BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	:	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	:	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	:	Case No. 12-672-EL-RDR

MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO STRIKE TESTIMONY OF FIRST ENERGY SOLUTIONS CORP. WITNESS JONATHAN A. LESSER

The Dayton Power and Light Company moves the Commission for an order to strike portions of the testimony of First Energy Solutions Corp. witness Jonathan A. Lesser. The Commission should issue the requested order because the testimony at issue contains numerous statements that are not based on personal knowledge, that do not set forth facts that would be admissible in evidence, and that are conclusions of law (not statements of fact).

Respectfully submitted,

s/ Judi L. Sobecki
Judi L. Sobecki (0067186)
THE DAYTON POWER AND
LIGHT COMPANY
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7171
Telecopier: (937) 259-7178
Email: judi.sobecki@dplinc.com

s/ Charles J. Faruki
Charles J. Faruki (0010417)
(Counsel of Record)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com

MEMORANDUM IN SUPPORT OF MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO STRIKE TESTIMONY OF FIRST ENERGY SOLUTIONS CORP. WITNESS JONATHAN A. LESSER

I. INTRODUCTION AND SUMMARY

On March 1, 2013, First Energy Solutions Corp. ("FES") filed the direct testimony of its witness Jonathan A. Lesser (the "Testimony"). The Testimony of FES's witnesses contains numerous statements that are not based on personal knowledge, that do not set forth facts that would be admissible in evidence, and that are conclusions of law (not statements of fact).

Specifically, the Commission should issue an order to strike the following portions of the Testimony:

Witness	Page and Line Numbers
Jonathan A. Lesser	page 53, lines 12-21; page 54, lines 23-24; page 55, lines 2-13; page 58, lines 12, 21-23

II. PORTIONS OF THE TESTIMONY CONTAINING STATEMENTS ON SUBSTANTIVE LAW ARE IMPROPER AND SHOULD BE STRICKEN

FES has attempted to instruct the Attorney Examiners on the law to be applied to the ESP Application filed by The Dayton Power and Light Company ("DP&L"). The inadmissible portions of the Testimony identified above are wholly improper under decades of well-settled precedent, and must be stricken from the evidentiary record. By opining on substantive law, FES in effect seeks to offer expert testimony on the law.

Legal testimony as to the law is inadmissible, particularly where (as here)[1] the witnesses are not legal experts. Camp St. Marys Ass'n of the W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes, 176 Ohio App. 3d 54, 2008-Ohio-1490, 889 N.E.2d 1066, ¶40 (3d Dist.) (rejecting testimony because witness "was not qualified as a legal expert, and his opinions concerning superiority, influence, and fiduciary duties are legal conclusions rather than statements of fact"); Niermeyer v. Cook's Termite & Pest Control, Inc., 10th Dist. No. 05AP-21, 2006-Ohio-640, ¶34 (affirming trial court's granting motion to strike testimony because "it stated only legal conclusions, and failed to outline any facts supporting such conclusions"); Molecular Tech. Corp. v. Valentine, 925 F.2d 910, 919 (6th Cir. 1991) ("it is impermissible for a trial judge to delegate his duty to determine the law of a case to an expert") (citations omitted); Smith v. United States, No. 3:95cv445, 2012 U.S. Dist. LEXIS 58623, at *53 (S.D. Ohio Apr. 26, 2012) ("It is axiomatic that a court must determine the law which is applicable in a particular suit. In other words, the applicable law is not a matter about which the parties present evidence.").[2]

This prohibition of testimony concerning substantive law has been applied to both lay and expert witnesses. United States v. Kingston, 971 F.2d 481, 486 (10th Cir. 1992) ("[L]ay witnesses and even expert witnesses are not permitted to give opinions as to what the law is.").

Here, FES has attempted to define the substantive law for DP&L's ESP Application. The portions of the Testimony outlined above are improper because FES has

[1] There is no evidence that Mr. Lesser is a lawyer, let alone a legal expert.

[2] Ohio courts may look to federal case law as persuasive authority in interpreting an Ohio rule. Industrial Risk Insurers v. Lorenz Equip. Co., 69 Ohio St. 3d 576, 579, 635 N.E.2d 14, 17 (1994). Thus, the Commission should consider the federal cases cited in this memorandum as persuasive authority.

crossed the line between witness and legal advocate. Indeed, the Testimony is further flawed because significant portions of it are written in the form of a legal brief, with citation to Ohio law and Commission precedent. G.F. Co. v. Pan Ocean Shipping Co., Ltd., 23 F.3d 1498, 1507 (9th Cir. 1994) (striking witnesses' testimony because "[e]ach is written in the form of a legal document, complete with subdivisions for discussion of the issues, the law, and the conclusions"); In re McKesson HBOC, Inc. Secs. Litig., 126 F. Supp. 2d 1239, 1246-47 (N.D. Cal. 2000) (granting motion to strike when expert testimony was written in form of legal brief because "[t]hese declarations offer few facts or any admissible expert opinions, instead proffering various and sundry conclusions of law.").

