BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING REPLY BRIEF OF FIRSTENERGY SOLUTIONS CORP.

Public Version

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I. INTRODUCTION

DP&L's post-hearing brief can be fairly categorized as a call for a return to regulated ratemaking. DP&L admits that its distribution and transmission revenues are sufficient, but claims that customers are nevertheless obligated to subsidize DP&L's generation assets in order to ensure that the company as a whole is not financially distressed. DP&L has provided no evidence of how this purported financial distress will harm customers, and has instead simply claimed that its profits will not be as high as it would like if DP&L is not given a generation subsidy. DP&L's request to "turn back the clock" must fail, both as a matter of law and due to DP&L's failure to present record evidence supporting its claims.

There is no dispute that generation service is competitive in Ohio. Indeed, generation has been "fully on its own in the competitive market" for more than a decade.[1] DP&L's filing of an ESP does not bestow upon the Commission discretion to ignore the competitive market and the benefits it provides to customers and Ohio's economy. An ESP must be better for customers than the market alternative; it cannot simply be a vehicle to funnel above-market subsidies to a self-entitled utility still operating like a vertically-integrated utility from the 1990s. The Commission does not have the statutory authority to authorize an ESP for DP&L which is almost a billion dollars over market in order to subsidize DP&L's generation assets.

DP&L's proposed ESP also fails due to the lack of record evidence submitted by DP&L in support of its financial integrity claim. DP&L misleadingly substitutes a "financial distress" test – i.e., DP&L is in "distress" because energy and capacity prices are down – for the financial integrity test that DP&L admittedly cannot satisfy. DP&L's own testimony demonstrates that

[1] R.C. § 4928.38.

DP&L's financial integrity is not actually threatened, particularly if DP&L stops dragging its feet and achieves corporate separation. Moreover, there is no record evidence in this proceeding regarding several essential findings the Commission must make in order to approve DP&L's requested above-market subsidy: (1) how customers will be harmed if DP&L is not provided with a generation subsidy; (2) whether DP&L has taken all appropriate steps to address its financial integrity issues before seeking a subsidy from customers; and (3) whether the massive subsidy requested by DP&L is the minimum amount needed in order to ensure DP&L's financial integrity.

By way of example, DP&L's post-hearing brief repeatedly claims that DP&L should be provided with a generation subsidy in order to ensure safe and reliable service for customers. Indeed, DP&L's first substantive argument is that anything less than its proposed ROE would put safe and reliable service in jeopardy.[2] However, there is no next step in this analysis. DP&L never explains <u>why</u> its generation assets need to be subsidized and protected from the competitive market in order to provide safe and reliable service to customers. DP&L acknowledges that distribution and transmission revenues are adequate, so the question is solely whether its generation assets must be subsidized. However, PJM provides generation reliability in DP&L's service territory, and there is no record evidence suggesting that DP&L's generation assets are needed in order to provide safe and reliable service to customers. In fact, DP&L's own witness Jackson admitted that DP&L's generation is not needed to ensure reliability.[3] While the parties disagree as to whether DP&L is truly facing a financial integrity issue, without any record evidence tying the purported financial distress to harm to customers there is no reason to award DP&L a massive generation subsidy.

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[2] DP&L Post-Hearing Brief ("DP&L Brief"), p. 7.

[3] Tr. Vol. I, p. 172.

There is similarly no record evidence establishing that DP&L has taken all appropriate steps to proactively reduce its purported financial distress before seeking generation subsidies from the Commission. One reason generation was exposed to competitive market forces was to encourage suppliers to trim excess from their budgets in order to compete effectively, but DP&L has chosen instead to use its bloated budgets as proof that it needs protection from competitive markets. DP&L witness Jackson's financial projections for the proposed ESP term show no indication that DP&L took any steps to address its purported financial distress. For example, DP&L projections claim that RTEP capex will increase from [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].[5] Similarly, Mr. Jackson's projections fail to address the identified reductions in O&M expenditures of [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].[6] Incredibly, DP&L contends that its decision to make these reductions in order to operate more efficiently is contingent upon the outcome of this case, not upon market forces.[7] As shown by these representative examples, Mr. Jackson's projections do not reflect market realities and fail to show that DP&L took all appropriate steps to address financial distress before asking for a massive nonbypassable charge. The Commission is left to guess as to whether generation units could potentially be retired, whether O&M and capex could be further reduced, whether DP&L's

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[4] Lesser Direct, p. 19.

