

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

)	
In the Matter of the Application of)	
The Dayton Power and Light)	CASE NO. 12-426-EL-SSO
Company for Approval of Its electric)	CASE NO. 12-427-EL-ATA
Security Plan, Approval of Revised)	CASE NO. 12-428-EL-AAM
Tariffs, Approval of Certain)	CASE NO. 12-429-EL-WVR
Accounting Authority, Waiver of)	CASE NO. 12-672-EL-RDR
Certain Commission rules, and to)	
Establish Tariff Riders.)	

DIRECT TESTIMONY OF

DAVID I. FEIN

ON BEHALF OF INTERVENORS

**EXELON GENERATION, LLC
CONSTELLATION NEWENERGY, INC.**

Dated: March 11, 2013

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I. INTRODUCTION

A. Identification of Witness

Q. Please state your name and your business address.

A. My name is David I. Fein, and my business address is 10 S. Dearborn Street, 47th Floor, Chicago, IL 60603.

Q. BY WHOM ARE YOU EMPLOYED?

A. I am employed by Exelon Corporation.

Q. PLEASE DESCRIBE YOUR POSITION WITH EXELON CORPORATION.

A. I am Vice President of State Government Affairs, East for Exelon Corporation. In this role, I am responsible for directing and implementing regulatory and legislative policies for Exelon Corporation's retail, wholesale, power generation, and other business interests in the eastern portion of the United States, which includes the State of Ohio.¹

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND BUSINESS EXPERIENCE.

A. I earned a Bachelor of Arts in Political Science and Behavioral Science & Law from the University of Wisconsin-Madison in 1989 and a Juris Doctorate from DePaul University College of Law in 1993. I have over 20 years of experience in all facets of the energy industry. Previously, I was Vice President of Energy Policy in the

¹ On March 12, 2012, Exelon Corporation acquired the Constellation Companies. *See Exelon Corp. et al.*, 138 FERC ¶ 61,167 (2012).

1 Midwest and Pennsylvania and Director of Retail Energy Policy for Constellation.
2 Also, I served as Senior Regulatory Counsel for Constellation and was responsible
3 for providing legal and regulatory support to all of the regulatory activities of
4 Constellation NewEnergy, Inc. ("CNE") before state and federal regulatory agencies
5 across the country and in Canada. In addition, I acted as Senior Counsel providing
6 primary legal support and counsel for all of CNE's commercial activities in Illinois
7 and Alberta, Canada as well as support for other markets. My previous experience
8 prior to joining Constellation includes over five years at DLA Piper, LLP, a 3,600-
9 lawyer law firm, specializing in energy and telecommunications law and regulation
10 and over four years as an Assistant State's Attorney, in the Illinois Cook County
11 State's Attorney's Office, focusing on public utility law and regulation.

12
13 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING?**

14 **A.** I am testifying on behalf of Exelon Generation Company, LLC ("Exelon Generation")
15 and CNE (collectively "Constellation").
16

17 **Q. PLEASE PROVIDE SOME BACKGROUND ON THE EXELON COMPANIES ON**
18 **WHOSE BEHALF YOU ARE TESTIFYING IN THE INSTANT PROCEEDING.**

19 **A.** The Exelon family of companies participates in every segment of the
20 energy marketplace, from generation to competitive energy sales to transmission to
21 delivery. Exelon has operations and business activities in 47 states, the District of
22 Columbia and Canada. Exelon's utilities deliver electricity and natural gas to
23 approximately 6.6 million customers in central Maryland, northern Illinois and

southeastern Pennsylvania. Exelon Generation is one of the largest competitive U.S. power generators, with approximately 35,000 megawatts of owned capacity comprising one of the nation's cleanest and lowest-cost power generation fleets. CNE provides electricity and energy-related services to retail customers in Ohio as well as in 15 other states, the District of Columbia, and two Canadian provinces and serves more than 15,000 megawatts of load and more than 10,000 customers. CNE holds a certificate as a competitive retail electric service ("CRES") provider from the Public Utilities Commission of Ohio ("PUCO" or "the Commission") to engage in the competitive sale of electric service to retail customers in Ohio, including in the Dayton Power & Light Company ("DPL") service territory. CNE currently provides service to retail electric customers in Ohio.

Q. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY BEFORE THIS COMMISSION?

A. Yes. I have testified before this Commission in a number of Standard Service Offer ("SSO") proceedings involving DPL, FirstEnergy, AEP, and Duke Ohio.

B. PURPOSE OF TESTIMONY

Q. WHAT IS CONSTELLATION 'S INTEREST IN THIS PROCEEDING?

A. Constellation has an interest in retail and wholesale competition and electricity sales in DPL's service territory. CNE, as licensed CRES provider, provides retail service to customers in DPL's service territory. Additionally, Constellation is interested in improving the auction construct and agreements proposed by DPL that will lead to the development of a successful competitive bidding process ("CBP") as

utilized by FirstEnergy, Duke, and soon to be utilized by AEP. In short, Constellation is interested in the Commission's approval of an Electric Security Plan ("ESP"), with certain modifications, that is consistent with Ohio's state policy of promoting the development of competitive markets and providing the customers in DPL's territory the benefits of a fully competitive retail market.

Constellation has been an active participant before the Commission and the General Assembly for a number of years. In fact, Constellation was an ardent advocate after Senate Bill 221 passed for the use of a CBP as a better means for setting the rates for SSO customers in Ohio. The results of the FirstEnergy May 2009 auction (and subsequent ones) demonstrated the benefits of competitive wholesale procurement, which resulted in generation rate decreases for a large number of FirstEnergy consumers. Other competitive wholesale auctions in Ohio have yielded similar results in both the FirstEnergy and Duke service territories. In addition, by setting retail rates based upon a CBP, and eliminating a number of legacy impediments to the development of retail competition, the retail market in those service territories began to develop, providing customers with more opportunities to choose or shop for a CRES provider, while still having a competitively-priced backstop SSO supply option.

Q. What is the purpose of your Direct Testimony?

A. Constellation has consistently advocated for a timely and efficient transition to full retail and wholesale electric competition. My Direct Testimony addresses DPL's

proposal to transfer its generating assets to an affiliate, and to transition to competitive wholesale procurements utilizing a New Jersey-style descending clock auction in the form of an ESP for the establishment of the SSO pursuant to the Revised Code. Based on Constellation's expertise in competitive wholesale procurements, we recommend improvements to the proposed CBP, with a goal to reduce regulatory uncertainty, provide greater clarity, allow for and encourage robust participation by a number of suppliers, and thereby promote the most competitive price for consumers. Additionally, my Direct Testimony addresses how DPL's proposal will impact the continued development of retail competition in the DPL service territory.

C. Summary of Constellation's Position and Recommendations

Q. Please summarize Constellation's position regarding DPL's ESP proposal.

A. Constellation appreciates and supports DPL's commitment to transition to competitive wholesale and retail markets in its territory. However, DPL's lengthy transition and the flaws in its proposal will deprive consumers the benefits of retail and wholesale competition that are being enjoyed across Ohio.

The principal problems with DPL's proposed ESP are: (1) an unnecessary delay in the transfer of generating assets; (2) too long of a blending period before using a CBP to obtain supply for 100% of SSO load; (3) CBP design flaws; (4) allowing DPL's affiliates to participate in the CBP while the Service Stability Rider ("SSR") is still in place; and (5) the failure to make necessary enhancements to certain antiquated

1 rules, tariffs, and the provision of data and information to facilitate retail market
2 development, as well as failure to eliminate certain fees for regular transactions
3 between CRES providers and DPL. These features are anti-competitive, inconsistent
4 with Ohio state policy, and are unnecessary for DPL to make the transition to a fully
5 competitive market structure.

6 Without the adoption of the recommendations outlined below, the proposed ESP
7 should be rejected. In this Testimony, Constellation recommends that the ESP be
8 modified as follows:

- 9 • **Accelerate Competitive Wholesale Procurement** – DPL should be
10 required to move to a more expedited blending schedule such that 100% of
11 the supply would be procured through a CBP beginning with the June 2015-
12 May 2016 delivery period.
- 13 • **Accelerate Transfer of Generation Assets** – DPL should be required to
14 transfer its generating assets no later than December 31, 2016. Neither DPL
15 nor any affiliate should be eligible to participate in the CBP until DPL
16 achieves full structural separation of the competitive and non-competitive
17 business units. Furthermore, during such time as DPL is allowed to maintain
18 the SSR, or any other form of rate stability rider, it should be required to sell
19 the energy from its generation assets into the Day Ahead or Real Time PJM
20 energy markets, or on a forward basis through a bilateral agreement. This is
21 the construct adopted by the Commission in the recent Duke ESP proceeding.

- 1 • **Modify Rules and Parameters of Competitive Wholesale Procurement**
2 **Process** – DPL should be required to make modifications to the bidding
3 rules, communication protocols, master supply agreement, wholesale
4 product definitions, and other aspects of the CBP as part of this proceeding,
5 in order to encourage a robust, competitive wholesale energy auction.
- 6 • **Reject Non-bypassable Generation-Related Riders** – The PUCO should
7 reject the imposition of Riders, such as a Reconciliation Rider (RR) and
8 Alternative Energy Rider-Nonbypassable Rider (AER_NR), on shopping
9 customers to the extent that they impose non-bypassable generation-related
10 charges upon customers that are not taking generation service from DPL.
- 11 • **Remove Barriers to Retail Competition** – DPL should be required to
12 implement market enhancements and remove obstacles in order to develop a
13 more sustainable and more robust competitive retail electric market in its
14 service territory.

