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

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

PUBLIC VERSION

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October 4, 2013

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APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the September 4, 2013 Opinion and Order ("September 4, 2013 Order") and the September 6 2013, Entry *Nunc Pro Tunc* ("September 6, 2013 Entry") (collectively "Orders") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). This case involves the rates that Dayton Power & Light Company ("DP&L" or "Utility") will be permitted to charge its customers for generation service.

Through this filing, OCC seeks rehearing of the PUCO's Orders pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The September 4, 2013 Order and September 6, 2013 Entry were unjust, unreasonable, and unlawful because:

A. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Exceeded The Allowable Scope Of A *Nunc Pro Tunc* Order.

B. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Did Not Comply With The Requirements Of R.C. 4903.09.

C. The PUCO Erred In Determining That The Service Stability Rider Meets The Criteria Of R.C. 4928.143(B)(2)(D), Resulting In Unlawful Charges To Customers.

   1. The PUCO erred in finding that the Service Stability Rider is a charge related to default service and bypassability.

      a. "Default service" is already defined under R.C. 4928.14 as provider of last resort service. Since DP&L failed to produce measurable and verifiable evidence of its provider of last resort costs that comprise the Service Stability Rider charge, the PUCO erred in approving it.

      b. Construing the Service Stability Rider to be related to bypassability leads to absurd and unreasonable results—something that should be avoided in statutory interpretation.

   2. The PUCO erred in finding that the Service Stability Rider is a charge that has the effect of stabilizing and providing certainty regarding retail electric service.

D. The PUCO Erred In Establishing A Service Stability Rider Charge To Ensure The Financial Integrity Of DP&L As A Whole, When, Under R.C. 4928.38:

   1. utilities are to be fully on their own in the competitive generation market after the market development period; and

2. the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.

E. The PUCO Erred In Establishing A Service Stability Rider To Achieve A Return On Equity Target (At Customer Expense), In Violation of R.C. 4928.03 Under Which Generation Service Has Been Declared A Competitive Retail Electric Service.

F. The PUCO Erred In Authorizing The Service Stability Rider Because It Is An Anti-Competitive Subsidy (Paid By Customers) That Violates R.C. 4928.02(H).

G. The PUCO Erred In Basing Its Opinion And Order On Facts Not Within The Record, Violating R.C. 4903.09.

H. The PUCO Erred In Determining The Amount Of The Service Stability Rider That Customers Will Be Required to Pay By:

1. Overstating the amount of the Service Stability Rider over the Electric Security Plan period because it failed to offset the Service Stability Rider by the amount of capital expenditure reductions that were approved as part of DP&L's round 2 budget/long term forecast.

2. Failing to reduce the amount of the Service Stability Rider because reasonable switching projections indicated less lost revenue from switching.

a. The PUCO should reduce the Service Stability Rider by the capital reductions approved under DP&L's round 2 budget/long term forecast.

b. The PUCO erred when it unreasonably failed to reduce the Service Stability Rider revenue requirement by incorporating reasonable assumptions about the level of switching.

I. The PUCO Erred In Authorizing A Service Stability Rider-Extension, Through Which DP&L Can Seek To Collect An Additional $45.8 Million In Stability Charges From Its Customers.

1. The PUCO's decision to give DP&L the opportunity to seek to collect an additional $45.8 million from its customers was made without record support and contains no findings of fact with respect to the need for such an extension of the Service Stability Rider, thus violating R.C. 4903.09.

2. The PUCO failed to identify how the Service Stability Rider-Extension is a provision allowed under R.C. 4928.143(B)(2), and failed to provide authority that permits the PUCO to modify a utility's Electric Security Plan if a utility can show its financial integrity is "at risk."

3. The PUCO erred in determining that the Service Stability Rider-Extension should be set in order to maintain DP&L's financial integrity when, under R.C. 4928.38:

    a. utilities are to be fully on their own in the competitive generation market after the market development period; and

    b. the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.

4. The PUCO erred in establishing a Service Stability Rider-Extension to address the financial losses DP&L will allegedly incur from its provision of competitive generation services because the Service Stability Rider-Extension is an anti-competitive subsidy violating R.C. 4928.02(H).

5. The PUCO erred by giving DP&L a second opportunity to provide more reliable data on its financial integrity related to year four of its Electric Security Plan term, when DP&L failed to satisfy its burden of proof under R.C. 4928.143(C)(1).

J. The PUCO Erred When It Found That Under R.C. 4928.143(C)(1) The Modified Electric Security Plan Is More Favorable In The Aggregate For Customers Than The Expected Results Under A Market Rate Offer.

1. The PUCO erred by failing in its analysis required by R.C. 4928.143 (C)(1) to determine how much more customers will have to pay under the PUCO-modified electric security plan than under a market rate offer.

2. The PUCO erred in finding that qualitative benefits of the electric security plan significantly outweigh the results of the quantitative analysis.

3. The PUCO erred when it considered "qualitative benefits" in its analysis required by R.C. 4928.143 (C)(1).

K. The PUCO Erred In Failing To Find That It Must, Under R.C. 4928.143(E), Test The PUCO-Modified Electric Security Plan In The Fourth Year (2017) To Determine Whether It Continues To Be More Favorable In The Aggregate For Customers As Compared To The Expected Results That Would Otherwise Apply Under R.C. 4928.142.

L. The PUCO Erred When It Failed To Find That The Standard Service Offer Should Be 100% Competitively Bid Over The Entire Electric Security Plan Period, Which Would Provide Customers With The Benefit of Currently Low Market Prices For Lowering Their Electric Bills.

M. The PUCO Erred In Authorizing DP&L To Defer The Costs Of The Competitive Retail Enhancements For Collection From Customers In A Future Distribution Rate Case.

N. The PUCO Erred In Delaying Structural Divestment Of DP&L's Generation Assets Until May 31, 2017 (Which Continues to Expose Customers To DP&L's Requests for Above-Market Prices).

O. The PUCO Erred In Adopting A 1 Coincident Peak Demand Cost Allocation For The Service Stability Rider.

P. The PUCO Erred In Failing To Consider Or Address Whether The PUCO-Modified Electric Security Plan Ensures The Availability to Consumers Of Reasonably Priced Retail Electric Service As Required By R.C. 4928.02(A). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(A).

Q. The PUCO Erred In Failing To Address Whether The PUCO-Modified Electric Security Plan Protects At-Risk Populations As Required By R.C. 4928.02(L). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(L).

The bases for this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its September 4, 2013 Order and September 6, 2013 Entry.

Respectfully submitted,

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OHIO CONSUMERS' COUNSEL

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Fourteen years after the 1999 law that was to secure for Ohioans the benefits of electric competition, electric customers in the Dayton area will continue to pay hundreds of millions of dollars to Dayton Power & Light Company ("DP&L" or "Utility") above the low market price for electricity that customers should instead be enjoying. OCC seeks rehearing of the PUCO's September 4, 2013 Opinion and Order (September 4, 2013 Order) and the September 6, 2013 Entry *Nunc Pro Tunc* (September 6, 2013 Entry), amending the September 4, 2013 Order (collectively "Orders").

On September 4, 2013,, the PUCO approved an Electric Security Plan ("ESP") for DP&L that the PUCO itself calculated will cost customers at least $250 million more than a Market Rate Offer ("MRO").[3] But things got much worse for customers two days later. In an Entry *Nunc Pro Tunc*, the PUCO: 1) delayed the competitive bidding of the Standard Service Offer ("SSO") by an additional five months—until June 1, 2017; 2) gave DP&L an additional five months—until May 31, 2017—to divest its generation assets; 3) extended the period of the ESP for an additional 5 months; 4) extended the Service Stability Rider ("SSR") an additional full year which means that customers have to pay DP&L an additional $110 million in 2016; and 5) made the Service Stability Rider – Extension ("SSR-E") available to DP&L in 2017 in the amount of $45.8 million.[4] Despite these major amendments to its September 4, 2013 Order, the PUCO does not even calculate the additional costs to customers (as compared to an MRO) of these changes.

Moreover, the PUCO's decision to approve an ESP (that will cost customers $250 million more than a MRO) ignores the impact of the resulting rates on customers' bills. In particular, the PUCO's Orders are unlawful in approving DP&L's proposed Service Stability Rider, which is intended to subsidize its provision of competitive generation services. Under Ohio law 3, DP&L is to be "fully on its own" in the competitive generation market by the end of its market development period – which ended almost nine years ago, on December 31, 2005.[5] Since that date, subsidies of generation services have been prohibited under the law.

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[3] September 4, 2013 Order at 50.

[4] September 6, 2013 Entry at 2-3.

[5] R.C. 4928.38.

The SSR is also, contrary to the PUCO's holding,[6] a transition charge as defined by the law. The authorization for DP&L to bill its customers for transition charges -- $441 million – ended in 2005.[7] Subsidies to competitive generation services that make-up for the under-recovery of costs – or lack of profitability -- of DP&L's generation assets are transition charges under the law.[8] It is unlawful for the PUCO to authorize such transition charges, let alone $110 million per year for 3 years.

DP&L's customers have waited too long for the benefits of generation competition in a market with historically low energy prices. The PUCO's Order fails to give customers what DP&L has withheld, the benefit of competition today.

Finally, the PUCO's September 4, 2013 Order further harms residential customers, including low-income customers, by approving an allocation for the Service Stability Rider based on peak demands of customer classes.[9] This conclusion is at odds with the PUCO's determination that the SSR is attributable to "financial integrity" issues that DP&L has claimed are primarily related to the amount of kWh load switching to competitive generation providers.[10] It is also inconsistent with the PUCO's finding that the SSR is not a transition charge – and, therefore, not related to the recovery of generation costs.[11]

The PUCO should grant rehearing to undo an outcome that will deprive DP&L's customers of the vast majority of the benefits intended by Senate Bill 221 and that

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[6] September 4, 2013 Order at 22.

[7] *See* Direct Testimony of Kenneth Rose at 7, 12.

[8] R.C. 4929.39.

[9] September 4, 2013 Order at 26.

[10] September 4, 2013 Order at 21, 25.

[11] September 4, 2013 Order at 22.

unlawfully extends subsidies to DP&L's provision of generation service that were required by Senate Bill 3 to end in 2005.

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the PUCO, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[12] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[13]

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear."[14] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *."[15]

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO's rule on applications for

[12] R.C. 4903.10.

[13] R.C. 4903.10(B).

[14] *Id.*

[15] *Id.*

rehearing.[16] Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

III. LAW AND ARGUMENT

A. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Exceeded The Allowable Scope Of A *Nunc Pro Tunc* Order.

As discussed above, through its Entry *Nunc Pro Tunc*, the PUCO made substantive changes to its September 4, 2013 Order. The PUCO: 1) delayed the implementation of the SSO being 100% competitively bid by an additional five months—until June 1, 2017; 2) gave DP&L an additional five months—until May 31, 2017—to divest its generation assets; 3) extended the period of the ESP for an additional 5 months; 4) extended the SSR an additional full year which means that customers have to pay DP&L an additional $110 million in 2016; and 5) made the SSR-E available to DP&L in 2017 in the amount of $45.8 million.[17]

However, the scope of the changes accomplished by the September 6, 2013 Entry exceeded the allowable scope of a *nunc pro tunc* order. Ohio law has been clear since the Ohio Supreme Court's holding in *Helle v. Pub. Util. Comm.*, that "[t]he province of a *nunc pro tunc* entry is to correct the record of the court in a case so as to make it set forth an act of the court, which though actually done at a former term thereof, was not entered upon the journal; and it cannot lawfully be employed to amend the record so as to make it show that some *act was done at a former term, which might or should have been, but was*

[16] *See* Ohio Adm. Code 4901-1-35.

[17] September 6, 2013 Entry at 2-3.

not, then performed."[18] (Citations omitted.) The Court further held, "the proper office of a *nunc pro tunc* order is to correct the record so as to cause it to show an act of the court which, though actually done at a former term, was not entered on the journal.

