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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of)	
The Dayton Power and Light Company for)	
Approval of Its Electric Security Plan)	Case Nos. 08-1094-EL-SSO
)	
In the Matter of the Application of)	
The Dayton Power and Light Company for)	
Approval of Revised Tariffs)	Case Nos. 08-1095-EL-ATA
)	
In the Matter of the Application of)	
The Dayton Power and Light Company for)	
Approval of Certain Accounting Authority)	Case Nos. 08-1096-EL-AAM
Pursuant to Ohio Rev. Code § 4905.13)	
)	
In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case Nos. 08-1097-EL-UNC
Approval of Its Amended Corporate)	
Separation Plan)	
)	
)	

Direct Testimony of David I. Fein

**Vice President, Energy Policy - Midwest
Constellation Energy Group, Inc.**

**On Behalf of Intervenors
Constellation NewEnergy, Inc.
and
Constellation Energy Commodities Group, Inc.**

Dated: January 26, 2009

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1 **INTRODUCTION**

2 **A. Identification of Witness**

3 **Q. Please state your name and your business address.**

4 A. My name is David I. Fein, and my business address is 550 West Washington
5 Boulevard, Suite 300, Chicago, Illinois 60661.

6

7 **Q. By whom are you employed?**

8 A. I am employed by Constellation Energy Group, Inc. ("Constellation").

9

10 **Q. Please describe your position with Constellation.**

11 A. I am Vice President of Energy Policy in the Midwest for Constellation. In this role, I
12 am responsible for directing and implementing regulatory and legislative policies for
13 Constellation's retail, wholesale, and merchant business interests in Illinois,
14 Michigan, and Ohio. Constellation Energy, a FORTUNE 200 company, is the
15 nation's largest competitive supplier of electricity to large commercial and industrial
16 customers and the nation's largest wholesale power seller. Constellation Energy also
17 manages fuels and energy services on behalf of energy intensive industries and
18 utilities. It owns a diversified fleet of 78 generating units located throughout the
19 United States, totaling approximately 8,700 megawatts of generating capacity. The
20 company delivers electricity and natural gas through the Baltimore Gas and Electric
21 Company ("BGE"), its regulated utility in Central Maryland.

1 **Q. Please describe your educational and business experience.**

2 **A.**From an educational perspective, I earned a Bachelor of Arts in Political Science and
3 Behavioral Science & Law from the University of Wisconsin-Madison in 1989 and a
4 Juris Doctorate from DePaul University College of Law in 1993. I am a member of
5 the American, Chicago, Energy, and Illinois State Bar Associations. I have more
6 than 15 years of experience in all facets of the energy industry. Previously, I served
7 as Senior Regulatory Counsel for Constellation and was responsible for providing
8 legal and regulatory support to all of the regulatory activities of Constellation
9 NewEnergy, Inc. ("CNE") before state and federal regulatory agencies across the
10 country and in Canada. In addition, I acted as Senior Counsel providing primary
11 legal support and counsel for all of CNE's commercial activities in Illinois and
12 Alberta, Canada as well as support for other markets. My previous experience prior
13 to joining Constellation includes five-and-a-half years at DLA Piper, LLP, a 3,600-
14 lawyer law firm, specializing in energy and telecommunications law and regulation
15 and four-and-a-half years as an Assistant State's Attorney, in the Illinois Cook
16 County State's Attorney's Office, focusing on public utility law and regulation.

17
18 **Q. On whose behalf are you testifying?**

19 **A.**I am testifying on behalf of CNE and Constellation Energy Commodities Group,
20 Inc ("CCG").

