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 Nos. 12-426-EL-SSO
In the matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case Nos. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	)))	Case Nos. 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 Nos. 12-429-EL-WVR
In the matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case Nos. 12-672-EL-RDR

FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE

I. INTRODUCTION

The Commission should deny the motion of The Dayton Power and Light Company ("DP&L") to strike portions of the testimony of FES witness Dr. Lesser (the "Motion"). DP&L contends that portions of Dr. Lesser's testimony constitute improper legal opinion, but DP&L has misstated the law. Expert testimony, and most particularly expert testimony offered by economists and utility regulatory experts such as Dr. Lesser, often applies applicable law to the operative facts in reaching an expert opinion. In the public utility context (as well as many others impacted by government regulation), regulatory law and policy necessarily provides the foundation upon which experts will

build their opinions. Indeed, without this foundation, no witness would be able to opine on many of the issues in this case, including the ESP v. MRO test, whether a nonbypassable rider can be established for the Yankee solar facility, or whether DP&L's request for almost a billion dollars in above-market revenues to preserve DP&L's credit rating is statutorily justified. As such, DP&L's Motion is flawed and should be denied.

Notably, DP&L's own testimony offers the same "legal opinions" that it seeks to strike from Dr. Lesser's testimony. Indeed, if the equivalent sections of DP&L's testimony also were stricken, it is likely DP&L's evidence in support of its ESP would be found facially lacking and subject to dismissal. DP&L witnesses repeatedly cite to statutes and case law in support of their position, and they provide extensive analysis of those statutes and case law. FES is entitled to respond to and rebut DP&L's testimony. Thus, the Motion should be denied.

II. Argument

A. DP&L Has Misstated The Law, And Dr. Lesser's Testimony Should Not Be Stricken.

1. DP&L Has Provided An Incorrect Legal Standard.

DP&L claims that portions of Dr. Lesser's testimony should be stricken because "[l]egal testimony as to the law is inadmissible." Motion, p. 2. DP&L further claims that the portions of Dr. Lesser's testimony at issue "crossed the line" because they include "citation to Ohio law and Commission precedent." Motion, p. 3. DP&L has misstated the applicable legal standard and mischaracterized Dr. Lesser's testimony. Expert witnesses providing testimony to the Commission often must reference relevant statutes in providing their opinions. Indeed, without a statutory framework as the basis for their opinions, many utility experts would be unable to testify at all. For example, a witness

cannot competently opine as to whether an ESP is more favorable in the aggregate than an MRO without having an understanding of R.C. §§ 4928.142 and 4928.143. Similarly, a witness cannot determine whether DP&L's ESP promotes state policy without referencing R.C. § 4928.02. In short, there is no way to provide expert testimony in these regulatory proceedings without reliance upon and reference to applicable statutes, Commission rules, and legal precedent.

DP&L improperly confuses "legal conclusions" with the technical regulatory and economic testimony provided by Dr. Lesser, which is necessarily informed by governing utility law. Dr. Lesser must apply that governing law and his regulatory and utility expertise to the facts before him in reaching his conclusions. A court accepted similar testimony in *Stearns Co., Ltd. v. U.S.*, 34 Fed. Cl. 264 (1995), in which the plaintiff sued the United States over rights to strip-mine particular sections of the Daniel Boone National Forest. The plaintiff's strip-mining efforts had been denied by the Secretary of the Interior pursuant to the Surface Mining Control and Reclamation Act (SMCRA). *Id.* at 267. To support its argument that these denials were an unconstitutional taking, the plaintiff presented the testimony of a mining engineer who interpreted several of the SMCRA's legal terms and concluded that the power vested in the Secretary stripped the plaintiff of his mineral rights. *Id.* at 268–69. After the government moved to strike, the court denied the motion in part "because the issue before the court involve[d] mixed questions of law and fact . . . ." *Id.* at 269. The court noted that an expert's reference to existing law and conclusions related to legal concepts are admissible if such testimony assists the court. *Id.* at 268–69. An expert's application of the law to the facts is generally accepted. *See, e.g., Snellman v. Ricoh Co., Ltd.*, 862 F.2d 283, 287 (Fed. Cir.