15
16 **II. DPL's Proposed Competitive Procurement Appears To Be Consistent With**
17 **Successful Competitive Procurement Processes Utilized In Other Markets**

18 **Q. How does the CBP mechanism proposed by DPL compare with the CBP used by**
19 **other Ohio utilities and utilities in other States?**

20 **A.** DPL has proposed use of a CBP in the form of an auction that is generally consistent
21 with the procurement mechanism used most recently in Ohio by FirstEnergy and
22 Duke, and as utilized in numerous other restructured electric markets (including
23 MISO and PJM), especially those in which regulated electric utilities no longer own

generating assets – these jurisdictions include, but are not limited to, Pennsylvania, Maryland, D.C., Delaware, New Jersey, Connecticut, Maine, and Massachusetts.

Q. Please describe the specific features of DPL’s ESP that Constellation believes supports a successful procurement process.

A. DPL’s ESP appears to have built off of the auction process used in prior Ohio auctions and DPL has chosen the same CBP manager as FirstEnergy and Duke. The important positive features of those processes DPL adopted include:

- The provision of a wide range of data and information for interested bidders;
- The use of an independent manager for the CBP; and
- The creation of a website that is dedicated to the CBP that will contain necessary information about the CBP, receive updates, ask questions, and have access to data that will better assist participants in the formulation of bids.

We are hopeful that under DPL’s proposed CBP, all of the data and information will be provided in a useable or active electronic format such as Microsoft Excel. It has been our experience that this type of information has been provided to interested suppliers in the FirstEnergy and Duke auctions and in competitive procurement processes in other states. This provides bidders with greater certainty regarding the load that is likely to be served, which leads to more accurate and competitive bids than would otherwise be possible. As discussed below, there is certain other additional data and information that should be provided to further promote successful CBP solicitations.

**III. DPL Should Make Certain Improvements To
Its Proposed ESP To Further Promote Successful CBP Solicitations**

Q. Do you have any overarching recommendations regarding DPL’s proposal?

A. Yes. Since the most recent Ohio auctions have been effective, it is appropriate for DPL to use that process as a starting point and make further improvements.

Q. Are there any specific amendments or improvements that should be made to the Application?

A. Yes.

- Improvements to the transition plan, blending period, auction products, and auction design;
- Clarifications on the specific PJM line items included to be recovered under TCRR-N;
- Including all DPL load in the CBP, including legacy special contract customers;
- Providing auction participants and winning wholesale suppliers with additional data and information to that proposed in the Application;
- Providing additional clarity regarding the authority of the CBP Manager;
- Adopting important improvements to the Master SSO Supply Agreement (“MSA”); and
- Using collaborative processes for all stakeholders to discuss potential improvements or other refinements to future CBPs.

A. Improvements to the Transition Plan, Blending Period, Auction Products, Auction Design and Timing

Q. Do you have any recommendations for changes that should be made to the DPL transition plan and blending period?

A. Yes. DPL has proposed a four year transition leading to fully competitive SSO pricing beginning with the June 2016 delivery period. Furthermore, the transition would only permit 10% of load to receive the benefit of CBP pricing for the delivery period ending May 31, 2014. DPL can and should be required to shorten the transition by one year providing 100% of SSO customers to be served through competitive procurements beginning with the June 2015 delivery period. DPL has offered no valid justification for delaying the transition to a fully competitive market, which all other Ohio utilities are on a quicker path to achieve than DPL under its proposal.

In addition to a slow path to a fully competitive market, DPL's proposal does not go far enough in affording customers the benefit of competitive SSO pricing. The percentage of load available for bid in the CBP should provide many more customers the benefits of competitive pricing, while maintaining an orderly transition. Accordingly, Constellation recommends the following blending period:

Period	Non-CBP%	CBP%
June 2013 – May 2014	65%	35%
June 2014 – May 2015	15%	85%
June 2015 – May 2016	0%	100%

Q. Do you have recommendations for changes that should be made to the DPL-proposed CBP products?

A. Yes. DPL should use a ladder approach as the ESP rate blending decreases for contracts of the following duration:

- a. For the initial auction, DPL should procure a 36-month contract.
- b. For the March 2014 auction, DPL should procure a 36-month contract, and
- c. For the March 2015 auction, DPL should procure a 24-month contract.

Q. Do you have any recommendations for what changes should be made with respect to auction timing and payments to winning suppliers?

A. Yes. There are a number of utility SSO procurements throughout PJM, which are likely to attract the same qualified bidders. When procurements are conducted at the same time or in close proximity, qualified bidders may choose to limit their participation to one or a limited number of procurements, due to resource or other constraints. Therefore, before setting the specific auction dates, DPL and the CBP manager should look at the procurement schedules of all other PJM states' utilities, to ensure that the proposed DPL auctions do not conflict with dates for other utilities' default service procurements that have already been established. The auctions should be held early in the week – preferably Monday, although Tuesday is acceptable, and on a schedule so as not to conflict with other utility SSO procurements.

Q. What is the basis for this recommendation?

A. There are a number of reasons why auctions earlier in the week are preferred for potential bidders. Gas storage numbers come out every Thursday, which makes the energy market more volatile for a period of time prior to and after those numbers come out. Conducting procurement events on Fridays compounds this volatility as bidders have to hold bids open over the weekend. The longer that bids must remain open, and are subject to the

possibility that bids will be rejected, the greater the likelihood that consumers will ultimately be economically harmed. These risks are particularly important in procurement events involving Block Energy Products, given the natural volatility that is inherent in the energy market. Potential suppliers have to incorporate such risks in their bids, which necessarily translates into higher bid prices to the detriment of consumers. That risk can be easily removed from the procurement process by scheduling procurement events for the beginning of the week.

B. Clarification on Charges To Be Recovered under TCRR-N

Q. What is your recommended clarification regarding the proposed Rider TCRR-N?

A. Constellation supports the separation of the current Transmission Cost Recovery Rider ("TCRR") into a market-based bypassable Rider ("TCRR-B") and a non-market-based non-bypassable Rider ("TCRR-N") that includes NITS, amongst various other charges. In order to add greater clarity to the specific non-market-based charges that will be recovered under Rider TCRR-N, Constellation recommends that the tariff be revised as follows:

DESCRIPTION OF SERVICE:

This Tariff Sheet provides the Customer with retail transmission service. This Transmission Cost Recovery Rider (TCRR-N) is designed to recover transmission-related costs imposed on or charged to the Company by FERC or PJM. These costs include but are not limited to:

Network Integration Transmission Service (NITS)

Schedule 1 (Scheduling, System Control and Dispatch Service)

Schedule 1A (Transmission Owner Scheduling, System Control and Dispatch Services)

Schedule 2 (Reactive Supply and Voltage Control from Generation or Other Sources Services)

Schedule 6A (Black Start Service)

Schedule 7 (Firm Point-To-Point Service Credits to AEP Point of Delivery)
Schedule 8 (Non-Firm Point-To-Point Service Credits)
Schedule 10-NEERC (North American Electric Reliability Corporation Charge)
Schedule 10-RFC (Reliability First Corporation Charge)
Schedule 10-Michigan-Ontario Interface (Phase Angle Regulators Charge)
Schedule 12 (Transmission Enhancement Charge)
Schedule 12A(b) (Incremental Capacity Transfer Rights Credit)
Schedule 13 (Expansion Cost Recovery Charge)
PJM Emergency Load Response Program – Load Response Charge Allocation
Part V – Generation Deactivation

C. Including All Load in the CBP

Q. What is the basis for your recommendation that all DPL load should be included in the CBP auction?

A. DPL has indicated that two extremely large customers are being served pursuant to legacy special contracts and as such will not be made part of the load that is part of the CBP. If the Commission wants to send a signal to market participants that the days of special contracts are indeed over in Ohio, then DPL needs to include such load in the auction.

D. Improvements to the Provision of Data and Information

Q. Do you have any recommendations for what specific information should be provided to potential participants in the CBP?

A. Yes. Constellation requests that DPL provide the following data and information to potential bidders:

- (1) Monthly information specific to the PIPP load in its service territory, including peak load, hourly consumption, and population statistics;
- (2) Monthly information specific to a municipal opt-out aggregation program that includes peak load, hourly consumption, and population statistics for existing programs and programs that are proposed for commencement during the term of an SSO;
- (3) Network service peak load (“NSPL”) data for non-shopping and shopping customers on an aggregate basis;
- (4) Peak load contribution (“PLC”) and historical hourly load data for non-shopping and shopping customers on a customer class basis;
- (5) Historical daily zonal scaling factors for the last 3 years;
- (6) A transparent methodology for how PLC and NSPL are calculated for all customers;
- (7) Hourly load data for eligible and SSO load by customer class as close as practical in time to the auction date;
- (8) Customer counts, peak demand and NSPL for eligible and SSO load by customer class as close as practical in time to the auction date;
- (9) For NITS charges, the expected allocation (below 138 kV) by rate class;
- (10) Historical distribution losses and any allocated Unaccounted for Energy (if applicable);
- (11) For the larger nonresidential customer base, a distribution of the number of customers above and below 500kW within a rate class; and

(12) Hourly consumption, customer counts, peak demand broken out by customer class as close as practical in time to the auction date (*e.g.*, a maximum of a 1 or 2 month lag) separated by eligible load and load served by CRES providers.

