several different ways by which we're currently exploring how that transfer of assets will occur and we've not reached a conclusion today as to how that will occur.

Q. Would you concede to the possibility that in 2017 DP&L's existing generation fleet, and let's assume -- we'll take your assumption that it remains static, that that fleet could have a higher fair market value than net book value?

A. I don't know what the market's going to be like in 2017. I don't know where capacity pricing and energy pricing is going to be in 2017. Anything's possible.

Q. Okay.

A. It could be higher, it could be lower.

Q. Okay. Now, if DP&L divested its plants at fair market value and the fair market value was higher than whatever the net book value is, the delta between fair market value and net book value would be a source of cash; would it not?

A. Your assumption presumes there will be a bill of sale and cash transfer and, again, we have not made that conclusion. We are looking at various ways by which the transfer of assets could take place. It could be in the manner that you just spoke, it could also be done in other ways whereby we would look at dividending and contribution of capital and looking at taxation issues. There are a whole host of issues we're examining right now; we have not made the determination as to how that would proceed.

Q. Okay.

A. So if you're looking at -- as a hypothetical you're looking at that delta, then that would be, you know, and we do it by some sort of bill of sale, then there would be the potential for profit, yes.

Q. Okay. And that profit could be used to offset, if not eliminate, the need for an SSR, couldn't it?

MR. FARUKI: I'll object. Calls for speculation, and no foundation for this witness.

EXAMINER PRICE: Sustained.

Q. Has DP&L made a determination that if it does divest itself of generation, then the transfer will occur to DPLER?

A. It has not made that decision, no.

Q. So DP&L is leaving open the possibility of selling or transferring its generation to unaffiliated companies?

A. Again, we're looking at all options at this point in time and there have been no decisions made exactly how that transfer will be completed.

Q. Going back to our discussion about fair market value versus net book value, would you agree with me that to the extent a generating plant generates electricity, that it would have some fair market value greater than zero?

MR. FARUKI: I'll object to the incomplete hypothetical. For example, nothing was said about depreciation, and also to lack of foundation as to this witness.

EXAMINER PRICE: He can answer if he understands the question and if he knows.

THE WITNESS: Could I ask to have it read back, please?

(Record read.)

A. I can't -- I mean, the answer is I would say no, not necessarily. I mean, there are several parts of your hypothetical I don't know about. I don't know what the debt of that particular facility might be or anything else. It might have in essence, unless you're presuming fair market value is, after all, is the cap, you know, if you're looking at the capitalization.

I'm not sure what that would be so I think the answer is a qualified no, I can't say there would be value above zero. It may indeed be below, below zero.

MR. WHITT: I don't have any further questions.

EXAMINER PRICE: Thank you.

Any other intervenors have questions for this witness?

(No response.)

EXAMINER PRICE: Mr. McNamee?

MR. McNAMEE: No, thank you.

EXAMINER PRICE: Redirect?

MR. FARUKI: Your Honor, I have a housekeeping matters but I'd rather stay on the record. I can shorten redirect if OCC is going to offer its exhibits because the public filings and the Commission orders that were marked as exhibits by OCC are obviously things that the Commission can refer to. Can I inquire about that? Is that their intention?

EXAMINER PRICE: You know, it doesn't matter because we will, as to the Commission orders, they speak for themselves, they don't need to be admitted, and if people want to request, we'll take administrative notice of the filings that have been marked thus far in the course of this witness.

MR. FARUKI: I request that you take administrative notice of each of the filings that the company has made of the finding and order that was marked --

EXAMINER PRICE: We don't need to do any commission orders. Commission orders speak for themselves.

MR. FARUKI: Right. And also of the stipulation and recommendation that was filed.

EXAMINER PRICE: Do we have any objections to us taking administrative notice of the application in 04-1557-EL-AIS, the amended application in 04-1557 --

MR. OLIKER: Your Honor.

EXAMINER PRICE: Yes.

MR. OLIKER: Just for ease of the briefing -- I'm sorry, I'll stand. For ease of briefing I've come to the conclusion that it's easier to refer to the exhibits than to say your Honor took administrative notice at such and such time.

EXAMINER PRICE: You can still refer to them as exhibits but just coming into the record under administrative notice. So why don't I reask the question according to how they've been marked.

MR. OLIKER: On the orders, your Honor, I'd be happy -- for purposes of the application I'd like them added as exhibits.

EXAMINER PRICE: You can still refer to them on briefing as exhibits, it's just they're not being admitted, we're taking administrative notice of them. You can still refer to them as OCC Exhibit X.

MR. OLIKER: Maybe for purposes of keeping the record in the event this case goes to appeal I think I would prefer the application to be in the record. I'm sorry, your Honor.

MR. FARUKI: Your Honor, let me do it this way, maybe I can assist. I'll ask that with regard to FES Exhibit 11, the application in the 99-1687 case, that administrative notice be taken of that.

Do you want me to give you a list or do you want to take these one at a time?

EXAMINER PRICE: Let's take them one at a time.

MR. BERGER: Your Honor?

EXAMINER PRICE: Yes.

MR. BERGER: Before we get into that, is he talking about the entire application, which is probably 6 volumes or something like that, or is he talking about some limited portion that just pertains to Exhibit 11?

MR. FARUKI: As I just said, I referred to Exhibit 11 and I meant to include just the pages that are in Exhibit 11.

EXAMINER PRICE: Just the pages that are in Exhibit 11.

MR. BERGER: Thank you.

EXAMINER PRICE: Okay. We will take administrative notice of Exhibit 11.

MR. FARUKI: I'll make the same request that you take administrative notice of FES Exhibit 12.

EXAMINER PRICE: No objection.

MR. FARUKI: In the 99-1687 case.

EXAMINER PRICE: Just the portion that has been marked.

MR. FARUKI: Yes, your Honor. When I reference the exhibit, I just mean the portions that were --

EXAMINER PRICE: Any objections?

(No response.)

EXAMINER PRICE: Seeing none, it will be admitted -- or we'll take administrative notice of it.

MR. FARUKI: Let me make the same request with regard to IEU Exhibit 16, skipping the opinion and order in view of your comment, but IEU Exhibit 16 which was the October 12, '04, application.

EXAMINER PRICE: This is I believe what

Mr. Oliker is --

MR. OLIKER: Thank you, I'm sorry. I just find that it's easier for purposes of when the record -- in the event this case were to be one day transmitted to the Supreme Court, to have the application and the amendment in the record that's transmitted rather than have to refer to a document that was taken administrative notice.

EXAMINER PRICE: I think it's still in the record, it's just we're not admitting it into the record as testimony or documents. We're just taking administrative notice of it.

MR. OLIKER: With that qualification, I'm fine, thank you.

EXAMINER PRICE: Then we'll take administrative notice of IEU 16 and 17.

MR. FARUKI: And then the second amended corporate separation plan of October 1, 2008, which was designated OCC Exhibit 8, same request.

EXAMINER PRICE: We'll take administrative notice of that document.

MR. FARUKI: Exhibit -- OCC Exhibit 9 which was the stipulation in the ETP case.

EXAMINER PRICE: Any objections?

(No response.

EXAMINER PRICE: No objection?

MR. LANG: Were there any questions asked about that?

EXAMINER PRICE: No, there were not.

MR. BERGER: Your Honor, I didn't ask any questions about that, so I don't --

MR. FARUKI: I'll withdraw my request, then.

EXAMINER PRICE: Okay.

MR. FARUKI: I'll ask for OCC, that you would take administrative notice of OCC Exhibit 10, which was the first amended corporate separation --

EXAMINER PRICE: Any objections to OCC Exhibit 10?

MR. BERGER: No, your Honor.

MR. FARUKI: That was the first amended corporate separation plan.

EXAMINER PRICE: We'll take administrative notice of that.

You did not ask for OCC Exhibit 7; was that correct, Mr. Rice's testimony?

MR. FARUKI: It is but that's fine, I'll ask for that as well. OCC Exhibit 7 was Mr. Rice's testimony in the 08-1094 case.

EXAMINER PRICE: Any objection?

MR. BERGER: No objection.

EXAMINER PRICE: We'll take administrative notice of that document.

MR. FARUKI: With that, your Honor, can we take five and I can shorten my redirect a bit?

EXAMINER PRICE: Yes.

MR. FARUKI: Thank you.

EXAMINER PRICE: Let's go off the record.

(Recess taken.)

EXAMINER PRICE: Let's go back on the record.

Redirect?

MR. FARUKI: Thank you, your Honors. Thanks for the interlude to cut this down.

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REDIRECT EXAMINATION

By Mr. Faruki:

Q. Mr. Rice, let me go back through just a few points. You remember early in your cross-examination you were asked about impediments presented by the first mortgage lien, the lien that secures the first mortgage bonds?

A. Yes.

Q. Would you explain what those impediments are?

A. Primarily, there are several and they're complex, but to summarize a few of the certainly more significant ones, one would be what we call the after-acquired clause in the first mortgage, that provision in the mortgage applies -- basically states that all the property of The Dayton Power & Light Company, that would be generation, transmission, and distribution, that to the --

Q. Slow down a little bit so that the court reporter's keeping up with you.

A. That all of the property of the Dayton Power & Light Company that would include generation, transmission, and distribution, are subject to the first mortgage.

So as the company acquires property, constructs facilities, puts up new poles, builds new generating facilities, replaces equipment, all of that -- all that property is subject to the first and refunding mortgage and the mortgage is not allocable to either -- any particular division of the company.

