BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 16-0395-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 16-0396-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	:	Case No. 16-0397-EL-AAM

REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO IMPLEMENT THE SSR EXTENSION RIDER

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I. INTRODUCTION AND SUMMARY

The Dayton Power and Light Company's ("DP&L") motion in this case seeks approval of the SSR-E starting January 1, 2017, but only if another stability charge has not been approved in this case. There is thus no need for the Commission to decide this motion now, as there is still time for a stability charge to be approved in this case before the end of the year.

If the Commission has not approved a stability charge for DP&L by the end of the year, the Commission must allow DP&L to implement the SSR Extension Rider ("SSR-E") on January 1, 2017. DP&L has filed testimony showing that the financial integrity of DP&L Inc. and DP&L is dependent on a stability charge when the SSR expires at the end of this year. DP&L has filed testimony showing that it has substantially complied with the Commission's conditions for implementing the SSR-E. DP&L also has demonstrated the legality of both the SSR and the SSR-E.

Various intervenors oppose DP&L's Motion to Implement the SSR-E. They quibble over DP&L's continuing need for a financial stability charge, argue that DP&L has not sufficiently complied with the Commission's conditions, and attempt to re-litigate the legality of the SSR and SSR-E, while that issue remains pending on appeal. As shown below, each of their arguments are without merit and – if adopted – would undermine DP&L's ability to provide stable, safe, and reliable retail electric service. Sept. 4, 2013 Opinion and Order, pp. 21-22 (Case No. 12-426-ELSSO).

II. DP&L HAS SUBSTANTIALLY COMPLIED WITH THE CONDITIONS FOR IMPLEMENTING THE SSR-E

As shown in the March 30, 2016 Direct Testimony of Sharon Schroder in Support of DP&L's Motion for Approval of the SSR-E ("Schroder Testimony"), DP&L has substantially complied with the four procedural conditions adopted by the Commission to implement the SSR-E: (1) file a distribution rate case by July 1, 2014; (2) file an application to divest its generation assets by December 31, 2013 and plan to divest those assets by December 31, 2016; (3) file an application to modernize its electric distribution infrastructure by implementing Smart Grid and Advanced Metering Infrastructure by July 1, 2014; and (4) file a billing modernization plan by December 31, 2014. Schroder Testimony pp. 3-6.

1. File a distribution rate case: Several intervenors note (IEU, p. 4; OCC, pp. 8-9, 11, 13; Dayton/Honda, p. 4; Kroger, p. 2; OMAEG, p. 4) that DP&L filed its distribution rate case after the Commission's deadline. However, the fact remains that DP&L has now filed that case (Case No. 15-1830-EL-AIR), and intervenors can evaluate its proposed rates.

Moreover, Witness Malinak's testimony is premised on the Commission approving DP&L's proposal in that case. Feb. 22, 2016 Direct Testimony of R. Jeffrey Malinak ("Malinak Testimony"), pp. 37-38 ("In addition, the projections of DP&L-TD's financial results are consistent with those filed in DP&L's distribution rate case. Thus, the projections assume that the PUCO will approve DP&L's distribution rates in that case."). Although IEU and OCC complain that DP&L has not exhausted all opportunities for rate relief, it is unlikely that they and other intervenors will argue that DP&L should receive a bigger increase in DP&L's distribution rate case than DP&L is requesting. The outcome of Case No. 15-1830-EL-AIR will not reduce the need for the SSR-E. To the contrary, any reduction in DP&L's request in the distribution rate case will increase DP&L's need for the SSR-E. The intervenors' ability to argue that the SSR-E should be lower was not prejudiced by DP&L's timing in filing the distribution rate case.

2. **__Divest generation assets__:** While IEU (p. 13) attempts to re-litigate DP&L's application to divest its generation assets, the Commission already has approved DP&L's timely application. Sept. 17, 2014 Finding and Order, pp. 1, 22 (Case No. 13-2420-EL-UNC). Thus, DP&L has complied fully with this condition to implement the SSR-E. Schroder Testimony, p. 5.

