BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer	)))	Case Nos. 12-426-EL-SSO
In the matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case Nos. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	)))	Case Nos. 12-428-EL-AAM
In the matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	)))	Case Nos. 12-429-EL-WVR
In the matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case Nos. 12-672-EL-RDR

POST-HEARING BRIEF OF FIRSTENERGY SOLUTIONS CORP.

Public Version

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I. INTRODUCTION

"The PUCO's role is to make the emerging competitive environment as even as possible for all players."[1] In this quote, the Commission has perfectly summarized Ohio law after S.B. 3. The Commission's role is not to ensure that generation suppliers all earn satisfactory returns. The Commission's role is not to ensure that there are no winners or losers in the marketplace. As recognized by the quote above, the Commission's role is to provide a level playing field for competition. DP&L seeks to avoid that competition through large nonbypassable charges and delays in corporate separation. Because these charges and delays make the playing field less level and are contrary to Ohio law and policy, the Commission should reject the proposed ESP.

Based on any reasonable analysis (as was done by Staff, FES, IEU, and OCC), the proposed ESP fails the statutory price test by imposing nearly $1 billion in above-market charges on DP&L's customers. There is no non-quantifiable benefit justifying these above-market rates. Apparently recognizing that it fails the price test dramatically under any reasonable calculation, DP&L claims that it needs the above-market revenue in order to protect its financial integrity and to subsidize its generation assets. However, generation assets have been competitive in Ohio for more than a decade, and there is no justification for an annual generation subsidy to protect assets which are on their own in the competitive market. More importantly, there is no benefit to Ohio ratepayers for subsidizing DP&L's generation fleet when the competitive market is ready, willing, and able to service this load on a wholesale and retail basis.

DP&L has enjoyed outstanding returns over the last decade, yet now it seeks to avoid the competitive market even when that market would provide lower prices for customers. This is

[1] March 28, 2013, Public Utilities Commission of Ohio, *Consumer Update: Energy Choice In Ohio*.

neither fair nor reasonable, and so DP&L's proposed ESP should be rejected. If the Commission chooses to modify the proposed ESP, then DP&L should be ordered to structurally separate and to conduct wholesale auctions as soon as possible. Additionally, the proposed Service Stability Rider and Switching Tracker should be rejected.

II. THE PROPOSED ESP SHOULD BE REJECTED BECAUSE IT IS NOT MORE FAVORABLE IN THE AGGREGATE THAN AN MRO

A. Ohio Law Requires The Commission To Compare The Proposed ESP With The Expected Results Of An MRO -- Not To The Proposed ESP Itself.

Knowing that its proposed ESP would hopelessly fail any reasonable ESP v. MRO test, DP&L proposes a novel interpretation of Ohio law. DP&L claims that its proposed ESP should be compared to a "hypothetical MRO" which DP&L would file on the same day.[2] DP&L contends that its hypothetical MRO would include all of the same terms and conditions as the proposed ESP, with the exception of the faster blending period being proposed by DP&L. As a result, DP&L believes that the law allows it to compare the price terms of the proposed ESP to what is essentially the same ESP. DP&L resorts to mischaracterizing it as a "hypothetical MRO", instead of comparing the proposed ESP to the results of an actual MRO under pricing and terms available in today's competitive market. DP&L believes this is proper so long as all of the elements in the hypothetical MRO are "in compliance with applicable rules and regulations."[3] This methodology does not comply with Ohio law, and it is improper.

As recognized by FES witness Ruch[4] and Staff,[5] DP&L's position removes all meaning from the ESP v. MRO test. If the ESP v. MRO test compares the proposed ESP to itself, then the

[2] Testimony of R. Jeffrey Malinak on behalf of DP&L, DP&L Ex. 5, ("Malinak Direct"), p. 5; Hearing Transcript ("Tr.") Volume ("Vol.") III, p. 601.

[3] Tr. Vol. III, p. 603.

[4] Testimony of Roger D. Ruch on behalf of FirstEnergy Solutions Corp., FES Exs. 13 and 13A ("Ruch Direct"), pp. 5-9.

test has no meaning whatsoever. If market prices are lower than the otherwise applicable SSO prices being blended with market prices under an MRO, then under DP&L's methodology any proposed ESP will pass the quantitative test, no matter how large the nonbypassable charge, as long as the ESP transitions to market even one day faster than anticipated by the MRO statute. DP&L's proposal is contrary to Commission precedent, inconsistent with Ohio's statutory framework, and bad policy.

1. Commission Precedent Makes Clear The Proposed ESP Should Be Compared To Market Rather Than Itself.

No Commission authority supports DP&L's position. Instead, every ESP v. MRO test conducted by the Commission compared the proposed ESP to the results available in the market – without consideration of whether or not the utility would have sought a nonbypassable charge in a hypothetical MRO or not.

In its ESP 2 proceeding, AEP sought a nonbypassable "Retail Stability Rider" ("RSR") charge with the same justifications applied to the "Service Stability Rider" ("SSR") charge proposed by DP&L.[6] DP&L repeatedly relies upon the decision in the AEP ESP 2 proceeding to support the SSR.[7] That same decision soundly refutes DP&L's purported "hypothetical MRO" test. As FES witness Ruch explains:

> In the PUCO Order in the AEP ESP 2 Case, the Commission determined that the RSR should be treated as a cost of AEP's ESP with no offsetting cost under the MRO: "Likewise, we [the PUCO] must consider the costs associated with the RSR of approximately $388 million in our quantitative analysis."[8] The Commission later

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[5] Testimony of Tamara S. Turkenton on behalf of Staff ("Turkenton Direct"), Staff Ex. 8, Attachment TST-1 (showing SSR in ESP portion of the test only).

[6] Ruch Direct, pp. 5-6 (citing Case No. 11-346).

[7] *See, e.g.*, Testimony of Phillip R. Herrington on behalf of DP&L, DP&L Ex. 8, ("Herrington Direct"), p. 3; Malinak Direct, p. 4; Testimony of William J. Chambers on behalf of DP&L, DP&L Ex. 4 and 4A, ("Chambers Direct") p. 2.

[8] Case No. 11-346-EL-SSO, August 8, 2012 Opinion and Order, p. 75.

> refers to the RSR revenue throughout the term of the ESP as "the quantifiable costs of $388 million under the RSR."[9]

In the AEP ESP 2 case, the Commission made clear that a proposed ESP is not compared to a "hypothetical MRO." Instead, the comparison is to market prices. Therefore any new ESP charges are not included on the MRO side of the test.

The Commission also considered a similar nonbypassable charge in the recent Duke ESP proceeding. As Mr. Ruch again explained, Duke, in its quantitative analysis, included the nonbypassable "ESSC" charge as a cost of the ESP with no offsetting cost assumed under the MRO side of the comparison.[10] In its November 22, 2011 Order, the Commission accepted this analysis.[11]

There is no Commission authority to support DP&L's "hypothetical MRO" construct. Instead, in two recent Commission decisions dealing with charges nearly identical to the proposed SSR, the Commission considered such charges to be a cost of the proposed ESP. Therefore, under well-established Commission precedent, DP&L's proposed method of quantitative analysis should be rejected and the proposed ESP compared to market prices.

2. DP&L's Proposed "Hypothetical MRO" Construct Is Contrary To Ohio's Statutory Scheme.

Under Ohio's statutory framework, the default mechanism for supplying SSO customers is market pricing through an MRO. The ESP is the exception to that default position and is permitted only if a proposed ESP is even more favorable to those SSO customers than the results available in the competitive market. DP&L claims that comparing the proposed ESP to market is inappropriate because "DP&L presumably would not propose an MRO that would result in

[9] Case No. 11-346-EL-SSO, August 8, 2012 Opinion and Order, p. 75.
[10] *See* Ruch Direct, pp. 7-8 (citing Case No. 11-3549-EL-SSO).

[11] Case No. 11-3549-EL-SSO, Opinion and Order dated November 22, 2011.

severe financial distress nor, presumably, would the PUCO approve such an MRO."[12] DP&L's "financial distress" argument is refuted below, but the policy question is clear: Should the ESP v. MRO test take into account what the EDU would request in a hypothetical MRO? The answer is unequivocally no.

The goal of the MRO and ESP statutes is to ensure that customers have the benefit of market pricing or better, so if the proposed ESP is compared to anything other than market pricing the statutory test loses all meaning. The Commission would be forced to guess at what the utility would have requested in an MRO, which of those requests would have been granted in an MRO, and how to weigh those entirely fictional costs against the very real costs to customers being imposed through huge nonbypassable charges. DP&L's proposal is exceedingly bad policy, is contrary to the intent and letter of the law, and should be rejected.

B. DP&L's Proposed ESP Fails The Aggregate Price Test And Contains Almost $1 Billion In Above-Market Charges.

DP&L witness Malinak calculates that the proposed ESP has a price benefit of $120 million.[13] However, Mr. Malinak's calculations are flawed. Once the corrections below are made, DP&L's proposed ESP would cost customers [**BEGIN CONFIDENTIAL**] $[redacted] [**END CONFIDENTIAL**] more than an MRO and contains $988 million in total above-market charges.[14] FES's adjustments to DP&L's calculations are shown in the following table sponsored by FES witness Ruch:

[BEGIN CONFIDENTIAL]

[12] Rebuttal Testimony of R. Jeffery Malinak on behalf of DP&L, DP&L Ex. 14, ("Malinak Rebuttal"), p. 8.

[13] Malinak Direct, p. 3.

[14] Ruch Direct, pp. 5, 30.

Adjustment Description	ESP Cost (Benefit)	
	Incremental	Cumulative
$ in millions		
As Filed - Exhibit RJM-1 (Second Revised)		$ (119.98)
Adjustment 1 - SSR Revenue	$ 687.50	$ 567.52
Adjustment 2 - Timing	$ 11.70	$ 579.22
Adjustment 3 - MRO Blending Percentages	$ 17.16	$ 596.38
Adjustment 4 - Shopping Levels	$ [redacted]	$ [redacted]
Adjustment 5 - Switching Tracker	$	$
Adjustment 6 - Rider AER-N	$ 3.30	$
	$ [redacted]	

[END CONFIDENTIAL]

While the proposed ESP fails the ESP v. MRO test in a spectacular fashion, this failure is even more impressive given DP&L's small size. FES witness Ruch calculates that the proposed cost of the ESP is [**BEGIN CONFIDENTIAL**] [redacted]. [**END CONFIDENTIAL**].[15] In comparison, the cost of the AEP ESP 2 was $386 million, or $2.68 per MWH.[16] Thus, the proposed ESP costs [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] more than AEP Ohio's proposal.[17] To put it another way, AEP Ohio's ESP costs $264 per customer and DP&L's proposal costs [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] per customer.[18] This means that on a per customer basis DP&L proposes to charge customers almost [**BEGIN CONFIDENTIAL**] [redacted] [**END**

[15] Ruch Direct, p. 28.

[16] Ruch Direct, p. 28. DP&L witness Malinak's rebuttal testimony claims that Mr. Ruch's calculation was in error, and that the AEP actual cost per MWh was $4.02 rather than $2.68. If Mr. Malinak was correct, DP&L would still be seeking to impose an ESP costing almost [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] more than AEP's. However, Mr. Malinak is not correct. While the Commission did limit the price test to only a portion of the proposed ESP term (24 months), the Commission included the full 36 month amount of the RSR nonbypassable charge imposed by AEP Ohio. *See* Case No. 11-346-EL-SSO, PUCO Order, p. 75. Further, it is the cost of the RSR that comprises the entirety of the Commission's result ($388 million of the $386 million total cost of the ESP). *See* Case No. 11-346-EL-SSO, Opinion and Order dated August 8, 2012, p. 75. Thus Mr. Ruch's calculation using 36 months is correct.

[17] Ruch Direct, p. 29.

[18] Ruch Direct, p. 29.

CONFIDENTIAL] the amount of AEP Ohio's ESP 2. Even if shopping is held constant (which it should not be as discussed below), DP&L's proposal will still cost ESP customers $1,168 per customer, more than **four times** the $264 cost per AEP Ohio customer.[19]

Nothing in DP&L's proposal justifies the massive costs it would impose on customers. DP&L has not agreed to corporately separate, and is not a Fixed Resource Requirement ("FRR") entity or a party to a relevant pool agreement as was the case with AEP. The only non-quantifiable benefits which have been identified involve: (1) retail enhancements which should be made by any EDU regardless of its rate plan to further Ohio's competitive market; (2) the general flexibility inherent in an ESP as opposed to an MRO; and (3) the non-price benefits of a faster transition to competition.[20] These benefits are not even close to enough to justify a proposed ESP which fails the test by even $1, let alone one that fails by [**BEGIN CONFIDENTIAL**] [redacted]. [**END CONFIDENTIAL**]

1. The SSR Should Be Included As A Cost Of The Proposed ESP

DP&L has proposed that the $137.5 million annual cost of the SSR be included on both the ESP and MRO sides of the statutory test. DP&L justifies this by claiming it would have requested an equal SSR charge in its hypothetical MRO. This position should be rejected, as discussed in detail below.

a. Commission Precedent For Nonbypassable Charges Like The SSR Makes Clear They Are Solely A Cost Of The ESP.

As discussed above, the Commission recently considered almost identical nonbypassable charges in the AEP and Duke cases. DP&L's proposal is inconsistent with how the Commission treated the similar charges in those cases. While there is conflicting testimony between Mr.

[19] Ruch Direct, p. 30.

[20] Malinak Direct, pp. 14-15.

Malinak's deposition and trial testimony regarding whether he read the relevant portions of the AEP ESP decision related to the RSR,[21] there is no dispute that he did not review the Duke ESP decision to determine how the Commission treated the ESSC charge.[22] Mr. Malinak also failed to review the price test testimony submitted, and relied upon by the Commission, in those cases.[23]

In each of those cases the Commission considered "financial stability" charges solely as a cost of the proposed ESP, yet neither case was considered by Mr. Malinak,. The Commission did not include those charges on the MRO side of the test. The Commission should do the same here and include the SSR as a cost of the ESP and not as an expected result of an MRO.

b. Ohio's Statutory Framework Does Not Anticipate Including New Nonbypassable Charges On Both Sides Of The Test.

Also as discussed above, including new nonbypassable charges on both sides of the test is inconsistent with the design and purpose of Ohio law. The proposed ESP is to be compared to a market-based MRO, not a hypothetical MRO that mimics the proposed ESP in all respects.

c. Every Intervenor And Staff Witness Agrees The SSR Should Be Treated As A Cost Of The ESP.

Every intervenor witness who testified in this proceeding agreed that the SSR should be included as a cost of the ESP.[24] Staff witness Turkenton also agreed that the SSR should be included as a cost of the ESP and should not be considered on the MRO side of the test.[25] On questioning from DP&L, she made this even more clear: "I understand that's [Mr. Malinak's]

[21] Tr. Vol. III, pp. 615-16.

[22] Tr. Vol. III, p. 618.

[23] Tr. Vol. III, pp. 596-98.

[24] Testimony of Beth E. Hixon on behalf of OCC, OCC Ex. 5, ("Hixon Direct"), p. 16; Testimony of Kevin M. Murray on behalf of IEU-Ohio, IEU Ex. 2 and 2A, ("Murray Direct"), p. 33.

[25] Turkenton Direct, Exhibits TST-1 through TST-4.

position. I don't agree with it, but I understand that's his position."[26] Mr. Malinak is the only witness to ever suggest that new nonbypassable charges like the SSR should be included on the MRO side of the test. Mr. Malinak admitted on the stand that he did not make this determination on his own, and was instructed to assume the SSR should be included on the MRO side of the test by counsel:

> Q. So DP&L instructed you to assume that the SSR should be included on the MRO side of the test.
>
> A. They asked me to make that assumption, yes.[27]

Since Mr. Malinak was only doing as he was asked, no expert opinion supports including the SSR on the MRO side of the test. All of the experts who actually considered the question provided testimony to the contrary.

d. Even If The "Hypothetical MRO" Construct Were Correct, DP&L Has Not Met The Burden Of Showing The SSR Should Be Included On The MRO Side Of The Test To Protect Its Financial Integrity.

If DP&L's "hypothetical MRO" theory were to be (wrongly) accepted by the Commission, DP&L has still not met its statutory burden of establishing that the SSR should be included on the MRO side of the test, as it has not met the burden established in R.C. § 4928.142(D) for a financial stability charge. More specifically, DP&L has failed to address the MRO requirements of Ohio law for financial stability charges. Its witness on this topic, Mr. Malinak, failed to consider that there is a difference between the requirements of R.C. § 4928.142 and R.C. § 4928.143 when drafting his testimony.

> Q. And you did not consider any difference between the legal standards for financial stability charges contained in the ESP and MRO statutes when drafting your testimony, correct?

[26] Tr. Vol. VII, p. 1813.

[27] Tr. Vol. III, p. 604.

A. Not explicitly.[28]

DP&L's failure to present evidence meeting the requirements for financial stability charges in R.C. § 4928.142(D), and Mr. Malinak's failure to consider the significant differences between R.C. § 4928.142(D) and R.C. § 4928.143(B)(2)(d), make clear that, even under the hypothetical MRO construct, there is no justification for including the SSR on the MRO side of the test.

R.C. § 4928.142(D) states that, for a first-time MRO applicant, the Commission may:

> "adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division."[29]

There are several items of note in this portion of the statute: (i) this section only applies to a first-time MRO applicant; (ii) the adjustment made by the Commission is to the most recent standard service offer price (i.e., the price to be blended with market prices), and is not a new nonbypassable charge like the SSR; (iii) the Commission may only award such a charge to address an "emergency" threat to financial integrity that amounts to an unconstitutional taking of property; and (iv) DP&L bears the burden of proof to establish that such an adjustment is proper. There is no evidence the SSR qualifies for inclusion in the MRO side of the test as DP&L has not satisfied any of these factors.

[28] Tr. Vol. III, p. 608.

