

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the : Case No.

Application of The Dayton : 12-426-EL-SSO

Power and Light Company for :

Approval of Its Electric :

Security Plan :

-----x

In the Matter of the : Case No.

Application of The Dayton : 12-427-EL-ATA

Power and Light Company for :

Approval of Revised Tariffs :

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In the Matter of the : Case No.

Application of The Dayton : 12-428-EL-AAM

Power and Light Company for :

Approval of Certain :

Accounting Authority :

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(Caption continued on the following Page.)

Deposition of DAVID I. FEIN

Baltimore, Maryland

Tuesday, March 19th, 2013, 7:20 p.m.

Reported By: Heather M. Chiaro, CSR, RPR

1 (Caption continued from preceding page.)

2 -----x

3 In the Matter of the : Case No.

4 Application of The Dayton : 12-429-EL-WVR

5 Power and Light Company for :

6 The Waiver of Certain :

7 Commission Rules :

8 -----x

9 In the Matter of the : Case No.

10 Application of The Dayton : 12-672-EL-RDR

11 Power and Light Company :

12 Establish Tariff Riders :

13 -----x

14 Deposition of DAVID I. FEIN, held at  
15 the offices of:

16 CONSTELLATION ENERGY

17 100 Constellation Way

18 Sixth Floor

19 Baltimore, Maryland 21202

20

21

22 Pursuant to Notice, before Heather M.

23 Chiaro, CSR, RPR, and Notary Public in and for the

24 State of Maryland, who officiated in administering the

25 oath of the witness.

A P P E A R A N C E S

ON BEHALF OF THE DAYTON POWER AND LIGHT COMPANY:

JEFFREY S. SHARKEY, ESQUIRE

FARUKI IRELAND & COX, PLL

500 Courthouse Plaza, SW

10 North Ludlow Street

Dayton, Ohio 45402

(937) 227-3700

jsharkey@ficlaw.com

(Present via telephone)

ON BEHALF OF THE CONSTELLATION ENERGY:

M. HOWARD PETRICOFF ESQUIRE

Voyrs, Sater, Seymour and Pease, LLP

52 East Gay Street

Columbus, Ohio 43215

(614) 719-5414

mhpetricoff@vorys.com

(Present via telephone)

1 APPEARANCES (Continued on Next Page)

2 A P P E A R A N C E S (Continued)

3

4 ON BEHALF OF CONSTELLATION ENERGY:

5 CYNTHIA FONNER BRADY, ESQUIRE

6 Assistant General Counsel

7 Exelon Business Services Company

8 4300 Winfield Road

9 Warrenville, Illinois 60555

10 (630) 657-4449

11 cynthia.brady@constellation.com

12 (Present via telephone)

13

14 ON BEHALF OF IGS ENERGY:

15 GREGORY L. WILLIAMS, ESQUIRE

16 Whitt Sturtevant, LLP

17 88 East Broad Street, Suite 1590

18 Columbus, Ohio 43215

19 (614) 224-3946

20 williams@whitt-sturtevant.com

21 (Present via telephone)

22

23

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C O N T E N T S

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E X H I B I T S

(None Marked)

PROCEEDINGS

DAVID I. FEIN,

called as a witness, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. SHARKEY:

Q. Mr. Fein, my name is Jeff Sharkey. And as I believe you know, I represent The Dayton Power and Light Company in this matter.

Can you state your name for the record.

A. Sure. It's David Fein. That's spelled F, as in Frank, E-I-N.

Q. And Mr. Fein, I've seen from your pre-filed testimony that you are an attorney?

A. I am an attorney.

Q. And you describe on Pages 1 and 2 of your testimony various job responsibilities that you've had for some Constellation entities.

The first question to you regarding those responsibilities are, are all of those responsibilities as an attorney or do you have responsibilities beyond acting as an attorney?

A. In the discussion on those pages of the testimony, which discuss both legal and nonlegal positions, it's a little hard to answer your

1 questions. I mean, I think if I could help,  
2 currently, in my current role for the company, I am  
3 not employed as an attorney. And in my current roles,  
4 which are discussed on Lines 11 through 15 on that  
5 first page of my testimony, those do not involve  
6 representing the company as an attorney.

7 Q. Before I pursue that line further,  
8 there's references in your testimony to some Exelon  
9 entities and some Constellation entities.

10 Can you describe to me who those entities  
11 are and what the relationship is between them?

12 A. Sure. Exelon Corporation is the parent  
13 corporation. Exelon Generation, LLC and Constellation  
14 NewEnergy are the two intervening parties in this  
15 case. Constellation NewEnergy is the licensed  
16 Competitive Retail Electric Service or CRES provider  
17 in Ohio.

18 Exelon Generation is a subsidiary of  
19 Exelon Corp. Constellation NewEnergy would be a  
20 subsidiary of Exelon Generation.

21 Q. Okay. And what's the nature of Exelon  
22 Generation's business?

23 A. Exelon Generation includes ownership in  
24 generating assets, wholesale electric supply and  
25 trading and various other similar type of business

1 lines.

2 Q. Does either -- I'm going to refer to  
3 Exelon and Constellation. And by those terms, I'm  
4 going to be referring to the interveners --

5 A. K.

6 Q. -- unless I indicate otherwise.

7 A. Okay.

8 Q. So as to Exelon, is it a CRES in Ohio?

9 A. Exelon Generation is not.

10 Q. And you said it participates in wholesale  
11 supply. Does it bid in competitive auctions?

12 A. It does. Either through Exelon  
13 Generation or -- as I think you may know, Exelon and  
14 Constellation consummated a merger a little over a  
15 year ago. So historically, there were -- Exelon  
16 Generation participated in wholesale auctions and  
17 Constellation Energy Commodities Group participated in  
18 auctions. Now the companies are together. So since  
19 your question didn't really -- wasn't confined to a  
20 time period, for completeness of answer, I wanted to  
21 provide that context.

22 Q. Okay. So on a going forward basis, is it  
23 your anticipation that Exelon would participate in the  
24 Ohio market as a bidder in competitive markets, but  
25 not as a CRES provider?



1 A. Correct.

2 Q. Okay. And then Constellation, you  
3 mentioned it was a CRES. Is it also an entity that  
4 bids in auctions?

5 A. Not the Constellation entity that's an  
6 intervener in this case, no.

7 Q. Other than you mentioned a minute ago,  
8 are there other Constellation entities who would be  
9 planning on bidding in Ohio auctions in the future?

10 A. With the merger of the two companies, it  
11 would be a single entity that would do that. That  
12 would fall under Exelon Generation.

13 Q. Okay. That helps. Can you describe for  
14 me the nature of the services that you provide -- do  
15 you provide services to Exelon Generation, the  
16 subsidiary?

17 A. You, as in, you, David Fein?

18 Q. You personally, yes.

19 A. Yes, I represent their interests on  
20 regulatory and legislative matters.

21 Q. And is that as an attorney or in some  
22 non-attorney role in your view?

23 A. Non-attorney role.

24 Q. And then what -- can you describe in a  
25 little more detail the nature of your

1 responsibilities.

2 A. Sure. I represent the interests of the  
3 company that you just asked about, Exelon Generation,  
4 in regulatory and legislative matters affecting the  
5 energy industry whether it's a proceeding like this,  
6 whether it's a legislative matter affecting the  
7 competitive energy markets, typical government affairs  
8 and regulatory affairs type position.

9 Q. How long have you been doing that?

10 A. I've been in my current role since the  
11 merger was consummated, and previously held a similar  
12 type of role with the Constellation Corporation.

13 Q. When you say that you represent Exelon in  
14 a governmental matters, can you put a little meat on  
15 that in terms of describing the nature of your duties.

16 A. I think I just did. But I represent  
17 their interests in proceedings before public service  
18 commissions, before legislatures, before other  
19 governmental agencies that might have an impact on  
20 their ability to do business or opportunities for them  
21 to conduct business in a particular state. So  
22 whether --

23 Q. Are you acting in those roles as a  
24 lobbyist, as an expert witness, or in some other role?

25 A. It could be all of the above. Obviously,

1 I wouldn't be acting as an expert witness necessarily  
2 in a legislative proceeding, but I'm a policy advocate  
3 for the company. And that's how I am testifying here  
4 today.

5 Q. Okay. Then can you describe the nature  
6 of the services, if any, that you provide to the  
7 Constellation entity as an intervener?

8 A. The services are identical.

9 Q. How long has it been since you have been  
10 in the practice of law?

11 A. I still maintain a license to practice  
12 law in the State of Illinois. But I ceased  
13 representing, acting as a company lawyer roughly in  
14 2006, I want to say, 2007 -- right in that time frame.

15 Q. Before the 2006, 2007 switch, would you  
16 have described yourself as engaged in the full-time  
17 practice of law?

18 A. Yes.

19 Q. And then in the last five or six years,  
20 since you ceased acting as an attorney in 2006 or  
21 2007, can you walk me through your job titles and  
22 history?

23 A. Sure. My current title is vice president  
24 of state government affairs, which I have officially  
25 been in since March 13, 2012, when the merger of

1 Exelon and Constellation was consummated. Prior to  
2 that time, I was a vice president of energy policy for  
3 Constellation Energy roughly from the period 2007  
4 through the date of the merger consummation.

