

FILE FAX

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Application of	:	Case No. 08-1094-EL-SSO
The Dayton Power and Light Company for	:	
Approval of Its Electric Security Plan	:	
	:	
In The Matter of the Application of	:	Case No. 08-1095-EL-ATA
The Dayton Power and Light Company for	:	
Approval of Revised Tariffs	:	
	:	
In The Matter of the Application of	:	Case No. 08-1096-EL-AAM
The Dayton Power and Light Company for	:	
Approval of Certain Accounting Authority	:	
Pursuant to Ohio Rev. Code Section 4905.13	:	
	:	
In The Matter of the Application of	:	Case No. 08-1097-EL-UNC
The Dayton Power and Light Company for	:	
Approval of Its Amended Corporate	:	
Separation Plan	:	

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**MEMORANDUM OF THE DAYTON POWER AND LIGHT COMPANY IN  
OPPOSITION TO MOTION TO STRIKE DP&L TESTIMONY AND APPLICATION  
RELATED TO INCREMENTAL COSTS AS INCONSISTENT WITH THE  
STIPULATION AND ORDER IN CASE NO. 05-276-EL-AIR BY OCC**

Days before the evidentiary hearing in this matter was scheduled to begin, The Office of the Ohio Consumers' Counsel ("OCC") has filed a baseless Motion to Strike. The Commission should deny OCC's Motion to Strike for each of the following separate and independent reasons: (1) Ohio Rev. Code § 4928.143(D) expressly authorizes the Commission to permit DP&L to defer fuel costs that are not being recovered under DP&L's current rate plan; (2) OCC is not a "Signatory Party" to the RSP Stipulation, and thus has no rights under the section of the RSP Stipulation upon which OCC relies; (3) even if OCC had a right to enforce the section of the RSP Stipulation that it cites, OCC is incorrect as to what that section means; (4) assuming for the sake of argument that changed circumstances were required for the

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Commission to permit DP&L to defer fuel costs, there have been significant changed circumstances due to the enactment of SB 221; (5) OCC's reliance on historic returns is misplaced; (6) the invited error doctrine upon which OCC relies is inapplicable; and (7) OCC has failed even to identify the portions of DP&L's filing that should be stricken.

**I. OHIO REV. CODE § 4928.143(D) AUTHORIZES THE COMMISSION TO PERMIT DP&L TO DEFER FUEL COSTS THAT ARE NOT BEING RECOVERED UNDER DP&L'S CURRENT RATE PLAN**

It is well-settled that the Commission is a creature of statute and is vested with those powers that the General Assembly has granted to it. Tongren v. PUCO (1999), 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255 ("The commission, as a creature of statute, has . . . the authority conferred upon it by the General Assembly.") (citations omitted); Coalition for Safe Elec. Power v. PUCO (1977), 49 Ohio St. 2d 207, 210, 361 N.E.2d 425 (the Commission "is a creature of statute, having . . . such power as the General Assembly has seen fit to confer upon it") (quotation and citation omitted). Here, through the passage of Ohio Rev. Code § 4928.143(D), the General Assembly has expressly granted to the Commission the power to permit DP&L to seek to defer costs incurred to provide a standard service offer ("SSO") under Ohio Rev. Code § 4928.141 that are not being recovered under current rates, including fuel costs.

Specifically, Ohio Rev. Code § 4928.143(D) applies to an electric utility that has a rate plan that extends beyond December 31, 2008. At the time that section was enacted (and today), DP&L was the only Ohio electric utility that fit that description. That statute further provides that DP&L:

"may include in its electric security plan under this section, and the commission may approve . . . provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate

plan and that the utility incurs during that continuation period to comply with section 4928.141[.]"

Id. Thus, the General Assembly has explicitly authorized the Commission to approve DP&L's planned deferral of 2009 and 2010 fuel costs that are in excess of fuel cost recovery in DP&L's existing rates. Id.

Indeed, OCC's own witness effectively conceded that DP&L should be permitted to defer fuel costs under Ohio Rev. Code § 4928.143(D). During the February 2, 2009 Deposition of Daniel Duann (excerpts attached), Dr. Duann admitted that: (1) when SB 221 was enacted, DP&L was the only electric utility that had a rate plan extending beyond December 31, 2008 (meaning DP&L was the only utility to which Ohio Rev. Code § 4928.143(D) would apply) (p. 23); (2) DP&L will incur fuel costs to provide customers an SSO under Ohio Rev. Code § 4928.141 (pp. 25, 56); (3) apart from an unrelated environmental rider, he knew of no other costs besides fuel that had increased for DP&L in its provision of electric service since the RSP Stipulation in 2005 (p. 27); (4) nothing in the RSP Stipulation expressly precludes DP&L from deferring recovery of excess fuels costs in 2009 and 2010 (p. 36); and (5) the OCC case team handling this matter has discussed the fact that Ohio Rev. Code § 4928.143(D) was intended to grant to the Commission the power to permit DP&L to recover excess fuel costs (pp. 45-46).

Therefore, to evade the express provisions set forth in Ohio Rev. Code § 4928.143(D), OCC must now argue -- notwithstanding the admissions of its own witness and case team to the contrary -- that either the General Assembly lacks the power to grant the Commission authority to permit DP&L to defer incremental costs associated with providing SSO under Ohio Rev. Code § 4928.141 (including fuel costs), or that the General Assembly is

somehow bound by, and its actions limited by, the RSP Stipulation. Those arguments find no basis in the law, because the General Assembly can grant such powers to the Commission. Tongren, 85 Ohio St. at 88. In Ohio Rev. Code § 4928.143(D), the General Assembly has granted to the Commission the authority to authorize DP&L to defer fuel costs, and the Commission should deny OCC's Motion to Strike on that basis alone.

## **II. OCC'S RELIANCE ON THE RSP STIPULATION IS MISPLACED**

As the basis for its Motion to Strike, OCC relies upon the Stipulation and Recommendation signed in Case No. 05-276-EL-AIR ("RSP Stipulation"). Motion to Strike, pp. 2-6. OCC, however, neither signed the RSP Stipulation in 2005, nor correctly interprets it now.