In another Ohio Supreme Court case the Court further explained the proper use of a *nunc pro tunc* order.[19] In *Interstate*, the Court was considering an appeal from a common carrier that was orally granted a certificate by the PUCO but then, before the certificate was written, the PUCO amended the route the certificate covered.[20] The Court considered the *Helle* case and stated:

> [W]hen an irregular route certificate is applied for, and an irregular route certificate is in fact granted, the commission may not at a later date, by a *nunc pro tunc* entry, change that which was done from an irregular to a regular route, **by merely saying that it was the intention of the commission** to issue a certificate for a regular instead of an irregular route, * * * The office of a *nunc pro tunc* is **not to change** what the court or the commission **in fact did and recorded**, but is to record that which was in fact done, but was not recorded.[21]

The Court, in *Interstate*, held that the *Helle* holding did not apply because in *Interstate* the PUCO had never memorialized its decision so it was authorized to amend it prior to issuing the certificate.[22]

Both cases are applicable to the facts at bar. The PUCO issued an Order on September 4, 2013, and then on September 6, 2013 issued a *nunc pro tunc* Entry amending the September 4 Order. The PUCO made multiple changes to the original

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[18] *Helle v. Pub. Util. Comm.*, 118 Ohio St. 434, 440, 161 N.E. 282 (1928).

[19] *The Interstate Motor Transit Co. v. Pub. Util. Comm. of Ohio*, 119 Ohio St. 264, 163 N.E. 713 (1928).

[20] *Id.* at *268.

[21] *Id.* at *270. (Emphasis added.)

[22] *Id.*

order and offered little justification for those changes. According to the PUCO, because of an "administrative error the [September 4, 2013] Opinion and Order does not reflect the decision that the Commission **intended** to issue, including the length of the modified ESP period."[23] By the PUCO's own admission it is engaging in the exact behavior that the Ohio Supreme Court explicitly stated was unlawful. It has amended a written and filed Order so that it better reflects the intended decision of the PUCO. According to both *Helle* and *Interstate* that is unlawful.

The PUCO issued an unlawful *nunc pro tunc* Entry that changed what it previously journalized. Such action is contrary to the laws of the State as explained by the Ohio Supreme Court and therefore the Entry *Nunc Pro Tunc* is unreasonable, unlawful, and invalid.

B. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Did Not Comply With The Requirements Of R.C. 4903.09.

Ohio law requires the PUCO to base all of its decisions on facts in the record and then explain the rationale behind its decision. R.C. 4903.09 states, "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

[23] September 6, 2013 Entry at 2. (Emphasis added.)

The Ohio Supreme Court has also made similar statements regarding the requirements of R.C. 4903.09.[24] The Court stated, "We have held that in order to meet the requirements of R.C. 4903.09, therefore, the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusions. (Citations omitted.) Although strict compliance with the terms of R.C. 4903.09 is not required, a legion of cases establishes that the commission abuses its discretion if it renders an opinion without record support."[25] (Citations omitted.) Additionally, the Court stated that it would not reverse an order of the PUCO, even if it was found to be an abuse of discretion, unless the challenging party proves prejudicial effect.[26]

In this case the PUCO offered no rationale for the changes it made to its September 4, 2013 Order beyond stating that the changes were rectifying an administrative error.[27] However, an administrative error cannot justify the magnitude of changes that the PUCO announced in its *nunc pro tunc* Entry (discussed above).[28] All of those changes were made with no reasoning offered and no mention of the record.

In its September 4, 2013 Order the PUCO stated each party's position on a given issue and then gave, in most cases, some explanation as to why it was making its decision. But in the Entry *Nunc Pro Tunc* the PUCO merely set forth changes based on a

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[24] *Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶23.

[25] *Id.* at ¶23.

[26] *Id.* at ¶31.

[27] September 6, 2013 Entry at 2.

[28] September 6, 2013 Entry at 2-3.

general statement that it was correcting an administrative error that did not reflect what it intended. This is not an adequate explanation of the changes made.

Additionally, the Entry *Nunc Pro Tunc* has a prejudicial effect on DP&L's customers and the parties to the case. Customers will have to pay an additional $110 million over the term of the ESP because of the September 6, 2013 Entry. That Entry also further delays DP&L's transition to a 100% competitively bid SSO. Furthermore, the complete lack of rationale behind those changes inhibits the parties' ability to challenge them because they do not know the basis for the changes.

Essentially, the changes memorialized in the September 6, 2013 Entry require customers to pay more money for their electric service. Such significant changes require more than a single non-substantive sentence of explanation and those changes must be supported by the record. However, this did not occur in this case. Instead, the PUCO changed at least five crucial decisions contained in its September 4, 2013 Order with five words, "due to an administrative error," as its sole rationale. In its September 4, 2013 Order, the PUCO states that the ESP time frame selected gives DP&L "sufficient time" to handle certain matters before moving to a fully competitive SSO.[29] Yet, the September 6, 2013 Entry does nothing to address why that time frame is no longer sufficient; instead, it just summarily extends it by five months. The PUCO made major changes to key portions of the ESP and failed to justify those changes in any substantive manner or cite to the record a single time. Because the PUCO has failed to support the changes announced in its Entry *Nunc Pro Tunc*, those changes are unreasonable and unlawful.

[29] September 4, 2013 Order at 15.

The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* is an unlawful amendment of a previously journalized Order. The September 6, 2013 Entry is in direct contravention of established Ohio Supreme Court precedent governing the use of *nunc pro tunc* orders. For all these reasons, the September 6, 2013 Entry *Nunc Pro Tunc* is unlawful. Accordingly, the PUCO should grant rehearing on this issue.

C. The PUCO Erred In Determining That The Service Stability Rider Meets The Criteria Of R.C. 4928.143(B)(2)(D), Resulting In Unlawful Charges To Customers.

Under R.C. 4928.143(B)(2)(d), in order for a provision such as the Service Stability Rider to be lawful under a utility's electric security plan, it must satisfy three criteria. First, the provision must be a term, condition, or charge. Second, the provision must relate to one of the following categories: 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. Third, the provision must also have the effect of stabilizing or providing certainty regarding retail electric service.

The PUCO determined that the SSR met these three criteria. But as explained below, the PUCO erred in its findings.

1. The PUCO erred in finding that the Service Stability Rider is a charge related to default service and bypassability.

In its Opinion and Order, the Commission found that the Service Stability Rider is a term, condition, or charge, thus meeting the first statutory condition.[30] But the PUCO

[30] September 4, 2013 Order at 21

then found the Service Stability Rider met the second and third criteria of the statute, conclusions that were disputed by nearly every party in the case, but the Utility.

The PUCO ruled that the standard service offer is the default service for DP&L customers who choose not to shop.[31] The PUCO also found that the SSR charge is a stability charge that maintains the Utility's financial integrity so that it may continue to provide the SSO, or "default service."[32] For both of these reasons, the PUCO concluded that the SSR is related to default service. In a similar vein, the PUCO concluded that the SSR relates to bypassability because it is a non-bypassable charge.[33] It appears that the PUCO merely accepted DP&L's claim that the SSR relates to the terms "default service" and "bypassability". DP&L's interpretation of these terms, in turn, appears to be based in large part on the PUCO's findings in the Ohio Power Company ("AEP Ohio") electric security plan case, Case No. 11-346-EL-SSO.[34]

The PUCO's interpretation of these terms, however, is wrong. It has misconstrued the statute in question—R.C. 4928.143(B)(2)(d). The SSR is not related to "default service." Nor is the SSR related to bypassability. The PUCO has statutorily construed "default service" when that term has a clear and definite meaning to it. In doing so, the PUCO erred.

When the language of the statute is clear and unambiguous, it is to be applied, not interpreted.[35] And when the PUCO construed the Service Stability Rider to relate to

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[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] OCC and others have appealed the Ohio Power Company ESP decision. The appeal is in the briefing stages.

bypassability it engaged in statutory construction that leads to unreasonable or absurd results. The PUCO should grant rehearing on these matters

a. "Default service" is already defined under R.C. 4928.14 as provider of last resort service. Since DP&L failed to produce measurable and verifiable evidence of its provider of last resort costs that comprise the Service Stability Rider charge, the PUCO erred in approving it.

It is well settled that where the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory construction.[36] An unambiguous statute is to be applied, not interpreted.[37] "In such a case, we do not resort to rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in * * * a particular statute--we rely only on what the General Assembly has actually said." [38] Thus, legislative intent may be inquired into only if the statute is ambiguous on its face.[39]

Here, there is no ambiguity in the law. "Default service" is legislatively defined. Under R.C. 4928.14, default service is defined as the provision of generation by the utility where the non-utility supplier (marketer) fails to provide retail generation service to customers. According to the statute, if a supplier fails to provide electric generation

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[36] *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), ¶5, syllabus).

[37] *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 404 N.E.2d 159 (1980).

[38] *Muenchenbach v. Preble Cty.*, 91 Ohio St.3d 141, 149, 742 N.E.2d 1128 (2001) (Moyer, C.J., dissenting).

[39] *See Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96-97, 573 N.E.2d 77 (1991), where the Ohio Supreme Court summarized the rules of statutory construction as follows: "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation * * *. However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent * * *. The primary rule in statutory construction is to give effect to the legislature's intention * * *. Legislative intent must be determined from the language of the statute itself * * *, as well as from other matters, see R.C. 1.49. In determining intent, it is the duty of the court to give effect to the words used, not to delete words used or insert words not used." (Citations omitted).

service to customers within the utility's service territory, the customers of the supplier default to the utility's standard service offer until the customer chooses an alternative supplier.

The Ohio Supreme Court has on a number of occasions addressed the default service requirements of R.C. 4928.14.[40] The Court has recognized that "default service" is related to a utility's provider of last resort ("POLR") obligations as provided in R.C. 4928.14. [41] Specifically, the Court explained that provider of last resort costs are "charges incurred by an incumbent electric distribution utility for risks associated with its statutory obligation under R.C. 4928.14(C), as the *default provider*, or provider of last resort, for customers who opt for another provider who then fails to provide service."[42]

The PUCO itself has also recognized that the default service requirements under R.C. 4928.14 relate to provider of last resort obligations. The PUCO concluded that POLR costs are costs incurred by the electric distribution utility for risks associated with its legal obligation as the default provider for customers who shop and then return to the utility for generation service. The PUCO made this finding just a few years ago.[43] The law has not changed since the PUCO last applied the default service language to mean

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[40] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.,* 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, *In re Application of Columbus Southern Power Company, et al*., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶22-30, *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶18-26.

[41] *See, e.g., Constellation New Energy, Inc. v Pub. Util. Comm*., 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶39, footnote 5.

[42] *Ohio Consumers' Counsel v. Pub. Util. Comm*., 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶4, footnote 2 (citation omitted).

[43] *In re 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).

provider of last resort. Since the law is unchanged, the PUCO's application of the law should not change.

As indicated, R.C. 4928.14 clearly defines default service as pertaining to the need to serve returning customers. Definitions provided by the General Assembly are to be given great deference in deciding the scope of particular terms.[44] Indeed, the Ohio Supreme Court has noted that "the General Assembly's own construction of its language, as provided in definitions, controls in the application of a statute.* * *."[45]

Default service as defined by the General Assembly, the Ohio Supreme Court, and the PUCO means service provided by the electric distribution company that must be offered if generation suppliers are unable to continue to serve customers who have switched from the utility to a supplier. No more and no less.

A standard service offer can only consist of "competitive" components of retail electric service, while default service (provider of last resort) can have competitive and non-competitive components.[46] Thus, the two terms are not synonymous. In R.C. 4928.141 the General Assembly defines the standard service offer in broad terms as "all *competitive* retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." For a component of retail electric service to be deemed "competitive" there must be a declaration by the Revised Code or the PUCO that the service component is competitive.[47]

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[44] *Good Samaritan Hospital v. Porterfield*, 29 Ohio St.2d 25, 30, 278 N.E.2d 26 (1972).

[45] *Ohio Civil Rights Comm. v. Parklawn Manor*, 41 Ohio St.2d 47, 50, 322 N.E.2d 642 (1975).

[46] *Indus. Energy Users-Ohio v. Pub. Util. Comm.,* 117 Ohio St.3d 486, 492, 2008-Ohio-990, 885 N.E.2d 195, ¶27(Court found that the PUCO may allow a distribution utility's non-competitive costs associated with POLR, and determined that the PUCO's approval must be given under R.C. Chapters 4905 and 4909).