III. CONCLUSION

Based on these severe defects in the Testimony, the Commission should issue an order to strike portions of the Testimony of FES witness Jonathan A. Lesser.

Respectfully submitted,

s/ Judi L. Sobecki
Judi L. Sobecki (0067186)
THE DAYTON POWER AND
LIGHT COMPANY
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7171
Telecopier: (937) 259-7178
Email: judi.sobecki@dplinc.com

s/ Charles J. Faruki
Charles J. Faruki (0010417)
(Counsel of Record)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of The Dayton Power and Light Company to Strike Testimony of First Energy Solutions Corp. Witness Jonathan A. Lesser has been served via electronic mail upon the following counsel of record, this 7th day of March, 2013:

Samuel C. Randazzo, Esq.
Frank P. Darr, Esq.
Matthew R. Pritchard, Esq.
Joseph E. Oliker, Esq.
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4225
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
joliker@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

Philip B. Sineneng, Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Philip.Sineneng@ThompsonHine.com

Amy B. Spiller, Esq.
Deputy General Counsel
Jeanne W. Kingery, Esq.
Associate General Counsel
DUKE ENERGY RETAIL SALES, LLC and
DUKE ENERGY COMMERCIAL ASSET
MANAGEMENT, INC.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Amy.Spiller@duke-energy.com
Jeanne.Kingery@duke-energy.com

Attorneys for Duke Energy Retail Sales, LLC and Duke Energy Commercial Asset Management, Inc.

Mark A. Hayden, Esq.
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F. Lang, Esq.
Laura C. McBride, Esq.
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com

N. Trevor Alexander, Esq.
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State St.
Columbus, OH 43215-4243
talexander@calfee.com

David A. Kutik, Esq.
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt, Esq.
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673
aehaedt@jonesday.com

Attorneys for FirstEnergy Solutions Corp.

Robert A. McMahon, Esq.
EBERLY MCMAHON LLC

Jay E. Jadwin, Esq.
AMERICAN ELECTRIC POWER

2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
bmcmahon@emh-law.com

Rocco O. D'Ascenzo, Esq.
Associate General Counsel
Elizabeth Watts, Esq.
Associate General Counsel
DUKE ENERGY OHIO, INC.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Elizabeth.Watts@duke-energy.com
Rocco.D'Ascenzo@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street Suite 1510
Cincinnati, OH 45202-4454
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

Attorneys for Ohio Energy Group

Gregory J. Poulos, Esq.
EnerNOC, Inc.
471 East Broad Street
Columbus, OH 43215
Telephone: (614) 507-7377
Email: gpoulos@enernoc.com

Attorney for EnerNOC, Inc.

Colleen L. Mooney, Esq.
OHIO PARTNERS FOR AFFORDABLE ENERGY
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
cmooney2@columbus.rr.com

Attorney for Ohio Partners for Affordable Energy

SERVICE CORPORATION
155 W. Nationwide Blvd., Suite 500
Columbus, OH 43215
jejadwin@aep.com

Attorney for AEP Retail Energy Partners LLC

M. Anthony Long, Esq.
Senior Assistant Counsel
Asim Z. Haque, Esq.
HONDA OF AMERICA MFG., INC.
24000 Honda Parkway
Marysville, OH 43040
tony_long@ham.honda.com
asim_haque@ham.honda.com

Attorney for Honda of America Mfg., Inc.

Richard L. Sites, Esq.
General Counsel and Senior Director of Health Policy
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

Attorneys for Ohio Hospital Association

Thomas W. McNamee, Esq.
Assistant Attorney General
Devin D. Parram, Esq.
Assistant Attorneys General
180 East Broad Street
Columbus, OH 43215
Thomas.mcnamee@puc.state.oh.us
devin.parram@puc.state.oh.us

Attorneys for the Staff of the Public Utilities Commission of Ohio

Mark S. Yurick, Esq.
(Counsel of Record)
Zachary D. Kravitz, Esq.
TAFT STETTINIUS & HOLLISTER LLP
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

Attorneys for The Kroger Company

Mark A. Whitt, Esq. (Counsel of Record)
Andrew J. Campbell, Esq.
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com

Vincent Parisi, Esq.
Matthew White, Esq.
INTERSTATE GAS SUPPLY, INC.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

Attorneys for Interstate Gas Supply, Inc.