[29] R.C. § 4928.142(D).

i. DP&L Is Not A First-Time MRO Applicant

R.C. § 4928.142(D) is limited to "[t]he first application filed under this section" only. It is undisputed that DP&L's first application filed under R.C. § 4928.142 was filed on March 30, 2012 and later withdrawn.[30] DP&L agrees that the proposed ESP should not be compared to that first MRO application.[31] Therefore, under the plain terms of the statute, DP&L no longer qualifies to receive an emergency adjustment in an MRO.

DP&L contested this plain reading of the statute, arguing that the word "application" does not really mean the application filed by the utility. DP&L argues that this reading of the statute would permit gamesmanship by utilities in filing applications and then withdrawing them to avoid the statutory MRO blending percentages. DP&L is incorrect, as no other reading of the statute makes sense. If the word "application" does not mean application what does it mean? DP&L has not offered any suggestions, as none are possible. If the statute had intended to limit itself to applications which had been accepted by the Commission it certainly could have done so. It did not, and thus "application" should be given its plain meaning.

The reason division (D) of R.C. § 4928.142 is limited to the first MRO application of a utility is obvious to those familiar with the enactment of S.B. 221 in 2008. Although it created an MRO as the default option, the General Assembly was concerned that utilities that had not transferred their generation assets would seek to take advantage of what was then a spike in energy prices by moving immediately to an MRO.[32] Thus, division (D) limits the first application for an MRO filed by such a utility to a blending period that would slowly increase the utility's rates to market, but also allowed the Commission to adjust those rates upward to

[30] Malinak Rebuttal, p. 12.

[31] Tr. Vol. IV, pp. 1146-47.

[32] *See* Tr. Vol. IX, p. 2383.

avoid an unconstitutional confiscation of utility assets. Because the General Assembly favored a transition to market pricing over the long-term for these utilities, division (D) is expressly limited to the first MRO application filed. For DP&L, that was its March 30, 2012 application.

DP&L already filed its first MRO application, so it is no longer eligible to include an emergency adjustment, let alone an SSR, on the MRO side of the test even if it met the remaining statutory criteria.

ii. The Adjustment For Financial Integrity Is To The "Standard Service Offer Price."

The adjustment authorized in R.C. § 4928.142(D) is to the "most recent standard service offer price." The statutory design is clear. The statute does not authorize a new nonbypassable charge such as the SSR. Instead, the statute anticipates that any adjustment to historic rates will be an adjustment to bypassable charges only. If market prices were higher than historic SSO prices, then forcing utilities to undertake a lengthy blending process and preventing them from accessing market prices could be construed as an unconstitutional taking. By authorizing an adjustment to the bypassable standard service offer price, division (D) authorizes the Commission to adjust bypassable charges in order to avoid a taking or emergency facing the utility. DP&L presents the exact opposite scenario. DP&L requests a nonbypassable charge from shopping and SSO customers in order to avoid market pricing.

Even if DP&L was able to show that additional funds were needed to protect its financial integrity under R.C. § 4928.142(D), the adjustment to the "most recent standard service offer price" would be to the base generation price, not a new nonbypassable charge. There is no legal justification for imposing a nonbypassable charge in an MRO.

iii. DP&L Has Not Even Attempted To Meet The Requirements For Emergency Rate Relief Or A Taking And Has Failed To Meet Its Burden Of Proof.

R.C. § 4928.142(D) permits an adjustment to the most recent standard service offer price to prevent a threat to a utility's financial integrity that rises to the level of an unconstitutional confiscation of its assets. There is no possible "confiscation" or "taking" in this case. All parties acknowledge that market prices are below the standard service offer price. By definition, even DP&L admits that exposing competitive generation assets to market pricing is inherently not confiscatory, since the Commission is not limiting DP&L's use of those assets.[33] Instead, DP&L seeks protection from the market through a $137.5 million per year annual subsidy. Denying DP&L's request for a massive above-market subsidy does not and cannot amount to the Commission confiscating DP&L's assets.

Moreover, DP&L has not met the statutory standard for demonstrating that it faces a financial emergency. Ohio law proscribes certain defined steps for an EDU facing an emergency affecting its financial integrity.[34] The Commission's "power to grant emergency relief is extraordinary in nature" and may only be granted after a utility sustains its burden of proving that, absent emergency relief, it will be financially imperiled or its ability to render service will

[33] Tr. Vol. II, p. 568 ("Q. But it is your opinion [Dr. Chambers,] that market pricing is not economically confiscatory, correct? A. **Inherently not**.") (emphasis added). It is impossible for the government to confiscate property by exposing it to market forces. In *Market Street Railway*, the U.S. Supreme Court found that "[t]he due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces." *Market Street Railway v. Railroad Commission of State of Cal.*, 324 U.S. 548, 567 (1945). This well established principle has been in place since that time. *See, In re Southern California Edison Co.*, 2002 WL 407297, Decision 02-01-001 (Cal. P.U.C., January 2, 2002), *8 ("the government is not required to protect utilities against losses caused by the operation of market forces.").

[34] R.C. § 4909.16.

be impaired.[35] A utility's evidence of financial impairment must "clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation."[36] If an emergency is shown, then the Commission is limited to granting temporary relief "only at the minimum level necessary to avert or relieve the emergency."[37] The Commission in the past has directed the utility seeking emergency relief to provide expert testimony supporting its application and conducted hearings on the application.[38]

DP&L did not even attempt to satisfy these criteria, and instead merely represented to the Commission that its credit rating may be lowered slightly due to its alleged degrading financial performance.[39] DP&L has offered no testimony establishing that the SSR is temporary relief "only at the minimum level necessary to avert or relieve the emergency."[40] A potential reduction to its credit rating from BB to BB- is not legally sufficient to justify the type of emergency relief requested by DP&L.[41] At a minimum, DP&L should have explained exactly what the purported "emergency" is that is being addressed, the precise amount needed to address that "emergency," and the length of time for which the rate adjustment is needed. DP&L did none of these things. As DP&L has not even attempted to meet the statutory standard for emergency rate relief, under no circumstances should the Commission consider the $137.5 million/year SSR on the MRO side of the test.

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[35] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

[36] *Id.*

[37] *Id.*

[38] *Id.*, p. 2.

[39] *See* Chambers Direct, pp. 6-50.

[40] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

[41] *See* Chambers Direct, Exh. WJC-8 (showing a "likely" downgrade from BB to BB- in 2013 if the Commission does not approve the SSR and Switching Tracker).

2. The Price Test Should Terminate At The End Of The ESP Period.

DP&L's proposed ESP runs from January 1, 2013 through December 31, 2017.[42] Instead of conducting his price test for that period, DP&L witness Malinak's price test continued through May 31, 2018, or an additional 5 months.[43] Mr. Malinak was instructed by DP&L to make this assumption in order to "align with the RPM auctions."[44] DP&L's position is obviously flawed. The term of the proposed ESP should be used in the price test, not some undefined period after the conclusion of the ESP term.

Apparently recognizing the invalidity of his position, Mr. Malinak sought to justify this position in his rebuttal testimony. In addition to repeating his earlier testimony about alignment with RPM auctions, Mr. Malinak claimed that because no ESP has been accepted to date his error was immaterial.[45] However, Mr. Malinak is confused. DP&L was exceedingly clear, both in its ESP Application[46] and at hearing,[47] that it was seeking an ESP through December 31, 2017. At hearing, Mr. Malinak attempted to distance himself from DP&L's position under questioning from counsel and Hearing Examiner Price:

> Q. The end of the ESP period is December 31st, 2017, correct?
>
> A. My issue is that I don't understand the legal end of the ESP period. I don't understand the definition of that. It's -- that's my problem. That's why I'm not answering, you know, on a legal basis, because I can't. But because the ESP period could be five years from June 1st of this year, which would take you right to May 31st, 2018, legally. I just don't know.

[42] Tr. Vol. III, p. 623.

[43] Tr. Vol. III, p. 623.

[44] Tr. Vol. III, p. 623.

[45] Malinak Rebuttal, p. 11.

[46] ESP Application, p. 2 ("with a term from January 1, 2013 through December 31, 2017 ('ESP Term').")

[47] Tr. Vol. III, p. 623.

EXAMINER PRICE: Do you know what the company asked for?

THE WITNESS: At the time of my testimony they were asking for January 2013 through December 2017 explicitly in the application.

EXAMINER PRICE: Do you have any reason to believe that's changed?

THE WITNESS: I don't have any knowledge of that.

EXAMINER PRICE: Okay.[48]

This exchange shows that Mr. Malinak's confusion caused his calculation and testimony to be incorrect. DP&L did not request a five-year ESP term regardless of when the Commission issues its decision.[49] DP&L instead requested an ESP terminating on December 31, 2017. DP&L presented no witnesses suggesting a different ESP term, and so any claim by Mr. Malinak that his "revised" aggregate price test encompassing this period has any meaning is invalid and not supported by record evidence. If DP&L wanted to propose an ESP ending on May 31, 2018, it could have done so. It did not, and may not now avoid the consequences of its choices.

Several witnesses who testified in this proceeding agreed that the ESP price test should terminate on December 31, 2017, including Staff Witness Turkenton.[50] These witnesses agreed that it is appropriate to end the price test when the ESP terminates. Though Staff Witness Turkenton did not make this adjustment in her exhibits because she was attempting to show Mr. Malinak's erroneous non-bypassable charge assumptions,[51]

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[48] Tr. Vol. III, pp. 625-26.

[49] Mr. Sharkey asserted in an objection that DP&L was seeking a five-year ESP irrespective of the start date of the ESP. This appears nowhere in DP&L's application and is simply not accurate. *See* Tr. Vol. XI, p. 2713.

[50] *See, e.g.*, Hixon Direct, p. 11; Tr. Vol. VII, p. 1790.

[51] Tr. Vol. VII, p. 1790.

Staff witness Turkenton agreed that "it is appropriate to stop the ESP versus MRO price test analysis at the end of the ESP period," as she did in her Exhibits TST-1 and TST-2.[52] There is no dispute as to how this adjustment should have been made if the test ends with the ESP period, as acknowledged by Mr. Malinak.[53] FES witness Ruch provides the necessary adjustment to this portion of Mr. Malinak's testimony.[54] Mr. Ruch removed the forecasted sales for the period from January 1, 2018 through May 31, 2018, and adjusted the claimed benefit of the proposed ESP by $11.70 million.[55] Staff witness Turkenton did not do this analysis, but agreed that making this correction to Mr. Malinak's testimony would make the ESP comparatively less favorable than an MRO.[56]

3. DP&L Uses Incorrect MRO Blending Percentages, Artificially Slowing The MRO Transition To Market.

Because DP&L's first MRO application is now history, the blending percentages contained in R.C. § 4928.142(D) do not apply in determining the expected results of any future MRO. As a result, the proposed ESP necessarily must be compared to 100% market rates, and the proposed ESP fails by almost $1 billion.

Even if the Commission were to apply the R.C. § 4928.142(D) blending percentages, it could not rely on Mr. Malinak's testimony. His ESP v. MRO test uses incorrect blending percentages on the MRO side of the test, which understates the expected benefits of an MRO. R.C. § 4928.142(D) provides for blending on an annual basis. Yet the first period of Mr.

[52] Tr. Vol. VII, p. 1791. Staff witness Turkenton's exhibits TST-1 and TST-2 ended at the end of her proposed ESP term.

[53] Tr. Vol. III, p. 626.

[54] Ruch Direct, pp. 11-12.

[55] Ruch Direct, p. 12.

[56] Tr. Vol. VII, p. 1791.

Malinak's test is 17 months, rather than 12 months.[57] By lengthening period one, Mr. Malinak artificially slows down the MRO statutory blending percentages not just in period one but in all later periods. By way of example, the 30% blending in period three should start on January 1, 2015, but does not start until June 1, 2015 under Mr. Malinak's analysis.

There is no justification in R.C. § 4928.142(D) for Mr. Malinak's altering of the statutory percentages to match the PJM planning year. Mr. Malinak did not provide any valid justification for his 17-month period on the stand, and instead relied on instruction from DP&L's counsel and the discretion provided to the Commission to adjust the statutory blending percentages in an MRO.[58] Mr. Malinak attempted to rehabilitate his error in his rebuttal testimony, claiming the statute requires blending of "not more than" twenty per cent in year two, thus authorizing his adjustment to the statutory percentages.[59]

Mr. Malinak's position is not credible. There is no reason for the Commission to slow down blending in an MRO when market prices are so much lower than DP&L's proposed SSO price. More importantly, there is a complete lack of justification and precedent for the Commission making the decision to slow down the blending on the MRO side of the test prospectively when approving an ESP. As explained by FES witness Ruch, Commission precedent goes the exact opposite way. In both the Duke ESP case and the AEP ESP 2 case, the Commission reviewed ESP v. MRO tests.[60] Each of these tests used blending percentages calculated on an annual basis. To account for partial year issues associated with competitive

[57] Tr. Vol. III, p. 627.

[58] Tr. Vol. III, p. 628.

[59] Malinak Rebuttal, p. 12.

[60] Ruch Direct, p. 14.

bids, AEP Ohio and Staff witnesses used weighted averages for each partial year.[61] The Commission adopted this blending methodology in its AEP ESP 2 opinion and order.[62] Later in that same case, the Commission again used annual blending periods for the MRO side of its test.[63]

Intervenor witnesses[64] and Staff agreed with FES that the MRO side of the test should conform to precedent and statutory standards through use of 12-month blending periods. Staff witness Turkenton testified:

> Q. And you believe that statute requires blending on an annual basis?
>
> A. I believe the statute used the word "year" and "year" equals "annual," yes.
>
> . . .
>
> Q. Do you agree with Company Witness Malinak's use of the 17-month first period?
>
> A. It's certainly not what I would use, and that's evidenced by TST-1 and TST-2.
>
> Q. And does using a 17-month first period understate the speed of a transition to market in an MRO?
>
> A. Yes.[65]

The MRO side of the test should use 12-month blending periods, and Mr. Malinak's failure to use 12-month blending periods causes him to understate the transition to market in an MRO.

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[61] Ruch Direct, p. 15.

[62] Ruch Direct, p. 15 (citing PUCO Order in Case No. 11-346-EL-SSO, pp. 31-32, filed December 14, 2011.)

[63] Ruch Direct, p. 16 (citing PUCO Order in Case No. 11-346-EL-SSO, pp. 74-75, filed August 8, 2012.)

[64] *See, e.g.*, Hixon Direct, p. 10.

[65] Tr. Vol. VII, pp. 1786-87.

FES witness Ruch quantifies this error. Assuming his second adjustment regarding the end date of the ESP test is accepted (if this adjustment is not accepted the effect of incorrect MRO blending would be higher due to the slower transition in the extra five months outside of the ESP period), this error results in an incremental cost of the proposed ESP of $17.16 million.[66]

4. DP&L Understates The Cost Of The ESP Through Its Failure To Incorporate Its Own Shopping Estimates.

DP&L's ESP v. MRO test holds shopping constant as of August 30, 2012 over the ESP period.[67] Mr. Malinak claims that this is appropriate because he assumes that the Switching Tracker would be in place on the MRO side of the test, thus nullifying the impact of switching on both sides of the equation.[68] Mr. Malinak is incorrect because there is no authority for a Switching Tracker under Ohio law, new nonbypassable charges created by an ESP would not be incorporated on the MRO side of the test (such as the SSR discussed above), and DP&L's failure to use its own switching estimates dramatically overstates the number of customers who would receive any benefit of a "faster transition to market" in SSO pricing. More troubling, DP&L relies on its switching assumptions to support its purported "financial integrity" claims. It is disingenuous for DP&L to rely on switching projections to support its claims for a nonbypassable charge, but then refuse to acknowledge those same projections when evaluating whether the ESP is more favorable than an MRO.

a. The Switching Tracker Is Not Authorized By Ohio Law.

DP&L argues that there is no need to consider its switching estimates due to the anticipated Switching Tracker. As discussed in detail below in section III.C, the proposed

[66] Ruch Direct, p. 16.

[67] Tr. Vol. III, p. 600.

[68] Tr. Vol. III, p. 600.

Switching Tracker is not authorized under Ohio law. If the Switching Tracker is rejected, then there is no justification for not using DP&L's own switching estimates when conducting the ESP v. MRO test.

b. New Nonbypassable Charges Such As The Switching Tracker Should Not Be Incorporated In The MRO Side Of The Test.

Similar to the SSR, the Switching Tracker is a new nonbypassable charge imposed by the proposed ESP. Just like the SSR, there is no authority supporting the inclusion of the Switching Tracker on the MRO side of the test. If the Switching Tracker is not included on the MRO side of the test since it is a new nonbypassable charge, then DP&L's switching estimates must be incorporated into the ESP v. MRO test.

c. DP&L's Failure To Use Its Own Switching Projections Overstates The Purported Benefits Of The Proposed ESP.

All parties agree there will be an impact on the ESP v. MRO test if the Switching Tracker is not included on the MRO side of the test. Mr. Malinak acknowledges that if the Switching Tracker is not included on the MRO side of the test then the proposed ESP benefit would decrease.[69] Staff also acknowledges that if switching increases then the MRO is less favorable.

> Q. And if switching increases from that level and SSO load accordingly decreases, would that make the ESP comparably less favorable?
>
> A. If switching increases, the MRO looks better, so yes, the ESP is less favorable.[70]

The cause of this adjustment is simple arithmetic. DP&L anticipates significant switching. If there is increased switching, then fewer customers will be receiving the benefit of a

[69] Tr. Vol. III, p. 601.

[70] Tr. Vol. VII, p. 1785.

faster transition to market under the proposed ESP and the ESP is then comparatively less favorable than an MRO.

FES witness Ruch quantifies the impact of Mr. Malinak's error. By using DP&L's own load projections, he calculates an incremental cost to the proposed ESP of [**BEGIN CONFIDENTIAL**]$[redacted]**END CONFIDENTIAL**]. This adjustment is wholly separate from the adjustment for the cost of the Switching Tracker discussed below, and only quantifies the decreased load that will be served under the proposed ESP.

5. The Cost of DP&L's Switching Tracker Should Be Included In The ESP v. MRO Test.

a. The Switching Tracker Imposes Significant Costs On Customers.

