BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE DAYTON POWER AND LIGHT COMPANY'S INITIAL POST-HEARING BRIEF PUBLIC VERSION

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<u>INITIAL POST-HEARING BRIEF</u>

I. INTRODUCTION AND SUMMARY

A. SUMMARY OF APPLICATION

Due to significant changes in market conditions, The Dayton Power and Light Company's financial integrity and its ability to provide safe and reliable service to its customers are in jeopardy. The Electric Security Plan ("ESP") proposed by DP&L in this case balances DP&L's need to preserve its financial integrity with the interests of its customers and other parties. DP&L Ex. 8, p. 3 (Herrington).

DP&L's ESP includes the following principal components:

1. A five-year ESP term.
2. The implementation of competitive bidding in DP&L's service territory through a blending of DP&L's existing rates and rates set through an auction, with 100% competitive bidding starting on June 1, 2016.
3. A $137.5 million annual Service Stability Rider ("SSR"), which is intended to allow DP&L to maintain its financial integrity and provide safe and reliable service.
4. A Switching Tracker ("ST"), which is also intended to allow DP&L to maintain its financial integrity and provide safe and reliable service.
5. A commitment by DP&L to file an application this year to separate its generation assets; DP&L expects to seek approval to transfer those assets by December 31, 2017.

The Commission should conclude that DP&L's ESP strikes an appropriate balance among the parties' interests because it will allow DP&L to maintain its financial integrity and continue to provide safe and reliable service, while providing numerous customer benefits, including competitive bidding on a faster timeline than the timeline authorized under a Market Rate Offer.

B. SUMMARY OF DP&L'S FINANCIAL INTEGRITY NEEDS

DP&L's declining return on equity (and the corresponding threats to DP&L's financial integrity and ability to provide stable service) is being driven principally by three factors: (1) increased switching; (2) declining wholesale prices; and (3) declining capacity prices. DP&L Ex. 1A, p. 13 & CLJ-1 (Jackson); Tr. 135-36 (Jackson). As demonstrated in more detail below, without the SSR and ST, DP&L is projected to [redacted] during each year of the ESP term. DP&L Ex. 4A, WJC-5 (Chambers). DP&L would not be able to provide safe and reliable distribution, transmission or generation service without those charges.

Even with the SSR and ST, DP&L is projected to earn a return on equity of only [redacted]% (under an adjusted capital structure), which is at the [redacted] a reasonable ROE range. DP&L Ex. 4A, WJC-2 (Chambers); DP&L Ex. 14A, p. 25 (Malinak Rebuttal). Staff agreed with DP&L on many issues related to the SSR. For example, Staff witness Choueiki testified that Staff agreed that an SSR should be established:

> "Q. Does the Staff agree with the establishment of an SSR?
>
> A. Yes. Staff also notes that the Commission has granted similar charges to other utilities based on R.C. 4928.143(B)(2)(d)."

Staff Ex. 10A, p. 11 (footnote omitted).

The Commission should approve DP&L's ESP, including the SSR and ST, so that DP&L can maintain its financial integrity and provide safe and reliable service.

C. THIS PROCEEDING

In its initial Application in this proceeding, DP&L asked the Commission to approve an MRO for DP&L. March 30, 2012 Application, p. 1. On April 27, 2012, the

Commission's Staff filed Comments in which Staff stated (p. 26) that DP&L "should consider" filing an ESP. DP&L thereafter withdrew its MRO Application, filed an ESP Application in this docket on October 5, 2012, and filed an Amended ESP Application on December 12, 2012.

DP&L's requests before this Commission, and the principal testimony supporting those requests, are:

1. Approval of five-year ESP term. DP&L Ex. 16A, pp. 5-6 (Jackson Rebuttal); DP&L Ex. 14A, pp. 28-29 (Malinak Rebuttal)

2. Approval of DP&L's Competitive Bidding Plan and Master Service Agreement. DP&L Ex. 13 (Lee)

3. Approval of DP&L's Rate Blending Plan. DP&L Ex. 9, pp. 6-12 (Seger-Lawson)

4. Approval of DP&L's plan to implement competitive bidding rates. DP&L Ex. 10, pp. 3-7 (Rabb, adopted by Seger-Lawson)

5. Approval of a Competitive Bid True-Up Rider. DP&L Ex. 7, pp. 5-6 (Parke)

6. Approval of a $137.5 million SSR. DP&L Ex. 4A, pp. 43-45 (Chambers); DP&L Ex. 7, pp. 6-8 (Parke) (rate design); DP&L Ex. 14A, pp. 18-29 (Malinak Rebuttal); DP&L Ex. 16A, pp. 6-7 (Jackson Rebuttal); DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal)

7. Approval of an ST. DP&L Ex. 1A, pp. 11-13 (Jackson); DP&L Ex. 4A, pp. 40-43 (Chambers); DP&L Ex. 9, pp. 16-17 (Seger-Lawson); DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal)

8. Approval of a plan to split DP&L's bypassable Transmission Cost Recovery Rider ("TCRR") into non-bypassable ("TCRR-N") and bypassable ("TCRR-B") riders. DP&L Ex. 11, pp. 3-11 (Hale); DP&L Ex. 9, pp. 5-6 (Seger-Lawson); DP&L Ex. 12, pp. 22-23 (Seger-Lawson Rebuttal)

9. Approval of DP&L's plan to add the current Environmental Investment Rider ("EIR") into base generation rates. DP&L Ex. 9, p. 10 (Seger-Lawson)

10. Approval of a Reconciliation Rider. DP&L Ex. 10, pp. 8-13 (Rabb); DP&L Ex. 12, pp. 5-11 (Seger-Lawson Rebuttal)

11. Approval of DP&L's plan to alter how the Reliability Pricing Model ("RPM") rider is reconciled. DP&L Ex. 11, pp. 12-14 (Hale)

12. Approval of a methodology to establish a fuel rider. DP&L Ex. 3, pp. 3-6 (Marrinan, adopted by Hoekstra)

13. Approval of DP&L's plan to alter how the fuel rider is reconciled. DP&L Ex. 7, pp. 4-5 (Parke)

14. Approval of an Alternative Energy Rider – Nonbypassable. DP&L Ex. 9, pp. 4-5, 15-16 (Seger-Lawson); DP&L Ex. 12, pp. 11-13 (Seger-Lawson Rebuttal)

15. Approval of a plan to establish a fixed-rate cap on DP&L's Alternative Energy Resource requirements. DP&L Ex. 7, pp. 3-4 (Parke)

16. Approval of DP&L's plan to phase out DP&L's maximum charge provisions. DP&L Ex. 7, pp. 8-10 (Parke)

17. Approval of DP&L's plan to implement certain competitive enhancements and to recover those costs from customers. DP&L Ex. 9, pp. 13-15 (Seger-Lawson); DP&L Ex. 12, pp. 13-17 (Seger-Lawson Rebuttal)

18. Approval of DP&L's plan to eliminate Rate B under DP&L's Residential Heating Tariff. DP&L Ex. 7, p. 8 (Parke)

19. Approval of DP&L's Third Amended Corporate Separation Plan. DP&L Ex. 6, pp. 2-3 (Rice)

20. Approval of DP&L's Tariffs. DP&L Ex. 9, pp. 24-26 (Seger-Lawson)

21. Approval of the Gross Revenue Conversion Factor. DP&L Ex. 10, pp. 13-14 (Rabb)

22. Approval of DP&L's Cost of Debt calculations. DP&L Ex. 1A, pp. 10-11 (Jackson)

23. A finding that DP&L's ESP is more favorable in the aggregate than a Market Rate Offer. DP&L Ex. 5, pp. 3-16 (Malinak); DP&L Ex. 14A, pp. 4-14 (Malinak Rebuttal)

24. A finding that a storm rider be set at $1.1 million per year. DP&L Ex.12, pp. 17-21 (Seger-Lawson Rebuttal)

25. If the Commission rejects the ST, then it should grant DP&L authority to file an application to adjust the SSR to account for a significant reduction in non-shopping load, as the Commission did in its recent order in the AEP ESP case. August 8, 2012 Opinion & Order, pp. 37-38 (Case No. 11-346-EL-SSO)

As demonstrated below, DP&L's ESP includes numerous consumer benefits, including:

1. The ESP will permit DP&L to continue to provide safe and reliable service.
2. The ESP provides for competitive bidding at a faster rate than the rate available under an MRO.
3. A commitment by DP&L to file this year an application to transfer its generation assets.
4. A plan to implement certain competitive enhancements.

As also demonstrated below, the Commission should approve DP&L's Application because it strikes a reasonable balance among the interests of DP&L, its customers and non-customer intervenors.

D. PRIOR DP&L RATE PLAN PROCEEDINGS

Before this proceeding, DP&L has had the following rate-plan cases:

1. 1999 ETP Case: DP&L's first rate-plan case was Case No. 99-1687-EL-ETP. That case established a three-year market development period ("MDP") for DP&L and allowed DP&L to recover certain transition costs. September 21, 2000 Opinion & Order, pp. 28-30.

2. 2002 MDP Case: DP&L's second rate-plan case was Case No. 02-2779-EL-ATA. That case extended DP&L's MDP to five years, created a three-year Rate Stabilization Period ("RSP") through December 31, 2008, and authorized DP&L to apply for a Rate Stabilization Surcharge ("RSS") during the RSP. September 2, 2003 Opinion & Order, pp. 19, 25, 27-28.

3. 2005 RSP Case: DP&L's third rate-plan case was Case No. 05-276-EL-AIR. That case extended DP&L's RSP through December 31, 2010, and approved DP&L's RSS. December 28, 2005 Opinion & Order, p. 3.

4. 2008 ESP Case: DP&L's fourth (and most recent) rate-plan case was Case No. 08-1094-EL-SSO. That case created an ESP for DP&L and extended it through December 31, 2012. June 24, 2009 Opinion & Order, p. 4.

DP&L's ESP from its 2008 rate case was thus set to conclude on December 31, 2012, i.e., before this case would be decided. In this proceeding, the Commission ordered that DP&L's ESP continue until a subsequent order by this Commission. December 19, 2012 Entry, pp. 3-4.

II. DP&L'S FINANCIAL INTEGRITY SHOULD BE PRESERVED

The Supreme Court of Ohio has explained that a wide range of provisions is permissible under an ESP:

> "The [ESP] statute does not provide a detailed mechanism for establishing rates under an ESP. Plans may contain any number of provisions within a variety of categories so long as the plan is 'more favorable in the aggregate' than the expected results of a market-rate offer. R.C. 4928.143(C)(1). But the statute does contain some limits . . . ."

In re Application of Columbus S. Power Co. for Admin. of Significantly Excessive Earnings Test, 134 Ohio St. 3d 392, 2012 Ohio-5690, 938 N.E.2d 276, ¶ 4 (emphasis added). As demonstrated below, DP&L's ESP falls well within the few "limits" imposed by § 4928.143.

A. THE COMMISSION SHOULD APPROVE THE SSR AND ST

Pursuant to Ohio Rev. Code § 4928.143(B)(2)(d), DP&L seeks approval of an SSR and an ST, which would allow DP&L an opportunity to earn a projected ROE of [redacted]% (under an adjusted capital structure). It is important for the Commission to understand that DP&L does not believe that a [redacted]% ROE target is reasonable; as demonstrated below, a reasonable ROE target is [redacted]%. DP&L proposed the SSR and the ST as one step toward allowing DP&L an opportunity to earn a reasonable ROE. DP&L recognizes that it bears the responsibility of considering additional steps such as potential operation and maintenance expense reductions to contribute to DP&L's opportunity to earn a reasonable ROE during the ESP period.

As demonstrated below, the Commission should conclude that: (1) DP&L needs the five-year SSR and the ST to allow it to maintain its financial integrity and to provide safe and reliable service; and (2) the SSR and ST are lawful under Ohio Revised Code § 4928.143(B)(2)(d).

1. DP&L Needs the SSR and ST to Allow It to Maintain Its Financial Integrity Which Will Allow DP&L to Continue to Provide Safe and Reliable Service

Due to significant changes in market conditions, DP&L faces serious threats to its financial integrity and consequently, to its ability to provide safe and reliable service. DP&L Ex. 1A, CLJ-1 (Jackson); Tr. 2822-23 (Malinak). DP&L's declining return on equity (and the corresponding threats to DP&L's financial integrity and ability to provide safe and reliable service) is being driven principally by three factors: (1) increased switching; (2) declining wholesale prices; and (3) declining capacity prices. DP&L Ex. 1A, p. 13 & CLJ-1 (Jackson); Tr. 135-36 (Jackson).

Without the SSR and ST, DP&L would earn the following projected ROEs (under an adjusted capital structure) during the proposed ESP term:

Year	ROE
2013	[redacted]
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]

DP&L Ex. 4A, WJC-5 (Chambers).

The testimony of DP&L witness Chambers demonstrates that DP&L would not be able to maintain its financial integrity without the SSR and ST:

> [redacted]
>
> [redacted]
>
> [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

DP&L Ex. 4A, pp. 45-47 (emphasis added).

Dr. Chambers' testimony demonstrates that with the SSR and ST, DP&L would have an opportunity to earn the following projected ROEs during the ESP term:

Year	ROE
2013	[redacted]
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]

DP&L Ex. 4A, WJC-2 (Chambers). Those ROEs average [redacted]% DP&L Ex. 14A, p. 25 (Malinak Rebuttal).

The Commission should approve the SSR and ST because a [redacted]% ROE is at the [redacted] a reasonable ROE range. For example, in AEP's recent ESP case, the Commission stated that it would "establish a reasonable revenue target that would allow AEP-Ohio an opportunity to earn somewhere within the seven to 11 percent range." August 8, 2012 Opinion & Order, p. 33 (Case No. 11-346-EL-SSO) ("AEP Order"). The Commission further stated that "we find that a benchmark shall be set in the approximate middle of this range" (id.), which demonstrates that a 9% ROE target is reasonable. Further, the rebuttal testimony of DP&L witness Malinak shows that a reasonable ROE range is [redacted]% to [redacted]%, and he recommends using the midpoint of that range of [redacted]%. DP&L Ex. 14A, p. 19. DP&L's request for an SSR and ST would thus result in an ROE that is at the [redacted] a reasonable ROE range.

2. The SSR and ST Are Authorized by Ohio Revised Code § 4928.143(B)(2)(d)

A lawful charge under Ohio Rev. Code § 4928.143(B)(2)(d) must satisfy three criteria: (1) it must be a "[t]erm[], condition[], or charge[]"; (2) it must "relat[e]" to one of the items listed in that statute; and (3) it must "have the effect of stabilizing or providing certainty regarding retail electric service." As demonstrated below, the SSR and ST meet each of those criteria.

(1) "Term condition or charge": There is no dispute that the SSR and ST are terms, conditions or charges. DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal); Tr. 2053-54 (Chriss); Tr. 2600 (White).

(2) "Relating to": Under Ohio Rev. Code § 4928.143(B)(2)(d) the SSR and ST must be charges:

> "relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals . . . ."

The Commission recently held that AEP's Rate Stabilization Rider (which is very similar to DP&L's SSR) related to "default service" and thus satisfies the second criterion. January 30, 2013 Entry on Rehearing, p. 15 (Case No. 11-346-EL-SSO, et al.). The SSR and ST also relate to default service. DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal). The SSR and ST also relate to bypassability, since they are non-bypassable. Id. Accord: Tr. 2023 (Rose). The Commission therefore should conclude that the SSR and ST satisfy that criterion.

(3) "Stabilizing or providing certainty regarding retail electric service": In AEP's recent ESP proceeding, the Commission held that AEP's RSR satisfied the stabilizing or certainty criterion:

> "[W]e find that the RSR freezes any non-fuel generation rate increase that might not otherwise occur absent the RSR, allowing current customer rates to remain stable throughout the term of the modified ESP. While we understand that the non-bypassable components of the RSR will result in additional costs to customers,

> we believe any costs associated with the RSR are mitigated by the effect of stabilizing non-fuel generation rates, as well as the guarantee that, in less than three years, AEP-Ohio will establish its pricing based on energy and capacity auctions, which this Commission again maintains is extremely beneficial by providing customers with an opportunity to pay less for retail electric service than they may be paying today.
>
> Therefore, we find that the RSR provides certainty for retail electric service, as is consistent with Section 4928.143(B)(2)(d), Revised Code. Until May 31, 2015, AEP-Ohio's SSO rate, as a result of this RSR, will remain available for all customers, including those who are presently shopping, as well as those who may shop in the future. The ability for AEP-Ohio to maintain a fixed SSO rate is valuable, particularly if an unexpected, intervening event occurs during the term of the ESP, which could have the effect of increasing market prices for electricity. The ability for all customers within AEP-Ohio's service territory to have the option to return to AEP-Ohio's certain and fixed rates allows customers to explore shopping opportunities. This is an extremely beneficial aspect of the RSR and is undoubtedly consistent with legislative intent in providing that electric security plans may include retail electric service terms, conditions, and charges that relate to customer stability and certainty."

AEP Order, pp. 31-32 (Case No. 11-346-EL-SSO, et al.).

DP&L's SSR provides the same benefits. <u>First</u>, the SSR permits DP&L to freeze any non-fuel generation rate increases so those rates will remain stable through the ESP term. DP&L Ex. 9, pp. 8-10 (Seger-Lawson). <u>Second</u>, DP&L will conduct auctions to set its SSO rate, which will allow it to establish its pricing based on energy and which will mitigate the non-bypassable costs. DP&L Ex. 13 (Lee). <u>Third</u>, DP&L's ESP has fixed SSO rates, which will protect customers who have switched in the event that market prices increase. DP&L Ex. 9, pp. 8-10 (Seger-Lawson). The SSR thus satisfies the stabilizing and certainty criterion.

Further, the evidence demonstrates that DP&L needs the SSR and ST so that it can continue to provide safe and reliable service. Specifically, as demonstrated above, DP&L would earn [redacted] ROEs for each period during the ESP without the SSR and ST, which would jeopardize DP&L's ability to maintain safe and reliable service to its customers. As Mr. Jackson testified:

> "Q. On Pages 10 and following in Witness Jonathan Lessers' Direct Testimony, he discusses the Company's proposed SSR and on Page 11 indicates that 'If a company is told its financial integrity is guaranteed, then the economic incentive to improve its operations and reduce costs is reduced.' Please comment on his assertion and the SSR.
>
> A. . . . I strongly disagree that the SSR requested in this proceeding will 'guarantee' the financial integrity of the Company. Instead, <u>it is the minimum that DP&L needs</u> to allow it to satisfy its obligations, operate efficiently <u>so as to provide adequate and reliable service</u> and otherwise continue operating as an ongoing entity." DP&L Ex. 16A, p. 8 (Jackson Rebuttal) (emphasis added).

Ms. Seger-Lawson also testified as follows:

> "Q. Is the SSR a charge that would have the effect of stabilizing or providing certainty regarding retail electric service?
>
> A. Yes it is. It would stabilize retail electric service provided by DP&L because it would help to assure DP&L's financial integrity, which is <u>important to the company's ability to provide stable, safe, and reliable electric service</u>. It would provide certainty regarding retail electric service because it would help to strengthen DP&L's financial integrity, and because the SSR is important to allowing a multi-year ESP, which itself provides certainty regarding retail electric service." DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal) (emphasis added).

Dr. Chambers explained further:

> "Q. Will the SSR have the effect of stabilizing and providing certainty regarding retail electric service?
>
> A. Yes. The SSR will provide DP&L with a relatively stable element in its revenue mix. As discussed above, it is an important factor in maintaining the Company's financial integrity and thus <u>permits it to provide quality service to its customers</u>. Alternatively, removal of the SSR will damage

> DP&L's financial position and integrity substantially, imperiling its ability to provide such quality service to its customers." DP&L Ex. 4A, p. 53 (emphasis added).

Receiving an SSR at a level sufficient to maintain DP&L's financial integrity is critical to ensure the continuation of safe and reliable service for DP&L's customers. The evidence presented demonstrates that the extent of potential Operation and Maintenance (O&M) savings measures which may be implemented by DP&L is directly dependent upon the outcome of this proceeding, and more specifically, the level of SSR authorized. Tr. 255-56 (Jackson); Tr. 1177 (Herrington). As Mr. Herrington testified: "An outcome that is materially different from the one that we've requests, obviously, requires us to reexamine those businesses again." Tr. 1120 (Herrington).

But as the evidence also demonstrated, O&M savings do not come without a risk, and that risk is a threat to reliability due to, among other things, potential performance issues that DP&L could see with its generation facilities as a result of the reductions. Tr. 256-257 ("What I've seen in my own experience is, for example, reducing the scope of an outage often leads to increased unavailability, not always in the long term, it could even be in the short term.") (Jackson); Tr. 1119-1120 (Herrington). Consequently, the continuation of safe and reliable service for customers hinges directly upon maintaining DP&L's financial integrity through the SSR and ST.

The Commission should thus find that the SSR and ST satisfy the three elements of § 4928.143(B)(2)(d), and should approve them.

B. STAFF RECOMMENDATIONS THAT AFFECT THE SSR

Staff agreed with DP&L on many issues related to the SSR. For example, Staff witness Choueiki testified that Staff agreed that an SSR should be established:

> "Q. Does the Staff agree with the establishment of an SSR?
>
> A. Yes. Staff also notes that the Commission has granted similar charges to other utilities based on R.C. 4928.143(B)(2)(d)."

Staff Ex. 10A, p. 11 (Choueiki) (footnote omitted).

Dr. Choueiki explained the basis for that agreement at the hearing:

> "Q. Now, in this case you state that the staff agrees with the establishment of an SSR. Do you see that in your testimony?
>
> A. Yes.
>
> Q. Is this agreement based on what the Commission has done with other utilities?
>
> A. . . . [M]y observation is the Commission under that specific statute has granted another EDU -- another EDU an SSR, stability rider, so that's the policy issue addressed here.
>
> * * *
>
> A. Now, to continue with this line of thought, under this we've looked at the financial information the company has provided us with. . . . [T]o the extent the Commission finds that the company -- the financial integrity of the company is compromised, then the SSR would be a recommendation . . . ."

Tr. 1840-41 (Choueiki).