Steven M. Sherman, Esq. Counsel of Record
Joshua D. Hague, Esq. (admitted *pro hac vice)*
KRIEG DEVAULT LLP
One Indiana Square, Suite 2800
Indianapolis, IN 46204-2079
ssherman@kdlegal.com
jhague@kdlegal.com

Attorneys for Wal-Mart Stores East, LP
and Sam's East, Inc.

Melissa R. Yost, Esq., (Counsel of Record)
Maureen R. Grady, Esq.
Assistant Consumers' Counsel
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
yost@occ.state.oh.us
grady@occ.state.oh.us

Attorneys for Office of the Ohio Consumers' Counsel

Christopher L. Miller, Esq.
(Counsel of Record)
Gregory H. Dunn, Esq.
Christopher W. Michael, Esq.
ICE MILLER LLP
250 West Street
Columbus, OH 43215
Christopher.Miller@icemiller.com
Gregory.Dunn@icemiller.com
Christopher.Michael@icemiller.com

Attorneys for the City of Dayton, Ohio

M. Howard Petricoff, Esq.
Stephen M. Howard, Esq.
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Attorneys for the Retail Energy Supply Association

Trent A. Dougherty, Esq. Counsel of Record
Cathryn N. Loucas, Esq.
OHIO ENVIRONMENTAL COUNCIL
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
trent@theoec.org
cathy@theoec.org

Attorneys for the Ohio Environmental Council

Joseph M. Clark, Esq., Counsel of Record
21 East State Street, Suite 1900
Columbus, OH 43215
joseph.clark@directenergy.com

Christopher L. Miller, Esq.
Gregory J. Dunn, Esq.
Alan G. Starkoff, Esq.
ICE MILLER LLP
2540 West Street
Columbus, OH 43215
Christopher.Miller@icemiller.com
Gregory.Dunn@icemiller.com

Attorneys for Direct Energy Services, LLC and Direct Energy Business, LLC

M. Howard Petricoff, Esq.
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Attorneys for Exelon Generation Company, LLC, Exelon Energy Company, Inc., Constellation Energy Commodities Group, Inc., and Constellation NewEnergy, Inc.

Matthew J. Satterwhite, Esq.
Steven T. Nourse, Esq.
AMERICAN ELECTRIC POWER SERVICE CORPORATION
1 Riverside Plaza, 29th Florr
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com

Attorneys for Ohio Power Company

Ellis Jacobs, Esq.
Advocates for Basic Legal Equality, Inc.
333 West First Street, Suite 500B
Dayton, OH 45402
ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood Coalition

Stephanie M. Chmiel, Esq.
Michael L. Dillard, Jr., Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Michael.Dillard@ThompsonHine.com

Attorneys for Border Energy Electric Services, Inc.

Matthew W. Warnock, Esq.
J. Thomas Siwo, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
mwarnock@bricker.com
tsiwo@bricker.com

Attorneys for The Ohio Manufacturers' Association Energy Group

Kimberly W. Bojko, Esq.
Joel E. Sechler, Esq.
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Sechler@carpenterlipps.com

Attorneys for SolarVision, LLC

Matthew R. Cox, Esq.
MATTHEW COX LAW, LTD.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

Attorney for the Council of Smaller Enterprises

Cynthia Fonner Brady, Esq.
Assistant General Counsel
EXELON BUSINESS SERVICES COMPANY
4300 Winfield Road
Warrenville, IL 60555
Cynthia.Brady@constellation.com

Attorney for Constellation
an Exelon Company

Edmund J. Berger, Esq. (admitted *pro hac vice)*
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
berger@occ.state.oh.us

Attorneys for Office of the Ohio Consumers' Counsel

Mary W. Christensen, Esq.
Christensen Law Office LLC
8760 Orion Place, Suite 300
Columbus, OH 43240-2109
mchristensen@columbuslaw.org

Attorneys for People Working Cooperatively, Inc.