[47] *See* R.C. 4928.01(B).

Thus, this Commission should not construe default service because it is clearly defined under R.C.4928.14. And as defined in that statute, default service means provider of last resort. Default service does not mean standard service.

But DP&L failed to prove that that the costs charges to customers through the Service Stability Rider are comprised of costs of DP&L being the provider of last resort. The PUCO has ruled that in order to collect POLR charges, the Utility must produce measurable and verifiable evidence of its provider of last resort costs.[48] Here, the Utility clearly failed to produce such evidence. Yet the PUCO approved the Service Stability Rider as a stability charge that maintains the Utility's financial integrity so that it may continue to provide SSO service, which it defined as "default service."

The PUCO violated the law when it allowed the Utility to charge customers $330 million for rate stability, on a premise that the standard service offer equates to default service under the statute. There is no statutory justification for approving the SSR under R.C. 4928.143(B)(2)(d). There is no evidence in the record that there are measurable and verifiable costs of the Utility's POLR obligations. The PUCO erred.

b. Construing the Service Stability Rider to be related to bypassability leads to absurd and unreasonable results—something that should be avoided in statutory interpretation.

Similarly, the PUCO erred in determining that the SSR is related to bypassability. Notably, it came to this conclusion without any explanation. Unlike "default service," "bypassability" is not a term defined by the General Assembly. Thus, the PUCO can

[48] *See In re 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, et al., Order on Remand at 29 (Oct. 3, 2011) (holding that POLR costs should be readily measurable and verifiable).

engage in statutory interpretation. But when the PUCO construes the statute it must do so in a reasonable manner and should consider Ohio's Rules of Statutory Construction and the case law that has developed under those rules.

One of Ohio's Rules of Statutory Construction is R.C. 1.49. Under R.C. 1.49 when a statute is ambiguous, a court or agency may consider, inter alia, the consequences of a particular construction in determining the intent of the legislature. If the interpretation of the statute produces unreasonable or absurd results it should be avoided. *State ex rel. Bolin v. Ohio Environmental Protection Agency*, 82 Ohio App.3d 410, 413, 612 N.E.2d 498 (1992) (holding that a strong presumption exists in favor of statutory construction which avoids absurd results).

But the PUCO did not consider the consequences of its interpretation of bypassability. It failed to consider that unreasonable or absurd results are likely if its statutory analysis holds. This is because all utility charges are either bypassable or non-bypassable and hence, under the PUCO's interpretation, all charges can be said to relate to bypassability. That type of interpretation renders subsection (d) and the entirety of R.C. 4928.143(B)(2) virtually meaningless.

The PUCO's interpretation, if accepted, would open the floodgates to all sorts of charges. This is contrary to the General Assembly's express intent (as construed by the Ohio Supreme Court)[49] to place limits on the provisions that an electric utility may include in its electric security plan. For these reasons, the PUCO erred. Rehearing should be granted on this issue.

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[49] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 32.

2. The PUCO erred in finding that the Service Stability Rider is a charge that has the effect of stabilizing and providing certainty regarding retail electric service.

As stated above, the PUCO erred in finding that the Service Stability Rider fits as a charge related to "default service" or "bypassability" under the statute. Thus, the second criteria – determining that the charge fits within the categories enumerated in the statute – was not met. But the PUCO also erred in finding that the SSR met the third criteria of the statute—that it has the effect of stabilizing or providing certainty regarding retail electric service.

The PUCO found that the SSR would have the effect of stabilizing or providing certainty regarding retail electric service.[50] It also found that if DP&L's financial integrity "becomes further compromised, it may not be able to provide stable or certain retail electric service."[51] The PUCO noted that DP&L is not structurally separated and thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility.[52] The PUCO then concluded that the SSR will provide stable revenue to DP&L for the purpose of maintaining its financial integrity.

But the PUCO misses the point. The statute is directed to providing *certainty regarding retail electric service, not certainty of revenues for the utility*. 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." But the PUCO reads the language to allow any provision that enriches the utility so long as the utility can

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[50] September 4, 2013 Order at 21.

[51] *Id*.

[52] *Id*. at 22.

make a case that it needs revenues in order to continue to provide service. In other words, under the PUCO's interpretation, as long as the provision stabilizes the utility's earnings, it is permissible.

Such a liberal construction of the statute conflicts with the Ohio rules of statutory construction. Had the General Assembly wanted to allow more permissive structuring of an electric security plan, it would have inserted language to that effect. It did not. The statute is written from the perspective of the customer and requires certainty regarding retail electric service, not certainty of earnings for the utility.

The doctrine of *expressio unius est exclusio alterius* provides that to express or include one thing implies the exclusion of the other or of the alternative.[53] Under that doctrine, the General Assembly's provision of authority to the PUCO to approve specific provisions that promote *stability and certainty regarding retail electric service* means just that. It does not mean that a provision is permissible so long as it promotes *stability and certainty of earnings for the utility*.

The PUCO cannot rewrite the law. "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts."[54] R.C. 4928.143(B)(2)(d) is clear and unambiguous.

The PUCO's attempt to interpret the words in the statute to justify approving the SSR under R.C. 4928.143(B)(2)(d) is unlawful and unreasonable. The PUCO should grant rehearing on this issue and reverse its holding.

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[53] *Black's Law Dictionary* 661 (9th Ed.2009).

[54] *Thompson Elec., Inc. v. Bank One, Akron, N.A.*, 37 Ohio St.3d 259, 264, 525 N.E.2d 761 (1988) (remaining citation omitted).

D. The PUCO Erred In Establishing A Service Stability Rider Charge To Ensure The Financial Integrity Of DP&L As A Whole, When, Under R.C. 4928.38:

1. **utilities are to be fully on their own in the competitive generation market after the market development period; and**

2. **the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.**

The PUCO noted that the Service Stability Rider will provide revenue to DP&L for purposes of maintaining its financial integrity.[55] The PUCO acknowledged that because DP&L had not structurally separated, its financial losses in generation, transmission or distribution are financial losses for "DP&L," the entire utility. Thus, the PUCO justified the SSR as supporting all of the utility's lines of business—generation, transmission, and distribution. But the SSR is not necessary to support the utility's transmission and distribution businesses, which DP&L's Chief Financial Officer, Mr. Jackson, acknowledged are financially stable.[56] Consequently, the SSR is really designed to just support DP&L's ***competitive*** generation services. The record in the proceeding bears this out. DP&L witness Jackson testified that DP&L's alleged financial integrity woes have been driven by three factors, all pertaining to the generation business: increased customer switching, declining wholesale prices, and declining capacity prices.[57]

But requiring customers of a utility to subsidize competitive generation services is contrary to the law. Under R.C. 4928.38, the General Assembly expressly limited

[55] September 4, 2013 Order at 22.

[56] Transcript Volume I-public, at pages 117-118.

[57] DP&L Ex. 1A at 13.

customer funding of generation services. The law clearly provides that with the termination of transition revenues at the end of the market development period, "the utility shall 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 from customers that support, either directly or indirectly, its generation operations. Rather the utility must compete with other generation market participants and face customer switching, fluctuating wholesale prices, and uncertain capacity prices, without subsidy. This should mean that the SSR cannot be approved because it is used as an unjustified "protection" or "insulation" for the Utility against the very market forces that the General Assembly intends to promote in Ohio.

But the PUCO never addressed the fact that the SSR is intended to unlawfully subsidize competitive generation services. Rather, it focused on addressing intervenor arguments that the SSR is an unlawful transition charge.[58] While the illegality of further transition charges is a critical inquiry, it involves a separate inquiry, apart from the inquiry as to whether the SSR is an illegal subsidy of competitive generation services.

Being fully on its own in the competitive market means there can be no subsidy of the utility's generation business. The Service Stability Rider is a subsidy, directed solely at ensuring the revenues or the "financial integrity" of DP&L's generation business. The PUCO's authorization of the Service Stability Rider was unlawful and violated R.C. 4928.38. The PUCO should reverse its decision.

But there are more reasons the PUCO should reverse its decision. Under R.C. 4928.38, once the market development period is over, there can be no further collection

[58] *See* September 4, 2013 Order at 22.

of transition revenues from the utility's customers. Additionally, the law precludes "any equivalent revenues" from being given to the utility. As OCC Witness Rose testified, the market development period for DP&L ended on December 31, 2005.[59] This means that all transition revenues or "any equivalent revenues" may not be authorized by the PUCO.

The only exception to this prohibition relates to express authorizations found in R.C. 4928.31 through 4928.40. Those provisions specifically relate to a utility's electric transition plan. DP&L's transition plan expired long ago. The exceptions, thus, no longer apply.

The PUCO however, concludes summarily that its authorization of the SSR is not the equivalent of authorizing transition revenues.[60] The PUCO appears to believe that because DP&L has not claimed that its electric transition plan ("ETP") failed to provide sufficient revenues, then the Service Stability Rider cannot be a claim for transition revenues or any equivalent revenues. This makes little sense. Transition charges were charges designed to subsidize generation services (during the transition to a competitive generation market). The SSR is a charge designed to subsidize generation services (that are supposed to be "fully on their own"). The SSR is an illegal transition charge.

Under R.C. 4928.37(A)(1), transition charges were initially permitted to provide a utility with the opportunity to receive revenues "that may assist it in making the transition to a fully competitive retail electric generation market."[61] Dr. Rose, who is very familiar with the transition cost legislation through his work with the Ohio Legislative

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[59] Direct Testimony of OCC witness Kenneth Rose at 12.

[60] September 4, 2013 Order at 22.

[61] *See* R.C. 4928.37.

Services Commission,[62] identified the SSR request as a request for transition revenues or any equivalent revenues.[63]

The law which uses the expansive phrase "any equivalent revenues" does not differentiate between ETP claims and post-ETP claims. DP&L's present claim is that it needs assistance in order to complete the transition to a fully competitive market when 100% of its SSO will be competitively bid.[64] It needs the assistance because of: increased customer switching, declining wholesale prices, and declining capacity prices.[65] This assistance the SSR provides to DP&L is the equivalent of receiving transition revenues, albeit in a different period of time—i.e. post-ETP.

The Commission erred in allowing DP&L to collect transition revenues or the equivalent revenues from customers through the SSR, above and beyond the $441 million already paid for by customers. [66] The Commission is a creature of statute. It may only exercise the authority given to it by the General Assembly.[67] It cannot authorize DP&L to collect any revenues equivalent to transition revenues after the end of the market development period. The PUCO should reverse its finding in this regard, and deny the

[62] Dr. Rose was employed by the Legislative Services Commission to assist in the drafting of S.B.3, which contained the transition cost provisions that became R.C. 4928.37-39. See Direct Testimony of Kenneth Rose at 2; Transcript Volume VIII-public, pages 2026-2030.

[63] Direct Testimony of OCC witness Kenneth Rose at 10.

[64] *See* Direct Testimony of DP&L witness Craig L. Jackson at 2-3; Second Revised Testimony of Craig L. Jackson at 6.

[65] DP&L Ex. 1A at 13.

[66] Direct Testimony of OCC witness Kenneth Rose at 7; *In the Matter of the Application of the Dayton Power & Light Company for Approval of 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).

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

Utility the ability to collect hundreds of millions of dollars more in new (or additional) transition revenues from its customers during 2014 through 2016, and possibly through May 31, 2017.

E. The PUCO Erred In Establishing A Service Stability Rider To Achieve A Return On Equity Target (At Customer Expense), In Violation of R.C. 4928.03 Under Which Generation Service Has Been Declared A Competitive Retail Electric Service.

In its Opinion and Order, the PUCO authorized a Service Stability Rider to achieve a Return on Equity ("ROE") target of 7 to 11 percent.[68] On this basis the PUCO approved a Service Stability Rider of $110 million per year for each of three years from January 2014 through December 2016.[69]

While the PUCO claims that it did not exactly determine the ROE the utility will recover,[70] it cannot escape the fact that it set a level of guaranteed revenues for the Utility, which is nothing short of regulation. Instead of allowing DP&L to address the challenges of market forces on its own, the PUCO set regulated electric utility charges for DP&L to collect from captive customers.