1988) (holding expert's claim interpretation was valid in patent case); *United States v. Buchanan*, 787 F.2d 477, 483 (10th Cir. 1986) (applying definition of "firearm" in 26 U.S.C. § 5861 to homemade firebomb); *Alinco Life Ins. Co. v. United States*, 373 F.2d 336, 352 (Cl. Ct. 1967) (adopting expert's interpretation of technical terms in casualty-type insurance policies).

While it is true that lawyers are prohibited from offering testimony going to the ultimate legal issue in a civil proceeding, there is a stark difference between technical regulatory proceedings like the instant case and a breach of contract case. Indeed, an expert may offer a legal conclusion where the testimony concerns the technical provisions of a particular industry and is within a witness's area of expertise. *See Applegate v. U.S.*, 35 Fed. Cl. 406, 425 (1996). In *Applegate*, the plaintiffs' asserted a takings clause violation after the Army Corps of Engineers constructed a harbor, allegedly flooding and eroding plaintiffs' property. *Id.* at 410-11. One issue before the court was whether land seaward of the "erosion control line" was owned by the State of Florida or by adjoining property owners. *Id.* at 423. Over the plaintiffs' objection, the government's expert witness helped to define, and ultimately construe, the meaning and scope of the state statute's use of the term "erosion control line." *Id.* at 424–25. Such testimony is admissible because of its technical nature, despite having legal overtones.

Thus, before the Commission, expert witnesses may testify on issues closely intertwined with legal rules, and such testimony will include references to various orders, laws, and court decisions. *See In re SBC Ohio*, 2004 WL 1908783, at *1 (Ohio P.U.C. 2004). In *SBC Ohio*, AT&T Communications of Ohio and other intervenors filed a motion to strike portions of SBC Ohio's expert testimony regarding economic and policy

issues impacted by the underlying total element long run incremental cost ("TELRIC") proceeding. *Id.* Although the testimony included an analysis and discussion of legal authorities and relied on court and Federal Communications Commission decisions, the Commission nevertheless denied the motion to strike. Such testimony was only "offered in the context of her position as an economist and not that of an attorney." *Id.* The Commission concluded that any "substantive TELRIC analysis" necessitated consideration of the relevant legal authorities. *Id.* The same is true of Dr. Lesser's testimony in this proceeding.

2. Using The Proper Legal Standard, Dr. Lesser's Testimony Is Not Objectionable.

The portions of Dr. Lesser's testimony challenged by DP&L are clearly appropriate under the legal standard provided above.[1] On p. 53, lines 12-21, Dr. Lesser discusses whether DP&L's purported "proof" in support of the Yankee Solar facility meets the requirements of R.C. § 4928.143(B)(2)(c). Based on the Commission's earlier holding that "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,'"[2] Dr. Lesser concludes that a nonbypassable AER-N should not be approved. There is nothing inappropriate about this testimony. Intervenors must have the opportunity to point out that the information provided by DP&L is incomplete and fails to meet either the statutory standard or the previous rulings of the Commission. Importantly, this

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[1] Each portion of the disputed testimony is briefly discussed herein, and the full revisions proposed by DP&L are attached as Exhibit A.

[2] Citing Case No. 11-346-EL-SSO, Opinion and Order dated December 14, 2011, p. 39.

testimony directly addresses DP&L witness Seger-Lawson's contrary understanding of Ohio law and prior Commission authority.[3]

DP&L also seeks to strike p. 54, lines 23-24, and p. 55, lines 2-13, where Dr. Lesser opines that DP&L's proposed Rider AER-N would have a severe negative impact on the competitive market in contravention of various policies set out in R.C. § 4928.02. This testimony directly rebuts DP&L witnesses Seger-Lawson and Herrington[4] and explains why the ESP is contrary to Ohio policy. Indeed, this testimony provides a clear explanation for the basis of Dr. Lesser's opinion on this point. If DP&L's absurd position were to be adopted, regulatory experts could discuss whether filings with consistent with Ohio policy but would be banned from referencing any such policies as set out in Title 49. DP&L's position is neither efficient nor effective in providing the Commission with the clearest record possible, and should be rejected.

