BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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I. INTRODUCTION

In its Brief, DP&L has one more surprise for those that have followed the twists and turns of its standard offer applications over the past year. After applying for a Market Rate Offer ("MRO"), then withdrawing that application, then applying for an electric security plan ("ESP"), and then replacing that application with a much more expensive application, DP&L has yet another proposal. DP&L proposes to increase the Service Stability Rider ("SSR") it seeks to charge southwestern Ohioans, to $151 million per year[2] (or approximately $775 million in total) for the five-year term of its proposed ESP.

The Service Stability Rider and Switching Tracker are not justified by DP&L's evidence. These proposed charges are duplicative of amounts the PUCO allowed DP&L to collect from customers more than a decade ago, as stranded generation costs. DP&L claims that its proposed charges are different from what it previously collected from customers. And DP&L claims that Senate Bill 221's Electric Security Plans essentially give it a second bite at the stranded cost apple. DP&L is wrong on both counts.

Nothing changes the fact that DP&L has already recovered $441 million in stranded generation costs from customers. Nothing changes the fact that DP&L's market development period ended on December 31, 2005. Nothing changes the fact that, since then, R.C. 4928.38 places DP&L "fully on its own" in the generation marketplace.

Under Ohio law, Ohio customers are supposed to be the beneficiaries of DP&L's entry into a competitive market. But DP&L turns the law upside down. Instead, it wants customers to protect it from the market. That protection would come from two charges it

[2] Post-Hearing Brief of DP&L at 23-24. The $151 million SSR is a floor, not a cap for the charge. The proposal assumes that the PUCO rejects the Switching Tracker (Rate ST).

devised, the SSR and Switching Tracker. But those charges would be generation subsidies. These subsidies that DP&L asks the PUCO to impose on customers are prohibited by law and should be rejected.

Nor should the Commission entertain another DP&L claim that flies in the face of the plain language in Senate Bill 221. One of the main tests for consumer protection in Senate Bill 221 is that utilities cannot obtain approval of an electric security plan unless the plan is more favorable in the aggregate than the expected results under a market rate offer. DP&L would have the PUCO disregard the law to project a wildly inflated result for a market rate offer, so that DP&L's proposed electric security plan seems lawful and reasonable by comparison. DP&L would inflate the projected cost to customers of a market rate offer by including charges for a Service Stability Rider and a Switching Tracker. That is a fiction. The law is reality. Market rate offers cannot include stability charges or stability trackers. The PUCO should follow the law. Customers should be given the General Assembly's intended protection. Furthermore, DP&L would have this Commission further delay – for years – the benefits of the competitive marketplace to its Standard Service Offer (SSO) customers. The General Assembly set Ohio (including DP&L) on a course for competition in 1999. It's 2013. And DP&L is still talking about taking years for its (and its customers') transition to competition. As DP&L delays,[3] its customers continue to pay some of the highest electricity rates in the state while losing the benefit of historically low energy prices.

DP&L claims poverty—that the SSR and Switching Tracker are needed to maintain its financial integrity. DP&L has made similar arguments in the past—while

[3] Direct Testimony of Daniel J. Duann at 6, 45; Direct Testimony of James F. Wilson at 3, 8-9.

earning phenomenal returns of 20% or more in 7 of the 10 years from 2001 through 2010. The real poverty is in DP&L's service territory. The poverty rate in Dayton, Ohio is 32.5%. The electric disconnection rate for customers in Dayton, Ohio is 8.3%.

The PUCO should act in the interest of southwestern Ohioans and order an ESP that delivers the benefits of the competitive market to SSO customers while protecting them from paying more than half a billion dollars in unlawful and unreasonable charges.

II. RECOMMENDATIONS

A. DP&L's Customers Should Be Provided A Standard Service Offer That Is 100% Competitively Bid Over The Entire Electric Security Plan Period, Consistent With Ohio Policy.

DP&L's customers should receive the full benefits of current and near-term low market prices of electricity. This benefit can only be accomplished by requiring DP&L's SSO be 100% competitively bid over the entire ESP period.[4] The PUCO should deliver that benefit now to customers.

OCC's position that customers will benefit if DP&L's SSO is 100% competitively bid at the beginning of the ESP period is supported by FirstEnergy Solutions ("FES") and Duke Energy Retail Sales ("Duke ERS"). FES witness Noewer testified that customers would receive a benefit from 100% market based rates.[5] Witness Noewer testified that 100% auction based rates would create significant value for DP&L's customers because it would allow them to take advantage of current low market prices.[6] Duke ERS witness

[4] Direct Testimony of Daniel Duann at 45.

[5] Direct Testimony of Sharon Noewer at 10.

[6] *Id.* at 10-11.

Walz testified that there was no reason why DP&L should not also operate under a 100% auction based SSO.[7]

DP&L's proposed blending ratio and schedule will deprive DP&L's SSO customers of the full benefits (savings) of a competitive generation market in Ohio that has been a state policy for many years.[8] And DP&L's proposed blending schedule is contrary to current PUCO policies which encourage a faster transition to market-based rates for SSO services.[9]

OCC witness James Wilson testified that DP&L's plan "takes too long to transition to full competition."[10] Several intervenors (FES, Duke ERS, Exelon Generation and Constellation Newenergy)[11] and the PUCO Staff[12] agree. They advocate, like OCC, for a more rapid schedule to blend in market prices than the slow schedule proposed by DP&L for transitioning to the market.[13]

The PUCO Staff has indicated that its preference is for DP&L to move to an SSO that is 100% competitively bid immediately.[14] But the Staff has concerns as to the impact that it would have on DP&L.[15]

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[7] Direct Testimony of Matthew Walz at 7.

[8] Direct Testimony of Daniel Duann at 45.

[9] *Id.*

[10] Direct Testimony of James Wilson at 3.

[11] *See* Post-Hearing Brief of FES at 60-61; Direct Testimony of Duke Energy Retail Sales witness Matthew Walz at 7; Post-Hearing Brief of Exelon Generation and Constellation Newenergy at 4.

[12] *See* Post-Hearing Brief of the PUCO Staff at 16.

[13] *See* Post-Hearing Brief of FES at 60-61; Direct Testimony of Duke Energy Retail Sales witness Matthew Walz at 7; Post-Hearing Brief of Exelon Generation and Constellation Newenergy at 4; Post-Hearing Brief of the PUCO Staff at 16.

[14] Post-Hearing Brief of the PUCO Staff at 16.

[15] *Id.*

DP&L raises no arguments against a more accelerated blending schedule other than its claim that its financial integrity will be compromised more with a faster move to market.[16] But as OCC argued in its Brief, there is no standard for reviewing an Electric Security Plan that requires the PUCO to determine that the ESP ensures the financial integrity of the distribution utility. And financial integrity (under Revised Code Chapter 4928) only can be considered under R.C. 4928.142(D)(4) when an emergency "threatens the utility's financial integrity."[17] DP&L did not claim such a financial emergency in the proposed ESP.

Moreover, DP&L has not put forth any credible evidence that shows its financial integrity will be severely compromised if the SSO is 100% competitively bid now. Furthermore, DP&L's financial projections put forth in the ESP Application are unreliable.[18] And unreliable financial projections should not be used to set rates and terms (such as the blending ratio for SSO prices) that will "deprive DP&L's SSO customers the full benefits (savings) of a competitive generation market in Ohio that has been a state policy for many years."[19]

The Commission should reject DP&L's rate blending proposal because it takes too long to provide customers the benefits of full competition. Instead, the Commission should require a more rapid transition (100% competitively bid immediately) to take advantage of market competition and lower the price of electricity for DP&L's SSO customers who are paying the highest electric public utility rates in the state.[20] This

[16] Post-Hearing Brief of DP&L at 63-64.

[17] Post-Hearing Brief of OCC at 26.

[18] *Id.* at 26-34.

[19] *Id.* at 19-20, citing the Direct Testimony of Daniel Duann at 45.

[20] Direct Testimony of James Wilson at 9.

approach is consistent with the State's policy that includes ensuring the diversity of electricity supplies and suppliers by giving consumers choices over who will supply their electricity.[21] And requiring a more rapid transition to competition is consistent with the view of the PUCO that customers should be able to benefit from market-based prices while they are low.[22] Accordingly, the PUCO should adopt OCC's proposal, under which DP&L would acquire 100% of the power necessary to serve DP&L's SSO customers through a competitive bidding process for the entire period of the ESP.

DP&L's proposal for rate blending over multiple years should be rejected. But if the Commission does order a rate blending over multiple years, then the term of the ESP should be no longer than the length of the blending period.[23] And, if at the end of the ESP term the Commission has not approved a new SSO rate, then the auction-based SSO rates should continue.[24]

B. DP&L's Claims To Make Customers Pay For A Half-Billion Dollar Service Stability Rider And A Switching Tracker Should Be Rejected.

In the very first breath of its Post-Hearing Brief, DP&L states its case for the Service Stability Rider and the Switching Tracker--"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."[25] In other words,

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[21] *See id.* at 3; R.C. 4928.02(C).

[22] Direct Testimony of James Wilson at 3; *see also In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143 Ohio Rev. Code in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO *et al*., Entry on Rehearing at ¶37 (January 30, 2013).

[23] Direct Testimony of Daniel Duann at 48.

[24] *Id.*

[25] Post-Hearing Brief of DP&L at 1, 8-9, relying upon Second Revised Direct Testimony of DP&L witness William J. Chambers at 45-47.

DP&L can't compete and cover its costs, so it needs extra-market help. DP&L alleges that it will not be able to provide safe and reliable distribution, transmission, and generation service if its generation revenues decline.[26]

DP&L's financial integrity woes are described by five years of its projected return on equities (ROEs).[27] The ROEs projected by DP&L decline over the five-year term of the proposed ESP without the Service Stability Rider, falling to negative ROEs in 2016 and 2017.[28] According to DP&L, the changes in market conditions driving the declining ROEs are increased switching, declining wholesale prices, and declining capacity prices.[29] These declining prices from market conditions are a very good thing for utility customers and should be part of delivering to customers the benefit of *Ohio's policy for* competition. But, in an amazing plot twist, DP&L would cast declining market prices as the villain and itself as the victim in distress that the PUCO should rescue. Nothing could be further from the truth.

If the Commission approves a $138 million annual "as filed" Service Stability Rider and the Switching Tracker as proposed, DP&L projects that its returns will average 7.2% over the term of the ESP.[30] Notably, DP&L does not provide the projected returns it will receive if it is successful in its Post-Hearing Brief bid for a $151 million annual floor for the SSR (with no Switching Tracker).[31] DP&L notes that in the recent Ohio

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[26] Post-Hearing Brief of DP&L at 36.

[27] *Id.* at 8. DP&L relies upon the five years of projected ROEs developed by DP&L witness William J. Chambers, specifically DP&L Exhibit WJC-5.

[28] Second Revised Exhibit CLJ-2, line 45.

[29] Post-Hearing Brief of DP&L at 7.

[30] Post-Hearing Brief of DP&L at 10, citing to Second Revised Exhibit WJC-2; Rebuttal and Supplemental Testimony of DP&L witness R. Jeffrey Malinak at 25.

[31] *See id.* at 17, which is discussed in later pages of this brief.

Power Electric Security Plan proceeding,[32] the PUCO set a revenue target of 7% to 11%, with 9% being a "benchmark."[33] Further, DP&L relies upon its witness Malinak's testimony that 7.5% to 10.2% is a reasonable ROE range,[34] and highlights that its request is at the bottom of, or below, that ROE range.[35]

But, as discussed in OCC's Brief and below, the PUCO must reject more customer funding[36] of DP&L's generation business. First, R.C. 4928.38 required DP&L to be fully on its own after its market development period ended (December 31, 2005). Second, DP&L failed to provide any sound evidence that it needs the SSR and Switching Tracker in order to provide reliable service. Third, the SSR is not a lawful charge to levy on customers in an Electric Security Plan. And, fourth, the Ohio Power decision relied upon by DP&L is not precedential (in regard to the SSR) because DP&L, unlike Ohio Power, is not a Fixed Resource Requirement (FRR) entity.[37]

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[32] *In the Matter of the Application of the Columbus Southern Power company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan*, Case No. 11-346-EL-SSO et. al, Opinion and Order (Aug. 8, 2012).

[33] Post-Hearing Brief of DP&L at 10.

[34] *Id.*

[35] *Id.*

[36] As discussed in OCC's Post Hearing Brief at 75, customers funded DP&L's above-market generation business by paying $441 million of generation transition charges to permit DP&L to collect stranded costs.

[37] An FRR entity requires an EDU to commit and secure capacity for the load of all of its distribution customers (including load served by CRES providers), in advance of the base residual auction. An FRR entity satisfies the capacity resources for its footprint by designated resources from its own fleet or through bilateral contracts. A non-FRR entity such as DP&L merely participates in the base residual auction process and has lesser obligations. *See* Transcript Volume VII-public, 1830-1837.

1. Under R.C. 4928.38, the financial integrity of DP&L's generation operations cannot be the basis for charging customers hundreds of millions of dollars.

DP&L claims that the intervenors, including OCC, "conceded numerous critical points related to DP&L's request for an SSR and ST."[38] It points out that OCC witnesses Hixon and Wilson both agreed that it was important for DP&L to maintain its financial integrity.[39]

While it may be important for DP&L to maintain its financial integrity, it is not the responsibility of customers to ensure it by paying hundreds of millions of dollars in stability charges. Quite simply, the law prohibits that. Under R.C. 4928.38, after the end of its market development period (December 31, 2005), DP&L was to be "fully on its own in the competitive market." By definition, being "fully on its own in the competitive market" (the generation market), means that a utility no longer receives funds that support, either directly or indirectly, its generation operations.[40] Otherwise, the utility receives a customer-funded subsidy to enrich its generation business.[41]

Reintroducing regulatory protection (via a customer-funded subsidy) for the generation portion of DP&L's business, even indirectly, is contrary to the primary directive of S.B. 221—where competition is intended to replace regulation for the benefit of consumers in the State of Ohio.

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[38] Post-Hearing Brief of DP&L at 28.

[39] *Id.*

[40] The exception to this concept is that an electric distribution utility may seek to collect costs for its Provider of Last Resort obligations. The PUCO determined that POLR obligations pertain to generation service and are a permissible provision under R.C. 4928.143(B)(2)(d*). In the Matter of the Application of Columbus southern Power Company for Approval of an Electric Security Plan; an Amendment to its corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO, Order on Remand at 18 (Oct. 3, 2011) (finding that POLR charges, under R.C. 4928.143(B) (2)(d), are related to standby and default service and provide certainty for both the utility and its customers).

[41] Direct Testimony of Daniel Duann at 8.

Where there is no mandated competition for a utility's business—in Ohio, a utility's transmission and distribution operations—financial integrity can and should be considered in the rates that customers are required to pay for service. For these services -- transmission and distribution there are statutes that establish rates and provide for the opportunity to earn a reasonable rate of return on investment (R.C. 4909.15). For these services, there are also statutes that protect utilities from financial emergencies (R.C. 4909.16).

But S.B. 221 does not contain any similar statutory provisions. The PUCO has no jurisdiction[42] to set ESP rates for generation service that allow a utility to charge customers hundreds of millions of dollars to ensure that a utility maintains its financial integrity. Deregulation, not reregulation, was the focus of S.B. 221. The Commission, accordingly, should reject efforts to seek reregulation of DP&L's generation business in the form of a financial integrity charge.

2. DP&L failed to prove that it should collect a half-billion dollars from customers for the Service Stability Rider, to provide reliable service.

DP&L argues throughout its brief that the SSR is needed to provide reliable service. But such a scare tactic should be given little credence. There is no evidence that DP&L produced proving that reliable service will be jeopardized if DP&L is denied an SSR and a Switching Tracker.

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[42] While there is a provision that addresses financial integrity under S.B. 221, it applies only to Market Rate Offers, not Electric Security Plans. See R.C. 4928.142(D), allowing the PUCO to adjust a utility's most recent SSO "by such just and reasonable amount" that the commission determines is "necessary to address any emergency that threatens the utility's financial integrity" or to ensure that the standard service offer rates produce revenues that do not amount to an unconstitutional taking.

DP&L witness Seger-Lawson generally testifies that the SSR is "important to the company's ability to provide stable, safe, and reliable electric service."[43] And DP&L witness Chambers indicates that the SSR permits DP&L to provide quality service.[44] While DP&L witness Jackson describes the SSR as the minimum DP&L needs to provide adequate and reliable service,[45] neither he nor any other DP&L witness has substantiated that claim.