5 Q. Have you previously submitted expert  
6 testimony to Public Utilities Commissions?

7 A. I've previously submitted testimony for  
8 the Ohio commission and a number of other state  
9 commissions, including the Illinois, Pennsylvania,  
10 Maryland Public Utility Commissions.

11 Q. Can you give me an approximate amount of  
12 times that you've submitted written testimony?

13 A. I don't have a complete list in front of  
14 me, but it's probably greater than -- probably greater  
15 than 20, less than 50.

16 Q. That's close enough approximation for my  
17 purposes.

18 If you would, turn to Page 3, Line 10 of  
19 your testimony.

20 A. I'm there.

21 Q. I notice you're referring to Dayton Power  
22 and Light Company in your testimony as "DPL"?

23 A. Yes.

24 Q. Are you aware of the fact that there's an  
25 entity called "DPL" who is the parent corporation of

1 The Dayton Power and Light Company and various other  
2 subsidiaries?

3 A. I don't profess to be an expert on all of  
4 the corporate entities within the family. But I'll  
5 accept that.

6 Q. For the purpose of my question, in your  
7 testimony when you're referring to "DPL," you're  
8 referring to the applicant, The Dayton Power and Light  
9 Company in this case and not to the parent  
10 corporation?

11 A. That's correct.

12 Q. Okay. I am going to try to refer to them  
13 generally as "DP&L" just for clarity of the  
14 deposition.

15 A. Sure.

16 Q. In light of the fact that people  
17 frequently refer to "DP&L" or "DPL" as distinct  
18 entities, and I think that would provide greater  
19 clarity.

20 If you would then, turn to Page 5, Line  
21 14.

22 A. Yes.

23 Q. You say there that you appreciate and  
24 support DP&L commitment to transition to competitive  
25 wholesale and retail markets in its territory.

1 Do you see that?

2 A. Yes.

3 Q. Is it accurate to say that you consider  
4 DP&L's application in this case to be a positive step  
5 in the development of competitive markets in Ohio?

6 A. It certainly is a positive step. And  
7 there are certain attributes of it that I think are --  
8 have been -- that I discuss in my testimony, that's  
9 right.

10 Q. Let me ask you some questions about some  
11 of those attributes.

12 A. Uh-huh.

13 Q. The first one I want to ask you about is  
14 on -- starts on Page 6, Line 13 of your testimony.

15 A. Uh-huh.

16 Q. You say that DP&L should be required to  
17 transfer its generating assets no later than  
18 December 31, 2016.

19 Do you see that?

20 A. Yes.

21 Q. Did you conduct any analysis feasible for  
22 DP&L to transfer its generating assets by that date?

23 A. When you use "feasible," what -- just --

24 Q. Did you conduct any analysis to determine  
25 whether it is lawful or practical for DP&L to transfer

1 its generating assets by December 31, 2016?

2 A. Other than reviewing the material filed  
3 in this case, no, I did not do any separate analysis.

4 Q. Are you aware of whether DP&L has any  
5 lien on its assets that would preclude it from  
6 transferring its generation assets?

7 A. I am not aware of whether they do or not.

8 Q. Do you know whether DP&L and the new  
9 company who would own the generating assets would be  
10 able to achieve financing on commercially reasonable  
11 terms to effectuate such a separation as you propose?

12 A. I do not know what discussions the  
13 company may have attempted to have or not regarding  
14 such matters.

15 Q. And you've done no analysis to determine  
16 the availability of any such financing, right?

17 A. I have not done any analysis of that,  
18 correct.

19 Q. You suggest that starting on Page 6, Line  
20 14, that neither DP&L nor any affiliate should be  
21 eligible to participate in any Competitive Bidding  
22 Process until DP&L achieve such structural separation  
23 of the competitive and non-competitive business units.

24 Do you see that?

25 A. Yes.

1           Q.     First of all, do you literally mean not  
2 participate in any competitive bidding processes or  
3 just competitive bidding processes within DP&L service  
4 territory?

5           A.     I mean in DP&L's service territory, much  
6 like the Commission has handled this issue, as I note,  
7 with the Duke Company.

8           Q.     You're aware that the Duke Company  
9 entered into certain stipulation in which it  
10 voluntarily agreed to restrict its ability and to bid  
11 at certain of its own auction?

12          A.     Yes, well aware of that.

13          Q.     And do you know -- strike that.  
14 Did you participate at all in the AEP ESP  
15 proceeding?

16          A.     Yes, I did.

17          Q.     Okay. And do you know whether or not the  
18 Commission barred AEP and its affiliates from  
19 participating in AEP's auctions?

20          A.     The Commission did put certain  
21 restrictions on the participation.

22          Q.     What were those restrictions?

23          A.     If my recollection serves me, they had to  
24 do with the period of time with which -- within which  
25 they were receiving certain -- whatever you want to



1 call them, let's call them transition payments and  
2 other matters that they needed to complete the  
3 structural separation of their generating assets from  
4 the legacy utility as called for under Senate bill 3.

5 Q. Do you know whether or not the Commission  
6 restricted AEP and its affiliates from participating  
7 in those auctions -- maybe I should strike that. I  
8 will strike that question.

9 AEP had two utilities that were Columbus  
10 Southern Power and Ohio Power, if I remember their  
11 names correctly. Is that consistent with your memory?

12 A. Yes.

13 Q. Do you know whether the Commission  
14 restricted those two utilities and their affiliates  
15 from bidding into any auctions associated with those  
16 two utilities' service territory?

17 A. My recollection is that the restrictions  
18 had to do with whomever the entity was that was owning  
19 the generating assets.

20 Q. So affiliates of those two entities were  
21 permitted to bid into the auctions, as you understand  
22 it?

23 A. I believe so.

24 Q. Is it true that you don't sponsor any  
25 analysis of any competitive injury that would result

1 from DP&L or its affiliates participating in  
2 competitive auctions in DP&L service territories?

3 A. What was the phrase used, any competitive  
4 harm did you say or injury?

5 Q. Correct.

6 A. No, I don't sponsor any analysis  
7 regarding that.

8 Q. You also state starting on Line 17 that  
9 DP&L should be required to sell the energy from its  
10 generating assets into certain energy markets or  
11 through bilateral agreement, correct?

12 A. Yes.

13 Q. What items -- strike that.

14 What is it then that you suggest DP&L  
15 should be prohibited from doing, other than bid  
16 nothing to its own auctions, if anything?

17 A. What I testify here about is the  
18 appropriate restrictions that should be placed on  
19 DP&L during this lengthy transition. And the  
20 recommendation, as I note there in the testimony, is  
21 largely based on the approach the Commission adopted  
22 in the Duke ESP proceeding.

23 Q. I see that. What I'm trying to figure  
24 out is as to DP&L, the distinction and the  
25 restrictions, if any, between your sentence that

1 begins, neither DP&L nor any affiliates should be able  
2 to participate in the Competitive Bidding Process.  
3 And then your subsequent sentence beginning with,  
4 "Furthermore DP&L should be required to sell its  
5 energy in specific markets or through agreements," I'm  
6 trying to figure out if the second sentence adds any  
7 substance to the first sentence.

8 A. The second sentence relates solely to  
9 DP&L, the utility, since they are the entity that owns  
10 the generating assets that is proposing, in this case,  
11 an extremely lengthy transition to sell those assets  
12 to an affiliate or some third party.

13 Q. Okay. I understand that you say DP&L  
14 should not be able to bid into its own auctions. Is  
15 there anything else that you think DP&L should be  
16 restricted from doing specifically, in terms of the  
17 sale of its generation?

18 A. Not that I propose in this testimony, no.

19 Q. And your proposed restriction in the  
20 second sentence, it's also true that that was not  
21 imposed upon AEP?

22 A. I believe that is correct.

23 Q. And Duke agreed to it voluntarily?

24 A. I don't know if you call it voluntarily,  
25 as it was a comprehensive settlement, I guess, that

1 was adopted by the Commission.

2 Q. What concerns or potential harm to your  
3 constituents may arise if DP&L or its affiliates were  
4 permitted to bid into DP&L's auctions in its service  
5 territory?

6 A. Well, coupled with the fact that they are  
7 proposing to receive a significant transition payment,  
8 they would be able to enjoy those subsidies flowing to  
9 their generating assets that others suppliers would  
10 not enjoy, and would be proposing a competitive  
11 procurement construct that I am unaware of any other  
12 competitive wholesale bidding construct in any  
13 restructured state in the U.S. that would allow the  
14 utility to bid in its own auction.

15 Q. Well, when Exelon submits a bid -- strike  
16 that.

17 When Exelon is making a decision about  
18 whether to submit a bid into a competitive auction,  
19 would Exelon submit a bid that was lower than what  
20 Exelon believed to be other prices it could charge  
21 other entities for its generation?

22 MR. PETRICOFF: I'm going to object to on  
23 this being outside of the scope.

24 But you can answer it if you wish -- if  
25 you can.

1           THE WITNESS: Your question is -- let me  
2     try to answer it. Exelon Generation would bid in to  
3     any auction what it believes to be the appropriate  
4     market price for the product and the term being sought  
5     in any particular auction. And like many wholesale  
6     suppliers, how they develop that obviously is  
7     competitively sensitive and proprietary information,  
8     but it would reflect whatever the market price for  
9     electricity would be for that type of product for that  
10    particular term.