Finally, DP&L seeks to strike p. 58, lines, 12, 21-23, wherein Dr. Lesser directly addresses witness Rabb's contention that R.C. § 4928.143(C)(3) authorizes recovery of CBP costs on a nonbypassable basis.[5] DP&L claims in witness Rabb's testimony that it is authorized by the MRO statute to recover CBP costs on a nonbypassable basis in an ESP, but seeks to strike the portion of Dr. Lesser's statute which directly addresses and contradicts this claim. It would be unfair to strike testimony directly refuting the argument made in DP&L's testimony.

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[3] *See* Second Revised Direct Testimony of Donna Seger Lawson, December 12, 2012, p. 5 lines 4-8, p. 15, lines 19-21 (attached as Exhibit C).

[4] Regarding whether or not DP&L's proposal meets the requirements of R.C. § 4928.02. *See* Second Revised Direct Testimony of Philip R. Herrington, December 12, 2012, p. 4 line 18 through p. 7, line 17 (attached as Exhibit E).

[5] Citing Second Revised Direct Testimony of Emily Rabb, December 12, 2012, p. 9, lines 3-9 (attached as Exhibit B).

Dr. Lesser is not an attorney and he is not offering legal opinions. He is not seeking to instruct the Commission on the law. Instead, Dr. Lesser is an economist with extensive experience in regulatory and utility proceedings. He is also the co-author of a popular textbook on utility regulation, *Fundamentals of Energy Regulation*. Dr. Lesser is providing his expert opinion regarding the proposals submitted by DP&L. It is impossible for Dr. Lesser to provide this analysis without reading and applying the relevant statutes that provide the ground rules for this proceeding. Thus, Dr. Lesser's application of law to fact should not be stricken.

B. DP&L's Testimony Contains The Exact Same Kind Of Analysis That It Seeks To Strike From Dr. Lesser's Testimony.

DP&L's testimony includes the exact same discussion of statutes and Commission precedent that it seeks to strike from Dr. Lesser's testimony. The examples are numerous, and only a few representative examples of this testimony are provided here to show the hypocritical nature of DP&L's claim:

- Witness Rabb, p. 9 lines 3-9: Analyzing O.R.C. § 4928.142(C)(3) to argue that CBP costs may be recovered in an ESP and discussing Commission precedent.

- Witness Seger-Lawson, p. 5 lines 4-8; p. 15, lines 19-21: Analyzing statutes and Commission precedent relating to the Yankee 1 facility while opining that the Yankee 1 facility meets the requirements of R.C. § 4928.143(B)(2)(c).

- Witness Malinak, p. 4 lines 8-23; p. 5 lines 3-5; p. 12 lines 5-7.[6] Discussion of prior Commission rulings regarding the ESP v. MRO test and providing an opinion that based on this authority the Commission should conduct legal standard of ESP v. MRO test in a certain manner.

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[6] Attached as Exhibit D.

- Witness Herrington, p. 4 line 18 through p. 7, line 17. Analysis of R.C. § 4928.02 and interpretation of whether DP&L's proposal meets the requirements of this statute.

It is black letter law that when one party opens the door to a category of testimony, the opposition must have the ability to rebut that testimony through their own witnesses. *See Peckham v. Continental Cas. Ins. Co.*, 895 F.2d 830, 837 (1st Cir. 1990) (denying a motion to strike expert testimony in insurance case). In denying the motion to strike, the court in *Peckham* noted, "plaintiffs started this particular ball rolling by presenting expert testimony in their case in chief, and one of their experts, Ashley, gave an opinion on causation." *Id.* at 837. This is precisely on point with the instant case. DP&L is seeking to prevent intervenors from offering testimony which is no different from that offered by DP&L. More troubling, DP&L is seeking to strike testimony which directly rebuts legal arguments made by DP&L. This is improper, and the Motion to Strike should be rejected.