Mr. Jackson's statements on rebuttal that DP&L needs the SSR to provide reliable service appear to be directed to the request for an SSR in the amount of $137 million annually, not the $151 million annual floor requested in DP&L's brief. Further, Mr. Jackson testified that even if DP&L's generating assets were not operating, customers would still receive stable service because PJM would dispatch electricity to meet the load from other resources.[46]

DP&L argues on brief that no intervenor witness sponsored any analysis that DP&L could maintain its financial integrity and continue to provide safe and reliable service without the SSR and Switching Tracker.[47] This argument is DP&L's attempt to shift the burden of proof away from DP&L and onto the intervenors.

The burden of proof in this proceeding rests squarely upon DP&L under R.C. 4928.143(C)(1). Yet, DP&L failed to identify the minimum cash flow necessary to sustain its operations—which would be consistent with a claim to "maintain its financial

[43] Post Hearing Brief of DP&L at 13, citing to Rebuttal Testimony of DP&L witness Dona Seger-Lawson at 23.

[44] *Id.*, citing to the Second Revised Testimony of DP&L witness William J. Chambers at 53.

[45] *Id.*, citing to Rebuttal Testimony of DP&L witness Craig L. Jackson at 8.

[46] Transcript Volume I-public, page 172.

[47] Post-Hearing Brief of DP&L at 29.

integrity." Instead DP&L wants to be compensated for its forecasted "impairment" based upon an average targeted ROE over the term of the ESP. Such a claim (under which rates are set to prevent forecasted "impairment") is unrelated to any legal standard. And it will cost customers hundreds of millions of dollars in added charges to help support DP&L's competitive generation services.

Additionally, DP&L wants the PUCO to forget that customers have already paid $441 million in stranded costs to this Utility for exactly the same reason. More fundamentally and, as discussed earlier, Ohio law prohibits the subsidization that DP&L seeks for its competitive generation offering.

3. The Service Stability Rider and Switching Tracker are not authorized under R.C. 4928.143(B)(2)(d).

According to DP&L, the SSR and Switching Tracker are lawful under 4928.143(B)(2)(d) because they relate to "default service" and "bypassability" under that provision of the Revised Code.[48] DP&L relies in part on the PUCO findings in the Ohio Power ESP proceeding where the PUCO allowed Ohio Power to charge its customers for a stabilization rider, after finding it related to "default service." Additionally, DP&L avers that the PUCO has "express authorization" to approve the SSR and Switching Tracker because the PUCO can approve charges to allow a utility to provide stable "retail electric service"—which it claims includes competitive electric generation service.[49] DP&L also argues that the SSR and Switching Tracker stabilize or provide certainty.

But, as explained below, these arguments are wrong. First, the SSR and Switching Tracker are not related to provider of last resort services, which are the

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[48] *Id.* at 11.

[49] *Id.* at 34-35.

"default services" referred to in R.C. 4928.143 (d)(2)(b). Second, interpreting the SSR and Switching Tracker as relating to bypassability renders the statute virtually meaningless. Third, the Commission cannot authorize a charge that stabilizes or provides certainty without the charge being one enumerated within R.C. 4928.143 (B)(2)(d). Fourth, R.C. 4928.143(B)(2)(d) was not meant to support charges that might indirectly stabilize or provide certainty of retail electric service. And fifth, the Switching Tracker and SSR as proposed will create rate instability, and thus cannot be approved under the statute.

a. The Service Stability Rider and Switching Tracker are not related to default service for customers.

Although DP&L witness Seger-Lawson testified that the SSR and Switching Tracker relate to default service,[50] Ms. Seger-Lawson's conclusion is mistaken. As OCC emphasized in its Brief,[51] "default service" as used in Chapter 4928 pertains to the provider of last resort obligations of an electric distribution utility. The Commission itself, in the Ohio Power Remand Order,[52] explicitly equated default service to provider of last resort service, stating:

> Additionally, Section 4928.143(B)(2)(d), Revised Code, provides than an ESP may include 'terms, conditions, or charges relating to ***standby, back-up, or supplemental power service, [and] default service***as would have the effect of stabilizing or providing certainty regarding retail electric service.' As AEP-Ohio must stand ready to provide SSO service to returning customers, and customers have the option to return at any time, we find that the charges associated with the Companies' POLR obligation, which

[50] *Id.* at 11, citing to Rebuttal Testimony of DP&L witness Dona Seger-Lawson at 23.

[51] Post-Hearing Brief of OCC at 55.

[52] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand at 18 (Oct. 3, 2011).

> are charges related to standby and default service, provide certainty for both the Companies and their customers regarding retail electric service.

DP&L relies heavily on the Ohio Power ESP Order[53] as precedent for finding that any "stability" charge relates to the default service category.[54] But the Commission's order in that case was in error and is currently on appeal to the Ohio Supreme Court.[55] The Commission there mistakenly construed the statute by defining default service to be standard offer service.[56] That finding, however, lacked sufficient evidentiary support and is inconsistent with the PUCO's findings in the Ohio Power Remand proceeding.[57]

b. The Service Stability Rider and Switching Tracker are not related to bypassability.

DP&L alleges that the SSR and Switching Tracker relate to bypassability since they are proposed to be non-bypassable charges,[58] citing to, among other things, the testimony of OCC witness Dr. Rose at the hearing. Since all utility charges must be either "bypassable" or "non-bypassable," under DP&L's interpretation all charges would relate to "bypassability." But this could not be what the General Assembly intended. Otherwise the words are rendered virtually meaningless.

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[53] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan*, Case No. 11-346-EL-SSO et. al, Opinion and Order at 15 (Aug. 8, 2012).

[54] Post-Hearing Brief of DP&L at 11.

[55] Kroger, IEU, OCC, FES, and OEG have appealed the order. *See* S.Ct. Docket 13-521.

[56] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan*, Case No. 11-346-EL-SSO et. al, Opinion and Order at 15-16 (Aug. 8, 2011); Second Entry on Rehearing at 3 (Mar. 22, 2012).

[57] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand at 18 (Oct. 3, 2011).

[58] Post-Hearing Brief of DP&L at 11, citing to DP&L witness Ms. Seger-Lawson and OCC witness Dr. Rose (Transcript Volume VIII-public, page 2023).

Moreover, DP&L's reliance on the transcript of Dr. Rose's testimony does not support its claims that Dr. Rose agreed to DP&L's interpretation of the statute. The exchange between DP&L's Counsel and Dr. Rose was:

> Q. The SSR may affect customer shopping because, as a bypassable charge, it would raise prices for alternative suppliers to meet; is that right?
>
> A. It would make it harder for alternative suppliers by reducing headroom. (Transcript Volume VIII-public, page 2023).

As seen, Dr. Rose was asked if the SSR (alone and not the Switching Tracker) "may affect" customer shopping, and Dr. Rose's response was that it would make it harder for alternative suppliers (to compete) by reducing headroom. Making it harder for alternative suppliers to compete falls short of saying that the SSR **and the Switching Tracker** "relate to bypassibility" under R.C. 4928.143(B)(2)(d). To the contrary Dr. Rose testified that the SSR is not any one of the permissible charges under R.C. 4928.143(B)(2)(d).[59]

Additionally, if one were to accept DP&L's interpretation—that as long as a charge was non-bypassible it would affect shopping and therefore "relates to shopping,"—this subsection of the law would be rendered almost meaningless. Almost every charge would qualify as it could arguably "affect" customers who are shopping or not shopping, as is the case with a non-bypassable charge. A bypassable charge would also "affect" shopping as it could create the incentive for customers to shop. But under

[59] Direct Testimony of Kenneth Rose at 12-13.

Ohio rules of construction the subsection is intended to have meaning[60] and, therefore, DP&L's claim should be rejected.

c. The PUCO is not "expressly authorized" to charge customers in an Electric Security Plan to allow a utility to provide stable electric service unless the charge fits within the enumerated provisions of R.C. 4928.143(B)(2)(d).

DP&L claims that Chapter 4928 "expressly authorizes" the PUCO to implement the SSR and Switching Tracker to allow DP&L to provide stable generation service.[61] DP&L argues that R.C. 4928.143(B)(2)(d) authorizes the PUCO to approve charges to allow a utility to provide stable "retail electric service."[62] And since "retail electric service" is defined as including generation service (under R.C. 4928.01(A)(27)), then R.C. 4928.143(B)(2)(d) must authorize a stability charge for generation service.

But this statutory construction is contrary to the rules of statutory construction in Ohio. In Ohio, under R.C. 1.47, all words of a statute must be given effect. As noted by the Ohio Supreme Court, "[t]he presumption always is, that every word in a statute is designed to have some legal effect, and putting the same construction on a statute, every part of it is to be regarded and so expounded if practicable, as to give some effect to every part of it."[63]

DP&L's interpretation of R.C. 4928.143(B)(2)(d), however, ignores the initial six lines of that subsection. The first six lines of Subsection (B)(2)(d) establish the parameters that must be met in order for a provision to be part of a utility's electric security plan. R.C. 4928.143(B)(2)(d) reads as follows:

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[60] R.C. 1.47 presumes that the "entire statute is intended to be effective."

[61] Post-Hearing Brief of DP&L at 35.

[62] *Id.*

[63] *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348; 1910 Ohio LEXIS 150 (Jan. 18, 1910).

> (2) The plan may provide for or include, without limitation, any of the following:
>
> ***
>
> Terms, conditions, or 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, as would have the effect of stabilizing or providing certainty regarding retail electric service;

The statute quite clearly requires that the provision be a term, condition, or charge relating to: (1) limitations on customer shopping for retail electric generation service,(2) bypassability, standby, back-up or supplemental power service; (3) default service; (4) carrying costs (5) amortization periods, and (6) accounting or deferrals, including future recovery of such deferrals. Thus, only after it is determined that the provision falls within one of these six categories (and here it does not) then is it expressly authorized <u>if</u> one of the enumerated terms, conditions, or charges has the effect of "stabilizing or providing certainty regarding retail electric service." The PUCO recently acknowledged this two-part requirement in its Second Entry on Rehearing in the Ohio Power Electric Security Plan proceeding[64], when it granted OCC's application for rehearing on this very issue.

In contrast, DP&L skips through the statutory analysis altogether and boldly proclaims that the PUCO can "expressly authorize" a generation stability charge without first demonstrating that it falls within one of the law's specified categories. Only if the charge fits within one of the six categories can the PUCO authorize such a charge. And then, only after it finds that it also has the effect of stabilizing or providing certainty. As

[64] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan*, Case No. 11-346-EL-SSO et. al, Second Entry on Rehearing at 15 (March 22, 2012).

discussed above, DP&L has not shown that the SSR (and Switching Tracker) have a basis in law under R.C. 4928.143(B)(2)(d). Thus, there can be no "express authorization" of such a charge, unless one ignores the requirements of R.C. 4928.143(B)(2)(d). But, the requirements of the law cannot be ignored. Accordingly, DP&L's claim should be rejected.

d. The Service Stability Rider and Switching Tracker do not stabilize or provide certainty regarding retail electric service; nor do they benefit consumers and the public interest.

In an attempt to satisfy the statutory "stability" requirement under R.C. 4928.143(B)(2)(d), DP&L relies upon the PUCO's holding on Ohio Power's rate stability rider ("RSR") in that utility's recent Electric Security plan proceeding.[65] DP&L boasts that its SSR (though not its Switching Tracker) provides the same benefits that the PUCO recognized for Ohio Power's RSR:[66]

- The SSR allows DP&L to freeze any non-fuel generation rate increases so that rates remain stable. [67]
- The SSR allows it to conduct auctions to set its SSO rate.
- The SSR allows it to offer, as a fixed rate, a standard service offer.

DP&L's arguments should be rejected for a number of reasons. First, the PUCO was wrong in approving Ohio Power's RSR. Numerous parties, including the OCC, have

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[65] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan,* Case No. 11-346-EL-SSO et. al, Opinion and Order at 31-32 (Aug. 8, 2012).

[66] Post-Hearing Brief of DP&L at 12.

[67] *Id.*, citing to the Rebuttal Testimony of DP&L witness Seger-Lawson at 8-10.

appealed the PUCO's findings in this regard. Second, DP&L has not met its burden of proof in this matter.

DP&L bears the burden of proving that the provisions of its ESP have a basis in law under R.C. 4928.143(B)(2)(d). DP&L must also demonstrate that the SSR (and the Switching Tracker) benefit consumers and the public interest.[68] In other words, DP&L must demonstrate that the SSR (and Switching Tracker) fit within one of the law's six categories of charges. It has not, as explained above. And DP&L must prove that its highly expensive charges would have "the effect of stabilizing or providing certainty regarding retail electric service." DP&L cannot show that. And DP&L must also show that the SSR (and Switching Tracker) benefit consumers and the public interest. To the contrary, DP&L's proposal has revealed that these charges are the most harmful elements to the public in its case.

DP&L assumes that the SSR[69] meets the requirements of R.C. 4928.143(B)(2)(d) because it indirectly stabilizes or provides certainty. But R.C. 4928.143(B)(2(d), requires more than an indirect stabilizing or providing certainty for retail electric service. The words of the statute state that the "terms, conditions, or charges must "have the effect of stabilizing or providing certainty regarding retail electric service." DP&L reads the language to allow any provision[70] that enables other provisions to be implemented. That is a misreading of the law that, if adopted, would open the door to unlimited transfers of

[68] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan,* Case No. 11-346-EL-SSO et. al, Entry on Rehearing at ¶19 (Jan. 23, 2012).

[69] DP&L makes no claim that the Switching Tracker stabilizes or provides certainty or provides the same benefits as the PUCO found for Ohio Power's SSR. As a matter of law, the Switching Tracker thus, cannot be adopted.

[70] *See* discussion *supra*.

wealth from customers to the utility. DP&L's approach cannot be validated under Ohio rules of statutory construction.

Had the General Assembly wanted to allow more permissive structuring of an ESP, it would have inserted language to that effect. For instance, the statute might have been written with the phraseology "which provision enables other charges that" "have the effect of stabilizing or providing certainty regarding retail electric service." But the statute is not written to support charges that may indirectly help to provide stability or certainty regarding retail electric service. Under the doctrine of *expressio unius est exclusio alterius*, if the General Assembly wanted to give the PUCO authority to approve a provision in an Electric Security Plan that "enables" other provisions, it would have expressly done so. But the General Assembly did not. DP&L cannot rewrite the law.

Assuming arguendo that an indirect stabilizing is sufficient to meet the requirements of R.C. 4928.143(B)(2)(d), DP&L has still not demonstrated that the SSR benefits consumers and is in the public interest. Although DP&L argues that the SSR allows DP&L to freeze non-fuel generation rate increases so that its rates remain stable,[71] this is not a benefit if its non-fuel generation rates are above market rates. Stable—but above market—rates do not benefit customers. And although the SSR may allow DP&L to conduct auctions to set its SSO rate, the blending ratio and schedule proposed by DP&L will deprive DP&L's SSO customers of the full benefit (savings) of a competitive generation market in Ohio.

[71] Post Hearing Brief of DP&L at 12.

Furthermore, DP&L's proposed blending schedule is contrary to current PUCO policies which encourage a faster transition to market-based rates for SSO services.[72] With respect to the SSR allowing DP&L to offer an SSO rate as a fixed rate, DP&L fails to recognize that under the law it must provide a standard service offer.[73]

Finally, if DP&L's position on Brief seeking a $151 million floor for the SSR[74] is adopted, then there will be even less stability. In its Brief, DP&L proposed that the SSR will be subject to variability on a yearly basis. The SSR would fluctuate if reductions in non-shopping load occur, and DP&L is able to adjust its SSR.[75] The PUCO, in ruling upon Ohio Power's RSR, found that truing the rider up or down each year would cause financial uncertainty and create customer confusion in rates.[76] Likewise, if a $151 million floor for charging customers is adopted, and the floor could be raised or lowered upon DP&L's request, there would be uncertainty and customer confusion. Such a provision would most certainly not have the "effect of stabilizing or providing certainty regarding retail electric service."

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[72] Direct Testimony of Daniel Duann at 45.

[73] R.C. 4928.141(A).

[74] Post-Hearing Brief of DP&L at 17.

[75] *See id.* at 26.

[76] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan,* Case No. 11-346-EL-SSO et. al, Opinion and Order at 32 (Aug. 8, 2012).

e. The Service Stability Rider and Switching Tracker seek to recover transition costs from customers beyond the market development period, which is unlawful under the Ohio Revised Code.

DP&L argues that the SSR and Switching Tracker will not collect transition costs.[77] DP&L's argument is twofold. First, it claims that the stranded cost statute (R.C. 4928.39) refers to "costs" and not "revenues." And because the SSR and Switching Tracker are designed to collect "revenues, the statute does not apply.[78] Second, DP&L argues that the SSR and Switching Tracker are permissible under R.C. 4928.143(B)(2)(d), because that statutory provision was a later enacted provision than the stranded cost statute, which was implemented in 1999 as part of Senate Bill 3.[79] DP&L alleges that under R.C. 1.52(A), if there is a statutory conflict, the later-passed statute–R.C. 4928.143(B)(2)(d)–controls. These arguments should be rejected, because DP&L has misconstrued the statutes and the rules of statutory construction.

f. Utilities may not collect transition charges or any equivalent revenues from customers beyond the market development period.