### **A. OCC Cannot Rely Upon a Stipulation to Which It Is Not a Party**

The crux of OCC's argument is based on the language found in Section I.G. of the RSP Stipulation, entitled "Subsequent Legislation." Motion to Strike, p. 3. That section allows "the Company and Signatory Parties" to address subsequent legislation that affects the terms of the RSP Stipulation. RSP Stipulation, p. 6 (emphasis added). OCC was not a "Signatory Party" (id., p. 9) -- in fact, OCC actively opposed the RSP Stipulation and filed an unsuccessful appeal of the Commission's Order approving the RSP Stipulation. Ohio Consumers' Counsel v. PUCO, 114 Ohio St. 3d 340, 2007-Ohio-4276, 872 N.E.2d 269. As a non-party to the RSP Stipulation, OCC may not now attempt to enforce it. Haley v. Hunter, Summit App. No. 23027, 2006-Ohio-2975, ¶ 19 (affirming dismissal because plaintiff lacked standing to assert contract claim where he "was not a party to the contract at issue").

**B. OCC Has Misinterpreted the RSP Stipulation**

Not only does the OCC's status as a non-signatory party preclude its arguments, but also its reading of the RSP Stipulation regarding subsequent legislation is simply wrong. Motion to Strike, pp. 3-5. The statement emphasized by OCC (at p. 3), that the signatory parties "will comply with the subsequently enacted legislation by amending this Stipulation to the extent necessary," in no way acts as a bar to (and does not even address) DP&L's ability to avail itself of permissive legislation subsequently enacted by the General Assembly. RSP Stipulation, p. 6.

The quoted language means only that a subsequent law that requires DP&L to take actions affecting the terms of the RSP Stipulation gives rise to a right of the Signatory Parties (a group to which OCC does not belong) to confer and possibly amend the RSP Stipulation to the extent necessary. The clause does NOT prohibit DP&L from taking actions pursuant to a statute that allows, but does not require, such actions to be taken. In other words, OCC's argument on pages 3-5 of the Motion to Strike treats actions taken under a permissive subsequent statute as barred by a provision designed to reconcile subsequently-enacted mandatory legislative dictates with the terms agreed to in the RSP Stipulation. Indeed, Ohio Rev. Code § 4928.143(D), which contains permissive provisions related to the recovery of incremental cost increases, was not the type of statutory change that was even contemplated by the RSP Stipulation, rendering OCC's Motion to Strike baseless. OCC concedes as much: "The Stipulation only addresses statutory mandates[,] not permissive cost recovery mechanisms." Motion to Strike, p. 5. The Commission should reject OCC's argument for this additional reason.

**III. CHANGED CIRCUMSTANCES ARE IRRELEVANT IN THIS MATTER, BUT NONETHELESS, SB 221 WOULD AMPLY JUSTIFY A MODIFICATION OF THE COMMISSION'S ORDER APPROVING THE RSP STIPULATION**

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On pages 4-6 of the Motion to Strike, OCC references the changed circumstances doctrine and argues that the Commission should not alter its Order approving the RSP Stipulation. Changed circumstances are irrelevant here, because there is no need to modify the RSP Stipulation. As discussed above, the General Assembly has conferred upon the Commission, through the passage of Ohio Rev. Code § 4928.143(D), the authority to permit DP&L to defer the incremental costs at issue, independent of the RSP Stipulation (which does not even address subsequently-passed permissive legislation) and any changed circumstances. DP&L's decision to avail itself of that legislative opportunity renders changed circumstances inapposite.

Even assuming, for the sake of argument, that (1) the RSP Stipulation needs to be modified, and (2) changed circumstances are necessary to do so, the passage of SB 221 more than qualifies. Under the line of cases analyzing changed circumstances, "[t]he [C]ommission may change or modify earlier orders as long as it justifies any changes." Ohio Consumers' Counsel v. PUCO, 114 Ohio St. 3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶ 14, 16 (upholding Commission order approving stipulation that modified previous order where competition-related projections did not materialize as anticipated) (citation omitted); Ohio Consumers' Counsel v. PUCO, 110 Ohio St. 3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶ 25 (upholding Commission order approving a modification of a prior order where the prior order unintentionally "created anticompetitive barriers to the entry of new CRES providers in DP&L's territory"; "the PUCO may change or modify earlier orders as long as it justifies any changes") (citation omitted).

While the significant changed circumstances described in the above-cited cases justified appropriate modifications to prior Commission orders, such changes pale in comparison to the new, unprecedented regulatory environment engendered by SB 221. On one hand, SB 221 imposes new costs and risks on DP&L (e.g., Ohio Rev. Code §§ 4928.64 and 4928.66), and on the other, the law provides for new recovery for DP&L (e.g., Ohio Rev. Code § 4928.143(D)). Although not required under Ohio Rev. Code § 4928.143(D), this new regulatory equilibrium would amply justify the modification of the Order approving the RSP Stipulation.

#### **IV. OCC'S RELIANCE ON RATEMAKING CASES AND DP&L'S HISTORIC RETURNS ON EQUITY RATES MUST FAIL**

OCC asserts that there is no financial need to modify the RSP Stipulation, or to allow DP&L to recover additional costs, based on DP&L's historic rates of return on equity. Motion to Strike, pp. 5-6. OCC's arguments, however, miss the mark for multiple reasons. First, Ohio Rev. Code § 4928.143(D) allows DP&L to seek to defer costs incurred to provide SSO, regardless of DP&L's historic equity return rates.<sup>1</sup>

Second, OCC's unfounded assertion that Fed. Power Comm'n v. Hope Natural Gas Co. (1944), 320 U.S. 591, 64 S. Ct. 281, and Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n (1923), 262 U.S. 679, 43 S. Ct. 675, govern "whether there is a need for a company to recover additional costs" lacks any basis in law or reason. Motion to Strike, pp. 5-6. Hope and Bluefield are rate of return cases that set forth broad constitutional standards and limits regarding return rate analysis in ratemaking proceedings. Those cases establish the minimum levels that a utility must be permitted to recover so that ratemaking does not result in an

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<sup>1</sup> Ohio Rev. Code § 4928.143(D) provides "for the incremental recovery or deferral of any costs that are not being recovered under the [current] rate plan and that the utility incurs . . . to comply with section 4928.141[.]"