In the alternative, if the Commission sees merit in DP&L's arguments, then the Commission must strike DP&L's testimony identified above and dismiss DP&L's ESP as facially inadequate. No party opened the door for what DP&L's own argument characterizes as "legal conclusions." If DP&L is correct, its own testimony should be purged. However, FES suggests that the more rational course of action is simply not to strike portions of Dr. Lesser's testimony.

IV. CONCLUSION

FES respectfully requests that the Commission deny DP&L's Motion to Strike portions of the testimony of Dr. Lesser.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum In Opposition To Motion To Strike* was served this 14th day of March, 2013, via e-mail upon the parties below.

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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

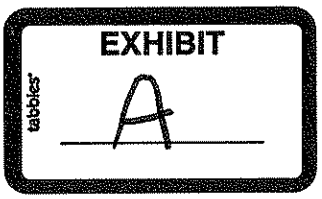
JONATHAN A. LESSER

ON BEHALF OF

FIRSTENERGY SOLUTIONS CORP.

March 1, 2013

PUBLIC VERSION



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.

BEFORE THE

PUBLIC UTILITIES COMMISSION OF OHIO

THE DAYTON POWER AND LIGHT COMPANY

CASE NO. 12-426-EL-SSO

CASE NO. 12-427-EL-ATA

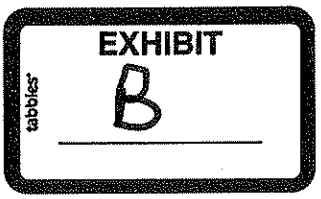
CASE NO. 12-428-EL-AAM

CASE NO. 12-429-EL-WVR

CASE NO. 12-672-EL-RDR

ELECTRIC SECURITY PLAN (ESP)
DIRECT TESTIMONY
OF EMILY W. RABB

- ☐ MANAGEMENT POLICIES, PRACTICES, AND ORGANIZATION
- ☐ OPERATING INCOME
- ☐ RATE BASE
- ☐ ALLOCATIONS
- ☐ RATE OF RETURN
- ■ RATES AND TARIFFS
- ☐ OTHER



may not fit the above descriptions; the Company may apply for recovery through the RR quarterly true-up filing.

Q. Why is it appropriate to include CBP expenses in the RR?

A. Pursuant to ORC §4928.142(C)(3), a Company has the right to recover all costs incurred as a result of or related to the CBP. Although this statute specifically applies to the MRO, since DP&L is seeking to establish a CBP through an ESP case, which has been authorized by the Commission before, the underlying policy in the MRO statue which supports recovery of CBP-related costs also supports the reasonableness of including CBP expenses in the RR here.

Q. Over what time frame are you planning to recover CBP expenses?

A. CBP expenses will be deferred until the costs are fully recovered. DP&L has proposed that the RR will recover CBP expenses annually.

Q. What will be included in the RR for competitive retail enhancements?

A. Once a given project is used and useful, the Company will place that project in service and will file those costs in the next quarterly RR filing. The revenue requirement for these costs will start with the rate base and apply the cost of debt and cost of equity components to the rate base. DP&L will use the Company's most recently supported cost of capital as filed in Case No. 08-1094-EL-SSO. Depreciation expense, operational and maintenance expenses (if any), and taxes other than income taxes (if any) will then be added to develop the revenue requirement exclusive of income taxes. Next the gross revenue conversion factor will be

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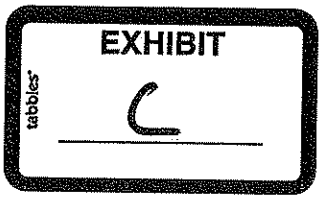
CASE NO. 12-429-EL-WVR

CASE NO. 12-672-EL-RDR

ELECTRIC SECURITY PLAN (ESP)
SECOND REVISED DIRECT TESTIMONY
OF DONA R. SEGER-LAWSON

- ■ MANAGEMENT POLICIES, PRACTICES, AND ORGANIZATION
- □ OPERATING INCOME
- □ RATE BASE
- □ ALLOCATIONS
- □ RATE OF RETURN
- ■ RATES AND TARIFFS
- ■ OTHER



support and full justification for that charge in a separate filing that will be made within six months of a final Commission order in this case.