DP&L assumes the Switching Tracker will be included in its "hypothetical MRO," just like the proposed SSR.[71] However, like the SSR, there is no justification for including a new nonbypassable charge like the Switching Tracker on the MRO side of the test. There is no evidence that a similar mechanism could potentially exist under an MRO, and there is no reason to believe such an anti-competitive, market-distorting mechanism would be approved by the Commission under an MRO.[72]

FES witness Ruch quantified the impact of the Switching Tracker. He used DP&L's switching estimates to calculate the level of load which would shop.[73] Mr. Ruch then used DP&L's estimates of future pricing to calculate the projected cost of the Switching Tracker as [**BEGIN CONFIDENTIAL**][redacted][**END CONFIDENTIAL**].[74] Notably, this

[71] Tr. Vol. III, p. 600.

[72] Ruch Direct, p. 20.

[73] Ruch Direct, p. 20.

[74] Ruch Direct, p. 20.

estimate is much lower than DP&L's [**BEGIN CONFIDENTIAL**] [**END CONFIDENTIAL**] estimate of Switching Tracker cost.[75] DP&L failed to provide any detail supporting its calculation, so a substantive analysis is not possible. However, it is clear that Mr. Ruch's calculation is conservative, and at minimum an incremental cost of [**BEGIN CONFIDENTIAL**]$ [**END CONFIDENTIAL**] should be added as a cost of the ESP to the ESP v. MRO test.

b. There Is No Duplication Between The Shopping Level Adjustment (No. 4) And The Switching Tracker Adjustment (No. 5).

There is no overlap between the shopping level (No. 4) and switching tracker (No. 5) adjustments. The shopping level adjustment quantifies the impact of incorporating DP&L's switching assumptions absent the proposed Switching Tracker on the MRO side of the test. Incorporating DP&L's switching estimates results in a higher level of switching load, and thus a lower level of SSO load. The Switching Tracker adjustment calculates the revenue to be collected from DP&L customers associated with the Switching Tracker, which have an additional impact on the ESP v. MRO test. The Switching Tracker produces incremental revenue to be collected from DP&L customers on top of the bypassable generation revenues resulting from the impact of the assumed switching levels discussed in the fourth adjustment.[76]

6. Rider AER-N Should Be Included In The ESP v. MRO Test.

DP&L requested to recover costs associated with its Yankee solar facility through nonbypassable rider AER-N. There is no dispute between the parties that the costs associated with Rider AER-N should be included in the ESP v. MRO test because recovery of these costs is not authorized in an MRO. Mr. Malinak acknowledges in his direct testimony that the Yankee

[75] Malinak Rebuttal, p. 5.

[76] Ruch Direct, p. 22.

solar costs are $3.3 million, but he does not include them in his RJM-1 quantification of the ESP v. MRO test.

> Q. And its true, isn't it, that you did not include the effect of the Yankee facility in RJM-1?
>
> A. Yes, I did not include it in RJM-1 but its discussed, included and quantified in the text of my direct testimony. . . .
>
> Q. So do you agree that in the price test aspect of your analysis that you would need to include those dollars?
>
> A. Yes.[77]

As shown by Mr. Malinak's testimony, an adjustment to his price test conclusion is needed. Mr. Malinak himself acknowledges that the necessary adjustment associated with Rider AER-N is $3.3 million.[78] FES witness Ruch adds these costs in his direct testimony as a cost to the ESP in the ESP versus MRO test.[79]

7. Results Of Price Test

Correcting all of the mistakes in Mr. Malinak's price test, except for his use of blending percentages, results in DP&L's proposed ESP being less favorable than an MRO by [**BEGIN CONFIDENTIAL**]$[redacted][**END CONFIDENTIAL**].[80] Correcting all mistakes plus using 100% market pricing on the MRO side of the equation as required by R.C. § 4928.142(A) results in DP&L's proposed ESP being less favorable than an MRO by $988 million.

[77] Tr. Vol. III, p. 664.

[78] Tr. Vol. III, p. 634.

[79] Ruch Direct, p. 22-24.

[80] Ruch Direct, p. 25.

C. DP&L's Alleged Nonquantifiable Costs And Benefits Do Not Justify The Proposed ESP.

FES strongly believes that an ESP that forces DP&L's customers to pay, on average, $1,923 of additional costs over the ESP's term[81] cannot be rescued by so-called "nonquantifiable" benefits. No level of such benefits could justify imposing this intolerable burden of above-market pricing on customers. In this case, where DP&L's proposed nonquantifiable benefits are insignificant, this is particularly true. Acknowledging this fact, on rebuttal DP&L proposed that the Commission also consider the "nonquantifiable costs" associated with rejecting the proposed ESP – the purported threat to DP&L's revenues. Neither the purported benefits nor the purported costs justify the proposed ESP.

1. The Purported Nonquantifiable Benefits Of The Proposed ESP Are Minimal.

a. The Price Benefits Of A Faster Transition To Market Are Encompassed In The Price Test.

DP&L claims that the faster transition to market of its proposed ESP is a nonquantifiable benefit which should be considered by the Commission.[82] Mr. Malinak states that:

> With this faster transition, DP&L's ESP will support the broader policy goals, such as a more favorable climate for business and more choices for consumers, that were envisioned when the General Assembly approved legislation to transition the state's customers to market-based pricing.[83]

FES agrees that a faster transition to market and lower prices leads to a more favorable climate for business. FES also agrees that the General Assembly intended a transition to market-based pricing in S.B. 3. However, this is a curious argument for DP&L to make while at the same time demanding a huge new nonbypassable charge (the SSR) and proposing to capture for itself all

[81] Ruch Direct, p. 32.

[82] Malinak Direct, p. 14.

[83] Malinak Direct, p. 14 (citing S.B. 3).

benefits of shopping through the Switching Tracker. These proposed charges would retard the transition to market and artificially raise prices for shopping and non-shopping customers alike by almost $1 billion. Contrary to DP&L's position, there is no benefit of a faster transition to market in this proposal – rather, the nonbypassable charges are a huge detriment of the proposed ESP.

In addition to the problematic departure from reality represented by this argument, the vast majority of the "benefit" of a faster transition to market can be quantified. The ESP v. MRO price test compares the proposed ESP to a proposed MRO. That quantification is discussed in detail above, and shows that the proposed ESP is less favorable than a blended MRO under R.C. § 4928.142(D) by [**BEGIN CONFIDENTIAL**]$[redacted][**END CONFIDENTIAL**]. The proposed ESP can also be compared quantitatively to the market prices that would expected in an MRO approved under R.C. § 4928.142(A). FES witness Ruch did this calculation, and determined that DP&L would receive $988 million in above-market revenue through the proposed ESP. These are numbers that have been quantified, and they show that DP&L's proposal would substantially harm customers through its above-market charges.

DP&L may claim that this "non-quantifiable" benefit was intended to encompass benefits of a transition to competition which cannot be included in the above calculations, such as an improvement in the general business climate. However, this argument also cuts against DP&L's position. All else equal, $988 million in above-market charges to customers in a relatively small service territory would necessarily slow business development, job growth, and harm the customers forced to pay such exorbitant charges. The harm of the proposal is not limited to SSO customers alone, as DP&L seeks to impose gigantic new nonbypassable charges that impact all

DP&L ratepayers. If the non-quantifiable costs associated with the transition to market under DP&L's proposal are considered, then the ESP application should be soundly rejected.

As explained by FES witness Noewer, there is no reason that DP&L cannot implement a fully market-based SSO now.[84] DP&L's customers should be allowed to access beneficial market-based pricing as soon as possible.

b. The Retail Enhancements Should Be Implemented Regardless Of The ESP Filing And Are Not A Benefit Of The ESP.

DP&L proposes to implement certain retail enhancements as part of its proposed ESP, and argues that those enhancements should be considered a non-quantifiable benefit of the proposed ESP.[85] FES agrees, these retail enhancements should be made, but disagrees that the retail enhancements should be considered a nonquantifiable benefit of the proposed ESP.

DP&L proposes that customers pay for the retail enhancements through a nonbypassable charge.[86] While FES agrees with this methodology, it is improper to claim that enhancements that customers pay for is a benefit of an ESP. Since customers are paying for the enhancements , any "benefit" associated with them simply represents receipt of the services paid for instead of something with additional value that should be considered when evaluating the ESP.

It is also inappropriate to consider the retail enhancements to be a benefit of the proposed ESP because these enhancements should be made regardless of the ESP filing. The enhancements should have been made years ago.[87] In fact, there continue to be a number of barriers to competition in DP&L's service territory, many of which would continue under the

[84] Testimony of Sharon Noewer on behalf of FES, FES Ex. 17 and 17A, ("Noewer Direct"), p. 7.

[85] Malinak Direct, p. 15.

[86] Noewer Direct, p. 7.

[87] Noewer Direct, p. 7.

proposed ESP. These barriers to competition are contrary to the intent of R.C. § 4928.02(A),[88] (B),[89] (C),[90] and (H).[91] Each of these statutory provisions support the development of the competitive market and customer choice in Ohio. It is the obligation of every EDU to fulfill these state policy goals. DP&L's barriers to competition are inconsistent with these goals and should be removed no matter what SSO plan DP&L ultimately pursues. Therefore, the enhancements to retail competition that DP&L's customers ay for should not be considered to be a benefit of the proposed ESP. Instead, the Commission should simply consider them as DP&L finally more fully complying with Ohio's state policy.

c. Regulatory Flexibility Is Not A Benefit That Can Justify Above-Market Pricing.

The final non-quantifiable benefit identified by DP&L is the general regulatory flexibility associated with an ESP as compared to an MRO.[92] Though it is true that ESPs are generally more flexible than MROs, this is a function of statute rather than any specific element of DP&L's proposal.[93] It is unclear why DP&L believes that this statutory framework can be considered a benefit of its proposed ESP. Indeed, given that the General Assembly has

[88] "(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;"

[89] "(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;"

[90] "(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;"

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

[92] Malinak Direct, p. 15.

[93] Noewer Direct, p. 7.

established an MRO as the default option, with an ESP only possible if it is more favorable than the expected results of an MRO, the mere fact that an EDU is implementing an ESP instead of the preferred MRO cannot in itself be considered a "benefit" of the ESP. The only time this make-weight argument is made is when a proposed ESP has above-market prices. Yet the General Assembly has directed that customers should, through an MRO, receive the benefit of market prices. If there is any benefit associated with regulatory flexibility, it was created by the General Assembly and cannot be considered an ESP benefit that justifies imposing $988 million of above-market costs on DP&L's customers.

2. The Purported Non-quantifiable Cost Of Rejecting DP&L's Proposal Is Overstated, And Has Not Been Supported By Record Evidence As Required By Ohio Law.

In rebuttal testimony, DP&L claims that the Commission should also consider the "non-quantifiable costs" to its financial integrity if the proposed ESP is rejected.[94] DP&L argues that it will suffer "financial distress" if it is not granted these massive new nonbypassable charges, and that the Commission should consider this "financial distress" when conducting the ESP v. MRO test.[95] DP&L's argument should be rejected because any "financial distress" is related to DP&L's generation assets, DP&L has failed to meet the statutory requirements for emergency rate relief, DP&L's financial integrity claims are incorrectly calculated, and DP&L overstates the impact to customers associated with financial integrity issues.

[94] Malinak Rebuttal, pp. 7-9.

[95] Malinak Rebuttal, p. 8.

a. The Alleged "Financial Distress" Is Limited To Generation Assets, Which Are Competitive Under Ohio Law.

DP&L claims that the Commission should consider its "financial distress" as a nonquantifiable cost of the MRO under the statutory test.[96] It is therefore important to analyze exactly what has caused DP&L's "financial distress." It is clear from the testimony of DP&L's witnesses that the generation assets of the company are the assets which are "distressed."

Mr. Jackson testified that DP&L requested the SSR and ST in order to make sufficient improvements to the generation assets in order for them to be competitive. Indeed, DP&L claims that the generation assets could not support any debt whatsoever:

> Q. Okay, so as we sit here today, the generation assets do not have a value which could be used to support debt?
>
> A. I do not believe that the generation assets could support debt today.[97]

In addition to being unable to maintain debt, Mr. Jackson agreed that the generation assets are "dragging down or depressing" overall company return.[98]

> Q. So the answer is that the remaining distribution and transmission utility would not have a financial integrity concern?
>
> A. Again, my answer is this is a DP&L filing, it's a filing for T, D, and G.
>
> EXAMINER PRICE: Mr. Jackson, that was not responsive. If you could answer the question, I would appreciate it.
>
> A. I believe that the T and D business has sufficient revenue included in it so I do not believe it would have a financial integrity issue for the T and D business.[99]

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[96] Malinak Rebuttal, p. 8.

[97] Tr. Vol. XII, p. 2908.

[98] Tr. Vol. XII, p. 2914. Tr. Vol. I, p. 117 ("Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct? A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections."); Tr. Vol. I, p. 118 ("Q. And you believe the transmission revenues would be adequate over the five-year proposed ESP period, correct? A. That is my expectation."); *see also*, Lesser Direct, p. 12 (citing Jackson Deposition pp. 100-01.)

[99] Tr. Vol. I, p. 150

As the testimony from DP&L's own witness makes clear, the generation assets are the cause of any financial distress facing DP&L. The question then is whether or not this is a relevant consideration for the Commission here. The answer is no. While the Commission may consider the financial integrity of a regulated utility,[100] financial integrity does not encompass competitive generation service, which is subject to the competitive market and not cost-based rate regulation.[101] Ohio law requires that the Commission treat DP&L's distribution and generation functions separately,[102] and no guaranteed returns are authorized for its generation function. To the contrary, Ohio law mandates that an EDU "shall be fully on its own in the competitive market" with regard to its generation assets.[103]

DP&L has made clear that market pricing for energy and capacity is what is causing its financial distress.[104] Yet the U.S. Constitution does not guarantee that public utilities exposed to market forces will earn a profit. In *Hope*, the U.S. Supreme Court recognized that "regulation

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[100] While this is an element of the Commission's mission statement, it is not a constitutional requirement. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944), does not guarantee a regulated utility any particular rate of return. Indeed, as shown in *Market St. Ry. Co. v. Railroad Commission of State of Cal.*, 324 U.S. 548, 566-67, 65 S.Ct. 770, 89 L.Ed. 1171 (1945), a regulated utility is not guaranteed a profit when competitive forces prevent it from recovering its costs.

[101] *See* R.C. § 4928.06(B) (Only if "there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions").

[102] *See* R.C. § 4928.17 (requiring separate accounting functions for competitive and noncompetitive services).

[103] R.C. § 4928.38.

[104] Jackson Direct, Exh. CLJ-1; Tr. Vol. I, p. 132 ("we do not believe that generation entity, you know, today would be able to have really any level of debt placed on them. . ."); Tr. Vol. I, p. 135-36 ("Q. Given the analysis that you prepared for this case and the review that you've done, among other things the dark spreads, is it your belief that electric generation in general is under water, will have negative margin, until at least 2018? A. What we have reflected, and again this kind of goes back to what are some of the drivers that were causing the ROE to decline over time, we indicated it's due to customer shopping, **it's due to lower market prices**, and then we had indicated **capacity pricing as well**. That is what's driving the change in the ROE. And, obviously, that is being reflected throughout the projections in my testimony.")(emphasis added)

does not insure that the business shall produce net revenues" and furthermore that "the hazard that the [utility] will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business."[105] The Ohio Supreme Court followed suit in *Dayton Power & Light*, stating: "Regulation is deemed no different from any other government action; it can 'limit stringently' the profitability of [a utility's] investment in endeavoring to balance the 'broad public interest entrusted to its protection.'"[106] In *Dayton Power & Light*, the utility argued the balancing of the investor and consumer interests in that case was not proper because all Ohio utilities would be disadvantaged in attracting capital "because the utilities must inform their investors that they may not be permitted to earn a rate of return on this investment if the facilities which are prudently planned and necessary today are canceled in the future."[107] The Ohio Supreme Court rejected this argument, noting that "[a]bsent such explicit statutory authorization, however, the commission may not benefit the investors by guaranteeing the full return of their capital at the expense of the ratepayers."[108] DP&L's claims fail this standard, because DP&L is not being prevented by Commission regulation from obtaining a market-based return on equity. Instead, DP&L is seeking to protect its generation assets from market pricing despite the statutory mandate that DP&L's assets be fully on their own in the competitive market. As in *Dayton Power & Light*, the Commission lacks explicit statutory authoritzation to give DP&L an above-market subsidy for its generation assets.

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[105] *Hope Natural Gas Co*., 320 U.S. at 603 (quoting *Fed. Power Comm'n v. Natural Gas Pipeline Co*., 315 U.S. 575, 590 (1942)); *Market Street Ry. Co. v. RR. Comm'n. of California*, 324 U.S. 548 (1945) (regulation does not insure a utility's profit).

[106] *Dayton Power & Light Co. v. Pub. Util. Comm'n of Ohio*, 4 Ohio St.3d 91, 99 (1983) ("The fixing of prices, . . . may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid.").

[107] *Dayton Power & Light Co.*, 4 Ohio St.3d at 102.

[108] *Dayton Power & Light Co.*, 4 Ohio St.3d at 102 (emphasis added).

DP&L has offered no evidence that a temporary decline in its return on equity from its historic 20% level will prevent it from operating successfully and maintaining its financial integrity. As the Ohio Supreme Court held when rejecting claims under the Fifth and Fourteenth Amendments, a valid claim under these amendments required a showing of both unreasonableness and confiscation when the decision is viewed as a whole. *Dayton Power & Light Co. v. Pub. Util. Comm'n of Ohio,* 4 Ohio St.3d 91, 99 (1983). DP&L can meet neither of these standards. It is certainly more reasonable for the Commission to follow Ohio law by denying DP&L's ESP application and to provide customers with the benefits available in the competitive market. Importantly, there can be no confiscation through the rejection of DP&L's proposal since none of DP&L's property will be confiscated by the Commission's order nor will DP&L's use of its property be limited in any way. Instead, DP&L will be free to do whatever it likes with its property and may seek to obtain the returns available in the competitive market. DP&L's own witness agreed that market pricing is not confiscatory, and this is supported by relevant law.[109] There will be no Commission-imposed limit on DP&L's generation-related return, so, by definition, there can be no confiscation of DP&L's assets through the Commission's order. Thus, the Commission's rejection or substantial modification of the proposed ESP as required by state law is not a denial of DP&L's substantive due process rights under the Fifth and Fourteenth Amendments.

