FILE

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

INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

TABLE OF CONTENTS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Dayton Power and Light Company ("DP&L") has requested approval of a standard service offer ("SSO") in the form of an electric security plan ("ESP"). DP&L's proposed ESP, however, is brimming with generation-related non-bypassable charges that deny customers the benefit of the "customer choice" rights which are vested in consumers by Ohio law. DP&L has attempted to justify the lion's share of its proposed non-bypassable charges—the Service Stability Rider ("SSR") and Switching Tracker ("ST")—based on a financial integrity claim which DP&L asserts has been legitimized by the Public Utilities Commission of Ohio ("Commission") in another proceeding.[1] More specifically, DP&L asserts that the Commission must authorize DP&L's generation-related non-bypassable charges to raise the electric bills of shopping and non-shopping customers because market prices available to DP&L's competitive generation business will not yield enough revenue to provide DP&L with a return on common equity ("ROE") that DP&L prefers.[2]

DP&L also is seeking Commission approval of several additional illegal non-bypassable riders, the Alternative Energy Rider-Non-bypassable ("AER-N"), the Reconciliation Rider ("RR"), and the Transmission Cost Recovery Rider-Non-bypassable ("TCRR-N"). These riders also are designed to deny customers the benefit of the "customer choice" rights which are vested in consumers by Ohio law.

Burdening customers with millions of dollars in non-bypassable charges, DP&L's proposed ESP is substantially more costly than the alternative Market Rate Offer ("MRO"). As a result, the proposed ESP fails to satisfy the statutory test that the ESP, including its pricing and all other terms and conditions, is more favorable in the aggregate than an MRO.[3]

The Commission must deny DP&L's request for approval of a legion of non-bypassable charges because they are unlawful, unjust and unreasonable. To remedy the unlawful and unreasonable aspects of DP&L's proposed ESP, the Commission may

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[11] *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 Nos. 11-346-EL-SSO, *et al.*, Opinion and Order (Aug. 8, 2012) (hereinafter "*AEP ESP II Order*").

[2] "DP&L has experienced a declining ROE since 2010, primarily driven by increased customer shopping and declining capacity prices and wholesale power prices, as shown on Second Revised Exhibit CLJ-1." DP&L Ex. 1 at 13.

[3] Section 4928.143(C)(1), Revised Code.

either reject the proposed ESP or modify the proposed ESP to remove the unreasonable and unlawful provisions and then approve the modified ESP proposal.

In the Initial Brief that follows, IEU-Ohio will explain why DP&L's proposed ESP is unreasonable and unlawful in the following specific respects:

- The proposed SSR and ST are unlawful and unreasonable because they would provide DP&L with the opportunity to collect "transition revenue" long after the opportunity ended by operation of Ohio law and in conflict with DP&L's Commission-approved settlement commitments.
- The proposed SSR and ST are unlawful and unreasonable since they are not permitted to be included in an ESP under Section 4928.143(B)(2), Revised Code, or otherwise.
- The proposed SSR and ST are unlawful and unreasonable because they violate corporate separation requirements and policy.
- The SSR and ST are unreasonable and unlawful because they would provide DP&L's competitive generation business with an unreasonable anticompetitive, discriminatory and non-comparable subsidy payable by shopping and non-shopping retail customers.
- The proposed ST is unreasonable and unlawful because it violates Section 4928.141, Revised Code, and amounts to retroactive ratemaking.
- DP&L has not met its burden of proof to demonstrate that it will be financially harmed or that it will not be able to access the capital markets if the SSR and ST are not approved.
- The proposed ESP is unreasonable and unlawful even if the Commission has authority to require retail consumers to pay non-bypassable charges to prop up DP&L's financial performance because DP&L has failed to satisfy the burden of proof that attaches, in accordance with Commission precedent, to proposals to increase rates for the purpose of protecting a utility's financial integrity.
- Any financial duress claimed by DP&L is self-inflicted due to its unlawful power sales agreement with its affiliates.
- The proposed AER-N is unreasonable and unlawful because it violates Sections 4928.64(E) and 4928.143(B), Revised Code, by allowing DP&L to recover the cost of complying with the alternative energy portfolio benchmarks through non-bypassable charges.
- The proposed non-bypassable transmission charge is unreasonable and unlawful because DP&L has not demonstrated that it should be granted a waiver of the requirement that transmission costs be bypassable for shopping customers.

- The proposed Reconciliation Rider is unreasonable and unlawful because it is non-bypassable and because, if approved, it would provide DP&L's competitive generation business with an anticompetitive, discriminatory and non-comparable subsidy funded by consumers.
- The proposed ESP is unreasonable and unlawful because the proposed ESP is not better than the MRO available under Section 4928.142, Revised Code.

II. BACKGROUND

A. DP&L's Successive Pleas for Non-Bypassable Charges to Prop Up Its Generation Business Earnings

On March 30, 2012, DP&L filed an application to establish a standard service offer ("SSO") in the form of an MRO ("MRO Application"). The MRO Application requested approval of a non-bypassable generation-related charge that would have provided DP&L with $73 million per year over the five-year term of the proposed MRO. In the MRO Application, DP&L proposed to establish the SSO generation supply price by procuring a portion of the SSO supply through a competitive bidding process ("CBP") and blending the CBP price with the legacy generation price. DP&L ultimately withdrew its MRO Application on September 7, 2012, shortly after the Commission approved Ohio Power Company's ("AEP-Ohio") ESP.

On October 5, 2012, DP&L filed an application seeking approval of an ESP (hereinafter "October 5 Application"). The October 5 Application proposed an ESP with a term of January 1, 2013 through December 31, 2017. In the October 5 Application, DP&L asserted that the non-bypassable generation-related charges proposed therein could be approved by the Commission to protect DP&L's financial integrity.[4]

DP&L's definition of financial integrity includes a laundry list of requirements that the proposed ESP must satisfy. DP&L asserts that an ESP must allow a utility an

[4] October 5 Application at 2.

opportunity to earn a reasonable return on its common equity because a utility's expected profits should be sufficient to not only motivate and enable it to provide safe and reliable service to its customers, but also avoid financial distress and provide a rate of return to investors commensurate with the risk they bear.[5] According to DP&L, if it is not provided a reasonable return on common equity, between [redacted],[6] its credit rating will decrease; DP&L's cost of capital will increase, which may in turn decrease DP&L's access to capital. As a result, DP&L claims its financial health may deteriorate and that such deterioration would potentially jeopardize its ability to provide safe and reliable service to customers. *Id.* [redacted]

Despite Ohio's longstanding corporate separation requirements and as an integral part of its financial integrity claims, DP&L also asserts that because it has not structurally separated its competitive business generating assets, DP&L's financial integrity must be considered and assessed on a total company basis including both competitive and non-competitive lines of business under common ownership. Regardless of DP&L's strategic maneuvering behind an invented total company shield, the evidence in this proceeding clearly shows that any projected financial underperformance is a result of revenue erosion to the competitive generation business

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[5] DP&L Ex. 4 at 9.

[6] DP&L Ex. 14 at 19.

from "customer shopping and declining capacity and wholesale power prices." DP&L Ex. 1 at 13, CLJ-1.[7]

DP&L, an electric distribution utility ("EDU"), has asserted that its financial integrity should be measured and evaluated based upon a total company basis despite Ohio's longstanding requirement that an EDU that provides competitive and non-competitive service operate must do so pursuant to a corporate separation plan that prevents the EDU's non-competitive lines of business from being used to benefit the competitive lines of business.

DP&L's October 5 Application requested that the Commission approve the collection of $120 million annually through a generation-related and electric bill-increasing non-bypassable rider, the SSR, which DP&L insisted was necessary to maintain its total company financial integrity. Based on this same financial integrity reasoning, DP&L also requested the Commission to authorize the ST. The ST is a generation-related and electric bill-increasing non-bypassable "true-up mechanism designed to compensate DP&L for lost revenues related to additional customer switching"[8] that occurs after August 30, 2012. For any incremental customer switching that occurs after August 30, 2012, DP&L would periodically compute the amount of revenue subject to collection through the ST charge, subtract the applicable generation supply price established by the CBP from the applicable overall SSO generation supply

[7] DP&L Ex. 1 at 13, CLJ-1. The Commission, however, has cast doubt on the recovery of the risk of migration, stating, "migration risk is 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." *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 or Transfer of Certain Generating Assets,* Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 22 (Oct. 3, 2011) (company failed to demonstrate out-of-pocket cost of serving provider of last resort ("POLR") obligation).

[8] DP&L Ex. 4 at Note 2.

price (a blend of the CBP price and legacy generation price)[9] and multiply the difference by the kilowatt-hour ("kWh") usage associated with the incremental customer migration away from the SSO. Under DP&L's proposal, the revenue amount produced by this math would be deferred for future collection. In simpler terms, the ST is designed to insulate DP&L's generation business from the risk of the competitive market by making DP&L whole for the revenue lost as a result of customers acting upon their right to obtain generation supply from a competitive retail electric service ("CRES") provider.[10] In effect, the ST is a shopping tax; it extracts from consumers the electric bill reduction value they would otherwise obtain as a result of switching to a CRES provider with a lower generation supply price than the SSO generation supply price available from DP&L as the default provider.

DP&L has proposed to begin collecting the ST shopping tax from customers on January 1, 2014 to amortize the deferred generation-related revenue produced by the math described above. The shopping tax would be collected from all customers and rate classes rather than directly assigned to those customers that switched after August 30, 2012.[11]

On December 12, 2012, DP&L amended its October 5 Application (the "Amended ESP Application") to fix numerous errors DP&L discovered in the October 5 Application. The bottom line is that the fixes introduced by DP&L made things even

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[9] October 5 Application at 3.

[10] Tr. Vol. II at 478-480.

[11] DP&L Ex. 9 at 17.

worse for consumers; the fixes escalated the annual amount of the proposed SSR to $137.5 million.[12]

The Amended ESP Application also requested Commission authorization to establish the Reconciliation Rider ("RR") which would, if approved, permit DP&L to collect from customers the costs associated with administering and implementing the CBP that DP&L has proposed as part of its Amended ESP Application and the costs of implementing certain competitive retail system enhancements. In addition, the proposed RR acts as a "circuit breaker" that would amortize, through cash collections, any deferred balance that exceeds 10% of the base recovery rate associated with any of the following "true-up" riders: the Fuel Rider, the PJM Reliability Pricing Model Rider ("RPM Rider"), the Transmission Cost Recovery Rider – Bypassable ("TCRR-B"), the Alternative Energy Rider ("AER"), and the Competitive Bid True-Up Rider ("CBT"). Finally, DP&L has proposed to split its current Transmission Cost Recovery Rider ("TCRR") into bypassable and non-bypassable components.

III. <u>ARGUMENT</u>

A. The Amended ESP Application Contains Unlawful and Unreasonable Generation Charges and Other Lost Revenue Provisions

1. The proposed SSR and ST are unlawful and unreasonable because they would provide DP&L with the opportunity to collect "transition revenue" long after the opportunity ended by operation of Ohio law and in conflict with DP&L's Commission-approved settlement commitments

The law and the facts in this proceeding are quite clear: any collection mechanism that permits DP&L to impose above-market generation-related charges on consumers is unlawful because such a mechanism would allow DP&L to collect

[12] Amended ESP Application at 8.

"transition revenue" long after such collection is barred by Ohio law. Both the Ohio Revised Code and the stipulation and recommendation ("ETP Stipulation") approved in DP&L's Electric Transition Plan ("ETP") proceeding[13] prohibit DP&L from collecting any more transition revenue. While the form of DP&L's request may go by a different name than the transition revenue claim previously advanced by DP&L in its ETP proceeding, it is clear that the SSR and ST are, in substance, another claim for generation plant-related transition revenue.[14] The proposals which DP&L has put forward are designed to provide it with generation-related revenue it claims it will lose as a result of customers shopping to obtain better retail generation supply prices and the lower prices in the wholesale electric market. The effect of these riders is to deny customers the benefits of shopping that are now available in the electric market.

a. Amended Substitute Senate Bill 3 and the opportunity to collect transition revenues

In 1999, the approval of Amended Substitute Senate Bill 3 ("SB 3") fundamentally altered the law governing the structure and regulation of the electricity industry in Ohio.[15] As part of the restructuring, SB 3 established a "transition period" beginning on January 1, 2001 and ending no later than December 31, 2010.[16]

Within this transition period, SB 3 created a five-year market development period ("MDP") during which incumbent investor-owned utilities and customers had the

[13] *In the Matter of the Application of the Dayton Power and Light Company for Approval of Transition Plan and Pursuant to § 4928.31, Revised Code, and for an Opportunity to Receive Transition Revenues as Authorized Under §§ 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.*, Stipulation and Recommendation at 10 (Jun. 2, 2000).

[14] IEU-Ohio Ex. 3. 4, 16-26.

[15] IEU-Ohio Ex. 2 at 24-27; IEU-Ohio Ex. 3 at 6-26.

[16] Section 4928.40, Revised Code; IEU-Ohio Ex. 2 at 24-27; IEU-Ohio Ex. 3 at 6-26.

opportunity to prepare for and transition to a competitive market.[17] SB 3 directed the Commission to structure transition plans with the objective of obtaining at least 20% customer switching by the mid-point of the MDP which could end no later than December 31, 2005.[18]

The evolutionary approach to restructuring the retail investor-owned electric industry in Ohio, accompanied by the completion of the transitional tasks, served two important objectives.[19] The first objective was to provide customers with certain price protections from the dysfunction that is often associated with new and immature markets until such time as the retail market was mature enough to produce "reasonable" prices.[20] The General Assembly protected customers by specifying that the total price of electricity in effect in October 1999 would define the total price envelope within which the individual or unbundled generation, transmission and distribution prices would be established through the transition plan process.[21] SB 3 also provided residential customers an immediate benefit in the form of a 5% discount on the unbundled generation price.[22]

The second consequence of the SB 3 restructuring protected incumbent EDUs during the MDP (from the effective date of SB 3 until December 31, 2005) from potential

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[17] *Id.*; IEU-Ohio Ex. 2 at 25.

[18] Section 4928.40, Revised Code.

[19] IEU-Ohio Ex. 2 at 25.

[20] IEU-Ohio Ex. 2 at 25.

[21] The total bundled price for each electric rate schedule established the total rate cap, which is then divided between the functional components (generation, transmission, and distribution). Ohio provided, in Section 4928.34(A)(6), Revised Code, that such rate cap was subject to adjustment for changes in taxes, costs related to the establishment of a universal service fund ("USF"), and a temporary rider established by Section 4928.61, Revised Code. Thus, the rate cap was not an absolute cap on the total charges paid by customers during the MDP.