Q. If Constellation is a successful bidder and becomes a winning supplier, would you still like to obtain the same data and information with the same frequency?

A. Yes. In addition, Constellation requests DPL to provide the following additional data to winning CBP suppliers:

- (1) Peak load (or hourly consumption) data that is updated monthly beginning after the execution of the SSO MSA that shows eligible load and load taking service from a CRES provider;²
- (2) Initial settlement hourly data;
- (3) From the time that the MSAs are executed, daily estimations for the capacity peak load contribution data seven days forward; and
- (4) To the extent available, the energy and capacity information that DPL provides to PJM related to suppliers' SSO obligations.

² See Attachment C, page 5.

Q. Does DPL's Application and supporting Testimony address what specific information will be provided to potential bidders in the CBP and/or winning suppliers?

A. Yes, to some extent. DPL witness Lee outlines some of the information in his Direct Testimony but only mentions the following: load data for a historical three-year period, historical hourly load data for DPL's total retail load and SSO load, historical switching statistics, and historical load profiles, and customer counts, peak demand and NSPL for eligible and SSO load by customer class.³ The proposed Bidding Rules in Attachment C list the exact same information. As such, it does not appear that DPL is proposing to provide anywhere near the amount of information, and not nearly as detailed information, as was provided by FirstEnergy and Duke under a similar structure administered by the same auction manager, and as is provided in similar CBPs throughout the PJM states. Therefore, at a minimum, DPL should be required to provide the same amount of specific information as provided to potential bidders under the FirstEnergy and Duke auctions and, similarly, the additional information requested above on an ongoing basis after the close of the auction.

Q. How will the provision of this other data and information assist suppliers?

A. The provision of this additional data and information will allow potential CBP participants to provide more accurate and competitive bids and will allow winning CBP suppliers to better manage risks of supplying the load on a going-forward basis. Moreover, by knowing up front that winning CBP suppliers will receive such

³ See DPL Robert J. Lee Direct Testimony, p. 6, December 12, 2012.

information on a going-forward basis to assist in meeting their SSO supply obligations, bidders will perceive less risk, leading to more competitive bidding and bid prices and. allow winning suppliers to better manage their positions.

Q. Do CBP Managers and/or electric distribution utilities in other States provide this type of information to CBP participants?

A. Yes. Prospective bidders and winning suppliers get most, if not all, of this type of data and information in the CBP utilized by other Ohio utilities and in states including, but not limited to, New Jersey, Maryland, Pennsylvania, and Delaware.

E. Providing Clarity Regarding the Authority of the CBP Manager

Q. Are there other important considerations regarding the design of the CBP that you wish to share with the Commission?

A. Yes. Substantive aspects of the CBP should not be left open to determination or interpretation by DPL, the CBP Manager or post-event Commission action. In certain other auctions, for example, issues such as phase-ins / deferrals, and the use of a reservation price, to name a few, increased uncertainty and potential risks. This can in turn lead to *less* robust participation and can be translated into the prices that come out of the auction process. A key to a successful competitive wholesale procurement process is one in which there is a high degree of transparency and confidence in the rules and the design so that potential suppliers possess all of the necessary information to effectively participate.

1 **Q. Do you have any recommendations regarding any of the specific tasks and**
2 **duties of the CBP Manager?**

3 **A.** Yes. Constellation recommends that the CBP process be revised in the following
4 three (3) respects:

5 (1) The CBP Manager and/or DPL should not be allowed to develop a
6 “reservation price” as part of the CBP.

7 (2) The CBP Manager should be required to notify winning bidders when the
8 required Report has been transmitted to the Commission.

9 (3) The CBP Manager should commit to providing responses to FAQs within two
10 (2) business days of submission.
11

12 **Q. Please explain why you recommend these three changes to the CBP process.**

13 **A.** The primary basis is our specific experience with the original FirstEnergy auctions
14 administered by CRA in Ohio. In addition, these recommendations are designed to
15 provide greater regulatory certainty and information associated with the CBP.
16 While there is always some level of uncertainty, the Commission should strive to
17 reduce that uncertainty to the greatest extent possible.
18

19 **Q. Why do you oppose the use of a reservation price?**

20 **A.** A reservation price increases uncertainty regarding the approval process, which
21 necessarily increases the risks to bidders, and consequently the prices that bidders
22 are able to offer. Given that uncertainty, the lack of any established benefit, that this
23 is not an attribute of other successful CBPs used in other jurisdictions, and the

1 inappropriateness of DPL's role in setting the reservation price, Constellation does
2 not support the use of a reservation price.

3
4 **Q. Why do you recommend the CBP manager notify winning bidders when the**
5 **required Report has been delivered to the Commission?**

6 **A.** This allows winning bidders to have an additional piece of information regarding
7 the timing associated with potential action by the Commission, reducing uncertainty
8 regarding the process and the likely timing for Commission review and approval of
9 results.

10
11 **Q. Why do you recommend that Responses to FAQs be provided within two (2)**
12 **business days?**

13 **A.** It has been our experience in other auctions in Ohio that it was somewhat
14 unpredictable when we would receive responses to FAQs. By specifically requiring
15 the CBP manager to adhere to a "2 business day" response time, it will provide
16 potential suppliers with greater certainty and necessary information to prepare for
17 the bidding process. Bidders will be encouraged to ask, and the CBP manager will
18 be encouraged to reply, in a timely manner, thereby improving the efficiency of the
19 process.

20
21 **F. Proposed Changes To The Master SSO Supply Agreement**

22 **Q. Please discuss the MSA proposed by DPL.**

A. Significant differences exist between the DPL MSA and those used by other Ohio utilities and in other jurisdictions, which cause DPL's MSA to vary from industry-standard practices and provisions, and/or which may create confusion. Where the recommendations below differ from the MSA used in the most recent Ohio auctions, the reasons for the differences are two-fold: (1) other petitioners failed to incorporate appropriate recommendations that are consistent with standard industry practice, or (2) our experience in these other auctions has provided additional insight into areas for improvement. DPL should be required to revise its proposed MSA in order to make it more consistent with other industry-standard agreements for wholesale supply, and to provide greater clarity with respect to its provisions, as recommended herein. Doing so will promote more robust competition from the broadest array of qualified suppliers, thereby improving the likelihood of the most competitive SSO prices for DPL's consumers.

Q. Do you wish to comment on any specific aspects of the MSA?

A. Yes. Constellation supports the exclusion of NITS from the auction product and the clarity that is being provided in the MSA in this regard. NITS charges are cost of service based charges and therefore can't be hedged or easily managed by wholesale suppliers. Requiring wholesale suppliers to bear such non-market based risks will result in them increasing their bid prices to cover the risks. The exclusion of such costs and charges from the auction product should be viewed as a benefit to SSO customers.

Q. Does Constellation have any recommended changes to the proposed MSA?

A. Yes. Constellation proposes a number of important changes to DPL's proposed MSA which, if implemented, will further promote competition in the ESP and ultimately benefit ratepayers. These changes include improvements to both the credit- and non-credit-related provisions of the MSA.

Q. Can you please explain in more detail why you propose to make certain modifications to credit and other provisions in the MSA at this time?

A. There are several important reasons why the Commission should and must consider certain changes to the MSA at this time, in order to encourage the most robust participation in DPL's CBP. First, competitive wholesale procurement processes are being considered and implemented in multiple jurisdictions, including in many large utility zones throughout PJM. As wholesale competitive procurement processes become more widespread as a best practice for utility load procurement, wholesale suppliers have an increasing number of opportunities to compete to serve load under wholesale contracts such as the SSO MSA. As these opportunities increase, wholesale suppliers will be required to carefully manage their portfolios and develop effective risk management strategies to provide cost effective service; this includes deciding which utilities' procurements represent the best opportunities to serve wholesale standard service load. This has become an increasing concern in the present global economic environment. In order to ensure the most robust participation in DPL's auctions – and, in turn, the most competitive SSO price for consumers – the Commission must be careful to compare and contrast other

utilities' and other jurisdictions' utilities' procurements' contracts and credit requirements, and make sure that DPL's CBP and MSA is *at least* equally – or *more* – attractive to potential bidders as such other utilities' competitive procurements.

Q. Generally, what credit-related improvements to the MSA will you propose?

A. Specifically, Constellation suggests (1) removal of the Independent Credit Requirement, (2) moving towards a weekly settlement process consistent with PJM practices, (3) in the event that the MSA does not include weekly settlements as I suggest, adding provisions under MSA Section 7.1 to accelerate payments on a weekly basis from DPL if it falls below investment grade, and (4) clarifying the SSO Supplier's need to provide notice to DPL of a change that would affect the SSO Supplier's credit standing.