11           BY MR. SHARKEY:

12           Q.     I understand that Exelon may value things  
13    a little differently than DP&L in terms of calculating  
14    a value, but would you otherwise expect that DP&L, if  
15    it were to bid at auctions, would consider the same  
16    types of things as Exelon would?

17           A.     It may or may not. I -- I do not profess  
18    to know how DP&L might participate in a competitive  
19    wholesale auction. You know, there's no -- your  
20    original question was -- had built into it a  
21    presumption about value of Exelon's generating assets.  
22    You don't need to own generating assets to participate  
23    in a wholesale auction. All you need to do is arrange  
24    for power in the competitive wholesale market. So it  
25    really does not have anything to do with the value of

1 one's generating assets necessarily to participate.

2 Q. Let's ask it differently. Suppose  
3 DP&L has developed its own particular strategies and  
4 analysis for bidding into a particular auction.  
5 Okay?

6 A. Uh-huh.

7 Q. Are you aware of any specific reasons  
8 that DP&L's strategy for bidding into those auctions  
9 would -- let me start that question over.

10 Are you aware of any reasonable economic  
11 reasons that The Dayton Power and Light Company would  
12 change its strategy for bidding in competitive  
13 auctions depending upon whether or not it received a  
14 stability rider?

15 A. Well, if a participant in a wholesale  
16 auction has a revenue stream associated with what  
17 purports to be potential lost revenues from their  
18 generating assets, it would seem that that would and  
19 could have an impact on one's bidding behavior in a  
20 particular auction, where they might be able to sell  
21 power at a lower amount due to the collection of those  
22 additional revenues.

23 Q. Let's suppose Dayton Power and Light  
24 Company did its analysis and it concluded that at \$50  
25 a megawatt hour it was better for DP&L to bid into the

1 auction, but at \$49.99, DP&L was better off selling  
2 its power into a wholesale market. Okay?

3 A. Uh-huh.

4 Q. Are you aware of any reason that that  
5 conclusion, in terms of the best place for it to sell  
6 its power, would change based upon whether or not The  
7 Dayton Power and Light Company was receiving a  
8 stability rider?

9 A. I guess I'm having troubling divorcing  
10 the two. I don't see how a company would ignore  
11 additional revenues that were coming in the door --  
12 how that would not affect their potential behavior.

13 Q. Well --

14 A. They would be receiving something,  
15 purportedly like you say, for those generating assets  
16 that they may or may not bid into a particular auction  
17 that other auction participants would not be  
18 receiving.

19 Q. Well, I understand that. But I'm trying  
20 to figure out if DP&L concludes without -- if you  
21 assume DP&L, without the SSR, would conclude that its  
22 profit maximizing decision to bid, its cutoff was at  
23 \$50, and then a penny below \$50, it would sell its  
24 generation into the PJM wholesale markets.

25 A. Uh-huh.

1           Q.     Then if you change that scenario to a  
2 different scenario that says DP&L had done the same  
3 analysis, reached the same conclusions, but you gave  
4 it \$50 -- you gave it another -- you gave it the SSR,  
5 are you aware of any economically rational reason that  
6 DP&L would, in that circumstances, offer a lower price  
7 in light of the fact that it had received additional  
8 money?

9           A.     In my opinion, there could be a variety  
10 of reasons why a company may chose to bid into an  
11 auction at a particular price or not. Whether it's  
12 selling the power in the wholesale market, whether  
13 it's selling to a retail supplier in the service  
14 territory, the revenues associated with a stability  
15 rider or whatever it's going to be called, in my  
16 opinion, is a factor that can affect the behavior and  
17 is precisely the reason why such a restriction was  
18 placed on Duke Energy in a voluntary, like you say,  
19 settlement that was adopted by the Commission to guard  
20 against that potential.

21          Q.     Can you name me one economically rational  
22 reason that if DP&L concluded that its profit  
23 maximizing bid was \$50 that it would bid, and  
24 otherwise it would sell its generation into the PJM  
25 market that that decision would change -- that The



1 Dayton Power and Light Company had an additional  
2 source of revenue through the SSR?

3 A. I guess I'm having trouble with your  
4 hypothetical that you reach. Because I don't  
5 understand how the company would come to that  
6 conclusion in a vacuum without factoring in the SSR  
7 revenues. So maybe we're talking past each other.  
8 I'm not trying to. But if these are revenues  
9 associated with the generating assets, which  
10 presumably will be part of the package of issues that  
11 would be resolved here, I don't see how you divorce  
12 them.

13 Q. Well, then explain to me how -- I've  
14 given you the one scenario: DP&L, as it stands today,  
15 with no stability rider has determined that its profit  
16 maximizing point -- its profit maximizing decision  
17 rather is to bid in to the auction up to \$50 and to  
18 sell at wholesale for any price below that.  
19 How, with the addition of a Service Stability Rider,  
20 how specifically could the Service Stability Rider  
21 change that conclusion by The Dayton Power and Light  
22 Company? Can you name me any specifics?

23 A. It would obviously be a factor considered  
24 in revenues. It would be a factor, I think, when you  
25 figure out an amount you're willing to bid, where you

1 do your attrition analysis of how many customers might  
2 leave the system for whatever the -- you know, you're  
3 obviously thinking where the auction is going to clear  
4 at. There's a lot of factors that go into it. You  
5 know, I'm not --

6 Q. Don't all of the same factors apply? I'm  
7 trying to figure out how the addition of a  
8 stability rider would, in your view, would change the  
9 DP&L's analysis of any of those factors. Can you  
10 identify for me any rational economic reason that The  
11 Dayton Power and Light Company would change its  
12 bidding behavior based upon whether or not it had a  
13 Service Stability Rider?

14 A. I believe that the known collection of  
15 revenues would affect them arriving at those numbers  
16 that you've chosen. Whether it's 50, whether it's 30,  
17 whether it's 40, whatever that number is, in some  
18 respects, is going to be driven by that number.

19 Q. You understand --

20 A. That's the fear -- that's the fear from  
21 potential competitive bidders about the existence of  
22 the rider, coupled with the fact that the utility is  
23 going to own the generation under the proposal through  
24 the end of 2017 about the participation in the  
25 auction.

1 I mean, this is not a novel theory.  
2 Again, this is unique in that a utility is choosing  
3 not only to participate in its own auction for the  
4 supply of wholesale power, but they want to do it  
5 while also recovering a stability rider. Like I said  
6 earlier, I am unaware of any competitive bid process  
7 throughout PJM, throughout the northeast where a  
8 utility owning generation is able to participate in a  
9 competitive auction.

10 Q. I understand you've articulated fears and  
11 you haven't seen it anyplace else. But I still  
12 haven't heard any economical reason that Dayton Power  
13 and Light Company concludes its best options -- strike  
14 that. We'll start the whole question over.

15 Again, I'm asking you to assume that The  
16 Dayton Power and Light Company has made a  
17 determination that it can sell its power at a higher  
18 price in the competitive auction, \$50, but if the  
19 competitive auction drops below that, DP&L is better  
20 selling its power into the PJM Day-Ahead market,  
21 that's DP&L's conclusion? Does that make sense?

22 MR. PETRICOFF: Objection, no foundation  
23 for this hypothetical, and argumentative at this  
24 point.

25 You can answer, if you can.

1 THE WITNESS: I guess -- you know, I'm  
2 not trying to be difficult, Mr. Sharkey. Your premise  
3 about where they can -- the market price for power is  
4 going to be what it is, right? It's going to be based  
5 upon where a bunch of bidders are willing to sell to  
6 serve the last number of tranches in an auction.  
7 That's how a descending clock auction works. How The  
8 Dayton Power and Light Company or any integrated  
9 utility owning generation views their best  
10 opportunities to sell to maximize profits, probably is  
11 going to be a function of a number of things that  
12 isn't just, you know, some number that they pick.

13 I'm just having a hard time --

14 BY MR. SHARKEY:

15 Q. Do you know how --

16 MR. PETRICOFF: Let him finish, please.

17 MR. SHARKEY: Were you finished with your  
18 answer?

19 THE WITNESS: I wasn't, but that's all  
20 right.

21 MR. SHARKEY: You can finish. I didn't  
22 mean to interrupt, with the telephone sometimes it's  
23 hard to tell if somebody's finished or just pausing.

24 THE WITNESS: Right. No, I've answered  
25 this. I've provided the same answer already, so I'll

1 let you ask the question.

2 BY MR. SHARKEY:

3 Q. I still don't think I got an answer to my  
4 question. And --

5 A. I am not aware of how you can divorce the  
6 collection of revenues to the analysis in the  
7 hypothetical that you've been using. I've been trying  
8 to follow it. I just don't understand how the  
9 collection of revenues from all customers in the form  
10 of a stability rider doesn't factor into a  
11 participant's decision on where best to sell their  
12 power.

13 Q. And what I'm asking you is for specific  
14 reasons that the receipt of a stability rider may  
15 affect the bidding behavior of The Dayton Power and  
16 Light Company.