DP&L seeks to recover "revenues" for the generation services it provides in the competitive market. But the revenues DP&L seeks arise from costs incurred for generation which exceed market revenues for the generation.[80] What DP&L wants fits the definition of stranded costs that it cannot collect—generation costs that cannot be recovered in the competitive generation market (with market revenues). In other words, the revenue DP&L is collecting falls short of its generation costs (plus a profit).

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[77] Post-Hearing Brief of DP&L at 42.

[78] *Id.* at 46.

[79] *Id.*

[80] Post-Hearing Brief of OCC at 43-44.

That DP&L wants customers to make up the amount of its costs that it cannot collect due to the lower market prices shows that DP&L is still living in a very old paradigm. Dr. Rose (and other experts[81]) explained the newer paradigm, under Ohio law, and accordingly identified DP&L's proposal as seeking the stranded costs that are no longer allowed under R.C. 4928.39. Additionally, the terms "revenues" and "costs" are used interchangeably in the stranded cost statutes.[82]

DP&L's overly simplistic reading of R.C. 4928.39 is patently unreasonable. It also directly conflicts with the General Assembly's stated intent to prohibit transition costs and "any equivalent revenues"[83] from being collected beyond a utility's market development period. The PUCO should uphold the law and refuse to allow any further collection of transition charges from DP&L's customers. Customers have already paid $441 million of transition charges for DP&L's stranded (above-market) generation investment. This was the compensation that DP&L agreed to in settling its electric transition plan proceeding.[84] DP&L cannot now be permitted to collect from customers additional stranded investment for its facilities which under S.B.221 (and S.B.3) were deemed to be competitive electric generation facilities.

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[81] IEU witnesses Murray and Hess; IGS witness White.

[82] *See* R.C. 4928.38 and 4928.39.

[83] *See* R.C. 4928.39.

[84] *In the Matter of the Application of the Dayton Power & Light Company for Approval of a Transition Plan, pursuant to 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized under 4928.31 to 4928.40, Revised Code, Case No. 99-1687-EL-ETP*, Opinion and Order (Sept. 21, 2000) (adopting the settlement agreement reached between DP&L and intervenors).

g. Ohio's rules of statutory construction do not support DP&L's argument that R.C. 4928.143(B)(2) is controlling over S.B. 3 and allows collecting even more stranded costs from its customers.

DP&L narrowly focuses on one of Ohio's rules of statutory construction and incorrectly applies it. DP&L cites R.C. 1.52(A), and claims that if two statutes conflict, the later-passed statute controls.[85] But R.C. 1.52(A) applies only when the conflict between the statutes is irreconcilable.[86] If the statutes are not irreconcilable then R.C. 1.52 does not apply, and the provisions are construed, if possible, so that effect is given to both.[87] Such interpretation follows the principle of statutory construction ("in pari materia"). Statutory provisions that address the same subject matter "should be read together to ascertain and effectuate if possible the legislative intent."[88]

The statutes in question are not irreconcilable. The transition charge statutes adopted as part of Senate Bill 3 (R.C. 4928.37-4928.40) specifically address the recovery of stranded generation transition costs through transition revenues post-1999. Those statutes remain in effect today. The later enacted statutes adopted as part of Senate Bill 221 (R.C. 4928.141 - 4928.143) refer to provisions that an electric distribution utility may include as part of a Market Rate Offer or an Electric Security Plan. R.C. 4928.143 does not provide that a utility may include transition charges as part of its Electric

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[85] Post Hearing Brief of DP&L at 46.

[86] *Jones v. City of Xenia*, 2011 Ohio App. LEXIS 4538, 2011 Ohio 5545 (Oct. 28, 2011).

[87] *Sugarcreek Twp. v. City of Centerville*, 193 Ohio App.3d 408, 952 N.E.2d 519 (Apr. 15, 2011) (reversed by, remanded by *Sugarcreek Twp. v. City of Centerville*, 133 Ohio St. 3d 467, 2012 Ohio LEXIS 2455, 2012 Ohio 4649 (Oct. 11, 2012).

[88] *State ex rel. Pratt v. Wevgandt*, 164 Ohio St. 463, 463; 132 N.E.2d 191, 191-92; 1956 Ohio LEXIS 585 at 2 (Feb. 1, 1956).

Security Plan. In fact, R.C. 4928.141(A)[89] precludes a utility from collecting under R.C. 4928.143 (and 4928.142) any previously authorized allowance for transition costs.

OCC witness Dr. Rose acknowledged this—testifying that allowing transition charges under a utility's ESP conflicts with R.C 4928.141(A).[90] If DP&L is allowed to include transition charges under the ESP, then it will double-collect from customers.[91] Such duplicate cost recovery is contrary to sound ratemaking principles and would undermine any reasonable basis for establishing rates. [92]

DP&L's statutory construction is flawed. R.C. 4928.143(B)(2)(d) does not conflict with the stranded cost provisions of the Revised Code. The Commission should reject DP&L's latest attempt to collect even more transition charges from customers.

h. The PUCO's Decision on Ohio Power's Electric Security Plan Does Not Bind The PUCO In This Proceeding In Regard To The Service Stability Rider.

DP&L argues throughout its Brief [93] that the Commission's decision in the Ohio Power (AEP Ohio) electric security plan proceeding,[94] serves as precedent that precludes the Commission from deciding issues in this case differently. In particular DP&L seeks to bind the Commission to its holdings on Ohio Power's Rate Stability Rider ("RSR"), including its determination that there is a legal basis for the charge.[95] Further, DP&L

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[89] R.C. 4928.141 (A) was enacted along with, inter alia, R.C. 4928.143, as part of S.B. 221.

[90] Direct Testimony of Kenneth Rose at 13.

[91] *See id.*

[92] *Id.*

[93] *See* Post Hearing Brief of DP&L at 10-12, 15, 17, 25- 26, 45, 47, 65, 87.

[94] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan*, Case No. 11-346-EL-SSO et. al, Opinion and Order (Aug. 8, 2012).

[95] Post Hearing Brief of DP&L at 11.

claims that the decision in the Ohio Power ESP dictates allowing it to earn a return in the range of 7% to 11%[96] and allowing it to adjust its stability charge if there are significant reductions in non-shopping load.[97]

The Commission, however, must decide this case based on the record established in this proceeding. The Commission's duty in this regard is established under R.C. 4903.09, which requires it to make "findings of fact," and issue "written opinions setting forth the reason prompting the decisions" "based upon said finding of fact." And each ESP case before the Commission is complex, lengthy, and fact-intensive.

For this reason, OCC and others[98] argue that the Ohio Power decision is not controlling in this proceeding (with regard to the SSR) where there is a significant distinction between Ohio Power and DP&L. The primary distinction is that Ohio Power is an FRR entity and DP&L is not.[99]

DP&L, however, alleges that AEP Ohio's status as an FRR entity was irrelevant to the PUCO's decision in establishing, among other things, an ROE.[100] DP&L notes that PUCO Staff witness Choueiki testified that DP&L's status as a non-FRR entity was not a basis to reject the SSR.[101]

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[96] *Id.* at 10.

[97] *Id.* at 26.

[98] *See, e.g.*, Direct Testimony of FES witness Jonathan A. Lesser at 29-30.

[99] *See* Direct Testimony of Kenneth Rose at 14.

[100] Post Hearing Brief of DP&L at 47.

[101] *Id.*

Both the PUCO Staff and DP&L are wrong. A review of Ohio Power's ESP order and the Ohio Power Capacity Order[102] illustrates this fact. In the Ohio Power capacity proceeding, the PUCO was primarily addressing whether the "state compensation mechanism" for Ohio Power should be modified.[103] In doing so, the Commission was addressing Ohio Power's role as an FRR entity under FERC-approved PJM rules.[104] In the Capacity Order, the PUCO very clearly linked Ohio Power's capacity compensation to its FRR capacity obligation:

> In short, the record reveals that RPM-based capacity pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations.[105]
>
> ***
>
> Therefore, with the intention of adopting a state compensation mechanism that achieves a reasonable outcome for all stakeholders, the Commission directs that the state compensation mechanism shall be based on the costs incurred by the FRR Entity for its FRR capacity obligations.[106]

Moreover, the PUCO determined that such compensation was only temporary, for as long as AEP-Ohio is an FRR entity: "We note that the state compensation mechanism, once effective, shall remain in effect until AEP-Ohio's transition to full participation in the RPM market is complete and the Company is no longer subject to its FRR capacity obligations."[107]

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[102] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012). ("Capacity Order").

[103] *Id.* at 22.

[104] Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement (RAA), of PJM's tariff.

[105] Capacity Order at 23.

[106] *Id.*

[107] *Id.* at 24.

And the PUCO made it clear that it was setting compensation based on cost, under its traditional rate regulatory authority and not its authority under Chapter 4928, Revised Code. It found that "The Commission's obligation under traditional regulation is to ensure that the jurisdictional utilities receive reasonable compensation for the services they render."[108]

Finally, in its Entry on Rehearing[109] in the capacity case, the PUCO advised that its holdings with respect to Ohio Power were specific to Ohio Power and were not generic holdings. The Commission concluded: "The Commission initiated this proceeding solely to review AEP-Ohio's capacity costs and determine an appropriate capacity charge for its FRR obligations. We have not considered the costs of any other capacity supplier subject to our jurisdiction nor do we find it appropriate to do so in this proceeding."[110]

In the Ohio Power ESP proceeding, the level of Ohio Power's RSR was set based on the Commission's decision in the capacity case. The CRES capacity revenues (set at RPM per the Capacity Order) affect the revenue target and hence, the RSR rider amount.[111] Additionally, the PUCO in the Ohio Power ESP proceeding established a recovery mechanism within the RSR for the deferred capacity costs established in the Capacity Order. One dollar/MWH of the RSR collections is allocated toward the deferrals created by the Capacity Order.[112] Indeed, the Commission noted, in responding

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[108] *Id.* at 22.

[109] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing at 32 (Oct. 17, 2012).

[110] *Id.*

[111] *See* Capacity Order at 35.

[112] *Id.* at 36.

to a transition charge argument, AEP-Ohio's FRR status and its ability to collect the actual costs of capacity pursuant to the capacity case decision.[113]

As Dr. Rose and Dr. Lesser testified, DP&L is not an FRR entity.[114] Thus, DP&L cannot claim that it must receive cost-based compensation for its generation costs through either a stability rider or the setting of a rate of return for a competitive generation service. Neither the Ohio Power Capacity Order nor the Ohio Power ESP order can be relied upon for that premise. DP&L's argument that its proposed SSR should be treated in the same manner as Ohio Power's RSR is, therefore, without basis. The Commission should reject any comparison since DP&L is not an FRR Entity and is not obliged to meet FRR requirements.

C. If The PUCO Approves A Service Stability Charge, It Should Reject DP&L's Open-Ended Request For An Annual $151 Million Floor For The Service Stability Rider For Five Years.

In its Brief, DP&L comes forward with yet another new proposal for its SSR. Shamelessly, DP&L raises the ante even more for customers. Perhaps sensing that its Switching Tracker is likely to be rejected, it now wants to cover its bets by seeking an even larger SSR – one that starts at $151 million per year, and can be adjusted only upward.[115] DP&L proposes that the $151 million floor can be adjusted if DP&L experiences a significant reduction in non-shopping customer load. [116]

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[113] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan,* Case No. 11-346-EL-SSO et. al, Opinion and Order at 32 (Aug. 8, 2012).

[114] Direct Testimony of Kenneth Rose at 14; Direct Testimony of FES witness Jonathan A. Lesser at 29-30.

[115] Post-Hearing Brief of DP&L at 17.

[116] *Id.* at 26.

To support this proposal, DP&L tries to rely upon the PUCO's holding in the Ohio Power ESP proceeding where the PUCO allowed Ohio Power similar authority. [117] DP&L's rationale for collecting $151 million every year for five years from customers comes from tinkering with the PUCO Staff's testimony, [118] which took no position on the threshold issue of whether DP&L's financial position is so dire as to require Commission intervention.[119]

But DP&L's new proposal should be rejected for a number of reasons. First, DP&L, as a matter of policy and precedent, should not be granted a rate increase that is higher than what it requested in its second revised application. Second, relying upon the Ohio Power clause to extract more money from customers unreasonably shifts additional risks to customers and guarantees a rate of return to DP&L. Such an approach is contrary to the entire scheme of S.B. 221 where utilities are to be on their own in the competitive generation market

1. The PUCO is constrained by precedent and policy from approving a service stability charge that is greater than that requested by DP&L in its application.

The quest for the golden goose-- a stability charge for which all customers (shopping and non-shopping alike) will pay hundreds of millions of dollars—has been fervently pursued by DP&L since March 2012. The quest began in March 2012, when DP&L filed a request for a Market Rate Offer. In that request, DP&L sought a new Electric Service Stability Charge ("ESSC") charge at the same level as its then existing

[117] *Id.*

[118] Id. at 21-24.

[119] Post Hearing Brief of PUCO Staff at 8.

$73 million annual Rate Stability Charge.[120] Seven months later, DP&L filed an ESP application claiming a stability charge which ballooned to $120 million annually.[121] A scant two months later, DP&L filed a second revised ESP application in which the stability charge increased to $137.5 million annually.[122] Now, consistent with its trend of ever increasing demands upon customers, DP&L requests an SSR with $151 million as a floor.

The PUCO has repeatedly held that the rate relief to which a utility is entitled is capped by the amount requested through its application.[123] It has applied this policy, even though a greater revenue deficiency has been demonstrated.[124] Indeed, in following this precedent, the Commission has, on occasion, adopted negative returns on equity.[125] In one case, after discussing the precedent that the rate relief can be no greater than that

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[120] DP&L Application at 9 (Mar. 30, 2012).

[121] DP&L Application at 2 (Oct. 5, 2012).

[122] DP&L Second Revised Application at 8 (Dec. 12, 2012) (as a result of correcting errors that reduced projected gross margins and operating income-Second Revised Testimony of DP&L witness Craig L. Jackson at 4, Second Revised ESP application at 4).

[123] *See, e.g., Arrowhead Hills Utilities Corp.*, Case No. 88-279-WW-AIR (Dec. 20, 1988); *Columbia Gas of Ohio*, Case No. 82-1151-GA-AIR (Nov. 9, 1983); *Toledo Edison Company*, Case No. 80-377-EL-AIR (Apr. 9, 1981).

[124] *See In the Matter of the Norlick Place Water Company for an Increase in Rates and Charges*, Case No. 90-1507-WW-AIR, Opinion and Order at 7 (May 23, 1991)(citing to *Arrowhead Hills Utilities Corporation*, Case No. 88-279-WW-AIR (Dec. 20, 1988); *Columbia Gas of Ohio*, Case No. 82-1151-GA-AIR (Nov. 9, 1983); *Toledo Edison Company*, Case No. 80-377-EL-AIR (Apr. 9., 1981)).

[125] *In the Matter of the Application of The West Millgrove Gas Company for an Increase in Rates and Charges*, Case No. 87-671-GA-AIR, Opinion and Order at 6-7 (Dec. 23, 1987); *In the Matter of the Application of Arrowhead Hills Utilities Corporation for an Increase in Rates and Charges*, Case No. 88-279-WW-AIR, Opinion and Order at 7-8 (Dec. 20, 1988).

requested, the Commission adopted a negative 48.57% rate of return, finding it to be "fair and reasonable for purposes of this case."[126]

The rationale supporting these PUCO decisions is that potential intervenors are entitled to know the stakes in deciding whether to oppose a rate request.[127] This rationale applies equally to the laws that created Electric Security Plans and Market Rate Offers. This is because, under R.C. 4928.141(B), the General Assembly preserved the requirement of notice. In that section of the law, hearings, written notice of hearings, and published newspaper notice is required. This is consistent with the notice requirements found under R.C. 4909.18 and .19. The PUCO should, thus, follow its well-established precedent and limit any SSR to no more than that requested in DP&L's application. It should reject DP&L's last minute attempt to increase rates above the filed request in its Second Revised Application.

2. The PUCO's decision on Ohio Power's Electric Security Plan does not support an open-ended stability charge.

DP&L again attempts to rely upon the Ohio Power ESP Order[128] to squeeze more money from customers. The Commission should reject this attempt. This is because there is a significant distinguishing factor between DP&L and Ohio Power—Ormet. Ormet, a customer of Ohio Power, accounted for a large percentage of Ohio Power's standard service offer load. If Ormet went out of business, the rate stability revenues

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[126] *In the Matter of the Application of the West Millgrove Gas Company for an Increase in Rates and Charges*, Case No. 87-671-GA-AIR, Opinion and Order at 6-7 (Dec. 23, 1987); *accord , In the Matter of the Application of Arrowhead Hills Utilities Corporation for an Increase in Rates and Charges*, Case No. 88-279-WW-AIR, Opinion and Order at 7-8 (Dec. 20, 1988) (adopting a negative 3.27% return on equity as "fair and reasonable").