In a similar way there are significant issues that we will be facing involving the release of property under the first mortgage. There are lots of constraints on how that is done and specifically one of the most significant constraints is there's a provision in the mortgage that restricts the company or prohibits the company from releasing the electric properties substantially as an entirety.

Beyond that, there would be consent issues that we are going to have to get with regards to bondholders and those would summarize at least the most significant ones.

Q. Is this mortgage, is this first mortgage interest representative by a single mortgage as amended from time to time or is it separate mortgages?

A. It's a difficult question to answer except to say that there is a primary mortgage that was first adopted in 1935 and then as we add new indebtedness to it we would add supplemental indentures to that first and refunding mortgage.

So you have the complexity associated with the provisions of the first mortgage in the initial document in 1935, and then you also add many times new covenants, new issues, new complexities when you add subsequent debt in the supplemental indentures which would -- are reflected in the six issuances which were discussed earlier in my testimony.

Q. We'll get to the issuances in a minute, but with regard to the indenture, you made the statement a couple of times that the indenture was originally drafted as well in the 1930s. The original one; is that correct?

A. That's correct.

Q. When that was prepared, was it prepared in contemplation of deregulation?

A. Absolutely not.

Q. Let me ask you about these debt issues, then. For clarity, define what a "no-call provision" is.

A. Sure. A no-call provision basically states that an issuance of debt cannot be called, i.e., redeemed or refinanced, dealt with by the issuer for a certain number of years. And that provision is typically inserted in debt financings for the purpose of giving holders of that debt the luxury, if you will, of knowing that that debt will be outstanding for a certain number of years and that they will earn a certain interest rate on that indebtedness for a certain number of years.

Q. Is there any advantage to DP&L and its customers to engage in financing which contains such a no-call provision?

A. Yes, there is.

Q. What is that?

A. The advantage primarily is lower interest rates. Because of the no-call provisions holders of those notes who know their investment is going to be outstanding for a certain number of years are willing to take a slightly smaller interest rate payment for that -- for that indebtedness for the security and the certainty of knowing that that investment will be outstanding for the no-call period.

Q. You were shown some of the Commission filings with regard to one of the financing issues, but let me ask you more broadly, with regard to the first mortgage bonds and the pollution control bonds on the schedule that you were shown, has the company made applications to the Commission for approval of those financings?

A. Yes, we have.

Q. With regard to the issuances that contained no-call provisions, were those provisions disclosed as part of those filings in those proceedings?

A. Yes, they were. For the -- for the issuance that was done in 2005, which three of the six were tied to that issuance there, in that case in the application itself the company attached as exhibits to it documentation which discloses the fact that we would be having a no-call provision within -- within those financings.

Q. Did the Commission approve those issuances?

A. They did.

Q. When you say "attached as exhibits," do you mean the application itself?

A. I do.

Q. You were also asked a couple of questions about whether the pollution control bonds were backed only by generation assets or only by some of the assets of the company. Do you remember that subject?

A. I do.

Q. What is the situation with regard to how extensive the security is in terms of company assets for the pollution control bond issuances?

A. Simply put, all of the property of the Dayton Power & Light Company, generation, transmission, and distribution, back all of the bonds. There is no way to allocate to any of the issuances, whether they be pollution control or otherwise, what property's backing that particular issuance.

Q. Okay. Let me change subjects.

You were asked some questions about fully-allocated cost or fully loaded embedded cost, and I had a couple of questions about that. Would you start with IEU Exhibit 14 which is the 99-1687 case opinion and order of which I have requested the Bench to take administrative notice. Do you have that exhibit?

A. I have that in front of me.

Q. Would you look at page 11.

A. I have that page.

Q. Paragraph 16 is a paragraph that talks about sales or transfers of wholesale power to its affiliates. Do you see that?

A. I do.

Q. The part I'm interested in is as follows: "With respect to sales or other transfers of wholesale power to any of its affiliates, including but not limited to any future DP&L unregulated retail marketing affiliate for resale at retail to DP&L electric distribution customers in the DP&L distribution service territory, DP&L agrees its generation affiliate shall not offer power or ancillary services incident to the delivery of power at prices and terms more favorable than those available to nonaffiliated electric suppliers."

Have I read that correctly?

A. You have.

Q. With regard to the question that you were asked by the Attorney Examiners concerning your interpretation of the corporate separation statute, 4928.17, let me ask you this: In connection with the work that you have done in corporate separation and including being one of the people that advise on that subject, have you ever had or become aware of a requirement that the Commission has that DP&L has to sell or transfer power to DPLER at a power price that is based on fully-allocated cost?

A. No, I'm not.

Q. With regard to the section that I just read here that talks about not offering power or services incident to the delivery of power at prices and terms more favorable than those available to nonaffiliated electric suppliers, to your knowledge, have DP&L and DPLER always complied with that standard?

A. They have.

Q. For clarity, DP&L sells generation in two ways in the sense that it sells to SSO customers and it also makes sales at wholesale; is that correct?

A. That's correct.

Q. And when you responded to the Attorney Examiner's questions about FERC-approved tariff, would you elaborate and explain to what that tariff applies?

A. The tariff applies to wholesale sales transactions. And so, therefore, the sale of generation service -- generation services wholesale would be covered by our open access tariff with FERC.

Q. Is a sale from DP&L to DPLER a sale at wholesale?

A. Yes, it is.

EXAMINER PRICE: So just to clarify, following up on my question, you are now saying that the DPLER sales are, in fact, covered by your FERC approved wholesale tariff.

THE WITNESS: I'm not saying that. As I said to you before, I'm not confident on that but I believe -- that is a wholesale transaction, but this is not my area of expertise.

EXAMINER PRICE: Thank you. I thought maybe you had had a chance to think it over and were more confident.

THE WITNESS: I wish I had. I wish I had a better answer for you, but I do not.

EXAMINER PRICE: Okay.

Q. (By Mr. Faruki) Now, I just mentioned the fact that you give advice with respect to corporate separation and code of conduct questions; is that right?

A. That's correct.

Q. You had some questions about how much of your time your 2 percent estimate annually that you would spend on that. Are you the only person in the Legal Department of the company that gives advice on those subjects?

A. No.

Q. How many others do that as at least as part of their duties?

A. I would say there are at least two other counsel in the office that have spent some time, maybe I would say three others have spent some of their time responding to these same types of issues.

Q. With regard to compliance with the corporate separation plan and compliance with the code of conduct, can you explain, in addition to you and others in the law department being available to answer questions, what else the company does to assure compliance?

A. First of all, we, obviously, counsel and advise on the CAM and we make sure CAM questions get addressed. We also would do and handle responsibility for training, training activities. The training activities of the company pursuant to our approved corporate separation plan that would include computer assisted as well as individual sessions on training and that would be applicable to all employees, particularly new employees. As soon as they get here on the job they're required to learn this because it's important from day one they understand the significance of the code of conduct.

That's all I've got.

Q. You paused, I just wasn't sure.

You have been asked some questions and Mr. Lang spent a long time on the initial corporate separation plan, you were asked some questions about subsequent amended plans. Would you describe for the record how the company's corporate separation plan has evolved over the years with regard to functional versus structural separation?

A. Sure. I'll try to make it brief. In 1999-2000 with the first plan, because it was so new and novel, we obviously had put statements within the plan for the purposes of complying with the statute including issues about structural operation and our intent to move forward that way.

Key there at the time, of course, was that despite our best intent there just wasn't a marketplace, and as time evolved and there was no marketplace, there were no switching going on, we had no CRES providers within the DPL service territory, we sort of evolved that to working toward a functional separation concept.

That really got crystallized in the 2008 plan which at that point in time we solidified the fact that we were continuing a functional separation in light of the absence of a marketplace and the absence of switching and activities by CRES providers. And the reason that there was no activity, of course, was that there was no market, was that our tariff prices were less than market rates, so, therefore, there was no push. There was no desire to push toward a lot of corporate separation because to do so would -- didn't appear to be appropriate at the time because there was no need to do so.

And in 2008 we pushed through and received in a stipulation a continuation of our corporate separation plan and certainly reinforcing the fact that we would be continuing to operate thereafter in a functional separation mode, which, of course, we have continued to do.

Q. Was the company's market development period actually extended with approval of the Commission?

A. It was.

Q. Do you remember why?

A. Because of the absence of a marketplace.

Q. You were asked a few questions about a statement in the first amended corporate separation plan about the plan to transfer of beneficial ownership of assets. Do you recall that subject?

A. I do.

Q. And you said that the plan to transfer of beneficial ownership did not come about or did not occur. Would you tell us why?

A. To a certain extent for the same reasons I just discussed; there was the absence of a marketplace. It looked like corporate separation, structural corporate separation wasn't necessarily viable and that functional separation became the way that the company should be operating.

We felt that too, we were trying to at the time, trying to deal with the fact that we had some very significant constraints in the first mortgage and no-call provisions but in the absence of the marketplace and the absence of switching, in the absence of CRES providers we ultimately decided to just stay in a functional separation mode.

Q. Were the provisions in the first corporate separation plan about which Mr. Lang, and perhaps others but at least Mr. Lang, asked you that required legal separation, were those provisions dropped or omitted or eliminated from the plan when it was subsequently amended?

A. Yes, they were.

Q. Did the Commission approve that amended plan?

A. They did.

MR. FARUKI: Your Honor, may I consult?

EXAMINER PRICE: You may.

MR. FARUKI: Your Honor, that's all I have. Thank you.

EXAMINER PRICE: Thank you.

Mr. Lang?

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CROSS-EXAMINATION

By Mr. Lang:

Q. Just to be clear on that, the last question about the Commission approving the amendments that dropped the structural separation provisions, is that what we looked at earlier that happened in 2008?