[22] Section 4928.40, Revised Code.

revenue loss that might otherwise be caused by an abrupt exposure to a new and immature market where customers had the ability to obtain generation supply from a CRES provider.[23] In 2001, price offers for competitive retail service were relatively low and the transition structure protected EDUs from revenue and earnings erosion.[24]

To protect EDUs from revenue erosion, SB 3 provided each EDU with the opportunity to protect itself in the event the EDU judged its unbundled generation prices to be in excess or above the generation service prices that would result from the forces of effective competition.[25] The opportunity to pursue this protection required an EDU to file a claim with the Commission for "transition revenue" (*i.e.*, the positive difference between existing unbundled generation prices and the unbundled prices attributed by the EDU to effective competition—sometimes called "stranded costs") as part of the ETP filings.[26]

As DP&L witness Chambers stated, from an economic standpoint, the purpose of a transition charge is to compensate a utility when its assets would not be competitive when subjected to market prices.[27] Other purposes include ensuring that a utility can pay the legacy debt on its books[28] or to protect the financial integrity of a utility.[29] A transition charge may recognize the market value of an asset is less than its book value and provide some means for a utility to recover the differential in cost.[30] But, as DP&L

[23] IEU-Ohio Ex. 2 at 26.

[24] IEU-Ohio Ex. 2 at 26.

[25] IEU-Ohio Ex. 3 at 16-18; IEU-Ohio Ex. 2 at 26-27.

[26] IEU-Ohio Ex. 3 at 17; IEU-Ohio Ex. 2 at 26.

[27] Tr. Vol. II at 536-537.

[28] Tr. Vol. II at 537.

[29] Tr. Vol. II at 537.

[30] Tr. Vol. II at 536.

witness Chambers stated, there are several different ways to calculate transition costs.[31]

All generation plant-related transition revenue was required to be collected by December 31, 2005, and all regulatory assets were required to be collected by December 31, 2010.[32] SB 3 contains the criteria that the Commission applied to determine how much, if any, of the transition revenue claim was eligible for recovery.[33]

SB 3 did not require transition revenue to be addressed unless the EDU submitted a claim for transition revenue.[34] A transition revenue claim was eligible for collection through transition charges if the revenue claim was limited to: (1) costs that were prudently incurred; (2) costs that were legitimate, net verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (3) costs that were unrecoverable in a competitive market; and (4) costs that the utility would otherwise have been entitled an opportunity to recover.[35] All four of these criteria had to be satisfied for the transition revenue claim to be recoverable from shopping and non-shopping customers.[36] These criteria were applied to determine the total amount of transition revenue that was eligible for collection through transition charges ***if*** an EDU submitted a claim for transition revenue.[37]

When the Commission approved a transition revenue claim, it also approved transition charges that the EDU could then charge shopping customers for the period

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[31] Tr. Vol. II at 540-541.

[32] Section 4928.40, Revised Code; Section 4928.38, Revised Code.

[33] Section 4928.39, Revised Code.

[34] IEU-Ohio Ex. 3 at 18.

[35] Section 4928.39, Revised Code.

[36] *Id.*

[37] IEU-Ohio Ex. 3 at 18.

specified by the Commission.[38] For non-shopping customers, the transition charges were embedded in the default generation supply SSO price and were equal to the portion of the applicable default generation supply price that was not avoidable by shopping customers.[39]

The total allowable amount of any transition revenue claim was separated if a portion of that total claim involved generation-related regulatory assets.[40] SB 3 limited the Commission's ability to make adjustments to the regulatory asset portion of an allowed transition charge and also required the regulatory asset portion of a transition charge to end no later than December 31, 2010.[41]

If an EDU wanted to make a claim for transition revenue, it had to include the claim in its proposed ETP.[42] A proposed ETP had to be filed 90 days after the effective date of SB 3.[43] The statutory criteria discussed above were then used to determine how much of the transition revenue claim was eligible for collection through transition charges. For the generation plant-related portion of the transition revenue claim, the net book value of generating assets at December 31, 2000 was used as the baseline to determine how much, if any, of the net, verifiable, prudently incurred book value was not

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[38] IEU-Ohio Ex. 3 at 17.

[39] IEU-Ohio Ex. 3 at 17, 22.

[40] Section 4928.39(D), Revised Code.

[41] Under SB 3 the non-regulatory asset portion of any transition charge which was associated with above-market generating plants had to end by no later than December 31, 2005 or the end of the MDP, whichever occurred first. Section 4928.40, Revised Code.

[42] Section 4928.31 (A)(5), Revised Code.

[43] Section 4928.31(A), Revised Code.

recoverable in the market and, in this context, the market included the wholesale and retail segments.[44]

Amended Substitute Senate Bill 221 ("SB 221") did not provide utilities a second bite at the transition cost recovery apple. SB 221 expressly provided that "[a] standard service offer under section 4928.142 or 4928.143 of the Revised Code 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."[45]

b. DP&L's ETP Case

DP&L filed its proposed ETP on December 20, 1999.[46] As a part of its proposed ETP, DP&L submitted a claim for transition revenue that included both above-market generation plant costs (Consumer Transition Charge or "CTC") and a regulatory asset component (Regulatory Transition Charge or "RTC").[47] DP&L relied upon witness Ralph L. Luciani to estimate the extent to which it had a basis for claiming generation plant-related transition revenue.[48] DP&L witness Richard D. Reid estimated the regulatory assets that DP&L requested.[49]

To determine the above-market cost of DP&L's generating assets, Mr. Luciani used a "Lost Book Value Under a Continued Ownership" approach.[50] Generally, this approach produces a present value of the future market-based after-tax cash flows for

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[44] IEU-Ohio Ex. 3 at 21.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

the various generating plants minus the net book value of the generating plants as they were valued at December 31, 2000.[51] Generation plant-related transition costs were deemed to be positive (and potentially eligible for recovery through transition charges) if the present value of the projected cash flow was, in the aggregate, less than the net book value of the generating plants at December 31, 2000.[52] Again, the generation plant-related transition revenue had to be recovered during the period beginning January 1, 2001 through either the end of the MDP or December 31, 2005, whichever occurred first.[53] Mr. Luciani projected market-based generation revenue, expenses, and capital expenditures for the period 2001 through 2031.[54] He discounted these projections to December 31, 2000 to develop his net present value revenue stream and then compared this net present value to the net generation plant and associated asset book values as of the same date, December 31, 2000.[55] From this comparison, he rendered an opinion on the amount of generation plant-related transition revenue that the Commission should approve for DP&L.[56] The results of his analysis are summarized in his Exhibit RLL-6 that DP&L filed December 20, 1999 as a part of its ETP case.[57] He estimated that there was $231 million of stranded generation-related costs, valued at December 31, 2000.[58] DP&L's request also included a carrying cost of

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[51] *Id.*

[52] *Id.* at 21-22.

[53] *Id.* at 22.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] IEU-Ohio Ex. 3 at Exhibit RLL-6.

[58] IEU-Ohio Ex. 3 at 21-22

$210 million (9.2% carrying cost rate) for a total recovery of $441 million.[59] The recovery mechanism for this item was the CTC for shopping customers.[60] The CTC was to be paid by all distribution customers and was unavoidable for shopping customers.[61] For non-shopping customers the transition revenue charge was embedded in the default generation supply price.[62]

As a part of its ETP filing, the method used by DP&L to value its transition costs included market-based generation revenues as an increase to cash flows and projected generation costs as a decrease to cash flows.[63] Any lost generation revenues (capacity and energy), whether as a result of decreases in overall market rates or decreases in the generation outputs of the individual units, were picked up in the transition cost calculations supported by DP&L.[64] These items are identified in Mr. Luciani's Direct Testimony, RLL Attachment 1, which was attached to IEU-Ohio witness Hess' testimony in this proceeding as JEH Attachment K.

Mr. Luciani also considered another revenue-based approach he titled "Lost Revenue under Continued Ownership."[65] This method would have quantified transition costs by calculating the present value of the difference between future annual market revenues and future annual revenue requirements under traditional cost-based ratemaking.[66] He explained that this method was equivalent to the "Lost Book Value

[59] *Id.* at 22.

[60] *Id.* at 22.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 25.

[64] *Id.*

[65] *Id.*

[66] *Id.*

Under Continued Ownership" method he utilized and proved that, theoretically, these methods would produce the same result.[67]

In addition to the transition costs identified by Mr. Luciani, DP&L also requested authorization to recover generation-related regulatory assets that DP&L claimed were transition costs.[68] Mr. Reid estimated that value at December 31, 2000 to be $171 million.[69] The recovery mechanism (RTC) for this item was calculated and subtracted from the unbundled generation rate.[70] The RTC was to be paid by all distribution customers and could not be avoided or bypassed by shopping customers.[71]

As part of a Stipulation and Recommendation that was approved by the Commission, DP&L agreed that recovery for CTC and RTC would end on December 31, 2003 and that "there will be no further netting or adjustments of any kind to any rate, CTC rate, RTC rate, or shopping credit through December 31, 2003, including, but not limited to, adjustments for the sale, lease, or transfer of any assets by DP&L or any of its affiliates."[72] DP&L also agreed that its MDP would end on December 31, 2003 based upon its agreement to forgo the recovery of transition costs beyond that date.[73]

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[67] *Id.* at 25-26.

[68] IEU-Ohio Ex. 3 at 23.

[69] This included deferral of regulatory assets for Demand-Side Management, Percentage of Income Payment Plan ("PIPP") costs, Station Emission Fees, Phase-In Deferral Costs, Deferred Interest–Zimmer, Killen Post In Service Accounting for Funds During Construction ("AFUDC"), Unamortized Debt Discount and Financial Accounting Standards 109 Net Assets. *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 23-24.

[73] The MDP was extended until December 31, 2005 through a subsequent stipulation. *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 Nos. 02-2779-EL-ATA, *et al.*, Opinion and Order at 13 (Sep. 2, 2003).

Based on the law and DP&L's ETP Stipulation, the time for transition cost recovery is over. The potential for generation-related earnings erosion and lost revenue resulting from Ohio's customer choice regulatory model was analyzed and accounted for as a part of the transition from cost-based regulation to market-based regulation in DP&L's ETP as required by SB 3. The amount of above-market generation plant costs recoverable by DP&L was resolved in the ETP case. The period for the recovery of CTCs ended no later than December 31, 2005, and the recovery of RTCs ended no later than December 31, 2010. Section 4928.38, Revised Code, prohibits the recovery of transition revenues or their equivalent after December 31, 2005 (emphasis added):

> The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues ***or any equivalent revenues*** by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code. [74]

By the express terms of both the Commission-approved Stipulation and Recommendation and Ohio law, DP&L is prohibited from proposing and charging a generation-related lost revenue charge, regardless of what it is called or the methodology by which it is computed.[75]

c. *The SSR and ST are illegal attempts to collect transition revenue*

As discussed below, DP&L's SSR and ST proposals are strategically asymmetrical, unbalanced, unjust, unreasonable and unlawful, attempts to recover additional transition revenue. As proposed by DP&L, the SSR and ST are designed to

[74] Section 4928.40, Revised Code, required all regulatory assets to be fully recovered by December 31, 2010.

[75] *Id.*

ensure that DP&L, on a total company basis, earns its desired return on common equity over the ESP. DP&L witness Malinak, in his rebuttal testimony, claimed the SSR does not constitute a request for additional transition revenue because the SSR does not recover a specific generation cost and that the SSR does not fit within the statutory criteria contained in Section 4928.39, Revised Code, related to permissible transition costs.[76] Witness Malinak's efforts to distinguish the SSR from transition revenue are meritless.

The differential used to calculate the SSR is based on the "lost" revenue associated with customer shopping, lower wholesale revenue, and lower capacity prices.[77] As a means of providing DP&L with generation-related revenue it could not recover in the market, the SSR and ST are nothing more than prohibited transition revenue recovery mechanisms.

In contrast to Mr. Malinak's unsupported assertion that the SSR and ST do not recover transition revenue or its equivalent, DP&L's own witness, Dr. Chambers, stated that if DP&L's ROE deficiency is being driven by lower-than-desired generation revenue, and the SSR was designed to make up the difference, then the SSR is equivalent to a transition charge.[78] Each of the parts of Dr. Chambers' definition of a transition charge is evident in the SSR and ST. Both are designed to make up the difference in generation-related revenue caused by the effects of lower market prices and customer shopping.

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[76] DP&L Ex. 14 at 17-18.

[77] DP&L Ex. 1 at 13, Ex. CLJ-1.

[78] Tr. Vol. II at 540-541.

Further, Dr. Chamber's correctly concluded that ratepayers should not be expected to protect the financial integrity of a utility's non-regulated lines of business.[79] The conclusion that ratepayers are not responsible for protecting DP&L from market related declines in revenue is consistent with Ohio law's requirement that the EDU be on its own in a competitive market.[80]

As discussed above, DP&L's claim for above-market generation transition revenue is meritless. The one-and-done opportunity to recover above-market generation revenue was through the ETP process. After the expiration of the market development period, Section 4928.38, Revised Code, prohibits the Commission from authorizing additional transition revenue ***or its equivalent***. Electricity generation assets must stand on their own in the competitive market. Based on the unequivocal restriction on the Commission's authority, the ETP settlement, and the unrebutted testimony that DP&L is seeking above-market generation revenue, the Commission cannot authorize the SSR and ST.

2. The SSR and ST are not permitted under Section 4928.143(B)(2), Revised Code

The Commission is strictly bound by Section 4928.143(B)(2), Revised Code, as to the provisions it may authorize in an ESP. "[I]f a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[81] DP&L has the burden of proof to establish the right to a charge in an ESP.[82] Based on the

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[79] Tr. Vol. II at 549.

[80] Section 4928.38, Revised Code.

[81] *In re Application of Columbus Southern Power Co,* 128 Ohio St.3d at 512, 520 (2011) (hereinafter "*Remand Decision*").

[82] Section 4928.143(C)(1), Revised Code.

record, DP&L has not demonstrated that the proposed SSR or ST may be approved as part of an ESP.

DP&L has claimed that the SSR and ST should be authorized under Section 4928.143(B)(2)(d), Revised Code, but DP&L has failed to demonstrate that the requirements of that division are satisfied. Section 4928.143(B)(2)(d), Revised Code, permits "[t]erms, conditions, or charges relating to customer shopping for retail electric generation service, bypassability, ... [and] default service... as would have the effect of stabilizing or providing certainty regarding retail electric service." Retail electric service is defined by Section 4928.01(A)(27), Revised Code, to mean "any service involved in the supplying or arranging of electricity to ultimate customers in this state." The terms "certainty" and "stabilizing," however, are not defined in Chapter 4928, Revised Code. Due to the lack of statutory definition, it is necessary to rely on the ordinary and appropriate dictionary meaning of the term.[83] Under that standard, the ordinary and appropriate definition of "certainty" is that the subject is made more probable of occurrence.[84] "Stabilizing" denotes "to hold steady."[85] Because the burden of proof rests with DP&L to demonstrate that the charge is reasonable and lawful, DP&L was required to show that the SSR was necessary to make it probable that customers would receive retail electric service or to hold steady the provision of retail electric service.

DP&L's witness supporting its request for the SSR failed to demonstrate that the SSR satisfies the provisions of Section 4928.143(B)(2)(d), Revised Code. That witness,

[83] *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049 ¶ 14 (quoting *Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70 (1988) ("[w]here a particular term employed in a statute is not defined, it will be accorded its plain, everyday meaning.").

[84] Webster's Ninth New Collegiate Dictionary at 223 (1983).