Q. Can you please describe your other, non-credit-related improvements to and comments regarding the MSA?

A. Yes. First, I recommend that the MSA should be revised to remove or make optional the "notional quantity language" as has become industry-standard in most PJM states. Second, I discuss certain concerns which are raised by the product delineated and provisions included in the MSA. Third, I will discuss important issues related to and clarifications needed regarding the Events of Default that have been included at MSA Article 5. Fourth, I discuss certain changes to the "Sample PJM Invoice" included at MSA Appendix G which are necessary to clear up ambiguities and make the items in the Sample PJM Invoice consistent with provisions elsewhere

in the MSA. Finally, I will point out and briefly describe a number of miscellaneous and general clarifications and edits that we propose be made to the MSA.

Q. Do you have any recommendations for what changes should be made in the MSA with respect to auction timing and payments to winning suppliers?

A. Yes. The MSA should be modified regarding the timing of settlements, and payments to winning suppliers. The DPL ESP seeks to take advantage of DPL's participation in, and access to, the PJM market. In order to reflect and operate in concert with PJM's procedures and practices, the MSA should be revised to provide for weekly settlements to winning suppliers. In addition, the MSA should be modified in order incorporate a seasonal billing factor. Seasonally-differentiated prices are more reflective of actual market prices.

Q. Are the recommended improvements you suggest herein all-encompassing?

A. No, not necessarily. I have tried in this testimony to at least address those issues that were most apparent on Constellation's review of the contract. Moreover, as time goes on and markets and RTOs change – whether in their policies, programs, trends or otherwise – it is important to continually review and seek improvements to the MSA's form on a regular (perhaps annual) basis for future CBPs.

1. CREDIT-RELATED IMPROVEMENTS TO THE MSA

Q. Please discuss, generally, Constellation's proposed modifications of credit-related provisions in the MSA.

A. Constellation offers certain recommended changes to the MSA in order to mitigate credit risks to suppliers, where possible and practical, in order to ensure that DPL customers are able to receive the lowest possible price for the required electric power and energy.

To explain the significance of such modifications at this particular time, it is important to note that credit ratings agencies will be carefully watching wholesale suppliers' risk exposure as their obligations under wholesale standard service contracts increase. When a significant portion of a wholesale supplier's transactions are subject to counterparty credit risk, without the benefit of appropriate credit protection within the contract, as may be the case under the MSA, credit ratings agencies are likely to view the wholesale supplier as having more risk, and the supplier's credit ratings could suffer. If and when this occurs, wholesale suppliers' costs to serve load will increase and, in turn, customers' costs will increase. Moreover, if wholesale suppliers limit their own participation in the CBP's auctions in order to limit their exposure in MSAs without the benefits of appropriate credit protection, customers will not receive the benefits of the most robust participation in the auctions, further increasing the chances that customers' costs may increase.

Furthermore, even if DPL does not suffer or otherwise face the possibility of a credit ratings downgrade, the supplier still must manage its credit risk due to exposure to DPL without appropriate credit protections under the MSA. Suppliers' credit risks due to DPL's financial standing may be managed in one or both of two ways: the

supplier may limit its participation in DPL's auctions thereby deterring the most robust participation in the CBP, and/or the supplier may increase its bids to reflect the increased credit risk that it faces.⁴ In either instance, consumers may face additional costs.

The need for appropriate credit provisions for the MSA is stronger than ever, as suppliers and the market as a whole perceive a riskier marketplace. In turn, the need to make DPL's auction as attractive to bidders as other similar procurements is more important than ever. For these reasons, the Commission should approve the credit-related improvements Constellation proposes to make to the MSA, as I will discuss in more detail.

Q. Please discuss Constellation's first credit-related revision regarding the MSA's Independent Credit Requirement ("ICR") and why Constellation seeks to eliminate the ICR.

A. The ICR under paragraph 6.3 of the MSA requires that winning SSO Suppliers post a fixed amount of collateral to cover the risk of costs that DPL may incur during the

⁴ When a supplier prepares its bids and knows that it will not have reciprocal credit provisions, as is currently the case under the MSA, it must consider the risk that in a market environment where prices have declined after the contracts are awarded, a declaration of bankruptcy by DPL, due to credit downgrades and/or other business failures, would likely result in a bankruptcy court's rejection of the applicable MSA. That risk component may be factored into suppliers' bids and thus passed on to customers for each and every megawatt-hour of energy delivered. In contrast, rather than having to pay for such additional risks at all times, for all energy delivered, regardless of DPL's financial standing, if the MSA included bilateral credit provisions, suppliers would no longer include costs for managing the credit risks due to changes in DPL's financial standing, and consumers may pay additional credit costs only if DPL's credit ratings actually are downgraded. While the credit improvements proposed herein will help suppliers to manage the credit risks they face, they will not serve to *eliminate* such risks completely. Only bilateral credit provisions can appropriately remove such risks.

time period from the time of an event of default until the Termination Payment is calculated.

The ICR should be eliminated because DPL's credit exposure for the term of the MSA is already covered in daily Mark-to-Market ("MtM") calculations. Thus, the ICR, in conjunction with the MtM calculation, represents repetitive collateralization that may require SSO Suppliers to increase their bid prices, and thus customers' costs, while providing little additional credit protection to DPL. Constellation notes that Delaware, the District of Columbia, Illinois and Maryland, in wholesale procurements similar to that in DPL's proposed ESP, all have eliminated or else decided not to include an ICR amount for wholesale bidders.

Q. Are there other problems associated with over-collateralization due to the ICR?

A. Yes. Over-collateralization of this type may be more likely to cause potential bidders to "use up" their valuable credit capacity limits, set by their managements, for instance, thereby providing an incentive to bidders *not* to participate in the ESP – potentially decreasing the competitiveness of the ESP and the competitiveness of resulting SSO prices. This is because each potential bidder, in determining its level of participation in any particular wholesale load auction, must consider how its participation in that procurement may impact its credit rating. In other words, wholesale suppliers must always consider how much credit they "devote" to a particular load auction. Competitive procurement processes that call for less

utilization of a wholesale supplier's credit capacity will have a competitive advantage, and likely will see greater participation.

In short, the ICR represents a less than optimal balance between the competing concerns of securing necessary credit protection while minimizing Suppliers' and, in turn, consumers' costs. Constellation believes that by eliminating the ICR, wholesale suppliers will be more inclined to participate in the ESP and will provide even more competitive bid prices.

Q. Do you have any other suggested changes related to credit ratings?

A. Yes. DPL defines the Minimum Rating as the minimum issuer rating as defined in Section 6.4(a)(i). Constellation proposes that the following term and definition replace Minimum Rating, which reflects the market standard:

"Credit Rating" means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating by S&P, Moody's or Fitch.

Q. Do you have any other suggestions for modifications of definitions related to credit issues?

A. DPL uses a definition for Net Worth, whereas other Ohio auctions use Tangible Net Worth. Using tangible net worth is preferable, as it removes any intangibles from

the calculation. Intangibles are assets that, although subject to GAAP tests, are values that can still be relatively subjective. Therefore, we propose that the term Tangible Net Worth be used, and that the definition mirror that of the First Energy auctions:

Tangible Net Worth – means total assets less intangible assets and total liabilities. Intangible assets include benefits such as goodwill, patents, copyrights and trademarks, each as would be reflected on a balance sheet prepared in accordance with generally accepted accounting principles.

Q. Please explain your credit-related proposal regarding MSA’s settlement procedures and PJM’s processes.

A. In June of 2009, PJM moved from its prior monthly settlement schedule to a weekly settlement process, in order to move to a more efficient and liquid marketplace. Due to this change in process, as currently proposed, the MSA is not structured to provide to suppliers, DPL and their customers the benefits that arise from PJM’s more efficient process. Constellation proposes that paragraph 8.1 of the MSA be revised so as to also provide for weekly settlements of amounts due to and due from each party to a MSA.

Q. What are the benefits that would be achieved from implementing weekly settlement procedures to reflect PJM’s weekly settlement process?

A. The New Jersey Board of Public Utilities’ (“New Jersey BPU”) independent advisor, Boston Pacific Company, Inc., explains in its April 22, 2009 report to the New Jersey BPU regarding New Jersey’s own auction process that a:

change in rules that could have had an effect on bid prices is PJM's proposed switch to weekly settlements. Under this design, PJM will send out weekly bills to suppliers . . . suppliers, however, will only get paid monthly. This creates a credit need for suppliers, who now must have the cash to pay their PJM bills prior to receiving cash from [the New Jersey utilities]. This additional cost may be driving bids up slightly.⁵

By adjusting the MSA's billing and payment provisions to settle on a weekly basis, in concert with PJM's new process, these identified costs for suppliers will be eliminated, allowing for more competitive pricing in bids to supply DPL's SSO requirements, to the ultimate benefit of consumers.

Q. Have any other utilities taken steps to move to weekly settlements in order to account for the changes at PJM?

A. Yes. All utilities in the District of Columbia, Maryland and Delaware, as well as certain utilities in Pennsylvania have adopted such a weekly settlement process.

Q. Please discuss Constellation's alternative credit-related proposal for accelerated payments in the event DPL's credit rating falls below investment Grade.