A. Yes.

MR. LANG: That's all I have. Thank you.

EXAMINER PRICE: Thank you.

Mr. Oliker

MR. OLIKER: Just a few questions, your Honor.

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RECROSS-EXAMINATION

By Mr. Oliker:

Q. Mr. Rice, you don't specifically remember when shopping in Dayton Power & Light's territory rose to 20 percent, do you?

A. No, I do not.

Q. You don't remember if that was a specific important number for purposes of the electric transition plan case?

A. I can't answer. I don't know the answer.

MR. OLIKER: That's all the questions I have, your Honor.

EXAMINER PRICE: Thank you.

Mr. Berger?

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RECROSS-EXAMINATION

By Mr. Berger:
Q. Mr. Rice, when you were talking about the 2005 and 2006 applications for the new no-call indebtedness -- do you recall that?
A. Yes.
Q. -- you said that, obviously, those bond issues were attached to the application and reflected the no-call provisions. Do you recall specifically whether the company included in the written portion of the application, not the attachments, a statement that there were no-call provisions in there and that that could impact on whether the company was able to structurally separate?
A. It was not included in the application document itself but was included, as I said previously in my testimony, in the appendices and then for the 2007 one it was actually in the report of sale also.
Q. And was the report of sale filed with the Commission?
A. It was.
Q. The market development period you indicated was extended. Was it extended into 2005 or beyond that?
A. I don't have specifics as to the

extension. I just remember that the cases -- that there were extensions provided under that case in order to provide for rate recovery in certain areas until we had our next ESP.

Q. You're not aware of any extension beyond 2005, are you?

A. I can't speak to the answer on that. I'm not sure of the specifics of how it was done.

Q. Okay. So you don't know when the end of the market development period for DP&L was.

A. That's correct.

Q. Thank you.

MR. BERGER: That's all I have.

EXAMINER PRICE: Mr. O'Brien?

MR. O'BRIEN: No questions, your Honor.

EXAMINER PRICE: Ms. Bojko?

MS. BOJKO: No, thank you.

EXAMINER PRICE: Ms. Petrucci, Mr. Boehm, Mr. Williams, Mr. McNamee?

MR. McNAMEE: No, thank you.

EXAMINER PRICE: Thank you, Mr. Rice. You're excused.

MR. FARUKI: Your Honor, I renew the offer of DP&L Exhibit 6 and its exhibit.

EXAMINER PRICE: Any objection to the

admission of DP&L Exhibit 6?

(No response.)

EXAMINER PRICE: Seeing none, it will be admitted.

(EXHIBIT ADMITTED INTO EVIDENCE.)

MR. FARUKI: The next witness is Mr. Sharkey's, your Honor.

MR. OLIKER: Your Honor, IEU-Ohio also moves, I believe I only have one, Exhibit IEU 15.

EXAMINER PRICE: Any objections to the admission of IEU 15?

MR. FARUKI: Let me refresh myself.

EXAMINER PRICE: CAM experts.

MR. FARUKI: No, your Honor.

MR. OLIKER: Actually, I would like to provide the court reporter with a numbered exhibit.

EXAMINER PRICE: We'll go ahead and admit IEU Exhibit 15 and Mr. Oliker will provide the court reporter with a copy of the exhibit with hand-numbered pages.

MR. OLIKER: Thank you, your Honor.

MR. LANG: Your Honor, for purposes of FES 11 and 12, so I guess I'm clear, because you took administrative notice of it do you not want us to move it in but we can still reference it in as part of the record?

EXAMINER PRICE: Yes.

MR. LANG: Thank you.

EXAMINER PRICE: And, again, as I indicated earlier, the Commission, actual Commission orders speak for themselves, no need to be admitted for administrative notice taken of those.

EXAMINER McKENNEY: Mr. Sharkey?

MR. SHARKEY: Yes, your Honors. DP&L would call Nathan Parke to the stand.

EXAMINER McKENNEY: Mr. Parke, please raise your right hand.

(Witness sworn.)

EXAMINER McKENNEY: Thank you.

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NATHAN C. PARKE

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sharkey:

Q. Mr. Parke, do you have before you a copy of your prefiled testimony entitled the "Second Revised Direct Testimony of Nathan C. Parke"?

A. Yes, I do.

Q. If I asked you the questions in it, would you give me the answers that are provided in that document?

A. Yes, I would.

Q. Do you have any corrections or changes to it?

A. I do have one correction on page 11. Line No. 1 and line No. 18 both have the month "October" and it should be the month of December.

EXAMINER PRICE: I'm sorry, could I have that page reference again?

THE WITNESS: It's page 11.

EXAMINER PRICE: Thank you.

THE WITNESS: That was part of our second revised filing that was made in December, that reference should have changed to December.

Q. Do you have any other changes or corrections to your testimony?

A. No, I don't.

MR. SHARKEY: Your Honor, we would designate his testimony as DP&L Exhibit 7 and I'll move for its admission at the close of cross and tender him for cross-examination.

(EXHIBIT MARKED FOR IDENTIFICATION.)

MR. BOEHM: Your Honor, we've gotten together and agreed that I will go first on this one, if that's okay with everybody.

EXAMINER McKENNEY: All right, Mr. Boehm.

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CROSS-EXAMINATION

By Mr. Boehm:

Q. Good afternoon, Mr. Parke.

A. Good afternoon.

Q. Your patience is finally being rewarded, you get to . . .

Mr. Parke, I've been reading your testimony about your experience and I don't see anything about designing rates. Have you ever designed a rate before?

A. Sure. I've been in the Rate Department since 2007.

Q. Okay.

A. And during that time I have designed some of the rates that came out of the company's first ESP.

Q. And they were riders; am I correct?

A. They were riders, correct.

Q. Would you agree with me, Mr. Parke, that traditionally when a utility company wants to design rates, they conduct a class cost-of-service study?

A. I would agree with that, yes.

Q. Okay. Did you conduct a class cost-of-service study in this case?
A. I did not in this case because the rates that I was designing in this case did not -- I didn't find the need for one to be performed.
Q. You didn't find a need, you say?
A. Correct.
Q. Okay. Let's go to your testimony, Mr. Parke, about that designing the rates. And I'm on page 7 and it says on line 5, or line 4 "How was the rate designed?"
"The rate was designed in the manner that factored in ratemaking principles of stable and predictable revenues and rates, fair distribution among customer classes, and easily understandable rates. Therefore, the rate was first designed by including the energy and demand rates of a prior nonbypassable rate, the rate stabilization charge, then a customer charge was added to balance the overall impact across tariff classes. Finally, energy charge and demand charge were adjusted to achieve parity among rate classes, et cetera, and to ensure the appropriate revenue recovery"; is that right?
A. That's right.

Q. Okay. Now, is it not a ratemaking principle, an old and traditional ratemaking principle, that rates should be designed for cost causality?
A. Yes, I would agree with that.
Q. Okay. So the idea is that the designer of rates will take a look at the differing responsibility of the various rate classes in contributing to certain costs of the utility; is that right?
A. Right.
Q. And so traditionally a residential rate is not the same as an industrial rate which is usually not the same as a commercial rate.
A. That's generally true.
Q. And that is almost invariably true when those rates are designed around a class cost-of-service study; isn't that true?
A. That's generally true.
Q. When you were looking -- let me back up.
So essentially, briefly, your testimony, as I understand it, is it you started off with the rates in the rate stabilization charge, right?
A. The existing rate stabilization charge, correct, that's one of the factors of rate design.

Q. And you built on them, right? Essentially it was your desire to keep the same relative rates as in the rate stabilization charge in your design of the rates to meet the increased rate of return on equity the company is asking for, right?

A. My goal in the rate design, I was asked to design a rate for the SSR which is a financial integrity charge, and that charge is not -- it's not a cost based charge that's easily identifiable costs to it to where a cost-of-service study would be prudent. I didn't see a cost-of-service study would be able to be done easily, therefore, while I agree with the theoretical concept of cost-of-service study, I didn't find that it was a practical way to design this rate.

So my key -- the key to designing this rate was to balance the overall impact across all customers and that's why I started with the rate stabilization charge to maintain some rate structure of rates that were currently being charged.

Q. Did you go back in the record to see how the rate stabilization charge came about?

A. I have a general understanding of that.

Q. What is that general understanding?

A. That the rate stabilization charge was a

POLR charge.

Q. A POLR charge. So is it true that there was no cost of service -- class cost-of-service study conducted to come up with the rate stabilization charge?

A. I'm not familiar with the -- that case. I wasn't in the Rate Department at the time that was developed.

Q. Did you go back and look at the record to see if you could find a class cost-of-service study that was used to design that rate?

A. I did not. I didn't see that that was necessary. My goal here was to design a rate that was -- that had some stability in the rate structure and balanced the impact of the entire ESP.

Q. And so far as you were concerned you didn't care which rate classes were causing the particular cost and in what proportion.

A. Again, the SSR is a financial integrity charge and I view it as all customers are causing the need for financial integrity, and that there's no -- that there's no good reason for a cost of service analysis on something that doesn't have costs that are easily identifiable.

Q. The SSR is essentially a charge to

increase the rate of return on equity of the company; isn't that correct?

A. I'm not sure the full justification of the SSR. I believe that's covered by other witnesses.

Q. Well, isn't it necessary to know exactly -- well, bear with me for a moment, Mr. Nathan. I'd like to investigate what the company's characterization of these costs are.

It is true, is it not, that the company's asking for an increase in rate of return on equity and it was their goal to obtain a rate of return on equity within a certain range? Isn't that correct?