[85] *Id.* at 1146.

Dona Seger-Lawson, testified that, as a factual matter, the SSR satisfies the criteria of Section 4928.143(B)(2)(d), Revised Code, because it "relates to default service, since DP&L will be providing SSO service during the SSO term."[86] She further stated that the "non-bypassable nature of the SSR means that it relates to bypassability."[87] Finally, she claimed the SSR would provide stability and certainty:

> It would stabilize retail electric service provided by DP&L because it would help to assure DP&L's financial integrity which is important to the company's ability to provide stable, safe, and reliable electric service. It would provide certainty regarding retail electric service because it would help to strengthen DP&L's financial integrity and because the SSR is important to allowing a multi-year ESP, which itself provides certainty regarding retail electric service.[88]

Similarly, DP&L witness Chambers claimed that the SSR will provide DP&L with a "[redacted]."[89] According to Dr. Chambers, [redacted]."[90]

The common thread in the testimony of DP&L's witnesses is that the SSR is necessary to assure DP&L's financial integrity and allow DP&L to maintain "stable, safe, and reliable electric service." While Ms. Seger-Lawson and Dr. Chambers were making broad claims regarding the SSR, DP&L witness Craig Jackson undermined those claims when he acknowledged that DP&L's retail service would not be less stable or certain if the Commission refused to authorize the rider. During his cross-examination, DP&L witness Jackson testified that he believed that DP&L's transmission and distribution

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[86] DP&L Ex. 12 at 23.

[87] DP&L Ex. 12 at 23.

[88] DP&L Ex. 12 at 23.

[89] DP&L Ex. 4A at 54.

[90] *Id.*

businesses received adequate revenue to ensure reliable service.[91] He also agreed that because DP&L operates within the PJM system, the reliability of retail generation service is a function of PJM's management practices and reliability assurance responsibilities.[92] Because DP&L operates in the PJM system, Mr. Jackson conceded that if DP&L did not have any generating facilities or if DP&L's generating facilities did not run, PJM would still dispatch resources under its control to satisfy the needs of DP&L's customers.[93]

Further, there is nothing certain or stable in the rates that would result from DP&L's proposed ESP. The proposed multi-year ESP contains several riders that fluctuate and cause uncertainty to customers' electric bills. Moreover, a multi-year ESP containing a non-bypassable charge provides less stability and certainty to customers than a single year ESP with no non-bypassable charge. And an MRO would provide more stability than DP&L's Amended ESP Application laden with hundreds of millions of dollars in non-bypassable charges. The only thing that is stabilized or made certain by the SSR and ST is DP&L's income statement.

It is also important to note that charges that may be authorized under Section 4928.143(B)(2)(d), Revised Code, bring into play the rights of governmental aggregators to avoid charges as provided by Section 4928.20, Revised Code. [redacted]

[91] Tr. Vol. I at 242.

[92] Tr. Vol. I at 172.

[93] *Id.*

[redacted].[94]

Because there has not been any demonstration that the SSR would have the effect of providing stability or certainty in the provision of retail electric service, the Commission has no basis to find that the SSR can be authorized under Section 4928.143(B)(2)(d), Revised Code.

3. The SSR violates corporate separation requirements and policy

[redacted].[95] DP&L claims that until it separates its generating assets, the Commission should ensure that the financial integrity of DP&L as a whole (distribution, transmission, and generation) is secure. As discussed below, DP&L's request violates corporate separation requirements.

SB 3 required EDUs to structurally separate their generating assets, but permitted an EDU to operate under functional separation during an interim period. Nonetheless, functionally separated EDUs are held to the same standards as legally or structurally separate EDUs. As the Commission has stated, "functional separation allows greater opportunity for cross-subsidization and other forms of anti-competitive behavior as compared with structural separation. Therefore, more stringent oversight is

[94] Tr. Vol. XI at 2838-40. Moreover, under Section 4928.20(K), Revised Code, the Commission must consider the effect on large scale governmental aggregation of any non-bypassable generation charges.

[95] Tr. Vol. I at 28-29, 116-117; Tr. Vol. II at 471.

justified."[96] Thus, the Commission's rules define affiliates as "companies that are related to each other due to common ownership or control. The affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service." Rule 4901:1-37-01(A), Ohio Administrative Code ("OAC"); Rule 4901:1-20-16(B)(1), OAC.

For an EDU to provide both the competitive and non-competitive electric service, it must operate under a corporate separation plan that is consistent with state policy enumerated in Section 4928.02, Revised Code, and that ensures that the EDU providing non-competitive service does not provide a competitive advantage or preference to any part of its business that supplies competitive retail electric service.[97] As DP&L witness Timothy Rice, a DP&L attorney that provided testimony regarding DP&L's corporate separation compliance, stated in simpler terms, one of the purposes of corporate separation is to prevent an incumbent utility from favoring or providing an advantage to its generating assets.[98]

DP&L's corporate separation plan contains provisions to separate DP&L's competitive and non-competitive businesses. [redacted]

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[96] *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, Finding and Order at 26 (Nov. 30, 1999) (hereinafter "*ETP Rulemaking*").

[97] *See, e.g.*, Section 4928.17(A)(2) and (3), Revised Code; Chapter 4901:1-20, OAC; IEU-Ohio Ex. 3 at 6-12. *See also* Tr. Vol. III at 708.

[98] Tr. Vol. III at 707. Moreover, DP&L witness Chambers agreed that, as a general rule, ratepayers should not be expected to protect the financial integrity of a utility's non-regulated lines of business. Tr. Vol. II at 549.

[redacted] Despite DP&L's failure to provide projected returns for its different lines of business, the evidence demonstrates that DP&L is seeking to prop up its total company returns by assessing all distribution customers for the losses it is incurring through the competitive generation segment of its business.[99] Increasing revenues through the SSR and ST to offset revenue lost by the portion of DP&L's business that provides competitive retail electric service is an unlawful misuse of the EDU's status and responsibility as the SSO default supplier, and provides an undue preference, advantage, and subsidy to the portion of DP&L's business that provides competitive retail electric services in direct violation of both Ohio's statutes and the Commission's rules. Section 4928.17(A)(2) and (3), Revised Code; Section 4928.02(H), Revised Code.[100]

The total company financial review advocated by DP&L effectively and improperly re-bundles 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 non-competitive services in the retail and wholesale markets. It is unlawful and improper to bundle competitive generation service together with distribution service, a non-competitive and regulated service.[101]

4. The SSR and ST would result in an unlawful and unreasonable anticompetitive, non-comparable and discriminatory subsidy

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[99] DP&L Ex. 1 at 13.

[100] *See also* IEU-Ohio Ex. 3 at 12.

[101] IEU-Ohio Ex. 3 at 15.

The SSR and ST are structured to provide an unlawful subsidy to DP&L's generation business. As is clear from the testimony of DP&L's chief financial officer, Craig Jackson, DP&L's earnings erosion is being driven by switching, low wholesale capacity prices, and low wholesale energy prices.[102] DP&L has requested that the Commission approve the SSR and ST to prop up the earnings of its generation business and provide a competitive advantage to DP&L that CRES providers simply do not have.[103] The favoritism that DP&L seeks violates Ohio law.

Section 4928.02(H), Revised Code, states the general policy prohibiting anticompetitive subsidies. In AEP-Ohio's *Sporn* proceeding, the Commission held that pursuant to Section 4928.02(H), Revised Code, AEP-Ohio was not entitled to a rider through which it sought to recover costs it alleged resulted from the closure of the Sporn 5 generating unit.[104] The Commission concluded that such a rider would effectively subsidize AEP-Ohio's generation, in violation of Section 4928.02(H), Revised Code.[105] Likewise, in Duke Energy Ohio Inc.'s MRO case, the Commission rejected a "circuit breaker" provision—a provision similar to the RR—which sought to make a bypassable generation charge non-bypassable after a certain threshold was reached. The Commission stated:

> Specifically, Section 4928.02(H), Revised Code, provides that it is the policy of the state to avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service and vice versa. If Duke were permitted to recover the costs included in

[102] DP&L Ex. 1 at 13.

[103] *See generally* Tr. Vol. II at 528-532; *See also* Tr. Vol. II at 479-480.

[104] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Opinion and Order at 19 (Jan. 11, 2012) (hereinafter "*Sporn Decision*").

[105] *Id.*

> Rider SCR from shopping customers, under any circumstances, we believe that it would create an anticompetitive subsidy.[106]

The Commission correctly concluded that a non-bypassable charge to recover generation-related costs would result in a subsidy of the generation business by distribution customers.[107] The reason for Ohio's prohibition on subsidies is clear. As conceded by DP&L witness Chambers, subsidies have a negative effect on competition.[108]

The SSR and ST violate Ohio's statutory prohibition on recovering generation-related costs through transmission or distribution rates. Despite this prohibition, DP&L has proposed that the SSR and ST, which are designed to recover generation-related costs, be non-bypassable. Thus, these provisions violate state law prohibiting the recovery of generation-related costs through distribution rates.[109] DP&L's corporate separation attorney, witness Rice, agreed that if the SSR was designed to provide financial support to DP&L's generation business, it would be a subsidy due to its non-bypassable nature.[110] Moreover, the SSR and ST would provide a discriminatory and non-comparable advantage to DP&L's generating assets. Because the uncontested evidence demonstrates that the SSR and ST are designed to support DP&L's generation business, the SSR and ST are unlawful anticompetitive, non-comparable and discriminatory subsidies that must be rejected.

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[106] *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 63 (Feb. 23, 2011).

[107] *Sporn Decision* at 19.

[108] Tr. Vol. II at 529-531.

[109] Section 4928.02(H), Revised Code.

[110] Tr. Vol. III at 742. DP&L witness Jackson did not deny that the SSR is a $137.5 million annual subsidy. Tr. Vol. I at 139.

5. DP&L has not met its burden of proof to demonstrate that it will be financially harmed or that it will not be able to access the capital markets if the SSR and ST are not approved

DP&L claims that it will suffer financial injury if not authorized to collect the SSR and ST. DP&L claims that the resulting financial duress will lead to a degradation of its credit rating, which will limit its access to capital. [redacted][111]

First, DP&L's claim that its financial duress may damage its credit rating violates commitments that AES Corporation ("AES") and DPL Inc. made to the Commission to support their merger. AES Corporation and DPL Inc. committed to protect the creditworthiness of DP&L as a merger condition.[112] In its Finding and Order approving the merger of DPL Inc., DP&L, and AES Corporation, the Commission noted that AES and DPL Inc. both "committed to maintain DP&L's credit rating at investment grade"[113] and the Commission relied on this commitment in approving the merger.[114] Rather than authorizing DP&L to increase revenue through non-bypassable charges, AES and DPL Inc. must be required to honor their merger commitments.

DP&L witness Chambers confirmed the significance of commitments from AES and DPL Inc.[115] Because AES and DPL Inc. have embodied their commitment in public documents submitted to and relied upon by the Commission in the Order approving the

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[111] DP&L Ex. 4A at 35, 52.

[112] IEU-Ohio Ex. 19 at 4.

[113] *In the Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company for Consent and Approval for a Change of Control of The Dayton Power and Light Company*, Case No. 11-3002-EL-MER, Finding and Order at 6,13 (Nov. 22, 2011).

[114] *Id.*

[115] Tr. Vol. II at 520.

merger, the credit rating commitment may be enforced by the Commission *sua sponte*, or through a complaint proceeding requesting that AES and DPL Inc. comply with the terms of the merger. Given AES's and DPL Inc.'s obligation to maintain DP&L's credit rating, it would be unlawful and unreasonable to shift this obligation onto customers through non-bypassable charges.

Second, the results of this case and DP&L's future credit rating will have no effect on DP&L's ability to refinance [redacted] in First Mortgage Bonds because DP&L expects to refinance those bonds prior to finishing the briefing cycle in this case. Specifically, on May 9, 2013, AES indicated in the AES Corporation 2013 Investor Day presentation that it will refinance or reduce $700 million of DPL Inc. and DP&L debt by the end of May 2013.[116] DP&L anticipates extending its debt maturities to 2016.[117]

Third, debt refinancing and merger commitments aside, DP&L has failed to demonstrate that it needs a legion of non-bypassable charges to avoid financial duress. The foundation of DP&L's financial integrity claim is built upon DP&L witness Jackson's financial projections; specifically, Exhibit CLJ-2. Witness Jackson testified that six key assumptions impact his financial projections.[118]

But, as witness Jackson conceded, Exhibit CLJ-2 was created exclusively for this case. It has no other purpose.[119] A closer examination of each of these assumptions

[116] Concurrently with this Initial Brief, IEU-Ohio has filed a Motion to Take Administrative Notice or in the Alternative to Reopen This Proceeding or in the Alternative to Supplement the Record to admit into evidence IEU-Ohio Supplemental Exhibit 1, which includes excerpted portions of the AES Corporation Investor Day Presentation.

[117] *Id.*

[118] Distribution baseline sales volumes and SSO sales volumes, operations and maintenance ("O&M") expense forecast, generation dispatch forecast, commodity prices, capital expenditures forecast, and switching forecast

[119] Tr. Vol. I at 151.

reveals that DP&L's financial integrity claim is based upon a rotten foundation—[redacted] of the assumptions for Exhibit CLJ-2 are incorrect. The evidence in this case demonstrates that the following incorrect assumptions are reflected in Exhibit CLJ-2:

[redacted]

Even if DP&L could demonstrate that there is a legal basis for either the SSR or ST to protect DP&L's "financial integrity" (which it cannot), DP&L has not carried its burden of proof to demonstrate that DP&L's financial integrity is at risk.

First, witness Jackson overstated [redacted] were included in Exhibit CLJ-2. Mathematically, these reductions allow DP&L to decrease the SSR on a dollar-for-dollar basis and achieve the same level of net income.[120] [redacted].[121] Although Mr. Jackson did not update his forecast, [redacted] reductions. Moreover, the Commission has held that when a utility is requesting financial assistance, it must undertake all possible expense reductions and revenue enhancements:

> [M]ost importantly, the Commission believes that the companies absolutely must take very aggressive steps to enhance their revenues and minimize their expenses particularly during this interim period in order to avoid the negative consequences of the current financial emergency. . . . What has been presented in terms of reduction of expenses in this record does not inspire us to the belief that these companies as yet comprehend the concept of "austerity" -- a concept which is mandatory in a financial emergency such as the one these companies face.[122]

[redacted]

Second, DP&L understated the generation dispatch assumed in the financial projections. According to Staff witness Timothy Benedict, DP&L understated its

[120] Tr. Vol. IV at 1009.

[121] Tr. Vol. I at 190.

[122] *In the Matter of the Application of The Cleveland Electric Illuminating Company and The Toledo Edison Company for Emergency Rate Relief*, Case No. 88-170-EL-AIR, Opinion and Order at 15-16 (Aug. 23, 1988) (hereinafter "*CEI Emergency Rate Relief Case*").

generation output by [redacted] Using DP&L's own forecast of forward power prices,[123] witness Benedict calculated that the increased output would improve DP&L's operating income by [redacted].[124] Again, these values would apply as a dollar-for-dollar reduction to the SSR.