unconstitutional taking, but those cases do not prohibit the General Assembly from authorizing a utility to recover specific costs, as the General Assembly has done here. OCC lifts quotations from the Supreme Court's discussion of the constitutional boundaries regarding the ratemaking determinations of public service commissions, and recasts those words in an attempt to support its own argument. Motion to Strike, p. 6. These cases and their progeny were meant to give broad constitutional guidance in rate of return cases, not settle cost recovery disputes outside of the ratemaking context.<sup>2</sup>

**V. THE INVITED ERROR DOCTRINE IS INAPPLICABLE**

OCC's reliance on the invited error doctrine is plainly misplaced. Motion to Strike, pp. 6-7. Under the invited error doctrine, "a party is not entitled to take advantage of an error that he himself invited or induced the court to make." State ex rel. Kline v. Carroll, 96 Ohio St. 3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27. Here, there has been no error made by a court (or Commission), much less one that was "invited or induced" by DP&L. Indeed, there has been no error committed at all. Finally, DP&L is not attempting to take advantage of such a (non-existent) error. This specious argument should be rejected by the Commission.

**VI. OCC HAS FAILED TO IDENTIFY THE PORTION OF DP&L'S ESP FILING THAT IT BELIEVES SHOULD BE STRICKEN**

In addition to the fatal infirmities set forth above, the Commission should not grant OCC's Motion to Strike in any event because OCC has failed to identify the portions of

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<sup>2</sup> E.g., Bluefield, 262 U.S. 679, paragraph 4 of the syllabus ("Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service of the utility to the public, are unjust, unreasonable and confiscatory; and their enforcement deprives the public utility company of its property, in violation of the Fourteenth Amendment"); Duquesne Light Co. v. Barasch (1989), 488 U.S. 299, 310, 314, 109 S. Ct. 609 (although there are "constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory," there are also "economic judgments required in rate proceedings [that] are (footnote cont'd...)")



DP&L's ESP Filing that should be stricken. Given this fundamental failure, how is the Commission expected to identify which portions of DP&L's voluminous filing should be stricken? OCC failed to identify which portions of DP&L's filing should be stricken, and its Motion to Strike should be denied for that additional reason. Early v. Toledo Blade (Lucas App. 1998), 130 Ohio App. 3d 302, 320, 720 N.E.2d 107 (court "disregard[ed]" plaintiffs' assignment of error because plaintiffs failed to identify the portion of the record that allegedly contained the error) (citing Ohio R. App. P. 12(A)(2): "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based[.]"); Williams v. S. Ohio Corr. Facility (Franklin App. 1990), 67 Ohio App. 3d 517, 525, 587 N.E.2d 870 (court could not consider plaintiff's argument "that testimony elicited from a nurse called by [defendant] was inadmissible hearsay" because plaintiff "failed to point out what part of the nurse's testimony was hearsay").

For each of the above reasons, OCC's motion should be denied.

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(...cont'd)

often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties.")

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum of The Dayton Power and Light Company in Opposition to Motion to Strike DP&L Testimony and Application Related to Incremental Costs as Inconsistent with the Stipulation and Order in Case No. 05-276-EL-AIR by OCC has been served via electronic mail upon the following counsel of record, this 13th day of February, 2009:

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Daniel Duann

## 1 BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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3 In the Matter of the :  
Application of The Dayton :4 Power and Light Company : Case No. 08-1094-EL-SSO  
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Pursuant to Ohio Rev. :  
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Application of The Dayton :14 Power and Light Company : Case No. 08-1097-EL-UNC  
for Approval of Its :  
15 Amended Corporate :  
Separation Plan. :

- - -

## 17 DEPOSITION

18 of Daniel Duann, taken before me, Karen Sue Gibson, a  
19 Notary Public in and for the State of Ohio, at the  
20 offices of Janine L. Migden-Ostrander, Ohio  
21 Consumers' Counsel, 10 West Broad Street, Suite 1800,  
22 Columbus, Ohio, on Monday, February 2, 2009, at 9:30  
23 a.m.