Q. Has the Commission granted similar requests?

A. Yes, the Commission permitted AEP in its SSO Case No. 11-346-EL-SSO, to have a placeholder tariff for cost recovery of its Turning Point Solar project. On page 24 of the August 8, 2012 order in that case, AEP was directed to address all of the statutory requirements in a future proceeding but was granted the authority to establish the Generation Resource Rider (GRR) at a rate initially set at zero. DP&L is seeking the ability to file in a future proceeding its cost support and legal arguments to set its non-bypassable cost recovery mechanism for the Yankee Solar Generating Facility.

Q. Please explain the waiver requests relating to the Transmission Cost Recovery Rider (TCRR).

A. The Appendix to OAC §4901:1-36-03 requires Schedules B-4, B-5, D-1, D-2, D-3 and D-3a...z to be filed as part of a Transmission Cost Recovery Rider (TCRR) application. These schedules require historical data (costs, revenues, typical bills, reconciliation amounts) to be filed. This information does not exist for DP&L's proposed newly established rider TCRR-N. Secondly, OAC § 4901:1-36-04(B) requires that a transmission cost recovery rider be avoidable by all customers who chose alternative generation suppliers. DP&L is seeking authority to split the TCRR requirements into bypassable and non-bypassable components, and DP&L thus requests a waiver of the requirement that all TCRR components be avoidable. Finally,

Q. Does the Company or its shareholders benefit from these competitive retail enhancements?

A. No. Neither the Company nor its shareholders benefit from these system enhancements. Most of the projects listed above will improve the administrative processes of CRES Providers operating in DP&L's service territory.

VI. ALTERNATIVE ENERGY RIDER – NONBYPASSABLE (AER-N)

Q. Ohio Revised Code §4928.143 (B)(2)(c) states that a utility may seek:

"The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility.

Does DP&L's Yankee Solar Generating Facility meet all of those requirements?

A. Yes. That facility was: 1) owned or operated by the utility, 2) sourced through a competitive bid process, 3) newly used and useful on or after January 1, 2009, and 4) found by the Commission to be needed as a result of the resource planning process.

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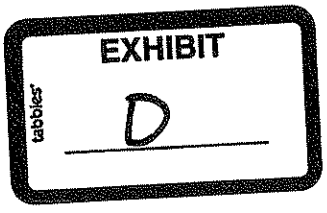
ELECTRIC SECURITY PLAN (ESP)
SECOND REVISED DIRECT TESTIMONY
OF R. JEFFREY MALINAK

- ☐ MANAGEMENT POLICIES, PRACTICES, AND ORGANIZATION
- ☐ OPERATING INCOME
- ☐ RATE BASE
- ☐ ALLOCATIONS
- ☐ RATE OF RETURN
- ☐ RATES AND TARIFFS
- ■ OTHER



"that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142 of the Revised Code."

My testimony provides an assessment of whether DP&L's ESP meets this criterion.

Q. Do prior Commission decisions provide guidance on how to interpret this criterion?

A. Yes. In prior rulings in which the Commission has decided that ESPs met this "more favorable in the aggregate" test, the Commission has taken a broad view of the expected impacts of ESPs relative to MROs to consider when performing this test, including (1) quantifiable differences in the prices to be charged to customers for electric generation service under each plan (Aggregate Price Test), (2) other quantifiable differences in customer charges (or, potentially, metrics of customer service); and (3) non-quantifiable differences.[1] This last category potentially includes a wide range of impacts, including expected short-run and long-run effects on price, service quality, reliability, and the range of product offerings. These differences also support broader effects on Ohio's economy through the impact of electric rates and services to business and industry within the state.

Reflecting this broad perspective, my assessment of the "more favorable in the aggregate" requirement considers multiple quantifiable and non-quantifiable characteristics of DP&L's proposed ESP versus those of a hypothetical alternative MRO. It is assumed that this hypothetical MRO would be similar to DP&L's ESP in every material respect, except that the ESP involves a faster transition to market generation rates and the ESP includes certain new programs aimed at enhancing retail markets.