1 **Q. Please provide some background on the Constellation Companies on whose**
2 **behalf you are testifying in the instant proceeding.**

3 A. CNE provides electricity and energy-related services to retail customers in Ohio as
4 well as in 15 other states, the District of Columbia, and two Canadian provinces and
5 serves more than 15,000 megawatts of load and more than 10,000 customers. CNE
6 holds a certificate as a competitive retail electric supplier ("CRES") from the Public
7 Utilities Commission of Ohio ("PUCO" or "the Commission") to engage in the
8 competitive sale of electric service to retail customers in Ohio. CNE currently
9 provides service to retail electric customers in Ohio. CCG provides wholesale power
10 and risk management services to wholesale customers (distribution utilities, co-ops,
11 municipalities, power marketers, utilities and other large load serving entities),
12 throughout the United States and Canada, in both regulated and restructured,
13 competitive energy markets. CCG is active in the PJM Interconnection, L.L.C. and
14 Midwest Independent System Operator ("MISO") wholesale power markets and has
15 sold power for wholesale delivery in Ohio. CNE and CCG are subsidiaries of
16 Constellation Energy Group, Inc.

17

18 **B. Purpose of Testimony**

19 **Q. Please describe Constellation's interest in this proceeding.**

20 A. As a licensed competitive retail electric supplier ("CRES") in the State of Ohio,
21 Constellation is extremely interested in this proceeding. The decisions that the
22 Commission makes in this proceeding will determine whether retail competition is
23 viable in the Dayton Power and Light Company ("DP&L") service territory; whether
24 CRES providers like CNE have an opportunity to provide customers with an

1 alternative to service with DP&L; and whether wholesale power suppliers like CCG
2 have an opportunity to supply DP&L with certain of its power procurement needs.
3 Due to its vast experience and participation in the competitive retail and wholesale
4 markets in Ohio and across the country, Constellation will be able to assist in the
5 development of a full and complete record to assist the Commission in its
6 consideration of DP&L's Electric Security Plan ("ESP") Application.
7

8 **Q. Under Senate Bill 221, do retail customers still retain the right to switch to a**
9 **CRES provider to receive electric generation service?**

10 **A.** Yes. Customers retain the right to select someone other than DP&L to receive
11 electric generation service. In addition, Senate Bill 221 ("SB 221") makes clear that
12 the promotion of retail competition is one of the policy goals of the State. The bulk
13 of the issues that I will address in my testimony are focused on ensuring that DP&L
14 consumers retain a realistic and meaningful opportunity to exercise that fundamental
15 right to choose a CRES provider and that retail competition has a chance to develop
16 for the benefit of DP&L's customers.
17

18 **Q. Please summarize the issues that you will address in your Direct Testimony.**

19 **A.** I will address the following two (2) policy and tariff aspects of DP&L's ESP
20 Application:

- 21 • The imposition of non-bypassable generation-related charges, including a
22 proposed Provider of Last Resort ("POLR") Rider, upon customers that wish to
23 select a CRES provider; and

- 1 • The mandatory imposition of deferred generation-related fuel, fuel-related and
2 purchased power expenses upon all customers via a new Fuel Rider, including
3 customers that wish to select a CRES provider.

4
5 As will be discussed below, if the Commission fails to alter DP&L's proposal, retail
6 competition and Government Aggregation will likely not develop now (much less
7 later after the expiration of the current rate plan) in DP&L's service territory in
8 Ohio.

9
10 **C. Summary of Recommendations**

11 **Q. Do you have any specific recommendations regarding these two (2) aspects of**
12 **DP&L's ESP Application?**

13 **A. Yes. First, the Commission should reject DP&L's imposition of generation-related**
14 costs, including the Rider RSS Charge (DP&L's POLR charge), onto consumers that
15 do not purchase generation supply from DP&L. Second, the Commission should
16 **reject any attempts by DP&L to force all customers to pay for any generation-**
17 related deferred charges.

18
19 **II. The Imposition of Non-bypassable Generation-Related**
20 **Charges Will Frustrate Customer Choice and Competition**

21 **Q. Please describe what you mean by the phrase "Non-bypassable Generation-**
22 **Related Charge."**

1 **A.** A non-bypassable generation-related charge is a fee or charge that the customer is
2 required to pay to the utility regardless of whether the customer receives generation
3 service from a CRES provider or from the utility.

4
5 **Q.** Should all charges be bypassable when a customer takes service from a CRES
6 provider?