- - -

Daniel Duann

Page 2	Page 5
<p>1 APPEARANCES:</p> <p>2 Faruki, Ireland &amp; Cox, P.L.L.C.</p> <p>3 By Mr. Jeffrey S. Sharkey</p> <p>4 500 Courtview Plaza, SW</p> <p>5 10 North Ludlow Street</p> <p>6 Dayton, Ohio 45402</p> <p>7 On behalf of the Applicant</p> <p>8 Janelle L. Milgden-Overlander,</p> <p>9 Ohio Consumers' Counsel</p> <p>10 By Mr. Rick Reese,</p> <p>11 Ms. Jacquellina L. Roberts,</p> <p>12 and Mr. Chris Alwehn</p> <p>13 10 West Broad Street, Suite 1400</p> <p>14 Columbus, Ohio 43215</p> <p>15 On behalf of the Residential Consumers of</p> <p>16 The Dayton Power and Light</p> <p>17 ---</p> <p>18 ---</p> <p>19 ---</p> <p>20 ---</p> <p>21 ---</p> <p>22 ---</p> <p>23 ---</p> <p>24 ---</p>	<p>1 DANIEL DUANN</p> <p>2 being by me first duly sworn, as hereinafter</p> <p>3 certified, deposes and says as follows:</p> <p>4 EXAMINATION</p> <p>5 By Mr. Sharkey:</p> <p>6 Q. Good morning, Doctor. As you know, my</p> <p>7 name is Jeff Sharkey, and I represent the Dayton</p> <p>8 Power and Light Company in this matter. Have you</p> <p>9 ever had your deposition taken before?</p> <p>10 A. I believe so.</p> <p>11 Q. Okay. Been long enough it's not fresh in</p> <p>12 your memory, I take it?</p> <p>13 A. Yes, I believe it was probably 1984.</p> <p>14 Q. Okay. Let me give you just a couple of</p> <p>15 quick ground rules because taking a deposition is a</p> <p>16 little different than an ordinary conversation</p> <p>17 because we have a court reporter sitting next to us</p> <p>18 who will take down what it is we say.</p> <p>19 The first rule is all of your answers</p> <p>20 must be oral, so if I ask a yes-no question, you</p> <p>21 can't nod your head or shake your head because the</p> <p>22 court reporter can't take that down. You need to say</p> <p>23 yes or no. Similarly uh-huh or huh-uh to be</p> <p>24 affirmative or negative won't be clear on the</p>
<p>1 Monday Morning Session,</p> <p>2 February 2, 2009.</p> <p>3 ---</p> <p>4 STIPULATIONS</p> <p>5 It is stipulated by and among counsel for the</p> <p>6 respective parties that the deposition of Daniel</p> <p>7 Duann, a witness called by the Applicant under the</p> <p>8 applicable Rules of Civil Procedure, may be reduced</p> <p>9 to writing in stenotypy by the Notary, whose notes</p> <p>10 thereafter may be transcribed out of the presence of</p> <p>11 the witness; and that proof of the official character</p> <p>12 and qualification of the Notary is waived.</p> <p>13 ---</p> <p>14 ---</p> <p>15 ---</p> <p>16 ---</p> <p>17 ---</p> <p>18 ---</p> <p>19 ---</p> <p>20 ---</p> <p>21 ---</p> <p>22 ---</p> <p>23 ---</p> <p>24 ---</p>	<p>1 transcript, so we need to again say yes or no in</p> <p>2 responses to the questions.</p> <p>3 There will be times when you know what I</p> <p>4 am going to be asking before I finish my question. I</p> <p>5 ask nonetheless you wait until I have finished</p> <p>6 articulating the question just so the court reporter</p> <p>7 can get it down, and we are not both talking at the</p> <p>8 same time because, again, it makes it hard for her.</p> <p>9 And then, finally, if you need a break,</p> <p>10 just let me know. My only request is not take a</p> <p>11 break while there is a question pending, okay?</p> <p>12 A. Sure.</p> <p>13 Q. Can you describe for me your employment</p> <p>14 history since the last degree that you received.</p> <p>15 A. I started working at the Ohio Division of</p> <p>16 Energy, the Ohio Department of Development in August,</p> <p>17 1983, and that was before I finished my doctorate</p> <p>18 dissertation, so I started working before I finished</p> <p>19 my dissertation, and I worked at ODDE until May,</p> <p>20 1985. Then I started working at the American Medical</p> <p>21 Association in Chicago from May, 1985, to September,</p> <p>22 1986. After that, I started working at Illinois</p> <p>23 Commerce Commission from September of 1986 through</p> <p>24 August, 1987. After that, I went to the Ohio State</p>
<p>1 INDEX</p> <p>2 ---</p> <p>3 Deposition Exhibit Identified</p> <p>4 1 July/August 2008 Consumers' Corner 29</p> <p>5 2 Case No. 05-276-EL-AIR stipulation 36</p> <p>6 ---</p> <p>7 ---</p> <p>8 ---</p> <p>9 ---</p> <p>10 ---</p> <p>11 ---</p> <p>12 ---</p> <p>13 ---</p> <p>14 ---</p> <p>15 ---</p> <p>16 ---</p> <p>17 ---</p> <p>18 ---</p> <p>19 ---</p> <p>20 ---</p> <p>21 ---</p> <p>22 ---</p> <p>23 ---</p> <p>24 ---</p>	<p>1 University at Columbus, Ohio, and I worked for the</p> <p>2 National Regulatory Research Institute as a senior</p> <p>3 Institute economist. I worked at NRRRI until</p> <p>4 December, 1995.</p> <p>5 Then I started my own business working as</p> <p>6 an independent business consultant. And I closed my</p> <p>7 own business in December, 2006, and started looking</p> <p>8 for a job, and I started working for the Office of</p> <p>9 Ohio Consumers' Counsel on January 7, 2008.</p> <p>10 Q. Okay. Now, let's go back to your</p> <p>11 position at the Ohio Division of Energy. It says in</p> <p>12 your prefiled testimony that you were responsible for</p> <p>13 reviewing long-term supply and resource forecasts of</p> <p>14 major electric utilities in Ohio. Can you tell me</p> <p>15 what that means?</p> <p>16 A. My recollection is at that time the State</p> <p>17 of Ohio just passed a new legislation that required</p> <p>18 the Ohio Division of Energy to review the long -- the</p> <p>19 20-year long-term forecast reports of -- long-term</p> <p>20 forecast reports of electric utilities, and my job at</p> <p>21 that time was to review those long-term forecast</p> <p>22 reports. And we -- at that time there is a forecast</p> <p>23 division that was doing that. I was part of that,</p> <p>24 And my focus at that time was looking at on the</p>

2 (Pages 2 to 7)