17 Can you give me one specific reason that  
18 DP&L would change its bidding behavior, in terms of  
19 what it thought was its profit maximizing bidding  
20 behavior, based on whether or not it received a  
21 stability rider?

22 A. Yes. It's my belief that by virtue of  
23 receiving the stability rider revenues, that unlike  
24 all other participants, The Dayton Power and Light  
25 Company might be able to sell its power in the auction

1 at a price lower than what another participant might,  
2 due to the fact that they're being subsidized with  
3 revenues for monopoly rate payers due to the existence  
4 of the Service Stability Rider.

5 Q. Why would it do that if it concluded  
6 profit maximizing decision --

7 A. It would do that --

8 Q. -- was at \$50 to bid -- that would be a  
9 bottom bid -- and for any amounts lower, its profit  
10 maximizing decision would be to sell its generation  
11 into the PJM market or through a bilateral agreement,  
12 how would that decision change?

13 A. It would change --

14 Q. What would happen differently if  
15 DP&L is receiving a Service Stability Rider that would  
16 change its optimum bidding behavior decision?

17 A. There are a number of factors here. If  
18 they're able to sell their power at a lower amount and  
19 effectively those customers remain on DP&L's bundled  
20 SSO service, there are other revenues that they can  
21 maximize. The customer won't leave the system. That  
22 is precisely why this is not a market structure, an  
23 auction structure that exists anywhere in the United  
24 States.

25 Q. Let me ask you this --

1           A.     It has --

2           Q.     -- as an attorney, I bill our firm's  
3 clients at an hourly rate. Suppose I won the lottery.  
4 If I continue to work, is there any economically  
5 rational reason for me to lower my hourly rate?

6           MS. BRADY: Objection. That's not the  
7 situation that we're talking about here. We're  
8 talking about intertwined companies that the revenues  
9 in one can affect the behavior in that company or in  
10 its parent. And this has been asked and answered.  
11 The fact that you don't like the answer, Mr. Sharkey,  
12 does not mean we need to keep going over it.

13           MR. SHARKEY: I still have -- well, first  
14 of all, it's an improper speaking objection.

15                 Second of all, I think only one person  
16 should be entitled to defend Constellation in the  
17 deposition.

18                 And third of all, I've asked the question  
19 a number of times, and he's not identified any  
20 specific economically rational reason that the bidding  
21 behavior would change. If he tells me he's not aware  
22 of any, I'll move on. But if he's aware of one, I'm  
23 entitled to know it.

24           MS. BRADY: And he's told you they can  
25 offer a lower price than somebody else could.

1                   MR. SHARKEY: I understand. My question  
2 is why would they do that.

3                   MS. BRADY: And he's answered that as  
4 well. If you want to -- mention it again, Mr. Fein.  
5 Go ahead.

6                   THE WITNESS: I think I answered that.  
7 That there are other considerations, not just from the  
8 clearing price of an auction. If there's --

9                   BY MR. SHARKEY:

10                  Q.     What are they? Name me one economically  
11 rational reason why they would bid lower, based upon  
12 whether or not they received an additional source of  
13 revenue.

14                  A.     If the company wants to keep customers  
15 and not see the load switch to a CRES provider, and  
16 they're able to participate in the auction, they might  
17 be able to bid a lower rate. They might want to keep  
18 that customer on SSO service so those revenues stay  
19 within the company as opposed to going to --

20                  Q.     So it's your view that if DP&L was of the  
21 opinion that its profit maximizing decision was to  
22 sell at \$50, but then it was better off selling at PJM  
23 at \$49.99, that if you change the facts and give DP&L  
24 the stability rider, that it may then bid a lower  
25 price at a competitive auction than what it believed



1 it could sell its power in competitive markets like  
2 the PJM?

3 A. Yes, and the other reasons that I cited.

4 Q. Can you identify -- let me step back.

5 If DP&L is prevented from bidding into  
6 its auctions, eliminating one bidder may cause the  
7 auction to close at a higher price, mightn't?

8 A. I can't agree with that.

9 Q. If you don't think that DP&L -- so you  
10 don't believe that DP&L's participation could  
11 potentially lead to a lower price?

12 A. I don't know whether it could or not in a  
13 vacuum like that.

14 Q. It certainly is possible that DP&L would  
15 offer the lowest and best bid, right?

16 A. It's entirely possible.

17 Q. So exclusion of The Dayton Power and  
18 Light Company may lead to a higher closing price at  
19 the auction?

20 A. Not necessarily.

21 Q. I didn't say necessarily. I said it may,  
22 right?

23 A. It's just as possible if Constellation  
24 didn't participate or Exelon, yes.

25 Q. Right. Excluding -- the particular

1 bidders were excluded from participating at auctions,  
2 it may result in a higher closing price at the  
3 auction, right?

4 A. It is possible, yes.

5 Q. Turn, if you would, to Page 7 of your  
6 testimony.

7 A. Yes.

8 Q. Actually, turn, if you would, instead to  
9 Page 8 of your testimony. There's three bullets there  
10 that are preceded by a sentence that says, DP&L ESP  
11 appears to have been built off the auction process  
12 used in prior Ohio auctions and DP&L has used the same  
13 competitive bidding manager as FirstEnergy and Duke.

14 A. Uh-huh.

15 Q. First of all, you understand that  
16 competitive bidding manager is Charles Rivers  
17 Associates?

18 A. Yes.

19 Q. Do they appear -- strike that.  
20 Have you had cause to interact with CRA?

21 A. Yes, we have.

22 Q. And has Exelon bid in the first Energy  
23 and Duke auctions?

24 A. Timing, I don't remember if it was the  
25 former Constellation entity or Exelon Generation, but

1 what's publicly available information is for those  
2 auctions where either Exelon or Constellation was a  
3 winning bidder in those auctions. Otherwise --

4 Q. Do those auctions appear to you to have  
5 been appropriately operated?

6 A. Yes, the auction manager appropriately  
7 operated them based upon the communications and rules  
8 endorsed by the Commission.

9 Q. Turn, if you would, to Page 9 of your  
10 testimony, you start there at the bottom identifying  
11 some improvements that you're proposing to DP&L's  
12 auction plan; is that right?

13 A. Yes.

14 Q. Okay. It appears that the first one  
15 starts at the bottom of that page with the question,  
16 and it spreads into the answer in which you propose to  
17 shorten the transition to 100 percent competitive  
18 bidding by one year?

19 A. Yes.

20 Q. Have you sponsored any testimony that  
21 analyzes what affect shortening the period by one year  
22 would have on DP&L's financial integrity?

23 A. No, I have not.

24 Q. Have you sponsored any type of  
25 mathematical calculation at all relating to your

1 suggestion that the period be shortened by one year?

2 A. No, I have not.

3 Q. Starting by Page 10 extending on to the  
4 following page, you say that the DP&L should be using  
5 a laddered approach to its lending?

6 A. Yes.

7 Q. And then I can't tell if the proposals  
8 you have listed on the following page were products  
9 that were different from or in addition to what  
10 DP&L's already proposed. Can you tell me?

11 A. Do you mean what appears at the top of  
12 Page 11? Is that what you're referring to?

13 Q. Yes.

14 A. I don't have their blending schedule in  
15 front of me of the products in that little chart. I  
16 think it's comparable to that, but I don't have it in  
17 front of me. If you'd like me to grab it, I think I  
18 may have it somewhere here.

19 Q. Let me just ask you this: It's my  
20 understanding that, for example, for DP&L's second  
21 auction, which would be the 2014 auction, that  
22 DP&L proposes products that would be 12, 24 and  
23 36 months?

24 A. Uh-huh.

25 Q. Is that consistent with your

1 understanding?

2 A. Yes, it is.

3 Q. And it is your recommendation that they  
4 offer only a 36 month contract and not a 12 and 24  
5 month contract in that auction?

6 A. Yes.

7 Q. Why do you believe that DP&L should not  
8 offer 12 and 24 month products?

9 A. It's our recommendation that a longer  
10 term product, based upon the smaller amount of load  
11 that's going to be procured through these -- you know,  
12 this blending period makes more sense for the way this  
13 was structured.

14 Q. You and I might understand the term  
15 ladder differently. Because I thought DP&L's  
16 proposal to have a 12, 24 and 36 month product during  
17 that auction was a ladder approach.

18 A. I would agree --

19 Q. Do you disagree with that?

20 A. No, I don't disagree. That is a ladder  
21 approach, as is the recommendation here on Page 11.  
22 It would continue that ladder process, you know,  
23 out into the future. So in other words, you're -- you  
24 know, in the recommendation that I provide with the  
25 March 2015 auction that I discuss there, you know,

1 you'd be procuring power through the 2017 time frame.

2 Q. Do you know whether other bidders may  
3 prefer to have a ladder approach in the way DP&L had  
4 proposed it was 12, 24 and 36 months of products  
5 offered at a particular auction?

6 A. I think, you know, other bidders, you  
7 know, may have a preference for the type of mix  
8 DP&L has proposed. Others may support the type of  
9 approach that we've recommended. I think different  
10 bidders have different preferences in the types of  
11 products they'd like to have included in any  
12 particular auction.

13 Q. The presence of DP&L's auction of 12 and  
14 24 months products doesn't preclude Exelon from  
15 bidding on the 36 month product, does it?