Dr. Choueiki also testified that "financial integrity" would include the ability to attract capital and maintain acceptable financial ratios:

> "Q. . . . . [L]et me ask you to tell us what your definition of 'financial integrity' would be.
>
> * * *
>
> A. It's the ability of the company to satisfy all its financial obligations, the ability of the company to operate

> efficiently, the ability of the company to provide adequate and reliable service, and the ability of the company, whether we like it or not, to pacify Wall Street.
>
> * * *
>
> Q. Let me ask you what you mean by the last statement about the ability of the company whether we like it or not to pacify Wall Street.
>
> A. I mean, we want -- the company has its investors and wants to attract investment, so to the extent its financial ratios are -- and I'm not very familiar with financial ratios but I've heard it here, but to the extent the financial ratios are not looking good or the company is showing negative returns in its SEC filings, then definitely folks who invest would not invest."

Tr. 1878-79 (Choueiki).

Dr. Choueiki further agreed that it was "very important" that DP&L be able to maintain its financial integrity:

> "Q. <u>Now that I understand your definition, let me ask you, is the financial integrity of a utility important, and if so, why?</u>
>
> A. <u>For the Commission it's very important</u>. I mean, the Commission -- in my mind, the Commission can decide what it wants on the financial integrity in this case, but in my mind if the Commission -- the Commission would want to make sure that the company is charging a reasonable rate to customers but also reasonable to the company. So the company doesn't go bankrupt."

Tr. 1879-80 (emphasis added).

Dr. Choueiki recommended that if the Commission finds that DP&L's financial integrity would be threatened, then the Commission should approve an SSR of $133 million to $151 million. Staff Ex. 10A, pp. 14-15 (Choueiki). <u>Accord</u>: Staff Ex. 1A, pp. 5-6 (Mahmud); Tr. 1881 ("in Staff's mind, there's enough evidence that the company needs some money")

(Choueiki). Dr. Choueiki also explained that if the Commission finds that DP&L's financial integrity is in jeopardy, then the Staff believes that the range of $133-$151 million is a reasonable range within which to establish the SSR. Tr. 1887-88 (Choueiki).

Staff and DP&L thus agree on many issues related to the SSR. However, Staff recommends that the Commission reject the ST and establish an SSR of $133 million to $151 million. Staff Ex. 10, pp. 14-15 (Choueiki). DP&L addresses the ST below. In the remaining portions of this Section III.B only, DP&L assumes, for the sake of argument, that the Commission will adopt the Staff's recommendation that the Commission reject DP&L's request for an ST, and this section addresses the Staff recommendation that the SSR be set at $133 million to $151 million.

According to Staff, a $133 million SSR targets an ROE of [redacted]%; a $151 million SSR targets an ROE of 7%. Staff Ex. 1A, pp. 5-6 (Mahmud). As demonstrated below, the Commission should use $151 million as the floor for the SSR, not the ceiling, because: (1) 7% is at the low end of (or below) a reasonable ROE range; (2) Staff witness Mahmud used the wrong capital structure when he calculated an SSR of $133 million; and (3) other errors in Staff's calculations demonstrate that Staff's calculations of DP&L's expected revenues are too low.

1. <u>A 7% ROE Is Below a Reasonable ROE Range</u>

The Commission should find that a $151 million SSR that targets a 7% ROE is reasonable because, as demonstrated above, the Commission has held that an ROE range of 7% to 11% was reasonable, and the Commission further stated that "a benchmark shall be set in the approximate middle of this range." AEP Order, p. 33. As also demonstrated above by evidence presented by DP&L, an ROE range of [redacted]% to [redacted]% and an ROE target of [redacted]% are reasonable.

DP&L Ex. 14A, pp. 19-21 & RJM 3R-7R (Malinak Rebuttal). The Commission should thus conclude that the SSR should target an ROE no lower than 7%.

2. Staff Witness Mahmud's [redacted]% ROE Figure Is Based upon the Wrong Capital Structure

Staff witness Mahmud made a material error related to DP&L's capital structure. Specifically, DP&L's actual capital structure is 40% debt/60% equity. DP&L Ex. 4A, p. 30 (Chambers). DP&L witness Chambers made a debt adjustment to his pro forma financial statements to reflect a 50%/50% capital structure for DP&L. DP&L Ex. 4A, p. 31. He explained that he made that debt adjustment because DP&L's peer utilities had 50%/50% capital structures, and the adjustment was thus necessary to allow him to compare DP&L to those utilities. DP&L Ex. 4A, p. 31.

Mr. Mahmud testified that he "adopted" the Dr. Chambers schedule that "applie[d] a pro form a debt adjustment." Staff Ex. 1A, pp. 3, 5; id. at SUM 1-4. Accord: Tr. 915-16, 935, 1026 (Mahmud).

It is important for the Commission to understand that the ROE that DP&L would earn under its "as filed" case is different depending upon whether the ROE calculation is done under DP&L's actual capital structure or under the capital structure with the debt adjustment. The exhibits to DP&L witness Jackson's testimony show that DP&L would earn a projected [redacted]% ROE under DP&L's "as filed" case under DP&L's actual capital structure over the full five years of the ESP. DP&L Ex. 1A, CLJ-2, line 36. The exhibits to DP&L witness Chambers testimony show that DP&L would earn a projected ROE of [redacted]% under DP&L's "as filed" case under a pro forma 50%/50% capital structure. DP&L Ex. 4A, WJC-2 (Chambers). Accord: DP&L Ex. 14A, p. 23 (Malinak Rebuttal). The ROE that results from DP&L's "as filed" case is thus substantially lower if it is calculated using DP&L's actual capital structure than if it is calculated using the pro forma 50%/50% capital structure.

Staff witness Mahmud proposed an SSR of $133 million-$151 million, which he explained as follows:

> "If the Commission finds that the Company requires a payment to preserve its financial integrity, I recommend that the Commission grant the Company an annual SSR charge of $133 million for a period of three years. This charge is based on a targeted average ROE of [redacted]% over the three-year ESP period. <u>In the event the Commission opts for a higher than the 'as filed' average ROE of [redacted]% requested by the Company</u>, I recommend an average ROE of no more than 7% over the three-year ESP period. This would then translate to an average annual SSR of $151 million for a three-year period. <u>In both the above scenarios the debt to equity ratio has been adjusted to approximately 50/50</u>."

Staff Ex. 1A, pp. 5-6 (emphasis added). <u>Accord</u>: <u>id</u>. at 3 ("My estimate for the SSR are based on: 1) an average ROE of [redacted]% - per the Company's application as filed in company witness Craig Jackson's Second Revised Exhibit, CLJ-2 . . . .").

The rebuttal testimony of DP&L witness Malinak demonstrated that Mr. Mahmud erred when he used a [redacted]% ROE under an adjusted 50%/50% capital structure:

> "Q. Mr. Mahmud proposed an SSR of $133 million because that matches the [redacted]% ROE in CLJ-2, which is based on a capital structure with less than 40% debt after 2011 (see WJC-1). What is your assessment of Mr. Mahmud's [redacted]% ROE target?
>
> A. As a matter of financial economics, the ROE that a business needs to earn in the long run to satisfy investors depends on its capital structure - businesses with higher leverage need to earn higher ROEs to compensate for their added risk. For example, Chambers Exhibit WJC-1 shows an ROE of [redacted]% in 2013 when debt is 38%, while WJC-2 shows an [redacted]% ROE when debt is 48%. Hence, it is

> important to use an appropriate capital structure when selecting a target ROE.
>
> DP&L's actual capital structure appears to have relatively low debt (40% in 2011), but in reality it supports debt held at the DPL, Inc. level. Dr. Chambers discussed the rationale for adjusting the capital structure to be more in line with industry norms (50/50) in his direct testimony (p. 31) [DP&L Ex. 4A]. Moreover, Dr. Duann (p. 41), Mr. Gorman (p. 9), Mr. Kollen (pp. 9-10), and Mr. Mahmud (p. 6) note that a 50% debt ratio is reasonable.
>
> <u>Because Mr. Muhmad analyzes DP&L at a pro forma 50% debt level, the true 'as filed' average ROE that he should use comes from [DP&L Ex. 4A,]WJC-2, which also reflects the 50% debt level. This average ROE is [redacted] percent. Therefore, he should focus on a 7% (or higher) ROE target, which implies an SSR of at least $151 million under Mr. Mahmud's calculations</u>."

DP&L Ex., 14A, pp. 23-24 (footnote omitted) (emphasis added).

Mr. Mahmud thus calculated a $133 million SSR that results in a [redacted]% ROE under the adjusted capital structure, and then supported the reasonableness of the [redacted]% ROE by comparing it to the ROE that DP&L would earn under its actual capital structure under its "as filed" case. <u>Id</u>. That is an apples-to-oranges comparison, which should be rejected by the Commission.

The Commission should make an apples-to-apples comparison, and should set the SSR to target an ROE that is no lower than 7% under an adjusted capital structure. As Mr. Malinak's rebuttal testimony demonstrates, an ROE target of 7% under an adjusted capital structure results in an SSR of $151 million. DP&L Ex. 14A, pp. 23-24.

3. Other Factors Show That the Commission Should Set an SSR Amount at the High End of Staff's Range

As demonstrated below, the revenue projections used by Mr. Mahmud for DP&L are too high, which means that his SSR range is too low. Specifically, as demonstrated below, those revenue projections are too high because (a) Mr. Mahmud fails to account for Staff's recommendation of accelerating the transition to 100% competitive bidding, and Staff's switching projections are understated; and (b) the generation dispatch model created by Staff witness Benedict overstates the likely output of DP&L's generating units.

(a) Accelerated Blending and Switching Rates: Staff witness Strom proposes that DP&L implement 100% competitive bidding at a rate that is more accelerated than the rate proposed by DP&L. Staff Ex. 2, p. 4. Dr. Choueiki explained that the accelerated implementation of 100% competitive bidding would cause DP&L to lose "[redacted]" in revenues. Tr. 1849. Dr. Choueiki also explained that Staff did not adjust its proposal for an SSR associated with the revenue that DP&L would lose due to an accelerated transition to 100% competitive bidding because the Staff believed that DP&L's switching projections were too high and that DP&L would have additional revenue if the Staff's switching projections were used. Staff Ex. 10A, p. 13; Tr. 1849-50, 1886-87. Dr. Choueiki believed that the revenue that DP&L would lose associated with implementing a faster transition to 100% competitive bidding would be offset by the increased revenue that DP&L would receive associated with using the Staff's switching projections. Tr. 1849-50, 1886-87. Since Dr. Choueiki believed that the two amounts offset, Staff did not account for either in its calculations of its recommended SSR range. Tr. 1849-50, 1886-87.

The Commission should reject that approach because the evidence shows that Staff's switching projections are too low. Specifically, evidence presented at the hearing demonstrated that almost all of DP&L's non-residential load has already switched and the customers that have not switched are primarily residential customers. DP&L Ex. 2A, p. 8 (Hoekstra). Further, CRES providers are aggressively marketing to residential customers in DP&L's service territory, and the rate of residential switching has increased significantly over the last year. Id. Most importantly, there are currently numerous communities in DP&L's service territory that are considering aggregation efforts; those governmental aggregation efforts are likely to lead to significant increases in residential switching. Id. at 8-9; Tr. 293-96, 389-94 (Hoekstra); FES Ex. 10; Tr. 1912 (Choueiki). Given the evidence that residential switching should accelerate rapidly in DP&L's service territory, the Commission should disregard the Staff's switching projections because they are unreliable.

Therefore, if the Commission implements the Staff's recommendation to accelerate the transition to 100% competitive bidding, then the Staff's failure to account for revenue that DP&L will lose associated with accelerated competitive bidding in determining the amount of the SSR was unreasonable.

(b) Generation Dispatch: Staff witness Benedict modeled Staff's expectations of DP&L's generation output using commercial software (as opposed to actual DP&L historical averages) and reached a conclusion that DP&L would have higher levels of generation output than DP&L projects. Staff Ex. 3A, pp. 2-4. Mr. Benedict assumes that DP&L would earn the same average revenue per MWh that DP&L projects that it will earn from its generation, and thus concludes that DP&L's projected generation revenue is understated. Id. at 9-10. Staff witness Mahmud incorporates Mr. Benedict's adjustments (Staff Ex. 1A, p. 5), which has the effects of increasing DP&L's projected earnings and lowering Mr. Mahmud's SSR range.

The Commission should find that there are at least two material errors in Mr. Benedict's adjustments. First, Mr. Benedict uses forced outage rates that are lower than the forced outage rates used by DP&L; he described that difference as one of "the most important factors that explain the differences in the generation forecasts." Staff Ex. 3A, p. 8; Tr. 1535. However, Mr. Benedict admitted that he did not compare his forced outage projections to DP&L's historic average forced outage rates, and was not aware of whether DP&L's projected forced outage rates are consistent with historic averages. Tr. 1537-38. DP&L witness Jackson testified that DP&L's forecasts in this case rely upon and incorporate actual results. DP&L Ex. 1A, p. 7; Tr. 85. Accord: Tr. 1176-77 ("The O&M forecasts that were included in the filing are based on the historic operation of DP&L as an enterprise.") (Herrington). The Commission should conclude that Mr. Benedict erred by failing to consider historic forced outage rates in creating his projections of DP&L's forced outage rates.

Second, Mr. Benedict claimed that "costless adders" that DP&L used contributed to his results. Staff. Ex. 3A, p. 8. Mr. Benedict contended that DP&L's use of these costless adders for its electric generation had the effect of lowering the number of hours of dispatch of those units. Tr. 1537. However, Mr. Benedict conceded that DP&L used costless adders only at its gas peaking plants (id.), which account for a very small percentage of DP&L's generation assets.

In summary, if the Commission adopts the Staff's recommendation that the Commission reject the ST, then the Commission should set the SSR no lower than $151 million because: (1) a 7% ROE is at the low end of (or below) a reasonable ROE range; (2) Mr. Mahmud used the incorrect capital structure to support his recommendation of $133 million as the low end of the SSR range; and (3) the Staff's projections of DP&L's revenue are artificially high and should be disregarded because they are unreliable.

C. THE SWITCHING TRACKER SHOULD BE APPROVED

As the Commission knows, it is difficult to predict how rapidly competition will develop and switching will occur in a utility's service territory. For example, the Commission expected competition to develop rapidly after DP&L's 1999 ETP plan was approved. September 2, 2003 Opinion & Order, p. 3 (Case No. 02-2779-EL-ATA) (describing Commission expectations when it approved DP&L's ETP Stipulation). As the Commission knows, that did not happen.

DP&L therefore proposed a $137.5 million SSR that was designed to allow it an opportunity to earn a reasonable ROE based upon switching rates that existed at the time it filed its ESP Application. DP&L Ex. 1A, pp. 11-13 (Jackson). Of course, DP&L was aware of the fact that it would probably experience additional switching; DP&L therefore proposed an ST that would allow DP&L an opportunity to achieve a reasonable ROE as additional switching occurred. Id.

DP&L witness Jackson's testimony describes how the ST would work. DP&L Ex. 1A, pp. 11-12. As Mr. Jackson explains, the ST would allow DP&L to "defer for later recovery from customers the difference between the level of switching experienced as of August 30, 2012 (62% of retail load) and the actual level of switching." Id. at 11.

The testimony of DP&L witness Chambers demonstrates that DP&L would earn the following projected ROEs during the ESP term without the ST:

Year	**ROE**
2013	[redacted]
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]

DP&L Ex. 4A, WJC-3. Those ROEs are well below the reasonable range identified in the Commission's AEP Order and in Mr. Malinak's rebuttal testimony.

The ST has two significant benefits. First, it would eliminate the need for the Commission to (again) attempt to forecast switching. Second, since the ST would be calculated based upon actual switching, it avoids the over or under recovery that inevitably would occur when actual switching did not match projected switching.

Staff and numerous intervenor witnesses recommend that the Commission reject the ST. Staff Ex. 10A, p. 9 (Choueiki); OCC Ex. 28A, p. 22 (Duann); Wal-Mart Ex. 1, pp. 14-15 (Chriss); Kroger Ex. 1, pp. 14-15 (Higgins); Constellation Ex. 1, pp. 43-44 (Fein); IEU Ex. 1A, pp. 11-20 (Bowser); IEU Ex. 2A, pp. 21-28 (Murray); IEU Ex. 3A, pp. 6-26 (Hess); FES Ex. 14A, pp. 5-6 (Lesser); FES Ex. 17A, p. 18 (Noewer); IGS Ex. 1, pp. 3-6 (White); OEG Ex. 1, pp. 6-17 (Kollen). That recommendation should be rejected for the following reasons:

First, the Commission should approve the ST for the reasons described above. Second, as demonstrated below, Staff's switching projections are understated, which means that its SSR range is also understated. Third, in AEP's ESP case, the Commission stated:

> "[T]he Commission notes that our determination regarding the RSR is heavily dependent on the amount of SSO load still served by the Company. Accordingly, in the event that, during the term of the ESP, there is a significant reduction in non-shopping load for reasons beyond the control of the Company, other than for shopping, the Company is authorized to file an application to adjust the RSR to account for such changes."

AEP Order, pp. 37-38. If the Commission were to reject the ST, then the Commission should grant similar authority to DP&L.

D. THE COMMISSION SHOULD APPROVE A FIVE-YEAR ESP TERM

DP&L witness Herrington explained that DP&L's ESP proposal – including DP&L's proposed five-year term – was the result of balancing various interests:

> "[W]e had prepared the ESP in its entirety consisting of a number of features; the SSR stability rider, switching tracker, and the blend percentage <u>as well as the duration of the ESP</u>. All of those things we thought about in terms of balancing one another looking for the key objectives that we were seeking in this regulatory filing which were a reasonable rate of return, stability of service, a manageable impact on our customers, as well as our shopped customers, and, lastly, our ability to position ourselves for generation separation in 2017 as we proposed."

Tr. 1094-95 (emphasis added). He further explained that altering one of the terms would require alterations to other terms to maintain the overall balance of the package. Tr. 1095-96.

Staff witness Choueiki recommends a three-year ESP term because, in his opinion, projections for years four and five are too uncertain. Staff Ex. 10A, pp. 5-6. The Commission should reject Dr. Choueiki's recommendation and should approve a five-year term for two separate and independent reasons.

<u>First</u>, the rebuttal testimony of DP&L witness Malinak demonstrates that projections that extend five years out are sufficiently accurate to be relied upon. DP&L Ex. 14A,

p. 28. For example, standard valuation texts recommend using, and companies and financial analysts frequently use, projections that extend for five years. Id.; Tr. 2798-2802.

Second, Dr. Choueiki's testimony does not address the additional regulatory risk and uncertainties created by his proposal. Mr. Malinak explained that risk:

> "Dr. Choueiki has not considered certain consequences of adopting a three-year versus five-year plan, such as the additional regulatory risk DP&L may face in the event it needs an additional SSR for subsequent years, which would be particularly problematic if the ST is not approved and the SSR is not set at a high enough level. For example, as shown in Chambers Exhibit WJC-3 [DP&L Ex. 4A], DP&L's ROE is expected to be just [redacted] percent in 2015 and [redacted] percent in 2016 with an SSR set at $137.5 million, which is indicative of a precarious financial position as noted by Witness Chambers. In light of this potential situation, it would be prudent for DP&L to request additional funds through an SSR for Years 1 to 3, a request that is mitigated through awarding the full five-year plan. Instead, Dr. Choueiki proposes to accelerate the transition to market rates with more aggressive blending of CBP auction rates than is proposed by DP&L, a proposal that compounds the effect of the shorter three year ESP term."

DP&L Ex. 14A, pp. 28-29 (Malinak Rebuttal) (emphasis added).

DP&L witness Jackson further explained that DP&L needed a five-year term to maintain DP&L's financial integrity:

> "Staff's position on the term would significantly weaken the Company's financial integrity and restrict the certainty of future cash flows that are needed to separate its generation assets by December 31, 2017. . . . [C]arving out the last two years of the SSR, the Company expects its net income to be [redacted] and [redacted] [for years 4 and 5]"

Accord: DP&L Ex. 16A, p. 5, Tr. 2896 (Jackson).

The Commission should thus approve a five-year ESP for DP&L.

E. INTERVENOR ARGUMENTS REGARDING THE SSR AND ST

1. Intervenor Witnesses Do Not Dispute That DP&L Needs the SSR and ST to Maintain Its Financial Integrity and to Provide Safe and Reliable Service

Intervenor witnesses conceded numerous critical points related to DP&L's request for an SSR and ST. For example, many intervenor witnesses agreed that it was important that DP&L be able to maintain its financial integrity and provide safe and reliable service. Tr. 2056 (Chriss); Tr. 1970 (Collins); Tr. 1658-59 (Higgins); Tr. 2434 (Noewer); Tr. 2577-78 (Walz); Tr. 2611-12 (White); Tr. 2097 (Hixon); OCC Ex. 17, pp. 10-11 (Wilson).[1]

Many witnesses also conceded that DP&L would need to earn a reasonable ROE and/or have reasonable earnings to maintain its financial integrity. Tr. 1000 (definition of financial integrity is "whether the company's able to generate revenue, meet its expenses, and provide a reasonable return to its investors") (Mahmud); Tr. 1878-80 (Choueiki); Tr. 1936 (Gorman);[2] Tr. 1984 (Kollen);[3] FES Ex. 14A, pp. 10-11 (Lesser); Tr. 2519-20 (Duann).[4]

[1] Mr. Wilson's deposition was filed with the Commission on March 20, 2013. Pursuant to agreement of counsel, his prefiled testimony and his deposition were admitted into the record without Mr. Wilson taking the stand. Tr. 1439-40.

[2] FEA witness Gorman defined financial integrity with a rate case cost-of-service definition; his definition is that financial integrity refers to setting rates at a level on regulated cost of service reflecting prudent and reasonable costs that are adequate to provide earnings and cash flow that are sufficient to maintain the credit standing of the utility and that allows it to attract additional capital to make investments to maintain high quality reliable service of the utility company. Tr. 1936.

[3] Mr. Kollen defined financial integrity as the company's ability to pay its bills and continue as a going concern, and agreed that financial integrity is generally defined by earnings. Tr. 1984.