[5] Lesser Direct, p. 19.

[6] Tr. Vol. I, p. 87, 90; Lesser Direct, p. 18 (2013 expense reductions also include an additional [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] Tr. Vol. I, p. 90).

[7] DP&L Brief, p. 40.

revenue could be increased, or even whether or not DP&L's projections submitted in this case take DP&L's purported financial distress into account through an austerity program. Once again, this is not a matter of the parties disputing projections or the effects of projections, there is simply no record evidence suggesting that DP&L has taken all appropriate steps before asking for rate relief.

Finally, there is no record evidence that the subsidy requested is in the minimum amount needed to protect DP&L's financial integrity. DP&L has presented testimony regarding the ROE it would like to have. DP&L fails to recognize that there is a difference between the ROE it would like to achieve and the inability to access capital markets that is the hallmark of a financial integrity claim. There is no record evidence suggesting that the subsidy requested is in the minimum amount needed to protect financial integrity.[8] Instead, DP&L's entire case is premised on projected ROE, yet DP&L witness Chambers could offer no opinion on the minimum ROE necessary to protect DP&L's financial integrity.[9] Indeed, Dr. Chambers agreed that DP&L could not legitimately assert a financial integrity claim as long as DP&L receives market-based compensation for its generation assets.[10] The Commission cannot award a subsidy based on claims of future harm to a company's financial integrity when there is no evidence suggesting that the subsidy is the minimum needed in order to protect that company's financial integrity and avoid economic confiscation.

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

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

[9] Tr. Vol. II, pp. 452-53. *See also* Tr. Vol. II, p. 452 ("Lots of companies get affected by economic conditions, we've seen many companies with losses. That by itself is not confiscatory . . . .").

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

DP&L has historically enjoyed outstanding returns. Its generation assets are now causing projected future returns to decrease, and so DP&L is seeking a return to regulated ratemaking for the brief period when energy prices are low. However, where is the benefit of this bargain for customers? Did DP&L return excessive profits to its customers or make forward-looking investments in its plants when it enjoyed 20% ROEs year after year? Does DP&L offer customers a share of generation revenues, either now or in the future when energy prices are projected to increase? Did DP&L provide the evidence required in a traditional regulated ratemaking proceeding which would allow the Commission to evaluate DP&L's costs for prudency? No, no, and no. DP&L is offering customers and this Commission a bad bargain. It enjoyed competition in the past, it currently enjoys competition in other EDU service territories, and it wants to enjoy competition in the future when energy prices are projected to increase. In the meantime, DP&L wants the Commission to approve an ESP which is almost a billion dollars over market. There is no reason for the Commission to approve such a bad deal for customers, and DP&L's proposed ESP should be rejected.

II. DP&L'S FINANCIAL INTEGRITY IS NOT THREATENED

A. DP&L Failed To Carry Its Burden Of Proof To Establish That It Needs Additional Funds For Financial Integrity.

In its brief, DP&L turns Ohio law on its head, making much of the fact that no intervenor witness opined that "DP&L could maintain its financial integrity and continue to provide safe and reliable service without the SSR and ST during the ESP term."[11] This is the incorrect legal standard, as DP&L has the burden of proof to establish the specific amount of additional funds it needs to prevent economic confiscation in violation of the U.S. Constitution, for which "financial

[11] DP&L Brief, p. 29.

integrity" is a short-hand reference.[12] In reality, the absence of intervenor testimony on this topic is explained by DP&L's failure to present any evidence whatsoever on this point.

DP&L's brief is filled with references to target returns on equity, and DP&L includes an extensive analysis of what is a reasonable ROE target for DP&L over the ESP term.[13] However, there is a significant difference between ROEs of comparable entities, which DP&L addresses, and financial integrity. In a regulated rate case, the ROEs of comparable entities are relevant to help establish a regulated rate of return. However, a financial integrity analysis is different. The relevant determination is not what ROE other entities return, but rather what revenue DP&L needs so that it can access capital markets. DP&L combines these two concepts improperly. Ohio is not a regulated environment for generation any longer, and DP&L's reliance on a traditional rate case concept and case law is simply no longer valid in Ohio.