But DP&L's generation business was declared a competitive service under R.C. 4928.03, and as a competitive service, it was deregulated. In other words, competitive generation service is no longer subject to traditional cost-based regulation.[71] OCC Witness Rose testified that setting the SSR (and the switching tracker) to ensure DP&L's

[68] September 4, 2013 Order at 25.

[69] September 6, 2013 Entry at 2.

[70] September 4, 2013 Order at 25.

[71] Direct Testimony of OCC witness Daniel J. Duann at 5.

"overall creditworthiness" is an attempt to re-introduce regulatory protection for the generation portion of DP&L's business that has been deregulated.[72]

Guaranteeing revenues for DP&L in order to meet a targeted return on equity conflicts with the goals of S.B.221. As Dr. Rose testified, requesting that all customers ensure the financial integrity of DP&L is equivalent to requiring customers to guarantee a certain level of earnings for both the regulated and non-regulated (i.e. generation) portions of DP&L's business. This interferes with the operation of a competitive market.[73]

Dr. Rose testified that, from an economic perspective, it is not sound regulatory policy to guarantee that DP&L receive a certain level of generation revenues.[74] Retail customers should no longer protect the Utility from competitive generation market risks. DP&L has had sufficient time to prepare for a competitive generation market. In a competitive market setting, DP&L should not receive compensation from customers for market losses, just as it does not share profits with customers from market gains.

Each market participant in Ohio's generation services market is responsible for its own loss or profit.[75] This is the premise of R.C. 4928.38—each utility, after the market development period, "shall be fully on its own in the competitive market."

But the Commission's ruling allowing the SSR disregards the statutes and the premise of the entire statutory scheme. The Commission erred. On rehearing it should

[72] Direct Testimony of OCC witness Kenneth Rose at 5.

[73] *Id*. at 16.

[74] *Id.* at 5.

[75] Direct Testimony of OCC witness Daniel J. Duann at 30.

reverse its ruling guaranteeing a ROE to a utility whose generation operations were deregulated.

F. The PUCO Erred In Authorizing The Service Stability Rider Because It Is An Anti-Competitive Subsidy (Paid By Customers) That Violates R.C. 4928.02(H).

When the PUCO approved the Service Stability Rider it created an anti-competitive subsidy to one competitive generation service supplier -- DP&L. DP&L will receive a customer-funded subsidy to enrich its generation business. Collection from customers of SSR revenues will give DP&L an unfair advantage because it will provide a subsidy of DP&L's competitive generation service by DP&L's captive distribution customers.[76]

Such a subsidy violates R.C. 4928.02(H). Under that statute, the PUCO must ensure effective competition by avoiding anti-competitive subsidies flowing between competitive and non-competitive retail service. That provision also prohibits the recovery of generation-related costs through distribution rates. In fact, the Ohio Supreme Court struck down a PUCO Order where the PUCO violated this policy provision of R.C. 4928.02.[77] There, the Commission had permitted a utility to collect generation costs through future distribution rate cases or fuel cost recovery mechanisms to reduce distribution related expenses. The Court found that R.C. 4928.02(G),[78] prohibiting anti-competitive subsidies, had been violated. The Court reversed the PUCO and remanded the case to the PUCO to modify the rate plan to remedy the statutory violation.

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[76] *Id.* at 15.

[77] *Elyria Foundry Co. v. Pub. Util. Comm.,* (2007), 114 Ohio St.3d 305.

[78] Under S.B. 221, new subsections were inserted into R.C. 43928.02, and thus the subsections were re-designated. Subsection (G) became the current subsection (H).

Similarly, here, the Service Stability Rider violates this provision of R.C. 4928.02. Thus, the SSR is an improper and illegal subsidy of DP&L's generation services, which have been declared to be competitive and may not be subsidized. The PUCO should reverse and reject the Service Stability Rider.

G. The PUCO Erred In Basing Its Opinion And Order On Facts Not Within The Record, Violating R.C. 4903.09.

In its Order, the PUCO summarizes the testimony and arguments of intervenors and Staff on numerous issues including the SSR. On page twenty of the Order, the PUCO refers to the testimony of Staff Witness Choueiki claiming that "Staff witness Choueiki noted that the Commission has granted similar charges [stability charges] to other utilities based upon Section 4928.143(B)(2)(d), Revised Code (Staff Ex. 10 at 11). *AEP /ESP II* Case; *In Re Duke Energy Ohio*, Case No. 11-3549-EL-SSO."

But, Mr. Choueiki's testimony citing the Duke Energy Ohio Case as an example of the PUCO granting similar charges to other utilities was withdrawn, in response to OCC's motion to strike.[79] Thus, the Commission erred in citing to testimony that is not within the record. When the PUCO did so, it violated R.C. 4903.09. That statute requires the PUCO to make factual findings in its written opinions based on evidence in the record. The PUCO should grant rehearing and correct its opinion and order, consistent with the record in this proceeding.

[79] Transcript Volume VII-public, page 1827.

H. The PUCO Erred In Determining The Amount Of The Service Stability Rider That Customers Will Be Required to Pay By:

1. Overstating the amount of the Service Stability Rider over the Electric Security Plan period because it failed to offset the Service Stability Rider by the amount of capital expenditure reductions that were approved as part of DP&L's round 2 budget/long term forecast.

And

2. Failing to reduce the amount of the Service Stability Rider because reasonable switching projections indicated less lost revenue from switching.

The PUCO authorized DP&L to collect an SSR from its customers over the term of DP&L's electric security plan. As argued, above, the PUCO erred in doing so, and it should reverse itself. In the event the PUCO does not grant rehearing on that issue, it should nonetheless grant rehearing on its findings pertaining to the amount of the SSR because the amount of the SSR needed to ensure DP&L's financial integrity is unreasonably overstated.

When considering the amount of revenues needed to ensure DP&L's financial integrity, the PUCO made two errors, which unreasonably overstate the calculation of the SSR. First, the PUCO failed to offset the SSR amount with the capital expenditure reductions that were approved as part of DP&L's round 2 budget/long term forecast. Second, it failed to reduce the SSR to reflect less revenue loss associated with reasonable switching assumptions. The failure to adjust the SSR downward for these errors resulted in an SSR that is unreasonably overstated and inconsistent with the PUCO's intent that the SSR is the "minimum amount necessary to ensure the Company's financial integrity and provide it with the opportunity to achieve a reasonable ROE during the ESP."[80]

[80] September 4, 2013 Order at 25.

a. The PUCO should reduce the Service Stability Rider by the capital reductions approved under DP&L's round 2 budget/long term forecast.

In the September 4, 2013 Order, the PUCO explained that it did not offset the proposed SSR by future capital expenditure reductions because it was not persuaded that the potential capital expenditure reductions have as significant an impact on the Company's ROE as the potential O&M savings.[81] While the Commission is correct that the capital expenditure reductions have less of a direct impact on the Company's ROE than potential O&M savings, there is still a distinct impact that translates to [redacted] in reduced depreciation expense, and consequently reduced revenue requirements over the term of the ESP.

The record reflects that DP&L did not include in its [redacted].[82] But as part of the round 2 budget/long term forecast, which was recently approved,[83] DP&L Inc. [redacted].[85] DP&L witness Malinak testified that, assuming the mid-point of the capital expenditure reduction of [redacted]

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[81] *Id.*

[82] Transcript Volume I-confidential, pages 102-103.

[83] Transcript Volume I-public, page 217.

[84] Transcript Volume I-confidential, page 95; FES Exhibit 4.

[85] Transcript Volume I-confidential, pages 96-97; FES Exhibit 4.

[redacted][86] [redacted] (per year).[87] Multiplying that reduced depreciation expense each year for the three year ESP period translates into [redacted] of reduced depreciation expenses. These reductions to depreciation expense equate dollar for dollar to reduced revenue requirements. These reduced revenue requirements should have been used to offset the SSR, but they were not. It was unreasonable for the PUCO to disregard these reductions. Doing so significantly overstates the amount of the SSR by [redacted] ([redacted] million/$110million), to the detriment of all customers who are being forced to pay it. The PUCO should grant rehearing to recalculate the SSR to take into account the reduced capital expenditures.

b. The PUCO erred when it unreasonably failed to reduce the Service Stability Rider revenue requirement by incorporating reasonable assumptions about the level of switching.

In starting with DP&L's SSR calculation of $137.5 million per year, and adjusting it for the O&M reductions, the PUCO unreasonably accepted the Utility's switching assumptions. As Staff Witness Choueiki testified, the projected annualized switch rates that DP&L Witness Chambers relied upon to estimate the utility's retail revenues were not reasonable.[88] The PUCO Staff advocated using more reasonable switch rates that would be in the [redacted] range, as compared to [redacted] overall switching rates incorporated into the Utility's SSR calculation.[89] When PUCO Staff adjusted the switch rates to more reasonable levels, it concluded that there would be a significant increase in

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[86] Assuming straight line depreciation over 25 years.

[87] Rebuttal and Supplemental Testimony of DP&L witness R. Jeffrey Malinak at 27.

[88] Prefiled Testimony of PUCO Staff witness Hisham M. Choueiki at 13.

[89] *See* Second Revised Testimony of DP&L witness Aldyn W. Hoekstra at 8; Exhibit WJC-3.B. Remarkably, the Utility projects an almost [redacted] increase in yearend overall switching from 2012 through 2013. The latest actual overall switching rates, as of February 28, 2013, was [redacted] showing no indication of a jump in overall switching as projected by Mr. Hoekstra. Transcript Vol. II –confidential, at page 293.

DP&L's retail revenues as compared to revenues projected by DP&L.[90] The increase in retail revenues would in turn decrease the need for SSR revenues. But the PUCO ignored this issue. That was unreasonable and resulted in an overstated SSR. The PUCO should grant rehearing on this issue to determine the revised revenue requirement for the SSR, using realistic switching rates.

I. The PUCO Erred In Authorizing A Service Stability Rider-Extension, Through Which DP&L Can Seek To Collect An Additional $45.8 Million In Stability Charges From Its Customers.

1. The PUCO's decision to give DP&L the opportunity to seek to collect an additional $45.8 million from its customers was made without record support and contains no findings of fact with respect to the need for such an extension of the Service Stability Rider, thus violating R.C. 4903.09.

The PUCO authorized DP&L to create an SSR Extension ("SSR-E") which it initially set at zero.[91] Under the PUCO's Order, DP&L can use the SSR-E to collect from its customers up to $45.8 million for the five months ending May 31, 2017.[92] The PUCO determined that the SSR-E mechanism will give DP&L the opportunity to provide more reliable data on its financial integrity.[93] The SSR-E will function like the SSR the PUCO approved—to inappropriately ensure stability and certainty regarding the *utility's earnings* during 2017. The PUCO noted that the SSR-E will ensure stability and certainty regarding electric service because DP&L will provide more clear and reliable data for the later months of the ESP.[94]

[90] Prefiled Testimony of PUCO Staff witness Hisham M. Choueiki at 13.

[91] September 4, 2013 Order at 26.

[92] September 6, 2013 Entry at ¶4.

[93] September 4, 2013 Order at 27.

[94] *Id*.

As discussed previously, under R.C. 4903.09, the Commission must decide the case before it based on evidence in the record. It must make "findings of fact," and issue "written opinions setting forth the reason prompting the decisions" "based upon said finding of fact."[95]

But the facts cited by the PUCO and the record developed in the case do not support the need for SSR-E. In fact, the PUCO found that it was "persuaded by the testimony at the hearing that the reliability of financial projections significantly declines over time." For that reason it authorized the SSR only until December 31, 2016.[96] Thus, if there are no reliable financial projections for 2017 that justify collecting the SSR over that time frame, there can be no facts that justify allowing DP&L to seek additional customer funding in 2017 through a similar mechanism, the SSR-E. Rehearing should be granted and the PUCO should reverse its decision to authorize rider SSR-E.

2. The PUCO failed to identify how the Service Stability Rider-Extension is a provision allowed under R.C. 4928.143(B)(2), and failed to provide authority that permits the PUCO to modify a utility's Electric Security Plan if a utility can show its financial integrity is "at risk."

