

500 Courthouse Plaza, S.W. 10 North Ludlow Street Dayton, Ohio 45402 937-227-3700 Fax 937-227-3717

R. Holtzman Hedrick
(937) 227-3727
rhedrick@ficlaw.com

February 5, 2009

VIA FEDERAL EXPRESS

Public Utilities Commission of Ohio
Attention: Renee Jenkins
Docketing Division
180 E. Broad Street, 10th Floor
Columbus, OH 43215

PUCO

2009 FEB -6 AM 10:28

RECEIVED-DOCKETING DIV

RE: DP&L ESP Filing, Case No. 08-1094-EL-SSO *et al.*

Dear Ms. Jenkins:

Enclosed are: (1) fourteen (14) copies of The Dayton Power and Light's Notice of Filing Depositions; and (2) deposition transcripts of:

- a. Gonzalez, Wilson
- b. Ibrahim, Amr A.
- c. Duann, Daniel J.
- d. Yankel, Anthony J.
- e. McClelland, Barry E.
- f. Pullins, Steven W.
- g. Fein, David I.
- h. Woolridge, J. Randall
- i. Bowser, Joseph G.
- j. Sawmiller, Daniel J.
- k. Murray, Kevin M.
- l. Dickstein, Shelley J. (awaiting transcript)
- m. Frye, Mark R. (awaiting transcript)
- n. Higgins, Kevin C. (awaiting transcript)

Very truly yours,

R. Holtzman Hedrick

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RHH/tes
Enclosures



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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the) Case No.
Application of The Dayton) 08-1094-EL-SSO
Power and Light Company for)
Approval of Its Electric)
Security Plan)
)

In the Matter of the) Case No.
Application of The Dayton) 08-1095-EL-ATA
Power and Light Company for)
Approval of Revised Tariffs)
)

In the Matter of the) Case No.
Application of The Dayton) 08-1096-EL-AAM
Power and Light Company for)
Approval of Certain)
Accounting Authority)
Pursuant to Ohio Rev. Code)
Section 4905.13)
)

In the Matter of the) Case No.
Application of The Dayton) 08-1097-EL-UNC
Power and Light Company for)
Approval of Its Amended)
Corporate Separation Plan)

The deposition of DAVID FEIN, taken in the above-entitled case, before Suzanne Thalji, CSR and Notary Public in and for the County of Cook and State of Illinois, at 550 West Washington Boulevard, Suite 300, Chicago, Illinois, on February 3, 2009, at 12:34 p.m.

PRESENT:

FARUKI IRELAND & COX PLL
BY MR. JEFFREY S. SHARKEY
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402
(937) 227-3705

appeared via telephone on behalf of
The Dayton Power and Light Company;
VORYS SATER SEYMOUR AND PEASE LLP
BY MR. M. HOWARD PETRICOFF
52 East Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

appeared via telephone on behalf of
Constellation NewEnergy, Inc. and
Constellation Energy Commodities
Group, Inc.;
OFFICE OF THE OHIO CONSUMERS' COUNSEL
BY MR. MICHAEL E. IDZKOWSKI
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
(614) 466-8574

appeared via telephone on behalf of
the Office of the Ohio Consumers'
Counsel.

ALSO PRESENT (via telephone):

MR. DANIEL DUANN

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WITNESS

DAVID FEIN

EXAMINED BY

MR. SHARKEY

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NO EXHIBITS WERE MARKED

DAVID FEIN,

having been first duly sworn, was examined and
testified as follows:

EXAMINATION

BY MR. SHARKEY:

Q Mr. Fein, as you know, my name is Jeff
Sharkey, and I'm representing The Dayton Power and
Light Company in this matter.

Do you have before you a copy of your
direct testimony that's been filed in this matter?

A Yes, I do.

Q Do you have any corrections or changes to
it?

A Yeah, a couple minor typographical errors.

Q Why don't you let me know what those are,
if you've got them handy.

A I do. On page 7, line 21, the reference to
the tariff G8 I believe should be D30.

Q Okay.

A And on the following page 8, line 3, I
believe the proper tariff designation would be G23,
not G10 as it's listed there, I think.

Q Okay. Any other changes?

A I believe I have one other, and obviously
we'll be making these corrections when the testimony

is submitted into the record. On page 10, line 11,
I believe the reference to G9 there should also be
D30 or -- I guess it's a little bit -- it should be
either D30 and/or G9. It's a little unclear in the
filing.

MR. PETRICOFF: I'm sorry, David. What was
the page number again?

THE WITNESS: The last one was page 10,
line 11.

MR. PETRICOFF: I think that one is okay.

A Okay. Then strike that answer. No further
changes at this time.

BY MR. SHARKEY:

Q Can you tell me what a vice president of
energy policy does for Constellation?

A Sure. A vice president of energy policy
implements and carries out the regulatory and
legislative objectives of the company and is the
person responsible for overseeing our interactions
with state public service commissions, state
legislatures, other branches of government and
energy policymakers in general.

Q Now, is that position considered to be
counsel, meaning do you consider yourself as an
attorney to be representing Constellation as an

1 attorney in that position?

2 A No. I have a law degree, but that
3 capacity, I'm not representing the company in a
4 legal capacity.

5 Q So you don't consider your communications
6 with Constellation employees who aren't attorneys to
7 be privileged?

8 A I'm sorry?

9 Q Those Constellation employees who are not
10 attorneys, you don't consider your communications
11 with them to be privileged?

12 A That's correct.

13 Q How long have you been in the position of
14 VP of energy policy?

15 A Since roughly July of 2007.

16 Q I didn't hear the end of your answer. Is
17 that July 2007?

18 A Yes, sir.

19 Q And before that time you were representing
20 Constellation as counsel in a position where you
21 acted as an attorney?