[127] *In the Matter of the Application of Columbia Gas of Ohio, Inc.*, Case No. 84-67-GA-AIR, Opinion and Order at 56 (May 21, 1985).

[128] *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of a Security Plan,* Case No. 11-346-EL-SSO et. al, Opinion and Order at 37-38 (Aug. 8, 2012).

collected by Ohio Power would be significantly reduced. The PUCO thus appeared to have adopted a clause for Ohio Power to address the unique issues of losing a major customer like Ormet. But DP&L has not demonstrated that it is in a similar position—that the loss of one major customer will cause its stability revenues to be reduced significantly. The PUCO should not give DP&L any further protection through the SSR than it requested in its Second Revised Application, if it finds that a stability rider is justified in any amount (and it's not).

3. DP&L's proposed floor for the Service Stability Rider would unreasonably transfer risks away from it and onto consumers, which is unfair, unjust, and unreasonable.

DP&L has asked for the treatment given to Ohio Power. As discussed above, that is inappropriate given that DP&L is not similarly situated. But there is another reason to reject DP&L's attempt to improve its position beyond its Second Revised Application. Granting DP&L further protection would essentially transfer the risks of reduced non-shopping load away from the Utility and onto the backs of customers. For instance, a "significant reduction" (which is not defined) in non-shopping load could result from a number of factors including weather, customer mobility, as well as economic downturn, i.e. customers going out of business.

But in Ohio these are risks that the electric utilities, and not customers, have consistently borne. Electric utilities have no protection from customer loss due to mobility or economic conditions. Guaranteeing DP&L full reimbursement for sales for non-shopping load without regard to the effect of innumerable factors such as weather, economic conditions, and/or customer mobility, is not appropriate or reasonable. It is the type of risk shifting that the PUCO refused to undertake in the Ohio Power ESP case when it rejected a decoupling proposal for Ohio Power's RSR.[129] And it is contrary to the law that utilities are to be on their own in the competitive market after the market development period is over. For DP&L that market development period ended December 31, 2005. Enough is enough.

D. If The PUCO Approves A Service Stability Rider, Contrary To The Recommendations Of OCC And Others, The Commission Should Protect Customers by (1) Reducing the SSR For Operation and Maintenance Savings And Capital Expenditure Reductions, (2) Delaying The Service Stability Rider Until The Standard Service Offer Is Competitively Bid, (3) Terminating The Service Stability Rider One Month Prior To The End Of The Electric Security Plan Term, And (4) Restricting The Payment Of Dividends.

As explained in OCC's Post-Hearing Brief, there are many reasons that the Commission should reject DP&L's request for an SSR.[130] If, however, the Commission determines to permit an SSR to be charged to customers, then OCC urges a number of reductions to the SSR to protect customers. OCC's recommendations are as follows.

1. The PUCO should reduce the Service Stability Rider to give customers the benefit of any savings in operation and maintenance expenses and capital expenditures.

DP&L argues that the PUCO should not consider operation and maintenance ("O&M") cost savings and capital expenditure reductions in setting the SSR and the Switching Tracker.[131] DP&L claims that the potential O&M reductions should not be considered a substitute for the SSR. Rather, it needs both the SSR and the potential O&M savings to have an opportunity to earn a reasonable ROE.[132]

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[129] *Id.* at 32.

[130] Post Hearing Brief of OCC at 26-60.

[131] Post Hearing Brief of DP&L at 39, 41.

[132] *Id.* at 40.

According to DP&L, the potential O&M savings have not been approved for 2014-2017. And whether they will be approved or can be implemented is speculative.[133] DP&L also argues that there are substantial risks associated with O&M savings in the form of reduced maintenance that may impair the operation of DP&L.[134] DP&L emphasizes that the extent of O&M savings that DP&*L may* implement is dependent on the outcome of this proceeding. O&M savings come with a risk—the threat to reliability due to performance issues, according to DP&L.[135]

Similarly, DP&L avers that the capital expenditure reductions should be considered a supplement, not a substitute for the SSR.[136] Again, it points out that there is no approved budget for 2014 and beyond. DP&L describes the capital expenditures for later years as "speculative."[137] And DP&L claims that these capital expenditure reductions carry significant risks, but it fails to identify those risks in its post hearing brief.[138]

Such arguments belie DP&L's own testimony on this issue. The so-called "speculative" O&M and capital expenditure ("cap ex") reductions[139] were recently approved for the 2013 budget, and are part of DP&L's normal ten-year operating forecast

[133] *Id.* at 41.

[134] *Id.*

[135] *Id.* at 14.

[136] *Id.* at 41.

[137] *Id.*

[138] *Id.* at 42.

[139] And these so called "speculative" O&M and cap ex reductions have been used and accepted by DP&L for other purposes. For instance, DP&L used these as input into the impairment analysis conducted at the DPL Inc. level. Transcript Volume I-public, page 231. The impairment analysis was then relied upon to adjust the pro forma projections presented in DP&L witness Craig L. Jackson's Second Revised Direct Testimony. *Id.*

for 2013-2022.[140] Mr. Jackson testified that under the normal operating forecast (the forecast from which the O&M and cap ex reductions are derived), assumptions are reviewed with DP&L's business units to determine the most reasonable set of assumptions to be incorporated into the forecast.[141] And "as we progress through the business year, we track and monitor actual results compared to the forecast. Based on actual results combined with potential changes in business and market conditions, the forecast is adjusted as needed."[142] Mr. Jackson then concluded that "[t]his process makes the forecast a reliable one."[143]

Moreover, DP&L's O&M and capital expenditure budgets have far more rigorous checks than the financial projections used to develop DP&L's SSR claim in this proceeding. Here, DP&L's SSR claim is based entirely on projections that were not part of any approved budget[144] and were not subject to DP&L's "track and monitor" process.[145] The projections, including the derivative SSR projection, were developed for purposes of this case—outside the normal operating forecast. DP&L wants to use these projections, even though they have not been updated to account for DP&L's actual experience in 2012 or partial year experience in 2013.[146]

It is these unadjusted, unchecked speculative projections that are not reliable and should not form the basis for a charge such as the SSR, as Dr. Duann testified.[147] The

[140] *See* Transcript Volume I-confidential, page 90.

[141] Second Revised Testimony of DP&L witness Craig L. Jackson at 7.

[142] *Id.*

[143] *Id.*

[144] Transcript Volume I-public, page 218.

[145] *Id.* at 225.

[146] *Id.*

[147] Direct Testimony of Daniel Duann at 33-36.

financial projections underlying DP&L's SSR claim have no legitimate business purpose; they just represent DP&L's justification of its financial integrity claim in this proceeding.[148] As OCC witness Duann testified, the PUCO should not base its decision on unreliable and speculative financial projections, especially for a claim that involves hundreds of millions of dollars,[149] plus untold hundreds of millions under the Switching Tracker. And once these riders are approved, they will be collected from DP&L's customers even if these long-term financial projections turn out to be totally wrong.

Moreover, even though DP&L witnesses Jackson and Herrington testified that the reduced maintenance **"**may**"** impair DP&L's operations, DP&L failed to produce any witness that could testify that such potential reductions do pose a threat to reliability or that it would be unable to continue to provide generation services to SSO customers. Certainly, if DP&L had someone who was able to testify to that, it would have filed rebuttal testimony. The fact that DP&L did not produce such a witness speaks volumes. And given that DP&L bears the burden of proof in these proceedings,[150] the PUCO should conclude that DP&L has failed to show sufficient reason why the financial projections underlying the SSR should not be adjusted for these reduced O&M and capital expenditure forecasts (if the PUCO determines that there is a basis for an SSR at all). Of course, this issue will be moot if OCC's recommendation of no SSR is approved.

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[148] *See* Transcript Volume X-public, pages 2552-54.

[149] If DP&L's Post Hearing Brief position seeking a $151 million SSR per year as a floor is adopted, the proposed SSR at a minimum will be $775 million if the Commission provides a 5-year ESP and SSR collection period.

[150] R.C. 4928.143(C).

2. The Service Stability Rider, if allowed to be collected from customers, should not begin until the time the Standard Service Offer is subject to competitive bidding, as opposed to beginning at the start of the Electric Security Plan.

Under DP&L's proposal, customers begin to pay the SSR at the start of its ESP term.[151] In its Second Revised Application, DP&L requested that the term of the ESP begin January 1, 2013 and run through December 31, 2017.[152] Under such an approach, the SSR revenues would be collected retroactively—before the Commission approves the ESP and before DP&L's SSO price is blended through its first competitive bid auction for SSO load. DP&L's request to begin the ESP term on January 1, 2013 and collect SSR revenues back to that date should be rejected. It is unreasonable and unlawful as discussed below.

DP&L's proposal is unlawful because it is retroactive ratemaking. It would permit DP&L to collect increased rates during the same period that it was pursuing those increased rates before the PUCO. Under *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*[153] and its progeny[154] this is exactly what the Court prohibited as retroactive ratemaking under Title 49 of the Ohio Revised Code. The Ohio Supreme Court, moreover, has recently held that Ohio law, specifically S.B. 221, also prohibits retroactive ratemaking.[155]

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[151] Second Revised Application at 8 (Dec. 12, 2012).

[152] *Id.* at 2.

[153] 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 165 (Mar. 27, 1957).

[154] *See, e.g., Lucas County Comm'rs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501, 1997 Ohio LEXIS 3111 (Dec. 3, 1997).

[155] *See In re: Columbus Southern Power Co. et al.*, at ¶13-14 (retroactive ratemaking is expressly prohibited under R.C. 4928.141).

DP&L's proposal is also unreasonable because it delinks the stability charge and the transition to a 100% competitively bid SSO. DP&L witness Jackson testified that a driver of the SSR is the transition to a 100% competitively bid SSO.[156] It is the transition to a 100% competitively bid SSO that is alleged to cause in part the reduced ROE that the SSR seeks to address. Yet, the transition to a 100% competitively bid SSO does not begin under DP&L's proposal until the SSO price is blended through the first auction. In that first auction, as proposed by DP&L, 10% of the SSO rate is being competitively bid for service rendered January 1, 2013 through May 31, 2014.[157]

OCC witness Duann testified that, if the SSR is to be collected, the collection of the SSR should not start until the blending of the auction-based rates begins.[158] Under this approach, the potential (minimal) savings to DP&L's customers will offset in part the significant costs of the SSR. Thus, if the SSR is to be collected, over the strenuous objections of OCC and others, then it should only be permitted to be collected when the SSO blending (that allegedly impacts DP&L's earnings) begins.[159] And under OCC's approach there would be 100% blending immediately to offset any of the costs of an SSR.

3. Charging customers for the Service Stability Rider should end one month before the end of the ESP term.

Under DP&L's proposal, the SSR will be collected even after DP&L implements SSO rates that are 100% competitively bid (on June 1, 2016).[160] But, as a number of

[156] *See* Transcript Vol. I-public, pages 218-19.

[157] Direct Testimony of DP&L witness Philip R. Herrington at 2.

[158] Direct Testimony of Daniel Duann at 44.

[159] *Id.*

[160] DP&L proposes to collect the SSR through the ESP Term, which extends beyond June 1, 2016. *See* Second Revised Application at 8 (Dec. 12, 2012).

witnesses testified, including Staff witness Choueiki and OCC witness Duann, a five-year term for the ESP is not appropriate.[161] Instead, as recommended by OCC witness Duann, the term of the ESP should coincide with the proposed blending period, and end on June 1, 2016--when DP&L implements SSO rates that are 100% competitively bid. This is consistent with the matching concept discussed above—where the claimed costs of the SSR rider (in terms of a reduced ROE) are matched against the alleged potential benefits to customers of the 100% competitively bid SSO. Staff witness Choueiki also proposed a shorter ESP term of three years.[162] Staff explains in its post hearing brief that the quality of available information for years four and five is "insufficient to warrant committing ratepayer dollars at this time."[163]

Along with a reduced term for the ESP, OCC recommends that the SSR, if implemented, end one month prior to the end of the term. In other words, the SSR, if implemented, should end April 1, 2016. This will assure that the SSR charge will not be collected from customers after the end of this ESP term, even if there is no new ESP or MRO approved and in place when this ESP term ends[164] This is important because it will protect customers from paying, in the Staff's words, "too high a price."[165] It will also prevent what occurred earlier in this proceeding when the Commission permitted the Rate Stabilization Charge to continue until a new ESP was implemented--despite the Stipulation provision requiring it to end on December 31, 2012.

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[161] *See* Direct Testimony of PUCO Staff witness H. M. Choueiki at 5; Direct Testimony of Daniel Duann at 45.

[162] Direct Testimony of PUCO Staff witness H. M. Choueiki at 5.

[163] Post Hearing Brief of PUCO Staff at 10.

[164] Direct Testimony of Daniel Duann at 48.

[165] *See* Post Hearing Brief of PUCO Staff at 12.

4. If the Service Stability Rider is approved, the PUCO should prohibit the transfer of money (by dividend payments) out of the distribution utility since DP&L has claimed that money is needed for financial integrity and reliability of service to customers.

OCC witness Duann testified that DP&L should be prohibited from paying dividends to its parent companies, DPL Inc. and AES Corporation during the term of the ESP without receiving prior approval from the Commission.[166] Staff witness Choueiki similarly recommended that SSR revenues collected by DP&L stay with DP&L and not be transferred to any of DP&L's affiliates or subsidiaries.[167] However, DP&L argues, among other things, that if its ability to pay dividends were restricted, then investors would not be able to earn a reasonable return on investment and an unconstitutional taking would occur.[168] DP&L also alleges that since some of the debt at DPL Inc. is attributable to DP&L, any restriction on DP&L's ability to pay dividends to DPL Inc. would unreasonably restrict DPL Inc.'s ability to pay its debts.[169]

As a fundamental matter, constitutional issues are not within the jurisdiction of the PUCO. The General Assembly has confined the scope of the Commission's jurisdiction to utility-related matters. Under Title 49, the PUCO has exclusive jurisdiction over various matters concerning utilities, such as rates and charges, classifications, and service, effectively denying jurisdiction on these matters to all courts except the Ohio Supreme Court. The rationale behind these grants of authority is that the determination of issues related to applicable laws and regulations, industry practices, and standards is best accomplished by the PUCO. But because the PUCO is a creature of statute, it has

[166] Direct Testimony of Daniel Duann at 48.

[167] Direct Testimony of PUCO witness H. M. Choueiki at 15.

[168] Post Hearing Brief of DP&L at 59.

[169] *Id.* at 60.

only those powers conferred to it by statute.[170] Thus, the Commission does not have the jurisdiction to decide constitutional challenges.

The PUCO itself has acknowledged its lack of authority to determine constitutional issues.[171] In the past, the PUCO has refused to deal with constitutional issues involving property rights because the issues were "beyond [its] jurisdiction."[172] Thus, DP&L's constitutional claims, even if valid (which they are not) are not claims the PUCO may rule upon.

5. A PUCO restriction on the dividends that DP&L can pay does not amount to a taking.

DP&L's claims that requiring DP&L to retain earnings during the ESP would constitute a taking should be rejected. First, DP&L's taking argument (See DP&L Brief at 59) is misplaced. The funds (primarily earnings) for paying the common stock dividends by DP&L will stay with DP&L and its one-and-only shareholder (DPL Inc.) in the form of either dividends or shareholder equity. Quite simply there is no taking. DP&L admits that any restriction on paying dividends to DPL Inc. would have the effect of increasing the equity balance at DP&L.[173]

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[170] *Columbus S. Power Co. v. Pub. Util. Comm*., 67 Ohio St.3d 535, 620 N.E.2d 835 (Nov. 3, 1993); *Pike Natural Gas Co. v. Pub. Util. Comm*., 68 Ohio St.2d 181, 22 O. O.3d 410, 429 N.E.2d 444 (Dec. 23, 1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 21 O.O.3d 96, 423 N.E.2d 820 (July 15, 1981); *Dayton Communications Corp. v. Pub. Util. Comm*., 64 Ohio St.2d 302, 18 O. O.3d 478, 414 N.E.2d 1051 (Dec. 30, 1980).

[171] *Monongahela Power Co. v. Schriber,* 322 F.Supp.2d 902, 911 fn. 8 (S.D. Ohio May 19, 2004) (citing *The East Ohio Gas Co. v. Pub. Util. Comm.,* 137 Ohio St. 225, 28 N.E.2d 599 (July 17, 1940)); *accord, In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative code,* Case No. 10-1261-EL-UNC, Opinion and Order at 9 (Jan. 11, 2011) (finding that it is the province of the courts, not the PUCO, to judge the constitutionality of R.C. 4928.143(f)).

