BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE DAYTON POWER AND LIGHT COMPANY'S REPLY BRIEF
PUBLIC VERSION

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THE DAYTON POWER AND LIGHT COMPANY'S REPLY BRIEF

I. INTRODUCTION AND SUMMARY

The intervenors ask the Commission to do many things. They ask the Commission to deny DP&L's request for an SSR and ST. They ask the Commission to order DP&L to implement 100% competitive bidding immediately. They ask that DP&L be ordered to separate its generation assets immediately. They ask the Commission to order DP&L to implement various competitive retail enhancements. They ask for so many things that DP&L cannot respond to all of them in this brief.

The most notable point about their briefs, however, is what they do not contain. The intervenors do not cite to any analysis that demonstrates that DP&L could provide safe and reliable distribution, transmission and generation service if the Commission were to grant any (much less all) of their requests. The Commission is charged with ensuring that DP&L can provide safe and reliable service. The intervenors make many proposals, but at the end of the day, they presented no evidence demonstrating that DP&L would be able to provide safe and reliable service under their proposals.

The reason that the intervenors do not present evidence on that point is that DP&L could not provide safe and reliable service if their various proposals were adopted. DP&L presented substantial -- and unrebutted -- evidence that its financial integrity is in jeopardy, and that DP&L would not be able to provide such service if its requests in this case were denied.

The intervenors complain at length about DP&L's rate proposals in this case, but they entirely ignore the fact that DP&L's ESP actually results in a rate decrease over its term for nearly all SSO customers. Specifically, due to implementation of competitive bidding, the evidence shows that DP&L's ESP plan is projected to result in lower rates for nearly all SSO customers over its term. DP&L Ex. 9, p. 7 (Seger-Lawson); Schedule 10. The Commission can read every word in the intervenors' briefs, but it will not find that fact mentioned.

The most persistent theme in the intervenors' briefs is that the cause of DP&L's financial integrity issues is generation-related, and that the Commission cannot approve rate riders that are intended to allow DP&L to continue providing stable, safe and reliable generation service. Not only are the intervenors wrong on the law on that point (as DP&L shows below), but also the intervenors ignore entirely the fact that DP&L is an integrated company that owns distribution, transmission and generation assets. The intervenors never explain how DP&L -- as an integrated company -- could provide safe and reliable distribution, transmission and generation service without enough revenue to maintain its financial integrity. The intervenors offer no explanation on that point because the facts show that it cannot be done. DP&L Ex. 16A, p. 8 (Jackson Rebuttal); DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal); DP&L Ex. 4A, p. 53 (Chambers).

Another theme in the intervenors' briefs is that DP&L should be ordered to separate its generation assets immediately. However, DP&L presented substantial evidence showing that it cannot transfer all of its generation assets until December 31, 2017. The intervenors do not cite to any evidence showing that the assets could be transferred any earlier. The reason that they do not cite to any such evidence is that there is none in the record.

As to the Staff's brief, DP&L's principal disagreements with Staff were thoroughly addressed in DP&L's initial brief. As demonstrated in DP&L's initial brief (pp. 14-24), Staff's proposed SSR range was too low, principally because (1) a [redacted] ROE is below a reasonable range; (2) Staff used the wrong capital structure; and (3) Staff used the wrong generation dispatch forecast.

The evidence demonstrates that DP&L's ESP Application strikes a reasonable balance. DP&L's ESP results in lower rates for SSO customers over the term, while allowing DP&L to maintain its financial integrity and provide safe and reliable service. The Commission should therefore approve DP&L's ESP Application as filed.

II. DP&L'S FINANCIAL INTEGRITY

A. SSR

As demonstrated in DP&L's initial brief (pp. 7-10, 14), the evidence at the hearing showed that DP&L needed the SSR so that it could continue to provide safe and reliable service. DP&L Ex. 4A, WJC-4 (Chambers). Staff agreed with the establishment of an SSR, and recommended an SSR range of $133 to $151 million. Staff Ex. 10, pp. 11, 14-15 (Choueiki).

DP&L's initial brief also demonstrated (pp. 28-34) that many intervenor witnesses agreed not only that it was important that DP&L be able to provide safe and reliable service,[1] but also that DP&L would need to earn a reasonable ROE to maintain its financial integrity.[2] The intervenors have made an odd record; they have painstakingly avoided looking at the key facts -- the deteriorating financial condition of DP&L and DP&L's ability to provide safe and reliable service <u>during the ESP term</u> -- and have instead looked backward, at historical financial metrics. Thus, their hammer completely missed the nail.

[1] Tr. 2056 (Chriss); Tr. 1970 (Collins); Tr. 1658-59 (Higgins); Tr. 2434 (Noewer); Tr. 2577-78 (Walz); Tr. 2611-12 (White); Tr. 2097 (Hixon); OCC Ex. 17, pp. 10-11 (Wilson).

[2] Tr. 1000 (definition of financial integrity is "whether the company's able to generate revenue, meet its expenses, and provide a reasonable return to its investors") (Mahmud); Tr. 1878-80 (Choueiki); Tr. 1936 (Gorman); Tr. 1984 (Kollen); FES Ex. 14A, pp. 10-11 (Lesser); Tr. 2519-20 (Duann).

In response to the evidence submitted by DP&L, the intervenors make a variety of arguments as to why the Commission should reject DP&L's request for an SSR. The Commission should reject those arguments for each of the following separate reasons:

1. <u>Safe and Reliable Service</u>

FES (pp. 36-37), IEU (pp. 20-24) and OEG (pp. 7-8) assert that DP&L has not offered evidence demonstrating that DP&L would not be able to provide stable, safe and reliable service without the SSR. That assertion simply is not true.

For example, DP&L witness Jackson testified:

> "Q. On Pages 10 and following in Witness Jonathan Lessers' Direct Testimony, he discusses the Company's proposed SSR and on Page 11 indicates that 'If a company is told its financial integrity is guaranteed, then the economic incentive to improve its operations and reduce costs is reduced.' Please comment on his assertion and the SSR.
>
> A. . . . I strongly disagree that the SSR requested in this proceeding will 'guarantee' the financial integrity of the Company. Instead, <u>it is the minimum that DP&L needs</u> to allow it to satisfy its obligations, operate efficiently <u>so as to provide adequate and reliable service</u> and otherwise continue operating as an ongoing entity."

DP&L Ex. 16A, pp. 7-8 (Jackson Rebuttal) (emphasis added).

DP&L witnesses Seger-Lawson and Chambers also explained that DP&L would need the SSR to provide stable, safe and reliable service. DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal) (the SSR "is important to the company's ability to provide stable, safe, and reliable electric service"); DP&L Ex. 4A, p. 54 (Chambers) (the SSR "permits [DP&L] to provide quality service to its customers . . . removal of the SSR will damage DP&L's financial position and integrity substantially, imperiling its ability to provide such quality service to its customers").

2. <u>Generation-Related</u>

OCC (pp. 26-29, 43-48), FES (pp. 55-57), IEU (pp. 24-29), FEA (pp. 6-7), Kroger (pp. 7, 12-13), OEG (pp. 3-7), OHA (pp. 7-8) and Walmart (pp. 9-10) argue that the Commission should reject the SSR because it is a charge that relates to generation. The Commission should reject that argument for two separate reasons.

<u>First</u>, § 4928.143(B)(2)(d) authorizes charges if they (among other elements) would have the effect of providing stable "retail electric service." The term "retail electric service" is defined in § 4928.01(A)(27) to include generation service. Thus, contrary to the intervenors' arguments, § 4928.143(B)(2)(d) authorizes charges that relate to generation service.

<u>Second</u>, the intervenors ignore the fact that DP&L is an integrated company which provides distribution, transmission and generation service; thus, if DP&L does not have sufficient revenue, DP&L's ability to provide all of those services would be affected. Tr. 1865-66 (Choueiki); Tr. 2635-36 (Bowser). DP&L witness Malinak explained that one <u>cause</u> of DP&L's financial integrity issues may be generation-related, but that those issues will <u>affect</u> all of DP&L's businesses. Tr. 2871-72. Staff witness Choueiki explained that DP&L is a vertically-integrated company and that the SSR would support its ability to provide distribution, transmission and generation service. Tr. 1865-66. Dr. Choueiki further explained that the SSR thus relates to distribution, transmission and generation service. <u>Id</u>. IEU witness Bowser conceded that the SSR would provide cash flow support for DP&L's distribution, transmission and generation businesses. Tr. 2636.

Significantly, none of the intervenors explain (much less offer evidence regarding) how DP&L could provide safe and reliable distribution service if it received insufficient revenue to maintain its total-company financial integrity. Common sense (and the evidence) shows that DP&L would not be able to provide safe and reliable service of any kind if it does not have sufficient total-company revenue to maintain its financial integrity.

3. Transition Costs

IEU (pp. 8-20), IGS (pp. 9-11), Kroger (pp. 8, 10-11), and OCC (pp. 48-52) all argue that the SSR is an unlawful transition charge under Ohio Rev. Code § 4928.39. The Commission should reject that argument for two separate and independent reasons. First, Ohio Rev. Code § 4928.39 states repeatedly that a transition charge recovers "costs." The SSR does not authorize the recovery of any specific costs; rather, it is a charge that was designed to allow DP&L to maintain a reasonable ROE so that it could provide safe and reliable service. Indeed, there was overwhelming evidence – including concessions by numerous intervenor witnesses – that the SSR was designed to allow DP&L to earn a targeted ROE and was not designed to recover any specific costs. DP&L Exhibit 14A, pp. 16-18 (Malinak Rebuttal); Tr. 209 (Jackson); Tr. 552 ("the SSR is not a cost-based from that standpoint . . . it is a general amount of money that contributes significantly to the ongoing financial integrity of the company") (Chambers); Tr. 823 (Parke); Tr. 1304-05, 1433 (Seger-Lawson); Tr. 2871 (Malinak); Tr. 1707 (Hess); Tr. 2035 (Rose); Tr. 2518 (Duann); Tr. 1808-09 (Turkenton). The SSR thus is not a transition cost as the term is defined in § 4928.39. (Staff agrees with this point. Staff Brief, pp. 18-21.)

Second, even if the SSR were a transition charge under Ohio Rev. Code § 4928.39 (enacted in 1999), the SSR would still be a lawful statutory charge under Ohio Rev. Code § 4928.143(B)(2)(d) (enacted in 2008). If there is a conflict between the two statutes (there is none), then § 4928.143(B)(2)(d) would control since it was the later-enacted statute. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."); Summerville v. City of Forest

Park, 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E.2d 522, at ¶ 33 (holding that two statutes conflicted and that "the more recent . . . statute . . . prevails"); Stutzman v. Madison County Bd. of Elections, 93 Ohio St. 3d 511, 517, 757 N.E.2d 297 (2001) ("the statute later in date of enactment, prevails").[3]

4. O&M Savings

The evidence at the hearing demonstrated that DP&L had identified potential Operations and Maintenance ("O&M") savings of $[redacted] in 2013, $[redacted] in 2014, and $[redacted] in 2015-2017. Tr. 87-88 (Jackson). DP&L did not include those potential O&M savings in its as-filed case because they had not been approved by DP&L's Board at the time of filing. DP&L Ex. 16A, p. 9 (Jackson Rebuttal); Tr. 1118 (Herrington).

IEU (pp. 32-33), OCC (pp. 30-31), FEA (pp. 5-6), FES (pp. 46-51), Honda (p. 5) and OEG (p. 10) assert that DP&L's as-filed O&M expenses are overstated, because the potential savings are not included, and that DP&L's need for the SSR is thus overstated. They argue that the Commission should therefore reduce DP&L's request for an SSR by the amount of the potential O&M savings. The Commission should reject that argument for the following separate reasons:

First, the potential O&M reductions are not a substitute for the SSR; they are a potential addition to it. DP&L would earn an ROE of only [redacted]% if it were able to achieve all of the potential savings (not likely) and suffered no lost revenue due to operational issues stemming

[3] On cross-examination, OCC witness Rose stated that he had analyzed the transition cost filing under the 1999 law in DP&L's previous case, which was one that compared book value of assets to market value of assets. Tr. 2017. He admitted that the SSR in this case is not based upon a comparison of market value of generation assets to book value. Tr. 2018. He made no analysis of stranded costs for this case, Tr. 2021, and conceded that this case is not brought under the 1999 statute, but on the subsequently passed statute (§ 4928.143) governing ESPs. Tr. 2016-17.

from reduced maintenance (also not likely). DP&L Ex. 16A, p. 10 and CLJ-7 (actual capital structure) (Jackson Rebuttal); Tr. 256-57 (Jackson). DP&L would therefore earn an ROE at the [redacted] a reasonable ROE range, even if it were able to successfully implement all of the potential savings measures.

Second, the O&M savings measures have not been approved by DP&L's Board for 2014-2017, and whether they will be approved or can be implemented is pure speculation. DP&L Ex. 16A, p. 9 (Jackson Rebuttal); Tr. 1118 (Herrington).

Third, there are substantial risks associated with reducing O&M expenses, and the potential savings are not risk-adjusted. DP&L Ex. 16A, pp. 9-10 (Jackson Rebuttal); Tr. 1113-14, 1176-77 (Herrington); Tr. 254-55 (Jackson).

DP&L's President Phil Herrington explained in detail that DP&L's need for an SSR is not reduced by potential O&M expense reductions:

> "Q. With regard to the potential O&M expense reductions let me ask you this: Is the need for an SSR in the amount that the company has requested lessened by virtue of the O&M expense reduction potential that you have identified?
>
> A. No, it's not.
>
> Q. Why not?
>
> A. For one, again, I spent some time talking about the ultimate impact of O&M expense reduction, there may be a cost.
>
> Secondly, many of these, as I commented on them as related to the first point, we've been calling them prospective or using other terminology that says they're potential O&M cuts. Regardless of the fact that they're in the budget, the budget is a goal and it's what we're striving towards. We have no indication that we will get there.

> The O&M forecasts that were included in the filing are based on the historic operation of DP&L as an enterprise. As I mentioned before, our team, the DP&L organization, has been around for some decades and has expertise in operating and has, in our belief, run the plants, run the facilities, the T and D system very efficiently.
>
> What that means is we have found what we believe historically to be the optimal O&M costs versus reliability, subject to your conversation we had said this is -- the O&M cuts were in relation to potential outcomes that may happen in this regulatory proceeding.
>
> So to that extent they are simply cuts or reductions, if you will, that give us an opportunity to continue to earn a reasonable rate of return. They're by no means guaranteed. We are taking on additional risk by doing them and that risk may ultimately prove to be not worth the savings that we think we will achieve at this point."