3. **__Smart Grid/Advanced Metering Infrastructure__:** Several intervenors (IEU, p. 14; OCC, p. 15; Dayton/Honda, p. 5; Kroger, p. 2; OMAEG, p. 4) complain that DP&L has not yet filed a proposal to implement Smart Grid and Advanced Metering Infrastructure. Although DP&L is willing to consider implementing these technologies, not one intervenor has identified any prejudice that has resulted from DP&L not filing this plan. They do not claim that they would have been better off if AMI/Smart Grid had been implemented.

4. **__Billing system__:** The same intervenors (IEU, p. 15; OCC, p. 15; Dayton/Honda, p. 6; Kroger, p. 2; OMAEG, p. 4) complain that DP&L has not filed a plan to modernize its billing system. However, as Witness Schroder testifies, "DP&L has taken steps to modernize its billing system to facilitate competition in the state." Schroder Testimony, pp. 5-6. DP&L's billing system can perform rate-ready billing and percentage off price-to-compare, and has a CRES portal, which allow DP&L-registered suppliers "to manage pricing options for rate ready billing," and which provides "daily updates to sync lists and payment agreement lists, and real time access to historical usage." __Id__. Contrary to the conclusory assertion of OMAEG (p. 4),

no prejudice has been caused by DP&L not filing an application to memorialize these billing-system updates.

III. DP&L'S DIVIDEND PAYMENTS TO DPL INC. TO PAY DOWN AND RETIRE DEBT DO NOT NEGATE THE NEED FOR THE SSR-E

Some intervenors argue (IEU, pp. 9-10; OCC, p. 9; Kroger, p. 3; OMA, p. 3) that dividends paid by DP&L to its corporate parent, DPL Inc., demonstrate that a stability charge is not needed. However, as shown in the testimony of Craig Jackson, those dividends have been "used to meet debt obligations and retire debt at DPL Inc.," March 30, 2016 Direct Testimony of Craig L. Jackson in Support of DP&L's Motion for Approval of the SSR-E ("Jackson Testimony"), p. 3, thus facilitating the divestment of DP&L's generation assets as required by the Commission. Sept. 4, 2013 Opinion and Order, p. 16 (Case No. 12-426-EL-SSO). At the same time, "DPL Inc. has not made any divided payments to AES since 2012 and none are projected to be made during the forecast period included in this case." Jackson Testimony, p. 3. Thus, while the Commission may consider "dividends paid to parent companies" in implementing the SSR-E, Sept. 4, 2013 Opinion and Order, p. 27, the dividends identified by intervenors are necessary to comply with DPL Inc.'s debt obligations. They are not a windfall to shareholders.

Instead of focusing on dividend payments, intervenors should have examined DP&L's return on equity. In Case No. 12-426-EL-SSO, the Commission authorized the SSR so that DP&L could "achieve an ROE target of 7 to 11 percent." Sept. 4, 2013 Opinion and Order, p. 25. As OCC concedes (Table 1, p. 10), DP&L has maintained an ROE between 6.87% and 9.98% since 2013 with the assistance of the SSR. IEU asserts (p. 10) that DP&L must have "cash flow problems that might give rise to a claim of a financial emergency" before the Commission can implement the SSR-E. Instead, the Commission should look to whether DP&L

is achieving the Commission-approved ROE for this ESP once the SSR expires. Past dividends issued to pay debt obligations do not negate the financial need.

IV. IEU'S CAPITAL EXPENDITURE ARGUMENT HAS NO MERIT

IEU also complains (p. 11) that DP&L does not address capital reduction expenditure levels. However, DP&L is already projected to make limited capital investments due to its financial condition. Miller Testimony, pp. 3-6. Further, the Commission previously declined to offset DP&L's SSR by such expenses because "DP&L should retain the ability to impact its ROE through additional measures such as capital expenditure reductions." Sept. 4, 2013 Opinion and Order, p. 25. Accord: June 4, 2014 Fourth Entry on Rehearing, p. 9. The Commission should continue to use that approach.