Daniel Duann

<p style="text-align: right;">Page 20</p> <p>1 2009, 2010?</p> <p>2 A. No.</p> <p>3 Q. You don't consider those to be a</p> <p>4 significant -- the DP&amp;L's fuel costs for 2009, 2010,</p> <p>5 you do not consider to be significant, large?</p> <p>6 A. I simply don't know what you mean by</p> <p>7 significant because it's significant for a person; it</p> <p>8 may not be significant for a company. It may not be</p> <p>9 significant for a large company. Significant for a</p> <p>10 small company, it may not be significant for a large</p> <p>11 company so that's the -- you know, I am not trying to</p> <p>12 not answer the question. I simply do not know --</p> <p>13 Q. I understand the terms like large or</p> <p>14 significant mean different things to different</p> <p>15 people, and I am just asking for your understanding</p> <p>16 in how you consider what those terms to mean. Do you</p> <p>17 consider DP&amp;L's projected fuel costs in 2009 and 2010</p> <p>18 to be large?</p> <p>19 A. I think I already answered the question.</p> <p>20 Q. I think your answer was, no, you do not?</p> <p>21 That was a yes for the record?</p> <p>22 A. I believe my answer is I do not know the</p> <p>23 meaning of significant in your question, so I cannot</p> <p>24 answer whether they are significant or large.</p>	<p style="text-align: right;">Page 23</p> <p>1 you don't have an opinion as to whether there will be</p> <p>2 significant changes up or down into the future?</p> <p>3 A. I don't know.</p> <p>4 Q. You have stated in your testimony that</p> <p>5 you reviewed Ohio Revised Code §4928.143(D)?</p> <p>6 A. Yes.</p> <p>7 Q. Let me give you a copy of that statute.</p> <p>8 I have handed you a copy of 4928.143(D). If you</p> <p>9 would, please, flip to that section beginning on line</p> <p>10 1 of Section D, at least on my copy there is a clause</p> <p>11 that begins "if an."</p> <p>12 A. I didn't see that. I'm at the D, okay.</p> <p>13 "If," okay.</p> <p>14 Q. Starting with the "if an," it says "If an</p> <p>15 electric distribution utility if it has a rate plan</p> <p>16 that extends beyond December 31, 2008."</p> <p>17 A. Yes, I see that.</p> <p>18 Q. Would you agree with me that at the time</p> <p>19 the statute was enacted, DP&amp;L was the only electric</p> <p>20 distribution utility in Ohio that had a rate plan in</p> <p>21 place that extended beyond December 31, 2008?</p> <p>22 A. Yes.</p> <p>23 Q. So is it your understanding that</p> <p>24 subsection D was written with DP&amp;L in mind?</p>
<p style="text-align: right;">Page 21</p> <p>1 Q. Do you consider the fuel markets to be</p> <p>2 volatile?</p> <p>3 A. I cannot answer that. I don't know which</p> <p>4 year you are referring to. I don't know what fuel</p> <p>5 you are referring to. I don't know which particular</p> <p>6 market you are referring to, the spot market, you are</p> <p>7 referring to the forward market, or you are referring</p> <p>8 to as a very general question. I really cannot</p> <p>9 answer that.</p> <p>10 Q. Okay. How about coal markets for 2007</p> <p>11 through 2008, do you consider those markets to have</p> <p>12 been volatile?</p> <p>13 A. I consider the coal market -- or should I</p> <p>14 more accurately the spot market for coal seems to be</p> <p>15 quite stable in 2007. And in 2008, for the first</p> <p>16 half of 2008, there was a very high percentage of</p> <p>17 increase in coal spot price, but after maybe July of</p> <p>18 2008, the spot coal price market experienced a</p> <p>19 substantial -- a very large percentage of decrease.</p> <p>20 So you can say the market -- the spot market for coal</p> <p>21 was indeed volatile in 2008.</p> <p>22 Q. Do you have an expectation as to whether</p> <p>23 it will be volatile in 2009 and 2010?</p> <p>24 A. I do not know whether the market for coal</p>	<p style="text-align: right;">Page 24</p> <p>1 A. I don't know. I don't know what the --</p> <p>2 what the legislature had in mind when they enacted</p> <p>3 these.</p> <p>4 Q. If you refer down to the "however" clause</p> <p>5 which is halfway down the section.</p> <p>6 A. Yes, I see the word "however."</p> <p>7 Q. Okay. It begins with, "However, that</p> <p>8 utility may include in its electric security plan</p> <p>9 under this section and the Commission may approve,</p> <p>10 modify and approve, or disapprove subject to Division</p> <p>11 D of this section provisions for the incremental</p> <p>12 recovery or deferral of any costs that are not being</p> <p>13 recovered under the rate plan and that the utility</p> <p>14 incurs during the continuation period to comply with</p> <p>15 Section 4928.141," and then it goes on. Do you see</p> <p>16 that?</p> <p>17 A. I believe you quoted a wrong division.</p> <p>18 The copy I have it read like this, "However, that</p> <p>19 utility may include in its electric security plan</p> <p>20 under this section and the Commission may approve,</p> <p>21 modify and approve, or disapprove subject to Division C</p> <p>22 of this section," and I believe you read as "Division</p> <p>23 D," so I don't know which one is -- you have in mind.</p> <p>24 Q. It certainly says Division C, so if I</p>
<p style="text-align: right;">Page 22</p> <p>1 will be volatile in 2009 and 2010.</p> <p>2 Q. I understand that nobody knows what's</p> <p>3 going to happen in the market because it's in the</p> <p>4 future. I am just asking you what your expectations</p> <p>5 are as to the future in 2009 and 2010 and whether you</p> <p>6 believe the market will be volatile.</p> <p>7 MR. REESE: I would advise my client not</p> <p>8 to guess.</p> <p>9 A. I simply don't know whether it will be</p> <p>10 volatile or not. I simply don't know.</p> <p>11 Q. And you don't know enough here as you sit</p> <p>12 here to even have an opinion as to whether it will be</p> <p>13 volatile or not in 2009 or 2010?</p> <p>14 A. As I sit here and try to see what the</p> <p>15 future price of coal would be, the best answer I can</p> <p>16 give is there will probably be change here</p> <p>17 constantly. So today's price -- the price on January</p> <p>18 1 will be different from the price on February 1 of</p> <p>19 2009. That's the best answer I can give.</p> <p>20 Q. So just so I have a clear understanding</p> <p>21 you don't have an expectation as to whether it will</p> <p>22 be -- step back.</p> <p>23 Everybody would agree presumably that</p> <p>24 there will be some changes in the market price, but</p>	<p style="text-align: right;">Page 25</p> <p>1 said D, I misspoke, no dispute about that. The focus</p> <p>2 of my question is on something different.</p> <p>3 A. Okay.</p> <p>4 Q. Would you agree that fuel costs are a</p> <p>5 cost that would fall within the scope of the clause</p> <p>6 that I just read?</p> <p>7 A. So you are asking whether the reference</p> <p>8 in the sentence provision for the incremental</p> <p>9 recovery or the deferral of any costs that are not</p> <p>10 being recovered under the rate plan so you are asking</p> <p>11 whether any costs that accrued, fuel costs?</p> <p>12 Q. Not precisely. I am asking whether DP&amp;L</p> <p>13 would incur fuel costs as part of its provision of</p> <p>14 standard service offer pursuant to 4928.141.</p> <p>15 A. Yes.</p> <p>16 Q. Excluding fuel costs for the moment, do</p> <p>17 you know if at the time this statute was enacted,</p> <p>18 DP&amp;L had incurred significant increases in any other</p> <p>19 item of cost since its 2005 RSP stipulation was</p> <p>20 approved?</p> <p>21 A. I don't understand your question. It's</p> <p>22 rather long so I --</p> <p>23 Q. Let's start over. We are setting aside</p> <p>24 fuel costs. And the question is since the 2005 RSP</p>

5 (Pages 20 to 25)