In approving the SSR-E, the PUCO found that the SSR-E will ensure that "customer charges are being assessed based upon current and reliable information, that stability charges will continue to have the effect of stabilizing or providing certainty regarding retail electric service, and the financial integrity of DP&L will be maintained without granting DP&L significantly excessive earnings."[97] But the PUCO nonetheless

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[95] R.C. 4903.09.

[96] September 6, 2013 Entry at ¶4.

[97] September 4, 2013 Order at 27.

authorized the SSR-E without making a finding that the rider is a permissible provision of an electric security plan.

In order for a provision to be authorized as part of a utility's electric security plan, it must fall within the purview of R.C. 4928.143(B)(2).[98] If a provision of an electric security plan does not fit within one of the categories listed in R.C. 4928.143(B)(2), the PUCO cannot authorize it. Here the PUCO appears to be relying upon its primary finding that the SSR is a charge authorized under R.C. 4928.143(B)(2); thus, the SSR-E, which is an extension of the SSR, must also be authorized.

But as explained above, the PUCO erred in finding that the Service Stability Rider is a charge related to default service and bypassability. The SSR is not related to default service. Nor is it related to bypassability. And the SSR does not stabilize or provide certainty regarding retail electric service. The SSR-E fares no better. It is not related to "default service." Nor is it related to bypassability. And it does not stabilize or provide certainty regarding retail electric service. Thus, the PUCO had no authority to approve the SSR-E, even as a "zero" rider.

Moreover, it appears that the PUCO has agreed to allow DP&L to collect (through the rider) up to $45.8 million of extra revenues from customers so long as DP&L can meet certain conditions[99]and show that its financial integrity will be compromised or is "at risk."[100] This enables the PUCO to adjust an approved ESP after three years have passed.

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[98] *In re: Columbus Southern Power Co*., 2011-Ohio-1788 at ¶32.

[99] DP&L must also meet the following conditions: it must file an application for a distribution rate case; it must file an application to divest its generation assets; it must file an application to modernize its electric distribution infrastructure; and it must establish and begin implementing a plan to modernize its billing system. September 4, 2013 Order at 27-28.

[100] September 4, 2013 Order at 27.

While the PUCO possesses the authority to adjust a market rate offer ("MRO") to address an emergency that threatens a utility's financial integrity under R.C. 4928.143(D), the PUCO does not possess the same authority for an electric security plan. Any adjustments to an ESP are limited to those that can occur under R.C. 4928.143(E).

Under R.C. 4928.143(E), when there is an ESP with a term greater than three years, the PUCO must test the plan to determine if the plan still meets the "more favorable in the aggregate" standard. Additionally, the PUCO must test whether the prospective effect of the ESP is substantially likely to provide the EDU with a significantly excessive return on equity. Notably, missing from the statute is any reference to reviewing whether the plan places the utility's financial integrity at risk.

Thus, by approving an SSR-E, and permitting the utility the opportunity to collect another $45.8 million from customers, the PUCO has rewritten the law to create another layer of protection for the Utility. The General Assembly could have included the "financial emergency" language of R.C. 4928.142(D) in the ESP statute (R.C. 4928.143). But it did not. Under the doctrine of *expressio unius est exclusio alterius*, because the General Assembly did not include that language, the Commission cannot rewrite the law.[101]

Additionally, the protection from a financial emergency threatening a utility's financial integrity is not needed under an electric security plan.[102] Utilities have ultimate

[101] *See State ex rel v. Evatt* (1944), 144 Ohio St. 65 (no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend, or improve the provisions of a statute to meet a situation not provided for).

[102] A utility filing an MRO does not have the same unilateral veto power over modifications made by the PUCO to the MRO. Thus, protections to the utility may be considered a quid pro quo for being unable to withdraw and terminate.

veto power over any modifications made to the ESP.[103] If the Commission modifies and approves, or disapproves the ESP, a utility may withdraw its application, thereby terminating it and may file a new SSO.[104] And there are other opportunities for utilities to terminate the ESP, for example, if the PUCO orders a return of significantly excessive earnings under R.C. 4928.143(E) or (F). These provisions already protect the utilities far beyond the means of other parties. No further protection is needed. Nor is further protection provided under the statutes. The PUCO erred here and should grant rehearing on this matter, reversing its findings.

3. The PUCO erred in determining that the Service Stability Rider-Extension should be set in order to maintain DP&L's financial integrity when, under R.C. 4928.38:

a. utilities are to be fully on their own in the competitive generation market after the market development period; and

b. the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.

The PUCO approved the SSR-E as a means for DP&L to "maintain its financial integrity."[105] And the PUCO has made no finding that revenues collected from the SSR-E cannot be used to support all of the utility's lines of business -- generation, transmission, and distribution.

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[103] Indeed Former Commissioner Roberto referred to the balance of power created by an EDU's authority to withdraw from a Commission modified and approved plan and concluded it created a dynamic that is impossible to ignore. *In the Matter of the Application of FirstEnergy to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Dissent at 59-60 (Mar. 25, 2009).

[104] R.C. 4928.143(C)(2)(a).

[105] September 4, 2013 Order at 27.

As explained in discussion of the SSR above, under R.C. 4928.38, the General Assembly expressly limited customer funding of generation services. After the market development period is over, "the utility shall be fully on its own in the competitive market." Thus, the utility can no longer receive funds that support, directly or indirectly, its generation operations. A supplemental rider such as the SSR-E, however, provides protection from competitive market forces. The PUCO authorization of the SSR-E, like its authorization of the SSR, was unlawful and violated R.C. 4928.38. The PUCO should reverse its decision.

Moreover, under R.C. 4928.38, once the market development period is over, a utility cannot collect any more transition revenues or "any equivalent revenues." For DP&L the market development period ended on December 31, 2005.[106] Thus, the PUCO cannot authorize DP&L to collect any more transition revenues or any equivalent revenues.

But that is just what the PUCO has done here. Revenues to maintain the utility's financial integrity, collected through the SSR-E, are transition revenues or equivalent revenues. Numerous witnesses, including OCC Witness Rose, identified the SSR proposal as a proposal to collect these unlawful revenues.[107] The SSR-E proposal is merely an extension of the SSR. Thus, it is as unlawful as the SSR, for the exact same reasons. The PUCO erred here, and should reverse on rehearing.

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[106] Direct Testimony of OCC witness Kenneth Rose at 12.

[107] *See id.* at 10.

4. The PUCO erred in establishing a Service Stability Rider-Extension to address the financial losses DP&L will allegedly incur from its provision of competitive generation services because the Service Stability Rider-Extension is an anti-competitive subsidy violating R.C. 4928.02(H).

When the PUCO approved the SSR-E, it created an anti-competitive subsidy for DP&L. DP&L will receive a customer-funded subsidy that it can use to support its generation business. This violates R.C. 4928.02(H), just as the SSR does. Under that statute, the PUCO must ensure effective competition by avoiding anti-competitive subsidies flowing between competitive and non-competitive retail service. The PUCO erred in approving the SSR-E to subsidize competitive generation services. Rehearing should be granted.

5. The PUCO erred by giving DP&L a second opportunity to provide more reliable data on its financial integrity related to year four of its Electric Security Plan term, when DP&L failed to satisfy its burden of proof under R.C. 4928.143(C)(1).

Under R.C. 4928.143(C), DP&L had the burden of proof in this proceeding. It failed to meet that burden of proof, with respect to, inter alia, its need for more customer funding to ensure its financial integrity for year four of its proposed ESP.[108] Instead of outright rejecting the utility's request for additional funding, the PUCO gave the utility a tool to collect more money from customers. It approved the SSR-E, a rider that no party presented as part of the evidentiary record in this proceeding.

[108] *See* September 4, 2013 Order at 27.

Under the SSR-E, DP&L will be able to request additional customer funding to maintain its financial integrity during year four of its ESP. It will be afforded a second chance to "provide more reliable data on its financial integrity."[109]

But the law is not written to afford the Utility a further opportunity to meet its burden of proof. A utility has the "burden of proof *in the proceeding*."[110] "The proceeding" being referred to is the utility's ESP proceeding, not a supplemental proceeding. DP&L failed to prove that in year four it would need more customer-funding for its financial integrity. Allowing DP&L to apply for an SSR-E during the term of the ESP, when it did not justify its need for funding the first time around, is unlawful, unjust, and unreasonable. Rehearing should be granted.

J. The PUCO Erred When It Found That Under R.C. 4928.143(C)(1) The Modified Electric Security Plan Is More Favorable In The Aggregate For Customers Than The Expected Results Under A Market Rate Offer.

1. The PUCO erred by failing in its analysis required by R.C. 4928.143 (C)(1) to determine how much more customers will have to pay under the PUCO-modified electric security plan than under a market rate offer.

In its September 4, 2013 Order, the PUCO found that DP&L's customers would pay $250 million more under the PUCO-modified ESP than under a MRO.[111] To arrive at that amount, the PUCO used the PUCO Staff's quantitative analysis (using a three year ESP) and adjusted it to "reflect that blending would begin on January 1, 2014, the blending percentages would be 10 percent, 40 percent, and 70 percent, the ST would be removed from both the ESP and MRO, the SSR would be in the amount of $110 million

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[109] *Id*.

[110] R.C. 4928.143(C)(1).

[111] September 4, 2013 Order at 50.

for the first two years of the ESP, and the SSR-E would be authorized for the first ten months of the third year of the ESP."[112] The PUCO also made an adjustment to the PUCO Staff's analysis because the PUCO-modified ESP did not match up with the PJM planning year.[113] But then a lot of that changed just two days later.

Through its Entry *Nunc Pro Tunc*, the PUCO made significant substantive changes to its September 4, 2013 Order. The PUCO: 1) delayed the implementation of the SSO being 100% competitively bid by an additional five months—until June 1, 2017; 2) gave DP&L an additional five months—by May 31, 2017—to divest its generation assets; 3) extended the period of the ESP for an additional 5 months to match up with the PJM planning period; 4) extended the SSR an additional full year which means that customers have to pay DP&L an additional $110 million in 2016; and 5) made the SSR-E available to DP&L in 2017 in the amount of $45.8 million.[114]

That Entry changed the amount that the PUCO-modified ESP failed the quantitative analysis. And the PUCO acknowledged this.[115] However, the PUCO did not re-calculate the amount that the ESP (as modified by the September 6, 2013 Entry) fails the quantitative analysis. This is an error. The PUCO has failed to perform the analysis required by R.C.4928.143(C). The PUCO's action is unlawful and OCC's application for rehearing should be granted for consideration of this issue.

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[112] *Id*.

[113] *Id.*

[114] September 6, 2013 Entry at 2-3.

[115] September 6, 2013 Entry at 3.

2. The PUCO erred in finding that qualitative benefits of the electric security plan significantly outweigh the results of the quantitative analysis.

The PUCO erred in finding, in its September 4, 2013 Order, that "qualitative benefits" of DP&L's ESP, as modified, "significantly outweigh[] the results of the quantitative analysis and that the modified ESP is more favorable" than an MRO.[116] The PUCO inappropriately attributes "weight" to "qualitative benefits" that are not supported by evidence. And, most problematically, it improperly considers requiring DP&L to comply with requirements of the law (through the ESP) to be a "qualitative benefit." In sum, the PUCO's decision to approve a modified ESP that will cost DP&L's customers $250 million or more than the rates paid under a MRO is unreasonable and unlawful.[117]

In reaching its conclusion, the PUCO identified six benefits which it deemed to be qualitative benefits of the ESP which would not be available with an MRO: (1) more rapid implementation of market rates[118]; (2) facilitation of complete divestment of DP&L's generation assets by the end of the term of the modified ESP, i.e. by May 31, 2017, which it considers necessary to "implement a fully competitive retail market in DP&L's service territory while providing "stable, safe and reliable retail electric service" [119]; (3) competitive retail enhancements, which it believes have a qualitative benefit that "is substantially greater than the cost of implementation"[120]; (4) incentives for billing

[116] September 4, 2013 Order at 52.