V. THE FINANCIAL INTEGRITY OF DP&L DEPENDS ON THE FINANCIAL INTEGRITY OF DPL INC.

A few intervenors argue (IEU, p. 6; OCC, p. 8; Dayton/Honda, p. 2) that the evidence offered by DP&L to implement the SSR-E is insufficiently specific since it focuses on the financial integrity of DPL Inc. That argument is inconsistent with the statutory scheme of R.C. 4928, as well as the financial interdependence of DP&L and DPL Inc.

In Case No. 12-426-EL-SSO, the Commission authorized DP&L to implement the SSR-E pursuant to R.C. 4928.143(B)(2)(d). That statute does not limit the availability of stability charges to electric distribution utilities that can demonstrate a financial need independent of their corporate parent. Instead, the statute allows electric security plans to include:

> "Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service,

> carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service."

R.C. 4928.143(B)(2)(d) (emphasis added).

Elsewhere, "retail electric service," is defined as "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption." R.C. 4928.01(A)(27) (emphasis added).

The Commission held in DP&L's last ESP case that the SSR and the SSR-E are not dependent on DP&L's retention of its generation assets:

> "As the Commission has previously noted, the SSR and SSR-E are financial integrity charges intended to maintain the financial integrity of the entire company, not just the generation business. Order at 21-22; Second Entry on Rehearing at 3. Therefore, when DP&L does, in fact, divest the generation assets, it does not necessarily follow that the SSR or the SSR-E must end. Instead, the structure of the SSR-E, and the conditions regarding its possible implementation, will ensure that, if the generation assets have been divested, DP&L must demonstrate a continuing need for a stability rider."

June 4, 2014 Fourth Entry on Rehearing, p. 9 (Case No. 12-426-EL-SSO).

As the testimony of Witness Malinak shows, the financial stability of DP&L is dependent on the financial stability of DPL Inc. Malinak explains:

> "[A]fter separation, DP&L's coal-fired generating assets and DP&L-TD will remain intertwined through their common ownership by DPL Inc., and DP&L-TD's financial and operational performance will be affected indirectly by the health of DP&L Inc. and the generating assets; thus, my evaluation of DPL Inc. necessarily includes consideration of the impact on DP&L-TD as well."

Malinak Testimony, p. 28 (emphasis added). Thus, it is proper for the Commission to consider the financial integrity of DPL Inc. in determining whether to implement the SSR-E.

VI. WITNESS MALINAK'S TESTIMONY JUSTIFIES IMPLEMENTING THE SSR-E TO COLLECT $43.2 MILLION

A stability charge is designed to maintain the financial integrity of DPL Inc. and, consequently, DP&L. Malinak Testimony, p. 62. Next year, the stability charge is designed to collect $130,825,000. Malinak Testimony, Exhibit RJM-3. However, without a stability charge in place on January 1, 2017, DP&L would need that amount from another source to ensure its financial integrity. Malinak Testimony, p. 13.

Dividing DP&L's need for $130,825,000 evenly throughout next year supports a financial integrity charge of $10.8 million per month. Over the four months of the SSR-E, that rate would result in a total charge of $43.2 million, approximately 5% less than the $45.8 million ceiling adopted by the Commission in Case No. 12-426-EL-SSO. Sept. 6, 2013 Entry Nunc Pro Tunc, p. 2 ("The amount of the SSR-E should be corrected from $92 million to $45.8 million."); Mar. 19, 2014 Second Entry on Rehearing, p. 16 ("The Commission finds that the SSR-E should end on April 30, 2017, one month prior to the end of the ESP.").

While IEU complains (p. 9) that Malinak's testimony is insufficiently specific, the Commission already approved the SSR to run for three years based on a projected annual need of $110 million. Mar. 19, 2014 Second Entry on Rehearing, p. 31. Malinak's figures provide even greater detail over a much shorter period of time. Thus, his testimony is sufficiently specific to support a $10.8 million monthly charge.

VII. DP&L'S PROJECTIONS INCLUDE PROJECTED O&M SAVINGS

A few intervenors argue (IEU, p. 10; OCC, p. 12; Kroger, p. 3; OMAEG, p. 3) that the Commission should deny DP&L's Motion to Implement the SSR-E because DP&L has not sufficiently described its projected O&M savings.