Tr. 1176-77.

5. <u>Capital Expenditures</u>

IEU (pp. 34-35), OCC (pp. 30-34), and FES (pp. 49-50) assert that the Commission should adjust the SSR associated with potential capital expenditure reductions that DP&L has identified. The Commission should reject that argument for several reasons. <u>First</u>, as with the potential O&M savings, DP&L may need the capital expenditure reductions to maintain its financial integrity; the potential capital expenditure reductions are potential additions to the SSR, not substitutes for it. <u>Second</u>, there is no approved budget for 2014 and beyond; potential capital expenditure reductions for later years are thus speculative. <u>Third</u>, the capital expenditure reductions carry significant risks; however, the amounts are not risk adjusted. <u>Fourth</u>, in any event, capital expenditure reductions will have little impact on DP&L's earnings or ROE. DP&L Ex. 14A, pp. 27-28 (Malinak Rebuttal).

FES also argues (p. 49) that DP&L's "cash and cash equivalents" will be $[redacted] higher than DP&L's projections. A large portion of that amount is associated with reduced capital expenditures. The Commission should reject FES' arguments, not only for the reasons stated above, but also because "cash and cash equivalents" is the wrong measure. As the Commission knows, the appropriate measure to determine whether a utility's rates are reasonable is ROE; that is the measure the Commission used in AEP's case. AEP Order, p. 33. Indeed, FES' own witness concedes that "expected return[s]" is the relevant measure of financial integrity. FES Ex. 14A, pp. 10-11 (Lesser). As DP&L witness Malinak demonstrated, the capital expenditure reductions have little impact on DP&L's earnings. DP&L Ex. 14A, pp. 27-28.

6. <u>Sales to DPLER at Zero Margin</u>

IEU (pp. 37-38), FES (p. 52) and Honda (p. 5) argue that the fact that DP&L sells generation to DPLER at "zero margin" shows that DP&L is subsidizing DPLER and that DP&L's needs for the SSR are thus overstated. The Commission should reject that argument for two reasons.

<u>First</u>, as demonstrated in DP&L's initial brief (pp. 71-74), FERC has exclusive jurisdiction to regulate wholesale sales. As DP&L also demonstrated, any decision in this case relating to the transfer price between DP&L and DPLER would be pre-empted.

<u>Second</u>, in any event, their arguments on this point are incorrect and misleading because they fail to address the fact that DP&L has fully accounted for the expected gross margin available from projected future generation sales. When DP&L sells power to DPLER, there are actually three transactions, not one. Specifically:

(1) DP&L sells all of its generation to PJM at a price called the locational marginal price ("LMP"). Tr. 38-41, 172 (Jackson). The LMP at which DP&L sells its generation to PJM varies on an hourly basis and is established by PJM.

(2) DP&L then pays to PJM LMP-based charges, to meet its load obligations (for its SSO retail customers, as well as for its wholesale customers including DPLER). Tr. 38-41, 172. The charges from PJM for meeting these load obligations, including the applicable LMP, also vary on an hourly basis. (The amount of generation that DP&L buys from PJM to satisfy its load obligations may be greater than, equal to or less than the amount of generation that it sold to PJM.)

(3) DP&L then charges its customers for the load that it has supplied, both to SSO retail customers (at SSO tariff rates) and to wholesale customers, including DPLER (at contract prices). Tr. 38-41, 172.

As to the first transaction -- DP&L's sale of all of its generation to PJM -- DP&L earns a margin (i.e., profit). That margin generally equals the LMP that DP&L receives from PJM minus DP&L's fuel and other variable costs. Tr. 74-75.

After DP&L buys the power that it needs from PJM to satisfy its retail and wholesale load obligations (transaction two), DP&L then charges DPLER for its sales to DPLER at contract prices (transaction three). Tr. 38-41, 172. DP&L and DPLER sign contracts that establish the price for these transactions (Tr. 69); it is undisputed that the contract price, at the time signed, is at a market rate (i.e., the projected cost to serve the DPLER load, based on then-expected LMP prices during the contract term). IEU Ex. 2A, p. 15; Tr. 1489 (Murray).

However, as the Commission knows, market prices (including the LMP) may change after a contract has been signed. In fact, the LMP varies on an hourly basis and only by coincidence would the PJM charges to serve the load based on hourly LMPs be equal to the contract price. Thus, during the term of the DP&L/DPLER contract, the LMP-based charges that DP&L pays to PJM to serve the DPLER load (in transaction two) may be equal to, less than or greater than the DP&L/DPLER contract price. Tr. 164 (Jackson).

At the time that DP&L and DPLER sign a contract (for transaction three), it would be irrational for DP&L and DPLER to agree to a price that was higher than or lower than the projected cost to serve the DPLER load based on then-expected LMP. From DP&L's perspective, it would not agree to a price that was lower than the projected cost to serve the load at the then-expected LMP because DP&L would expect to take losses on the transaction. From DPLER's perspective, it would not agree to a price that was higher than the projected cost to serve the load based on the then-expected LMP because DPLER (like any other CRES provider) could buy the power from another generation provider at prices based on the then-expected LMP.

Indeed, the intervenors' suggestion that DP&L should sell generation to DPLER at a price above the projected cost to serve the load based on then-expected LMP would result in DPLER subsidizing DP&L and would harm DPLER's ability to compete with CRES providers. Specifically, CRES providers (including DPLER) can acquire generation from other generation providers at prices reflecting the projected cost to serve the load based on the then-expected LMP. DPLER would be subsidizing DP&L if DPLER paid more than what the generation was worth in the market, and DPLER would be at a competitive disadvantage if it agreed to pay more for generation than the amount that CRES providers paid for it.

Some of DP&L's projected sales to DPLER are under contract, but DP&L projects that it will make additional sales to DPLER during 2013-2017 that are not currently under contract. Tr. 302-03 (Hoekstra); IEU Ex. 5, pp. 3-4. As to the proposed sales that are not currently under contract, for the reasons explained above, DP&L expects to enter contracts with DPLER at the projected cost to serve the DPLER load based on the then-expected LMP. Tr. 164 (Jackson). The reason that DP&L shows zero margin on those projected sales (IEU Ex. 5, p. 4,

Chart 2) is thus the fact that DP&L expects to pay PJM LMP-based charges to serve the load (transaction two), and expects to sell power to DPLER at a contract price that exactly equals the identical LMP-based charge (transaction three), thus resulting in a zero margin. Tr. 68-69 (Jackson), 308 (Hoekstra).

Accordingly, the intervenors' claims that DP&L is subsidizing DPLER by selling generation to it at zero margin are incorrect and highly misleading. The intervenors neglect to mention that they are discussing only transactions two and three and that DP&L earns a margin on its sales of generation to PJM (transaction one). More importantly, the intervenors neglect to address whether it is rational for DP&L and DPLER to sign contracts at prices that reflect the then-expected LMP; instead, they make cryptic references to sales at "zero margin" and insinuate that there is an impropriety without explaining the nature of the transactions. As demonstrated above, the fact that DP&L and DPLER sign contracts at prices that reflect the then-expected LMP is rational and appropriate.

7. Sales at Auction

FES (p. 51) also criticizes DP&L's projected revenues because they do not include any projected sales under competitive bid auctions (other than auctions for which DP&L is already the winning bidder). That is another misleading argument, for at least two reasons.

First, competitive bid auctions in Ohio have been highly competitive, and DP&L has been a winning bidder in only one of them. The intervenors' claim that DP&L is likely to win load in future auctions is highly speculative. Second, and more importantly, DP&L's projections show sales into wholesale markets to the full extent that DP&L projects that its generation costs will be lower than projected wholesale market rates. DP&L Ex. 1A, CLJ-2 (Jackson). While it is possible that DP&L will win load in auctions in the future, there is no reason to believe based on recent auction results that the winning bid would be higher than prevailing wholesale market prices; bidders at the auction are likely to bid the auction price down until there is little if any difference between the expected market price and the auction price. If DP&L were to include auction sales in its projections, then it would need to reduce its projected wholesale sales by an identical amount; as there is no reason to expect there to be a material difference between the two amounts, DP&L's decision not to include additional auction sales in its projections was reasonable.

8. Generation Dispatch

Staff (pp. 13-15) and IEU (p. 33-34) argue that the Commission should use Staff witness Benedict's adjustments to DP&L's projections of revenues expected from its generating facilities. However, Mr. Benedict used forced outage rates that are lower than the forced outage rates used by DP&L; he described that difference as one of "the most important factors that explain[s] the differences in the generation forecasts." Staff Ex. 3A, p. 8; Tr. 1535. On cross-examination, Mr. Benedict admitted that he was unaware that DP&L's modeled forced outage rates at the DP&L-operated generation units are in line with the historic five-year average of those rates. Tr. 1538. Evidence submitted by DP&L showed that its projected O&M was consistent with its historic O&M. DP&L Ex. 1A, p. 7; Tr. 85 (Jackson). Accord: Tr. 1176-77 ("The O&M forecasts that were included in the filing are based on the historic operation of DP&L as an enterprise.") (Herrington).

Further, Mr. Benedict modeled higher generation output, but then assumed that in each hour that the generation units ran, they would receive the average annual revenue per mWh. Tr. 1538. However, he conceded that (a) the margin for a generation unit is lower in off-peak or shoulder periods, and (b) in the hours in which these units are running and in which they make a positive contribution to the annual average revenue, those units are already running at full capacity. Tr. 1539.

In addition, Mr. Benedict was unable to explain why he forecasted an increase in generation output in 2013 (more than a 6% increase), but he forecasted a decline in O&M expenditures of over $2.1 million in 2013 (Tr. 1542-44), concluding that his proffered explanation for that disparity is just "my best guess" (Tr. 1543) and that he does not know in fact why his figures show such an illogical result (Tr. 1544). Thus the record does not support his suggested adjustments.

9. Switching Projections

IEU (pp. 35-36) cites to the testimony of Staff witness Choeuiki to support an argument that DP&L's switching projections are overstated. However, IEU and Dr. Choeuiki failed to address the significant effects that governmental aggregation is projected to have upon DP&L's switching rates. As explained in the testimony of DP&L witness Hoekstra, there are currently numerous communities in DP&L's service territory that are considering aggregation efforts; those governmental aggregation efforts are likely to lead to significant increases in residential switching. DP&L Ex. 2A, pp. 8-9; Tr. 293-96, 389-94 (Hoekstra); FES Ex. 10. The Commission should thus conclude that DP&L's switching projections are reasonable.

10. Forward Curves

FES (pp. 52-54) and IEU (p. 34) argue that DP&L's request for the SSR is overstated because the forward curves for generation have improved as of the time of DP&L's filing. Before review of the reasons that this argument should be rejected, it should be noted that the PJM Reliability Pricing Model ("RPM") capacity auction results for delivery year 2016/2017 were announced on Friday, May 24, 2013. The $59.37/MW-day result[4] is significantly lower than the figures used in DP&L's filed case -- almost two-thirds lower. This result shows (a) the fallacy of intervenors' various criticisms of DP&L's filing in which the intervenors argue that DP&L should have updated its filing again (intervenors select updated figures favorable to themselves); (b) the point made by DP&L repeatedly in its testimony, that the SSR and the switching tracker are designed merely to give DP&L the opportunity to earn a reasonable rate of return, and there are still significant risks and known business challenges facing DP&L going forward; and (c) the need for the SSR and the switching tracker to be for a five-year period, not a shorter period.

Turning to FES' and IEU's argument about forward curves, the Commission should reject that argument for the following separate reasons:

a. <u>One Point in Time</u>: As the Commission knows, actual costs and market projections change on a daily basis. The pattern in any rate-setting case will be that the utility files its cost data, then the hearing occurs, and then the Commission issues its decision. The cost data will always have changed by the time of the hearing and the Commission's decision. The Commission thus should pick a point in time to evaluate the utility's requests, and stick to that point in time. The Commission should not consider updated data.

b. <u>All data</u>: If the Commission were to consider updated data regarding the forward curve for generation, then the Commission would need to consider updated data for <u>all</u> of DP&L's projected costs and revenues. The Commission should not consider one change in

[4] http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx

isolation, since the effect of that change may be offset or even exceeded by other changes to costs and related issues that go the other way. Neither FES nor IEU offered any evidence that updated the actual and projected changes to all of DP&L's costs and revenues. The Commission should not consider the change in forward curves in isolation, and should thus reject their argument.

Indeed, DP&L projected that it would be able to sell capacity during the 2016/2017 PJM planning year at a price of $[redacted]/MW-day. FES Ex. 1, p. 53808. DP&L projects that it would earn capacity revenues in 2016 of $[redacted] and in 2017 of $[redacted]. Id. However, as discussed above, publicly available market-price data show that the PJM capacity price for the 2016-2017 delivery year cleared on May 24, 2013 at a price of $59.37 (i.e., [redacted] of DP&L's projected price). DP&L is not seeking to reopen the record to admit this new data or to address this issue. However, the change in capacity pricing does confirm that the Commission needs to look at data for one point in time, and should not consider updated data (particularly if the updated data is limited to one revenue item).

11. Distribution Rate Case

FES (p. 51) asserts that DP&L should file a distribution rate case. DP&L addresses that issue in its initial brief (p. 42), which explained (among other points) that DP&L may need a distribution rate case to give it an opportunity to earn a reasonable ROE.

12. SSR Equivalent to $73 Million RSC

Honda (p. 6) and OEG (p. 11) argue that the Commission should set the SSR at the same level as DP&L's current $73 million RSC. However, the record in this case demonstrates that DP&L would earn an ROE of only [redacted] under that proposal (DP&L Ex. 14A,

p. 7 (Malinak Rebuttal)); that ROE is well below any reasonable ROE range and should be rejected.