7 **A.** No, only those costs associated with the service they receive from a CRES provider
8 should be bypassable. This prevents customers from having to pay the utility for
9 services they do not receive. For example, services which are distribution-related or
10 non-supply related should continue to be paid by all customers regardless of whether
11 they choose to select a CRES provider or remain with the utility. Customers should
12 only pay for the costs they cause from the services that they purchase.

13
14 **Q.** How do non-bypassable charges potentially cost customers more when their
15 supply offer is lower than the utility standard service offer ("SSO") supply?

16 **A.** It is fairly simple. When a customer takes supply from a CRES provider they are
17 receiving all of their generation-related service from that company. They are no
18 longer taking generation-related service from the utility. If that shopping customer is
19 forced to continue to pay the utility for generation-related supply charges plus pay
20 their CRES provider for generation service, they are effectively paying twice for the
21 same service. Paying the utility for a service that the customer is already receiving
22 from the CRES provider could cause the customer to pay more for electric power
23 than had they not switched to the CRES provider - even if the CRES provider's
24 generation is at a lower cost than the standard service offer.

1

2 **Q. Has the General Assembly addressed the issue of whether generation-related**
3 **expenses can be collected in a utility distribution fee?**

4 **A.** Yes, in SB 221 the General Assembly amended Section 4928.02 (H), Revised Code
5 which addresses anti-competitive subsidies by specifically "...prohibiting the
6 recovery of any generation-related costs through distribution or transmission rates".

7

8 **Q. What is the effect on the competitive retail market when shopping customers**
9 **are required to pay the utility for generation services they do not receive?**

10 **A.** Making shopping customers pay DP&L for generation service they do not receive
11 has the potential to destroy the development of the competitive retail market, and in
12 fact was a major contributing factor in the collapse of retail competition and
13 governmental aggregation programs in other Ohio service territories in 2005.

14

15 **Q. Are there specific generation-related charges that DP&L seeks to impose on**
16 **customers regardless of whether they actually purchase electric generation**
17 **service from DP&L?**

18 **A.** Yes. Today, shopping customers pay a 5 mil per kWh Rate Stabilization Surcharge
19 ("RSS") which secures the shopping customer, at its election, the right to return to
20 the SSO at the SSO price. The purpose of the RSS charge as both the name and the
21 brief description in tariff G8 connote is to provide a shopping customer with a
22 "stable" rate alternative. DP&L, in its Application¹, seeks to eliminate the right of
23 shopping customers to return to the SSO price and require all such returning

¹ See Direct Prepared Testimony of Dona Seger-Lawson, pp. 4-6.

1 customers to pay a market-based price. The method of determining the market based
2 rate for standard service was not provided as part of the Application. (It was given a
3 tariff designation "G10", and presumably will be submitted later if approved by the
4 Commission.) However, the intent of the change is clear – to transfer the risk of
5 generation cost increases from DP&L to the returning customer.

6
7 **Q. Do you have any observations regarding this aspect of DP&L's Application?**

8 **A.** Yes. Making customers pay a rate stabilization surcharge for a stable rate option but
9 then not providing the stable rate is illogical, inappropriate, and not supported in the
10 Application. DP&L has historically justified its RSS fee for non-shopping customers
11 as a generation fuel charge². In fact, the RSS is part of the baseline for fuel revenue
12 that DP&L is using to calculate the increased fuel charges for purposes of its fuel
13 deferral. Although it was not articulated in the Application, we are concerned that
14 by eliminating the stable rate option for the RSS charge, DP&L will justify the
15 continued assessment of the RSS fee as a fuel generation charge. Charging a
16 shopping customer for fuel violates Section 4928.02(H), Revised Code and as such is
17 unlawful.

18
19
20 **Q. How do other competitive retail markets address the POLR risk of an SSO**
21 **supplier like DP&L?**

22 **A.** In well-functioning competitive retail electric markets where customers have the
23 ability to select someone other than the incumbent default supplier, we do not see

² Dona R. Seger-Lawson, Direct Testimony, Book I – Standard Offer, p.6.