Scott C. Solberg, Esq.(admitted *pro hac vice)*
Eimer Stahl LLP
224 South Michigan Avenue, Suite 1100
Chicago, OH 60604
ssolberg@eimerstahl.com

Attorney for Exelon Generation
Company, LLC

Stephen Bennett, Manager
State Government Affairs
300 Exelon Way
Kenneth Square, PA 19348
stephen.bennett@exeloncorp.com

Bill C. Wells, Esq.
AFMCLO/CL
Industrial Facilities Division
Bldg 266, Area A
Wright Patterson AFB, OH 45433
bill.wells@wpafb.af.mil

Christopher C. Thompson, Esq.
Staff Attorney (admitted *pro hac vice)*
USAF Utility Law Field Support Center
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

Attorneys for Federal Executive Agencies

s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

698470.1

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer	)))	**Case No. 12-426-EL-SSO**
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	)))	**Case No. 12-427-EL-ATA**
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	)))	**Case No. 12-428-EL-AAM**
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	)))	**Case No. 12-429-EL-WVR**
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	)))	**Case No. 12-672-EL-RDR**

DIRECT TESTIMONY

OF

JONATHAN A. LESSER

ON BEHALF OF

FIRSTENERGY SOLUTIONS CORP.

March 1, 2013

PUBLIC VERSION

TABLE OF CONTENTS

I. INTRODUCTION, PURPOSE, AND SUMMARY OF CONCLUSIONS

Q. PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is Jonathan A. Lesser. I am the President of Continental Economics, Inc., an economic consulting firm that provides litigation, valuation, and strategic services to law firms, industry, and government agencies. My business address is 6 Real Place, Sandia Park, NM 87047.

Q. PLEASE DESCRIBE YOUR PROFESSIONAL QUALIFICATIONS, EMPLOYMENT EXPERIENCE, AND EDUCATIONAL BACKGROUND.

A. I am an economist with substantial experience in market analysis in the energy industry. I have almost 30 years of experience in the energy industry working with utilities, consumer groups, competitive power producers and marketers, and government regulators. I have provided expert testimony before numerous state utility commissions, as well as before the Federal Energy Regulatory Commission ("FERC"), state legislative committees, and international venues.

Before founding Continental Economics, I was a Partner in the Energy Practice with the consulting firm Bates White, LLC. Prior to that, I was the Director of Regulated Planning for the Vermont Department of Public Service. Previously, I was employed as a Senior Managing Economist at Navigant Consulting. Prior to that, I was the Manager, Economic Analysis, for Green Mountain Power Corporation. I also spent seven years as an Energy Policy Specialist with the Washington State Energy Office, and I worked for Idaho Power Corporation and the Pacific Northwest Utilities Conference Committee (an electric industry trade group), where I specialized in electric load and price forecasting.

Q. SHOULD DP&L BE ALLOWED TO RECOVER THE COSTS OF THE YANKEE SOLAR FACILITY BECAUSE THE PUCO ACCEPTED THE 2010 LTFR STIPULATION, WHICH STATED THERE WAS A "NEED" FOR THE SOLAR FACILITY?

A. No. The evidence provided by DP&L to justify the "need" for Yankee Solar consisted solely of Attachment 1 to the Stipulation. That attachment failed to address DP&L's SREC requirement based on its net SSO loads and failed to account for other SREC supplies. In other words, to justify the "need" for Yankee Solar, Attachment 1 compares DP&L's total SREC requirement, based on the company's entire connected load against the SRECs provided by Yankee Solar. By showing that DP&L's total (in-state and out-of-state) SREC requirement is greater than the SRECs provided by Yankee Solar, DP&L supposedly "proves" the "need" for the Yankee Solar facility. This sort of "proof" cannot provide a legitimate regulatory basis for allowing DP&L to claim a "need" for Yankee Solar under R.C. § 4928.143(B)(2)(c) and, therefore, justify a nonbypassable AER-N, even as a placeholder.

The most that can be shown from the Stipulation and the PUCO's April 19, 2011 Order is that DP&L needed additional solar generation facilities to meet the increasing benchmarks in R.C. § 4928.64(B)(2). The determination of "need" under R.C. § 4928.143(B)(2)(c) requires a demonstration that "generation needs cannot be met through the competitive market."[63] No such demonstration was made by DP&L in Case No. 10-505-EL-FOR.

[63] AEP Order in Case No. 11-346-EL-SSO, p. 39 (Dec. 14, 2011).