13. Statutory Basis

OCC (p. 53-56) and IEU (pp. 20-23) argue that DP&L did not offer evidence that the SSR satisfied the statutory criteria contained in § 4928.143(B)(2)(d). To the contrary, there is factual support for the proposition that the SSR satisfies the first two criteria (that it be a charge and that it relate to one of the items listed in that section) in the rebuttal testimony of Dona Seger-Lawson. DP&L Ex. 12, p. 23. As demonstrated above, numerous witnesses addressed the third criterion, stable and certain rates.

OCC argues (p. 55) that the SSR does not relate to default service under § 4928.143(B)(2)(d) because default service is defined under § 4928.14 to be POLR service. OCC further argues (id.) that to relate to default service, the SSR would have to "relate to revenues DP&L claims that it will lose due to customer switching." The Commission should reject that argument for several reasons. First, the Commission has already held that a charge similar to the SSR relates to default service. January 30, 2013 Entry on Rehearing, p. 15 (Case No. 11-346-EL-SSO, et al.). Second, OCC's claim that "default service" is defined in § 4928.14 is not true. That section states that if a CRES provider fails to provide service, then the customer will default to SSO service. That section thus shows -- as the Commission held in its Entry on Rehearing in AEP's ESP case -- that default service is SSO service.

OCC also argues (p. 55) that the SSR does not relate to bypassability. However, on cross-examination OCC witness Rose conceded that it did:

> "Q. You understand that as proposed by DP&L the SSR would be nonbypassable; is that right?

A. That's right.

Tr. 2023 (emphasis added).

OCC's argument (pp. 26-27) that the Commission may not even consider the utility's financial integrity under Rev. Code § 4928.143 is incorrect as a matter of statutory interpretation, and unsupported by OCC's own witness Rose. Section 4928.143(B)(2)(d) provides for charges "as would have the effect of stabilizing or providing certainty regarding retail electric service"; there is ample support in the record for a Commission finding that stabilizing or providing certainty regarding retail electric service is promoted by assuring that the utility's financial integrity is not jeopardized.

As for the testimony of OCC witness Rose, cross examination showed that the very basis of his testimony is a series of legal opinions and conclusions provided to him by OCC's counsel. Tr. 2003-2013. Yet he conceded that he is not competent to testify on points of law. Tr. 2012-13. Further, Dr. Rose conceded on cross examination that he characterized DP&L's proposed auction blending schedule as a denial of the benefits of competition to consumers because he classifies anything less than 100% bidding as a denial, Tr. 2022; that position is illogical and is inconsistent with the statutory scheme which allows a graduated schedule of blended percentages.

14. <u>Credit Rating</u>

FES (pp. 42-46) and OCC (pp. 38-40) assert that DP&L's evidence in this case is based solely or primarily upon its credit ratings. For example, FES asserts (p. 43) that "Dr. Chambers' testimony does not analyze DP&L's financial integrity, even as he defines it, but is [sic] instead analyzes whether DP&L is at risk of a reduction in its credit rating." That statement is plainly false. Specifically, FES' own witness, Dr. Lesser, conceded that financial integrity should be measured by the utility's "expected return." FES Ex. 14A, pp. 10-11. Dr. Chambers' testimony identifies the expected ROE that DP&L would earn under various different scenarios. DP&L Ex. 4A, WJC-1, WJC-2, WJC-3, WJC-4 and WJC-5. DP&L witnesses Jackson and Malinak also submitted testimony on DP&L's expected ROE. DP&L thus submitted substantial evidence on the exact metric that FES' own witness conceded should be used.

The truth is that ROE is the primary metric upon which DP&L relied to support its financial integrity claim. DP&L submitted evidence regarding its actual and expected credit rating[5] because credit ratings are useful and objective evidence that support DP&L's claims. Indeed, if DP&L cannot maintain an acceptable credit rating, then its ability to refinance its debt would be severely hampered. DP&L Ex. 4A, pp. 50-53. However, contrary to the intervenors' arguments, DP&L's claims in this case are not entirely or even primarily based upon credit ratings.

15. Merger Commitments

IEU claims (pp. 29-30) that the Commission should not approve the SSR because AES committed to maintaining DP&L's credit rating at investment grade. The Commission should reject that argument for two reasons.

First, IEU ignores the time limitation upon AES' commitment. AES did not commit to maintaining DP&L's investment grade credit rating into perpetuity. Rather, the commitment by AES was that "[u]pon consummation of the merger, DP&L's credit rating will

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[5] DP&L witness Chambers also presented testimony regarding numerous other financial ratios and measures. DP&L Ex. 4A, pp. 37-38, 40-41, 43-46.

remain investment grade." May 19, 2011 Application of the AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company, p. 4 (Case No. 11-3002-EL-MER) IEU Ex. 19). AES' commitment was thus limited to the time immediately after the merger.

Indeed, a broader interpretation of that commitment would be irrational. AES has no control over many items that would affect DP&L's credit rating, including the economic conditions in DP&L's service territory, the rates that the Commission would approve and the way that credit agencies reach their decisions. The Commission should not interpret the commitment that AES made in the merger case to impose a broad obligation by AES to commit unlimited resources over an unlimited time frame to DP&L to guaranty against all possible future outcomes. The commitment by AES was narrow in time -- limited to the period "upon completion of the merger" -- and AES satisfied that commitment. The commitment could have been written differently, for example, by replacing "upon consummation of the merger" with the phrase "for three years after the merger" but was not -- and language should not be rewritten. Alexander v. Buckeye Pipe Line Co., 53 Ohio St. 2d 241, 245-46, 374 N.E.2d 146 (1978) ("[C]ommon words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument. Furthermore, where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.") (citations omitted); Sunoco, Inc. (R&M) v. Toledo Edison Co., 129 Ohio St. 3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37 ("When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. We will examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract. In addition, we will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. 'As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.'") (quoting Westfield Ins. Co. v. Galatis, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11); Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos., 86 Ohio St. 3d 270, 273, 714 N.E.2d 898 (1999) ("When the terms included in an existing contract are clear and unambiguous, we cannot create a new contract by finding an intent not expressed in the clear and unambiguous language of the written contract.")

Second, a necessary predicate to maintaining DP&L's investment grade is that the Commission provide to DP&L an opportunity to earn sufficient revenue to earn a reasonable ROE. The evidence demonstrates that DP&L needs the SSR (and the ST) to do so. DP&L Ex. 4A, WJC-3, WJC-4, WJC-5 (Chambers); DP&L Ex. 16A, pp. 6-7 (Jackson Rebuttal); DP&L Ex. 14A, pp. 25-26 (Malinak Rebuttal). Even were the Commission to conclude that AES made a commitment unlimited in time and amount to maintain DP&L's credit rating (AES made no such commitment), the Commission should not hamstring DP&L's ability to achieve or maintain an investment grade credit rating.

16. Emergency Rate Case Statute

IEU argues (pp. 39-41) that DP&L has not met the standard of a statute that does not apply to this case: the emergency rate case statute, Ohio Rev. Code § 4909.16. IEU's argument fails for several reasons. First, this case is brought under § 4928.143, the ESP statute, and not under Title 4909 of the Revised Code, in which the emergency rate case statute is located. DP&L's application in this case does not even reference § 4909.16.

IEU's reliance upon § 4909.16 is also undercut by the testimony of its own witness, Mr. Bowser. His testimony depends upon a number of opinions and conclusions, including his legal opinion that § 4909.16 should apply, but he conceded on cross examination that he is not qualified to be opining on questions of law. Tr. 2628-29. He admitted that § 4909.16 is not the statute upon which DP&L relies in its application for an ESP (Tr. 2632-33), and he offered no opinion as to what the financial picture would be for DP&L over the period of the ESP (Tr. 2634). This testimony undercuts any basis for reliance upon the emergency rate case statute in this case.

17. The AEP Sporn Decision

IEU (pp. 27-28) and FEA (p. 4) cite to the Commission decision in AEP's Sporn proceeding,[6] but that case is not on point. In that case, AEP sought to collect the costs associated with the closure of a generating facility through a distribution rider. Finding and Order, p. 1. The Commission rejected that request, holding that "there is no statutory basis upon which to grant recovery of the closure costs for [a generation facility]." Id. at 18. Here, in contrast, there is a statutory basis for DP&L's request -- Ohio Rev. Code § 4928.143(B)(2)(d). Indeed, in the Commission's decision in AEP's more recent ESP case, the Commission held that a rider very similar to DP&L's SSR is lawful. AEP Order, pp. 31-32; January 30, 2013 Entry on Rehearing, p. 15 (Case No. 11-346-EL-SSO, et al.).

[6] 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, No. 10-1454-EL-RDR, Opinion and Order, p. 19 (Jan. 11, 2012).

18. Efficient Operations

Staff (Staff Ex. 10, pp. 13-14 (Choueiki)) and OCC (p. 41) state that DP&L should operate efficiently; DP&L agrees. However, if the implication of their statements is that DP&L is not currently operating efficiently, then there is no evidence in the record that supports such a claim. DP&L has every financial incentive to operate efficiently, and the Commission should disregard any unsupported implication that it is not doing so.

19. Dividend Restrictions

Staff (p. 21) argues that the SSR revenues should stay with DP&L and not be transferred to any of its affiliates or subsidiaries. DP&L has already thoroughly addressed this issue in its initial brief (pp. 58-60) and would add that such a step would reduce DP&L's financial flexibility, and would hinder DP&L's ability to accomplish another goal desired by the Staff, namely the goal of separating its generation assets into a separate affiliate. In order to engage in such separation, DP&L's debt will have to be refinanced, and the proposed restriction should be rejected because it would have the effect of reducing DP&L's financial flexibility at the very time that the Staff would have the Commission order a faster transition to market, would have the Commission reject the switching tracker, and would give DP&L a lower SSR than DP&L's testimony shows is necessary to preserve its financial integrity. The Staff's proposal should be rejected.

OCC also claims (OCC Ex. 28A, pp. 46-47 (Duann)) that the Commission should restrict DP&L's ability to make payments to DPL Inc. but also argues in its brief (p. 41) that DP&L Inc. should take steps to reduce its debt. Not surprisingly, OCC offers no explanation as to how those contradictory objectives can be accomplished. As demonstrated in DP&L's initial brief (pp. 58-60), the Commission should reject OCC's argument that the Commission should restrict DP&L's ability to make dividend payments.

B. SWITCHING TRACKER

The evidence at the hearing demonstrated that DP&L needs the ST so that it can maintain its financial integrity, and provide safe and reliable service. For example, the testimony of DP&L witness Chambers demonstrated that DP&L would earn the following projected ROEs without the ST:

Year	ROE
2013	[redacted]
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]

DP&L Ex. 4A, WJC-3.

Those projected ROEs are well below the 7%-11% reasonable range that the Commission identified in its AEP Order (p. 33), and are also well below the [redacted] to [redacted] range that DP&L witness Malinak identified as reasonable. DP&L Ex. 14A, p. 19. Dr. Chambers explained the significant adverse effects that would occur if DP&L's request for an ST were denied. DP&L Ex. 4A, pp. 40-42.

Staff and intervenors argue that the Commission should reject the ST for various reasons. As demonstrated below, the Commission should reject those arguments and approve the ST.

1. SSR Arguments

Various intervenors assert the same arguments as to the ST that they assert for the SSR (e.g., it will not assist DP&L to continue to provide safe and reliable service, it is a generation charge, it is a transition charge, etc.) The Commission should reject those arguments for the reasons identified above.

2. The Switching Tracker Is Not Anti-Competitive

Staff (pp. 3-4), FES (p. 59) and OHA (pp. 5-6) argue that the Commission should reject the ST because it is anti-competitive. The Commission should reject that argument and approve the ST for the following reasons: First, the ST is a lawful charge under § 4928.143(B)(2)(d) that is designed to allow DP&L to maintain its financial integrity and provide safe and reliable service. The criteria in § 4928.143(B)(2)(d) are the only relevant criteria, and the ST satisfies them. Second, the reason that DP&L proposed the ST was to avoid the inevitable problems that arise when the Commission attempts to forecast switching. The ST eliminates the need to rely upon switching projections, and thus permits the Commission to set DP&L's total stability charges (the SSR and ST) at a lower level initially; those statutory charges would increase only if switching increased. The ST thus is not anti-competitive as it may lead to lower overall stability charges.

3. Switching to DPLER

OCC (p. 64) argues that the ST is improper because a large portion of DP&L's switched load has switched to DPLER. The Commission should reject that argument not only because DP&L's sales to DPLER and DPLER's sales to retail customers are outside of this Commission's jurisdiction, but also because that argument ignores the economics of the market. Specifically, customers that switch are going to attempt to get the best price that they can, which in many instances has been from DPLER. The fact that DPLER is apparently offering lower prices than other CRES providers demonstrates that DPLER is not earning excessive or unreasonable returns. The fact that many switching customers have switched to DPLER is thus irrelevant to DP&L's request for the ST.

4. Retroactive Rate Making

IEU argues (pp. 45-47) that the switching tracker "amounts to unlawful retroactive ratemaking." IEU relies (p. 46) upon the well-known Keco Industries case, Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465, cert. denied, 355 U.S. 182, 78 S. Ct. 267, 2 L. Ed. 187 (1957). However the syllabus law of that case is of no help to IEU; the relevant holding is in syllabus ¶ 2, which states in full:

> "2. Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."

The retroactive ratemaking principle in Ohio is only that where a utility collects charges based upon rates approved by the Commission, the fact that such electric rates are subsequently reduced does not give rise to a right of damages, or for refund of the difference between the old and new rates. 166 Ohio St. at 259. This principle is of no help to IEU; IEU would offer a new principle, not established in Ohio law, that would prevent this Commission from considering amounts necessary to protect against a utility's deteriorating financial condition. There is no such principle of law in Ohio (and certainly no such principle comes out of Keco Industries).

The other case upon which IEU relies is In re Columbus Southern Power Co., 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655. However, the order in that case involved a Commission order setting AEP's rates at a level "intended to permit the companies to recover 12 months of revenue over a 9-month period." Id. at ¶ 9 (internal quotation marks omitted). In contrast, the ST is not a device that allows recovery of a certain number of months of revenue over a shorter period. The ST would not authorize DP&L to recover costs that it incurred in the past; instead, the ST will allow DP&L to recover amounts in the future, calculated based upon the difference between future switching rates and 62%. DP&L Ex. 1A, pp. 11-13 (Jackson). DP&L does not seek to recover the difference between historic switching rates and 62%; the ST therefore does not seek to recover past costs, and thus is not retroactive.