[4] OCC witness Duann, whose testimony was shot through with legal opinions, Tr. 2507-12, testified with regard to financial integrity that (1) his definition of financial integrity is that a utility providing monopoly service is allowed to have an opportunity to earn a reasonable rate of return so that it can continue its operations and attract capital, Tr. 2519-20; (2) oddly, that "Financial integrity is only applicable in a case of a utility providing monopoly service." Tr. 2520; (3) he believes that his definition is the one used in traditional cost-based regulation such as is the case with rate cases, but he concedes that DP&L's request for an SSR and its claim of deteriorating financial integrity are not based on the data and the methodology used in a traditional rate case, Tr. 2520-21; (4) based on the legal advice that he received from OCC, it is his belief that financial integrity is irrelevant, Tr. 2508. He did not calculate returns

(footnote cont'd...)

However, not a single intervenor witness – not one – sponsored any analysis showing that DP&L could maintain its financial integrity and continue to provide safe and reliable service without the SSR and ST during the ESP term. Specifically, the testimony of the intervenor witnesses who opposed the SSR or ST demonstrates the following:

1. Joe Bowser, IEU: Mr. Bowser recommends that the Commission reject DP&L's request for an SSR and ST. IEU Ex. 1A, p. 20. However, Mr. Bowser admitted that he has not done any analysis regarding whether DP&L could provide safe and reliable service without the SSR, and that he has not done any financial analysis for 2013 and beyond. Tr. 2633. In addition, Mr. Bowser conceded that the SSR would provide cash flow support for DP&L's transmission, distribution and generation businesses. Tr. 2636. That concession effectively negates IEU's argument that the SSR is solely generation related.[5]

2. Ed Hess, IEU: Mr. Hess recommends that the Commission reject the SSR and ST. IEU Ex. 3A, pp. 4-6. However, Mr. Hess admitted that he did no analysis of whether DP&L could earn a reasonable return on equity if the Commission adopted his approach. Tr. 1707.

(...cont'd)
on equity for the period of the ESP, Tr. 2515, because he thinks "that the ROE of Dayton Power & Light Company is irrelevant in this proceeding." Tr. 2516.

[5] IEU witness Bowser defines financial integrity purely in terms of an emergency rate case under Ohio Revised Code § 4909.16, Tr. 2626, the emergency rate case statute that does not apply in this case. He admitted that he is aware that § 4909.16 is not the statute upon which DP&L relies in its application for an ESP. Tr. 2632-33. Bowser's opinion is based on advice of counsel, Tr. 2626-27, although he conceded that he is not a lawyer and that he is not qualified to be opining on questions of law, Tr. 2628-29; nevertheless he expressed the opinion that DP&L improperly defines financial integrity. Tr. 2631. He backed away from that opinion on cross examination, conceding that he is not claiming that DP&L defines financial integrity in some way that is different from the generally accepted definition of financial integrity that is used in financial analysis. Tr. 2632. Thus Mr. Bowser's opinions with regard to DP&L's ESP are based upon legal advice that he received; he admits that he is not qualified to express legal opinions, Tr. 2629; he uses an incorrect definition of financial integrity; and his testimony should be disregarded.

3. Kevin Murray, IEU: Mr. Murray opines that the Commission should not approve DP&L's request for an SSR and ST. IEU Ex. 2A, pp. 21-27. However, Mr. Murray admitted that he has not done any analysis of DP&L's financial integrity, that he offers no opinions on the reasonableness of DP&L's projected ROEs, and that he has done no analysis of whether the SSR and ST are needed to protect DP&L's financial integrity. Tr. 1460-62.

4. Dan Duann, OCC: Dr. Duann recommends that the Commission reject DP&L's request for an SSR and ST. OCC Ex. 28A, pp. 3-28. However, Dr. Duann admitted that his analysis was purely retrospective and that he did no analysis of DP&L's projected ROE for the term of the ESP. Tr. 2515, 2548.

Dr. Duann also offered a number of criticisms of DP&L's projections, but his testimony at the hearing demonstrated that his criticisms were unfounded. First, Dr. Duann criticized DP&L's projections because they were "not audited." OCC Ex. 28A, p. 32. However, he admitted that projections cannot be audited because projections cover a future period of time. Tr. 2525-26. Second, Dr. Duann criticized DP&L's projections because they were not included in SEC filings. OCC Ex. 28A, p. 32; Tr. 2529. However, Dr. Duann conceded that there is no SEC requirement that companies file projections. Tr. 2529. Third, Dr. Duann criticized DP&L's projections because "there is no way to check the 'actual results of 2014' in 2013." OCC Ex. 28A, p. 33. However, as the Commission knows, it is never possible to check the actual results of projections when the projections are made. Further, the cross-examination of Dr. Duann demonstrated that he did not understand fundamental accounting principles. For example, Dr. Duann did not understand the difference between a balance sheet and an income statement. Tr. 2541-43.

5. Ken Rose, OCC: Dr. Rose opines that the Commission should reject DP&L's request for an SSR. OCC Ex. 21, p. 2. However, Dr. Rose admitted that he is not sponsoring any testimony regarding DP&L's financial integrity. Id. at 5; Tr. 2002. Dr. Rose further admitted that he has not done any financial analysis regarding DP&L's distribution, transmission or generation businesses. Tr. 2025.

6. Jonathan Lesser, FES: Dr. Lesser offers opinions that the Commission should reject DP&L's request for an SSR and ST. FES Ex. 14A, pp. 9-38. However, Dr. Lesser's testimony does not contain any analysis demonstrating that DP&L could maintain its financial integrity and provide safe and reliable service if his proposals were adopted. Id.

Significantly, Dr. Lesser conceded that a financial integrity analysis needed to include "expected return[s]":

> "I define 'financial integrity' as a company's ability to remain a 'going concern.' In other words, 'financial integrity' means a company can meet its operating expenses, service its debt, be able to make needed capital investments and provide investors with an expected return that is comparable to the returns earned by firms facing comparable business and financial risks." (Emphasis added.)

FES Ex. 14A, pp. 10-11.

The remaining testimony of FES witness Lesser is easily disposed of, because, though not a lawyer, his testimony presents no objective analysis, but instead is highly argumentative. Indeed, it reads like an over-aggressive, intemperate memorandum: rather than provide logical bases for his opinions, he uses characterizations. FES Ex. 14A, pp. 4, 10, 13-14, 15, 16. The argumentative, accusatory tone of his entire testimony shows that it is not an objective analysis of facts which support opinions, but rather is merely an argumentative piece entitled to no weight. DP&L's cross-examinations of the other intervenor economists and financial witnesses produced admissions which leave Lesser's testimony as an outlier, inconsistent with Staff and DP&L testimony and with the testimony of intervenors' financial witnesses.

7. Sharon Noewer, FES: Ms. Noewer recommends that the ST and SSR be rejected. FES Ex. 17A, p. 18. However, Ms. Noewer admitted that she did not conduct any analysis regarding whether DP&L's financial integrity could be preserved or whether DP&L could provide reliable service if her recommendations were adopted. Tr. 2433-34.

8. Lane Kollen, OEG: Mr. Kollen offers the opinion that the Commission should reject the SSR and ST. OEG Ex. 1, pp. 6-17. However, Mr. Kollen admitted that he has not done any quantification or analysis of DP&L's financial integrity or projected ROE during the ESP period. Tr. 1986-87.

9. Kevin Higgins, Kroger: Mr. Higgins recommends that if the Commission approves an SSR, then it should be no greater than DP&L's existing Rates Stabilization Charge ("RSC") ($73 million), and that the Commission should reject DP&L's request for an ST. Kroger Ex. 1, p. 10, 14-15. However, Mr. Higgins admitted that the Commission could reasonably conclude that DP&L was entitled to some level of an SSR (Tr. 1653-54), that his $73 million proposal was not based upon any mathematical calculation (Tr. 1667), that he did not sponsor any testimony regarding whether DP&L can provide stable service with a $73 million SSR (Tr. 1667-68), and that he has not analyzed the effect that denial of the ST would have upon DP&L's financial integrity (Tr. 1680).

10. Mike Gorman, FEA: Mr. Gorman recommends reducing DP&L's SSR request from $137 million to $90 million. FEA Ex. 1A, p. 10. Mr. Gorman opined that DP&L would earn a reasonable ROE under his proposal during 2013 (already half over) and 2014, but conceded that DP&L would earn an ROE below 7% for the remainder of the ESP term. Tr. 1943; FEA Ex. 1A, MPG-1. Further, Mr. Gorman's calculations are based upon assumptions relating to O&M savings (FEA Ex. 1A, pp. 9-10); as demonstrated below, those assumptions are unwarranted.

11. Steve Chriss, Wal-Mart: Mr. Chriss recommends that the Commission reject the SSR and ST, and that if the Commission approves the SSR, then it should limit the SSR to $72.5 million, the amount of DP&L's current RSC. Wal-Mart Ex. 1, p. 16. However, Mr. Chriss admitted that he did not do any financial analysis to determine whether DP&L could provide safe and reliable distribution, transmission and generation service without the SSR, that his proposed $72.5 million SSR was not the result of any mathematical calculation, and that he did not know whether DP&L could maintain its financial integrity with an SSR of that amount. Tr. 2057.

12. Matt White, IGS: Mr. White recommends that the Commission reject DP&L's request for an SSR and ST. IGS Ex. 1, pp. 3-4. However, Mr. White admitted that he did no analysis of whether DP&L could maintain its financial integrity or provide safe and reliable service under his proposals. Tr. 2611.

Further, numerous intervenor witnesses opposed the SSR and ST, but conceded that they did no analysis regarding whether the elements of Ohio Rev. Code § 4928.143(B)(2)(d) were satisfied. Tr. 1210 (Fein); Tr. 1706-07 (Hess); Tr. 2054 (Chriss); Tr. 2423 (Noewer); Tr. 2600-01 (White).

The record thus shows that numerous intervenor witnesses conceded that it is important that DP&L maintain its financial integrity and provide stable service, and that DP&L needs to earn a reasonable ROE to maintain its financial integrity. However, none of the intervenor witnesses – not one – sponsored testimony that would contradict the substantial evidence submitted by DP&L that it could not maintain its financial integrity and provide safe and reliable service without the SSR and ST. In so doing, they render their testimony irrelevant. As Staff witness Choueiki explained, the Commission must determine whether DP&L's financial integrity will be compromised without the SSR and ST. Tr. 1882-83.

2. The SSR and ST will allow DP&L to Provide Safe and Reliable Distribution, Transmission and Generation Service

Various intervenor witnesses assert that it is a decline in DP&L's generation revenue that is jeopardizing DP&L's financial integrity, and that the Commission should not approve an SSR and ST to allow DP&L to provide stable generation service. OCC Ex. 28A, p. 8 (Duann); OEG Ex. 1, p. 8 (Kollen); IEU Ex. 1A, p. 15 (Bowser); IEU Ex. 2A, p. 22 (Murray); IEU Ex. 3A, pp. 6-12 (Hess); OCC Ex. 21, pp. 4-6 (Rose); FES Ex. 14A, pp. 10-17 (Lesser); Wal-Mart Ex. 1, pp. 13-14 (Chriss).

As demonstrated below, the Commission should reject those assertions for three separate and independent reasons: (a) Chapter 4928 expressly authorizes the Commission to implement the SSR and ST to allow DP&L to provide stable generation service; (b) while the decline in DP&L's generation revenue is a <u>cause</u> of DP&L's financial integrity issues, the <u>effect</u> of that decline in revenue (without the SSR and ST) will be that DP&L cannot provide stable distribution, transmission and generation service; and (c) customers have historically received substantial benefits from the fact that DP&L owned generation assets, and their current complaints that DP&L's generation assets are a cause of DP&L's financial integrity issues ignore the results of prior Commission proceedings.

a. **Chapter 4928 authorizes the SSR and ST to allow DP&L to provide stable generation service**

As an initial matter, Section 4928.143(B)(2)(d) authorizes the Commission to approve an SSR and ST to allow DP&L to provide stable and certain "retail electric service." The term "retail electric service" is defined in Section 4928.01 to include "generation service":

> "'Retail electric service' means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, <u>from the point of generation</u> to the point of consumption. For the purposes of this chapter, <u>retail electric service includes</u> one or more of the following 'service components': <u>generation service</u>, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service."

Ohio Rev. Code § 4928.01(A)(27) (emphasis added).

The intervenors' argument that the Commission cannot approve a charge to allow DP&L to provide stable generation service is thus incorrect as a matter of law. Section 4928.143(B)(2)(d) expressly authorizes the Commission to approve charges to allow a utility to provide stable "retail electric service," and "retail electric service" is defined in Section 4928.01(A)(27) to include "generation service."

b. **The intervenors fail even to address the effect of DP&L's financial integrity issues during the ESP period**

In addition, the SSR and ST are necessary to allow DP&L to provide stable <u>distribution</u> service. The intervenors focus on cause, while ignoring the effects. It would not matter in this case that the primary <u>causes</u> of DP&L's financial integrity issues were <u>generation</u> related (increased switching, decreased wholesale generation prices, decreased capacity prices), because the intervenor witnesses fail to consider the <u>effects</u> that DP&L's financial integrity issues will have on DP&L's ability to provide stable <u>distribution</u> service.

Specifically, DP&L still, at this point, is an integrated company that provides distribution, transmission and generation service.[6] Tr. 1865-66 (Choueiki); Tr. 2635-36 (Bowser). DP&L witness Malinak explained that the cause of DP&L's financial integrity issues may be generation related, but that those issues will affect all of DP&L's businesses. Tr. 2871-72. Staff witness Choueiki explained that if DP&L cannot maintain its financial integrity, then all of its services – including distribution service – would be effected. Tr. 1865-66. Dr. Choueiki further explained that the SSR thus relates to transmission, distribution and generation service. <u>Id</u>. IEU witness Bowser also conceded that the SSR would provide cash flow support for DP&L's distribution, transmission and generation businesses. Tr. 2636.

The Commission should thus find that the SSR is necessary to allow DP&L to provide safe and reliable distribution, transmission and generation service.

c. **<u>DP&L's Ownership of Generation Assets</u>**

The intervenors' criticism of DP&L for not yet separating its generation assets ignores the fact that in prior Commission proceedings, DP&L agreed to provide generation service at below-market rates to SSO customers; DP&L could not have provided below-market generation if it did not own generation assets. Specifically, after SB 3 was passed in 1999, DP&L filed its Electric Transition Plan, Case No. 99-1687-EL-ETP. DP&L Ex. 12, p. 1 (Seger-

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[6] DP&L has committed to filing an application by December 31, 2013 to separate its generation assets. In that Application, DP&L expects to request Commission authority to transfer its generation assets by December 31, 2017.

Lawson Rebuttal). SB 3 provided for a five-year Market Development Period ("MDP") (Ohio Rev. Code 4928.40(A)), but DP&L, its customers, CRES providers and Staff expected competition in the generation markets to develop quickly. Id. The parties thus agreed to a Stipulation that created a three-year MDP for DP&L. Id. (citing June 1, 2000 Stipulation and Recommendation, VII).

As the end of DP&L's three-year MDP approached, CRES Providers were not able to beat DP&L's then-existing prices, and competition therefore was not developing in DP&L's service territory. Id. Customers thus faced the prospect of significant rate increases if the price freeze associated with the MDP were to expire and they were to be charged market rates. Id. DP&L filed an application to extend its MDP to five years, Case No 02-2779-EL-ATA. Id. The parties to that case eventually entered into a Stipulation that extended DP&L's MDP to five years, and created a three-year Rate Stabilization Period ("RSP") for DP&L through December 31, 2008. Id. (citing May 27, 2003 Stipulation and Recommendation, II, IX). The Commission cited to the facts that "[d]uring that MDP, the Commission anticipated that competition would develop" and "the failure of competition to develop according to expectations" as reasons supporting its approval of that Stipulation. Id. at 1-2 (alteration in original) (quoting Opinion and Order, p. 3). Accord: Tr. 2312-13 (Seger-Lawson).

In 2005, competition still had not developed as expected and customers and the Commission's Staff expressed concerns to DP&L that there would be significant rate increases if DP&L's RSP expired as scheduled after 2008. DP&L Ex. 12, p. 2. With Staff's encouragement, DP&L thus entered into a Stipulation that extended its RSP to December 31, 2010. Id. (citing November 3, 2005 Stipulation and Recommendation, I.A. (Case No. 05-276-EL-AIR)). It was undisputed that that Stipulation provided $262 million in savings compared to projected market rates over the period 2006-2010. Id. (citing November 14, 2005 Testimony of D. Seger-Lawson, Attachment B). Accord: Tr. 2322-24 (Seger-Lawson).

SB 221 was passed in 2008, and pursuant to that statute, DP&L filed an ESP, Case No. 08-1094-EL-SSO. DP&L Ex. 12, p. 2. Yet again, parties expressed concern about the failure of competition to develop sufficiently in DP&L's service territory. DP&L Ex. 12, p. 2. The parties entered into yet another Stipulation that extended DP&L's rate plan through December 31, 2012. Id. (citing February 24, 2009 Stipulation and Recommendation, ¶ 1). In approving the Stipulation, the Commission relied upon that fact that it was undisputed that "the rates contained in the ESP proposed in the Stipulation are more favorable in the aggregate than the equivalent market rates." Id. (quoting June 24, 2009 Opinion and Order, p. 11).

Indeed, IEU witness Murray admitted that: (1) in 2005 through 2009, the Commission was encouraging utilities to implement RSPs, (2) one of the purposes of those plans was to avoid a sudden move to market-based rates, (3) the expectation was that going to market-based rates at the end of 2005 would have resulted in higher rates, and (4) the market was not developed in the 2003-2006 time period. Tr. 1480-82. Accord: Tr. 1875 ("in those rate stabilization plans the Commission was, as a goal, looking for rate stability for consumers") (Choueiki); Tr. 2271-72, 2312 (shopping levels were low from 2006-2010, indicating that DP&L's rates were below market) (Seger-Lawson).

If DP&L had transferred its generation assets at an earlier date, then it would not have been able to provide generation service at below-market rates that it has long provided to customers. DP&L Ex. 12, p. 4 (Seger-Lawson Rebuttal). DP&L's ownership of generation assets thus provided significant benefits to DP&L's customers. Id.

The intervenors in this case could have asked the Commission to order DP&L to transfer its generation assets in DP&L's 2002 MDP case; or they could have made that request in DP&L's 2005 RSP case; or they could have made that request in DP&L's 2008 ESP case. However, they did not. Instead, they elected to receive the benefits of the Stipulations in those cases, including DP&L's willingness to provide generation service at below-market rates.

It is thus apparent that the intervenors want to eat their cake and have it too. As demonstrated above, DP&L's ownership of generation assets permitted it to provide below-market generation for years. The intervenors received the benefits of the Stipulations in the prior cases (including generation service at below-market rates), but now that the market prices have fallen, they claim that DP&L should have transferred its generation assets years ago and that the Commission should disregard the adverse effect of changing generation market conditions upon DP&L's financial integrity. The Commission should not let the intervenors have it both ways. Many of them received substantial benefits associated with the fact that DP&L owned generation assets, and until this proceeding, none of them were critical of the fact that DP&L owned those assets. The Commission should therefore reject the assertions by the intervenor witnesses that the Commission should disregard the effect of changing generation market conditions upon DP&L's financial integrity.

3. The Commission Should Not Consider O&M Cost Savings in Setting the SSR and ST

DP&L's filing in this case included its then-existing projections of its O&M expenses. DP&L Ex. 1A, CLJ-2 (Jackson); DP&L Ex. 16A (Jackson); Tr. 1176-77 ("The O&M forecasts that were included in the filing are based on the historic operation of DP&L as an enterprise.") (Herrington). Since the time of the filing, DP&L has also worked on identifying potential O&M expense savings. Tr. 87 (Jackson). The effort to identify O&M expense savings was linked to DP&L's expected results of this case; specifically, DP&L was attempting to identify O&M expense savings to allow it the opportunity to earn a reasonable ROE based upon its expectations as to the results of this case. Tr. 1176-77 (Herrington).

DP&L eventually identified potential O&M savings of $[redacted] in 2013, $[redacted] in 2014, and $[redacted] in 2015-2017. Tr. 87-88 (Jackson).

Intervenor witnesses assert that the Commission should lower the SSR to account for potential O&M expense reductions that DP&L <u>might</u> implement. FES Ex. 14A, pp. 17-22 (Lesser); FEA Ex. 1, p. 7 (Gorman); OCC Ex. 28A, p. 41 (Duann); OEG Ex. 1, p. 10 (Kollen); IEU Ex. 1A, p. 18-19 (Bowser). The Commission should reject that argument for three separate and independent reasons.

<u>First</u>, potential O&M reductions should not be considered as a substitute for the SSR; rather, they should be considered as a potential supplement to the SSR. Specifically, as demonstrated at length above, a reasonable ROE target for DP&L is [redacted]%. The rebuttal testimony of DP&L witness Jackson shows that DP&L could earn only a [redacted]% ROE under its as-filed case that ROE would increase to only [redacted]% if it were able to implement all of the potential O&M savings that it has identified. DP&L Ex. 16A, p. 10 and CLJ-7 (actual capital structure).[7] Thus, even if DP&L were able to implement all of the O&M savings (an unlikely event) and even if DP&L suffered no lost revenue as a result of reducing maintenance (also an unlikely event), DP&L would still earn an ROE that is at the [redacted] the reasonable ROE range. Tr. 256-57 (Jackson).

[7] The [redacted]% ROE figure comes from an adjusted capital structure; the [redacted]% and [redacted]% figures come from an actual capital structure. As demonstrated above, adjusting the capital structure adds approximately 1% to the ROE figure.

The potential O&M savings, if implemented, would result in an ROE that is barely adequate. The potential O&M saving thus are not a substitute for the SSR; DP&L would need both the SSR and the potential O&M saving to have an opportunity to earn a reasonable ROE. The Commission therefore should not reduce the SSR to account for potential O&M savings.

Second, the potential O&M savings have not been approved by DP&L's Board for 2014 through 2017. DP&L Ex. 16A, p. 9 (Jackson Rebuttal); Tr. 1118 (Herrington). Whether they will be approved or can be implemented is thus purely speculative at this point.

Third, even if all of the future O&M savings were to be approved and implemented, there will be substantial risks associated with them. DP&L Ex. 16A, pp. 9-10 (Jackson); Tr. 1113-14, 1176-77 (Herrington); Tr. 254-55 (Jackson). The potential O&M savings would lower DP&L's O&M expenses below DP&L's historic averages, and the reduced maintenance may impair the operation of DP&L's. DP&L Ex. 16A, pp. 9-10 (Jackson Rebuttal); Tr. 1176-77 (Herrington). The amount of the potential O&M savings has not been adjusted for increased risk.