However, as Craig Jackson notes, the ESP application in this proceeding assumes O&M cost savings that have not been identified. Jackson Testimony, p. 4. These savings "are $9.2M in 2017 at DPL Inc. which includes $4.3M at DP&L." Id. "Similar O&M savings were also included in DP&L's distribution rate case (Case No. 15-1830-EL-AIR)." Id. Since these savings already are built into DP&L's projected need for a stability charge, whether they actually can be achieved would not affect the SSR-E, which also relies on those projections. In other words, if DP&L and DPL Inc. do not achieve these savings, then they alone stand to lose, not customers.

VIII. THE SSR-E IS CONSISTENT WITH OHIO LAW

In DP&L's pending case, the Supreme Court of Ohio is currently reviewing the legality of the SSR – and, by extension, the SSR-E. Ohio S. Ct. Case No. 2014-1505 (scheduled for oral argument June 14, 2016). Despite the pending appeal, several intervenors now attempt to re-litigate those issues, in light of the Court's recent decision in In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶ 43-59 (Sup. Ct. Ohio Apr. 21, 2016). However, as shown below, the AEP case does not control the legality of either the SSR or the SSR-E.

A. <u>The SSR-E Is Authorized by R.C. 4928.143(B)(2)(d)</u>

Contrary to the assertions of IEU (p. 16) and OEG (p. 3), the SSR-E – like the SSR – is a valid charge under R.C. 4928.143. The Supreme Court of Ohio settled that issue in the <u>AEP</u> case, accepting the grounds identified by the Commission in both DP&L's most recent ESP case and AEP's case. The Court reasoned:

> "Our analysis must begin with the language of the statute. <u>See</u> <u>In re Application of Ohio Power Co.</u>, 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, ¶ 20. R.C. 4928.143(B)(2)(d) does not speak to whether the 'effect of stabilizing or providing certainty regarding retail electric service' must be direct or indirect. While the stated goal is stable or certain retail electric service, the statute does not tell the commission how to reach it. This gives the commission discretion to determine how the '[t]erms, conditions, or charges' meet the criteria. <u>In re Application of Columbus S. Power Co.</u>, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 68 ('Any lack of statutory guidance on that point should be read as a grant of discretion'); <u>Payphone Assn. v. Pub. Util. Comm.</u>, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 25 ('When a statute does not prescribe a particular formula, the [commission] is vested with broad discretion').
>
> OCC has not shown an abuse of discretion. R.C. 4928.143(B)(2)(d) does not expressly exclude effects that are indirect; it does not use the word 'direct,' or even some equivalent. We would have to insert language into the statute to find in favor of OCC's preferred construction. But in construing a statute, we may not add or delete words. <u>State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.</u>, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶ 32." (Alterations in original.)

<u>In re Application of Columbus S. Power Co.</u>, 2016-Ohio-1608, at ¶ 48-49. A fixed nonbypassable rider is valid under this holding.

Moreover, Witness Malinak's testimony shows that the SSR-E would promote stability of retail electric service. Malinak Testimony, p. 59 ("I also note that the RER provides immediate long term stability and certainty regarding future cash flows, which will enable DPL

Inc. to successfully manage short-term debt maturities and mitigate both the short- and long-term debt refinancing risk inherent in the MRO scenario.").

B. The SSR-E Is Related to Default Service

OPAE argues (p. 8) that the SSR-E is not related to default service. However, the Commission already has found that "the SSR is related to default service," and that "[t]he SSR is a nonbypassable stability charge for the purpose of maintaining DP&L's financial integrity so that it may continue to provide default service." Sept. 4, 2013 Opinion and Order, p. 21. The SSR-E is no different.

The Commission's decision on that issue was correct, for several reasons.

First, "[d]efault service" is not defined by statute. Instead, § 4928.14 shows that "default service" is synonymous with SSO service. Specifically, since a failure by an alternative generation supplier to provide service results in its customers "defaulting to the utility's standard service offer," that section shows that SSO service is the "default service." R.C. 4928.14.