A. I believe that to be true from reading Witness Chambers' testimony.

Q. Okay.

A. He's outlined several financial and business risks that factor into financial integrity.

Q. So would it be informative to understand how a rate of return on equity is calculated in designing your rates?

A. My understanding of his testimony is that there are several factors that go into the need for financial integrity and many of them would be very difficult to truly identify which customer was causing the cost.

Q. Have you been in the hearings over the last few days? Have you heard the witnesses, et cetera?

A. I was here part of the time on Monday --

Q. Okay.

A. -- and I was not here yesterday.

Q. From what you heard or -- either in this room or back in the office, is it your understanding that the company is -- isn't it your understanding that the company is relatively satisfied with the rates of return that it is earning on transmission and distribution?

A. I don't have an opinion on that.

Q. If I were to tell you or if I were to represent -- no, let's do it this way: Let me represent to you that in response to a question by Attorney Examiner Price the DP&L witness indicated that -- Mr. Jackson I believe indicated that the company was satisfied with its distribution and transmission revenues, okay? Do you accept that?

A. Okay.

Q. So if that's the case, then by a process of elimination the revenue shortfall must be in the generation function; am I correct?

A. Again, I don't know that for sure, but --

Q. Assuming that I am correct and that the witness responded as I indicated to the question by Attorney Examiner Price, wouldn't you conclude from that that the company's shortfall in revenues, claimed shortfall in revenues, is in the generation function?

A. It could be. I guess my understanding of the financial integrity was that it affected all lines of business.

Q. Well, if it needed more revenues from transmission and distribution functions, it could file a T and D rate case, couldn't it?

A. I suppose it could. I guess I'm not supporting anything regarding that.

Q. But it's not doing that here. It's asking for a SSR, right?

A. The company is seeking for an SSR, which my understanding was that it was to provide revenues to -- for all business units of the company to operate.

Q. Okay. And don't you -- and you don't think it's important in designing those rates that the customer classes be assigned responsibility for their causation of the particular costs that the company wants to be reimbursed for.

A. In this circumstance with the SSR I did not find that a cost-of-service study was practical.

Q. Let me ask you, Mr. Parke, have you ever conducted a class cost-of-service study?

A. For many riders that the company has we've worked to identify the cost causers and designed the rates to align with our -- the customers that cause the costs.

Q. Okay. Let me ask it this way: Have you done a fully embedded class cost-of-service study?

A. I have not.

Q. Okay. Have you testified with regard to a fully embedded class cost-of-service study?

A. I have not testified to that.

Q. If one were going to do a fully embedded class cost-of-service study, isn't it true that the company's plant, generation of plant, would be almost entirely assigned to the demand function of the rates?

A. That could be true, yes.

Q. Well, it is true, isn't it?

A. Generally I would agree with that, yeah.

Q. And so wouldn't it, then, seem logical to you that if what you're looking for is an increase in rates for the generation, that the rate design should be such that it would pass those costs along on a demand basis?

A. I guess my testimony here is that the SSR is for financial integrity and the explanation of financial integrity by Witness Chambers included many factors and I didn't see that any of those factors could easily be identifiable to demand or energy.

Q. So this is just sort of a general bailout. This isn't related to any particular kind of property; is that right?

MR. SHARKEY: Object to the characterization as a bailout, your Honor.

EXAMINER McKENNEY: Mr. Boehm, can you rephrase the question?

MR. BOEHM: I'm trying to think of a nice way to . . .

Q. I don't know how to do that. Okay, I'll withdraw the question.

So that I can understand this and without running it on too long, Mr. Parke, there is nothing in these rates including the existing rate stabilization charge upon which you have constructed your rates that, to your knowledge, speaks to the cost causation responsibility of the various rate classes for those costs.

A. Again, as I stated, the SSR is a financial integrity charge and I did not see that it was necessary to do a full cost-of-service study financial integrity --

Q. What about the rate stabilization charge? What was that?

A. To my knowledge that was a POLR charge.

Q. POLR charge, okay. Provider of last resort charge? Is that right?

A. That's my understanding.

Q. That's what it stands for?

A. Yes.

Q. Okay. And you don't know how that was constructed either.

A. I believe I understand the rate design.

Q. Well, but as far as you know that rate design had nothing to do with cost causation.

A. Well, I believe that rate design was based off of generation rates at the time and I believe the generation rates would have had a cost-of-service study.

Q. But you don't know that. Let's assume for the moment, Mr. Parke, that there was a class -- let's assume, contrary to what we both believe, that there was a class, fully embedded class cost-of-service study done at the time those rates were -- went in, what was it, 2004, something like that originally?

A. I believe it was probably later than 2004, but I'm not certain of the exact timing of when it went in.

Q. Well, the record will reflect. But in any event, let's assume it was nine years ago, okay. Is that fair?

A. Okay.

Q. About nine years ago. Even if there was a fully embedded class cost-of-service study nine years ago, would you believe that that cost-of-service study would still be valid today?

A. My testimony here is on the SSR which is a financial integrity charge which is different from the RSC.

Q. And so when you talk about the fair distribution among customer classes being one of the ratemaking principles that you think you achieved, this is fair -- this is not fairness based upon who caused the costs, right?

A. As I stated, I didn't find the need for a cost-of-service study because it wasn't a practical method, so the most practical thing for me was to balance the impact across all tariff classes for the ESP filing.

Q. Regardless of cost causation.

A. Again, the SSR was a financial integrity charge which I didn't see it necessary to perform a full cost-of-service study for.

Q. So your concept of fairness, then, is to preserve the status quo.

A. I wouldn't characterize it as "status quo." The SSR charge is new and this is a new rate design for it.

Q. I don't want to beat a dead horse and you've been very forthcoming, Mr. Parke, I just want to understand where you got this concept of fairness from. Is this just something innate to you or what are the factors that make it fair?

A. So this charge is new and one of the ratemaking principles is stable and predictable revenue and rates and, you know, another factor is gradualism, and that's part of the reason we would start with the rate structure from a previous rate was to maintain some rate structure so we don't have any major cost shifts between customer classes as a result of a new rider.

MR. BOEHM: Can I have a moment, your Honor?

EXAMINER McKENNEY: Yes, you may.

MR. BOEHM: I think that's all I have, thank you.

Thank you, Mr. Parke.

EXAMINER McKENNEY: Mr. Boehm.

Is there an agreement who would go next?

MR. BERGER: Yes.

EXAMINER McKENNEY: Mr. Berger.

MR. BERGER: Yes.

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CROSS-EXAMINATION

By Mr. Berger:

Q. Good afternoon, Mr. Rice -- Mr. Parke. Excuse me, Mr. Parke. We spoke previously at your deposition, and I think Mr. Boehm already established that you did not perform a fully-allocated cost-of-service study; is that correct?

A. Correct. I didn't see a need for a full cost-of-service study on the financial integrity charge.

Q. And you just referenced the concept of gradualism, I just want to -- tell me what the concept of gradualism means in your understanding.

A. Gradualism means that you don't create a rate that causes significant changes in revenue across tariff classes.

Q. Now, I think you agreed with Mr. Boehm that, in fact, the financial integrity charge relates to the rate of return of the company; is that right?

A. I believe there were several factors listed by Company Witness Chambers, both financial and business risks that he identified.

Q. Okay. But he did establish, Dr. Chambers, a rate of -- rate of return as the reason for the financial integrity charge, right?

A. I believe that to be true.

Q. Okay. So then the financial integrity charge would be associated with rate of return.

A. That's not my testimony. I'm only providing the rate design for the charge.

Q. Well, but the dollars, the calculation, the way in which it was calculated all relates to establishing a level of return in order for the company to maintain financial integrity allegedly; is that right?

A. My understanding is that the dollar amount was determined to provide financial integrity.

Q. And it was determined based upon the rate of return that the company wanted to achieve that it said it was necessary to achieve for financial integrity, right?

A. That's probably true. I guess I'm not the one supporting that, but --

Q. You're aware of the 6.2 percent return included in CLJ-2, aren't you?

A. Vaguely.

Q. Okay. You're not aware that that's how the ... service stability rider that you're proposing to allocate in a particular way was calculated.

MR. SHARKEY: Your Honor, I believe that that was confidential information.

MR. BERGER: If so, we strike it and ask it on the confidential record.

EXAMINER McKENNEY: All right. At this time we'll strike the question. Let's move to the confidential record. If you have not signed a stipulated protective agreement with the company, please step out of the room at this time.

MR. SHARKEY: Just so the record is clear, your Honor, it was the reference to --

EXAMINER McKENNEY: Let's wait until we go on the confidential record. Let's wait.

Go off the record real quick.

(Discussion off the record.)

(Confidential portion excerpted.)

(Open record.)

EXAMINER McKENNEY: Mr. Berger, can you restate your question?

MR. BERGER: Sure. Do we want to call back in the folks who stepped out?

EXAMINER McKENNEY: Are they out there to be called back?

FROM THE FLOOR: They're not coming back.

MR. BERGER: I just want to show them I had courtesy.

EXAMINER McKENNEY: Thank you, Mr. Berger.

Q. Can you tell me, Mr. Parke, the steps that are normally performed in preparing a cost-of-service study?

A. So normally you identify the costs for what you're trying to recover and then identify which customers or why those costs are being incurred and then design a rate to recover those costs.

Q. Do you know what cost functionalization is?

A. Functions as in transmission, distribution, generation?

Q. I'm asking if you know what functionalization is in terms of performing a cost-of-service study.

A. I guess that's how I would classify it.

Q. Which is?

A. To classify it into transmission, generation, distribution.

Q. Okay. And did you speak to the people who determined what the costs were, such as Mr. Jackson and Dr. Chambers, to determine how these costs should be functionalized, whether they related to generation, transmission, or distribution?