A. In the event that Constellation's third proposal for weekly settlements is not adopted, Constellation recommends that the MSA be revised to at least provide for accelerated payments to SSO Suppliers from DPL in the event of a DPL credit downgrade. While accelerated weekly payments do not alleviate the credit risks that Suppliers face (only fully bilateral credit provisions would best protect

⁵ 2009 NJ Auction Report at p.7.

Suppliers), such provisions would provide greater assurance to Suppliers that they will receive prompt payment in the event that DPL's credit standing is downgraded – a circumstance which may reflect financial conditions which would make payment by DPL less certain. In the event that Constellation's proposal for weekly settlements overall is not adopted, modifying the MSA to accelerate payments on a weekly basis has little additional cost to DPL, but will serve to give potential Suppliers more certainty with regard to the risk of nonpayment by DPL. Specifically, in the event that weekly settlements are not adopted as Constellation recommends, Constellation proposes that DPL add the following new MSA Section 8.3 in order to implement such accelerated payments under the MSA:

"8.3 Accelerated Payments

If at any time during the delivery period a Company Downgrade Event occurs, (i) the billing period applicable to the Company shall be shortened to a Weekly Billing Period; (ii) a Statement will be prepared and sent to the SSO Supplier on the first Business Day after the end of each Weekly Billing Period; (iii) the Statements for each Weekly Billing Period will be based upon estimated data and will be adjusted for actual data through a Statement sent to the SSO Supplier within six (6) Business Days after the end of the calendar month; and (iv) payment will be made on the third Business Day after the end of each Weekly Billing Period. Alternatively, the Companies and the SSO Supplier may agree upon a schedule. The Weekly Billing Period shall be in effect only for so long as the Company is experiencing a Company Downgrade Event. The Company's failure to make payments in accordance with this Section 7.1 shall be deemed an Event of Default under Section 7.1 (Events of Default) of the Agreement if the Company fails to remedy such failure within two (2) Business Days of receipt of written notice from the SSO Supplier. For the purposes of this Section 7.1: a "Company Downgrade Event" means that DPL Ohio's Credit Rating is less than BBB- from S&P, Baa3 from Moody's or BBB- from Fitch; and a "Weekly Billing Period" means a period of seven (7) calendar days commencing on Tuesday and ending on Monday."

Q. Please discuss your final revision to the credit-related provisions of the MSA, regarding the need to provide notice of a change that would affect a SSO Supplier's credit standing.

A. Constellation proposes to revise the first sentence of MSA Section 6.1 and 6.10 to reflect that (1) a SSO Supplier must provide notice to DPL only if the Supplier's *credit rating* changes (and not when its "financial condition" changes), and (2) a SSO Supplier should only need to provide such notice of a change in its credit rating if such a change is *adverse*. With respect to the first revision, the term "financial condition" as proposed in the MSA is too ambiguous in order to create a clear obligation with which a SSO Supplier must comply. On the second item, there is no reason to create an obligation on a SSO Supplier to notify DPL when its ratings improve, as that does nothing to harm, and in fact improves, DPL's situation with respect to such Supplier.

2. NON-CREDIT-RELATED IMPROVEMENTS TO THE MSA

a. The MSA's Notional Quantity Language.

Q. Please discuss Constellation's first non-credit improvement regarding the MSA's notional quantity language.

A. Constellation recommends that the second sentence of the definition of "Settlement Amount" in MSA Article 1 (the "Notional Quantity Language") be deleted or, in the alternative, removed such that it is explicitly optional, at the discretion of the SSO Supplier, due to the specific accounting consequences to a SSO Supplier from net

settling a standard service contract subject to such language.⁶ The Notional Quantity Language is included in the MSA to create a “notional quantity” and transform the MSA into a derivative instrument as defined under Rule 133 of the Statement of Financial Accounting Standards (“SFAS”), in order to meet the accounting practices of only certain wholesale suppliers. In other words, with the inclusion of the Notional Quantity Language, the MSA is considered to have a notional quantity and thus results in the MSA being considered a derivative under SFAS 133, such that certain wholesale suppliers are able to elect “mark-to-market” (derivative) accounting.

Q. Please explain what the implications are for inclusion of the Notional Quantity language in the MSA.

A. Due to the inclusion of the Notional Quantity Language and the MSA’s resulting status as a derivative, in order for a SSO Supplier to account for this contract on an accrual basis (*i.e.*, not on a ‘mark-to-market’ basis) it must designate it as a “normal purchase and sale” for accounting purposes. One of the requirements for electing the “normal” designation is that such contracts must be taken to physical delivery throughout their entire term. Because of this requirement, the future assignability of the contract is compromised.

⁶ The second sentence of the definition of “Settlement Amount” states, “For purposes of calculating the Settlement Amount, the quantity of Energy (and other components of SSO Supply) provided for under this Agreement for the period following the Early Termination Date through the remainder of the Original Delivery Period will be deemed to be those quantities that were delivered on an hourly basis, or would have been delivered on an hourly basis had this Agreement been in effect, during the previous calendar year, adjusted for any SSO Load changes as may have occurred since the previous calendar year as determined by the Dayton Power and Light Company.” MSA at Article 1.

Q. Please explain how the future assignability of the contract would be compromised.

A. If the MSA is designated as normal were to be net settled, as might occur if such MSA were ever assigned, it would call into question the SSO Supplier's initial designation as normal and could require, under current accounting rules, that the MSA be rebooked as a mark-to-market contract unless the assignment was caused by exogenous circumstances (e.g., bankruptcy), potentially causing significant negative financial and accounting consequences for the SSO Supplier. More specifically, "net settlement" of a contract designated as "normal" under SFAS 133 paragraph 10(b), as would occur if the contract were ever to be assigned, would be considered an accounting "error," not just for that particular MSA, but also for any other similar contracts to which the SSO Supplier is a party. Such an error, if material, would cause the SSO Supplier to restate its financial results using mark-to-market (derivative) accounting for such contract(s) for all affected periods. Such a restatement of several years of financial results would be unduly burdensome and viewed as a very adverse event in financial markets, to the point that assignment, under such circumstances, is not a viable option.

Q. What are the benefits to consumers as well as the competitive procurement process for adopting your recommendation?

A. An ability to assign the MSA provides reassurance to SSO Suppliers that they will be able to appropriately manage their obligations. Moreover, an ability to assign the MSA promotes the interests of consumers in that a SSO Supplier that unexpectedly

finds itself unable to meet its obligations under the MSA due to financial or other reasons will be able to transfer its supply obligations to a Supplier that is more readily able to meet the MSA's requirements.

Q. How do you propose to implement your recommendation?

A. Constellation proposes that the definition of "Settlement Amount" be revised such that the Notional Quantity Language be deleted. Alternatively, it may be made explicitly optional, at the discretion of the SSO Supplier, due to potential accounting consequences to a Supplier arising from such language. This optionality can be achieved using one of two approaches. The MSA could first be revised simply by identifying the Notional Quantity Language as new subparagraph(i) for the definition of "Settlement Amount," moving it to the end of the definition of "Settlement Amount," and including the following prior to the Notional Quantity Language:

"☐ SSO Supplier may, in its sole discretion, add the following subparagraph (i) to the definition of "Settlement Amount" by checking this box. If SSO Supplier does not check this box, subparagraph (i) will not be deemed to be included as part of the Parties' Agreement."

In the alternative, the MSA could be revised by moving the Notional Quantity Language to a new Appendix [X] to the MSA, as "Optional Subparagraph (i) to Article 1, "Settlement Amount," and adding prior to the Notional Quantity Language in such Appendix [X] the following language:

"☐ SSO Supplier may, in its sole discretion, add the below subparagraph (i) to the definition of "Settlement Amount" in Article 1 by checking this box. If Supplier does not check this box,

subparagraph (i) will not be deemed to be included as part of the Parties' Agreement."

Without such a revision to the MSA, certain wholesale suppliers likely will account for their inability to appropriately manage their obligations (*i.e.*, their inability to assign the MSA without incurring potentially significant financial consequences as a result of accounting practices) by limiting their participation in the ESP and/or including in their bids an additional risk premium. Thus, by making optional the Notional Quantity Language as explained herein, the Commission may reduce the likelihood of additional risk premiums and increase the robustness of the bidding process by attracting more wholesale suppliers to the procurement, resulting in a more competitive procurement process and more competitive prices for consumers. Making such language optional will allow for an *equal* ability to assign the MSA for all potential SSO Suppliers (rather than only by those SSO Suppliers who utilize mark-to-market accounting). However, making such a revision will do nothing to either undermine the requirements that a SSO Supplier must meet its supply and other obligations under the MSA or limit the Companies' ability under the MSA to reject any proposed assignment by a Supplier.

Q. Have other jurisdictions that utilize competitive procurement processes made changes such as those that you propose here?