Second, OPAE's claim that SSO service is not default service is also directly contradicted by § 4928.141(A), which provides that an SSO "shall serve as the utility's default standard service offer." That section's plain meaning is that SSO service is "default service." The fact that an SSO is the utility's "default standard service offer" demonstrates that SSO service is the "default service," a point that OPAE entirely ignores.

Third, § 4928.64(C)(4)(a) uses the term "default service" to mean SSO service: Under § 4928.64(B)(1), a "utility shall provide from qualifying renewable energy resources . . . a portion of the electricity supply required for its standard service offer." The percentage of the utility's SSO that is required to be from renewable energy resources is set by statute. R.C. 4928.64(B)(2). However, a utility can be relieved of the obligation to provide renewable energy as part of its SSO by a "force majeure" event. R.C. 4928.64(C)(4)(a).

Critically, that section further provides that "[t]he commission may require the electric distribution utility . . . to make solicitations for renewable energy resource credits as part of its default service before the utility's . . . request of force majeure under this division can be made." Id. Thus, § 4928.64(C)(4)(a) uses the term "default service" as synonymous with SSO service. Specifically, a utility is required to include renewable energy as part of its "standard service offer." R.C. 4928.64(B)(1). The fact that a utility may be required "to make solicitations for renewable energy resource credits as part of its default service" before a force majeure event would be recognized shows that "default service" is synonymous with "standard service offer." R.C. 4928.64 (C)(4)(a).

C. The SSR-E Is Not Prohibited by R. C. 4928.38

Several intervenors (IEU, p. 18; OCC, p. 4; OPAE, pp. 3-4; and OEG, p. 1) latch onto the Court's recent decision that AEP's financial integrity charge collected the "equivalent" of transition revenue and was, therefore, barred by § 4928.38. In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶ 25 (Sup. Ct. Ohio Apr. 21, 2016). The AEP Court did not consider two arguments that are being made by DP&L in its pending appeal.

1. The "Notwithstanding" Clause of R. C. 4928.143(B) Negates the Applicability of R.C. 4928.38

DP&L has argued that fixed non-bypassable riders such as the SSR-E are lawfully pursuant to § 4928.143(B)(2)(d), which states, in pertinent part:

"(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

* * *

(2) The plan may provide for or include, without limitation, any of the following:

* * *

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;" (emphasis added)

The "[n]otwithstanding" clause establishes that a fixed non-bypassable charge is lawful even if the Court or the Commission were to conclude that it constituted a transition charge. Specifically, the sections that bar the recovery of transition costs are § 4928.141(A) and § 4928.38. Those sections are not listed as exceptions to the "[n]otwithstanding" clause. A stability charge approved under § 4928.143(B)(2)(d), thus, would be lawful even if it was a transition charge or its equivalent.

In its recent decision in the AEP case, the Supreme Court's majority opinion declined to consider whether the "[n]otwithstanding" clause saved AEP's stability charge only because "no party appears to have raised the issue." In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 38 n.3. Two Justices (O'Connor, C. J. and Lanzinger, J.) dissented and would have remanded the case for the PUCO to interpret the "notwithstanding" clause. Id. at ¶ 71-79.

The Chief Justice's separate opinion looked favorably on this "[n]otwithstanding" argument. The Chief Justice, joined by Justice Lanzinger, first criticized the majority opinion because "the majority ignores what could be significant language in the ESP statute, R.C. 4928.143(B)." Id. at ¶ 74 (emphasis added). After quoting the "[n]otwithstanding" clause, the Chief Justice recognized the "significant language" of that clause:

> "The provision could be construed to allow an ESP to include charges that other provisions of R.C. Title 49 prohibit. Here, even assuming that the majority is correct that R.C. 4928.38 bars the recovery of transition revenue, R.C. 4928.143(B) nevertheless could be read to create an exception to the prohibition on transition revenue as long as the revenues are recoverable under the requirements of R.C. 4928.143(B)(2). Stated differently, the word 'notwithstanding' could render R.C. 4928.38 inapplicable if the revenues are recoverable under one of the many provisions of R.C. 4928.143(B)(2).
>
> I recognize that the commission did not rely on the 'notwithstanding' provision of R.C. 4928.143(B) in the proceedings below.
>
> * * *
>
> Given that the 'notwithstanding' provision could create an exception to the prohibition against the recovery of transition revenue and that the commission has offered no guidance on the meaning of that provision, I would remand the cause to the commission to consider and interpret the statutory language before rendering a decision on whether AEP is improperly recovering transition costs. See, e.g., In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 31-35. By doing so, we would not only respect the role of the General Assembly to create the framework by which utilities must provide service to the millions of Ohio consumers who rely on safe, affordable electrical service, but also the collective expertise of the commission in a complex area of law that implicates important public-health and financial-policy considerations."