[176] Id.

[173] *See* Post Hearing Brief of DP&L at 60.

Moreover, no one, including OCC, has proposed to transfer the earnings from DP&L's ESP away from DP&L to other parties. DP&L's claim that "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 its investment and a constitutional taking would occur" is baseless.[174] This particular declaration reflects a lack of understanding regarding the role of dividends in modern corporate finance. Paying dividends does not decrease or increase the earnings of DP&L. Paying dividends also does not transfer the earnings from DP&L to anyone other than its shareholder.

DP&L's claim that DPL Inc.'s debt level is related to the regulated activities of DP&L[175] is also unfounded. To the contrary, DP&L has contributed significantly to the financing (including paying down the debts) of its parent, DPL Inc. in the past. Specifically, from 2001 to 2011, when DP&L was enjoying exceedingly high ROEs, it paid common stock dividends to DPL Inc. totaling $2.26 billion. This represented a payment of approximately 86% of DP&L's total net income over that period.[176] But even more amazing, during the more recent three year period of 2009 to 2011, DP&L paid $845 million in common stock dividends to DPL Inc. This amount ($845 million) is more than the total net income of DP&L ($730 million) in the three-year period.[177] Put another way, DP&L might have been borrowing money to pay the dividends to its parent company, DPL Inc. depending on the cash availability of DP&L during that time period.

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[174] Post-Hearing Brief of DP&L at 59.

[175] *Id.* at 59-60.

[176] *See* Direct Testimony of IEU witness Joseph Bowser at 14.

[177] *See id.* at Exhibit JGB-4.

This was a questionable dividend policy even when DP&L was enjoying excessive earnings in the past. But now, when DP&L is claiming to be on the verge of financial impairment, it would be unreasonable for the Commission to allow DP&L to continue this type of dividend policy. Instead, some reasonable restrictions on paying dividends, such as those proposed by OCC, should be adopted. The Commission has recognized it has authority to take action regarding dividends.[178] Indeed the Ohio Supreme Court in *Ohio Central Tel. Corp. v. Pub. Util. Comm*. (1934) 127 Ohio St. 556, clearly stated that the PUCO could prohibit a utility from paying dividends where the utility lacks sufficient surplus for paying dividends. In *Central Telephone,* the Court upheld the Commission's authority to prohibit a utility from paying dividends "when there are neither earnings nor surpluses from which such payments may properly be paid."[179] Here where earnings are derived from forced customer funding of DP&L's financial integrity, it is reasonable to restrict dividends to ensure that customers pay no more than is necessary and prudent for the provision of safe and adequate utility service.

OCC's proposal regarding the dividend payment by DP&L to its one-and-only common stock shareholder is modest and reasonable. These are common restrictions and are essential in protecting DP&L's customers and shareholders.[180] They are aimed to preserve the cash and financial flexibility of DP&L during a time when DP&L is claiming potential financial ruin.[181] Under OCC's proposal, DP&L can continue to pay

[178] *See In the Matter of the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case Nos. 95-299-EL-AIR *et al*., at 41 (July 16, 1996).

[179] *Ohio Central Tel. Corp. v. Pub. Util. Comm.,* 127 Ohio St. 556, 557 (Mar. 7, 1934).

[180] *See* Transcript Volume X-public, pages 2551-52.

[181] *See* Direct Testimony of Daniel Duann at 46.

dividends to its shareholders in the amount and form approved by the Commission.[182] To prevent any possible "bypass" of this restriction, in the sense that DP&L's dividend payment will be restricted, during the ESP period, DP&L should also be prevented from "hoarding" the earnings in the ESP period, which is largely derived from the collection of SSR and Switching Trackers, to be distributed to shareholders after the ESP period. And DP&L would be prevented from paying dividends higher than its reported net income after the ESP period.[183]

A restriction on paying dividends by a corporation (including a public utility) imposed by the lenders, bond holders, or regulatory agency, for the purpose of protecting the corporation's financial integrity is not without precedent.[184] The Commission has approved restrictions on dividend payment (not exceeding 60% of net income), the percentage of income allowed to be distributed to the parent companies, interest coverage ratio, and total indebtedness as a per cent of total capitalization in the past.[185] The Commission should impose similar, reasonable restrictions in this case.

E. The PUCO Should Reject DP&L's Proposed Cost Allocation and Rate Design For Determining The Relative Amounts That The Customer Classes (Residential, Commercial, Industrial, Etc.) Will Pay For The Service Stability Rider And The Switching Tracker.

In its Post-Hearing Brief, DP&L addresses the cost allocation and rate design for the Service Stability Rider and Switching Tracker in a few brief paragraphs, contending

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[182] *Id.*

[183] *Id.*

[184] *See* Transcript Volume X-public, pages 2552, 2556.

[185] *See In the Matter of the Joint Application of Brainard Gas Corporation, Northeast Ohio Natural Gas Corporation, and Orwell Natural Gas Company for Approval of Long-Term Financing Arrangements and for Expedited Consideration*, 10-2330-GA-AIS, Application (Oct. 8, 2010); Exhibit A (Oct. 22, 2010) ; Finding and Order (Mar. 30, 2011).

that the goal of DP&L's rate design is to "balance the impact of the entire ESP filing across all tariff classes."[186] DP&L's proposed cost allocation and rate design should be rejected.

As discussed in OCC's Brief, DP&L's claims of "balance" are misplaced, as are its claims of "providing stable and predictable rates."[187] It is not possible to "balance" the impact of a charge without understanding and applying an assessment of cost causation to the costs at hand.[188] As OCC demonstrated through cross-examination of DP&L witness Parke, Mr. Parke's allocation of charges between customer classes and design of rates has no relation to the causes for which these costs will allegedly be incurred.[189]

Mr. Parke allocated 48% of the SSR to residential customers. That would be a substantial increase from the 41% of the RSC currently allocated to the residential class. But the residential class only uses 37% of the electricity on the DP&L system. Mr. Parke's proposed allocation does not create rate stability and predictability, but in fact undermines such objectives. It undermines the goals of predictability and stability because of its inconsistency with the underlying rationale for these charges and the substantial change in allocation from the manner in which the RSC has been allocated.[190] Accordingly, DP&L's proposed rate design does not strike a "reasonable balance" and should be rejected.

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[186] Post-Hearing Brief of DP&L at 60-61.

[187] Post-Hearing Brief of OCC at 82-85.

[188] *Id.*

[189] *Id.*, quoting Transcript-Volume III --- Confidential at 836-37.

[190] Direct Testimony of Scott J. Rubin at 11.

It is the volumes of load switching that DP&L contends are responsible for the incurrence of costs in this manner. Thus, it follows that the allocation of costs should be on a volumetric basis, as recommended by OCC witness Rubin.[191]

Also, Mr. Parke allocated the SSR between customer classes by adding a customer charge to the design of DP&L's existing Rate Stabilization Charge (RSC) and by retaining the RSC's demand component. His allocation is arbitrary and notable for its inconsistency with ratemaking principles. And his allocation has no relation to the basis for the charge.[192]

Similarly, OEG's recommendation to utilize a Coincident Peak (1 CP) allocator should be rejected because it does not track the reasons that "financial integrity" charges such as the SSR and Switching Tracker are allegedly needed. In its Post-Hearing Brief, OEG argues that SSR revenues "represent recovery of 100% demand-related production costs aimed at enhancing the return on equity the Company would earn on its fixed and unregulated generation assets."[193] But it is not customers' peak demand which is driving these costs. Rather, it is the volumes of energy switching and the volumes which will be subject to competitive bid pricing, that are driving the costs. Thus, it would be inappropriate to allocate any of these costs on a peak demand basis when it is kWh usage—not peak demand—that is driving their incurrence.

OCC would also emphasize that because DP&L's generation assets are no longer subject to cost-based regulation, OEG's use of a peak allocator is misplaced. Capacity costs associated with generation are now allocated through PJM and energy is priced

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[191] Post-Hearing Brief of OCC at 86, quoting Direct Testimony of Scott Rubin at 9.

[192] *Id.* at 83.

[193] Post-Hearing Brief of OEG at 14.

volumetrically.[194] Since DP&L's own rationale for needing an SSR is "solely related to electricity consumption,"[195] any revenues authorized under the SSR "should be allocated to the customer classes – both shopping and non-shopping – in proportion to each class's consumption of electricity."[196]

Finally, OCC would emphasize that OEG witness Kollen, who sponsored OEG's recommendation, has no recent experience performing cost allocation studies or allocating production plant.[197] Further, he did not recall ever having testified to a 1 CP methodology or any other allocation methodology for production plant.[198] Additionally, Mr. Kollen did not prepare a proposed revenue allocation or any quantitative analysis of each customer class's responsibility for these charges.[199] He described his recommendation as "simplistic."[200] OEG's recommendation for a 1 CP allocation should be rejected.

OCC's per-kWh allocation should be adopted if the PUCO authorizes the SSR or the Switching Tracker.

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[194] Transcript Volume VII-Public, pages 1831-37 (Direct Testimony of PUCO Staff witness Hisham Choueiki).

[195] Direct Testimony of Scott J. Rubin at 12.

[196] *Id.* at 13.

[197] Transcript Vol. VIII-Public at 1975-76.

[198] Transcript Vol. VIII-Public at 1976.

[199] Transcript Vol. VIII-Public at 1977.

[200] Transcript Vol. VIII-Public at 1976.

F. The PUCO Should Reject DP&L's Proposed Electric Security Plan Because It Is Less Favorable In The Aggregate Than A Market Rate Offer Would Be For Customers.

1. The Service Stability Rider Cannot Lawfully Be Collected From Customers under a Market Rate Offer.

To win the PUCO's authorization to collect SSR payments of $687.5 million (or more) from customers,[201] DP&L has to pass a statutory test. The test requires DP&L to show that its proposed ESP is more favorable in the aggregate than would be a market rate offer. It therefore is not lost on DP&L that increasing what a market rate offer would cost customers is helpful to its cause. Indeed, DP&L has dramatically inflated the projected cost of a market rate offer by claiming that customers would have to pay the same stability rider ($687 million) as what DP&L proposes for its electric security plan.

That is so wrong. DP&L's claim[202] that its proposed ESP is more favorable in the aggregate than an MRO is mistaken and indefensible. The SSR or Switching Tracker would be unlawful under an MRO. Accordingly, the $687.5 million SSR (plus the cost of the Switching Tracker) must be added only to the ESP side of the equation. When that is done, the cost of DP&L's proposed ESP is far greater than its benefits relative to an MRO. DP&L's ESP fails the statutory test.

For example, using DP&L's filed 62% switching assumption, the proposed ESP produces results that are less favorable in the aggregate than the expected MRO results because the ESP results in $580.5 million in additional costs to customers over what should reasonably be expected under an MRO.[203] Assuming an increase in switching to

[201] Post-Hearing Brief of DP&L at 23-24.

[202] Post-Hearing Brief of DP&L at 78.

[203] Direct Testimony of Beth Hixon at Schedule BEH-1, $693.0 million cost in non-bypassable revenue, less $112.5 million benefit in bypassable revenue.

70% during the ESP, DP&L's proposed ESP produces results that are $669.9 million less favorable than the expected MRO results.[204]

FES correctly points out that "there is no evidence the SSR qualifies for inclusion in the MRO side of the test" because DP&L has failed to show the SSR satisfies the statutory requirements.[205] Similarly, FES highlights that there is no authority supporting the inclusion of the Switching Tracker on the MRO side of the test.[206]

The Commission has already decided that a "stability charge" should not be included on the MRO-side of the statutory test. IEU and FES argue this in their respective Briefs.[207] Specifically, IEU points out that "In the *AEP-Ohio ESP II* case *** the Commission treated the Retail Stability Rider ("RSR") as a cost of the proposed ESP, but did not adjust the MRO used in the ESP versus MRO price test despite AEP-Ohio's claim that it needed a stability charge to protect its financial integrity."[208]

Since DP&L has proposed to include the SSR in a projected MRO, we have to address the matter here. But addressing the matter gives DP&L much more credit than is deserved. It strains credibility that DP&L is proposing this scenario to the PUCO. The very essence of the market rate offer is a legislative attempt to differentiate a market approach from the ESP. But DP&L is willing to distort the statutory intent, for the purpose of trying to pass a statutory test that it otherwise cannot.

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[204] Direct Testimony of Beth Hixon at Schedule BEH-2, $758.7 million cost in non-bypassable revenue, less $88.8 million benefits in bypassable revenue.

[205] Post-Hearing Brief of FES at 10.

[206] *Id.* at 21.

[207] Post-Hearing Brief of FES at 7-8; Post-Hearing Brief of IEU at 65-66.

[208] Post Hearing Brief of IEU at 65.

As FES pointed out in its Post-Hearing Brief, "Every intervenor and Staff witness who examined the proposed ESP reached the same conclusion: DP&L's proposed ESP fails the statutory ESP v. MRO test."[209] Accordingly, the Commission should come to the same conclusion. DP&L's proposed ESP must be rejected because it fails the test mandated by the Ohio General Assembly to protect consumers from unreasonable rates and charges.

2. There is no unconstitutional taking just because Ohio law does not provide for A Service Stability Charge under a Market Rate Offer.

Ohio law does not provide for a SSR or Switching Tracker under an MRO (or ESP). But this does not amount to an unconstitutional taking of DP&L's property. DP&L argues that if the SSR and the Switching Tracker are not permitted under the hypothetical MRO for the statutory test, then DP&L's earnings would not be reasonable and that would amount to a taking.[210] DP&L calls upon the landmark cases of *Hope*, *Bluefield*, and *Duquesne* to support its claim that any denial of an SSR and/or Switching Tracker would result in rates below that which is legally acceptable.[211]

For reasons discussed previously, OCC disagrees with DP&L that, under the *Hope* end result test, the denial of the SSR or Switching Tracker would have such an economic result. Moreover, DP&L fails to recognize a critical distinction between the nature of the entities involved in *Hope, Bluefield, and Duquesne Light* and the entity –

[209] Post-Hearing Brief of FES at 37; *see also* the Direct Testimony of FES witness Ruch, IEU witness Murray, OCC witness Hixon and PUCO Staff witness Turkenton.

[210] Post-Hearing Brief of DP&L at 85-86.

[211] *Id.*, citing *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 603; 64 S. Ct. 281; 88 L. Ed. 333 (1944); *Bluefield Water Works and Service Co. v. Pub. Util. Comm.*, 262 U.S. 679, 690; 43 S. Ct. 675; 67 L. Ed. 1176 (1923); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310; 109 S. Ct. 609; 102 L. Ed. 2d 646 (1989).

DP&L – to which the Commission's rate order in this proceeding will be directed. Those landmark cases all involved companies whose services were fully regulated. In contrast, DP&L is not in a similar situation because electric generation services in Ohio are a fully competitive, market-based industry.

As discussed in OCC's Brief, the SSR and Switching Tracker are clearly related only to DP&L's competitive generation services.[212] The United States Supreme Court has distinguished when a taking occurs with utilities that are facing financial pressure from competitive forces as opposed to utilities under the traditional regulated model.

Specifically, in *Market Street Railway Co. v. Railway Comm. of California*, the Court rejected the argument that a commission-mandated rate reduction resulted in confiscatory rates and therefore a taking under the Constitution.[213] The Court explicitly noted the different set of circumstances the case presented from the previous rate cases it had decided.[214] The Court stated:

> [I]t should be noted at the outset that most of our cases deal with utilities which had earning opportunities, and public regulation curtailed earnings otherwise possible. But if there were no public regulation at all, this appellant would be a particularly ailing unit of a generally sick industry. The problem of reconciling the patrons' needs and the investors' rights in an enterprise that has passed its zenith of opportunity and usefulness, whose investment already is impaired by economic forces, and whose earning possibilities are already invaded by competition from other forms of transportation, is quite a different problem.

The utility in *Market Street Railway* pointed to *Hope* as authority for it to earn a rate which, even if not producing profit, would be enough to protect the utility's financial

[212] *See* Post-Hearing Brief of OCC at 43-44.

[213] *Market Street Railway Co. v. Railway Comm. Of Cal.*, 324 U.S. 548. 554; 65 S. Ct. 770; 89 L. Ed. 1171 (1945).