22 A Yes, a couple different capacities, yes.

23 Q Okay. And all of your background prior to
24 that, you were acting as an attorney in various
25 capacities as described in your pretrial testimony?

1 A Yes, on page 2.

2 Q Okay. Do you have any technical or
3 business degrees?

4 A No.

5 Q Okay. Any technical or business training?

6 A What do you mean by training?

7 Q Have you gone to any formal courses that
8 were conducted anywhere?

9 A I have gone to many conferences that based
10 upon that -- how you are explaining training, I
11 guess could be considered training, whether it be
12 CLE courses or conferences in the energy industry of
13 various nature that talk about regulatory policy.

14 Q Okay.

15 A Issues like that, I guess.

16 Q Now, I know what CLE courses are. Have you
17 had any similar courses where you were actually --
18 there was an instructor and the goal was to convey
19 information to you as opposed to a conference which
20 sometimes seems to be mostly meet and greet and such
21 and less formal?

22 A If you mean like there was a degree or some
23 certificate -- I guess I am not following your
24 question.

25 Q For CLE there is a course that you sign up

1 in and there is some type of requirement that you
2 complete it, and I am trying to see if there's
3 anything similar to a CLE course that you attended
4 that would have been technical in nature.

5 A I have certainly attended courses in -- I
6 think they were called courses but in the energy
7 regulatory rate-making arena where it was not a CLE
8 credit, but it was I guess what you would call akin
9 to continuing education that attendees might
10 receive, whether they're in some specific vocation,
11 but that touched on aspects of the energy industry.
12 I have taken, you know, courses like that in the
13 past.

14 Q What materials did you review to prepare
15 your testimony?

16 A I reviewed the company's application, the
17 testimony of the company witnesses, you know,
18 certain -- at least one or two of the company
19 tariffs that I reference in my testimony.

20 Q Did you review any historic stipulations or
21 Commission orders?

22 A Well, obviously you provided us with a
23 couple of those, I believe, yesterday and indicated
24 that you plan to -- I guess your question was in
25 preparing my direct testimony. No, I did not.

1 Q I assume that the materials that your
2 counsel has provided to me were reviewed in the
3 preparation of your testimony; is that accurate or
4 inaccurate?

5 A The materials that were provided?

6 Q Yes. I received three documents from your
7 counsel. One was an Ohio Supreme Court decision.

8 A Yes, I have reviewed that.

9 Q The other being a Commission opinion order
10 in the Duke application in its 08-920 matter.

11 A Yes, very familiar with that order.

12 Q And the Commonwealth Edison order -- I'm
13 sorry, tariff sheet.

14 A Yes, I'm familiar with those.

15 Q Anything else you can remember that you
16 reviewed to prepare your testimony?

17 A Nothing else jumps out, no, other than, you
18 know, what is cited in the testimony.

19 Q Can you help me understand the corporate
20 structure of Constellation? I guess I will start
21 with is there an ultimate parent that is publicly
22 traded?

23 A Yes.

24 Q What is the name of that entity?

25 A Constellation Energy or Constellation

1 Energy Group, publicly traded under the symbol CEG.
 2 Q Okay. And you are here testifying on
 3 behalf of Constellation NewEnergy, Inc. and
 4 Constellation Energy Commodities Group, Inc.?
 5 A That's correct.
 6 Q Okay. Are those both subsidiaries of
 7 Constellation Energy?
 8 A Yes.
 9 Q And you're employed by Constellation Energy
 10 Group, Inc., which was the parent you described to
 11 us; is that correct?
 12 A Yes.
 13 Q Can you describe for me the nature of the
 14 business of Constellation NewEnergy, Inc.?
 15 A Yes. Constellation NewEnergy, Inc. is a
 16 competitive retail electric supplier.
 17 Q Does CNE do business in Ohio?
 18 A Does CNE do business in Ohio? Was that the
 19 question?
 20 Q Correct.
 21 A Yes.
 22 Q What -- does it serve retail customers?
 23 A You started the question with "what." Is
 24 the question does --
 25 Q Strike the "what." Just does it serve

1 retail customers?
 2 A Yes.
 3 Q Okay. In which utility service territory?
 4 A Currently in the Duke Energy Ohio service
 5 territory.
 6 Q Does it serve any other retail customers
 7 that are not located within a public utility service
 8 territory?
 9 A Do they serve customers not -- did you say
 10 not in a Duke Energy service territory or not in a
 11 utility service territory?
 12 Q Not in any public utility service
 13 territory.
 14 A So a customer of a co-op or something?
 15 Q It could be a municipality or other
 16 location.
 17 A Constellation NewEnergy does not.
 18 Q Okay. And does Constellation NewEnergy
 19 serve customers outside of Ohio?
 20 A Yes.
 21 Q Okay. What other states?
 22 A Let's start from left to right.
 23 California, Oregon, Texas, Illinois, Michigan,
 24 Pennsylvania, New York, New Jersey, Maine, Vermont,
 25 Connecticut, Massachusetts, Maryland, Washington,

1 D.C., Delaware. I believe those are the states that
 2 we're serving in in the Continental U.S. Those
 3 would be all the states that allow retail
 4 competition.
 5 Q Okay. And then can you describe the
 6 business of Constellation Energy Commodities Group,
 7 Inc.?
 8 A Yes. Constellation Energy Commodities
 9 Group, Inc. is a competitive wholesale supplier of
 10 electricity. They serve electric distribution
 11 utilities, cooperatives, municipal electric systems.
 12 They serve wholesale customers.
 13 Q So does it make sales in spot markets?
 14 A It makes sales in spot markets, RTO
 15 markets, bilateral agreements, just like any other
 16 wholesale competitive supplier.
 17 Q Okay. Does CCG own generating assets?
 18 A I do not believe that CCG has ownership in
 19 any generating assets.
 20 Q Okay. And how about CNE?
 21 A They do not.
 22 Q Does Constellation Energy Group or any of
 23 its subsidiaries own generating assets?
 24 A Yes.
 25 Q Could you tell me the approximate megawatts