16 A. No.

17 Q. And you don't sponsor any mathematical  
18 analysis or other form of analysis that shows that  
19 customers would receive lower prices if your proposal  
20 was adopted as opposed to the proposal offered by  
21 DP&L?

22 A. No, I do not.

23 Q. Then on that page starting on Line 6, you  
24 offer some testimony relating to days of the week that  
25 DP&L should conduct its auctions, right?

1           A.     Yes.

2           Q.     Have other auctions in Ohio been held  
3     early in the week on Monday and Tuesday, as you  
4     propose?

5           A.     I believe some have. Some have not,  
6     which is the basis for our recommendation.

7           Q.     And help me to understand your concern  
8     about having auctions that are held later in the week.

9           A.     Sure. It really comes down to market  
10    fundamentals and the ability to hold open prices. So  
11    take, for example -- and I talk about this in my  
12    testimony -- how later in the week you see a little  
13    bit more volatility in the markets. One of the  
14    factors that causes that is the gas storage numbers  
15    that come out every Thursday.

16                   If bids are sought and required to be  
17    submitted late in the week, and the time that's  
18    allotted for an auction manager to recommend that the  
19    results be approved and for the Commission to approve  
20    them, the longer period of time that a bidder has to  
21    hold open a price is a greater amount of risk that  
22    they may bear. And that's a factor that is going to  
23    have an impact on the bids that are submitted.

24                   So that is why we make the recommendation  
25    based upon our experience in these types of

1 procurements, that for consumers, it's better off to  
2 do these things earlier in the week than later in the  
3 week.

4 Q. Turn, if you would, to Page 12 of your  
5 testimony. I want to ask you about your proposal as  
6 to DP&L's TCRR-N?

7 A. Uh-huh.

8 Q. You understand the DP&L's proposal is  
9 associated with a solar generating facility that is  
10 referred to as the Yankee Solar Generating Facility?

11 A. I'm familiar but not as it relates to  
12 TCRR-N. TCRR-N deals with transmission costs.

13 Q. You're right. I have confused my two  
14 non-bypassable riders. We'll come back to that one.

15 TCRR-N is DP&L's proposal to switch its  
16 currently bypassable Transmission Cost Recovery Rider  
17 into a non-bypassable and a bypassable component?

18 A. Yes.

19 Q. And you say there that you support  
20 DP&L's proposal, right?

21 A. Yes, we do.

22 Q. Why do you support that?

23 A. We believe that it's more appropriate for  
24 DP&L as the distribution utility to be responsible for  
25 the various PJM costs that are listed there in my



1 testimony that are essentially non-market based  
2 charges. And that it's more efficient and better for  
3 consumers that those costs be passed through without  
4 markup to the consumers. Some of these non-market  
5 based charges, if you were to follow the alternative  
6 approach and include them in the auction product, you  
7 know, would result in customers paying likely higher  
8 rates than they would need to otherwise, due to the  
9 non-market based nature of those charges and the  
10 inability to predict those charges.

11 Q. Do you understand that certain customers  
12 have opposed DP&L's proposal because they are  
13 concerned that if charges are converted from a non- --  
14 from a bypassable charge to a non-bypassable charge  
15 that they'll end up paying both their CRES provider  
16 and the Dayton Power and Light Company for the same  
17 costs?

18 A. I have heard that concern expressed, and  
19 we disagree with that concern, and don't understand  
20 why a CRES provider would have any economic interest  
21 to do that.

22 Q. Does Constellation have customers to  
23 which it assigned contracts to supply power for fixed  
24 terms in DP&L service territory?

25 MR. PETRICOFF: Objection, that's outside

1 the scope. And I don't think we have a  
2 confidentiality agreement with you at the moment, and  
3 we're bordering on confidential information.

4 THE WITNESS: And we also have --

5 BY MR. SHARKEY:

6 Q. I'm not asking for the identity of any  
7 customers, the terms, I'm just asking if such  
8 contracts exists.

9 A. Do we have -- do we have contracts with  
10 customers in The Dayton Power and Light Service  
11 territory, the answer is yes.

12 Q. And are those contracts, at least some of  
13 them for a fixed period of time, be it a year,  
14 two years, whatever it may be?

15 MR. PETRICOFF: I'll renew my objection.

16 But you can answer if you wish.

17 THE WITNESS: I don't profess to have  
18 specific knowledge of the terms of any one of the  
19 specific contracts. But like most -- no, but like all  
20 contracts, there is a term associated with the  
21 contract.

22 BY MR. SHARKEY:

23 Q. If the -- if the Commission were to  
24 approve DP&L's proposal that the TCRR portions of it  
25 be made non-bypassable, would Constellation grant to

1 its customers a corresponding price decrease so that  
2 customers were paying twice for the same charges  
3 associated with the TCRR?

4 MS. BRADY: Objection as to what  
5 Constellation's business practices were. And you're  
6 talking not only now about specific terms included in  
7 the contract, but what Constellation would do with  
8 those terms. And I'm not going to let David answer  
9 that.

10 MR. SHARKEY: What's the basis for the  
11 instruction that he not answer?

12 MS. BRADY: Confidential information.  
13 You're now not only talking about provisions of  
14 contract, but you're talking about going forward, what  
15 a particular business practice would be for  
16 Constellation.

17 BY MR. SHARKEY:

18 Q. You told me earlier, Mr. Fein -- I don't  
19 want to put words in your mouth, so if I misstate it,  
20 correct me, please -- but that you believed that it  
21 would not be economically rational for CRES providers  
22 to charge their customers in such a way that they were  
23 being double billed for the same costs. First of all,  
24 was that an accurate characterization of your earlier  
25 testimony?

1           A.     I don't know if I used the word  
2 "economically rational." But if a CRES provider  
3 wishes to maintain a customer relationship, I don't  
4 think they would do themselves well by requiring a  
5 customer to pay for a cost that the customer has to  
6 pay to their utility.

7           Q.     Turn to Page 13 of your testimony, if you  
8 would, starting on Line 16. You state DP&L has  
9 extremely large customers that are being served  
10 pursuant to legacy specialty contracts, and those  
11 customers should be included in the Competitive  
12 Bidding Process; is that right?

13          A.     Yes.

14               MS. BRADY: I'm sorry, Mr. Sharkey, for  
15 interrupting, but what page are you on? I can't find  
16 the reference.

17               MR. SHARKEY: Page 13, starting on line  
18 17.

19               MS. BRADY: Thank you.

20           BY MR. SHARKEY:

21          Q.     Do you understand that -- first of all,  
22 which contracts and customers do you have in mind?

23          A.     I don't remember the names of the  
24 customers. But I believe this information was gleaned  
25 either in a discovery response or in a deposition of

1 one of your clients in this case.

2 Q. Might one of them have been  
3 Wright-Patterson Airforce Base?

4 A. Yes, now that's ringing a bell, yes.

5 Q. And, frankly, I don't know who the other  
6 one you may have been referring to is.

7 But do you know whether the Public  
8 Utilities Commission of Ohio has approved those  
9 contracts?

10 A. I don't know offhand, but I would assume  
11 so.

12 Q. Do you know whether those contracts have  
13 terms that permit them to be terminated at will by the  
14 customers?

15 A. I am not privy to the terms of those  
16 contracts.

17 Q. If those contracts exist for a fixed  
18 term, do you still believe that the terms of those  
19 contracts should be altered so that those customers  
20 could participate in competitive bidding?

21 A. I think that from a policy perspective,  
22 that special contracts have no place in the  
23 competitive restructured market. I don't know what  
24 the terms of those contracts are. I don't know how  
25 far they go out. But the very nature of those

1 contracts flies in the face of a competitive market.  
2 We believe that it's inappropriate to continue that  
3 practice. We believe that all the loads should be  
4 included in the auction. And that's the  
5 recommendation we've made.

6 Q. Are you aware of any facts that suggest  
7 that those customers were somehow forced or coerced  
8 into signing those contracts?

9 A. I'm not aware of any such coercion.

10 Q. Are you aware of any facts suggesting  
11 that those customers are unsophisticated and incapable  
12 of understanding the contracts they signed?

13 A. I have no reason to believe they are.

14 Q. Do you believe that the Commission should  
15 require that any customers immediate contract with  
16 Constellation should be included in the Competitive  
17 Bidding Process?

18 A. I guess I'm not following you.

19 Q. You told me earlier that Constellation  
20 has customers under contract in DP&L service  
21 territory, right?

22 A. Yes.

23 Q. Do you believe that the Commission should  
24 include those customers in the Competitive Bidding  
25 Process?

1           A.     No, because Constellation is a licensed  
2     retail provider. The Commission has no jurisdiction  
3     over that.

4           Q.     Setting aside the legalities, do you  
5     believe it would be good policy?

6           A.     No, it would be terrible policy.

7           Q.     Why?

8           A.     Because it would be government  
9     interference with a competitively bid and sought  
10    contract as opposed to the contract that DP&L has, by  
11    nature of its role as the incumbent monopoly utility  
12    provider.

13          Q.     At the time those contracts were signed,  
14    do you know if those customers had the option to  
15    select -- to contract with DP&L or a CRES provider?

