

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :
Application of The Dayton :
Power and Light Company : Case No. 12-426-EL-SS0
for Approval of its :
Electric Security Plan :

In the Matter of the :
Application of the Dayton :
Power and Light Company : Case No. 12-427-EL-ATA
for Approval of Revised :
Tariffs :

In the Matter of the :
Application of the Dayton :
Power and Light Company : Case No. 12-428-EL-AAM
for Approval of Certain :
Accounting Authority :

In the Matter of the :
Application of the Dayton :
Power and Light Company : Case No. 12-429-EL-WVR
for the Waiver of Certain :
Commission Rules :

In the Matter of the :
Application of the Dayton : Case No. 12-672-EL-RDR
Power and Light Company :
to Establish Tariff Riders:

- - -

PROCEEDINGS

before Mr. Gregory A. Price and Mr. Bryce A.
McKenney, Hearing Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-C,
Columbus, Ohio, called at 10:00 a.m. on Tuesday,
April 2, 2013.

VOLUME XI - PUBLIC

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1 Tuesday Morning Session,
2 April 2, 2013.

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4 EXAMINER MCKENNEY: Let's go on the
5 record. The Public Utilities Commission of Ohio
6 calls at this time and place Case No. 12-426-EL-SSO
7 being In the Matter of the Application of The Dayton
8 Power & Light Company for approval of its electric
9 security plan.

10 My name is Bryce McKenney, with me is
11 Gregory Price, we are the Attorney Examiners assigned
12 by the Commission to hear this case.

13 Before we proceed, as we discussed
14 yesterday, the briefing schedule for this case
15 consists of 30 days from the filing, following 15
16 days after that for reply briefs.

17 At this time we'll move to rebuttal
18 testimony. Mr. Sharkey.

19 MR. SHARKEY: Yes, your Honor. Dayton
20 Power & Light calls Jeff Malinak.

21 EXAMINER MCKENNEY: Thank you.

22 (Witness sworn.)

23 EXAMINER MCKENNEY: Thank you. Please
24 state your name and address again for the record.

25 THE WITNESS: My name is R. Jeffrey

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1 Malinak. My address is 107123 Normandy Farm Drive,
2 Potomac, Maryland, 20854.

3 - - -

4 R. JEFFREY MALINAK

5 being first duly sworn, as prescribed by law, was
6 examined and testified as follows:

7 DIRECT EXAMINATION

8 By Mr. Sharkey:

9 Q. Good morning, Mr. Malinak. Do you have
10 before you the rebuttal and supplemental testimony of
11 R. Jeffrey Malinak?

12 A. I do.

13 MR. SHARKEY: And, your Honors, we would
14 designate the public version of that testimony as
15 Exhibit 14 and the confidential version of that
16 testimony as DP&L Exhibit 14A.

17 Q. Mr. Malinak, do you also have a copy of
18 DP&L Exhibit 15?

19 A. I do.

20 Q. Can you explain briefly what Exhibit 15
21 is?

22 A. Yes. Exhibit 15 is a printout, a new
23 printout of my Exhibit RJM-4RA with the column widths
24 expanded so that the notches, the pluses and minuses,
25 for various ratings are fully visible.

1 Q. Did you prepare Exhibit 14A or was it
2 prepared under your direction?

3 A. 14A is the confidential version of my
4 rebuttal. It was -- I prepared it, and parts of it
5 were prepared under my direction.

6 Q. If I asked you the same questions that
7 were contained in that exhibit, would you give me the
8 same answers?

9 A. I would.

10 MR. SHARKEY: Thank you, Mr. Malinak.

11 Your Honors, Mr. Malinak is available for
12 cross-examination.

13 EXAMINER MCKENNEY: Thank you.

14 DP&L 14, 14A and 15, will be so marked as
15 Malinak's rebuttal, the confidential version of his
16 rebuttal, and the provided, are we calling it an
17 errata? Not really an errata, but a clarifying
18 document.

19 (EXHIBITS MARKED FOR IDENTIFICATION.)

20 EXAMINER MCKENNEY: At this time we'll
21 proceed -- oh, Ms. Grady.

22 MS. GRADY: Yes, thank you, your Honor.
23 We do have a motion to strike.

24 EXAMINER MCKENNEY: All right.

25 MS. GRADY: OCC's motion to strike goes

1 to what Mr. Malinak characterizes as his supplemental
2 testimony. If you'd turn to Mr. Malinak's testimony,
3 page 3 of 29, he indicates there that he directs his
4 supplemental testimony to certain financial integrity
5 and rate of return issues that were addressed in his
6 prefiled direct testimony and, at Mr. Malinak's
7 deposition, he directed me to portions of his
8 prefiled direct testimony where he discussed
9 financial integrity and rate of return issues which
10 would be page 12.

11 So my motion to strike starts with page
12 18, lines 11 through 21, pages 19, 20, and 21.

13 EXAMINER MCKENNEY: Can you repeat that?

14 MS. GRADY: I'm sorry.

15 EXAMINER MCKENNEY: Nineteen?

16 MS. GRADY: The first motion or the first
17 part of the material is beginning on page 18, lines
18 11 through 21, and then going to the complete pages
19 19, 20, and 21, then going to page 25, lines 1
20 through 3, and also on page 25, lines 19 through 21
21 starting with the sentence "As noted above."

22 The motion to strike also goes to
23 schedules 5R, 6R, and 7R which are the supplemental
24 schedules presenting information that supplements,
25 but does not update Mr. Chambers. And this

1 information pertains to Mr. Malinak's DCF analysis
2 and his CAPM analysis along with showing revenues of
3 the regulated comparable firms to DP&L, which that
4 information, those firms, were contained in
5 Mr. Chambers' testimony.

6 The motion to strike, your Honor, is
7 basically that this testimony is not proper rebuttal
8 testimony. The scope of rebuttal testimony is
9 limited by evidence voluntarily offered by an
10 opposing party. It's not the equivalent of
11 introducing evidence in a party's case in chief.
12 Rebuttal is inappropriate where it should have been
13 presented as part of the party's direct case.

14 PUCO has routinely limited rebuttal to
15 testimony that a party could not have presented as
16 part of their direct case. A case cite being In the
17 Matter of the Review of Ameritech-Ohio's Economic
18 Cost for Interconnection Unbundled Networks and
19 Reciprocal Compensation for Transport and Termination
20 of Local Telecommunications Traffic, Case No.
21 96-922-TP-UNC, entry at paragraph 8, dated
22 January 29th, 2001.

23 Mr. Malinak's testimony should have been
24 and could have been submitted as part of AEP's -- I'm
25 sorry, as part of the company's direct case. The

1 return on equity calculation could have been
2 presented; in fact, one was presented by
3 Mr. Chambers. Updates to Mr. Chambers' testimony may
4 be appropriate to reflect later-known data and those
5 are permissible, but an entirely new approach to the
6 return on equity is not rebuttal and should have been
7 presented as part of the company's direct case.

8 I'd point you, for instance, to
9 Mr. Chambers' Exhibit RJM-7R; there is information
10 that Mr. Chambers could have presented as part of his
11 return on equity analysis, but he did not.
12 Mr. Chambers also could have presented a traditional
13 return on equity analysis, but chose not to.

14 There is no -- in closing, there is no
15 reason that the company could not have presented the
16 information as part of its direct case. It could
17 have and should have and, for that reason, we move to
18 strike.

19 EXAMINER MCKENNEY: Thank you, Ms. Grady.
20 Mr. Sharkey.

21 Oh, I'm sorry. Mr. Darr.

22 MR. DARR: IEU joins in the motion to
23 strike, and I would also point out that, according to
24 the deposition testimony that we heard last night,
25 the rationale, in part, for this testimony is tied to

1 page 12 of 16 of Mr. Malinak's direct testimony.
2 There was no cross-reference to anything in anything
3 else in terms of the testimony of any of the
4 intervening parties or the staff with regard to the
5 sections that I believe Ms. Grady has asked to have
6 stricken.

7 And I would further point out that the
8 testimony that he's linking it to has to do with the
9 financial integrity of the MRO, doesn't even have
10 anything to do with the ESP. Specifically, I believe
11 he referenced page 12, lines 8 through 16. That
12 being the case, it's hard to find any logical or
13 legal basis for this to be rebuttal testimony.

14 EXAMINER MCKENNEY: Thank you, Mr. Darr.

15 Other intervenors?

16 (No response.)

17 EXAMINER MCKENNEY: Mr. Sharkey.

18 MR. SHARKEY: Yes. Thank you, your
19 Honors. As an initial matter, I want to clear up the
20 way that Mr. Malinak has used the word "rebuttal" and
21 "supplemental testimony." As he explained in his
22 deposition, he's described his testimony as "rebuttal
23 testimony" if the testimony was originally something
24 covered in his testimony, an intervenor responded,
25 and then he responded to it.

1 He has described his testimony as
2 "supplemental testimony" if the original testimony
3 was in Dr. Chambers' testimony, intervenors responded
4 to it, and then he is responding to the intervenors.

5 So that we called it "supplemental
6 testimony" in his caption and other places, it's, in
7 fact, appropriate rebuttal testimony. Your Honors --

8 EXAMINER PRICE: Why did he call it
9 "supplemental" then?

10 MR. SHARKEY: Why did he?

11 EXAMINER PRICE: Yeah.

12 MR. SHARKEY: I think he's not familiar
13 with the distinction that the Commission uses between
14 "rebuttal" and "supplemental testimony." For
15 example, your Honor, if you'd look at page 15 of his
16 testimony, line A, he begins: "This section provides
17 my supplemental testimony in response to certain
18 issues raised by intervenors and staff witnesses in
19 their prefiled direct testimony."

20 He has simply used the phrase
21 "supplemental testimony," but I don't think his
22 labeling as "supplemental" or "rebuttal" should be at
23 all material to the analysis. The question is, is it
24 appropriate rebuttal testimony whether it's been
25 labeled by Mr. Malinak as "supplemental" or

1 "rebuttal".

2 Also, your Honors, we thought it was
3 better to call fewer rebuttal witnesses, if possible,
4 and Mr. Malinak was actively involved in helping
5 Mr. Chambers to assemble his original testimony, but
6 Mr. Chambers wasn't helping Mr. Malinak, so we simply
7 asked one Analysis Group expert witness come instead
8 of two. And so that's why Mr. Malinak is, in fact,
9 rebutting responses that various intervenors made to
10 some criticisms of Dr. Chambers, because Mr. Malinak
11 was actively involved in preparing Dr. Chambers'
12 original draft.

13 As to the specifics, we could go through
14 the questions line by line, some of which, at least
15 one of which, I noted, as I was following Ms. Grady's
16 cross-outs, made an explicit reference to Dr. Duann,
17 OCC's witness.

18 But in general, your Honor, Mr. Malinak's
19 testimony that OCC and IEU have moved to strike
20 relates to the appropriate and reasonable range of a
21 return on equity and it's intended and does respond
22 directly to staff witnesses principally.

23 As your Honors know, Staff Witness Mahmud
24 and Staff Witness Choueiki have sponsored testimony
25 that suggested an appropriate ROE range for the

1 company is somewhere between 6.2 percent and
2 7 percent, and so this testimony is intended to
3 respond directly to the testimony raised -- the
4 points raised in that testimony saying, no, that's
5 not accurate and, in fact, here are not only updated
6 information to show that, in fact, the numbers
7 sponsored by Dr. Chambers originally are still
8 essentially current, though it changes a little bit.

9 But I would also note, your Honor, that
10 OCC Witness Duann specifically said that the original
11 filing by DP&L was inadequate and was incomplete
12 because, I'm quoting here, "DP&L does not use the
13 discounted cash flow approach or the capital asset
14 pricing model commonly used by financial analysts in
15 estimating the 'reasonable ROE.'" That was page 38,
16 starting on line 6.

17 So he is responding to that criticism
18 that the, in fact, rebutting that criticism showing
19 even using those methodologies that Dr. Duann says
20 are appropriate to show that, in fact, the reasonable
21 ROE range that he sponsors is appropriate.

22 EXAMINER MCKENNEY: Thank you,
23 Mr. Sharkey.

24 Ms. Grady, did you have something
25 further?

1 MS. GRADY: Yes, your Honor. You know,
2 in terms of what Mr. Malinak believes is supplemental
3 versus rebuttal, if you go to page 62 of his
4 deposition, he gives an explanation and his answer
5 is: "I should say, by the way, that this distinction
6 between rebuttal and supplemental comes from my own,
7 what I described as supplemental simply because, you
8 know, it was covered less extensively in my first
9 testimony. And this was my understanding, this is
10 not a legal interpretation of what that means one way
11 or another."

12 EXAMINER MCKENNEY: Ms. Grady, as you're
13 aware, we were not present at the deposition and you
14 can certainly explore that on cross-examination of
15 the witness.

16 MS. GRADY: Okay.

17 EXAMINER MCKENNEY: Did you have anything
18 further?

19 MS. GRADY: No, your Honor, I do not.

20 EXAMINER PRICE: But if he is expressly
21 saying he's not making a legal conclusion, why should
22 we give his definition any weight at all? I mean,
23 what matters isn't what he thinks is supplemental and
24 rebuttal, what matters is what the law thinks is
25 supplemental and rebuttal.

1 MS. GRADY: Understood. But in his own
2 words it's that he didn't cover it extensively in his
3 testimony so now he gets a second bite at the apple,
4 in his own words, which is not the purpose of
5 rebuttal, certainly not the purpose of rebuttal.

6 EXAMINER MCKENNEY: Thank you, Ms. Grady.
7 Mr. Darr.

8 MR. DARR: Mr. Sharkey essentially makes
9 three arguments, one, that the labels shouldn't
10 matter; I'm fine with that. Whether you describe it
11 as A or B, it's either rebuttal testimony or it is
12 not.

13 He secondly argues that they seek to call
14 fewer witnesses. Well, that doesn't answer the key
15 question here of whether or not this is rebuttal
16 testimony.

17 We finally get down to the point, to the
18 brass tacks, when he says that he's responding to
19 testimony presented by the staff and by Mr. Duann.
20 The problem is his argument proves too much. He
21 says, in effect, that the criticism by Mr. Duann is
22 that there wasn't testimony in the first place in the
23 case. There should have been. If the point of this
24 case was to demonstrate that this was a reasonable
25 rate of return, that should have been in the direct

1 testimony. It is not. By Mr. Sharkey's own
2 argument.

3 Therefore, it is improper rebuttal at
4 this point to try to fill the hole that was
5 identified by other parties. And that's the reason
6 why this is improper rebuttal testimony and should be
7 stricken. Thank you.

8 EXAMINER MCKENNEY: Thank you.

9 EXAMINER PRICE: I'd like Mr. Sharkey to
10 respond to that last point because I think Mr. Darr
11 summarized where we're at very well. Wouldn't the
12 proper rebuttal be Mr. Duann was wrong, we don't need
13 discounted cash flow and this is why; rather than
14 okay, if we used discounted cash flow, we end up with
15 the same result?

16 MR. SHARKEY: Your Honor, that would have
17 been one way that you could rebut the testimony of
18 Mr. Duann, but I think it's also appropriate to say
19 that not only have I updated the prior methodologies,
20 but I've also looked at methodologies that we've been
21 criticized for not using and, in fact, those don't
22 change the results. I think it still responds to a
23 criticism made by Mr. Duann of DP&L's original
24 filing.

25 To say that those could have been in

1 DP&L's original filing, your Honor, is -- is not the
2 test. The test is whether or not it is rebutting or
3 responding to intervenor witnesses' testimony and, in
4 fact, your Honor, pretty much anything could have
5 been in DP&L's original filing. If that was the
6 test, there would be almost no rebuttal testimony
7 ever, because we, you know, frequently could
8 anticipate arguments that the intervenors might make
9 and respond to all of them in advance.

10 EXAMINER PRICE: They never said you had
11 to anticipate it; they just said they could have
12 been.

13 MR. SHARKEY: Well, it could have been,
14 but that would have been a, you know, an anticipation
15 that they would have been criticizing the original
16 methodology for not using CAPM and the discounted
17 cash flow method.

18 I'd also note, your Honor, that if
19 Mr. Malinak's testimony includes both rebuttal -- I'm
20 sorry, addresses both the CAPM and discounted cash
21 flow methodologies that Mr. Darr addresses, but he
22 also is updating and responding to staff's testimony
23 with a look at comparables. So the analysis of
24 comparables and the CAPM and discounted cash flow
25 methodologies are highly intertwined in the various

1 pieces of testimony that have been moved by IEU and
2 OCC to be stricken.

3 This isn't a need to delete these
4 specific lines, would you need to -- even if you were
5 to agree with that argument, which we suggest you
6 don't, we believe that it would require a lot more
7 precision in terms of going through it on lines and,
8 perhaps, specific words as to what would be stricken
9 even if you were to agree with that argument.

10 EXAMINER MCKENNEY: Thank you,
11 Mr. Sharkey.

12 At this time we are going to deny the
13 motion to strike the rebuttal testimony of
14 Mr. Jeffrey Malinak. As we review the testimony, we
15 believe that the testimony was proper rebuttal, but
16 if we show something, as we continue forward with
17 this case, that we believe is supplemental testimony,
18 we will afford it the appropriate weight even if that
19 means affording it no weight at all.

20 We would also indicate that this is
21 consistent with our prior ruling regarding the
22 rebuttal testimony of Witness Dona Seger-Lawson. So
23 at this time the motion to strike is denied.

24 At this time, then, we will move to
25 cross-examination of the witness, begin with OCC.

1 Ms. Grady.

2 MS. GRADY: Thank you, your Honor.

3 EXAMINER MCKENNEY: Before I continue,
4 was there an agreed upon -- was there an agreement of
5 who would go or what order we would go in?