A. Yes. Other jurisdictions have made changes similar to those proposed by Constellation with respect to the Notional Quantity Language. Delaware, Maryland the District of Columbia, and Pennsylvania all revised their agreements equivalent to the MSA in order to make their respective versions of the Notional Quantity

Language optional, at the wholesale supplier's discretion, as Constellation has proposed. In approving the revision to make the Notional Quantity Language optional, at the supplier's discretion, the Maryland Public Service Commission ("Maryland Commission") stated that:

[i]t has always been the intent of the [Maryland] Commission that language in the [contract] should provide for the optionality discussed in [Constellation's] "notional quantity" proposal. [Making the Notional Quantity Language optional] broadens the pool of potential bidders.⁷

The Public Service Commission of the District of Columbia ("DC Commission"), in deciding to make the Notional Quantity Language optional at the supplier's discretion, stated that the DC Commission:

recalls that [the Notional Quantity Language] was included in the contract [in order] to allow more diverse parties such as investment banks to participate in the SOS process. The [DC Commission] does not believe that [making the Notional Quantity Language optional] will detract from the clause's intended purpose and therefore accepts. . . [the] revision to [the contract].⁸The Delaware Public Service Commission ("Delaware Commission") similarly approved the proposal to make the Notional Quantity Language optional at the discretion of the supplier.⁹

The Pennsylvania Public Utility Commission ("Pennsylvania Commission") has also approved agreements containing similar language to that which Constellation is proposing. For example, it approved an agreement that makes such Notional Quantity Language optional under West Penn Power Company's (d/b/a Allegheny Power) ("Allegheny-PA") competitive procurement process for a product similar to

⁷ Order No. 81102, Maryland Commission Case No. 9064 (issued Nov. 8, 2006) at p.49 (*emphasis added*).

⁹ Order No. 14065, DC Commission Formal Case No. 1017 (issued Sept. 21, 2006) at P36. ⁸ See Order No. 7053, Delaware Commission Docket No. 04-391 (issued Oct. 17, 2006) at P70 (stating that all parties "have agreed on" making the Notional Quantity Language optional at the supplier's discretion and approving "the parties" agreement as being in the public interest").

that proposed in the ESP.¹⁰ Most recently, the Pennsylvania Commission approved an agreement that contains similar optionality for Notional Quantity Language under the competitive procurement processes of the Pennsylvania Power Company, Metropolitan Edison Company and Pennsylvania Electric Company.¹¹

Q. Please summarize the benefits of having such an option in the MSA.

A. Having such an option will increase flexibility in the types of accounting treatment that Suppliers may elect for the MSA. Making the Notional Quantity Language optional in this way may lead to increased willingness of certain companies to participate in the ESP, to the benefit of the competitiveness of the procurement and, ultimately, to the benefit of DPL's consumers.

b. Events of Default Under the MSA.

Q. Does Constellation propose suggested revisions to the Events of Default provisions in MSA Article 5?

A. Yes. The MSA should be revised with respect to the Events of Default, in order to include important clarifications and industry-standard language to improve the MSA:

¹⁰ See, generally, *Petition of the West Penn Power Company dba Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, Pennsylvania Commission Docket No. P-00072342; see also *Opinion and Order*, Pennsylvania Commission Docket No. P-00072342 (entered July 25, 2008).

¹¹ Pennsylvania Commission Docket Nos. P-2009-2093053 and P-2009-2093054, Joint Petition Exhibit B-1 (Met-Ed) and Exhibit B-2 (Penelec), p. 28 (August 12, 2009), *Opinion and Order* (entered Nov. 6, 2009).

- 1 • **Notice, Generally:** DPL should be required to provide appropriate notice of any
2 credit-related Events of Default under Article 5 (for instance, under the events
3 identified in Sections 5.1(f), (k), etc.), as well as at least a brief opportunity to
4 cure, as is industry standard and good market practice. Such notice and brief
5 cure period will assure that there is not an automatic default declared for small,
6 correctible, non-substantive administrative errors.
- 7 • **Section 5.2(a):** Constellation recommends certain revisions which assure that
8 these provisions are bilateral – i.e., equally applied to DPL and the SSO Supplier –
9 as is industry standard for wholesale supply agreements. DPL has certain
10 material obligations under the MSA for which SSO Suppliers could be left
11 without an appropriate (or any) remedy for DPL’s non-performance.
- 12 • **Section 5.3(a):** Constellation recommends that the final sentence be removed
13 from this subparagraph as it is not industry-standard, and represents an
14 unhedgeable risk for SSO Suppliers. In the event that a Governmental Authority
15 terminates the MSA, either the terms of the MSA will control, or the parties will
16 have to meet any revised provisions for termination required by such
17 Governmental Authority.
- 18 • **Section 5.3(c):** Constellation proposes removal of any party’s right to withhold
19 any or all of the Termination Payment. The Termination Payment under the
20 MSA is intended and designed to include a reconciliation of *all* amounts owed
21 under the MSA, including all Default Damages, so there exists no reason for a
22 party to withhold any of such Termination Payment amount; that language
23 simply creates confusion regarding the terms and performance of the MSA.

- **Section 5.4:** The rights of SSO Suppliers should be revised to assume a defaulting supplier's tranches to assure that no one SSO Supplier will receive undue preference in serving those tranches if more than one SSO Supplier seeks to do so.

e. Changes to the MSA's Sample PJM Invoice.

Q. Why does Constellation propose certain changes to the Sample PJM Invoice included at MSA Attachment G?

A. Constellation's improvements to the "Sample PJM Invoice" included at MSA Attachment G are necessary in order to clear up ambiguities and make the items in the Sample PJM Invoice consistent with provisions elsewhere in the MSA, and consistent with appropriate industry practice

Constellation's suggested changes to the PJM Sample Invoice are shown on Constellation 1.1, attached. Items that Constellation believes should be added to the PJM Billing Line Item Transfers in the PJM Declaration of Authority are highlighted.

f. Other Recommended Changes to the MSA.

Q. Do you have any other recommendations regarding the MSA?

A. Yes. There are a number of other clarifications and suggested changes that we propose in the MSA, which may not require much explanation. These improvements generally provide important clarifications to remedy inconsistencies, address ambiguities, and bring MSA provisions in-line with industry-standard agreements. These changes include the following:

- Definition of Dayton Load Zone – Clarify this by adding PNODE ID
- “Letter of Credit” – Revise definition to reflect that DPL must accept a standard form of Letter of Credit but retains discretion regarding any alternative forms.
- Definition of Market Price Hub – Identify a specific hub, either PJM West Hub or AD Hub.
- Definition of Settlement Amount –Add language to specifically exclude default damages.
- Definition of SSO Supply - Section 2.3(b), and Section 2.4 are currently inconsistent in their allocation of responsibility for new charges/obligations. Language in Section 2.3(b) is preferable, indicating that new charges/obligations will be allocated based on the allocation in Exhibit G. This methodology maintains the benefit of the original bargain. DPL is responsible for NITS, renewables, etc., while suppliers are responsible for everything else.
- Definition of Unique Arrangement Customers – As discussed above, these customers should be included in SSO Load.
- Section 2.3 – Specify whether DPL intends to be the NITS customer or solely to be financially responsible for the charges associated with NITS.
- Section 2.5 – Clarify that SSO Supplier receives the benefit of any FTRs/ARRs allocated to DPL.
- Section 2.7 – Delete the last two sentences and state that supplier can manage its PJM e-accounts in its sole discretion, as is the case with the MSA used in the FirstEnergy auctions. The supplier may want to use one account for multiple load in order to minimize cost and ultimately provide the customer with the lowest price.
- Renewables - Clarify who is responsible for renewables, including all current and future requirements.
- Section 2.13 – Delete references to “sole discretion”. This should be a mathematical calculation that does not require any subjectivity.
- Add new MSA Section 3.2(j) to reflect the additional data and information to be provided to SSO Suppliers as I discuss earlier in this testimony.
- Section 3.3 – Delete.
- Section 5.3(e) – Delete “and in the form....judgment” at the end of the last sentence. Any acceptable collateral under the agreement should satisfy this obligation.
- Section 13.11 – The appropriate standard of review is the “public interest” application of the “just and reasonable standard”, and the paragraph should be revised accordingly.
- Revise MSA Section 13.1 to make clear that notices should become effective upon actual receipt.
- Revise Section 13.10(b) to make clear that certain other individuals may have access to information and documents if they must in order to allow the SSO Supplier to perform its obligations under the MSA.

F. Use of Future Collaborative Processes

Q. Do you have any final recommendations regarding the CBP and the MSA?

A. Yes. The Commission should require DPL to utilize a collaborative stakeholder process prior to any future proposals for a CBP. There are various products and approaches to conducting competitive bidding to meet the standard service offer requirements of the Ohio electric utilities. However, the goals of any competitive process should be to attract the maximum number of qualified participants and to solicit the best offer possible from those participants. It has been our experience that an open collaborative stakeholder process is an excellent way in which to consider various products and approach to competitive wholesale procurement.

Q. What types of issues could be addressed in such an informal stakeholder process?

A. There is a wealth of data, information, and experience from other markets that market participants could share with the Commission and other stakeholders. Thus, details such as what kind of data will be made available to suppliers prior to the bidding process, the financial security to be posted by would-be bidders, credit requirements, standard contracts, terms and conditions, and similar aspects can be discussed, debated and developed in a collaborative stakeholder process by those with experience in many markets. Well-crafted bidding rules will also attract a larger number and diverse set of suppliers which in turn would lead to more competitive procurement process. Thus, Constellation suggests that the Commission should require that a collaborative stakeholder process be conducted

prior to DPL (or any other electric utility for that matter) submitting a CBP plan under an ESP (or ESP). In this collaborative stakeholder conference, the potential bidders and others can be consulted as to what pre-bid information needs to be made available and well as other key terms associated with competitive wholesale procurement, including the master supply agreement.