Third, Staff witness Hisham Choueiki testified that DP&L's financial projections rely upon forward power prices that are understated by approximately $3 to $5/MWH over the term of the ESP recommended by Staff.[125] [redacted] Moreover, Mr. Benedict's calculations, described above, did not account for the increase in power prices.[126] Thus, Mr. Benedict's calculations are conservative. The increased value that DP&L will recognize from the higher power prices can be derived through simple math: $4 (the midpoint of the expected increase in power prices) multiplied by the increased generation dispatch would cause an increase in DP&L's operating income by [redacted]. This additional value would act as a dollar-for-dollar reduction to the SSR.

[redacted]

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[123] Tr. Vol. VI at 1522-24.

[124] Staff Ex. 3A at 10.

[125] Tr. Vol. VII at 1871-1873.

[126] Id. at 1872-73.

[redacted]

[redacted] overstatement would increase DP&L's income and operate as a dollar for dollar decrease to the SSR.

Fifth, DP&L overstated the amount of switching that will occur during the ESP period.[127] Witness Hoekstra assumed that switching would rise from [redacted] in 2017. DP&L's forecasted switching was flatly rejected by the Commission Staff because, over

[127] This overstatement impacts the information on witness Chambers' Exhibit WJC-3 and WJC-5. Witness Jackson did not include any exhibit to demonstrate the impact of switching.

a ten-year period, there has never been an increase in switching at the magnitude projected by DP&L.[128] Staff witness Choueiki testified that a more appropriate switching forecast would be [redacted]. The impact of changing this one variable cannot be overstated. [redacted]

[redacted]

	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]		
[redacted]	[redacted]	[redacted]	[redacted]		
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]		
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

Finally, witness Jackson's exclusion [redacted], and utilization of what he called "net RTO accounting" further discredits DP&L's

[128] Tr. Vol. VII at 1845.

financial integrity claim. Net RTO accounting is a method of accounting that excludes both revenue and expense.[129] [redacted]

The workpapers supporting DP&L's Exhibit CLJ-2, FES Exhibits 1 and 2, demonstrate a significant problem with the calculation of total revenue. Exhibit CLJ-2's forecast of wholesale generation revenue is allegedly supported by FES Exhibit 1 at 53809 and the purchase power expense is allegedly supported by FES Exhibit 1 at 53812. The values contained on FES Exhibit 1, however, are summary values, some of which are supposed to come from FES Exhibit 2.

[redacted] Based on the methodology Mr. Hoeskstra applied after the filing of Exhibit CLJ-2, Mr. Hoekstra (at page 53673) projects [redacted] on projected sales.[130] [redacted]

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[129] Tr. Vol. I at 153-154.

[130] Tr. Vol. II at 307-308. [redacted] Tr. Vol. II at 305. Witness Hoekstra referred to IEU-Ohio Ex. 5, which is an identical copy of FES Ex. 2. *Id.* at 300.

[redacted]

DP&L's generating units are dispatched by PJM only when the cost of producing a megawatt hour of electricity is less than the revenue DP&L will receive for that megawatt hour.[131] Thus, for each hour that DP&L's assets generate electricity, there will be some positive gross margin (properly measured as revenue minus the cost of producing electricity, i.e. fuel) associated with DP&L's actual generation output.

Moreover, although witness Jackson claimed that his net RTO accounting exclusion of revenue and expense had no effect on the results in his financial projections, he conceded that both the wholesale revenue[132] [redacted] could not be tied back to the values contained in Exhibit CLJ-2.

Thus, even if it was lawful for DP&L to request a charge to support the financial integrity of its competitive generation business, DP&L has failed to meet its burden of proving that the SSR and ST are necessary.

6. DP&L has not demonstrated it is experiencing a financial emergency

[131] Tr. Vol. I at 59-60. This principle is known as economic dispatch and the differential between cost and revenue is known as the dark spread, which equals the gross margin for power production. As witness Hoekstra testified, the dark spread "[redacted]." Tr. Vol. II at 377.

[132] Tr. Vol. I at 158.

When utilities have presented claims for emergency financial relief in cases under the Commission's authority to grant emergency rate increases,[133] the Commission has held that the ultimate question for it to decide is "whether, absent emergency rate relief, the public utility will be financially imperiled or its ability to render service will be impaired."[134] "If the applicant fails to sustain its [heavy] burden of proof on this issue, the Commission's inquiry is at an end."[135]

To review the "ultimate question" the Commission has developed a four-step process.

> [f]irst, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the applicant's supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation. Next, emergency relief will not be granted pursuant to Section 4909.16, Revised Code, if the emergency request is filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.[136]

In this proceeding, DP&L claims that its financial integrity is at risk if the Commission does not grant it hundreds of millions of dollars of non-bypassable charges to prop up its ROE but DP&L has not offered any evidence demonstrating the nature and extent to which DP&L will be financially imperiled or any evidence to demonstrate its ability to render service will be impaired if the Commission does not accept DP&L's financial integrity claims. DP&L has not identified the minimum level of financial support that is

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[133] Section 4909.16, Revised Code.

[134] *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order at 6 (Sept. 2, 2009).

[135] *Id.*

[136] *Id.*

necessary to address the alleged financial problem or the extent to which the financial problem could have been avoided or mitigated through actions other than actions to increase electric rates. Indeed, witness Jackson testified that DP&L did not need a $137.5 million SSR in 2013 to maintain adequate service.[137] Additionally, DP&L witness Chambers indicated at page 2 of his Second Revised Direct Testimony that an ROE range of 7.7% to 10.4% is a reasonable ROE for DP&L to maintain its financial integrity, but he did not specify a minimum level of financial support that would avoid, as Mr. Chambers noted at page 1 of his testimony, a severe impact on DP&L's survival probability.[138]

Generalized and unsubstantiated claims of lower ROEs than the significantly excessive returns that DP&L has enjoyed over the last decade as a result of its historical generation prices do not get the job done.[139] Therefore, the Commission cannot rely upon its limited authority under Section 4909.16, Revised Code, to consider or act upon DP&L's proposal to establish non-bypassable charges applicable to all DP&L retail customers.

Moreover, although DP&L has presented its financial integrity claim as a total company problem, DP&L agrees that its projected lower-than-desired ROE is being driven by its generation business. Section 4909.16, Revised Code, may be applied only to an EDU's non-competitive businesses. Competitive retail generation electric service is specifically excluded by operation of Section 4928.05(A)(1), Revised Code, from consideration pursuant to Section 4909.16, Revised Code.

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[137] Tr. Vol. I at 142.

[138] IEU-Ohio Ex. 1 at 17.

[139] Tr. Vol. I at 113. *See also* Ohio Energy Group ("OEG") Ex. 1 at 15.

The bar found in Section 4928.05, Revised Code, on the Commission's use of Section 4909.16, Revised Code, must be read consistently with the bar on Commission action found in Section 4928.38, Revised Code. Under that section, a "utility shall be fully on its own in the competitive market."[140] Further, "[t]he commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in Sections 4928.31 to 4928.40 of the Revised Code."[141]

Additionally, the Commission has determined that company earnings are not relevant for determining generation rates. In the Commission's Opinion and Order dated January 26, 2005 in Case No. 04-169-EL-UNC (Rate Stabilization Plan for Columbus Southern Power Company and Ohio Power Company), the Commission found that under Section 4928.05(A)(1), Revised Code, generation rates are subject to the market and "company earnings levels would not come into play for establishing generation rates—market tolerances would otherwise dictate."[142] Based on Ohio law and Commission precedent, the effects of generation service prices on the financial condition of DP&L's generation business are irrelevant.

7. DP&L's financial duress is self-inflicted due to its unlawful power sales agreement with its affiliate

The Commission must also reject DP&L's request for the SSR and ST because DP&L's claims of impaired financial integrity are self-inflicted and are the direct result of its improper business relationship with Dayton Power and Light Energy Resources

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[140] Section 4928.38, Revise Code.

[141] *Id.*

[142] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 15, 18 (Jan. 26, 2005).

("DPLER"), in violation of both the letter and spirit of Ohio's corporate separation requirements governing the business relationships between a regulated EDU and its non-regulated affiliates.[143] Specifically, the power sales contract between DP&L and DPLER violates the requirement that transactions between an EDU and its affiliate be based upon fully loaded embedded cost.[144]

As of August 30, 2012, approximately 62% of DP&L's retail load had switched to a CRES provider.[145] The majority of the switched load has been retained by DPLER.[146] DPLER relies upon [redacted]

Although DP&L's transfer price associated with generation and transmission sales to DPLER currently reflects a market-based price, this is a change from prior business practices.[147] As shown on IEU-Ohio Exhibit 2, Exhibit KMM-5, which is DP&L's response to the Office of the Ohio Consumers' Counsel's ("OCC") Interrogatory No. 339, in 2010 DP&L and DPLER implemented a new wholesale supply agreement that provided for transfer prices to be at market-based rates. Prior to 2010, the

[143] IEU-Ohio Ex. 2 at 11-12.

[144] Section 4928.17(A)(3), Revised Code; Rule 4901:1-37-04, OAC; Rule 4901:1-37-08, OAC.

[145] IEU-Ohio Ex. 2 at 12.

[146] *Id.*

[147] IEU-Ohio Ex. 2 at 13.

wholesale sales from DP&L to DPLER were at prices that approximated DPLER's sales prices to retail customers. DP&L and DPLER implemented the new wholesale supply agreement in 2010 to meet their "business needs."[148]

[redacted]

Because DP&L's transfer prices for its generation sales to DPLER are market-based, rather than cost-based, DP&L is not receiving revenue to offset a significant portion of the fixed costs associated with the generating assets that remain on DP&L's books. [redacted]

The self-inflicted financial problem created by DP&L's sales agreement with DPLER violates state law. Section 4828.17(A)(3), Revised Code, and Rule 4901:1-37, OAC, require transactions between an EDU and its affiliates to be based upon fully loaded embedded costs.

It would be unreasonable for the Commission to reward and compensate DP&L for the self-inflicted harm caused by its unlawful power sales agreement. As DP&L witness Chambers, the primary sponsor of the SSR and ST, testified, if the transfer

[148] IEU-Ohio Ex. 2 at 13-14.

price was the cause of DP&L's financial harm and the price was established in violation of Ohio law, then DP&L should not be compensated for that harm.[149] Because both conditions identified by witness Chambers have been demonstrated, the Commission must reject the SSR and ST.

In addition to the current transfer pricing agreement between DP&L and DPLER being unlawful, the effect of DP&L's current transfer pricing method shifts the margin from DP&L to DPLER. As shown on IEU-Ohio Exhibit 2, Exhibit KMM-18,[150] prior to 2010, the transfer price between DP&L and DPLER was set at levels that approximated DPLER's retail selling price. As a result, the retail margin earned by DPLER was relatively low. In its 2010 10-K, DPL reported (as reflected on page 50) that DPLER earned net income of $1.9 million in 2008 and lost $2.7 million in 2009.[151] Following the change in transfer price methodology that was implemented in 2010, in which the transfer prices were prospectively market-based, DPL reported that DPLER earned $18.8 million in net income in 2010.[152] Thus, DP&L's claim that its financial integrity will be impaired unless the SSR and ST are approved requires the Commission to turn a blind eye to how DP&L has unlawfully shifted generation revenue and margins to its non-regulated affiliate.

8. The proposed ST violates Section 4928.141, Revised Code, and amounts to retroactive ratemaking

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[149] Tr. Vol. II at 523-24.

[150] IEU-Ohio Ex. 2 at 19. *See also* The 2010 10-K report is available on the SEC website at: http://www.sec.gov/Archives/edgar/data/787250/000110465911008106/0001104659-11-008106-index.htm (last accessed February 12, 2013).

[151] IEU-Ohio Ex. 2 at 19.

[152] *Id.*

Even if the Commission has authority to authorize non-bypassble riders to prop up the earnings of DP&L's generation business, the proposed ST amounts to unlawful retroactive ratemaking. DP&L's Amended ESP Application requests authority to defer, for future collection through the ST, the difference between the blended SSO rate and the legacy SSO rates multiplied by the incremental switching that has and will occur from August 30, 2012. Thus, DP&L's proposal violates Section 4928.141, Revised Code, which states that SSO rates may only be prospective in nature, and also violates the prohibition against retroactive ratemaking.

Presented with a proposal similar to DP&L's, the Court in *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 9-14 ("*AEP-Ohio ESP I Appeal*"), held that case law and Section 4928.141, Revised Code, prohibited retroactive rate increases in the context of an ESP. In AEP-Ohio's ESP I proceeding, AEP-Ohio requested "a rate increase effective January 2009," but the Commission did not issue its order until March 2009.[153] The Commission ultimately approved AEP-Ohio's request and established rates for the remainder of 2009 to collect the entire revenue increase AEP-Ohio sought to obtain in 2009.[154] The Court reversed the Commission decision on two grounds.

First, the Court held that the Commission's actions amounted to unlawful retroactive ratemaking under *Keco*.[155] "'[A] utility may not charge increased rates during proceedings before the commission seeking same[,] and losses sustained thereby'—

[153] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 9.

[154] *Id.*

[155] *Id.* at ¶ 10-11 (*quoting Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259 (1957)).

that is, while the case is pending—'may not be recouped.'"[156] "'[U]tility ratemaking * * * is prospective only' and ... R.C. Title 49 'prohibit[s] utilities from charging increased rates during the pendency of commission proceedings and appeals.'"[157] The Court concluded that the Commission's decision allowed AEP-Ohio to collect revenue that was lost during the pendency of the administrative review and therefore amounted to unlawful retroactive ratemaking.[158]

The Court also concluded that AEP-Ohio's retroactive rate increase violated Section 4928.141, Revised Code. That section provides that existing rates "shall continue" until new SSO rates are authorized. The Court found that "[a]lthough the statute does not expressly prohibit a retroactive rate increase, the express remedy (to 'continue' existing rates until new rates are approved) rules out nonexpress remedies (such as tracking and restoring the difference between old and new rates if approval is delayed) and concluded that the statute "rules out retroactive rate increases."[159]

DP&L's proposed ST presents the same circumstances that the Court held were unlawful in *AEP-Ohio's ESP I Appeal*. DP&L requests that the Commission authorize the deferral of a difference in rates calculated based upon the incremental switching that has and will occur from the level of shopping as of August 30, 2012. DP&L's application and testimony claims that switching has and will increase dramatically from the level of shopping that existed as of August 30, 2012. Thus, DP&L requests that the Commission authorize it to collect revenue that was lost during the pendency of this

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[156] *Id.*

[157] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 11 (*quoting Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997)).

[158] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 11.

[159] *Id.* at ¶ 13.

proceeding. That result violates the prohibition on retroactive ratemaking established by the Court in *Keco* and violates the requirement in Section 4928.141, Revised Code, that SSO rates be prospective in nature.

For each of the reasons identified in Sections 1 through 8 above, the Commission must reject the SSR and ST.