5. Double Recovery

Walmart (pp. 10-11) asserts that the ST and RR may lead to double recovery. However, Walmart does not provide a clear explanation for this theory, and it is clear that the theory is highly speculative – Walmart describes its theory using the following phrases: "highly possible," "may potentially," "would appear," "possibly," and "potentially." The Commission should reject that argument on the ground that it is not supported and is speculative.

C. ESP TERM

The Commission should reject the Staff's proposal (pp. 10-12) that DP&L's ESP be limited to three years. As explained in the rebuttal testimony of DP&L witness Jackson, Staff's position favoring a three-year term "would significantly weaken the Company's financial integrity and restrict the certainty of future cash flows that are needed to separate its generation assets by December 31, 2017. As shown on Second Revised Exhibit CLJ-2, removing the

$137.5 million Service Stability Rider in the fourth and fifth years substantially degrades the Company's financial outlook." DP&L Exhibit 16A, p. 5.

In his rebuttal testimony, DP&L witness Malinak explained that financial projections beyond three years are not so uncertain to be unreliable. DP&L Exhibit 14A, pp. 28-29. Indeed the MRO statute, § 4928.142(D), contemplates a five-year standard service offer in the form of a market rate offer, also showing that five-year projections are not thought by the General Assembly to be inherently unreliable.

D. BLENDING PERCENTAGES

DP&L proposed that competitive bidding be implemented so that 10% of its load is bid out in period one, 40% in period two, 70% in period three and 100% in period four. DP&L Ex. 8, p. 2 (Herrington). Staff (pp. 16-17) and various intervenors (Exelon, p. 4; FES, pp. 60-61; OCC, pp. 19-26) argue that the Commission should order DP&L to implement competitive bidding at a faster rate. The Commission should reject those arguments for the reasons stated below.

Staff asserts (p. 16) that the Commission should implement competitive bidding at a faster rate than proposed by DP&L -- 40% in period one, 60% in period two, and 100% in period three. The MRO statute provides for competitive bidding (Ohio Rev. Code § 4928.142), but there is nothing in the ESP statute (§ 4928.143) that authorizes the implementation of competitive bidding, nor would it authorize the implementation of competitive bidding at rates that are more rapid than DP&L proposes. Columbus S. Power Co. v. Pub. Utils. Comm'n, 67 Ohio St. 3d 535, 537, 620 N.E.2d 835 (1993) (per curiam) (the Commission is a creature of statute and has only the jurisdiction given to it).

In addition, Dr. Choueiki admitted "[t]hat DP&L would lose a little bit under a hundred million dollars" under Staff's proposal. Tr. 1908. Staff argues (p. 17) that no adjustment is needed to address that loss in revenue because DP&L's switching projections are overstated, and that the dollar values of the two adjustments offset. The Commission should reject that argument because, as demonstrated in DP&L's initial brief (pp. 21-22), Staff's switching projections are understated because Staff failed to consider the substantial governmental aggregation activity that is projected to occur in DP&L's territory. DP&L Ex. 2A, pp. 8-9 (Hoekstra); Tr. 293-96, 389-94 (Hoekstra); FES Ex. 10; Tr. 1912 (Choueiki).

OCC (pp. 19-26) and FES (pp. 60-61) assert that the Commission should order DP&L to implement 100% competitive bidding immediately. The Commission should reject that proposal because the intervenors do not sponsor <u>any</u> evidence regarding the amount of revenue DP&L would lose under that proposal, or whether DP&L could provide safe and reliable service under that proposal.

III. <u>CORPORATE SEPARATION</u>

A. <u>SEPARATION OF ASSETS</u>

Various parties criticize DP&L's structural separation plan. <u>E.g.</u>, Exelon, p. 4; FES, pp. 61-67; OCC pp. 94-97. As shown in DP&L's initial brief (pp. 68-75), however, that plan is a practical one, by which DP&L has committed to file an application this year for structural separation, which is dependent upon refinancing of its long-term debt and upon a sufficient level of financing that DP&L can, as a practical matter, move all of its generation assets into a separate entity. The intervenors' criticisms of that plan are unfounded in the record.

FES argues (pp. 61-64) that the least-cost way to resolve DP&L's financial integrity issues is for the Commission to order immediate structural separation. However, as explained by Mr. Jackson, immediate structural separation is precluded by the trust indenture and First and Refunding Mortgage on DP&L's long-term debt. DP&L Exhibit 16A, pp. 2-4. In addition, it will take time to restructure DP&L's debt obligations so as to permit structural separation, and DP&L has retained an outside law firm to work on that project. Tr. 694-95 (Rice). An order of immediate structural separation would fail to recognize the reality of the First and Refunding Mortgage (DP&L Exhibit 16A, p. 2 (Jackson)), and would be damaging to the company's financial health, (id. at 5). Further, FES' own witnesses conceded that they did no analysis of whether DP&L could separate its generation assets. Tr. 1637-39 (Lesser); Tr. 2400-01 (Noewer).

FES also claims (p. 63) that "DP&L witness Rice sponsors DP&L's corporate separation plan, but he does not make any effort to justify continued functional separation." That is a false statement in light of the testimony of Mr. Rice at Tr. 687-704, 771-72, and 800-05. Mr. Rice's testimony established that DP&L is not "dragging its feet" as FES (p. 65) claims.

FES (pp. 65-67) criticizes DP&L for issuing no-call bonds, but Mr. Rice explained that the issuance of no-call bonds benefitted customers because they were issued at lower interest rates (Tr. 803-04), and this Commission approved those issuances (Tr. 804-05). Indeed, Staff acknowledged that it was reasonable for DP&L to issue no-call bonds:

> "It was recognized in DP&L's 1999 ETP case that no-call financing prevented the transfer of DP&L's generating assets at that time. Subsequently all of the debt that existed then has been refinanced with new no call provisions. On this basis it will be argued that the Company made its own problem. This argument ignores history and should be rejected.
>
> In fact the world changed between 1999 and when the debt was refinanced. It appeared that transferring the generating plant was unnecessary, even unwise. The Commission itself approved the

> debt issuances which included the new no-call provisions. The general assembly repealed the provision mandating transfer of generating plant ownership and replaced it with a requirement that Commission approval be obtained before any generating plan *could* be transferred. Given this change in circumstance, and the fact that no-call provisions lower the required debt rate, the refinancings were reasonable at the time. That the world has changed yet again, making it appear necessary to transfer to generating plant as soon as possible, does not mean that the Company has done anything wrong; it is merely Monday morning quarterbacking."

Staff Brief, p. 20 (footnotes omitted; emphasis in original).

IEU (p. 30 & n.120) supports its argument related to separation of generation assets with a reference to its Motion to Take Administrative Notice or in the Alternative to Reopen This Proceeding or in the Alternative to Supplement the Record, filed the same day as its brief. As shown in DP&L's Memorandum in Opposition to that motion and the accompanying declaration of Mr. Jackson, IEU presents only its speculation in support of that motion; the short excerpt from a PowerPoint slide attached to its motion deals with short-term credit facilities, and does not support the proposition for which it is cited in IEU's motion. DP&L incorporates by reference its Memorandum in Opposition and the accompanying Jackson declaration.

B. <u>TRANSFER PRICE</u>

IEU's argument (pp. 42-45) that DP&L's sales agreement with DPLER violates state law is incorrect for two separate reasons. <u>First</u>, as demonstrated in DP&L's initial brief (pp. 71-74), that agreement and the sales under it fall within FERC's exclusive jurisdiction.

<u>Second</u>, IEU misreads the statute on which it relies, § 4928.17(A)(3). That statute first requires that a corporate separation plan be "sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product

or service." If an undue preference or advantage are provided by the utility to an affiliate, then they must be provided at "compensation based upon fully loaded embedded costs charged to the affiliate." Thus the statute establishes that only if there is an undue preference or advantage does the Commission need to reach the second issue of whether services or supplies are being provided at compensation based upon fully loaded embedded costs. DP&L witnesses Hoekstra (Tr. 408-09) and Rice (Tr. 723-24, 727-28, 806-08) explained that there was no undue preference or advantage. That fact ends the matter.

Further, a fundamental precept of statutory construction is that a statute will not be construed to provide absurd or illogical results.[7] However, IEU's argument reaches exactly that result. According to IEU, if power is sold by DP&L to DPLER at fully loaded embedded cost, then there is no violation of the statute. In other words, IEU's position is that power must always be sold by DP&L to DPLER at fully loaded embedded cost. Is that interpretation logical? This point was addressed by Mr. Jackson, in DP&L Exhibit 16A, p. 9:

> "Q. In an environment where market prices are higher than DP&L's fully loaded embedded costs, would it be appropriate for the transfer price from DP&L to DPLER to be based on fully loaded embedded costs?
>
> A. No. If DP&L's transfer price to DPLER was set at fully loaded embedded costs at a time of high market prices, DPLER would have an advantage over competitors buying

[7] AT&T Commc'ns of Ohio, Inc. v. Lynch, 132 Ohio St. 3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶ 18 (holding that "when interpreting a statute, courts must avoid an illogical or absurd result") (internal quotation marks and citations omitted); State ex rel. Barley v. Ohio Dep't of Job & Family Servs., 132 Ohio St. 3d 505, 2012-Ohio-3329, 974 N.E.2d 1183, ¶ 25 (per curiam) (refusing to interpret statute in a way that would lead to "an unreasonable result," the court held that "[s]tatutes must be construed, if possible, to operate sensibly and not to accomplish foolish results.") (internal quotation marks and citations omitted); State ex rel. Striker v. Cline, 130 Ohio St. 3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶ 25 (per curiam) (finding that "courts construe statutes and rules to avoid unreasonable or absurd results); Riedel v. Consol. Rail Corp., 125 Ohio St. 3d 358, 2010-Ohio-1926, 928 N.E.2d 448, ¶ 10 (refusing to construe statute in a way that would lead to an "unreasonable or absurd" result because "it is [the court's] duty to construe the statute to avoid [such] result.").

> at market prices. Therefore, the only transfer price that makes sense under the ORC 4928.17(A)(3) is the market price, which is the basis of the current transfer pricing."

Finally, IEU (pp. 44-45) also criticizes DP&L's decision to change to the method that DP&L uses to establish the price at which it sells power to DPLER. However, IEU has conceded that DP&L currently sells power to DPLER at a market rate. IEU Ex. 2A, p. 15; Tr. 1489 (Murray). DP&L demonstrated in its initial brief (pp. 74-75) and above that a market rate is the appropriate rate. (Indeed, FES witness Noewer agrees that the transfer price should be a market rate. FES Ex. 17A, p. 18 (Noewer)).

C. SUBSIDY

IEU argues (p. 26) that there is a corporate separation violation because revenues provided through the SSR and ST constitute a "subsidy to the portion of DP&L's business that provides competitive retail electric services" (emphasis added). This argument about subsidizing a portion of a business ignores the fact that the applicant in this case is DP&L, and that DP&L is an integrated company. To try to make this argument, IEU pretends that DP&L is not an integrated company, but that it is actually two companies, a T&D business and a generation company. A subsidy analysis is not required by the Ohio statutes with respect to the internal operations of an integrated company, and no case has so held.

IV. STATE POLICIES

Numerous intervenors spread various state policy arguments throughout their briefs, e.g., Dayton, pp. 10-12; FEA, p. 4; FES, p. 60; IEU, pp. 24-29; IGS, p. 11; OCC, pp. 56-60; OHA, pp. 6-8; OMA, p.3. Generally, they focus on particular policies that they believe promote their insular interests, and argue that the Commission should reject DP&L's ESP because it does not promote (or does not do enough to promote) a policy that they favor.

The principal defect in their arguments is that they entirely ignore the many state policies that DP&L's ESP does promote. As explained in the testimony of DP&L witness Herrington, DP&L's ESP promotes the following state policies:

1. The policy in § 4928.02(A) to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service";

2. The policy in § 4928.02(B) to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs";

3. The policy in § 4928.02(H) to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates";

4. The policy in § 4928.02(I) to "[e]nsure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power";

5. The policy in § 4928.02(L) to "[p]rotect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource";

6. The policy in § 4928.02(N) to "[f]acilitate the state's effectiveness in the global economy."

DP&L Ex. 8, pp. 4-7 (Herrington).

In particular, the intervenors ignore the policy in § 4928.02(A) related to the "reliable" and "safe" provision of "retail electric service." Retail electric service is defined to include distribution, transmission and generation services. Ohio Rev. Code § 4928.01(A)(27). As demonstrated at length above, DP&L's ESP -- including the SSR, the ST, the ESP term, and the proposed blending percentages -- are critical to allowing DP&L to maintain its financial integrity, and thus allowing it to provide safe and reliable retail electric service.

OCC (p. 57 & n.264) relies on the Supreme Court's decision Elyria Foundry Co., v. Pub. Utils. Comm'n, 114 Ohio St. 3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, but that case is not on point. In Elyria, the Commission approved a Stipulation that permitted FirstEnergy to defer fuel costs for later recovery in distribution rates. Id. at ¶ 45. The Court ruled that recovery of fuel costs through distribution rates violated § 4928.02(G), which bars a subsidy flowing from a non-competitive retail electric service to a competitive retail electric service, and vice versa. Id. at ¶ 50-57.

Elyria is not on point for several reasons. First, the Elyria court rejected the argument that the deferral was authorized by other sections of the Revised Code. Id. at ¶ 56-57. Here, in contrast, the SSR and ST are expressly authorized by § 4928.143(B)(2)(d). Further, § 4928.143(B)(2)(d) was enacted after § 4928.02(G); thus, to the extent that those sections conflict, § 4928.143(B)(2)(d) would control. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."). Second, in any event, § 4928.02(G) is inapplicable here because the SSR and ST are not (as OCC asserts) distribution charges that will be used to support a generation business. The evidence at the hearing showed that DP&L needed the charges to support its distribution, transmission and generation businesses. Tr. 1865-66 (Choueiki); Tr. 2635-36 (Bowser); Tr. 2871-72 (Malinak). There is thus no subsidy flowing between non-competitive and competitive services, since the charge is needed to support distribution, transmission and generation service.