6 MS. GRADY: We discussed that this
7 morning, it would be our preference to follow FES in
8 their cross-examination.

9 EXAMINER MCKENNEY: Thank you.

10 Is that correct?

11 MR. LANG: They're throwing me to the
12 wolves first. Yes, your Honor.

13 MS. GRADY: I think he can soften the
14 witness up for me.

15 EXAMINER MCKENNEY: Then Mr. Lang.

16 MR. LANG: Thank you, your Honor.

17 EXAMINER MCKENNEY: You may proceed.

18 - - -

19 CROSS-EXAMINATION

20 By Mr. Lang:

21 Q. Good morning, Mr. Malinak.

22 A. Good morning.

23 Q. I want to ask you first about your
24 calculation that you have on page 5 and then also on
25 page 7 of your testimony. And one particular number

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1 there on page 5 shows an after -- I'm sorry, a
2 pre-tax income reduction under an MRO, and I'm
3 specifically referring to, on page 5, lines 22 and
4 23.

5 A. Yes, I see that.

6 Q. Do you see that reference?

7 A. Uh-huh.

8 MR. LANG: For the company, is this
9 number a confidential number? I think it is, I just
10 want to make sure.

11 MR. SHARKEY: I believe that it is. I
12 apologize. I don't have a copy of the public version
13 to compare to it.

14 MR. LANG: I don't either.

15 Q. Well, I'm going to ask, I just have a
16 couple questions about this number, I'm going to ask
17 the question without stating the number so we can
18 stay on the public record. All right?

19 A. Okay.

20 Q. Is that fair?

21 A. I'll do my best.

22 MR. SHARKEY: If I may interject, Jeff,
23 please don't state the number, yourself, either, in
24 response to the question.

25 I apologize for interrupting.

1 EXAMINER MCKENNEY: If you need to, we
2 can move to a confidential portion of the transcript.

3 THE WITNESS: Okay.

4 Q. So what the number is, it's in brackets,
5 that reflects a negative number on line 23, right?

6 A. Correct.

7 Q. And that represents a pre-tax income
8 reduction; is that correct?

9 A. That's correct.

10 Q. And so that would reflect an ESP with the
11 SSR and the switching tracker, that that would result
12 in DP&L's customers paying that amount more than the
13 hypothetical blended MRO over a five-year period; is
14 that right?

15 A. That is a reduction in pretax income over
16 a five-year period under an MRO relative to the ESP.

17 Q. And that reduction is with regard to
18 retail customers, that is, the amount that retail
19 customers pay more, or extra, for an ESP as compared
20 to your hypothetical blended MRO, correct?

21 A. Well, I would say that it relates to all
22 customers because the SSR is a nonbypassable charge
23 and the switching tracker also is nonbypassable. So,
24 relative to the ESP, this is showing a reduction to
25 the MRO that would affect all customers, all

1 distribution customers.

2 Q. Now, on page 6, line 8 of your testimony,
3 you refer to management attention being diverted to
4 focus on the company's financial distress. I want to
5 ask you about that.

6 A. I'm sorry, what page are you on? I'm
7 sorry.

8 Q. It's page 6, line 8 and 9.

9 A. Yes.

10 Q. Now, management's focus in this case is
11 to prepare its generation assets for separation over
12 a five-year period; is that correct?

13 A. I don't know, I mean, I would think that
14 would be one of their focuses if there is a plan to
15 separate. I would think that that would be something
16 they're working on, but I don't know for a fact what
17 level of focus that is or who's focusing on it.

18 (Confidential portion excerpted.)
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(Open record.)

Q. (By Mr. Lang) Mr. Malinak, when you're discussing the, what you referred to as the "hypothetical MRO," is it fair to say that you believe that offering market pricing to retail customers is unrealistic?

A. Under the hypothetical MRO, there's a blended SSO rate, which includes a blending in of a competitive bid rate in with the cost of service rate to produce a blend, and so, the CBP rates are market-determined or market-based. So I'm not completely sure what you mean by "realistic" or "unrealistic," but it certainly seems realistic that the SSO customers would be paying ultimately a rate that reflects market factors.

Q. Page 8, line 10, you refer to "hypothetical MRO scenarios that are unrealistic." So there you're at least opining that the MRO

1 scenarios of other witnesses are unrealistic,
2 correct?

3 A. Yeah. What I mean by that is that they
4 assume that under an MRO there would be no SSR at all
5 or a reduced SSR and no switching tracker so that, as
6 I state in other parts of my testimony, you would
7 have a scenario, under a hypothetical MRO, in which
8 the company would be under severe financial distress.
9 And so, it would strike me as unrealistic to assume
10 that, that the company would propose such an MRO or
11 that it would be approved.

12 And so, from the point of view of my
13 analysis, which is comparing the ESP to the MRO on a
14 more-favorable-in-the-aggregate basis, it's just not
15 a valid comparison without considering the high,
16 potentially high financial distress costs that there
17 would be under this hypothetical MRO. So that's what
18 I meant by "unrealistic."

19 Q. So looking at what the expected results
20 of an MRO would be, your opinion is that the expected
21 results of an MRO could not result in market pricing
22 for customers, correct?

23 A. No. I mean, I don't think I'm making an
24 explicit assumption about that. Under my MRO, I'm
25 assuming that -- in my case I'm assuming that there

1 would be an SSR and a switching tracker in place, or
2 that switching would be held constant, so that you're
3 effectively holding financial integrity constant
4 between the two before you look at the quantifiable
5 piece of things, okay?

6 To me, that's a realistic comparison and
7 it's the comparison that I did to set up my analysis
8 in the beginning. So in both cases, the ESP and
9 under the MRO, there are market rates that are being
10 blended into the SSO, CBP rates are being blended in
11 at different rates, and, of course, that's where I
12 get a lot of the -- a portion of the nonquantifiable
13 benefits under the ESP are in those -- in that faster
14 transition to market.

15 Q. So you will at least agree that an MRO
16 includes a CBP.

17 A. Either -- under the MRO there is also an
18 assumed blending-in of competitive bid rates over
19 time.

20 Q. So an MRO includes a competitive-bid
21 process; do you agree to that?

22 A. My understanding is that it would have a
23 process very similar to under an ESP. Legally, I
24 don't know if there's a distinction, but yes, my
25 assumption is essentially that there would be a CBP

1 process under the MRO.

2 Q. And the results of the CBP is that the
3 Commission is required to select the least-cost bid
4 winner or winners of that CBP process, that
5 competitive-bid process; isn't that correct?

6 A. I actually don't know the details of the
7 CBP process. I relied on other witnesses for those
8 prices. I did check the process by which to
9 calculate those prices, you know, looking at the
10 local markets and looking at actual results of actual
11 bids, so I did check that for reasonableness and it
12 seemed quite reasonable to me.

13 They looked at actual historical prices,
14 they looked at forward curves, and they added to that
15 an adder that would make sense to add from my
16 perspective, so that I did rely on -- well, I relied
17 on the other witnesses, I did check their methodology
18 for reasonableness.

19 Q. In your review of the MRO statute, did
20 you determine whether the statute says that the bid
21 selected by the Commission shall be the standard
22 service offer? Is that something you're familiar
23 with or not?

24 A. I don't remember reading that. I mean, I
25 read the statute, but I don't remember that

1 particular part of it. I can take a look at it if
2 you want me to.

3 Q. Do you remember the part of the statute
4 that has the blending percentages?

5 A. I do.

6 Q. Now, on page 8, line 20 of your
7 testimony, and you just referred to this, about
8 holding financial integrity constant --

9 A. Right.

10 Q. -- and that's for purposes of the ESP
11 versus MRO test that you're suggesting that be done;
12 is that right?

13 A. Yes. This is one way to characterize
14 what I did with my assumption that the -- and this is
15 an assumption that I was asked to make by counsel,
16 that the SSR would be the same under the MRO, but I
17 checked it for reasonableness by analyzing financial
18 integrity and profitability and revenues under both
19 the MRO and the ESP.

20 And so this is one way I characterize the
21 fact that I used this assumption in my analysis and
22 the underlying financial integrity or profitability
23 check that I did on that assumption.

24 MR. LANG: Your Honor, I'd move to strike
25 his answer after, well, "Yes," and, perhaps, an

1 instruction to answer my question, we could move
2 along a little bit faster this morning.

3 EXAMINER MCKENNEY: Motion to strike is
4 denied. However, you will receive an instruction,
5 Mr. Malinak, please try to be responsive to the
6 questions that are asked of you. Try to listen to
7 them carefully and just respond to the questions that
8 are asked.

9 THE WITNESS: Yes, sir.

10 Q. So is what you're proposing, in terms of
11 holding constant, that the financial integrity
12 charges would be the same under an ESP and an MRO?

13 A. By "financial integrity charges," I
14 assume you mean the nonbypassable charges and, yes, I
15 assume that they would be in place under both the ESP
16 and the MRO.

17 Q. And I'm trying to understand, would the
18 charges be the same for an ESP or an MRO, or is the
19 return on equity going to be the same but the charges
20 different?

21 A. The answer is both. I mean, under the
22 MRO, the financial integrity charges, as I've assumed
23 them, are the same as under the ESP. Under the MRO,
24 there's a slower transition to market, okay, so
25 there's higher revenue on a net basis under the MRO.

1 But when I looked at the financial
2 integrity metrics under the MRO and under those
3 assumptions, they were -- had to be a little better
4 than under the ESP, okay, but they were still below
5 normal in terms of like, for example, in particular,
6 the ROE was still below normal by a fair amount.

7 And so, 100 or 200 basis points is what I
8 remember. And so, I concluded that it was very
9 reasonable to assume that the SSR be the same under
10 the MRO as it is under the ESP and, if anything,
11 under the ESP, the company might have asked for a
12 higher SSR in order to, you know, improve its
13 financial integrity and reduce its risk of financial
14 distress.

15 Q. So that would be the case of using the
16 same ROE target, but what you refer to as the
17 "financial integrity charges" would be different.
18 You'd have higher financial integrity -- you'd have a
19 higher amount of charges on the ESP side --

20 A. Right.

21 Q. -- as opposed to the MRO side.

22 A. Right. And that flows from the
23 assumptions under the ESP where you're transitioning
24 to market more quickly, so you have lower revenues
25 than under the MRO. And so, you know, by definition,

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1 to bring it up to the level under the MRO, you would
2 need a higher SSR.

3 (Confidential portion excerpted.)
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(Open record.)

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Q. (By Mr. Lang) On page 8, line 4,

Mr. Malinak, you refer to "large

difficult-to-quantify costs of the financial distress

that DP&L would experience under a hypothetical MRO,"

and that would be without the SSR or the ST, correct?

A. Yes.

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Q. So what you're describing there is an MRO

that results in close-to-market pricing, would result

in market pricing over time because you're still

using the blending percentages, correct?

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A. Again, I'm not sure exactly what you mean

by "market pricing," but what I'm referring to here

is the fact that under the hypothetical MRO, without

the SSR or switching tracker, you would have large --

you would have large reductions in the ROE and

financial integrity of the company.

25

Q. Do you understand that an MRO uses a

1 competitive bidding process to set the market price
2 for standard service -- for SSO service?

3 A. Yes. Subject to the blending percentages
4 over time, yes.

5 Q. Now, you say these costs are difficult to
6 quantify. Have you, nevertheless, quantified them?

7 A. I haven't put a particular number on
8 them, but without the switching tracker or the SSR
9 you would have a pretty severe, a very severe
10 reduction in the financial integrity of the company
11 which would require dramatic efforts by the company
12 to turn it around. And so, in my opinion, those
13 costs would outweigh, you know, benefits. So net
14 net, the ESP would still be favorable in the
15 aggregate.

16 Q. And what you were asked to do in this
17 case was to analyze the impact of having or not
18 having the SSR and the switching tracker on the
19 company's financial condition, correct?

20 A. In this particular part of my testimony,
21 I was looking at whether the ESP is more favorable in
22 the aggregate than an MRO, a hypothetical MRO, so
23 that's what I was addressing here. Financial
24 integrity and those other issues are relevant to that
25 question, but that's what's being addressed here.

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1 Q. Well, let me ask it another way. You did
2 not do an analysis with regard to the company's
3 financial distress, as you call it, that would
4 include any solution to that financial distress other
5 than the SSR and the switching tracker.

6 A. That's correct. I did no specific sort
7 of quantifiable analysis of that issue, but I did
8 analyze it in the sense that given the dramatic
9 decline in financial integrity, without the SSR and
10 the switching tracker in the MRO, the company would
11 be in severe enough financial distress that, in my
12 opinion, the nonquantifiable costs of an MRO would be
13 large enough that the ESP would still be more
14 favorable in the aggregate.

15 Q. And, among other things, you have not
16 done any sort of analysis with regard to whether the
17 company completing corporate separation prior to
18 their proposed date at the end of 2017 would be a
19 lower-cost solution, either for the company or the
20 company's customers, than what you did analyze in
21 this case, correct?

22 A. That's correct. I did not analyze a
23 scenario like that. I analyzed just the scenarios
24 that were brought by the company and analyzed by
25 Mr. Chambers.

1 Q. You did not analyze the scenario that
2 would include the company retiring or selling some of
3 its generation assets, correct?

4 A. That's correct. I did not analyze those
5 types of scenarios. I do note that they -- those
6 types of scenarios would have significant costs
7 associated with them.

8 Q. You did not analyze the scenario that
9 would include the company's writing-down the value of
10 their generation assets on their books, correct?

11 A. I didn't analyze a specific scenario like
12 that. Again, you know, you're talking about
13 writing-down asset values, there's probably a lot of
14 other things going on with that, but I haven't
15 specifically analyzed a scenario like that. Again,
16 all I analyzed are the scenarios that are in my
17 report and that were provided by the company and
18 Mr. Chambers.

19 Q. So is it also fair to say that your
20 analysis did not include DP&L filing a base
21 distribution rate case?

22 A. I have not seen anywhere where there's
23 been a discussion of that being included in
24 Mr. Jackson's projections and Mr. Chambers', so the
25 answer is no, I don't believe that's included. But I

1 relied on these other people for their projections.

2 Q. All right. And the qualification in that
3 answer, referring to Dr. Chambers and Mr. Jackson's
4 financials, that's because you're relying on, for
5 purposes of your analysis, what Dr. Chambers prepared
6 and what Mr. Jackson prepared, correct?

7 A. Yes, that's correct. Although, I would
8 note that projecting forward, you know, serial
9 results from rate cases might be a difficult process.

10 Q. And the calculations you have on pages 5
11 and 7 of your testimony, the source data for that
12 would be Dr. Chambers; in particular, is that from
13 his Exhibit WJC-2?

14 A. WJC-2 and WJC-3.

15 Q. Now, at page 10 of your testimony,
16 starting at page 10, you talk about how you modified
17 your aggregate price test that was in your direct
18 testimony filed in this case, correct?

19 A. Yes. Starting on page 10, I do discuss
20 the change in the time period.

21 Q. And so the one thing you did -- well, I
22 guess the one thing you did was you modified the
23 aggregate price test to start on June 1, 2013, right?

24 A. That's correct. That's one change.

25 Q. And that's now reflected on your Exhibit

1 RJM-1R which starts June 1, 2013, and then runs
2 through May 31, 2018, correct?

3 A. That's correct.

4 Q. And as we discussed the last time you
5 were here, the ESP, as proposed, ends on December 31,
6 2017, correct?

7 MR. SHARKEY: I actually object, your
8 Honor. I believe that's inaccurate.

9 EXAMINER MCKENNEY: I think --

10 MR. SHARKEY: It's an inaccurate
11 characterization of what DP&L is requesting in this
12 case and would seek through its application.

13 EXAMINER MCKENNEY: Mr. Lang.

14 MR. SHARKEY: May I clarify, your Honor?

15 EXAMINER MCKENNEY: Yeah, I think a
16 clarification would be needed.

17 MR. SHARKEY: DP&L originally filed, your
18 Honor, seeking an ESP that would begin on January 1
19 of this year and run through the date that Mr. Lang
20 mentioned, but it was DP&L's intent it would be a
21 five-year ESP application. DP&L's original
22 expectation was that this case would be resolved in
23 time for it to be implemented on January 1, so it's
24 DP&L's request then, and continuing request now, for
25 a five-year ESP, not an ESP that ends on December 31.

1 MR. LANG: And, your Honor, that's
2 interesting to hear, but it's not in their
3 application and it's not part of what they filed in
4 this case. I'd actually like to ask the witness
5 about what's in the application and what they filed
6 in this case.

7 EXAMINER MCKENNEY: The objection is
8 overruled. If the witness knows or has an opinion,
9 he can answer the question.

10 A. I actually don't know what the legal
11 elements are, but my understanding, from discussions
12 with counsel, is that there would be a five-year
13 period to the ESP and that is part of what underlies
14 my assumption going through May 31st, 2018, but there
15 are other elements, as well, including the RPM
16 schedule and the need to conform with that.

17 Q. Let me ask you a hypothetical based on
18 the actual application filed in this case. Assume
19 that the ESP ends December 31, 2017, so that's the
20 starting point of the hypothetical. Assuming that's
21 the case, DP&L would have to file, in 2017, for --
22 either for a new ESP or an MRO; is that fair?

23 A. I don't know the legal requirements, but
24 I'll accept your representation.

25 Q. And if DP&L were to file -- were to

1 propose a new ESP to commence January 1, 2018, that
2 new ESP, again, would have to be compared to the
3 expected results of an MRO, same as you've done in
4 your testimony, correct?

5 A. My general understanding is that that's a
6 requirement, that there be an assessment of more
7 favorable in the aggregate. But, yes.

8 Q. And for that new ESP, comparing it to the
9 expected results of an MRO, your opinion is that the
10 first year of that MRO would be -- would include a
11 10-percent blending, correct?

12 A. My understanding of the MRO statute is
13 that in the first year the maximum blend rate, at
14 least the way the statute is now, would be
15 10 percent.

16 Q. And --

17 EXAMINER PRICE: Could I ask a question?
18 In his hypothetical that he posed to you, we're
19 talking about January 1st, 2018; is that correct?

20 MR. LANG: Yes, your Honor.

21 EXAMINER PRICE: Have you assumed the
22 generation assets have been spun off at that point or
23 are you assuming they're still holding the generation
24 assets?

25 THE WITNESS: Underlying my calculations

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1 is an assumption that they still have those assets.

2 EXAMINER PRICE: I'm asking about his --

3 THE WITNESS: Yeah.

4 EXAMINER PRICE: -- hypothetical. You're
5 assuming they still hold the generation assets.

6 THE WITNESS: Yeah. None of my
7 calculations are based on a spin-off scenario.

8 EXAMINER PRICE: Okay. Thank you for the
9 clarification.

10 Q. (By Mr. Lang) Would it change your answer
11 if they had separated the generation assets prior to
12 January 1, 2018?