16          A.     I don't know at what time they contracted  
17    and what competitive retail electric providers were in  
18    the marketplace, other than DP&L's affiliate.

19          Q.     Starting at the bottom of Page 13,  
20    extending all the way through the top of Page 15, you  
21    identify additional data and information that you  
22    believe The Dayton Power and Light Company should  
23    provide potential bidders?

24          A.     Yes.

25          Q.     As an initial matter, was all of that

1 data provided in the FirstEnergy and Duke auctions?

2 A. Virtually all of that, yes.

3 Q. Are you aware of any of those items that  
4 were not provided?

5 A. Yes.

6 Q. Which items were not provided and in  
7 which auctions weren't they provided?

8 A. I believe that Item 2 was not provided,  
9 and I believe Item 1 was not provided. I believe that  
10 most, if not all, the remaining items were provided in  
11 one form or another in the FirstEnergy and Duke  
12 auction constructs.

13 Q. It's true, isn't it, that you don't  
14 sponsor any testimony regarding whether that  
15 information is available to DP&L at a reasonable cost?

16 A. No, I don't -- I don't have information  
17 on what -- the information is available to DP&L as the  
18 monopoly utility. And no, I don't offer testimony on  
19 what cost it might be for them to provide to bidders  
20 information that they possess.

21 Q. And you don't sponsor any testimony that  
22 would specifically identify or quantify the benefits  
23 of providing additional information that you want?

24 A. I certainly testify regarding the  
25 benefits of data. You want to get a lower price to



1 consumers. You want to provide potential bidders with  
2 the type of information to provide as low of a price  
3 as they can. This is the type of information that you  
4 provide. And I do testify about it on Pages 16 and  
5 17.

6 Q. Turn, if you would, to Page 17 of your  
7 testimony.

8 Is one of your proposals there -- turning  
9 to Section E here regarding providing clarity  
10 regarding the authority of the Competitive Bidding  
11 Process Manager.

12 A. Uh-huh.

13 Q. First of all, let's start with actually  
14 on Page 18, Line 5, Item 1, the "reservation price".

15 A. Uh-huh.

16 Q. It's true, isn't it, that they had a  
17 reservation right in both the Duke and FirstEnergy  
18 auctions?

19 A. Yes, that's true. CRA is the only  
20 auction manager that uses such a mechanism.

21 Q. Item 2 on your list deals with notice to  
22 winning bidders when a report is submitted to the  
23 Commission?

24 A. Yes.

25 Q. Do you know if, in practice, CRA does

1 that?

2 A. I believe they have done that in  
3 practice. But, again, we're looking at clarity and  
4 rules. It is not something that appears in any of the  
5 bidding documents that they proposed in this  
6 proceeding.

7 Q. Are you aware of any bidding documents in  
8 Ohio where there's been a specific requirement that  
9 that type of notice be provided?

10 A. Again, I don't know, I don't believe that  
11 CRA has provided that level of detail, but certainly  
12 other auction managers have agreed to provide that  
13 kind of detail in other states.

14 Q. Then the third item you ask for is a  
15 response to frequently asked questions in two  
16 businesses days, right?

17 A. Yes.

18 Q. In general, in your experience with CRA,  
19 have they been responsive to questions that Exelon  
20 have asked, Exelon or its predecessor?

21 A. They've certainly provided responses.  
22 And as my testimony outlines, the timing with which --  
23 within which they provided those for the very first  
24 auction held in Ohio was not in a timely fashion. And  
25 that is why we make the recommendation that we make.

1 Some clarity on that provides bidders with a greater  
2 level of certainty. That if you have questions, you  
3 will get them answered within a specific time frame.

4 Q. Has CRA provided timely responses to  
5 subsequent auctions other than the first one?

6 A. I think the timing of the responses has  
7 gotten better, yes.

8 Q. Is it true that some of the questions  
9 that have been proposed by Exelon in the past have  
10 been technical in nature and would take some time to  
11 assemble answers to?

12 A. Certainly some questions might take  
13 longer. But the vast majority are simple and  
14 straightforward questions and, thus, that's why we  
15 make the reasonable recommendation for a two-day  
16 turnaround.

17 Q. On Page 19 starting on Section F you  
18 propose certain changes to DP&L's Master SSO  
19 Agreement, right?

20 A. Yes.

21 Q. As an initial matter, are you aware of  
22 any Commission rule or statute that DP&L Master Supply  
23 Agreement would violate?

24 A. Any rule or statute, is that what you  
25 said?

1 Q. Correct.

2 A. No.

3 Q. Of the various proposals that you make in  
4 that section, which I believe spans a significant  
5 number of pages, is there anything in DP&L's proposal  
6 that was different than what was in Duke's auction?

7 A. Yes, I believe there are. I don't have a  
8 line by line list in front of me. But, yes, I believe  
9 there were some changes.

10 Q. Why don't you take the time. It appears  
11 to me that sections runs through Page 42.

12 A. Do you want me to print out the Duke SSA  
13 and we sit here for a couple hours to go over this?

14 Q. I'm just asking you, as you sit here now,  
15 if you want to read through those and see if there's  
16 anything that you can identify that you believe is  
17 different than Duke's proposal.

18 A. We could sit here for hours. Unless I go  
19 print out a copy, I'm not going to remember line by;  
20 line specific contractual language differences in  
21 hundred page documents sitting here right now.

22 Q. Did you do that -- did you do any such  
23 comparison before submitting your proposal?

24 A. On whether these -- these --

25 Q. Strike the question. It's a poorly

1 worded question.

2 Before you made the proposals that start  
3 on the bottom of Page 19 and extend to Page 42  
4 regarding changes to DP&L's MSA, did you make any  
5 effort to compare DP&L's MSA to other similar  
6 agreements that have been entered by other utilities?

7 A. I did not view this line by line with the  
8 Duke agreement. What I reviewed this with are  
9 recommendations and consistent recommendations we've  
10 made throughout Ohio cases for changes to the Master  
11 Supply Agreement. In many of those other cases, we've  
12 been able to reach settlements, some of which address  
13 certain changes to contracts. I am happy to go  
14 through it and look at it and go line by line with  
15 every single one of these changes here. If you think  
16 that would be productive, we can do that. If counsel  
17 could maybe provide me with a copy of that agreement,  
18 I'm happy to do that.

19 MS. BRADY: Mr. Sharkey, is that what  
20 you're asking that we do, spend another couple hours  
21 on the phone?

22 MR. SHARKEY: I'm going to go through  
23 them item by item.

24 MS. BRADY: Knowing that he does not have  
25 the Duke -- knowing he doesn't have any other

1 documents in front of him?

2 MR. SHARKEY: I understand that.

3 BY MR. SHARKEY:

4 Q. Turn to Page 26 of your testimony,  
5 please. Actually, it starts on the bottom of Page 25  
6 and extends on to the top of 26. You propose certain  
7 changes to DP&L's independent credit requirement and  
8 mark-to-market calculations -- hold on. There's been  
9 a delivery to my hotel room and I'll be back.

10 (Whereupon, discussion was held off the record.)

11 BY MR. SHARKEY:

12 Q. Do you know whether DP&L's proposal is  
13 identical to the one proposed by Duke?

14 A. I believe the proposal -- I don't know  
15 about identical, but it sounds familiar to what was  
16 proposed by Duke.

17 Q. And Constellation NewEnergy, in fact,  
18 signed the Duke stipulation, didn't it?

19 A. Yes, I believe so.

20 Q. And you submitted testimony in that  
21 proceeding on behalf of Constellation NewEnergy  
22 supportive of the Duke stipulation?

23 A. I did.

24 Q. And, in particular, supportive of the  
25 competitive bidding process that Duke was

1 implementing?

2 A. I did.

3 Q. Is it your understanding of the ICR --  
4 strike that.

5 What is your understanding of how the ICR  
6 will be set?

7 A. Well, it's a bit of a formula. And it  
8 basically supplies winning suppliers to post the  
9 amount of collateral.

10 Q. And is it your understanding that winning  
11 bidders would have to post that amount of collateral  
12 at the close of the auction?

13 A. Yes.

14 Q. Is it your understanding that -- strike  
15 that.

16 Then what is your understanding of the  
17 MtM?

18 A. The mark-to-market calculation?

19 Q. Yes.

20 A. Basically the mark-to-market calculation  
21 calculates the contract price times the volume for the  
22 remaining term of the contract in the event of default  
23 or other credit related matters.

24 Q. Is it your understanding of the MtM  
25 calculation that it will initially be set at zero and

1     require the posting of collateral only if there are  
2     subsequent changes to market prices?

3             A.     Yes.

4             Q.     So the MtM provides additional support --  
5     strike that.

6                     So the MtM provides additional collateral  
7     to DP&L above and beyond what the ICR would provide in  
8     response to changes in market conditions?

9             A.     Not only in addition to, but we believe  
10     it results in over-collateralization.

11            Q.     Have you done any -- do you sponsor any  
12     calculations that show that the ICR and the MtM result  
13     in over-collateralization?

14            A.     Any analysis, no.

15            Q.     Turn, if you would, then to Page 28 of  
16     your testimony.

17                    You propose, I believe, there that  
18     DP&L should settle with winning bidders on a weekly  
19     basis; is that right?