[117] As discussed previously, because the PUCO has not yet "corrected" its calculation of the quantitative detriments resulting from the revisions made to the ESP through its September 6, 2013 Entry, it is not possible to know how much more customers will have to pay under the ESP. However, the increase in the SSR by $110 million would likely add to the $250 million cost to customers as the SSR was a primary driver for the original $250 million amount.

[118] September 4, 2013 Order at 50-51.

[119] September 4, 2013 Order at 51; September 6, 2013 Entry at 2.

[120] September 4, 2013 Order at 51.

system modernization allowing CRES providers to “offer a more diverse range of products to customers”[121]; (5) economic development provisions to improve state’s competitiveness in the global market,[122] and (6) incentives to submit a plan to modernize DP&L’s distribution infrastructure.[123]

One of the PUCO’s “qualitative benefits” of the proposed ESP is the facilitation of complete divestment of DP&L’s generation assets by the end of the term of the modified ESP, i.e. by May 31, 2017.[124] The PUCO considers divestment over this time frame to be necessary to “implement a fully competitive retail market in DP&L’s service territory while providing “stable, safe and reliable retail electric service.”[125] But facilitation of complete divestment should not be viewed by the PUCO as a qualitative benefit since divestment was legally mandated by Senate Bill 3 in 1999.[126] While the PUCO may now view DP&L’s complete divestment as a qualitative benefit of the ESP, Senate Bill 3’s legal mandate for divestment established this endpoint track long ago. Thus, divestment is a requirement of the law and cannot reasonably be considered a “qualitative benefit” of an ESP.

R.C. 4928.17(C), provides for “functional separation” only for an “interim period prescribed” as ordered by the PUCO “for good cause shown” and to the extent consistent with the policies set forth in R.C. 4928.02. The PUCO has appropriately determined that such a “functional separation” period should come to an end, and structural separation, or

[121] September 4, 2013 Order at 51.

[122] September 4, 2013 Order at 52.

[123] September 4, 2013 Order at 52.

[124] September 4, 2013 Order at 51; September 6, 2013 Entry at 2.

[125] September 4, 2013 Order at 51.

[126] R.C. 4928.17(A)(1).

divestment, as prescribed by R.C. 4928.17(A)(1) should be implemented. But the modified ESP itself does nothing that the PUCO could not otherwise do under R.C. 4928.17 to advance the date of divestment or provide appropriate guidelines under which divestment could be completed. Thus, the PUCO is in error in indicating that structural separation of DP&L is a "qualitative benefit" of the modified ESP that would not be available with a MRO.

Further, while the PUCO suggests that, under the ESP, this divestment will be completed while DP&L is able to continue providing "stable, safe, and reliable electric service,"[127] there is no evidence that divestment could not be completed over the same time frame under an MRO. There is also no evidence that divestment concurrent with an MRO would jeopardize the provision of stable, safe, and reliable retail electric service.

With respect to DP&L's proposed "competitive retail enhancements," the PUCO points to no basis for its conclusion that the "qualitative benefits" of DP&L's proposed $2.5 million in competitive retail enhancements are "substantially greater than the cost of implementation."[128] The fact that [redacted] of DP&L's load is with competitive suppliers[129] – and DP&L is projecting [redacted] [redacted][130] -- indicates that competitive retail enhancements are unlikely to have substantial benefit beyond the cost of implementation.

Similarly, the PUCO points to no evidence of substantial "qualitative benefits" associated with its requirement for billing system modernization. Nor is there any

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[127] September 4, 2013 Order at 51.

[128] September 4, 2013 Order at 51.

[129] Transcript Vol. II-Confidential, page 293 (DP&L witness Aldyn Hoekstra).

[130] Direct Testimony of DP&L witness Aldyn Hoekstra at 8 (Confidential).

evidence that there are substantial "qualitative benefits" to the PUCO's proposed shareholder-funded Economic Development Fund, or that such benefits would exceed the $2 million per year proposed funding for 2014-2016.[131] Accordingly, the PUCO should grant rehearing on this issue and find that the ESP is not more favorable in the aggregate for customers than a MRO.

3. The PUCO erred when it considered "qualitative benefits" in its analysis required by R.C. 4928.143 (C)(1).

The PUCO erred in finding, in its September 4, 2013 Order, that "qualitative benefits" of DP&L's ESP, as modified, "significantly outweigh[] the results of the quantitative analysis and that the modified ESP is more favorable" than an MRO.[132] The PUCO inappropriately considered alleged "qualitative benefits" resulting from the ESP. The plain language of the statute does not authorize the PUCO to consider qualitative factors. And the PUCO does not provide any support for its statement that it "must consider the qualitative benefits of the modified ESP, in order to view the proposed plan in the aggregate."[133] Accordingly, the PUCO should grant rehearing on this issue.

K. The PUCO Erred In Failing To Find That It Must, Under R.C. 4928.143(E), Test The PUCO-Modified Electric Security Plan In The Fourth Year (2017) To Determine Whether It Continues To Be More Favorable In The Aggregate For Customers As Compared To The Expected Results That Would Otherwise Apply Under R.C. 4928.142.

The PUCO erred in failing to find that it must, under R.C. 4928.143(E), test the PUCO-modified ESP in the fourth year (2017) to determine whether it continues to be more favorable in the aggregate as compared to the expected results that would otherwise

[131] September 4, 2013 Order at 52.

[132] September 4, 2013 Order at 52.

[133] September 4, 2013 Order at 50.

apply under R.C. 4928.142. In the September 4, 2013 Order, the PUCO approved a three year ESP term.[134] Specifically, the PUCO found that "DP&L's ESP should be approved for a term beginning January 1, 2013, and terminating December 31, 2016."[135] Subsequently, the PUCO amended the September 4, 2013 Order. Through the September 6, 2013 Entry, the PUCO changed the end date of DP&L's ESP from December 31, 2016 to May 31, 2017.[136] The PUCO-modified ESP is now 41 months.[137] In other words, the PUCO expanded the length of DP&L's ESP from three years to three years and five months. This change has statutory consequences.

When the term of an ESP exceeds the length of three years from the effective date of the plan, Ohio law places an additional duty upon the PUCO. Under R.C. 4928.143(E), "the commission shall test the plan in the fourth year." That test is performed to determine whether the ESP "continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."[138] By expanding the length of DP&L's ESP into a fourth year, the PUCO is bound by Ohio law to test the plan in 2017, the fourth year.

Yet, the September 6, 2013 Entry fails to address the consequences of the PUCO's approval of an ESP term beyond three years. The PUCO erred by failing to find that it must, consistent with Ohio law, test DP&L's ESP in 2017, the fourth year of the ESP's term.

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[134] September 4, 2013 Order at 15.

[135] *Id*.

[136] September 6, 2013 Entry at 2.

[137] *Id*.

[138] R.C. 4928.143(E).

L. The PUCO Erred When It Failed To Find That The Standard Service Offer Should Be 100% Competitively Bid Over The Entire Electric Security Plan Period, Which Would Provide Customers With The Benefit of Currently Low Market Prices For Lowering Their Electric Bills.

Fourteen years after the General Assembly implemented Senate Bill 3 and five years after Senate Bill 221 became effective, the PUCO holds that only 10% of DP&L's Standard Service Offer ("SSO") load will be served by a competitive auction effective January 1, 2014.[139] While the PUCO's September 6, 2013 Entry follows this 10% auction with a 40% auction for service beginning on January 1, 2015 and a 70% auction for service beginning on January 1, 2016, these delays in providing customers with the benefits of a competitive market are unreasonable. As a result of such delays, the PUCO's Entry deprives SSO customers of the full benefits of current and near-term low market prices of electric generation.

The PUCO's failure to require that the SSO be 100% competitively bid over the entire ESP period is unreasonable.[140] The blending ratio and schedule adopted by the PUCO 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.[141] And the PUCO's blending schedule is contrary to current Commission policies which encourage a faster transition to market-based rates for SSO services.[142]

In its September 4, 2013 Order, the PUCO delays the implementation of the SSO being 100% provided through a competitive bid until January 1, 2017.[143] Two days later,

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[139] September 4, 2013 Entry at 2.

[140] September 4, 2013 Order at 15; September 6, 2013 Entry at 2-3.

[141] Direct Testimony of OCC witness Daniel Duann at 45; *see also* R.C. 4928.02.

[142] Direct Testimony of OCC witness Daniel Duann at 45.

[143] September 4, 2013 Order at 15, 16

through its Entry *Nunc Pro Tunc*, the PUCO delayed that customer benefit by an additional five months—until June 1, 2017.[144] The PUCO states that its approved CBP schedule will "move DP&L rates to market while granting DP&L sufficient time to refinance its long term debt to facilitate the divestment of the Company's generation assets."[145] The PUCO states no other reason for delaying the transition to competition. Nor does the PUCO explain how delaying the benefits to SSO customers of the competitive generation market is necessary for DP&L to refinance its long-term debt and transfer its generation assets.

It is wrong to condition the SSO being 100% competitively bid on the divestiture of DP&L's generation assets for two reasons. First, there is no evidence in the record that the SSO cannot be 100% competitively bid while DP&L still owns generation assets. Second, the idea that a SSO cannot be 100% competitively bid while the distribution utility also owns generation assets is contrary to what other Ohio electric utilities have done. Specifically, Duke Energy Ohio, Inc. ("Duke") has been providing a SSO that is 100% competitively bid (since January 1, 2012)[146] while it still owns generating assets.[147]

For the reasons stated above, the PUCO should grant rehearing on this issue. The PUCO should ultimately reverse its decision to unnecessarily delay the benefits that DP&L's customers would receive with an immediate transition to full competition for its generation service.

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[144] September 6, 2013 Entry at 2-3.

[145] September 4, 2013 Order at 15.

[146] See PUCO Case No. 11-6000.

[147] FERC authorized the divestiture of Duke's generating assets in an order issued on September 5, 2012. *Cinergy Corp. et al.,* EC12-90-000, 140 FERC ¶ 61,180 (FERC September 5, 2012).

M. The PUCO Erred In Authorizing DP&L To Defer The Costs Of The Competitive Retail Enhancements For Collection From Customers In A Future Distribution Rate Case.

In its September 4, 2013 Order, the PUCO approved DP&L's proposed $2.5 million in competitive enhancements and also required DP&L to implement EDI processes, standards, interfaces, and competitive retail enhancements that have been "adopted by every other EDU in Ohio."[148] The PUCO also held that the costs of competitive retail enhancements "should be deferred for recovery in DP&L's next distribution rate case" and that DP&L may seek recovery of such costs in that forum.[149] This finding is not reasonable.

Competitive retail enhancements are "projects that will improve the interaction of CRES providers with DP&L to ensure a smoother customer choice administrative process."[150] CRES providers should pay for all costs associated with enhancing the service that CRES suppliers provide.[151] It is error for the PUCO to decide otherwise.

DP&L sought to collect the costs of competitive retail enhancements from its customers through its Reconciliation Rider.[152] The PUCO rejected DP&L's proposal. But instead of then ordering the primary beneficiary (CRES providers) of the competitive retail enhancements to pay for those enhancements[153] -- the PUCO granted DP&L an unlawful deferral.

[148] September 4, 2013 Order at 38.

[149] September 4, 2013 Order at 35, 39.

[150] Direct Testimony of DP&L witness Dona Seger-Lawson at 13-14.

[151] Direct Testimony of OCC witness Kathy Hagans at 6.

[152] Direct Testimony of DP&L witness Emily Rabb at 8-10; Direct Testimony of DP&L witness Dona Seger-Lawson at 12-14.

[153] Direct Testimony of OCC witness Kathy Hagans at 6; Direct Testimony of DP&L witness Emily W. Rabb at 8.