Daniel Duann

<p style="text-align: right;">Page 26</p> <p>1 stipulation for the Dayton Power and Light Company do 2 you know whether the Dayton Power and Light Company 3 had experienced any other significant increases in 4 costs up to the time the statute was enacted? 5 MR. REESE: Objection. Can you tell us 6 what you mean by any other? 7 Q. Any costs the Dayton Power and Light 8 Company incurs to provide standard service offer. 9 Does the question make sense to you? 10 A. Okay, I try my best. So what you are 11 asking is since the approval of the second RSP in 12 2005 which established the RSP rate and you are 13 asking me whether Dayton Power and Light has incurred 14 quote-unquote a substantial amount of cost other than 15 fuel in providing the standard service offer? 16 Q. I am asking whether you know whether the 17 Dayton Power and Light Company has incurred such 18 increases, that is correct. 19 A. Okay. Let me answer this way, I have not 20 reviewed all Dayton and Power's -- those accounting 21 information. But I do notice that in the second RSP 22 it specifies environmental investment rider which 23 causes the Dayton Power &amp; Light to increase its rate 24 around 5.4 percent every year. And I believe this</p>	<p style="text-align: right;">Page 29</p> <p>1 being recovered under the rate plan, and the second 2 test is just the one following that whether the 3 utility incurred during the continuation period to 4 comply with the standard service offer Section 5 4928.141. 6 Q. You make some -- you offer some reasons 7 in your testimony that you believe DP&amp;L shouldn't be 8 entitled to defer fuel costs. Set those reasons 9 aside for the moment. The question that I have for 10 you is did you consider any other reasons or factors 11 in the course of your analysis that you did not 12 include in your testimony? 13 A. No. 14 Q. I am going to hand you a document that I 15 am going to mark as Exhibit 1. Exhibit 1 is a 16 document that was issued by the Office of the Ohio 17 Consumers' Counsel in July, August of 2008. Do you 18 see that? 19 A. Yes. 20 Q. Okay. Are you familiar with the fact 21 that the Office of the Ohio Consumers' Counsel issues 22 such documents? 23 A. Yes. 24 Q. And you would agree that on page 1 of the</p>
<p style="text-align: right;">Page 27</p> <p>1 amount of increase -- 5.4 percent of the 2004 2 generation tariff in each year in 2000 -- 2000 -- at 3 least 2007, 2008, 2009, and 2010 and the original -- 4 at least when I read the stipulation, these costs are 5 supposed to offer the Dayton Power and Light's 6 investment on compliance with -- well, anyway it's 7 related to the Dayton Power's environmental 8 investment, so I suppose that probably indicated that 9 Dayton Power has incurred some environmental 10 investment, but I also want the record to show that 11 this investment rider, they are not subject to any 12 prudency review or trueup under the RSP. They are 13 simply just characterized as environmental rider, and 14 the stipulation specifically says the PUCO can only 15 review whether it is the same as those contained in 16 the RSP stipulation. 17 Q. Other than the environmental costs that 18 you've identified are you aware of any other such 19 increases that the DP&amp;L has incurred since 2005? 20 A. No. 21 Q. And I believe your answer touched on this 22 but just so we have a clear record it's your 23 understanding that the environmental investment rider 24 in the 2005 RSP stipulation was intended to</p>	<p style="text-align: right;">Page 30</p> <p>1 document there is an article regarding energy law and 2 in particular Senate Bill 221? 3 A. Without reading the whole issue I see on 4 page 1 this -- there's a headline that states, 5 "Energy law will shape the future of electricity in 6 Ohio," yes, I did see that. 7 Q. And you understand this article -- step 8 back, you understand the headline to be referring to 9 Senate Bill 221, correct? 10 A. I believe so. 11 Q. And who prepares articles such as the one 12 we are looking at on behalf of the Office of the 13 Consumers' Counsel? 14 A. We have a department called Department of 15 Communication and I believe the staff there prepared 16 that and I don't know who prepared this particular 17 one. 18 Q. How many people are in that Department of 19 Communication that you referred to? 20 A. I don't know how many people are there. 21 Q. Could you tell me approximately how many 22 people work at the Office of the Ohio Consumers' 23 Counsel? 24 A. I would say about 70.</p>
<p style="text-align: right;">Page 28</p> <p>1 compensate DP&amp;L for the environmental investment that 2 you've described? 3 A. That's what I -- that's my understanding 4 based on the reading of the stipulation. 5 Q. Do you have a test that you believe the 6 PUCO should use to determine whether costs are 7 recoverable either directly or through a deferral 8 under Ohio Revised Code 4928.143(D)? 9 A. I do not have the Revised Code -- at 10 least the section -- can you say that? 11 Q. Same Subsection D that we were just 12 looking at. 13 A. 4928.143(D)? 14 Q. If I said something different, I 15 misspoke. That's -- I mean to ask you about the same 16 section we have been discussing. The question is do 17 you have a test or method that you believe that the 18 PUCO should use to determine whether costs are 19 recoverable or deferrable under that section? 20 A. I think the test I would propose is just 21 follow what the statutes say here, whether -- that 22 any costs when they are not being recovered under the 23 rate plan, I think that would definitely be a test 24 that data should be used whether those costs are not</p>	<p style="text-align: right;">Page 31</p> <p>1 Q. And that includes attorneys, staff, and 2 support personnel? 3 A. I believe so. 4 Q. Do you know if articles such as the one 5 at -- that we are looking at go through a review 6 process within the Office of the Ohio Consumers' 7 Counsel? 8 A. I really don't know. 9 Q. Okay, if you turn to page 3. 10 A. Yes. 11 Q. There is a continuation of the article 12 and I want to read to you the beginning piece. Are 13 you with me? 14 A. Yes. 15 Q. It says, "While the OCC worked to secure 16 as many protections as possible for residential 17 customers, there were issues that did not come out in 18 the favor of consumers. Some negative aspects of the 19 law that the OCC unfortunately could not get changed 20 include the possibility of automatic increases for 21 fuel, purchased power, and emission allowances." Do 22 you agree with that statement? 23 A. Yes. 24 Q. Could you take a look at your testimony</p>

6 (Pages 26 to 31)