20            A.     That's right.

21            Q.     And DP&L proposed to settle monthly?

22            A.     That's correct.

23            Q.     When does Duke settle?

24            A.     I'm sorry?

25            Q.     Does Duke settle on a monthly basis?



1           A.     I can't recall sitting here right now if  
2 they agreed to settle on a weekly basis.

3           Q.     Turn, if you would, to Page 31 of your  
4 testimony.

5                     At the top, you discuss some changes  
6 regarding notice of an SSO Supplier's credit standing,  
7 right?

8           A.     Yes.

9           Q.     I'm having a little trouble understanding  
10 your proposal. Can you describe it for me, really  
11 describe the problem in your proposal.

12           A.     Well, it talks here about credit rating  
13 changes and the sections of the MSA. And, you know,  
14 what we suggest here is a little more clarity with the  
15 first recommendation.

16                     And on the second recommendation, we  
17 condition that on a negative credit change, so an  
18 adverse change as opposed to, for example, if a  
19 bidder's credit rating improves.

20                     In other words, the purpose of such a  
21 provision would be to provide the other party with  
22 notice of potential credit degradation or downgrade.  
23 That's why that type of provision exists in such  
24 contracts. So we don't see the need why you'd want  
25 notice on the flip side if it improves.

1 Q. At the bottom of Page 31, you make a  
2 recommendation regarding a notional quantity language  
3 being deleted, right?

4 A. Yes, or at least made optional.

5 Q. Do you have available to you a copy of  
6 DP&L's MSA?

7 A. I don't have that in front of me, no.

8 Q. Can you describe for me what you  
9 understand DP&L's quantity language to require?

10 A. I'm sorry?

11 Q. Can you describe for me what you  
12 understand DP&L's notional quantity language that you  
13 described, what does it require?

14 A. Sitting here right now, I don't remember  
15 the specific language of the lengthy session of the  
16 contract without reviewing it.

17 Q. On Page 32, you have a Footnote 6. Is  
18 that the language to which you're objecting?

19 A. Yes.

20 Q. And explain for me, if you would, what  
21 problems that language -- actually step back.

22 Explain to me then your understanding of  
23 what that language requires Exelon to do if it's the  
24 winning bidder?

25 A. What this sentence talks about is yet

1 another settlement amount under the agreement, which  
2 would cover a period from whenever it's terminated  
3 prior to when it was, you know supposed to continue  
4 and the concern about such provision. And the reason  
5 why similar provisions have been removed in a number  
6 of other states is due to concerns about to whether it  
7 be deemed a derivative instrument under the applicable  
8 accounting standards.

9 Q. Are you aware of any instances in which  
10 such provisions have been ruled a derivative  
11 instrument?

12 A. I'm not aware of such incidences where it  
13 has been ruled as such, but the risk is still there.  
14 And, you know, the other main reason for it, of  
15 course, is it would potentially restrict the  
16 assignability of the contract.

17 Q. Do you have an understanding of why --  
18 strike that.

19 Are you aware of whether utilities such  
20 as Dayton Power and Light Company have included that  
21 same or similar type of language in their comparable  
22 agreements?

23 A. I don't recall any specific testimony  
24 being offered by DP&L specific to this provision.

25 Q. I apologize. Either I misstated it or

1 you misunderstood my question.

2 My question is: The language you quote  
3 in Footnote 6 of your testimony, do you know whether  
4 other utilities have used the same or similar language  
5 in their MSAs or their comparable agreements?

6 A. Yes, I do believe that other CRA run  
7 auctions have proposed similar language.

8 Q. That would include Duke and FirstEnergy?

9 A. At least initially. And I can't recall  
10 if those provisions have since been removed from the  
11 FirstEnergy contract. I don't remember sitting here  
12 right now what they may have.

13 Q. You believe they're still included in the  
14 Duke contract?

15 A. Yes, since Duke's just going through  
16 their initial auction rounds under their current ESP.

17 Q. Turn, if you would, to Page 37 of your  
18 testimony.

19 I want to talk about you about the events  
20 defaults under the MSA. First of all, can you  
21 describe generally what your concerns are regarding  
22 the events of default, what injuries -- strike that  
23 question. I'm going to ask it differently.

24 What injury or harm, do you believe, if  
25 any, may come to Exelon as a result of the way events

1 of default are defined in DP&L's proposed MSA?

2 A. What harm could occur to Exelon?

3 Q. Yes.

4 A. Well, without some additional clarity,  
5 some of the provisions in the contract that would  
6 subject Exelon to certain, you know, financial  
7 penalties, loss of collateral posted, et cetera could  
8 occur to anyone for an event of default under a  
9 contract. So what Constellation is proposing here, of  
10 course, are a variety of different recommendations,  
11 some of which are to make the contracts bilateral.  
12 Certainly since the company's been talking about its  
13 financial condition, these types of concerns of making  
14 certain provisions bilateral certainly take on even  
15 greater importance.

16 Q. Do you know whether Duke had  
17 substantially list similar events of default language  
18 in its service agreement?

19 A. I don't recall the specifics of the  
20 section of their contract sitting here, as we  
21 mentioned earlier.

22 Q. Without recalling the specifics, do you  
23 know if they have similar language as to the language  
24 you are objecting to?

25 A. As I indicated, I don't recall if they

1 did have language or do have language similar to what  
2 I discuss in my testimony. I'm sure that we made  
3 similar recommendations regarding any language that we  
4 found objectionable in their contract as well.

5 Q. Turn, if you would, to Page 39.

6 Starting on -- starting on Page 39, you  
7 make other recommended changes to the MSA, right?

8 A. Right.

9 Q. And then your list of changes is on  
10 Page 40?

11 A. That's correct.

12 Q. First of all, do you know whether these  
13 points were included in the Duke or the FirstEnergy  
14 supply agreements?

15 A. I can't answer them one by one, but yes,  
16 definition of the load zone, I -- for certain was  
17 something addressed in, I'm sure, those agreements.

18 Q. Did you read through the list? Is there  
19 anything else that you believe was included, that you  
20 recall sitting here, sitting here now was included in  
21 either of those agreements?

22 A. I don't recall sitting here now. There's  
23 a number of them listed there.

24 Q. Turn, if you would, to Page 42.

25 A. Okay.

1 Q. Now we're to the Alternative Energy Rider  
2 dealing with Yankee at the bottom of that page  
3 extending on to the following page, correct?

4 A. Correct.

5 Q. It's true, isn't it, that you don't  
6 sponsor any testimony regarding whether that facility  
7 was -- strike that.

8 You agree with me that that facility is  
9 owned or operated by DP&L?

10 A. Yes.

11 Q. You don't sponsor any testimony regarding  
12 whether it was sourced through a Competitive Bidding  
13 Process?

14 A. No, I don't.

15 Q. You don't sponsor any testimony regarding  
16 whether it was newly used and useful on or after  
17 January 1, 2009?

18 A. No, I do not.

19 Q. And you don't sponsor any testimony  
20 regarding whether it was needed as a result of a  
21 resource planning process?

22 A. No, I do not.

23 Q. Turn to Page 43, if you would.

24 You recommend that the Commission reject  
25 DP&L Switching Tracker, right?

1 A. Yes.

2 Q. Are you familiar with the statutory  
3 section under which DP&L's requested the Switching  
4 Tracker?

5 A. Which section was that?

6 Q. It's a highly revised code  
7 4928.143(B)(2)(d).

8 A. I have familiarity with the statute. I  
9 just don't have it in front of me right now.

10 Q. Okay. Is it true that you don't sponsor  
11 any testimony regarding whether the elements of that  
12 statute are satisfied by the Switching Tracker?

13 A. No, I do not sponsor such testimony.

14 Q. Tell me if I'm wrong, but it appears to  
15 me that your testimony doesn't take a position on  
16 DP&L's request for the SSR?

17 A. That's correct. Other than as it relates  
18 to other related provisions of Dayton's proposal  
19 including conditions on participation in the  
20 competitive bid process if Dayton is to receive SSR  
21 revenues.

22 Q. Then, turn if you would, please, to  
23 Page 45.

24 You discussed there certain proposals  
25 that would be competitive retail enhancements, right?



1 A. Yes.

2 Q. First of all, is it true that you support  
3 the proposals by Dona Seger Lawson to implement  
4 certain specific enhancements?

5 A. I certainly support those.

6 Q. And you identify certain additional ones  
7 that you believe DP&L should implement?

8 A. Both additional ones and further  
9 clarifications regarding what, specifically,  
10 Ms. Seger Lawson is proposing.

11 Q. Are you aware of any specific rules that  
12 DP&L is in violation of relating to the proposals you  
13 make in that section?

14 A. Am I aware of any rules that DP&L is in  
15 violation of?

16 Q. Yes.

17 A. No, I am not.

18 Q. Who do you believe should pay any costs  
19 associated with implementing your various proposals?

20 A. Well, I believe the costs associated with  
21 the data and information enhancements to what DP&L  
22 provides to CRES providers should be borne by  
23 customers. These are services that stand to enable  
24 CRES providers to provide service to customers and are  
25 the types of charges that we see collected through

1 distribution rates in other restructured markets.