13 A. I mean, if they did separate them prior
14 to 2018, you would have a whole different set of
15 entities and financial statements and considerations.
16 So I would say that it could very well have an impact
17 on my analysis.

18 But one problem I'm having is that, are
19 you talking about my analysis here today or are you
20 talking about the analysis, hypothetical analysis,
21 that would need to be done at the end of 2017 or in
22 that range? Because it seems imponderable to try to
23 project forward what might happen with the split
24 entity and what kind of ESP would be filed and what
25 MRO would be filed and what blend percentages would

1 be requested, all of those moving parts, so it's very
2 difficult to answer your question.

3 Q. One more question under that
4 hypothetical, January 1, 2018, obviously you have an
5 ESP that's in place for that five-year period; what
6 would be the most recent SSO price?

7 A. Are you talking about the ESP that might
8 be approved on June 1, 2013, or the new hypothetical
9 ESP that's being proposed?

10 Q. We're assuming that the ESP, as proposed
11 in this case, gets adopted, which is what underlies
12 your RJM-1R. I want to know, as of January 1, 2018,
13 assuming the ESP ends at the end of 2017, this new
14 calculation has to be done, comparing the ESP to the
15 MRO for purposes of that MRO calculation, which
16 you've done for -- in this case, so you're familiar
17 with it, what would the most recent SSO price be when
18 you're doing that comparison for the first part of
19 2018?

20 MR. SHARKEY: Your Honors, I'm going to
21 object, calls for a legal conclusion, it's also
22 speculative as to what rates would be in place and
23 the ESP.

24 MR. LANG: And if he has no idea, your
25 Honor, that's a perfectly acceptable answer. Just

1 want to let him know -- asking him whether he knows
2 or not.

3 EXAMINER MCKENNEY: The objection is
4 overruled. If the witness knows, he can answer.

5 A. There are projected rates that are built
6 into my calculation and they're there in RJM-1R. You
7 know, at the end of that year, at that point in time,
8 you know, there would be new projections that would
9 need to be prepared in order to assess more favorable
10 in the aggregate for the ESP versus the MRO, and I
11 don't have rates like that in here.

12 Q. Okay.

13 EXAMINER PRICE: But are you aware of
14 whether or not the MRO statute says the adjustments
15 will be made for fuel and -- the SSO plus adjustments
16 made for fuel and purchased power? Are you aware of
17 that?

18 THE WITNESS: That language is ringing a
19 bell, but I'd have to look back at it.

20 EXAMINER PRICE: Assuming,
21 hypothetically, that it does include adjustments to
22 fuel and purchased power and they have spun off their
23 generation assets, doesn't it follow that you'll be
24 blending with purchased power? You'll be blending
25 the CBP, some percentage of CBP with some percentage

1 of purchased power, because at that point, according
2 to Mr. Lang's hypothetical, it's all purchased power;
3 isn't that correct?

4 THE WITNESS: Yeah, I think at the end of
5 this period we're talking about --

6 EXAMINER PRICE: Yeah, we're talking
7 about Mr. Lang's hypothetical ESP.

8 THE WITNESS: Yeah, under the ESP, you
9 would be -- a distribution utility would still be
10 doing a blend of some kind under the ESP. And it
11 would be proposing a blend at some rate.

12 EXAMINER PRICE: But my question to you
13 is: Wouldn't you be blending CBP results just with
14 purchased power because there is no -- there are no
15 generation assets to provide the standard service
16 offer?

17 THE WITNESS: Ah. Now I understand.
18 Yeah, I mean, at that point, if you had a spun-off
19 entity, the EDU would be acquiring all of its power
20 on the market and it would be as you described. I
21 mean, it would be -- yes.

22 EXAMINER PRICE: Thank you.

23 THE WITNESS: Sorry.

24 Q. (By Mr. Lang) A different hypothetical.
25 Let's assume the Commission approves this ESP, but

1 only for two years, and let's assume that it's, even
2 though we're already in 2013, it's for the two years
3 of 2013 and 2014. When you're doing this ESP versus
4 MRO test, the MRO blending percentages that you're
5 applying for the first two years would be 10 percent
6 and 20 -- or, 10 percent and up to 20 percent,
7 correct?

8 A. Those are the percentages for the first
9 two years; so if one were to evaluate this issue over
10 a two-year period, these would be the percentages
11 that would apply.

12 Q. And let's assume there is another ESP
13 filed for 2015 and 2016, you're asked to do the same
14 analysis that you did in this case, you would again
15 compare the proposed ESP to an MRO with blending
16 percentages of 10 percent and 20 percent, correct?

17 A. If there were a brand-new ESP proposal in
18 the end of the two-year period in your hypothetical,
19 I would perform the same type of analysis that I
20 perform here, looking at blend percentages under each
21 proposal and, you know, projected into the future.

22 Q. And then if there was a third ESP
23 proposed for 2017 and 2018, you would again do the
24 same analysis with the blending percentages, correct?

25 A. I would do the same, again, I would do

1 the same type of analysis that I've done in this
2 case.

3 Q. Now, RJM-1R assumes no additional
4 switching, correct?

5 A. That's correct. It holds switching
6 constant.

7 Q. So the ESP benefit shown on your Exhibit
8 1R is solely attributable to the ESP having higher
9 blending percentages than your assumed MRO blending
10 percentages, correct?

11 A. That's right. That's where the
12 additional 120 million comes from, but it also
13 depends on the other assumptions of the analysis,
14 including that the SSRs would be the same.

15 Q. And then your Exhibit 2R assumes
16 additional switching at the level estimated by
17 Mr. Hoekstra and, in hopes that we don't have to go
18 on the confidential record, you don't have to tell me
19 what those levels are.

20 A. Yes. Exhibit 2R assumes the additional
21 level of switching calculated by Mr. Hoekstra. It
22 also assumes no switching tracker and it assumes that
23 under both the MRO and the ESP.

24 Q. And on your Exhibit 2R, under the far
25 right column, "Source/Calculation," for lines 2 and

1 32, you reference "Worksheets." Are those worksheets
2 that were prepared for purposes of this exhibit or
3 were they prepared as part of your initial testimony?

4 A. They were actually -- I'm sorry, the two
5 lines were 2 --

6 Q. Two and 32.

7 A. -- and 32. Yeah, these were prepared,
8 these worksheets I believe were prepared with respect
9 to an answer to an interrogatory. I'd have to pull
10 out my backup to be sure, but that's my recollection.
11 And so, the 7-17A through E is -- refers to an
12 interrogatory response, that question did.

13 Q. Now, for -- neither Exhibit 1R or 2R
14 includes revenue from a switching tracker, correct?

15 A. Not explicitly. I mean, revenue R1 can
16 be interpreted -- I'm sorry, Exhibit 1R can be
17 interpreted that way, because the switching tracker
18 effectively trues up revenues due to additional
19 switching, and this exhibit holds switching constant
20 for five years.

21 Q. So your understanding is that the effect
22 of the switching tracker, if approved by the
23 Commission along with the SSR, it would result in
24 the -- produce the same financial results that are
25 shown on your Exhibit 1R.

1 A. It would produce very, very similar
2 results. There might be some minor discrepancies.

3 Q. Would the minor discrepancies relate to a
4 difference in blending percentages between the -- of
5 what's used for the purposes of the ESP?

6 A. No. I mean, I'm thinking of the, you
7 know, delays and, you know, there's a deferral and
8 there's some timing differences, that sort of thing.

9 MR. LANG: Your Honor, I do have to ask
10 him a number that I'm --

11 EXAMINER MCKENNEY: Confidential?

12 MR. LANG: -- I'm sure is confidential.

13 EXAMINER MCKENNEY: All right. Let's go
14 on the confidential portion of the transcript at this
15 time. Again, if you would step out of the room if
16 you have not signed a protective agreement. Thank
17 you.

18 (Confidential portion excerpted.)
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(Open record.)

Q. (By Mr. Lang) Mr. Malinak, you have not done an independent analysis as to whether the transfer price to DPLER is sufficient to cover all of DP&L's costs of generation, both fixed and variable, correct?

A. That's correct. I've not done an

1 independent analysis beyond my review of documents
2 and testimony in this case.

3 Q. And your understanding is that DP&L sells
4 all of its generation into PJM at market prices,
5 correct?

6 A. Yes, it sells capacity in the capacity
7 market and then it sells its energy at market prices
8 over time.

9 Q. And is it your understanding that with
10 regard to energy sold to PJM, it receives the LMP
11 price from the day-ahead market?

12 A. Are we talking about DP&L right now
13 selling to PJM?

14 Q. Yes, sir.

15 A. My understanding is they're selling to
16 PJM at market prices. It may be all at LMP, but as I
17 sit here I'm not 100 percent sure, but they are
18 selling to PJM at the market-energy prices.

19 Q. And then DP&L buys energy back out of
20 PJM, correct?

21 A. That's correct.

22 Q. And your understanding is that DP&L sells
23 that energy plus capacity and ancillary services to
24 DPLER under forward contracts, correct?

25 A. My understanding is that DP&L sells to

1 DPLER under forward contracts and ancillary services,
2 I believe, are included. I haven't studied the
3 extent to which, you know, capacity is included or
4 risk premium is included, but that's my understanding
5 of what they sell at. And, you know, I'd defer on
6 this, in large part, to Mr. Hoekstra who testified on
7 this topic about the transactions between DP&L and
8 DPLER.

9 Q. So is it fair to say you don't know the
10 exact details of the contracts between DP&L and
11 DPLER?

12 A. That is true, I don't -- I don't know the
13 exact details. I just have a general understanding
14 of what those contracts would be.

15 Q. Do you know what an LSE, or load-serving
16 entity, is for purposes of PJM?

17 A. I actually don't have a clear
18 understanding of exactly what the requirements are
19 for an LSE versus not an LSE. I have heard the term
20 before.

21 Q. Okay. And you don't know whether DPLER
22 is an LSE, correct?

23 A. Actually, my understanding is that DPLER
24 is not an LSE.

25 Q. And that's an understanding that you've

1 gained since the deposition yesterday?

2 A. It is.

3 Q. Okay. Now, you believe that with regard
4 to the transactions between DP&L and DPLER, you do
5 believe that there are some transaction cost benefits
6 to having DP&L make the purchase out of PJM just
7 instead of DPLER having to make the purchase,
8 correct?

9 A. I think there's a possibility that
10 DPLER's purchases from DP&L, there might be some
11 small transactional cost benefits, but I wouldn't
12 consider them to be materially different than if
13 DPLER was buying from another entity altogether.

14 Q. And you don't know whether DPLER benefits
15 from not having to establish credit with PJM,
16 correct?

17 A. I've seen no evidence that DPLER benefits
18 in that fashion.

19 Q. Well, is it fair to say you don't know
20 one way or the other?

21 A. I've seen no evidence, one way or the
22 other, but I've seen -- yeah, I've seen no evidence,
23 so.

24 Q. That's obviously something that you
25 haven't asked the company for evidence about, one way

1 or the other, correct?

2 A. That's correct, I've not asked the
3 company for evidence on that specific topic.

4 Q. Now, with regard to DP&L selling
5 generation to DPLER, as we sit here today that is
6 going on under existing contracts, correct?

7 A. Yeah. My understanding is that as of the
8 time at least that certain documents were prepared in
9 this case, including the financial projections that I
10 relied on, that there were existing forward contracts
11 that were in place between DP&L and DPLER.

12 Q. And those contracts include a profit
13 margin that is over and above what DP&L receives from
14 the hourly LMP, correct?

15 A. There's an important distinction there.
16 Based on the fact that those contracts were signed at
17 a previous point in time and market prices moved, as
18 of the time of the projections there was a projected
19 additional margin under those contracts, but it was a
20 function of things that happened after they were
21 signed.

22 Q. So the answer is -- that was the
23 explanation. The answer is "yes" to my question.
24 They do include that additional profit margin.

25 A. Not exactly, because when they were

1 originally signed they didn't include a profit margin
2 but, you know, at the time of the projections, market
3 prices had moved, so they were projected to produce
4 profits going forward from that point in time.

5 MR. LANG: All right. The deposition,
6 your Honor.

7 EXAMINER MCKENNEY: You may approach.

8 Q. If I could ask you to -- well, first, it
9 was so recently. Do you remember being deposed
10 yesterday?

11 A. My memory is deteriorating as I age, but
12 not that much.

13 Q. Not that much?

14 A. So I do remember, yes.

15 Q. There was a court reporter there, you
16 were sworn in, swore to tell the truth. Do you
17 remember that?

18 A. I do.

19 Q. All right. If I can ask you to turn to
20 page 9, and on line 12, I'm going to read a Q and A,
21 you can follow along, please.

22 The question was: "So is it also your
23 understanding that in those contracts, they included
24 a profit margin that is over and above what DP&L
25 receives from the hourly LMP?"

1 And your answer was: "Yes. It is my
2 understanding that there was or were still -- was a
3 projected additional small amount of gross margin on
4 those contracts."

5 MR. SHARKEY: Object, your Honor. That's
6 inconsistent with his answer.

7 EXAMINER MCKENNEY: I think it's entirely
8 consistent with his answer. Your objection is
9 overruled.

10 Q. Did I read that correctly?

11 A. You did read that correctly, yes.

12 Q. Okay. Now, on page 16, line 2 of your
13 testimony, you refer to DP&L spinning off its
14 generation. Now, you understood that if DP&L did
15 spin off its generation, that generation would be
16 fully on its own in the competitive market, correct?

17 A. It would depend on the exact terms of the
18 spin-off, but, you know, if it was spun off into a
19 completely unregulated independent subsidiary, then
20 yes, it would be independent and on its own, as you
21 say.

22 Q. And if DP&L did spin off its generation,
23 you haven't analyzed what the T and D company would
24 be seeking in terms of an SSR or an ST following the
25 spin-off, correct?

1 A. That's correct. I've done no analysis of
2 a spin-off including wholly separate entities like
3 that.

4 Q. So you haven't looked at the profit
5 margins or the revenues for those entities
6 separately, correct?

7 A. No, not completely. I've looked at an
8 exhibit that was part of Mr. Jackson's deposition in
9 which there are gross margins attributed to different
10 parts of the business. I haven't looked at them as
11 independent entities, but I have looked at those
12 gross margins as measured in DP&L as it currently is
13 structured.

14 Q. Those are margins for DPLER, you said?

15 A. I'm sorry. I may have misunderstood.
16 No, those are margins for the different parts of --
17 of DP&L's business.

18 Q. Maybe my question wasn't clear. You
19 haven't looked at the profit margins and revenues for
20 what the separate entities would be once the
21 generation is spun off, correct?

22 A. And by "profit margins" you mean gross
23 profit margins or do you mean another type of profit
24 margin?

25 Q. Can you answer my question as asked?

1 A. I haven't looked at those margins as if
2 the companies were completely independent. I have
3 looked at those margins based on the segments of the
4 business in that exhibit that I referred to.

5 Q. And you have not conducted an analysis
6 that concluded that DP&L's T and D revenues are
7 inadequate, correct?

8 A. No, I haven't analyzed the issue of
9 inadequacy; although, I have -- I'm not sure exactly
10 what you mean by that, by "adequate" or "inadequate."

11 Q. In terms of public utility regulation, is
12 the term "adequacy" something you're familiar with or
13 is that foreign to you?

14 A. In my experience, the term can be used in
15 various ways. It can be used to refer to whether
16 rates are adequate to cover costs, but you have to
17 specify whether the costs include costs of capital as
18 well. And typically, in my experience, "adequate"
19 means sufficient to cover not only your operating
20 costs but also a reasonable cost of capital.

21 Q. So, using that definition, it's fair to
22 say you have not had discussions with anyone at DP&L
23 regarding whether DP&L's T and D revenues are
24 adequate.

25 A. I've not had any discussions beyond

1 talking about the revenues for T and D and the gross
2 margins for T and D and -- which are on that document
3 I described, and I have had discussions about whether
4 there are more detailed analyses and I learned that
5 there are not. By "detailed," I mean further down
6 the income statement, if you will, into the
7 operating-income line.

8 Q. If a competitive supplier has costs that
9 are unrecoverable in the competitive market, your
10 understanding is that the competitive supplier
11 basically has two simple options: Either try to
12 increase revenues or control costs, correct?

13 A. Yes, I think I testified to that earlier
14 today, that, generically, a CRES provider could try
15 to increase its revenues or -- and control its costs
16 and that would enhance its profitability, and there
17 would need to be some additional information about
18 the nature of the CRES provider to the degree to
19 which some of its operations are subject to
20 regulation or not, things like that.

21 Q. Now, with regard to the SSR, your opinion
22 is that the SSR is a charge that supports
23 transmission, distribution, and generation operations
24 of DP&L, correct?

25 A. The SSR is a financial integrity charge

1 that supports or provides additional assistance in
2 maintaining financial integrity for DP&L as a whole,
3 and DP&L as a whole includes those operations,
4 generation, transmission, and distribution.

5 Q. So, in your mind, the SSR is not a
6 distribution charge, correct?

7 A. No. I would say it's, in part, a
8 distribution charge. I mean, as I just said, it
9 affects the whole company, and distribution,
10 transmission, generation are all part of that
11 company. So it's a charge that supports the company
12 which has those operations so it's maintaining the
13 financial integrity of the entity.

14 Q. So, following up on that answer, you
15 would also say that the SSR is, in part, a generation
16 charge and, in part, a transmission charge?

17 A. I wouldn't try to split it into pieces or
18 talk about it that way. I mean, I would talk about
19 it the way that I am, which is that it's a charge
20 that is designed to enhance the chances for the whole
21 entity to maintain its financial integrity, and these
22 other operations are under its umbrella. And you
23 can't -- it's artificial to try to separate these
24 parts of the business out.

25 Q. So if you were asked whether the SSR is a

1 generation charge or a distribution charge, you would
2 say "none of the above," correct?