Deferral authorization should be limited to "exigent circumstances" and for "good reason" because such authorization is a departure from standard accounting procedures as provided by R.C. 4905.13.[154] Thus, in connection with FirstEnergy's request for deferral of an estimated $450 million in distribution expenses projected to be incurred from 2006-2008, the PUCO stated:

> Standard application of public utility rate making and accounting policies would require that ordinary expenses incurred by a regulated public utility must be recovered, if at all, through annual revenues. The instant proposal, as it relates to the capitalization and deferral of distribution related expenses is a departure from those generally recognized policies. Although the granting of such deferral authority is within the discretion of the Commission, we believe that to approve such a measure requires that we find there to be both exigent circumstances and good reason demonstrated before such amounts should be treated differently from ordinary utility expenses. In the current case, because the companies are clearly in need of significant and costly improvements to their infrastructure, including vegetation management practices, maintenance practices, and storm damage repairs, we believe that it is important for the utilities to be encouraged through regulatory incentives to quickly accomplish those improvements. Thus, we find that exigent circumstances exist to deviate in a controlled way from the above stated public utility regulatory principles.[155]

These principles have been recognized and confirmed by the Supreme Court of Ohio.[156] Thus, utilities requesting deferral authorization must demonstrate both exigent circumstances and good reason why the amounts should be treated differently from

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[154] *See In the Matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a Generation Charge Adjustment Rider*, 05-704-EL-ATA, 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, Opinion and Order (Jan. 4, 2006), *aff'd in part and rev'd in part, and remanded **(aff'd in relevant part)** Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St. 3d 305; 2007-Ohio-4164; 871 N.E.2d 1176; [hereinafter *"Elyria Foundry" case].*

[155] *Id.*

[156] *Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St.3d at 310-312., 2007-Ohio-4164.

ordinary utility expenses.[157] Furthermore, the costs must be subject to review before they are incorporated into rates, ensuring the costs are reasonable, appropriately incurred, clearly and directly related to the exigent circumstances for which they were authorized, and in excess of expense amounts already included in the rates of the utility. [158]

In this case, the PUCO did not cite to any exigent circumstances justifying deferral accounting for competitive retail enhancements. The PUCO merely indicated that these enhancements "would promote further development of the competitive retail electric service market." But it did not indicate that there is significant urgency to these enhancements, stating only that they "should be implemented as soon as practicable."[159] Furthermore, unlike in *Elyria Foundry,* the costs are extremely small compared to DP&L's annualized revenues at current rates of over $510 million.[160] Approximately [redacted][161] and thus there is no evidence that the retail market is impaired because of the absence of such

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[157] While the Supreme Court of Ohio recognized that FirstEnergy had not demonstrated exigent circumstances for approval of deferral, it found that current rates are not affected by the accounting deferrals and other parties could challenge the recovery of deferred distribution expenses in FirstEnergy's next distribution rate cases. The Supreme Court emphasized that "[t]he commission made it clear that "deferred amounts will be reviewed before they are incorporated into future rates" and thus the "commission's accounting order was not conclusive for ratemaking purposes." *Elyria Foundry, citing Cincinnati v. Pub. Util. Comm.*, 63 Ohio St.3d 366, 588 N.E.2d 775 (1992) (no prejudice resulting from an accounting order having a ratemaking effect where rate proceeding was still pending and appellant had a right of appeal). The Supreme Court of Ohio also emphasized that the commission provided "a process to ensure that the deferred expenses for improvements to and maintenance of its infrastructure are in fact necessary costs related to improving the reliability of its distribution system." The Supreme Court stated that the "commission will scrutinize these deferred expenses to determine whether the 'costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of [FirstEnergy], and in excess of expense amounts already included in the rate structures of each of the [FirstEnergy] Companies.'" Among other things, the Court noted that the commission required FirstEnergy to establish separate accounts for each project for which they proposed to defer expenses and that commission staff would then review the reasonableness and necessity of the deferred expenses in those accounts annually.

[158] *Id.*

[159] September 4, 2013 Order at 38-39.

[160] DP&L Sch. 1.

[161] Transcript Vol. II-confidential, page 293.

enhancements. The PUCO erred in allowing such a deferral in the absence of a showing of exigent circumstances and good reason.

Alternatively, if the PUCO allows deferral of these expenses, it should make clear that, before any collection of costs from customers is allowed, DP&L must demonstrate that the deferred costs are reasonable, appropriately incurred, clearly and directly related to the circumstances for which they were authorized, and in excess of expense amounts already included in DP&L's rates at the time of approval.

N. The PUCO Erred In Delaying Structural Divestment Of DP&L's Generation Assets Until May 31, 2017 (Which Continues to Expose Customers To DP&L's Requests for Above-Market Prices).

The PUCO's decision that DP&L should not be required to divest its generation assets before May 31, 2017 is in error for several reasons. First, Ohio's other electric utilities have either divested or committed to divesting in the near future, long before DP&L indicates that it is able or willing to divest. FirstEnergy has been divested since 2005,[162] and AEP Ohio and Duke Energy will likely complete divestment of their generation assets in the near future, since FERC has approved their requests to divest their assets to non-utility affiliates.[163]

Second, DP&L has indicated that it could divest its generating assets earlier than 2017. Specifically, DP&L has stated that it can divest its generation assets as early as

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[162] *See* Ohio Edison 2005 Annual Report to Shareholders, pages 3-4, "FirstEnergy Intra-System Generation Asset Transfers."

[163] FERC authorized the divestiture of Duke's generating assets in an order issued on September 5, 2012. *Cinergy Corp. et al.,* EC12-90-000, 140 FERC ¶ 61,180 (FERC September 5, 2012). FERC authorized Ohio Power Company's divestiture of its generating assets on April 29, 2013. *Ohio Power Company; AEP Generation Resources Inc.*, Docket No. EC13-26-000, 143 FERC ¶ 61,075 (FERC April 29, 2013).

September 1, 2016.[164] It is therefore error for the PUCO to unnecessarily grant DP&L additional time to divest.

Third, DP&L carries the burden of proof that it cannot reasonably divest at an earlier date. DP&L argued that it could not divest before September 1, 2016 because of provisions in its first and refunding mortgage bonds that prohibit calling such bonds at an earlier date.[165] This was based on the testimony of DP&L's Chief Financial Officer, Craig L. Jackson. The PUCO found that defeasement and release of the first and refunding mortgage bonds are the only options for earlier divestment and that these options "present significant financial risk to DP&L."[166]

But Mr. Jackson's testimony was unconvincing and the PUCO should not rely upon it. Divestment of EDUs' generation assets to a separate affiliate was mandated in 1999 by Senate Bill 3 with "functional separation" intended only as an "interim" measure.[167] Fourteen years later, DP&L has not yet filed its plan for divestment and has only committed to do so by the end of the current year.[168] To the extent that further postponement is the result of refinancing its first and refunding mortgage bonds, the PUCO erred in approving DP&L's delaying tactic. In conducting its review, the PUCO should be cognizant that the non-callable status of DP&L's then-extant first and refunding mortgage bonds expired in 2002.[169] But DP&L refinanced those bonds with

[164] DP&L witness Jackson testified that the no-call provisions that impose an impediment on divestment expire in September 2016. Transcript Volume I-public, page 126. The PUCO acknowledged this time frame in its September 4, 2013 Order at 15.

[165] Transcript Volume I-public, page 126; DP&L Exhibit 16 at 2-4.

[166] September 4, 2013 Order at 15, *citing* DP&L Exhibit 16 at 2-4.

[167] R.C. 4928.17.

[168] Direct Testimony of DP&L witness Timothy Rice at 4.

[169] OCC Exhibit 10 at 17-18.

other non-callable bonds,[170] imposing the limitations to which DP&L now points to justify the postponement of its divestment. Mr. Jackson testified that DP&L saved money by refinancing with non-callable bonds as compared to callable bonds.[171] He also testified that at the time of refinancing these bonds, DP&L was not anticipating "full legal separation" – despite the law's mandate for full legal separation.[172] However, he was unable to identify the differential in cost that justified refinancing with non-callable bonds and the continuation of this impediment to divestment.[173]

Finally, it is DP&L's claimed financial integrity issues which drive its SSR claim, and which are directly attributable to the generation assets that DP&L has not yet divested. Without evidence that the costs of achieving an earlier divestment exceed the financial impact of retaining the generation assets on DP&L, the PUCO erred in postponing the date of divestment.

In light of these facts, the PUCO should not accept DP&L's claim that it cannot divest at an earlier date. The PUCO erred in finding that DP&L met its burden of proof. DP&L did not show that its non-callable bonds prevent divestment earlier than September 1, 2016. Nor did the PUCO's determination to postpone divestment until the even later date of May 31, 2017 have any evidentiary basis. OCC notes that the PUCO's September 6, 2013 Entry *Nunc Pro Tunc* extended the date for divestment from December 31, 2016 as provided in its September 4, 2013 Order, without explanation.[174]

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[170] FES Exhibit 5.

[171] Transcript Volume III-public, pages 696, 772.

[172] Transcript Volume I-public, page 124; R.C. 4928.17.

[173] Transcript Volume III-public, page 772.

[174] September 6, 2013 Entry at 2.

As discussed earlier, the PUCO erred in extending this date without the findings required by R.C. 4903.09.

The PUCO erred in postponing DP&L's divestment until May 31, 2017. Ohio's other electric utilities will be divested years before the PUCO has required DP&L to divest. And even DP&L has indicated that it could divest earlier. The PUCO should grant rehearing and find that DP&L has not met its burden of proof to show that it could not divest in the near future. Consequently, the PUCO should direct DP&L to promptly divest its generation assets.[175]

O. The PUCO Erred In Adopting A 1 Coincident Peak Demand Cost Allocation For The Service Stability Rider.

The PUCO erred when it allocated the costs of DP&L's proposed Service Stability Rider between customer classes based on a 1 coincident peak ("1 CP") demand allocation, as recommended by OEG witness Lane Kollen.[176] In support of such allocation, the PUCO stated that this "reflects the underlying character of the SSR charges."[177] This PUCO finding is wrong.

First, and most importantly, a 1 CP demand allocation should be rejected because OEG is wrong in its position that the SSR "represent[s] 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."[178] The PUCO rejected OEG's position that DP&L's SSR claim is related to the recovery of generation-related

[175] Post-Hearing Initial Brief of OCC at 97; Post-Hearing Reply Brief of OCC at 65.

[176] September 4, 2013 Order at 26.

[177] September 4, 2013 Order at 26, *citing* to OEG Exh. 1 at 7-8.

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

"costs."[179] Further, the PUCO held that the proposed SSR charges do not represent "transition revenues or stranded costs" but is "the minimum amount necessary to maintain [DP&L's] financial integrity to provide" SSO service.[180] Thus, the PUCO has itself rejected OEG's position that it is production-related costs, driven by customers' peak demand, that are responsible for DP&L's SSR claim. Instead, it is the ***volumes of energy switching and the volumes which will be subject to competitive bid pricing***, that are driving DP&L's claim. OCC's expert on class allocation and rate design, OCC witness Scott Rubin, explained the reasons that underlie DP&L's proposed "financial integrity" charges:

> The purpose of the SSR is to compensate DP&L for the impact on its financial integrity of its allegedly "lost" margin on electricity sales that it would have made if customers had not switched to another supplier to purchase electricity, coupled with the market price for generation being lower than DP&L's embedded generation-related cost of service. That is, the proposed SSR is solely related to costs associated with electricity sold to customers. Consequently, it is properly allocated to each customer class on a KWh basis.[181]

It would be inappropriate to allocate any of these costs on a peak demand basis when it is not production-related costs or customer peak demands related to such costs that are driving the charge. It is kWh usage. The PUCO erred in adopting a production demand allocator when the SSR relates to usage, not to generation costs.

Second, DP&L's generation assets are no longer subject to cost-based regulation. Capacity costs associated with generation are now allocated through PJM and energy is

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[179] September 4, 2013 Order at 21-22 (the PUCO held that DP&L's proposed SSR is related to "financial integrity," not stranded generation costs that should have been collected prior to December 2010).

[180] September 4, 2013 Order at 22.

[181] Direct Testimony of OCC witness Scott Rubin at 9.

priced volumetrically.[182] Since DP&L's own rationale for needing an SSR is "solely related to electricity consumption,"[183] 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."[184] Charging the SSR on a production allocator of any kind would make such charges related to the cost of generating capacity. Since an EDU's generating capacity is not subject to cost-based regulation,[185] the PUCO's authorization of a production cost allocator is tantamount to imposing an illegal generation charge on customers.[186]

Third, it should be emphasized that OEG witness Kollen, who sponsored OEG's recommendation lacks expertise in cost allocation. He could not recall ever testifying on any cost allocation study for production plant.[187] He had no knowledge of testifying to a 1 CP methodology or any other allocation methodology for production plant.[188] Additionally, Mr. Kollen did not prepare a proposed revenue allocation or any quantitative analysis of each customer class's responsibility for these charges.[189] Mr. Kollen described his recommendation as "simplistic."[190]

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

[183] Direct Testimony of OCC witness Scott J. Rubin at 12.