MR. SHARKEY: Object, your Honor. Mr. Parke has testified a number of times that it wasn't designed to recover specific costs. The question assumes that it was designed to recover specific costs which I don't think there's any basis in evidence for.

EXAMINER McKENNEY: The objection's overruled. If the witness knows the answer, he can answer.

A. My understanding of the SSR was that it was a financial integrity charge.

Q. My question to you was --

MR. SHARKEY: Object, your Honor, he hadn't had a chance to finish his question. I object to him cutting off the answer.

MR. BERGER: I'm sorry.

EXAMINER McKENNEY: If you had more, please proceed.

A. It was a financial integrity charge and it was not a cost-based charge, therefore, a cost-of-service study would be extremely difficult and I didn't see that to be a practical thing to do.

Q. You didn't see speaking to Dr. Chambers or Mr. Jackson as a practical thing to do?

A. I didn't see a cost-of-service study as a practical thing to do for a financial integrity charge which is not cost based and has several factors to it.

Q. Okay. My question to you was: Did you speak to Dr. Chambers and/or Mr. Jackson regarding how they determined the charge in order to determine whether you could functionalize the costs?

A. I don't believe I did. I don't believe that that was necessary since it was a financial integrity charge.

Q. Do you know whether a return on capital is functionalized?

A. Can you repeat the question?

Q. Yes. Do you know whether return -- return on capital is functionalized?

A. In general terms?

Q. In a class cost-of-service study in a base rate proceeding.

A. I'm sorry, I didn't catch all that. I didn't hear all that.

EXAMINER PRICE: Let's go off the record.

(Off the record.)

EXAMINER McKENNEY: Let's go back on the record.

Q. Mr. Parke, is return on capital functionalized in performing a class cost-of-service study to your knowledge?

A. In general terms I believe it is. But in this circumstance it's not applicable since we're dealing with financial integrity charge.

Q. Well, you heard Mr. Boehm ask you some questions about whether these dollars would relate to generation, okay, because Mr. -- because of Mr. Jackson's testimony. Do you recall that?

A. I recall the question.

Q. Okay. And if that's correct, would you agree with me that it would have been appropriate to functionalize them to generation because they would be return on capital costs related to generation?

A. That was not my understanding when I designed the rate. My understanding was it was a financial integrity charge that applied to all the business units for the company to operate.

Q. Okay. But you can't -- strike that.

And do you know what the classification steps of a cost-of-service study is?

A. Yes. Typically you classify costs by type of charge whether it be customer, energy, or demand charge.

Q. Okay. And can you tell me what kind of costs are included in customer costs?

A. Sure. Generally customer charge costs are items that can't easily be identified as energy or demand and exist whether or not the customer reaches energy or demand.

Q. Well, wouldn't they be the kind of costs that vary based upon the number of customers?

A. They could.

Q. Okay. You didn't perform a classification step in performing your assessment of the service stability rider, did you?

A. No, I did not see that that was necessary. Again, the SSR charge was a financial integrity charge which I didn't see the need for a theoretical study on cost of service to be performed, so I took the practical approach of making sure that the rate was balanced and fair among all the tariff classes for the ESP.

Q. Are you aware that it's the company's position that customers who are switching, and in particular the load of customers switching are primarily responsible for the factors driving the financial integrity issues that underlie the claim for the SSR?

A. My understanding is that that was one of the factors that was discussed by Chambers and likely Jackson, but there were many others.

Q. There are many others?

EXAMINER PRICE: Mr. Parke, if the Commission were to conclude, based upon the evidence in this proceeding, that the primary driver is, in fact, customer switching which is driving the financial distress, potential financial distress of the company, would you agree that your rate design is defective?

THE WITNESS: I guess I wouldn't agree

that it's defective. The goal for the rate design was to balance the impact across all tariff classes and I think it --

EXAMINER PRICE: But if the Commission -- I'm sorry. Finish your answer.

THE WITNESS: I think the rate design would accomplish that.

EXAMINER PRICE: But if the rate design, according to your testimony, took nothing into account as to whether it was generation related or distribution related or transmission related, you said it was simply a financial integrity charge that you attempted to balance the impact on all classes, if the Commission were to conclude that it really is driven by generation, then would you agree that your rate design is inappropriate? Instead of defective, would you agree that it's inappropriate?

THE WITNESS: I'm still not sure I would agree with that. I guess -- I think it was a sound rate design for mitigating the cost impacts to all the customers that would be assessed on that charge.

EXAMINER PRICE: Even though there's no cost causation element to this rate design.

THE WITNESS: Correct.

EXAMINER PRICE: Thank you.

Q. (By Mr. Berger) Mr. Parke, the switching tracker would -- would you agree with me that the underlying principle for the switching tracker is that when customers switch, it causes financial integrity problems for the company?

A. I don't think I can. I guess I'm not the witness that supports anything regarding the switching tracker.

Q. Okay. Are you familiar with the switching tracker?

A. Only in general terms.

Q. Are you aware that the company has indicated in responses to discovery that the design of the switching tracker is to follow -- the rate design of the switching tracker follows the rate design of the service stability rider?

A. I haven't reviewed all the discovery in the case so I'm not completely familiar with all of it.

Q. Now, you'd agree with me that your proposal would effectively double customer charges for residential customers.

A. I believe that to be true.

Q. And would you agree with me that your rate design, in coming up with your rate design you stated that you started out with the rate stabilization charge, correct?

A. That was one of the factors that -- that was one of the factors that went into the rate design was the rate stabilization rate structure, correct.

Q. But at the time you designed the service stability rider you didn't know what the purpose of the rate stabilization charge was; would you agree with that?

A. I think I understood the purpose of the rate stabilization charge to be a POLR charge.

Q. But you don't know what a POLR charge is; is that right? Or at the time you designed these rates you didn't know what a POLR charge was.

A. I knew it to be a provider of last resort.

Q. Do you know what the purpose of the POLR charge is?

A. I don't know the details of the POLR case, no.

Q. Do you know what the purpose of a POLR charge is?

A. Not specifically, no.

Q. So at the time you designed these rates you didn't know the purpose of the rate stabilization charge, the POLR charge, that you were basing it upon; is that correct?

A. No, I don't believe that was -- that was necessary. I guess the reason I used that charge is because customers were currently paying those rates and to maintain rate structure and to factor in the ratemaking principles of stable and predictable rates, I used that rate structure as one of the factors that went into designing the new SSR.

Q. I didn't ask you whether you used the rate structure or not. I asked you if you knew what the purpose of the charge was. Would you agree with me you didn't know the purpose of the charge at the time that you designed the rates for the service stability rider?

A. Again, I didn't see that that was necessary in designing a new SSR which was a different -- it is a different charge.

Q. Mr. Parke, I'm just asking you whether you knew the purpose of the RSC charge -- I've asked it three times now. Did you know the purpose of the RSC charge other than that it was a POLR charge at the time you designed the service stability rider charge?

A. Right, and I believe I answered that,

that I didn't, and I didn't see that that was necessary in designing a new SSR charge.

Q. At the time that you designed the SSR charge, would you agree with me that you did not know what costs are typically recovered in rates through a customer charge?

A. Generally speaking, there are items that aren't easily identifiable as energy or demand.

Q. And, again, my question was: At the time that you designed the rate did you know what kinds of costs are typically included in a customer charge?

A. Generally I think I did.

Q. Now, Mr. Parke, the reason you give for having a customer charge is that all customers cause the need for financial viability; is that correct?

A. Correct, all customers do cause the need for financial viability.

Q. Would you agree with me that all customers that use electricity cause a need for generation or purchased power, but even though that's the case we don't put cost of generating electricity or purchased power itself into a customer charge?

A. I believe what I'm saying in my testimony is that all customers cause the need for financial viability and financial viability isn't something that can be determined through a cost-of-service study, therefore, I performed the rate design on a practical method of stabilizing the rates.

Q. Can you answer my question?

A. Can you repeat the question?

Q. Yes. Would you agree with me that all customers that use electricity cause a need for generation or purchased power but we don't put the cost of generating electricity or purchased power itself in a customer charge?

A. Yes, I would agree that generation is different from financial viability.

Q. What I'm asking you is we don't put the cost of generation into a customer charge.

A. Correct. Because it's -- it's different.

Q. And -- would you agree with me that on DP&L's system most of the load that is switched would be load associated with large commercial and industrial customers?

A. Can you repeat that question?

Q. Would you agree with me that on DP&L's system most of the load that has switched would be load associated with large commercial and industrial customers?

A. I believe that to be generally true.

Q. So is it your view that small residential customers should pay the financial integrity costs imposed by large commercial and industrial customers who have switched?

A. No. I have designed a rate that is charged to all customers, I believe it's a fair balance among all of the tariff classes.

Q. Are you aware of any Ohio electric distribution utility that has a customer charge as part of a nonbypassable charge?

A. Can you repeat that question?

Q. Would you agree with me that there's no Ohio electric distribution utility that has a customer charge as part of a nonbypassable charge that's not included in base rates?

A. Can you define the term "base rates"?

Q. What is your understanding of what base rates are?

A. I believe there's base rates for generation and distribution and potentially some utilities might put transmission, but . . .

Q. Okay. Other than those base rates, are you aware of an Ohio electric distribution utility that has a customer charge as part of a nonbypassable charge?

A. Other than their base rates I'm not sure if they do or if they don't.

Q. Is the customer charge you're proposing in this case for all customer classes the same or does it vary by customer class?