9. The AER-N violates Sections 4928.64(E) and 4928.143(B), Revised Code, by allowing DP&L to recover the cost of complying with alternative energy benchmarks through non-bypassable charges

The Commission should reject DP&L's proposed AER-N because it is unlawful and unreasonable. As proposed, DP&L's AER-N will provide DP&L a return of and a return on the approximately $3.3 million of costs DP&L incurred to construct the first stage of its Yankee Solar Facility ("Yankee 1").[160] DP&L also proposes that additional costs could be added to the AER-N, further increasing the revenue received by DP&L and costs imposed on customers.[161] The Commission, however, must reject DP&L's proposed non-bypassable AER-N because: (1) it is unlawful under Sections 4928.143(B)(1) and 4928.64(E), Revised Code; (2) DP&L failed to demonstrate that the AER-N meets the requirements of Section 4928.143(B)(2)(c), Revised Code; and (3) DP&L failed to meet the Commission's ESP filing requirements in Rule 4901:1-35-09(C)(9)(b), OAC.

Although Section 4928.143(B)(2)(c), Revised Code, authorizes the Commission to approve a non-bypassable charge for the life of a generating facility in limited circumstances, that Section does not authorize a non-bypassable rider to recover costs

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[160] Tr. Vol. V at 1314.

[161] Tr. Vol. V at 1320.

associated with compliance with renewable energy requirements. Specifically, Section 4928.143(B), Revised Code, states that the Commission cannot approve a provision of an ESP that is "contrary" to Section 4928.64(E), Revised Code.[162] Section 4928.64(E), Revised Code, states that "***[a]ll*** costs incurred by an electric distribution utility in complying with the [renewable energy] requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code." According to DP&L, the only project costs currently proposed to be collected through the AER-N are associated with Yankee 1; the only purpose of the Yankee 1 is to comply with renewable energy requirements.[163] Thus, DP&L's proposed AER-N cannot be approved because it violates the statutory prohibition against recovering the cost of compliance with renewable energy requirements through a non-bypassable charge.

Even if the Commission could approve a non-bypassable rider to recover the cost of compliance with renewable energy requirements, the Commission must reject DP&L's proposed AER-N because DP&L failed to satisfy the requirements of Section 4928.143(B)(2)(c), Revised Code. That Section requires the EDU seeking a non-bypassable rider to demonstrate that the proposed generating facility is newly used and useful after January 1, 2009, and is sourced through a competitive bid process subject to rules adopted by the Commission. Section 4928.143(B)(2)(c), Revised Code, also requires that the need for the facility be demonstrated in the ESP proceeding before the

[162] Section 4928.143(B), Revised Code.

[163] Tr. Vol. IX at 2305 (Q: "... it is [DP&L's] intent moving forward to use any [SRECs] generated from the solar facility to meet compliance with the [renewable] standards that are in 4928.64; is that correct? A: Yes."); Tr. Vol. IX at 2225 (DP&L has sufficient generation without Yankee 1 to meet its projected SSO load for the next 10 years); *see also* Tr. Vol. IX at 2287-93.

Commission has the authority to allow a non-bypassable cost recovery mechanism for a new generation facility to become part of an ESP:

> no surcharge shall be authorized unless the commission first determines in ***the proceeding*** that there is need for the facility based on resource planning projections submitted by the electric distribution utility. (emphasis added).

DP&L witness Dona Seger-Lawson conceded that DP&L did not submit any evidence in this proceeding to demonstrate that Yankee 1 was needed.[164] Instead of presenting the information required by statute, DP&L is attempting to rely upon a previously approved stipulation in DP&L's long-term forecast report ("LTFR") proceeding ("Yankee Stipulation") in an attempt to support the requisite finding of need. Although DP&L claims it satisfied the need requirement through the Yankee Stipulation, the Commission is without authority to use a finding from an LTFR proceeding to satisfy the requirements to establish a non-bypassable rider under Section 4928.143(B)(2)(c), Revised Code. That Section and the burden of proof requirements in Section 4928.143(C)(1), Revised Code, require DP&L to present the evidence necessary for the Commission to make a finding of need in an ESP proceeding. Furthermore, DP&L's reliance on the Commission rules to claim that the finding of need to satisfy Section 4928.143(B)(2)(c), Revised Code, can be made in an LTFR proceeding is meritless; to the extent the Commission's rules allow or require this outcome, the Commission's rules are in conflict with the plain language of Section 4928.143(B)(2)(c), Revised Code, and are therefore void.[165] Thus, the Yankee Stipulation and the Commission's order

[164] Tr. Vol. V at 1321-22.

[165] While the Commission may set its own rules with respect to the governance of its hearings, those rules cannot conflict with more specific statutory requirements that dictate how and when the Commission may exercise authority to increase electric bills or approve non-bypassable cost recovery mechanisms.

approving the Yankee Stipulation are insufficient to meet the requirements of Section 4928.143(B)(2)(c), Revised Code.

Section 4928.143(B)(2)(c), Revised Code, also requires that Yankee 1 was "sourced through a competitive bid process," and Rule 4901:1-35-09(C)(9)(b)(ii), OAC, further requires DP&L to include in its ESP application "a proposed process, subject to modification and approval by the commission, for the competitive bidding of the construction of the facility unless the commission has previously approved a process for competitive bidding, which would be applicable to that specific facility." Ms. Seger-Lawson agreed that DP&L had not submitted any evidence that Yankee 1 was sourced through a competitive bid and did not include as part of its application a "proposed process, subject to modification and approval by the commission, for the competitive bidding of the construction of the facility" because the facility had already been constructed by early 2010.[166] Thus, Yankee 1 fails to meet the statutory requirement and Commission rules regarding a competitively sourced facility.

Section 4928.143(B)(2)(c), Revised Code, also requires that the "capacity and energy" associated with Yankee 1 be "dedicated" to the customers paying the AER-N, *i.e.* both shopping and non-shopping customers under DP&L's proposal. Ms. Seger-Lawson admitted that DP&L did not plan to dedicate the energy, capacity, and Solar Renewable Energy Credits ("SREC") associated with Yankee 1 and the AER-N to shopping customers; instead Ms. Seger-Lawson testified that the only thing shopping

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Youngstown Sheet & Tube Co. v. Lindley, 38 Ohio St.3d 232, 234 (1988); *Hoffman v. State Med. Bd.*, 113 Ohio St.3d 376, 378 (2007) (rules promulgated by administrative agencies are [in]valid and [un]enforceable [if] unreasonable or in conflict with statutory enactments covering the same subject matter."). Accordingly, DP&L was required to satisfy the finding of need in both the LTFR proceeding (pursuant to Rule 4901:1-35-09(C)(9)(b)(ii), OAC) and in this proceeding (pursuant to Section 4928.143(B)(2)(c), Revised Code).

[166] *See* Tr. Vol. V at 1323-25.

customers would receive is "the benefit of renewable energy just in general in Ohio."[167] Thus, the proposed AER-N violates Ohio law, because it would require shopping customers to pay for energy, capacity, and SRECs that they are not using and which provide no benefit to shopping customers.[168]

Finally, the Commission's rules require detailed cost information be submitted as part of an EDU's ESP application before the Commission will approve a non-bypassable charge under Section 4928.143(B)(2)(c), Revised Code. Rule 4901:1-35-09(C)(9)(b)(iv), OAC, requires DP&L to include in its ESP application a "detailed description of the actual costs, as of a date certain, for which the applicant seeks recovery and a detailed description of the impact upon rates of the proposed surcharge." Rule 4901:1-35-09(C)(9)(b)(v), OAC, requires the EDU to include in its ESP application "the proposed terms for the capacity, energy, and associated rates for the life of the facility."

Instead of providing the information required by the Commission's rules, DP&L requested a waiver of those filing requirements. DP&L's waiver was not granted prior to the hearing, and DP&L failed to offer any of the required evidence during the evidentiary hearing.[169] Moreover, DP&L failed to demonstrate that good cause exists for a waiver. DP&L's only argument offered to support good cause for a delay in submitting the required information was that it needed additional time to develop a revenue

[167] Tr. Vol. V at 1340.

[168] Sections 4928.143(B)(2)(c) and 4928.64(E), Revised Code. Under Ohio law, they would also be paying for the alternative energy requirements embedded in energy provided by their CRES providers. Section 4928.64, Revised Code.

[169] Tr. Vol. V at 1314, 1322-25. Although DP&L submitted evidence regarding the capital costs associated with Yankee 1, DP&L failed to introduce evidence regarding the revenue requirement calculation. Missing from DP&L's evidence is the O & M costs associated with Yankee 1 for the life of the facility and DP&L's proposed return of and on the capital costs. Thus, DP&L failed to introduce a detailed description of the costs to be collected through Yankee 1.

requirement calculation. However, construction on Yankee 1 began in 2009, was completed in early 2010, and the facility has been in service since early 2010. The cost information associated with Yankee 1 should be readily available to DP&L, and, in fact, DP&L plans to submit that cost information within six months of the Commission approving the proposed AER-N.[170] There simply is not a legitimate reason for a waiver.

DP&L's failure to introduce the detailed cost information takes on added significance because DP&L has improperly excluded these costs from the ESP versus MRO test,[171] and has not submitted any evidence regarding the cost-effectiveness of Yankee 1. Ms. Seger-Lawson admitted that DP&L did not present any evidence regarding the cost-effectiveness of Yankee 1 compared to alternative methods of securing SRECs, such as purchasing SRECs from the market.[172] Thus, not only is the revenue requirement associated with Yankee 1 and the rate of the AER-N unknown, but DP&L has not demonstrated that the costs of Yankee 1 were prudent.

Accordingly, the Commission must reject the proposed AER-N. The proposed rider would be in direct conflict with Sections 4928.143(B)(1) and 4928.64(E), Revised Code, fails to satisfy the requirements of Section 4928.143(B)(2)(c), Revised Code, and violates the Commission's rules.

10. DP&L's proposed non-bypassable TCRR-N is unlawful and unreasonable. Further, DP&L has not demonstrated that it should be granted a waiver of the requirement that transmission costs be bypassable.

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[170] Tr. Vol. V at 1316.

[171] The Commission has previously concluded that the ESP must include the cost of a non-bypassable charge to collect the cost of a solar facility in the ESP versus MRO test. *AEP ESP II Order* at 75.

[172] Tr. Vol. V at 1323.

The Commission should reject DP&L's proposal to bifurcate the TCRR into bypassable and non-bypassable components because DP&L's request is unreasonable. DP&L proposes to split the TCRR into what it deems market-based costs and non-market bases costs, collecting the market-based costs through the bypassable TCRR-B, and collecting the non-market-based charges through the non-bypassable TCRR-N.[173] DP&L's proposal is unlawful and unreasonable because it will cause shopping customers to potentially be billed multiple times for transmission service, and because it violates Rule 4901:1-36-04(B), O.A.C.[174]

DP&L acknowledges that there is a potential for shopping customers to be billed multiple times for transmission service, yet DP&L has not proposed any method to address the problem.[175] The double billing can occur because shopping customers are already paying their CRES providers for the non-market-based transmission service, which DP&L also proposes to charge shopping customers through the TCRR-N.[176] Despite being aware of this issue since March of 2012 (when DP&L made a similar proposal in its MRO application), DP&L witness Seger-Lawson testified that CRES providers and shopping customers should have to clean up the mess that DP&L's proposal will make:

> the company proposed this in its original MRO filing which was in March of 2012 and if the parties were drafting contracts for a CRES service anytime

[173] DP&L Ex. 11 at 3.

[174] IEU-Ohio Ex. 2 at 37-38. Shopping customers are currently paying for their own transmission service, and if the appropriate amounts are not removed from their CRES contracts, should the TCRR-N be approved, shopping customers would be billed twice. Additionally, there is an outstanding under-collection associated with the TCRR, and therefore shopping customers could be billed additional amounts under the proposed TCRR-N to make up for the amounts DP&L failed to collect from SSO customers over prior periods. These billing issues are discussed in additional detail below.

[175] Tr. Vol. V at 1356-57.

[176] *See* IEU-Ohio Ex. 2 at 38; Tr. Vol. V at 1356-57.

> thereafter, they should have known that this is the proposal the company would be coming forward with. It shouldn't be a surprise to anybody because they've known at least since March of 2012 that the company was going to propose a nonbypassable TCRR. ... And I would encourage those customers to go back to their CRES provider and work out something as obviously provisions have changed since the contract was filed.[177]

Thus, DP&L's proposal, or lack thereof, would admittedly and unreasonably double bill shopping customers..

Additionally, the Commission should reject DP&L's proposed TCRR-N because DP&L proposes to charge shopping customers for non-market-based transmission charges incurred by DP&L to serve non-shopping customers over previous years.[178] DP&L's current TCRR under-recovery balance is $8.4 million and, according to DP&L, a majority of that balance is associated with non-market-based transmission costs.[179] Accordingly, shopping customers may actually be billed three times for transmission service; once through their CRES contract, once to collect DP&L's going forward non-market-based transmission costs, and once to collect the non-market-based transmission costs that DP&L has failed to collect over a period of years from non-shopping customers. This is an unlawful and unreasonable result.

Further, DP&L claims that the existing TCRR under-recovery balance should be collected on a non-bypassable basis because "DP&L and its customers are struggling with growing unrecovered balances." It further argues that "[u]nless the Commission allows DP&L to implement a different rate design and/or resolution to the perpetually

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[177] Tr. Vol. V at 1356-57.

[178] Tr. Vol. V at 1345 ("the company has a proposal in this case to split the TCRR into a bypassable and non-bypassable charge. To the extent the Commission would approve that, part of this deferral balance would go with the TCRR non-bypassable charge ... ."); Tr. Vol. IX at 2208 (the TCRR deferral balance has existed for at least two years).

[179] Tr. Vol. V at 1345, 1347.

growing unrecovered balances," DP&L's transmission costs "will far exceed the market value of these transmission-related costs and the remaining SSO customers may experience much higher" transmission rates.[180] DP&L's argument is a red-herring.

The only reason a TCRR under-recovery balance exists is because DP&L has failed to accurately forecast its load and transmission costs.[181] Additionally, DP&L has ignored the Commission's rule that requires EDUs to file an interim application if the EDU's costs are substantially different than the amounts the EDU is authorized to collect.[182] Further, while SSO customers might, on a going-forward basis, be charged transmission rates that "exceed the market value," the under-recovery balance only exists because SSO customers were charged ***below*** the market value over at least the previous two years.

DP&L's proposed TCRR-N is also unlawful and unreasonable because Rule 4901:1-36-04(B), OAC, requires that transmission costs be fully avoidable by shopping customers. Although this rule may be waived for good cause, DP&L has failed to demonstrate that good cause exists for the waiver.[183] DP&L's Amended ESP

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[180] DP&L Ex. 12 at 8. Witness Seger-Lawson was addressing the roughly $8.4 million TCRR under-recovery balance in her rebuttal testimony in relation to the proposed TCRR-B. Ms. Seger-Lawson previously testified that the under-recovery balance would be split between market-based and non-market-based charges and assigned to the TCRR-B and TCRR-N, respectively. Thus, the discussion at page 8 of her rebuttal testimony is applicable to both the TCRR-B and TCRR-N.

[181] Tr. Vol. IX at 2208 (the TCRR deferral balance has existed for at least two years). Additionally, DP&L assumes that a change in shopping directly impacts the TCRR under-recovery balance. *See, e.g.*, DP&L Ex. 12 at 8; Tr. Vol. IX at 2343 (shopping customers helped to create the under-recovery balance). Although it is true that when a customer leaves the SSO DP&L collects less transmission revenue, PJM, in turn, charges DP&L less for transmission service.

[182] Rule 4901:1-36-03(E), OAC. DP&L indicated that it did not file an interim application to adjust its TCRR rates over the prior year, despite the Commission's rule and despite being well aware that it would not recover its outstanding under-recovery balance. Tr. Vol. IX at 2344-45 (DP&L looks at the under-recovery balances at least biannually and despite recognizing that DP&L would not "burn down the deferral" decided to not file an interim application).

[183] Rule 4901:1-36-02(B), OAC.

Application and pre-filed direct testimony of DP&L witness Seger-Lawson indicated DP&L was seeking a waiver of Rule 4901:1-36-04(B), OAC, but, neither the Amended ESP Application, nor Ms. Seger-Lawson's direct testimony, offered any analysis to demonstrate that good cause existed for the waiver.[184] Based on the unreasonable results produced by DP&L's proposal, the direct testimony does not support a waiver.

During her cross-examination, however, Ms. Seger-Lawson claimed that good cause existed for the waiver because the Commission had waived that Rule for Duke and FirstEnergy.[185] The two cases referenced by Ms. Seger-Lawson, however, do not demonstrate good cause for the Rule to be waived for DP&L. First, both of the cases referenced by Ms. Seger-Lawson were resolved by stipulations; and the stipulations, by their terms, stated that they could not be relied upon except for purposes of enforcement.[186] Furthermore, the stipulations are an agreed-upon package of terms and conditions and DP&L has not proposed to implement any of the other agreed-upon terms and conditions from those stipulations.[187] For instance, FirstEnergy and Duke both agreed to not collect significant amounts of transmission-related costs from

[184] *See* DP&L's Revised Application at 16 (Oct. 5, 2012) (DP&L did not move to admit the Application into the record); DP&L Ex. 9 at 5.

[185] Tr. Vol. V at 1349-50.

[186] IEU-Ohio Ex. 24 at 45 ("This Stipulation is submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding ... ."); IEU-Ohio Ex. 26 at 2. The Commission approved these two stipulations without modifying these provisions. *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariff Approval*, Case Nos. 11-2641-RDR, *et al.*, Opinion and Order at 17 (May 25, 2011) (adopting the stipulation without modification).

[187] IEU-Ohio Ex. 24 at 5; IEU-Ohio Ex. 26 at 2.

customers.[188] DP&L does not have a similar proposal containing valuable concessions to customers. Accordingly, DP&L has not provided any substantive basis for the Commission to grant waiver of its rules.

In sum, DP&L's proposed TCRR-N is unlawful and unreasonable. Under DP&L's proposal, shopping customers could be billed multiple times for transmission service, and rather than proposing a solution to ensure this does not happen, DP&L encourages shopping customers and CRES providers to clean up any mess created by DP&L's proposal. DP&L's proposal also violates Rule 4901:1-36-04(B), OAC, and DP&L has failed to offer any substantive reason for a waiver of this Rule. Accordingly, the Commission should reject DP&L's proposal to make a portion of DP&L's previously incurred and going-forward transmission costs non-bypassable.

11. The RR is not approvable as a non-bypassable rider. It would provide DP&L with an anticompetitive subsidy

DP&L proposes to include in the RR: (1) the costs associated with administering the SSO CBP auctions; (2) competitive retail enhancements; and (3) under-recoveries of bypassable riders to the extent the under-recovery exceeds 10% of the rider's costs ("the circuit-breaker component").[189] Because the RR is unlawful and would result in illegal cost shifts from non-shopping customers to shopping customers,[190] the Commission should reject DP&L's proposal to create the RR on a non-bypassable basis.

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[188] IEU-Ohio Ex. 24 at 25 (FirstEnergy "agree to not seek recovery through retail rates for MISO exit fees or PJM integration costs from retail customers" of FirstEnergy); IEU-Ohio Ex. 26 at 5, 7.

[189] DP&L Ex. 10 at 8.

[190] IEU-Ohio does not oppose the creation of the rider on a bypassable basis, but would point out to the Commission, as discussed below, that the design of the circuit-breaker portion of the RR will have unknown impacts on customers' bills, regardless of whether the RR is charged to only SSO customers or is charged to all customers.

a. There is no statutory basis to approve the RR on a non-bypassable basis

DP&L claims that the RR can be authorized under Sections 4928.143(B)(1), 4928.143(B)(2)(a), 4928.143(B)(2)(d), 4928.143(B)(2)(e), and 4928.143(B)(2)(g), Revised Code.[191] These Sections, however, do not authorize the Commission to create a non-bypassable rider.

Although the Commission has previously approved a non-bypassable charge under Section 4928.143(B)(2)(d), Revised Code (an issue which IEU-Ohio has appealed to the Ohio Supreme Court[192]), DP&L has still failed to prove that the RR will have the effect of making "retail electric service more stable or certain." "Retail electric service" is defined to mean the physical "supplying or arranging for the supply of electricity to ultimate customers in this state, from the point of generation to the point of consumption."[193] Thus, the Commission may authorize a term, condition, or charge that makes the physical supply of retail electric service more stable or certain. The RR does not make the physical supply of retail electric service more stable or certain; the rider is merely a cost-collection mechanism for a variety of DP&L's endeavors that include, among others, upgrading its billing system and tariffs, administration of auctions, and buying renewable energy credits ("RECs").

Furthermore, even if a charge could be approved under this section on grounds that it provides stability or certainty to rates, there is nothing stabilizing or certain about

[191] IEU-Ohio Ex. 1 at 7, JGB-3.

[192] *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 Nos. 11-346-EL-SSO, *et al.*, Notice of Second Appeal of Appellant IEU-Ohio (May 8, 2013).

[193] Section 4928.01(A)(27), Revised Code.

DP&L's proposed RR.[194] The revenue requirement for the rider is completely unknown, and DP&L does not know the magnitude of the CBP auction administration costs that it proposes to ultimately collect through the RR.[195]

Additionally, the circuit-breaker provision of the RR will cause further rate instability and uncertainty as it switches the manner in which certain charges are billed to customers. Specifically, the RR will be billed on a kWh basis but the individual riders subject to the circuit-breaker provision are not all billed on a kWh basis.[196] For example, the RPM Rider, for non-residential customers, and the TCRR, for all customers, are billed on a demand and energy basis.[197] Because DP&L failed to model all of the effects of the RR on customers' bills, it is impossible to determine the true rate impacts associated with the RR. Furthermore, the instability and uncertainty associated with the circuit-breaker provisions is not strictly hypothetical: at least two of the riders subject to the circuit-breaker provision currently have outstanding under-recoveries that would trigger the provision.[198]

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[194] In AEP-Ohio's ESP II proceeding, the Commission unlawfully and unreasonably authorized AEP-Ohio's Retail Stability Rider under Section 4928.143(B)(2)(c), Revised Code, on the basis that the rider provided rate stability by allowing AEP-Ohio to freeze its base generation rates. *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 Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 31-32 (Aug. 8, 2012). IEU-Ohio has appealed the Commission's findings regarding the Retail Stability Rider. *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 Nos. 11-346-EL-SSO, *et al.*, Notice of Second Appeal of Appellant IEU-Ohio (May 8, 2013).

[195] Although DP&L estimates that the CBP costs total $3.5 million (included in Schedule 7A attached to its Amended ESP Application), DP&L failed to move this schedule, or any part of its Amended ESP Application, into the record.

[196] Tr. Vol. V at 1334.

[197] *Id.*

[198] IEU-Ohio Ex. 22 (showing the existing under-recovery balances for DP&L's TCRR and RPM riders). DP&L's proposal is to look at the under-recovery balances associated with the following bypassable riders on a quarterly basis: FUEL Rider, RPM Rider, TCRR-B, AER, and the CBT Rider. DP&L Ex. 10 at 8. And it will only be during those quarterly updates that DP&L will determine if any of these riders have

Additionally, DP&L's bill impacts, which along with the Amended ESP Application and Rate Blending Plan were ***not*** moved into the record, include no costs associated with the circuit-breaker provision or the competitive retail enhancements, which DP&L seeks to recover through the RR.[199] IEU-Ohio, along with numerous other intervenors, identified this issue in a joint pleading filed on October 22, 2012 (before DP&L filed its Amended ESP Application). Despite the issue being brought to DP&L's attention, DP&L did not update its bill impacts when it filed its Amended ESP Application on December 12, 2012. Furthermore, DP&L's bill impacts exclude any analysis of the effect of the RR of shopping customers' rates, despite the fact that the majority of the customers that would be billed under the RR are shopping.[200]

In sum, there is no statutory support to approve the RR on a non-bypassable basis. None of the Sections identified by DP&L allows for a non-bypassable rider. Furthermore, even if Section 4928.143(B)(2)(d), Revised Code, allows a non-bypassable rider that has the effect of stabilizing or providing certainty to rates (which it does not), the RR fails to meet the requirements of that Section because DP&L has failed to show that the design for the RR will provide certainty or stability. Additionally, DP&L has ignored the effect that the RR will have on the roughly 70% of customers that are shopping. Accordingly, the Commission should reject DP&L's request to make the proposed RR non-bypassable.

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an under-recovery balance greater than 10% of the base rate of the rider, and if so move the costs that exceed 10% of the base rate to the RR. Tr. Vol. V at 1341-43. Furthermore, DP&L's bill impacts, which were not moved into the record, include zero costs attributable to the circuit-breaker portion of the RR. Amended ESP Application at Schedule 7A.

[199] *Id.*

[200] Tr. Vol. V at 1348 (as of September 2012, over 60% of customers were shopping).

b. DP&L improperly relies on stipulations to support its proposed RR

DP&L's case supporting the RR also fails because DP&L improperly relies upon stipulations entered into by Duke and FirstEnergy in establishing their respective ESPs.[201] The stipulation in Duke's proceeding states that the stipulation and order approving the stipulation cannot be relied upon in other proceedings; the Commission's order approved this provision of the stipulation.[202] The stipulation in FirstEnergy's ESP proceeding contained a similar clause, which the Commission approved in its order.[203] Furthermore, these stipulations are an agreed-upon package of terms and DP&L has not proposed to implement any of the other agreed-upon terms in those stipulations.[204] DP&L acknowledged that it has not agreed to implement any of the commitments that FirstEnergy and Duke agreed to in those stipulations.[205]

In conclusion, the stipulations that DP&L has cited to, by the terms approved through the Commission's orders, are not precedential and are not to be relied upon in

[201] DP&L Ex. 12 at 6-7; Tr. Vol. IX at 2198-99, 2333-42.

[202] IEU-Ohio Ex. 31 at 51; *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.*, Opinion and Order at 51 (Nov. 22, 2011) (approving the stipulation without modification).

[203] IEU-Ohio Ex. 24 at 45 ("This Stipulation is submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding ... ."); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at _ (July 18, 2012).

[204] Tr. Vol. IX at 2335-42.

[205] *See id.* For instance, Duke agreed to not bid into its own SSO auctions for a period of time, agreed to transfer its generation assets at a quicker pace than DP&L has proposed, agreed to only be compensated for capacity at prices set by PJM's Reliability Pricing Model ("RPM"), agreed to terminate its Fixed Resource Requirement ("FRR") election and participate in PJM's RPM auctions, and agreed that its successor SSO would also be set by a CBP process. Tr. Vol. IX at 2336-39; IEU-Ohio Ex. 31. FirstEnergy agreed to auction off 100% of its SSO load for the entire term of its ESP, agreed to waive its minimum stay provision for no charge, agreed to freeze its distribution rates for the term of the ESP, and provided millions of dollars of shareholder funds for economic development and job retention. IEU-Ohio Ex. 24 at 7-10, 18-19, 34-35.

other proceedings. Additionally, even if the stipulations could serve as precedent, DP&L has not agreed to the package of terms and conditions that were necessary for parties to agree to a circuit-breaker provision. Accordingly, the Commission should reject DP&L's proposal to include a circuit-breaker provision as part of the RR.

c. *The proposed non-bypassable RR would provide DP&L an unlawful subsidy in violation of Section 4928.02(H), Revised Code.*

The non-bypassable RR should also be rejected because it will provide DP&L an anti-competitive subsidy in violation of Section 4928.02(H), Revised Code. As prior Commission precedent confirms, over/under-recoveries of a bypassable rider must remain bypassable.

In Duke's MRO proceeding, Duke requested authority to true-up two of its existing riders through a new non-bypassable rider (the majority of the under-recovery balance was attributable to bypassable charges) and proposed a circuit-breaker provision that would make one of its existing bypassable riders non-bypassable.[206]

Staff opposed Duke's two non-bypassable proposals stating that "Duke's generation-related costs should not be attributed to customers not taking generation service from Duke."[207] The Commission adopted Staff's recommendations and held that neither of Duke's riders could be approved as proposed.[208] The Commission reasoned that true-ups of bypassable riders cannot be collected on a non-bypassable basis "under any circumstances" because it "would create an anticompetitive subsidy" in

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[206] *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service,* Case No. 10-2586-EL-SSO, Opinion and Order at 56 (Feb. 23, 2011) ("Duke MRO Order").

[207] *Id.* at 56, 57, 63.

[208] *Id.* at 57, 63.

violation of R.C. 4928.02(H).[209] The Commission also held that Duke's costs associated with serving SSO customers "should not be borne by customers who do not take ... service from Duke."[210]

DP&L's proposal similarly requests that the Commission authorize a true-up of bypassable riders on a non-bypassable basis. Thus, DP&L's proposal would result in the same kind of unlawful subsidy by which costs associated with serving SSO customers would be borne by shopping customers; the Commission rejected authorizing this type of unlawful subsidy in Duke's MRO Order. As in the Duke MRO Order, the Commission should reject DP&L's request to make its proposed RR non-bypassable.

B. The Amended ESP Application Is Not More Favorable Than An MRO

In order to approve an ESP, the Commission must find that the ESP is more favorable in the aggregate than an MRO ("ESP versus MRO test").[211] The EDU has the burden of demonstrating that the ESP is more favorable.[212] DP&L's efforts to demonstrate that the Amended ESP Application satisfies the ESP versus MRO test, however, are meritless. When the ESP versus MRO test is properly applied, the Amended ESP Application fails the ESP versus MRO test by $204 million to $664 million.[213]

1. DP&L Has Failed to Demonstrate the Amended ESP Application Satisfies the ESP versus MRO Test

[209] *Id.* at 63.

[210] *Id.* at 57.

[211] Section 4928.143(C)(1), Revised Code.

[212] *Id.*

[213] IEU-Ohio Ex. 2 at 35.

In support of its application, DP&L submitted testimony that claimed that the Amended ESP Application was more favorable than an MRO by $120 million. This result was driven by the benefits of the CBP contained in the ESP side of the test.[214] To reach that conclusion, DP&L witness Jeff Malinak assumed that DP&L would be permitted to impose and collect from customers the non-bypassable SSR rider, under either an MRO or an ESP.[215] Thus, the estimated benefit of the proposed ESP that would be realized through the CBP, $120 million, was not offset by any of the SSR. If an MRO did not include the SSR revenues, however, Mr. Malinak conceded that the Amended ESP Application would fail the ESP versus MRO test.[216]

Mr. Malinak reasoned that the SSR revenue should be included in his estimated calculation cost of an MRO based on the assumption that "the Commission should compare the ESP that DP&L filed to a hypothetical MRO that DP&L would file on the same day."[217] According to Mr. Malinak:

> If DP&L had filed an MRO, then DP&L would face threats to its financial integrity that are similar to those described in Mr. Chambers' testimony. Like the ESP statute, the MRO statute permits the Commission to implement charges to preserve a utility's 'financial integrity.' DP&L thus would have sought an SSR if it had filed for an MRO.[218]

Because there is no lawful basis for assuming that an MRO would include SSR revenues, as Mr. Malinak has done, his conclusion that the Amended ESP Application passes the ESP versus MRO test is incorrect.

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[214] DP&L Ex. 5 at Ex. RJM-1.

[215] DP&L Ex. 5 at 10-11. Mr. Malinak did not include the ST in his calculation, but testified that the ST would be included in the hypothetical MRO as well as in the ESP "because DP&L would face financial risks from customer switching under either plan." *Id.* at 11.

[216] Tr. Vol. III at 619.

[217] DP&L Ex. 5 at 11-12.

[218] *Id.* at 12 (footnote omitted).

For purposes of applying the ESP versus MRO test, the MRO is defined by Section 4928.142(D), Revised Code. That section does not permit a hypothetical MRO to be adjusted to include SSR revenues. For an EDU that owns generation assets as of July 31, 2008 (which would include DP&L), the Section provides that the MRO price is to reflect a blending of the results of a CBP with DP&L's legacy SSO generation price. It also authorizes the Commission to adjust the legacy generation price that is blended with the results of a CBP in four specific circumstances. The Commission may adjust the legacy generation price to reflect the prudently incurred costs of fuel; prudently incurred purchased power costs; prudently incurred costs to satisfy supply and demand portfolio requirements for renewable energy and energy efficiency projects; and prudently incurred costs to comply with environmental requirements.[219] The proposed SSR does not fall within any of the categories of costs that the Commission is authorized to adjust to an EDU's legacy SSO generation price. Therefore, Mr. Malinak's conclusion that an MRO would include SSR revenue is contrary to the requirements of Section 4928.142(D), Revised Code.[220]

Additionally, Mr. Malinak's inclusion of SSR revenues as part of his estimated MRO cost is inconsistent with Commission's precedent regarding DP&L's Rate Stabilization Charge ("RSC"). As the Commission is aware, once it became apparent that a new ESP would not be approved prior to the scheduled expiration of DP&L's current ESP on December 31, 2012, several intervenors challenged DP&L's

[219] Section 4928.142(D)(1)-(4), Revised Code.

[220] IEU-Ohio Ex. 2 at 31-32.

authorization to continue to collect the RSC after December 31, 2012.[221] In response, DP&L argued that the most recent ESP included the RSC and permitted it to continue to collect $72 million through the rider.[222] The Commission agreed with DP&L and issued an order authorizing DP&L to continue collecting generation rates that included RSC revenues.[223] Therefore, the additional non-bypassable revenue in excess of the $72 million currently collected through the RSC are not properly included as part of the legacy SSO price and cannot be incorporated into the MRO price used in the ESP versus MRO test.[224]

The methodology used by Mr. Malinak also is inconsistent with prior Commission precedent. In the *AEP-Ohio ESP II* case, for example, the Commission treated the Retail Stability Rider ("RSR") as a cost of the proposed ESP, but did not adjust the MRO used in the ESP versus MRO price test despite AEP-Ohio's claim that it needed a stability charge to protect its financial integrity.[225] Although Mr. Malinak indicated that he was familiar with the Commission's application of the ESP versus MRO test in the *AEP-Ohio ESP II* case,[226] he did not exclude the SSR revenues from the MRO side of the test as the Commission approved in its application of the ESP versus MRO test in

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[221] If an EDU terminates an ESP application or if the Commission disapproves an ESP application Section 4928.143, Revised Code, provides that "the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section of the Revised Code."

[222] IEU-Ohio Ex. 2 at 32-33.

[223] *In the Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company for Consent and Approval for a Change of Control of The Dayton Power and Light Company*, Case No. 11-3002-EL-MER, *et al.*, Entry (Dec. 19, 2012).

[224] IEU-Ohio Ex. 2 at 33.

[225] *AEP-Ohio ESP II* at 75.

[226] Tr. Vol. III at 597.

the *AEP-Ohio ESP II* case. As a result, Mr. Malinak's approach is inconsistent with the Commission's decision in the *AEP-Ohio ESP II* case.

Further, Mr. Malinak's assumption that DP&L could lawfully include an SSR as part of MRO to protect its "financial integrity" is not supported by the record. Even if the Commission were permitted to adjust the hypothetical MRO for factors other than the four costs noted above, DP&L, as discussed elsewhere, has not demonstrated that it faces any challenge to its "financial integrity." Without a demonstration that DP&L's "financial integrity" is imperiled, DP&L own improper argument is groundless.

Finally, the inclusion of the SSR revenue in the MRO violates the assumption that the test is to compare the proposed ESP with market-based pricing. SSO rates are either market-based or market-tested. In the case of an ESP, the SSO is market-tested; under Section 4928.143(C)(1), Revised Code, the ESP must be more favorable in the aggregate than the auction-based MRO. Inclusion of the SSR in the MRO corrupts the market test provided by Section 4928.143(C)(1), Revised Code. As FirstEnergy Solutions Corp. ("FES") witness Roger Ruch explained:

> [T]he intent of the ESP vs. MRO test is to compare the expected pricing of the proposed ESP to market-based prices, i.e., an MRO, recognizing that market pricing could potentially be blended in over time. In the Aggregate Price Test presented by DP&L, the only market-based prices are the expected results of the competitive bid process [reference omitted], which are assumed to be blended in with the current ESP pricing over time. Accordingly, these are the only prices that should be recognized on the MRO side of the comparison.[227]

In summary, Mr. Malinak's testimony that the Amended ESP Application satisfies the ESP versus MRO price test is unsound, inconsistent with Commission precedent, and must be rejected. DP&L has failed to carry its burden of proof that the Amended

[227] FES Ex. 13 at 10-11.

ESP Application is more favorable than an MRO. Therefore, the Commission should reject the Amended ESP Application.

2. A Proper Quantification of the Amended ESP Application Demonstrates it Fails the ESP versus MRO Test

On behalf of IEU-Ohio, Kevin Murray testified that DP&L's proposed ESP failed the ESP versus MRO test by $204 million to $664 million. In his application of the test, Mr. Murray used DP&L's CBP results and adjusted the starting date to June 1, 2013 to account for the fact that the ESP would not be in effect any sooner than that date. He then analyzed four scenarios that addressed varying assumptions concerning the continuation of the RSC under an MRO and the effect of the ST if switching increased to 70%.[228]

In the first scenario, Mr. Murray assumed that the current RSC would continue under an MRO and that DP&L would bill and collect its proposed SSR under the Amended ESP Application. Under this scenario, the Amended ESP Application failed the ESP versus MRO test by $204 million.[229]

In his second scenario, Mr. Murray used the same assumptions as in the first scenario and added to the proposed ESP the effects of the ST with an assumed switching rate of 70%. With the addition of the effect of the ST, the Amended ESP Application failed the ESP versus MRO test by $281 million.[230]

[228] In rebuttal testimony, DP&L identified an error in Mr. Murray's calculation of the amount of revenue that would be generated by the ST. DP&L Ex. 14 at 14. In the following discussion, scenarios two and four are corrected to account for the lower level of revenue that would be generated by the ST as proposed by DP&L.

[229] IEU-Ohio Ex. 2 at 34-35 and KMM-14.

[230] *Id.* at 35 and Attachment 1 (verified by DP&L witness Malinak at Tr. Vol. XI at 2841-44). Attachment 1 revises KMM-15 to calculate the ST based on the difference between the blended SSO rate and the forecasted CBP rate as proposed by DP&L. *See* DP&L Ex. 14 at 14.

In Mr. Murray's third scenario, he removed the revenue effect of the RSC from the results of the MRO because IEU-Ohio and others have argued that the existing RSC terminated on December 31, 2012 under the terms of DP&L's prior ESP stipulation.[231] When the RSC revenue is removed from the MRO, the Amended ESP Application fails the ESP versus MRO test by $568 million.[232]

Finally, Mr. Murray presented a scenario in which the RSC revenue is removed from the MRO and the ST at an assumed 70% switching rate is included in the Amended ESP Application. Under that scenario, the Amended ESP Application fails the ESP versus MRO test by $644 million.[233]

Thus, under any reasonable set of assumptions, the Amended ESP Application is less favorable in the aggregate than an MRO by hundreds of millions of dollars.

3. The Amended ESP Application does not provide non-quantifiable benefits

The Amended ESP Application fails the ESP versus MRO test by hundreds of millions of dollars. However, Mr. Malinak also testified the faster transition to a market-based SSO provides "difficult to quantify" benefits of the Amended ESP Application. According to Mr. Malinak the Amended ESP Application will result in a faster transition to a market-based SSO than under an MRO and this faster transition will provide a more favorable climate for business and more choices for consumers. Mr. Malinak also claims that approving the Amended ESP Application will result in DP&L's customers

[231] *Id.* See Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders Issued by the Public Utilities Commission of Ohio and Memorandum in Support (Sept. 26, 2012).

[232] IEU-Ohio Ex. 2 at 35 and Attachment 2 (verified by DP&L witness Malinak at Tr. Vol. XI at 2841-44). Attachment 2 revises KMM-17 to calculate the ST based on the difference between the blended SSO rate and the forecasted CBP rate as proposed by DP&L. See DP&L Ex. 14 at 14.

[233] *Id.* and IEU-Ohio Ex. 2 at Ex. KMM-17.

having comparable market conditions to those available in other service territories. Finally, Mr. Malinak identifies competitive retail enhancements and additional regulatory flexibility associated with an ESP (as compared to an MRO) as benefits.[234] None of Mr. Malinak's claims that the Amended ESP Application provides non-quantifiable benefits have merit.

The "faster" transition to market-based SSO prices is more than offset by the substantial shopping tax DP&L has requested the Commission to impose on customers. Additionally, for shopping customers, there is no positive benefit if the Commission approves DP&L's application, only a rate increase. As Mr. Murray correctly observed:

> The reality is the vast majority of DP&L's business customers are already shopping. As of the end of the third quarter 2012, which is the most recent report available, the Commission's electric switching report ... shows that 94.31% of DP&L commercial sales are being supplied through CRES providers. For these customers, DP&L's proposed ESP will result in a significant increase in their overall price of electricity. It is axiomatic that an ESP that results in higher electricity prices for the vast majority of commercial and industrial customers cannot be properly characterized as creating a more favorable business climate.[235]

Additionally, the competitive retail enhancements that Mr. Malinak claims as a benefit are to be paid for by customers through a non-bypassable charge. They cannot be deemed a benefit to customers when they will be charged the $2.5 million estimated cost.[236]

The improved product mix that Mr. Malinak claims provides a "difficult to quantify" benefit also is an empty promise. Mr. Malinak offered nothing specific to the DP&L

[234] DP&L Ex. 5 at 14-15.

[235] IEU-Ohio Ex. 2 at 36.

[236] FES Ex. 17 at 7.

service territory and was not aware of any change in product mix in any Ohio service territory that resulted from moving to a CBP.[237]

Beyond failing to demonstrate that the proposed ESP provides any meaningful "difficult to quantify" benefits, DP&L failed to account for the apparent costs that result from its proposed ESP. [redacted].[238] For these reasons, the non-quantifiable benefits of the Amended ESP Application are illusory and fail to offset the substantial costs of the Amended ESP Application.

Additionally, DP&L's reliance on "difficult to quantify" benefits to support its claim that the Amended ESP Application satisfies the ESP versus MRO test does not provide the Commission the evidence it must have to apply the test. As Mr. Malinak admits in his testimony, he cannot identify an objective financial benefit associated with the faster move to a CBP.[239] The limits of DP&L's proof, however, are more significant. As noted above, on cross-examination, Mr. Malinak also admitted that he had not studied the effect of CBPs on the service offerings in other Ohio service territories, one of the supposed outcomes of the faster transition from which the "difficult to quantify" benefits were to flow. Thus, his broad assertion that the Amended ESP Application would provide "difficult to quantify" benefits was nothing more than a subjective guess.

Because DP&L has not provided the factual basis for its claim that the Amended ESP Application will provide additional "difficult to quantify" benefits, the Commission

[237] Tr. Vol. III at 652.

[238] Tr. Vol. XI at 2840.

[239] DP&L Ex. 5 at 14-15.

has no objective basis to determine that these benefits offset any part of the millions in additional costs by which the Amended ESP Application fails the ESP versus MRO test. In a contested case such as this one, however, the Commission must issue "findings of fact and [a] written opinion[] setting forth the reasons prompting the decision[] arrived at, based on said findings of fact."[240] As the Supreme Court has indicated, the Commission in assessing the record must explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.[241] "The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom."[242] Mr. Malinak's subjective guess that there are additional benefits to be realized from a faster move to a CBP do not satisfy the objective standards required by Ohio law. Thus, DP&L's claim that a faster move to market-based SSO rates cannot be a basis for the Commission to find that the Amended ESP Application satisfies the ESP versus MRO test.

C. Procedural Errors

In addition to the extensive substantive errors addressed above, various procedural errors have occurred in this proceeding. Specifically, these procedural errors include failing to strike the testimony of witnesses Chambers and Mahmud and improperly denying IEU-Ohio's motions to compel. As explained below, the Commission should remedy these procedural errors.

[240] Section 4903.09, Revised Code.

[241] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 519 (2011).

[242] *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 406 (1991) (*quoting Columbus v. Pub. Util. Comm.*, 58 Ohio St.2d 103, 104 (1979) (Brown, J., dissenting)).

Witness Chambers modeled five scenarios based upon financial projections that were provided by DP&L witness Jackson. These five scenarios relied upon two different pro forma projections that were provided by witness Jackson:

- No incremental switching as of August 30, 2012 (Exhibit CLJ-2); and
- The effect of incremental switching and with no switching tracker

Witness Chambers testified that he did not verify the validity of the information contained in the financial projections provided by witness Jackson.[243]

The first financial projection that supported witness Chambers' Exhibits WJC-1, WJC-2, and WJC-4, was sponsored by witness Jackson and admitted into evidence as DP&L Exhibit 1, Exhibit CLJ-2. The second financial projection, which provides the basis for witness Chambers' Exhibits WJC-3 and WJC-5, was not sponsored by DP&L witness Jackson. Witness Chambers indicated in his prefiled testimony at footnote 29 on page 39 that the source of the information that supports Exhibits WJC-3 and WJC-5 was an Excel Spreadsheet titled "CLJ Second Revised Exhibits with DETAIL-incremental switching."

Because DP&L failed to lay a proper foundation or demonstrate the reliability of the information contained in witness Chambers' Exhibits WJC-3 and WJC-5, IEU-Ohio moved to strike those exhibits and the portions of witness Chambers' testimony that relied on those exhibits.[244] After taking the motion under advisement, the Attorney Examiner denied the motion, stating that the Excel Spreadsheet had been provided to

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[243] Tr. Vol. II at 504-05.

[244] Tr. Vol. II at 423-27.

parties during discovery and that any party that wished to recall witness Jackson to the stand could do so.[245]

IEU-Ohio later moved to strike the testimony of Staff witness Mahmud, which relied upon DP&L witness Chambers' Exhibit WJC-3.[246] The Attorney Examiner also denied that motion for the same reason identified above.

The Attorney Examiner's rulings were in error. Under Ohio Rule of Evidence 703, opinion testimony of experts must be based upon "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." The data that provided the basis for Exhibits WJC-3 and WJC-5 was not perceived by DP&L witness Chambers—he did not create or verify the information. Moreover, DP&L failed to sponsor or move the facts contained in the Excel Spreadsheet into evidence during the testimony of DP&L witness Jackson. Therefore, under Rule 703, it was improper for witness Chambers to rely upon the Excel Spreadsheet that provided the information contained in Exhibits WJC-3 and WJC-5.

Moreover, the information contained in the Excel Spreadsheet is hearsay that does not fall within an exception. Hearsay is an out-of-court statement by someone other than the witness providing testimony that offered for the truth of the matter asserted. The Excel Spreadsheet is an out-of-court statement by witness Jackson. Witness Chambers has clearly offered the Excel Spreadsheet to demonstrate the impact on DP&L of the scenario where there was incremental switching with no switching tracker. Witness Chambers, however, did not create the Excel Spreadsheet

[245] Tr. Vol. III at 593.

[246] Tr. Vol. IV at 1037-38.

or verify its contents. Thus, witness Chambers' Exhibits WJC-3 and WJC-5 are based upon improper hearsay.

Finally, because the information contained in the Excel Spreadsheet is hearsay and was not properly sponsored by a witness, the facts contained in the Excel Spreadsheet are not reliable. Ohio Rule of Evidence 702 requires expert testimony to be based upon "reliable scientific, technical, or other specialized information." Because the Excel Spreadsheet is not reliable, the portions of witness Chambers' testimony that relied upon the Excel Spreadsheet should have been stricken.

Additionally, The Commission should reverse the Attorney Examiner's denial of IEU-Ohio's January 3, 2013 and February 22, 2013 Motions to Compel. In those Motions to Compel, IEU-Ohio sought information from DP&L regarding DP&L's ability to increase its revenue (e.g., through filing applications seeking increases in distribution or transmission rates).[247] DP&L identified that it had responsive studies but claimed that the studies were privileged.[248] The Attorney Examiners improperly ruled that DP&L's responsive studies contained information protected by the attorney-client privilege and work-product doctrine.[249] The Attorney Examiners also improperly ruled that DP&L's claim of privilege had not been voluntarily waived.[250]

DP&L's memorandum contra IEU-Ohio's February 23, 2013 Motion to Compel stated that DP&L was considering filing applications to increase its distribution and

[247] Motion of IEU-Ohio to Compel Discovery Responses from DP&L and Memorandum in Support, *in passim* (Jan. 3, 2013); Motion of IEU-Ohio to Compel Discovery Responses from DP&L and Memorandum in Support at 23-27 (Feb. 22, 2013).

[248] DP&L's Memorandum in Opposition to Motion of IEU-Ohio to Compel Discovery Responses from DP&L at 6-9, Declaration of Dona R. Seger-Lawson (Mar. 1, 2013).

[249] Tr. of the March 7, 2013 Prehearing Conference at 98 (Mar. 22, 2013).

[250] *See id.* (In denying IEU-Ohio's Motion to Compel which raised the issue of voluntary waiver, the Attorney Examiners implicitly rejected the waiver argument).

transmission rates and that two studies about the impact of filing applications to increase rates had in fact been completed.[251] The crux of DP&L's claim of privilege is that the Ms. Seger-Lawson, director of DP&L's regulatory department, was asked by her boss, the general counsel of DP&L, to perform a review regarding DP&L's ability to obtain increases in distribution and transmission rates.[252] This is the sole claim that DP&L relied upon to argue before the Attorney Examiners that its two responsive studies were privileged.

For an investigative report to obtain the attorney-client privilege, much more must be demonstrated. Ohio law holds that an investigative report can be protected under the attorney-client privilege if the "investigation was 'related to the rendition of legal services'"[253] and requires "the client for whom the investigation was conducted [to] show that other legal advice or assistance was sought and that the investigation conducted was ***integral*** to that assistance."[254] DP&L failed to demonstrate that these two requirements were met.

For DP&L's studies to be protected by the work-product doctrine, Ohio law requires it to be produced in anticipation of litigation.[255] Conversely, if the document at issue is produced in the ordinary course of business, even if expected to also be used in litigation, the document does not qualify for protection under the work-product

[251] DP&L's Memorandum in Opposition to Motion of IEU-Ohio to Compel Discovery Responses from DP&L at 6-9, Declaration of Dona R. Seger-Lawson (Mar. 1, 2013).

[252] *Id.*

[253] *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767, ¶ 27 (*quoting In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997)).

[254] *Toledo Blade*, 2009-Ohio-1767 at ¶ 28 (emphasis added, original emphasis omitted).

[255] *Roggelin v. Auto-Owners* Insurance, 2002-Ohio-7310 ¶¶ 29-30 (Ohio App.3d)

doctrine.[256] The information IEU-Ohio sought through discovery and its Motions to Compel was the type of information that would be produced in the ordinary course of business. Accordingly, the two responsive studies identified by DP&L were not covered by the work-product doctrine.[257]

Furthermore, even if DP&L's responsive studies were subject to the attorney-client privilege and/or work-product doctrine, DP&L had voluntarily waived either claim by voluntarily providing testimony on the same subject matter. "A client's voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege," and therefore "voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter."[258] As of the time IEU-Ohio filed these two Motions to Compel, DP&L had submitted pre-filed direct testimony of its witness, Craig Jackson, who included testimony regarding DP&L's projected revenue over the term of its proposed ESP. Thus, DP&L voluntarily placed at issue in this proceeding its potential revenue for the coming years; this is exactly what IEU-Ohio sought through discovery. Accordingly, even if DP&L's two responsive studies were privileged (which they are not) DP&L had voluntarily waived any claim of privilege.

IV. CONCLUSION

In its Amended ESP Application, DP&L has requested approval to collect in excess of $700 million in generation-related non-bypassable charges and electric bill

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[256] *Id.* at ¶ 15 (*citing Tayler v. Travelers Ins. Co.*, 183 F.R.D. 67, 70-71 (N.D.N.Y.1998)).

[257] See Motion of IEU-Ohio to Compel Discovery Responses from DP&L and Memorandum in Support at 17-27 (Feb. 22, 2013).

[258] *MA Equipment*, 2012-Ohio-4668, ¶ 20; *Mid-American Natl. Bank and Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 599 N.E.2d 699, 704 (6th Dist. 1991) (*citing Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)).

escalating mechanisms that increase the cost of the ESP relative to the MRO option. The Commission must deny DP&L's requests because they are unlawful, unjust, and unreasonable.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief of Industrial Energy Users-Ohio was served upon the following parties of record this 20th day of May, 2012, via hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

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ATTACHMENT 1

Revised Exhibit KMM-15

Line	**MRO and ESP Rates and Revenues**	6/2013-5/2014	6/2014-5/2015	6/2015-5/2016	6/2016-5/2017	6/2017-5/2018	Total or Average	Source or Calculation
1	Bypassable Current Generation Rates ($/MWh)							
2	Current Generation Rates	$76.62	$76.62	$76.62	$76.62	$76.62		Second Revised Exhibit RJM-1
3	Forecasted CBP Auction Rates	$44.86	$58.01	$61.70	$64.07	$65.75		Second Revised Exhibit RJM-1
4								
5	CBP Rate Blending Schedule (%)							
6	MRO	10.0%	20.0%	30.0%	40.0%	50.0%		Second Revised Exhibit RJM-1
7	ESP	10.0%	40.0%	70.0%	100.0%	100.0%		Second Revised Exhibit RJM-1
8								
9	Blended SSO Rate ($/MWh)							
10	MRO	$73.44	$72.90	$72.14	$71.60	$71.19		Line 2*(1-Line 6)+Line 3*Line 6
11	ESP	$73.44	$69.18	$66.18	$64.07	$65.75		Line 2*(1-Line 7)+Line 3*Line 7
12	Difference in Bypassable Rates	$0.00	-$3.72	-$5.97	-$7.53	-$5.44		Line 10 - Line 11
13								
14	Total Bypassable Revenues ($Millions)							
15	MRO	$304.55	$302.29	$299.16	$296.91	$295.18	$1,498.09	Line 10 * Line 36
16	ESP	$304.55	$286.85	$274.41	$265.68	$272.65	$1,404.15	Line 11 * Line 36
17	Difference in Bypassable Revenues	$0.00	-$15.43	-$24.75	-$31.22	-$22.54	-$93.94	Line 16 - Line 15
18								
19	Non-bypassable Revenues ($Millions)							
20	MRO	$72.68	$72.68	$72.68	$72.68	$72.68	$363.40	Direct Testimony of Kevin Murray
21	ESP	$137.50	$137.50	$137.50	$137.50	$137.50	$687.50	Second Revised Exhibit RJM-1
22	Difference in Non-bypassable Revenues	$64.82	$64.82	$64.82	$64.82	$64.82	$324.10	Line 21 - Line 20
23								
24	ESP Versus MRO Price Test ($Millions)							
25	Difference in Bypassable Revenues	$0.00	-$15.43	-$24.75	-$31.22	-$22.54	-$93.94	Line 17
26	Difference in Non-bypassable Revenues	$64.82	$64.82	$64.82	$64.82	$64.82	$324.10	Line 18
27	Forecast Switching Tracker Revenue Requirement ($ Millions)	$32.79	$12.81	$5.13	$0.00	$0.00	$50.73	Line 40
28	**Total Change in Revenues**	$97.61	$62.19	$45.21	$33.60	$42.28	$280.89	Line 25 + Line 26 + Line 27
29								
30	**Load and Switching Assumptions**							
31								
32	August 30, 2012 Switching	61.7%	61.7%	61.7%	61.7%	61.7%		(1 - Line 33)/Line 34
33	August 30, 2012 DP&L SSO Load (TWh)	5.29	5.29	5.29	5.29	5.29		Second Revised Exhibit RJM-1 w/ adjustment to first CBP
34	Total Load (TWh)	13.82	13.82	13.82	13.82	13.82		Second Revised Exhibit RJM-1 w/ adjustment to first CBP
35	Forecast Switching	70.0%	70.0%	70.0%	70.0%	70.0%		
36	Forecast SSO Load	4.15	4.15	4.15	4.15	4.15		(1-Line 35)* Line 34
37	Forecast Switching Tracker Revenue Requirement ($ Millions)	$32.79	$12.81	$5.13			$50.73	(Line 33 - Line 36)*(Line 2-Line 3)

ATTACHMENT 2

Revised Exhibit KMM-17

Line	MRO and ESP Rates and Revenues	6/2013-5/2014	6/2014-5/2015	6/2015-5/2016	6/2016-5/2017	6/2017-5/2018	Total or Average	Source or Calculation
1	Bypassable Current Generation Rates ($/MWh)							
2	Current Generation Rates	$76.62	$76.62	$76.62	$76.62	$76.62		Second Revised Exhibit RJM-1
3	Forecasted CBP Auction Rates	$44.86	$58.01	$61.70	$64.07	$65.75		Second Revised Exhibit RJM-1
4								
5	CBP Rate Blending Schedule (%)							
6	MRO	10.0%	20.0%	30.0%	40.0%	50.0%		Second Revised Exhibit RJM-1
7	ESP	10.0%	40.0%	70.0%	100.0%	100.0%		Second Revised Exhibit RJM-1
8								
9	Blended SSO Rate ($/MWh)							
10	MRO	$73.44	$72.90	$72.14	$71.60	$71.19		Line 2*(1-Line 6)+Line 3*Line 6
11	ESP	$73.44	$69.18	$66.18	$64.07	$65.75		Line 2*(1-Line 7)+Line 3*Line 7
12	Difference in Bypassable Rates	$0.00	-$3.72	-$5.97	-$7.53	-$5.44		Line 10 - Line 11
13								
14	Total Bypassable Revenues ($Millions)							
15	MRO	$304.55	$302.29	$299.16	$296.91	$295.18	$1,498.09	Line 10 * Line 36
16	ESP	$304.55	$286.85	$274.41	$265.68	$272.65	$1,404.15	Line 11 * Line 36
17	Difference in Bypassable Revenues	$0.00	-$15.43	-$24.75	-$31.22	-$22.54	-$93.94	Line 16 - Line 15
18								
19	Non-bypassable Revenues ($Millions)							
20	MRO	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	Direct Testimony of Kevin Murray
21	ESP	$137.50	$137.50	$137.50	$137.50	$137.50	$687.50	Second Revised Exhibit RJM-1
22	Difference in Non-bypassable Revenues	$137.50	$137.50	$137.50	$137.50	$137.50	$687.50	Line 21 - Line 20
23								
24	ESP Versus MRO Price Test ($Millions)							
25	Difference in Bypassable Revenues	$0.00	-$15.43	-$24.75	-$31.22	-$22.54	-$93.94	Line 17
26	Difference in Non-bypassable Revenues	$137.50	$137.50	$137.50	$137.50	$137.50	$687.50	Line 18
27	Forecast Switching Tracker Revenue Requirement ($ Millions)	$32.79	$12.81	$5.13	$0.00	$0.00	$50.73	Line 40
28	**Total Change in Revenues**	$170.29	$134.87	$117.89	$106.28	$114.96	$644.29	Line 25 + Line 26 + Line 27
29								
30	**Load and Switching Assumptions**							
31								
32	August 30, 2012 Switching	61.7%	61.7%	61.7%	61.7%	61.7%		(1 - Line 33)/Line 34
33	August 30, 2012 DP&L SSO Load (TWh)	5.29	5.29	5.29	5.29	5.29		Second Revised Exhibit RJM-1 w/ adjustment to first CBP
34	Total Load (TWh)	13.82	13.82	13.82	13.82	13.82		Second Revised Exhibit RJM-1 w/ adjustment to first CBP
35	Forecast Switching	70.0%	70.0%	70.0%	70.0%	70.0%		
36	Forecast SSO Load	4.15	4.15	4.15	4.15	4.15		(1-Line 35)* Line 34
37	Forecast Switching Tracker Revenue Requirement ($ Millions)	$32.79	$12.81	$5.13			$50.73	(Line 33 - Line 36)*(Line 2-Line 3)