As to the policy in § 4928.02(A) regarding reasonably priced retail electric service, OCC asserts (p. 58) that "the additional high cost of the Service Stability Rider will not be offset by potential generation market price savings expected under the limited blending plan proposed in DP&L's ESP" and (p. 61) that "customers do not necessarily receive any value (such as the savings from a lower SSO price as a result of rate blending) . . . for the payment of the service stability rider." Those assertions simply are not true. OCC admits (p. 58 n.267) that a typical residential customer uses 750 kWh a month. Although OCC cites (p. 58 n.269) to DP&L's typical bill comparisons, OCC neglects to mention that those typical bill comparisons show that a customer that uses 750 kWh per month will receive substantial savings during DP&L's ESP proposal. Schedule 10, p. 1 (2.61% increase for period 1), p. 13 (1.05% decrease for period 2), p. 25 (4.04% decrease in period 3), p. 37 (6.64% decrease in period 4), and p. 49 (5.34% decrease in period 5). Accord: DP&L Ex. 9, p. 7 (Seger-Lawson) ("Most tariff classes are expected to experience SSO rate decreases for periods 2 through 5 as market prices are blended into current rates."). The Commission should thus conclude that DP&L's ESP promotes the policy of providing reasonably priced service.

As to the policy in § 4928.02(L) regarding protecting at-risk populations, OCC states (p. 59) that "electric service will become even less affordable for those at-risk customers in DP&L's service territory." Again, in light of the fact that DP&L's plan provides an overall rate decrease for residential customers, OCC is incorrect on this point. Indeed, low income customers actually tend to have higher usage than typical customers. Tr. 1431 (Seger-Lawson). Schedule 10, pp. 1, 13, 25, 37 and 49 shows that higher usage customers will experience greater savings as a result of DP&L's ESP. DP&L's ESP thus protects at-risk customers by providing them rate discounts that are greater than those received by typical customers.

There is no requirement in the statute that an ESP be rejected unless it fulfills every single one of the policies in § 4928.02. The Commission should conclude that DP&L's ESP promotes the policies of the state of Ohio -- and in particular, the policies of promoting "reliable" and "safe" service in § 4928.02(A).

V. ESP V. MRO TEST

DP&L's initial brief (pp. 78-79) demonstrated that DP&L's ESP is $112 million more favorable on a quantifiable basis than an MRO. DP&L's initial brief (pp. 87-89) also demonstrated that DP&L's ESP would have substantial non-quantifiable benefits as compared to an MRO.

The intervenors make a wide variety of arguments regarding the ESP v. MRO test, but the principal issues for the Commission to decide are whether the SSR and ST would be available under a hypothetical MRO, and if not, whether that hypothetical MRO would have substantial non-quantifiable costs.

A. A HYPOTHETICAL MRO WITHOUT AN SSR OR ST

As the rebuttal testimony of DP&L witness Malinak demonstrates, DP&L would have an opportunity to earn an ROE of [redacted] under its as-filed ESP Application (adjusted capital structure). DP&L Ex. 14A, p. 23. DP&L is thus projected to earn an ROE under its ESP that is at the [redacted] of a reasonable range. AEP Order, p. 33; DP&L Ex. 14A, p. 19 (Malinak Rebuttal).

In conducting their versions of the ESP v. MRO test, Staff and intervenor witnesses constructed hypothetical MROs under which DP&L would not receive the SSR and ST; under their hypothetical MROs, DP&L would earn $[redacted] to $[redacted] less revenue than under DP&L's as-filed ESP. Staff Ex. 9, TST-4 ($613 million); OCC Ex. 23, BEH-2 ($758 million); FES Ex. 13A, p. 5 ($[redacted]); IEU Ex. 2A, p. 35 & KMM-17 ($[redacted]). Intervenors thus assert (FES, pp. 7-14; IEU, pp. 64-69; OCC, pp. 15-17; RESA, pp. 3-5) that DP&L's ESP fails the ESP v. MRO test in Ohio Rev. Code § 4928.143(C)(1).

The principal defect in their analysis is that it would be impossible for DP&L to provide safe and reliable service under their hypothetical MROs. One can always create an unrealistic hypothetical, but it should not be used to show that an ESP fails to satisfy the test -- else any ESP can be shown to fail the test, simply by construction of an unrealistic hypothetical MRO. As DP&L witness Malinak explained, DP&L would not be able to provide stable service under a hypothetical MRO in which DP&L did not received the SSR and ST. DP&L Ex. 14A, pp. 5-6.

The Staff and intervenor witnesses entirely ignore this significant factual defect in their analysis. Staff and intervenor witnesses admitted that they did not address whether DP&L could provide safe and reliable service under their hypothetical MROs. Tr. 1260 (Ruch); Tr. 1484-85 (Murray); Tr. 2097 (Hixon); Staff Ex. 8 & 9 (Turkenton).

There are two different ways that the Commission could address that defect in the Staff and intervenor testimony. Both ways lead to the same ultimate conclusion: namely, that DP&L's ESP is more favorable in the aggregate than an MRO.

First, the Commission could conclude that the SSR and ST would be available under a hypothetical MRO. As demonstrated in DP&L's initial brief (pp. 86-87), the Staff and intervenor witnesses each assume that the SSR and ST would not be available under the hypothetical MROs; each witness admitted, however, that DP&L's ESP would pass the ESP v.

MRO test if the SSR and ST were equally available under an ESP and a hypothetical MRO. Tr. 1813-17 (Turkenton); Tr. 2090-92 (Hixon); Tr. 1238 (Ruch); IEU Ex. 2A, KMM-17 (Murray).[8] Further, none of the witnesses that sponsored ESP v. MRO test testimony included any analysis of whether the SSR and ST would be available under an MRO; i.e., they did not address whether the SSR and ST would be necessary to address an emergency that threatens DP&L's financial integrity or to avoid a taking. Tr. 1239, 1250 (Ruch); Staff Exs. 8 & 9 (Turkenton); Tr. 1484 (Murray); Tr. 2089 (Hixon).

As demonstrated at length in DP&L's initial brief (pp. 80-86), the SSR and ST would be lawful under an MRO. The Commission should conclude that it would approve those charges under a hypothetical MRO for the same reasons that the Commission should approve them in this case; namely, without those charges, DP&L would not be able to provide safe and reliable service.

Second, in the alternative, the Commission could conclude that there would be very substantial non-quantifiable costs under a hypothetical MRO in which DP&L could not provide safe and reliable service. Specifically, as demonstrated in DP&L's brief (pp. 7-14), DP&L would not be to provide safe and reliable service under its ESP without the SSR and ST. DP&L Ex. 16A, p. 8 (Jackson Rebuttal); DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal); DP&L Ex. 4A, p. 53 (Chambers). The same is true under a hypothetical MRO -- DP&L could not provide safe and reliable service under a hypothetical MRO without the SSR and ST. DP&L Ex. 14A, pp. 5-6 (Malinak Rebuttal).

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[8] KMM-17 shows that DP&L's ESP is $668.45 million less favorable than an MRO. However, Mr. Murray assumed that the SSR (valued at $687.5 million by Mr. Murray) and a switching tracker (valued at $74.9 million by Mr. Murray) would be available under the ESP but not under MRO. Id. Thus, if those items were equally available under an ESP and an MRO, then DP&L's ESP would pass the statutory test under Mr. Murray's calculations.

Many witnesses agreed that it was important that DP&L be able to provide safe and reliable service. Tr. 2056 (Chriss); Tr. 1970 (Collins); Tr. 1658-59 (Higgins); Tr. 2434 (Noewer); Tr. 2577-78 (Walz); Tr. 2611-12 (White); Tr. 2097 (Hixon); OCC Ex. 17, pp. 10-11 (Wilson).[9] The Commission should thus conclude that there would be substantial non-quantifiable costs under a hypothetical MRO that did not include the SSR and ST. The Commission should further conclude that an ESP under which DP&L will be able to provide safe and reliable service is substantially more favorable than a hypothetical MRO under which DP&L cannot provide safe and reliable service.

In short, the Commission should reach one of two conclusions. If it concludes that the SSR and ST <u>would be available</u> under a hypothetical MRO, then DP&L's ESP is more favorable than an MRO on a quantifiable basis. If it concludes that the SSR and ST <u>would not be available</u> under a hypothetical MRO, then the ESP is still more favorable than a hypothetical MRO because the hypothetical MRO would have substantial non-quantifiable costs.

B. <u>OTHER ESP V. MRO TEST ISSUES</u>

The intervenors also raised a variety of other issues relating to the ESP v. MRO test. As demonstrated below, the Commission should reject those arguments because they are wrong. Further, in many cases, they would have no effect on the results of the ESP v. MRO test even if they were right.

[9] Mr. Wilson's deposition was filed with the Commission on March 20, 2013. Pursuant to agreement of counsel, his prefiled testimony and his deposition were admitted into the record without Mr. Wilson taking the stand. Tr. 1439-40.

1. Commission Precedent

FES (pp. 3-4) cites the testimony of witness Ruch for the proposition that in AEP's and Duke's ESP cases, the Commission considered those utilities' stability charges as a cost of the ESP without an offset under the hypothetical MRO. However, FES fails to mention that neither AEP nor Duke asserted that their non-bypassable charges would be available under a hypothetical MRO; FES witness Ruch concedes that neither AEP nor Duke made the argument. Tr. 1241 (Ruch). The Commission thus never decided the issue in those cases.

2. Competitive Market

FES (p. 4) also asserts that an ESP "is permitted only if a proposed ESP is even more favorable to those SSO customers than the results available in the competitive market." Not true. The ESP statute very clearly states that the Commission should compare the ESP "to the expected results that would otherwise apply under" an MRO. Ohio Rev. Code § 4928.143(C)(1). The MRO statute expressly authorizes the Commission to approve charges "necessary to address any emergency that threatens the utility's financial integrity" or to prevent an unconstitutional taking. Ohio Rev. Code § 4928.142(D)(4). The relevant comparison is, thus, an ESP to the expected results of an MRO, and not to the results of a "competitive market" as claimed by FES.

3. Witness Testimony

FES also cites (pp. 8-9) the testimony of various witnesses in support of its argument that the SSR and ST would not be available under an MRO. The Commission should reject that argument for two reasons. First, the testimony of those witnesses does not contain any analysis of whether the SSR or ST would be necessary under a hypothetical MRO to preserve DP&L's financial integrity or to prevent a taking. Tr. 1239, 1250 (Ruch); Staff Exs. 8 & 9

(Turkenton); Tr. 1484 (Murray); Tr. 2089 (Hixon). That testimony is thus irrelevant to the issue. Second, in any event, the question of whether the SSR and ST would be available under a hypothetical MRO is a question of law for the Commission to decide.

4. First-Time MRO Applicant

FES also claims (pp. 11-12) that Ohio Rev. Code § 4928.142(D) applies only to a first-time MRO applicant. DP&L demonstrated in its initial brief (pp. 89-91) that FES is wrong on that point.

5. Adjustments to Bypassable Charges

FES further argues (p. 12) that the Commission could adjust only DP&L's bypassable charges under the MRO statute. In DP&L's initial brief (pp. 81-82), DP&L demonstrated that FES is wrong on that point as well.

6. A Taking

FES also claims (p. 13) that there cannot be a taking under the MRO statute because generation markets have been deregulated; FES thus concludes that the SSR and ST would not be available under a hypothetical MRO. That argument by FES is plainly flawed. Section 4928.142(D)(4) authorizes certain adjustments to prevent a "taking." Under FES' argument, that provision in § 4928.142(D)(4) would be superfluous. Specifically, under FES' interpretation of that section, there never could be a taking and the statutory language would thus be inapplicable in all cases. It is well settled that a statute should not be interpreted so as to render its terms superfluous. State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ., 131 Ohio St. 3d 478, 483-84, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 19 ("No part [of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.") (alteration in original) (internal quotation marks and citation omitted); State ex rel. Myers v. Bd. of Educ. of Rural Sch. Dist. of Spencer Twp., 95 Ohio St. 367, 373, 116 N.E. 516 (1917). The Commission should thus reject FES' interpretation of § 4928.142(D)(4). Further, as demonstrated in DP&L's initial brief (pp. 84-86), the SSR and ST would be lawful under a hypothetical MRO to prevent a taking.

7. No Emergency

FES also claims (pp. 13-14) that "DP&L did not even attempt to satisfy these criteria [relating to whether there was a financial emergency that threatened utility's financial integrity], and instead merely represented to the Commission that its credit rating may be lowered slightly due to its alleged degrading financial performance." However, FES admits (pp. 13-14) that an emergency would exist if the utility "will be financially imperiled or its ability to render service will be impaired." As demonstrated in DP&L's initial brief (pp. 86-87), it would be financially imperiled and its ability to render service would be impaired under a hypothetical MRO without the SSR and ST. Specifically, DP&L needs the SSR and ST to provide safe and reliable service under its ESP. DP&L Ex. 16A, p. 8 (Jackson Rebuttal); DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal); DP&L Ex. 4A, p. 54 (Chambers). If the Commission were to approve an MRO with the SSR and ST (as FES suggests the Commission would), then the same result would be reached -- DP&L would be financially imperiled and unable to provide safe and reliable service. DP&L Ex. 14A, pp. 5-6 (Malinak Rebuttal).

8. Quantification of Other Alleged Errors

As demonstrated above, the intervenor witnesses conceded that DP&L's ESP would be more favorable than a hypothetical MRO if the SSR and ST were equally available under an ESP and a hypothetical MRO. The intervenor witnesses also identify other alleged errors in Mr. Malinak's testimony. This subsection demonstrates that their other adjustments are both wrong (for the first three) and do not affect the results of the test (for all four).

a. ESP Period: FES (pp. 15-17) and OCC (pp. 11-13) criticize the ESP period used by Mr. Malinak. However, as Mr. Malinak explained in his rebuttal testimony, he adjusted the ESP period that he used and that the adjustment had no effect whatsoever upon his analysis. DP&L Ex. 14A, pp. 10-11.

FES also claims (p. 15) that Mr. Malinak used the wrong ESP term in his rebuttal testimony because DP&L's proposed ESP would end on December 31, 2017. Again, not so. Specifically, in DP&L's initial application, it requested a five-year ESP that would begin on January 1, 2013 and end on December 31, 2017. It is now impossible for DP&L's ESP to become effective on January 1, 2013, as that date has already passed. However, DP&L continues to seek a 5-year ESP.