D. Approving a Nonbypassable AER-N, or Even a "Placeholder" AER-N, Will Damage Retail Competition and Harm the Ohio Economy

Q. WHY WOULD IMPOSING A NONBYPASSABLE SURCHARGE FOR YANKEE SOLAR BE ANTICOMPETITIVE?

A. Imposing a nonbypassable surcharge to pay for Yankee Solar would be anticompetitive because CRES providers are also required to comply with the renewable energy requirements set forth in R.C. 4928.64(B)(2). Therefore, if a nonbypassable surcharge is imposed on DP&L customers, then customers who purchase their electricity from CRES providers would be forced to pay twice for renewable energy. They would be forced to pay for the Yankee Solar project costs and the costs of SRECs purchased by their CRES provider. Forcing CRES customers to pay twice for in-state solar RECs, while DP&L's ESP customers only pay a diluted price for Yankee Solar, harms those customers who have elected to shop and places CRES suppliers at an obvious competitive disadvantage, thus foreclosing competition. It would impose a barrier to entry in the form of an "entrance fee" for CRES suppliers to compete in the market, penalize existing CRES customers for shopping, and act as a disincentive to existing ESP customers choosing CRES providers. That is clearly anticompetitive.

Q. WOULD IMPOSING A NONBYPASSABLE SURCHARGE FOR YANKEE SOLAR BE CONTRARY TO ESTABLISHED STATE POLICY TO DEVELOP COMPETITIVE RETAIL ELECTRIC MARKETS?

A. Yes. Imposing a nonbypassable surcharge for Yankee Solar would penalize customers who wish to purchase electricity from CRES providers and, thus, would inhibit retail electric competition. That would be contrary to the plain language of R.C. 4928.02(A)-(D), and (H).

CRES providers already produce or procure all requisite energy, capacity and renewables to serve their retail customers. Forcing all DP&L customers, including those who purchase electricity from CRES providers, to pay for Yankee Solar would be discriminatory and contrary to the language of R.C. 4928.02(A). It would restrict "the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs," contrary to the language of R.C. 4928.02(B). It would reduce the diversity of electric suppliers, contrary to the language of R.C. 4928.02(C). It would discourage market access, contrary to the language of R.C. 4928.02(D). And, by forcing CRES customers to pay twice for in-state solar RECs, once through the nonbypassable surcharge and again for the in-state solar RECs purchased or developed by their CRES provider, it would restrict effective competition in the provision of retail electric service, contrary to the language of R.C. 4928.02(H).

Q. DP&L IS ONLY PROPOSING A "PLACEHOLDER" AER-N AT THIS TIME. HOW CAN SUCH A "PLACEHOLDER" AER-N BE ANTICOMPETITIVE?

A. A "placeholder" sends a signal to retail markets and customers. In essence, a placeholder is a "warning signal" to both CRES providers and customers, which will increase market uncertainty and affect the choices made by both customers and suppliers. Specifically, a placeholder AER-N means there is a positive probability that DP&L will be allowed to recover the costs of the Yankee Solar facility, which will force CRES customers to pay for both the costs of Yankee Solar and their CRES provider's own SREC requirements. As such, retail competition will be discouraged because SSO customers will be less likely to want to switch to a CRES provider. The reason is simple:

recovery associated with the Fuel Rider, PJM Reliability Pricing Model ("RPM") Rider, Transmission Cost Recovery Rider - Bypassable ("TCRR-B"), Alternative Energy Rider ("AER"), and the Competitive Bidding True-Up ("CBT") Rider; and 4) any remaining deferral balance or credit after the Fuel, RPM, and TCRR-B are eliminated as of June 1, 2016.

Q. ON WHAT BASIS DOES DP&L JUSTIFY RECOVERY OF COSTS ASSOCIATED WITH THE CBP ON A NONBYPASSABLE BASIS?

A. According to DP&L witness Rabb,[64] the company justifies collection of the costs associated with the CBP based on the language of R.C. § 4928.142(C)(3).

Q. DOES THE LANGUAGE OF R.C. § 4928.142(C)(3) DISCUSS RECOVERY OF CBP CHARGES ON A NONBYPASSABLE BASIS?

A. No, quite to the contrary. R.C. § 4928.142(C)(3) states:

> All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

This provision applies to MROs, and it makes no reference whatsoever to collection of CBP costs on a nonbypassable basis. Instead, CBP costs are to be recovered through the bypassable SSO price.

[64] *Application of the Dayton Power and Light Company for Approval of an Electric Service Plan*, Second Revised Direct testimony of Emily Rabb, December 12, 2012 ("Rabb Direct"), p. 9, lines 3-9. I understand that DP&L witness Seger-Lawson has adopted Ms. Rabb's testimony in its entirety.

Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: Motion Motion of the Dayton Power and Light Company to Strike Testimony of First Energy Solutions Corp. Witness Jonathan A. Lesser electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company