[214] *Id*.

integrity and maintain its credit.[215] But the Court rejected this argument, distinguishing the utility in *Hope* as one which was in an advantageous economic position and poised to make significant earnings as opposed to the utility at bar which was operated in a competitive market and could not hope to rectify its financial problems with the a rate increase.[216] The Court further rejected the utility's takings claim, holding that the Due Process Clause has never been used or intended for public utility commissions to fix rates that ensure the continuation of a service no one currently wants or to protect the credit of a business whose securities are already impaired.[217] The Court held that the Due Process Clause "has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces."[218]

The current case presents strikingly similar issues to *Market Street Railway*. DP&L claims changes due to the competitive market are threatening its financial security. But the Commission does not regulate the competitive market and the non-competitive side of DP&L's business should not be given a rate increase to subsidize the economic condition of its competitive generation services.

The PUCO Staff points out that the creation and emergence of the competitive market has been clear for 13 years and that DP&L has had ample opportunity to prepare itself for the changing winds.[219] The PUCO Staff also noted that DP&L collected transition charges meant to prepare/compensate utilities for the transition period between

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[215] *Id* at 566.

[216] *Id.*

[217] *Id.* at 567.

[218] *Id.*

[219] Post-Hearing Brief of PUCO Staff at 2-3.

regulated and competitive.[220] DP&L has already been afforded the opportunity to prepare for the transition and should not be allowed to charge its customers more for its failure to adequately manage its affairs.

DP&L cannot successfully argue a taking because the admitted factors behind its problems are from market forces. As the United States Supreme Court stated in *Market Street Railway,* the Due Process Clause does not ensure protection of financial integrity against the operation of economic forces. Customer switching and declining wholesale prices are both products of economic forces and DP&L cannot seek shelter from these forces behind the wallets of its customers.

Just like the utility in *Market Street Railway,* DP&L is attempting to protect its bottom line from its loss of customers by seeking to charge its current customers more for regulated services. This was rejected in *Market Street Railway* and should also be rejected by the Commission.[221]

G. The Fuel Rider Rate That DP&L's Standard Service Offer Customers Pay Should Continue To Be Based On A Least Cost Methodology But Should Not Include DPL Energy Resources' Load.

The PUCO should reject DP&L's proposal to replace its least cost methodology with a system average cost methodology for calculating its Fuel Rider rate applicable to SSO service. DP&L's true goal with requesting to move to a system average fuel cost approach, rather than using a least-cost fuel methodology for SSO customers, is to provide a subsidy for its wholesale sales,[222] which includes sales to its affiliates.[223]

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[220] *Id.* at 4.

[221] OCC notes that the PUCO does not have the jurisdiction to decide constitutional issues. S*upra* at fn.175.

[222] Post-Hearing Brief of PUCO Staff at 24.

[223] Post-Hearing Brief of OCC at 78.

OCC agrees with FirstEnergy Solutions that "there is no reason to subsidize DPLER *** to the detriment of customers." [224] FirstEnergy Solutions argues that DP&L's proposed fuel methodology (moving from a "least-cost" to a "system average") "will be an obvious cross-subsidy to DPLER, to be paid by SSO customers." [225] FirstEnergy Solutions is right. DP&L's proposed fuel rider methodology is just wrong.

DP&L argues that it "has no statutory obligation to allocate least-cost fuel to SSO customers."[226] While there is no Ohio law that uses those words, Ohio law does prohibit "anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service."[227] And DP&L's proposal to use an average cost methodology for calculating its Fuel Rider rate (applicable to SSO service) creates a subsidy to its competitive affiliate.[228] DP&L's proposal violates the State policy in R.C. 4928.02(H), against subsidies.

Moreover, the PUCO has a long history of minimizing fuel costs to produce reasonable rates for utility customers. To this day, Ohio policy requires reasonably priced retail electric service.[229]

Furthermore, DP&L is incorrect when it says that OCC witness Slone conceded that "There is no Commission Order that requires DP&L to allocate least-cost fuel to SSO customers."[230] DP&L conveniently ignores the fact that OCC witness Slone

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[224] Post-Hearing Brief of FES at 87-88.

[225] *Id.* at 87.

[226] Post-Hearing Brief of DP&L at 50.

[227] R.C. 4928.02(H).

[228] Post-Hearing Brief of OCC at 78.

[229] R.C. 4928.02(A).

[230] Post-Hearing Brief of DP&L at 50.

testified that the Commission Order approving the stipulation in PUCO Case No. O8-1094-EL-FAC requires DP&L to allocate least-cost fuel to SSO customers.[231]

Finally, DP&L mischaracterizes the process of selling power into the wholesale market, to confuse the issue.[232] DP&L points out it could not charge wholesale customers a market rate plus an additional amount associated with DP&L's higher-cost fuel, as that would prevent DP&L from recovering its fuel costs associated with generating the wholesale power.[233] But that scenario is not reality. In reality, if DP&L could not make a profit selling power into the wholesale market, regardless of its fuel cost, it would simply not generate the power. If DP&L is generating power and selling it into the wholesale market below its cost to produce the power, then DP&L needs to rethink its business model.

And DP&L has proven that selling into the wholesale market using its higher cost fuel is not a deterrent to its financial integrity. For example, in 2010, DP&L's least cost method allocated the least cost fuel to retail customers. As such, it stands to reason that, at that time (2010), higher cost fuel was allocated to non-retail, or wholesale customers. Yet DP&L was able to earn a return on equity of 20.02% in 2010,[234] a year when its wholesale power sales were made using its higher cost fuel.

Consistent with the recommendations of OCC, the PUCO Staff, and FirstEnergy Solutions, the Commission should approve a modified version of the least cost methodology currently used to calculate the Fuel Rider rate. The lowest to highest cost

[231] Transcript Volume VIII-public, pages 2114-15.

[232] Post-Hearing Brief of DP&L at 50.

[233] *Id.*

[234] Direct Testimony of Daniel Duann at 43.

stacking principles of the least cost methodology should be used to determine the effective rate of the Fuel Rider and the DPLER load should be excluded from any calculation of the Fuel Rider rate that SSO customers pay. Including the DPLER load in the Fuel Rider calculation could inflate the rate that SSO consumers pay for fuel.[235]

H. The Commission Should Reject The PUCO Staff's Proposed Rider For Collecting The Costs Of Storm Damage Recovery From Customers.

The Commission should reject the PUCO Staff's proposal that DP&L establish a Storm Damage Recovery Rider ("Storm Rider").[236] Specifically, the PUCO Staff proposes that the Commission authorize a Storm Rider (on a going-forward basis) so that DP&L can defer major storm-related costs that exceed an annual baseline of $4 million, and provide refunds in years when major storm-related costs are below the baseline.[237]

The Commission should deny the PUCO Staff's proposed Storm Rider because it is unreasonable. It is unreasonable because such a proposal would permit DP&L to track changes in only one expense element (i.e., major storm costs) of its total revenue requirement. In tracking only this one expense item, the presumption is that DP&L is entitled to collect, from customers, major storm-related costs incurred that are higher than the amount of those particular costs included in the determination of distribution rates. That is a mistaken presumption and contrary to how ratemaking should balance the interests of customers and utility investors. We will explain.

A utility should be required to prove to the Commission that the level of costs it incurs across all cost categories, absent recovery from customers, would result in

[235] Post-Hearing Brief of OCC at 81-82.

[236] Post-Hearing Brief of PUCO Staff at 25.

[237] *Id.*

financial harm. For ratemaking purposes, the utility should not be allowed the asymmetry of cherry-picking collection of single items of cost when the totality of its costs and revenues might not justify a rate increase. But the proposed Storm Rider would require DP&L to meet a much lower standard—that its major storm costs are higher than the annual baseline amount. That is unfair to customers.

The result is that the PUCO Staff's proposal does not allow the Commission to consider potentially offsetting expense reductions or revenue increases that indicate that the increased storm damage costs have not harmed the Utility's bottom line. Thus, customer rates might increase even though the Utility is making as much, or more, than it did before.

Furthermore, the Commission should deny the PUCO Staff's proposal to create a deferral. The PUCO is, in general, opposed to the creation of deferrals.[238] And there are no "extraordinary circumstances" that would necessitate the use of a deferral in this case.[239] Accordingly, the Commission should reject the PUCO Staff's proposed Storm Rider.

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[238] *In the Matter of the Application of Columbus Southern Power Company*, Case No. 11-346-EL-SSO *et al.*, 2012 Ohio PUC LEXIS 738 at *88, Opinion and Order (Aug. 8, 2012).

[239] *Id.*

I. If The PUCO Approves A Storm Damage Recovery Rider, Then The Storm Rider Should Include Consumer Protections, Including A $4 Million Annual Baseline.

1. The Storm Rider should be used to collect those amounts of major storm O&M costs that exceed $4 million annually. If the amount expensed for major storm O&M restoration is less than $4 million, then DP&L should refund to customers the difference between the major storm annual expense and $4 million.

As stated above, OCC urges the Commission to reject the PUCO Staff's proposal for a Storm Rider. But if the Commission does authorize a Storm Rider, then the Commission should structure the Storm Rider so that DP&L's customers are protected. Most importantly, the Commission should require an annual baseline amount of $4 million as proposed by the PUCO Staff.[240] Thus, DP&L would be allowed to defer the annual amount of "major storm O&M cost that exceeds the baseline, or to refund the difference between the amount expensed for major storm O&M restoration and the baseline, should the annual expense be less than the baseline."[241]

The PUCO Staff correctly determined that the amount of the baseline should be $4 million. Evidence shows that this amount ($4 million) is based on the average annual level of costs incurred by DP&L for storm damage from 2002 to 2011 ($3,977,641) and a recent (2009-2011) three-year average.[242] Accordingly, the Commission should reject DP&L's argument that the Storm Rider annual baseline should be $1.1 million.[243]

[240] Post-Hearing Brief of PUCO Staff at 25.

[241] Direct Testimony of PUCO Staff witness David M. Lipthratt at 5.

[242] Post-Hearing Brief of PUCO Staff at 25.

[243] Post-Hearing Brief of DP&L at 91-96.

2. DP&L is precluded by the doctrine of collateral estoppel from re-litigating its claim that its current distribution rates do not include any recovery from customers for major storm damage.

The Supreme Court of Ohio characterized "collateral estoppel" as precluding the re-litigation of an issue that has been "actually and necessarily litigated and determined in a prior action * * *."[244] "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[245]

The doctrine of collateral estoppel applies to hearings before the PUCO.[246] According to the Court, "where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding."[247]

DP&L argues against the PUCO Staff's $4 million annual baseline calculation and urges the Commission to find that "DP&L's current distribution rates do not include any recovery associated with unusually large storms."[248] And DP&L argues that because "DP&L's current rates do not include any recovery for unusually large storms, it is

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[244] *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision*, 80 Ohio St. 3d 36, 41; 684 N.E.2d 312 (Oct. 8, 1997).

[245] Restatement of the Law, Second, Judgments, Section 27.

[246] *Superior's Brand Meats, Inc. v Lindley*, 62 Ohio St.2d 133, *403 N.E.2d 996, (1980), syllabus. Office of Consumers' Counsel v. Pub. Util. Comm., 16 Ohio St.3d 9, 10, 475 N.E.2d 782, (1985).*

[247] *Superior' Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133(syllabus).

[248] Post-Hearing Brief of DP&L at 93.

unreasonable to include the 2005, 2008 and 2011 storms in any baseline average that is used to set a storm rider for DP&L."[249]

But this is the same argument DP&L made in another case (12-2281-EL-AAM) that the PUCO rejected.[250] The ink on that PUCO decision is barely dry yet DP&L is again making its claim. DP&L is precluded by the doctrine of collateral estoppel from re-litigating this issue.

Specifically, in Case No. 12-2281, DP&L sought authority to defer distribution related O&M expenses associated with restoring electric service after storms that occurred at the end of June 2012.[251] In its application for rehearing, DP&L argued that that the PUCO's Order reducing the Utility's deferral request by the three-year average service restoration O&M expenses associated with major storms was unreasonable because there are no major storm costs included in DP&L's current rates.[252] The Commission rejected DP&L's argument and held that DP&L's recovery of O&M expenses should be reduced by the three-year average of O&M expenses associated with major storms.[253] Specifically, the PUCO held "that allowing DP&L to recover the full amount could allow for DP&L to engage in double-recovery for the O&M expense, first from base distribution rates and second from this proceeding."[254]

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[249] *Id.* at 95.

[250] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify Its Accounting Procedure for Certain Storm-Related Service Restoration Costs*, Case No. 12-2881-EL-AAM, Entry on Rehearing at ¶6-7 (Feb. 13, 2013).

[251] *Id.* at ¶2.

[252] *Id.* at ¶6.

[253] *Id.* at ¶7.

[254] *Id.*

The Commission has rejected DP&L's argument that its current distribution rates do not include major storm costs. Therefore, based on the doctrine of collateral estoppel, DP&L is precluded from re-litigating this issue. Accordingly, the PUCO should not revisit DP&L's arguments that its current rates lack recovery for major storm damage.

3. The PUCO should require additional consumer protections if it authorizes DP&L to collect the Storm Rider from customers.

If the Commission approves a Storm Rider, which OCC opposes, then the Commission should protect customers as recommended by the PUCO Staff. In this regard, the Commission should require the following:

(1) Find that DP&L may defer only "major storm"-related incremental distribution O&M expenses,[255] that DP&L would not have incurred absent the major storm and that are incremental to normal DP&L O&M expenses;

(2) Find that "[t]he determination of whether a storm is deemed to be 'major' or not is determined by the methodology outlined in the IEEE Guide for Electric Power Distribution Reliability Indices, as set forth in Rule 4901:1-10-10(B), O.A.C;"[256]

(3) Prohibit the inclusion of any capital expenditures in the Storm Rider;[257]

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[255] *See* Direct Testimony of PUCO Staff witness David M. Lipthratt at 7.

[256] *Id.* at 6-7.

[257] *Id.* at 8.

(4) Require DP&L to maintain a detailed accounting of all storm expenses within its storm deferral account, including detailed records of all incidental costs and capital costs. The capital costs should be recorded separately and are not to be recovered through the Storm Damage Recovery Rider, but rather should be reviewed and considered as part of future base distribution rate cases. DP&L should provide this information annually for Staff to audit to determine if additional proceedings are necessary to establish recovery levels or refunds as necessary;[258]

(5) Order DP&L to file an application by December 31st of each year during the ESP commencing a proceeding where:

- DP&L has the burden of proof to demonstrate that all the major storm costs were prudently incurred and reasonable:
- Any interested party and the PUCO Staff have the opportunity to file comments on the annual application within 90 days after it is filed;
- If any objections are not resolved by DP&L, then an evidentiary hearing will be scheduled;

[258] *Id.* at 7.

- Parties will be provided ample time to conduct discovery; and
- Parties will be provided the opportunity to present testimony before the Commission.[259]

The consumer protections above have been established in PUCO precedent. Specifically, these protections were mandated by the PUCO when it approved a Storm Damage Recovery Mechanism for AEP-Ohio.[260] Accordingly, if the Commission approves the Storm Rider, then DP&L's customers should be afforded the same protections as AEP-Ohio's customers.

J. The PUCO Should Order DP&L's Legal Corporate Separation To Take Place In The Very Near Future.

In its Post-Hearing Brief, DP&L takes issue with other parties' positions that the PUCO should order DP&L to rapidly implement structural separation of its generation from its transmission and distribution business, rather than accept DP&L's commitment to make a filing by December 31, 2013, without any commitment to structurally separate by a date certain.[261] DP&L emphasizes that it cannot transfer its assets until it has obtained prior Commission approval.[262] DP&L also argues that it cannot do anything until the no-call provisions on certain outstanding bonds expire, which it contends cannot be redeemed until September 1, 2016.[263]

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[259] *Id.* at 8.

[260] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO *et al.*, Opinion and Order at 68-69 (Aug. 8, 2012).

[261] Post-Hearing Brief of DP&L at 68-71.

[262] *Id.* at 69, citing R.C. 4928.17(E).

[263] *Id.* at 69-70.

OCC addressed these issues in its Brief and agreed with IEU and FES witnesses that continuing delays in structural corporate separation are problematic and should not be accepted by the PUCO.[264] Exelon also supports a more rapid transfer of generation assets to an affiliate.[265] Although DP&L points out that no party has conducted an independent analysis of whether legal separation is legally or financially feasible prior to the expiration of no-call provisions in its bonds,[266] this does not mean that an analysis is not in order. OCC agrees with FES that R.C. 4928.17(A) requires structural separation and that DP&L must provide good cause why it should not be required to structurally separate before accepting continuing functional separation.[267] And such good cause has not been demonstrated.[268] The Commission should promptly open a proceeding to explore how structural separation could be implemented in the very near future.

K. The PUCO Should Phase-Out The Maximum Charge Provision For Low-Load Factor Customers on The Company's Commercial (Secondary and Primary) Tariffs.