In any event, even if FES and OCC were right about this issue, the issue has only an $11.7 million effect according to FES (FES Ex. 13A, p. 5 (Ruch)) or a $7 million effect according to OCC. OCC Ex. 23, p. 12 (Hixon). The issue thus does not affect the ESP v. MRO test, since the amount at issue is less than the $112 million benefit of an ESP over a hypothetical MRO that Mr. Malinak calculated.

b. Blending Percentages: FES also criticizes (pp. 17-20) the MRO blending percentages used by Mr. Malinak. The Commission should reject that argument for multiple reasons. First, DP&L's initial ESP proposal had a 17-month initial term; DP&L proposed the 17-month initial term so that the second through fifth periods would begin on June 1, of each year, consistent with the PJM planning cycle. No party disputed the reasonableness of that proposal. Thus, in constructing his hypothetical MRO, Mr. Malinak assumed that the first period under a hypothetical MRO would be a 17-month period under a 10% blending percentage. DP&L Ex. 5, p. 7. That assumption would result in a lawful MRO, because the MRO statute requires a blending percentage of 10% in the first year and a blending percentage of "not more" than 20% in the second year. Ohio Rev. Code § 4928.142(D). Mr. Malinak's initial testimony thus used appropriate blending percentages. Second, Mr. Malinak used 12-month periods in his rebuttal testimony, and the use of 12-month periods had no effect upon his results. DP&L Ex. 14A, pp. 10-11. Third, even if the Commission were to accept FES' argument, FES concedes (p. 20) that the issue would have only a $[redacted] effect on the analysis. The issue thus does not affect the results of the test.

c. Shopping Estimates: FES (pp. 20-22) and OCC (p. 14) also argue that Mr. Malinak failed to include shopping estimates in his testimony. The Commission should reject that argument for two reasons. First, as explained in Mr. Malinak's testimony, he assumed that the ST would be equally available under both the ESP and the hypothetical MRO, and incremental shopping is therefore irrelevant. DP&L Ex. 5, pp. 10-11. Second, in any event, FES concedes (p. 22) that the issue would have an effect of only $[redacted]; OCC (p. 14) also concedes that DP&L's ESP is more favorable than an MRO even if this item is considered. The issue thus does not affect the results of the test.

d. AER-N: DP&L agrees with FES (pp. 23-24) and OCC (pp. 18-19) that the $3.3 million AER-N would be available under an ESP, but not an MRO, and Mr. Malinak therefore addressed that issue in his testimony. DP&L Ex. 5, p. 13 (Malinak).

e. Collective Effect: Finally, Mr. Malinak's testimony demonstrated that DP&L's ESP was $120 million more favorable than an MRO under an aggregate price test (before the other quantifiable adjustments that he addresses in his initial testimony on page 13). DP&L Ex. 5, p. 3; DP&L Ex. 14A, p. 11. If the Commission makes Mr. Ruch's proposed adjustments to that $120 million figure, DP&L's ESP is still $23.56 million more favorable than Mr. Ruch's hypothetical MRO ($120-$11.7-$17.16-$64.28-$3.3 = $23.56). Mr. Ruch's other four adjustments (individually and collectively) thus do not affect the results of the test.

9. **Non-Quantifiable Benefits**

FES (pp. 25-29) and IEU (pp. 70-73) also argue that non-quantifiable benefits associated with an ESP as compared with an MRO are minimal. However, Commission precedent establishes that FES and IEU are, once again, wrong. Specifically, in the Commissions' decision on AEP's ESP case, the Commission concluded that AEP's ESP was $386 million less favorable on a quantifiable basis than a hypothetical MRO. AEP Order, p. 75. However, the Commission concluded that the non-quantifiable benefits of the fact that AEP's ESP implemented 100% competitive bidding at a rate that was faster than the rate available under the MRO statute was a substantial non-quantifiable benefit that exceeded the quantifiable benefits of an MRO. Id. at 75-77. Commission precedent thus establishes that the non-quantifiable benefits of a faster move to 100% competitive bidding are substantial.

10. **Cause of the Non-Quantifiable Cost**

FES also argues (pp. 30-33) that the Commission should not consider the fact that DP&L could not provide safe and reliable service under a hypothetical MRO to be a non-quantifiable cost because the cause of that inability is generation related. As demonstrated above, that argument is inconsistent with the record in this case. As demonstrated above, if

DP&L cannot provide safe and reliable distribution, transmission and generation service to its customers under a hypothetical MRO, then DP&L's customers will suffer significant non-quantifiable costs. FES apparently expects the Commission to explain to customers that the Commission approved a plan that resulted in unsafe and unreliable distribution, transmission and generation service, but that customers were not harmed because the cause of DP&L's inability to provide safe and reliable service was generation-related. The Commission should conclude that an inability to provide reliable service is a non-quantifiable cost, regardless of the cause.

11. Stale Data

FES also claims (p. 35) that DP&L's analysis is flawed because it uses stale and incorrectly calculated data. FES raised the same arguments related to DP&L's request for an SSR, and as demonstrated above (Section II.A.4, II.A.5, II.A.10), those arguments are flawed.

VI. OTHER ISSUES

1. Fuel

DP&L's initial brief (pp. 49-51) demonstrates that the fuel rider that is included in DP&L's SSO rates should be set using system average cost. Staff (pp. 24-25), OCC (pp. 78-82), and FES (pp. 87-89) assert that system average cost is an inappropriate methodology since it subsidizes DP&L's wholesale customers, including DPLER. The Commission should reject that argument for two reasons.

First, as demonstrated in DP&L's initial brief (p. 50), SSO customers do not have any right to DP&L's least cost fuel by statute or by rule. It is reasonable to expect SSO customers to pay the average system cost of DP&L's fuel.

Second, in any event, the fuel rider tariff is used to set SSO rates and has no effect – none – on the amounts that DP&L charges to wholesale customers, including DPLER. Tr. 1577 (Gallina). Regardless of how the SSO Fuel rider tariff rate is set, DP&L sells power at market-based prices to wholesale customers, including DPLER, that do not include or reference the SSO Fuel rider tariff rate. DP&L Ex. 16A, p. 9 (Jackson); IEU Ex. 2A, p. 15 (Murray). The SSO Fuel rider tariff rate thus does not subsidize DPLER, regardless of how it is calculated.

2. <u>AER-N</u>

DP&L's initial brief (pp. 54-56) demonstrates that the Commission should approve the AER-N because DP&L has demonstrated that its Yankee solar facility satisfies the elements of Ohio Rev. Code § 4928.143(B)(2)(c). As the Commission did in its AEP Order (pp. 23-24), DP&L asks that the Commission set the AER-N initially at zero, and to allow DP&L to file its supporting evidence in a subsequent case. DP&L Ex. 9, p. 16; Tr. 1316 (Seger-Lawson).

Certain intervenors raise various arguments regarding why the Commission should not approve DP&L's request. As demonstrated below, the Commission should reject those arguments.

a. <u>Statutory basis</u>: IEU (p. 48) and SolarVision (p. 7) argue that DP&L's proposal to recover the capital that it invested in its Yankee solar facility is barred by Ohio Rev. Code § 4928.64(E), which states that all costs of complying with that section should be bypassable. The Commission should reject that argument because § 4928.143(B)(2)(c) expressly authorizes a utility to recover investments in new construction if the elements of that section are satisfied. Section 4928.64(E) addresses the recovery of compliance costs, while Section 4928.143(B)(2)(c) addresses the recovery of investments. DP&L Ex. 12, pp. 12-13 (Seger-

Lawson Rebuttal). Section 4928.64(E) does not require a utility to build new renewable facilities to comply with that section. However, § 4928.143(B)(2)(c) permits the utility to recover on a nonbypassable basis costs of a new generation facility that meets certain criteria. DP&L built the Yankee solar facility, and it meets the criteria required to obtain a nonbypassable charge for the life of the facility.

In reconciling these two provisions, it is noteworthy that two sections of the Revised Code apply different terms. Ohio Rev. Code § 4928.143(B)(2)(c) discusses a non-bypassable surcharge in the context of a "facility" constructed after a certain date, pursuant to competitive bidding and a finding of need. In contrast, Ohio Rev. Code § 4928.64(E), discusses the recovery through a bypassable surcharge of the costs of compliance to obtain renewable resources. What constitutes a "cost of compliance" is not explicitly defined within the statutory language and the Commission therefore has considerable latitude to make a reasonable interpretation of that phrase. It is clear from the express language of Ohio Rev. Code § 4928.64 that the costs of obtaining renewable resources through "electricity supply contract[s]," "renewable energy resource credits," and "long-term contracts" are costs of compliance. It is similarly clear that renewable resources that do not meet the requirements of Ohio Rev. Code § 4928.143(B)(2)(c) would be recoverable only as a cost of compliance under Ohio Rev. Code § 4928.64. But nowhere in Ohio Rev. Code § 4928.64 does it require that the construction costs of a new electric generation facility that generates power using a solar renewable resource be considered a cost of compliance. Thus output, capacity, energy and RECs represent "compliance." The bricks and mortar of the facility do not. The use of the word "resources" in that section in this context should be interpreted to mean renewable attributes, not the generation facility itself.

(b) <u>Sourced through a competitive bid</u>: IEU argues (pp. 50-51) that the Commission should reject DP&L's proposal because "Ms. Seger-Lawson agreed that DP&L had not submitted any evidence that Yankee 1 was sourced through a competitive bid." That statement is simply false. Ms. Seger-Lawson testified in her direct testimony that the Yankee facility was sourced through a competitive bid. DP&L Ex. 9, p. 15. <u>Accord</u>: Tr. 1324-25 (Seger-Lawson). In her testimony to which IEU cites, Ms. Seger-Lawson testified:

> "Q. [W]as the construction of Yankee 1 related to an RFP for in-state Ohio solar RECs?
>
> A. No." Tr. 1325.

IEU thus misstates the record, since she did not state that Yankee was not sourced through a competitive bid.

Further, as noted above, Ohio Rev. Code § 4928.143(B)(2)(c) permits a charge for "an electric generating facility that . . . was sourced through a competitive bid process." The Yankee facility satisfies that criterion, and there is no requirement in the statute or any Commission rule that the facility be constructed pursuant to an RFP for in-state Ohio solar RECs.

(c) <u>Additional information</u>: FES (pp. 71-72) and IEU (pp. 51-52) assert that the Commission should reject DP&L's request in this case because DP&L did not include in this case all of the information that is required by Commission rules to establish an AER-N. The Commission should reject that argument because DP&L asks only that the Commission set the AER-N at zero in this case. DP&L Ex. 9, p. 16 (Seger-Lawson). DP&L sought a waiver of the Commission's rules, and will file the required information when DP&L subsequently makes a filing to establish the rate to be charged through the AER-N. Id. DP&L's request is thus consistent with the order that the Commission issued in AEP's ESP case. AEP Order, pp. 23-24.

(d) All customers: FES (pp. 68-69) and IEU (p. 51) argue that the Commission should reject DP&L's proposal because DP&L does not plan to provide to CRES providers a pro rata share of the S-RECs from the Yankee solar facility. They assert that DP&L is required to share S-RECs with CRES providers because § 4928.143(C)(1) states that "the commission shall ensure that the benefits derived for any purpose for which [a surcharge is approved under § 4928.143(B)(2)(c)] is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application." (Emphasis added.)

The Commission should reject that argument because the output of the Yankee 1 facility (generation and S-RECs) will be "reserved" and "available" to all customers. For example, there is no dispute that DP&L could recover the costs of a newly-constructed coal-fired generation facility under § 4928.143(B)(2)(c); that facility would satisfy the "reserved and made available" criterion in § 4928.143(C)(1) because all customers -- SSO customers and switched customers -- would have the option of taking service from DP&L. Such a coal-fired facility would be "reserved and made available" to switched customers because they have the option of taking service from DP&L.

DP&L's proposed AER-N for the Yankee facility satisfies that criterion for the same reasons. Specifically, the benefits of the Yankee facility will be "reserved and available" to all customers (SSO and switched), so DP&L's proposal complies with the statute.

(e) Current needs: FES (pp. 72-74) argues that the Commission should reject DP&L's request for the AER-N because there are currently sufficient S-RECs available in the market. The Commission should reject that argument because the Commission has already determined that there was a need for Yankee 1. August 19, 2011 Opinion & Order, p. 5 (Case No. 10-505-EL-FOR) ("There is a need for a 1.1 MW solar generation facility, known as Yankee 1, and for additional solar generation facilities during the LTFR planning period."). Section 4928.143(B)(2)(c) does not authorize the Commission to deny recovery for a facility that was needed at the time it was constructed simply because needs subsequently change. Indeed, that section authorizes a nonbypassable charge "for the life of an electric generating facility"; the fact that the charge was to be recovered for the life of the generating facility demonstrates that the Commission should not periodically re-evaluate whether the facility continues to be needed.

FES also argues (p. 70) that DP&L would not be prejudiced if the Commission denied DP&L's request for an AER-N because DP&L constructed the facility before the Commission found that it was needed. That argument makes no sense. DP&L constructed the facility because it was needed at the time. The fact that the Commission found that there was a need after the facility was constructed does not change the fact that it was needed when it was constructed.

3. Reconciliation Rider

DP&L's Reconciliation Rider ("RR") contains three components, and Staff and intervenors make various arguments regarding those components. DP&L addresses those arguments below.

a. Competitive bidding: DP&L proposes to recover the costs of the competitive bidding process from all customers. DP&L Ex. 10, pp. 8-9 (Rabb). Staff (p. 27), Exelon (p. 12), FES (pp. 79-80), RESA (p. 17) and Walmart (p. 6) argue that costs associated with the competitive bidding process should be bypassable. The Commission should reject that argument because the competitive bidding process benefits all customers. Tr. 1751 (Donlon); Tr. 1822 (Turkenton).

b. Competitive enhancements: To the extent that the Commission approves the implementation of competitive enhancements and concludes that the costs should be recovered from customers, the Commission should conclude that those costs would be recovered through the nonbypassable RR. DP&L Ex. 10, pp. 8-10 (Rabb). Staff (p. 27) is the only party that suggests that DP&L should pay a portion of any costs associated with competitive enhancements; as demonstrated in DP&L's initial brief (pp. 97-99), the Commission should reject that argument for numerous reasons, including that the proposal is inconsistent with fundamental rate-making principles.