[184] *Id.* at 13.

[185] R.C. 4928.38 (providing that EDUs are "fully" on their own in the competitive generation market as of the end of their market development periods).

[186] *Id.*

[187] Transcript Vol. VIII-public at 1975-76. OEG witness Mr. Kollen testified that the last time he performed a cost allocation study was more than five years ago and that the testimony he presented in this proceeding was actually prepared by his associate, Stephen Baron.

[188] Transcript Vol. VIII-public at 1976.

[189] Transcript Vol. VIII-public at 1977.

[190] Transcript Vol. VIII-public at 1976.

The PUCO's reliance on Mr. Kollen's class allocation recommendation is in error. And the PUCO should not inadvertently revisit an AEP Ohio-type customer back-lash by approving a class allocation methodology[191] without the benefit of knowing the impact of such a decision.

Finally, OCC would emphasize that, regardless of the customer class allocator determined to be appropriate, the PUCO should analyze and consider customer bill impact in its decision. OEG's witness provided no analysis of customer bill impact from his proposed 1 CP allocator. This is important information for the PUCO to know. But OEG's witness failed to present either a revenue allocation or bill impact analysis. The PUCO erred in accepting Mr. Kollen's unsupported 1 CP methodology without any evidence in the record of the impact the allocation will have on customers' bills.

The PUCO erred in allocating costs based on a production demand allocator when DP&L's claim for the SSR is based on the financial impact of customer load switching and is unrelated to production costs. The PUCO also erred in adopting Mr. Kollen's analysis, given his limited experience performing cost allocation studies and his failure to perform a revenue allocation or bill impact analysis. The result is the imposition of unlawful and unreasonable charges on customers. Any "financial integrity" charge should be allocated and collected on a per-kWh basis. Accordingly, the PUCO should grant rehearing on this issue.

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[191] *See 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 at al., Entry on Rehearing (January 23, 2012) at ¶19.

P. The PUCO Erred In Failing To Consider Or Address Whether The PUCO-Modified Electric Security Plan Ensures The Availability to Consumers Of Reasonably Priced Retail Electric Service As Required By R.C. 4928.02(A). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(A).

The PUCO erred in failing to evaluate the affordability of the rates that it authorized DP&L to charge customers beginning in 2014. The Ohio General Assembly declared affordability of electric service to be one of the key policies to be implemented as the State transitions to a competitive retail electric marketplace. Specifically, R.C. 4928.02(A) provides that it is state policy to:

> (A) *Ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and **reasonably priced** retail electric service*; *(Emphasis added).*

R.C. 4928.06(A) requires the PUCO to ensure that the policies specified in section R.C. 4928.02 are effectuated beginning on the starting date of competitive retail electric service. Despite a number of parties' presentation of evidence and/or briefs on this issue,[192] the PUCO neglected to even mention the state's affordability policy in its September 4, 2013 Order or its September 6, 2013 Entry *Nunc Pro Tunc*. This is troubling. The absence of a determination, based on evidence of record, that the PUCO-approved ESP produces reasonably priced electric service is fatal to the validity of any rate-setting order under Chapter 49 of the Revised Code.

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[192] *See* Post-Hearing Initial Brief of OCC at 97-103; Post-Hearing Initial Brief of Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition at 14-15; Post-Hearing Initial Brief of City of Dayton at 4 (focused on impact on low-income customers); Post-Hearing Initial Brief of OMA Energy Group at 2-3 (stating that "DP&L's SSR does not comply with Ohio's policy of ensuring the availability of reasonably priced retail electric service); Post-Hearing Initial Brief of Ohio Hospital Association at 6-7 (stating that DP&L's proposed SSR "runs counter" to R.C. 4928.02(A).

The PUCO failed to address the evidence presented in this case that DP&L's current electric rates are high and that some of DP&L's customers are struggling to pay their electric bills. Specifically, that (1) DP&L's bills are 10.9% higher than the average electric bill in the state when they were 5.8% lower than them 5 years ago[193]; (2)32.5% of DP&L's customers were struggling to pay, or unable to pay, their electric bills in 2012[194]; (3) DP&L disconnected 34,389 customers in 2012 and has an average disconnection rate of 7.5% compared to an average disconnection rate of 4.8% for Ohio electric utilities,[195] and (4) DP&L's filed proposal would make the average electric bill of DP&L customers 13.8% higher than the average electric bill of other customers.[196] Thus, the PUCO should grant rehearing on the issue of affordability.

Q. The PUCO Erred In Failing To Address Whether The PUCO-Modified Electric Security Plan Protects At-Risk Populations As Required By R.C. 4928.02(L). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(L).

There are numerous factors which contribute to the current unaffordability of DP&L's rates to at-risk populations.[197] The PUCO should grant rehearing of its September 4, 2013 Order to review how DP&L's rates can be moderated to lessen the

[193] Direct Testimony of OCC witness James D. Williams at 21.

[194] Direct Testimony of OCC witness James D. Williams at 7.

[195] Direct Testimony of OCC witness James D. Williams at 7.

[196] Direct Testimony of OCC witness James D. Williams at 21. This would increase to 16.0% (higher than the average electric bill) if DP&L's proposed storm cost charges to customers at Case No. 12-3062-EL-RDR are approved. *Id.*

[197] These include (1) the high level of DP&L's residential customer bills that are nearly 11% higher than the average Ohio residential electric bill; (2) the significant increase in DP&L's charges over the last five years – increasing from 10¢/kWh to 14¢/kWh; (3) DP&L's credit and collection policies that, in 2012, contributed to nearly 150,000, or 32.5%, of customers on Commission-ordered payment plans and 7.5% of total customers, or 34,389 being disconnected; and (4) the unavailability of bill payment assistance. Direct Testimony of OCC witness James D. Williams at 7-21. These factors, among others, caused a 68% increase in the number of DP&L customers on PIPP and a 90% increase in the number of PIPP customers disconnected for non-payment. Direct Testimony of OCC witness James D. Williams at 10.

impact on at-risk populations, how its credit and collection practices and policies might be modified, and to encourage DP&L shareholders to increase their contribution to alleviating the difficult circumstances facing such at-risk populations in DP&L's service territory. Notably, the PUCO has directed DP&L's shareholders to fund an economic development program in the amount of $2 million per year for 2014-2016.[198] And the PUCO has approved ESPs of other Ohio electric utilities that contained shareholder funding of low-income assistance programs.[199] The PUCO should not ignore the needs of at-risk populations while directing shareholder funding of private sector investment.

The Ohio General Assembly also declared the protection of "at-risk populations" to be one of the key policies to be implemented as the State transitions to a competitive retail electric marketplace. Specifically, R.C. 4928.02(L) provides that it is state policy to:

> (L) ***Protect at-risk populations****, including, but not limited to, when considering implementation of any new advanced energy or renewable energy resources; (Emphasis added).*

As indicated above, R.C. 4928.06(A) requires the PUCO to ensure that the policies specified in section R.C. 4928.02 are effectuated beginning on the starting date

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[198] September 4, 2013 Order at 42-43.

[199] *In the matter of the application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan on behalf of Ohio Edison Company and The Toledo Edison Company and The Cleveland Electric Illuminating Company,* Case No. 12-1230-EL-SSO, Opinion and Order at 16, 42-43 (July 18, 2012) ($8 million in shareholder-funded low-income assistance over two years); *.In the matter of the application and stipulation and recommendation of Ohio Edison Company, The Cleveland Electric Illuminating and The Toledo Edison Company for authority to establish a standard service offer pursuant to R.C. 4928.143 in the form of an electric security plan*, Case No. 10-0388-EL-SSO, Opinion and Order at 44 (August 25, 2010) (providing $12 million in shareholder-funded low-income assistance over 3 years); *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, Opinion and Order at 24, 64 (December 14, 2011) (providing $3 million annually in low-income assistance).

of competitive retail electric service. But the PUCO did not address whether the PUCO-modified ESP protects at-risk populations.

Specifically, the PUCO erred in failing to discuss the impacts on at-risk populations and limit any charges to such customers. The facts regarding the poverty in DP&L's service territory, the number of disconnections, and the already high level of customer bills compel reconsideration of the impact, as well as justification for, the rate increases that the PUCO approved.[200]

The PUCO also erred in failing to initiate a review of DP&L's credit and collection policies and practices with the PUCO Staff and OCC, to seek cost-effective ways to reduce the number of disconnections.[201] While Ohio Admin Code 4901:1-18 provides minimum service standards, Mr. Williams testified that DP&L "can adopt other policies that are more conducive in helping reduce the number of disconnections."[202] Given the 90% increase in the number of PIPP customers disconnected from 2007 to 2012, and the 32.5% rate of default on Commission-ordered payment plans (compared to 16.9% for other Ohio electric utilities), the PUCO erred in failing to take appropriate measures to reduce the high number of DP&L customers being disconnected. The PUCO erred in failing to direct an assessment of other cost-effective policies and practices that

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[200] These facts were detailed by OCC witness Mr. Williams in his testimony. They include an increase in the number of PIPP customers from 21,242 in 2007 to 35,715 in 2012; a 90% increase in the number of PIPP customers disconnected from 2007 to 2012; an increase in the number of customers on Commission-ordered payment plans because of inability to pay their electric bills; a 32.5% rate of default on Commission-ordered payment plans, compared to 16.9% for other Ohio electric utilities; the significant number of medical certifications in 2012 for customers who would have otherwise been disconnected (6,316 DP&L customers).

[201] Direct Testimony of OCC witness James D. Williams at 25.

[202] Direct Testimony of OCC witness James D. Williams at 25.

could be implemented to reduce disconnections.[203] Such an assessment should consider not only families that qualify for the low-income PIPP Plus program but families that are above these income levels and still experience difficulty making their payments.[204]

Finally, the PUCO erred in failing to encourage DP&L to initiate a shareholder-funded bill payment assistance program until such time as the DP&L disconnection rate is more closely aligned with other Ohio electric utilities.[205] Shareholder funding at a level of $1.5 million per year could help provide an incentive for reducing disconnections and potentially reduce the DP&L disconnection rate from the current 7.5 percent to a level closer to that of other utilities.[206] Such shareholder funding would be consistent with the PUCO's requirement for economic development funding to ensure the vitality of the Dayton region.[207]

IV. CONCLUSION

For all the reasons discussed above, the PUCO should grant rehearing on OCC's claims of error and modify or abrogate its September 4, 2013 Opinion and Order and September 6, 2013 Entry *Nunc Pro Tunc* consistent with Ohio law and reason.

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[203] Direct Testimony of OCC witness James D. Williams at 25. OCC witness Williams identified a range of possible remedies, including suspending disconnections during inclement weather, adjusting due dates when possible, reducing payment plan costs, suspension of delayed payment charges, and reducing bill payment charges. *Id. at 26-27.* Suspension of disconnections during times of especially hot or cold weather is necessary given the health and safety concerns mentioned earlier. *Id.* The review should also consider suspending disconnections when temperatures are below 32 degrees or higher than 90 degrees Fahrenheit. *Id.* Furthermore, the review should include an examination of the effectiveness of medical certifications for customers who have chronic illnesses. *Id.*

[204] Direct Testimony of OCC witness James D. Williams at 25-26. Mr. Williams detailed how payment plans can be better customized to customers' payment needs. *Id. at 27.* Changes to payment plans might include "lower out-of pocket upfront payments and the use of ceiling amounts," as well as the adjustment of due dates and the limitation of "additional bill payment charges" (such as late payment charges) in order to "make more resources available for actual payment of electric charges." *Id.*

[205] Direct Testimony of OCC witness James D. Williams at 28.

[206] Direct Testimony of OCC witness James D. Williams at 29.

[207] September 4, 2013 Order at 42-43.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing* (Public Version), was served on the persons stated below via electronic transmission, this 4th day of October, 2013.

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