Id. at ¶ 76-77, 79.

In short, the "[n]otwithstanding" clause unambiguously establishes that a charge authorized by § 4928.143(B)(2)(d) will be lawful even if the Court or the Commission were to conclude that the charge is equivalent to a transition charge. As that issue was not considered by the majority of the Court in the AEP case, the Commission can consider DP&L's argument now in the first instance.

2. Ohio Rev. Code 4928.143(B)(2)(d) is the Later-Enacted Statute

DP&L has argued as a separate and independent reason that a fixed nonbypassable does not violate the prohibition (enacted in 1999) in § 4928.38 against the recovery of costs that are the "equivalent" of transition costs. Specifically, § 4928.143(B)(2)(d) was included in Am.Sub.S.B. 221, which was enacted in 2008.

As shown above, the Supreme Court of Ohio recently held that a stability charge is lawful under § 4928.143(B)(2)(d). In re Columbus S. Power, 2016-Ohio-1608, ¶ 43-59. Since § 4928.143(B)(2)(d) was enacted after § 4928.38, a stability charge approved under § 4928.143(B)(2)(d) is lawful even if it is equivalent to a transition charge. R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.") The Court did not address this argument in AEP's case.

In its opinion, the Supreme Court of Ohio noted that § 4928.141(A), which was also included in Am.Sub.S.B. 221 (i.e., at the same time as § 4928.143(B)(2)(d)), includes a prohibition against the recovery of "'previously authorized allowances for transition costs[,]'" quoting § 4928.141(A). In re Columbus S. Power, 2016-Ohio-1608, at ¶ 17. That section does not change the analysis because the term "transition cost" is defined by statute, and a fixed NBC does not satisfy the statutory definition.

Specifically, transition costs are defined by statute as historic costs that a utility incurred in the past (generally, costs of constructing generation plants). R.C. 4928.39(A) ("The costs were prudently incurred.") (emphasis added); R.C. 4928.39(B) ("The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.") (emphasis added); In re Columbus S. Power, 2016-Ohio-1608, at ¶ 22.

In contrast, a fixed non-bypassable charge under § 4928.143(B)(2)(d) would be set at an amount to allow the utility to provide stable retail electric service in the future. Therefore, a fixed NBC would not recover "transition costs," as defined by statute, since a fixed non-bypassable charge would be forward looking.

AEP's RSR was based on projections of future revenues and expenses. In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 24. In its decision in the AEP case, the Court nevertheless held that AEP's RSR recovered the "equivalent" of transition costs, and that AEP's RSR was thus barred by § 4928.38. Id. at ¶ 25. As shown above, the statutory bar against recovery of the "equivalent" of transition costs in § 4928.38 does not bar the recovery of a fixed nonbypassable, because § 4928.143(B)(2)(d) is the later-enacted statute.

While § 4928.141(A) was enacted at the same time as § 4928.143(B)(2)(d), that section does not bar the recovery of costs that are the "equivalent" of transition costs. Instead, it bars the recovery of only "transition costs." Since a fixed non-bypassable is forward-looking, it does not satisfy the definition of transition costs. Thus, it is not barred by § 4928.141(A).

This conclusion – that the equivalent of transition costs can be recovered through § 4928.143(B)(2)(d), and that such recovery is not barred by § 4928.141(A) – is consistent with the structure of Am.Sub.S.B. 221. Specifically, when the General Assembly partially re-regulated the generation market in 2008, it authorized utilities to recover charges to allow them to provide stable "retail electric service" – including generation service, R.C. 4928.143(B)(2)(d). Such a charge would necessarily be forward-looking. The General Assembly thus continued the prohibition against the recovery of transition costs (i.e., historic costs of constructing generation plants) in § 4928.141(A), but authorized charges to stabilize the generation market on a forward-looking basis in § 4928.143(B)(2)(d).