1 owned by Constellation Energy Group and its
 2 subsidiaries?
 3 MR. PETRICOFF: I am going to object here
 4 on relevancy, and I guess at this point -- this is
 5 the difficulty of a telephone deposition because I
 6 have no communication with my client because I don't
 7 know whether this is a trade secret or proprietary
 8 information. I guess I will object on that basis as
 9 well.
 10 A I don't believe -- well, let me -- I think
 11 I could respond --
 12 BY MR. PETRICOFF:
 13 Q The question to you, Mr. Fein, is first of
 14 all is the amount of megawatts owned by
 15 Constellation Energy Group and its subsidiaries a
 16 number that's publicly known?
 17 A I believe that it is -- the company
 18 publicly acknowledged how many -- approximately how
 19 many megawatts it owns and the number of generating
 20 facilities or plants that it owns. I don't have
 21 that -- either of those two numbers before me today,
 22 but I believe that information is generally publicly
 23 available, probably even on our website.
 24 MR. PETRICOFF: I withdraw the objection on
 25 the basis of trade secret but maintain the objection

1 on the basis of relevancy. But I think the question
2 has been answered.

3 BY MR. SHARKEY:

4 Q Do you know whether the generating assets
5 owned by Constellation Energy Group and its
6 subsidiaries are principally coal-fired, gas-fired,
7 nuclear, or some other fuel source?

8 MR. PETRICOFF: Once again, I object on
9 relevancy, and you can answer if this is publicly
10 known.

11 A I believe the mix is diverse. Again, also
12 I think this is publicly known information. The
13 company owns nuclear generating assets, natural gas-
14 fired assets, coal-fired assets, geothermal and
15 probably other.

16 BY MR. SHARKEY:

17 Q Does it have any generating assets within
18 the state of Ohio --

19 A No.

20 Q -- that is, Constellation Energy Group or
21 its subsidiaries?

22 A Constellation does not.

23 Q Does it have any generating assets in any
24 of the states neighboring Ohio?

25 A Yes. I believe they have generating assets

1 in Pennsylvania, if you consider that near Ohio.

2 Q That borders it.

3 A That's what I thought.

4 Q Now, you have been a witness in other Ohio
5 electric utility ESP proceedings; is that right?

6 A I have.

7 Q Did you testify in all three?

8 A No. I did not testify in the Duke Energy
9 ESP case because the parties entered into a
10 stipulation, but I did testify in the AEP and
11 FirstEnergy ESP cases, as well as the FirstEnergy
12 MRO case.

13 Q Okay. Other than those two, have you
14 testified previously in regulatory proceedings?

15 A I have. Not in Ohio but in other
16 jurisdictions.

17 Q In other jurisdictions? Do you know how
18 often?

19 A I have testified in a few proceedings in
20 Illinois and I believe one or two in Pennsylvania.

21 Q And has that testimony all been since you
22 took your position as VP of energy policy?

23 A That is correct. I think we might have had
24 a different title for the position instead of energy
25 policy for one or two of those testimonies, but all

1 since I left my former position as regulatory
2 counsel.

3 Q Did to your knowledge any of the
4 Constellation-related entities ever submit a bid in
5 the DP&L voluntary enrollment program?

6 A I have no knowledge regarding that. That
7 predates my employ with the company even, I believe.

8 Q Do you know what the DP&L voluntary
9 enrollment program is?

10 A I didn't know anything about it until I saw
11 some reference to it in one of the documents you
12 asked -- or you provided to counsel that you wanted
13 to review today.

14 Q Okay. Has Constellation ever made efforts
15 to your knowledge to solicit customers within the
16 Dayton Power and Light service territory?

17 A I know that over time we certainly have
18 received inquiries from customers about whether we
19 could serve them or there was any opportunity for
20 customers to provide them any savings opportunities.

21 We are not a registered supplier with
22 Dayton Power and Light, so we have never solicited
23 customers, but due to our footprint and our
24 relationships with customers across the country,
25 they're always asking whether we can serve them in

1 other markets, and that's generally how those
2 opportunities have come across Constellation.

3 I personally, you know, aren't involved in
4 the sales efforts of our company. So, you know,
5 that's the extent of my knowledge.

6 Q Do you know whether the determination was
7 made as to whether Constellation could profitably --
8 strike that question.

9 Do you know whether it was determined that
10 Constellation or its affiliates could offer those
11 companies a price that was lower than DP&L's price
12 to beat?

13 MR. PETRICOFF: I am going to object both
14 on relevance and on trade secrets. You may answer
15 the question if you can in a way which does not
16 reveal trade secrets.

17 A I don't have any personal knowledge of any
18 analysis or any review of that nature. I guess what
19 I could say is this. You know, we go into retail
20 electric markets where we have an opportunity to
21 provide value to customers, presumably to offer them
22 savings potentially, and for us to serve customers,
23 you know, so that we make money. We are a
24 for-profit business. So where those opportunities
25 exist, we always analyze them to see if it's a

1 viable opportunity.

2 Q Your testimony, generally speaking, deals
3 with two subjects, I think, The Dayton Power and
4 Light Company rate stabilization charges and
5 proposal to defer certain fuel costs. I want to
6 start with the former piece, the piece dealing with
7 the rate stabilization charge.