IV. Riders RR and AER-N Should Be Bypassable For CRES Customers and the Switching Tracker Should Be Eliminated

Q. Please explain the proposed Rider RR.

A. According to DPL, Rider RR is supposed to allow DPL to recover certain costs associated with providing SSO service, including CBP auction costs, CBP consultant fees, and PUCO consultant fees. Those charges included in Rider RR should be bypassable for customers taking service from a CRES provider.

Q. Is the recovery of generation-related costs by DPL from customers who are not taking such service from DPL appropriate?

A. Not at all. Simply put, customers that are not taking SSO service from DPL should not have to pay DPL for costs associated with SSO service.

Q. Please explain the proposed Rider AER-N.

A. Rider AER-N seeks to recover costs associated with a proposed solar generating facility. As this is a generation-related charge, it is inappropriate to make such a Rider nonbypassable for shopping customers. The Commission similarly rejected

attempts by AEP to improperly impose a generation-related charge on shopping customers associated with the Turning Point solar project.

Q. Please explain DPL's proposed Switching Tracker.

A. As described by DPL witness William Chambers, the Switching Tracker is designed to reimburse DPL its lost revenues if additional switching continues, beyond the August 30, 2012 switching rate of 62%.¹² According to DPL, "[s]uch switching reduces DPL's retail load, thereby reducing its revenues as it sells more of its power at wholesale (lower) rates."¹³

Q. Why do you recommend that the Switching Tracker be eliminated?

A. This proposal is a clear example of inappropriate cross-subsidies between DPL's distribution business and its generation fleet. As is evident from Mr. Chambers' testimony, DPL is in this position due solely to the fact that it is currently charging its customers above-market generation rates, and stands to lose if more customers make economic decisions. The PUCO should not continue to foster and promote uneconomic generation, and to similarly encourage inefficiencies by rewarding utility affiliates that cannot effectively compete in the market. Moreover, the costs associated with generation should be paid for by DPL's supply customers alone. Customers of CRES providers pay their supplier the cost of generation; imposing a switching tracker is charging CRES customers twice for generation – once from their CRES provider, and a second time from DPL, from whom they take NO generation

¹² Second Revised Testimony of William J. Chambers, pp. 25-26.

¹³ *Id.* at 25.

1 service. Not only are such charges unfair, but they are intended to, and in fact do,
2 discriminate against customers taking service from CRES providers.

3
4 **Q. How have other States that allow retail competition addressed the imposition**
5 **of generation-related costs or charges for customers that took service from a**
6 **competitive supplier?**

7 **A.** In short, except for the period of time when electric distribution utilities ("EDUs")
8 were allowed to collect stranded costs or transition charges, in virtually all such
9 markets in the U.S., all generation-related charges are avoidable when a customer
10 elects to take service from a competitive retail supplier. In fully functioning
11 competitive retail markets in States such as Illinois, Pennsylvania, Texas, New York,
12 New Jersey, Maryland, Connecticut, D.C., Massachusetts, Maine, and Delaware, EDU
13 generation-related charges are fully avoidable and bypassable when a customer
14 elects to take service from a competitive retail electric supplier. The reason for
15 adoption of such a policy is clear: customers should not be required to pay twice for
16 the same service -- once to their EDU and once to the CRES. That same economic
17 principle applies equally to Ohio consumers, and its adoption is essential if the
18 competitive retail electric market is going to be allowed to develop in Ohio.

V. Development of the Competitive Retail Market Under DPL's ESP Proposal

Q. Please discuss the current status of the development of competition in the DPL service territory.

A. According to DPL witness Hoekstra, as of August 30, 2012, more than 61.7% of the load is being served by a CRES provider.¹⁴ This breaks down to 84% of the non-residential load, and 24.7% of the residential load.

Q. Please discuss how DPL's ESP will affect the continued development of retail competition within its service territory.

A. Certain facets of the ESP affirmatively support the continuing development of the competitive retail electric market. Constellation supports the various data enhancements proposed by Dona Seger Lawson at pages 13-14 of her Direct Testimony. However, if DPL is committed to the development of the competitive retail electric market, there are additional enhancements that could be made to better enable a sustainable and more robust marketplace.

Q. Please explain some of your recommendations to lead to a more robust competitive retail electric market.

A. Based upon our experience, Constellation recommends that DPL modify their existing retail tariffs and business practices so that CRES providers are provided with the following data and information to better enable the development of retail competition:

¹⁴ See Second Revised Direct Testimony of Aldyn W. Hoekstra, p. 6, December 12, 2012.

- 1 1. That the proposed Web-based, electronic access to key customer usage and
2 account data that DPL is going to develop, allow CRES provider to access via a
3 supplier website that presents data and information in a format that can be
4 automatically scraped;
- 5 3. Data access including access to the following types of data:
 - 6 (a) Validation, Error Detection, and Editing (“VEE”) data posted via
7 Electronic Data Interchange (“EDI”)- post;
 - 8 (b) 867 Historical Usage (“HU”) and Historical Interval Usage (“HIU”) data;
 - 9 (c) 867 Monthly Usage (“MU”) and Interval Usage (“IU”) data;
 - 10 (d) Transmission and capacity Peak Load Contributions (“PLCs”) in 867s;
 - 11 (e) Meter read cycle information;
 - 12 (f) Accounts requested together should come back together, unless there
13 would be an unnecessary delay for a particular subset of accounts; and
 - 14 (g) The monthly sync-list that is proposed to be provided to CRES Providers
15 should be done on a confidential basis and contain information such as
16 service start date, bill method, and PLC values.

18 **Q. Why is it important that such information be provided to CRES Providers?**

19 **A.** By providing this type of data and information, CRES providers will be better able to
20 provide services to prospective customers, better able to meet the needs of existing
21 customers, and better able to manage their businesses. Further, provision of this
22 type of data and information allows a CRES Provider to provide a prospective
23 customer with a competitive offer for electric service, check the enrollment status of

a new customer, and perform other functions designed to better serve customers. The Commission should direct DPL to allow CRES Providers to obtain such usage and account information, including interval data through a website or through other electronic means.

Q. What can happen if this type of data and information is not provided on a timely basis?

A. Unnecessary delays in the provision of this data and information can have an effect on the ability to contract with customers, render invoices, and provide other services to consumers. Ultimately, given the fact that pricing may change during the intervening time, a customer may be economically harmed.

Q. Are there any more granular or specific issues associated with access to interval data for customers with interval meters?

A. Yes. If CRES providers do not receive timely and accurate delivery of interval data, this not only impacts suppliers' ability to provide price quotations to customers but also frustrates their ability to issue an invoice to a customer on a timely basis, which inconveniences customers and increases suppliers' costs.

Q. When you indicate that you support DPL's development of a web-based, customer-specific data and information system, what type of customer-specific information are you referring to?

A. The customer-specific information should include the following:

- 1 • Account Numbers;
- 2 • Meter Numbers;
- 3 • Names;
- 4 • Service Addresses, including Zip codes;
- 5 • Billing Addresses, including Zip codes;
- 6 • Email addresses;
- 7 • Meter Read Cycle Number or Dates;
- 8 • Meter Types;
- 9 • Interval Meter Flags;
- 10 • Rate Code Indicators;
- 11 • Load Profile Group Indicators;
- 12 • DPL assigned PLC and NSPL values and effective dates;
- 13 • 24 months of consumption data (in kWh) by billing period, including:
- 14 ○ On-Peak data; and
- 15 ○ Off-Peak data;
- 16 • 24 months of demand data (in kW) by billing period;
- 17 • 24 months of interval data;
- 18 • Effective dates for current and pending rate class;
- 19 • Standard Service indicators (if on SSO);
- 20 • Minimum stay dates (if applicable);
- 21 • Identifiers of whether customers are participating in Budget Plans; and
- 22 • Identify if a PIPP customer.

Q. Are there other enhancements to the provision of data and information or elimination of certain fees and practices that DPL should implement in order to promote the development of retail competition?

A. Yes. The Commission should direct DPL to implement the following additional retail market enhancements:

- a. The Company shall allow suppliers to enroll individual meters.
- b. The Company shall provide certain types of data via EDI transactions including:
 - i. Sum the unmetered consumption to total usage in the summary loop of the EDI 867 transaction in a manner which is consistent with the Ohio's EDI implementation guidelines.
 - ii. Send "billed kWh" as opposed to "metered kWh" to CRES providers on EDI 867 transaction in a manner which is consistent with the Ohio EDI implementation guidelines.
 - iii. Adopt the same net metering provisions as delineated in the PA Electronic Data Exchange Working Group (EDEWG) EDI Change Control 103 so that certain EDI transactions use a special meter configuration segment (REFKY) to notify the CRES provider that a customer uses net metering (PA EDEWG EDI Change Control 85/90 can be provided on request), to the extent it can be done in a manner which is consistent with the Ohio EDI implementation guidelines.
 - iv. Remove the enrollment validation customer name
 - v. Auto-cancel related supplier charges when DPL cancels a usage cycle under the bill-ready option.
 - vi. Support Historical Interval Usage (HIU) data requests via EDI.
- c. DPL should provide 500 billing codes that mirror DPL's rate structures without charge to the CRES provider. Changing a variable code shall not count as a new code.
- d. DPL should bill the switching fee directly to CRES providers.
- e. Accounts that have not switched and have both a residential and commercial meter should be separated into two accounts to enable individual services to be enrolled.

f. DPL should eliminate the 90 or 60 day notice period for large and industrial customers returning to standard service, and with it, also eliminate the \$10/kW penalty for not complying with notification periods.

g. DPL should eliminate certain CRES service charges, which are not charged in other jurisdictions. The itemized CRES service charges to be eliminated will include:

i. Supplier Registration Fee

ii. Sync List Charge

Q. How do you propose that these issues be reconciled or clarified?

A. We are hopeful that DPL, in a compliance filing will specifically indicate which additional retail market enhancements are already being implemented and a date upon which the specific items and retail market enhancements will be made available to CRES providers. Ideally, DPL would commit to providing the enhanced data and information by January 1, 2014 but in no event later than June 1, 2014. Constellation recommends that the Commission in its final order, provide much needed clarity on the timing and substance of these retail market enhancements.