In short, a fixed non-bypassable charge is recoverable under § 4928.143(B)(2)(d), and the bar against the recovery of costs that are the "equivalent" of transition costs in § 4928.38 is inapplicable because § 4928.143(B)(2)(d) is the later-enacted statute. Further, a fixed non-bypassable charge is forward-looking and does not satisfy the statutory definition of a "transition cost"; the bar to recovering transition costs in § 4928.141(A) is thus inapplicable.

D. The SSR-E Is Not Prohibited by R.C. 4928.02(H) or 4928.17

IEU also argues (pp. 20-23) that the SSR-E is prohibited by § 4928.02(H), which prohibits anticompetitive subsidies, and § 4928.17, which prohibits commitment of funds to maintain the financial viability of an affiliate. However, the same reasons that negate the applicability of § 4928.38 – i.e., the "[n]otwithstanding" clause of § 4928.143(B)(2) and the later-enacted statute rule (both § 4928.02(H) and § 4928.17 were enacted in 1999) – apply with equal force to these statutes.

IX. THE SSR-E IS CONSISTENT WITH FEDERAL LAW

IEU (p. 25) also erroneously argues that the SSR-E is preempted by federal law, given the recent decision by the United States Supreme Court in Hughes v. Talen Energy

Marketing, LLC, ___ U.S. ____ , 136 S.Ct. 1288 (2016). In that case, Maryland's utility commission required a local utility to sign a contract for differences ("CFD") with a company that agreed to construct generation in Maryland. Id. at 1294-95. That CFD included a price at which the generator was willing to sell power. Id. Under that CFD, the generator sold capacity to PJM, and if the capacity cleared the market, then the generator would collect from or charge to the utility the difference between the PJM price and the CFD price; the utility would then charge or credit the difference to customers. Id. at 1295.

The Hughes Court concluded that such an arrangement was preempted by FERC:

> "We agree with the Fourth Circuit's judgment that Maryland's program sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators. As earlier recounted, see supra, at 2, the FPA allocates to FERC exclusive jurisdiction over 'rates and charges . . . received . . . for or in connection with' interstate wholesale sales. §824d(a). Exercising this authority, FERC has approved the PJM capacity auction as the sole ratesetting mechanism for sales of capacity to PJM, and has deemed the clearing price per se just and reasonable. Doubting FERC's judgment, Maryland—through the contract for differences—requires CPV to participate in the PJM capacity auction, but guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to PJM. By adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf. [(Omission of text in original; citation omitted.)]
>
> [In Mississippi Power & Light], [t]his Court invalidated the States' attempts to second-guess the reasonableness of interstate wholesale rates. "'Once FERC sets such a rate,'" we observed in Mississippi Power & Light, "'a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.'" 487 U. S., at 373 (quoting Nantahala, 476 U. S., at 966). True, Maryland's program does not prevent a utility from recovering through retail sales a cost FERC mandated it incur—Maryland instead guarantees CPV a certain rate for capacity sales to PJM regardless of the clearing price. But Mississippi Power & Light and Nantahala make clear

> that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation."

Id. at 1297, 1298-99.

However, the Hughes Court's opinion included the following limiting paragraph:

> "Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation. . . .' So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable."

Id. at 1299 (emphasis added). Thus, the Hughes opinion is not to be read broadly but is limited to its facts.

In short, the reason that the CFD was preempted in Hughes was the fact that the generator was being compensated for wholesale sales at a rate different from the rate established through PJM auctions. Id. at 1297, 1298-99. The Court made plain that its opinion does not prohibit "direct subsidies" that are "untethered to a generator's wholesale market participation." Id. at 1299 (internal quotation marks and citation omitted).

A fixed nonbypassable charge is consistent with the Court's decision in Hughes, because it would be "untethered to a generator's wholesale market participation," i.e., not dependent on sales into PJM. Thus, the SSR-E is not preempted.