Finally, several intervenor witnesses assert that the Commission should adjust the SSR associated with potential capital expenditure reductions that DP&L had identified. FES Ex. 14A, pp. 17-22 (Lesser); OCC Ex. 28A, p. 41 (Duann). The Commission should reject those arguments for several reasons. First, as with the O&M expense savings, DP&L may need the capital expenditure reductions to maintain its financial integrity; the potential capital expenditure reductions are potential additions to the SSR, not substitutes for it. Second, there is no approved budget for 2014 and beyond; capital expenditure reductions for later years are thus speculative.

Third, the capital expenditure reductions carry significant risks; however, the amounts are not risk adjusted. Fourth, in any event, capital expenditure reductions will have little impact on DP&L's earnings or ROE. DP&L Ex. 14A, pp. 27-28 (Malinak Rebuttal).

4. Distribution Rate Case

Various intervenor witnesses assert that DP&L should file a distribution rate case. FES Ex. 14A, pp. 16-17 (Lesser). OCC Ex. 28A, p. 29 (Duann); OEG Ex. 1, p. 9 (Kollen). The possibility of a future distribution rate case should not affect the results of this case (including the level of the SSR) for three reasons. First, there is no record evidence quantifying the effects of such a future distribution case. Second, as with the potential cost reductions, DP&L may need a distribution rate case in the future to give it an opportunity to earn a reasonable ROE of [redacted]%. A potential distribution rate case is thus not a substitute for the SSR; it is an addition to it. Third, no such case has been filed, and the Commission should not speculate on the results of an unfiled case.

5. The SSR and ST are Not Transition Charges

Numerous intervenor witnesses contend that the Commission should deny DP&L's request for the SSR and ST because those charges constitute transition charges. IEU Ex. 2A, pp. 24-27 (Murray); IEU Ex. 3A, pp. 16-26 (Hess); OCC Ex. 21, pp. 6-12 (Rose); IGS Ex. 1, pp. 3-6 (White). The Commission should reject that contention for two separate and independent reasons: (1) the SSR and ST are not "transition charges" as that term is defined by Ohio law; and (2) even if the SSR and ST were transition charges, the charges are specifically authorized by Ohio Rev. Code § 4928.143(B)(2)(d), which was enacted after the statute that bars the recovery of transition charges.

a. **<u>Under Ohio law, the SSR and ST are not transition charges</u>**

As an initial matter, the Commission should find that the SSR and ST are not transition charges because they are not cost-based charges. The statute authorizing the recovery of transition charges states:

> "[T]he public utilities commission . . . shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues . . . . Such amount shall be the just and reasonable transition <u>costs</u> of the utility, which <u>costs</u> the commission finds meet all of the following criteria:
>
> (A) The <u>costs</u> were prudently incurred.
>
> (B) The <u>costs</u> are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.
>
> (C) The <u>costs</u> are unrecoverable in a competitive market.
>
> (D) The utility would otherwise be entitled an opportunity to recover the <u>costs</u>."

Ohio Rev. Code § 4928.39 (emphasis added).

Hence, transition revenues recover specific "costs." The Supreme Court of Ohio has recently held that a cost-based charge must be "related to a[] cost[] [that the utility] will incur." <u>In re Application of Columbus S. Power Co.</u>, 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 25 (reversing Commission decision approving POLR charge for AEP because there was no evidence supporting the Commission's holding that the charge would compensate AEP for POLR costs).

Here, the SSR and ST were not designed to allow DP&L to recover any specific costs; instead, they were designed to allow DP&L the opportunity to earn a reasonable ROE. Tr. 209 (Jackson); Tr. 552 ("the SSR is not a cost-based from that standpoint . . . it is a general amount of money that contributes significantly to the ongoing financial integrity of the company") (Chambers); Tr. 823 (Parke); Tr. 1304-05, 1433 (Seger-Lawson); Tr. 2871 (Malinak).

The rebuttal testimony of DP&L witness Malinak explains the fact that the SSR and ST were not cost-based:

> "Q: Numerous intervenor witnesses claim that the SSR is a mechanism to recover transition costs under Ohio law. Ohio Rev. Code 4928.39 states that transition costs are costs that meet the following criteria, quoted at p. 10 of OCC Witness Rose's testimony:
>
> '(A) The costs were prudently incurred.
>
> (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.
>
> (C) The costs are unrecoverable in a competitive market.
>
> (D) The utility would otherwise be entitled to an opportunity to recover the costs.'
>
> <u>Does the SSR proposed by DP&L meet these criteria?</u>
>
> A: <u>No</u>. The proposed SSR is a charge that is designed and intended to provide DP&L as a whole with the financial wherewithal to continue to provide safe, reliable service to its customers at reasonable rates. This goal is furthered if DP&L has the opportunity to earn an ROE that will assist it in maintaining its financial integrity on a going-forward basis. Moreover, the level of the SSR is set based on projections of the future financial results of DP&L as a whole, not with regard to historical costs. <u>The process of setting the SSR has nothing to do with</u> whether certain 'generation costs' were 'prudently incurred,' nor <u>whether 'the utility would otherwise be entitled to an opportunity to recover these costs</u>.' It is set purely with regard to whether it is sufficient to allow DP&L to continue to provide safe, reliable service, a goal which is furthered if DP&L has an opportunity to earn a reasonable ROE. Thus, the <u>justification for the charge and the level at which it is set</u>

are not based on the transition charge criteria specified above."

DP&L Ex. 14A, pp. 17-18 (emphasis added) (footnote omitted). Accord: Tr. p. 2871 ("Q. Is the SSR or switching tracker designed to recover any particular costs? A. No. Those charges are designed to increase the probability that DP&L, as a whole, will be able to maintain its financial integrity going into the future or under certain assumptions.") (Malinak).[8]

Further, numerous intervenor and Staff witnesses conceded that the SSR and ST were established to allow DP&L to recover a targeted ROE. Tr. 1707 (Hess); Tr. 2035 (Rose); Tr. 2518 (Duann); Tr. 1808-09 (Turkenton). Those concessions thus demonstrate that the SSR and ST were not designed to recover any specific "costs," and thus are not transition costs as defined in Ohio Rev. Code § 4928.39.

Indeed, the Commission rejected a similar argument in its AEP Order. Specifically, in that Order, the Commission stated: "we reject the claim that the RSR allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010 pursuant to Senate Bill 3, as AEP-Ohio does not argue its ETP did not provide sufficient revenues." AEP Order, p. 32. Similarly, here, DP&L does not argue that it recovered insufficient revenues under its ETP case, and the SSR and ST thus are not transition charges for this additional reason.

[8] DP&L witness Chambers testified that he did not know how transition costs were defined under Ohio law, but that the SSR and ST would be transition costs if they were designed to provide compensation to DP&L's generation business and DP&L's transmission and distribution businesses were earning a reasonable ROE. Tr. 535, 540-41. As demonstrated in the text, Dr. Chambers stated that "the SSR is not a cost-based from that standpoint, is not directed at specific assets, it is a general amount of money that contributes significantly to the ongoing financial integrity of the company." Tr. 552. Dr. Chambers' description of the SSR and ST plainly demonstrates that those charges were not designed to recover any specific costs, and thus do not qualify as transition costs under Ohio law.

b. **The SSR and ST Are Permissible Under § 4928.143(B)(2)(d), Which Was Enacted After SB 3**

Even assuming for the sake of argument that the SSR and ST were transition costs, they would still be lawful because SB 221 was enacted after SB 3. As the Commission knows, SB 3 was enacted in 1999. As the Commission also knows, SB 3 provided that "[t]he commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code." Ohio Rev. Code § 4928.38. Nine years later, the General Assembly passed SB 221, which included Ohio Rev. Code § 4928.143(B)(2)(d).

If the Commission were to conclude that the SSR and ST were barred by § 4928.38 (as transition charges) but were authorized under § 4928.143(B)(2)(d) (as stability charges), then the Commission should conclude that § 4928.143(B)(2)(d) controls because it was enacted <u>after</u> § 4928.38. It is well settled that if two statutes conflict, then the later-passed statute controls. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."); <u>Summerville v. City of Forest Park</u>, 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E.2d 522, at ¶ 33 (holding that two statutes conflicted and that "the more recent . . . statute . . . prevails"); <u>Stutzman v. Madison County Bd. of Elections</u>, 93 Ohio St. 3d 511, 517, 757 N.E.2d 297 (2001) ("the statute later in date of enactment, prevails").

Thus, even if the SSR and ST were transition costs (as demonstrated above, they are not), they would still be lawful because § 4928.143(B)(2)(d) was enacted after § 4928.38.

6. <u>The Fact that AEP was an FRR was Irrelevant to the Commission's Decision in Establishing a Reasonable ROE Target</u>

Several intervenor witnesses assert that the Commission's 7%-11% ROE range from its AEP decision should not be treated as precedent in this case because AEP was an FRR entity, while DP&L is an RPM participant. OCC Ex. 21, p. 14 (Rose); FES Ex. 14A, pp. 29-30 (Lesser). The Commission should reject that assertion because AEP's status as an FRR entity was not relevant to the Commission's decision that a 7%-11% ROE was reasonable. At no point in its analysis did the Commission state that its 7% to 11% ROE range was based upon or related to the fact that AEP was an FRR entity. AEP Order, p. 33. Indeed, when the Attorney Examiners asked OCC witness Rose to identify any section in the Commission's decision that supported his contention that the ROE range from the AEP decision was based upon AEP's status as an FRR entity, Dr. Rose was unable to do so. Tr. 2036-39. Further, Dr. Choueiki agreed that the fact that DP&L is not an FRR entity was not a basis to reject the SSR. Tr. 1909-10.

7. <u>DP&L's Historic Earnings Are Irrelevant</u>

Several intervenor witnesses assert that the Commission should consider DP&L's historic ROEs in evaluating DP&L's request for an SSR and ST. OCC Ex. 28A, pp. 42-43 (Duann); OEG Ex. 1, pp. 14-16 (Kollen); IEU Ex. 1A, pp. 12-13 (Bowser). The Commission should reject that assertion for the following reasons:

<u>First</u>, it is well settled that past profits cannot be considered by the Commission when it is setting future rates. For example, in <u>City of Marietta v. Pub. Utils. Comm'n</u>, 148 Ohio St. 173, 184-85, 74 N.E.2d 74 (1947), the city argued that the Commission should have considered the utility's past earnings to set (and lower) the utility's future rates. The Supreme Court of Ohio held that doing so would violate the United States Constitution:

> "The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. . . . Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations."

Id. (emphasis in original) (internal quotation marks and citations omitted). Accord: City of Cincinnati v. Pub. Utils. Comm'n , 113 Ohio St. 259, 281-82, 148 N.E. 817 (1925) ("The claim that past profits justify a present rate that is not reasonable is no more tenable than the converse contention that if a public service corporation has operated at a loss in prior years, it is therefore entitled to more than a reasonable present rate of return in order to make up for past deficits.") (internal quotation marks and citation omitted); Bd. of Pub. Utils. Comm'rs v. N. Y. Tel. Co., 271 U.S. 23, 31-32, 46 S. Ct. 363, 70 L. Ed. 808 (1926) (under the Fourteenth Amendment to the United States Constitution, "[t]he revenue paid by the customers for service belongs to the company. . . . And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations.").

Second, as explained above (section II.E.2), DP&L has a long history of providing generation at below-market rates, which demonstrates that its historic ROEs are irrelevant in this proceeding.

8. Retail Auctions

IGS witness White recommends that the Commission not conduct wholesale auctions, but should instead maintain DP&L's existing base generation rates for the proposed ESP term. IGS Ex. 1, pp. 5-6. Mr. White further suggests that the Commission "should strongly consider retail auctions" for DP&L's next ESP proceeding. Id. at 6.

The Commission should reject Mr. White's proposal regarding retail auctions for several reasons. First, DP&L's next ESP proceeding will not be filed for several years. There is no reason to make decisions in this case for that proceeding. Second, Mr. White admitted that there is no reason to expect rates would be lower under a retail auction than under a wholesale auction. Tr. 2605-06. Third, there is no statutory support for a retail auction.

F. OTHER RIDERS

1. Fuel

DP&L will continue to have a fuel rider as part of its SSO rate until DP&L's SSO rate is established through 100% competitive bidding. Tr. 1574 (Gallina). DP&L acquires its fuel from different sources under contracts that are signed at different times; the fuel that DP&L uses thus costs different amounts. Tr. 1574. There are two methodologies that are proposed in this case regarding how DP&L's fuel rate for SSO customers should be calculated during the remainder of the ESP term:

1. System average cost: DP&L proposes to use a system average cost method to set its fuel rate. Under that method, DP&L would determine its total fuel cost for the period, and would determine its total generation sales for a period (the total generation sales would include retail and wholesale sales). DP&L Ex. 3, pp. 5-6 (Marrinan, adopted by Hoekstra). DP&L would then determine its average fuel costs, and use that average to establish the fuel rider to be charged to SSO customers. Id.

2. Least-cost stacking: Staff and OCC propose that DP&L use a least-cost stacking methodology, under which DP&L's least-cost fuel would be allocated to SSO customers. Staff Ex. 5, pp. 2-4 (Gallina); OCC Ex. 24A, pp. 5-10 (Slone). Under that method,

the fuel rider would be lower than under a system-average method because the least-cost fuel would be allocated to retail customers. Tr. 1576 (Gallina).

The Commission should conclude that system average cost is the appropriate method for the following reasons:

First, DP&L has no obligation to allocate its least-cost fuel to SSO customers. Specifically, Staff witness Gallina and OCC witness Slone both conceded the following points:

1. DP&L has no statutory obligation to allocate least-cost fuel to SSO customers. Tr. 1579; Tr. 2114.

2. There is no Commission rule that requires DP&L to allocate least-cost fuel to SSO customers. Tr. 1579-80; Tr. 2114.

3. There is no Commission Order that requires DP&L to allocate least-cost fuel to SSO customers. Tr. 1580-81; Tr. 2115.

4. There is no binding agreement that requires DP&L to allocate least-cost fuel to SSO customers. Tr. 1581-82; Tr. 2115.

SSO customers thus have no right to demand that least-cost fuel be allocated to them.

Second, DP&L would not be able to recover all of its fuel costs under a least-cost stacking methodology. If DP&L's least-cost fuel is allocated to retail customers, then DP&L's higher-cost fuel would be allocated to wholesale customers. Tr. 1586 (Gallina). It is undisputed that DP&L sells generation in the wholesale market at market rates. DP&L Ex. 16A, p. 9 (Jackson Rebuttal); IEU Ex. 2A, p. 15 (Murray). However, Messrs. Gallina and Slone both admitted that DP&L could not charge wholesale customers a market rate plus an additional amount associated with the fact that DP&L's higher-cost fuel was allocated to them. Tr. 1587; Tr. 2120. Under their proposals, DP&L thus would not be able to recover all of its costs associated with its higher-cost fuel.

Third, while both Mr. Gallina and Mr. Slone opined that SSO rates would be lower under a least-cost method (Tr. 1576; Tr. 2120), both conceded that they have not considered the effect that their proposals would have upon DP&L's financial integrity (Tr. 1588-89; Tr. 2120-21). Further, the projected revenue figures in DP&L's filing assume the use of a system-average method, but Staff witness Mahmud admitted that he did not account for the use of a least-cost-stacking method in calculating his proposed SSR range. Tr. 1031. The Commission should reject a least-cost-stacking method because there is no obligation for DP&L to calculate its fuel rate using this methodology and that method would have further adverse effects upon DP&L's financial integrity.

2. Reconciliation Rider

DP&L's proposed non-bypassable Reconciliation Rider ("RR") includes three components: (1) costs of administering the competitive bidding process; (2) the costs of certain competitive retail enhancements; and (3) any deferred balance that exceeds 10% of the balance associated with particular riders. DP&L Ex. 10, p. 8 (Rabb). Each item is addressed below:

(a) CBP costs: The competitive bidding process benefits all customers. Tr. 1751 (Donlon); Tr. 1822 (Turkenton). DP&L thus proposed to recover the costs from all customers. DP&L Ex. 10, pp. 8-9 (Rabb).

(b) Competitive enhancements: DP&L discusses competitive enhancements below. To the extent that the Commission approves the implementation of such enhancements and concludes that the associated costs would be recovered from customers in a non-bypassable rider, those costs should be included in the RR. DP&L Ex. 10, pp. 8-10 (Rabb).

(c) Deferred balances: DP&L proposes to recover through the RR any deferred balance that exceeds 10% of the base amount associated with the following riders: FUEL, RPM, TCRR-B, AER and CBT. DP&L Ex. 10, pp. 8, 10-11 (Rabb). Thus, for example, if the base amount to be recovered in a given period under one of the riders was $10,000,000, and the unrecovered deferral was $2,000,000, then DP&L proposes to include $1,000,000 of the deferral balance in the RR. Tr. 1334-35 (Seger-Lawson).

DP&L proposed that those costs be included in the RR to avoid what others have called the "death spiral" phenomenon. The "death spiral" name is perhaps too dramatic, but the problem is real. Specifically, DP&L faces a risk that it will not fully recover costs under the listed riders in one period due to switching. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal). DP&L is then left to attempt to recover those costs from a smaller group of customers in the next period, but may again be unable to do so due to ever-increasing switching rates. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson). There is thus a significant risk that DP&L will be in a position that it has to recover a very large deferral balance from a very small group of customers. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson). Including deferral balances from those riders that exceed 10% of the base amount to be recovered under those riders eliminates that risk. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson).

Ms. Seger-Lawson explained that DP&L is currently experiencing the "death spiral" for its TCRR. DP&L Ex. 12, p. 8; Tr. 1344-45. Her rebuttal testimony also demonstrated that DP&L's proposal was consistent with mechanisms that the Commission has approved for other utilities. DP&L Ex. 12, pp. 6-7, 9-10. Accord: Tr. 2198-99 (Seger-Lawson). In fact, DP&L's proposal is more moderate than the provision that the Commission approved for

FirstEnergy since (a) the FirstEnergy threshold was 5%; and (b) under the FirstEnergy provision, the entire bypassable rider could become non-bypassable. DP&L Ex. 12, pp. 9-10; Tr. 2247-48 (Seger-Lawson).

Staff and numerous intervenor witnesses opposed including those deferral balances in the RR. Staff Ex. 7, pp. 9-10 (Donlon); Wal-mart Ex. 1, pp. 7-10 (Chriss); FEA Ex. 2, pp. 4-8 (Collins); Constellation Ex. 1, p. 42 (Fein); Kroger Ex. 1, pp. 15-16 (Higgins); FES Ex. 17A, pp. 16-17 (Noewer); FES Ex. 14A, pp. 57-63 (Lesser); IGS Ex. 1, pp. 7-8 (White); IEU Ex. 1A, pp. 4-9 (Bowser). However, numerous witnesses conceded that there was a real risk that DP&L may be left to recover a very large deferral balance from a very small group of customers if something was not done to address the issue. Tr. 1747-48, 1753-54 (Donlon); Tr. 1960 (Collins); Tr. 2049 (Chriss).

Staff witness Donlon proposes that DP&L attempt to recover any unrecovered costs at the end of the ESP term. Staff Ex. 7, p. 10. However, that proposal does not address the fundamental problem – namely, a small group of SSO customers may be left to pay a very large deferral balance. Mr. Donlon also suggests that DP&L ask the Commission for relief if it is experiencing the death spiral. Staff Ex. 7, p. 10. However, his testimony at the hearing demonstrated that he did not understand the death spiral problem. Tr. 1747. He further failed to understand that DP&L is currently experiencing the death spiral issue for the TCRR rider and is seeking Commission relief through this proceeding. Tr. 1760-61.

The Commission should conclude that DP&L's proposal is a reasonable proposal that will protect consumers.

3. __AER-N__

DP&L also seeks approval of a non-bypassable rider titled the Alternative Energy Rider – Nonbypassable ("AER-N") associated with DP&L's Yankee Solar Generating Facility. DP&L seeks approval of the AER-N pursuant to Ohio Rev. Code § 4928.143(B)(2)(c), which states:

> "The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements."

__Id__.

The testimony of DP&L witness Seger-Lawson demonstrates that the Yankee facility satisfies the statutory criteria: (1) it is owned and operated by a utility, (2) it was sourced through a competitive bidding process, (3) it was used and useful after January 1, 2009, and (4) it was found by the Commission to be needed as a result of the resource planning process. DP&L Ex. 9, p. 15. __Accord__: Tr. 1311 (Seger-Lawson). Witnesses who opposed the AER-N admitted that they did not sponsor any testimony regarding whether the elements of § 4928.143(B)(2)(c) were satisfied. Tr. 1209-10 (Fein); Tr. 2025 (Rose); Tr. 2421 (Noewer).

IEU witness Bowser asserts that the Commission should reject the AER-N because (a) it is inconsistent with Ohio Rev. Code § 4928.64(E); and (b) the finding of need for the facility cannot be in a Long Term Forecast Report ("LTFR"). IEU Ex. 1A, pp. 10-11. However, the Commission considered and rejected those exact same arguments when it approved a similar rider for AEP. AEP Order, pp. 23-24. Accord: DP&L Ex. 12, pp. 11-13 (Seger-Lawson Rebuttal). Further, Mr. Bowser conceded that findings of need are typically done in the LTFR process. Tr. 2647.

FES witness Lesser claims that the Commission should reject the AER-N because there is "no longer" a need for the Yankee facility. FES Ex. 14A, p. 50. The Commission should reject that argument because it found in DP&L's LTFR case that: "There is a need for a 1.1 MW solar generation facility, known as Yankee 1, and for additional solar generation facilities during the LTFR planning period." April 19, 2011 Opinion & Order, p. 5 (Case No. 10-505-EL-FOR). Further, in another proceeding, the Commission stated that "we find that there was an insufficient quantity of Ohio-based solar energy resources reasonably available in the market . . . ." March 17, 2010 Finding & Order, ¶ 7 (Case No. 09-1989-EL-ACP). Accord: Tr. 2287 ("when the company built Yankee, there were insufficient solar RECs") (Seger-Lawson). Once there has been a finding by the Commission of a need for the facility, there is no further requirement in § 4928.143(B)(2)(c) of an ongoing need for the facility. Stated differently, if the facility was needed when it was constructed, then it satisfies the requirements of § 4928.143(B)(2)(c). DP&L Ex. 12, p. 13 (Seger-Lawson Rebuttal).