8 My first question as to that charge is do
9 you understand that that charge was designed to
10 compensate DP&L's POLR risk at least to the extent
11 that charge is paid by switching customers?

12 A I don't know how it was designed by Dayton.
13 All I know is what I read in the order in the court
14 case, that it talked about two things, rate
15 stability as well as compensating -- purportedly
16 compensating the company for providing the POLR
17 service. As I read the order in the Supreme Court
18 case, there are two purposes for that RSS charge.

19 Q Okay. You understand, don't you, that The
20 Dayton Power and Light Company does have a statutory
21 POLR obligation?

22 A Yes, I am aware of that.

23 Q And the presence of that obligation creates
24 costs and/or risks for The Dayton Power and Light
25 Company?

1 A I think I would agree that it certainly
2 imposes potential costs. Whether or not a POLR by
3 definition subjects the company to risks is all a
4 function of how that POLR is structured.

5 Q Do you understand that currently the rate
6 structure for The Dayton Power and Light Company
7 permits customers to return to service at DP&L's
8 fixed standard service offer generation rates?

9 A Subject to a number of switching and notice
10 and enrollment rules, yes, I understand how that
11 currently applies.

12 Q And that structure creates risks for The
13 Dayton Power and Light Company that the customer
14 might elect to return to DP&L standard service offer
15 when market prices are higher than DP&L's standard
16 service offer, correct?

17 A That is a possibility, yes, by the way it's
18 structured, yes.

19 Q And it's also true, isn't it, that neither
20 CNE nor CCG has a POLR risk the way Dayton Power and
21 Light Company does?

22 A Neither CNE nor CCG have a franchise
23 monopoly in Ohio, that's right. So we don't have a
24 POLR obligation or risk as you're using that term.

25 Q Do you know whether utilities besides

1 Dayton Power and Light Company have a POLR charge?

2 A I believe whether it's called a POLR charge
3 or not, all of the Ohio EDCs have something akin to
4 one that they -- well, let me clarify that.

5 They either have a charge that is the POLR
6 rate that a customer pays when they return. Ohio
7 has structured the POLR very different than
8 basically every other competitive retail state that
9 I'm familiar with. There is a rate that a returning
10 customer pays, which may or may not be the same as
11 the SSO rate.

12 Q Do you know whether any other Ohio utility
13 charged to shopping customers a fixed rate that is
14 intended to cover POLR costs and risks?

15 A Are you talking current? Are you talking
16 going forward?

17 Q Currently.

18 A Yeah. AEP utilities charge a POLR charge.

19 Q How about FirstEnergy or Duke?

20 A I don't know if FirstEnergy calls it --
21 well, maybe they do call it a POLR charge currently
22 as we know that. And Duke, I don't believe they
23 call it a POLR charge. I believe they have a rate
24 that you pay. You have an option to pay it as a
25 shopping customer, which entitles you to return at

1 that rate. If you choose not to pay it, then you
2 return at some market-based return.

3 Q Okay. Let's focus on Duke for a moment.
4 Do you know whether if the customer elects to pay
5 the rate and have the right to return at a fixed
6 standard offer, is the rate that they pay bigger
7 than or smaller than the DP&L rate stabilization
8 charge?

9 A I have not compared the two.

10 Q Same question as to AEP?

11 A I have not compared the two for purposes of
12 this testimony. I believe currently AEP is fairly
13 low to my recollection.

14 Q And I believe you said that FirstEnergy
15 also had a POLR charge?

16 A I believe they have some form of one, yes.

17 Q Okay. Have you compared that to DP&L's?

18 A I have not compared the two.

19 Q Is it your understanding that Dayton Power
20 and Light Company's currently existing rate plan
21 provides the rate stabilization charges to be
22 non-bypassable?

23 A That's my understanding of it, yes.

24 Q And is it also your understanding that
25 under the Ohio Revised Code 4928.143(D), the

1 Commission is obligated to continue DP&L'S rate plan
2 in effect until the date it's scheduled to
3 terminate?

4 A I believe -- I don't see that word
5 obligated in that section that you're quoting. I
6 see words there that say it shall continue in
7 effect, and there's also the final sentence of that
8 section that talks about when the utility makes a
9 filing under this section, that the Commission may
10 approve, modify and approve or disapprove certain
11 other things here.

12 Q Well, let's break that down. Let's start
13 with the first clause you referred to, and I am
14 going to start -- in one of the e-mails to you is
15 the fourth line of the document. If you are looking
16 at that copy, if you can look for the words revised
17 code, it begins, "That rate plan and its terms and
18 conditions are hereby incorporated into its proposed
19 Electric Security Plan and shall continue in effect
20 until the date scheduled under the rate plan or its
21 expiration."

22 A I'm sorry, where are you reading?

23 Q I am reading from Ohio Revised Code section
24 symbol 4928.143(D).

25 A Did you say -- what letter, I'm sorry?

1 Q D as in dog.

2 A Okay.

3 Q And I believe you were referring to that
4 same section when you were --

5 A I was. I just -- I didn't hear what you
6 said.

7 Q It's a clause that's in the middle of the
8 first sentence.

9 A Yep.

10 Q It begins "That rate plan"?

11 A Yep.

12 Q Do you consider the word shall to be a
13 mandatory term?

14 A Yes. Those terms of the rate plan shall
15 continue in effect.

16 Q Okay. In your prior answer you referred to
17 the Commission's rights to approve, modify, or
18 disapprove certain items?

19 A Yes.

20 Q The rate stabilization charge -- let me
21 strike that.

22 Do you know whether the rate stabilization
23 charge falls within the scope of any of the three
24 listed items that the Commission -- strike that
25 again.