A. It varies by customer class.

Q. And outside of Ohio are you aware of any nonbypassable charge that includes a customer charge component that is not part of distribution rates?

A. I'm not aware if there are or if there aren't. I didn't perform any research on that.

Q. Now, are you aware that the company has proposed in this case to phase out the maximum charge provision in certain secondary and primary tariffs?

A. Yes, I'm aware of that. I have that in my testimony.

Q. And you would agree with me that this is a subsidy to those customers.

A. It is a benefit to secondary and primary customers, that's true.

Q. And residential customers are one of the classes that subsidize that rate; is that correct?

A. For many of the rate components the rate is designed to recover a certain amount of revenue, therefore, other customers are paying the difference from what otherwise would be collected from the customers on the max charge provision.

Q. You'd agree with me that it is a subsidy; is that correct?

A. I would use the term "benefit."

Q. Would you agree with me that the maximum charge provision subsidized those customers who have poor load factors?

A. Yes. The max charge provision does provide a benefit to low-load factor customers, meaning they have a high demand and low energy use, and it works to cap their overall average cents per kilowatt-hour rate.

Q. Your use of the term "benefit" is equivalent to the term "subsidy" in your mind; is that correct?

A. It's basically the same.

Q. So you'd agree with me that the maximum charge is a tariff subsidy for a small group of customers in the secondary and primary tariffs.

A. Right. And I think I just stated that I would agree to that but use the term "benefit."

Q. And the amount of the subsidy is currently approximately $5 million; would you agree?

A. Generally it's approximately $5 million, that's my understanding, on an annual basis.

Q. But you don't know the residential share of that subsidy?

A. I do not.

Q. Are you aware, Mr. Parke, of the residential share of the SSR charge under your proposed allocation? And I think that's shown in your Schedule 8 if I'm not mistaken.

MR. BERGER: Your Honor, if I may approach the Bench, I can provide you with a copy of Schedule 8 which is part of the company's filing in this case.

EXAMINER McKENNEY: You may approach.

MR. BERGER: Can we mark that as OCC Exhibit 11.

EXAMINER McKENNEY: It is so marked.

(EXHIBIT MARKED FOR IDENTIFICATION.)

MR. BERGER: This exhibit I don't think is confidential. If the company -- is that correct, Jeff?

MR. SHARKEY: It is not confidential, you're correct.

Q. (By Mr. Berger) Mr. Parke, are you aware of the percentage allocation to the residential class on this schedule?

A. No, I'm not familiar with the percentage.

Q. Would you, either can you calculate it here or -- of the service stability rider is what I'm talking about, adding up the line that has the residential heating and the line that has the residential nonheating, residential and residential heating, and then dividing those by the 137.5 at the bottom, would you agree that that equals approximately 48.4 percent?

A. It appears to, correct.

Q. Okay. And do you know what the allocation percentage is of the current rate stabilization charge to the residential class?

A. No, I'm not sure what that is.

MR. BERGER: Just one minute, your Honor.

EXAMINER McKENNEY: Take your time.

MR. BERGER: Your Honor, can we have marked as OCC Exhibit 12 the company's response to data request No. 1.2, this was sponsored by Ms. Seger-Lawson but I think it relates to rate design. And if I may approach the Bench.

EXAMINER McKENNEY: Sure. This will be marked OCC 12.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. Now, Mr. Parke, this response to data request No. 1.2, this refers to the ESSC charge. Is that the same as the rate stabilization charge or is that something different? This was from the MRO proceeding.

Was this the -- was this the projected allocation in the MRO proceeding with respect to the proposed charge in that case?

EXAMINER PRICE: I think you need to establish that the witness has some understanding of what this document is before you start asking him questions about it.

MR. BERGER: Okay. Thank you, your Honor.

Q. Have you seen this response before, Mr. Parke?

A. I don't recall that I have.

Q. Okay. Are you familiar at all with the proposed allocation or the proposed rate design in the MRO proceeding before it was withdrawn?

A. Generally. I wasn't the witness on there for the ESSC.

Q. Are you aware of whether the proposed rate design from the MRO proceeding was a rate design that you also utilized?

A. Could you repeat that?

Q. Did you rely on the rate design at all from the MRO proceeding?

A. Not exactly. My rate design was from the RSC, was one of the factors that went into it.

MR. BERGER: Can we mark, your Honor, as Exhibit OCC No. 13 the company's response to interrogatory 330. If I may approach the Bench.

EXAMINER McKENNEY: Approach. It will be marked OCC 13.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. Mr. Parke, does this have the current allocation of revenues or the current recovery of revenues by class for the rate stabilization charge from 2008 through 2011?

A. That appears to be what it is, yes.

Q. Are you familiar with this response?

A. Generally. I did not draft it, but I believe it to be accurate.

Q. Would you agree with me that if you look at this response, the approximate allocation to the residential class during that timeframe was approximately 41 percent?

A. That generally appears to be true.

Q. So there's a -- would you agree that there's a substantial increase in the allocation of the -- with respect to the service stability rider that you've proposed versus the existing rate stabilization charge?

A. I would agree that there is an increase but also point out that it is being offset by the benefits of the competitive bid process.

Q. Did you perform an analysis of that offset?

A. So the analysis I performed in the rate design was within regard to the typical bills.

Q. Did you present that analysis in this proceeding?

A. I believe the typical bills were filed in the case, Schedule 10.

Q. So we can refer to those.

A. Sure.

Q. Okay. And are you saying that the reduction in rates to the residential class reflected in Schedule 10, the overall reduction is more or less than for other classes? If you know.

A. I guess I'm not sure I know in detail. I mean, generally I understand that certain classes of customers have shopped and aren't paying the standard offer rates and the majority of the residential class is.

MR. BERGER: Can I just have a minute, your Honor?

EXAMINER McKENNEY: You may.

MR. BERGER: Thank you.

Q. Mr. Parke, you address the rate design of the fuel rider in your testimony; is that correct?

A. Yes, there were a couple of modifications to the fuel rider that were proposed.

Q. And you've provided documents or discovery responses with respect to the fuel rider; is that correct?

A. There probably were some, yes.

MR. BERGER: Your Honor, I'd like to go to the confidential record here because this document I want to distribute is a confidential document and if we can mark this as OCC Exhibit 14.

EXAMINER McKENNEY: Move to the confidential portion of the transcript. I don't think there's anyone present in the room, there shouldn't be. So, Mr. Berger, you may continue.

(Confidential portion excerpted.)

(Open record.)

EXAMINER McKENNEY: Mr. Berger, you may continue.

Q. (By Mr. Berger) So when you -- when you received the information that the number was going to be 137.5 per year rather than the original I think 120 million, did you do anything to change your proposed rate design? Or did you just float through the rate design that you had originally proposed?

A. There was a small change. I guess I had to change the rates to get them to equate to 137.5.

Q. Did you increase all the rates proportionately for the SSR?

A. I did not.

Q. Which rates did you increase?
A. I increased the energy and demand rates.
Q. Thank you. And you increased them proportionately for all customer classes?
A. Yes, I did.
MR. BERGER: Thank you, Mr. Parke.
That's all I have, your Honor.
EXAMINER McKENNEY: Are there any other intervenors that have questions for Mr. Parke?
MR. BOEHM: I think Ms. Bojko, who ran out, has some questions, your Honor.
EXAMINER McKENNEY: I will remember to ask Ms. Bojko when she returns.
Does anyone else have questions, first, before we wait for Ms. Bojko? Mr. Williams?
Let's go off the record at this time, we'll wait for Ms. Bojko.
(Recess taken.)
EXAMINER McKENNEY: Let's go back on the record at this time.
Ms. Bojko.
MS. BOJKO: Thank you, your Honor.
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CROSS-EXAMINATION

By Ms. Bojko:

Q. Mr. Parke, my name's Kim Bojko and I represent SolarVision, LLC in this proceeding. I'd like to talk to you a few minutes about the AER rider starting on page 3 of your testimony.

A. Okay.

Q. Do I need a mic?

A. Yeah, I can barely hear you.

Q. Is that better?

A. Yes.

Q. Are you on page 3 of your testimony, sir?

A. Yes.

Q. Could you tell me what the AER actually includes and what kind of costs are passed through this rider?

A. So this rider is the alternative energy rider, it includes the cost of compliance with the Ohio Revised Code requiring renewable energy given that certain percentages for certain years -- it's a 3 percent average.

So it includes costs of compliance such as RECs, it would also include some research and development and costs included to buy RECs.

Q. I'm sorry. Did you mean to state that the 3 percent average is the renewable portfolio standard?

A. No, there's a three-year average in the Revised Code that determines the amount of the requirement.

Q. Three-year rolling average of what? Maybe you can explain more.

A. It's of sales.

Q. So it's based on load. Kilowatt-hour load sales, the renewable portfolio standards is based on the sales or the load.

A. Yes, that's my understanding.

Q. So if the load -- is it your understanding then if the load increases, then the level of RPS would increase?

A. The amount needed to comply with the RPS would increase.

Q. Correct.

A. Right.

Q. That's your understanding.

A. Yes.

Q. Do you know if there was a -- and then also, I'm sorry, in your testimony you reference a 3 percent cost cap on line 15 on page 3; is that correct?