<p style="text-align: right;">Page 32</p> <p>1 page 7, line 7.  2 A. Okay.  3 Q. You refer to DP&amp;L's request for a  4 deferral as a rate increase. Can you tell me, first  5 of all, why that point is included in your testimony?  6 A. That's what I believe.  7 Q. Do you believe that your statement that  8 the request for deferral is a rate increase is  9 important to the Commission's evaluation and  10 consideration of DP&amp;L's request?  11 A. I believe every issue I raised in my  12 testimony is important for the Commission's  13 evaluation and the decision in this case, yes.  14 Q. Okay. And why do you believe that this  15 particular issue meaning the request of the deferral  16 is a rate increase is important?  17 A. I already answered that.  18 Q. Can you explain how the fact that the  19 request for deferral is a rate increase should affect  20 the Commission's decision making?  21 A. Can you rephrase the question or what do  22 you exactly mean?  23 Q. Sure. You say here that the request for  24 deferral is a rate increase, and you've told me that</p>	<p style="text-align: right;">Page 35</p> <p>1 indicated that in order to comply with the existing  2 RSP, the company will not increase its rate as a  3 result for those related to incremental fuel-related  4 costs.  5 Q. Okay. You referred to the Dayton Power  6 and Light Company's RSP. I assume you are referring  7 to the 2005 RSP stipulation Dayton Power and Light  8 entered into; is that correct?  9 A. You mean in my testimony?  10 Q. No, in your answer just then.  11 THE WITNESS: Can you read back the  12 answer?  13 (Answer read.)  14 A. Yes, I think that RSP referred to the '05  15 RSP.  16 Q. Okay. And on pages 8 and 9 of your  17 testimony, you offer your opinion that the 2005 RSP  18 stipulation prohibits DP&amp;L from seeking a rate  19 increase associated with fuel costs for 2009 and  20 2010, correct?  21 A. I believe my testimony used the words  22 does not provide for the adjustment for increased  23 fuel-related costs in 2009 and 2010.  24 Q. Which line were you looking at, I'm</p>
<p style="text-align: right;">Page 33</p> <p>1 you believe that to be an important consideration for  2 the Commission. And my real question is why do you  3 believe that to be important? What do you think the  4 Commission should do with that piece of information?  5 A. Well, why I think this deferral is a rate  6 increase is important is because this request for  7 deferral will increase the amount of money collected  8 from the ratepayer and that the Commission should --  9 should consider it.  10 Q. Do you agree that the request for  11 deferral is not a rate increase in 2009 and 2010?  12 A. No.  13 Q. Do you consider a deferral in 2009 and  14 2010 to be the equivalent of a rate increase in 2009  15 and 2010?  16 A. Yes.  17 Q. Why?  18 A. I think you used the word, very good, it  19 is equivalent. It is a rate increase. As I say, you  20 know, the company filed an application, expects to  21 recover the incremental cost incurred, the  22 quote-unquote company's definition of incremental  23 cost occurred in 2009 and 2010. The company expects  24 to recover those costs, and the ratepayer will pay</p>	<p style="text-align: right;">Page 36</p> <p>1 sorry, Dr. Duann?  2 A. I am referring to lines 14, 15, 16 of  3 page 8. It reads, "Yes, there is. In other words,  4 the current rate plan under the company's  5 PUCO-approved RSP does not provide for the adjustment  6 for increased fuel-related costs in 2009 and 2010."  7 Q. Okay.  8 A. I don't know whether -- is this what you  9 are referring to when you asked the question?  10 Q. You are in the right area, yes. Let me  11 ask you this, it's also true, isn't it -- step back.  12 I am going to hand you a document I am  13 going to mark as Exhibit 2 and that's the 2005 RSP  14 stipulation that we have been discussing. It's true,  15 isn't it, that there is nothing in that document that  16 expressly precludes DP&amp;L from seeking to defer fuel  17 costs that it incurs in 2009 and 2010?  18 A. I did not see any language or provision  19 that specifically mentioned any adjustment for  20 fuel-related costs in 2009 and 2010. Either way it  21 does not allow and it does not exclude that.  22 MR. SHARKEY: Go off the record for a  23 minute.  24 (Recess taken.)</p>
<p style="text-align: right;">Page 34</p> <p>1 for this recovery in 2011 and beyond. So I think  2 that's equivalent to a rate increase.  3 Q. Do you agree with me rates would not go  4 up in 2009 or in 2010 as a result of DP&amp;L's request,  5 correct?  6 A. I probably need you to clarify this  7 question because when you say the rate will not  8 increase, I believe the company's application not  9 only covers those that related it to fuel, there are  10 also others related to investment in Smart Grid and  11 other items. So when you say the rate, I am kind of  12 hesitant to really say whether it would increase or  13 not because that also includes riders so --  14 Q. Fair enough. My question was intended to  15 be limited to the request for fuel deferral. With  16 that limitation you would agree, wouldn't you, that  17 rates paid by DP&amp;L's customers would not increase in  18 2009 or in 2010 as a result of DP&amp;L's request for a  19 deferral?  20 A. Yeah. Strictly just considering the  21 company's request for deferral, you know, we just  22 limited it. We didn't look at any other automatic  23 increase for environmental investment rider. If we  24 look at the proposal, I think the company has</p>	<p style="text-align: right;">Page 37</p> <p>1 Q. Doctor, I meant to ask you this question  2 before we started but referring specifically to the  3 confidential version of your direct testimony, do you  4 have any corrections or changes to that testimony  5 that you intend to make?  6 A. No.  7 Q. I believe you state in your testimony  8 that you reviewed Senate Bill 221; is that correct?  9 A. Yes.  10 Q. Okay.  11 A. I did not say that in my testimony, but I  12 did review it.  13 Q. Okay. Not that it matters but you did  14 state in your testimony that you reviewed the related  15 statutes, that's page 4, line 3.  16 A. Yes, yes, I did say that.  17 Q. Not that it matters. Are you aware of  18 the fact that Ohio Revised Code Section 4928.66  19 requires DP&amp;L to make substantial expenditures to  20 attempt to achieve energy efficiency and demand  21 reduction targets in that section? I see you are  22 flipping through that section so I will just give you  23 a copy of that section for your review.  24 A. Actually I did not review this section,</p>