DP&L's net plant investment in the Yankee facility is approximately $3.3 million. DP&L Ex. 5, p. 13 (Malinak). DP&L asks the Commission to approve a placeholder tariff for the AER-N, and that the rate initially be set at zero. DP&L Ex. 9, p. 16 (Seger-Lawson). DP&L

intends to implement a subsequent proceeding at which it would demonstrate that its expenditures on Yankee were prudent. Id.; Tr. 1316. The Commission should approve DP&L's request since it is identical to AEP's request that the Commission approved. AEP Order, pp. 23-24.

4. TCRR-N/TCRR-B

DP&L proposes to split its current bypassable Transmission Cost Recovery Rider ("TCRR") into non-bypassable ("TCRR-N") and bypassable ("TCRR-B") riders. DP&L Ex. 11, pp. 3-11 (Hale). DP&L seeks a waiver of Ohio Administrative Code § 4901:1-36-04(B), to permit it to charge a non-bypassable TCRR-N. The Commission has previously approved similar structures for FirstEnergy Corp. and Duke Energy Ohio. July 18, 2012 Opinion & Order, pp. 11, 58 (Case No. 12-1230-EL-SSO); May 25, 2011 Opinion & Order, pp. 7, 17 (Case No.11-2641-EL-RDR).[9]

IEU witness Murray and Wal-Mart witness Chriss oppose DP&L's request that the TCRR be split into a TCRR-N and a TCRR-B. They speculate that customers may currently be paying TCRR charges to their CRES provider pursuant to a contract, and DP&L's request that some TCRR costs be made non-bypassable would create a risk that customers would be paying those costs to both their CRES provider and to DP&L. IEU Ex. 2A, p. 38; Wal-Mart Ex. 1, p. 18. The Commission should reject their arguments for four reasons:

First, neither has made any showing that customers in fact have contracts that create a risk of double payment. Mr. Murray merely identifies the possibility of double payment

[9] Both the FirstEnergy and Duke proceedings were resolved via Stipulation. The Commission held in both cases that the Stipulation did not violate any important regulatory principle or practice.

(IEU Ex. 2A, p. 38), and Mr. Chriss admitted that he has made no effort to determine whether Wal-Mart's contracts create a risk of double payment (Tr. 2058-60). Further, DP&L's request to split its TCRR into a TCRR-N and TCRR-B was included in DP&L's March 30, 2012 Application (p. 10) in this matter; the request has been pending for over a year, and customers have thus had ample notice of the proposed change. Tr. 1356-57 (Seger-Lawson).

Second, even assuming for the sake of argument that customers were parties to contracts that placed them at risk of paying the same cost twice, Mr. Murray does not claim to have contacted the applicable CRES provider to ask whether they would agree to remove the charge from the customer's bill; Mr. Chriss admitted that he did not make such an inquiry (Tr. 2059-60).

Third, neither Mr. Murray nor Mr. Chriss identified the magnitude of the potential double charges for the customers that they represent. There has been no showing that the impact may be material for any customers who may be affected.

Fourth, splitting the TCRR into a TCRR-N and TCRR-B is reasonable because the utility pays the non-bypassable components to PJM. DP&L Ex. 11, p. 6 (Hale). Indeed, Constellation witness Fein supports DP&L's request to split the TCRR into a TCRR-N and TCRR-B. Constellation Ex. 1, p. 12. Separating the TCRR into bypassable and non-bypassable components is consistent with the practice approved for other utilities, will more accurately reflect actual market conditions, and should be approved.

G. OTHER ISSUES

1. The Commission Should Not Restrict DP&L's Ability to Issue Dividends

Staff witness Choueiki recommended that SSR revenues collected stay with DP&L and not be transferred to any of DP&L's affiliates or subsidiaries. Staff Ex. 10A, p. 15. OCC witness Duann recommends that DP&L be barred from paying any dividends during the ESP term, and that future dividends be "forever" limited to future earnings. OCC Ex. 28A, pp. 46-47; Tr. 2545. The Commission should reject those proposals for the following reasons:

1. Board Discretion: As an initial matter, as long as DP&L is able to provide safe and reliable service, DP&L's Board should have discretion to issue dividends to DPL Inc.

2. Unnecessary Restriction: DP&L has addressed the policy concern of potential cross-subsidization of an unregulated affiliate during the ESP period. DP&L witness Jackson testified as follows:

> "Q. On Page 15 of his testimony, Witness Choueiki indicates 'To the extent the Commission grants an SSR charge to DP&L, Staff recommends that the revenues collected stay with DP&L and not be transferred to any of DP&L's current, or future-formed, affiliates or subsidiaries.' Is this reasonable?
>
> A. I disagree with this proposal. DP&L has no intention of transferring cash received from its proposed ESP, including the Service Stability Rider (SSR), to fund the current or future operations of DPLER, DPLE or any other subsidiaries of DPL Inc. The revenues from the ESP, including the SSR revenues, are needed to ensure the financial integrity of DP&L, and are required to meet DP&L's own obligations and enable the Company to legally separate at December 31, 2017. Since cash is fungible, it is not necessary to isolate the SSR revenues. I therefore, disagree with this proposal and believe that it would add an unnecessary restriction to the Company or DPL Inc.'s ability to pay down its debts and restructure its balance sheet."

DP&L Ex. 16A, pp. 4-5 (Jackson Rebuttal).

3. A Taking: It is well settled that an unconstitutional taking would occur if investors do not have an opportunity to earn a reasonable return on equity. Ohio Edison Co. v. Pub. Utils. Comm'n of Ohio, 63 Ohio St. 3d 555, 562-63, 589 N.E.2d 1292 (1992) (per curiam) (quoting Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944)). If DP&L's ability to pay dividends to its investors was restricted, then DP&L's investors would not be able to earn a reasonable return on their investment and an unconstitutional taking would occur.

4. DPL Inc. Debt Is Attributable to DP&L: As discussed above, DP&L witness Chambers explained that DP&L's debt-to-equity ratio of 40% debt/60% equity showed that DP&L had relatively low debt compared to DP&L's peers, which generally had ratios of approximately 50%/50%. DP&L Ex. 4A, pp. 30-31. Dr. Chambers further explained that DPL Inc. (DP&L's parent) had relatively high debt. DP&L Ex. 4A, p. 30. Mr. Jackson explained that the relatively low debt at DP&L and the relatively high debt at DPL Inc. demonstrates that from an economic perspective, some of the debt at DPL Inc. was attributable to DP&L. Tr. 145-46.

Dr. Chambers explained that he thus conducted his analysis of DP&L under a pro forma 50%/50% capital structure, which effectively assigned some of the debt at DPL Inc. to DP&L. DP&L Ex. 4A, pp. 30-31. As demonstrated above, Staff witness Mahmud testified that he "adopted" Dr. Chambers' pro forma debt adjustment. Staff Ex. 1A, pp. 3, 5; id. at SUM 1-4. Accord: Tr. 915-16, 935, 1026. Numerous intervenor witnesses also testified that they agreed with the pro forma debt adjustment. OCC Ex. 28A, p. 41 (Duann); FEA Ex. 1A, p. 9 (Gorman); OEG Ex. 1, pp. 9-10 (Kollen).

Any restriction that the Commission would impose upon DP&L's ability to pay dividends to DPL Inc. would necessarily restrict DPL Inc.'s ability to pay its debts. Such a restriction would not be reasonable given that DP&L, Staff and numerous intervenor witnesses all agree that a significant portion of DPL Inc.'s debt is fairly attributable to DP&L.

5. <u>DP&L's ROE</u>: If DP&L were restricted from paying dividends to DPL Inc., then that would have the effect of increasing the equity balance at DP&L. All else being equal, an increased equity balance would lead to a lower return on equity for DP&L. Thus, if DP&L's ability to issue dividends was restricted, then it would need a higher SSR to allow it to maintain a reasonable ROE.

6. <u>Transfer of Generation Assets</u>: As discussed in more detail below, numerous intervenor witnesses asked the Commission to order DP&L to transfer its generation assets. DP&L witness Herrington explained that to enable DP&L to transfer its generation assets, there would need to be a "DPL-wide" restructuring of its balance sheet. Tr. 1149-50. DPL Inc. would not be able to restructure its balance sheet if it does not receive sufficient dividends to allow it to pay off its debt. The dividends are thus necessary to enable DP&L to transfer its generation assets.

2. <u>Rate Design for SSR</u>

DP&L's proposed rate design for the SSR and ST started with the rate design for DP&L's current RSS and added a customer charge to that rate design. DP&L Ex. 7, p. 7 (Parke). The goal of DP&L's rate design was to balance the impact of the entire ESP filing across all tariff classes. Tr. 831-32 (Parke). DP&L's proposed rate design promotes the rate-making principles of providing stable and predictable rates. <u>Id</u>.

Staff witness Turkenton recommends that the customer charge be eliminated from the rate design. Staff Ex. 8, pp. 14-15. OCC witness Rubin recommends that rates be designed to allocate the SSR based upon consumption of energy. OCC Ex. 20A, p. 13. OEG does not object to DP&L's proposal for residential and other non-demand rate schedules, but states that the SSR should be allocated on a kW demand charge for demand metered classes. OEG Ex. 1, p. 21 (Kollen).

The Commission should approve DP&L's proposed rate design because it strikes a reasonable balance. DP&L's rate design will minimize the effects of DP&L's ESP as a whole, and thus will result in stable rates for all customers.

3. <u>Phase-Out of Maximum Charge</u>

DP&L proposes to phase out the maximum charge provision in its tariffs. DP&L Ex. 7, pp. 8-10 (Parke). The maximum charge provision serves to limit the amounts that poor load factor customers pay. <u>Id</u>. at 8. It is appropriate to eliminate the maximum charge provision because the customers who benefit from the maximum charge provision do not pay their fair share of costs. <u>Id</u>. at 9. Further, a maximum charge provision is inconsistent with competitive markets.

4. <u>AER Cost Cap</u>

SB 221 requires utilities to provide a portion of their SSO load using alternative energy resources. Ohio Rev. Code § 4928.64(B). That section further provides that a utility "need not comply with a benchmark . . . to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more." Ohio Rev. Code § 4928.64(C)(3). DP&L proposes that the statutory cost cap be set based upon the expected auction results, which are

$0.04271; three percent of that amount of $0.0012813. DP&L Ex. 7, p. 3 (Parke Test.). DP&L's proposal is consistent with § 4928.64(C)(3), since that section permits the 3% cost cap to be set based upon the "cost of . . . acquiring the requisite electricity," and the bid rate reflects the costs of acquiring electricity.

5. The Commission Should Not Order DP&L to Make Charitable Contributions

OPAE witness Rinebolt asks the Commission to order DP&L to make charitable contributions of $750,000 per year for a fuel fund. OPAE Ex. 1, pp. 3-6. DP&L has historically provided support for low-income residents in its service territory, and its current intent is to provide some level of support so long as it can do so without adversely affecting its financial integrity. However, the Commission should not order DP&L to make any charitable contributions for the following separate and independent reasons. First, the Commission does not have jurisdiction to require DP&L to make charitable contributions. Second, the General Assembly has already established the PIPP program to assist low-income residents. It is the responsibility of the General Assembly, not this Commission, to determine what funds should be provided to assist low-income residents. Third, as demonstrated above, DP&L is already facing financial integrity issues. The Commission should not order DP&L to make charitable contributions that may adversely affect DP&L's financial integrity. Fourth, OPAE is requesting a substantial increase to the amount of the existing fuel fund, but has not provided any analysis to show the reasonableness of its request. Tr. 2563-64 (Rinebolt).

III. COMPETITIVE BIDDING

A. DP&L'S ESP PROVIDES FOR A RAPID TRANSITION TO 100% COMPETITIVE BIDDING

DP&L proposes the following blending schedule to implement rates from a competitive auction:

Date	Existing Rates	Competitive Bid
January 1, 2013 - May 31, 2014	90%	10%
June 1, 2014 - May 31, 2015	60%	40%
June 1, 2015 - May 31, 2016	30%	70%
June 1, 2016	0%	100%

DP&L Ex. 8, p. 2 (Herrington).

Staff witness Strom recommends that a more accelerated blending schedule that would use 40% of the competitive bid rates in the blend in year one; 60% in year two; and 100% in year three. Tr. 1077-78 (Strom). In his rebuttal testimony, DP&L's CFO, Craig Jackson, modeled the financial effect of the Staff's proposal, including the Staff's 40%/60%/100% suggestion. DP&L Exhibit 16A, pp. 6-7. Mr. Jackson explained that "in order to allow the Company the opportunity to realize a three year average ROE of 7% if the Staff proposals above are implemented, we have estimated the [SSR] would have to be at a level of approximately $[redacted] per year compared to the $151 million per year noted in Witness Choueiki's testimony." Id. Accord: DP&L Ex. 14A, pp. 5-9 (Malinak Rebuttal); Tr. 637-38, 640-41 ("[A] faster transition to market results in lower revenues . . . . [T]hat factor would tend to lead to, all else equal, point to a higher SSR.") (Malinak); Tr. 1096 ("But certainly to the extent that you move on the blend percentage either to accelerate it or decelerate it for that matter, it changes how all of those features hang together and it could have an impact on the SSR.") (Herrington); Tr. 1298 (Seger-Lawson).

In his rebuttal testimony, DP&L witness Malinak explained that the Staff's suggested 3-year ESP plan would adversely affect DP&L's financial condition:

> "For example, as shown in Chambers Exhibit WJC-3, DP&L's ROE is expected to be just [redacted] percent in 2015 and [redacted] percent in 2016 with an SSR set at $137.5 million, which is indicative of a precarious financial position as noted by Witness Chambers. In light of this potential situation, it would be prudent for DP&L to request additional funds through an SSR for Years 1 to 3, a request that it mitigated through awarding the full five-year plan. Instead, Dr. Choueiki proposes to accelerate the transition to market rates with more aggressive blending of CBP auction rates than is proposed by DP&L, a proposal that compounds the effect of the shorter three year ESP term."

DP&L Exhibit 14A, pp. 28-29.

Staff witness Strom conceded on cross examination that the Staff's blending percentages of 40%/60%/100% were recommended without any test or assessment of the reasonableness of those numbers in terms of DP&L's financial integrity. Tr. 1078-79. Mr. Strom did not review the analysis of DP&L's financial integrity at all in the process of coming up with blending percentages. Tr. 1080-81. Other witnesses who recommended a more accelerated blending schedule also admitted that they did not study the effect that their proposal would have on DP&L's financial integrity. Tr. 1201 (Fein); Tr. 2416 (Noewer); Tr. 2545-46 (Duann).

Dr. Choueiki admitted that the Staff recognizes that going to market two years earlier than the company proposes would result in a loss to DP&L of "[redacted]." Tr. 1908.

B. DP&L AND ITS AFFILIATES SHOULD BE PERMITTED TO BID INTO DP&L'S AUCTIONS

Staff asserts that the Commission should preclude DP&L from bidding at its own auctions. Staff Ex. 2, pp. 4-5 (Strom).[10] Several intervenor witnesses assert that the Commission should preclude DP&L and its affiliates from bidding at DP&L's auctions. FES Ex. 17A, p. 18 (Noewer); Constellation Ex. 1, p. 6 (Fein). The Commission should reject those positions since they (1) are inconsistent with Commission precedent; (2) have no evidentiary support; and (3) may result in higher prices to customers.

(1) Commission Precedent: In AEP's ESP case, the Commission stated: "nothing within this Order precludes AEP-Ohio or any affiliate from bidding into any of these auctions." AEP Order, p. 40.

(2) No Evidentiary Support: On cross examination, Staff witness Strom admitted that he has not done any surveys or other analysis to see whether his concern about DP&L's participation in its own action has any basis. Tr. 1066. In fact, he admitted "I don't have any specific facts" to support that concern. Tr. 1067. He agreed that it is desirable to have more bidders rather than fewer bidders. Tr. 1081-82. Similarly, FES witness Noewer opines that DP&L and its affiliates should not be permitted to bid into DP&L's auctions as long as DP&L is recovering the SSR (FES Ex. 17A, p. 18), but she admitted that she does not sponsor any evidence showing that CRES providers have been injured by the fact that utilities have received non-bypassable charges (Tr. 2438-39). Further, Mr. Fein also does not sponsor any specific evidence showing that the bidding process would be harmed if DP&L or its affiliates were allowed to bid at DP&L's auctions. Constellation Ex. 1, p. 6.

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[10] Staff is not recommending that DPLER be prohibited from bidding into DP&L's auctions. Tr. 1055 (Strom).

(3) Higher Rates: Further, the exclusion of DP&L and its affiliates from bidding into DP&L's auctions may lead to higher rates for customers. Tr. 1200 (Fein); Tr. 1081-82 (agreeing that "it's desirable to have more bidders rather than fewer bidders") (Strom). Further, Ms. Noewer testified that FES opposed load caps because they "serve as an artificial limit on competition because, when the cap is triggered, it necessarily means that a lower-priced bidder was willing to serve more of the available load," and customers may thus "be left to pay a higher price." FES Ex. 17A, pp. 12-13; Tr. 2418. The same logic applies to FES' request that DP&L and its affiliates be excluded from bidding into DP&L's auctions; namely, the exclusion would serve as an artificial limit on competition that may lead to higher prices.

C. THE COMMISSION SHOULD REJECT PROPOSED CHANGES TO DP&L'S COMPETITIVE BIDDING PLAN

The testimony of DP&L witness Lee demonstrates that DP&L's competitive bidding plan ("CBP") and Master Supply Agreement ("MSA") are reasonable and should be approved. DP&L Ex. 13. FES witness Noewer and Constellation witness Fein propose various changes to DP&L's CBP and MSA. FES Ex. 17A, pp. 11-14; Constellation Ex. 1, pp. 9-42. The Commission should reject those proposals for the following separate and independent reasons.

1. Commission Rules: Neither Ms. Noewer nor Mr. Fein identified any rules or regulations that DP&L's CBP or MSA violated, and Mr. Fein admitted that he was not aware of any such rules that DP&L's MSA violated. Tr. 1205. Since DP&L's CBP and MSA are consistent with the Commission's rules, the Commission should approve them.

2. Staff Recommendations: The Staff Comments filed on April 27, 2012, found little fault with DP&L's competitive bidding procedures. Staff's few comments on DP&L's initial CBP were incorporated into DP&L's amended CBP as follows:

A. Pursuant to Staff Comments on page 4, DP&L adopted an 80% load cap for its Competitive Bidding Plan ("CBP"). DP&L Ex. 13, p. 26 (Lee).

B. Pursuant to Staff Comments on page 5, DP&L removed the requirement that winning bidders supply renewable energy credits as part of the bidding process.

C. Pursuant to Staff Comments on page 6, DP&L provided that it will allow for the selection of a different auction manager. DP&L Ex. 9, p. 18 (Seger-Lawson).

D. Pursuant to Staff Comments on pages 13-14, DP&L removed its request to recover case expenses from this filing.

E. Pursuant to Staff Comments on pages 13-14, expenses included in DP&L's RR will include CBP auction costs, CBP consultant fees, PUCO consultant fees, audit costs, supplier default costs (if any), and carrying costs at the cost of long-term debt. DP&L Ex. 10, pp. 8-9 (Rabb).

Staff witness Strom agreed that DP&L's CBP addressed Staff's concerns. Staff Ex. 2, pp. 2-3; Tr. 1069, 1071-72, 1074-75, 1077 (Staff has no criticism of DP&L's bidding rules).

3. Other Ohio Auctions: The evidence shows that DP&L's CBP and MSA are consistent with the plans used by FirstEnergy and Duke. DP&L Ex. 13, p. 5 (Lee); Constellation Ex. 1, p. 7 (Fein); Tr. 1205-06, 1208 (Fein); Tr. 2419 (Noewer). Mr. Fein admitted that uniformity was a benefit:

> "A uniform agreement would be of benefit . . . . It certainly makes it easier and some states have attempted to do that and to try to have a uniform agreement for all of these auctions, so it's certainly a benefit."

Tr. 1208-09. In fact, Mr. Fein supported testimony in the Duke proceeding supporting the competitive bidding process that was implemented by Duke. Tr. 1206.

Further, DP&L proposes to use Charles Rivers Associates ("CRA") as its auction manager. DP&L Ex. 13, p. 28 (Lee). CRA served as the auction manager for auctions held by

FirstEnergy and Duke (DP&L Ex. 13, p. 2 (Lee)), and Mr. Fein and Ms. Noewer both agreed that CRA was qualified to serve in that position. Tr. 1200-01 (Fein); Tr. 2417-18 (Noewer).

4. Cost/Benefit analysis: Neither Ms. Noewer nor Mr. Fein sponsor any analysis that quantifies either the costs or the benefits of their various proposals.

5. No Advantage to DPLER: FES witness Noewer admitted that DP&L's competitive bidding plan did not provide any unfair advantage to DPLER. Tr. 2417-18.

6. Reasonable arrangements: While Ms. Noewer and Mr. Fein make too many proposals for DP&L to address all of them here, DP&L will briefly address a request that they both make that DP&L's reasonable arrangements be included in the competitive bid. FES Ex. 17A, pp. 13-14 (Noewer); Constellation Ex. 1, p. 13 (Fein). The Commission should reject that request for two reasons: First, as the Commission knows, reasonable arrangements are contracts that were approved by the Commission pursuant to Ohio Rev. Code § 4905.31. Neither Mr. Fein nor Ms. Noewer even reviewed the contracts to determine whether they permit the load associated with the contract to be included in the competitive bid. Tr. 1203 (Fein); Tr. 2419 (Noewer). Second, those customers are served via a contract and thus are not SSO customers. Their load thus is not eligible to be included in the competitive bidding process.

IV. CORPORATE SEPARATION

A. SEPARATION OF GENERATION ASSETS

In DP&L's ESP, it commits to filing an application by December 31, 2013 to separate its generation assets. DP&L Ex. 6, p. 4 (Rice). In that Application, DP&L expects to request Commission authority to transfer its generation assets by December 31, 2017. Id.