1 the imposition of POLR charges on shopping customers, or on all customers, for
2 that matter. Rather, the allowed POLR charge is a modest fee to cover the cost of
3 accepting the customer back to utility default service; it does not include the cost of
4 providing electric generation service.

5
6 **Q. If utilities in other states are not imposing a POLR charge on customers that**
7 **wish to select a competitive retail supplier, how do they protect themselves**
8 **from POLR risks?**

9 **A.** It has been our experience that such risks are addressed through switching rules,
10 enrollment windows or notice provisions, and default service rates that compensate
11 the POLR supplier for their actual costs to provide electric generation service to a
12 returning customer. Other states require returning customers to take service that
13 mimics or tracks a verifiable index -- such as the PJM West Hourly or Day-Ahead
14 price for on-peak and off-peak power. For example, this approach is utilized as the
15 default rate in the Commonwealth Edison Company service territory in Illinois.

16
17 **Q. Do all Ohio POLR suppliers apply a POLR or Standby Charge on customers**
18 **to address this POLR risk?**

19 **A.** Duke Energy - Ohio ("DE-Ohio") does not impose any POLR or Standby Charge
20 on customers that take service from a CRES provider and agrees not to return to the
21 SSO. Should a customer, who pledged not to return, in fact default back to the SSO,
22 they are charged a market price for generation instead of the standard service price.
23 In DE-Ohio's ESP case (Case No. 08-920-EL-SSO), a Stipulation was recently filed
24 which alters the rate that applies to the unscheduled returning customer to the SSO

1 price plus 15%. DE-Ohio currently, and would under the Stipulation, provides a
2 customer with the option to pay the full POLR fee in order to reserve the right to
3 return at the SSO price.

4
5 **Q. What is your opinion regarding the manner in which DE-Ohio addresses its**
6 **POLR risks, as compared to that proposed by DP&L?**

7 **A.** As a CRES provider to Ohio customers in the DE-Ohio service territory, our
8 experience with the Duke POLR structure is that it is preferable to the mandatory
9 imposition of a non-bypassable POLR charge that has a generation reservation
10 component, as proposed by DP&L. Constellation believes that DP&L should
11 amend Tariff G9 so that retail customers may elect either to pay the RSS fee and
12 secure the right to return at the SSO price, or choose not to pay the RSS fee and
13 return to SSO at market rates. It is simply inequitable to charge customers for a
14 service or product they do not use.

15
16 **III. The Commission Should Reject The Mandatory, Non-bypassable**
17 **Nature of DP&L's Proposed Fuel-Related Generation Deferral / Phase-in**

18 **Q. Please discuss DP&L's proposal to defer fuel costs that is part of DP&L's**
19 **ESP Application.**

20 **A.** DP&L proposes a deferral of fuel, fuel-related, and purchased power costs incurred
21 for the period of January 1, 2009 – December 31, 2010 to be recovered over a ten-
22 year period beginning on January 1, 2011 after the expiration of its current rate plan.
23 (Seger-Lawson Direct Testimony, p. 8.) As part of DP&L's request, it seeks
24 Commission approval for a Rider mechanism to recover such costs.

1 Q. Has DP&L proposed the specific rider or tariff language for approval in this
2 proceeding?

3 A. No.
4

5 Q. Has DP&L estimated the specific amount of the deferral for which they are
6 seeking Commission approval?

7 A. It is my understanding that such information has not been provided in any of the
8 public testimony, applications, books, or other documents submitted in this
9 proceeding.
10

11 Q. Are all customers required to pay for the 10-year deferral of DP&L's fuel
12 related costs?

13 A. It is unclear on whether DP&L will require all customers, SSO and shopping
14 customers alike, to pay for the costs associated with the 10-year fuel cost deferral.
15