Q. Do you have any recommendations regarding the billing options that DPL offers to CRES providers?

A. Yes. Constellation would like to see DPL offer both Rate Ready and Bill Ready utility consolidated bill options as it offers much more flexibility from a product and billing perspective.

Q. Is having those billing options alone enough, in your opinion?

A. No. DPL should be required to offer a Purchase of Receivables ("POR") program for residential and small commercial customers. Under a POR program, the utility bears the uncollectibles risk associated with that class of customers, the risk of which is calculated as a discount rate, paid to DPL by suppliers that choose to exercise that option. Constellation recognizes that this issue is being addressed in other dockets before the PUCO, and should specifically be considered for DPL's service territory. As noted by DPL witness Hoekstra, although competition is robust in the larger commercial and industrial service classes, less than 25% of residential load is taking advantage of offerings by CRES providers.¹⁵ A properly constructed POR program is the key to a successful retail market for residential, as well as small commercial customers.

Q. Are there other business practices related to the provision of data and information and/or support to CRES Providers that you believe should be implemented by DPL?

A. Yes. In order to further enhance the ability of CRES Providers to meet the needs of retail customers, DPL should adopt the following four (4) business practices:

1. Notification to CRES provider of record before a drop occurs, providing the CRES providers the ability to cure the situation;
2. Provision of legacy customer numbers. If there are any plans to change the customer account numbers or meter numbers due to systems changes or upgrades, the old account/meter numbers should be maintained and

¹⁵ See Second Revised Direct Testimony of Aldyn W. Hoekstra, p. 6, December 12, 2012.

provided in the customer lists and on EDI data transactions. This allows the old numbers to be cross referenced with the new numbers so that CRES providers can synchronize their systems/databases.

3. Regular electronic mail notifications of tariff supplements, modifications, or changes when filed with the Commission.

4. Semi-Annual or Quarterly Meetings or Conference calls with CRES providers to discuss proposed tariff changes, business practices, or other information. DPL currently conducts an annual CRES provider meeting but with all of the changes being proposed, more frequent meetings, emails, or other forms of communication are warranted.

Q. Do you have any final recommendations regarding DPL's ESP that are important to the successful implementation of customer choice and retail competition in the DPL service territory?

A. Yes. The Commission should require DPL to file the applicable implementation tariffs within thirty (30) days of the entry of a final Order in this proceeding but in no event less than ninety (90) days prior to their effective date. It is important for at least three (3) reasons that specific implementation tariffs addressing the attendant rules regarding retail choice are submitted in a clear and easy to follow manner. First, it increases efficiency. Having clear tariffs will help to avoid unnecessary expenditures of time and effort, thereby lowering transaction costs for customers. Second, tariffs can identify, and therefore allow customers to avoid, specific problems. A lack of clarity can create real problems for real individual customers

1 resulting in costly situations that hurt their business, their owners, and their
 2 employees. Third, tariffs will be the best, most definitive guidepost for customers
 3 and suppliers alike regarding what will be a completely new process, resulting in
 4 new products.

5
 6 **Q. Are there corresponding benefits to winning SSO suppliers in receiving a**
 7 **complete set of tariffs?**

8 **A.** Yes. While such tariffs may not include actual prices that are dependent upon the
 9 results of the CBP, having a complete set of the tariff structure, associated rate
 10 designs, retail rate translation mechanisms, and other terms and conditions would
 11 be a benefit to suppliers. In the recent CBP, the final tariff structure lacked clarity,
 12 and was ultimately provided only days before the auction, after many requests.
 13 Greater certainty regarding that structure would enable suppliers to better estimate
 14 the switching risk, and therefore allow them to properly construct their bids.

15
 16 **Q. If your suggested modifications to DPL's ESP are adopted, do you believe that**
 17 **retail competition will continue to develop?**

18 **A.** Yes. By adopting DPL's ESP, with the recommended modifications discussed herein,
 19 the Commission will establish a framework that will better support the continued
 20 development of retail competition, large-scale government aggregation, and
 21 competitive wholesale electric markets.

1 **VI. CONCLUSION AND SUMMARY OF RECOMMENDATIONS**

2 **Q. Please summarize your conclusions and recommendations regarding DPL's**
3 **ESP Application.**

4 **A.** The Commission has an opportunity to be a steadying force in the continued
5 evolution of the competitive electric market in Ohio. As a general matter, DPL's ESP
6 proposal, with the modifications discussed herein, is the best means for the
7 procurement of SSO. DPL's proposal will bring the benefits of wholesale
8 competition to customers that do not choose a competitive alternative to DPL's
9 standard offer service and should help foster the continued evolution of the
10 competitive retail electric market.

11
12 DPL should revise its ESP consistent with Constellation's recommendations for all
13 the reasons set forth herein.

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

16 **A.** Yes, it does.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 11th day of March, 2013 by electronic mail upon the persons listed below.



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Constellation 1.1 - Appendix G Changes

ID #	Charge Name	Current Responsible Party	Proposed Responsible Party
1110	Direct Assignment Facilities	SSO Supplier / Generator	SSO Supplier
1140	Non-Firm Point-to-Point Transmission Service	Generator	N/A
1250	Meter Error Correction	Generator	SSO Supplier
1600	RPM Auction	Generator	N/A
1650	Auction Specific MW Capacity Transaction	Generator	N/A
1660	Demand Resource and ILR Compliance Penalty	Curtailment Service Provider	N/A
1661	Capacity Resource Deficiency	Generator	N/A
1662	Generation Resource Rating Test Failure	Generator	N/A
1663	Qualifying Transmission Upgrade Compliance Penalty	Transmission Owner	Electric Distribution Co.
1664	Peak Season Maintenance Compliance Penalty	Generator	N/A
1665	Peak-Hour Period Availability	Generator	N/A
1666	Load Management Test Failure	Curtailment Service Provider	N/A
1980	Miscellaneous Bilateral	SSO Supplier / Generator	SSO Supplier
2100	Network Integration Transmission Service	Transmission Owner	Electric Distribution Co.
2106	Non-Zone Network Integration Transmission Service	Transmission Owner	Electric Distribution Co.
2108	Transmission Enhancement	Transmission Owner	Electric Distribution Co.
2110	Direct Assignment Facilities	Transmission Owner	Electric Distribution Co.
2240	Day-ahead Economic Load Response	Curtailment Service Provider	N/A
2241	Real-time Economic Load Response	Curtailment Service Provider	N/A
2245	Emergency Load Response	Curtailment Service Provider	N/A
2320	Transmission Owner Scheduling, System Control and Dispatch Service	Transmission Owner	Electric Distribution Co.
2330	Reactive Supply and Voltage Control from Generation and Other Sources Service	Generator	N/A
2340	Regulation and Frequency Response Service	Generator	N/A
2360	Synchronized Reserve	Generator	N/A
2365	Day-ahead Scheduling Reserve	Generator	N/A
2370	Day-ahead Operating Reserve	Generator	N/A
2371	Day-ahead Operating Reserve for Load Response	Curtailment Service Provider	N/A
2375	Balancing Operating Reserve	Generator	N/A
2376	Balancing Operating Reserve for Load Response	Curtailment Service Provider	N/A
2377	Synchronous Condensing	Generator	N/A
2378	Reactive Services	Generator	N/A
2380	Black Start Service	Generator	N/A

Constellation 1.1 - Appendix G Changes

ID #	Charge Name	Current Responsible Party	Proposed Responsible Party
2600	RPM Auction	Generator	N/A
2620	Interruptible Load for Reliability	Curtailed Service Provider	N/A
2650	Auction Specific Capacity Transaction	Generator	N/A
2665	Peak-Hour Period Availability	SSO Supplier / Generator	N/A
2930	Generation Deactivation	Generator	N/A
2932	Generation Deactivation Refund	Generator	N/A
2980	Miscellaneous Bilateral	SSO Supplier / Generator	SSO Supplier

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in

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

Summary: Testimony Direct Testimony of David I. Fein on behalf of Intervenors Exelon Generation, LLC & Constellation NewEnergy, Inc. electronically filed by Mr. Stephen M Howard on behalf of Exelon Generation Company LLC and Constellation NewEnergy, Inc.