Numerous intervenor witnesses ask the Commission to order DP&L to transfer its generation assets before December 31, 2017. FES Ex. 17A, pp. 9-10 (Noewer); FES Ex. 14A, pp. 63-79 (Lesser); Constellation Ex. 1, p. 6 (Fein). The Commission should reject those requests for two reasons:

First, DP&L has not yet filed an application to transfer its generation assets. The statute governing the separation of generation assets states: "No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval." Ohio Rev. Code § 4928.17(E). The appropriate time to consider DP&L's request to transfer its generation assets is when DP&L files its application seeking Commission approval to do so. Indeed, Staff's plan is to wait until that proceeding to evaluate DP&L's request. Tr. 1857 (Choueiki).

Second, the testimony of DP&L witnesses demonstrate in detail that DP&L cannot transfer its generation assets at an earlier date due to: (1) restrictions in its First and Refunding Mortgage; and (2) limitations on its ability to refinance the bonds. DP&L Ex. 16A, pp. 2-4 (Jackson). Specifically, the Company maintains a First and Refunding Mortgage, which creates a lien on all of the assets (transmission, distribution and generation) of DP&L for the purposes of securing approximately $884M of current indebtedness ("Secured Bonds"). Id. So long as this First and Refunding Mortgage remains in existence in its current form, the Company is unable to effectuate a legal separation of the generation assets from the transmission and distribution assets. Id. The First and Refunding Mortgage cannot be extinguished until Secured Bonds are called (i.e., redeemed prior to maturity) by the Company and either refinanced or re-paid in cash. Id. Given certain "no-call" provisions on certain outstanding bonds, the earliest possible date that all the Secured Bonds could be called is September 1, 2016. Id. Tr. 2911

(Jackson). The debt issuances containing the no-call provisions benefitted ratepayers by yielding a lower interest rate, and were approved by the Commission at the time of issuance. Tr. 801-05 (Rice). DP&L witness Jackson further explained that very little if any of DP&L's existing debt could be supported by the generation business, and that if DP&L were compelled to transfer its generation assets now, then DP&L's transmission and distribution businesses would be supporting the full amount of the debt, which would lead to a very unbalanced capital structure. Tr. 260-61. DP&L's transmission and distribution businesses would have difficulty providing safe and reliable service in that circumstance. Tr. 261-62, 2897 (Jackson); Tr. 1148-50 (Herrington).

Significantly, the intervenor witnesses uniformly concede that they have not studied (1) whether DP&L's mortgages would permit DP&L to refinance those bonds on the schedule that they prefer, or (2) whether DP&L could obtain the financing necessary to accomplish the transfer at an earlier date. Tr. 1197-98 (Fein); Tr. 1485 (Murray); Tr. 1937-38 (Gorman); Tr. 1986 (Kollen); Tr. 2400-01 (Noewer). Those witnesses thus have no basis to support their opinions that DP&L can and should transfer its generation assets at a sooner date.

For example, FES witness Lesser's proposal that DP&L separate its generation by 2014 is made without any independent analysis of whether that separation is legally or financially feasible to be accomplished by 2014. Tr. 1636. Asked on cross examination whether he has done an independent analysis as to how feasible it is to accomplish generation separation by 2014, he first tried to dodge the question, and then admitted: "No, I have not done an independent analysis of that." Tr. 1637. He also made no independent analysis or determination about the effect on DP&L's financial integrity of separation of generation assets by the end of

2014. Tr. 1637-38. Thus his recommendation of generation separation by 2014 is without adequate support.

B. TRANSFER PRICING

IEU witness Murray concedes that DP&L sells generation to DPLER at a market-based rate. IEU Ex. 2A, p. 15; Tr. 1489 (Murray). However, he asserts that DP&L is required to sell generation to DPLER at DP&L's "fully loaded embedded cost[]" pursuant to Ohio Rev Code § 4928.17(A)(3), and that DP&L is violating that statute by selling generation to DPLER at market-based rates. IEU Ex. 2A, p. 21. The Commission should reject that argument for the following three reasons:

1. FERC Preemption

As an initial matter, this Commission does not have jurisdiction to review the reasonableness of the rates that DP&L charges to DPLER because those rates fall within the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Regulation by this Commission is therefore preempted.

Specifically, it is well settled that FERC's jurisdiction "extend[s] . . . to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986) (internal quotation marks and citation omitted). Accord: Pub. Util. Dist. No. 1 of Grays Harbor County Wash. v. Idacorp. Inc., 379 F.3d 641, 646-47 (2004). Pursuant to that authority, FERC has issued decisions and promulgated rules regarding the sale of power by utilities to their affiliates. Order No. 697, 119 FERC ¶ 61,295 ¶¶ 464-603 (June 21, 2007); Order No. 697-A, 123 FERC ¶ 61,055 ¶¶ 181-259 (April 21, 2008); 18 C.F.R. § 35.39.

Further, FERC has granted DP&L authority to sell wholesale generation at market-based rates. Dayton Power & Light Co., et al., 76 FERC ¶ 61,367 (Sept. 30, 1996). FERC has also ruled that DP&L need not comply with the affiliate transfer rules in 18 C.F.R. § 35.39. Order Accepting Updated Market Power Analysis and Accepting Order No. 697 Compliance Filing and Directing Further Compliance Filing, 123 FERC ¶ 61,231, ¶ 21 (June 3, 2008) ("[W]e find that, based upon Dayton's representations, its wholesale customers are adequately protected from affiliate abuse. Additionally, based on Dayton's representation that under Ohio law every retail customer has retail choice, we find that there are no captive retail customers. Accordingly, we find that the affiliate abuse restrictions of 18 C.F.R. § 35.39 do not apply.") (footnote omitted) (Docket No. ER96-2601-020)).

In addition, DP&L has a FERC-approved tariff for the sale of generation, which states:

> "This Tariff is applicable to all wholesale sales of electric capacity, energy and ancillary services to the extent authorized by the Commission and not otherwise subject to another tariff that is in effect.
>
> * * *
>
> All sales pursuant to this Tariff shall be made at rates established by and subject to the terms and conditions of a service agreement between Buyer and Seller."

Wholesale Market-Based Rate Tariff Providing for Sales of Capacity and Energy, p. 2 (emphasis added).[11] DP&L's FERC-approved tariff extends to "all wholesale sales" and thus covers

[11] Available at http://etariff.ferc.gov/TariffList.aspx , typing in Dayton Power, clicking "Find Tariffs," then clicking on the Tariff Title of "Wholesale Market Based Rate Tariff," then clicking on "View/Export Tariff," then clicking on "View/Export to RT."

DP&L's sales to DPLER. Staff Witness Choueiki agreed that DP&L's transactions with its affiliates are governed by DP&L's market authority from FERC. Tr. 1918.

It is well settled that the Federal Power Act grants FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." New England Power Co. v. New Hampshire, 455 U.S. 331, 340, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982) (emphasis added). Accord: Pub. Util. Dist. No. 1, 379 F.3d at 646. The United States Supreme Court has further held:

> "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."

Nantahala, 476 U.S. at 966 (emphasis added) (internal quotation marks and citation omitted).

The Court's decision in Nantahala demonstrates that this Commission has no jurisdiction over wholesale energy sales between affiliates. In that case, FERC had approved a contract between two affiliates. Id. at 956-59. The North Carolina Utilities Commission ("NCUC") concluded that the contract terms were unfair to the retail affiliate, and ordered the retail affiliate to allocate costs to customers under terms that were inconsistent with FERC's decision. Id. at 959-62.

The Court held that the NCUC did not have jurisdiction to conclude that the FERC-approved terms were unreasonable in setting retail rates. Id. at 965-66. The Court stated:

> "Many of these cases involved purchases by closely related entities, but these courts have uniformly concluded that FERC's regulation still pre-empted review by state utility commissions of FERC-approved rates.

* * *

> Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."

Id. at 965-66. Accord: Pub. Util. Dist. No. 1, 379 F.3d at 647-51 (finding that state regulation of wholesale transaction price was barred by doctrines of field preemption, conflict preemption and the filed rate doctrine).

The Commission should thus conclude that the rate that DP&L charges to DPLER falls within the scope of FERC's exclusive jurisdiction, and any finding by this Commission that that rate was unreasonable would be preempted.

2. No Preference or Advantage

Not only does the Commission lack jurisdiction, but also, IEU misconstrues Section 4928.17(A)(3). That section provides that "the utility will not extend any undue preference or advantage to any affiliate . . . without compensation based upon fully loaded embedded costs charged to the affiliate." Ohio Rev. Code § 4928.17(A)(3). A utility is thus required to charge "fully loaded embedded cost[]" only if it provides an "undue preference or advantage" to an affiliate.

The Commission should conclude that a "preference" would exist only if DP&L was providing a benefit to DPLER that DP&L was not willing to provide to CRES suppliers under the same terms, and that an "advantage" would exist only if DPLER received a benefit that was not available to CRES suppliers under the same terms. An example of a preference or an advantage would be if a DP&L employee provided services to DPLER; that benefit would not be available to other CRES suppliers, and thus under § 4928.17(A)(3), DP&L must charge the fully-loaded embedded cost associated with those services to DPLER. Ohio Rev. Code § 4928.17(A)(3).

DP&L witness Hoekstra explained that DP&L does not provide a preference or advantage to DPLER by selling generation to DPLER at market rates:

> "Q. Using the methodology that you used for setting the transfer price as you do, is there any pricing preference or advantage to DPLER in so doing?
>
> A. No. As I noted, DPLER's alternative cost, if it were to buy from an unaffiliated third party, would be based on wholesale market prices at the time, and conversely, DP&L's alternative of selling power to a nonaffiliated counterparty would be based on the same wholesale market price. There is no affiliate preference or advantage for either business line."

Tr. 410. Accord: Tr. 727-28 (no undue preference occurs when DP&L sells generation to DPLER at market rates) (Rice). Mr. Hoekstra further explained that DP&L would offer the same terms to other suppliers that it offers to DPLER. Tr. 409. Accord: DP&L Ex. 16A, p. 9 ("DP&L sells power to DPLER at arm's length and at market costs. This is consistent with how DP&L would sell power to any affiliated or unaffiliated CRES provider.") (Jackson Rebuttal).

The Commission should thus conclude that there is no preference or advantage when DP&L sells power to DPLER at market rates, and that DP&L does not have an obligation to sell generation to DPLER at a fully loaded embedded cost.

3. IEU Failed to Offer any Evidence as to the Amount of DP&L's Fully Loaded Embedded Cost

Assuming for the sake of argument that the Commission had jurisdiction and that DP&L was required to sell generation to DPLER at DP&L's fully loaded embedded cost, IEU has failed to offer any evidence as to the amount of DP&L's fully loaded embedded cost. IEU concedes that DP&L sells generation to DPLER at market-based rates (IEU Ex. 2A, p. 15 (Murray)), but does not sponsor any evidence as to the amount of DP&L's fully-loaded embedded costs. There is thus <u>no evidence</u> in this case as to whether DP&L's market-based rates are greater than, equal to, or less than its fully-loaded embedded costs. Without any evidence as to the amount of DP&L's fully-loaded embedded cost to supply generation to DPLER, the Commission should reject IEU's argument that DP&L is selling generation to DPLER at an amount less than that cost.

C. <u>SEPARATE BOOKS AND RECORDS</u>

IEU witness Hess claims that DP&L should be ordered to maintain separate books and records for its transmission, distribution and generation lines of business. IEU Ex. 3A, pp. 13-15. The Commission should reject that request for the following reasons:

(1) <u>No benefits</u>: As an initial matter, Mr. Hess fails to identify any benefits that would result from his proposal. DP&L has complied with all of the Commission's filing requirements and tracks expenses so that they can be properly allocated under DP&L's Cost Allocation Manual to the generation, transmission and distribution sides of the business. Tr. 784-85 (Rice). There is no need or reason for DP&L to incur significant additional costs to prepare useless records. Tr. 784, 786-87 (Rice).

(2) <u>No rule requires</u>: Mr. Hess claims that the Commission's rules require DP&L to maintain such records. IEU Ex. 3A, p. 14. However, the rule that Mr. Hess cites to applies to "affiliates." Ohio Admin. Code § 4901:1-37-04(B). DP&L's generation, transmission and distribution businesses are not "affiliates," and therefore, the rule does not apply. Mr. Hess claims that DP&L's generation, transmission and distribution functions fall within the term

"affiliates" because the term "affiliates" is defined to "'apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service.'" IEU Ex. 3A, p. 14 (quoting Ohio Admin. Code § 4901:1-37-01(A)). The Commission's rules do not define "competitive service," but the Commission should conclude that the phrase refers to competitive retail electric service (Ohio Rev. Code § 4928.03), which DP&L does not provide. The rule to which Mr. Hess cites is thus inapplicable.

(3) DP&L's Corporate Separation Plan: Mr. Hess also claims that DP&L's Corporate Separation Plan requires DP&L to maintain separate books and records since the plan refers to maintaining such records for DP&L's "business unit." IEU Ex. 3A, p. 13. However, DP&L witness Rice explained that the reference to "business units" was added to DP&L's Corporate Separation Plan in 2008 to address DP&L's (since abandoned) plans to offer "behind-the-meter services" to customers. Tr. 729; IEU Ex. 3A, Att. I (Hess). Mr. Hess admitted that he was not involved in that 2008 case, and had no personal knowledge regarding Mr. Rice's explanation. Tr. 1715.

V. ESP V. MRO TEST

Section 4928.143(C)(1) provides that "the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."

In conducting its analysis under Section 4928.143(C)(1), the Commission has held that it should conduct a "statutory price test," that it should consider "other provisions that are quantifiable," and that it should also "consider the non-quantifiable aspects" of the ESP. AEP Order, pp. 73, 75. As demonstrated below, the Commission should: (a) conclude that DP&L's ESP is $112 million more favorable in the aggregate than an MRO under the statutory price test and after considering the other quantifiable aspects of DP&L's ESP; and (b) reject arguments by various intervenor witnesses that DP&L's ESP is not more favorable in the aggregate than a hypothetical MRO.

A. DP&L WITNESS MALINAK'S TESTIMONY SHOWS THAT DP&L'S ESP HAS QUANTIFIABLE BENEFITS OF $112 MILLION OVER AN MRO

The initial and rebuttal testimony of DP&L witness Malinak demonstrates that DP&L's proposed ESP is $112 million more favorable in the aggregate than an MRO under the statutory price test and after other quantifiable benefits of the ESP are considered. DP&L Ex. 5, pp. 3-15; DP&L Ex. 14A, pp. 4-14. Specifically, Mr. Malinak's testimony demonstrates that under the statutory price test, as a result of the fact that the ESP moves to 100% competitive bidding faster than the rates that are available under an MRO, DP&L's customers would pay approximately $120 million less under DP&L's ESP than they would pay under an MRO. DP&L Ex. 5, p. 13 and Ex. RJM-1. Accord: Tr. 2080-81 (Hixon). In Mr. Malinak's rebuttal testimony, he makes certain adjustments to his initial testimony (associated with the fact that the expected start date of DP&L's ESP was January 1, 2013, which date had passed), and explained that DP&L's ESP was still $120 million more favorable under the statutory price test than an MRO. DP&L Ex. 14A, pp. 10-11 & Ex. RJM-1R.

Mr. Malinak also considered other quantifiable aspects of DP&L's ESP filing as compared to an MRO. Specifically, Mr. Malinak explained that there would be one-time expenses under DP&L's ESP of $2.5 million (associated with proposed competitive retail enhancements) and $3.3 million (associated with DP&L's Yankee solar facility). DP&L Ex. 5, p. 13.[12] Mr. Malinak explained that those costs would not affect his conclusion that the ESP is more favorable in the aggregate than an MRO. Id.

Mr. Malinak's testimony thus demonstrates that DP&L's ESP is approximately $112 million more favorable than an MRO on a quantitative basis.

B. THE SSR AND ST WOULD BE AVAILABLE UNDER BOTH THE ESP AND AN MRO

Staff and intervenor witnesses have sponsored ESP v. MRO calculations that assume that the SSR and ST would be available under an ESP but not under an MRO. Staff Ex. 9, TST 4 (Turkenton); OCC Ex. 23 (Hixon); FES Ex. 13 (Ruch); IEU Ex. 2A, pp. 30-31 & KMM-17 (Murray).[13] Each of those witnesses further sponsors testimony that purports to show that DP&L's ESP proposal is less favorable on a quantifiable basis than a hypothetical MRO. Staff Ex. 9, TST-4 ($[redacted]); OCC Ex. 23, BEH-2 ($[redacted]); FES Ex. 13, p. 5 ($[redacted]); IEU Ex. 2A, p. 35 & KMM-17 ($[redacted]). However, each of those witnesses admitted that if the SSR and ST were equally available under an ESP and an MRO, then DP&L's ESP would pass the ESP v. MRO test. Tr. 1813-17 (Turkenton); Tr. 2090-92 (Hixon); Tr. 1238 (Ruch); IEU Ex. 2A, KMM-17 (Murray).[14]

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[12] The inclusion of those amounts was conservative, since DP&L may be able to recover them under an MRO.

[13] Mr. Murray actually sponsors four alternative ESP vs. MRO tests. IEU Ex. 2A, KMM-14-17. DP&L cites to KMM-17 because DP&L understands that analysis to be the one that IEU believes to be most reasonable. IEU Ex. 2A, p. 35.

[14] KMM-17 shows that DP&L's ESP is $[redacted] less favorable than an MRO. However, Mr. Murray assumed that the SSR (valued at $[redacted] by Mr. Murray) and a switching tracker (valued at $[redacted] by Mr. Murray) would be available under the ESP but not under MRO. Id. Thus, if those items were equally available under an ESP and an MRO, then DP&L's ESP would pass the statutory test under Mr. Murray's calculations.

As demonstrated below, the Commission should reject those parties' claims that DP&L's ESP is not more favorable than a hypothetical MRO for three separate and independent reasons. First, the Commission should conclude that the SSR and ST would be available under a hypothetical MRO. Second, if the Commission were to conclude that an SSR or ST were not available under a hypothetical MRO, then the Commission should conclude that the hypothetical MRO would have substantial non-quantifiable costs associated with DP&L's inability to provide safe and reliable distribution, transmission, and generation service, and that those non-quantifiable costs of a hypothetical MRO would exceed the quantifiable benefits of a hypothetical MRO. Third, even if the Commission were to reject the first two arguments, the Commission should conclude that DP&L's plan to implement 100% competitive bidding under its proposed ESP at a rate that is faster than the rate available under the MRO statute is a non-quantitative benefit that exceeds any quantifiable benefits of a hypothetical MRO.

1. The SSR and ST Would Be Available Under Either an ESP or an MRO

The MRO statute authorizes the Commission to approve an SSR and ST under an MRO. Specifically, Ohio Revised Code § 4928.142(D)(4) states:

> "[T]he 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 I, Ohio Constitution."

To determine whether the SSR and ST would be permissible under the MRO statute, the Commission must therefore make two determinations: (a) the Commission must determine what is DP&L's "most recent standard service offer" that is subject to adjustment under that section; and (b) the Commission must determine whether it is necessary to adjust those charges either (i) "to address any emergency that threatens [DP&L's] financial integrity"; or (ii) "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 I, Ohio Constitution." As demonstrated below, DP&L would be entitled to the SSR and ST under a hypothetical MRO.

a. <u>DP&L's Most Recent SSO</u>: DP&L's "most recent standard service offer" (which is subject to adjustment under § 4928.142(D)(4)) includes both DP&L's existing bypassable generation charges and its existing non-bypassable charge. Specifically, § 4928.141(A) states that "the electric distribution utility shall apply to the public utilities commission to establish the <u>standard service offer</u> in accordance with section 4928.142 or 4928.143 of the Revised Code." A "standard service offer" is thus either an MRO or an ESP. DP&L's "most recent standard service offer" is thus DP&L's existing ESP.

DP&L's existing ESP includes both its bypassable generation charges and its non-bypassable charge. Specifically, the Commission's Order from DP&L's 2005 rate plan case approved a Stipulation that extended DP&L's rate plan through December 31, 2010. December 28, 2005 Opinion & Order, pp. 3, 16 (Case No. 05-276-EL-AIR). That Order also established DP&L's currently-existing non-bypassable charge (the RSC). <u>Id</u>.

DP&L filed its first ESP Application in 2008 (Case No. 08-1094-EL-SSO), and pursuant to Ohio Rev. Code § 4928.143(D), the terms of the 2005 Stipulation were automatically incorporated into DP&L's initial ESP. Further, the Commission's Order in DP&L's 2008 ESP proceeding extended DP&L's ESP for two years (through December 31, 2012). June 24, 2009

Opinion & Order, pp. 4, 13 (Case No. 08-1094-EL-SSO). The RSC was continued as a non-bypassable standby charge authorized by Ohio Rev. Code 4928.143(B)(2)(d). Id. at 5, 13.

DP&L's existing ESP thus includes its existing non-bypassable charge. Indeed, the Commission recently held that "the provisions, terms, and conditions of the ESP include the RSC." December 19, 2012 Entry, ¶ 5 (Case No. 11-3002-EL-MER, et al.). Therefore, if DP&L had filed an MRO application, then the Commission could modify DP&L's existing non-bypassable charge to preserve DP&L's financial integrity or to prevent a taking.

b. Financial Integrity or a Taking: As demonstrated below, under a hypothetical MRO, DP&L would be entitled to an SSR or ST to preserve it financial integrity or to prevent a taking.

1) Financial integrity: There are not any decisions from the Supreme Court of Ohio or this Commission that interpret the phrase "any emergency that threatens the utility's financial integrity" under Ohio Rev. Code § 4928.142(D)(4). However, Ohio Rev. Code § 4909.16 contains an analogous provision, which allows the Commission to increase a utility's rates when it is "necessary to prevent injury to the business or interests . . . of any public utility . . . in case of any emergency."