A. Correct.
Q. And do you know if there's been a methodology determined in this statute that talks about the 3 percent or sets a methodology for that 3 percent cap?
A. I'm not aware of the methodology that -- I'm not aware of any methodology that has been developed.
Q. Are you aware if there's any contained in the statutory provision?
A. I guess the methodology for determining the 3 percent cost cap?
Q. That's what I'm asking, that's correct.
A. Yeah, I'm not aware that the methodology to determine the 3 percent cost cap.
Q. Is in the law?
A. Right. I don't believe that it has been developed, no.
Q. Okay. And so then is it also your understanding it hasn't been developed by the Commission through either orders or Commission rules?
A. I don't believe that it has.
Q. And, again, going back to line 15 -- you're not an attorney, right, Mr. Parke?
A. I am not.

Q. So you're not attempting on lines 15 and 16 to interpret the statutory provision of the 3 percent cost cap in your testimony, are you?
A. No. I'm not a lawyer and I'm not testifying to a legal opinion on the law, no.
Q. On lines 18 and 19 you talk about an estimated competitive bid auction result is used as the means of otherwise acquiring electricity. Do you see that?
A. Yes.
Q. Is that what you based your calculation of the 3 percent cap on?
A. Yes.
Q. Does your calculation include the load associated with the standard service offer portion of the ESP application?
A. Can you repeat that question?
MS. BOJKO: Could you please repeat the question?
EXAMINER McKENNEY: Can we have that.
(Record read.)
A. I guess indirectly it does, but I didn't specifically consider that.
Q. Let's take a step back. Are you aware that Dayton's application includes a blending

percentage with regard to the load that's offered under the ESP?

A. It does.

Q. And when you did your calculation of the 3 percent cap, did you base that on the otherwise acquiring electricity that's on line 19 or did you also include the standard service offer portion of that blend?

A. Perhaps I can clarify. The AER is not part of the blend. It will be charged throughout the blend and after the company's hundred percent competitive bid process so that rate is going to apply to standard offer customers and not be blended.

Q. I understand that, Mr. Parke. That's not my question. When you calculated the 3 percent to come up with your fixed rate of .0012813, did you calculate the 3 percent based on the auction load only or did you include both the auction load and the standard service offer load?

A. It was based on the auction price.

Q. Okay. And the auction price is determined on that load that is bid into the auction?

A. The auction price is determined on an amount of load.

Q. And so that was based on a price on a given amount of load that is bid out through the auction; is that right?

A. That's true.

Q. So it doesn't include the price of electricity that is supplied under the standard service offer portion of the blend.

A. No, it does not.

Q. And if it did -- do you know whether the price of the standard service offer under the ESP is going to be higher than the anticipated load price or auction price?

A. I believe in the filing the noncompetitive bid portion on the rate is higher.

Q. And if we were to add the standard service offer load to the competitive bid auction load since the 3 percent is based on the total load, as you just previously stated, wouldn't the 3 percent fixed price that you have listed in your testimony increase?

THE WITNESS: Can I have that question reread?

(Record read.)

A. In that hypothetical I believe that to be true, but what I was proposing here is that the auction price is a means of acquiring electricity so, therefore, that rate could be used.

Q. So you didn't take the amount of load into consideration in your analysis?

A. I did not.

Q. You purely took the price.

A. Right.

Q. Of the estimated auction price.

A. Yes.

Q. So if the auction is not as estimated, if the auction price increases, then your corresponding 3 percent cap would increase as well.

A. As I stated earlier, I'm not a lawyer, but my understanding of the law was that it was to be an expected means of otherwise acquiring electricity. So, therefore, I used the expected result of the competitive bid as an expected result.

Q. You used the price.

A. The price, correct.

Q. And you used an estimated forecasted price.

A. Yes.

Q. Over what period of time did you estimate?

A. I believe it was the first auction.

Q. So you used an estimated price of one auction only to arrive at your capped number.

A. Yes. I used the auction price as the means of otherwise acquiring electricity.

Q. And you did not, just to be clear since you said "otherwise," you did not include the price of the standard service offer load or per kilowatt-hour, if you want to just focus on the price instead of load, you did not take a blended price to make your estimation.

A. I did not. I viewed it as one of the means of acquiring electricity could be through a competitive bid process.

Q. And another means of acquiring electricity could be through a standard service offer, correct?

A. I guess I'm not sure --

Q. Well, isn't the application, Mr. Parke, in part based on standard service offer to customers and in part based on competitive bid auction to customers?

MR. SHARKEY: Let me object, your Honor, I don't believe Mr. Parke had completed his prior answer.

EXAMINER McKENNEY: The objection's sustained. There was a question asked before that.

MS. BOJKO: I'm sorry, I thought he was done. He paused.

EXAMINER McKENNEY: I don't believe the witness was finished answering the question. The objection's sustained.

Do we need to have the question read from the record?

MR. SHARKEY: Can we have the prior question reread to him so that he can answer the question.

(Record read.)

MS. BOJKO: Your Honor, it was a yes or no question; correct. "I'm not sure," I assumed he was finished answering the question.

EXAMINER McKENNEY: Is there a question following that?

(Record read.)

EXAMINER McKENNEY: We'll allow the witness to continue, then.

THE WITNESS: Can I have that question reread one more time.

(Record read.)

MR. SHARKEY: I believe, your Honor, it was the next question.

(Record read.)

MS. BOJKO: I object, he answered the question and I'm going to move to strike anything after a yes or no response to "is that correct."

EXAMINER McKENNEY: Mr. Sharkey, I believe "I don't know" is a complete answer in this case.

MR. SHARKEY: Okay, your Honors, thank you.

EXAMINER McKENNEY: Can we have the last and final question that was asked reread to the witness, please.

(Record read.)

A. This application, the ESP application, does include both standard offer current rates and the competitive bid process, yes.

Q. (By Ms. Bojko) And just so I understand your proposal, the figure that's established today in this case that's based on the one estimated auction will be the cap going forward regardless as to whether the RPS requirements increase each year -- I'll break up the question.

It will be stabilized as to whether any RPS requirements are increased; is that correct?

A. The company's proposal is that the rate of the AER be capped, correct.

EXAMINER PRICE: Are you saying that this number, .0012813, is the cap irrespective of what the actual results in the CBP are, this is if -- this is your calculation so this is it for four years?

THE WITNESS: That is the company's proposal, yes.

EXAMINER PRICE: And I'm not asking if that's the company's proposal. I'm asking if that's your testimony.

THE WITNESS: Yes, that's the testimony.

EXAMINER PRICE: Isn't it true that you in your paraphrasing of the statute have left out half of the words that are relevant to this question?

THE WITNESS: I believe the statute is much longer, I don't think I recited the whole thing.

EXAMINER PRICE: Well, I'm not even talking about the statute, I'm talking about the phrase. Isn't it true that the statute actually says -- now I've lost it on my phone.

Isn't it true that the statute actually says "To the extent that it's reasonably expected cost of" -- wait, I'm sorry -- "exceeds its reasonably expected cost of otherwise producing or acquiring requisite electricity by 3 percent more," it's not just of otherwise producing or acquiring.

It says reasonably expected cost of otherwise producing or acquiring the requisite electricity, not electricity in general.

Isn't that what the statute actually says? Understanding that you're not an attorney, I'm not asking you for legal advice.

THE WITNESS: Yeah, I guess I'm not sure. I mean, my understanding was that the forecast was reasonable because it says "expected cost." So that's the reason why we used a forecast.

EXAMINER PRICE: But the --

THE WITNESS: And then --

EXAMINER PRICE: I'm sorry, go ahead.

THE WITNESS: I guess on the second part, producing or acquiring, I'm not certain that our standard offer rates are the exact production cost of electricity, therefore, I used the acquiring electricity through a CBP process.

EXAMINER PRICE: But it's also the requisite electricity, for the first year the CBP is only going to provide 10 percent of the cost, correct?

THE WITNESS: It is.

EXAMINER PRICE: Ninety percent of the requisite electricity is going to be provided by --

through the legacy blended rate.

THE WITNESS: Right. I guess some of the difficulty I have is that you can comply with this law through RECs which isn't purchasing energy, and the company was looking for a way to have some stability on this issue. So I was asked to come up with a method for providing some certainty.

EXAMINER PRICE: Thank you, Ms. Bojko. Sorry for the interruption.

MS. BOJKO: Took the words out of my mouth. Shortened my questions. You got to the end faster than I expected.

Q. (By Ms. Bojko) But you used the word "purchasing." In the quoted statutory section that Mr. Price just read and, again, we've already determined you're not an attorney and you're not offering a legal interpretation of the statute, but I think it's helpful to understand the mentality or the thinking behind creating the methodology, so that's why -- you just used the word "purchasing" and I don't see the word "purchasing" in the statute.

A. I believe the word in the statute is "acquiring."

Q. Or "producing."

A. Or "producing," correct.

Q. And under the company's ESP, the standard service offer is producing -- the company is going to be producing electricity to serve the standard service offer; is that right?

A. They do. I guess the difficulty I had was that I wasn't sure that the standard service offer rates were exactly production cost.

Q. Does it talk anything about, in the statutes, production costs?

A. It says "the cost of producing."

Q. Or acquiring.

A. Correct.

Q. It doesn't talk about the cost to actually -- strike that.

And irrespective of, we talked about already irrespective of the increase in renewable -- well, first of all, let's back up and lay some foundation.

Is it your understanding that the renewable portfolio standard requirements increase every year?

A. Yes, I believe they do.

Q. So irrespective of that renewable portfolio standard increase every year, the flat rate of .0012813 would be stable and remain the cap.

A. That's what the proposal is, yes.

Q. And irrespective of the company's blend on a per-year basis, the cap remains stable; is that correct?

A. That's correct.

Q. And irrespective of the load in DP&L's service territory, the rate remains stable.

A. That's correct.

Q. And irrespective of whether the methodology is established by the Commission or has been established, the proposal is that that rate would remain stable.