X. THE MOTION TO IMPLEMENT THE SSR-E IS PROCEDURALLY PROPER

OCC argues (p. 6) that the form of the filing – the Motion to Implement the SSR-E in this proceeding – is procedurally improper. However, resolving the SSR-E in this case promotes administrative economy and reduces duplication of efforts since the Motion cites to Malinak's testimony, which was filed with DP&L's ESP application.

Moreover, pursuant to the Attorney Examiner's April 13, 2016 Entry, DP&L served notice of the Motion on all parties to its prior ESP case in which the SSR-E was authorized. Apr. 14, 2016 Notice of Filing Motion to Implement the SSR-E (Case No. 12-426-EL-SSO). Thus, no intervenor can argue that it will suffer prejudice by the Commission deciding whether to implement the SSR-E in this proceeding.

XI. A HEARING IS NOT NECESSARY TO IMPLEMENT THE SSR-E

Some intervenors argue (OCC, p. 6; OPAE, p. 2; and OEG, p. 4) that the Commission must hold an evidentiary hearing to implement the SSR-E. However, the Commission imposed no such requirement when it allowed DP&L to request an extension of the SSR. Sept. 4, 2013 Opinion and Order, pp. 26-28; Sept. 6, 2013 Entry Nunc Pro Tunc, pp. 2-3; Mar. 19, 2014 Second Entry on Rehearing, pp. 12-16; June 4, 2014 Fourth Entry on Rehearing, pp. 7-12.

Instead, along with various conditions, the Commission ruled that "DP&L must demonstrate a continuing need for a stability rider." June 4, 2014 Fourth Entry on Rehearing, p. 9. Accord: Mar. 19, 2014 Second Entry on Rehearing, p. 10 ("The SSR-E will provide updated and more accurate figures for determining the appropriate amount for a stability charge approaching the end of the ESP term.") (emphasis added). DP&L has demonstrated the need for that rider. Jackson Testimony, p. 3 ("The testimony of R. Jeffrey Malinak, filed in this proceeding on February 22, 2016, demonstrates that DP&L's financial integrity would be threatened in 2017 without a stability charge."); Malinak Testimony, p. 13 ("The financial performance of these [generation] assets has a direct and critical impact on DPL Inc.'s financial condition and ultimate financial integrity, and has an indirect impact on DP&L-TD as well."), id. at 62 ("With the RER in place from 2017 through 2026, the financial condition of the coal generating assets and by extension, the financial integrity of DPL Inc. would be maintained.").[1]

Moreover, extending DP&L's stability charge without an evidentiary hearing would be consistent with the Commission's similar decision to extend DP&L's initial SSO rates without a hearing when it became apparent that DP&L's existing rates would expire before the Commission could approve new rates. Dec. 19, 2012 Entry, p. 4 (Case No. 12-426-EL-SSO). In that Entry, the Commission extended DP&L's then-existing rates – including a stability charge – without conducting a hearing. DP&L raised this argument in its Motion, p. 2, and no intervenors have argued to the contrary.

In any event, if the Commission decides to conduct a hearing on DP&L's motion, DP&L has submitted prefiled testimony in support of its motion. None of the intervenors submitted any evidence to the contrary in their opposition to DP&L's motion.

[1] While OCC argues (pp. 6-7) that such testimony is inadmissible hearsay, "the Commission is not strictly bound by the rules of evidence and thus is not precluded from admitting . . . prefiled testimony even if it does contain hearsay evidence." In re Petitions of Bauman, et al., Pub. Util. Comm. No. 90-1095-TP-PEX, 1991 Ohio PUC LEXIS 1422, at *7 (Dec. 19, 1991).

XII. CONCLUSION

For the foregoing reasons, the Commission should grant DP&L's Motion to Implement the SSR-E and allow DP&L to collect $10.8 million per month between January 1, 2017 and April 30, 2017, unless and until the stability charge is approved in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Memorandum in Support of the Motion of The Dayton Power and Light Company to Implement the SSR Extension Rider has been served via electronic mail upon the following counsel of record, this 13th day of May, 2016:

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