3 A. No. I would say all of the -- in this
4 case, I would say all of the above.

5 Q. All of the above.

6 A. It's all of the above and more, because
7 the entity is, you know, has operations that kind of
8 span or are more allocable to the operation of the
9 whole entity rather than any particular business
10 within it. So I would say the charge relates to the
11 whole entity.

12 Q. So it supports more than the
13 distribution, transmission, and generation
14 operations, correct?

15 A. There's a sense in which it supports
16 more, you know, those operations of the entity which
17 are -- span across the whole thing.

18 Q. Is it fair to say that you are not
19 familiar with the details of how DP&L's transmission
20 operations, its distribution operations, and its
21 generation operations are managed within the company?

22 A. Yes, it's fair to say that I'm not
23 familiar with the details. I'm just familiar
24 generally that there is some level of coordination
25 that's going on. I'm not sure exactly who talks to

1 who and how that exactly is implemented.

2 Q. Now, with regard to the question of
3 whether the Public Utilities Commission of Ohio is
4 obligated to ensure that DP&L's generation assets
5 earn a reasonable return on equity, you don't know
6 the exact details of the Commission's role; is that
7 fair?

8 A. Yeah, it is fair that I don't know the
9 PUCO's legal obligations and requirements. I
10 understand that, in general, you know, again, as a
11 nonlegal opinion, that they are focused on the DP&L
12 as an entity and whether, you know, rates are
13 sufficient for the entity as a whole. And one of the
14 things in the entity as a whole is generation
15 operations.

16 Q. It's fair to say you're not familiar with
17 the details of the regulatory scheme in Ohio.

18 A. That's correct; not the details.

19 Q. With regard to your testimony having to
20 do with return on equity, you have not done an
21 analysis that determines an ROE under assumptions
22 other than the ones that are in your report, correct?

23 A. The ROE, by definition, I haven't
24 calculated an ROE that's different than the one that
25 is in my testimony. That ROE is based on DP&L as a

1 whole.

2 Q. So you haven't done an ROE analysis of --
3 let me start over. Let me try that question again.
4 No, actually, strike it. I think we covered that
5 already.

6 Now, with regard to the "confiscation of
7 utility assets test" that is set forth in the Hope
8 Natural Gas Case and other U.S. Supreme Court cases,
9 you had said, last night, those are decisions that
10 you read -- decisions you read a long time ago,
11 correct?

12 A. I did say that, yes. I read those
13 decisions a long time ago.

14 Q. And you are not offering an opinion in
15 this case about what constitutes a taking or what
16 would constitute a taking under those decisions,
17 correct?

18 A. No. As I said last night, my opinion is
19 that the company experiences an economic loss when
20 they're earning less than their cost of capital. So
21 I don't know how that relates to those opinions, I'm
22 not a legal expert, but from an economic point of
23 view, that's an economic, a clear economic loss.

24 Q. Now, you're certainly familiar with
25 Dr. Chambers' testimony provided in this case, right?

1 A. I'm generally familiar with it. I
2 haven't, you know, reviewed it in great detail
3 recently.

4 Q. And you are not offering an opinion that
5 Dr. Chambers' credit-ratings analysis is inaccurate,
6 correct?

7 A. That's correct. I'm not offering any
8 opinion on the rating side of things, except to the
9 extent that, you know, financial-integrity analysis,
10 rate-of-return analysis, is obviously related to
11 that, to ratings. But there's another step on the
12 ratings side where you say, okay, what would happen
13 to ratings given this particular set of financial
14 results, and I don't -- I don't take that second
15 step.

16 Q. And you wouldn't consider yourself to be
17 an expert on the ratings analysis or the type of work
18 that Dr. Chambers did, correct?

19 A. Well, to the extent that he's looking at
20 various financial metrics, which he does, I do
21 consider myself an expert on that, on financial
22 integrity, on profitability, on financial
23 projections.

24 The piece I don't consider myself an
25 expert on is, as I just said, the next step, you

1 know, taking that and saying, "Okay, now try to make
2 a prediction about what the rating would be under
3 this set of circumstances or that set," that I am not
4 as expert as he is, certainly.

5 Q. Are you aware that DP&L does not develop
6 its budgets based on its expect revenues?

7 A. I actually don't have any familiarity
8 with the precise way that they develop their budgets.

9 Q. I'd asked you a couple questions earlier
10 about competitive generation suppliers, CRES
11 suppliers. You don't have information with regard to
12 what an average return on equity would be for a CRES
13 supplier at any time, correct?

14 A. I haven't done an analysis of a return on
15 equity. I have looked at profit margins for DPLER
16 because that information is included in DP&L's 10-K,
17 but it's a profit margin relative to revenue, not to
18 equity.

19 Q. Right. That doesn't get you to an ROE,
20 correct?

21 A. That's correct. Without the equity
22 component to do a calculation, you can't -- you can't
23 do that.

24 Q. Assuming the average ROE for competitive
25 generation suppliers, in 2012, is a negative number,

1 should DP&L be given the opportunity to earn a
2 negative return on its generation assets?

3 THE WITNESS: I'm sorry. Could you
4 reread that?

5 (Record read.)

6 A. I'm not sure that it's particularly
7 relevant what other entities are earning. You know,
8 my analysis, as I've said several times, is based on
9 DP&L as a whole, and the ROE of DP&L as a whole. And
10 my opinion is that, as stated in various places, that
11 if that ROE falls below the cost of capital, that it
12 will enhance or increase the risk of financial
13 distress. And so, I -- the fact that the CRES
14 providers, one or more, are earning lower returns, is
15 not really that pertinent to what I'm doing.

16 Q. Another hypothetical. I'd like you to
17 assume that DP&L shut down all of its generation
18 assets for the entire period of the ESP. If that
19 were the case, PJM would have the responsibility of
20 ensuring reliability in DP&L's service territory by
21 dispatching other generation, correct?

22 A. My understanding is that generally, yes.
23 I mean, if DP&L took its plants off line, if they're
24 currently being included and dispatched under the
25 economic dispatch models now, such that they're

1 running some amount, and then you shut them all down,
2 you take the capacity off line and out of PJM's
3 purview, or out of the availability to PJM, my guess
4 or my understanding is PJM would need to redispatch
5 based on available capacity.

6 Q. I want to ask you, on page 22 of your
7 testimony, toward the bottom, on line 30, where you
8 refer to, actually lines 29 and 30, you're referring
9 to "risks associated with capacity revenues affect
10 but one of these regulated revenue streams...." And
11 when you're referring there to "capacity revenues,"
12 you're referring both to AEP's capacity revenues and
13 DP&L's capacity revenues; is that right?

14 A. Yeah. What I'm trying to do or the point
15 I'm making in this paragraph is that Dr. Lesser says
16 that because AEP is an FRR entity, that its risks are
17 substantially different than DP&L's from a cost of
18 capital point of view, and I'm pointing out that
19 capacity revenues are just one of the revenue streams
20 that these two companies are earning, and so you
21 can't really just carve one out and -- without
22 thinking about the others as well. There's a lot of
23 moving parts and, at the end of the day, I do think
24 there's a valid comparability between the two. But
25 this point, you know, is a type of red herring, so

1 that's the point I'm trying to make here.

2 MR. LANG: Your Honor, I'd move to strike
3 the answer after "yes." "Yes" was the answer to my
4 question and then, the rest of it, if he wants to
5 reserve that for some other time --

6 EXAMINER MCKENNEY: Thank you, Mr. Lang.
7 The motion to strike is granted.

8 Mr. Malinak, I'm going to ask that you
9 try to be responsive just to the question that's
10 asked.

11 THE WITNESS: Okay. I'm sorry.

12 Q. So your rebuttal testimony is relying on
13 the previous testimony of both Dr. Chambers and
14 Mr. Jackson; is that right?

15 A. Yes. I take various information from
16 both witnesses.

17 Q. And you're relying on the financial
18 scenarios that they've developed, correct?

19 A. The financial scenarios, yes, that were
20 developed by Mr. Jackson, and then that -- there were
21 some adjustments that Mr. Chambers made, and I'm
22 relying on both of those together.

23 Q. So, in your rebuttal testimony, you have
24 not considered any other scenarios than the ones that
25 are included in your testimony that rely on the

1 Jackson and the Chambers scenarios, correct?

2 A. Yes, that's correct. Those are the
3 scenarios that I am presenting are the ones I rely
4 on.

5 Q. Now, your view of DP&L as a whole is that
6 the transmission, distribution, and generation assets
7 are all part of the regulated entity, correct?

8 A. Yes. They are part of DP&L Co., which I
9 understand to be subject to regulation.

10 Q. Now, in this case, you are not offering
11 the Commission an opinion -- if the Commission were
12 attempting to determine what the lowest-cost solution
13 is for the financial integrity threat that you
14 describe in your testimony, you're not offering the
15 Commission an opinion as to what the lowest-cost
16 solution is to remedy that threat, correct?

17 A. No, not explicitly. I mean, I'm focused
18 just on the cost and benefits of the different
19 scenarios that I have addressed, and it would
20 certainly be lower cost in a broad sense to multiple
21 stakeholders involved here, including ratepayers and
22 investors and employees of DP&L to implement, you
23 know, an SSR of sufficient size so that financial
24 integrity doesn't become an issue, in which case, you
25 know, there would be very high costs associated with

1 that.

2 So, in that sense, I am addressing high
3 versus low cost in what I'm opining on. But I'm not
4 comparing it to any other scenarios than I address in
5 my testimony which include both the scenarios with
6 the switching tracker and the SSR and those without.

7 Q. And for that scenario that you are
8 analyzing, you're relying on Craig Jackson for the
9 underlying fundamental assumptions with regard to
10 revenues and operating costs, correct?

11 A. Yes. But in my work with Dr. Chambers,
12 we actually evaluated the various assumptions that we
13 were being asked to make and found them to be
14 reasonable relative to historical results. In
15 particular, on the O&M side, we went over carefully
16 with Mr. Jackson the bridge, O&M bridge from 2011 to
17 the projections included in 2013, and those are
18 included in Mr. Jackson's rebuttal testimony, but
19 they memorialize a discussion that we had. And so,
20 that level of O&M for 2013 was reasonable, relative
21 to historical 2011.

22 So while I'm relying on them for the
23 assumptions, we also did our own expert, independent
24 "kicking of the tires," so to speak.

25 MR. LANG: Move to strike after "yes,"

1 Your Honor.

2 MR. SHARKEY: It was all completely
3 responsive. He asked him regarding what analysis
4 he's done and he explained it.

5 EXAMINER MCKENNEY: I think it was a
6 fairly open-ended question but, Mr. Malinak, I am
7 going to warn you again, you need to try to rein it
8 in.

9 Q. Mr. Malinak, you do not know whether DP&L
10 is obligated to provide capacity and energy from its
11 own generating units to satisfy its obligations to
12 DPLER or to satisfy its obligations for its SSO load;
13 is that fair?

14 A. I'm not aware of any of the specific
15 contractual obligations it has in that regard, but I
16 understand that it has -- DP&L has obligations with
17 respect to DPLER or a relationship as a seller and a
18 buyer of power.

19 Q. Now, on page 25, line 1, you refer to
20 maintaining "financial integrity at 'normal
21 levels'...." You had mentioned this earlier this
22 morning. And by "normal," you mean what allows the
23 company to earn its cost of capital, right?

24 A. Yes, that's correct. For a company to
25 have normal levels of financial-distress risk, it

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1 needs to be earning its market rate of return which
2 is its cost of capital. If it starts to earn less
3 than that, then you have increasingly or increased
4 risk of financial distress as you earn less and less
5 and less than your cost of capital.

6 (Confidential portion excerpted.)
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(Open record.)

EXAMINER McKENNEY: Let's go back on the record. At this time we're on the public portion of the transcript.

Mr. Lang, you may continue.

MR. LANG: Thank you, your Honor.

Q. (By Mr. Lang) If I could take you to page

1 25, line 17.

2 A. Yes, I'm there.

3 Q. You're describing WJC-2 here, and that
4 reference is actually on line 16, to Dr. Chambers'
5 exhibit. Do you see that?

6 A. I do.

7 Q. And you state there that WJC-2 assumes
8 the switching tracker is in place, correct?

9 A. Yes. Implicitly, I mean, it's assuming
10 that, you know, it's holding switching constant, so
11 it's implicitly assuming the switching tracker is in
12 place if there's additional switching.

13 Q. So the implicit assumption is that the
14 switching tracker would offset any revenue losses
15 resulting from switching after August 30th, 2012; is
16 that right?

17 A. Yes. That's correct, during the period
18 of transition.

19 Q. Now, do you know whether DP&L can choose
20 to run certain facilities, generating facilities, if
21 they are determined to be uneconomic and, instead,
22 purchase power from other sources?

23 A. I'm actually not completely clear on what
24 their flexibility is vis-a-vis PJM and what PJM can
25 do in terms of dispatching their plants. If their

1 plants are uneconomic, then a decision likely would
2 be made not to run them, but I'm not sure where
3 exactly that decision rests, but -- and in that case,
4 to the extent they had obligations to supply power,
5 they would have to try to fill them in another way.

6 Q. On page 27 of your testimony, you
7 reference potential capital expenditure reductions.
8 I wanted to ask you with regard to -- if there are
9 reductions in capital expenditures, and I'm talking
10 about an actual reduction as opposed to a delay, then
11 that would have a material impact on DP&L's available
12 cash, correct?

13 A. In the near term, if you don't make a
14 particular capital expenditure, then, by definition,
15 there's less pressure on your cash balance; but, as
16 we discussed last night, it would typically be
17 difficult to identify pure reductions in a capital
18 budget that would have no adverse consequences.

19 Q. Now, if the company has additional
20 available cash, that could allow DP&L to -- would
21 give DP&L the opportunity to pay dividends to DPL,
22 Inc., its parent; is that right?

23 A. Well, dividends can be funded a number of
24 different ways. I think having cash on hand, you
25 know, makes it easier, in some ways, to pay the

1 dividends, but it would all depend on the financial
2 plan of the entity and whether it needed cash at the
3 DP&L level, other issues, including potentially
4 legally -- legal issues related to whether they are
5 allowed to pay dividends or not.

6 Q. Now, at the top of page 28, you cite
7 several depositions and one of them is Dr. Lesser's
8 deposition, correct?

9 A. Yes.

10 Q. And is that a -- is that a cite that you
11 obtained? Did you review Dr. Lesser's deposition?
12 Or were you provided that cite by someone else?

13 A. You know, I reviewed these pages. These
14 pages were actually identified by staff people
15 working under my direction.

16 Q. And do you have that page of Dr. Lesser's
17 testimony?

18 A. I do.

19 Q. Two pages.

20 A. I have pages 25 and 26, yes.

21 Q. All right. So is the testimony that
22 you're referring to, I want to read it to you and
23 tell me if it's the testimony you're referring to.
24 It's the question that says: "Well, you are familiar
25 with the principle that if you defer expenses now, it

1 may be more costly in the future to make those same
2 repairs and maintenance." That's the question.

3 Then the answer was, of Dr. Lesser:
4 "That's true. But, again, that's sort of off point
5 in terms of -- the issue is who should be responsible
6 for paying those costs, whether it's DP&L's regulated
7 customers and customers that wish to switch or
8 whether those expenditures should be made by an
9 independent, structurally-separated generation
10 company that can then make those decisions based on
11 the economics of its generation facilities, not based
12 on whether it is going to receive subsidies from
13 ratepayers."

14 So that's the -- that was the question
15 and answer that you've cited for purposes of your
16 testimony?

17 A. That is one of, you know, several.
18 There's some other passages that come after that, but
19 that's -- that's the primary one, the statement
20 "That's true" in response to the question.

21 Q. Okay. Now, I think on the next page,
22 page 28, you criticize the proposed three-year ESP
23 term that Staff Witness Choueiki is proposing, and
24 your concern is that a three-year ESP would not be
25 acceptable to DP&L because of the financial harm that

1 it would still cause or the financial harm that would
2 still exist for purposes of years 4 and 5.

3 A. That's not exactly right. I mean, my
4 concern with the three-year ESP is that -- there are
5 a couple of areas of concern, okay. One of them is
6 that with that shorter timeframe you have a falloff
7 in 4 and 5, in years 4 and 5, and so you would need a
8 much higher SSR during that period.

9 And then the second thing is that, you
10 know, it creates uncertainty, and uncertainty has
11 costs, you know, that hit a lot of people or can hit
12 a lot of different stakeholders. So there's kind of
13 those two pieces to it.

14 Under a five-year plan, you know, the
15 risk, this uncertainty in risk, okay, is ameliorated
16 to some degree.

17 Q. And you're saying, under the three-year
18 plan, you would need a much higher SSR, and that's so
19 DP&L can bank those savings for use in 2016 and '17;
20 is that right?

21 A. I wouldn't say it that way. I would say
22 that it would give them additional financial
23 resources that would give them options. I'm not
24 quite sure what you mean by "bank," but they would
25 have more options with that kind of additional

1 financial wherewithal.

2 But, as we talked about last night as
3 well, you know, once you get to that end of year 3,
4 what's gone on in the past is only so relevant, okay,
5 because there would then be a new set of decisions to
6 be made and that's where my uncertainty point comes
7 in.

8 Q. Now, the current ESP, the five-year ESP,
9 is designed in a similar way that, by using the
10 average SSR over five years, there are savings in
11 the -- there are revenues from the earlier years that
12 are used to offset increasing losses in years '15,
13 '16, and '17; isn't that right?

14 A. It's really hard to draw that conclusion
15 from the financial projections. I mean, the flat SSR
16 is set at a level that, you know, is -- provided for
17 a minimum level of ROE for a period of time. And,
18 you know, the financial projections themselves make
19 assumptions about how the profits and resources are
20 used over time. And, you know, given the level of
21 ROE and so forth, there's no real excess there, so I
22 don't know that one year is bleeding into the next,
23 you know, specifically.

24 I mean, certainly, if the profits were
25 lower, they would have less equity, there would be

1 more financial-integrity issues that would have to be
2 dealt with than if they got what was projected in the
3 as-filed case.

4 Q. As part of Dr. Choueiki's proposed
5 three-year ESP, if the Commission also directed the
6 company to complete corporate separation by the end
7 of that third year, it's fair to say you do not know
8 whether the surviving T and D company would be in
9 financial distress in years 4 and 5.