In fact, DP&L's financial integrity claim must fail because any such claim depends as a matter of law upon regulatory refusal to approve revenues at least equivalent to market-based pricing. There is no dispute that DP&L is receiving market-based compensation for the energy and capacity produced by its generation assets. There also is no dispute that market-based compensation is inherently compensatory.[14] The *Hope Natural Gas* line of cases protect regulated utilities only from a regulator's refusal to allow utilities the opportunity to earn at least a market-based rate equivalent, and the evidence here conclusively demonstrates that DP&L is receiving market-based rates. As such, DP&L has not met the legal prerequisite to asserting a financial integrity claim, let alone proving that its financial integrity is threatened.

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[12] *See Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944). *See also* Lesser Direct, pp. 27-28.

[13] *See, e.g.*, DP&L Brief, pp. 14-28.

[14] Tr. Vol. II, p. 568. *See Market St. Ry. Co. v. Railroad Commission of State of Cal.*, 324 U.S. 548, 566-67, 65 S.Ct. 770, 89 L.Ed. 1171 (1945) (a regulated utility is not guaranteed a profit when competitive forces prevent it from recovering its costs).

On the latter point, DP&L failed to present evidence showing that, without massive above-market subsidies, it would be unable to "maintain its credit and attract capital."[15] Instead, it presented evidence regarding its projected returns, the returns of allegedly comparable companies, and its credit rating. DP&L merely demonstrated that during the current downturn in energy prices it might have to pay more to attract capital, not that it would be unable to attract capital. There was no evidence examining whether DP&L could cut costs or increase revenues, or explaining why DP&L couldn't access capital markets if its ROEs were lower than it would like. There was no evidence of the impact on DP&L's financial integrity if it separated out to an affiliate the allegedly revenue-harming generation assets during the proposed ESP period, and no evidence of the impact on DP&L as a company once it does finally achieve corporate separation.[16] There was no evidence examining what would happen if DP&L were not granted any subsidy (other than Dr. Chamber's opinion that DP&L's credit rating could drop a notch or two), or what minimum level of subsidy would be required to avoid harm to DP&L's financial integrity. The record is silent.

Due to the complete lack of record evidence, DP&L failed to meet the requisite burden of proof for financial integrity claims under Ohio law.

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[15] *See Hope Natural Gas*, 320 U.S. at 603; Lesser Direct, p. 28. Again, even if it could carry its burden of proof in this point, its claim nevertheless would fail because it is receiving market-based rates.

[16] Dr. Chamber's analysis did not consider corporate separation as an option and did not consider how corporate separation after December 31, 2017 would rapidly improve DP&L's financial integrity. Tr. Vol. II, pp. 442-43, 451, 458. Yet Dr. Chambers agreed that DP&L's customers should not bear the burden of protecting DP&L's financial integrity if the financial integrity is impaired due to corporate reorganization decisions that DP&L has made (such as the decision to maintain functional separation and carry market risk within DP&L instead of transferring that risk to a separate company). Tr. Vol. II, p. 457-58.

B. It Is Undisputed That Generation Is The Cause Of Any Financial Integrity Issue.

DP&L freely admits on brief,[17] as it did at hearing,[18] that any financial integrity issues it may have are caused by its generation assets. Accordingly, it is undisputed that if the Commission provides DP&L with an above-market subsidy in this proceeding, then the Commission will be subsidizing DP&L's competitive generation assets in clear violation of Ohio law and policy.