It is noteworthy that the CRES providers assert that the costs of the competitive bidding should be bypassable (they argue that only SSO customers benefit), but argue that the costs of competitive enhancements should be paid by all customers (e.g., FES Brief, p. 83). For example, FES (p. 79) argues that the "principle of cost causation" shows that SSO customers should pay for competitive bidding costs; but FES (p. 83) does not explain how that principle shows that SSO customers should pay for costs of competitive enhancements.

c. Deferred balances: DP&L proposes to recover through the RR any deferred balance that exceeds 10% of the base amount associated with the following riders: Fuel, RPM, TCRR-B, AER and CBT. DPL Ex. 10, pp. 8, 10-11 (Rabb). The purpose of including those amounts in the RR is to avoid the "death spiral" -- namely, there is a risk that the deferred balance associated with those riders will grow to be a large amount, and as switching increases, DP&L will be left to recover those deferred balances over an ever-decreasing group of SSO customers. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33; 2242-44 (Seger-Lawson). A very small group of customers may thus be left to pay a very large deferral balance. Id.

Numerous witnesses agreed that there was a real risk that DP&L may be left to recover a very large deferral balance from a very small group of customers if something was not done to address the issue. Tr. 1747-48, 1753-54 (Donlon); Tr. 1960 (Collins); Tr. 2049 (Chriss). Staff (pp. 27-28) and various intervenors (Exelon, p. 12; FEA, pp. 11-14; FES, pp. 80-82; IEU, pp. 57-62; IGS, p. 14; Kroger, p. 19; RESA, pp. 17-18; Walmart, p. 6) nonetheless argue that the Commission should reject DP&L's request that deferred balances be recovered through a nonbypassable RR.

The principal defect in the various arguments made by Staff and intervenors is that none of them address the "death spiral" issue. Under the method that rates are currently set, there is a real risk that a small group of customers will have to pay a very large deferral balance. DP&L Ex. 12, pp. 7-8; Tr. 1432-33; 2242-44 (Seger-Lawson). Some seem to believe that if they ignore the issue, then it will go away. It will not. The Commission should approve including deferral balances in the RR to avoid that problem.

The Commission should reject the specific arguments made by Staff and intervenors for the following reasons:

i. Staff: Staff states (p. 28) that DP&L "should be permitted to petition the Commission to true-up any over or under recovery of bypassable riders at the end of the ESP term. The Commission should be free to determine at that time how best to permit recovery of those costs to avoid a 'death spiral.'" The Commission should reject that proposal because it does not address the death spiral problem, but instead will allow the deferral balances and carrying costs to continue to accumulate until some future unknown time period.

ii. Statutory basis: IEU argues (pp. 58-61) that there is no statutory basis to impose a nonbypassable RR. Not true. The deferred balances in the nonbypassable RR would be lawful under Ohio Rev. Code § 4928.143(B)(2)(d) since the nonbypassable RR would be (1) a charge; (2) that was related to bypassability and default service; and (3) that had the effect of stabilizing or providing certainty regarding retail electric service.

IEU also argues (pp. 58-59) that DP&L has not submitted any evidence that its proposal would stabilize or provide certainty as to retain electric service. Also not true. DP&L's proposal would avoid the problem of a small group of customers paying a very large deferral balance; that proposal would thus stabilize the rates paid by SSO customers. DP&L Ex. 12, pp. 7-8; Tr. 1432-33; 2242-44 (Seger-Lawson). The RR would thus stabilize retail electric service by stabilizing the rates that customers pay for that service.

iii. Reliance on Stipulations: One of the reasons that DP&L cites in support of its proposal is the fact that the Commission approved Stipulations for Duke and FirstEnergy that included similar terms. IEU argues (pp. 61-62) that it is improper for DP&L to rely upon Commission orders approving Stipulations in other cases. Not so.

As an initial matter, DP&L did not sign those Stipulations (IEU Ex. 24, pp. 47-48; IEU Ex. 31, pp. 42-48), and thus is not bound by the parties' agreement in them not to cite to them as precedent.

In addition, as the Commission knows, one of the criteria that it uses to evaluate a Stipulation is whether the Stipulation as a package benefits customers; DP&L agrees with IEU that the Commission's decisions in the Duke and FirstEnergy cases on that issue are irrelevant in this case. Since the Commission considered the proposals in those cases as part of packages that are different from DP&L's proposal here, DP&L agrees that the Commission's findings that those Stipulations benefited customers as a package are irrelevant here.

However, in evaluating a Stipulation, the Commission also considers whether the Stipulation violates any important regulatory principle or practice (i.e., is lawful). The Commission approved similar riders for Duke and FirstEnergy, and held that the Stipulations did not violate any important regulatory principle or practice. November 22, 2011 Opinion & Order, pp. 12, 44 (Case No. 11-3549-EL-SSO); July 18, 2012 Opinion & Order, pp. 9, 44-48 (Case No. 12-1230). The fact that the Commission found that the Stipulations in those cases did not violate the law is thus precedent in this case.

It is also significant that DP&L's proposal is less burdensome than the FirstEnergy rider, since: (a) all of FirstEnergy's rider becomes nonbypassable once the trigger is hit; and (b) FirstEnergy has a 5% trigger, compared to DP&L's 10% trigger. DP&L Ex. 12, pp. 10-11 (Seger-Lawson Rebuttal).

4. Competitive Enhancements

The intervening CRES providers (Exelon, pp. 13-15; FES, pp. 74-78; IGS, pp. 1-9; RESA, pp. 7-10, 18-36) include in their briefs long lists of competitive enhancements that they want the Commission to approve. DP&L addressed competitive enhancements in its initial brief (pp. 97-103), and as in its initial brief, DP&L will not address each of their requests here; there are too many to address them all. The principal reasons that the Commission should reject their requests are as follows.

a. Commission rules: None of the intervenors claim that their proposals are required by Commission's rules. Further, the Commission recently issued an entry that scheduled a series of workshops that are intended "to promote coordinated efforts to further develop Ohio's retail electric service market." May 29, 2013 Entry, p. 2 (Case No. 12-3151-EL-COI). Those workshops are intended to address various matters including "existing issues impacting the relationship between competitive retail electric service providers and electric distribution utilities." Id. That is the appropriate process to consider the various requests made here by CRES providers.

b. No evidence of costs: The intervenors have provided absolutely no evidence of the costs of their many proposals. As the Commission knows, competitive enhancements -- particularly ones that involve modification of an existing billing system -- can be quite expensive. (The intervenors apparently are unconcerned about costs, because they expect customers to pay for the enhancements.)

c. No evidence of customer benefits: The intervenors also provide no evidence that customers would benefit from their various proposals. As the Commission knows, switching is occurring at rapid rates in DP&L's service territory; there is thus no reason to believe that there are significant barriers to switching, or that competitive enhancements need to be made to allow customers to receive the benefits of competition.

d. No quantification of CRES provider benefits: While the CRES providers claim that the various enhancements that they request will make it easier to do business in DP&L's service territory, they offered no evidence that quantifies either how often they would benefit from the particular enhancement or how much money they would save as a result.

e. Interval meters: DP&L requires SSO customers with a demand above 200 kW to have an interval meter; DP&L requires switched customers with demand above 100 kW to have an interval meter. FES (pp. 74-75) and RESA (pp. 11-13) argue that it is improper for DP&L to treat SSO customers and switched customers differently regarding whether they are required to install an interval meter.

Ms. Seger-Lawson explained that it is reasonable for DP&L to impose different interval meter requirements on SSO customers and switched customers. Tr. 2256-63. As Ms. Seger-Lawson explained, the amount that DP&L and CRES providers owe to PJM for generation used in DP&L's service territory is determined by first establishing the amount of generation used to serve the customers of CRES providers; DP&L is then left to pay to PJM any amounts that are left over. Id. It is thus important that DP&L have a very accurate measurement of the amount of generation used by CRES customers, because DP&L will need to pay to PJM any generation costs not assigned to those CRES providers. Id. DP&L therefore needs more accurate measures of the amount of generation used by CRES providers' customers. Id.

5. Affordability

OCC argues at length (pp. 97-103) that the Commission should consider affordability as it evaluates DP&L's ESP. DP&L agrees that the Commission should consider affordability, and affordability was one of the interests that DP&L balanced as it prepared its ESP Application in this matter. DP&L Ex. 8, p. 3 (Herrington). Indeed, as demonstrated above, DP&L's ESP results in widespread rate decreases for SSO customers over the term of the ESP.

DP&L Ex. 9, p. 7 (Seger-Lawson); Schedule 10. The Commission should thus conclude that DP&L's ESP promotes affordability.

6. Credit and Collection Policies

OCC asserts (pp. 103-05) that the Commission should review DP&L's credit and collection policies. However, OCC does not assert -- much less offer evidence -- that DP&L has violated any Commission rules or any other requirements related to its credit and collections policies. There is thus no basis to engage in a time-consuming review of those policies.

7. Bill Impacts

IEU (p. 60) claims that DP&L's bill impacts were not admitted into the record. Not true. DP&L's bill impacts are in Schedule 10, which was supported by DP&L witness Parke. DP&L Ex. 7, p. 10. IEU (p. 60) also criticizes DP&L's bill impacts because they do not show the bill impacts on shopping customers; IEU ignores the fact that DP&L cannot provide bill impacts for shopping customers because DP&L does not know the rates that shopping customers pay to CRES providers.

8. Procedural Rulings

IEU asserts (pp. 73-78) that the Commission should revisit certain procedural rulings that were made by the Attorney Examiners. The Commission should reject those arguments for the reasons below.

a. Unsupported Exhibits: IEU argues (pp. 73-74) that the Commission should strike DP&L Ex. 4A, WJC-3 and WJC-5 because they were unsupported by the record. WJC-3 contains DP&L's projections of what would occur if the Commission denied DP&L's request for an ST; Staff witness Mahmud testified that he relied upon WJC-3 to perform the Staff's calculations that underlie its recommendations in this case. Staff Ex. 1A, pp. 3-4. IEU concedes (p. 74) that it received the information that supported WJC-3 and WJC-5 in discovery and that it had the opportunity to recall the witness (Craig Jackson) who prepared the underlying data. IEU nonetheless argues that the Commission should strike WJC-3 and WJC-5 from the record. The Commission should reject that argument for each of the following reasons.

First, the Ohio Rules of Evidence state that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Ohio Evid. R. 103(A). IEU does not claim that it has had a "substantial right" affected; it could not make such a claim since it had the underlying supporting data and the right to recall the supporting witness. It was IEU's decision not to recall the witness.

Second, the rule to which IEU cites (p. 74) states: "The 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." Ohio Evid. R. 703 (emphasis added.) Note the "or" in the rule. IEU makes the argument (p. 74) that the underlying data was not "perceived" by Dr. Chambers because "he did not create or verify the information." That argument is plainly wrong.

Third, as a practical matter, IEU's argument that all supporting data needed to be filed with the Commission would be unduly burdensome. For example, utilities routinely file cost data on a wide variety of subjects and in a wide variety of cases before the Commission. If IEU was correct -- namely, that the supporting data needed to be filed -- then utilities would have to file all of their actual invoices and proof that the invoices were actually paid. Otherwise, under IEU's argument, the schedules that utilities typically file would be without evidentiary support. That result would be unreasonable. The amount of paper that a utility needs to file in support of its case needs to stop somewhere. The Attorney Examiners drew a reasonable line.

Fourth, in any event, IEU relies upon the Ohio Rules of Evidence for its argument. Those rules do not apply in Commission proceedings. Greater Cleveland Welfare Rights Organization, Inc. v. Public Utilities Commission, 2 Ohio St. 3d 62, 68, 442 N.E.2d 1288 (1982) ("[T]he commission is not stringently confined by the Rules of Evidence.")

b. Analysis of Distribution or Transmission Rate Case: IEU argues (pp. 75-78) that the Attorney Examiners erred when they denied IEU's motion to compel DP&L to produce analysis that it performed of potential distribution or transmission rate cases. The Attorney Examiners ruled that the information was privileged and work product. Transcript of March 7, 2013 proceedings, p. 96. DP&L has already thoroughly briefed this issue, and incorporates its arguments from its briefs here. March 1, 2013 DP&L Memorandum in Opposition, pp. 6-9, and attached Declaration of D. Seger-Lawson, ¶¶ 2-3. As those briefs demonstrate, the Attorney Examiners were correct.

Specifically, as to privilege, DP&L demonstrated that the analysis at issue was prepared at the request of legal counsel and was provided to counsel so that counsel could provide legal advice to DP&L regarding the potential filing of distribution and transmission rate cases. Id. The information was thus privileged. IEU argues (p. 77) that DP&L waived the privilege by "voluntarily providing testimony on the same subject matter." That argument is clearly flawed; the privilege is not waived when testimony on the same subject matter as the advice of counsel was submitted; clients routinely receive advice on a subject matter and later testify on the same subject matter, and doing so does not waive the privilege. In fact, the cases that IEU cites (p. 77) state the correct standard -- a waiver occurs only if there is a "voluntary disclosure of confidential communications." IEU does not claim that there has been a disclosure of DP&L's privileged communications, so its waiver argument is without merit.

As to work product, DP&L demonstrated that the analyses of distribution or transmission rates was prepared in anticipation of potential distribution or transmission rate cases. March 1, 2013 DP&L Memorandum in Opposition, pp. 6-9. They were thus prepared in anticipation of litigation, and are protected by the work product doctrine. IEU again argues (p. 77) that DP&L waived the work product protection by "voluntarily providing testimony on the same subject matter." That argument is, again, flawed. The very purpose of the work product doctrine is to protect work product relating to a case from having to be produced in discovery; testimony on the "same subject matter" as the work product is routinely introduced at trial, and that introduction does not waive the protection. Indeed, IEU's argument would effectively eviscerate the work product doctrine.

9. <u>OCC Witness Duann</u>

Cross-examination of OCC witness Duann revealed numerous defects in his testimony. For example, OCC witness Duann testified that the concept of "financial integrity" only applies to a utility that provides monopoly service, Tr. 2520, a baseless opinion as the concept of financial integrity is widely used for both public and privately-held companies. Although he claims that DP&L's financial projections are irrelevant, he then provides criticisms of them that are not fact-based. Specifically, on cross examination he admitted that although he criticized DP&L's projections because they cannot be audited, one cannot audit a projection for a future period of time. Tr. 2526. Inconsistently, he then admitted that the fact that the projections are unaudited is not what makes them unreliable, Tr. 2558, thereby abandoning that criticism.