[109] Tr. Vol. II, p. 568 ("Q. But it is your opinion [Dr. Chambers,] that market pricing is not economically confiscatory, correct? A. Inherently not."). *See also, Market Street Railway v. Railroad Commission of State of Cal.*, 324 U.S. 548, 567 (1945) ("[t]he due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces."); *In re Southern California Edison Co.*, 2002 WL 407297, Decision 02-01-001 (Cal. P.U.C., January 2, 2002), *8 ("the government is not required to protect utilities against losses caused by the operation of market forces.").

b. DP&L Has Failed To Comply With The Statutory Standards For Emergency Rate Relief.

Ohio law requires utilities seeking emergency rate relief to meet certain minimum standards. These include an "extraordinary" showing by the utility that, absent emergency relief, it will be financially imperiled or its ability to render service will be impaired.[110] A utility's evidence of financial impairment must "clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation."[111] If an emergency is shown, the Commission is limited to granting temporary relief "only at the minimum level necessary to avert or relieve the emergency."[112]

DP&L has not even attempted to meet this standard. Instead, it has presented testimony regarding its credit rating[113] and the vague notion of "financial distress."[114] While even these claims are significantly overstated and use stale data, there is a significant difference between these claims and a showing of "extraordinary circumstances which constitute a genuine emergency situation." [115] DP&L also makes no effort to show that the rate relief requested is "only at the minimum level necessary to avert or relieve the emergency."[116] The Commission cannot consider DP&L's financial integrity to be a "cost" of the proposed ESP because DP&L fails to present any evidence in support of its position.

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[110] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

[111] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

[112] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

[113] Chambers Direct.

[114] Malinak Rebuttal, p. 8.

[115] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

[116] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

By way of example, DP&L claims that the SSR is needed in order for it to provide safe and reliable service, but it does not identify any specific measure of "stable service."[117] DP&L fails to identify a single project which it would not be able to complete without the above-market ESP. DP&L fails to identify any essential maintenance it would be forced to forgo. DP&L fails to identify why it would not be able to provide safe and reliable service without the SSR. DP&L also fails to explain why it needs exactly $137.5 million/year in order to maintain adequate service.

> Q. But in terms of the amount required to provide adequate service, you can't tell me that to provide adequate service in 2013 you need that--exactly $137.5 million, correct?"
>
> A. Correct.[118]

There is no reason to grant such a massive subsidy when DP&L's own financial witness is unable to testify as to the amount needed to ensure financial integrity.

Without even a general description of these issues, essential for emergency rate relief claims under Ohio law, the Commission should not give any weight to DP&L's completely unsupported claims.

c. DP&L's Financial Integrity Claims Use Stale Data And Are Incorrectly Calculated.

As discussed in detail below in Section III.A.2, DP&L's financial integrity claims use stale data and are incorrectly calculated. Moreover, they fail to meet the standard for financial integrity claims proposed by DP&L's own witness. Accordingly, DP&L's claims should be rejected as invalid.

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[117] Malinak Rebuttal, p. 14; Lesser Direct, p. 24.

[118] Lesser Direct, p. 25 (citing DP&L witness Jackson's deposition).

d. DP&L's "Financial Integrity" Issues Do Not Mean That Customers Will Not Receive Safe And Reliable Service.

DP&L's counsel engaged in clasic straw-man argument by asking intervenor witnesses whether or not customers would be affected if DP&L's service was so impeded such that there would be "periodic and prolonged power outages."[119] There is no record evidence suggesting that DP&L needs a $988 million above-market subsidy to avoid periodic and prolonged power outages. The only "financial distress" claimed by DP&L relates to its competitive generation assets, and DP&L's competitive generation assets are not needed to maintain reliable electric service. There is a well-developed regional PJM market that adequately addresses reliability. DP&L witness Seger-Lawson admitted that generators participating in PJM have responsibilities to comply with PJM requirements even when the generators are not providing SSO service to customers.[120] If DP&L's generation assets are no longer economic and are retired by DP&L, then there is a PJM process to address potential reliability issues, if any, that would result from those retirements. Energy and reliability can be provided by the wholesale market as administered by PJM. Indeed, acquiring 100% of SSO energy needs at wholesale is exactly what is proposed by DP&L in this case starting in 2016, and reliable capacity is provided by PJM today.

Despite the fact that it is DP&L's generation assets, which have been treated by DP&L as competitive since 2000, are causing the alleged financial distress, DP&L presented no evidence regarding return on equity by function. At hearing, DP&L witness Jackson testified that he did not evaluate return on equity by distribution, transmission or generation function because DP&L

[119] *See, e.g.*, Tr. Vol. V, p. 1250.

[120] Tr. Vol. IX, p. 2197.

does not track that data.[121] DP&L also failed to examine projected return on equity by function for the period 2013-2017.[122] DP&L acknowledged that the transmission and distribution functions are regulated by the PUCO, and that the generation function is deemed competitive and unregulated by the PUCO.[123] Despite these admissions, DP&L witness Jackson admitted that his group makes no effort to track whether or not there are cross-subsidies that flow between the distribution/transmission functions and the generation function of DP&L.[124] In fact, other than transaction confirmations between DP&L and DPLER (which only relate to ensuring transactions are at market), Mr. Jackson was not aware of any effort at DP&L to ensure that the distribution and transmission functions were not subsidizing the generation function.[125]

Rather than acknowledging the existence of a market for energy, DP&L is demanding nearly one billion dollars in above-market revenues. Customers do not need to provide this massive subsidy to DP&L to ensure access to generation. The wholesale market is available to provide the generation needed by DP&L's customers at a lower cost than DP&L's assets, and there is no evidence in the record that DP&L's assets are needed in order to ensure that customers have access to reliable generation service.

D. Every Intervenor And Staff Witness Agrees That DP&L's Proposed ESP Fails The ESP v. MRO Test.

Every intervenor and Staff witness who examined the proposed ESP reached the same conclusion: DP&L's proposed ESP fails the ESP v. MRO test.[126] As demonstrated by FES

[121] Tr. Vol. I, p. 29.

[122] Tr. Vol. I, p. 29.

[123] Tr. Vol. I, p. 29.

[124] Tr. Vol. I, p. 30.

[125] Tr. Vol. I, pp. 30-31.

[126] *See* Ruch Direct, Murray Direct, Hixon Direct, Turkenton Direct.

witness Ruch, the quantifiable cost of the proposed ESP of [**BEGIN CONFIDENTIAL**] $ [**END CONFIDENTIAL**] outweighs any benefits that may stem from additional non-quantifiable characteristics.[127] Mr. Ruch reaches this conclusion based on the results of the price test, as well as a review of prior Commission decisions. In the AEP ESP 2 case, the Commission approved a proposed ESP which failed the price test by $386 million based on a transition to market and an agreement to structurally separate during the term of the proposed ESP.[128] Neither of these elements are present in DP&L's proposal, which is [**BEGIN CONFIDENTIAL**] [**END CONFIDENTIAL**] the cost of AEP Ohio's ESP 2 on a per customer basis. Indeed, even if switching is assumed to remain constant, there is no justification for the $600 million cost of the proposed ESP, or $1,168 on average per customer.[129]

Staff witness Turkenton agreed with Mr. Ruch's analysis, even without making all necessary adjustments. She agreed that the ESP v. MRO test should terminate at the end of the proposed ESP, that the MRO blending percentages should be conducted on an annual basis, that the switching tracker should be included as a cost of the proposed ESP, and that increased switching would make the ESP comparatively less favorable. Despite her agreement with each of these adjustments, they are not shown in her exhibits TST-3 and TST-4 which she structured to remain consistent with DP&L's exhibits. The effect of the adjustments, which Staff witness Turkenton agreed with, is shown in the analysis of FES witness Ruch. Even without considering these adjustments, Staff witness Turkenton concluded that "the ESP is not more favorable than an MRO on a quantitative basis in any" of the scenarios she conducted.[130]

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[127] Ruch Direct, p. 27.

[128] Case No. 11-346-EL-SSO, August 8, 2012 Opinion and Order, p. 75, Ruch Direct, p. 27.

[129] Ruch Direct, p. 30.

[130] Turkenton Direct, p. 12.

E. The RSC Should Not Be Included On The MRO Side Of The ESP v. MRO Test.

DP&L does not claim that the Rate Stabilization Charge ("RSC") in its current ESP should be considered on the MRO side of the ESP v. MRO test.[131] However, witnesses for IEU and Staff have suggested that the RSC could be considered on the MRO side of the ESP v. MRO test.[132] Neither witness opines that the RSC should be included on the MRO side of the test, but each includes this assumption as an element of its analysis in order to provide the Commission with additional data.[133] As stated by Staff witness Turkenton, "[t]his is a legal question for the Commission to decide."[134] There is no legal justification for including the RSC on the MRO side of the test, and the Commission should decide accordingly.

1. The RSC Cannot Be Included In a 100% Market-Based MRO.

The theory advanced for including the RSC on the MRO side of the ESP v. MRO price test is that R.C. § 4928.142(D) requires that, for a first-filed MRO application, the SSO price "for retail electric generation service **under this first application** shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price."[135] Under this theory, the RSC could be part of the existing generation service price. While this is incorrect, as discussed below, it also is irrelevant. Because any "expected" MRO could not possibly result from DP&L's first application for an MRO, since DP&L's first MRO application has already been made. DP&L's proposed ESP must instead be compared to the

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[131] *See* Malinak Direct.

[132] Murray Direct, pp. 31-33; Turkenton Direct, Exhibits TST-1a through TST-4a.

[133] Murray Direct, p. 35; Turkenton Direct, p. 6.

[134] Turkenton Direct, p. 6.

[135] R.C. § 4928.142(D) (emphasis added).

expected results of a 100% market-based MRO pursuant to R.C. § 4928.142(A). There is no room for the RSC in an MRO approved under R.C. § 4928.142(A).

2. The RSC Ended On December 31, 2012.

In an entry dated December 19, 2012, the Commission held that the RSC was part of the terms and conditions of the current ESP, and thus should be continued during the pendency of this proceeding. While the Commission's decision may have been correct as far as maintaining the status quo during litigation, there is no justification for considering the RSC as continuing indefinitely during the ESP v. MRO test period.

Regardless of what the original justification for the RSC was, there is no justification for assuming that the RSC would continue indefinitely when it concluded by its own terms on December 31, 2012. Even DP&L witness Malinak did not consider the RSC on the MRO side of the test. The Commission should not consider the RSC on the MRO side of the test, and should instead abide by its previous decision by considering the RSC to have terminated with the current ESP.

The potential negative policy impact of including the RSC on the MRO side of the test while also ignoring that R.C. § 4928.142(D) is limited to the first MRO application filed is also important to consider. If nonbypassable charges with an end date are considered by the Commission when conducting the test, then future tests will be forever tainted by charges which at the time of approval were considered by the Commission to be temporary. By way of example, suppose DP&L is granted an SSR in this case. Even if the next ESP uses a 100% wholesale auction, DP&L could institute a new nonbypassable charge and still claim the proposed ESP is more favorable than an MRO which includes the SSR in its blending. This would not apply just to DP&L, it would also apply to any EDU which had received a temporary nonbypassable charge of any type. There is no justification for these gymnastics when the

Commission can simply abide by the plain terms of its previous decisions and assume that temporary nonbypassable charges have terminated under the terms of those decisions.

3. The RSC Is Not Part Of The "Generation Service Price."

The Commission continued the RSC during the pendency of this proceeding. When making this decision, the Commission held that it was appropriate to maintain the status quo in this manner under R.C. § 4928.141, which provides that the "rate plan" of an EDU shall continue until a standard service offer is authorized.[136] The Commission also relied on R.C. § 4928.143(C)(2)(b), which provides that if the utility terminates an application after Commission modification then "the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer."[137]

The Commission's decision does not alter the context of the blending program set out in R.C. § 4928.142(D), which requires that competitive bid results be combined with the "generation service price." The "generation service price" necessarily encompasses bypassable generation charges only, as only bypassable charges could be blended with competitive bid results to calculate the SSO price. The "generation service price" does not include nonbypassable charges for distribution costs or EDU stability. There is a significant difference between the "rate plan" and "provisions, terms, and conditions" language relied upon by the Commission to continue the status quo during this case and the "generation service price" language applicable to the ESP v. MRO test. Regardless of the justification for the RSC it is not part of the "generation service price" in the current ESP. Therefore, there is no justification for including the RSC on the MRO side of the test.

[136] Entry dated December 19, 2012.

[137] Entry dated December 19, 2012; R.C. § 4928.143(C)(2)(b).

III. DP&L HAS NOT ESTABLISHED THAT IT NEEDS ADDITIONAL REVENUE TO PROTECT ITS FINANCIAL INTEGRITY, SO THE SSR AND ST SHOULD BE REJECTED

A. DP&L Has Not Established A Valid Financial Integrity Claim.

DP&L presented no valid evidence of a financial emergency. Instead, DP&L presented evidence regarding its potential credit rating. There is a significant difference between a credit rating decrease and a valid financial integrity claim, as recognized by DP&L's own witness Chambers. More significantly, DP&L uses stale data which dramatically overstates its projected costs and understates projected revenue. DP&L admits that distribution and transmission revenues are adequate over the ESP time frame, and that the integrity issue is solely related to generation assets.[138] As such, DP&L has not established a valid financial integrity claim.

1. DP&L's Financial Integrity Testimony Advances A Creditworthiness Claim, Not a Confiscation Claim.

DP&L witness Chambers defines financial integrity in a manner which he does not support, except with creditworthiness metrics, and which he admits is not a true confiscation analysis. For both of these reasons, the Commission should give no weight to his testimony.

First, Dr. Chambers states that the strength of a company's financial integrity is determined from a review of whether the company operates efficiently, has qualified management and capable personnel, has the ability to meet its obligations in a timely manner, can maintain and invest in its infrastructure, is sufficiently flexible to adjust to changing conditions, and has positive forward-looking financial prospects given the risks and uncertainties

[138] Tr. Vol. I, p. 117 ("Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct? A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections."); Tr. Vol. I, p. 118 ("Q. And you believe the transmission revenues would be adequate over the five-year proposed ESP period, correct? A. That is my expectation."); *see also*, Lesser Direct, p. 12 (citing Jackson Deposition pp. 100-01.)

of regional, national and international economies.[139] He further acknowledges that "the determination of financial integrity involves balancing these many factors" and that one way to measure this type of financial integrity is to "relate it to a company's overall creditworthiness."[140] Dr. Chambers then proceeds not to balance any of these factors but, instead, to simply provide creditworthiness metrics for DP&L.[141] He did not evaluate whether DP&L can operate its business efficiently with qualified management. He did not evaluate DP&L's ability to meet its obligations. He did not evaluate DP&L's ability to maintain its infrastructure. In short, Dr. Chambers ignored almost all of the factors he identified as relevant to a financial integrity review, and none of DP&L's other witnesses provided testimony addressing these factors.

Dr. Chambers' testimony does not analyze DP&L's financial integrity, even as he defines it, but is instead analyzes whether DP&L is at risk of a reduction in its credit rating. Dr. Chambers agreed that these are not identical concepts, and that his chosen topic of creditworthiness is a more narrow concept than financial integrity.[142] Dr. Chambers further agreed that economic confiscation "does not result simply from a change in a company's credit rating."[143] Instead, economic confiscation only applies when a utility is prevented from competing in the market and earning a market-based return:

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[139] Chambers Direct, p. 9.

[140] Testimony of Jonathan Lesser, FES Ex. 14 and 14A, ("Lesser Direct"), p. 26 (citing DP&L's response to OCC Interrogatory INT-223); Chambers Direct, p. 9.

[141] Chambers Direct, p. 9.

[142] Tr. Vol. II, p. 454 ("Now, you would agree that these are not identical concepts, right? A. That's correct. . . . Q. And creditworthiness, as you understand it, is a narrower concept than financial integrity, right? A. Yes.").

[143] Tr. Vol. II, p. 452.

> Q. You do believe that under certain circumstances where a rate of return is expected to be extremely low or negative, that could be viewed from an economic standpoint as confiscatory.
>
> A. **The low rate by itself is not necessarily confiscatory**. What would be confiscatory is if the company is unable to earn a reasonable rate of return under various conditions. Lots of companies get affected by economic conditions, we've seen many companies with losses. That by itself is not confiscatory, but if **by regulation** a company is totally unable to achieve a reasonable rate -- expected rate of return, I would consider that from an economic standpoint confiscatory.[144]

Dr. Chambers' statement is precisely correct, and is consistent with the *Hope Natural Gas* and *Market Street Railway* cases cited above. A low return on equity by itself is not necessarily confiscatory. Confiscation occurs only when a company is affirmatively prevented through regulation from earning a reasonable return on equity for an extended period of time. Importantly and decisively, Dr. Chambers agreed that he is not offering an opinion regarding when a low return on equity for DP&L over an extended period of time would cross the line into being confiscatory.[145] He also agreed that DP&L's exposure to market pricing is inherently not confiscatory.[146]

As confirmed by FES witness Dr. Lesser, there is a significant difference between a ratings downgrade and the ability of DP&L to "maintain its credit and attract capital", which is the constitutional prerequisite for a confiscation claim using a "financial integrity" analysis.[147] As Dr. Lesser testified, "[a] ratings downgrade, by itself, does not mean a company is unable to maintain its credit or attract capital."[148] Instead, a ratings downgrade may simply mean that a

[144] Tr. Vol. II, p. 452 (emphasis added).

[145] Tr. Vol. II, pp. 452-53.

[146] Tr. Vol. II, p. 568.

[147] Lesser Direct, p. 28.

[148] Lesser Direct, p. 28.

company's cost of capital increases, which Dr. Chambers confirmed.[149] There is a significant difference between a higher cost of capital and the inability to attract capital at any cost. Indeed, Dr. Chambers' opinion is that the impact on DP&L of not receiving above-market subsidies through the SSR and ST would be, in the short term, a possible downgrade from BB to BB-, and a company with a BB- rating can still service its financial commitments.[150] In the long-term, he projects that DP&L's credit rating could drop to B or lower and that DP&L would nevertheless maintain the ability to meet its financial commitments, although this somewhat negative outlook ignores DP&L's likely improved financial position following corporate separation.[151] In short, DP&L has provided no evidence that its financial integrity is threatened at the level that gives rise to a confiscation claim.

Although Dr. Chambers cited to the AEP ESP 2 case to argue that the Commission has determined that an ROE between 7% and 11% is necessary to maintain DP&L's financial integrity,[152] his analysis failed to account for the fundamental differences between DP&L and AEP. The Commission's decision in the AEP ESP 2 case was dependent on AEP Ohio's status as a FRR entity under PJM's rules.[153] Dr. Chambers failed to account for this fundamental difference, and he admitted that he has no understanding of the FRR option and its significance.[154] Dr. Chambers also did not demonstrate that DP&L's business and financial risk

[149] Tr. Vol. II, pp. 463-64.

[150] Chambers Direct, Appendix B and Exh. WJC-8; Tr. Vol. II, pp. 460-63.

[151] Chambers Direct, Appendix B and Exh. WJC-8; Tr. Vol. II, p. 443.

[152] Lesser Direct, p. 28.

[153] Lesser Direct, p. 29.

[154] Lesser Direct, p. 29.

are comparable to AEP Ohio's, even though such "comparability" underlies the U.S. Supreme Court's *Hope Natural Gas* decision that Dr. Chambers cited as justifying the SSR.[155]

Finally, no DP&L witness evaluated DP&L's financial integrity and determined that the $137.5 million annual SSR was the minimum amount needed to preserve DP&L's financial integrity. DP&L witnesses Jackson and Chambers point at each other for this determination, but neither ever explains how the SSR was calculated or why this is the minimum amount needed to ensure financial integrity.[156] This shows the frivolous nature of DP&L's claim. If DP&L's financial integrity was truly threatened, DP&L would be able to clearly explain the need for additional funds (infrastructure maintenance it can't afford, debt it couldn't service, etc.) and how much money it needed to meet those obligations. DP&L did not provide any of this evidence, most likely because there is no true threat to its financial integrity, either under the standard provided by its own witness Chambers or under the statutory standard.

2. DP&L Uses Stale Data Which Significantly Overstates Cost And Understates Revenue.

a. DP&L Identified Cost Savings Which Meet Its Financial Integrity Concerns, But Failed To Reflect Those Savings In Its Testimony.

DP&L's financial integrity claim is based on pro forma financials provided by DP&L witness Jackson. Those projected financials are in turn based on cost and revenue projections from DP&L as of August of 2012, and are what was relied on by Dr. Chambers.[157] Dr. Chambers was not provided with the confidential information which DP&L may have presented to ratings agencies.[158] Dr. Chambers was not provided with any of DP&L's updated budget

[155] Lesser Direct, p. 30.

[156] Lesser Direct, pp. 30-31.

[157] Tr. Vol. II, p. 434.

[158] Tr. Vol. II, p. 436.

projections (reducing costs), and was not provided with updated revenue calculations to reflect the new forward curves used by DP&L in its budget but not in its testimony in this case.[159]

DP&L's future return on equity is largely dependent on future costs. However, DP&L's testimony did not taken into account any potential capex or O&M cost savings which would reduce those costs.[160] The possible cost savings are not in dispute. DP&L already identified these savings but failed to incorporate them into the pro forma analysis prepared by Mr. Jackson.[161] The projected cost savings are significant. DP&L already determined that it can reduce capex by [**BEGIN CONFIDENTIAL**]$[redacted][**END CONFIDENTIAL**] annually.[162] According to DP&L, this analysis was related solely to DP&L's competitive generation assets.[163] DP&L also has identified reductions in O&M expenditures of [**BEGIN CONFIDENTIAL**]$[redacted][**END CONFIDENTIAL**].[164] DP&L acknowledges that these O&M expense reductions were "more heavily weighted on the generation side."[165] DP&L further admits that some of those cost savings have already been implemented by DP&L.[166] Together, these expenditure reductions identified by DP&L total more [**BEGIN CONFIDENTIAL**][redacted] [**END**

[159] Tr. Vol. II, p. 437.

[160] Lesser Direct, p. 33 (citing CLJ-2).

[161] Lesser Direct, p. 34.

[162] Lesser Direct, p. 18 (citing DP&L Impairment Analysis prepared in October 2012, attached as Exhibit JAL-6).

[163] Lesser Direct, p. 18.

[164] Tr. Vol. I, p. 87; Lesser Direct, p. 18.

[165] Lesser Direct, p. 18 (citing Jackson deposition, p. 322).

[166] Tr. Vol. I, p. 89.

CONFIDENTIAL].[167] In addition to these already identified and partially implemented savings DP&L has identified yet more savings are possible. By way of example, DP&L also identified additional reductions in O&M expenditures of [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].[168] However, once again, none of these cost savings were incorporated into Exhibit CLJ-2.[169]

Neither Mr. Jackson nor Dr. Chambers include these reductions in their testimony.[170] Instead, these witnesses assume that budgets are completely divorced from DP&L's financial position and from revenues earned.[171] The scale of DP&L's projected capex increases is staggering for a company this size, particularly given its claims of financial distress. DP&L anticipates capex in 2016 will be $104 million greater than projected 2013 capex.[172] DP&L anticipates that RTEP capex will increase from [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].[174] Similarly, DP&L projects

[167] Lesser Direct, p. 18.

[168] Tr. Vol. I, p. 90.

[169] Tr. Vol. I, p. 90.

[170] Tr. Vol. I, p. 256 ("EXAMINER PRICE: What is in the [2013] budget? THE WITNESS: We have the, I think I mentioned earlier approximately 45 million of identified reductions. EXAMINER PRICE: Those are in your approved budget but they're not in your projections on CLJ-2. THE WITNESS: That's correct.")

[171] Lesser Direct, p. 19; Tr. Vol. I, p. 85 ("And when each group does that, for example, when the generation group develops their power production forecast, is it your understanding that that is not based on revenue productions [sic, projections] for that functional area? A. [by Mr. Jackson] That's correct.").

[172] Lesser Direct, p. 19.

[173] Lesser Direct, p. 19.

[174] Lesser Direct, p. 19.

generation capex to increase from [**BEGIN** [redacted] [**END CONFIDENTIAL**].[175]

If DP&L proceeds with the capex reductions not currently reflected in CLJ-2, the reductions would also reduce annual depreciation expense. However, DP&L does not show any of these reductions in its pro formas. Instead, DP&L projects depreciation expense will increase from [**BEGIN CONFIDENTIAL**]$[redacted][**END CONFIDENTIAL**]. The depreciation expense savings alone are significant, but the full quantification of those savings including depreciation will depend on the assumed service life of the investments.

FES witness Dr. Lesser discusses how a reduction in capex and O&M expenses would affect DP&L's projected financials. After making only the DP&L-provided cost adjustments discussed above, Dr. Lesser found that DP&L's annual "cash and cash equivalents" could increase by [**BEGIN CONFIDENTIAL**]$[redacted][**END CONFIDENTIAL**] per year.[176] Obviously, this more than [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. **DP&L has not identified a single project it would be unable to complete or a single negative outcome for customers associated with these expense reductions**. As DP&L has already identified generation cost savings which will provide it with the same ROE's which it claims to need in this proceeding, the SSR should be rejected.

Amazingly, DP&L relies on these updated expense calculations despite its failure to address them in its testimony,. As shown in FES Exhibit 4, on October 19, 2012, DP&L created a technical accounting memorandum relating to DP&L's interim goodwill impairment

[175] Lesser Direct, p. 20.

[176] Lesser Direct, p. 21.

evaluation.[177] Notably, this document was created **before** DP&L updated its testimony in December of 2012. In this impairment evaluation, which was reviewed by Mr. Jackson when it was created, DP&L conducted an impairment analysis for DP&L, DPLER, and MC Squared.[178] As part of this analysis, DP&L analyzed projected income using the "income approach."[179] Mr. Jackson and his team took this projection of cash flows "absolutely" seriously, and used a process similar to the creation of Exhibit CLJ-2.[180] In this evaluation, Mr. Jackson used the capital expense reductions discussed above. By way of example:

[**BEGIN CONFIDENTIAL**] [redacted].[181] [**END CONFIDENTIAL**]

As shown by these representative examples, DP&L relied on these expense reductions when conducting its impairment analysis and concluding that no asset impairment needed to be recognized. Despite its reliance on this data, DP&L did not see fit to provide it to the Commission when it updated its testimony in December of 2012. There is no reason for the Commission to ignore the reality of the expense reductions when it has already been accepted by DP&L. The projected expense reductions identified by DP&L are real and are already

[177] Tr. Vol. I, p. 91.

[178] Tr. Vol. I, pp. 91-92.

[179] Tr. Vol. I, p. 93.

[180] Tr. Vol. I, p. 94.

[181] Tr. Vol. I, pp. 94-95.

incorporated into DP&L's business plan. The Commission should likewise consider them when evaluating DP&L's financial integrity claim.

b. DP&L's Projections Ignore Potential Sources Of Revenue And Understate Known Revenue Streams.

There is nothing prohibiting DP&L from seeking a distribution rate increase if it needs additional funds to make new capital investments or to address increased distribution O&M expenses to ensure safe and reliable service. DP&L acknowledges that it can file a distribution rate case if it believes its distribution revenues are insufficient.[182] Even if DP&L receives its requested subsidies (the SSR and ST), it has not promised that it will not seek a distribution rate increase during the ESP term. [183] In fact, DP&L produced documents in discovery in this case indicating that: [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. DP&L's financial projections do not incorporate the results of any potential distribution rate case during the ESP period, indicating either than distribution revenues are sufficient or that DP&L's forecasts are inaccurate.[185] There is no reason why DP&L should receive a subsidy from both SSO and switched customers when it can ensure safe, reliable and financially sound distribution service through structural separation.

DP&L's projections also fail to acknowledge the revenue available to DP&L from bidding into other utilities' SSO auctions.[186] This omission is typical of DP&L's position in this case. DP&L owns generation, but has failed to project potential positive uses of that generation

[182] Tr. Vol. I, p. 117.

[183] Tr. Vol. I, p. 117.

[184] Lesser Direct, p. 16 (citing Technical Accounting Memorandum dated January 15, 2012, Based No. DPL 0054725, attached as Confidential Exhibit JAL-6).

[185] Tr. Vol. I, p. 118.

[186] Lesser Direct, p. 22.

through bidding into other utilities' auctions. This understates potential revenue and potential margins.

DP&L also claims it transfers power to DPLER at a zero margin rate set by DP&L based on projected market prices.[187] DP&L assumes that it will continue to transfer power to DPLER for the term of the ESP at zero margin (the anticipated PJM LMP minus embedded fuel cost).[188] This pricing methodology is a prime example of why DP&L should be forced to structurally separate. As explained by Dr. Lesser, if DP&L were properly structurally corporately separated and operating to maximize its revenues, independent of DPLER's interest in generating higher margins on its retail sales, DP&L would likely require a structure with a price higher than the PJM LMP from whoever it would sell to.[189] In fact, DP&L's own records show that DP&L is earning more than a zero margin on existing sales under contract to DPLER.[190] By instead assuming that all future contracts will transfer power to DPLER at the PJM LMP, DP&L has transferred the profit margin on those sales to DPLER and excluded it from Mr. Jackson's pro formas.[191] While it is impossible to quantify the margin above LMP which DP&L could receive on the open market, it is certainly inappropriate for DP&L as the regulated entity to transfer power to DPLER at zero margin while at the same time demanding a subsidy from shopping customers to support the assets producing those sales.

DP&L's general revenue projections are also stale. The DP&L revenue projections Mr. Jackson relied on are marked as FES Ex. 1. In these projections, Mr. Jackson relied on energy

[187] Tr. Vol. II, p. 364.

[188] Lesser Direct, p. 23.

[189] Lesser Direct, p. 23.

[190] Tr. Vol. I, pp. 68-71. Mr. Jackson did not include the above-zero-margin off-system sales in his pro formas. *Id.*

[191] Lesser Direct, p. 23.

forward curves as of August 30, 2012.[192] The revenue incorporated into his Exhibit CLJ-2 is based on those August 30, 2012 forward curves.[193] Despite filing second amended testimony in December of 2012 to correct other errors related to revenue, Mr. Jackson failed to update his August 30, 2012 revenue data.

> Q. Now, at the time you filed that testimony in December you corrected those mistakes you identified in your revenue numbers, but you did not update your revenue numbers from the August data; is that correct?
>
> A. That's correct.[194]

Mr. Jackson chose not to update his calculations in this case when he updated his testimony in December of 2012, but admitted that he reviews updated forward data frequently.[195] DP&L witness Hoekstra agreed that his group provides the forward data ignored by Mr. Jackson, and that this data is updated on a daily basis because data timeliness is important.[196]

Mr. Jackson's failure to update his projections is important not just to the revenue he anticipates from dispatched units, but also to whether or not the units will dispatch at all. As shown in FES Exhibits 2 and 3, from 2009 through 2011 (the most recent year data was available), DP&L had output of approximately [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] megawatt-hours.[197] Despite this historic average, Mr. Jackson's testimony in this case projects that DP&L will sell approximately [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] less megawatt-hours in 2013 than it did in prior years. In fact, Mr.

[192] Tr. Vol. I, p. 43.

[193] Tr. Vol. I, p. 44.

[194] Tr. Vol. I, p. 44.

[195] Tr. Vol. I, p. 45.

[196] Tr. Vol. II, p. 372.

[197] Tr. Vol. I, p. 58.

Jackson does not anticipate that plant output will return to 2011 levels until [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. Mr. Jackson explained that the most significant cause of the decrease in output is the forward curve price of energy.[198] As this energy price increases, plant output would increase.[199] By using the stale August of 2012 data, Mr. Jackson utilized stale, artificially low forward curve prices which understate the revenue which DP&L will receive.

3. DP&L's Historic Returns On Equity Show That A Subsidy Will Not Resolve DP&L's Financial Integrity Issues.

As shown at hearing, DP&L wildly overstated its financial integrity claims. However, before moving on from this point it is also important to acknowledge how DP&L reached this position, and what an additional $137.5 million/year in annual subsidies would provide to ratepayers.

DP&L experienced an extraordinary amount of success over the past decade. DP&L witness Jackson acknowledged that during the 2000s (after corporate separation was statutorily mandated) DP&L consistently earned returns on equity in the range of 18 to 20 per cent per year.[200] OEG witness Kollen states that DP&L "has enjoyed twelve years of supra-normal returns on equity and excessive recoveries since 2001 when the generation function was statutorily deregulated and retail rates were unbundled."[201] DP&L's analysis does not take into account DP&L's historic returns on equity.[202]

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[198] Tr. Vol. I, pp. 59-60.

[199] Tr. Vol. I, p. 60.

[200] Tr. Vol. I, p. 113.

[201] Testimony of Lane Kollen on behalf of OEG, OEG Ex. 1 ("Kollen Direct"), p. 5.

[202] Tr. Vol. I, p. 115.

Despite earning these extraordinary returns, DP&L did not structurally separate in accordance with Ohio law during the period from 2000 to present. DP&L also did not make necessary improvements to its generation assets in order to ensure that its fleet would be economic in coming years. Instead, during the last decade DP&L simply enjoyed its profits. While that may have been DP&L's choice, there is no reason to believe that providing a subsidy today will result in any different result than occurred in the last 12 years. DP&L's balance sheet would improve but customers would be in no better position. There is no reason to provide a subsidy today when DP&L chose not to invest its supra-normal historic returns in improvements to its units.

Finally, there is no evidence in the record that the returns on equity calculated by DP&L witness Chambers are reliable. Dr. Chambers admitted that he is an expert on creditworthiness, not calculating utility rates of return.[203] Dr. Chambers has never testified about the appropriate rate of return on regulated capital, and does not consider himself an expert on utility rate regulation.[204] His testimony in this regard should therefore not be given any weight by this Commission.

B. The Proposed SSR Should Be Rejected

1. Generation Has Been Competitive For A Decade, And There Is No Reason For Shopping Customers To Subsidize Uneconomic Generation Assets.

As DP&L acknowledged, it has treated its generation assets as competitive for over a decade.[205] Over this period, DP&L has enjoyed outstanding financial results. Now DP&L finds itself with generation assets that are uneconomic, and could not be "separated out separately and

[203] Tr. Vol. II, p. 440-41 ("To develop a return on equity in the classic utility fashion, no. . .").

[204] Tr. Vol. II, p. 444.

[205] Lesser Direct, p. 32.

be financed with, you know, a certain level of debt."[206] Rather than act like a player in the competitive markets as it did when enjoying outstanding results, DP&L now asks that all its customers, including switched customers, subsidize its competitive generating assets for at least the next five years.[207] This request is inappropriate and at odds with Ohio's system of electric competition. The market provides generators with incentives to improve efficiency, reduce costs, and manage risks rather than asking customers to bear those risks.[208] In short, the market does not guarantee financial integrity. Instead, the market provides incentives for companies to improve efficiency.

There has been no surprise in Ohio's transition to the market. Indeed, DP&L's own witness acknowledges Ohio's transition was "reasonable, transparent and straightforward."[209] DP&L recovered $400 million as part of this transition, and since 2003 has enjoyed healthy returns on equity. Now it argues that the Commission is obligated to provide DP&L with at least $687.5 million over the next five years to prop up its competitive assets in an era of lower market prices. This argument ignores the entire structure of Ohio's system of generation competition at the wholesale and retail levels.

DP&L seeks to ignore the discipline of the market, and instead to use a nonbypassable subsidy to compete against suppliers who are actually participating in the market. Indeed, DP&L admits that it seeks to use the SSR subsidy to make improvements to its coal-fired generation

[206] Lesser Direct, p. 9 (quoting Jackson Deposition, p. 70).

[207] It is important to note that while DP&L has only requested the SSR for the 5 year term of the ESP, there is no guarantee that it will not request an additional subsidy as part of its next ESP. DP&L does not commit to corporate separation within the ESP term. In its last ESP, DP&L negotiated a stipulation which specifically provided that its "Rate Stabilization Charge" would end as of 12/31/12. Not only has DP&L requested to continue that charge, it has requested to almost double the charge. Without corporate separation, there is no guarantee that DP&L and intervenors will not be having these exact same arguments in 2017.

[208] Lesser Direct, p. 10.

[209] Chambers Direct, p. 24.

plants, improvements which DP&L admits could be delayed.[210] There is no justification for forcing distribution customers to subsidize generation assets solely so that those generation assets can be in a better market position whenever DP&L finally gets around to complying with Ohio law by completing corporate separation. DP&L's request for an SSR is simply an attempt at end run around Ohio's competitive market and should be rejected.

2. Staff's SSR Calculations Are Overstated Since They Rely On Flawed DP&L Projections.

As generation assets (the cause of DP&L's financial integrity concern) are competitive under Ohio law, there is no justification to award an SSR in any amount. While the Commission should not target an ROE for a competitive service like generation, there is no need for an SSR in light of the cost reductions and revenue increases already identified by DP&L.

Staff presented ROE calculations to assist the Commission in evaluating DP&L's application. Staff witness Mahmud presented calculations of an SSR targeted to result in a ROE of 6.2% and 7%. Based on these calculations, he suggests an annual SSR of between $133 million to $151 million is necessary in order for these target ROEs to be reached. Unfortunately, Mr. Mahmud's calculations are not reliable because they rely on the inaccurate projections provided by DP&L witness Chambers.

> Q. Would you agree that you took the information from Mr. Chambers' testimony at face value and you didn't check it to make sure that it was correct?
>
> A. I used it as face value, yes.[211]

The DP&L's projections Dr. Chambers included in his testimony are flawed because they fail to incorporate cost savings already identified by DP&L and fail to account for revenues available to

[210] Lesser Direct, p. 13 (citing Jackson Deposition, pp. 129-30).

[211] Tr. Vol. IV, p. 922.

DP&L. As these adjustments more than outweigh the SSR values calculated by Mr. Mahmud, Mr. Mahmud's SSR calculation is overstated and lacks probative value.[212]

Similarly, Staff witness Mahmud relied on Dr. Chambers' calculation of projected depreciation (which is dependent on the expenses discussed above), taxes, and other issues which would have the effect of increasing net income.[213] If those issues were addressed in Dr. Chambers' exhibit, which Staff used as a starting point, then the SSR could be decreased and still lead to the same operating income requested by DP&L.

Finally, DP&L's projections in Dr. Chambers' testimony assume no future dividend payments.[214] Staff witness Mahmud was not aware of whether or not DP&L had historically paid dividends or not, but agreed that if DP&L does not pay a dividend it would have the effect of increasing owners equity, and thus decreasing return on equity.[215] If DP&L is assumed to continue its historic practice of paying dividends, then the SSR needed to reach the same level return on equity would be reduced.[216]

C. The Proposed Switching Tracker Should Be Rejected As An Unlawful Attempt To Stop Switching Unauthorized Under Ohio Law.

DP&L's proposed ST would "defer for later recovery from customers the difference between the level of switching experienced as of August 30, 2012 (62% of retail load) and the actual level of switching."[217] DP&L would calculate the ST as the difference between the

[212] Mr. Mahmud acknowledged that if adjustments were made to the Exhibit WJC-3.B starting point he used in his analysis, those numbers would then flow through into his testimony. Tr. Vol. IV, p. 1003. *See* Tr. Vol. IV, pp. 1004-1010.

[213] Tr. Vol. IV, p. 1008.

[214] Tr. Vol. IV, p. 1009.

[215] Tr. Vol. IV, p. 1010.

[216] Tr. Vol. IV, p. 1012.

[217] Jackson Direct, p. 11.

Blended SSO rate and the CB rate.[218] In essence, DP&L seeks to capture the entire economic benefit of shopping for all of its customers through a nonbypassable charge.

There is no justification for the anticompetitive ST under Ohio law. As explained by FES witness Lesser, the ST would reduce the incentive for customers to switch to CRES providers.[219] The more customers who switch, the more switched and SSO customers will be required to pay. This is nothing more than an attempt to destroy Ohio's retail marketplace, and should be rejected as such.

In addition to the policy reasons to reject the ST, there is also no legal basis for instituting this rider. Nothing in Ohio law authorizes an EDU to capture 100% of the economic benefit to customers of shopping for itself through a nonbypassable charge. Instead, Ohio law encourages shopping. Staff witness Choueiki correctly testified that, "[t]he concept of a switching tracker mechanism, in Staff's opinion, is anti-competitive, and violates the spirit of several of the state policy goals set forth in R.C. § 4928.02."[220] In support of this position, Dr. Choueiki points out that DP&L is simply attempting to avoid retail competition.

> Retail generation service has been deemed competitive for more than ten years in Ohio. For the Company to be asking for relief from the Commission for a service that has been deemed competitive for more than a decade in Ohio is, in Staff's opinion, based on flawed logic.[221]

Dr. Choueiki is exactly right. There is no justification for awarding DP&L a huge nonbypassable rider for a competitive service, particularly when DPLER is a significant CRES provider in DP&L's service area. As Dr. Choueiki points out, "A request for relief by DP&L for

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[218] Jackson Direct, p. 11.

[219] Lesser Direct, p. 5.

[220] Testimony of Hisham D. Choueiki on behalf of Staff ("Choueiki Direct"), Staff Ex. 10 and 10A, p. 9.

[221] Choueiki Direct, p. 9.

lost retail sales to its unregulated affiliate, DPLER, is an unreasonable request at best."[222] The ST should be rejected.

IV. THE PROPOSED ESP VIOLATES STATE POLICY AND DOES NOT BENEFIT RATEPAYERS OR THE PUBLIC INTEREST.

A. DP&L Proposed Lengthy Delay To Achieve 100% Wholesale Competition Should be Rejected.

As explained by FES witness Noewer, wholesale competition results in numerous benefits for customers and the economy.[223] As compared to regulated rates, competition promotes lower prices to customers in both the near and long term. A competitive market encourages suppliers to reduce their costs in order to secure more customers. These cost reductions may come from reduced supplier profits or increased operating efficiencies. In a competitive market, such cost reductions are reflected in lower electric prices at both the wholesale and retail levels. As a result, competition promotes a favorable environment for the overall development of Ohio's economy.

Rather than embracing the benefits of competition, DP&L proposes to establish SSO rates through a 3-year, 5-month blending plan. DP&L proposes that ESP generation prices will be blended with the CB Rate at a 90/10% ratio through May of 2014, 60%/40% through May of 2015, 30%/70% through May of 2016, and 100% market beginning in June of 2016.[224]

There is no justification for delaying the transition to wholesale competition for so long. Market prices are near historic lows, evidenced by the recent auctions conducted by Duke Energy Ohio and the FirstEnergy Ohio utilities.[225] Approving a more rapid transition to market

[222] Choueiki Direct, p. 10.

[223] Noewer Direct, p. 8.

[224] Noewer Direct, p. 10.

[225] Noewer Direct, p. 10.

would create significant value for customers and allow them to take advantage of today's historically low market rates. It would also lower prices on the retail level by setting a lower price to compare that suppliers must beat to attract customers.

B. DP&L Should Be Ordered To Structurally Separate As Quickly As Possible.

1. The Best Way To Resolve Any Financial Integrity Issue Is To Structurally Separate Immediately As Required By Ohio Law.

DP&L presents no evidence as to what DP&L's earnings would be as a wires company following corporate separation.[226] DP&L's financial integrity claim is flawed because it assumes that DP&L remains a vertically integrated utility at the mercy of market forces.[227] This assumption is wrong due to DPL's current functional separation of its generating assets and treatment of those assets as "competitive."[228] If DP&L structurally separates then the "wires" company will be able to provide nonbypassable distribution service, charging regulated rates and earning a regulated return on its assets.[229]

DP&L proposes to delay structural separation for another five years, but has not provided any compelling reason why its generation assets cannot be transferred out of the EDU before December 31, 2017.[230] By December 2014, all other Ohio utilities will have completed structural separation, but DP&L inexplicably requires another three years to do so.[231] More troublingly, DP&L has not made a firm commitment to structurally separate during the ESP

[226] Tr. Vol. I, p. 115.

[227] Lesser Direct, p. 31.

[228] Lesser Direct, p. 31.

[229] Lesser Direct, p. 32.

[230] Noewer Direct, p. 9.

[231] Noewer Direct, p. 9.

period,[232] most likely because it is seeking to increase the market values of its competitive generating assets before completing structural separation at a time convenient to it.[233] DP&L should not be (handsomely) rewarded for its continued delay.

The SSR would allow DP&L to maintain profit margins on competitive market generation sales that DP&L itself admits are unsustainable in a competitive market.[234] There is no reason to subsidize DP&L in this manner. DP&L received over $400 million in transition revenues from 2002-2004.[235] DP&L has treated its generating assets as a competitive business unit since 2003, over a decade.[236] Almost fourteen years has passed since S.B. 3 was enacted and EDUs were put on notice of the requirement for corporate separation.[237] Based on these facts, there is no justification for continuing to subsidize DP&L's generating assets. Instead, the most cost effective and most efficient way to handle DP&L's alleged "financial integrity" problem is to require corporate separation. By ordering DP&L to structurally separate, the Commission would eliminate any financial integrity problem which affected the regulated business. This would put DP&L's generation assets in a position to compete in the market, as they should have been doing a decade ago. Structural separation is the best solution to DP&L's alleged financial integrity problem, and the Commission should order DP&L to structurally separate as quickly as possible.

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[232] Tr. Vol. I, p. 116 ("Q. But what I'm asking is there's nothing in the ESP that says DP&L is making a hard commitment to separate by December 31, 2017, correct? A. Yes. Again, we've made a commitment to make a filing by the end of the year where our current expectation is to separate by the end of 2017."); Lesser Direct, p. 32.

[233] Tr. Vol. I, pp. 133-34.

[234] Lesser Direct, p. 32.

[235] Lesser Direct, p. 32.

[236] Lesser Direct, p. 32.

[237] Noewer Direct, p. 9.

Notably, DP&L has an affirmative obligation to demonstrate that there is good cause to continue functional separation instead of complying with the mandate in R.C. § 4928.17(A) to complete full corporate separation.[238] Nowhere in DP&L's case has it even attempted to satisfy this obligation. Indeed, it has not even affirmatively requested that the Commission extend its existing corporate separation plan but has merely produced it as a fait accompli. DP&L witness Rice sponsors DP&L's corporate separation plan, but he does not make any effort to justify continued functional separation.[239] The entirety of his testimony is that DP&L has been working on corporate separation since 1999, developed solutions in 1999 to address any impediments to completing corporate separation, but continues today to work on corporate separation.[240] Because good cause has not been demonstrated, the Commission should order structural separation as mandated by Ohio law.

2. Functional Separation Raises Cross Subsidy And Transparency Concerns

The General Assembly foresaw the dangers of functional separation and ordered that functional separation be limited to only "an interim period."[241] Despite this clear direction from the legislature, DP&L has not guaranteed to structurally separate during the ESP period. DP&L's proposed continued functional separation raises significant cross subsidy and transparency concerns. The Commission should take the dangers of cross-subsidies and transparency seriously and order DP&L to structurally separate as quickly as possible.

DP&L, as the EDU, should be neutral as to where it procures the energy needed to serve its customers. Under no circumstances should an EDU seek recovery for a generation subsidy.

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[238] R.C. § 4928.17(C).

[239] *See generally* DP&L Exh. 6, Direct Testimony of Timothy G. Rice ("Rice Direct").

[240] Rice Direct, p. 4; Tr. Vol. III, pp. 687, 688-89, 700-05, and FES Exh. 12, pp. 15-17.

[241] R.C. § 4928.17.

Functional separation has blurred this line for DP&L, as shown through its request for an SSR and ST. As an EDU, DP&L should explore potentially less costly market alternatives, but instead of acting in the best interests of its customers DP&L has acted to subsidize its own generation assets at what would be a great expense to its customers. This is not appropriate, and shows the dangers of allowing functional separation to continue.

Another danger of continued functional separation is the danger of improper cost shifting. FES witness Lesser explains that a utility with both regulated businesses and unregulated competitive businesses will have an incentive to shift costs, revenues and information between these two aspects of its business to its greatest advantage.[242] Structural separation makes such cost shifting transparent. By way of example, DP&L has admitted that it does not maintain separate audited accounting ledgers for its competitive generation and regulated T&D business operations.[243] Without separate audited accounting ledgers it is difficult to determine whether improper cost shifting is occurring, or whether the cost allocation manual is being followed. Because DP&L admits that "[t]he financial results of these two units are not exact and are merely a rough approximation" its allocations of costs are clearly suspect. Structural separation would address this problem since separate legal entities necessarily must have separate accounting.

FERC has also made extensive findings regarding the problems of functional separation. Dr. Lesser includes an extensive analysis of FERC findings in his testimony, including FERC's Order 2000:

> [O]pportunities for undue discrimination continue to exist that may not be remedied adequately by functional unbundling. We further conclude that perceptions of undue discrimination can also impede the development of efficient and competitive electric markets.[244]

[242] Lesser Direct, p. 65.

[243] Lesser Direct, p. 65 (citing response to IEU Interrogatory No. 1-45).

[244] Lesser Direct, p. 75 (citing FERC Order 2000).

FERC's analysis is correct. There is a significant danger of functional separation which can, and should, be remedied through structural separation.

3. DP&L's "Complex Indenture-Related Issues" Are Not A Valid Reason To Delay Structural Separation.

During the hearing DP&L claimed that one of the issues delaying its structural separation was its corporate debt structure. Specifically, DP&L claims that substantially all of its assets are encumbered by a first mortgage lien.[245] DP&L claims that structural separation should be delayed while it determines how to deal with this lien.

DP&L's claim should be rejected as another example of DP&L willfully dragging its feet rather than complying with Ohio law. Duke and AEP Ohio both faced issues associated with their debt structure as well, but that did not stop those two entities from agreeing to corporately separate on a much faster timeline. Whether DP&L needs to refinance the debt, offer a premium to bondholders, or transfer the debt to another entity, debt structure issues can be resolved. Indeed, DP&L's original corporate separation plan submitted to this Commission in 1999 identified the same "complex indenture-related issues" DP&L hides behind today but also proposed common sense fixes to those issues.[246]

DP&L's claim of hardship relating to no-call bonds is also not credible based on the timing of its debt issuances. As shown in FES Exhibit 5, which is one of Mr. Jackson's workpapers, DP&L issued these bonds after it knew it was required to structurally separate. Mr. Rice testified that DP&L has been exploring how to complete structural separation since 1999.[247] Despite the clear obligation to structurally separate after S.B. 3, all of DP&L's outstanding long-

[245] Tr. Vol. III, p. 688.

[246] Tr. Vol. III, pp. 700-05, and FES Exh. 12, pp. 15-17.

[247] Tr. Vol. III, p. 689.

term debt, which is secured by all assets of the company (distribution, generation, and transmission), was issued between the years 2003 and 2007.[248]

> Q. And so each of these bond issuances was issued after Ohio required corporate separation of generation assets, correct?
>
> A. Yes. These were issued, obviously, in the years that we've shown here, and I would note that they were -- yes, that is correct.[249]

Not only did DP&L issue these no-call bonds after Ohio law had changed, it issued these bonds after it had stopped using regulatory accounting for its generation assets.[250] Remarkably, DP&L's first corporate separation plan identified that it had, in 1999, five bond issuances with no-call provisions, but DP&L did not believe that these outstanding bond issuances would prevent it from achieving corporate separation prior to cancellation of the no-call provisions.[251]

It is improper for DP&L to ask for additional time to complete structural separation to resolve its debt issues when the problem is entirely of its own making. By way of example, DP&L issued pollution control bonds (which should relate only to generation assets) in 2005 with maturity dates of 2028 and 2034.[252] Amazingly, despite operating under functional separation at the time, DP&L issued most of these bonds with a no-call provision.[253] Other DP&L bonds run through 2040.[254] DP&L testified that it did not consider whether its functional

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[248] Tr. Vol. I, pp. 122-23. In 1999, DP&L had $550 million in debt that was tied to the first mortgage lien, and five of the six series of bonds had no call provisions. Tr. Vol. III, p. 704. All have been retired or refinanced. Today, DP&L has $904 million in debt outstanding as reflected in six series of bonds, many with no-call provisions. Tr. Vol. III, p. 705. Not only did DP&L continue its no-call debt issuances after corporate separation was mandated, but it substantially increased the debt level.

[249] Tr. Vol. I, p. 123.

[250] Tr. Vol. I, p. 123.

[251] Tr. Vol. III, p. 703 and FES Exh. 12, p. 17.

[252] Tr. Vol. I, p. 124.

[253] Tr. Vol. I, p. 125.

[254] FES Ex. 5; Tr. Vol. III, p. 696.

separation would continue through 2040, and that it didn't "think there was a specific understanding one way or another" on that point.[255] DP&L chose to issue these no-call bonds while it was operating under temporary functional separation, and it should now be required to resolve this issue and structurally separate as soon as possible. DP&L should also not be heard to complain about the cost of redeeming these bonds when DP&L has not presented any evidence regarding how much redeeming these bonds would cost, and has not resolved any issues relating to its bonds to date.[256]

4. At Minimum DP&L Should Not Be Permitted To Bid Into Its Own Auction Until Structural Separation.

If DP&L does not structurally separate, there is a risk of higher costs to customers. The inappropriate SSR and ST will raise customer costs directly through a nonbypassable charge which would not be requested if generation had been separated from distribution. In addition to those direct costs, there are also potential indirect costs to customers. DP&L could use the increased revenue to subsidize its bids into the anticipated CBP auctions or into CBP auctions conducted by other EDUs. DP&L also could use the increased revenues to support its competitive sales by making capital investments in its generation facilities. As explained by Dr. Lesser, these actions would serve to discourage competition.[257] Prospective bidders will likely hesitate to incur the time and expense of participating in an auction process where one competitor is receiving a large subsidy with which to bid. This could mean that DP&L could actually receive higher prices than otherwise because it would not have to compete against as many alternatives to bid successfully.[258]

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[255] Tr. Vol. III, p. 696.

[256] Tr. Vol. III, pp. 691-93.

[257] Lesser Direct, p. 79.

[258] Lesser Direct, pp. 79-81.

The most direct method of addressing the problems with DP&L's functional separation is to require full structural separation. If the Commission decides to instead maintain functional separation, then the Commission should not permit DP&L to participate in the CBP auction while DP&L is receiving the SSR and/or ST subsidies. This will encourage supplier participation in an auction because they will not be competing against a subsidized competitor, moreover it will incentivize DP&L to complete structural separation so that it can fully participate in the CBP.[259]

Staff agrees that DP&L should not be permitted to bid into the auction until structurally separated. Staff witness Strom testified at length on this issue:

> I am concerned that DP&L's participation could have a negative impact on participation of other potential bidders. This is because of the potential perception by other bidders that they would be bidding against subsidized generation resources, because of revenue that DP&L would receive through the Service Stability Rider (SSR). Robust participation is an important factor for the success of the auction. Therefore, I recommend that DP&L not be permitted to participate in the auction while the SSR is in place.[260]

Both FES's and Staff's testimony shows that allowing DP&L to bid subsidized generation into the auction could hinder competition at the expense of DP&L's customers. Therefore DP&L and its affiliates (who receive power from DP&L at zero margin) should not be permitted to participate in the auction while receiving the SSR and/or ST subsidies.

C. Rider AER-N Is Not Authorized Under Ohio Law

1. Shopping Customers Should Not Be Forced To Pay Twice For Solar RECs.

CRES providers must meet the renewable energy requirements of R.C. § 4928.64(B). Thus, a customer taking service from a CRES provider pays for the s-RECs obtained by its

[259] Lesser Direct, p. 82.

[260] Testimony of Raymond W. Strom on behalf of Staff, Staff Ex. 2 ("Strom Direct"), pp. 4-5.

CRES provider.[261] Despite the fact that switched customers do not receive s-RECs from DP&L, DP&L proposes to impose a nonbypassable charge on shopping customers to pay for its Yankee solar facility.[262] However, switching customers would get no benefit from this proposal. DP&L witness Seger-Lawson admitted that DP&L has no intention to share any benefits with shopping customers.

> EXAMINER PRICE: Dayton has no plans to provide any CRES providers a pro rata share based upon their share of the load of those solar energy -- of those renewable resources, solar renewable resources.
>
> THE WITNESS: No, we don't have any plans to do that.
> . . . .
> EXAMINER PRICE: So shopping customers who will be paying a nonbypassable rider will receive no benefit from paying that nonbypassable rider; is that correct?
>
> THE WITNESS: I think they would just get the benefit of renewable energy just in general in Ohio.[263]

As such, DP&L's proposal violates R.C. § 4928.143(C)(1).[264] Regardless, switching customers should not be forced to subsidize DP&L's s-RECs. Ms. Seger Lawson admitted that they would not receive a pro rata share of those s-RECs, and would receive no substantive benefit from those charges. Therefore there is no reason to impose a nonbypassable charge on customers who will already be paying their own CRES providers from renewable resources.

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[261] Lesser Direct, p. 39.

[262] DP&L's request is not limited to the Yankee solar facility. DP&L reserves the right to seek recovery under Rider AER-N for a new facility built by DP&L.

[263] Tr. Vol. V, p. 1340.

[264] "[I]f the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application." R.C. § 4928.143(C)(1).

2. DP&L Has Failed To Provide The Data Necessary For The Commission To Consider The Proposed AER-N.

DP&L claims that the Commission has already determined there is a "need" for the Yankee solar facility in the 2010 DP&L LTFR proceeding, and therefore the Commission need not examine the proposed Rider AER-N in any meaningful way.[265] DP&L argues that since the settlement of its 2010 LTFR proceeding was approved by the Commission, the Commission is now required to approve cost recovery even though DP&L built the facility with no determination of "need" and still has not provided the Commission with essential information regarding the price of Yankee solar as compared to alternatives. DP&L's position misstates Ohio law and Commission precedent.

The Yankee solar facility was built by DP&L, and was not the result of an RFP for in-state Ohio solar RECs.[266] The Yankee solar facility was operational in March of 2010.[267] DP&L filed its 2010 LTFR, the purported justification for this facility, on April 15, 2010.[268] The 2010 LTFR proceeding was resolved through stipulation on April 19, 2011.[269] Thus, DP&L filed the 2010 LTFR proceeding **after** it had built the Yankee solar facility. The Commission did not issue any decision on the Yankee solar facility until more than a year after it was operational. These undisputed facts show that DP&L did not have a finding of "need" for the Yankee facility when it was built, and built Yankee solar with no guarantee of cost recovery. Therefore DP&L would not be prejudiced by a Commission review of its proposal in this proceeding.

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[265] Tr. Vol. V, p. 1314; Seger Lawson Direct, p. 16.

[266] Tr. Vol. V, pp. 1324-25.

[267] Tr. Vol. V, p. 1313.

[268] Tr. Vol. V, p. 1312.

[269] Tr. Vol. V, p. 1314.

Unfortunately, no real review of the costs and benefits of Yankee solar is possible due to the complete lack of record evidence in this proceeding. DP&L conveniently provided almost no data about its proposal or the associated costs it, not even the data required by Commission Rule. By way of example, the following are items required by O.A.C. 4901:5-5-06(B) that DP&L admits that it has not provided:

- The revenue requirement for Yankee solar to determine the ultimate charge to customers.[270]
- How rider AER-N will be charged.[271]
- The current availability of s-RECs in Ohio.[272]
- Any forecast regarding the future availability of s-RECs in Ohio.[273]
- Any forecast regarding DP&L's need for in-state s-RECs. [274]
- Any evidence regarding the O&M costs for Yankee solar. [275]
- Any evidence regarding other projects other than Yankee solar it may seek to include in Rider AER-N.[276]
- Any evidence regarding the lead times for construction or implementation of planned electricity resource options. [277]
- Any evidence of the cost-effectiveness of Yankee solar as compared to alternatives, such as purchasing s-RECs from the market. [278]
- Any evidence regarding a detailed description of the impact upon rates of the proposed surcharge.[279]

[270] Tr. Vol. V, p. 1315.

[271] Tr. Vol. V, p. 1316.

[272] Tr. Vol. V, p. 1321.

[273] Tr. Vol. V, p. 1321.

[274] Tr. Vol. V, p. 1321.

[275] Tr. Vol. V, p. 1322.

[276] Tr. Vol. V, p. 1323.

[277] Tr. Vol. V, p. 1323.

[278] Tr. Vol. V, p. 1323.

The way DP&L has pursued cost recovery for Yankee solar is wholly improper. It is completely inappropriate for DP&L to build a facility, obtain a finding of "need" via a stipulation, and then seek to force the Commission to award cost recovery without presenting the Commission with the data required by Commission rules. DP&L is simply asking the Commission to approve cost recovery, absent any information, without giving the Commission the opportunity to weigh the costs and benefits of Yankee solar. More troubling, DP&L does not ever anticipate providing the Commission with this information. Ms. Seger-Lawson testified that DP&L anticipates another filing six months from now to address the revenue requirement only. This anticipated future proceeding would not include any information on the state of Ohio's solar market to allow the Commission to determine whether the costs of Yankee solar outweigh its benefits.[280] The anticipated future proceeding will not weigh whether cheaper resources are available in the market, or whether Yankee solar meets the other statutory requirements. Instead, DP&L assumes that after this ESP proceeding the only issue left for determination in the next proceeding will be a prudency review to determine the total amount of cost recovery.[281]

DP&L's strategy for Yankee solar has been to completely avoid any substantive Commission review of its proposal where the costs to all customers, shopping and SSO, is weighed against any benefits they would receive. This is improper, and Rider AER-N should be rejected due to DP&L's failure to present any evidence in support of its claims.

3. The Data Which DP&L Did Provide Is Stale. More Recent Data Shows More Than Enough Solar Resources To Meet Ohio's Needs.

The data which DP&L relies on in this proceeding is from its 2010 LTFR case. This data is now dated and contrary to Commission rule. O.A.C. 4901:5-5-06(B) requires that a utility

[279] Tr. Vol. V, p. 1323.

[280] Tr. Vol. V, p. 1317.

[281] Tr. Vol. V, pp. 1317, 1319.

seeking approval of a generation resource under R.C. § 4928.143(B)(2)(c) file for an allowance in the long-term forecast report filed in the forecast year prior to the ESP filing. As this proposed ESP was filed in 2012, DP&L was required to demonstrate a need for its proposed generation resource in its 2011 LTFR filing. However, DP&L made no such showing in its 2011 LTFR filing. Instead, it is relying on stale data contrary to Commission rule.

DP&L's total end-use electric consumption has declined substantially since it filed its 2010 LTFR.[282] DP&L admits that as end use sales decrease, so does DP&L's s-REC requirement under R.C. § 4928.64(B)(2).[283] In addition to overstating the s-RECs required, DP&L has not acknowledged the changed market conditions since the 2010 LTFR was filed. The Commission has approved over 60 MW of in-state solar PV resources since 2010.[284] Dr. Lesser examined DP&L's 2012 LTFR filing and the retail switching levels used by DP&L in this ESP proceeding. After adjusting for all relevant factors, Dr. Lesser found that DP&L had significantly overstated its in-state s-REC requirement. For 2013 this overstatement was 14%, and by 2022 it had increased to 33%.[285]

Furthermore, the market is working. Additional solar resources are being developed in Ohio through market forces, rather than through top down regulation. Not only are market-provided resources more than enough to meet DP&L's needs, Dr. Lesser shows that s-REC prices have dropped significantly over the last few years as price incentives change over time.[286] Approving even a "placeholder" AER-N would severely damage that developing market. Switching customers would be forced to pay twice for s-RECs, which is clearly anticompetitive

[282] Lesser Direct, p. 43.

[283] Tr. Vol. V, p. 1326.

[284] Lesser Direct, p. 45.

[285] Lesser Direct, p. 49.

[286] Lesser Direct, pp. 51-52.

and violates several provisions of R.C § 4928.02.[287] Solar developers would also be unable to rely on market forces to provide demand for their product with the threat of subsidized solar development would constantly be hanging over their heads.[288] There is no reason to take such an anticompetitive step when the market is working well and prices for s-RECs are falling.

D. Anti-Competitive Retail Practices Should Be Eliminated.

Significant questions were raised during the hearing regarding DP&L's retail practices and its relationship to DPLER. Among other things, Staff witness Mahmud testified: "Staff does not have enough information to come to a specific conclusion on inappropriate relationships with affiliates, but is concerned as to the relationship between regulated and unregulated entities."[289] FES shares Staff's concern. DP&L's positions in this case regarding the SSR and ST suggest that DP&L views its customers as captives rather than individuals with real retail choice. The Commission should embrace competition for the benefit of all customers and order DP&L to eliminate barriers to competition in DP&L's territory.

DP&L requires customers who have a maximum peak demand of 100 kW over a 12-month period or who reach 100 kW at any time while on CRES service to install an interval meter.[290] Customers must pay for the installation of the interval meter at their own expense.[291] Incredibly, this requirement only applies to switching customers.[292] SSO customers are not required to install an interval meter until their peak demand exceeds 200 kW.[293] DP&L was

[287] Lesser Direct, p. 55.

[288] Lesser Direct, p. 55.

[289] Testimony of Shahid Mahmud on behalf of Staff, Staff Ex. 1 and 1A, ("Mahmud Direct"), p. 7.

[290] Noewer Direct, p. 20.

[291] Noewer Direct, p. 20.

[292] Tr. Vol. V, p. 1337.

[293] Tr. Vol. V, p. 1337.

unaware that no other EDU in Ohio requires customers to install an interval meter at 100 kW.[294] The significant charge associated with an interval meter reduces, if not eliminates, the savings that customers can enjoy from shopping. There is no valid justification for requiring customers to bear the cost of an interval meter when every other EDU in Ohio uses a 200 kW threshold, and there is certainly no justification for discriminating against switching customers by requiring them to install an interval meter while SSO customers are not required to. This anti-competitive practice should be eliminated.

Another barrier to effective competition is DP&L's refusal to offer rate-ready percent-off price-to-compare ("PTC") billing in its territory.[295] Ohio Power Company, Duke Energy Ohio, and the FirstEnergy Ohio utilities all offer this service.[296] DP&L's systems would allow it to offer this service as well, but DP&L refuses to do so because it claims that CRES providers could do this themselves.[297] There is no justification for this position, and requiring CRES providers to do the calculation themselves is overly burdensome, inefficient, and ineffective. DP&L's PTC changes several times each year.[298] Some of the components are calculated on a bills rendered basis, and some are calculated on a service rendered basis. [299] This calculation is additionally complicated by the multiple meter read dates which would need to be calculated to apply the rate. While it may be theoretically possible for a CRES provider to calculate a percent-off PTC offer for each customer, it is an administrative nightmare which would need constant revision and updating. There is no reason for such inefficiency. Percent-off PTC billing is a

[294] Tr. Vol. V, p. 1338.

[295] Noewer Direct, p. 20.

[296] Noewer Direct, p. 20.

[297] Tr. Vol. IX, p. 2230

[298] Noewer Direct, p. 21.

[299] Noewer Direct, p. 21.

very popular program with customers, and is the predominant product offered through governmental aggregation programs in Ohio. [300] To promote effective retail competition as well as governmental aggregation, DP&L should be ordered to join the other Ohio EDUs in providing percent-off PTC billing. If the Commission does not agree with this recommendation, then at minimum DP&L should switch its base generation rates and proposed CB rate to a bills rendered format. This change would result in all PTC components being charged on a bills rendered basis, substantially easing the calculations.

DP&L has acknowledged that its distribution revenues are sufficient.[301] These distribution revenues are used for, among other things, billing customers.[302] There is no dispute that DP&L must bill every customer for distribution service, regardless of whether the customer is shopping or not.[303] Despite the fact that it recovers for issuing bills through distribution revenues and must send a bill anyway, DP&L charges CRES providers $0.20 per consolidated bill and $0.12 per dual bill. [304] No other Ohio EDU charges similar fees. [305] In fact, of the six states (and 24 EDU service territories) in which FES operates, only one utility charges a per bill fee for consolidated billing. [306] That utility's fee of $0.03 per bill is significantly smaller than the $0.20 DP&L charge and is tied in with the purchase of receivables program, so there are additional program features associated with this charge that do not exist with DP&L's markedly

[300] Noewer Direct, p. 21.

[301] Tr. Vol. I, p. 117.

[302] Tr. Vol. IX, p. 2232.

[303] Tr. Vol. IX, p. 2232.

[304] Noewer Direct, p. 22.

[305] Noewer Direct, p. 22.

[306] Noewer Direct, p. 22.

higher charge.[307] DP&L's charge is unnecessary because DP&L is already compensated for issuing its bills through distribution charges, and the charge inhibits residential retail shopping. DP&L should not charge providers for consolidated or dual bills.

Moreover, DP&L's cost to register rate codes in its consolidated billing system is also excessive. DP&L charges a $5,000 initial set up fee and $1,000 for each change to its billing system – even where only a single rate code is added. [308] No other EDU in Ohio applies this type of charge. [309] Out of the 24 EDU territories in which FES operates, only one other EDU imposes a large initial set up fee. [310] However, that utility's subsequent fee is $30/month, as opposed to the $1,000 per change fee charged by DP&L. [311] DP&L has not, and can not, provide any reasonable cost-based claim that each change from the CRES provider justifies the $1,000 charge. The Commission should order DP&L to comply with the industry standard and eliminate these large fees.

DP&L's customer enrollment process is also flawed and has a negative effect on competition. DP&L has accounts with both a residential and a commercial meter, but does not allow CRES providers to enroll individual meter accounts.[312] This is an undue barrier to switching because rules and pricing are substantially different for these customer groups. Switching should either be permitted on a per meter basis or customers with both a residential and commercial meter should be split into two accounts.

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[307] Noewer Direct, p. 22.

[308] Noewer Direct, p. 22.

[309] Noewer Direct, p. 22.

[310] Noewer Direct, p. 22.

[311] Noewer Direct, p. 22.

[312] Noewer Direct, p. 22.

Of the 24 EDU service territories in which FES operates, only seven charge any fees related to switching. The three FirstEnergy Ohio EDUs refer to this $5 fee as a processing fee, not a switching fee, and it is charged to the supplier, not the customer.[313] Similarly, Duke Energy Ohio charges a $5 switching fee directly to the supplier. DP&L charges a $5 fee to customers.[314] DP&L should allow providers to pay the fee on behalf of a customer.

DP&L has made changes to its eligibility file that make it impossible for a supplier to determine whether a customer is shopping or is on default service.[315] At one time this information was available to CRES providers, but now that detail has been lost.[316] As a result, CRES providers spend unnecessary time and resources marketing to customers who are already shopping. By including a flag in the system to identify shopping status, communications will be streamlined, customers will be less confused by marketing materials, and CRES providers' costs will be decreased – thus promoting greater competition and further savings. [317] DP&L should include a "Y/N" shopping indicator field, similar to Duke Energy Ohio.

Finally, when a customer is dropped by a CRES provider, the customer's past-due CRES charges are only shown on the consolidated bill for three months at most. [318] DP&L should include past-due CRES charges on the consolidated bill until those charges are paid in full.

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[313] Noewer Direct, Ex. SLN-3.

[314] Noewer Direct, p. 24. Ohio Power Company charges an unnecessary $10 fee directly to retail customers. However, the Commission recently ordered Ohio Power Company to reduce its fee to $5 and allow the charge to be paid by suppliers. *See* Case No. 11-346-EL-SSO *et al.,* Entry on Rehearing (Jan. 30, 2013) at p. 43.

[315] Noewer Direct, p. 24.

[316] Noewer Direct, p. 24.

[317] Noewer Direct, p. 24.

[318] Noewer Direct, p. 25.

E. DP&L's Reconciliation Rider Should Be Rejected.

DP&L's proposed non-bypassable Reconciliation Rider ("RR") includes: 1) the costs of administering and implementing the CBP; 2) the cost of implementing certain competitive retail enhancements; 3) any deferred balance that exceeds 10% of the base recovery associated with the Fuel Rider, PJM Reliability Pricing Model ("RPM") Rider, Transmission Cost Recovery Rider - Bypassable ("TCRR-B"), Alternative Energy Rider ("AER"), and the Competitive Bidding True-Up ("CBT") Rider; and 4) any remaining deferral balance or credit after the Fuel, RPM, and TCRR-B are eliminated as of June 1, 2016.[319] There is no justification for the creation of the Reconciliation Rider on a nonbypassable basis[320] since these are properly generation costs which should be recovered from customers taking generation service from DP&L.

FES does not oppose DP&L's full bypassable recovery of administrative costs associated with the anticipated CBP. However, there is no justification for CBP costs being recovered on a nonbypassable basis. There is no statute which provides that the costs of an auction should be recovered on a nonbypsasable basis. DP&L cites R.C. § 4928.142(C)(3),[321] but this statute applies to MROs and makes no reference to nonbypassable cost recovery. Instead, R.C. § 4928.142(C)(3) reflects the basic principle of cost causation. The CBP administrative costs will procure power for SSO customers. Those customers benefit from the CBP administrative costs,

[319] Lesser Direct, pp. 57-58.

[320] As discussed above, FES does not oppose nonbypassable cost recovery for retail enhancements. However, these costs should be recovered through their own rider and not be included in a nonbypassable Reconciliation Rider.

[321] Rabb Direct, p. 9.

and there is no justification for requiring switched customers to bear the burden of the costs which benefit SSO customers.[322]

There is also no justification for the transfer of deferral balances from Riders FUEL, RPM, TCRR-B, AER, and CBT. These riders (other than the proposed new CBT) are all currently recovered on a bypassable basis, and there is no reason to change that proper recovery mechanism solely because DP&L's inaccurate forecasting has caused or may cause the deferral balance to exceed an arbitrarily suggested threshold of 10%. Allowing DP&L to game the deferral balances in this way could lead to the perverse incentive of DP&L benefiting by the resultant lower price-to-compare (through a transfer from bypassable to nonbypassable charges) from an inaccurate forecast. This does not "stabilize" the SSO rate.[323] Instead, it simply reduces the economic incentive to shop while solving a "death spiral" problem which does not exist. CRES providers face these same costs and the same risk of a customer leaving before the costs are fully recovered. CRES providers are not able to charge their customers and nonshopping customers for these costs if their forecasts are inaccurate. Instead, it means that CRES providers need to accurately forecast their costs and loads so they recover costs in a timely manner from the customers that they incurred the costs for. DP&L should do the same.

By way of example, DP&L has historically calculated the TCRR rate based on the projected costs to be recovered, which takes into account estimated load.[324] DP&L's forecasts were inaccurate, causing the deferral balance to rise to $8 million. DP&L admits that the causes of the deferral balance were variances between projected and actual costs and actual and

[322] Lesser Direct, p. 59.

[323] Lesser Direct, p. 61.

[324] Tr. Vol. IX, p. 2208.

projected load.[325] DP&L also admits that the TCRR deferral balance would trigger the RR immediately by exceeding the 10% threshold.[326] There is no reason for the Commission to approve the nonbypassable RR when CRES providers face these exact same forecasting challenges. Ms. Seger-Lawson admitted that, just like the AER which DP&L seeks to include in the RR above the threshold of 10%, CRES providers face the same risk of cost changes and migration risk as DP&L.[327] This same analysis applies to all of the bypassable riders proposed to be included in the RR. CRES providers are obligated to forecast their load and expenses accurately. If their forecasts are not accurate, when customers migrate CRES providers bear those costs directly. There is no reason to treat SSO load differently. Generation related costs incurred by DP&L should be recovered from their generation customers on a timely basis. DP&L admits that if it forecasts costs and load accurately, it will fully recover its costs.[328]

DP&L claims that its proposal is similar to recent riders approved for the FirstEnergy Ohio utilities and Duke Energy Ohio.[329] However, there is a significant difference between DP&L's proposed RR and those riders. The FirstEnergy and Duke generation reconciliation riders are bypassable do not recover renewable costs or the other types of costs DP&L seeks to include in the RR.[330] The FirstEnergy and Duke riders seek to recover actual costs, not forecasted costs or costs incurred but not recovered prior to the ESP like the DP&L rider.[331] Both the FirstEnergy and Duke riders are intended to recover the actual costs of procuring power

[325] Tr. Vol. IX, p. 2210-12.

[326] Tr. Vol. IX, p. 2218.

[327] Tr. Vol. IX, p. 2212-13.

[328] Tr. Vol. IX, p. 2217.

[329] Tr. Vol. IX, p. 2198.

[330] *See* FES Ex. 15; FES Ex. 16 (tariffs for FirstEnergy and Duke Riders at issue).

[331] Tr. Vol. IX, p. 2204.

for SSO customers and have not yet been switched from bypassable to nonbypassable. The RR is intended to recover for several different types of bypassable riders and would be triggered immediately as a result of the $8 million TCRR deferral balance.[332] As shown by these representative examples, the FirstEnergy and Duke riders are not similar to the RR proposed by DP&L.

There is no justification for asking shopping customers to pay twice for the same service – once to the utility and once to the supplier.[333] As shopping customers do not receive any of the services being procured, they should not be asked to pay for them.[334] Forcing them to do so would be anticompetitive, force customers to pay twice for the Riders at issue, and would chill customers' willingness to shop.[335]

In addition to the substantive problems with DP&L's proposed RR, it is unclear as to how the RR would be calculated. By way of example, DP&L intends to include Rider TCRR in the RR. There is an $8 million deferral balance in the TCRR.[336] DP&L witness Hale testifies that in the future the TCRR will be split into bypassable and nonbypassable components, but there is no record evidence regarding how the existing deferral would be split up for inclusion in the RR.[337] The DP&L witness on the RR, Ms. Seger-Lawson, did not know where, or if, it was addressed in the rate blending plan.[338]

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[332] Tr. Vo. IX, p. 2205.

[333] Noewer Direct, p. 15.

[334] Noewer Direct, p. 16.

[335] Noewer Direc,t p. 17.

[336] Tr. Vol. IX, p. 2205.

[337] Tr. Vol. IX, p. 2205-08.

[338] Tr. Vol. IX, p. 2208.

Staff witness Donlon testified that CBP costs should be recovered through a new proposed bypassable Reconciliation Rider, competitive retail enhancements should be recovered through a nonbypassable Reconciliation Rider, and bypassable riders should remain bypassable.[339] FES agrees with Staff regarding CBP costs and the bypassable riders, but disagrees with Mr. Donlon's cost allocation proposal.[340] Mr. Donlon suggests that the costs of competitive enhancements be split between customers, CRES providers, and DP&L.[341] Unfortunately, this proposal is unworkable. Costs were to be included when they "go live", but it is not clear how those costs will then be allocated among the three groups. Will a CRES provider be charged a flat fee for registering in the territory or by load? Why would DP&L pursue competitive enhancements if it was obligated to pay for them with shareholder dollars? If CRES providers are paying the majority of the costs, are they entitled to decide what projects are pursued? There are simply too many questions associated with this proposal for it to be workable at the moment. Instead, FES recommends that DP&L be permitted to recover its cost of competitive enhancements through a nonbypassable rider. All customers will benefit from the shopping opportunities created by this rider, and it is therefore appropriate that DP&L recover these costs on a nonbypassable basis.

V. IF THE ESP IS NOT REJECTED IT SHOULD BE SIGNIFICANTLY MODIFIED.

Staff has suggested modifying the proposed ESP to shorten its term and eliminate some of the most egregious provisions. If the Commission chooses to modify the proposed ESP rather than eliminating it outright, then several modifications are necessary.

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[339] Donlon Direct, p. 4.

[340] Donlon Direct, p. 6.

[341] Donlon Direct, p. 6.

A. The SSR And ST Should Be Rejected.

As discussed above, there is no legal or factual support for approving the SSR and ST. If the Commission is inclined to consider either the SSR or ST, at minimum it should use the most recent and accurate information provided to date by DP&L in determining the need for these massive above-market subsidies. This more recent data shows that DP&L does not need either of these anti-competitive riders in order to reach its target ROEs.

B. DP&L Should Be Ordered To Structurally Separate

Staff has expressed a concern about DP&L's relationship to affiliates, and this concern is well founded. S.B. 3 was passed almost fourteen years ago, and there is no justification for DP&L's continued failure to structurally separate. The easiest and most efficient way to ensure that the problems with DP&L's generation assets do not affect service safety and reliability is to separate the wires business from the generation assets completely.

C. There Should Be A 100% Competitive Bid Auction As Quickly As Possible.

DP&L's proposed ESP seeks nearly a billion dollars in above-market charges. There is no reason for such a huge windfall for DP&L. The best outcome for customers is a rapid transition to a 100% CBP. A 100% CBP would provide immediate lower prices for customers and would encourage economic development in DP&L's service territory.

D. DP&L Should Not Bid Into Its SSO Auction Until It Has Completed Corporate Separation And Is Not Receiving Above-Market Subsidies.

Permitting DP&L to bid into its own auction while it is receiving any generation subsidy may have a chilling effect on potential bidders. If DP&L is granted a subsidy, it should be given the same restriction as was applied to Duke Energy Ohio and be prohibited from participating in its CBP auction or the CBP auctions of other EDUs until it is no longer receiving a subsidy.

E. Reasonable Arrangement Load Should Be Included In The Auction Product

DP&L proposed excluding the load associated with reasonable arrangements from the auction product.[342] DP&L claims that reasonable arrangement load should not be included because the reasonable arrangements are a contract between DP&L and the reasonable arrangement beneficiary.[343] If the contract were solely between these two entities, then this argument would make sense. However, that is not the case. Instead, DP&L has requested that the Commission approve a reasonable arrangement under Ohio law. Under this reasonable arrangement, DP&L's customers are required to pay the difference between the SSO price and the reasonable arrangement price to DP&L. While the reasonable arrangements at issue in this case may been justified from an economic development perspective, they come at a cost to other customers. Since other customers are forced to pay this cost, it would be inappropriate to consider reasonable arrangements to be solely a contract between DP&L and the customer.

Reasonable arrangement load, which represents a significant portion of DP&L's total load, should be included in the SSO auction product.[344] Including this load in the CBP makes the auction product more attractive to potential bidders and will benefit all customers.

F. Load And Credit Limit Caps Should Be Eliminated.

The CBP proposes to institute an 80% load cap on supplier participation. While this proposal is used in other auction processes, FES opposes limiting supplier participation in this manner.[345] Assuming no improper subsidies to market participants, load caps are an artificial limit on competition. When a load cap is enforced it necessarily means that a lower-priced

[342] Noewer Direct, p. 13.

[343] Tr. Vol. V, pp. 1418-19.

[344] Noewer Direct, p. 14.

[345] Noewer Direct, p. 12.

bidder was willing to serve more of the available load, which means customers pay more than they would have otherwise. If there are no improper subsidies (such as the improper SSR), then there is no reason to mandate load caps.

FES also opposes the credit limit caps contained in Section 6.4 of the Master SSO Supply Agreement.[346] Capping the maximum level of the Independent Credit Threshold ("ICT") at these amounts will limit supplier participation, and the credit limit caps should be eliminated entirely. If the Commission finds that having a credit limit cap related to the maximum ICT is appropriate, then the caps should, at a minimum, be raised to $30,000,000 for BB+/Bal/BB+ rating, $20,000,000 for a BB/Ba2/BB rating, and $5,000,000 for a BB-/Ba3/BB- rating.[347] Eliminating or increasing the caps is an important step to ensuring robust supplier participation and therefore greater competition.

G. The Auction Product Should Be Modified.

DP&L's proposed auction process is still somewhat vague. DP&L should be required to file specific auction details in a later proceeding, including the number of auctions, the proposed auction timeline, and the products offered in each auction.[348] DP&L should also be required to propose fixed dates for future auctions, which would generate supplier interest and provide clarity to the CBP process. Finally, incorporating a mix of various auction terms beginning in Year 2 of the auction process would help mitigate market movements and would take advantage of today's historically lower electricity prices.

[346] Noewer Direct, p. 13.

[347] Noewer Direct, p. 13.

[348] Noewer Direct, p. 11.

H. DP&L's Proposed Rider CB Methodology Is Flawed

DP&L's proposed Rider CB proposes to blend two methodologies to assign the costs associated with the CBP to tariff classes.[349] DP&L proposes that CBP results will be blended with existing SSO rates, and other rates will be adjusted for changes in actual revenues received. Since the proposed auctions are on a slice-of-system basis, the differences between tariff classes in the existing rate design do not go into the suppliers' bids to create the auction price, and should not be preserved via the CB rate design.[350] Approving the proposed methodology would continue the existing non-market-based rate design even after DP&L is at 100% auction-based pricing. There is no reason for such a complicated system which does not reflect the market.

The Commission should instead require a methodology similar to the FirstEnergy Ohio utilities in which the wholesale auction price is broken into energy and capacity components and are both charged on a cent per kWh basis.[351] The energy prices should simply be grossed up for losses, resulting in voltage differentiated rates.[352] There is no need to preserve any existing cost relationships, as gradualism will naturally occur through the blending process.[353]

I. The FUEL Rider Should Be Modified To Avoid Any Improper Subsidization Of DPLER.

DP&L proposes that its FUEL Rider be changed from a "least cost" to a "system average cost" methodology. DP&L's proposal fails to address the fundamental issue: DP&L's proposed methodology will be an obvious cross-subsidy to DPLER, to be paid for by SSO customers.[354] As explained by Staff and FES, there is no reason to subsidize DPLER in this manner to the

[349] Seger Lawson Direct, p. 6 (citing Book 1).

[350] Noewer Direct, p. 19.

[351] Noewer Direct, p. 19.

[352] Noewer Direct, p. 19.

[353] Noewer Direct, p. 19.

[354] Lesser Direct, p. 69.

detriment of customers.[355] If DP&L were structurally separated and used a 100% CBP immediately there would be no need for a fuel rider.[356] Until that time, there is no reason for SSO customers to subsidize fuel used by DPLER or MC Squared in their competitive activities. SSO customers should be provided with least-cost fuel, whether from purchased power or coal purchases.

Staff witness Gallina's testimony on this point is persuasive. He states that he does not believe that DP&L's "average cost" methodology is appropriate, and that it "will result in higher than necessary rates to SSO customers as a result of SSO customers subsidizing non-SSO customers."[357] He goes on to explain that DP&L's generation assets should be used to provide DP&L SSO customers with the lowest cost generation, and that including DPLER and MC Squared sales are "by definition, sales to non-jurisdictional DP&L customers." He concludes that:

> Staff believes DP&L's jurisdictional customers should be availed the lowest cost generation and/or purchased power. Average cost will always be higher than least cost, and to the extent DP&L SSO customers pay rates higher than least cost, they will be contributing to DP&L's non-regulated operations.[358]

FES agrees, DP&L should retain the least-cost methodology currently in place.

Retaining the current least-cost methodology is important, but is not enough. The current least-cost methodology includes DPLER load in DP&L's service territory in the least-cost calculation.[359] As pointed out by Mr. Gallina, this creates a significant risk of cross subsidization whereby SSO customers would be subsidizing DPLER sales in DP&L's service

[355] Gallina Direct, p. 3; Lesser Direct, p. 70.

[356] Lesser Direct, p. 70.

[357] Gallina Direct, p. 3.

[358] Gallina Direct, pp. 3-4.

[359] Gallina Direct, p. 4.

territory. FES therefore agrees with Staff's recommendation that the current least-cost methodology should be modified to exclude DPLER load.

Although DP&L argues that the projected impact of its proposed change in methodology will be de minimis, there is no support for this claim. DP&L's witness Hoekstra, who makes the claim, offers no evidence supporting it. When asked about the discovery response allegedly authenticating the claim of minimal rate impact (FES Ex. 9), Mr. Hoekstra stated that he did not do the analysis personally and did not expect the conditions shown in the response to occur.[360] He was also unable to provide any detail as to how this projection was created.[361] Without this basic information and evidentiary support, there is no credibility to DP&L's claim of a de minimis rate impact. Evidentiary issues aside, this claim makes no sense. Purchased power could be an alternative under either a least-cost or average-cost methodology.[362] Under no logical scenario would average-cost pricing produce lower prices than least-cost pricing, and DP&L's unsupported claim to the contrary should be rejected.

VI. CONCLUSION

DP&L's proposed ESP is flawed and should be rejected by the Commission as failing the ESP v. MRO test. If the Commission chooses to modify the proposed ESP, then FES

[360] Tr. Vol. II, p. 388 ("Well, I expect the exact conditions underlying these numbers are very unlikely to occur.")

[361] Tr. Vol. II, p. 387: "Q. What assumption was made regarding the purchased power price over the year 2013? Was it the same purchased power price and projected energy price as was included in the rest of DP&L exhibits or does this assume a different price for purchased power?

A. I don't know specifically. I imagine it was consistent with the forward price curves that we've been describing as of August 30th, 2012.

Q. Okay. But you don't know specifically?

A. I did not do the work personally so I don't know specifically."

[362] Tr. Vol. II, p. 386.

respectfully requests that the proposed ESP be modified in accordance with its recommendations above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post Hearing Brief Of FirstEnergy Solutions Corp.* was served this 20th day of May, 2013, via e-mail upon the parties below.

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