10 A. That's correct. I've not done an
11 analysis of a spin-off and the separate entities that
12 might occur and what costs and -- revenues and costs
13 would be attached to each one.

14 MR. LANG: Thank you, your Honor. Those
15 are all my questions.

16 EXAMINER MCKENNEY: Thank you, Mr. Lang.

17 Let's go off the record.

18 (Discussion off the record.)

19 (Lunch recess taken.)

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1 Tuesday Afternoon Session,
2 April 2, 2013.

3 - - -

4 EXAMINER MCKENNEY: Let's go back on the
5 record at this time.

6 Ms. Grady, are you prepared?

7 MS. GRADY: Yes, I am, your Honor.

8 - - -

9 CROSS-EXAMINATION

10 By Ms. Grady:

11 Q. Good afternoon, Mr. Malinak.

12 A. Good afternoon.

13 Q. Would you agree with me that bond ratings
14 measure default risks associated with a firm's debt
15 securities?

16 A. Some bond ratings do. Those bond ratings
17 that relate to a particular bond issue measure -- are
18 an indicator of default risk for those bonds. Then,
19 sometimes, there's a company bond rating, as well,
20 which relates to the whole company as opposed to a
21 particular issue.

22 Q. And the bond ratings information that is
23 contained in your -- or, that was contained in
24 Mr. Chambers' testimony, that was the type of bond
25 ratings that measured default risks associated with

1 the firm's debt securities? If you know.

2 A. I can't recall exactly whether those bond
3 ratings were company bond ratings or were for
4 particular bond issues, but if they -- regardless,
5 they are relevant for default risk for a company's
6 debt securities.

7 Q. Would you agree with me that bond ratings
8 do not necessarily provide an accurate measure of a
9 firm's equity risks?

10 A. I would say that they are an indicator, a
11 potential indicator of a firm's equity risk. I don't
12 know that there's any one piece of evidence,
13 including bond ratings, that give a complete picture
14 of an equity -- of the equity-risk component.

15 Q. Thank you.

16 Let's go to your testimony on page 3,
17 Mr. Malinak, specifically lines 4 through 10. You
18 indicate there that you are "providing supplemental
19 testimony regarding financial integrity and rate of
20 return issues...." Is that -- do you see that
21 reference?

22 A. Yes, that's what this sentence says,
23 subject to a discussion we had yesterday, for
24 example, about rebuttal versus supplemental.

25 Q. Yes. Now, the testimony that you are

1 addressing in your prefiled -- or, the testimony that
2 you indicate here that -- let me strike that.

3 You indicate, on lines 6 through 7, that
4 you are "providing supplemental testimony to the
5 financial integrity and rate of return issues" that
6 you addressed in your prefiled direct testimony. Do
7 you see that reference?

8 A. Yeah. The reference is to my prefiled
9 direct and then also the prefiled direct of Witness
10 Chambers and of several intervenor and staff
11 witnesses as well.

12 Q. Let's focus on your testimony. The
13 testimony that you refer to is found on page 12 of
14 your second revised testimony.

15 A. I believe so. Let me just quickly get
16 there.

17 Q. Sure.

18 A. Yeah. That's the primary location, as I
19 think we discussed yesterday as well, my testimony
20 and the more favorable in the aggregate generally
21 presupposes certain levels of financial integrity and
22 addresses it in its own way.

23 Q. Implicitly addresses; would you agree
24 with that?

25 A. Yeah. I would agree with that in terms

1 of the implicit-versus-explicit distinction, and then
2 page 12 is where I talk explicitly about the things
3 that I looked at with respect --

4 Q. Now -- I'm sorry.

5 A. I'm sorry -- with respect to financial
6 integrity.

7 Q. Thank you. I didn't mean to interrupt.

8 Now, in that specific portion of your
9 testimony, you're discussing that DP&L would recover
10 the SSR under either an ESP filing or under a
11 hypothetical MRO; is that right?

12 A. Yes, that's correct. I analyzed
13 financial integrity issues under both the ESP and the
14 MRO.

15 Q. Now, Mr. Malinak, you also mention that
16 you're providing supplemental testimony to the
17 prefiled direct testimony of Witness Chambers. Do
18 you see that reference?

19 A. Are we back on page 3?

20 Q. Yes, we are.

21 A. Yes. Again, the use of the word
22 "supplemental" isn't exactly accurate. With respect
23 to Mr. Chambers, I'm rebutting people who rebutted
24 him.

25 Q. Now, let's focus on the supplemental

1 testimony you present to the prefiled direct
2 testimony of Witness Chambers. Does that begin on
3 page 18, under your return on equity section?
4 Specifically, I'm talking about page 18, under
5 Section C, entitled "Return on Equity and Financial
6 Integrity."

7 A. Well, actually, I would say that, you
8 know, wherever I am rebutting a witness who rebutted
9 Mr. Chambers, then that would be a portion that
10 relates to his testimony, and I'm not sure if this is
11 where it starts.

12 For example, two pages earlier, there's
13 discussion of DPLER margins and transfer pricing and
14 purpose of the SSR, and those were things that I
15 think were addressed -- or, people made points
16 related to Mr. Chambers' testimony on those issues as
17 well.

18 (Confidential portion excerpted.)
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(Open record.)

THE WITNESS: I'm sorry, can you please
reread the question?

(Record read.)

A. He didn't show that in an exhibit, but
his exhibit references JDM-6, which, of course, has

1 that information on it.

2 Q. (By Ms. Grady) Am I correct that the
3 percentages of -- the percentage of revenue from
4 regulated operations dates back to 2008, the JDM-6
5 reference?

6 A. Yeah. That's from a few years back,
7 that's correct.

8 Q. And have you done any analysis to
9 determine whether or not the revenue from regulated
10 operations have changed since 2008 for any of these
11 entities that are shown on RJM-7R?

12 A. Yes. I had one of my staff members look
13 at their most recent financial data, 10-Ks, to check
14 whether there was any material deviation from these
15 percentages, and he showed me some of the
16 calculations and some of the underlying data, and it
17 did not look as though there were, you know, there
18 were some sort of systematic, material deviation from
19 these numbers.

20 Q. Now, for purposes of this schedule, how
21 do you define "regulated operations"?

22 A. This is with respect to the comps?

23 Q. Yes.

24 A. You know, there's actually a little bit
25 of judgment involved. You look at their 10-Ks and

1 they don't -- they will have different subsidiaries
2 that you look at and you read the description of them
3 and when they -- the description makes it look as if
4 all or a majority of their revenue, a large majority
5 of it is regulated, then, you know, you include them
6 in the regulated portion.

7 The companies don't have a, you know, a
8 calculation in their 10-K that says this is the
9 percentage of our revenue that's regulated, you have
10 to make some judgments based on what's in their
11 financial statements.

12 Q. And the judgments that were made, with
13 respect to the revenue from regulated operations,
14 were not made by you, I take it, with respect to this
15 exhibit.

16 A. No. These were -- they were in effect.
17 I mean, these were the -- these were the percentages
18 that Dr. Malcolm put in his spreadsheet, and then I
19 went and, like I said, checked it against current
20 10-Ks and were getting numbers like this in the high
21 90s, above 90 percent.

22 And I would just add that I believe it
23 was Witness Duann who may have made the same point
24 and that is that these comps are more regulated than
25 DP&L. I can't remember what his basis was precisely,

1 but he must have had some basis for that.

2 MS. GRADY: Your Honor, I would move to
3 strike beginning with his statements about Mr. Duann.
4 I think it's way beyond what I asked him.

5 MR. SHARKEY: Your Honor, I think she was
6 exploring the basis for whether these were comparable
7 or not, and he was explaining not only how he reached
8 the conclusion but the supporting information for it.

9 EXAMINER MCKENNEY: Motion to strike is
10 denied.

11 Mr. Malinak, I will warn you again,
12 please try to be responsive directly just to the
13 question that's asked of you.

14 THE WITNESS: Yes, sir.

15 Q. Mr. Malinak, how did you determine the
16 regulated operations of DP&L?

17 A. As a rough approximation, in consultation
18 with Mr. Jackson, I simply assumed that their
19 wholesale operating revenues, going forward, would be
20 the unregulated portion, and whatever is left over
21 would be regulated.

22 And my discussions made it clear that
23 that's a conservative estimate, because there's an
24 unregulated portion of the line in the projections
25 that says "RTO Revenues" or "RTO Operations" or

1 revenues from those, and a portion of those, I
2 understand, also could be characterized as
3 unregulated.

4 So this is a relatively conservative, if
5 you will, percentage going forward.

6 Q. Am I correct that the, the source for
7 your determination as to what represented DP&L
8 regulated revenues would be the information contained
9 on WJC-1B?

10 A. WJC. It's probably -- I usually go off
11 of WJC-2 because that's the -- that's the adjusted
12 as-filed case. So it would have been, I mean,
13 actually, I see we pulled it from WJC-1B but it might
14 be the same as 2B. Let me just check real quick.

15 Yeah, I'm sorry, it's exactly the same as
16 2B, so, yes, 1B or 2B is fine.

17 Q. So let's stay with 1B. If I looked on
18 WJC-1B, and I looked at the operating revenues, you
19 would have included line 4 as the regulated revenues
20 alone, correct?

21 A. That's correct.

22 Q. Tell me, are the service stability rider
23 revenues listed on line three, are those regulated or
24 unregulated revenues, in your opinion?

25 A. For my purposes I'm treating them as

1 regulated revenues in this calculation.

2 Q. And for what purposes did you define them
3 as "regulated revenues"? Why would you define them
4 as "regulated revenues" for purposes of making your
5 determination on Schedule RJM-7R?

6 A. Well, because as projected they're
7 invariant to changes in market prices. They are
8 nonbypassable and fixed and set by regulation.

9 Q. So you included as wholesale revenues, or
10 you included as regulated revenues the service
11 stability rider revenues for 2013 through 2017; is
12 that correct?

13 A. Yes, that's correct.

14 Q. And you included the wholesale revenues
15 shown on line four as regulated -- revenue from
16 regulated operations, correct?

17 A. I know line four was what I considered to
18 be unregulated. So, that one, minus the percentage
19 of wholesale to total revenues, is the regulated
20 portion. So it would be pretty much -- everything
21 else, but wholesale, I considered to be regulated.

22 And as I just finished saying a short
23 time ago, the line five, RTO capacity and other RTO
24 revenues, I understand that a portion of those also
25 could be considered unregulated.

1 So the percentages that I have in 7R may
2 be a bit overstated.

3 Q. Do you consider DP&L to be a regulated
4 utility?

5 A. Yes. DP&L, I consider them to be subject
6 to regulation, yes.

7 Q. Are all of their operations subject to
8 regulation, if you know?

9 A. A portion -- a portion is, and then a
10 portion of their operations, as I understand it, are
11 subject to market forces, you know, a portion of
12 their generation is sold through the SSO which is a
13 regulated rate. Then they sell, also, into the
14 wholesale markets, as well, which is market-based.

15 Q. Now, you make many comparisons throughout
16 your testimony between AEP Ohio and the company; do
17 you not? DP&L.

18 A. I don't know if I would characterize it
19 as, I think you may have said "numerous," but I do
20 compare them, I mean, I really think I just address
21 the comparison in one place in my rebuttal testimony.

22 Q. Can you tell me, Mr. Malinak, if you
23 reviewed the revenues associated, the regulated
24 revenues associated with Ohio Power to determine what
25 percent of their revenues are regulated?

1 A. Ohio Power is not one of the companies on
2 my Exhibit 7R, so I haven't looked at it
3 specifically. It is listed on my 4RB.

4 Q. So you don't know, as we sit here today,
5 what percentage of revenues Ohio Power derives from
6 regulated revenues versus unregulated revenues,
7 correct?

8 A. I have not looked at that specifically,
9 someone on my staff may have, but I do not know as I
10 sit here today.

11 Q. Now, if we go to your testimony on page
12 22 of 29, you indicate, and I believe this is perhaps
13 where you referred to AEP and DP&L, and you talk
14 about AEP and DP&L sharing -- or, "facing some
15 systematic risk." Do you see that?

16 A. Yes. I reference that fact on line 21.

17 Q. Do you have an understanding of the
18 potential penalties AEP may face from failing to meet
19 its FRR obligations?

20 A. I understand that there could be
21 penalties for its failure to meet those obligations,
22 yes.

23 Q. And what are those specific penalties, if
24 you know, for failing to meet the obligations under
25 the PJM RAA?

1 A. I don't actually know specifically what
2 those penalties are.

3 Q. Are you familiar with the FRR commitment
4 insufficiency charge?

5 A. No, not specifically.

6 Q. Are you generally familiar with that?

7 A. Well, yeah, in the sense that I just
8 described earlier that I do understand that there --
9 if that -- I actually don't know if that's one of the
10 penalties, but, if it is one, then I understand
11 generally there can be penalties and that would fall
12 under that category.

13 Q. Thank you.

14 A. But I don't know specifically how much it
15 is or how it's levied or anything like that.

16 Q. Mr. Malinak, do you know whether or not,
17 under the RAA agreement, an FRR entity is restricted
18 in its ability to sell the surplus resources into the
19 RPM auction?

20 A. No, I'm not familiar with the details of
21 what you're describing.

22 Q. Now, on page 22, lines 28 through 30, you
23 indicate that the systematic risks associated with
24 the capacity revenues affect but one of the regulated
25 revenue streams. Do you see that?

1 A. I see where I say those words and -- I
2 certainly see that where I say those words.

3 Q. Can you tell me there what you meant by
4 the "regulated revenue streams" of DP&L?

5 A. Here is what I mean by this passage,
6 Mr. -- Dr. Lesser was criticizing the comparison
7 between AEP and DP&L and the basis of the different
8 ways that they sell capacity. And the point here is
9 that's just one revenue stream for either entity and
10 there are multiple other revenue streams.

11 And so the point is that he ignored all
12 those other things. And when you think about all
13 those other things and include them in the analysis,
14 from a systematic risk standpoint it is appropriate
15 to include AEP Ohio in the mix as a firm that's of
16 comparable systematic risk to DP&L.

17 Q. Are you finished?

18 A. Pardon me?

19 Q. Are you concluded?

20 A. I am.

21 MS. GRADY: I move to strike, your Honor.
22 I specifically asked the witness how do you define
23 "regulated revenue streams." Didn't come close to
24 answering my question.

25 MR. SHARKEY: Could we have the question

1 reread, your Honor?

2 EXAMINER MCKENNEY: Yeah, let's have the
3 question and answer reread.

4 MR. SHARKEY: The "can you explain"
5 question.

6 (Record read.)

7 EXAMINER MCKENNEY: Ms. Grady, it's an
8 open-ended question. Motion to strike is denied.

9 Q. (By Ms. Grady) Mr. Malinak, can you
10 define what you mean by "regulated revenue streams"
11 of DP&L?

12 A. Yes. There are, you know, it's selling
13 under the SSO and so there are, you know, there are
14 charges that are cost-of-service-based charges or
15 regulated charges that go into the SSO and those, as
16 I sit here today, I would have to -- I don't know
17 exactly what all the components that go into those
18 rates, but there's likely a capacity component to
19 those cost-of-service rates, in addition to fuel cost
20 and the other things that normally go into a
21 regulated rate.

22 And their transmission and distribution
23 revenues also are regulated, and so those would be
24 part of their regulated revenue streams as well.

25 Q. Would you include, in the regulated

1 revenue stream of DP&L, the SSR?

2 A. As I think I testified earlier, I did
3 consider the SSR to be a regulated revenue stream,
4 especially for my purposes, because the issue is
5 whether there's variation driven by the market or
6 not, and since the SSR is a fixed amount, it's not
7 varying with the market.

8 Q. Now, when you looked at the -- when
9 you're talking there about the regulated revenue
10 streams of DP&L and AEP, can you define for me what
11 the regulated revenue streams of AEP are?

12 A. I didn't make a specific study of the
13 details of their particular revenue streams, but, you
14 know, my understanding is that they are a, you know,
15 regulated entity. If you look at -- I don't know if
16 I have a Value Line on them or not, but my
17 recollection is that they are regulated and so maybe
18 most of their revenue is regulated.

19 Q. Do you know if AEP -- when you -- let me
20 strike that.

21 Do you include, in the regulated revenue
22 stream of AEP, the RSR that was approved for AEP in
23 AEP's last ESP proceeding?

24 A. You know, my understanding would be,
25 again, this is just my best recollection, that the

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1 RSR is a rate stability rider. If, in fact, it's a
2 fixed charge of the SSR type, I would include that as
3 a regulated revenue for my purposes.

4 Q. Do you know if it's a fixed charge,
5 Mr. Malinak?

6 A. I can look it up in the decision or try
7 to look it up in the decision, but that's my --
8 that's my recollection.

9 Q. And do you know anything about the
10 capacity payments that AEP is receiving in terms of
11 what the Commission approved in 11-346-EL-SSO, AEP's
12 most recent electric security plan proceeding?

13 A. I had not made a specific study of all of
14 the components of AEP Ohio's revenue stream. I just
15 have a general understanding from my reading of the
16 AEP decision and from other sources of information as
17 well.

18 Q. Do you know, Mr. Malinak, how the
19 capacity revenues are linked to the RSR in the AEP
20 ESP decision?

21 A. I have no specific knowledge without
22 reading back through the decision to refresh my
23 recollection.

24 (Confidential portion excerpted.)
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(Open record.)

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Q. (By Ms. Grady) Are there other ways to enhance that, the company's ability to continue offering safe and reliable transmission and distribution service beyond the proposed SSR?

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A. There may be other actions that could be taken; I've not really given much thought or analysis to those. I've just analyzed the proposed SSR and also the scenarios that assume it's removed; switching tracker, the same thing.

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Q. Would you agree with me that the filing of a distribution and/or a transmission rate case would be a way to enhance DP&L's ability to continue offering safe and reliable transmission and distribution service?

23

24

25

A. It could be.

Q. And is it your understanding that DP&L has the ability to seek or file a distribution and

1 transmission -- distribution and/or transmission rate
2 case in Ohio?