A. When we filed this, there wasn't and to my knowledge there still is not a methodology that is accepted.

Q. And assuming going forward that there is a methodology, your proposal is that this is a fixed rate, it doesn't alter or change based on any of the factors we've discussed so far.

A. The proposal is that it's a fixed rate but I guess if there were Commission rules that were adopted, we would need to comply with those.

Q. But the proposal does not have that qualification in it, does it?

A. It does not because they --

Q. And neither does your testimony.
A. Because that does not exist right now.
Q. Thank you.
And when this rate is hit, what happens?
A. I believe that the company's requirement would no longer increase.
Q. Can you be a little more specific, please. The company's requirement for what?
A. For the renewable requirements would be capped as in it does not continue to increase.
Q. Meaning that the company does not further have to comply with the law of the renewable portfolio standard increase.
A. I believe the company will still comply up to that rate, but not beyond because it would exceed the 3 percent.
Q. And this calculation was based on the estimated, just to be sure, of the auction that is proposed to take place in what year? What month and year?
A. I believe the filing, the auction was to take place prior to January 2013.
Q. And it's your understanding that there was going to be subsequent -- three other auctions for subsequent periods?

A. Yes.

Q. And those estimated prices were not considered or forecasted prices were not considered in your calculation.

A. They were not.

MS. BOJKO: Thank you. No further questions, your Honor.

EXAMINER McKENNEY: Ms. Bojko.

Any other intervenors, questions for the witness?

(No response.)

EXAMINER McKENNEY: Does staff have questions for the witness?

MR. McNAMEE: Sadly, I do.

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CROSS-EXAMINATION

By Mr. McNamee:

Q. Good evening, Mr. Parke.

A. Good evening.

Q. Let's look at this maximum charge provision, I believe you had some questions about that previously.

A. Yes.

Q. Company's proposing to eliminate the maximum charge provision, right?

A. Yes.

Q. Okay. That would have the effect of raising some customers' bills, would it not?

A. It could, some customers, yes.

Q. Well, it must, mustn't it?

A. Yes, I believe it will.

Q. You say this in your testimony, 8 of 17, you indicate that this applies to customers that have very poor load factors. What do you mean by "very poor load factors"?

A. I believe the max charge provision typically kicks in around 12 percent load factor.

Q. Okay. And what do you mean by "12 percent load factor"?

A. Load factor is a ratio between the amount of energy divided by the demand times the hours in the period.

Q. Okay. Good. What sort of customers have such a poor load factor?

A. There would be a wide variety of customers. Typically they would have a process that would require a high amount of usage in a short period of time and then relatively low demand for the remaining of the billing period. So they're setting a high peak and then not consuming as much energy through the rest of the billing period.

Q. These would all be businesses, wouldn't they?

A. Generally, yeah.

Q. Okay. And what kind of businesses do you think would fall into that class, not specific names, but types of business?

A. There really could be lots of different ones. It is the secondary and primary tariffs so I wouldn't even be able to classify it as being all small businesses. Customers on the primary tariff are typically a little bit larger. But it could be anything from, you know, a bakery or a farm or a seasonal recreation facility or something like that.

Q. How many customers are we talking about that would be affected by the elimination of this, I've forgotten the name, maximum charge provision?

A. My recollection there is approximately 3,000 a month.

Q. 3,000. Are they the same from month to month?

A. No, they are not. Some customers would be billed under the max charge provision for only one month out of the year and some may be billed more frequently than that. There may be customers that are billed all 12 months but generally I think it's spread out.

EXAMINER PRICE: Mr. Parke, the poor load factors, does this take into account people whose peak usage would be in off-peak hours so if somebody's peak usage is during the evening, could they still be -- are they still counted as one of your customers with a very poor load factor, or is it only on-peak demand that gets counted?

THE WITNESS: I believe it's both.

EXAMINER PRICE: It's both. Churches could have very poor load factors, and schools.

THE WITNESS: They could. The off-peak mechanism --

EXAMINER PRICE: Have you done any calculation to determine whether any churches or schools would be affected by the withdrawal of the maximum charge provision?

THE WITNESS: I would expect that there are some that would, yes.

Q. (By Mr. McNamee) Okay. How long has this sort of provision been in in the company's tariffs?

A. It's been in there for a very long time. It's been at least since the 1991 rate case and it was unbundled generally in the '99-2000 timeframe.

Q. So it's been around for at least 22 years.

A. Probably at least, yes.

Q. Can you give me any indication of how large of an increase customers affected by the removal of this provision would see as a result of the removal of that provision?

A. Yeah, I'm not sure that I can because there's customers of all different sizes and depending on how many months out of the year they are actually billed under this provision, there will be some customers that if they're only billed under this provision for a month or two may not really see any impact to it. But customers who are billed under max charge most months out of the year could see a larger impact.

Q. Okay. So we don't know how many people and we don't know what affect we'll be seeing from the removal of this provision; is that right?

A. Right. I guess, as I stated in my testimony, the max charge provision was contained in our generation tariff which is being phased out and replaced with a competitive bid tariff and I didn't see the max charge provision was reflective of markets or market pricing, therefore -- that and that the max charge provision is very complex and many customers are confused by it, and to simplify it and to help customers make better decisions about customer choice and shopping, we decided to phase it out.

EXAMINER PRICE: Does the company currently recover revenue foregone because of the maximum charge provision from other customers?

THE WITNESS: In some of the components it does, in others it does not.

EXAMINER PRICE: So when you phase out, then, the maximum charge provision, you'll cease recovering that foregone revenue from some customers, right? Some of the revenue you'll cease collecting; what will happen to the remaining revenue?

THE WITNESS: I'm not sure I understand.

EXAMINER PRICE: You said some of the components of the maximum charge provision are recovered from other customers.

THE WITNESS: Right, there are tariff riders that contain a max charge provision, yeah.

EXAMINER PRICE: So there is going to be some percentage that's not currently recovered from other customers and when you phase out the maximum charge provision, there's going to be additional revenue. Where does that additional revenue go?

THE WITNESS: Right, I guess it goes to the company, and I guess I would say it would have the effect of those customers that are now getting the benefit of the max charge paying their fair share.

MR. McNAMEE: You've taken the last of my questions.

EXAMINER PRICE: I'm sorry.

MR. McNAMEE: It's not a problem.

EXAMINER PRICE: It was such an interesting topic.

EXAMINER McKENNEY: Redirect, Mr. Sharkey?

EXAMINER PRICE: Before you do redirect I'd like to cover my handful of questions.

EXAMINER McKENNEY: Oh, I thought you -- apologize.

EXAMINER PRICE: No, I'm not done yet, but that way if I mess something up, Mr. Sharkey can correct me.

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EXAMINATION

By Examiner Price:

Q. You do have distribution tariffs and

generation tariffs and transmission tariffs; is that right?

A. Correct.

Q. In fact, we famously lost a Supreme Court case on the sole issue of placing the predecessor for the RSR in the wrong tariff.

Where is the rate stability charge tariff, the service stability rider, going to go, in the distribution tariffs, the generation tariffs, or the transmission tariffs?

A. I believe we propose that as a generation tariff.

Q. You're putting in the generation tariff but you represent that it is not a generation charge; is that correct?

A. My understanding was that it was -- for financial integrity that would cover the utility as a whole for all business units.

Q. So it's not a generation charge.

A. My understanding when I developed it was that it was for the utility to operate.

Q. So the service stability rider is not related to transmission. It's not related to distribution. Follow along and say yes.

A. Yes.

Q. It's not related to transmission, is it?
A. I guess I'm not sure I'm supporting an opinion on that but --
Q. Well, you said it's solely related to financial integrity of the company. So --
A. The company, DP&L the utility that owns transmission, distribution, and generation.
Q. It has nothing to do with providing standard service offer service, does it?
A. I don't know that it does or doesn't.
Q. But in your opinion it's solely a financial integrity --
A. That's the best that I can testify to. My understanding was that it was a financial integrity charge and I believe there are other witnesses that testified to it.
EXAMINER PRICE: Okay. Fair enough. Fair enough.
Thank you, Mr. Sharkey.
MR. SHARKEY: Your Honor, no questions.
EXAMINER McKENNEY: The witness, Mr. Parke, you're dismissed.
THE WITNESS: Thanks.
EXAMINER McKENNEY: I mean excused.
Mr. Sharkey. Do you seek the --

MR. SHARKEY: Oh, thank you. Yeah, we'd like to have the admission of DP&L Exhibit 7, your Honor.

EXAMINER McKENNEY: Any objection?

(No response.)

EXAMINER McKENNEY: It will be admitted.

(EXHIBIT ADMITTED INTO EVIDENCE.)

EXAMINER McKENNEY: OCC?

MR. BERGER: We would move the admission of OCC Exhibits 11, 12, 13, and 14.

EXAMINER McKENNEY: Any objection?

MR. SHARKEY: No objection, your Honor.

EXAMINER McKENNEY: OCC, in regards to OCC 11, 13, and 14, they will be admitted.

(EXHIBITS ADMITTED INTO EVIDENCE.)

EXAMINER McKENNEY: However, in regards to OCC 12, we find that there was a lack of foundation for that document and it will not be admitted into the record.

MR. BERGER: Thank you, your Honor.

EXAMINER McKENNEY: At this time we will go off the record.

(Hearing adjourned at 7:18 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, March 20, 2013, and carefully compared with my original stenographic notes.

____
Maria DiPaolo Jones, Registered
Diplomate Reporter and CRR and
Notary Public in and for the
State of Ohio.

My commission expires June 19, 2016.

(71892-MDJ)

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