1 That sentence provides DP&L may seek
2 incremental recovery of certain costs, correct?

3 A Yes.

4 Q And those costs are incremental costs
5 associated with providing standard service offer
6 under 4928.141?

7 A Yes.

8 Q And of providing alternative -- advanced
9 energy, alternative energy, whichever it was, under
10 4928.64?

11 A Yes.

12 Q And providing energy efficiency and demand
13 response programs under 4928.66?

14 A Correct.

15 Q Do you believe that the Commission has
16 jurisdiction to alter the rate stabilization charge
17 contained in DP&L's currently existing rate plan?

18 A I do.

19 Q What's the basis?

20 A The basis is that the company in this
21 filing is proposing to alter the terms of that
22 charge as outlined. This is as I understand the
23 filing. The company is proposing to alter the rate
24 that -- the POLR rate for that returning customer.

25 So as I understand the company's filing in

1 this case, the company on its own is proposing to
2 alter the manner in which the RSS charge is applied
3 to customers and the terms and conditions of that
4 tariff as outlined in the red line version of that
5 tariff that's part of the company's filing.

6 Q And how does that lead you to the
7 conclusion that the Commission has jurisdiction to
8 alter terms of the Dayton Power and Light Company's
9 existing rate plan?

10 A Because The Dayton Power and Light Company
11 is essentially asking the Commission to alter that
12 term of its existing rate plan by virtue of
13 submitting the red line tariff.

14 Q Any other basis for that conclusion?

15 A I think it speaks for itself otherwise.

16 I'm not following why the company would have filed
17 such significant, substantive changes to a tariff if
18 they weren't seeking Commission approval of that
19 tariff, and they have submitted those tariffs for
20 approval in this case.

21 Q My question to you then is is there any
22 other reason that you believe that the Commission
23 has authority to alter the existing rate plan Dayton
24 Power and Light Company has in effect other than
25 what you have already identified?

1 A I think the Commission has their general
2 and broad authority to ensure just and reasonable
3 rates for consumers, and since the company has
4 proposed to alter the terms and conditions of a
5 particular rate and charge that is seeking
6 Commission approval in this case, that the
7 Commission retains that jurisdiction.

8 Q Okay. Anything else?

9 A No.

10 Q Let me ask you about your testimony about
11 DP&L's proposal to defer certain fuel expenses.

12 A Yes.

13 Q As an initial matter, am I correct that you
14 do not oppose the recovery of fuel costs or the
15 deferral of those costs by Dayton Power and Light
16 provided the ultimate recovery is bypassable?

17 A I think my testimony lays out some
18 alternatives for how to handle that, so I am having
19 trouble agreeing with the way you have made that
20 statement. I mean as a general proposition and as a
21 policy matter, yes, deferrals by their very nature
22 are in conflict with a well-functioning retail
23 market.

24 So, yes, we do not support the use of
25 deferrals, and my testimony outlines other ways in

1 which if the Commission believes it's appropriate to
2 have some form of deferral, that the deferral not be
3 mandatory, that a customer have the right to make a
4 choice of whether they want to defer those costs and
5 pay the interest on that deferral or whether the
6 customer wishes to pay the actual costs associated
7 with that fuel-related expense.

8 That would be -- those are two preferable
9 ways in which to handle that from our perspective.

10 Q How is Constellation injured if Dayton
11 Power and Light Company is permitted to defer fuel
12 costs and later recover them through a bypassable
13 rider?

14 A I don't know that Constellation is hurt,
15 but customers are hurt, and the transparency of a
16 well-functioning retail market is hurt in that
17 customers aren't paying actual costs for the
18 commodity of electricity. They are paying for -- in
19 the current state, they would not be paying the true
20 cost. Those costs would be deferred out into the
21 future, and it's just not a -- it's not -- the use
22 of deferrals is antithetical to a functioning retail
23 market because it obscures the actual cost that a
24 customer is paying for the commodity of electricity.

25 Q Does that affect Constellation?

1 A It affects Constellation to the extent that
2 that is a competitive impediment to a customer
3 exercising choice, yes.

4 Q If The Dayton Power and Light Company was
5 to recover the fuel cost as incurred, would
6 Constellation oppose The Dayton Power and Light
7 Company's request?

8 THE WITNESS: Could you read that back one
9 more -- I am not sure I got it all.

10 (Question read.)

11 A When you say request, are you referring to
12 this aspect of the request?

13 BY MR. SHARKEY:

14 Q Request is probably a poor choice of words,
15 so let me phrase it differently.

16 Would Constellation oppose the recovery of
17 fuel costs above and beyond what's in current rates
18 by The Dayton Power and Light Company as DP&L incurs
19 those costs, meaning no deferral?

20 A Constellation would certainly prefer that
21 there wasn't a mandatory deferral of fuel costs. I
22 am not certain I'm answering your question.

23 Q No, I don't think that does answer the
24 question.

25 A Because I'm struggling with what you're

1 trying to gather. Was your question going to the
2 amount of it or just as a matter of rate design?

3 Q The question is more of a matter of rate
4 design, and if it matters to your answer, please let
5 me know, but the question was if there was a
6 provision that entitled DP&L to recover some amount
7 of fuel cost above what Dayton Power and Light
8 Company is currently receiving and that was a
9 current recovery, meaning no deferral, would
10 Constellation oppose it?

11 A We would look more favorably on that type
12 of mechanism than the one that's been proposed.

13 Q I still don't think that answers my
14 question. Would Constellation oppose it?

15 A You know, with the one-sentence manner in
16 which you have outlined it, I can't answer that
17 question.

18 Q What else would you need to know?

19 A Are you saying that it's a non-bypassable
20 fuel charge paid now by everyone?

21 Q I am saying it's a bypassable fuel charge.

22 A It's a bypassable fuel charge that applies
23 currently? I don't think we would oppose such a
24 charge.

25 Q Would you take a look again, Mr. Fein, at

1 4928.143(D).