Daniel Duann

<p style="text-align: right;">Page 44</p> <p>1 management, you know, both of -- have attorneys and 2 they review it and they -- they review it, they 3 provide comments, provide -- suggest changes to my 4 testimony and this is the -- the end result is my 5 testimony. 6 Q. So there wasn't any specific conversation 7 or writing in which an OCC attorney confirmed your 8 understanding of Senate Bill 221? 9 A. I believe it is when we -- when we -- the 10 team prepared, we discussed this issue, and I 11 expressed the assets -- maybe not exactly words, the 12 essence of my understanding here and there's -- to my 13 recollection I don't believe there is any -- anybody 14 said, oh, your understanding is wrong. So probably, 15 you know, we had a meeting, so I don't know whether 16 you can say there was a conversation or not. 17 Q. When you refer to OCC's case team, who is 18 on that case team? 19 A. I believe there may be like 10 to 12 20 people. 21 Q. Okay. The -- does the case team include 22 all of the OCC representatives who have filed 23 testimony? 24 A. I believe so.</p>	<p style="text-align: right;">Page 47</p> <p>1 amount DP&amp;L incurs in those same seven FERC accounts 2 related to fuel in 2009 and 2010, correct? 3 A. Yes. As a general description, I think 4 that is true, but I think the company's proposal also 5 indicated that you have to allocate those costs to 6 jurisdictional sales customer and nonjurisdictional 7 and then you calculate the quite-unquote fuel costs 8 per kilowatt hour and you compare those two. You 9 calculate the difference and you times the -- the 10 jurisdictional sales you came up -- and you record 11 that in -- in other regulatory assets. 12 Q. Okay. Fair enough. Why don't you set 13 aside the allocation questions because I understand 14 those were covered by Mr. Yankel in his testimony. 15 A. Yes. 16 Q. You understand that the Dayton Power and 17 Light Company's proposal is to compare the amount it 18 is recovering in its current rate plan associated 19 with fuel which the company calculates to be 1.8 20 cents to the fuel-related costs that it incurs in 21 those seven FERC accounts in 2009 and 2010; is that 22 fair? 23 A. Yes. 24 Q. You would agree with me that the -- let</p>
<p style="text-align: right;">Page 45</p> <p>1 Q. Okay. And does it include the attorneys 2 who have been representing OCC in public filings? 3 A. Can you explain what you mean by public 4 filings? I really don't understand what you mean. 5 Q. Does it include Jackie Roberts, Mike 6 Idzkowski, Rick Reese, and -- 7 A. Greg. 8 MR. REESE: Greg Poulos. 9 Q. Greg Poulos? 10 A. Yeah. 11 Q. Does it include anybody else? 12 A. You mean the attorney or other? 13 Q. Does the case team include any person 14 besides the people who filed testimony and the four 15 attorneys we've identified? 16 A. Yes, it does, yes. 17 Q. Who else is on the case team? 18 A. I think Beth Hixon, Karen Hardy, Dave 19 Cleaver, and I think Chris also is on the case team 20 and Stacia Harper. And I think there may be some 21 communication people also members of the case team. 22 Q. In your conversations with the case team, 23 have you ever discussed whether Section 4928.143(D) 24 was intended to permit the Dayton Power and Light</p>	<p style="text-align: right;">Page 48</p> <p>1 me step back. 2 Your recommendation is the 2008 costs is 3 actual 2008 fuel costs incurred -- recorded in those 4 seven accounts, correct? 5 THE WITNESS: Can I have the question 6 read back? 7 (Question read.) 8 Q. Let me strike that. I will just ask you 9 a question more directly. Your recommendation for 10 calculating the base would be actual 2008 costs, 11 correct? 12 A. The actual costs in those seven 13 fuel-related accounts, yes. 14 Q. And you would agree with me, I assume, 15 that the rates calculated and set in DP&amp;L's 2005 RSP 16 stipulation were not and could not have been based 17 upon actual costs DP&amp;L incurs in 2008, correct? 18 THE WITNESS: Can you read back the 19 question? 20 (Question read.) 21 A. I'm hesitant to answer this question 22 because the word "rate calculated" is not clear to me 23 because my belief is there is no such thing as a fuel 24 rate per se in the 2005 RSP case, so in the 2005 RSP</p>
<p style="text-align: right;">Page 46</p> <p>1 Company to recover or defer fuel costs? 2 A. I think we discussed that, yes. 3 Q. Okay. Was your conclusion that it was 4 intended to permit DP&amp;L to recover for deferred fuel 5 costs? 6 MR. REESE: Objection. 7 A. I think I already answered that. We 8 discussed it, yes. 9 Q. Yes. And the answer was that, yes, it 10 was intended to do so? 11 A. I think in my testimony already say that. 12 Q. Let's turn our focus and for the next 13 series of questions I have for you I want you to 14 assume that the Public Utilities Commission of Ohio 15 has decided to permit the Dayton Power and Light 16 Company to defer fuel costs, and the questions are 17 designed to figure out how the deferral amount should 18 be calculated. Does that make sense to you? 19 A. Yes. 20 Q. Your recommendation as I understand it is 21 that the amount of the deferral should be calculated 22 by comparing the amount the Dayton Power and Light 23 Company records in the seven FERC accounts related to 24 fuel in 2008, that amount should be compared to the</p>	<p style="text-align: right;">Page 49</p> <p>1 there is a rate and that rate is a negotiated rate 2 amount to various parties so that's the reason I kind 3 of hesitate. If we are talking about those 4 negotiated rates that enter into 2005, I believe they 5 are certainly not related to the fuel costs in 2008. 6 Q. I want you to assume that the PUCO 7 decides that DP&amp;L should be permitted to defer costs 8 not being recovered under DP&amp;L's RSP rate plan. If 9 the PUCO were to reach that conclusion, would you 10 agree that DP&amp;L's proposed methodology for 11 calculating the amount of the deferral was correct? 12 A. No. 13 Q. Why not? 14 A. Because I think you say that the 15 Commission will allow DP&amp;L to recover costs that are 16 above and beyond those recovered in its current RSP 17 rate and -- and my projection is those rates recover 18 under -- that my position is the actual fuel costs of 19 DP&amp;L in 2008 are already recovered under the existing 20 RSP rate. 21 Q. Why do you believe that to be true? 22 A. Because there is no evidence to indicate 23 that DP&amp;L was underrecovering its fuel costs in 2008. 24 Q. Well, would you agree with me that -- let</p>

9 (Pages 44 to 49)