16 Q. Is charging a deferred generation rider to all customers equitable?

17 A. No. Customers who take service from a CRES provider are no longer taking
18 generation service from DP&L. It is impossible to point to any benefit being
19 conferred upon a shopping customer if the fuel is being utilized by other customers
20 that are taking service from DP&L. By charging those shopping customers,
21 shopping customers will be paying the generation costs for a service they did not use,
22 plus carrying costs. In addition, if DP&L happens to sell electric power and energy
23 to the CRES provider, that customer will be paying twice for fuel-related costs –
24 once to the CRES provider and once to DP&L. Compounding the problem is the

1 fact that these deferrals associated with increased fuel, fuel-related, and purchased
2 power charges are unknown at this time but the 10-year deferral collection period
3 will commence on January 1, 2011 at exactly the same time the existing rate plan is
4 set to expire. This will have a negative effect on the development of retail
5 competition.

6

7 **Q. Are there other ways to structure a deferral of generation-related fuel or other**
8 **costs?**

9 **A.** Yes. There are a number of different options to address issues associated with
10 deferred generation charges.

11

12 First, all customers should be provided with the option of whether they want to pay
13 the full generation price now, instead of being forced to defer certain costs and later
14 be requiring to pay not only the deferred costs, but interest charges imposed on top
15 of those deferred costs. Another alternative is that shopping customers should have
16 the option of not being charged the Fuel Rider Charge, or getting a credit equal to
17 the deferral if paying the Fuel Rider Charge. As I noted before, charging shopping
18 customers for generation service that they do not take from DP&L is inequitable.

19

20 **Q. Have other states utilized such an optional process when addressing rate**
21 **increase phase-ins or deferrals of certain generation-related costs?**

22 **A.** Yes. In Maryland and Illinois, after the expiration of a lengthy period of capped
23 rates, residential customers were provided with the option to defer or phase-in the
24 resulting rate increases instead of being forced to finance the deferrals. Surprisingly,

1 despite all of the press coverage of the alleged rate increases in those two States, a
2 very small percentage of customers (far less than 10%) elected to defer such costs
3 and take on the additional costs associated with interest and carrying charges.
4 Instead, they decided to pay the full and actual price for the electric power that they
5 consumed.

6
7 **IV. Conclusion**

8 **Q. Please summarize why the Commission should consider the effects of ESP**
9 **pricing, which includes non-bypassable generation-related charges, on**
10 **shopping customers.**

11 **A.** When reviewing the benefits of the ESP, the Commission must include in its analysis
12 the fact that S.B. 221 retained the right of customers to select someone other than
13 the utility for their electricity. The Commission must consider the economic reality
14 for customer choice and customer switching when evaluating DP&L's ESP proposal.

15
16 Customers who shop with a CRES provider have a variety of products to choose
17 from, including the ability to fix a rate at any point in the market. The imposition of
18 non-bypassable charges, such as DP&L's proposed POLR Rider and the use of
19 generation-related deferrals, are a detriment to the ability of customers to shop –
20 especially when market prices are competitive with or below the utility SSO price.
21 At that point, the benefits of paying a lower price for generation outweigh any
22 benefit of deferrals which may artificially lower prices in the short term but cost
23 more in the long term. As I explained earlier, the imposition of a number of

1 inappropriate non-bypassable charges only benefits DP&L – to the detriment of
2 customers.

3

4 **Q. Please summarize your recommendations regarding DP&L's ESP**
5 **Application.**

6 **A.** The Commission should take the following actions regarding DP&L's ESP
7 Application:

- 8 • **Amend** DP&L's requested changes to tariff G9 so that customers can either
9 pay the RSS charge and return at the SSO price, or not pay the RSS charge
10 and return to the SSO at a market-based price.
- 11 • **Reject** DP&L's attempts to force all customers to pay for unsubstantiated
12 deferred generation-related charges.

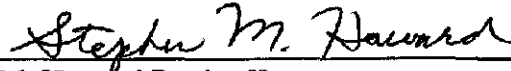
13

14 **Q. Does this conclude your testimony?**

15 **A.** Yes.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 26th day of January, 2009 by electronic mail or, where no e-mail address is available, by regular U.S. mail, postage prepaid, upon the persons listed below.



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