2 A I'm there.

3 Q Okay. It refers at the end of the first
4 line, wrapping on down to the second line, to
5 electric distribution utility that has a rate plan
6 that extends beyond December 31, 2008?

7 A Yes.

8 Q Do you know whether any utility in Ohio had
9 such a rate plan besides Dayton Power and Light
10 Company?

11 A No. It's my understanding this is The
12 Dayton Power and Light Company only provision.

13 Q And there's the clause at the end, the last
14 sentence in that section that begins with the word
15 "However"?

16 A Yes.

17 Q And paraphrasing pieces of that, that
18 section permits The Dayton Power and Light Company
19 to seek the incremental recovery or the deferral of
20 costs that The Dayton Power and Light Company incurs
21 to provide standard service offer under 4928.141 to
22 the extent those costs aren't being recovered under
23 DP&L's current rate plan?

24 A Yes.

25 Q Do you agree that fuel is a type of cost

1 that would fall within that section?

2 A That certainly is conceivable, yes. The
3 term cost is not defined, but it certainly seems
4 like a typical type of cost that you could -- that
5 utilities traditionally who have fuel riders seek
6 recovery of, yes.

7 Q And other than fuel, do you know whether
8 The Dayton Power and Light Company at the time that
9 this section was enacted had received any
10 significant increases in other costs associated with
11 providing standard service offer?

12 A Am I aware of whether there are any other
13 types of costs that the company has incurred,
14 significant costs over and above what's in the rate
15 plan? Was that essentially your question?

16 Q Correct. It's a do you know question.

17 A I am not aware of any if there are, not to
18 say that there aren't any. I am just not aware.

19 Q Let me go back to your proposal that
20 customers have an option to pay fuel costs as they
21 are incurred or to defer those fuel costs.

22 A Yes.

23 Q My question is do you know whether DP&L's
24 existing billing system is capable of offering that
25 functionality?

1 A I am not intimately familiar with the
2 company's billing system.

3 Q Let's assume that it is not capable of
4 doing so. Who do you believe should pay the expense
5 associated with modifying DP&L's billing system to
6 create that functionality?

7 A To the extent that there are any costs
8 associated with adding this functionality to the
9 billing system, I assume that a cost like that would
10 be something that is recovered in rates, and it
11 being the billing system, I assume that's handled as
12 a distribution expense. I don't know.

13 Q Okay. You described a similar plan was
14 implemented in the state of Maryland?

15 A Not for fuel but for -- you know, a
16 phase-in, a deferral of rates, yes.

17 Q Can you describe for me how that works in
18 terms of how the option was provided to Maryland
19 retail customers?

20 A Yes. A customer was notified that they had
21 the option to phase in known rate increases, and
22 they had an opportunity to opt into that, which
23 would then require them to pay interest on that
24 deferred balance for a certain period of time.

25 There were some terms and conditions around

1 what would happen if a customer -- you know, I can't
2 recall the term of the phase-in, but I seem to
3 recall it was a two- or three-year phase-in, so that
4 there were different things that happened if that
5 customer wanted to terminate their participation at
6 some period of time.

7 I'm probably more familiar with a similar
8 mechanism that was put in place in Illinois.

9 Q Let's stay with Maryland for just a second,
10 and then we will move to Illinois.

11 How was notice provided, if you know, to
12 individual customers?

13 A I don't recall the actual form of notice,
14 whether that came in the form of a bill insert or a
15 note on a bill or whether there was any separate
16 mailing. I don't recall how that was communicated.
17 I don't know --

18 Q Do you know --

19 A I was going to say --

20 Q -- what the presumption was if a customer
21 didn't respond to the notice?

22 A I seem to recall that you had to opt into
23 it, so that if you did not take advantage of the
24 opportunity to phase in those costs, that you then
25 paid the full retail rate.

1 Q And then why don't you tell me about what
2 you know about Illinois.

3 A Illinois, it was a similar mechanism. A
4 customer had to opt into the deferred payment
5 arrangement, and if a customer didn't, they would
6 pay the full retail rate and that if you left the
7 company's -- what is akin to their standard service
8 offer, you would then be responsible for the balance
9 on your deferred amount.

10 So, in other words, basically it would be
11 like an accelerated payment if you didn't stay
12 within the terms of the loan essentially that the
13 company was offering, you know, in the form of the
14 deferral.

15 Q And how was notice provided to individual
16 customers?

17 A I believe the notice came in the form of --
18 I think it was something that appeared on the bill,
19 in sort of the note section of the bill, and I also
20 seem to recall a separate mailing. And I guess the
21 two things that I did not mention that is common to
22 both of these is that these arrangements were only
23 for the residential customer class. That's probably
24 the only difference, just to be precise.

25 Q And for the nonresidentials, were they

1 required to pay the increase up front or were they
2 automatically deferred? What happened to them?

3 A Well, the nonresidential customers, because
4 Illinois and Maryland both had well-functioning
5 retail markets, there was no need to offer that type
6 of deferral because those customers had at the time
7 and continue to have an array of competitive
8 opportunities to take service from a competitive
9 supplier.

10 If they chose to stay with the utility, the
11 largest customers did not have a fixed price utility
12 offering. It was only an hourly product so that
13 they more likely than not if they didn't want to be
14 on that type of service, they were taking service
15 from a competitive supplier. So it was more of a
16 nonissue for them.

17 Q Okay. Does --

18 A And that --

19 Q -- Constellation provide generation service
20 to any retail customers in Ohio?

21 A Did you say generation service?

22 Q Right.

23 A Yes. As we talked about earlier,
24 Constellation has served some customers behind the
25 Duke Energy utility.

1 Q I misspoke. I meant to say the word
2 residential, not the word retail.

3 A Oh, sorry. No, we do not currently serve
4 residential customers in Ohio.

5 Q Does Constellation or any of the affiliated
6 entities serve residential customers anywhere within
7 the Continental United States?

8 A I do not believe that Constellation
9 directly serves residential customers, but
10 Constellation does supply the electricity that a
11 large number of electric distribution utilities
12 utilize to meet their obligations to serve
13 residential customers.

14 Q Can you tell me why Constellation hasn't
15 gotten into the business of providing service
16 directly to residential customers?

17 MR. PETRICOFF: I object on relevancy, and
18 you may answer the question if you can do so without
19 violating trade secrets.

20 A You know, I'll answer as best I can. You
21 know, Constellation started and its predecessor
22 companies in focusing on the commercial and
23 industrial markets, and, you know, thus far
24 throughout our history those are the customer
25 segments that we focused on.

1 That's not to say we haven't looked at
2 opportunities where they make sense, but to date we
3 have not expanded into residential markets in any of
4 the jurisdictions that I'm aware of.

5 Q Have there been any public announcements
6 that Constellation is planning to do so in the near
7 future?

8 A To serve residential customers?

9 Q Correct.

10 A If there are, I haven't seen them.

11 Q Fair enough. Your attorney provided to me
12 three documents, and I would like to ask you just
13 brief questions about them. Let me start with the
14 Commonwealth Edison Company tariff sheet.

15 A Yes.

16 Q Can you describe for me the relevancy, if
17 any, that you believe this document has to this
18 proceeding?

19 A Yes. When I talked about other ways for a
20 company to meet its POLR obligation, I talked and I
21 gave an example of the approach utilized -- this is
22 on page 9 of my testimony, the approach utilized by
23 Commonwealth Edison Company in the state of
24 Illinois.

25 And the way the market is structured in

1 Illinois as it is in a number of states is that
 2 there is no POLR charge for a shopping customer, so
 3 that the utility is indifferent to shopping, which
 4 is a very important term, that the company incurs no
 5 risks whatsoever to serve a customer should it
 6 return because the company would simply be charging
 7 that returning customer some market rate that is
 8 verifiable and known, so that the company makes no
 9 money on that service and loses no money on that
 10 service, that they recover their actual costs of
 11 selling electricity to this returning customer.

12 And the document that we attached is an
 13 example of that type of rate. It's a little
 14 lengthy, yes, about 17 pages or so -- I don't
 15 know -- 12 pages, that outlines the terms of the
 16 conditions.

17 So this is the POLR rate that a returning
 18 customer would pay if they were returning to utility
 19 service after being out in the competitive retail
 20 marketplace and that customer --

21 Q Has Constellation had any communications
 22 with the Office of the Consumers' Counsel as to
 23 whether that office supports returning customers
 24 coming back at a market-based rate?

25 A I have not had any conversations with the

1 Consumers' Counsel on that.

2 Q Do you know of any --

3 A And I can say that I do not believe that
 4 anyone else from Constellation has had any such
 5 discussions.

6 Q Let me then turn to the decision by the
 7 Supreme Court of Ohio --

8 A Yes.

9 Q -- in the Ohio Consumers' Counsel versus
 10 Public Utility Commission of Ohio, Case
 11 No. 2006-0788.

12 A Yes.

13 Q We discussed this decision somewhat during
 14 the course of your deposition. The question is
 15 simple. Other than what we have discussed already,
 16 are you aware of any other relevance that this case
 17 has to this proceeding?

18 A Well, I mean the case addresses a number of
 19 things including, you know, making sure that, you
 20 know, generation costs are properly categorized as
 21 generation costs. Maybe some day in this case we'll
 22 get to a stipulation, so maybe the discussion on
 23 proper standards for stipulation will come into
 24 play. I don't know. In the case --

25 Q Let me ask you this. Are you relying on

1 this decision -- probably a better question. Are
 2 you relying on this decision for anything else than
 3 we have already discussed?

4 A I am not relying on it for anything else
 5 other than what we discussed about the RSS charge,
 6 no.

7 Q You also -- your counsel, rather, provided
 8 to me the opinion and order in the Duke ESP case
 9 from the PUCO, Case No. 08-920?

10 A Yes.

11 Q Can you describe to me the relevancy, if
 12 any, that you believe this opinion and order has in
 13 this case?

14 A Yes. As you know, my testimony at pages 9
 15 and 10, we talk about the structure that Duke Energy
 16 Ohio uses, and we talked about that earlier. They
 17 don't impose a POLR charge but have a structure of a
 18 POLR rate that applies to returning customers. And
 19 that discussion is on pages 9 and 10 of my
 20 testimony.

21 And the document that counsel provided to
 22 you is a copy of the opinion and order that the
 23 Commission entered in that matter, where they
 24 approved a stipulation that addressed a number of
 25 issues, including the POLR structure going forward

1 or the default charge structure going forward for
 2 customers who wish to avail themselves of
 3 competitive retail electric service.

4 Q Constellation was a party to that
 5 stipulation, correct?

6 A Yes, sir.

7 Q Were you personally involved in
 8 negotiations leading to that stipulation?

9 A I was.

10 Q Is it fair to say that the stipulation was
 11 a negotiated document in which parties gave on
 12 certain terms to receive benefits and other terms
 13 that's typical of a stipulation?

14 A Without a doubt.

15 MR. SHARKEY: Let me pause. I am going to
 16 put you on mute because I may be finished, but I
 17 want to review my notes.

18 THE WITNESS: Sure.

19 MR. SHARKEY: So if you want to just take a
 20 restroom break, we can come back in, say, ten
 21 minutes.

22 THE WITNESS: Sure, that's fine.

23 MR. SHARKEY: All right.

24 THE WITNESS: Thanks.

25 MR. SHARKEY: You are welcome.

1 MR. PETRICOFF: While we are still on,
 2 Michael, do you have questions?
 3 MR. IDZKOWSKI: No.
 4 MR. PETRICOFF: Okay.
 5 (Recess taken.)
 6 BY MR. SHARKEY:
 7 Q Regarding your proposal, Mr. Fein, that the
 8 Commission implement a structure in which a customer
 9 who had switched could elect to either pay a fixed
 10 rate to return at a fixed price or could not pay
 11 that rate and return at a market-based rate, I want
 12 to focus on the rate that a customer would pay if
 13 they elected the former option.
 14 Do you have any opinion regarding how that
 15 rate should be set?
 16 A And just so I'm clear, so this would be the
 17 returning customer who elects not to pay would come
 18 back at some market-based rate?
 19 Q No, no, no. The customer who elects to pay
 20 a rate to return at a fixed standard service offer.
 21 A Well, I would assume that if -- what we're
 22 talking about really is the returning customer being
 23 allowed to return to that same standard service
 24 offer rate that the customer would pay as if they
 25 had never left. I didn't have any opinion about

1 structuring it in any other fashion.
 2 It sounds like what you are -- well, if I
 3 understood your question, were you asking if there
 4 was some third rate option, if you will, that a
 5 customer would pay?
 6 Q Well, I guess the question is do you have
 7 an approach that you would recommend in general as
 8 to how that rate would be set; for example, would
 9 you recommend the use of the Black-Scholes
 10 methodology?
 11 A No, I don't have a methodology that I am
 12 proposing, nor do I believe you -- what you are
 13 talking about now is setting whatever that POLR fee
 14 is that the shopping customer pays while they shop
 15 for the right to return at the standard service
 16 offer rate, correct?
 17 Q Correct.
 18 A Yeah. I don't have any formula or proposal
 19 on how to set that number, nor did I testify to one.
 20 Q No, I know you didn't testify to one. I
 21 was trying to figure out if you had a proposed
 22 methodology or not. And you do not; is that
 23 correct?
 24 A I don't have a methodology that I'm
 25 offering in this case, no.

1 Q As opposed to one that you're offering in
 2 this case, do you have one that you believe would be
 3 appropriate?
 4 A Not a methodology, but whatever that charge
 5 is going to be, it should not enrich the company and
 6 should merely reflect the cost considering all
 7 factors, including the switching and notice
 8 requirements and restrictions that exist currently
 9 in the company's tariffs to properly quantify that
 10 number so it doesn't act as a hindrance to customers
 11 or unduly enrich the company.
 12 Q And you don't have a proposal beyond those
 13 general principles?
 14 A No, I do not.
 15 MR. SHARKEY: I have no further questions
 16 at this time.
 17 MR. PETRICOFF: Thank you.

(WITNESS EXCUSED.)

1 BEFORE
 2 THE PUBLIC UTILITIES COMMISSION OF OHIO

3 In the Matter of the) Case No.
 4 Application of The Dayton) 08-1094-EL-SSO
 5 Power and Light Company for)
 6 Approval of Its Electric)
 7 Security Plan)
 8 In the Matter of the) Case No.
 9 Application of The Dayton) 08-1095-EL-ATA
 10 Power and Light Company for)
 11 Approval of Revised Tariffs)
 12 In the Matter of the) Case No.
 13 Application of The Dayton) 08-1096-EL-AAM
 14 Power and Light Company for)
 15 Approval of Certain)
 16 Accounting Authority)
 17 Pursuant to Ohio Rev. Code)
 18 Section 4903.13)
 19 In the Matter of the) Case No.
 20 Application of The Dayton) 08-1097-EL-UNC
 21 Power and Light Company for)
 22 Approval of Its Amended)
 23 Corporate Separation Plan)

16 I, DAVID FEIN, being first duly sworn, on
 17 oath say that I am the deponent in the aforesaid
 18 deposition taken on February 3, 2009; that I have
 19 read the foregoing transcript of my deposition,
 20 consisting of pages 1 through 46 inclusive, and
 21 affix my signature to same.

22 Corrections have been submitted
 23 No corrections have been
 24 submitted

DAVID FEIN, Deponent

25 Subscribed and sworn to
 before me this day of
 , 20__

1 STATE OF ILLINOIS)
) SS.

2 COUNTY OF C O O K)

3 I, SUZANNE THALJI, CSR and Notary Public in
 4 and for the County of Cook and State of Illinois, do
 5 hereby certify that on February 3, 2009, at
 6 12:34 p.m., at 550 West Washington Boulevard,
 7 Suite 300, Chicago, Illinois, the deponent DAVID
 8 FEIN personally appeared before me.

9 I further certify that the said DAVID FEIN
 10 was by me first duly sworn to testify and that the
 11 foregoing is a true record of the testimony given by
 12 the witness.

13 I further certify that the deposition
 14 terminated at 1:53 p.m.

15 I further certify that I am not counsel for
 16 nor related to any of the parties herein, nor am I
 17 interested in the outcome hereof.

18 In witness whereof, I have hereunto set my
 19 hand and seal of office this 4th day of February,
 20 2009.

21

22

23 Notary Public

24

25 CSR No. 084-002337 - Expiration Date: May 31, 2009

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