C. DP&L Failed To Provide Sufficient Evidence Of A Financial Integrity Issue.

1. DP&L's Evidence Fails To Address The Financial Integrity Standard Provided By Its Own Witness.

Dr. Chambers states that the strength of a company's financial integrity is determined from a review of whether the company operates efficiently, has qualified management and capable personnel, has the ability to meet its obligations in a timely manner, can maintain and invest in its infrastructure, is sufficiently flexible to adjust to changing conditions, and has positive forward-looking financial prospects given the risks and uncertainties of regional, national and international economies.[19] He further states that "the determination of financial integrity involves balancing these many factors" and that one way to measure this type of financial integrity is to "relate it to a company's overall creditworthiness."[20] While interesting, Dr. Chambers describes the "financial distress" standard, as did DP&L witness Malinak,[21] which

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[17] DP&L Brief, p. 34 ("while the decline in DP&L's generation revenue is a <u>cause</u> of DP&L's financial integrity issues") (emphasis in original); DP&L Brief, p. 36 ("the primary <u>causes</u> of DP&L's financial integrity issues were <u>generation</u> related (increased switching, decreased wholesale generation prices, decreased capacity prices)") (emphasis in original).

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

[19] Chambers Direct, p. 9.

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

[21] Lesser Direct, pp. 27-28. *See generally* Malinak Rebuttal.

is a lower standard than the constitutional financial integrity issue. Even with a lower hurdle, DP&L is unable to produce probative evidence to satisfy this lesser standard.

Rather than providing evidence of any of the factors identified by its own witness, DP&L's testimony instead only addressed ROE and credit ratings.[22] Dr. Chambers did not evaluate whether DP&L can operate its business efficiently with qualified management.[23] He did not evaluate DP&L's ability to meet its obligations or maintain its infrastructure.[24] Dr. Chambers ignored almost all of the factors he identified as relevant to a financial integrity review,[25] and none of DP&L's other witnesses provided testimony addressing these factors.

On brief DP&L claims that the multiple intervenor witnesses who question DP&L's financial integrity claim are not credible because they fail to address whether DP&L can provide safe and reliable service without a massive subsidy to ensure financial integrity.[26] As anticipated in the FES brief at page 36, DP&L is asserting a classic straw-man argument. DP&L creates a hypothetical world where ROE necessarily correlates with safe and reliable service, and then attacks witnesses who failed to address this nonsensical position. DP&L failed to provide any evidence which tied credit rating and ROE to the other financial integrity factors identified by its own witness. DP&L also failed to provide any evidence connecting credit rating and ROE to safe and reliable service. Therefore, there was nothing in DP&L's testimony for the intervenor witnesses to rebut, and DP&L's attacks on intervenor witnesses are unpersuasive.

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[22] Chambers Direct, p. 9.

[23] Chambers Direct; *see also*, Tr. Vol. II, p. 455 ("I don't know that I address that specifically in my report. I certainly do believe that they are.")

[24] Chambers Direct; *see also*, Tr. Vol. II, p. 456 ("I don't believe I had any specific information with respect to [transmission and distribution infrastructure] and did not discuss this. This information with respect to the generation facilities was taken directly out of their, out of the company's 10-K report.")

[25] Chambers Direct.

[26] DP&L Brief, p. 29.

Apparently recognizing this hole in its case, on brief DP&L attempts to take some vague and unsupported comments out of context to create a record for its financial integrity claim. These comments are so generalized, unsupported, and isolated that each of them can be addressed individually:

- "DP&L faces serious threats to its financial integrity and consequently, to its ability to provide safe and reliable service." (citing Exhibit CLJ-1 and Tr. 2822-23).[27]

Exhibit CLJ-1 is Mr. Jackson's chart showing the declining ROE's from their historic 20% level in 2010 through an ROE of "only" [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] in 2012. This historical data is not evidence of a financial integrity problem, and does not even address the proposed ESP term. The citation to Mr. Malinak's testimony at pages 2822-23 may be a typographical error. At these pages Mr. Malinak admits that increased switching is a result of competition in Ohio.[28] He also admits that declining ROEs are a result of competition.[29] None of this testimony relates to whether DP&L can provide safe and reliable service without a massive subsidy to ensure financial integrity. Instead, this testimony is additional evidence that DP&L is seeking protection from competitive markets in order to subsidize its generation assets.

- "[R]emoval of the SSR will damage DP&L's financial position and integrity substantially, imperiling its ability to provide such quality service to its customers." (citing Chambers Direct, p. 53)[30]

As discussed in detail above, