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 No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

PUBLIC VERSION

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I. INTRODUCTION

On March 30, 2012, Dayton Power & Light Company ("DP&L" or "Utility") submitted an application for a Market Rate Offer (MRO Application) to charge its 513,526 customers for generation service. The Public Utilities Commission of Ohio ("PUCO" or "Commission") and parties devoted considerable resources to processing DP&L's MRO application. Then DP&L withdrew it. DP&L next applied for an Electric Security Plan ("ESP") on October 5, 2012. The PUCO and parties devoted considerable resources to processing DP&L's ESP application. But DP&L later concluded it had made a material error in its application. DP&L next filed a revised ESP application ("Second Revised ESP Application") that contains even more expensive proposals for customers in southwestern Ohio. DP&L's third filing, its revised ESP application, is the subject of this brief.

Along the way DP&L increased its proposal to charge customers for "stability," from $365 million in its MRO Application[2] to $600 million in its ESP Application[3] to $687.5 million in the Second Revised ESP Application[4] over a 5-year period. DP&L is proposing these charges in a service area that includes Dayton, where its customers are already suffering from high unemployment rates[5] and 32% of its residential customers either are struggling or unable to pay their bills.[6]

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[2] Transcript Vol. V-Public at 1275-1276; *see also* R.C. 4928.142(D) mandating that the first MRO is for a five-year period.

[3] October 5, 2012 ESP Application at 2. ($120 million annually for the ESP Term of five years.)

[4] Second Revised ESP Application at 8. ($137.5 million annually for the ESP Term of five years.)

[5] Census Bureau statistics from 2010 showed unemployment in the area served by DP&L ranged from 10.7% to 16.4%, as compared to the U.S. unemployment rate of 8.9% and Ohio unemployment rate of 10.1%. Direct Testimony of James D. Williams at 24, Table 6 & Attachments JDW-23 and JDW-24.

[7] R.C. 4928.38.

DP&L's proposed Electric Security Plan would undermine the goals of Senate Bill 221 ("S.B. 221"). That legislation was designed to drive utilities toward competitive generation prices for Standard Service Offer ("SSO"), while protecting SSO customers from unreasonable rates. Indeed, S.B. 221 was preceded nine years earlier by another law intended to give customers the benefit of competition, Senate Bill 3. But years after those laws, DP&L is charging customers the highest electric rates in Ohio, while the market price that DP&L denied to its customers is historically low. Under the law, DP&L, was to be "fully on its own in the competitive market"[7] after its market development period ended in 2005.[8]

For the Commission to impose an Electric Security Plan on customers, the utility must prove that the Plan is more favorable in the aggregate than a Market Rate Offer.[9] DP&L's proposed ESP fails this test for customer protection. Specifically, DP&L's ESP would require customers to ante up $687.5 million in additional subsidies for DP&L's generation service. But DP&L's alleged major benefit for customers--a proposed blending of lower market rates with its high existing rates--would reduce SSO rates by only $120 million compared to an MRO, or $567.75 million less than the Service Stability Rider ("SSR") would increase rates.[10]

In 1999, DP&L requested, and the Commission authorized it to charge customers for $441 million in stranded generation transition costs, including carrying costs, through

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[7] R.C. 4928.38.

[8] *In the matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Opinion and Order (September 2, 2003).

[9] R.C. 4928.143 (C)(1).

[10] Second Revised Testimony of R. Jeffrey Malinak, Exh. RJM-1.

a Customer Transition Charge.[11] Transition costs, as specified in R.C. 4928.39, are prudently incurred costs assignable to retail electric generation service that are unrecoverable in a competitive market, but which the utility would otherwise have been entitled to recover.[12] In other words, they are the above-market costs associated with a utility's generation fleet/assets. DP&L already recovered these costs once from customers and the law could not be clearer that DP&L cannot recover them again.[13]

DP&L's proposed $687.5 million claim for a stability charge is for the "financial integrity" of its combined regulated and non-regulated utility business. Since 1999, Ohio law (R.C. 4928.17) has directed DP&L to separate these business enterprises. But DP&L never did. So today, 14 years later, DP&L says it still needs money from customers to survive. Years after Ohio's transition to competition, the law requires the PUCO to protect customers from paying for DP&L's losses in the marketplace.

Notably, DP&L has had some of the highest returns on equity of any utility in recent years. From 2001 through 2010, DP&L's return on equity was 17% or greater, 20% or more in 7 of those 10 years.[14] While DP&L's returns on equity appear to be declining – 14.1% in 2011 and 10.8% in 2012,[15] it is premature to conclude that the floor will fall out on DP&L's financial condition any time soon. Moreover, had DP&L separated its generation operations from its other operations, it would not face the

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[11] Direct Testimony of Kenneth Rose at 6-7 and *In the Matter of the Application of the Dayton Power & Light Company for Approval of Transition Plan, pursuant to 4928.31, Revised Code and for the opportunity to receive transition revenues as authorized under 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, Opinion and Order (Sept. 21, 2000).

[12] R.C. 4928.39.

[13] R.C. 4928.38. DP&L has never contended that it would qualify to make a claim for any additional transition revenues under any of the exceptions set forth in this section of the Revised Code.

[14] Direct Testimony of IEU witness Joseph G. Bowser, Exh. JGB-4.

[15] Direct Testimony of IEU witness Joseph G. Bowser at 13 & Exh. JGB-4.

claimed threat that operation of its generation assets presents today. DP&L bears responsibility for its "predicament," if indeed there is one. Under the law, DP&L—and not customers—was to be "wholly responsible" for the success of its competitive generation operations.[16] The Commission must hold DP&L to these legal limitations and protect customers.

DP&L's customers have waited too long for the benefits of competition in a market with historically low energy prices. The PUCO should give customers what DP&L has withheld, the benefit of competition today. That benefit should be delivered to customers now with a 100% competitively bid ("CBP") rate.[17]

The Commission should also protect customers by rejecting DP&L's proposed "Switching Tracker." The Switching Tracker is nothing more than an extension of the subsidy (for pricing generation above the market price) that DP&L seeks with its proposed Service Stability Rider. And DP&L's claims do not reflect the financial improvement that should result from its recent [redacted].

Something else that will help DP&L and its customers is corporate separation. The Commission should require DP&L to separate itself from its generation plants so that it and its customers are not harmed by the vagaries of the competitive marketplace (which DP&L claims will drive its financial condition into the red.)

As stated above, there is no sound basis for the SSR or the Switching Tracker. However, if any amount of subsidy is charged to customers for DP&L's generation service, then it should be allocated on a kWh basis to all customer classes since the asserted cause of the charge –customers switching to competitors -- is volumetric in

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[16] R.C. 4928.38.

[17] Direct Testimony of Daniel Duann at 45.

nature.[18] That will further the potential for a fair rate design where the residential class is not overpaying and other customers' classes are not underpaying for this charge. The Switching Tracker, if any is permitted, should follow this same rate design. The maximum charge provision in DP&L's tariff – that gives an approximate $5 million subsidy to low-load factor commercial customers -- should also be eliminated.[19] DP&L's Fuel Rider should continue to be allocated to SSO customers based on the least cost of fuel, rather than using DP&L's proposed "system average" fuel cost which would result in lower cost fuel being allocated to DP&L's affiliates, DPL Energy Resources, and MC Squared than is currently allocated to them.[20]

Finally, customers should be protected regarding DP&L's proposed Reconciliation Rider. Certain competitive enhancements designed to benefit Competitive Retail Electric Service ("CRES") suppliers should be charged directly to those CRES suppliers rather than charged to customers on a non-bypassable basis.[21]

The PUCO should give electric customers in southwestern Ohio the benefit and protection of the law. In 2013, that means the PUCO's ruling should result in significantly lower generation rates, at a time when southwestern Ohioans especially need that result.

II. STANDARD OF REVIEW

The standard of review for ESP cases is found in R.C. 4928.143(C)(1), which states in pertinent part:

[18] Direct Testimony of Scott J. Rubin at 13, 19.

[19] Transcript Vol. III-Public at 853-54.

[20] Direct Testimony of Greg Slone at 4, 11-12.

[21] Direct Testimony of Kathy Hagans at 6.

> [T]he commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if 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.

In addition, R.C. 4905.22 mandates that every public utility furnish necessary and adequate service and facilities, and that all charges for any service must be just and reasonable.

III. BURDEN OF PROOF

R.C. 4928.143(C)(1) provides that, in regard to an ESP application, the "burden of proof in the proceeding shall be on the electric utility." That burden refers to not only proving the SSO meets the statutory test, but also extends to proving that the provisions in the ESP have a basis in law under R.C. 4928.143(B)(2)(d).[22] The Commission has stated that provisions of an ESP that are based in R.C. 4928.143(B)(2)(d) must meet the statute's requirement, to provide rate stability and certainty, and that the proponent of a proposed provision must demonstrate it benefits consumers and the public interest.[23]

On many issues DP&L failed to meet this burden of proof. For example, DP&L did not prove that its proposed ESP is more favorable in the aggregate than an MRO. DP&L failed to show that it would be lawful under R.C. 4928.143(B)(2)(d) to charge

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[22] *See In re Columbus Southern Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32.

[23] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO at al., Entry on Rehearing (January 23, 2012) at ¶19.

customers for the SSR. The Commission should reject DP&L's proposed ESP on grounds that it failed to meet its burden of proof.

IV. LAW AND ARGUMENT

A. The PUCO Should Reject DP&L's Proposed Electric Security Plan Because It Is Less Favorable in the Aggregate than A Market Rate Offer for Customers.

In S.B. 221, the General Assembly revised Chapter 4928 and introduced the concepts of an Electric Security Plan ("ESP") and a Market Rate Offer ("MRO") for providing a Standard Service Offer (SSO) generation price to retail electric customers. R.C. 4928.143(C)(1) states:

> [T]he commission by order shall approve or modify and approve an application filed under division (A) of this section [i.e. the ESP] if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.

The "otherwise apply" portion of the quoted statute refers to providing generation service by a market means -- the MRO. This provision of the law requires that the expected price of the SSO generation under an Electric Security Plan be compared to the expected price derived under a Market Rate Offer. This requires a price comparison to determine if an ESP is better for customers.

Additionally, the statute requires the comparison to be made on an "aggregate" basis. That means that the comparison must consider "all other terms and conditions" of

the proposed ESP. This comparison has been referred to by the Commission and parties as the "statutory test."[24]

OCC Witness Hixon presented testimony comparing the proposed ESP results with the expected results of an MRO.[25] Ms. Hixon concluded that the ESP produces results that are less favorable in the aggregate than the expected MRO results.[26] Other intervenor witnesses and the PUCO Staff came to the same conclusion as OCC witness Hixon – that the ESP proposed by DP&L is significantly less favorable than an MRO.[27]

Mr. Malinak claims that DP&L's proposed ESP would be more favorable than an MRO.. There are a number of shortcomings with DP&L witness Malinak's analysis of the aggregate price test, which are discussed below. But the most glaring shortcoming is the fact that Mr. Malinak assumes that the SSR and Switching Tracker would be part of an MRO under R.C. 4928.142. That is just legally wrong.[28] There is no basis for the Commission to conclude that the SSR or Switching Tracker would be lawful under an MRO. Accordingly, the $687.5 million SSR plus the cost of the Switching Tracker must be added only to the ESP side of the equation. When that is done, the cost of DP&L's proposed ESP is far greater than its benefits relative to an MRO. DP&L's ESP does not pass the statutory test. On this basis, the Commission cannot approve the proposed ESP because DP&L failed to prove that its proposed ESP complies with R.C. 4928.143(C)(1).

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[24] *See In the Matter of the Application of Columbus Southern Power Companies and the Ohio Power Companies for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order (December 14, 2011) ("December 14 Order") at 27.

[25] Direct Testimony of Beth Hixon at 4.

[26] Direct Testimony of Beth Hixon at 4.

[27] *See* Direct Testimony of FES Witnesses Ruch at 3; Direct Testimony of IEU Witness Murray at 3; Prefiled Testimony of Staff Witness Turkenton at 12.

[28] *See* R.C. 4928.142.

1. DP&L's aggregate price test methodology

DP&L Witness Malinak testified that DP&L's proposed ESP is "more favorable in the aggregate than an MRO."[29] Witness Malinak's comparison consists of two steps:

1) An aggregate price test, " reflecting both bypassable and non-bypassable charges" and

2) "Other differences *** whose effects are difficult or impossible to quantify accurately."[30]

The first step, which Mr. Malinak describes as the "aggregate price test," is shown on Exhibit RJM-1. Using DP&L's aggregate price test, the proposed ESP would result in $119.98 million less in charges to customers than an MRO over the 5-years and 5-months from January 1, 2013 through May 31, 2018.[31] This result, (shown on line 28 of Exhibit RJM-1) is a combination of his opinion of the differences in bypassable charges (line 17) and non-bypassable charges (line 23).[32]

As indicated above, Mr. Malinak proposes a two-step methodology. His second step is the comparison of "other, non-quantifiable characteristics of the proposed ESP and MRO."[33]

However, for a number of reasons, Mr. Malinak's methodology should be rejected by the Commission. That proposed methodology is flawed and is inappropriate for use by

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[29] DP&L Witness Malinak Second Revised Testimony at 3.

[30] DP&L Witness Malinak Second Revised Testimony at 5.

[31] Direct Testimony of Beth Hixon at 6.

[32] But Mr. Malinak's aggregate price test does not consider the proposed ESP's non-bypassable charges to customers which will result from DP&L's $2.5 million in capital costs for competitive retail enhancements and $3.3 million in total capital costs for the Yankee Solar Facility. Direct Testimony of Beth Hixon at 6; *see also* DP&L Witness Malinak Second Revised Testimony at 13.

[33] Second Revised Testimony of James Malinak at 14-16.

the Commission in evaluating DP&L's proposed ESP. The problems with Mr. Malinak's aggregate price test analysis were detailed by OCC witness Hixon as follows:[34]

1. DP&L incorrectly compares the SSO generation rates under the ESP versus MRO for January 1, 2013 through May 31, 2018, a period that starts prior to when the PUCO would issue an order in this case and goes five months beyond the ESP term's end date of December 31, 2017.
2. DP&L incorrectly mixes together the comparison of bypassable SSO charges with non-bypassable charges (i.e. Mr. Malinak's aggregate price test), rather than evaluating the proposed ESP's SSO generation charges as the PUCO has previously done (i.e. the statutory price test).
3. While indicating that its aggregate test "reflects both bypassable and non-bypassable charges,"[35] as discussed above, DP&L does not include on Mr. Malinak's Exhibit RJM-1 the proposed non-bypassable charges to customers for the cost of the Yankee Solar Facility and competitive retail enhancements.
4. DP&L incorrectly assumes that its proposed non-bypassable Service Stability Rider ("SSR") and non-

[34] Direct Testimony of Beth Hixon at 7.

[35] Second Revised Direct Testimony of James Malinak at 5.

bypassable switching tracker would be the same under an ESP and an MRO.[36]

Accordingly, the Commission should reject DP&L's methodology and adopt the analysis presented by OCC witness Hixon. In addition, the Commission should also reject DP&L's proposed time period[37] described below.

2. Statutory price test – time period

DP&L's proposed statutory price test starts in January 2013, a date before the PUCO will make a decision in this case, and goes through May 2018—five months after the end of the proposed ESP. But the start of the statutory price test should be (the best estimate of) when DP&L's proposed ESP SSO blended rates would be in effect during the same period that an MRO SSO blended rates would be in effect.

Consequently, January 1, 2013 is not an appropriate starting date.[38] DP&L's ESP SSO blended rates were not in effect as of January 1, 2013. And the use of a January 1, 2013 start date is also inconsistent with DP&L's proposal that "the first period at the 90%/10% blend of Electric Security Plan (ESP) generation prices and the Competitive Bidding (CB) rate, will be from the effective date of the Competitive Bid through May 31st, 2014."[39]

Instead, the starting date should be determined in a consistent manner, as the Commission determined in the recent AEP Ohio ESP case.[40] AEP Ohio presented a

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[36] Direct Testimony of Beth Hixon at 8.

[37] Direct Testimony of Beth Hixon at 9.

[38] Direct Testimony of Beth Hixon at 9.

[39] Direct Testimony of Beth Hixon at 10; Rate Blending Plan at 1.

[40] Direct Testimony of Beth Hixon at 10-11; *see also* Ohio Power, Case No. 11-346-EL-SSO et al., Opinion and Order (August 8, 2012) at 74.

statutory test that began on June 1, 2012, while the Commission order was issued on August 8, 2012. In that case, the PUCO found that it could not "compare prices during a time period that has elapsed prior to the issuance" of an order.[41] The Commission rejected starting the statutory test at June 1, 2012. The Commission determined that the test would begin on the date the utility would be able to implement SSO rates under an MRO. That date was June 1, 2013 for AEP Ohio in that proceeding.[42]

Based on DP&L's indication of when, in relationship to a Commission order, it could conduct an auction,[43] the statutory test should begin two months after the estimated Commission order in this case. Since the hearing was scheduled to commence in March 2013, OCC estimated that a Commission order could be issued in two months, or May 2013. This estimated date for the issuance of an order in this case is based on the Commission's August 2012 order in the AEP Ohio ESP case with the hearing beginning in June 2012. Assuming a May 2013 Commission order in this case, the statutory test should start two months later, or July 1, 2013.[44]

The Commission should use December 31, 2017—the end of the proposed ESP term—as the ending point for the statutory test.[45] It is not appropriate to apply the test beyond the end of the ESP (as DP&L proposes) because the ESP Blended SSO rate would not extend past December 31, 2017. The SSO rates customers will pay beginning January 1, 2018 will be determined by a subsequent DP&L SSO filing.[46]

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[41] Ohio Power, Case No. 11-346-EL-SSO et al., Opinion and Order (August 8, 2012) at 74.

[42] Direct Testimony of Beth Hixon at 10.

[43] Direct Testimony of Beth Hixon at 10; Rate Blending Plan at 4.

[44] Direct Testimony of Beth Hixon at 11.

[45] Direct Testimony of Beth Hixon at 11.

[46] Direct Testimony of Beth Hixon at 11.

Changing these dates impacts DP&L's statutory test in two ways. First, the forecasted Competitive Bidding Plan ("CBP") auction prices must be adjusted to reflect the statutory time period. Since DP&L's CBP auction prices are developed using prices for delivery months, adjusting the dates of delivery will change the resulting auction prices.[47] OCC Witness Hixon's changes[48] to the starting and ending dates results in different forecasted CBP auction rates than those used by Mr. Malinak.[49]

The second impact of changing the statutory time period is that the customer load assumed, to which the difference in rates is applied, also changes. Therefore, OCC Witness Hixon reduced the load[50] assumptions used by Mr. Malinak to reflect the appropriate shorter period of comparison from July 1, 2013 through December 31, 2017.[51]

For the period July 1, 2013 through December 31, 2017, customers under the proposed ESP would pay $113 million less in generation rates than under an MRO.[52] This is a $7 million difference from Mr. Malinak's calculation that customers under the proposed ESP would pay $120 million less in generation rates than under an MRO for January 1, 2013 through May 31, 2018.[53]

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[47] Direct Testimony of Beth Hixon at 12; DP&L's Proxy Auction Results are shown on DP&L Witness Marrinan's Exhibit TFM 2 and the calculations are details in WPC-13.1, in which prices by delivery months are listed.

[48] Direct Testimony of Beth Hixon at Schedule BEH-1, line 3.

[49] Direct Testimony of James Malinak at Exhibit RJM-1, line 3.

[50] Direct Testimony of Beth Hixon at Schedule BEH-1, lines 37 and 38.

[51] Direct Testimony of Beth Hixon at 12.

[52] Direct Testimony of Beth Hixon at Schedule BEH-1.

[53] Direct Testimony of James Malinak at Exhibit RJM-1.

3. Statutory price test – bypassable charges

The Commission, when applying the statutory price test, should not consider the difference in non-bypassable charges in the manner in which DP&L included them in its aggregate test. DP&L's proposed statutory test methodology should be modified to better align with the first two parts of the statutory test as applied by the Commission in recent decisions.[54] Accordingly, OCC Witness Hixon separated the differences in bypassable charges from non-bypassable differences.[55] The differences in bypassable charges reflects the statutory price test – a comparison between the SSO prices customers would pay under DP&L's proposed ESP versus under an MRO.

To illustrate the results of the statutory price test, OCC Witness Hixon presented an SSO price comparison which shows that DP&L's proposed ESP, assuming that switching remains at 62%, would be more favorable to customers than the MRO SSO price by $ 112.5 million.[56] However, OCC Witness Hixon also illustrated, in relation to her testimony regarding the switching tracker, how increased switching would affect the results of the statutory price test.[57] For example, the benefit of lower SSO generation rates to customers is reduced to $88.8 million assuming switching is at 70% during the ESP.[58]

4. Other quantifiable provisions

The Commission should consider other quantifiable provisions of the ESP, including other proposed rates and charges to customers, in applying the second part of

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[54] Direct Testimony of Beth Hixon at 13.

[55] Direct Testimony of Beth Hixon at Schedule BEH-1.

[56] Direct Testimony of Beth Hixon at Schedule BEH-1.

[57] Direct Testimony of Beth Hixon at Schedule BEH-2.

[58] Direct Testimony of Beth Hixon at 13.

the statutory test.[59] Specifically, the Commission should consider DP&L's proposals for non-bypassable charges to customers for a Service Stability Rider, a switching tracker, an Alternative Energy Rider – Non-bypassable ("AER-N") and, the portion of the Reconciliation Rider which will collect for the costs of competitive retail enhancements. These non-bypassable charges are other quantifiable provisions of the ESP that should be included in the second part of the statutory test.

a. Service Stability Rider

As part of the proposed ESP, DP&L seeks approval of a non-bypassable Service Stability Rider to collect $137.5 million annually from customers during the 5-year ESP period to "give DP&L an opportunity to earn a reasonable return on equity (ROE)". [60] In applying the statutory test, Mr. Malinak did consider the Service Stability Rider charge as a non-bypassable charge to customers resulting from the ESP. However, he wrongly assumed that the same level of non-bypassable charge would be charged to customers under an MRO. Based on this flawed assumption (that a Service Stability Rider would be the same under an ESP and an MRO), Mr. Malinak concluded that there is no difference to customers between the ESP and MRO resulting from the proposed Service Stability Rider.[61] Mr. Malinak is wrong.

Even if the Service Stability Rider were available to DP&L under an ESP, which OCC submits that it is not, such a charge would not be available to DP&L under an MRO.[62] Indeed, it would be unlawful to charge customers for that Rider in an MRO. Therefore, for the purposes of the statutory test of DP&L's ESP proposal, the costs to

[59] Direct Testimony of Beth Hixon at 14.

[60] Direct Testimony of Beth Hixon at 15.

[61] Direct Testimony of Beth Hixon at 15.

[62] R.C. 4928.142; Direct Testimony of Beth Hixon at 16.

customers of the Service Stability Rider should be considered as costs of the ESP, but not considered costs under the MRO. Accordingly, the Service Stability Rider charge revenue of $687.5 million should be included as a quantifiable provision/cost of the ESP.[63]

b. Switching Tracker

DP&L seeks approval of a "switching tracker account [that] 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."[64] DP&L would begin to charge customers for deferrals on January 1, 2014 and would continue until the deferral balance was zero.[65]

In applying the statutory test, Mr. Malinak did not explicitly consider the switching tracker.[66] He merely assumed that a switching tracker would be equally available in an MRO as DP&L has requested in its ESP. Since Mr. Malinak assumed the same level of switching in both the ESP and MRO, then there would be no difference in charges to customers resulting from the switching tracker mechanism.[67]

But Mr. Malinak's assumption is wrong. A switching tracker would not be available to a utility under an MRO.[68] Indeed, it would be unlawful to charge customers for that Tracker in an MRO.

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[63] Direct Testimony of Beth Hixon at Schedule BEH-1.

[64] Second Revised Direct Testimony of Jackson at 11.

[65] Direct Testimony of Beth Hixon at 16.

[66] Second Revised Direct Testimony of James Malinak at 10-11.

[67] R.C. 4928.142; Direct Testimony of Beth Hixon at 17.

[68] R.C. 4928.142; Direct Testimony of Beth Hixon at 17.

Accordingly, in the statutory test, the quantifiable costs to customers of the Switching Tracker should be considered as costs of the ESP. The amount of money collected from customers through the proposed Switching Tracker would be dependent on numerous variables – the ESP blended SSO rate, the CBP auction price and the level of switching above 62%.

DP&L assumes the level of switching at 62% in its ESP filings.[69] No Switching Tracker deferrals would occur and there would be no charges to customers using DP&L's 62% switching assumption. But when switching is above 62%, there is a cost for customers.[70] And DP&L expects customer switching rates to increase. Specifically, DP&L Witness Mr. Hoekstra testified that DP&L projects switching to increase above the 62% level based on expected changes in the marketplace during the ESP, including entry of additional generation suppliers, and increased governmental aggregation programs.[71]

The Commission, in applying the statutory test, should not use the 62% switching percentage DP&L proposes because DP&L expects shopping to increase above the 62% level. And when switching goes above 62% during the ESP, there will be costs to customers.[72] Since the level of switching during the ESP is unknown, it is difficult at this time to quantify the costs to customers that would result from Commission approval of a switching tracker for DP&L. But, under Ohio law,[73] the Commission must acknowledge

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[69] Direct Testimony of Beth Hixon at 17. "The current level of switching is held fixed in the projections included in the ESP filing," DP&L Witness Malinak at 10-11.

[70] Direct Testimony of Beth Hixon at 17-18.

[71] Second Revised Testimony of Hoekstra at 7-9.

[72] Direct Testimony of Beth Hixon at 18.

[73] R.C. 4928.143(C)(1).

and take into consideration these probable costs to customers as it evaluates DP&L's proposed ESP. For example, DP&L's own calculation shows that with just an 8% increase in switching (above August 2012 levels), the cost to all customers is an additional $66 million, plus carrying charges,[74] under the proposed ESP.[75]

For the purposes of the statutory test, the Commission should consider, at a minimum, the impact of 70% switching during the ESP. As explained above, customer switching at 70% during the ESP will result in $65.7 million additional ESP costs to customers for the switching tracker.[76] Increased switching, above 70% during the ESP, also results in a reduced benefit to SSO customers. This reduced benefit occurs because, as switching load increases, the differential between the ESP and MRO generation rates is applied to a decreased level of SSO load.[77] Accordingly, for the purposes of the statutory price test, the benefit would be reduced to $88.8 million. This means that SSO customers would pay $88.8 million less in generation rates under the proposed ESP than under an MRO.[78]

c. Competitive Retail Enhancements and Alternative Energy Rider – Non-Bypassable

DP&L is proposing charges to customers for competitive retail enhancements and for the alternative energy rider-nonbypassable ("AER-N") in its ESP application. Although Mr. Malinak did indicate that costs to customers for these two items are associated with the ESP, he did not show these two items in his aggregate price test. He

[74] Rate Blending Plan at 23-24.

[75] Direct Testimony of Beth Hixon at 19.

[76] Direct Testimony of Beth Hixon at 19.

[77] Direct Testimony of Beth Hixon at 19.

[78] Direct Testimony of Beth Hixon at 19 and Schedule BEH-1.

also determined that those ESP costs would not affect his conclusion that DP&L's proposed ESP is more favorable in the aggregate than the MRO.[79]

Both of these costs should be included in the statutory test that the Commission uses to determine whether the proposed ESP should be approved.[80] For the purposes of the statutory test of the ESP, OCC Witness Hixon reflected the total capital costs of both projects as costs of the ESP.[81] For the proposed competitive retail enhancements, which DP&L proposes to charge to customers through the Reconciliation Rider, DP&L estimated an investment of $2.5 million. For the Yankee Solar Facility, which DP&L seeks to charge to customers through the AER-N, the facility's total capital costs of $3.3 million should be included as a cost of the ESP.[82] Both of these costs should be included on the ESP side of the price test but not on the MRO side of the price test, and they are reflected accordingly in Ms. Hixon's schedules.

B. DP&L's Customers Should Be Provided A Standard Service Offer That Is 100% Competitively Bid Over The Entire Electric Security Plan Period, Consistent With Ohio Policy.

DP&L's customers should receive the full benefits of current and near-term low market prices of electricity as intended from more competition in Ohio. This can only be accomplished by requiring DP&L's SSO be 100% competitively bid over the entire ESP period.[83]

The blending ratio and schedule as proposed by DP&L in the ESP will deprive DP&L's SSO customers of the full benefits (savings) of a competitive generation market

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[79] Second Revised Testimony of James Malinak at 13-14.

[80] R.C. 4928.143(C)(1).

[81] Direct Testimony of Beth Hixon at 20 and Schedule BEH-1.

[82] Direct Testimony of Beth Hixon at 19 and Schedule BEH-1.

[83] Direct Testimony of Daniel Duann at 45.

in Ohio that has been a state policy for many years.[84] And DP&L's proposed blending schedule is contrary to current Commission policies which encourage a faster transition to market-based rates for SSO services.[85] Accordingly, the Commission should reject DP&L's proposal, as contained in the ESP, to unnecessarily delay its transition to full competition for its generation service.

Under DP&L's proposal, only 10% of the applicable load would be met through a competitive bidding process ("CBP"), and priced at a resulting Competitive Bid ("CB") rate, through May of 2014.[86] The CBP portion would rise to 40% for June 2014 through May 2015, to 70% for June 2015 through May 2016, and to 100%, representing full competition, only in June 2016.[87]

OCC witness James Wilson testified that DP&L's plan "takes too long to transition to full competition" and that a more rapid transition "would enhance market efficiency, consistent with the State's policy that includes ensuring the diversity of electricity supplies and suppliers by giving consumers choices over who will supply their electricity."[88] More importantly, as Mr. Wilson testified, setting SSO rates "through a competitive auction would, judging from current and forecasted market prices, give customers a significant benefit relative to the current base generation rates."[89]

As currently proposed, DP&L's blending plan might expose DP&L's SSO customers (due to the 100% auction-based rates only after June 1, 2016) to potentially higher prices of electricity when the market conditions change in later years of the ESP

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[84] Direct Testimony of Daniel Duann at 45.

[85] Direct Testimony of Daniel Duann at 45.

[90] Direct Testimony of James Wilson at 3.

[89] Direct Testimony of James Wilson at 3.

but would not give them the full benefit of those market prices in today's low-price market.[90] This asymmetry in the amount and timing of risks and benefits is fundamentally unfair to DP&L's customers.[91] A 100% competitively bid SSO over the entire ESP period will help eliminate this asymmetry.[92]

OCC's position that DP&L's SSO should be 100% competitively bid is supported by other intervenors in this proceeding. FirstEnergy Solutions witness Noewer testified that customers would receive a benefit from 100% market based rates.[93] Witness Noewer testified that 100% auction based rates would create significant value for DP&L's customers because it would allow them to take advantage of current low market prices.[94] Furthermore, FirstEnergy Solutions maintained that a 100% auction based price would also put downward pressure on CRES provider rates, likely resulting in lower prices in the competitive generation service provided by the CRES providers to the benefit of the DP&L customers who might decide to shop.[95]

Additionally, Duke Energy Retail Sales' witness Walz found no reason why DP&L should not also operate under a 100% auction based SSO.[96] Walz also noted that, at the present time, both Duke Energy Ohio ("Duke") and the FirstEnergy utilities ("FirstEnergy") set prices for SSO loads using 100% auction based pricing.[97]

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[90] Direct Testimony of Daniel Duann at 6.

[91] Direct Testimony of Daniel Duann at 6. (See Direct Testimony of Herrington at 2 (December 12, 2012) and Direct testimony of Dona Seger-Lawson at 6-11 (December 12, 2012) for more discussion about DP&L's proposed blending schedule.)

[92] Direct Testimony of Daniel Duann at 45.

[93] Direct testimony of Sharon Noewer at 10.

[94] Direct testimony of Sharon Noewer at 10-11.

[95] Direct testimony of Sharon Noewer at 11.

[96] Direct Testimony of Matthew Walz at 7.

[97] Direct Testimony of Matthew Walz at 7.

The positions of FirstEnergy Solutions and Duke Energy Retail Sales are consistent with OCC witness Wilson's testimony that other Ohio utilities are moving rapidly to full competition.[98] In regard to Duke, it has now completed three of the scheduled five auctions designed to provide market-based generation prices to customers continuing to purchase electricity from the SSO.[99] The first auction resulted in auction prices of $49.72, $51.10, and $57.08 per MWh for supply from January 2012 through May of 2013, 2014, and 2015 respectively.[100] Duke's residential customers (consuming 1,000 kWh per month) saw a 17.5% rate reduction off their total bill for 2012 (from December 2011 rates) as a result of the auction.[101]

FirstEnergy's auction (for the term June 1, 2009 through May 31, 2011) produced a clearing price of $61.50 per MWh for each of the three operating companies. Based on that auction price, the Commission found that Ohio Edison's customers would experience a 16% decrease, Toledo Edison's customers a 12.6% decrease, and Cleveland Electric Illuminating's customers a 7.4% decrease.[102]

As OCC witness Wilson noted and as mentioned above, a 100% competitively bid SSO will not be reached until June 2016, under DP&L's proposal.[103] This delay (in going to 100% immediately) will almost certainly be to the detriment of DP&L's

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[98] Direct Testimony of James Wilson at 4.

[99] Direct Testimony of James Wilson at 5; *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 11-6000-EL-UNC, Evaluation and Recommendation (Jan. 20, 2012).

[100] *Id.*; *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 11-6000-EL-UNC, Updated Auction Manager Report, (Jan. 5, 2012).

[101] Direct Testimony of James Wilson at 5; Ohio Public Utilities Commission – News Release (Dec. 15, 2011).

[102] Direct Testimony of James Wilson at 5; Ohio Public Utilities Commission – News Release (May 14, 2009).

[103] Direct Testimony of James Wilson at 5.

customers in light of the significant savings seen by Duke and FirstEnergy customers following implementation of 100% auction based SSOs.[104]

Based on DP&L's own forecasted auction prices, if the SSO rate is a 100% auction-based price, then DP&L's customers will see significant savings.[105] For example, using 100% auction results based on DP&L's information, the forecasted CBP auction rate would be 39% below the proposed Blended SSO Rate for 2013 through May 2014, 16% lower for June 2014 through May 2015, and 7% lower for June 2015 through May 2016.[106] These savings would be in addition to the savings calculated by DP&L from its Blended SSO rates as compared to the current Base Generation Rate of $76.62 per MWH.

Furthermore, DP&L's CBPs are not likely to be substantially different from the other aforementioned Ohio utilities' recent CB auctions or from DP&L's forecasted auction price.[107] DP&L's service territory is part of the large and generally unconstrained western region of PJM.[108] Although there have been recent concerns about possible transmission constraints into FirstEnergy's service territories resulting from retirements announced in 2012, which may have had some impact on FirstEnergy's latest CBP results, OCC witness Wilson testified that he was not aware of such concerns about the

[104] Direct Testimony of James Wilson at 4.

[105] Direct Testimony of James Wilson at 7.

[106] Direct Testimony of James Wilson at 7.

[107] Direct Testimony of James Wilson at 7-8.

[108] Direct Testimony of James Wilson at 7-8.

DP&L region.[109] Nor was he aware of any reason why DP&L's CBPs would have results substantially different from those of the other Ohio utilities or DP&L's projections.[110]

The results of Duke's and FirstEnergy's 100% auction-based SSO's (discussed above) indicate that DP&L's SSO load could be satisfied at substantial savings for customers through a 100% CBP process. In both cases, residential customers experienced significant decreases from their then-existing SSO rates.[111] In contrast, DP&L's proposal is a three-year blending process where 100% CBP rates will not be achieved for customers until June 1, 2016. If the Commission approves DP&L's proposal, then rates for a residential customer using 750 kWh would actually increase 2.61% in the first year of the ESP[112] with some residential customers actually experiencing up to a 37.38% increase.[113] DP&L's proposal to delay moving to a 100% auction price (for all of DP&L's SSO customers) will result in substantial lost savings to customers.[114]

Additionally, a more rapid transition to competition by DP&L would result in more Ohio generation competing in retail markets to serve loads not only in DP&L's service territory, but also in the service territories of the other Ohio utilities.[115] This additional competition could contribute some additional downward pressure on prices in

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[109] Direct Testimony of James Wilson at 7-8.

[110] Direct Testimony of James Wilson at 8.

[111] *See* Direct Testimony of James Wilson at 8.

[112] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case No. 12-426-EL-SSO, Second Revised Application (Rate Blending Plan at 1) (December 12, 2012).

[113] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case No. 12-426-EL-SSO, Second Revised Application (Schedule 10, page 1) (December 12, 2012).

[114] Direct Testimony of James Wilson at 8.

[115] Direct Testimony of James Wilson at 8-9.

the other utilities' CBPs, enhancing competitiveness and market efficiency and benefiting consumers.[116]

The Commission should reject DP&L's proposal (to delay competition) because it takes too long to provide customers the benefits of full competition. Instead, the Commission should require a more rapid transition (100% CBP immediately) to enhance market efficiency and lower the price of electricity for DP&L's SSO customers.[117] This approach is consistent with the State's policy that includes ensuring the diversity of electricity supplies and suppliers by giving consumers choices over who will supply their electricity.[118] And requiring a more rapid transition to competition is consistent with the view of the PUCO that customers should be able to benefit from market-based prices while they are low.[119]

Establishing DP&L's SSO rates through a competitive auction would, judging from recent and forecasted market prices, give customers a significant benefit relative to the current base generation rates charged by DP&L. Finally, a more rapid transition to market will enhance the competitive marketplace, providing opportunities for competitors to fulfill the electricity needs of their customers, a policy of the state under R.C. 4928.02. Accordingly, the proposal by OCC, FirstEnergy Solutions,[120] and Duke Energy Retail Sales,[121] under which DP&L would acquire 100% of the power necessary to serve

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[116] Direct Testimony of James Wilson at 8.

[117] Direct Testimony of James Wilson at 9.

[118] *See* Direct Testimony of James Wilson at 3; R.C. 4928.02(C).

[119] Direct Testimony of James Wilson at 3; *see also In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143 Ohio Rev. Code in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO et al., Entry on Rehearing at ¶37 (January 30, 2013).

[120] Direct Testimony of Sharon Noewer at 10-11.

[121] Direct Testimony of Matthew Walz at 7.

DP&L's SSO load through a competitive bidding process beginning with the effective date for rates under the ESP, should be adopted by the Commission. DP&L's proposal for rate blending over multiple years should be rejected.

C. The Law Establishing Electric Security Plans Does Not Provide For Protection, at Customer Expense, Of The Financial Condition Of Unregulated Operations Of An Electric Distribution Utility.

Under R.C. 4928.143(C)(1), the standard of review for electric security plans is expressly set out. The Commission must apply the more favorable in the aggregate test. OCC Witness Hixon testified that the statutory test requires a comparison between the results of a utility's proposed Electric Security Plan with the results that would be expected under a Market Rate Offer ("MRO").[122] Under that statute, the Commission "shall approve or modify and approve" an ESP "if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and future recover of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply" under an MRO.

DP&L's claim for a Service Stability Rider and its Switching Tracker is founded upon the claim that the financial integrity of DP&L's operations is an appropriate subject to consider in its ESP proceeding. But it is not. There is no standard for reviewing an Electric Security Plan that requires the Commission to determine that the plan ensures the financial integrity of the distribution utility. Financial integrity under Revised Code Chapter 4928 only comes into play under R.C. 4928.142(D)(4), when an emergency "threatens the utility's financial integrity."

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[122] Direct Testimony of Beth E. Hixon at 23.

Notably, the General Assembly could have included the "financial emergency" language of R.C. 4928.142(D) in the ESP statute (R.C. 4928.143). It did not do so. Under the doctrine of *expressio unius est exclusio alterius*, because the General Assembly did not, neither the Commission nor the Utility can rewrite the law.[123]

But that is just what DP&L seeks to do here. It seeks to have customers support DP&L's generation business through a Service Stability Rider (and Switching Tracker) that it claims will maintain the utility's financial integrity. While DP&L has calculated the risk to the financial integrity of its entire operations, as Mr. Jackson admitted, DP&L's transmission and distribution operations are on sound footing. It is the generation business alone that is driving DP&L's financial integrity claim.[124]

While the Commission has found that the financial integrity of a *regulated* utility may be considered in certain contexts,[125] the financial integrity of the *unregulated* operations of an electric distribution utility is not a proper subject of an Electric Security Plan. Dr. Rose testified that DP&L's proposal to set rates through a Service Stability Rider and Switching Tracker is an attempt to reintroduce regulatory protection for the generation portion of DP&L's business.[126] But that portion of DP&L's business has been deregulated. Customers should no longer be required to protect DP&L from competitive

[123] *See State ex rel. v. Evatt* (1944), 144 Ohio St. 65 (no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for).

[124] Direct Testimony of Daniel J. Duann at 28.

[125] *See In the Matter of the Commission's review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company,* Case No. 10-2929-EL-UNC, Opinion and Order at 22 ("The Commission's obligation under traditional rate regulation is to ensure that the jurisdictional utilities receive reasonable compensation for the services they render.").

[126] Direct Testimony of Kenneth M. Rose at 5.

generation market risks.[127] The financial condition of the generation portion of DP&L's business is not a proper subject or component of an ESP plan review. Accordingly, Dr. Duann testified that DP&L's projected pro forma statements for 2013-2017 are not relevant to the PUCO's consideration in this case.[128]

Under an Electric Security Plan, a utility does not need to be protected by the Commission from any emergency that threatens its financial integrity. The utility, such as DP&L in this proceeding, has the ultimate veto power over any modifications made by the PUCO to the proposed ESP. If the Commission modifies and approves, or disapproves the ESP, the utility may withdraw its application, thereby terminating it and may file a new SSO application.[129] And there are other opportunities for a utility to terminate the ESP, for example, if the Commission orders a return of significantly excessive earnings under R.C. 4928.143(E) or (F). These provisions already protect the utility far beyond the means of other parties. Commissioner Roberto wrote: "In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore ***."[130]

No further protection for the financial integrity of a utility under an ESP is needed. No further protection is given under the statutes. The protection sought in this case by DP&L, in the form of a $687.5 million SSR and an untold amount from the

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[127] Direct Testimony of Kenneth M. Rose at 5-6.

[128] Direct Testimony of Daniel J. Duann at 31-32.

[129] R.C. 4928.143(C)(2)(a).

[130] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO Concurring and Dissenting Opinion of Commissioner Roberto to Second Opinion and Order, p. 2 (March 25, 2009).

Switching Tracker, will only enrich DP&L's generation business at the expense of its customers. The PUCO should reject both riders.

D. DP&L's Financial Projections Are Unreliable And Should Not Be Used To Set Rates For DP&L's Customers To Pay.

1. The projections are inherently imprecise.

Dr. Duann testified that the pro forma projections presented by DP&L Witness Jackson are not reliable and are speculative.[131] Notably, the pro forma projections, though reviewed, were not a part of any approved budget.[132] The pro forma projections instead were put together exclusively for purposes of this case.[133] Dr. Duann pointed out that the projections are not audited, not available to the general public, and are inherently imprecise given the long period of time that the projections cover (5 years).[134]

The inherent imprecision of DP&L's pro forma projections stems from a number of factors. Dr. Duann testified that the components of DP&L's financial forecasts are subject to significant variations over any extended period of time, let alone the five year period presented.[135] These components include the commodity price forecast, retail and wholesale generation estimates, operation and maintenance forecast, and capital expenditures forecasts.[136] DP&L itself recognizes the variation and uncertainty associated with its long-term financial projections. Mr. Jackson testified to this when he explained the normal operating budget process: "As we progress through the business year, we track and monitor results compared to forecast. Based on actual results

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[131] Direct Testimony of Daniel J. Duann at 33-36.

[132] Transcript Volume I-public, page 218.

[133] Transcript Volume I-public, page 151.

[134] Direct Testimony of Daniel J. Duann at 33-36.

[135] Direct Testimony of Daniel J. Duann at 33.

[136] Direct Testimony of Daniel J. Duann at 33.

combined with potential changes in business and market conditions, the forecast is adjusted as needed." [137]

The "monitor and adjust" process Mr. Jackson described,[138] though, pertains to the normal budgeting process, which is related solely to DPL, Inc. (the parent company of the electric utility, DP&L), not the utility itself. While the "monitor and adjust process" may generally improve financial forecasts, that process was not used to improve the projections made in this proceeding. Nor is it proposed to be used to adjust the underlying basis for the SSR into the future. Rather, such financial projections are inappropriate for setting rates because they are "inherently imprecise and unreliable" and thus not appropriate for use "in a regulatory setting."[139]

Mr. Jackson presented his pro forma projections for 2012 through 2017 based on data that has not been updated to account for DP&L's actual experience for the complete year of 2012 or partial year experience in 2013.[140] [REDACTED]

[REDACTED]

[REDACTED].[141] Among the changes recently approved by DP&L are [REDACTED]

[REDACTED]

[REDACTED][142] [REDACTED]

[REDACTED]

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[137] Second Revised Direct Testimony of Craig L. Jackson at 7.

[138] Second Revised Direct Testimony of Craig L. Jackson at 7.

[139] Direct Testimony of Daniel J. Duann at 34.

[140] Transcript Volume I-public, page 225.

[141] Transcript Volume I-confidential, page 90.

[142] Transcript Volume I-public, page 141.

[143] Had the updated and approved budget for 2013, and the information from the 2013 through 2022 ten year operating forecast been used in lieu of the information presented in Mr. Jackson's testimony, the results would show a markedly improved return on equity average (7.5%) over the term of the ESP.[144] This emphasizes the point Dr. Duann makes in his testimony—Mr. Jackson's projections that are used to set the Service Stability Rider are imprecise and not reliable. DP&L's financial projections have little to do with the realities of its financial situation but are custom-made for this proceeding with one and only one purpose -- to attempt to justify making customers pay an SSR of $687.5 million and potentially hundreds of millions in additional Switching Tracker charges.

The projections were not developed as part of a regular operating forecast or budget. They have not been approved by DP&L. They were developed specifically for this case. Going forward, DP&L does not propose to check the projections utilized in setting rates against actual results.[145] Similarly, because these numbers were developed only for purposes of this proceeding, there is no way to check the results against independently generated financial projections by other third parties. Additionally, these financial projections are not included in any government filing such as the 10-K required by the Securities and Exchange Commission (SEC).[146]

Yet DP&L's case for a $687.5 million Service Stability Rider and a Switching Tracker rider hinge upon these financial projections. And there is no corporate

[143] Transcript Volume I-confidential, pages 102-103.

[144] Transcript Volume I –public, pages 215-216.

[145] Direct Testimony of Daniel J. Duann at 33-36.

[146] Direct Testimony of Daniel J. Duann at 33-36.

accountability mechanism related to the results presented. Nor has DP&L shown due diligence with respect to its financial projections.[147] Thus, the Commission should not rely upon the pro forma projections presented by DP&L even if financial integrity was a valid consideration under the ESP statutes (and it is not).

2. Assumptions made in the pro forma financials are unreasonable, inconsistent with a utility in "dire" financial straits, and contrary to the 2013 budget and ten-year operating forecast that applies to DP&L.

In addition to the general imprecision and unreliability of DP&L's financial projections, there are numerous concerns about the assumptions underlying them. Dr. Duann testified that major assumptions made in DP&L's financial projections raise special concerns.[148] Those assumptions included the projected capital structure, the projected operation and maintenance expenses, and the projected capital expenditures.[149] Dr. Duann concluded that DP&L's assumptions are not consistent with the actions of a business facing the dire financial consequences DP&L claims.[150]

More specifically, DP&L bases its financial projections on a capital structure that has unusually high and increasing equity ratios.[151] Such high ratios of equity to debt are inconsistent with a business entity whose financial integrity is deteriorating.[152] Second, DP&L has assumed increasing levels of operation and maintenance expenses, instead of

[147] Direct Testimony of Daniel J. Duann at 33-36.

[148] Direct Testimony of Daniel J. Duann at 40.

[149] Direct Testimony of Daniel J. Duann at 40.

[150] Direct Testimony of Daniel J. Duann at 40.

[151] *See* Second Revised Direct Testimony of Craig L. Jackson, CLJ-2; Second Revised Direct Testimony of William J. Chambers, WJC-1.

[152] Direct Testimony of Daniel J. Duann at 41.

holding at its 2013 levels, contrary to its own cost-cutting forecast.[153] A company in "dire" financial condition could and should be expected to take efforts to reduce its expenses, as Dr. Chambers testified.[154] And DP&L's pro forma financial projections feature capital expenditures that increase in 2016 and 2017.[155] A company in a "dire" financial condition would be expected to rein in its capital expenditures, rather than increase capital expenditures. Dr. Duann testified that DP&L's projected financial condition will be very different "if one or more of these three financial inputs are adjusted to a more reasonable and realistic level."[156]

Indeed, evidence was adduced that calls into question DP&L's O&M and capital expenditure projections. Mr. Jackson testified that DP&L has identified potential [157] [158]

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With respect to capital expenditures reductions,

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[153] Direct Testimony of Daniel J. Duann at 41.

[154] Transcript Volume I-public, pages 493-497.

[155] Direct Testimony of Daniel J. Duann at 41.

[156] Direct Testimony of Daniel J. Duann at 41-42.

[157] Transcript Volume I-public, page 141.

[158] Transcript Volume I-confidential, pages 87, 90

[159] Transcript Volume I-confidential, page 87-88.

[160] Transcript Volume I-confidential, page 95; FES Exhibit 4.

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.[167] But these potential capital expenditure reductions were not included in the pro forma financials presented by DP&L to justify the SSR and Switching Tracker.

Not only is DP&L's proposal to use a 5-year forecast to set rates inconsistent with sound regulatory principles but, for the reasons discussed above, relying on DP&L's pro forma results that use many unjustifiable assumptions is wholly unreasonable for allowing charges to utility customers. DP&L has failed to bear the burden of proof that its pro forma projections are reasonable and should be the basis to set the rates customers will pay under the Service Stability Rider and Switching Tracker. Accordingly the Commission should reject DP&L's proposed SSR and Switching Tracker.

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[161] Transcript Volume I-confidential, page 91.

[162] Transcript Volume I-confidential, page 92.

[163] Transcript Volume I-confidential, page 94.

[164] Transcript Volume I-confidential, page 94.

[165] Transcript Volume I-confidential, pages 96-97; FES Exhibit 4.

[166] Transcript Volume I-confidential, page 97-98.

[167] Transcript Volume I-public, page 217.

3. A return on equity target of 7.7% to 10.4% is not reasonable to use in setting the amount of a Service Stability Rider for customers to pay.

As part of the pro forma financial projections that DP&L developed, it identified a target return on equity that served as the key factor driving the amount of the Service Stability Rider. But, as OCC Witness Duann testified, any expected return on equity ("ROE") is irrelevant to this ESP proceeding. [168] This is simply because an ESP is concerned with the rates and terms for generation service, which the General Assembly has defined as a competitive retail electric service.[169] Setting rates for competitive generation service based on cost of service principles, including the use of a target ROE for customers to pay, is inappropriate and inconsistent with the requirement that a utility be on its own in the competitive marketplace.[170]

Dr. Duann also testified that evaluating a utility's performance based upon a per-book ROE as reported to the shareholders and the general public does not always present a fair and complete picture of the financial integrity of a business.[171] He described numerous factors that can affect a reported ROE in any particular period that may not bear upon its financial integrity.[172] Thus, Dr. Duann testified that a low ROE or even a negative ROE in one year does not necessarily indicate that the financial integrity of a business is threatened.[173]

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[168] Direct Testimony of Daniel J. Duann at 36-37.

[169] *See* R.C. 4928.141.

[170] R.C. 4928.38.

[171] Direct Testimony of Daniel J. Duann at 37.

[172] Direct Testimony of Daniel J. Duann at 37.

[173] Direct Testimony of Daniel J. Duann at 37.

DP&L's proposed SSR and Switching Tracker are based on its position that a return on equity in the range of 7.7% to 10.4% is a range consistent with financial integrity. But, as Dr. Duann testified, even if it were appropriate to consider a projected ROE for DP&L's total company operations, which it is not, DP&L has not demonstrated that the range of 7.7% to 10.4% is reasonable or necessary to preserve financial integrity.[174]

As Dr. Duann testified, DP&L's proposed range was developed based on questionable data and methodology including the selection of "peer firms" and the use of the parent company's ROE as the proxy of the ROE of the peer firm.[175] Selection of "peer firms" on the basis of one factor only—credit ratings— is not a credible approach to selecting market comparables, as Dr. Duann testified.[176] Dr. Chambers' approach inappropriately examines the projected ROEs of publicly traded parent companies, and not the projected ROEs of the individual utilities.[177] While the ROEs of some of the selected peer firms may track the ROEs of their parent companies, there can be peer utilities that have a return on equity that is quite different than their parent companies.[178] Thus, Dr. Chambers, in many instances, is comparing apples to oranges.

DP&L attempted to address the weaknesses of Dr. Chamber's ROE analysis [179] by having Mr. Malinak provide rebuttal testimony to OCC witness Dr. Duann and Staff witnesses Dr. Choueiki and Mr. Mahmud. However, DP&L's "rehabbed" ROE

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[174] Direct Testimony of Daniel J. Duann at 38.

[175] Direct Testimony of Daniel J. Duann at 38.

[176] Direct Testimony of Daniel J. Duann at 38.

[177] Direct Testimony of Daniel J. Duann at 39.

[178] Direct Testimony of Daniel J. Duann at 39.

[179] Mr. Chambers testified as well that he was not a rate of return expert; nor was he making a ROE recommendation in this proceeding. *See* Transcript Volume II-confidential, pages 440-441; 498.

recommendation of 8.9% is no improvement, and is also unreasonable and unjustified. Mr. Malinak used the same 28 comparable firms used by Dr. Chambers for the analysis of the historical ROEs. Consequently, the selection of these comparable firms is equally unreasonable and unjustified. Mr. Malinak, similar to Dr. Chambers, never explained why these firms are comparable to DP&L. Mr. Malinak also repeated the same mistake using the parent companies'(utility holding companies) projected ROEs*, instead of the electric utilities' own, projected ROEs* for the period of 2013 to 2017.[180]

The attempt by DP&L, through Mr. Malinak, to present additional analysis of the recommended ROE based on the results of the Discounted Cash Flow ("DCF") and Capital Asset Pricing Model ("CAPM") are baffling and self-contradictory. Mr. Malinak used the same twelve comparable firms (which is different from the 28 firms selected for the historical ROEs) used by Dr. Chambers.[181] Then he estimated the individual ROEs of these twelve comparable firms and identified the ROEs at the 25th percentile, the median, and the 75th percentile.[182] This is not what the typical DCF and CAPM entail and there is no proper interpretation of his results. Mr. Malinak also concluded that the CAPM results were biased downwards because the firms in his sample are less risky than DP&L.[183] This begs the question as to why he included these utilities in his sample in the first place.

In summary, DP&L's target ROEs should be rejected because they are not relevant to determining prices of a competitive generation service under S.B. 221. DP&L

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[180] *See* Rebuttal and Supplemental Testimony of R. Jeffrey Malinak at RJM-5R, 6R.

[181] *See* Rebuttal and Supplemental Testimony of R. Jeffrey Malinak at RJM-5R and RJM-6R.

[182] *See* Rebuttal and Supplemental Testimony of R. Jeffrey Malinak at RJM-5R and RJM-6R.

[183] *See* Rebuttal and Supplemental Testimony of R. Jeffrey Malinak at 20.

has not shown that its target ROE range is reasonable to charge to customers or that such returns are necessary to maintain financial integrity. Of course, the financial integrity of competitive generation service--and making customers pay to shore it up--are not properly considered in an ESP proceeding.

E. Customers Should Not Bear The Burden Of Protecting DP&L's Credit Ratings, Especially When Its Credit Rating Is Impaired Due To The Activities Of Affiliated Unregulated Entities.

DP&L, through the testimony of Dr. Chambers sought to define financial integrity in terms related to DP&L's overall creditworthiness.[184] Dr. Chambers testified that credit ratings are an important source of information to many market participants, have a significant impact on the costs of borrowing, and affect a utility's access to capital markets.[185]

Dr. Chambers testified that [redacted]

[redacted][186] [redacted]

[redacted][187] [redacted]

[redacted]

[redacted].[188]

Dr. Chambers testified further that DP&L's current business position appears relatively stable, though weaker than in previous years, with a stable economic and

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[184] *See, e.g.,* Second Revised Direct Testimony of William J. Chambers at 9.

[185] Second Revised Direct Testimony of William J. Chambers at 51.

[186] Second Revised Direct Testimony of William J. Chambers at 4.

[187] Second Revised Direct Testimony of William J. Chambers at 4.

[188] Second Revised Direct Testimony of William J. Chambers at 4.

demographic service area and good infrastructure.[189] Dr. Chambers evaluated the financial position of DP&L, the wholly owned subsidiary of DPL Inc.[190]

Dr. Chambers, nevertheless, acknowledged that the ratings of DPL Inc., AES (the ultimate parent), and its subsidiaries, are not totally independent. [191] There is a relationship even if not directly linked.[192] It became clear during cross-examination that DP&L's financial integrity has been negatively affected by the ratings of DP&L's parent, DPL Inc. and its unregulated subsidiaries.[193]

This testimony is borne out by the fact that the recent downgrade (November 8, 2012) of DP&L's credit rating by Standard &Poor's ("S&P")[194] was linked in part to DPL Inc.'s financial position.[195] S&P reported that DPL Inc.'s financial position was "stressed due to the substantial amount of acquisition debt[196] layered onto it by AES."[197] At the same time, Moody's placed [198] both DP&L and DPL, Inc. under review for a possible downgrade, citing the concern that the addition of unregulated retail customers beyond the historical footprint of the utility increases DP&L Inc.'s consolidated risk

[189] Second Revised Direct Testimony of William J. Chambers at 26.

[190] Second Revised Direct Testimony of William J. Chambers at 29.

[191] Transcript Volume II-public, page 483.

[192] Transcript Volume II-public, page 483.

[193] *See* e.g. Transcript Volume II-public, pages 481-487.

[194] *See* Second Revised Direct Testimony of William C. Chambers at 4.

[195] *See* Transcript Volume II-public, page 481; OCC Exhibit 2.

[196] 1.25 billion of acquisition debt was incurred, as Mr. Chambers recognized in reviewing OCC Exhibit 5. Transcript Volume II-public, page 490.

[197] Transcript Volume II-public, page 482.

[198] *See* Second Revised Direct Testimony of William C. Chambers at 4; Transcript Volume II-confidential, pages 487-492; OCC Exhibit 5.

profile. [199] Indeed Dr. Chambers acknowledged that AES, the ultimate parent of DPL Inc. and DP&L, has a lower credit rating than either DPL Inc. or DP&L.[200]

But, as Dr. Chambers conceded, customers of DP&L should not bear the burden of protecting DP&L's financial integrity when its financial integrity is impaired due to the activities of an unregulated affiliate.[201] Yet, there is nothing that stops this from happening in DP&L's proposal. Customers of DP&L are being asked to pay hundreds of millions of dollars to DP&L in order to assure its financial integrity is not compromised. And if financial integrity is defined as maintaining DP&L's creditworthiness, then customers are on the hook for all purposes, regardless of whether the financial integrity is being impaired by DP&L's parent or its affiliate(s). This is fundamentally unfair, unjust, and unreasonable.

The costs of maintaining a certain credit rating are not statutorily recognizable costs that pertain to providing the generation component of retail electric service to customers in this State. The PUCO should reject DP&L's argument that all of its customers should be compelled to pay $687 million (plus unknown amounts from a Switching Tracker) so that DP&L can maintain a certain credit rating.

F. There Are Numerous Other Actions DP&L Can Undertake, Without Leaning on Customers, To Assure Its Financial Integrity Is Maintained.

Although DP&L seeks a bail out from customers (in the form of a $687 million Service Stability Rider and more from a Switching Tracker), DP&L should instead undertake other actions to address any financial integrity issues it may have. For

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[199] OCC Exhibit 5 at page 53788.

[200] Transcript Volume II-public, pages 484-485(Moody's placement of DP&L and DPL Inc. under review for possible downgrade reflects Moody's institutional view of the securities).

[201] Transcript Volume II-public, page 492-493.

instance, Dr. Chambers testified that to avoid further credit downgrades or to maintain current ratings, DP&L could take actions such as operating efficiently.[202] Indeed, Dr. Chambers testified that management of a company has a responsibility to examine its levels of expenditures and determine whether the expenses are needed.[203]

Additionally, Dr. Chambers testified that if DPL Inc. reduces its current level of debt, it will assist in preventing further credit downgrades to DP&L.[204] Dr. Chambers testified that generally if debt reduction occurs at the parent level it would improve the overall financial position of the parent and the parent's ability to provide support for subsidiaries.[205] Indeed, information reported to Moody's[206] indicated that deleveraging efforts are being undertaken at DPL Inc. which, according to Dr. Chambers, will likely have some beneficial effect on DP&L.[207] Dr. Chambers also opined that reductions in capital expenditures are a way that a company can improve its overall financial position.[208] And, Mr. Malinak recognizes that if DP&L could justify distribution and/or transmission rate increases, obtaining such rate relief would enhance DP&L's ability to continue offering safe and reliable service.[209] However, Mr. Jackson testified that DP&L's distribution and transmission lines of business are doing just fine.[210]

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[202] Transcript Volume II- public, pages 493, 494-495.

[203] Transcript Volume II-public, page 496.

[204] Transcript Volume II-public, page 486.

[205] Transcript Volume II-public, page 487.

[206] *See* OCC Exhibit 5.

[207] Transcript Volume II-public, page 488.

[208] Transcript Volume II-public, pages 495-496

[209] Transcript Volume XI-public, page 2804.

[210] Transcript Volume I-public, pages 117-118.

G. The Commission Should Protect Customers By Denying DP&L's Request For A Service Stability Rider.

DP&L has requested that its customers pay a significant rate increase in this Electric Security Plan that would wipe out any benefits customers could otherwise realize from implementing the competitive bidding procedure proposed by DP&L. DP&L has sought this rate increase through a charge that it has termed the "Service Stability Rider" or SSR.

According to DP&L, the SSR is designed to collect $137.5 million per year from customers for each of the five years of its ESP, for a total of $687.5 million.[211] DP&L claims that the SSR "is critical for the Company to maintain its financial integrity and to have the opportunity to earn a reasonable rate of return."[212] DP&L does not propose a reconciliation mechanism for the Service Stability Rider. But DP&L has proposed a "Switching Tracker" to collect additional financial losses it claims it will incur if more customers switch from SSO service to CRES providers.[213] The SSR is proposed as a non-bypassable charge, to be paid for by all customers – shopping and non-shopping.

As discussed below, DP&L's proposed Service Stability Rider would constitute a subsidy of its generation service, which is no longer subject to regulation as of December 31, 2005. Further, if this charge were approved it would authorize DP&L to collect additional stranded generation transition charges, over and above those specifically authorized and paid for by customers in its 1999 Electric Transition Plan proceeding. Under Ohio law, DP&L is no longer permitted to collect such stranded generation

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[211] Second Revised Direct Testimony of Philip R. Herrington at 3.

[212] Second Revised Direct Testimony of Craig L. Jackson at 5.

[213] Transcript Volume XII-public, page 2899.

charges from customers.[214] Moreover, DP&L's claim for stranded generation costs is unreasonable in addition to being unlawful. In this regard, it has been earning significant returns for years.[215] And DP&L now seeks to postpone SSO customers' ability to realize benefits of the currently low market price for energy.

1. DP&L's proposed Service Stability Rider is designed to lean on customers to pay losses DP&L anticipates that it may experience in the competitive generation market.

Why does DP&L believe the SSR is needed? DP&L claims that the market price of electricity has declined and the number of its customers switching to alternative providers of generation services has increased.[216] DP&L also claims declining capacity and lower wholesale prices along with increased customer shopping has caused DP&L to experience a declining ROE.[217] In other words, the "need" for the SSR is driven by DP&L's intent to counter the competitive forces of the electric generation market through regulatory "relief." How does DP&L spell relief? "C-u-s-t-o-m-e-r-s."

In fact, Mr. Jackson testified specifically that the "decline in the forecasted ROE is driven by low forward commodity prices, customer shopping realized as of August 30, 2012, and the Company's transition to 100% auction."[218] In other words, DP&L claims that it can't compete in the generation market and retain the level of revenues that it

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[214] R.C. 4928.38.

[215] See Direct Testimony and Exhibit of Lane Kollen at 14.

[216] Interestingly, customers switching from DP&L to a CRES provider have in large part chosen to obtain service from DP&L's wholly owned subsidiary, DPLER. *See, e.g.,* Transcript Volume I-public, page 208-209. Thus, while revenues may be lost to DP&L, to a large extent those revenues are picked up by DPL Inc., the parent of DP&L.

[217] *See* Second Revised Exhibit CLJ-1; Transcript Volume I-public, page 114.

[218] Second Revised Direct Testimony of Craig L. Jackson at 2.

previously realized from its generation service. But DP&L's generation service is a competitive service and DP&L is "fully on its own" in that portion of its business.[219]

Nowhere, however, in DP&L's filing or testimony, does it acknowledge that it already collected $441 million from customers in stranded generation transition costs to compensate it for losses due to the difference between the costs of its generation and the market value of that generation. And, since its last ESP, DP&L has also been permitted to charge customers $73 million annually in "Rate Stabilization Charges. This Rate Stabilization Charge gave DP&L extra protection when its costs of generation were higher than market prices.

The utility's transmission and distribution operations, which are still subject to PUCO regulation –are not contributing to its financial integrity issues.[220] If DP&L were to be authorized a rate increase by the PUCO, it should only be for operations still subject to regulation. It is time for the Commission to recognize that DP&L's market development period is over and require DP&L to be "fully on its own" in the generation marketplace**.**

2. DP&L's proposed Service Stability Rider is a regulatory charge that is contrary to the law and the goals of creating a competitive market.

OCC Witness Dr. Duann testified that if the PUCO approves the SSR, then DP&L will be receiving a customer-funded subsidy to enrich its generation business.[221] But DP&L's generation business was declared a competitive service under R.C. 4928.03, and as a competitive service it was " deregulated" under S.B. 221 In other words,

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[219] R.C. 4928.38.

[220] *See e.g.* Second Revised Direct testimony of Craig L. Jackson at CLJ-2.

[221] Direct Testimony of Daniel J. Duann at 8.

competitive generation service is no longer subject to traditional cost-based regulation.[222] OCC Witness Dr. Rose agreed, testifying that DP&L's proposal to set the SSR (and the Switching Tracker) to ensure its "overall creditworthiness" is an attempt to re-introduce regulatory protection for the generation portion of DP&L's business that has been deregulated.[223]

Such a step is contrary to the goals of S.B. 221. It also conflicts with this Commission's approach embracing the development of a healthy competitive market.[224] As Dr. Rose testified, requesting that all customers ensure the financial integrity of DP&L is equivalent to requiring customers to guarantee a certain level of earnings for both the regulated (distribution) and non-regulated portions (generation) of DP&L's business.[225] This amounts to improper cross-subsidization of DP&L's unregulated operations –further interfering with the operations of the competitive market.[226]

But there are other reasons that the Service Stability Rider should be rejected. Dr. Rose testified that, from an economic perspective, it is not sound regulatory policy to guarantee that DP&L receives a certain level of generation revenues.[227] Retail customers should no longer protect the utility from competitive generation market risks.[228] Dr. Rose testified that DP&L's customers have already protected the utility financially by

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[222] Direct Testimony of Daniel J. Duann at 5.

[223] Direct Testimony of Kenneth Rose at 5.

[224] *See, e.g., In the Matter of the Application of Columbus and Southern Power Company and Ohio Power Company for Authority to establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at 39 (citing to the importance of customers having access to market based prices and ensuring transition to a full energy auction).

[225] Direct Testimony of Kenneth Rose at 5.

[226] Direct Testimony of Kenneth Rose at 16.

[227] Direct Testimony of Kenneth Rose at 5.

[228] Direct Testimony of Kenneth Rose at 5.

funding $441 million of stranded costs. Moreover, Dr. Rose concluded that DP&L has had sufficient time to prepare for a competitive generation market.[229] In a competitive market setting, DP&L should not receive compensation from customers for market losses, just as it does not share profits with customers from market gains. Symmetry is achieved because under S.B. 221 a utility is able to earn excessively, and keep those profits.[230] A utility is precluded, however, from keeping "significantly excessive" profits.

Indeed the PUCO has no obligation to ensure the financial integrity of a utility's competitive generation business through government-approved rates charged to customers.[231] Under the SSR, however, DP&L seeks such regulatory protection. While DP&L insistently claims that the SSR is related to total company operations, it is clear that any alleged deterioration of DP&L's financial integrity is caused by its unregulated generation business.[232]

DP&L witness Jackson admitted that the Utility's regulated operations – its transmission and distribution operations – are doing just fine and that the ESP would not necessarily affect them. With respect to distribution operations, he testified as follows:

> Q. Now, with regard to the distribution function of DP&L, you believe that distribution revenues are adequate today, right?
>
> A. Yes.
>
> Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct?

[229] Direct Testimony of Kenneth Rose at 14.

[230] *See* R.C. 4928.143(F).

[231] Direct Testimony of Daniel J. Duann at 30.

[232] Direct Testimony of Daniel J. Duann at 29.

> A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections.
>
> Q. And you understand that if DP&L believes its distribution revenues are inadequate, it can file a distribution rate case, correct?
>
> A. Yes, that is my understanding.
>
> Q. And there is -- there's no commitment being made by DP&L as part of the ESP not to file a distribution rate case during the ESP term, correct?
>
> A. I don't believe we have indicated anything with regard to a distribution rate case.[233]

With respect to transmission revenues, Mr. Jackson again testified that they are adequate over the term of the ESP:

> Q. Now, with regard to transmission revenues, you also believe that those are adequate today, correct?
>
> A. Well, our transmission, obviously a portion of our transmission revenues are tied to the transmission cost recovery rider that's in effect today so that moves with costs, as costs go up or down, the revenue side of that changes as well. So that, yes, I believe that, that said, the recovery that we're getting on the transmission side would be adequate.
>
> Q. And you believe the transmission revenues would be adequate over the five-year proposed ESP period, correct?
>
> A. That is my expectation.[234]

But generation is subject to market competition. Each market participant in Ohio's generation services market is responsible for its own loss or profit.[235] This is the premise of R.C. 4928.38—each utility, after the market development period, "shall be fully on its own in the competitive market." The PUCO should follow the law and reject

[233] Transcript Vol. I-public at 117.

[234] Transcript Vol. I-public at 118.

[235] Direct Testimony of Daniel J. Duann at 30.

any attempt by DP&L to collect more money from its customers under the guise of financial integrity claims that are inconsistent with the words of the law—each utility shall be fully on its own in the competitive market.

3. The Service Stability Rider would compensate DP&L for stranded generation transition costs or equivalent revenues that, under the law, DP&L can no longer collect from customers.

Under Ohio law, an electric distribution utility cannot recover "transition revenues" beyond the "market development period."[236] Specifically, R.C. 4928.38 provides that a utility may receive "transition revenues"[237] only during a limited time—from the start date of competition through the market development period. Once the utility's market development period is over, the utility "shall be fully on its own in the competitive market."[238] The law is pervasive in scope. It not only prohibits the Commission from authorizing transition revenues, but also "any equivalent revenues" beyond the market development period.

In this ESP case, the proposed SSR is an unlawful request by DP&L to collect transition revenues or equivalent revenues from customers over and above the $441 million in transition revenues it was authorized to collect in DP&L's electric transition plan proceeding, Case No. 99-1687-EL-ETP et al.[239] In DP&L's electric transition plan case, Mr. Luciani, DP&L's witness, explained the need for transition revenues:

> With customer choice, if the utility's rates for retail generation service exceed the retail market price for electricity, it is reasonable to expect customers to switch to another generation supplier. As a result, the utility may be unable to recover the plant

[236] Direct Testimony of Kenneth Rose at 9.

[237] Transition revenues are defined under R.C. 4928.39.

[238] R.C. 4928.38.

[239] *See generally* Direct Testimony of Kenneth Rose at 6.

> investment costs that it prudently incurred to meet its obligation as a regulated utility to serve retail customers in reliance upon its ability to charge the customers the rates established by the PUCO.[240]

Fast forwarding 13 years, DP&L's claim for the SSR in this ESP case is a request that seeks transition revenues or equivalent revenues, something the law expressly prohibits because DP&L's market development period ended on December 31, 2005.[241] DP&L links its "need" for transition revenues to its financial integrity claims—claims that stem from the risk it faces associated with generation services. DP&L has defined these risks to include the risk that the forward gas curve will decrease; the risk that there will be increased competition in its service territory; and the risk associated with transitioning to a 100% competitive bid.[242] DP&L thus faces the risk that its Standard Service Offer generation rate is higher than the retail market price for electric generation service, and that its customers will switch to competitive electric generation suppliers offering lower market-based rates. Accordingly, DP&L may not be able to sell its generation into the wholesale market at a price that assures it of the higher revenues it receives at its SSO generation rate.[243]

These claims for additional revenue because the market revenue is not enough are the same claims that DP&L made back in 1999, when it argued that its generation costs exceeded the revenue it would receive in a competitive market. The need for such

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[240] Direct Testimony of Kenneth Rose at 7, quoting Mr. Luciani's testimony in the Company's ETP proceeding.

[241] Direct Testimony of Kenneth Rose at 12, citing to the Commission's Order in Case No. 05-276-EL-AIR, *In the Matter of the Application of Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Opinion and Order (Dec. 28, 2005).

[242] Direct Testimony of Kenneth Rose at 11, citing to the Company's response to OCC INT-308.

[243] DP&L Witness Malinak also described stranded costs in such terms. *See* Transcript Volume XI-public, pages 2808-2809 (stranded cost relates to reduced market value relative to historical costs as part of the regulated ratemaking regime).

revenues is driven solely by the fact that DP&L's generation costs (and the profit it expects) are above current market rates for retail generation service.[244] And, as Dr. Rose testified, the costs the utility seeks to recover as transition revenues fall squarely within the definition of transition costs under the R.C. 4928.39.[245]

Under R.C. 4928.39, the PUCO was required to determine the allowable amount of transition costs that may be received as transition revenues, subject to finding that the transition costs are just and reasonable costs meeting all of the following criteria:

> (A) The costs were prudently incurred;
>
> (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state;
>
> (C) The costs are unrecoverable in a competitive environment;
>
> (D) The utility would otherwise be entitled an opportunity to recover the costs.

In its Order of September 21, 2000, the PUCO determined that DP&L could collect $441 million in stranded generation transition costs through a "customer transition charge."[246]

Dr. Rose, who is very familiar with the legislation from his work with the Ohio Legislative Services Commission,[247] identified DP&L's proposal in this case as a request

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[244] Mr. Jackson testified that DP&L's current SSO rates for retail generation service exceed the current retail market price for electricity. Transcript Volume I-public, page 220.

[245] Direct Testimony of Kenneth Rose at 10.

[246] Direct Testimony of Kenneth Rose at 7 and *In the Matter of the Application of the Dayton Power & Light Company for Approval of Transition Plan, Pursuant to 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized Under 4928.31 to 4928.40, Revised Code,* Case No. 99-1687-EL-ETP, Opinion and Order (Sept.21, 2000).

[247] Dr. Rose was employed by the Legislative Services Commission to assist in the drafting of S.B. 3, which contained the transition cost provisions that became R.C. 4928.37-39. *See* Direct Testimony of Kenneth Rose at 2; Transcript Volume VIII-public, pages 2026-2030.

for transition revenues under the statute.[248] DP&L is likely to claim that it is not requesting recovery of "costs," but is requesting recovery of transition revenues. Such superficial semantics should be rejected. First, the statutes use the terms "transition revenues" and "transition costs" interchangeably.[249] Second, DP&L's request for transition revenues is the result of incurring transition costs. DP&L claims it needs more revenues from customers because market revenue is not enough.[250] This is the same thing as saying that DP&L's costs exceed its market revenues. And that is the definition of stranded costs—generation costs that cannot be recovered in the competitive generation market (with market revenues.) In other words, the revenue DP&L is collecting falls short of its generation costs (plus a profit). The difference is stranded costs – costs not recoverable in a competitive market that otherwise the utility would have an opportunity to recover. It is these stranded costs that the statute speaks to and defines as "transition costs" to be received as "transition revenues" during a utility's market development period.

But the market development period for DP&L ended on December 31, 2005.[251] There can be no further collection of transition revenues from this utility's customers. The law precludes it. Once a utility's market development period is over, the utility "shall be fully on its own in the competitive market."[252] The Commission is expressly prohibited from authorizing not only the receipt of transition revenues but also "any equivalent revenues" beyond the market development period. The Commission, as a

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[248] Direct Testimony of Kenneth Rose at 10-11.

[249] *See*, e.g.. R.C. 4928.38, 4928.39.

[250] *See generally* Second Revised Direct Testimony of Craig L. Jackson at CLJ-1.

[251] Direct Testimony of Kenneth Rose at 12.

[252] R.C. 4928.38.

creature of statute, may only exercise the authority given to it by the General Assembly.[253] Accordingly, the PUCO must carry out the provisions of the law and must reject DP&L's attempt to collect additional transition revenues beyond the market development period. In the case before it, the additional transition revenues are being requested by DP&L in the form of a Service Stability Rider. Consequently, the SSR is an unlawful rate and must be rejected.

4. The proposed Service Stability Rider charge is not a valid charge to levy on customers in an electric security plan and is not necessary to provide certainty regarding retail electric service.

As discussed above, DP&L's proposal would impermissibly extend DP&L's market development period more than seven years after it expired, and would result in the recovery of impermissible and duplicative stranded generation costs. But there are more reasons to reject the SSR. The Commission must also reject the SSR because DP&L has failed to prove[254] that the SSR is a permissible provision of an ESP under R.C. 4928.143(B)(2). The Ohio Supreme Court recently determined that if a provision of an Electric Security Plan does not fit within one of the categories listed in R.C. 4928.143(B)(2), it is not authorized by statute.[255]

The burden of proving that a provision of an ESP falls within the scope of R.C. 4928.143(B)(2) lies with the utility seeking approval.[256] DP&L has failed to meet its

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[253] *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

[254] Under R.C. 4928.143(C)(1), the burden of proof rests squarely upon the electric distribution utility, not the intervenors.

[255] *See In re: Application of Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶ 32.

[256] R.C. 4928.143(C)(1).

burden of proof. DP&L fails to tie its request into the provisions of R.C. 4928.143(B)(2), instead relying upon generalized financial integrity claims. But, when the nine categories of cost recovery under R.C. 4928.143(B)(2) are examined, not one of the nine categories permits the collection of a Service Stability Rider.

Subsection (a) of R.C. 4928.143(B)(2) refers to the costs of fuel and purchased power to generate the electricity supplied under the Standard Service Offer. The Service Stability Rider does not seek to collect such costs. Subsection (b) pertains to a reasonable allowance for construction work in progress ("CWIP"). The Service Stability Rider is not related to CWIP. Subsection (c) refers to a surcharge for a generating facility dedicated to serving Ohio consumers. The Service Stability Rider does not amount to such a charge. Subsection (e) refers to automatic increases or decreases in any component of the Standard Service Offer price. The Service Stability Rider is not such a provision. Subsection (f) refers to securitization costs related to the phase-in of costs authorized under R.C. 4928.144. The Service Stability Rider does not fit within the scope of that provision either. Neither is the Service Stability Rider related to transmission, ancillary, congestion, or other related service required for the SSO under subsection (g) of R.C. 4928.143(B)(2). The Service Stability Rider is unrelated to DP&L's distribution service, and thus does not qualify under subsection (h). And the Service Stability Rider fails to qualify under subsection (i) as a provision to implement economic development, job retention, or energy efficiency initiatives.

All that is left as a basis for the Service Stability Rider is subsection (d) of R.C. 4928.143(B)(2). And, as explained below, the Service Stability Rider does not qualify as a provision under this subsection either.

The first six lines of Subsection (B)(2)(d) establish the parameters that must be met in order for a provision to be part of a utility's electric security plan. R.C. 4928.143(B)(2)(d) reads as follows:

> (2) The plan may provide for or include, without limitation, any of the following:
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> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

The statute quite clearly requires that the provision be a term, condition, or charge relating to: (1) limitations on customer shopping for retail electric generation service; (2) bypassability, standby, back-up or supplemental power service; (3) default service; (4) carrying costs; (5) amortization periods; and (6) accounting or deferrals, including future recovery of such deferrals. And if it is determined that the provision falls within one of these six categories, then the provision must also "have the effect of stabilizing or providing certainty regarding retail electric service."

While the Service Stability Rider appears to be a term, condition, or charge, DP&L failed to present evidence that the SSR satisfies any one of the conditions in this subsection. It was not until DP&L filed its rebuttal testimony that the Utility revealed how it believes the SSR fits within the provisions of R.C. 4928.143(B)(2). In Ms. Seger-Lawson's rebuttal testimony, she claimed that the proposed charge related to "default service" and to "bypassability."[257] However, she failed to explain how the Service Stability Rider fit within either of these categories.

[257] Rebuttal Testimony of Dona Seger-Lawson at 25-26.

The Service Stability Rider cannot reasonably be argued to relate to either of these categories as contended by Ms. Seger-Lawson. "Default service" as used in Chapter 4928, is defined under R.C. 4928.14 as pertaining to the failure of a supplier to provide retail generation service and defaulting to the utility's standard service offer. In other words, "default" service pertains to the provider of last resort ("POLR") obligations of the electric distribution utility. But, the costs that DP&L would collect under the Service Stability Rider do not relate to the need to meet POLR obligations. To the contrary, they relate to revenues DP&L claims it will lose due to customer switching, i.e. customers leaving default service, thereby allegedly saddling DP&L with above-market generation costs.

Nor does the SSR charge relate to "bypassability," which is not defined in the law. However, a reasonable interpretation of this category would be costs incurred because customers switch to CRES providers. This should not extend to lost revenues from no longer serving customers who have switched, which was directly addressed by the law through the provision of transition charges. Certainly, it was not contemplated that utilities would claim, or recover, additional transition charges as charges related to "bypassability." Otherwise, R.C.4928.143(B)(2)(d) would conflict with other provisions of the Revised Code, including R.C. 4928.141.[258]

Under R.C. 4928.141, a standard service offer shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan." Otherwise, double recovery of costs would occur. And as OCC Witness Rose testified,

[258] *See also* Ohio's rules of statutory construction require amendments to be harmonized to give effect to each. R.C. Sec. 1.52.

duplicate cost recovery is contrary to sound ratemaking principles and would undermine any reasonable basis for establishing rates.[259]

Even assuming arguendo, that the Service Stability Rider falls within one of the categories listed under R.C. 4928.143(B)(2)(d), it must then be shown to have the effect of stabilizing or providing certainty regarding retail electric service. But, as discussed above, DP&L's retail electric service that is subject to regulation is its transmission and distribution service. And DP&L has provided no evidence that the service stability rider (despite its moniker) will stabilize or provide certainty of its transmission and distribution service. As Mr. Jackson confirmed, DP&L's ability to provide those services is not in financial jeopardy. Nor did the Staff of the PUCO make any determination that the Service Stability Rider would have the effect of stabilizing or providing certainty with regard to retail electric service.[260]

a. It would be inconsistent with regulatory principles and policies under the law to approve a Service Stability Rider for customers to pay.

OCC Witness Duann testified that the Service Stability Rider is inconsistent with established regulatory principles and practices, in numerous respects.[261] In particular, the SSR violates several policies of the state contained in R.C. 4928.02, including (1) the prohibition against anti-competitive subsidies, (2) the assurance of reasonably priced retail electric service, (3) the protection of at-risk populations, and (4) the state's effectiveness in competing on a global level. It is also contrary to the longstanding regulatory principle against protecting utilities from normal risks associated with business

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[259] Direct Testimony of Kenneth Rose at 13.

[260] Transcript Volume VII-public, page 1842.

[261] Direct Testimony of Daniel J. Duann at 7.

operations. Yet, the Commission has a duty to ensure that these policies are effectuated, as prescribed under R.C. 4928.06, and consistent with Ohio Supreme Court holdings.[262]

The Service Stability Rider would create an anti-competitive subsidy to one supplier-- DP&L. If the SSR were approved, DP&L would receive a customer-funded subsidy to enrich its generation business. Collection from customers of SSR revenues would give an unfair advantage to DP&L because it would provide a subsidy of DP&L's generation service by DP&L's distribution customers.[263]

Approving the Service Stability Rider is contrary to the policy provisions of R.C. 4928.02(H), which prohibit anti-competitive subsidies. R.C. 4928.02(H) requires the PUCO to ensure effective competition by avoiding anti-competitive subsidies flowing between competitive and non-competitive retail service. That provision also prohibits the recovery of generation-related costs through distribution rates. In fact, the Ohio Supreme Court struck down a PUCO Order where the PUCO violated this policy provision of R.C. 4928.02.[264] There, the Commission had permitted a utility to collect generation costs through future distribution rate cases or fuel cost recovery mechanisms to reduce distribution related expenses. The Court found that R.C. 4928.02(G),[265] prohibiting anti-competitive subsidies, had been violated. The Court reversed the PUCO and remanded the case to the PUCO to modify the rate plan to remedy the statutory violation. Similarly, here, if the Service Stability Rider is approved it will violate this provision of R.C. 4928.02. This is one of the reasons that the PUCO should reject the SSR.

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[262] *Migden-Ostrander v. Pub. Util. Comm.,* 102 Ohio St.3d 451, 2004 Ohio 3924 at ¶13: *Elyria Foundry Co. v. Pub. Util. Comm.,* (2007), 114 Ohio St.3d 305.

[263] Direct Testimony of Daniel J. Dunn at 15.

[264] *Elyria Foundry Co. v. Pub. Util. Comm.,* (2007), 114 Ohio St.3d 305.

[265] Under S.B. 221, new subsections were inserted into R.C. 43928.02, and thus the subsections were redesignated. Subsection (G) became the current subsection (H).

Dr. Duann also testified that if the Service Stability Rider is approved, it is not likely the Commission can ensure reasonably priced retail electric service will be available to consumers in this state, another policy of the state under subsection (A) of R.C. 4928.02.

Through the SSR, $687.5 million will be charged by DP&L to customers over five years.[266] A typical residential customer[267] will be charged an additional $6.51 per month.[268] This SSR charge alone represents an increase of 6.06% over the current total monthly bill of a typical residential customer.[269] And at the present time, customers in DP&L's service territory are already paying the highest price for electric service among Ohio's major electric distribution utilities. Notably, the additional high cost of the Service Stability Rider will not be offset by potential generation market price savings expected under the limited blending plan proposed in DP&L's ESP.[270]

Dr. Duann also testified that if the Service Stability Rider is approved it will not ensure that Ohio's policy[271] of protecting at-risk populations will be served.[272] According to DP&L's own projections, the proposed blended generation rates will be significantly higher than the market-based auction prices during the entire ESP period.[273] Low-income residential customers with low usage will be especially hard hit with an increase in monthly total bills ranging from 4.51% to 37.38% in the first blending period,

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[266] Direct Testimony of Daniel J. Duann at 10.

[267] A "typical residential customer" is defined as one using 750 kWh a month.

[268] Direct Testimony of Daniel J. Duann at 10-11.

[269] Direct Testimony of Daniel J. Duann at 11, citing to DP&L's Schedule 10 Typical Bill Comparison.

[270] Direct Testimony of Daniel J. Duann at 17.

[271] R.C. 4928.02(L).

[272] Direct Testimony of Daniel J. Duann at 16-19.

[273] Direct Testimony of Daniel J. Duann at 17.

with the full Service Stability Rider.[274] As OCC Witness Williams testified, in 2012, approximately 32.5% of residential customers reported having difficulty paying their current electric bills.[275] Thus if DP&L electric bills are increased to collect the Service Stability Rider from such customers, electric service will become even less affordable for those at-risk customers in DP&L's service territory.

While DP&L claims that the at-risk population will be protected by receiving the best available market prices,[276] such claims ring hollow. Because there is only a partial market blending of rates under DP&L's proposed ESP, the SSO price will always be above market rates until a 100% competitively bid SSO is available in June 2016. And low-income customers that are on the Percentage of Income Payment Plan cannot individually choose to shop.[277]

Additionally, Dr. Duann testified that if the Service Stability Rider is approved it will do little to facilitate the state's effectiveness in the global economy.[278] High energy costs are detrimental to economic development.[279] The high electricity prices resulting from the SSR and the limited blending of market-based rates proposed by DP&L will negatively impact the local economy in DP&L's service territory. And as DP&L witness Chambers concluded, the economic outlook for Dayton is subdued.[280]

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[274] Direct Testimony of Daniel J Duann at 17, citing to Schedule 10 Typical Bill comparison.

[275] Direct Testimony of James Williams at 7.

[276] *See, e.g.,* Second Revised Direct Testimony of Philip R. Herrington at 7.

[277] *See* Ohio Adm. Code 4901:1-21-06 (B)(1).

[278] Direct Testimony of Daniel J. Duann at 20.

[279] Direct Testimony of Daniel J. Duann at 20, citing to one of numerous studies that came to such a conclusion.

[280] Second Revised Direct Testimony of William Chambers at 22.

Residential customers of DP&L will have less money to spend on other items after paying their higher electric bills.[281] Commercial customers will be adversely affected when their customers have less money to spend on items other than electricity service. And the cost of doing business for commercial customers will be higher than it would otherwise be.[282]

The Service Stability Rider should also be rejected because it is inconsistent with the regulatory principle of not insulating a regulated utility from incurring losses due to normal business operations.[283] OCC Witness Duann testified that DP&L alone should be at risk for profits and losses in providing a competitively-supplied generation service within its service territory.[284] It is unjust and unreasonable to ask DP&L's customers (SSO and shopping customers) to guarantee DP&L revenues or a profit for its generation business. As discussed above, according to R.C. 4928.38, after the market development period, utilities must be "fully on their own" in the competitive market.

b. It would be unjust and unreasonable for customers to pay the proposed Service Stability Rider.

Dr. Duann testified that the Service Stability Rider is unjust and unreasonable.[285] The SSR is a mechanism that would guarantee DP&L collection of $687.5 million. In comparison, under DP&L's proposed ESP, there is no assurance for customers that they

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[281] Direct Testimony of Daniel J. Duann at 20.

[282] Direct Testimony of Daniel J. Duann at 20.

[283] Direct Testimony of Daniel J. Duann at 8, citing to *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575,585 (1942).

[284] Direct Testimony of Daniel J. Duann at 9.

[285] Direct Testimony of Daniel J. Daunn at 5.

will receive savings in return for paying the Service Stability Rider.[286] In other words, customers do not necessarily receive any value (such as the savings from a lower SSO price as a result of rate blending) or any additional services for the payment of the Service Stability Rider. One driving reason that customers will not be assured of savings is that DP&L's proposed transition to market based competition is occurring in slow-motion on a timeline that favors DP&L and not customers. Currently, and into the near term, market based electric prices are low. And there have been significant savings from conducting competitively bid auctions for SSO service, as seen in Duke Energy Ohio auctions,[287] and auctions for the FirstEnergy utilities.[288] But DP&L's ESP proposal will hamper SSO customers' ability to benefit from current low market rates by the limited amount of blending[289] it proposes in the early years of its lengthy ESP. Under DP&L's plan, SSO customers receive very little of the benefit of the low market price for electricity that currently exists. And yet these same customers are fully exposed to higher prices of electricity into the future due to paying the SSR.[290] Dr. Duann testified that the asymmetry in the amount and timing of costs and savings is fundamentally unfair to DP&L's customers who must pay the Service Stability Rider.[291]

Additionally, the magnitude of the costs imposed under the SSR far outweighs the potential savings that are likely to be achieved under DP&L's proposed transition to

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[286] Direct Testimony of Daniel J. Duann at 6.

[287] Direct Testimony of James Wilson at 5.

[288] Direct Testimony of James Wilson at 5-6.

[289] Under DP&L's ESP, the proposed blending schedule is: 90% of existing rates and 10% of competitive bid (market rates) for the period of 1/1/2013 to 5/31/2014, 60% of existing rates and 40% of competitive bid for the period of 6/1/2014 to 5/31/2015, 30% of existing rates and 70% of competitive bid for the period of 6/1/2015 to 5/31/2016, and 100% of competitive starting 6/1/2016. *See* DP&L Second Revised Application at 7.

[290] Direct Testimony of Daniel J. Duann at 6.

[291] Direct Testimony of Daniel J. Duann at 6.

market. If one accepts DP&L's calculation of potential savings associated with its proposed ESP's faster transition to market than required under a Market Rate Offer , there will only be a potential savings of $120 million, in comparison to a sure and certain $687 million cost.[292] If one uses OCC Witness Hixon's projected savings associated with a faster transition to market under an MRO, the comparison is even more egregious—customers would pay a sure and certain $687 million and receive potential savings of only $112.5 million.[293]

H. The Commission Should Deny DP&L's Request To Charge Customers A Switching Tracker.

In addition to its proposed service stability rider charge, DP&L has proposed what it calls a "Switching Tracker." The Switching Tracker is, like the SSR, related to DP&L's claim that when customers switch from DP&L's SSO service to a Competitive Retail Electric Service ("CRES") provider, DP&L will lose revenues. Thus, DP&L alleges its financial integrity will be jeopardized.[294] DP&L's proposed Switching Tracker is a non-bypassable charge, meaning all distribution customers will be forced to pay it.[295] The Switching Tracker is intended by DP&L to "compensate" it for generation revenues that it loses for all shopping that occurs above the switching levels experienced as of August 30, 2012 (62%).[296] According to Witnesses Jackson and Seger-Lawson, the tracking of lost revenue begins with the start of DP&L's proposed ESP term (January 1,

[292] Direct Testimony of Daniel J. Duann at 6.

[293] Direct Testimony of Daniel J. Duann at 6.

[294] *See* Second Revised Direct Testimony of Craig L. Jackson at 12-13, CLJ-5, page 1; Transcript Volume I-public, pages 204-206; Transcript Volume II-confidential, page 478 (Chambers.)

[295] Transcript Volume I –public, page 203.

[296] See Second Revised Direct Testimony of Craig L. Jackson at 11.

2013) and ends June 1, 2016 when DP&L proposes to procure 100% of its SSO generation supply through a competitive bid process.[297]

As proposed, the amount of the Switching Tracker will be the difference in generation revenues between DP&L's blended rate and the competitive bid rate in effect, multiplied by the amount of switched distribution load.[298] DP&L proposes to defer this difference for later collection from customers by placing this amount into a regulatory asset account that will accrue carrying charges of 4.943%, which is DP&L's embedded cost of long-term debt.[299] DP&L Witness Seger-Lawson explained that customers will begin paying off the deferral balance beginning on January 1, 2014.[300] Collection of the lost generation revenues will extend until the deferral balance reaches zero,[301] with DP&L's distribution customers paying for these deferrals into 2017 and beyond.

The magnitude of the lost generation revenues proposed to be collected under the Switching Tracker are not known at this time since it depends on how much switching above the 62% occurs during the term of the ESP. However, if one accepts DP&L's estimates of anticipating switching for the term of the ESP,[302] customers will pay [redacted] [redacted], without carrying charges.[303] If one accepts the switching assumptions used by Witness Chambers to develop the alternative scenarios

[297] Second Revised Direct Testimony of Craig L. Jackson at 11; Second Revised Direct Testimony of Dona R. Seger-Lawson at 16-17.

[298] Second Revised Direct Testimony of Craig L. Jackson at 11.

[299] Direct Testimony of Daniel J. Duann at 22.

[300] Second Revised Direct Testimony of Dona R. Seger-Lawson at 17.

[301] Second Revised Direct Testimony of Dona R. Seger-Lawson at 17.

[302] [redacted] Second Revised Testimony of Aldyn W. Hoekstra at 8 (confidential).

[303] *See* Direct Testimony of Kevin M. Murray at KMM-2, DP&L response to OCC INT-368.

presented as part of his testimony, [304] the total revenues collected from customers will increase to a whopping ███ million, without carrying charges.[305]

Notably, the Switching Tracker tracks sales lost to all CRES providers, including DPLER, even though DPLER is an unregulated affiliate within the DPL Inc. structure.[306] Indeed, of the 62% of customers who have switched, DPLER has picked up 72%.[307] Staff Witness Choueiki testified that a request for customers to compensate DP&L for lost retail sales to its unregulated affiliate "is an unreasonable request at best"[308] and referred to this phenomenon as double compensation.[309]

The Commission should reject DP&L's request for a switching tracker because it is unlawful, unjust, and unreasonable, as described below.

1. DP&L failed to identify any legal basis for charging customers for a Switching Tracker.

DP&L does not identify any provision of law that permits a Switching Tracker in an Electric Security Plan. Mr. Jackson merely indicates that if additional switching occurs beyond the level at August 20, 2012, DP&L's earnings and return on equity will be negatively impacted.[310] According to Mr. Jackson, the Switching Tracker would moderate the impact of such additional customer switching.[311] In other words, the

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[304] Mr. Chambers assumed switching increases to ███ of customers by 2013 and to almost ███ by 2017 in his Schedule WJC-3.

[305] *See* Direct Testimony of Daniel J. Duann at 23; Attachment DJD-5.

[306] Transcript Volume I-public, page 206.

[307] Transcript Volume I-public, page 208-209.

[308] Pre-filed Testimony of Hisham M. Choueiki at 10.

[309] Transcript Volume VII-public, page 1908.

[310] Second Revised Direct Testimony of Craig L. Jackson at 5.

[311] Second Revised Direct Testimony of Craig L. Jackson at 5.

Switching Tracker will work in conjunction with the Service Stability Rider to ensure DP&L's financial integrity is not impaired.

Apparently, DP&L hopes that uttering the words "financial integrity" over and over will produce something of a magical result where the law of Ohio will disappear and hundreds of millions of dollars from customers will materialize. But that cannot happen.

The PUCO is a creature of statute. It has no authority other than what is expressly granted to it by the General Assembly.[312] And the PUCO's authority over provisions that a utility may include in an Electric Security Plan has been limited by law and the application of that law in a recent ruling by the Ohio Supreme Court. The Ohio Supreme Court found that if a provision of an Electric Security Plan does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized by statute.[313]

The burden of proving that a provision falls within the scope of R.C. 4928.143(B)(2) lies with the utility seeking approval.[314] DP&L has failed to meet its burden of proof. While admitting that the Switching Tracker seeks to collect lost generation revenues, DP&L fails to tie its request into the provisions of R.C.4928.143(B)(2). Not one of the nine categories in that statute permits the collection of lost generation revenues.

Subsection (a) of R.C. 4928.143(B)(2) refers to the costs of fuel and purchased power to generate the electricity supplied under the standard service offer. The

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[312] *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St.2d 302, 18 Ohio Op.3d 478, 414 N.E.2d 1051.

[313] *See In re: Application of Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶ 32.

[314] R.C. 4928.143(C)(1).

Switching Tracker does not seek to collect such costs. Subsection (b) pertains to a reasonable allowance for construction work in progress ("CWIP"). The Switching Tracker is not related to CWIP. Subsection (c) refers to a surcharge for a facility dedicated to serving Ohio consumers. The Switching Tracker does not amount to such a charge. Subsection (e) refers to automatic increases or decreases in any component of the standard service offer price. The Switching Tracker is not such a provision. Subsection (f) refers to securitization costs related to the phase in of costs authorized under R.C. 4928.144. The Switching Tracker does not fit within the scope of that provision either. Neither is the Switching tracker related to transmission, ancillary, congestion or other related service required for the SSO under subsection (g) of R.C. 4928.143(B)(2). The Switching Tracker is not related to DP&L's distribution service, and thus does not qualify under subsection (h). And the Switching Tracker fails to qualify under subsection (i) as a provision to implement economic development, job, retention, or energy efficiency.

While subsection (d) permits the inclusion of specific "terms, conditions, or charges" there has been no evidence presented (nor arguments made) that the Switching Tracker falls within the confines of this subsection either. The first six lines of Subsection (B)(2)(d) establish the parameters that must be met in order for a provision to be part of a utility's electric security plan. R.C. 4928.143(B)(2)(d) reads as follows:

> (2) The plan may provide for or include, without limitation, any of the following:[315]
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[315] The Supreme Court of Ohio rejected a utility's claim that the statute permits a utility to recover unlisted items. Rather, the Court found that "[b]y its terms, R.C. 4928.143(B)(2) allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any provision.' So if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute.***[T]his phrase ("without limitation") does not allow unlisted items. Rather it allows unlimited inclusion of listed items."

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

The statute quite clearly requires that to fit within subsection (d) the provision must be a term, condition, or charge relating to: (1) limitations on customer shopping for retail electric generation service, (2) bypassability, standby, back-up or supplemental power service; (3) default service; (4) carrying costs (5) amortization periods, and (6) accounting or deferrals, including future recovery of such deferrals. And if it is determined that the provision falls within one of these six categories, then the provision must also "have the effect of stabilizing or providing certainty regarding retail electric service." While the Switching Tracker may qualify as a "term, condition or charge" there has been no showing by DP&L that it falls within any of the six categories mentioned.

And even assuming arguendo that it would qualify as one of the six potential charges, DP&L has also failed to show that the Switching Tracker has the effect of "stabilizing or providing certainty regarding retail electric service." Instead, as OCC Witness Duann testified, the Switching Tracker will lead to instability in rates and possibly "rate shock" because the charges to all customers for the switching tracker are not known at this time and are not capped.[316]

S.B. 221 does not provide that electric distribution utilities such as DP&L will be permitted to collect lost revenues, let alone be made whole for sales of generation lost to CRES providers. Such a theory of ensuring the financial integrity of its generation

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[316] Direct Testimony of Daniel J. Duann at 27.

service, as proposed by DP&L, is antithetical to the underlying premise of SB 221—promoting retail electric competition. There is no provision in Chapter 4928 that underlies DP&L's "financial integrity" theory. In fact, as discussed above, lost generation revenues has, since the end of DP&L's market development period, been subject to the vagaries of the competitive market. And DP&L has failed to show under what provision of law it would be entitled to receive a "Switching Tracker" even though the burden of proof lies with it.[317]

Simply put, Chapter 4928 cannot be construed to allow utilities to collect revenues lost from customers moving off the standard service offer to obtain generation service from competitive suppliers. These are what the PUCO has recognized as "migration" risks.[318] Under Ohio law, the risk of losing revenues from customers exercising their right to switch and obtain generation service from an alternate supplier is not a risk that an electric distribution utility may be compensated for.[319] Where the General Assembly wanted to allow utilities to recoup lost sales opportunities or revenue foregone, it expressly provided for such. For example, R.C. 4905.30 permits the Commission, with regard to economic development arrangements, the discretion to approve the collection of "revenues foregone." Additionally, under R.C. 4928.143(B)(2)(h), a utility's ESP may include "lost revenues" as part of the EDU's distribution infrastructure and modernization plans.

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[317] See generally R.C. 4928.143(C)(1); *In re AEP Ohio's First Electric Security Plan Proposal,* Case Nos. 08-917-EL-SSO et al., Remand Entry at 2 (May 4, 2011) (finding that if AEP Ohio intends to seek a non-cost-based POLR charge or a POLR charge based upon costs, it should make the appropriate filing in these proceedings).

[318] *In re AEP Ohio's First Electric Security Plan Proposal,* Case Nos. 08-917-EL-SSO et al., Order on Remand at 31 (Oct. 3, 2011).

[319] *See In re AEP Ohio's First Electric Security Plan Proposal,* Case Nos. 08-917-EL-SSO et al., Order on Remand at 32 (Oct. 3, 2011).

That the General Assembly provided limited conditions under which there may be costs collected from customers for lost or foregone revenues reflects the legislative intent to otherwise disallow collection from customers under other conditions not specified. The legislative canon expressio unius exclusio alterius applies—the inclusion of one thing implies exclusion of the other.[320] The inclusion of authority to allow lost revenues for economic development and for distribution infrastructure and modernization plans, and not otherwise, was intended. The General Assembly, in its wisdom, enacted no provision for the collection of generation revenues lost due to switching through an electric security plan. The PUCO thus has no authority to allow a utility to collect for lost generation revenues in an electric security plan.

2. Any approval to charge customers a Switching Tracker would be inconsistent with the practices and policies under the law, including the policies prohibiting anti-competitive subsidies.

Not only is there no statutory basis for the switching tracker, but the Switching Tracker would be an anti-competitive subsidy to DP&L's competitive generation business.[321] And it would be a subsidy that would be provided by all distribution customers, even though distribution service is a noncompetitive service.[322] OCC witness Dr. Duann came to this conclusion,[323] as did IEU Witnesses Hess and Murray[324] and Staff Witness Choueiki.[325] FES Witness Dr. Lesser also characterized the switching

[320] *See Crawford-Cole v. Lucas Co. Dept. of Jobs & Family Services,* 121 Ohio St.3d 560, 566, 2009-Ohio-1355, ¶42.

[321] Generation service is a competitive retail electric service under R.C.4928.03 and 4928.14(A).

[322] *See* R.C. 4928.15(A).

[323] Direct Testimony of Daniel J. Duann at 24-25.

[324] Direct Testimony of J. Edward Hess at 3; Direct Testimony of Kevin M. Murray at 24.

[325] Prefiled Testimony of Hisham M. Choueiki at 9 (testifying that the switching tracker is anti-competitive).

tracker as anti-competitive but for different reasons. Dr. Lesser testified that the Switching Tracker reduces the incentive for customers to switch to CRES providers, because the more customers that switch, the more these, and SSO customers will be required to pay for the customers who have exercised their right to switch.[326]

While numerous intervenors came to this conclusion, it is notable that at least one DP&L witness, Dr. Chambers, at some level concurred. Dr. Chambers acknowledged that the switching tracker collects revenues that are

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This Commission recently rejected another utility's attempt to collect lost generation revenues, concluding, like Witnesses Duann, Hess, and Chambers, that it would provide an advantage to an EDU over its CRES competitors. [330] In the AEP Ohio Remand case,[331] the PUCO addressed Ohio Power's claim for provider of last resort ("POLR") risks which included "migration risk." "Migration risk" – or the risk

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[326] Direct Testimony of Jonathan A. Lesser at 5.

[327] (Transcript Volume II-confidential, page 478).

[328] (Transcript Volume II-confidential, page 478-479).

[329] Transcript Volume II-confidential, page 479-480); Mr. Chambers also testified (at deposition)

[330] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale of Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

[331] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale of Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011). (AEP Ohio Remand case).

associated with customers switching to a CRES provider, was determined by the Commission to be "more properly regarded as a business risk faced by all retail suppliers as a result of competition rather than a risk resulting from an EDU's POLR obligation."[332] The Commission found compensation for migration risk by means of an EDU's POLR charge would provide the EDU with an advantage over its CRES competitors.[333]

Dr. Duann similarly pointed out the unfair advantage that would be created for DP&L, the distribution utility, if the Switching Tracker were approved. Dr. Duann testified that there is no justification for providing a guarantee of lost revenues when generation is competitive and there are no underlying costs incurred or service provided for the Switching Tracker.[334] Allowing DP&L the Switching Tracker will just add an additional layer of protection on to DP&L's generation business.[335] And this is a layer of protection that is not available to other alternative generation suppliers. According to OCC Witness Dr. Duann, the Switching Tracker guarantees that DP&L will maintain a certain market share of retail electric service (SSO) within its service territory.[336]

Providing DP&L a guaranteed market share will create an undue advantage for DP&L vis-a-vis the CRES providers, protecting DP&L from a business risk. Such an advantage is detrimental to establishing a competitive market for electric service, the

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[332] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale of Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

[333] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale of Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

[334] Direct Testimony of Daniel J. Duann at 24.

[335] Direct Testimony of Daniel J. Duann at 25.

[336] Direct Testimony of Daniel J. Duann at 24.

main premise of S.B. 221. Other CRES providers do not have the ability to be compensated for revenues lost due to competition. As such, a Switching Tracker directly conflicts with the policy objectives of R.C. 4928.02 and undermines the cornerstone of S.B. 221—providing effective competition to enable retail customers a choice of retail electric service supply.

Approving a Switching Tracker is also inconsistent with subsection (H) of R.C. 4928.02 which establishes as a state policy to avoid anti-competitive subsidies flowing from a non-competitive retail electric service (distribution) to a competitive service (generation), and vice versa. In other words, each service component is required to stand on its own.[337]

R.C. 4928.06 makes the policies of R.C. 4928.02 more than a statement of general policy objectives. R.C. 4928.06(A) imposes upon the Commission a specific duty to "ensure the policy specified in section 4928.02 of the Revised Code is effectuated."[338] In fact, the Ohio Supreme Court struck down a PUCO Order where the PUCO violated one of the subsections of R.C. 4928.02.[339] There, the Commission had permitted a utility to collect generation costs (deferred increased fuel costs) through future distribution rate cases or alternatively use excess fuel cost recovery to reduce distribution related expenses. The Court found that R.C. 4928.02(G),[340] prohibiting anti-competitive subsidies, had been violated. The Court reversed the PUCO and remanded the case to the PUCO to modify the rate plan to remedy the statutory violation.

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[337] *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, ¶4.

[338] *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924 at 13.

[339] *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305.

[340] Under S.B. 221, new subsections were inserted into R.C. 43928.02, and thus the subsections were redesignated. Subsection (G) became the current subsection (H).

Similarly, if DP&L's proposed Switching Tracker is approved it will violate the specific provisions of R.C. 4928.02, as well as the underlying premise of S.B. 221. For these reasons, the PUCO should reject the Switching Tracker.

3. DP&L's proposed Switching Tracker is unjust and unreasonable for charging to customers.

OCC Witness Duann testified that the Switching Tracker is unjust and unreasonable.[341] IEU Witness Hess echoed these concerns, calling the tracker strategically asymmetrical, and unbalanced.[342] The Switching Tracker is unreasonable because it will create rate instability, and possibly rate shock, as pointed out by OCC Witness Duann.[343] The amount of the Switching Tracker balance to be collected is unknown.[344] Charges to customers from the Switching Tracker will depend on the level of shopping and the auction-based price of electricity well into the future. This uncertainty will create instability.

The Switching Tracker will also result in higher electric rates to all DP&L customers. Such a rate increase makes it difficult for the PUCO to ensure that reasonably priced electric service is made available to customers in the State, consistent with R.C. 4928.02(A). DP&L has proposed no cap on the Switching Tracker charges, so customers are vulnerable to significant increases in their bills.

Another reason the Switching Tracker is unreasonable is because it could cause double recovery.[345] Walmart Witness Chriss testified that if DP&L is permitted to collect

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[341] Direct Testimony of Daniel J. Duann at 24-25.

[342] Direct Testimony of J. Edward Hess at 26.

[343] Direct Testimony of Daniel J. Duann at 25.

[344] Direct Testimony of Daniel J. Duann at 25.

[345] *See* for example, Staff Witness Choueiki's admission that paying DP&L for lost revenues on sales to DPLER is a double payment. Transcript Volume VII-public, page 1908.

lost revenues in addition to recovering costs through SSO rider true ups, then there will be a double collection.[346] Double collection of costs from customers is inconsistent with reasonable and just regulation.

4. With its proposed Switching Tracker, DP&L seeks to make customers pay transition charges, beyond the market development period that was an end for such requests.

IEU Witnesses Murray and Hess testified the Switching Tracker is an untimely request for transition revenues.[347] Interstate Gas Supply Witness White also identified the Switching Tracker as a stranded cost recovery mechanism.[348] OCC agrees. The Switching Tracker seeks to collect revenues that equate to transition costs or "equivalent revenues" which cannot be collected by DP&L because DP&L's market development period has ended.[349]

Under S.B. 3, Ohio electric utilities were required to file plans to provide retail electric service in Ohio during the market development period.[350] Utilities were permitted to include a request for the opportunity to receive "transition revenues."[351] R.C. 4928.39 sets forth the criteria which transition costs (equating to transition revenues to the utility) must meet before being approved by the PUCO. Transition costs are clearly defined as costs that are unrecoverable in a competitive market. This is especially germane to the lost revenues being sought through the Switching Tracker.

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[346] Direct Testimony of Steve W. Chriss at 15.

[347] Direct Testimony of J. Edward Hess at 4; Direct Testimony of Kevin M. Murray at 24-27.

[348] Direct Testimony of Matthew White at 4-5.

[349] As Dr. Rose testified, the market development period for DP&L ended December 31, 2005. See Direct Testimony of Kenneth Rose at 8.

[350] R.C. 4928.31(A).

[351] R.C. 4928.31(A)(5).

The opportunity to recoup transition revenues ended when the market development period ended, or on December 31, 2005.[352] Once that period was over, the Commission is precluded from authorizing the receipt of transition revenues or "any equivalent revenues" by an electric utility except as is expressly permitted under 4928.31 to 4928.40[353] of the Revised Code. Additionally, under R.C. 4928.40, the PUCO shall not increase the charge recovering revenue requirements associated with regulatory assets beyond December 31, 2010. What DP&L is claiming through its Switching Tracker is to collect costs that they cannot collect in a competitive market. It is the revenue shortfall that would result from competition – and it does not constitute a claim for regulatory assets. In either case, however, the dates for such recovery from customers are now well in the past.

As OCC Witness Rose testified, DP&L's customers have already paid DP&L for transition costs associated with its generation assets during the period leading up to the competitive offering of generation.[354] DP&L was authorized to collect $441 million of stranded cost.[355] The Commission approved DP&L's transition plan filing in Case No. 99-1687-EL-ETP, et al. The generation transition charges were associated with above-market, stranded generation costs and based upon the going forward value of the

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[352] R.C. 4928.38.

[353] These provisions of the code apply to a utility's transition plan filing. DP&L filed its transition plan in 1999, and that transition plan was approved by the PUCO. Therefore these sections of the code do not apply to allow an exception.

[354] Direct Testimony of Kenneth Rose at 6.

[355] *See In the Matter of the Application of the Dayton Power & Light Company for Approval of Transition Plan, pursuant to 4928.31, Revised Code and For The Opportunity to Receive Transition Revenues as Authorized under 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, Opinion and Order (Sept. 21, 2000).

generation assets in a competitive market, using a discounted cash flow approach.[356] In other words, the generation transition charges were "lost revenue charges."

Under the approved transition plan, the market development period for DP&L ended December 31, 2005.[357] Thus, by statute, the Commission is precluded from authorizing any additional receipt of transition revenues or "any equivalent revenues" by an electric utility except as provided for in R.C. 4928.31 to 4928.40.

And yet DP&L's proposed Switching Tracker is just that—revenues that are the equivalent of transition revenues. By seeking to collect lost revenues due to customer shopping, DP&L is once again seeking to collect the difference between its generation rates (SSO) and the market price of generation. But such lost revenues, aimed at protecting DP&L from competitive risks, are not permissible under the Revised Code. This is because the market development period has ended and DP&L failed to show that the lost revenues are expressly permitted under R.C. 4928.31 to 4928.40. Hence, the Commission is without authority to approve the Switching Tracker that represents lost revenues or any "equivalent revenues." As such, this is an additional basis under which the PUCO should reject the request for a Switching Tracker.

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[356] Direct Testimony of Kenneth Rose at 7, citing *In the Matter of the Application of the Dayton Power & Light Company for Approval of Transition Plan, pursuant to 4928.31, Revised Code and For the Opportunity to Receive Transition Revenues as Authorized under 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, Direct Testimony of Luciani at 9.

[357] Direct Testimony of Kenneth Rose at 8, citing to Case No. 02-2779-EL-ATA, Opinion and Order (Sept. 2, 2003) which extended the market development period two years longer than what was originally agreed to in Case No. 99-1687-EL-ETP.

5. The Switching Tracker should not be used to maintain DP&L's financial integrity at customer expense.

DP&L advocates for the Switching Tracker as a tool to assist it in maintaining its financial integrity.[358] But as OCC Witness Rose testified, Ohio is moving from a regulated environment for generation to a market-based environment. Under R.C. 4928.38, with the termination of transition revenues, a utility "shall be on its own in the competitive market." DP&L's transition to competition should be over after 13 years, as Dr. Rose testified.[359] Still, DP&L persists in seeking another bite at the apple.[360] But at this stage of the law's timeline, the apple is forbidden fruit.

As Staff Witness Choueiki testified, retail generation service has been deemed competitive for more than a decade. DP&L seeks regulatory relief related to a competitive service. This is, in Mr. Choueiki's expert opinion, "based on flawed logic."[361] The Commission should not allow DP&L to collect a regulatory charge for this portion of the generation business under the theory that doing so will assist the utility in maintaining its financial integrity.

Both IEU Witness Murray and FES Witness Lesser are correct in pointing out that there are other ways for DP&L to manage its financial integrity besides imposing a Switching Tracker. Mr. Murray testified that DP&L's financial integrity can be managed through the transfer of its generating assets.[362] Alternatively, Mr. Murray recommended

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[358] Second Revised Testimony of Craig L. Jackson at 5.

[359] Direct Testimony of Kenneth Rose at 8.

[360] *See* Direct Testimony of Jonathan A. Lesser at 5-6.

[361] Prefiled Testimony of Hasham M. Choueiki at 9.

[362] Direct Testimony of Kevin M. Murray at 23.

that the transfer price charged by DP&L to DPLER[363] should reflect DP&L's fully embedded costs. Dr. Lesser testified that the financial integrity of its regulated operations can be addressed more easily and at a lower cost by requiring DP&L to structurally separate.[364] For the reasons given by witnesses Rose, Choueiki, Murray and Lesser, the Commission should reject the proposed switching tracker.

I. The Fuel Rider Rate That DP&L's Standard Service Offer Customers Pay Should Continue To Be Based On A Least Cost Methodology But Should Not Include DPL Energy Resources' Load.

The Commission should reject DP&L's proposal to replace its least cost methodology with a system average cost methodology for calculating its Fuel Rider rate applicable to SSO service. DP&L's proposal violates the State policy in R.C. 4928.02(H), against subsidies. And its proposal violates the State policy, in R.C. 4928.02(A), for reasonably priced services. As OCC demonstrated in this proceeding, DP&L's proposal would increase the Fuel Rider rate paid by DP&L's SSO customers, to their detriment, and would decrease the cost at which fuel is recovered from DP&L's wholesale customers, including its affiliates.[365]

Instead, DP&L's Fuel Rider should continue to be based on a least cost fuel and purchased power methodology.[366] However, the load of DPL Energy Resources ("DPLER") should not be included in the calculation of the Fuel Rider rate paid by SSO customers.[367]

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[363] IEU Witness Murray characterizes DP&L's financial integrity claims as self-inflicted due to its improper relationship with DPLER. Direct Testimony of Kevin M. Murray at 23.

[364] Direct Testimony of Jonathan Lesser at 5-6.

[365] Direct Testimony of Gregory Slone at 11.

[366] Direct Testimony of Gregory Slone at 4.

[367] Direct Testimony of Gregory Slone at 10.

DP&L's existing Fuel Rider is based on a stacked cost principle. Specifically, DP&L's generation and purchased power costs are stacked from lowest to highest cost, with the lowest fuel and purchased power cost for the power supply needed to serve the retail load included in the Fuel Rider rate.[368] For purposes of calculating the Fuel Rider, the retail load is made up of existing DP&L SSO customer load and DPLER[369] customer load.[370] But the Fuel Rider rate is only charged to SSO customers. DPLER does not pay the Fuel Rider rate.[371]

Under DP&L's current stacking methodology, the costs (fuel, emission allowances, etc.) associated with providing electricity to the wholesale market are currently treated as DP&L's highest costs to generate electricity, and are not included in the calculation of the existing Fuel Rider.[372] But DP&L seeks to change that in its proposed ESP.

DP&L now seeks to base the calculation of the Fuel Rider rate on a system average cost methodology. Under that methodology all the costs associated with providing the total megawatt-hours (MWh) of electricity for DP&L's energy supply system during the applicable period (e.g. monthly, quarterly or annually) would be totaled.[373] Those costs would then be divided by the total MWh of electricity from the

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[368] Direct Testimony of Gregory Slone at 6.

[369] DPLER is a subsidiary of DPL Inc. which sells competitive electric energy services. (Second Revised Testimony of William J. Chambers at 29).

[370] Direct Testimony of Gregory Slone at 6.

[371] Direct Testimony of Gregory Slone at 6.

[372] Direct Testimony of Gregory Slone at 67; *see* DP&L response to OCC Interrogatory 377, Attachment GS-2.

[373] Direct Testimony of Gregory Slone at 7-8.

DP&L energy supply system for that same period.[374] Unlike the current least cost methodology, the system average cost methodology proposal includes all the fuel and emission allowances necessary for DP&L to generate electricity to both retail and wholesale customers.[375]

DP&L's system average methodology should be rejected. This methodology, on average, would reduce DP&L's cost to generate electricity that it would sell into the wholesale market. That result is problematic for two reasons. One problem is that DP&L would be using the fuel methodology to gain a competitive advantage against competitors in the wholesale market. The other problem is that this competitive advantage for DP&L would be subsidized at the expense of SSO customers.[376] If the Commission approves the proposed system average cost methodology as proposed by DP&L, the Fuel Rider rate paid by SSO customers would increase.[377]

OCC's position is supported by the PUCO Staff. Specifically, PUCO Staff witness Gallina testified that "Average cost will always be higher than least cost, and to the extent DP&L SSO customers pay higher than least cost, they will be contributing to DP&L's non-regulated operations."[378] Witness Gallina also testified that DP&L's primary obligation regarding serving load is to its SSO customers and that SSO

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[374] Second Revised Direct Testimony of Teresa F. Marrinan at 5.

[375] Direct Testimony of Gregory Slone at 6; *see* DP&L response to OCC Interrogatory 335 (c), Attachment GS-4.

[376] Direct Testimony of Gregory Slone at 9.

[377] Direct Testimony of Gregory Slone at 11.

[378] Prefiled Testimony of Victor Gallina at 3-4.

customers should be provided with the lowest cost generation since the generation assets are still on the books of DP&L.[379]

As the PUCO Staff testified, if DP&L's SSO customers pay more than least cost, then SSO customers are contributing to DP&L's non-regulated operations.[380] Such an arrangement would violate Ohio Policy mandated to "[e]nsure effective competition in the provision of retail electric service ***."[381] Specifically, Ohio policy prohibits "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 ***."[382]

Instead of providing customers with the least overall cost energy supply, as DP&L states is its objective,[383] its proposed system average cost methodology would actually increase the Fuel Rider rate paid by its SSO customers.[384] Such a proposal violates State policy and should be rejected.

Further, DP&L should not be allowed to include DPLER's load in the least-cost calculation. Including the DPLER load in the Fuel Rider calculation could inflate the rate that SSO consumers pay for fuel.

OCC witness Slone explained why the calculation of the Fuel Rider rate should not include DPLER's load: "retail load for purposes of calculating the Fuel Rider includes both DP&L SSO customer load and DPLER customer load. However, since the

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[379] Prefiled Testimony of Victor Gallina at 3.

[380] Prefiled Testimony of Victor Gallina at 3-4.

[381] R.C. 4928.02(H).

[382] R.C. 4928.02(H).

[383] Second Revised Direct Testimony of Teresa F. Marrinan at 3.

[384] Direct Testimony of Gregory Slone at 11.

Fuel Rider rate is only charged to SSO customers and since the rate does not impact DP&L sales to DPLER, the DPLER load should not be included in the determination of the Fuel Rider rate paid by SSO customers."[385] In other words, DPLER's load should be excluded from the least-cost fuel calculation because, if it is included in the calculation, then SSO customers would likely have to pay more.

OCC's recommendation for the Commission to exclude the DPLER load from the Fuel Rider rate calculation is consistent with the PUCO Staff's position. PUCO Staff Witness Gallina testified that the Fuel Rider should be calculated using the current methodology, but excluding the DPLER load from the calculation to avoid the cross-subsidization of non-regulated operations.[386]

Consistent with the recommendations of OCC and the PUCO Staff, the Commission should approve a modified version of the least cost methodology currently used to calculate the Fuel Rider rate. The lowest to highest cost stacking principles of the least cost methodology should be utilized to determine the effective rate of the Fuel Rider and the DPLER load should be excluded from any calculation of the Fuel Rider rate that SSO customers pay.

J. If DP&L Is Permitted To Implement Its Unjustified Service Stability Rider, Then Customers Should Pay Based On The Amount Of Energy (kWh) Used.

If the Commission allows DP&L to collect money through a Service Stability Rider, then the Rider should be allocated and collected on a per-KWh basis.[387] DP&L's proposal is to collect the SSR from all customers through a combination of increases to

[385] Direct Testimony of Gregory Slone at 10.

[386] Prefiled Testimony of Victor Gallina at 4.

[387] Direct Testimony of Scott Rubin at 4, 13.

customer charges, energy charges, and demand charges.[388] That is mistaken and should be rejected.

DP&L witness Mr. Parke described the basis for the design of the charge as follows:

> The rate was designed in a manner that factored in rate-making principles of stable and predictable revenues and rates, fair distribution among customer classes, and easily understandable rates. Therefore, the rate was first designed by including the energy and demand rates of a prior non-bypassable rate, the Rate Stabilization Charge. Then, a customer charge was added to balance the overall impact across tariff classes. Finally, the energy charge and demand charge were adjusted to achieve parity among tariff classes and to ensure the appropriate revenue recovery.[389]

Notably, Mr. Parke proposed a customer charge for the SSR equal to the existing customer charge, "effectively doubl[ing] the customer charge that is currently in effect."[390] In other words, Mr. Parke took the design of the existing Rate Stabilization Charge – which includes energy and demand rates – and added a customer charge component to it, without any analysis of whether this was consistent with a primary basis for designing rates – cost causation. This arbitrary design was reflected during his cross-examination, where he was unable to explain how his proposed SSR cost allocation and rate design related to the "financial integrity" charges that Mr. Jackson proposed to be recovered.[391]

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[388] Second Revised Direct Testimony of Nathan Parke at 6-7.

[389] Second Revised Direct Testimony of Nathan Parke at 7.

[390] Direct Testimony of Scott Rubin at 7.

[391] Transcript-Volume III-Confidential at 836-37.

Specifically, Mr. Parke testified that he only [REDACTED] Mr. Jackson's testimony, who had developed the amount of dollars sought to be allocated.[392] He testified to his limited understanding of the charges he sought to allocate as follows:

[REDACTED][393]

[392] Transcript-Volume III – Confidential at 836-37.

[393] Transcript- Volume III – Confidential at 836-37.

Mr. Parke's failure to analyze the reasons for the proposed SSR charge and then provide a clear basis for relating his proposed SSR to those reasons undermines the reasonableness of his proposal in the first instance. In the absence of such analysis, Mr. Parke's statements -- that his proposed rates provide "stable and predictable revenues and rates, fair distribution among customer classes, and easily understandable rates," "balance the overall impact across tariff classes," and "achieve parity"[394]--are platitudes without meaning.

There are many rate designs that can result in stable and predictable revenues and rates and understandability to customers.[395] However, fair distribution/allocation of charges can only be achieved when there is a clearly established relation between the basis for the charges and the design of the rates.[396] This is why a cost-of-service analysis proceeds methodically through a series of steps designed to capture the reasons for cost/charge incurrence and cost/charge responsibility.[397] Since Mr. Parke completely overlooked this essential aspect of rate design, his assessment should be disregarded.

OCC witness Rubin reviewed Mr. Parke's proposed SSR rate design and determined that DP&L "has not prepared a cost-of-service study for this case and has not

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[394] Second Revised Direct Testimony of Nathan Parke at 7.

[395] Direct Testimony of Scott Rubin at 10-12.

[396] R.C. 4905.35 (prohibiting public utilities from giving "any undue or unreasonable preference or advantage" to any person or entity). *See Ohio Consumers' Counsel v. PUC*, 109 Ohio St. 3d 328, 847 N.E. 2d 1184, 2006 Ohio 2110 (2010) (reasonable differentials in rates may occur where it is "based upon some actual and measurable difference in the furnishing of services to the consumer").

[397] The Commission has long turned to cost of service studies to provide the best guidance for the establishment of rates. *See, for example, In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code, Case No. 99-1141-EL-ORD, 1999 Ohio PUC LEXIS 674 (PUCO November 30, 1999) at 146 (where the Commission required electric utilities to utilize cost of service studies for the purpose of unbundling electric rates).*

provided any cost-based analysis to support its proposal."[398] Mr. Rubin then proceeded to provide his assessment of the reasons that would underlie allocation of the proposed "financial integrity" charges among customers/customer classes:

> The purpose of the SSR is to compensate DP&L for the impact on its financial integrity of its allegedly "lost" margin on electricity sales that it would have made if customers had not switched to another supplier to purchase electricity, coupled with the market price for generation being lower than DP&L's embedded generation-related cost of service. That is, the proposed SSR is solely related to costs associated with electricity sold to customers. Consequently, it is properly allocated to each customer class on a KWh basis.[399]

In light of the reasons underlying the proposed SSR charge, Mr. Rubin specifically explained why there is no justification for allocating any portion of the charge based on the number of customers in a class or for collecting the SSR through increased customer charges as Mr. Parke had proposed:

> In my opinion, there is no policy justification for allocating any SSR revenues based on the number of customers in a class. Similarly there is no justification for collecting any SSR revenues through increased customer charges. ***All of the reasons identified by DP&L to allegedly justify the SSR are related to the generation (electricity supply) portion of DP&L's business; there are no customer-related factors driving the alleged need for the SSR.***[400]

Given that the basis for Mr. Rubin's proposed allocation and rate design is DP&L's own rationale for the charge, DP&L simply has no basis to take issue with Mr.

[398] Direct Testimony of Scott Rubin at 9.

[399] Direct Testimony of Scott Rubin at 9.

[400] Direct Testimony of Scott Rubin at 9 (Emphasis added).

Rubin's position. And DP&L did not challenge the substance of Mr. Rubin's testimony on cross-examination.[401]

Mr. Rubin also addressed specifically Mr. Parke's claim that the proposed SSR rate design resulted in a "fair distribution among customer classes."[402] Specifically, Mr. Rubin concluded that Mr. Parke "has failed to provide any objective measure of fairness" and does not explain how the existing energy-based RSC charge is not appropriately "balanced," why there should be any customer-related component, or what rate impacts would result.[403] More fundamentally, Mr. Rubin noted that Mr. Parke failed to point out in his testimony that his proposed SSR would increase the allocation to the residential class from the current RSC charge allocation of 41% based on energy, to 48%.[404] As Mr. Rubin testified, Mr. Parke "does not – and cannot – explain why this approach is more 'balanced,' particularly when the Residential classes use only 37% of the electricity on the DP&L system."[405]

Mr. Parke is also incorrect in contending that his proposed allocation for the SSR would provide a "predictable revenue recovery" and/or that it helps to ensure DP&L recovers an "appropriate level of revenue."[406] In fact, Mr. Parke failed to provide any analysis to support this position, as the absence of any relation between his proposed charges and cost causation undermines the claim that the charges would recover an

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[401] Amazingly, despite Mr. Rubin's extensive experience testifying on cost-of-service and rate design issues as detailed on Attachment SJR-1 to his testimony, DP&L moved to strike Mr. Rubin based on his qualifications, a Motion that had no merit and was appropriately denied by the Attorney Examiners. Transcript-Vol. VII-Public at 1700-1701.

[402] Direct Testimony of Scott Rubin at 10.

[403] Direct Testimony of Scott Rubin at 10.

[404] Direct Testimony of Scott Rubin at 11.

[405] Direct Testimony of Scott Rubin at 11.

[406] Direct Testimony of Scott Rubin at 12.

"appropriate" level of revenues or that the costs are incurred by DP&L on a per-customer basis.[407] Nor did Mr. Parke provide any analysis showing that collecting the SSR in the same manner as the RSC "would be any more or less stable" than his proposal to collect a portion of the revenues on a per-customer basis.[408] The evidence shows that the RSC design has been a stable recovery mechanism.[409]

As indicated above, in light of the fact that DP&L's rationale for needing an SSR is "solely related to electricity consumption,"[410] Mr. Rubin proposed that any revenues authorized under the SSR "should be allocated to the customer classes – both shopping and non-shopping – in proportion to each class's consumption of electricity."[411] Mr. Rubin's allocation is shown on Attachment SJR-3 to his testimony.[412] He explained why this is appropriate:

> All of the benefits from DP&L's movement toward market-based pricing of generation flow to customers in proportion to their usage of electricity. Similarly, all of DP&L's alleged "costs" associated with that changing market (including its proposed SSR) should be borne by customers in proportion to their energy consumption. In this way, the benefits of market changes would be matched with the alleged costs associated with such changes.[413]

In addition to setting forth his allocation and providing a rationale that is directly related to the reasons for the proposed SSR charge, Mr. Rubin also analyzed the impacts of DP&L's proposal and found that, if DP&L's proposal were implemented, then "low-use residential customers would see excessively large percentage increases in their

[407] Direct Testimony of Scott Rubin at 12.

[408] Direct Testimony of Scott Rubin at 12.

[409] IEU Ohio Exh. 12 at 9.

[410] Direct Testimony of Scott Rubin at 12.

[411] Direct Testimony of Scott Rubin at 13.

[412] Direct Testimony of Scott Rubin at 13 & Attachment SJR-3.

[413] Direct Testimony of Scott Rubin at 13.

bills."[414] Specifically, under DP&L's proposed rates, "a residential customer who uses 200 kWh per month would face a 12% increase in its total bill."[415] In contrast, higher-use customers, including many commercial and industrial customers, would see "decreases in their total bills."[416]

"[**A]ll residential customers using less than 2,000 KWh per month would see their overall bills increase"** under DP&L's proposal.[417] There is no justification for such a result when it is the level of usage of electricity that DP&L claims is causing these generation–related costs to be incurred.[418] Mr. Rubin's Attachment SJR-4 provides a bill analysis for residential heating and non-heating customers, showing the significant increases to residential non-heating customers at different consumption levels.[419] This shows that ███ of Residential non-heating customers would receive overall increases in Period 1 and ███ of Residential non-heating customers would have increases of 12% - 37%.

Although Residential non-heating customers would experience rate increases under DP&L's proposed rate design, a substantial number of Residential Heating customers would also see such increases in Period 1, with ███ of heating customer bills increasing and ██ of such customers' bills increasing by 10% or more during the winter.[420] The number of Residential Heating customers who will see increases goes up

[414] Direct Testimony of Scott Rubin at 14.

[415] Direct Testimony of Scott Rubin at 14.

[416] Direct Testimony of Scott Rubin at 14.

[417] Direct Testimony of Scott Rubin at 14.

[418] Direct Testimony of Scott Rubin at 14-15.

[419] Direct Testimony of Scott Rubin at 15 & Attachment SJR-4.

[420] Direct Testimony of Scott Rubin at 16 & Attachment SJR-4.

to [REDACTED] in the summer, with [REDACTED] of Residential Heating customers seeing increases of 12% - 37%.[421]

The point is that DP&L ignored rate impacts on low-use residential customers in its analysis and would unfairly place the burden of the SSR rate increases on Residential Non-Heating customers who have the lowest consumption. This is contrary to DP&L's rationale for the proposed SSR, which should increase based on a customer's level of consumption to reflect DP&L's claimed reasons for the SSR charge.[422] Therefore, DP&L's proposed rate design for the SSR should be rejected by the Commission. If any "financial integrity" charge is granted by the Commission, it should be allocated and collected on a per-kWh basis.

K. If DP&L Is Permitted To Implement Its Unjustified Switching Tracker, Then Customers Should Pay Based On The Amount of Energy (kWh) Used.

Mr. Parke's proposal with respect to the Switching Tracker rate design suffers from the same analytical shortfalls as his analysis of the appropriate rate design for the SSR rate. Mr. Rubin testified that the design of the Switching Tracker should follow the design of the SSR rate, which in his opinion should be allocated and collected on a per-kWh basis. A per kWh allocation is appropriate because the justification for the tracker "is based solely on costs allegedly incurred by DP&L as a result of changes in the generation market."[423] Again, the Switching Tracker is a charge that has as its basis changes in the consumption of DP&L's generation service. If any Switching Tracker charges are allowed, the charges should be allocated on a per-KWh basis.

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[421] Direct Testimony of Scott Rubin at 16 & Attachment SJR-4.

[422] Direct Testimony of Scott Rubin at 16-17.

[423] Direct Testimony of Scott Rubin at 18-19.

L. The Costs Of DP&L's Proposed Competitive Retail Enhancement Should Be Paid By Competitive Retail Electric Service Providers.

DP&L proposes that it be permitted to charge customers, through its proposed non-bypassable Reconciliation Rider ("RR") approximately $2.5 million in "competitive retail enhancement" costs, among other costs it proposes to recover through the RR."[424] The $2.5 million in costs should be paid by CRES providers, not DP&L's customers.[425]

Ms. Seger-Lawson described competitive retail enhancements as "projects that will improve the interaction of CRES providers with DP&L to ensure a smoother customer choice administrative process."[426] The projects involve modifications to DP&L's Customer Service System ("CSS"), Electronic Data Interchange (EDI") system and Information Technology ("IT") systems.[427] Descriptions and breakdowns of the proposed competitive enhancements and related cost estimates are set forth in Ms. Seger-Lawson's testimony and in the Direct Testimony of OCC witness Hagans.[428]

OCC witness Hagans testified that those costs which are associated with enhancing services that CRES suppliers provide "should be paid for directly by CRES providers," rather than recovered from customers through the non-bypassable RR.[429] Ms. Hagans testified that the benefits of the competitive enhancements are directed specifically to CRES providers, giving them "a greater opportunity to gain new

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[424] Direct Testimony of Dona Seger-Lawson at 13-14; Direct Testimony of Kathy Hagans at 3-4.

[425] Direct Testimony of Kathy Hagans at 6.

[426] Direct Testimony of Dona Seger-Lawson at 13-14.

[427] Direct Testimony of Dona Seger-Lawson at 14.

[428] Direct Testimony of Dona Seger-Lawson at 14; Direct Testimony of Kathy Hagans at 3-5 & Attachment KLH-2.

[429] Direct Testimony of Kathy Hagans at 6.

customers."[430] While customers may also benefit from the enhancements, she testified that "any such benefit is much less than the benefits that will be realized by the CRES providers with the implementation of the Competitive Retail Enhancements proposed by DP&L."[431]

Since CRES providers have "the business option to pass or not pass those costs along to their own customers," they are not deprived of an opportunity to recover these costs.[432] Accordingly, DP&L's customers should not be required to pay for enhancements that directly benefit CRES providers.

M. The Commission Should Phase-Out The Maximum Charge Provision For Low Voltage Service Because It Is Unduly And Unreasonably Discriminatory.

As part of its filing in this case, DP&L proposed the phase-out of the maximum charge provision for its GS (Commercial) Secondary and Primary Tariffs.[433] As DP&L witness Nathan Parke explained, "the maximum charge provision works to limit the average rate ($/kWh) charged to customers that have very poor load factors."[434] He testified that the maximum charge provision is a "tariff subsidy for a small group of customers in the secondary and primary tariffs."[435] The subsidy is approximately $5 million, and the shortfall is picked up by other customers.[436]

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[430] Direct Testimony of Kathy Hagans at 6.

[431] Direct Testimony of Kathy Hagans at 6.

[432] Direct Testimony of Kathy Hagans at 6.

[433] Second Revised Direct Testimony of Nathan Parke at 8-9.

[434] Second Revised Direct Testimony of Nathan Parke at 8-9.

[435] Transcript Vol. III-Public at 853.

[436] Transcript Vol. III-Public at 853-54.

DP&L proposes to phase out the maximum charge amount "by 10% every quarter until 100% of the SSO is being supplied through the CBP."[437] This phase-out will reverse the subsidy that other customers end up paying. OCC supports DP&L's proposed phase-out of this charge.

The PUCO Staff opposes the phase-out of the maximum-charge provision.[438] The PUCO Staff also proposes to include new Riders TCRR-N, CB and SSR in calculating the maximum charge provision.[439] The PUCO Staff argued against phasing out the charge because of the substantial increase that some of the applicable customers might experience.[440] Alternatively, the PUCO Staff recommended that the charge be phased out by 2.5% per quarter (as opposed to the 10% per quarter proposed by DP&L) and that the status of the phase-out should be reevaluated at the end of the ESP Term.[441]

OCC submits that it is unjust, unreasonable, and unduly discriminatory[442] for the maximum charge provision to continue. Furthermore, there is no evidence that phasing out the charge (10% each quarter) as proposed by DP&L would significantly harm any particular customer. In fact, as Ms. Turkenton acknowledged, these customers may use a significant amount of power in certain months and very little power in other months.[443] The customers may not even be aware that they are receiving this subsidy.[444] Ms. Turkenton testified that she had not assessed whether DP&L's phase-out of the charge

[437] Second Revised Direct Testimony of Nathan Parke at 8-9.

[438] Direct Testimony of Tammy Turkenton at 12-14.

[439] Direct Testimony of Tammy Turkenton at 13.

[440] Direct Testimony of Tammy Turkenton at 13.

[441] Direct Testimony of Tammy Turkenton at 14.

[442] R.C. 4909.15(E).

[443] Transcript Vol. VII-Public at 1779-80.

[444] Transcript Vol. VII-Public at 1783.

was unaffordable to any particular customer, as she only performed an illustrative calculation.[445] OCC submits that DP&L's proposed phase-out of the charge should be adopted as there is neither a cost justification for continuing the maximum charge provision, nor any evidence that the rate without this provision is unaffordable to any particular customer.

N. The PUCO Should Order Legal Corporate Separation To Take Place In The Very Near Future.

DP&L witness Tim Rice sponsored DP&L's "Third Amended Corporate Separation Plan" in this proceeding, which, as he testified "remains substantially unchanged from DP&L's Second Amended Corporate Separation Plan."[446] DP&L's Corporate Separation Plan continues its existing "functional separation" of "noncompetitive retail electric services from its businesses of providing competitive retail electric services."[447] Mr. Rice testified that DP&L has "implemented and complied with the Code of Conduct that governs its financial and other relationships with its DPL Inc. affiliates, and DP&L has maintained a Cost Allocation Manual."[448]

Mr. Rice testified that DP&L intends to continue its functional separation under the Third Amended Corporate Separation Plan and will continue to operate all businesses under its Code of Conduct and Cost Allocation Manual, with training to all employees.[449] Mr. Rice also testified that DP&L "continues to study the issue of legal separation of its generation assets and commits to file an application to seek legal separation "by no later

[445] Transcript Vol. VII-Public at 1778-79.

[446] Direct Testimony of Timothy Rice at 2.

[447] Direct Testimony of Timothy Rice at 2.

[448] Direct Testimony of Timothy Rice at 2.

[449] Direct Testimony of Timothy Rice at 3.

than December 31, 2013."[450] Mr. Rice states further that DP&L "expects to request that the Commission authorize DP&L to transfer its generation assets by December 31, 2017."[451]

OCC is in agreement with much of IEU witness Hess's testimony on this issue and with FES witness Noewer's recommendation for an acceleration of full structural separation.[452] First, OCC agrees with Mr. Hess that Senate Bill 3 was intended to provide the legal separation of entities that operate the non-competitive transmission and distribution functions of the utility from the competitive generation functions of the utility. R.C. 4928.17 specifically provides "***at minimum***, for the provision of the competitive retail electric service or the nonelectric product or service ***through a fully separate affiliate of the utility."***[453] Although "for good cause shown" the PUCO may approve a corporate separation plan that implements only functional separation, it may do so only for an interim period, provided the plan complies with R.C. 4928.02.[454] Senate Bill 3 established these requirements as of its effective date of October 5, 1999, but DP&L continues to utilize "functional separation" on an "interim" basis rather than structural legal separation. It is time for DP&L's "interim" functional separation to end and legal separation to be completed.

OCC would emphasize that because DP&L has not structurally separated, DP&L is able to argue for continued rate subsidies related to the financial challenges of its

[450] Direct Testimony of Timothy Rice at 4.

[451] Direct Testimony of Timothy Rice at 4.

[452] Direct Testimony of J. Edward Hess at 6-15; Direct Testimony of Sharon Noewer at 9-10.

[453] R.C. 4928.17 (A)(1)(Emphasis added).

[454] R.C. 4928.17(C).

generation business. Yet under the law the generation business is a competitive retail electric service. As IEU witness Hess testified in this regard:

> The financial review performed by DP&L effectively and improperly rebundles DP&L's distribution, transmission and generation functions to calculate the ROE, thereby violating corporate separation requirements that apply when an EDU like DP&L is providing competitive and noncompetitive services in the retail and wholesale markets. It is my understanding that Ohio has by statute defined generation as a competitive service. As a competitive service, it is improper to bundle this service together with distribution service, a noncompetitive and regulated service. Further, the testimony of witness Chambers leads me to believe that the forecasted financial degradation is driven by an assumed loss of revenue and margin from the competitive wholesale generation business.[455]

OCC agrees with IEU witness Hess that, by not implementing structural corporate separation, DP&L has effectively rebundled its competitive generation service with its non-competitive transmission and distribution services and seeks to exact regulated rates to recover its lost margin in the competitive marketplace. DP&L should not be permitted to continue using functional separation as a justification for charges that subsidize its competitive generation services. The General Assembly intended that generation services will be provided by a separate affiliate.

FES witness Noewer specifically recommended an acceleration of DP&L's corporate separation, stating:

> By December 2014, all other Ohio utilities will have completed corporate separation. But DP&L inexplicably requires another <u>three years</u>. Such delay is unacceptable. Almost fourteen years has passed since S.B. 3 was enacted and EDUs were put on notice of the requirement for corporate separation. DP&L should be required to pursue full structural separation as soon as possible, to prevent further cross subsidies between the utility and competitive affiliates and to ensure that DP&L's customers (and all Ohio

[455] Direct Testimony of J. Edward Hess at 15.

> customers) receive the benefits of a competitive market for electric generation service. Full corporate separation also would ensure that DP&L does not have any basis in which to request above-market revenues, as it seeks to do through the proposed ESP's blending plan, SSR, and Switching Tracker.[456]

OCC agrees with FES witness Noewer that DP&L's proposed delay for achieving full structural separation, until December 2017, is unacceptable. The Commission should direct such structural separation to occur promptly.

O. The Commission Should Consider Affordability In Rendering Its Decision In This Case.

The affordability of electric service is a fundamental consideration in the Commission's review of DP&L's proposed ESP. Not only does the law require the Commission to consider affordability[457] but, as discussed below, DP&L's unaffordable electric rates are currently having profound economic and societal impacts which cannot be sustained. The health, safety and finances of DP&L's customers are being impacted by the unaffordability of DP&L's electric service as some customers limit their use of electric service to unhealthy levels and other customers simply can't maintain access to electric service because of its cost.

DP&L claims that it needs still more revenues from customers to buttress the financial position of the generation portion of its business. But that need is unproven. And DP&L's proposals cannot be permitted to violate state policy for reasonable rates.

The Ohio General Assembly declared affordability of electric service to be one of the first and foremost policies to be implemented as the State transitions to a competitive

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[456] Direct Testimony of Sharon Noewer at 9-10 (Emphasis in original).

[457] R.C. 4928.02(A) and 4928.02(L).

electric marketplace. Specifically, R.C. 4928.02(A) requires the Commission to support State policies which accomplish the following objectives:

> (A) *Ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and* ***reasonably priced*** *retail electric service*; *(Emphasis added).*

Further, State law requires the Commission to implement policies that protect certain at-risk segments of the Ohio population. These policies are enumerated in R.C. 4928.02(L) which requires the Commission to:

> (L) ***Protect at-risk populations****, including, but not limited to, when considering implementation of any new advanced energy or renewable energy resources; (Emphasis added).*

Even though Senate Bill 3 established unambiguously that affordable service and protection of at-risk populations are critical to the provision of electric service and the rates for electric services,[458] DP&L didn't even mention affordability when it filed its current ESP application. This is troubling because DP&L has the burden of proof in an ESP application. DP&L must demonstrate that the "electric security plan, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate" as compared to the expected result under an MRO, R.C. 4928.142. Certainly, one of the relevant components for comparison is the extent to which the proposed ESP, as compared to an MRO, will result in reasonably priced electric service and will protect at-risk populations.[459]

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[458] R.C. 4928.02(A) and 4928.02(L).

[459] R.C. 4928.143(C)(1).

In the absence of any effort by DP&L to address the affordability of DP&L's electric services, OCC witness Williams evaluated the affordability of DP&L's residential electric service by reviewing available statistical data.[460] More specifically, Mr. Williams reviewed the number of customers being disconnected for non-payment, the number of customers on the Percentage Income Payment Plan ("PIPP"), and the number of customers on Commission-ordered payment plans.[461] Based on this analysis, Mr. Williams testified that approximately **32.5** percent of the total number of DP&L residential customers are part of the at-risk population who are either struggling or were unable to pay their electric bills in 2012.[462]

Mr. Williams testified that despite the relatively small number of customers served by DP&L, DP&L customers were far more likely to be disconnected for non-payment than customers of the other Ohio electric utilities.[463] For example, whereas DP&L disconnected 34,389 residential customers for non-payment in 2012, establishing a disconnection rate of 7.5 percent, the average disconnection rate of the other Ohio utilities was 4.8 percent.[464] Even more pointedly, Mr. Williams showed that DP&L has approximately 205,000 fewer residential customers compared to CEI, yet DP&L disconnected over twice the number of customers that were disconnected by CEI in 2012.[465]

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[460] Direct Testimony of James D. Williams at 8.

[461] Direct Testimony of James D. Williams at 6.

[462] Direct Testimony of James D. Williams at 7.

[463] Direct Testimony of James D. Williams at 17.

[464] Direct Testimony of James D. Williams at 17.

[465] Direct Testimony of James D. Williams at 17.

To help ensure that the 2012 disconnection data is representative of the service DP&L customers have received over time, Mr. Williams performed and presented a comprehensive analysis of disconnection data for all of the Ohio electric utilities over a three-year time period.[466] The results of this analysis demonstrate conclusively that DP&L customers have experienced a much higher occurrence of disconnection for non-payment over the last three years compared with other Ohio electric utilities.[467] The DP&L three-year average disconnection rate was 8.3 percent.[468] This is significantly higher than any of the other Ohio electric utilities that together averaged approximately 4.8 percent.[469]

In addressing the affordability issues related to the at-risk PIPP population, Mr. Williams also presented data comparing the number of DP&L PIPP customers in 2012 with 2007.[470] Mr. Williams observed significant growth in the number of PIPP customers. In 2012, there were approximately 35,715 DP&L customers on PIPP; yet in 2007 there were only 21,242.[471] The increase in the number of PIPP customers is a strong indicator of the unaffordability of service for DP&L customers. However, even more troubling was the data Mr. Williams presented showing a 90 percent increase in the number of PIPP customers disconnected in 2012 compared with 2007.[472]

In addition to analyzing and presenting disconnection data and PIPP data, Mr. Williams also looked at Commission-ordered payment arrangements. He testified that a

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[466] Direct Testimony of James D. Williams at 18.

[467] Direct Testimony of James D. Williams at 19.

[468] Direct Testimony of James D. Williams at 19 (Table 4).

[469] Direct Testimony of James D. Williams at 19-20.

[470] Direct Testimony of James D. Williams at 10.

[471] Direct Testimony of James D. Williams at 10.

[472] Direct Testimony of James D. Williams at 10.

higher percentage of DP&L customers were on Commission-ordered payment plans in 2012 compared with the other Ohio electric utilities.[473] At a minimum, the Commission requires payment plans to be offered by electric utilities when customers contact the utility and establish an inability to pay their electric bill.[474]

Approximately 5 percent of DP&L customers were on Commission-ordered payment plans on an average monthly basis in 2012 compared with an average 3.4 percent with the other Ohio electric utilities.[475] However, **32.5** percent of the customers who were on a Commission-ordered extended payment plan in 2012 defaulted on the plan.[476] The average default rate with the other Ohio electric utilities was 16.9 percent.[477] The inability of customers to stay on payment plans in DP&L's service territory is another indicator of the unaffordability of DP&L's rates.

The level of DP&L's rates relative to other Ohio electric utilities is also indicative of the affordability issues faced by DP&L customers.[478] As Mr. Williams testified, "DP&L residential electric bills are 10.9 percent higher than the average electric bill in the state."[479] This reflects a significant increase in the last five years, as DP&L electric bills were 5.8% below the average electric bill five years ago.[480] Electric rates have increased from $0.10 per KWH in DP&L's service territory in 2008 to $0.14 per KWH in 2013 as shown on Mr. Williams' Table 5.

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[473] Direct Testimony of James D. Williams at 17.

[474] Direct Testimony of James D. Williams at 7.

[475] Direct Testimony of James D. Williams at 17.

[476] Direct Testimony of James D. Williams at 17.

[477] Direct Testimony of James D. Williams at 17.

[478] Direct Testimony of James D. Williams at 21-22.

[479] Direct Testimony of James D. Williams at 21.

[480] Direct Testimony of James D. Williams at 21.

The fact that DP&L's residential electric bills are already so high relative to other Ohio electric utilities should compel this Commission to limit the additional charges that DP&L seeks to assess customers under its proposed ESP. Mr. Williams testified that DP&L's ESP proposal, as filed, would increase the average residential bill to $110.23 or 13.8 percent higher than the average electric bill in the state.[481] DP&L's pending request for storm cost recovery in Case No. 12-3062-EL-RDR would further add to this impact, making the average DP&L electric bill 16% higher than the state average bill.[482]

Attesting to the health and safety issues being experienced by DP&L customers who also face difficult financial circumstances, Mr. Williams testified that medical professionals had certified that it was especially dangerous to the health of 6,316 DP&L customers who would otherwise have been disconnected for non-payment in 2012.[483] Further, Mr. Williams expressed concern that the number of customers who have medical needs could exceed the limits for the number of medical certifications that can be used in a household on an annual basis.[484] Mr. Williams also testified about the disparity in the number of medical certifications that were being used by the lowest income DP&L customers.[485] Obviously, affordable electric service promotes public health as it enables customers to ensure that the temperature in their homes is consistent with their health requirements.[486]

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[481] Direct Testimony of James D. Williams at 21.

[482] Direct Testimony of James D. Williams at 22.

[483] Direct Testimony of James D. Williams at 12.

[484] Direct Testimony of James D. Williams at 12.

[485] Direct Testimony of James D. Williams at 12.

[486] Direct Testimony of James D. Williams at 13.

In light of this data, the Commission should implement OCC's recommendations. Specifically, the Commission should consider affordability when rendering a decision in this case and limit charges to customers..[487] The facts regarding the poverty in DP&L's service territory, the number of disconnections, and the already high level of customer bills should compel the Commission to carefully consider the impact, as well as justification for, the rate increases DP&L proposes in its ESP.

P. The Commission Should Initiate A Review Of DP&L's Credit And Collection Policies And Practices To Identify Ways To Reduce The High Number Of Disconnections.

The Commission should also initiate a review of DP&L's credit and collection policies and practices with the PUCO Staff and OCC, to seek cost-effective ways to reduce the number of disconnections.[488] While Ohio Admin Code 4901:1-18 provides minimum service standards, Mr. Williams testified that DP&L "can adopt other policies that are more conducive in helping reduce the number of disconnections."[489] DP&L should be encouraged to do so and, in particular, to consider the public interest in reducing disconnections as well as to assess the cost-effectiveness of different policies and practices in achieving that public interest objective.[490]

Mr. Williams emphasized that this review should not only consider families that qualify for the low-income PIPP Plus program but families that are above these income levels but still experience difficulty making their payments.[491]

[487] Direct Testimony of James D. Williams at 25.

[488] Direct Testimony of James D. Williams at 25.

[489] Direct Testimony of James D. Williams at 25.

[490] Direct Testimony of James D. Williams at 25.

[491] Direct Testimony of James D. Williams at 25-26.

OCC specified a range of steps that could be taken to assess the cause of DP&L's high level of disconnections and to make changes accordingly. These include:

> The review should consider the possibility of suspending disconnections during inclement weather, adjusting due dates when possible, reducing payment plan costs, suspension of delayed payment charges, and reducing bill payment charges. Suspension of disconnections during times of especially hot or cold weather is necessary given the health and safety concerns mentioned earlier. The review should also consider suspending disconnections when temperatures are below 32 degrees or higher than 90 degrees Fahrenheit. Furthermore, the review should include an examination of the effectiveness of medical certifications for customers who have chronic illnesses.[492]

Mr. Williams also emphasized that payment plans can be better customized to customers' payment needs.[493] Such changes include "lower out-of pocket upfront payments and the use of ceiling amounts," as well as the adjustment of due dates and the limitation of "additional bill payment charges" (such as late payment charges) in order to "make more resources available for actual payment of electric charges."[494]

In addition, the Commission should encourage DP&L to initiate a shareholder-funded bill payment assistance program until such time as the DP&L disconnection rate is more closely aligned with other Ohio electric utilities.[495] Mr. Williams testified that shareholder funding at a level of $1.5 million per year could help provide an incentive for reducing disconnections and potentially reduce the DP&L disconnection rate from the current 7.5 percent to a more comparable level.[496]

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[492] Direct Testimony of James D. Williams at 26-27.

[493] Direct Testimony of James D. Williams at 27.

[494] Direct Testimony of James D. Williams at 27.

[495] Direct Testimony of James D. Williams at 28.

[496] Direct Testimony of James D. Williams at 29.

There are numerous factors which contribute to the unaffordability of DP&L's rates to many customers, resulting in the high disconnection rate for its customers. The Commission must act with caution in reviewing DP&L's proposed ESP rate increases, direct an appropriate review of DP&L's credit and collection practices and policies, and encourage DP&L shareholders to increase their contribution to alleviating the difficult circumstances facing many customers in DP&L's service territory.

V. CONCLUSION

The Commission should reject the ESP because it fails to meet the statutory test mandated by Ohio law to protect customers. DP&L's proposed ESP is *not* more favorable in the aggregate as compared to the expected results that would otherwise apply under a Market Rate Offer under Ohio law. Using DP&L's filed 62% switching assumption, the proposed ESP produces results that are less favorable in the aggregate than the expected MRO results because the ESP results in $580.5 million in additional costs to customers over what should reasonably be expected under an MRO.[497] Assuming an increase in switching to 70% during the ESP, DP&L's proposed ESP produces results that are $669.9 million less favorable than the expected MRO results.[498]

Furthermore, there is no justification for DP&L's continuing delay in extending the benefits of competition to SSO customers. DP&L's SSO customers should see the full benefit of competition today, with a 100% CBP rate. Further subsidies of DP&L's generation, such as DP&L's proposed SSR and Switching Tracker, are simply uncalled

[497] Direct Testimony of Beth Hixon at Schedule BEH-1, $693.0 million cost in non-bypassable revenue, less $112.5 million benefit in bypassable revenue.

[498] Direct Testimony of Beth Hixon at Schedule BEH-2, $758.7 million cost in non-bypassable revenue, less $88.8 million benefits in bypassable revenue.

for. And subsidies are contrary to the General Assembly's longstanding objectives of bringing the benefits of competition to all customers, including those who choose to remain with SSO service. Accordingly, the Commission should reject DP&L's ESP proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Post-Heating Brief by the Office of the Ohio Consumers' Counsel, Public Version,* was served on the persons stated below via electronic transmission, this 20th day of May, 2013.

/s/ Melissa R. Yost
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