As discussed in OCC's Brief, OCC supports DP&L's proposal to phase out the maximum charge provision in its tariffs, which is designed to limit the amount paid by low load factor customers.[269] In its Post-Hearing Brief, DP&L emphasizes that the phase-out of the charge is a matter of equity between customers and that the continuation of the charge is "inconsistent with competitive markets."[270]

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[264] Post-Hearing Brief of OCC at 94-96.

[265] Post-Hearing Brief of Exelon at 4.

[266] Post-Hearing Brief of DP&L at 70.

[267] *See* Post-Hearing Brief of FES at 61-67.

[268] *Id.*

[269] Post-Hearing Brief of OCC at 92-94.

[270] Post-Hearing Brief of DP&L at 61.

The PUCO Staff opposes the phase-out of the charge.[271] The PUCO Staff argues that little is known about who the customers are that benefit from the maximum charge provision. As a result, PUCO Staff argue that the impact which a phase-out of the charge will have on these customers is also unknown.[272] The PUCO Staff suggests "the possibility of very negative consequences" and that phase-out of the maximum charge is "simply too risky."[273] However, the PUCO Staff does not produce any evidence of such negative consequences or evidence of any risk to any customer, nor does it provide any sound basis why a subsidy of this magnitude should continue. And, importantly, what **is** known is that customers who pay the maximum charge are subsidized by other customers by approximately $5 million per year.[274]

While the PUCO Staff indicates that DP&L shareholders may be bearing the vast majority of the subsidy to these customers (85%), such a subsidy will nonetheless impact rates. Specifically, if DP&L's rates are inadequate as DP&L has contended in this proceeding, then a subsidy paid for by DP&L will increase DP&L's need for rate relief.

OCC would also emphasize that customers may not even know that they are receiving this subsidy.[275] Certainly, if customers don't even know whether they are benefiting from the charge, it is unclear the extent to which customers will be impacted by phase-out of the maximum charge. Further, there is no basis for the PUCO Staff's

[271] Post-Hearing Brief of PUCO Staff at 23-24.

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] Transcript Vol. VII-Public at 1783.

claim that "problems will assuredly crop up" if the maximum charge provision is eliminated.[276]

OCC submits that the maximum charge provision constitutes an inappropriate subsidy, is unreasonably discriminatory, and gives an undue preference to low load factor customers. It should be phased out as DP&L has proposed.

L. Customers Should Not Be Required To Pay For The Enhancements That Competitive Retail Electric Service Providers Want.

DP&L proposed "competitive enhancements," such as a web-based portal for CRES providers to obtain customer information, for funding through a non-bypassable Rider that customers will pay. A number of parties proposed adding to the so-called "competitive enhancements," to include in costs for recovery through a non-bypassable Reconciliation Rider. DP&L argues that nobody wants to pay for these competitive enhancements and that many of the competitive enhancements are not necessary.[277]

OCC would simply reiterate here that, to the extent the competitive enhancements are designed primarily to facilitate the provision of service by CRES providers, then they should be paid for directly by CRES providers.[278] These enhancements primarily benefit CRES providers and, therefore, should be paid for by them.[279] There is no basis for charging the cost of such competitive enhancements to all customers on a non-bypassable basis when they are implemented to enhance the offerings of CRES providers.

[276] Post-Hearing Brief of PUCO Staff at 24.

[277] Post-Hearing Brief of DP&L at 97-103.

[278] Post-Hearing Brief of OCC at 91-92.

[279] *Id.*

M. The Alternative Energy Three Percent Cost Cap Should Not Be Decided In This Case.

DP&L has proposed that the Alternative Energy statutory cost cap (3% test) mandated in R.C. 4928.64(C)(3) be set in this case based upon the expected auction results.[280] The PUCO Staff recommends that the implementation of the Alternative Energy cost cap not be considered in this case.[281] The OCC agrees with the PUCO Staff.

The PUCO Staff correctly indicates that there are two cases currently pending before the Commission addressing the determination of the three percent cost cap—Case Nos. 11-5201-EL-RDR and 13-0652-EL-ORD. The PUCO Staff correctly points out that the cost cap issue has been a major issue in Case No. 11-5201-EL-RDR.[282] In that case, the three percent cost cap issue was addressed in a financial audit report prepared by Goldenberg Schneider ("Goldenberg Audit Report"). The Goldenberg Audit Report discussed the three-percent provision and analyzed several different methodologies for approaching the calculation.[283] A number of parties to that proceeding submitted testimony responding to the Goldenberg Audit Report recommendations and made varying proposals. The Commission has not yet issued its opinion in that case.

In the PUCO rulemaking case identified above (13-0652-EL-ORD), the rule (Ohio Adm. Code 4901:1-40) addressing the implementation of the three percent cost cap

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[280] Post-Hearing Brief of DP&L at 61-62.

[281] Post-Hearing Brief of PUCO Staff at 30.

[282] *Id.* at 29-31.

[283] Final Report, Financial Audit 1 of the Alternative Energy Resource Rider of the FirstEnergy Ohio Utility Companies, prepared by Goldenberg Schneider, LPA ("Goldenberg Audit Report), filed on August 15, 2012 in PUCO Case No. 11-5201-EL-RDR at 24. Three witnesses also addressed the three-percent cost cap in their prefiled direct testimony in said case and OCC addressed this issue on pages 42-44 of their May 6, 2013 Reply Brief.

is also being reviewed.[284] That rulemaking proceeding is an appropriate proceeding to establish how DP&L, as well as other utilities, should implement the 3% test relative to rates established through competitive bidding procedures.

In addition to seeking consistency in the manner in which the 3% alternative energy cost cap is determined, the PUCO Staff also argued that DP&L's proposal for establishing the cost cap is not reasonable.[285] And SolarVision argued that the methodology used by DP&L to calculate the three percent cap is contrary to law:[286] Given the contentious nature of these positions and the fact that the Commission is already poised to address these issues elsewhere, the Commission should reject DP&L's cost cap proposal in this case and resolve the issue through one of the pending proceedings.

N. DP&L Should Increase Its Shareholder Contribution To The Fuel Fund for the Benefit of Its Low-Income Customers.

OPAE witness Rinebolt recommended that DP&L should increase its fuel fund to $750,000 per year, to provide bill-payment assistance for low-income residential customers.[287] DP&L took issue with that testimony.[288] As discussed in OCC's Brief, OCC witness Williams recommended that in light of the significant poverty level in Dayton (32.5%) and an average disconnection rate over the last three years of 8.3%, DP&L should make significant bill payment assistance available to its customers.[289] Mr. Williams recommended shareholder funding in the amount of $1.5 million in an effort to

[284] Post-Hearing Brief of PUCO Staff at 30-31.

[285] *Id.* at 30.

[286] Post-Hearing Brief of SolarVision at 5.

[287] Post-Hearing Brief of DP&L at 62.

[288] Post-Hearing Brief of DP&L at 62.

[289] Post-Hearing Brief of OCC at 104-105.

reduce DP&L's disconnection rate down to a level consistent with that of other Ohio electric utilities.[290]

OPAE discusses in its Brief the significant increase in the poverty level in Dayton along with the fact that, in 2012, DP&L's disconnection rate of 7.5% significantly exceeded the 4.8% average of other Ohio electric utilities.[291] OPAE emphasizes the fact that DP&L's residential electric bills are now 10.9% higher than the average electric bill in Ohio.[292] OPAE also points to other key indicators of the increasing difficulties low-income customers are facing in paying their bills, such as the increase in the number of PIPP customers being disconnected (a 90% increase), and the increase in the number of customers who need the Commission's special winter reconnection procedures to restore service during the winter (a 140% increase).[293]

As OCC emphasized in its Brief, an important goal of the General Assembly in passing Senate Bill 221 was reflected in the state policy to protect at-risk populations.[294] A further policy was to maintain reasonably-priced electric service.[295] The Commission is obligated to evaluate how to achieve these goals most efficiently and effectively.[296] Although DP&L argues that it is "the responsibility of the General Assembly, not this Commission, to determine what funds should be provided to assist low-income

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[290] *Id.* at 104, citing Direct Testimony of James D. Williams at 29.

[291] Post-Hearing Brief of OPAE at 3-4.

[292] *Id.*, citing Direct Testimony of James D. Williams at 21.

[293] *Id.* at 5, citing Direct Testimony of James D. Williams at 11.

[294] R.C. 4928.02(L).

[295] R.C. 4928.02(A).

[296] R.C. 4928.06(A) requiring the PUCO to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."

residents," DP&L is mistaken. The General Assembly clearly obligated the PUCO to determine how best to protect at-risk populations and reasonably-priced electric service through actions taken in the implementation of Senate Bill 221.

Furthermore, DP&L asserted that its commitment to the fuel fund is not relevant to DP&L's ESP. That position is simply inconsistent with the law, as OPAE has emphasized.[297] OCC agrees with OPAE that ensuring low-income customers the "best available market price" is not adequate protection of this population.[298] DP&L witness Herrington's testimony that DP&L intends to continue the same level of funding that it has committed in the past when the size of its at-risk population and the bills those customers pay have increased over the years is at odds with the goals of Senate Bill 221.[299]

Considering the size of DP&L's at-risk population and the increasing bills they have to pay, DP&L's fuel fund, as paid for by shareholders, should be increased to $1.5 million.[300] The PUCO should also implement OCC witness Williams' recommendation to review DP&L's credit and collection policies to evaluate how disconnections can be cost-effectively reduced.[301]

[297] Post-Hearing Brief of OPAE at 7.

[298] *Id.*, citing Direct Testimony of DP&L witness Philip Herrington at 6-7.

[299] Direct Testimony of DP&L witness Philip Herrington at 7; Direct Testimony of OCC witness James D. Williams at 11, 22.

[300] Post-Hearing Brief of OCC at 104.

[301] *Id.* at 105; Post-Hearing Brief of OPAE at 8.

O. OCC Testimony

1. OCC's proposed rate design is sponsored by an expert witness with experience in 131 utility proceedings and should be adopted by the PUCO.

Expert witnesses may be qualified by virtue of "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony."[302] In this proceeding, OCC presented the testimony of Mr. Scott J. Rubin as an expert on the economic regulation of public utilities and, in particular, on cost of service, public utility tariffs, and rate design.[303] In this case, Mr. Rubin addresses in particular the allocation of any amounts allowed to be recovered through DP&L's proposed Service Stability Rider and Switching Tracker and the appropriate charges for recovery of any allowed amounts.[304] Mr. Rubin has extensive experience as a consultant on these issues.[305] He has provided consulting services since 1994 in these areas.[306] He has published and presented papers on these subjects.[307] He has presented testimony in 131 utility regulatory proceedings. And the majority of his testimonies concerned cost of service and rate design issues.[308]

Despite this extensive experience, DP&L moved to strike Mr. Rubin's testimony during the hearing, a motion which was summarily denied.[309] And DP&L now argues

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[302] Ohio Evid. R. 702

[303] Direct Testimony of Scott J. Rubin.

[304] Direct Testimony of Scott J. Rubin.

[305] *Id.* at 1-3; Attachment SJR-1.

[306] *Id.*

[307] Direct Testimony of Scott J. Rubin at 2; Attachment SJR-1 at 2-9.

[308] Direct Testimony of Scott J. Rubin at 3; Attachment SJR-1 at 9-20

[309] Transcript Vol. VII at 1700-01.

that no weight should be given to his testimony.[310] DP&L argues that Mr. Rubin's experience "as an attorney alone does not qualify" him to testify as an expert. However, Mr. Rubin is not testifying here as an attorney. He is testifying as an expert on cost of service and rate design with the experience detailed in his 20 page curriculum vitae, including 131 cases in which he has testified in utility regulatory proceedings.[311] Certainly, the fact that Mr. Rubin is an attorney as well as a consultant does not disqualify him to testify on the subject matter of utility regulation, and cost of service and rate design, upon which he has established substantial expertise.[312]

Moreover, this Commission has recognized the range of expertise required of witnesses in public utility commission proceedings derive from a broad field of experience and training.[313] The fact that a witness's training may be in one area but they have developed expertise in other areas does not disqualify them from testifying on

[310] Post-Hearing Brief of DP&L at 103-05.

[311] Direct Testimony of Scott J. Rubin; Attachment SJR-1.

[312] DP&L points to a Michigan Federal District Court case as the primary basis for its argument. *Cicero v. Borg-Warner Auto., Inc.*, 163 F. Supp. 2d 743 (E.D. Mich. S.D. 2001). Notably, in that case, the attorney expert was presented as an expert on employment discrimination and, in the context of Defendants' Motion for Summary Judgment, his testimony was considered by the Court. DP&L also points to a federal court decision in the Eastern District of Kentucky, *Scott v. Deerbrook Ins. Co.*, 714 F. Supp. 2d 670 (E.D. Ky. S.D. 2010) in which that Court determined that a former Judge had not done sufficient analysis to support his valuation of a personal injury claim in a bad faith proceeding. In neither of these cases was the testimony denied because of the witness's absence of qualification. In any event, Mr. Rubin's qualifications on cost of service and rate design issues in public utility proceedings are detailed in his testimony and resume and provide ample support for the scope of his testimony in this proceeding. DP&L also relies on the case of *United States v. Lupton*, 620 F.3d 790, 799 (7th Cir. 2010) in which an attorney's testimony was offered on the ultimate issue of whether a broker's actions were criminal or not. In that case, though, it was established that the attorney had not "held a real estate broker's license for thirty years, had never participated in a competitive bid transaction like the one at issue here, and had no personal experience with the statutes he was interpreting." In the instant case in contrast, Mr. Rubin is testifying on a subject matter – cost of service and rate design -- that he has testified to numerous times and with which he has extensive experience. None of these cases is in any way analogous to the instant issue and none of them address Ohio law.

[313] *See, e.g., In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power & Light Company and Related Matters, Case No.* 86-07-EL-EFC, 1987 Ohio PUC LEXIS 107 at 27-37, Opinion and Order (Feb. 18, 1987).

matters within that broad field of expertise.[314] Thus, in a fuel audit case, the Commission commented on the qualifications of a management auditor as follows:

> In this case, Dr. Jones has more than met the basic qualifications required of a management/performance auditor. Dr. Jones is a systems engineer with many years of experience in the evaluation of management systems and problems. He is eminently qualified as a management systems analyst and in the art of using his skills to improve management systems. He is educated, experienced, and grounded in sciences directly related to the audit function.
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> Dr. Jones does not hold himself out as a utility executive. He does not profess to be experienced in the coal industry itself. Dr. Jones is a systems engineer with a high level of skill and experience in analyzing and improving large, complex management systems. As such, Dr. Jones has acceptable benchmark qualifications to serve as a management/performance auditor in this case.[315]

DP&L claims that "there was not even an attempt by OCC to have Mr. Rubin explain why he was supposedly an expert."[316] This is untrue and it is unbelievable that DP&L makes such a claim. Pages 1-3 of Mr. Rubin's Testimony and Attachment SJR-1 detail OCC's presentation of Mr. Rubin's qualifications.[317] While DP&L then performed cross-examination of Mr. Rubin's qualifications, there was no proper basis for disqualification of Mr. Rubin and OCC, therefore, did not redirect the witness on his qualifications. It was only after Mr. Rubin was dismissed from the stand that counsel for

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[314] *Id.; see also In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates; In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval, In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods, In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Rider BDP, Backup Delivery Point,* Case No. 08-709-EL-AIR *et al*., 2009 Ohio PUC LEXIS 482 at *12, Opinion and Order at 6 (July 8, 2009) (finding that the fact that the witness was not a Certified Public Accountant did not disqualify him when he had testified in numerous proceedings and his qualifications as an expert were well-established on the subject matter at hand).

[315] *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power & Light Company and Related Matters, Case No.* 86-07-EL-EFC, 1987 Ohio PUC LEXIS 107 at 34-35, Opinion and Order (Feb. 18, 1987).

[316] Post-Hearing Brief of DP&L at 105.

[317] Direct Testimony of Scott J. Rubin at 1-3; Attachment SJR-1.

DP&L made his Motion to Strike which, as noted above, was summarily dismissed by the Attorney Examiners.[318]

DP&L claims that "the record shows no qualifications to testify on rate design."[319] DP&L also emphasizes that most of Mr. Rubin's experience involves water utilities and Clean Air Act compliance.[320] Apparently, DP&L did not review Mr. Rubin's resume. A significant percentage—more than 50%—of Mr. Rubin's testimonies concern cost of service and/or rate design issues.[321] Other testimonies concern related issues, including alternative regulation methods, automatic adjustment clauses, appropriate ratemaking methodologies and other regulatory issues.[322] Clean Air Act testimony is a smaller percentage of his testimonies.