Decisions by the Supreme Court and the Commission under § 4909.16 establish that an emergency exists if the utility would be unable to pay its operating expenses, dividends on preferred stock and debt obligations absent an emergency rate increase.[15] The Supreme Court

[15] City of Cambridge v. Pub. Utils. Comm'n, 159 Ohio St. 88, 92, 111 N.E.2d 1 (1953) (affirming Commission order granting emergency rate increase to utility; stating that "[t]here was undisputed evidence to sustain the finding that the income available for fixed charges . . . is not sufficient to defray the cost of bond interest and dividends on the preferred stock; that the company requires additional revenue . . . in order to meet increased operating expenses and pay its fixed charges"); In re the Application of The Toledo Edison Co. for Auth. to Change Certain of its Filed

(footnote cont'd…)

has also held that rates set under the emergency rate statute should be "sufficient to yield a reasonable return":

> "'In fixing an emergency or temporary street railway rate of fare, the Commission has the power to fix it in such an amount as will produce revenue not only necessary to meet fixed charges and operating expenses, but also sufficient to yield a reasonable return on the fair value of the property devoted to street railway use.'"

City of Cambridge, 159 Ohio St. at 93-94 (emphasis added) (quoting In re Applications of Minneapolis & St. Paul St. Ry. Cos., 37 N.W.2d. 533, 537 (Minn. 1949)). Thus, under a hypothetical MRO, the Commission could adjust DP&L's existing non-bypassable charge to allow DP&L to earn a reasonable ROE.

Further, the evidence shows that the Commission should approve an SSR and ST under a hypothetical MRO for DP&L. Specifically, the evidence shows that under DP&L's ESP proposal (including the SSR and ST), it would have an opportunity to earn an ROE of [redacted]% (under the adjusted capital structure). DP&L Ex. 14A, p. 23 (Malinak Rebuttal). That ROE is at [redacted] the reasonable 7-11% ROE range that this Commission identified in its AEP decision. AEP Order, p. 33. Further, the rebuttal testimony of DP&L witnesses Malinak

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(...cont'd)
Schedules Fixing Rates & Charges for Elec. Serv., No. 84-1286-EL-AEM, 1987 Ohio PUC LEXIS 82, at *25 (PUCO May 12, 1987) (granting utility's request for emergency rate increase and stating that in the absence of such an increase, "the company may not be able to make necessary payments during 1987 for current operating expenditures, interest and dividend payments, and construction expenditures."); In re the Application of The Toledo Edison Co. for Auth. to Change Certain of its Filed Schedules Fixing Rates & Charges for Elec. Serv., No. 84-1286-EL-AEM, 1985 Ohio PUC LEXIS 1794, at *31 (PUCO Feb. 19, 1985) (granting utility's request for emergency rate increase and stating that "[i]n the absence of such [an increase], the company will be financially imperiled in that it will be unable to raise funds in the capital markets to meet its operating expenses and the costs of its construction program"); In re the Application of Ohio Edison Co., Nos. 09-21-EL-ATA, et al., 2009 Ohio PUC LEXIS 23, at *5-6 (PUCO Jan. 14, 2009) (reciting company's argument that "drastic reduction in cash [due to Commission's order that the company purchase power to provide SSO service to customers] could result in an increase in the debt to capital ratio, which would trigger events of default under the financial arrangements available to the Companies. Default could eliminate the Companies' ability to borrow and may result in a downgrade of the Companies' credit ratings to non-investment grade . . . . Furthermore, the Companies believe that the negative financial impacts would have an adverse effect on the customers they serve and will likely lead to immediate and severe reductions in operating and capital expenses.").

demonstrates that DP&L would suffer from significant financial distress under a hypothetical MRO without the SSR or ST. DP&L Ex. 14A, pp. 5-9.

Under a hypothetical MRO without the SSR and ST, DP&L would thus experience substantial difficulties paying its bills and would not be able to earn a reasonable ROE. Id. The Commission should therefore conclude that DP&L would experience an "emergency that threatens [DP&L's] financial integrity" under a hypothetical MRO without the SSR and ST, and that an SSR and an ST therefore would be approved under a hypothetical MRO. The Commission should further conclude -- as Staff and intervenor witnesses conceded[16] -- that DP&L's ESP is more favorable on a quantitative basis than a hypothetical MRO that includes an SSR and ST.

2) A Taking: The Commission should also conclude that a taking would occur under a hypothetical MRO without the SSR and ST, and that those charges would thus be permissible under § 4928.142(D)(4). As to when a taking would occur, the Supreme Court of Ohio has stated:

> "In determining whether a rate order is just and reasonable (and thus constitutionally permissible), the [United States Supreme Court in Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944)] required a balancing of investor and consumer interests. With respect to the investors' interest, the court stated:
>
> '. . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.'"

[16] Tr. 1813-17 (Turkenton); Tr. 2090-92 (Hixon); Tr. 1238 (Ruch).

Ohio Edison Co. v. Pub. Utils. Comm'n of Ohio, 63 Ohio St. 3d 555, 562-63, 589 N.E.2d 1292 (1992) (per curiam) (emphasis added) (quoting Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944)).

As shown above, a reasonable ROE target for DP&L is [redacted]%. AEP Order, p. 33 (Case No. 11-346); DP&L Ex. 14A, p. 19 (Malinak Rebuttal). As also demonstrated above, DP&L would earn an ROE of [redacted]% (under an adjusted capital structure) under its "as filed" case. Under Ms. Turkenton's hypothetical MRO, DP&L would have $[redacted] less revenue than under DP&L's ESP (Staff Ex. 9, TST-4); under Ms. Hixon's hypothetical MRO, DP&L would have $[redacted] less revenue than under DP&L's ESP (OCC Ex. 23, BEH-2); under Mr. Ruch's hypothetical MRO, DP&L would have $[redacted] less revenue than under DP&L's ESP (FES EX. 13A, p. 5); under Mr. Murray's hypothetical MRO, DP&L would have $[redacted] less revenue than under an ESP (IEU Ex. 2A, KMM-17). If the Commission were to approve a hypothetical MRO with $[redacted] less revenue than under DP&L's proposed ESP, then DP&L would earn an ROE well below [redacted]%, and well below the [redacted]% target.

That result would constitute a taking under well-established United States Supreme Court and Supreme Court of Ohio precedent. Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 690, 43 S. Ct. 675, 67 L. Ed. 1176 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."); Duquesne Light Co. v. Barasch, 488 U.S. 299, 310, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989) (finding that there are "constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory"). Accord: Tr. 2739 (Malinak).

The various witnesses who opined that the SSR and ST would not be available under the MRO statute did not sponsor any testimony regarding whether the SSR and ST were necessary to preserve DP&L's financial integrity or to prevent a taking. Tr. 1239, 1250 (Ruch); Staff Ex. 9, pp. 3-12 (Turkenton); Tr. 1484 (Murray); Tr. 2089 (Hixon).

Under a hypothetical MRO, the Commission should thus approve the SSR and ST to avoid a taking under § 4928.142(D)(4). The Commission should therefore conclude that the SSR and ST would be equally available under either an ESP or an MRO, and that DP&L's ESP proposal is thus more favorable on a quantitative basis than an MRO due to the accelerated transition to 100% competitive bidding in DP&L's ESP.

2. Non-Quantifiable Costs of an MRO Without an SSR or ST

In addition, under the hypothetical MROs proposed by Staff and intervenor witnesses, there would be substantial non-quantifiable costs because DP&L would not be able to provide safe and reliable distribution, transmission and generation service. Specifically, as demonstrated above, DP&L would have $[redacted] less revenue under a hypothetical MRO without the SSR and ST than DP&L would have under its "as filed" ESP.

As explained in the rebuttal testimony of DP&L witness Malinak, DP&L would suffer from significant financial distress under a hypothetical MRO in which it had $[redacted] less revenue than under its proposed ESP. DP&L Ex. 14A, pp. 5-9 (Malinak Rebuttal); Tr. 637-38, 645, 663 (without the SSR and ST "the viability of the company would be really greatly threatened" and there would be "severe financial distress which could lead to significant difficult-to-quantify costs"), 2709 (Malinak). If an additional $[redacted] was removed from DP&L's revenue, then DP&L would obviously need to make drastic cuts to its maintenance expenses, which would create substantial reliability risks. DP&L Ex. 14A, pp. 5-9 (Malinak Rebuttal); Tr. 637-38.

As demonstrated above, many witnesses in this case agreed that it was important that DP&L be able to provide safe and reliable service.[17] None of the witnesses who opined that the SSR or ST would not be available under an MRO sponsored testimony showing that DP&L could maintain its financial integrity and provide safe and reliable service under their hypothetical MRO without the SSR and ST. Tr. 1260 (Ruch); Tr. 1484-85 (Murray); Tr. 2097 (Hixon); Staff Ex. 8, pp. 3-12 (Turkenton).

The Commission should thus find that if the SSR and ST were not available under a hypothetical MRO, then the hypothetical MRO would have substantial non-quantifiable costs associated with the fact that DP&L could not provide safe and reliable service. The Commission should further conclude that those non-quantifiable costs would exceed any quantifiable benefits associated with a hypothetical MRO.

3. <u>Non-Quantifiable Benefits of an ESP</u>

In addition to the non-quantifiable costs of an MRO without an SSR or ST, the Commission should also consider the non-quantifiable benefits of DP&L's ESP. Specifically, in the Commission's decision approving AEP's ESP, the Commission concluded that a hypothetical MRO for AEP was $386 million more favorable on a quantifiable basis than AEP's proposed

[17] Tr. 2056 (Chriss); Tr. 1970 (Collins); Tr. 1658-59 (Higgins); Tr. 2434 (Noewer); Tr. 2577-78 (Walz); Tr. 2611-12 (White); Tr. 2097 (Hixon); OCC Ex. 17, pp. 10-11 (Wilson).

ESP. AEP Order, p. 75. The Commission nonetheless concluded that the non-quantifiable benefits of AEP's ESP exceeded that amount:

> "The most significant of the non-quantifiable benefits is the fact that in just under two and a half years, AEP-Ohio will be delivering and pricing energy at market prices, which is significantly earlier than what would otherwise occur under an MRO option. If AEP-Ohio were to apply for an MRO it is not feasible to conclude that energy would be at market prices prior to June 1, 2015, even if the Commission were to accelerate the percentages set forth under Section 4928.142, Revised Code. Thirteen years ago our general assembly approved legislation to begin paving the way for electric utilities to transition towards market-based pricing, and provide consumers with the ability to choose their electric generation supplier. While the process has not been easy, we are confident that this plan will result in the outcome the general assembly intended under both Senate Bill 3 and Senate Bill 221, and this modified ESP is the only means in which this can be accomplished in less than two and a half years. Further, while the modified ESP will lead us towards true competition in the state of Ohio, it also ensures not only that customers will have a safe harbor in the event there is any uncertainty in the competitive markets by having a constant, certain, and stable option on the table, but also that AEP-Ohio maintains its financial stability necessary to continue to provide adequate, safe, and reliable service to its customers. Accordingly, we believe these non-quantifiable benefits significantly outweigh any of the costs."

Id. at 76.

DP&L's proposed ESP contains the same benefit. Specifically, under the MRO statute, 100% competitive bidding would not be available in DP&L's service territory until six years after a Commission order approving a hypothetical MRO. Ohio Revised Code § 4928.142(D). In contrast, DP&L's proposed ESP provides for 100% competitive bidding four years after Commission approval of DP&L's ESP. DP&L Ex. 8, p. 2 (Herrington).

Many witnesses agreed that a more rapid transition to 100% competitive bidding would provide non-quantifiable benefits. DP&L Ex. 5, p. 14 (Malinak); Tr. 646 (Malinak);

OCC Ex. 16, p. 3 (Wilson); Tr. 1046-49 (Strom); Tr. 1253-54 (Ruch); Tr. 1485 (Murray); Tr. 1803-04 (Turkenton); Tr. 2094 (Hixon). DP&L's ESP thus provides substantial non-quantifiable benefits that would not be available under an MRO, and the Commission should conclude that those benefits exceed any quantifiable benefits that a hypothetical MRO might have.

4. Staff's Recommendations

As discussed above, Staff has recommended an SSR for DP&L that is different from the SSR that DP&L seeks and Staff has also recommended that the Commission reject DP&L's request for a ST. A Commission order adopting Staff's recommendations (with which DP&L disagrees) would have no effect on the results of the ESP v. MRO test. Specifically, the SSR and ST would be equal under both the ESP and MRO (the SSR would be equal under both the ESP and MRO; the ST would be zero under both), and would thus have no effect on the ESP v. MRO test. DP&L's ESP would still be more favorable than a hypothetical MRO on a quantitative basis because the ESP includes a faster transition to 100% competitive bidding.

5. Other Issues Raised by Intervenors

(a) "First filed": As the Commission knows, DP&L originally filed and later withdrew an MRO Application in this same case number. March 30, 2102 Application, p. 1 (Case No. 12-426-EL-SSO). FES witnesses Noewer and Ruch offer a legal opinion that the blending percentages in the MRO statute would be inapplicable in the ESP v. MRO test because those percentages apply only to the "first application" that was filed under the MRO statute, Ohio Rev. Code § 4928.142(D). FES Ex. 17A, p. 7 (Noewer); Tr. 1253-55 (Ruch). Ms. Noewer and Mr. Ruch thus offer a legal opinion that the blending percentages for the hypothetical MRO should be 100% for each year. Tr. 2377-86 (Noewer); Tr. 1253-55 (Ruch). The Commission should conclude that their legal opinions are incorrect for multiple independent reasons.

First, Ohio Rev. Code § 4928.142(D) states that "[t]he first application filed . . . shall require" competitive bidding under fixed percentages. As the Commission knows, Applications cannot "require" anything – only a Commission order approving an Application can impose requirements. That provision in the MRO statute applies to the "first application" that "require[s]" blending -- meaning the application had to have been approved. DP&L's MRO Application was not approved, and it therefore did not "require" that competitive bidding be implemented under the MRO statute using the blending percentages. The blending percentages thus remain applicable.

Second, FES witnesses Noewer and Ruch's interpretation would lead to absurd results.[18] For example, if market prices were higher than the utility's prices, then under their interpretation, a utility could file an MRO Application, withdraw it an hour later, and file a second MRO Application. The second MRO Application would, under their interpretation, be free from complying with the statutory blending percentages. Tr. 2386-87 (Noewer). Ms. Noewer and Mr. Ruch attempt to defend their interpretation by asserting that the Commission would evaluate whether the first-filed MRO application was a legitimate filing (Tr. 2377-79;

[18] Governing law mandates that a statute not be interpreted in a way that leads to absurd results. AT&T Commc'ns of Ohio, Inc. v. Lynch, 132 Ohio St. 3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶ 18 (holding that "when interpreting a statute, courts must avoid an illogical or absurd result") (internal quotation marks and citations omitted); State ex rel. Barley v. Ohio Dep't of Job & Family Servs., 132 Ohio St. 3d 505, 2012-Ohio-3329, 974 N.E.2d 1183, ¶ 25 (per curiam) (refusing to interpret statute in a way that would lead to "an unreasonable result," the court held that "[s]tatutes must be construed, if possible, to operate sensibly and not to accomplish foolish results.") (internal quotation marks and citations omitted); State ex rel. Striker v. Cline, 130 Ohio St. 3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶ 25 (per curiam) (finding that "courts construe statutes and rules to avoid unreasonable or absurd results); Riedel v. Consol. Rail Corp., 125 Ohio St. 3d 358, 2010-Ohio-1926, 928 N.E.2d 448, ¶ 10 (refusing to construe statute in a way that would lead to an "unreasonable or absurd" result because "it is [the court's] duty to construe the statute to avoid [such] result.").

1254-56), but both admitted there was no language in § 4928.142(D) to support that interpretation (Tr. 2383; 1255-56).

Third, even if the statutory percentages were mandatory only for the first filed Application, the Commission would still maintain discretion as to which percentages to use in subsequent filings. There is nothing in § 4928.142 that would bar the Commission from using the blending percentages for a second MRO application.

(b) Timing: Various intervenor witnesses criticized Mr. Malinak's ESP v. MRO testimony because (1) he assumed that the respective SSOs would start on January 1, 2013, which date had passed by the time of the hearing; and (2) his test extended beyond the date of DP&L's proposed ESP. OCC Ex. 25, pp. 9-12 (Hixon); FES Ex. 13A, pp. 11-12 (Ruch); IEU Ex. 2A, p. 34 (Murray). Mr. Malinak's rebuttal testimony updates his ESP v. MRO test to adjust the start date for DP&L's ESP and to adjust the end date to correspond to the five-year ESP that DP&L seeks; his rebuttal testimony shows that the changes have no effect on the results. DP&L Ex. 14A, pp. 10-11.

VI. THE STORM RIDER BASELINE SHOULD BE $1.1 MILLION

Staff witness Lipthratt recommends that the Commission establish a Storm Damage Recovery Rider of $4 million to allow DP&L to recover costs associated with major storms. Staff Ex. 6, pp. 3-6. Under his proposal, DP&L would not recover $4 million per year. Tr. 1601. Instead, DP&L would recover any major event storm O&M expenses that it incurred over $4 million, and would refund to customers any amounts that it incurred under $4 million. Staff Ex. 6, p. 8; Tr. 1601.

Staff witness Lipthratt cites two reasons that he believes show that the $4 million amount is reasonable: (1) it is consistent with DP&L's historic major storm costs; and (2) it is consistent with the storm rider amount approved for AEP[19] and the storm rider amount proposed by Duke. Staff Ex. 6, p. 6. As demonstrated below, neither item provides support for his $4 million figure. As is also demonstrated below, the Commission should set a storm rider at $1.1 million, and it should be set on a going-forward basis only. (Staff witness Lipthratt admits that his testimony does not address DP&L's pending request in Case No. 12-3062-EL-RDR for recovery of historic major storm O&M expenses. Tr. 1599.)

A. DP&L'S HISTORIC MAJOR STORM O&M EXPENSES

As an initial matter, it is important to understand that there is a difference between a "major storm" and an unusual storm. The term "major storm" is defined by Commission rule. Staff Ex. 6, pp. 6-7 (Lipthratt). Attachment A to Mr. Lipthratt's testimony shows that DP&L has incurred O&M expenses for "major storms" every year from 2002-2011. However, as Attachment A to Mr. Lipthratt's testimony demonstrates, DP&L's major event storm O&M expenses for three of those years (2005, 2008, 2011) were much higher than its major event storm O&M expenses for other years:

Year	Major Events O&M
2002	$926,958
2003	$1,386,639
2004	$1,717,105
2005	$6,094,093
2006	$872,528
2007	$1,715,226
2008	$15,950,806
2009	$774,841

[19] Mr. Lipthratt referred to a $5 million rider amount for "Ohio Power Company" in his pre-filed testimony. Staff Ex. 6, p. 6. On cross-examination, Mr. Lipthratt admitted that the $5 million was the amount for Ohio Power Company and Columbus Southern Power. Tr. 1610-12. DP&L refers to those utilities as "AEP" in the text.

Year	Major Events O&M
2010	$302,919
2011	$10,035,297
Total	$39,776,412
10 Year Avg.	$3,977,641
2009 - 2011 Avg.	$3,704,352

Staff Ex. 6, Att. A.[20]

Mr. Lipthratt conceded that DP&L's O&M expenses for 2005, 2008, and 2011 were "outliers." Tr. 1605. DP&L witness Seger-Lawson explained in her rebuttal testimony that there were extraordinary storms in those years -- a 2005 ice storm, the 2008 Hurricane Ike wind storm, and a 2011 ice storm. DP&L Ex. 12, p. 18.

It is also important to understand that DP&L's last rate case was in 1991 (Case No. 91-414-EL-AIR), and that case was resolved via a "black box" Stipulation. Tr. 1602-03 (Lipthratt). While Staff believes that there was some recovery in DP&L's distribution rates set in that case for major storms, there is no way to determine from that Stipulation how much DP&L is currently recovering in its distribution rates for major storms. Tr. 1600-02 (Lipthratt). Accord: Tr. 2359 (Seger-Lawson). The Commission should find that DP&L's current distribution rates do not include any recovery associated with unusually large storms.

Specifically, it has long been the Commission's practice to exclude unusually high costs associated with major storms from the test year in rate cases. For example, in determining a utility's test-year expenses, the Commission held: "Test year operating income should be reflective of the results of normal operations for the company. The impact of unusual or

[20] Mr. Lipthratt's prefiled testimony refers to a "2009-2001" average of $3,704,352. Staff Ex. 6, Attachment A. He agreed at the hearing that the date range was a typographical error, and that it should be 2009-2011. Tr. 1604. DP&L corrected that typographical error in the chart in the text.

nonrecurring events should be excluded from the determination of expenses if they are not reflective of what the company is reasonably expected to experience." In re the Application of The Ohio Edison Co. to Increase Certain of Its Filed Schedules, No. 82-1025-EL-AIR, 1983 Ohio PUC LEXIS 40, at *89 (PUCO Sept. 14, 1983).

The Commission applied that rule to exclude unusual major storm costs from DP&L's test-year expenses in DP&L's 1983 rate case. In re the Application of The Dayton Power &Light Co. for Auth. to Modify & Increase Its Rates, No. 82-517-EL-AIR, 1983 Ohio PUC LEXIS 70, at *69 (PUCO Apr. 27, 1983). In that case, "[t]he Staff proposed to reduce test year operating expenses by $1,224,032 to account for the abnormally high level of storm damage expense included by the company . . . ." Id. The Commission approved that recommendation. Id. at *72. Accord: In re the Application of The Ohio-American Water Co. to Increase Rates, No. 79-1343-WW-AIR, 1981 Ohio PUC LEXIS 3, at *18-19 (PUCO Jan. 14, 1981) ("The record in this case indicates that the severe storm occurred in 1977 that generated the expense at issue and there have not been recurring storms of such a nature every year. Thus, the Commission can only conclude that this was an unusual and non-recurring expense and should be excluded from the cost of service of the Applicant.").

Mr. Lipthratt conceded that the practice of "normalizing" unusually large storm expenses is a practice that the Commission continues to use. Tr. 1607-08. For example, Mr. Lipthratt conceded that if DP&L had filed a distribution rate case such that 2008 was the test year, then he would recommend that the Commission "normalize" DP&L's major event storm expenses so that DP&L would not recover in rates the full $15.9 million in major storm expenses that DP&L incurred in 2008. Tr. 1608.