2 Q. Have you read the testimony of OCC  
3 witness Hagens?

4 A. I don't recall if I reviewed that  
5 testimony.

6 Q. If I have the witness's name right, and I  
7 believe I do, she's an OCC witness who recommends that  
8 customers not pay for the proposals made by Dona Seger  
9 Lawson, but the CRES providers pay for them.

10 A. Yeah.

11 Q. And the question is: If customers don't  
12 want to pay for those proposals, do you believe they  
13 should be required to anyway?

14 A. Well, by the same token, if customers are  
15 opposed to a rate increase that DP&L proposes, should  
16 DP&L pay for that themselves? I don't believe that's  
17 dispositive to the issue, I guess is my point. My  
18 point is that these are normal services and  
19 information that are provided to retail providers in  
20 other competitive markets. This type of data and  
21 information is collected in rates, and is important to  
22 the development of competition in the DP&L service  
23 territory.

24 Q. It's true, isn't it, that you don't  
25 sponsor any analysis that shows that the benefits of

1 these various proposals exceed their costs?

2 A. No, I don't provide an analysis of that.

3 Q. Turning to Page 50. Starting on Line 15,  
4 you address whether DP&L should provide both Rate  
5 Ready and both Bill Ready bill options.

6 Can you tell me what the difference is  
7 between Rate Ready and Bill Ready billing.

8 A. Yes, it has to do with the ability that a  
9 CRES provider has to provide certain line items or the  
10 extent of the data they can provide to DP&L when  
11 billing on behalf of the CRES provider. And depending  
12 on the product that you may offer to an end-use  
13 customer, you know, it may be more -- it may be more  
14 conducive to have a Bill Ready versus Rate Ready and  
15 to provide you with that flexibility to offer those  
16 types of products to your customers.

17 Q. How does Rate Ready billing work, if you  
18 know?

19 A. Rate Ready essentially provides you as  
20 the CRES provider are allotted a certain number of  
21 rates or rate codes, I guess, that you are able to  
22 affix to the -- you know, on an account by account  
23 basis.

24 So let's just say for sake of example,  
25 you know, it's 4¢ a kilowatt hour, that would be, you

1 know, certain rate codes that are defined by the EDC.  
2 There would probably be a range of them. And there's  
3 some limitation on, you know, how -- what you can use.

4 Q. Then how does Bill Ready billing work?

5 A. Bill Ready provides you with greater  
6 flexibility, as such where maybe you could utilize a  
7 more creative billing structure, maybe it's an hourly  
8 type situation where it's not just a fixed price, it  
9 fluctuates. And you would have the ability maybe to  
10 include other types of line item costs maybe that you  
11 charge to your customer and some greater flexibility  
12 there.

13 Q. Turn to page 51 at the top. You  
14 recommend that DP&L be required to implement a  
15 Purchase of Receivables program, right?

16 A. Yes.

17 Q. As an initial matter, are you aware of  
18 any rule requiring DP&L to -- for Purchase of  
19 Receivables?

20 A. I am not.

21 Q. Constellation's concern is that its  
22 customers might not pay it for services provided by  
23 Constellation to the customers?

24 A. No, that's not its concern.

25 Q. Then why do you recommend a POR program?

1           A.     Because a POR program is a requirement  
2     for successful development of mass market or  
3     residential competition. If you look around the  
4     country, it's a necessary component for that due to  
5     the risks associated with marketing to the homeowner  
6     and the risks that a supplier has where a supplier,  
7     unlike the utility, does not have the ability to  
8     disconnect a customer for failure to pay.

9           Q.     I thought you told me that Constellation  
10    wasn't concerned about its customers paying it?

11          A.     Constellation isn't concerned. I  
12    answered the question about how that's successful --  
13    how it's necessary for the development of a  
14    residential marketplace.

15          Q.     I thought you said that they didn't have  
16    the ability to disconnect for failure to pay as part  
17    of your rationale?

18          A.     That is. It's a standard feature if you  
19    do any research into successful residential markets  
20    around the country. Having a Purchase of Receivables  
21    program ensures actually that the utility gets paid.  
22    Because the utility, the loan entity who has the  
23    ability to disconnect for nonpayment has greater  
24    control over that than, of course, a CRES provider  
25    has.

1 Q. It's true, isn't it, that Constellation  
2 is not compelled to enter into any contract with any  
3 person or any entities?

4 A. Constellation is not compelled to enter  
5 into any retail contracts, no.

6 Q. Under your proposal, who would bear the  
7 risk of nonpayment?

8 A. Who would bear the risk of nonpayment?

9 Q. Yes. A pretty good customer doesn't pay  
10 his or her bill --

11 A. Under a Purchase of Receivables program,  
12 the utility would bear that risk, but that risk also  
13 is recovered in the utility's rates, because you have  
14 a certain uncollectible component that you recover  
15 from all ratepayers. Of course, that's not something  
16 a CRES provider has.

17 Q. So in the end, DP&L customers would bear  
18 the cost of the fact that Constellation's customer  
19 didn't pay his or her bill?

20 A. No, actually just like they do today,  
21 they bear the risk. They bear the risk of nonpayment.  
22 And, in fact, purchase of receivable programs around  
23 the country have shown there's a greater propensity of  
24 customers to pay, and the utility has a greater  
25 ability to ensure payment, so it's a win-win for

1 everyone.

2 Q. Well, it's just -- (Inaudible).

3 A. I'm sorry?

4 Q. If a customer does not pay Constellation,  
5 the loss is on constellation's books, right?

6 A. Yes, it is.

7 Q. Under your proposal, the loss would be  
8 shifted to all of DP&L's customers?

9 A. For a Purchase of Receivables, first of  
10 all, you're talking about residential and small  
11 commercial customers. You're not talking about large  
12 industrial customers. So again --

13 Q. I'm talking about your proposal. So you  
14 tell me what I'm talking about.

15 A. Yeah, right, that's what I'm trying to  
16 do. Because I don't think you understand it. And I  
17 don't think you understand what a Purchase of  
18 Receivables program is for. It is generally for  
19 residential and small commercial customers.

20 Q. That, I understand.

21 A. So currently today in DP&L's rates,  
22 customers are currently paying for the risk of  
23 customers not paying their bill. Whether it's to a  
24 CRES provider or whether it's to Dayton Power and  
25 Light Company, they're paying for it today. They

1 don't get a credit when they leave Dayton Power and  
2 Light Company to go to a CRES provider. So it's  
3 really no different than the situation today.

4 Q. You're telling me that currently --

5 A. There's an uncollectible component in  
6 rates.

7 Q. I'm familiar with that. You're telling  
8 me that that uncollectible component includes amounts  
9 associated with the failure of a customer to pay a  
10 CRES supplier like Constellation's bill?

11 A. No. What I'm saying is it's included for  
12 a customer's failure to pay their entire bill. So if  
13 I'm an SSO customer of Dayton Power and Light, there  
14 is a component of my rate that's for uncollectibles.

15 Q. That, I understand.

16 A. It's not just on the delivery portion.

17 Q. But once that customer switches --

18 A. That customer doesn't get --

19 Q. -- to a competitive provider like  
20 Constellation, there is nothing in DP&L's rates  
21 associated with the failure of that customer to pay  
22 Constellation, right?

23 A. I think there is embedded already. You  
24 tell me. Does a customer get a credit for their --  
25 what amount they pay in uncollectible said when they



1 switch to a CRES provider? I don't believe so.

2 Q. You know if that charge that you're  
3 talking about is included in DP&L's SSO rates?

4 A. How are you defining SSO rate? Just the  
5 generation component?

6 Q. The by passable component of DP&L's  
7 rates?

8 A. I don't know that it's in there.

9 MR. SHARKEY: Okay. Mr. Fein, I have no  
10 more questions for you.

11 THE WITNESS: Thank you.

12 (Deposition concluded at 9:22 p.m.)

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## 1 CERTIFICATE OF DEPONENT

2  
3 I hereby certify that I have read and  
4 examined the foregoing transcript, and the same is a  
5 true and accurate record of the testimony given by me.  
6

7 Any additions or corrections that I  
8 feel are necessary, will be made on the Errata Sheet.  
9

10  
11  
12 \_\_\_\_\_  
13 DAVID I. FEIN  
14

15 (If needed, make additional copies of the Errata Sheet  
16 on the next page or use a blank piece of paper.)  
17  
18  
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1 STATE OF MARYLAND

2 COUNTY OF BALTIMORE CITY

3  
4 I, Heather Chiaro, a Notary Public of the  
5 State of Maryland, Baltimore City, do hereby certify  
6 that the within-named witness personally appeared  
7 before me at the time and place herein set out, and  
8 after having been duly sworn by me, according to law,  
9 was examined by counsel.

10 I further certify that the examination  
11 was recorded stenographically by me and this  
12 transcript is a true record of the proceedings.

13 I further certify that I am not of  
14 counsel to any of the parties, nor in any way  
15 interested in the outcome of this action.

16 As witness my hand this 20th day of March,  
17 2013.

18  
19  
20 \_\_\_\_\_  
21 Heather M. Chiaro

22 Notary Public

23  
24 My Commission Expires:

25 May 25, 2015

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Summary: Deposition of David I. Fein electronically filed by Mr. Jeffrey S Sharkey on behalf of  
The Dayton Power and Light Company