Moreover, while it is true that Mr. Rubin testifies extensively in cases dealing with water utility rate design and cost-of-service studies, he has significant experience with energy utilities as well. In just the past five years, Mr. Rubin has testified as an expert witness on cost-of-service studies, rate design, and other tariff issues in cases involving Ameren (multiple cases for these electric and gas utilities in Illinois), Commonwealth Edison Company (multiple cases for this electric utility in Illinois), Northern Illinois Gas, Duke Energy Ohio (electric), Peoples Gas and North Shore Gas

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[318] Transcript Vol. VII at 1700-01.

[319] Post-Hearing Brief of DP&L at 105.

[320] *Id.*

[321] Direct Testimony of Scott J. Rubin; Attachment SJR-1 at 9-20 (OCC counted 68 out of 132 testimonies specifically concerned with rate design and/or cost of service.).

[322] Direct Testimony of Scott J. Rubin; Attachment SJR-1 at 9-20.

(multiple cases for these gas utilities in Illinois), Yankee Gas (Connecticut), and Heritage Gas (Nova Scotia).[323]

There is no basis for DP&L's challenges to Mr. Rubin's qualifications and such an unsubstantiated attack on a witness's qualifications should be repudiated by the PUCO. DP&L's baseless attack is particularly egregious when the Utility's own cost-of-service/rate design witness, admitted that he has never prepared a fully-embedded cost-of-service analysis.[324] Indeed, Mr. Parke's rate design experience was limited to designing some of the riders in DP&L's ESP I proceeding.[325] In contrast to Mr. Rubin's 131 other testimonies, Mr. Parke testified that his only other testimony has been on DP&L's fuel rider in Case No. 09-1012-EL-FAC and No. 11-5730-EL-FAC.[326] If the PUCO should question the weight of any witness's testimony on cost of service and rate design issues in this proceeding, it should question Mr. Parke in light of these almost non-existent qualifications.

But Mr. Parke's inexperience speaks for itself, as discussed in OCC's Post-Hearing Brief.[327] A review of the transcript of cross-examination showed demonstrably Mr. Parke's lack of understanding of the basic principle of cost causation and its relationship to the design of rates.[328] DP&L's challenges to the weight of Mr. Rubin's testimony should be dismissed. The PUCO should recognize DP&L's attempt to draw

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[323] Direct Testimony of Scott J. Rubin; Attachment SJR-1 at 18-20.

[324] Transcript Vol. III at 828.

[325] *Id.* at 820.

[326] Second Revised Direct Testimony of DP&L witness Nathan Parke at 2.

[327] Post-Hearing Brief of OCC at 82-88.

[328] *Id.* at 83-85; *See also* Transcript Vol. III at 829-32 where it is shown that Mr. Parke's design of rates based on financial integrity is basically unrelated to cost causation.

attention away from the significant limitations of its own witness and the absence of basis for Mr. Parke's/DP&L's proposed rate design.

2. The testimony of OCC witnesses Duann and Rose should be afforded proper weight and should not be stricken.

DP&L broadly argues that the Commission should give no weight to the entire testimony of OCC witnesses Rose and Duann, contending they are not competent to testify as to legal matters, and legal matters are integral to the opinions contained in their testimony.[329] DP&L also claims that their testimony should be stricken for lack of foundation.[330] DP&L's arguments should be rejected for a number of reasons.

DP&L's request is misplaced and overly broad. While there are a number of legal conclusions presented in both Dr. Duann and Dr. Rose's testimony, it is well established that expert testimony from non-attorney witnesses on regulatory objectives and the flexibility the Commission has to meet the objectives has been a mainstay in regulatory proceedings. Expert witnesses often address complex economic issues albeit through an existing statutory and regulatory framework. In this case specifically, DP&L witnesses offered extensive testimony regarding DP&L's Electric Security Plan and its alleged consistency with the statutory framework implemented by the General Assembly. In fact,

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[329] Post Hearing Brief of DP&L at 106.

[330] *Id.* at 107.

DP&L's testimony is replete with citations to statutes and regulations. [331] And OCC's witnesses appropriately responded to DP&L's position through its policy witnesses. If the Commission were going to disregard the legal conclusions presented through OCC's policy witnesses, it would also have to disregard similar claims by DP&L that its Electric Security Plan is consistent with the law and Commission regulations.

There is nothing in Ohio law that makes legal conclusions presented by expert witnesses *per se* inadmissible and thus appropriate to strike. Expert testimony is governed by the Ohio Rules of Evidence Rules 702-705, and if those rules are satisfied, testimony can be admissible in court, regardless of whether the expert is presenting a legal conclusion. Rule 704 specifically provides that "opinion evidence on an ultimate issue is not excludable *per se*."[332]

Second, so long as testimony aids the fact finder in determining an issue in the case, the expert's testimony is admissible. This general concept is supported by case law. Several Ohio court cases have allowed legal conclusions by non-lawyers where the testimony aided the fact finder. In *Hite v. Lanes*,[333] an expert offered testimony that bowling alley employees were negligent and that the establishment was unreasonably

[331] *See, e.g.*, Direct Testimony of Claire Hale at 5-6, citing R.C. 4928.05(A)(2) and R.C. 4928.143(B)(2)(g); Direct Testimony of Claire Hale at 2, 7, 17, citing Ohio Adm. Code 4901:1-36-03; Direct Testimony of Dona Seger Lawson at 4, citing R.C. 4928.143 and Ohio Adm. Code 4901:1-35-03(C)(9)(b), Ohio Adm. Code 4901:1-36-03 and Ohio Adm. Code 4901:1-36-04(B), Direct Testimony of Dona Seger Lawson at 5, citing Ohio Adm. Code 4901:1-36-03 and Ohio Adm. Code 4901:1-36-04(B); Direct Testimony of Herrington at 4-7, citing R.C. 4928.143(C)(1) and R.C. 4928.02(A), (B), (H), (L) and (N); Direct Testimony of Jackson at 6, citing Ohio Adm. Code 4901:1-35-03; Direct Testimony of Malinak at 4, 7, 12, 15 citing R.C. 4928.143 (C)(1) and (D); Direct Testimony of Rabb at 9, citing R.C. 4928.142(C)(3); Direct Testimony of Parke at 3, citing R.C. 4828.64(C)(3); Direct Testimony of Parke at 15, citing Ohio Adm. Code 4901-7-01. Many of these and other DP&L witnesses also cite to various decisions of the PUCO on issues surrounding these and other statutory and regulatory provisions, emphasizing their consistency with Commission rules and orders (see, e.g., Direct Testimony of Rice at 2 that DP&L's Third Amended Corporate Separation Plan is "is consistent with the Commission's Rules and prior orders.").

[332] Ohio Evid. R. 704, 1980 Staff Notes.

[333] 1987 Ohio App. LEXIS 9430 (Oct. 27, 1987).

dangerous. Citing Ohio Rules of Evidence 702 and 704, the Court of Appeals found that the expert's testimony would assist the trier of fact in understanding the evidence, and that his credentials indicated that his opinions were based on "technical knowledge and experience."[334]

The case of *Stelma v. Juguilon*[335] also allowed expert testimony as to what a "reasonable person" would have done in the applicable circumstances, which was an ultimate issue in the case. The appellate court found that, "the expert's specialized background and experience in evaluating a patient's response to the disclosed risks could have been helpful in assisting the jury to understand what the ordinary patient would do in that situation," and thus the testimony was not improper.[336]

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[334] *Id.* at 9-10. *See also* Ohio Evid. R. 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.").

[335] 73 Ohio App. 3d 377, 597 N.E.2d 523, 1992 Ohio App. LEXIS 14 (Jan. 9, 1992).

[336] *Id.* at 384.

Moreover, expert testimony commenting on legal and regulatory provisions has generally been allowed by this Commission and other regulatory commissions.[337] To the extent such testimony is "legal" in nature, the Commission will make an appropriate determination as to the weight to be accorded such testimony. This has especially been the case in recent Commission history where utilities have filed electric security plans and the provisions of S.B. 221 are at issue. For example, in AEP Ohio's first ESP proceeding,[338] a non-attorney expert was permitted to testify on behalf of AEP Ohio as to three statutory bases contained in S.B. 221 in support of the utility's claim for recovery of environmental carrying costs. In that case, the Attorney Examiners and the Commission recognized that the witness was not offering a "legal opinion." The testimony was allowed as policy testimony.

[337] Many regulatory commissions have addressed this issue and have found, with few exceptions, that regulatory policy testimony bearing upon statutory and regulatory provisions, are appropriate. *See, e.g. Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: Bay State Gas Company, M.D.T.E. Nos. 38 through 62,* D.T.E. 06-77, 2006 Mass. PUC LEXIS 26 at 4-5 (Mass. Dept. of Telcom & Energy 2006) (In denying a motion to strike a legal opinion, Department stated "As a rule, the Department admits all testimony of experts and evaluates a witness's qualifications as we weigh the evidence of the proceeding"); *In the matter of the application of Michigan Consolidated Gas Company for approval of a price change determined pursuant to price amendments to gas purchase contracts with certain Michigan producers,* Case No. U-8918, 1989 Mich. PSC LEXIS 38 (Mich PSC 1989) (stating that a witness commenting on the utility's contracts with producers "did not provide a legal opinion regarding the contracts; rather, he provided expert opinion evidence regarding gas rate regulatory matters." That Commission further stated that the "Staff witnesses presented are experts in the gas regulatory field, well-qualified to provide opinion evidence regarding FERC policy, pipeline PGA matters, and the day-to-day implementation of the Commission's regulatory powers under Act 9."); *In the Matter of Union Electric Company d/b/a Ameren UE's Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area*, Case No. ER-2007-0002; Tariff No. YE-2007-0007, 2007 Mo. PSC LEXIS 545 (Mo. PSC 2007) (stating that "if the Commission were to now strike Downs' expert legal opinion, it would also need to strike the legal opinion testimony that other parties offered" and that it is "confident in the belief that the Commission will be able to sort out factual testimony, expert testimony, and legal opinion testimony to reach an appropriate decision").

[338] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO *et al.*, 2011 Ohio PUC LEXIS 1084 at *18, Order on Remand (Oct. 3, 2011).

Similarly, in the first phase of AEP Ohio's second ESP proceeding, Case No. 11-346-EL-SSO, the Commission ratified the Attorney Examiner's rulings[339] at the evidentiary hearing confirming that non-attorneys could testify on provisions in S.B. 221 based on advice of counsel. AEP Ohio's witness Mr. Hamrock was allowed to present rebuttal testimony, based on advice of counsel, that certain statutory provisions of S.B. 221 supported its proposed distribution investment rider.[340] Such testimony was permitted over the objection of OCC.[341]

Specifically, the Commission found OCC's arguments "that the testimony of a non-attorney witness who admits his legal understanding is based on the advice of counsel"—to be without merit. While recognizing that non-attorneys are not qualified to offer a legal opinion, the Commission found that the testimony should not be struck but would be accorded its proper weight.[342]

Similarly, in Duke Energy Ohio's first ESP proceeding,[343] the Commission refused to strike testimony of an Industrial Energy Users witness on a stipulation in a Duke Energy proceeding:

> Mr. Murray testified as to the specific issues under consideration. To the extent that he presented factual evidence or expert opinion

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[339] *See* Tr. XII at 1990 (denying OCC's motion to strike); Tr. VIII at 1533-43 (denying AEP Ohio motion to strike testimony of IEU witness Murray that was based on advice of counsel).

[340] Mr. Hamrock testified that "first and foremost, I have been advised by counsel that the Commission is not limited by R.C. 4928.143(B)*(2)(h) for approval of an item like the Distribution Investment Rider. For example, I am advised that R.C. 4928.143(B)(2)(d) also allows for Commission approval of carrying costs. As advised by counsel R.C 4928.143(B)(2)(h) does include provisions related to distribution infrastructure and the examination of reliability of the distribution system, alignment of the utility's and customer expectations and the dedication of sufficient resources to reliability." Hamrock Rebuttal at 12-13 (Oct. 21, 2011).

[341] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 11-346-EL-SSO *et al.*, 2011 Ohio PUC LEXIS 1325 at ¶26-30 (Dec. 14, 2011).

[342] *Id.* at 12.

[343] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO *et al.*, 2008 Ohio PUC LEXIS 762 at 80-81, Opinion and Order (Dec. 17, 2008).

> testimony, we will consider his testimony in our analysis. However, we note that multiple parties moved to strike portions of Mr. Murray's testimony on the ground that he is not an attorney and the testimony appeared to be a legal argument. Although the attorney examiners denied the motions to strike, they cautioned that the Commission would recognize that the witness is not an attorney in evaluating the weight to be given to his testimony.

In a 2004 case,[344] Columbia Gas claimed that the testimony filed by OCC witnesses contained legal conclusions and that such testimony should be stricken. There, the Commission upheld the ruling of the Attorney Examiner denying the motion to strike. The Commission concluded that OCC's experts were not making legal arguments but were "providing their expert opinion regarding the costs and credits to be included in the gas cost recovery rates charged to residential customers." Again, the Commission essentially found that expert witnesses may comment about policy, including the recovery of costs and charges and the design of rates, without such testimony being considered "legal" testimony. To the extent that such testimony bears upon legal issues, the Commission has consistently found that such testimony goes to the weight of the evidence, not its admissibility.

These cases and others[345] indicate that legal conclusions offered in expert testimony are generally admissible when they assist the fact finder in deciding a fact at issue in the case. Dr. Rose's and Dr. Duann's testimony are aimed at assisting the Commission in reaching its decision by discussing how the law should be applied to the facts of this case. It is admissible and should be given proper weight by the PUCO.

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[344] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc., and Related Matters*, Case Nos. 04-221-GA-GCR *et al.*, 2006 Ohio PUC LEXIS 817 at 2-3, 7-8, Entry (Dec. 29, 2006).

[345] *Schaffter v. Ward*, 17 Ohio St.3d 79, 477 N.E.2d 1116, 1985 Ohio LEXIS 317 (May 15, 1985) (holding that expert testimony with respect to the point-of-impact in motor vehicle accident cases is admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue).

The amount of weight given to testimony is a matter within the discretion of the Commission. And as both Dr. Duann and Dr. Rose are seasoned experts with deep regulatory experience, DP&L's argument that their testimony should be afforded no weight is absurd.

Third, the PUCO does not function as a traditional court. There is no jury, just an Attorney Examiner. Accordingly, the protections to keep juries from being prejudiced are not necessary. The Attorney Examiner and the PUCO are perfectly capable of giving the proper weight to all statements made by expert witnesses. There is no necessity that the testimony be stricken or be given no weight in order to avoid confusing or misleading the fact finder.

Fourth, the frugal case-based support that DP&L does present is completely at odds with the facts in this case. D&L repeatedly cites to *Scott v. Yates*,[346] including quoting two paragraphs from the opinion. The "expert" in *Scott*, however, was completely different from Dr. Rose and Dr. Duann. The expert was called to give his opinion on how an auto accident occurred, but his highest level of education was grade twelve. He had studied accident investigation for only two weeks while at the police academy, and he was unfamiliar with the scientific concepts relevant to an accident reconstruction. Also, he admitted that he had never before conducted an accident reconstruction.[347] The issue in *Scott* was not that the witness was giving improper legal conclusions; it was that the witness was not qualified to give expert testimony. A similar issue of witness qualifications was present in *Siegel v. Lifecenter*,[348] also cited by DP&L.

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[346] 71 Ohio St.3d 219, 643 N.E.2d 105, 1994 Ohio LEXIS 2832 (Dec. 20, 1994).

[347] *Id.* at 221.

[348] 969 N.E.2d 1271, 2011 Ohio 6031, 2011 Ohio App. LEXIS 4974 (Nov. 23, 2011).

The witnesses attempting to give expert testimony in Siegel did not have any specialized training that would aid the jury in determining if a party had acted in good faith.

And fifth, the Attorney Examiner already denied DP&L's Motion to strike the testimony of Dr. Rose.[349] That ruling was appropriate and consistent with denying other motions to strike testimony alleged to be legal in nature. There is no reason to reverse such rulings, and at this late date in the proceeding, set new and different standards for OCC's witnesses. The Commission should reject DP&L's request.

III. CONCLUSION

The overwhelming evidence adduced at the evidentiary hearing shows that DP&L's proposed electric security plan does not pass the statutory test. Because of this, the PUCO should reject the ESP because it fails to adequately protect customers. Furthermore, there is no justification for DP&L's continuing delay in extending the benefits of competition to SSO customers. DP&L's SSO customers should see the full benefit of competition today, with a 100% competitively bid rate.

Further subsidies of DP&L's generation, such as DP&L's proposed SSR and Switching Tracker, are uncalled for. And subsidies are contrary to the General Assembly's longstanding objectives of bringing the benefits of competition to all customers, including those who choose to remain with SSO service. Accordingly, the Commission should reject DP&L's ESP proposal.

[349] Tr. VIII-public, page 2014-15.

Respectfully submitted,

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[350] Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Post-Hearing Reply Brief by the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 5th day of June 2013.

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