Including the unusually large 2005, 2008 and 2011 storms in the average that Mr. Lipthratt used to calculate his $4 million baseline would effectively preclude DP&L from recovering its O&M expenses associated with unusually large storms. Specifically, if a $4 million baseline was implemented, historic data suggests that DP&L would be issuing a refund to customers for most years, and would collect amounts under the rider only after unusually large storms. Staff Ex. 6, Att. A. Assuming that future storms were consistent with historic experience, DP&L would thus recover a net zero under Mr. Lipthratt's proposal.[21]

Given that DP&L's current rates do not include any recovery for unusually large storms, it is unreasonable to include the 2005, 2008 and 2011 storms in any baseline average that is used to set a storm rider for DP&L. As explained in the rebuttal testimony of DP&L witness Seger-Lawson, excluding those three years, DP&L's O&M expenses for major event storms over 10 years averaged $1.1 million. DP&L Ex. 12, p. 19. The Commission should thus set any storm recovery rider at $1.1 million.

Indeed, Mr. Lipthratt cites to the storm rider set in AEP's case as support for his proposal (Staff Ex. 6, p. 6), but he ignored the fact that the Commission set that amount after excluding from its calculation unusually high storm expenses in prior years. AEP Order, pp. 68-69 ("In the event AEP-Ohio incurs costs due to one or more unexpected, large scale storms, AEP-Ohio shall open a new docket and file a separate application by December 31 each year throughout the term of the modified ESP, if necessary."); Tr. 1612-13; DP&L Ex. 12, p. 19 (Seger-Lawson Rebuttal). If the Commission were to set a storm rider for DP&L in this case,

[21] Actually, DP&L's collection would be negative, because DP&L's 10-year average was $3.9 million. Staff Ex. 6, Att. A. Mr. Lipthratt not only included unusually large storms in his average, but also, he rounded up.

then it should follow the same method that it used in the AEP case, and should exclude unusual storms from the calculation.

B. COMPARISON TO AEP AND DUKE

Mr. Lipthratt also argues that the $4 million storm rider that he proposes for DP&L is consistent with the $5 million storm rider set in AEP's case and the $4 million storm rider proposed by Duke. Staff Ex. 6, p. 6. However, Mr. Lipthratt admitted that he was "not sure" whether AEP was a much larger utility than DP&L (Tr. 1613), and further admitted:

> "Q. And it's true, isn't it, that you don't sponsor any testimony that compares The Dayton Power & Light Company to AEP on a number of customers, miles of line, dollars of O&M, or other similar basis to support the reasonableness of the $5 million figure for AEP's storm rider as compared to the proposed $4 million rider for DP&L?
>
> A. No, I did not do that analysis."

Tr. p 1614. Mr. Lipthratt admitted that he did not compare the relative sizes of DP&L and Duke, either. Tr. 1616.

Ms. Seger-Lawson did conduct such comparisons in her rebuttal testimony. DP&L Ex. 12, pp. 19-20. Her testimony shows that AEP's total O&M expenses were 342% higher than DP&L's, and that using a ratio that compares DP&L's total O&M to AEP's total O&M would result in a $1.46 million storm rider for DP&L. Id. Using a similar method applied to Duke would result in a $1.09 storm rider for DP&L.[22] Id. A comparison of DP&L to AEP and Duke -- which accounts for the relative sizes of the utilities -- thus supports the reasonableness of a $1.1 million storm rider for DP&L. Id.

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[22] This calculation was performed using the distribution rates in place for Duke at the time of DP&L's ESP hearing. According to the January 11, 2011 Opinion & Order in Case No. 09-1946-EL-RDR, Duke's distribution rates included only $1.58 million in storm expenses.

C. IMPACT UPON DP&L'S FINANCIAL INTEGRITY

Finally, Dr. Choueiki agreed that Staff had not taken into consideration Mr. Lipthratt's proposal regarding a storm rider in Staff's calculations of a recommended SSR. Tr. 1885. Dr. Choueiki further admitted that if Mr. Lipthratt's proposal was implemented, then the SSR would need to be higher. Tr. 1916-17.

VII. COMPETITIVE ENHANCEMENTS

A. DP&L SHOULD NOT HAVE TO PAY COSTS OF COMPETITIVE ENHANCEMENTS

The evidence at the hearing revealed that various parties (including DP&L) have proposed various competitive enhancements, but no party is willing to pay for those enhancements. Tr. 2191 (Hagans); Tr. 2310-11 (Seger-Lawson); Tr. 2440-41 (Noewer);[23] Tr. 2445-47 (Bennett); Tr. 2654 (Bowser). Staff witness Donlon testified that he did not take a position on which enhancements (if any) should be approved (Tr. 1726-27), but offered the opinion that the enhancements should be paid for as follows: CRES providers should pay 60%; customers should pay 25%; and DP&L should pay 15%. Staff Ex. 7, pp. 5-6. The Commission should reject the proposal that DP&L pay a portion of any such costs for the following reasons:

(a) Rate-making principles: As demonstrated above, a fundamental aspect of setting lawful rates is that a utility should be permitted an opportunity to earn a reasonable return on any investments that it makes. The proposal that DP&L pay a portion of those costs would be unlawful since it would deny DP&L that opportunity. Indeed, Mr. Donlon admitted:

> "Q. [Y]ou indicate three reasons the company should contribute 15 percent: So the project stays on track, so it's done

[23] FES witness Noewer testified that the competitive enhancements were not a benefit if customers had to pay for them. FES Ex. 17A, p. 7; Tr. 2388.

economically, and because the company receives a tax benefit from depreciation; is that correct?

A. Yes.

Q. Wouldn't those three factors apply to any distribution asset? If the company is going to put in a new power line, we would want the company -- the project to stay on track, we'd want it to be done economically, and the company would receive a tax benefit.

A. Correct.

Q. But we would not ask the company to contribute 15 percent towards that new distribution line, would we?

A. Well, they'd get recovery through base rates, correct? So I mean --

Q. That's right.

A. They're going to pay --

Q. They would be fully compensated. They wouldn't receive 85 percent of the costs, they would be fully compensated, right?

A. I guess so, yes."

Tr. 1767-68.

(b) No benefit: The various enhancements will benefit CRES providers and customers. Tr. 1288 (Seger-Lawson). But they will provide no benefit to DP&L. Tr. 1289 (Seger-Lawson). DP&L thus should not have to pay for them.

(c) Timely: Mr. Donlon proposes that DP&L pay a portion of the costs so that the project "stays on track." Staff Ex. 7, p. 8. However, DP&L will already have an incentive to finish the projects in a timely manner because it cannot recover costs associated with those projects until they are "used and useful." Id. at 6; Tr. 1765-66 (Donlon).

(d) Economically: Mr. Donlon also suggests that DP&L should bear a portion of the cost to ensure that the projects are "done economically." Staff Ex. 7, p. 8. However, DP&L will not be able to recover the costs associated with the projects unless the costs are prudently incurred. DP&L thus already has an incentive to implement the projects in an economical fashion. Tr. 1766 (Donlon).

(e) Tax benefit: Mr. Donlon also believes that DP&L would receive a tax benefit from depreciation associated with the enhancements as a reason that DP&L should pay a portion of the cost of enhancements. Staff Ex. 7, p. 8. However, the amount of that tax benefit is not in the record and thus is speculative.

(f) Future incentives. Mr. Donlon also admitted that it would not be rational for utilities to propose competitive enhancement in the future if the Company was required to pay a portion of the costs. Tr. 1770.

B. THE COMPETITIVE ENHANCEMENTS PROPOSED BY INTERVENORS ARE NOT NECESSARY

In addition to the enhancements that are proposed by DP&L (DP&L Ex. 9, pp. 13-15 (Seger-Lawson),[24] various intervenor witnesses propose various enhancements that they ask the Commission to order DP&L to implement. Constellation Ex. 1, pp. 45-53 (Fein); FES Ex. 17A, pp. 19-26 (Noewer); DERS Ex. 1, pp. 3-7 (Walz); IGS Ex. 1, pp. 9-13 (White); RESA Ex. 6, pp. 2-17 (Bennett). The Commission should reject those requests for the following separate and independent reasons.

[24] Mr. Fein and Ms. Noewer testified that they supported DP&L's proposals to implement competitive enhancements. Tr. 1211 (Fein); Tr. 2396 (Noewer).

(a) Commission rules: The intervenor witnesses concede that there is no Commission rule that requires DP&L to implement the various enhancements that they propose. Tr. 1211 (Fein); Tr. 2388-89, 2424-25 (Noewer). The Commission should conclude that DP&L is in compliance with its rules, and there is thus no basis for the Commission to order additional enhancements.

Indeed, the Commission has engaged in a lengthy process to set competitive rules in the State of Ohio, and is currently reviewing its rules in Case No. 12-2050-EL-ORD. As the Commission knows, intervenors have made many of the same requests that they make in this case in rule-making proceedings before this Commission. E.g., January 7, 2013 Initial Comments of Retail Energy Supply Association (Case No. 12-2050-EL-ORD); January 7, 2013 Comments of FirstEnergy Solutions Corp. (Case No. 12-2050-EL-ORD). The decision of whether additional competitive enhancements should be required should be made in a rule-making proceeding, so that the decision would have state-wide effect, and the Commission could hear all points of view. In addition to the rule review case, the Commission opened an investigation into the vitality of the competitive retail electric markets and sought comments and reply comments regarding the extent to which barriers may exist for customers to choose a retail electric service in Case No. 12-3151-EL-COI.

(b) Cost/benefit analysis: Although numerous CRES intervenor witnesses request that the Commission order DP&L to implement a variety of competitive enhancements, none of those witnesses included any analysis of either the benefits or the costs of their proposals. Constellation Ex. 1, pp. 45-53 (Fein); FES Ex. 17A, pp. 19-26 (Noewer); DERS Ex. 1, pp. 3-7 (Walz); IGS Ex. 1, pp. 9-13 (White); RESA Ex. 6, pp. 2-17 (Bennett). Indeed, they repeatedly admitted that they did not conduct any cost/benefit analysis. Tr. 1211-12 (Fein); Tr. 2425 (Noewer); Tr. 2478 (Bennett); Tr. 2569-76 (Walz).

DP&L is not suggesting that a full cost-benefit analysis would be necessary for the Commission to consider each individual enhancement. The cost of conducting such an analysis would likely be prohibitive. But there should be sufficient evidence in the record to allow the Commission to make a reasonable approximation of the costs and the benefits. Staff agrees with that position. Tr. 1745-46 (Donlon). However, there is no such evidence in this record. For example, none of the intervenor witnesses identified how often they encounter the particular issues that they identify, the costs that they incurred to respond to those issues, or any estimate of the amounts that it would cost DP&L to implement their proposed resolutions.

The Commission thus has no evidence to support a finding that the benefits of the various intervenor proposals exceed their costs. The Commission should thus reject all of the requests.

C. PARTICULAR COMPETITIVE ENHANCEMENTS

The intervenors request too many enhancements for DP&L to respond to all of them (the Commission should reject all of the enhancements that DP&L does not propose for the reasons identified above). DP&L will address several of the specific enhancements proposed by intervenors.

(a) Purchase of receivables: Various intervenors request that the Commission order DP&L to implement a purchase of receivables program. Constellation Ex. 1, pp. 50-51 (Fein); DERS Ex. 1, pp. 5-6 (Walz); IGS Ex. 1, pp. 9-13 (White); RESA Ex. 6, pp. 10-14 (Bennett). Their requests generally lack specifics – for example, they do not address the appropriate discount rate that they believe would be appropriate. Constellation Ex. 1, pp. 50-51 (Fein); DERS Ex. 1, pp. 5-6 (Walz); IGS Ex. 1, pp. 9-13 (White); RESA Ex. 6, pp. 10-14 (Bennett). DP&L has not agreed to implement a purchase of receivables program because such a program would be "programming intensive, very costly, provides no benefit to the company, and, more importantly, provides no benefit to customers." Tr. 2309 (Seger-Lawson). In any event, intervenors asked the Commission to order AEP to implement a purchased receivables program, and the Commission encouraged AEP to participate in a workshop established in Case No. 12-1250-EL-ORD. AEP Order, p. 41. DP&L is currently participating in this rule review and attended both workshops established by the Commission in Case No. 12-1250-EL-ORD on August 17, 2012 and August 31, 2012.

(b) Percentage off billing: FES witness Noewer claims that "DP&L does not offer rate ready percentage off price-to-compare ('PTC') billing in its territory." FES Ex. 17A, p. 20. However, in the same prefiled testimony, she later admits that CRES providers can provide such PTC billing, but that they need to perform certain calculations themselves; she objects that "suppliers would have to stay on top of DP&L's PTC changes and submit new rates each time it changes." Id. at 21. The Commission should reject her request for two reasons. First, as Ms. Noewer admits, CRES providers can perform percentage off billing; they just need to "stay on top of" DP&L's price to compare. Second, DP&L provides bill-ready billing services pursuant to a Stipulation associated with the AES/DPL Inc. merger, and therefore CRES providers have the flexibility they need to provide creative pricing options. November 22, 2011 Finding and Order, pp. 9-10 (Case No. 11-3002-EL-MER). The Commission should not impose additional requirements upon DP&L.

(c) Billing charges: FES witness Ms. Noewer and RESA witness Bennett also object to the $.20 per consolidated bill fee, $.12 per dual bill, the $5,000 initial set up fee, and the $1,000 per change to billing system fee that DP&L charges. FES Ex. 17A, p. 22; RESA Ex. 6, pp. 14-15. The Commission should reject their requests for two reasons. First, those charges were set via a Stipulation that was approved by the Commission. February 2, 2005 Opinion & Order, pp. 5-6, 22 (Case No. 03-2405-EL-ATA); Tr. 1379, 1387 (Seger-Lawson). The intervenors did not sponsor any evidence that the terms of that Stipulation were unreasonable or that the cost that DP&L incurs have changed since the Stipulation was approved. Tr. 2482 (Bennett). Second, regarding the $.20 per consolidated bill fee, the evidence at the hearing showed that DP&L's costs to perform consolidated billing were actually $.70 per consolidated bill, and that a CRES provider's fair share of that charge was thus $.35 per bill. Tr. 1405, 2363 (Seger-Lawson).

In short, all of the CRES intervenors' requests should be rejected because they are not required by Commission rules and there is no record evidence on the costs and benefits of the various items that they request. The three specific items listed above should be rejected for the additional reasons identified above.

VIII. INTERVENOR WITNESSES

A. OCC WITNESS ATTORNEY RUBIN AND IGS WITNESS ATTORNEY WHITE

The Commission should give no weight to the testimony of OCC witness Rubin and IGS witness White because their testimony is beyond the scope of proper expert testimony. Work experience as an attorney alone does not qualify Mr. Rubin to testify as an expert. United States v. Gallion, 257 F.R.D. 141, 148-49 (E.D. Ky. 2009) (holding that an attorney with nearly three decades of experience was precluded from giving expert testimony because, among other things, there was no evidence that the attorney's opinions had been peer reviewed or critiqued). Indeed, "something more than time in practice would be required to qualify an **attorney** as an **expert** in a given specialty." Cicero v. Borg-Warner Auto., Inc., 163 F. Supp. 2d 743, 749 n.7 (E.D. Mich. 2001), rev'd on other grounds, No. 01-2489, 2003 U.S. App. LEXIS 21220 (6th Cir. Oct. 16, 2003). Accord: Scott v. Deerbrook Ins. Co., 714 F. Supp. 2d 670, 673-75 (E.D. Ky. 2010) (rejecting proposed expert testimony from attorney and former judge regarding the value of plaintiff's claim, notwithstanding his "long and illustrious career in the Kentucky legal community") (internal quotation marks and citation omitted).

This concern was well-articulated in Cicero v. Borg-Warner Auto., Inc.:

> "The court is not at all sure that time in service leads to expertise. . . . One would hope that attorneys who practice in a particular area of law for many years would develop an expertise in that area, however, courts do sometimes encounter attorneys who have been practicing law not very well but for a great length of time. By noting this unfortunate reality, the court in no way suggests that Mr. Gasiorek is such an attorney, but only notes the limits of relying upon an attorney's time in practice as an indicator of expertise. Though plaintiff's counsel and Mr. Gasiorek were not presented with this question at the hearing, the court is of the view that something more than time in practice would be required to qualify an attorney as an expert in a given specialty."

Cicero, 163 F. Supp. 2d at 749& n.7.[25]

An attorney basing his opinion solely on experience must do more than aver conclusorily that his experience led to his purported expert opinion. Id. Instead, an expert who

[25] Courts also have similar concerns about qualifying witnesses as experts in non-legal subject matter areas on the basis of work experience alone. E.g., In Trs. of Univ. of Pa. v. Lexington Ins. Co., 815 F.2d 890, 903 (3d Cir. 1987) (affirming trial court's decision to exclude the opinions of a claims examiner regarding the value of a potential jury verdict and the claim's settlement value; finding that she "had several years experience as a claims adjuster, but she was not shown to have any experience with claims approaching the magnitude presented by this case"); Certain Underwrites at Lloyds, London v. Inlet Fisheries, Inc., 389 F. Supp. 2d 1145, 1152-54 (D. Alaska 2005) (holding that proposed expert was not qualified to testify with respect to underwriting marine pollution policies, despite forty-five years of experience in the insurance industry), aff'd, 518 F.3d 645 (9th Cir. 2008).

is relying solely on experience must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. United States v. Lupton, 620 F.3d 790, 799 (7th Cir. 2010) (affirming trial court's exclusion of attorney expert testimony; finding that expert's "thirty-year distance from the day-to-day goings-on in the brokerage world and lack of experience with the statutes and contract at issue in this case call into question the extent to which [he is qualified] to render an opinion" on the industry standards of practices among local real-estate brokers), cert. denied, ___ U.S. ___, 131 S. Ct. 1544 (2011). There was not even an attempt by OCC to have Mr. Rubin explain why he was supposedly an expert.

OCC witness Rubin was not qualified to express the rate design opinions in his prefiled testimony. His undergraduate degree was in political science, and then he attended law school, during part of which he clerked at U.S. EPA. Tr. 1693. After being an associate at a law firm for two or three years, he became an assistant consumer advocate in the Office of the Consumer Advocate in Pennsylvania for just over ten years. Tr. 1693-94. He also was a lecturer in computer science at Susquehanna University for a couple of years. Tr. 1694. He is a member of the American Waterworks Association, because "[a] substantial amount of my work involves the water utility industry. Nearly all of my research work involves water utilities," and approximately "50 percent of my work as an expert witness involves water utilities." Tr. 1695. Cross examination showed that most of his activities have been with either water companies or issues of Clean Air Act compliance. Tr. 1695-98. He has testified for OCC 15 times, mostly on Clean Air Act implementation and in fuel cases. Tr. 1698. The record shows no qualifications to testify on rate design. In sum, his testimony shows no qualifications to render the opinions that he has rendered.

Similarly, Mr. White graduated from law school in 2007, and has worked as a regulatory attorney at IGS and the Chester Willcox firm. Tr. 2590-91. In fact, Mr. White originally appeared as counsel in this case and withdrew as counsel before filing testimony. Tr. 2593. Mr. White is thus no more qualified to offer testimony than any of the other attorneys that practice regularly before this Commission. Lawyers should not be permitted to call their co-counsel to act as witnesses instead of bringing in witnesses who have actual relevant experience.

Accordingly, Mr. Rubin's and Mr. White's testimony should be given no weight because there has been an insufficient showing they are qualified to give any expert opinions that would be admissible in evidence in this case.

B. OCC WITNESSES ROSE AND DUANN

The Commission should give no weight to the testimony of OCC witnesses Rose and Duann because they are not competent to testify as to legal matters, which (as Drs. Rose and Duann concede) are integral to the opinions contained in their testimony.

As an initial matter, the Commission must determine whether a witness is competent to testify as an expert. Scott v. Yates, 71 Ohio St. 3d 219, 221, 643 N.E.2d 105 (1994). "The admissibility of expert testimony must be made on a case-by-case basis[.]" Nead v. Brown County Gen. Hosp., 12th Dist. No. CA2005-09-018, 2007-Ohio-2443, ¶ 46.

An expert witness may testify only on matters that he is competent to testify about as an expert. Id., ¶ 43 (affirming trial court's decision to exclude expert witness (an emergency room physician) because he was not competent to testify as an expert witness on the standard of care for surgeons) (citing City of Akron v. Pub. Utils. Comm'n., 5 Ohio St. 2d 237, 242, 215 N.E.2d 366 ("expert must be qualified in the matters about which he is to testify"), cert. denied, 385 U.S. 828, 87 S. Ct. 62, 17 L. Ed. 2d 64 (1966); Ohio R. Evid. 104); Siegel v. Lifecenter Organ Donor Network , 1st Dist. No. C-100777, 2011-Ohio-6031, ¶ 45 (affirming trial court's finding that expert witnesses had no "specialized training based on scientifically valid principles that would qualify them to properly" testify as experts).

The Supreme Court of Ohio has ruled that a witness may not testify as an expert where the witness is not competent to testify on matters. Scott, 71 Ohio St. 3d at 221-22 (reversing and remanding for new trial; holding that trial court abused its discretion because the witness did not possess the necessary knowledge or expertise to competently testify on matters of accident reconstruction). In Scott, the witness conceded that:

> "[H]e was unfamiliar with the theory of conservation of momentum and consequently did not know how it might affect the post-impact course of motor vehicles involved in a crash. Nor did he know the formula for calculating the speed of motor vehicles, either before or after impact, or what effect speed would have upon the post-impact course of vehicles. . . .
>
> . . . He frankly admitted that he was not an accident reconstructionist; that he never had the opportunity to work with an accident reconstructionist; and further, that he had never conducted an accident reconstruction." Id. at 221.

Here, Drs. Rose and Duann are not competent to testify as to the various legal conclusions contained in their testimony. Tr. 2013 (Rose); Tr. 2504 (Duann). In addition, the legal conclusions that they sponsor are integral to the opinions contained in their testimony. Tr. 2006-07 (Rose); Tr. 2507-10 (Duann). As Drs. Rose and Duann are not competent to testify about legal matters and their opinions cannot be separated from the legal conclusions contained in their testimony, Drs. Rose and Duann's testimony should be stricken for a lack of foundation. Scott, 71 Ohio St. 3d at 221-22; Siegel, 2011-Ohio-6031, at ¶ 45; Nead, 2007-Ohio-2443, at ¶ 43.

IX. CONCLUSION

DP&L's ESP Application will allow DP&L to maintain its financial integrity and provide safe and reliable service, while also providing numerous customer benefits. The Commission should approve DP&L's ESP Application because it strikes a reasonable balance among many competing interests.

Respectfully submitted,

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