[1] Public Utilities Commission of Ohio, Opinion and Order, Case No. 11-346-EL-SSO, August 8, 2012; Public Utilities Commission of Ohio, Opinion and Order, Case No. 12-1230-EL-SSO, July 18, 2012

Q. Can you explain how the "more favorable in the aggregate" test should be conducted?

A. Yes. The test should be an apples-to-apples comparison. By that I mean that the test should compare DP&L's as-filed ESP to a hypothetical MRO that DP&L would file on the same day.

Q. What elements have you considered in your comparison of the two alternative plans?

A. First, I perform an Aggregate Price Test, which compares rates and charges to customers that choose DP&L's Standard Service Offer (SSO) under the ESP as compared to the rates and charges that they would pay if they chose the SSO under an MRO. This test reflects both bypassable and non-bypassable charges. Second, I consider other differences between the ESP and an MRO which are meaningful but whose effects are difficult or impossible to quantify accurately. These include a range of effects, such as those arising from a faster transition of Ohio's electric markets to greater retail competition, enhancements to DP&L's administrative processes that promote customer shopping, and differences in regulatory flexibility between an ESP and an MRO.

III. AGGREGATE PRICE TEST FOR DP&L'S ESP

Q. What is the Aggregate Price Test?

A. The Aggregate Price Test is a comparison of the projected prices and charges to customers under DP&L's ESP as compared to an MRO. I perform this price test in

would file on the same day. As explained in the testimony of Company Witness William Chambers, DP&L needs an SSR of $137.5 million to preserve its financial integrity; DP&L seeks approval of that charge under § 4928.143(B)(2)(d) of the ESP statute.

If DP&L had filed an MRO, then DP&L would face threats to its financial integrity that are similar to those described in Mr. Chambers' testimony. Like the ESP statute, the MRO statute permits the Commission to implement charges to preserve a utility's "financial integrity."[3] DP&L thus would have sought an SSR if it had filed for an MRO.

If this SSR is assumed to be the same magnitude as under the ESP, then all else equal DP&L's projected revenues, profits and financial integrity would be somewhat higher (due to higher SSO rates) under the MRO than under the ESP. However, the improvement in DP&L's projected financial condition would not be sufficient to eliminate the financial risks that DP&L is projected to experience in the out years, as determined by Company Witness Chambers. Therefore, it is reasonable to assume that DP&L would have sought the same SSR under an MRO as it is seeking under the ESP. Consequently, the SSR that DP&L seeks to recover in its ESP filing has no effect on the comparison to an MRO.

Nevertheless, if one were to assume that under an MRO DP&L would have requested an SSR that was just large enough so that total customer charges (and DP&L revenue) were the same as under the ESP, then the ESP and MRO would be equivalent under the Aggregate Price Test, but the ESP still would be more favorable in the aggregate than the MRO due to the non-quantifiable benefits of the ESP discussed later in my testimony.

[3] Ohio Rev. Code § 4928.142(D)(4).

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CASE NO. 12-429-EL-WVR

CASE NO. 12-672-EL-UNC

ELECTRIC SECURITY PLAN (ESP)
SECOND REVISED DIRECT TESTIMONY
OF PHILIP R. HERRINGTON

- ■ MANAGEMENT POLICIES, PRACTICES, AND ORGANIZATION
- □ OPERATING INCOME
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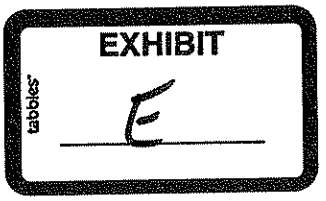

A. Yes. As explained in Company Witness Tim Rice's testimony, DP&L agrees make a separate application by December 31, 2013 to request the transfer of its generation assets. In this subsequent application, DP&L expects to request that the Commission authorize DP&L to transfer its generation assets by no later than December 31, 2017.

Q. Does DP&L's ESP filing promote competition?

A. Yes. As explained in the testimony of Company Witness Dona Seger-Lawson, DP&L's ESP filing contains six new provisions that will make it easier for CRES providers to do business in DP&L's certified territory.

Q. Does DP&L's ESP filing pass the "more favorable in the aggregate" test required by Ohio Revised Code §4928.143(C)(1)?

A. Yes. Company Witness Jeff Malinak's testimony supports the Company's determination that this ESP plan is more favorable in the aggregate that what would otherwise apply under an MRO.

III. ADVANCEMENT OF STATE POLICIES

Q. Are you familiar with the state policies contained in Ohio Revised Code § 4928.02?

A. Yes, I have studied the policies and I am familiar with them.

Q. Does DP&L's ESP filing advance those policies, and if so, how?

A. Yes, it does. As described below, DP&L's ESP filing advances many of the Ohio Revised Code §4928.02 policies. There are some policies in Ohio Revised Code §4928.02 that are unrelated to DP&L's ESP filing (e.g., those relating to transmission and

distribution) that my testimony does not address; DP&L's ESP filing is consistent with those policies, as the filing does not adversely affect the achievement of those policies.

Q. Section 4928.02(A) states that it is the policy of the state to:

> **"Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."**

Does DP&L's ESP advance that policy, and if so, how?

A. Yes. Through the ESP, DP&L will procure generation to satisfy a portion of its Standard Service Offer (SSO) obligations through a competitive bidding process (CBP). DP&L's customers should thus be assured of receiving reasonably priced retail electric service. Further, since only those suppliers that satisfy the financial and managerial criteria of DP&L's CBP will be allowed to bid, the consumer can be assured that the generation will be adequate, reliable, safe, efficient and nondiscriminatory.

Q. Section 4928.02(B) states that it is the policy of the state to:

> **"Ensure 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."**

Does DP&L's ESP advance that policy, and if so, how?

A. Yes. Through DP&L's ESP, SSO customers will over time receive generation through the CBP from the lowest bidder. Further, customers will retain the right to select any generation supplier from which they wish to buy.

Q. Section 4928.02(H) states that it is the policy of the state to:

"Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."

Does DP&L's ESP advance that policy, and if so, how?

A. Yes. DP&L's ESP filing advances this policy because DP&L will abide by its filed Corporate Separation Plan as amended and DP&L's filing describes its plan to request a transfer DP&L's generation assets into a separate affiliate.

Q. Section 4928.02(I) states that it is the policy of the state to:

"Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power."

Does DP&L's ESP advance that policy, and if so, how?

A. Yes. By conducting a CBP in which all qualified bidders are permitted to bid, DP&L's ESP should ensure that its customers receive the best available market price. Further, the CBP will be conducted in accordance with Commission rules, and will be managed by an independent third party auction manager, so that there should be no unreasonable sales practices, market deficiencies or exercise of market power.

Q. Section 4928.02(L) states that it is the policy of the state to:

"Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource."

Does DP&L's ESP advance that policy, and if so, how?

A. Yes. DP&L's ESP protects at-risk populations by ensuring that they will receive the best available market price.

Q. Section 4928.02(N) states that it is the policy of the state to:

> **"Facilitate the state's effectiveness in the global economy. In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state."**

Does DP&L's ESP advance that policy, and if so, how?

A. Yes. DP&L's ESP will facilitate Ohio's effectiveness in the global economy by ensuring that Ohio businesses have access to market-based generation. In addition, competitive retail enhancements funded through DP&L's ESP will reduce administrative barriers and transaction costs that potentially affect the opportunities for CRES providers to encourage customers to switch to competitive suppliers. The overall design of the ESP, which allows DP&L to smoothly transition to market-based pricing, will have a positive influence on economic development initiatives within the state, enhancing Ohio's ability to compete in the global economy.

IV. CONCLUSION

Q. Does this conclude your direct testimony?

A. Yes, it does.

Summary: Memorandum in Opposition to Motion to Strike Testimony of FES Witness Lesser electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.