Next, on cross-examination he conceded that although he criticized these projections as not available to the general public, he conceded that this objection is based on his more general objection that this Commission should not allow utilities to file such projections confidentially, Tr. 2528, a point that reveals a gross misunderstanding of the scope of regulation. His next criticism was that such projections were not included in regulatory filings, but on cross examination he conceded that he is <u>not</u> testifying that such projections should be included in SEC Form 10-Q or 10-K filings, Tr. 2529, and he admitted that he was unable to identify any SEC filing that would allow, much less require, filing of such five-year financial projections, Tr. 2529-30. His final criticism, that the projections were not included in presentations to financial analysts, is nothing more than a restatement of the point that because projections are for a future period, that period has not yet happened, Tr. 2531-32. His philosophical objections to projections are frivolous.

In addition, OCC witness Duann testified that he disregarded the projections that DP&L filed in accordance with this Commission's ESP requirement; he thought that they were irrelevant. In fact, on cross examination he stated that it was his belief that the financial integrity of DP&L's generation business is irrelevant in this case, Tr. 2507, and his opinion is based upon his conclusion on Ohio law provided to him by OCC's counsel, Tr. 2508-09. He proceeds from that belief to his next opinion, that DP&L's proforma financial statements filed in support of its ESP application are also irrelevant, Tr. 2509 -- yet he conceded that the Commission's filing requirements for an ESP require the applicant, DP&L, to file projected financial statements <u>for the duration of the ESP</u>. Tr. 2509-10. Dr. Duann did no calculation of ROEs for the period of the ESP or for any part of that period. Tr. 2515. He explained that he did not do so because he thinks that the ROE of DP&L "is irrelevant in this proceeding, so I did not recommend ROE."

Tr. 2516. Thus the key issues in this case as to DP&L's financial integrity are dismissed by Dr. Duann as irrelevant -- as so should his testimony be.

10. Charitable Contributions

The post-hearing brief of Ohio Partners for Affordable Energy ("OPAE") and the Edgemont Neighborhood Coalition skips over a critical point: there is not statutory authorization nor precedent for the relief that OPAE and Edgemont seek. In previous cases, a fuel fund was established by agreement between OPAE and DP&L, and the Commission approved those Stipulations. There is no statutory authority for the type of fuel fund that OPAE and Edgemont wish the Commission to order, and it is well settled in Ohio that the Commission is a creature of statute and can exercise only the statutory authority conferred upon it. Columbus S. Power Co. v. Pub. Utils. Comm'n, 67 Ohio St. 3d 535, 537, 620 N.E.2d 835 (1993) (per curiam).

Whether non-payors' utility bills should be socialized -- spread over paying customers -- is a question for the General Assembly. The Commission is not empowered to create such a system absent the agreement of the parties. Perhaps recognizing this point, OPAE and Edgemont argue (p. 6) that "the authorization and funding for the fuel fund is consistent with the policies established" in Ohio Rev. Code § 4928.02(L). However, that is a statement of policy, and is not an authorization for funding.

Other suggestions are without economic foundation in the record. For example, citing to the testimony of OCC witness Williams, one suggestion that they make (p. 8) is that disconnections "could be suspended during inclement weather," which would have the effect of increasing the amounts owed by customers when those disconnections are performed weeks later. Another suggestion (p. 8), which is ambiguous, is merely that "due dates could be adjusted" which again appears to be a suggestion that customers be allowed to run up arrearages without any ability to pay them. Yet another suggestion (p. 8) is that somehow "payment plan costs could be reduced" which would extend the time that customers would be faced with paying arrearages. Another suggestion (p. 8), that "delayed payment charges could be suspended" is also ambiguous because it does not specify the duration of a suspension, and such a suspension would, again, simply increase the amount of arrearages with which customers are faced. The final suggestion (p. 8), that "bill payment charges could be reduced," contains no specifics as to when, at what rate, or for how long charges might be reduced. These suggestions are ambiguous, lack specificity, are speculative, and would result in an increase in the amounts of customer arrearages borne by customers.

11. City of Dayton

The City of Dayton does not oppose DP&L's ESP. Its brief (p. 4) so states: "Dayton does not oppose Commission approval of the proposed ESP." The rest of the brief of the City of Dayton seeks various funding requests for which there is no statutory authority. Again, the Commission is a creature of statute and may exercise only the authority given to it by statute. Columbus S. Power Co., 67 Ohio St. 3d at 537.

12. OHA

Similarly, the post-hearing brief of the Ohio Hospital Association (which takes issues only with the ST and the SSR: p. 5: "The OHA does not challenge the balance of DP&L's application.") makes most of its argument with no citation to the record other than a few citations to the testimony of Dr. Choueiki about the switching tracker. Indeed, after citations to Dr. Choueiki's testimony, the remainder of its brief (pp. 6-10) contains not a single citation to the testimony or the hearing record, despite the fact that much of the argument is factual. Its unsupported arguments regarding the SSR are dealt with above, but it should be noted that its arguments without citation on the elements of Section 4928.143(B)(2)(d) are shown to be wrong by the rebuttal testimony of DP&L witness Seger-Lawson, who testified that the elements of the statute are met. DP&L Exhibit 12, p. 23.

13. <u>RESA</u>

The Initial Brief of the Retail Electric Supply Association ("RESA") amounts to a complaint that RESA is not getting all of its long list of demands. The brief ignores the significant admissions elicited on cross examination. With regard to a purchase-of-receivables program, this Commission has considered such a program in other proceedings. This Commission recently rejected a request that AEP be ordered to implement a purchase of receivables program. AEP Order, p. 41. If a purchase of receivables program is to be ordered, the Commission ought to consider it on a statewide basis, and not on a utility-by-utility basis that would result in a patchwork of different programs across the state.

With regard to RESA's alternative (p. 10), there are at least two reasons not to order it. First is the unknown cost of the program. Second, if a purchase-of-receivables program is to be considered on a statewide basis, then RESA's costly alternative should not be ordered now.

With regard to interval meters, RESA witness Bennett admitted on cross-examination that if a customer had 100 kW of demand, Mr. Bennett does not know what percentage of the bill that customer could save by signing up with a CRES provider which competes with DP&L, and that he did not study that question to prepare his testimony. Tr. 2457. He also conceded that neither he nor RESA made an analysis to determine a payback period for a customer investment in an interval meter. Tr. 2457-58. He was unable to say whether or not customers have switched, or how many might have switched because of the cost of an interval meter. Tr. 2458. Although some utilities provide interval data for a charge, Tr. 2460-61, he was unable to articulate an economic rationale for having the data be provided by the utility at no cost when there was a cost of creation, handling, and managing the data. Tr. 2460.

With regard to the web-based system in the EDI data exchange, Mr. Bennett admitted that he does not know the cost to implement the very system that RESA sponsors. Tr. 2463-64. He also has no idea of the timeframe that it would take to develop, test, or implement such a system. Tr. 2464. He had no suggestion or proposal on how to pay for that system, Tr. 2464, and his testimony is silent on any cost recovery mechanism, Tr. 2465. He has no idea whether it would take more than his recommended six months to create and implement the system. Tr. 2465-66. Mr. Bennett said he knew of no jurisdiction that has adopted all of the EDI and web-based system features that RESA has advocated. Tr. 2466.

He concedes that DP&L already has both rate-ready billing and bill-ready billing, Tr. 2467, and agreed that DP&L currently has in place a viable bill-ready billing system under which the CRES provider can calculate its own charges and then send them to DP&L to be included on a bill. Tr. 2468.

Mr. Bennett conceded that for all of RESA's various recommendations, RESA does not have a cost-benefit analysis, and has not even tried to calculate or estimate the costs of making any of the changes. Tr. 2478.

14. <u>OMA</u>

The post hearing brief of the OMA Energy Group repeats the other parties' arguments regarding the SSR. The brief is notable in that it does not contain a single reference to the prefiled testimony or the hearing record. The brief should be ignored as its factual statements are not supported by record evidence.

15. Honda

Honda's brief makes three requests (p. 2) of the Commission. First, that the Commission "carefully analyze DP&L's proposed Service Stability Rider ('SSR') and its ramifications on companies such as Honda." Second, "that the Commission consider setting the SSR at the current amount of the RSC charge." And third that the Commission "structure the SSR as a demand charge." As to Honda's first request, of course the Commission will carefully analyze the proposed SSR. On that point, Honda further offers (p. 3 of its brief) that it "would be faced with the possibility of making the cost increase fit into existing budgets" which is, however, always a factor for a company when one of its costs increase. Honda states (p. 3) that it would also have "to assess its current level of community involvement," which of course DP&L would also have to do if its financial integrity is further jeopardized by an inadequate level of rate relief in this case.

16. FES

The evidence at the hearing shows that FES is not a customer of DP&L, but FES makes arguments regarding the rates that DP&L's customers will pay. The Commission should conclude that FES does not have standing to challenge those rates. Util. Serv. Partners v. Pub. Utils. Comm'n of Ohio, 124 Ohio St. 3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49 ("A party must have standing to be entitled to have a court decide the merits of a dispute.") (quoting City of N. Canton v. City of Canton, 114 Ohio St. 3d 253, 2007-Ohio 4005, 871 N.E.2d 586, ¶ 11); State v. Bloomer, 122 Ohio St. 3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 30 (internal quotation marks and citation omitted) ("Before a court may decide the merits of a case, the party seeking relief must have standing to do so. A person has no standing to attack the constitutionality of an ordinance unless he has a direct interest in the ordinance of such a nature that his rights will be adversely affected by its enforcement.")

VII. ISSUES THAT DP&L HAS ALREADY FULLY BRIEFED

DP&L has found it unnecessary to reply to every argument in the many pages of intervenors' post-hearing briefs, as DP&L's Post-Hearing Brief was comprehensive, and as some issues in this case simply present a choice for the Commission and DP&L's testimony and brief present fully the utility's position. Those issues include:

1. Reasonable Arrangements

FES (p. 85) and Exelon (p. 5) argue that DP&L's reasonable arrangement contracts should be included in the competitive bid. As demonstrated in DP&L's initial brief (p. 68), the Commission should reject that argument because (a) the reasonable arrangements are contracts that were approved pursuant to Ohio Rev. Code § 4905.31, and those contracts do not authorize the customers' load to be included in the competitive bid; and (b) the reasonable arrangement customers are not SSO customers.

2. TCRR-N

IEU (pp. 53-54), Walmart (pp. 2-3) and FEA (pp. 14-15) argue that the Commission should not approve DP&L's proposal to split its existing TCRR into bypassable (TCRR-B) and nonbypassable (TCRR-N) riders because customers would be at risk of paying transmission costs to both their CRES provider and to DP&L. As demonstrated in DP&L's initial brief (pp. 56-57), the Commission should reject that argument for various reasons, including that (a) there is no evidence that customers are actually at risk of paying the same cost twice; and (b) DP&L's proposal more accurately reflects how transmissions costs should be billed to customers.

3. Bidding into Auctions

Staff (p. 17) argues that DP&L should be prohibited from bidding into its own auctions. FES (pp. 67-68) argues that DP&L and its affiliates should be barred from bidding into DP&L's auctions. As demonstrated in DP&L's initial brief (pp. 65-66), the Commission should reject that argument for various reasons, including that (a) the Commission's order in the AEP case (p. 40) authorized AEP and its affiliates to bid into AEP's auctions; (b) there is no evidence -- just speculation -- that the bidding process would be harmed if DP&L or its affiliates were permitted to bid; and (c) their participation in the bidding process may lead to lower prices for customers.

4. Auction Process

Exelon (pp. 7-11) and FES (pp. 85-87) ask the Commission to order DP&L to modify its proposed competitive bidding process. As demonstrated in DP&L's initial brief (pp. 66-68), the Commission should reject those requests for various reasons, including: (a) DP&L's bidding plan complies with the Commission's rules; and (b) DP&L's plan is consistent with the plans used by other Ohio utilities.

5. Maximum Charge

Staff (pp. 23-24) recommends that the Commission reject DP&L's proposal to phase out the maximum charge provision in DP&L's tariff. DP&L's initial brief (p. 61) demonstrated that the Commission should phase out the maximum charge since it subsidizes particular customers. OCC (pp. 92-94) supports DP&L's position.

6. DP&L's Historic Earnings

FES (pp. 54-55), Kroger (pp. 13-14) and OEG (pp. 3-5) argue that the Commission should consider DP&L's historic earnings in evaluating DP&L's request for an SSR. As demonstrated in DP&L's initial brief (pp. 47-48) the Commission should reject that argument because: (a) well-settled law establishes that the Commission cannot consider historic earnings when setting rates; and (b) DP&L's past rates were actually below the then-existing market rates.

7. Storm

Staff (pp. 25-26) argues that the Commission should establish a storm cost recovery rider baseline for DP&L of $4 million. As demonstrated in DP&L's initial brief (pp. 91-97), the Commission should reject that request and should approve a $1.1 million storm cost recovery rider baseline because the Commission should not consider unusually-large major storms in setting the storm cost recovery rider baseline.

8. Allocation of SSR and ST

Staff (p. 22), OEG (pp. 12-15), Honda (p. 5), and OCC (pp. 82-90) all make various arguments regarding how the Commission should allocate the SSR and ST. As demonstrated in DP&L's initial brief (pp. 60-61), the Commission should reject those arguments and should approve DP&L's proposed allocation because DP&L's plan balances the rate impacts of DP&L's ESP as a whole across all customer classes, and avoids rate shock.

9. AER 3% Cost Cap

Staff (pp. 29-31) and SolarVision (pp. 3-5) oppose DP&L's request for a 3% AER cost cap. As demonstrated in DP&L's initial brief (pp. 61-62), the Commission should approve DP&L's request because it is consistent with the statute.

VIII. CONCLUSION

The Commission should conclude that DP&L's ESP Application strikes a reasonable balance. It results in rate decreases for SSO customers, while allowing DP&L to continue to provide safe and reliable service for all customers. The Commission should thus approve DP&L's Application.

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