3 A. I actually don't know, legally, exactly
4 what their options are.

5 Q. Do you know if there is any impediment,
6 in the upcoming years, to DP&L filing an application
7 to increase its rates with respect to transmission
8 and distribution?

9 A. I'm not aware one way or the other.

10 Q. Now, on page 18, lines 2 through 3, you
11 indicate that the level of the SSR is based on the
12 "projections of the future financial results of DP&L,
13 as a whole, not with regard to historical costs." Do
14 you see that?

15 A. I do.

16 Q. So, for purposes of your statement, would
17 you agree with me that the five years of projected
18 data is being used to set rates here in Ohio, if
19 DP&L's proposal is accepted?

20 A. I would agree that it's an input to
21 the -- it would be an input to the decision, as I
22 understand it; the five-year projections would be an
23 input.

24 Q. Would you agree, Mr. Malinak, that the
25 SSR rider amounts to a guarantee of SSR revenues?

1 A. I would agree that it creates a fixed
2 charge, you know, it depends on what level of
3 guarantee you're talking about, but it, you know, it
4 might vary depending on, you know, whether customers
5 leave or not completely. But, you know, it's
6 designed to be a fixed charge that doesn't vary.

7 Q. Do you know, Mr. Malinak, if, under Ohio
8 regulations, safe and reliable service is a goal or a
9 mandate?

10 A. I would say that, you know, my general
11 understanding is it's at least a goal. I don't know
12 whether it -- I don't know whether it actually rises
13 to a level of legal mandate or not.

14 Q. Is that important to you, whether it
15 rises to a legal mandate, for purposes of the
16 recommendations you make in this case?

17 A. I would say it's not critical. It seems
18 like it's an important goal that all companies, like
19 DP&L, are under a regulatory regime to try to reach,
20 so whether or not it's a mandate is not critical.

21 But if it were a mandate, then it would
22 seem to argue for, you know, even more strongly, if
23 you will, in some ways for an SSR. But it's such an
24 important goal that it may be very close to a mandate
25 of some kind. So I'm not sure there's much of a

1 distinction.

2 Q. You don't see much of a distinction?

3 A. I mean, it's a very important goal.
4 Maybe the most important goal in some ways for some
5 decision-makers.

6 Q. Let's talk for a moment about the
7 specific SSR testimony that begins on page 16 of 29.
8 The question and answer begins: "Is the SSR a
9 mechanism to recover 'stranded costs'?" And you have
10 stranded costs in parentheses -- or, in quotation
11 marks. Do you see that?

12 A. I do.

13 Q. And you state that "Stranded costs are
14 measured," and this is on lines 12 through 13,
15 they're measured "as the difference between the book
16 value of the assets and the market value of the
17 generation assets." Do you see that?

18 A. I do say that.

19 Q. And is that how you define "stranded
20 costs"?

21 A. I define "stranded costs" as the, in an
22 economic sense, as the -- if you take a company that
23 has assets that were under cost-of-service regulation
24 and then those assets become subject to market forces
25 and those particular assets' market value declines,

1 as a result, to a level below what they would have
2 recovered under the regulated regime, then you have
3 an argument for a measurement of something called --
4 that many people call "stranded costs."

5 And since book value of assets can be
6 part of ratemaking, there -- at times, stranded costs
7 can be measured in this fashion, but the concept is,
8 you know, the reduced market value relative to
9 historical costs as part of a regulated ratemaking
10 regime.

11 Q. And you indicate that yours is an
12 economic sense. You're defining it in terms of an
13 economic sense?

14 A. Yeah, I mean, my approach is, you know,
15 as an economic and financial analyst, that's right.

16 Q. Now, if we go to your Appendix A of your
17 second revised direct testimony and we look at your
18 vitae, can you point to any experience there that
19 pertains to analyzing stranded costs recovery?

20 A. You know, this is going to shock you, I
21 think, but I don't have a copy of my résumé in my
22 backup binder so --

23 Q. If your counsel could provide that to
24 you, that would be great.

25 MR. SHARKEY: I actually don't have it

1 either. It wasn't in the binder I got. Could we go
2 off the record briefly?

3 EXAMINER MCKENNEY: Let's go off the
4 record.

5 (Discussion off the record.)

6 EXAMINER MCKENNEY: All right. Let's go
7 back on the record.

8 A. No, there's no specific thing listed on
9 this résumé, but the way I do my résumé is I have
10 selected experience, under the various different
11 things I've worked on over my career, and so, as I
12 think I testified to yesterday, I believe that I did
13 such an analysis back in the early-2000s at the same
14 time that Mr. Luciani, whose testimony is attached to
15 Mr. Hess's testimony, was analyzing stranded costs.

16 Q. So were you involved in the stranded
17 costs analysis that was presented by Mr. Luciani?

18 A. Not that I recall.

19 Q. You did an analysis at the same,
20 coincidentally, at the same time as Mr. Luciani; is
21 that correct?

22 A. Yeah, back at that time, the energy group
23 at Putnam, Hayes and Bartlett, my old firm, was
24 involved in a number of stranded costs. Hold on a
25 second.

1 Okay. That was post Putnam Hayes, okay.
2 My error, okay.

3 Back in the mid-'90s, it would have been
4 in the mid-'90s, not in the late-'90s, but I remember
5 talking about stranded costs extensively when I was
6 at Putnam Hayes, and I can't remember the specific
7 project, but it was something that we were analyzing,
8 doing a lot of analysis on when I was there.

9 Q. Was that analysis done for purposes of
10 any Ohio utility, if you can recall?

11 A. I can't recall.

12 Q. Have you ever testified before on
13 stranded costs?

14 A. I have not.

15 Q. Now, in your testimony you cite to, and
16 I'm back in your, I'm sorry to jump around, but I'm
17 back in your rebuttal and supplemental testimony and
18 I want to turn to a statute that you cite on page 17
19 of 29. You cite to the statute 4928.39. Do you see
20 that reference?

21 A. Yeah. I actually quote that from a
22 witness's testimony, yes.

23 Q. Have you read that statute or did you
24 read it first in Mr. Rose's testimony?

25 A. I just -- oh, I just read this portion in

1 Mr. Rose's testimony that related to this.

2 Q. And what did you do to obtain an
3 understanding of this statute?

4 A. Really nothing beyond reading the
5 language that is cited right here and applying my
6 recollection of the stranded costs analyses and work
7 that I was part of in the past.

8 Q. Are you relying on an understanding of
9 the statute that was obtained by you from counsel?

10 A. No, not really. I really am just relying
11 on this language that is cited here, and it's pretty
12 clear language, but I don't go beyond that. Plus my
13 own knowledge and experience as a finance evaluation
14 person.

15 Q. Are you presenting your analysis or
16 your -- let me strike that.

17 Were you involved at all, Mr. Malinak,
18 with respect to the drafting of this statute?

19 A. I was not.

20 Q. Do you have any familiarity with what has
21 been -- what is called SB 3?

22 A. I've not reviewed SB 3. I've seen it
23 discussed in multiple testimonies.

24 Q. Do you have any familiarity with the
25 legislative efforts surrounding SB 3?

1 A. I do not, beyond some of the descriptions
2 in testimony which, frankly, I haven't studied
3 closely.

4 Q. Do you know the relationship of SB 3 to
5 the provision that you cite in your testimony,
6 4928.39? Do you know how those are connected?

7 A. I do not.

8 Q. Were you present for the
9 cross-examination of Mr. Rose?

10 A. I was not.

11 Q. Did you listen in to the deposition of
12 Mr. Rose?

13 A. I did not.

14 Q. Did you read the deposition of Mr. Rose?

15 A. Not personally, but I believe one of my
16 staff people reviewed it.

17 Q. And were you present for the testimony of
18 Mr. Hess?

19 A. I was not.

20 Q. Did you listen in at the deposition of
21 Mr. Hess?

22 A. No, I did not.

23 Q. And did you read Mr. Hess's deposition?

24 A. Again, one of my staff people read it. I
25 believe that I may have read portions of it, but, as

1 I sit here today, I can't recall.

2 Q. Do you understand the term "market
3 development period"?

4 A. I'm sorry, someone was coughing. You
5 said "market development"?

6 Q. Yes. Do you understand what the term
7 "market development period" refers to?

8 A. In what context?

9 Q. In the context of transition costs.

10 A. As a general matter or in connection with
11 Ohio laws in some form?

12 Q. In connection with Ohio law.

13 A. Those sound like terms of art, market
14 development period, transition costs. I have an
15 understanding, you know, based generally on
16 transitions to market that are going on around the
17 country and have gone on around the country, but,
18 other than that, I have no specific knowledge of how
19 those terms are specifically defined under Ohio law.

20 Q. Do you know how long the market
21 development period was for Dayton Power & Light in
22 Ohio?

23 A. I don't have a specific understanding of
24 how long that may have been.

25 Q. Do you know if market development periods

1 can be extended in Ohio?

2 A. Again, I don't know how that -- what that
3 term means legally in Ohio, so I don't know under
4 what circumstances it might be extended.

5 Q. Mr. Malinak, have you read any PUCO
6 decisions on stranded costs?

7 A. I have not.

8 Q. Are you familiar with the company's 1999
9 electric transition plan filing?

10 A. I wouldn't say I'm familiar with it. It
11 may be, and I don't know, but it may be that
12 Mr. Luciani's analysis, which was attached to
13 Mr. Hess's testimony, may have been part of that.

14 I have reviewed Mr. Luciani's analysis of
15 stranded costs that was attached to Mr. Hess's
16 testimony, and so I'm -- I wouldn't say I'm familiar
17 with it, it's been a while since I looked at it, but
18 I gained a general understanding of what he was doing
19 there.

20 Q. Have you looked at any other electric
21 distribution utility's electric transition plans
22 where stranded costs recovery was sought in Ohio?

23 A. I have not.

24 Q. And you have not done a stranded costs
25 calculation for any purposes with respect to any

1 electric distribution utility in Ohio.

2 A. As I said before, you know, not that I
3 recall, although it's lost -- could be lost in time,
4 you know, prior to -- talking mid-'90s, thereabouts.

5 Q. Do you understand, Mr. Malinak, that
6 stranded costs can be something different than the
7 difference between book value of assets and the
8 market value of assets?

9 A. Yes, for different purposes, stranded
10 costs can be measured in different ways. As I
11 described earlier, there's an economic concept of
12 stranded costs and, you know, depending upon the
13 question that's being asked and the circumstances,
14 you might apply a different method, there also may be
15 a different set of legal standards that are being
16 adhered to, but the concept, the general concept is
17 the same across the board in my understanding.

18 Q. Now, when you cite to 4928.39 on page 17
19 of 29, do you know if there are any other Ohio
20 statutes that pertain to stranded costs?

21 A. Not as I sit here today. I was reacting
22 to this language right here.

23 Q. Do you know when this law was passed?

24 A. 4928.39? No, I don't know when it was
25 passed.

1 Q. Do you know the context in which the law
2 was passed?

3 A. Meaning the historical context?

4 Q. Yes.

5 A. Not specifically. As I already testified
6 to, I'm generally aware that the issue of stranded
7 costs, you know, has been around for a while.

8 Q. Do you understand when retail competition
9 or customer choice was introduced as a concept in
10 Ohio pertaining to electric service?

11 A. I mean, just based generally on the date
12 of Mr. Luciani's testimony it would, and some of the
13 other materials that I've seen, I have a general
14 recollection that it was, you know, late-'90s,
15 early-2000s.

16 Q. And do you generally understand why
17 utilities would have sought stranded costs back at
18 the beginning of retail competition?

19 A. Yeah. I have a general understanding
20 that there was a regulatory compact in place when
21 they made a lot of decisions to make investments.
22 And when that regulatory compact changes, it causes
23 an economic loss; utilities would have an incentive
24 to seek recovery of that loss.

25 Q. And is it your understanding, with

1 respect to Ohio, that that regulatory concept --
2 compact would have applied to generation service as
3 opposed to transmission and distribution service?

4 A. I don't know the specifics of the Ohio
5 law, but, I mean, my economic concept of stranded
6 costs is not generation specific, it's really just
7 any -- if you had any asset that was part of a
8 regulatory rate regime and then was transitioned to a
9 market system and lost value as a result, you could
10 argue, at least economically, for some form of
11 stranded costs.

12 Q. And do you understand 4928.39 to refer to
13 generation stranded costs?

14 A. I mean, I'm just, again, looking just at
15 this language and it says, part (B) says: "The costs
16 are legitimate, net, verifiable, and directly
17 assignable or allocable to retail electric generation
18 service...."

19 I mean, assuming that there's no other
20 law that modifies this or statute that modifies it,
21 based on the language in my report, it would appear
22 to apply to electric generation services only. At
23 least this particular language; this statute.

24 Q. Is it your understanding that electric
25 retail generation service was declared competitive in

1 Ohio?

2 A. Yeah, that's my -- my general
3 understanding is that, yes, there's been competition
4 for years.

5 Q. Is it your understanding that generation
6 costs are included in DP&L's electric security plan?

7 THE WITNESS: Could you read that back
8 real quickly? I'm sorry.

9 (Record read.)

10 Q. Proposed currently before the Commission.

11 A. It's my understanding that the ESP has --
12 there's a proposed blending schedule between the SSO
13 and market rates that is compensation for generation
14 and then, of course, there are the nonbypassable
15 charges that are being proposed for the whole company
16 that we talked about before that relate, really, to
17 the entire company.

18 But part of the entire company is
19 generation along with transmission and distribution
20 and any other operations that it's providing. So
21 there's a sense in which the nonbypassable charges
22 are related to generation, among other things, and
23 it's really related to the whole company.

24 Q. Now, are you familiar with Mr. Jackson's
25 Exhibit CLJ-2?

1 A. I've certainly reviewed it before, but
2 it's been a while since I looked at that.

3 Q. Can you take a look at that again for me,
4 please?

5 A. You know, I think I just have
6 Mr. Chambers' exhibit which is WJC-1.

7 Q. If your counsel could provide that to
8 you, I would appreciate it.

9 EXAMINER MCKENNEY: Is CLJ-2
10 confidential?

11 MR. SHARKEY: CLJ-2 is confidential, your
12 Honor, so could we move to the confidential portion
13 of the transcript, I suggest.

14 EXAMINER MCKENNEY: Let's move to the
15 confidential portion of the transcript at this time.

16 (Confidential portion excerpted.)
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(Open record.)

EXAMINER MCKENNEY: Let's go back on the
record.

Ms. Bojko, did you have cross-examination
for this witness?

MS. BOJKO: I did not, your Honor. Thank
you.

EXAMINER MCKENNEY: Mr. Satterwhite?

MR. SATTERWHITE: No, your Honor. Thank
you.

EXAMINER MCKENNEY: Mr. Williams?

MR. WILLIAMS: No, your Honor.

EXAMINER MCKENNEY: Mr. Darr?

MR. DARR: Thank you, your Honor.

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CROSS-EXAMINATION

By Mr. Darr:

Q. I'd like to follow up on a couple questions from where Ms. Grady just left off on transition revenue. You indicated earlier that you did not participate in the Ohio cases involving transition revenues or you don't recall participating in those cases; is that correct?

A. Yes, that's correct. I don't recall specifically.

Q. So in terms of your preparation for today's hearing, with regard to the definitions of stranded costs, I take it you relied on Mr. Hess's testimony and Mr. Rose's testimony; is that correct?

A. I relied, in part, on their testimony and then, of course, on my own understanding of the concept, as I described earlier, based on my own earlier work on the issue.

Q. And the "earlier work" you're referring to is the work that you did in the mid-'90s.

A. Yeah, the mid-'90s and some -- might lead back to the early-'90s, but the mid-'90s is what sticks in my mind.

Q. Now, you, in your testimony, define stranded costs at page 16 as "the difference between

1 the book value of assets and the market value of the
2 generation assets." You had the opportunity, though,
3 to read Mr. Luciani's testimony that was filed on
4 behalf of DP&L, correct?

5 A. I did review that weeks ago, yes.

6 Q. And, in fact, Mr. Luciani, on behalf of
7 DP&L, defined at least four different alternative
8 methods of calculating the stranded-cost portion
9 related to generation; did he not?

10 A. My recollection is that he had more than
11 one method.

12 Q. And, if I remember correctly, and it
13 would help -- do you have Mr. Luciani's testimony in
14 front of you? If you don't, that's okay.

15 A. I do not have Mr. Hess's testimony.

16 MR. DARR: May I approach?

17 EXAMINER MCKENNEY: You may.

18 Q. I'm directing your attention to
19 Mr. Hess's testimony, Attachment K, which I believe
20 is the Luciani testimony. Is that the testimony that
21 you reviewed?

22 A. It definitely looks like it.

23 Q. And I've opened it up, I believe, to
24 pages 11 and 12 of Exhibit K.

25 A. Yes.

1 Q. And there are listed four alternative
2 manners or means by which to calculate stranded
3 costs, correct?

4 A. Not on those two pages. He has several
5 different DCF methods, it looks like three, unless
6 I'm --

7 Q. In fact, preceding that is a fourth
8 method that's based on a comparable sales method.

9 A. Okay. I don't immediately see it, but
10 I'll accept your representation.

11 Q. And would you agree with me that the
12 second method that Mr. Luciani presented to the
13 Commission, on behalf of DP&L, was a calculation
14 based on the present value of the required revenue
15 requirement less the present value of the market
16 revenues?

17 A. That's the formula that's presented here.
18 I would need to refresh my memory as to what exactly
19 that is, but those are the words there, yes.

20 EXAMINER McKENNEY: Mr. Darr, can we go
21 off the record real quick?

22 (Discussion off the record.)

23 EXAMINER McKENNEY: Let's go back on the
24 record. We're now on the public portion of the
25 transcript.

1 (Open record.)

2 Q. (By Mr. Darr) Do you have any personal
3 familiarity with the three present value methods that
4 are used by Mr. Luciani in his testimony on behalf of
5 DP&L?

6 A. I've done many calculations that are
7 similar to these calculations, so they make sense to
8 me in terms of the methodologies. With respect to
9 these specific calculations, you know, like I said,
10 I've read his testimony, but I have not sort of
11 delved into the details of the specific assumptions
12 that he was using. I --

13 Q. Go ahead.

14 A. I do note that you're talking about three
15 methods. Mr. Luciani notes that DCF method two
16 actually yields the same formula as in DCF method
17 one, so they're effectively the same thing. Again, I
18 haven't studied the details of that, but that's what
19 his testimony says, so maybe there's fewer than
20 three.

21 Q. Actually, you anticipated my next
22 question. Have you, in fact -- can you confirm or
23 deny that method one and method two yield essentially
24 the same result?

25 A. You know, I mean, I would -- I'd have to

1 go through and do a proof to make sure that
2 Mr. Luciani got it right, in order to know that for
3 sure. But I know him very well, he's a former
4 partner, and he, most likely, is right.

5 Q. Okay. You would say that he is an expert
6 in the field of calculation of stranded costs?

7 A. Among other things, yes.

8 Q. And do you have a personal understanding
9 of the second methodology to the extent that you can
10 explain to us what the elements of that methodology
11 are? I'm speaking now of the revenue requirement
12 approach.

13 A. I mean, I can talk to you generally about
14 what it -- what the purpose of the formula is. It's
15 very consistent with what I was describing earlier as
16 to the economic definition of stranded costs.

17 He's taking the present value of the
18 revenue requirements, which is the recovery of net
19 invested capital in future operating costs, and he's
20 looking at the present value of that, and then he's
21 taken the -- he's subtracting, from that, the present
22 value of the revenues that would be earned in a
23 market setting.

24 And so, what you have is the difference
25 between the present value of the revenue under a cost

1 of service regime, and the present value under a
2 market regime, and that's highly consistent with what
3 I described the concept of stranded costs to be.

4 Q. And if the revenue requirement, at
5 present value, is less than the -- or, excuse me,
6 greater than the market revenues at present value,
7 the difference would be the stranded costs, correct?

8 A. If the present value of the revenue
9 requirement under the cost of service regime versus
10 under the market regime, if that's a positive
11 difference, then it suggests that, yes, the market
12 value of the revenue is less than the market value of
13 the regime and you would have a positive stranded
14 costs number, yes.

15 Q. Now, in calculating the revenue
16 requirement, would you expect that that would be done
17 on a standard-revenue-requirement basis, that is a --
18 by looking at the O&M, a return on investment, and
19 that return on investment would be based on both the
20 embedded cost of capital and a calculation of the
21 return on equity?

22 A. Now you're getting into some more of the
23 details that I would want to make sure that, you
24 know, I've got all of the moving parts right, as to
25 what the right cost of capital would be, to value the

1 cash flows.

2 Q. My question was a little more general
3 than that, Mr. Malinak. Would you agree that the,
4 what we're talking about here would be a standard or
5 what we would call a "standard revenue requirement
6 analysis" for calculating that part of the formula
7 for stranded costs?

8 A. By that part you mean the first component
9 of the formula?

10 Q. Yes, the revenue requirement component.

11 A. Based on this description here, which is
12 just one piece of his testimony and, again, you know,
13 there's a lot to it, but conceptually, you know, what
14 he should have been doing, and likely was doing, was
15 projecting forward revenues using a
16 revenue-requirements model that would involve the
17 recovery of the actual costs, both capital and O&M,
18 plus the embedded costs of capital or approved costs
19 of capital, perhaps, of the company that would set
20 the rates over time. And then those would then need
21 to be discounted back to present value at some
22 appropriate cost of capital and you get the present
23 value of those cash flows.

24 Q. Fine. What I understand from your answer
25 is that you're generally agreeing with me that this

1 would be a standard revenue requirement kind of
2 calculation, correct?

3 A. I'm just having a little bit of trouble
4 with the word "standard," but based on the way rates
5 are set and projected forward by companies, it looks
6 as if that's what this term is referring to. It's
7 the normal rate structure that would be developed
8 under a cost-of-service-type regime.

9 Q. And embedded in that would be a
10 return-on-equity component, correct?

11 A. Yes. Typically, there would be an
12 approved rate of return, one component of which would
13 be the return on equity and then there's the return
14 on debt as well, so it would be a weighted-average
15 cost of capital that would be used to project forward
16 what those revenue requirements are in those rates.

17 Q. Did I understand you correctly, earlier
18 today, when you said that implicit in the calculation
19 of the SSR and the rates that are being proposed in
20 the ESP is an ROE in this filing, or a return on
21 equity?

22 A. The financial projections on which I've
23 relied, which include a proposed level for the SSR,
24 do result in a particular ROE for the whole company,
25 along with all the other assumptions that go into

1 those projections.

2 Q. I'd like to change directions here for a
3 second. Earlier today, much earlier today, I believe
4 we established that you are not making any or giving
5 us any opinions with regard to whether or not legal
6 confiscation has taken place here -- would take place
7 if the company did not receive the SSR or the
8 switching tracker, correct?

9 A. Yeah, that's correct. I don't address
10 the legal side of it. I make the note that any ROE
11 that is below their cost of capital is an economic
12 loss; that's what I've opined.

13 Q. And I believe, in your prior testimony,
14 we established that you would agree that only a
15 lawful MRO could be compared to the proposed ESP
16 offered by the company in this case, correct?

17 A. Yes, I think I did -- I do agree that,
18 you know, if something is, if a particular charge or
19 a type of charge is unlawful, and there's no other
20 way to recover a nonbypassable charge, say, under an
21 MRO, then --

22 Q. And I believe you're not offering an
23 opinion as to what constitutes the taking under
24 Article I, Section 19 of the Ohio Constitution,
25 correct?

1 A. I'm offering no legal opinion.

2 Q. Now, you provide an extended discussion
3 as to why DP&L would not file the MRO that did not
4 include either an SSR or an ST, and I think we've
5 been around that quite a bit here earlier today.

6 MR. DARR: And I think we need to go on
7 the confidential at this point, your Honor.

8 EXAMINER MCKENNEY: Let's go on the
9 confidential portion of the transcript at this time.

10 (Confidential portion excerpted.)

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1 (Open record.)

2 EXAMINER MCKENNEY: Second of all, please
3 allow the witness to finish, even if you're going to
4 make a motion, before you make a motion to strike.

5 MR. YURICK: I was just going to ask the
6 Court to instruct the witness to answer the question
7 and no more, frankly.

8 EXAMINER MCKENNEY: Yeah, if you would
9 allow the witness to finish his answer before making
10 a motion to strike, and then we'll direct the witness
11 to answer the question directly, we would appreciate
12 it.

13 So at this time we will not -- we will
14 deny any motion to strike his answer, but can we have
15 the -- first, can we have the question and answer
16 read back.

17 (Record read.)

18 EXAMINER MCKENNEY: Thank you.

19 Mr. Yurick, is there a motion to strike?

20 MR. SHARKEY: Your Honor, I believe he
21 wasn't finished with his answer. I believe he was
22 about to tie up the idea that he was articulating, so
23 it was leading to a final thought, and I ask he be
24 permitted to finish his answer before Mr. Yurick
25 interrupted him, before there is a motion to strike.

1 EXAMINER MCKENNEY: Certainly.

2 Mr. Malinak, you can finish your answer.

3 A. And, therefore, the premise of your
4 question, the way you phrased it, you were only --
5 you were saying that it was just the financial
6 projections that led to that level of SSR, and that's
7 not something that I think is -- agrees with my
8 recollection.

9 MR. YURICK: So the motion to strike
10 would be everything after the word "charge," and when
11 he took up his answer again after the pause, I have
12 no problem with the rest of that answer, just between
13 the word "charge" and when he began to, I guess
14 clarify after what Mr. Sharkey -- after Mr. Sharkey
15 asked that he clarify.

16 EXAMINER MCKENNEY: At this time, your
17 motion to strike is going to be denied, but I am
18 going to inform Mr. Malinak, you do need to try to
19 listen to exactly what -- the question that was
20 asked, I understand that was a long question, but you
21 need to try to understand the question and respond
22 just to that question.

23 THE WITNESS: Yes, sir.

24 EXAMINER MCKENNEY: Thank you.

25 Q. (By Mr. Yurick) Would you agree with me

1 that there were three factors that led to the company
2 having a less than adequate ROE, those factors being
3 a drop in energy prices, the effect of competition,
4 and low capacity prices?

5 A. No, I would not agree those are the only
6 things that are leading to the financial results of
7 the company being negative. And I can explain that
8 further if you want me to.

9 Q. You responded to a question asked by
10 Mr. Lang earlier, you said that the SSR, I believe
11 you said that the SSR related to generation,
12 distribution, and transmission; is that correct?

13 A. I don't believe that is correct, and I
14 can explain that, too, if you want me to.

15 Q. You don't believe that's correct.

16 A. I don't believe that's what I said.

17 Q. Would you agree with me that the SSR does
18 not entitle the customer to any additional energy,
19 depending on what the level of SSR that customer paid
20 would be?

21 A. My understanding of the SSR is that it's
22 a nonbypassable fixed charge that doesn't vary with
23 the level of kWh usage.

24 Q. So you would agree with me, then, that
25 the amount of energy that a particular customer is

1 entitled to is not dependent on the level of the SSR
2 charge that customer pays, correct?

3 A. That's right. The level of energy would
4 be driven by their own demand for energy.

5 Q. You would also agree with me that the
6 level of the SSR charge that a customer would pay is
7 not dependent on the amount of the -- or, does not
8 entitle a customer to any additional capacity; isn't
9 that correct?

10 A. You know, I don't know the details of how
11 the charge would be implemented, but, you know,
12 whether it would be attached to some level of
13 capacity. I just don't know the details of the rate
14 structure of how it would be implemented. But, in
15 general, it's a fixed charge, so it's likely -- I
16 just don't know exactly how it would be related on
17 the capacity side.

18 Q. So, based on your expertise and your
19 knowledge, you don't know whether or not the amount
20 of an SSR charge that a customer pays entitles that
21 customer to any more or less capacity?

22 A. Yeah, I don't know the details of
23 whether -- I just don't recall the details of whether
24 it's a per-customer charge, it's being proposed as a
25 per-customer charge, or if it's going to be set in

1 some other way related to capacity. I just don't
2 know.

3 Q. Would you agree with me that the SSR
4 charge, in and of itself, does not require the
5 company to invest anything in distribution?

6 A. I'm not aware of any requirement that is
7 attached to the approval of the SSR.

8 Q. And would you agree with me that the SSR
9 charge, in and of itself, does not require the
10 company to stay out for any time period in terms of
11 asking for additional distribution charges?

12 A. Again, I'm not aware of any particular
13 requirement like that that's attached to the SSR.

14 MR. YURICK: Your Honors, at this point,
15 I don't have any further questions for this witness,
16 but I would like to join in Ms. Grady's motion to
17 strike this witness's testimony, but I'd also like to
18 move to strike the entire rebuttal testimony as being
19 not probative of anything and I'd like to just state
20 my motion for the record.

21 This witness's testimony should go, as
22 should this entire proceeding, as to whether or not a
23 particular charge is just or reasonable and, frankly,
24 this witness's testimony, particularly rebuttal,
25 doesn't say at all what the SSR charge is for, what a

1 customer -- in terms of what a customer's getting for
2 a level of SSR charge that they're paying.

3 So, frankly, this is not probative of
4 anything. It is tautologically true that if the
5 company makes additional money, that their financial
6 position will be better, but that doesn't answer the
7 ultimate question that's posed here which is: Is
8 this a just and reasonable charge.

9 And this witness, throughout his
10 testimony, has offered no evidence or no testimony
11 that's helpful at all to make a determination as to
12 whether these charges are just and reasonable.

13 EXAMINER PRICE: Mr. Yurick, doesn't
14 "just and reasonable" apply Bluefield, and isn't
15 that, then, a legal question that the parties should
16 be arguing on brief and not asking the witness to
17 offer a rationale on?

18 MR. YURICK: Well, I think we will be
19 arguing it on brief. But I think the witness is
20 there, ultimately, to offer, if anything, based on
21 his expertise, his training, and his experience,
22 testimony that's going to help your Honors and,
23 ultimately, the Commission make a determination as to
24 whether these charges are just and reasonable.

25 And I don't think anything that he's said

1 is at all helpful in that regard because he hasn't
2 identified anything that customers are getting for
3 these charges, and any sort of inquiry into what the
4 customers are receiving in return for this
5 \$137.5 million per year charge has been met with "It
6 will make the company's financial health better,"
7 which I assume it's true since it is a positive
8 revenue flow for the company.

9 But it is not fair, and I certainly will
10 be arguing this on brief, to expect customers to sort
11 of blindly pay this charge just because it will make
12 the company's financial health better.

13 They have to be able to get something for
14 the charge and throughout this man's testimony he has
15 offered nothing in the way of what a customer is
16 receiving for this charge. Customers will pay, but
17 what are they getting for it? He's told us what the
18 company's going to get for it in terms of their
19 financial stability and in terms of a revenue stream,
20 but he hasn't told us what the customers are getting
21 for this charge; they're receiving it. In fact, he's
22 been incredibly vague to the point of being
23 tautological as to what customers are receiving for
24 this charge.

25 And I certainly will be arguing that

1 ultimate point on brief, but I want to make the point
2 that as far as there have been other witnesses that
3 my esteemed counsel have offered that are helpful in
4 making a determination on that, I think Mr. Jackson's
5 testimony and Ms. Seger-Lawson's testimony, those
6 witnesses, as well as others that I haven't
7 mentioned, have been helpful in making a
8 determination on the ultimate issue.

9 EXAMINER PRICE: But he's a rebuttal
10 witness. He's not trying to make the company's case
11 in chief. He's trying to rebut what the other
12 witnesses said.

13 You're trying to say "Well, he's not
14 giving us testimony that we should have heard on
15 direct." He would just fall into the trap that the
16 other intervenors said, that he would be giving
17 testimony he could have given when he first did
18 direct.

19 This is rebuttal. He's supposed to be
20 explaining, counteracting, or rebutting previous
21 testimony, not -- he's not a summary witness giving
22 "This is why we should get this overall." Is he?

23 MR. YURICK: Well, I think what his
24 testimony is, that he's giving supplemental testimony
25 and rebuttal testimony and he's being called as an

1 expert. So I still, I really don't think anything in
2 his rebuttal testimony is helpful at all to an
3 ultimate issue in this case, your Honor.

4 I just, I don't think that his rebuttal
5 testimony is, in any way, saying what customers get
6 for this charge, which is what he's being offered to
7 say. It's just not probative. It's not relevant
8 because it's not probative of anything.

9 Yes, the \$137.5 million will help the
10 company. True. You know, I understand that that is
11 likely to be the case as it is a positive revenue
12 stream. But is the charge fair and reasonable? He's
13 offered nothing to show that it is fair and
14 reasonable to a customer paying the charge. It may
15 be fair and reasonable to the company because they
16 need a certain level of revenue, but it's not fair to
17 a customer. So I don't think it has any bearing on
18 any issue in this case.

19 MR. SHARKEY: Do your Honors want
20 argument?

21 EXAMINER MCKENNEY: Please.

22 EXAMINER PRICE: I'd like to hear what
23 you have to say.

24 MR. SHARKEY: I'll be brief.

25 As an initial matter, your Honors, the

1 point that you made earlier, your Honor Price, that
2 he's a rebuttal witness and his testimony is proper
3 in terms of responding to various points or
4 various --

5 EXAMINER PRICE: I wasn't saying it's
6 proper. I was saying he's either rebutting them or
7 he's not. He's not a summary witness. He's not
8 supposed to tie this up into a nice little package
9 for us.

10 MR. SHARKEY: I misstated it. You're not
11 saying that; I'm saying that. And I believe that his
12 testimony is appropriate rebuttal testimony.

13 Also, your Honor, to the broader point, I
14 believe that Mr. Yurick's objection is not so much
15 with DP&L's case, but the statute. The statute,
16 under which DP&L has applied, permits it to recover a
17 term, condition, or charge relating to various items,
18 among them default service and such, that it does
19 relate to as would have the effect of stabilizing and
20 providing certainty regarding retail electric
21 service. The statute permits DP&L to seek such a
22 charge.

23 Mr. Yurick essentially conceded, in his
24 argument, that the charge would have that effect, and
25 I, thus, believe that the charge under Mr. Yurick's

1 own argument, namely that it would have the effect of
2 stabilizing the company, demonstrates that it's
3 lawful.

4 So the suggestion that Mr. Malinak's
5 testimony should be rejected is incorrect.

6 MR. YURICK: If I may be provided with an
7 opportunity make an extremely brief response.

8 The statute says stabilize service, not
9 stabilize the company. There's a big difference
10 between stabilizing service and stabilizing the
11 company. I understand that it might be helpful to
12 the company and that's what Mr. Malinak's testimony
13 basically says, but he hasn't said how the customers
14 are going to get an increase in stability of any
15 components --

16 EXAMINER PRICE: That's for the company
17 to demonstrate on brief.

18 MR. YURICK: Correct.

19 EXAMINER PRICE: Again, that's a legal
20 question, not evidentiary question. That's for the
21 company to demonstrate why his testimony results in
22 the provision of --

23 MR. YURICK: It is, but I think that
24 this, particularly this rebuttal testimony fails so
25 horribly in showing any kind of, helping the court in

1 any kind of determination on that ultimate question
2 and it ought to be stricken. That's my motion.

3 EXAMINER PRICE: I'm not sure --

4 MR. YURICK: I wouldn't make it --

5 EXAMINER PRICE: -- any of the parties to
6 this case want to really empower the examiners that
7 much, but maybe.

8 EXAMINER MCKENNEY: Mr. Yurick, your
9 request to strike the witness's testimony is denied.

10 Let's go off the record.

11 (Discussion off the record.)

12 EXAMINER MCKENNEY: Let's go back on the
13 record.

14 Mr. McNamee.

15 - - -

16 CROSS-EXAMINATION

17 By Mr. McNamee:

18 Q. Good afternoon, Mr. Malinak.

19 A. Good afternoon.

20 Q. You're aware, of course, that Dayton
21 Power & Light owns generating capacity, aren't you?

22 A. Yes, that's my understanding.

23 Q. Good. You're also aware, Mr. Malinak,
24 that it's been the practice of Dayton Power & Light
25 to offer that generating capacity into the base

1 reserve auction; isn't that right?

2 A. I'm not familiar with that particular
3 term, "base reserve auction." I think they offer
4 their capacity to PJM and they sell it to PJM; they
5 sell all their energy and generation to PJM and then
6 they buy it back.

7 Q. I'm sorry, perhaps you misunderstood me.
8 I was talking about their capacity, not their energy.

9 A. Yes. My understanding is that they, I
10 don't know, the term "base reserve auction" is
11 something that I have not seen, and so that's why I
12 reverted to what I do know is that they sell their
13 capacity to PJM and -- that's my answer.

14 Q. Okay. And it's been their practice to
15 offer all of their capacity into whatever the "PJM
16 system for providing capacity" is called; isn't that
17 right?

18 A. That's my understanding, that they sell
19 all of their generation to PJM, yes.

20 Q. Okay. Again, their capacity is what
21 we're talking about here. You understand?

22 A. Yeah, capacity, they bid it into the RPM
23 auctions and then they receive a payment for that.

24 Q. Okay. Do you know if, for the planning
25 year 2013 to '14, the planning year 2014 to '15, and

1 the planning year 2015 to '16, if all of Dayton
2 Power & Light's capacity cleared in those auctions?

3 A. I don't actually know if all of it
4 cleared, but those are the periods of time that you
5 would be able to sell capacity. So I don't know the
6 results, exact results.

7 Q. So you don't know if all of the
8 capacity -- if there was any capacity left over that
9 did not clear.

10 A. I don't know specifically, that's
11 correct.

12 Q. Okay. Do you know if there is a market
13 for capacity that does not clear in those auctions?

14 A. I don't specifically know, one way or the
15 other, whether there is such a market and how deep it
16 is.

17 MR. McNAMEE: Then we're done. Thank
18 you.

19 EXAMINER MCKENNEY: At this time let's go
20 off the record. Let's take a ten-minute recess.

21 (Recess taken.)

22 EXAMINER MCKENNEY: Let's go on the
23 record at this time.

24 Before we went off the record -- when we
25 were off the record, we had a brief discussion on the

1 next witness. We'll take Rebuttal Witness Jackson
2 tomorrow morning at 9:00 a.m.

3 EXAMINER PRICE: Just to be clear, it was
4 our preference to take him tonight, but we do want to
5 make sure that everybody has a full opportunity to be
6 ready for cross --

7 MS. GRADY: And we do very, very much
8 appreciate that.

9 EXAMINER PRICE: -- examination.

10 EXAMINER MCKENNEY: So, at this time,
11 Mr. Sharkey, are you prepared to proceed with
12 redirect?

13 MR. SHARKEY: I am. Thank you, your
14 Honor.

15 - - -

16 REDIRECT EXAMINATION

17 By Mr. Sharkey:

18 Q. Mr. Malinak, do you remember when
19 Mr. Lang was asking you some questions about the
20 possibility that the amount of the SSR and the ST
21 would be identical under the ESP and the MRO?

22 A. I do remember those kinds of questions,
23 yes.

24 Q. And he also posited to you sort of an
25 alternative scenario in which he asked about whether

1 or not the SSR and ST were set in an ESP and an MRO
2 to target an identical return on equity. Do you also
3 remember that question?

4 A. I do remember a question like that, yes.

5 Q. Okay. Under that scenario, where an
6 identical ROE was targeted under the ESP and
7 hypothetical MRO, what would happen under the more
8 favorable in-the-aggregate test?

9 A. As I said in my original testimony, if
10 those financial metrics were set at the same level
11 and the ROE was the same, the ESP would still be more
12 favorable in the aggregate because of the faster
13 transition to market and the nonquantifiable benefits
14 that come from that, and there were a couple of other
15 items of nonquantifiable benefits as well, including
16 the retail enhancements and so forth.

17 MR. McNAMEE: Could I have that answer
18 reread, please?

19 (Record read.)

20 MR. McNAMEE: Thank you.

21 Q. Let me break the answer down into two
22 pieces just briefly. What effect would targeting an
23 identical ROE under both have as to the aggregate
24 price test, initially?

25 A. You know, targeting, you know, I can't

1 say exactly that they're targeting exactly the same
2 ROE. But from a customer point of view, if the
3 charges were -- the total revenues, if you will, to
4 the company, and the total charges to the customer
5 are the same under both, that should result in the
6 same ROE, then the ESP test would still be more
7 favorable in the aggregate because it has a faster
8 transition to market which has pro-competitive
9 impacts.

10 Q. Mr. Lang also asked you some questions
11 about whether the SSR and the ST would be available
12 on only one side of the
13 more-favorable-in-the-aggregate test. Do you
14 remember those questions?

15 A. Yes.

16 Q. Do you believe it's reasonable, from an
17 economic perspective, to conclude that the SSR and
18 the ST would be available under an ESP but not under
19 an MRO?

20 A. No. As I've testified before, if you
21 assume that the SSR and ST are available under the
22 MRO or any other nonbypassable charge that would
23 produce the same result, you end up with a scenario
24 that's not realistic because of the very low
25 profitability that it would be implying.

1 Q. You recall when Ms. Grady asked you some
2 questions relating to your qualifications to perform
3 DCF and CAPM methodologies for determining reasonable
4 returns on equity?

5 A. I do remember those questions, yes.

6 Q. Okay. How many years have you worked
7 with those methodologies?

8 A. Pretty much my whole career, starting in
9 the late-'80s through today. Cost-of-capital
10 calculations and rate-of-return calculations have
11 been a central focus of many of the projects that
12 I've done, both in regulated industries and
13 unregulated industries.

14 Q. Can you describe the types of projects in
15 which you've used those measures?

16 A. Sure. In almost any damages calculation
17 you have to determine a cost of capital, and DCF and
18 CAPM methods are ways to do that. You know, if there
19 are projected future cash flows, they have to be
20 discounted, they require that kind of calculation,
21 and it's in both the regulated and unregulated
22 industries.

23 In the regulated industries I've done,
24 I've been involved in, I don't know, maybe half a
25 dozen different proceedings in which rate-of-return

1 testimony was filed that I supported; the latest one
2 is SCEG. There were others back in the early- to
3 mid-'90s as well.

4 Q. Turn, if you would, to page 17 of your
5 rebuttal testimony.

6 A. Yes.

7 Q. Do you recall when Ms. Grady and Mr. Darr
8 asked you some questions about whether the SSR and
9 the switching tracker were recovering transition
10 costs?

11 (Discussion off the record.)

12 A. I remember questions along those lines,
13 yes.

14 Q. On page 17, starting on line 13, that is
15 a quote from the Ohio Revised Code, as you understand
16 it?

17 A. Yes.

18 Q. And do you understand that that lists
19 certain elements or criteria that need to be
20 satisfied for the recovery of costs as transition
21 costs?

22 A. Yes.

23 Q. Do you see item (A) includes the item --
24 the word "costs"?

25 A. I do.

1 Q. Do you see item (B) includes the word
2 "costs"?

3 A. I do.

4 Q. Do you see item (C) includes the word
5 "costs"?

6 A. I do.

7 Q. Do you see item (D) includes the word
8 "costs"?

9 A. I do.

10 Q. Is the SSR or switching tracker designed
11 to recover any particular costs?

12 A. No. Those charges are designed to
13 increase the probability that DP&L, as a whole, will
14 be able to maintain its financial integrity going
15 into the future or under certain assumptions.

16 Q. Let me ask a cause-and-effect question.
17 Do you recall that Ms. Grady, Mr. Darr, and
18 Mr. Yurick had asked you some questions about whether
19 increased switching and declining market revenues
20 were the cause of DP&L's financial integrity issues?

21 A. I do remember questions like that, yes.

22 Q. Okay. Can you describe the effect that
23 those items will have on the company as a whole as
24 you understand it?

25 A. Yes. You know, market forces that are

1 affecting the company and causing it to earn lower
2 revenues might be driven by declines in generation
3 markets and increases in switching, that will have a
4 negative impact on the company, especially given that
5 other parts of the business don't pick up the slack,
6 so to speak, and so you really need to look at the
7 whole business as a whole, but those will be part of
8 the cause of the company's reduced financial results.
9 But the effect is the same; the effect is that the
10 company will have issues with financial integrity,
11 unless it has rate relief of some kind.

12 Q. Thank you.

13 Would you turn, please, to page 25 of
14 your rebuttal testimony.

15 A. Yes.

16 Q. Starting on line 7, there's a sentence
17 that says "Indeed, the Commission could decide to set
18 the SSR at a level that would result in an expected
19 ROE that is higher than the low end of the range in
20 order to provide a cushion."

21 A. Yes.

22 Q. Do you recall, I believe it was Ms. Grady
23 who asked you some questions about that text.

24 A. I do remember those questions, yes.

25 (Confidential portion excerpted.)

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(Open record.)

MR. SHARKEY: Thank you, your Honor.

Q. (By Mr. Sharkey) My last topic for you.

Do you recall when Mr. Darr was asking you some questions about whether DP&L's sales to DPLER were the cause of DP&L's financial integrity problems?

A. I do remember questions that implied that or referenced that, yes.

Q. What's your understanding of the rate that DP&L sells generation to DPLER at?

A. My understanding is that they sell it at the market rate, prevailing market rate, at the time of the transaction.

Q. If DP&L was not selling that power to DPLER, are you aware of any better options that DP&L has or where it could get a better rate?

A. No, I'm not. I was there at the end of Mr. Hoekstra's testimony, and I read part of his transcript where he addresses that topic, and I believe he says if the generation was a separate entity, it would be selling at the same price.

MR. SHARKEY: Thank you, Mr. Malinak.

Your Honor, that's all I have for

1 redirect.

2 EXAMINER McKENNEY: Thank you,

3 Mr. Sharkey.

4 Recross. Mr. Lang?

5 MR. LANG: No. Thank you, your Honor.

6 EXAMINER McKENNEY: Ms. Grady?

7 MS. GRADY: No Thank you, your Honor.

8 EXAMINER McKENNEY: Mr. Satterwhite?

9 MR. SATTERWHITE: No. Thank you, your
10 Honor.

11 EXAMINER McKENNEY: Mr. Williams?

12 MR. WILLIAMS: No questions.

13 EXAMINER McKENNEY: Mr. Darr?

14 MR. DARR: Just a couple questions, your
15 Honor.

16 - - -

17 RECROSS-EXAMINATION

18 By Mr. Darr:

19 Q. Mr. Malinak, are you aware that DP&L
20 improved, by \$42.1 million, its revenues from
21 wholesale transactions in 2012?

22 A. I haven't actually analyzed that, no.

23 Q. And just so the record's clear, do you
24 understand the contract price, as described by
25 Mr. Hoekstra, is the forward market price of a fixed

1 full requirements contract for the term of the
2 transaction between DP&L and DPLER when it enters
3 into a -- when it enters into a contract for the
4 provision of generation and other products? I kind
5 of made a hash of that question. Let me try it
6 again.

7 Do you understand that the transfer price
8 is set as the all-in, fixed contract amount for
9 generation, capacity, ancillary, and other services
10 over the specific term of the contract?

11 A. I haven't reviewed the specific contract,
12 so I'm unaware of the particular terms. What my
13 understanding is, is that they are set on a
14 forward-contract basis and that at the time that
15 those contracts are negotiated, that it's done at an
16 equivalent market rate for whatever bundle of
17 services is being bought and sold.

18 MR. DARR: Your Honor, I move to strike
19 basically his prior answer with regard to redirect
20 because he's obviously indicated that he doesn't have
21 the information on which to opine; and, second,
22 everything -- if that is not granted, I ask that
23 everything be stricken after his first comment which
24 was "I'm not familiar with the terms of the
25 contract." So either one or the other.

1 EXAMINER MCKENNEY: May I have the
2 question and answer read back then.

3 And I'll allow you to reply to that,
4 Mr. Sharkey.

5 (Record read.)

6 EXAMINER MCKENNEY: Mr. Sharkey.

7 MR. SHARKEY: Yes, your Honor. Mr. Darr,
8 during his initial cross-examination, had asked
9 Mr. Malinak some questions about whether or not it
10 was sales from DP&L to DPLER that were causing DP&L's
11 financial integrity problems.

12 On redirect, I asked Mr. Malinak
13 basically two questions, one is what's his
14 understanding of the rate that was being charged from
15 DP&L to DPLER. Mr. Malinak indicated that it's his
16 understanding, based upon testimony of another
17 witness, Witness Hoekstra, that it's a market rate.
18 That's not an opinion that Mr. Malinak's sponsoring,
19 but he's relying upon that other witness.

20 So then the next question I asked him
21 was: Are you aware of any better deals that DP&L
22 could do, could sell at prices, at higher rates,
23 which is directly responsive to the points that
24 Mr. Darr was asking Mr. Malinak about, whether it was
25 the sales from DP&L to DPLER that were causing the

1 financial integrity problems.

2 The fact that Mr. Malinak is not the one
3 who is intimately familiar with the workings and how
4 a market price is arrived at under the contract is
5 immaterial. He's relying upon testimony from Witness
6 Hoekstra on that and explaining --

7 EXAMINER PRICE: But Mr. Hoekstra -- he
8 didn't say he's relying on Mr. Hoekstra's testimony
9 where there are no other deals out there. How is he
10 competent to testify that there's no better
11 opportunities for Dayton Power & Light out there?

12 MR. SHARKEY: I believe the question
13 wasn't that there are no better, but that he's not
14 aware of any better. That he's not, in his
15 professional knowledge and experience, he works in
16 this industry, of any ways that DP&L could sell its
17 power at prices above market prices.

18 He's an economist, and it's fair for an
19 economist to say, if the sale is at market prices,
20 DP&L's not going to be able to go out and then turn
21 and sell its power at a price above market prices.
22 So it's more of an economics question than a market
23 question, your Honor.

24 EXAMINER PRICE: The sole basis for it
25 being market prices is Mr. Hoekstra. He has not done

1 any independent evaluation of whether or not these
2 sales are market price, correct?

3 MR. SHARKEY: That's absolutely correct.
4 The question, then, is assuming that Mr. Hoekstra's
5 correct that these are market prices, is he aware of
6 any way that The Dayton Power & Light Company could
7 sell its power in the market at above-market prices.

8 And, your Honors, I submit to you that if
9 it's a market price, you're not going to be able to
10 sell your power above that price. So I think his
11 responses were just, really, pretty basic economics.

12 EXAMINER MCKENNEY: Mr. Darr?

13 MR. DARR: If I go back to the original
14 question, it was: Are you aware of certain kinds of
15 transactions existing? It was not "Would you like to
16 render an opinion on some other fact?"

17 In fact, he has to know, for purposes of
18 rendering an opinion, whether something exists or
19 doesn't exist. It must be in the record. That
20 doesn't exist here.

21 So his first statement, "Is it operating
22 at a market rate," doesn't have any factual support.
23 And then the conclusion, "Are there any better
24 options," is either a factual question for which he
25 has no demonstrated factual basis or, if it is a

1 legal -- or, excuse me, an economic opinion, he has
2 no factual basis upon which to base it.

3 Either way, it should be stricken.

4 MR. SHARKEY: He absolutely has a factual
5 basis. Witness Hoekstra sat at the stand and swore
6 that that was his, you know, that they were set based
7 on market rates.

8 Mr. Malinak, as an outside expert, is
9 entitled to rely upon the testimony of other
10 witnesses and facts established by other persons.

11 EXAMINER MCKENNEY: The motion to
12 strike -- motions to strike are denied. I think it
13 goes to the weight, so we'll allow the witness to
14 answer the question.

15 MR. SHARKEY: Thank you, your Honors.

16 EXAMINER MCKENNEY: Mr. Darr.

17 MR. DARR: Nothing further, your Honor.

18 EXAMINER MCKENNEY: Nothing further?

19 Mr. Yurick?

20 MR. YURICK: Very briefly.

21 - - -

22 RECROSS-EXAMINATION

23 By Mr. Yurick:

24 Q. Just so I have it straight, you would
25 agree with me, sir, that SSR is not directed toward

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1 the recovery of any costs that you know of, correct?

2 A. That's correct. It's designed --

3 MR. YURICK: Nothing further.

4 A. -- as a financial-integrity charge,
5 that's correct.

6 EXAMINER MCKENNEY: Staff?

7 MR. McNAMEE: No. Thank you.

8 EXAMINER MCKENNEY: Thank you,
9 Mr. Malinak, for a long day. You are excused.

10 THE WITNESS: Thank you.

11 EXAMINER MCKENNEY: Mr. Sharkey.

12 MR. SHARKEY: Yes, your Honor. I would
13 move for the admission of DP&L Exhibits 14, 14A, and
14 15.

15 EXAMINER MCKENNEY: Start with Mr. Darr.

16 MR. DARR: Renew the motions to strike
17 with regard to the testimony related to the ROE --
18 related to the ROE.

19 EXAMINER MCKENNEY: Ms. Grady.

20 MS. GRADY: Yes, your Honor, we would
21 renew our motion. It's based specifically on the
22 CAPM and DCF approach, that is information that
23 should have been presented earlier; it was not.

24 I have no objection to the updates to
25 Mr. Chambers' testimony, that could not possibly have

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1 been done earlier, but the CAPM and DCF should have
2 been done and submitted as part of the direct case.

3 EXAMINER MCKENNEY: The motions to strike
4 will be denied. DP&L 14, rebuttal of Mr. Malinak,
5 will be admitted; DP&L 14A, the confidential version
6 of his rebuttal testimony will be admitted; and DP&L
7 15 will also be admitted.

8 MR. SHARKEY: Thank you, your Honors.

9 (EXHIBITS ADMITTED INTO EVIDENCE.)

10 EXAMINER MCKENNEY: At this time, let's
11 go off the record.

12 (Hearing adjourned at 4:52 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, April 2, 2013, and carefully compared with my original stenographic notes.

Maria DiPaolo Jones, Registered
Diplomate Reporter and CRR and
Notary Public in and for the
State of Ohio.

My commission expires June 19, 2016.

(71945-MDJ-PUBLIC)

- - -

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

Summary: Transcript in the matter of The Dayton Power and Light Company hearing held on 04/02/13 - Volume XI - Public Version electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Jones, Maria DiPaolo Mrs.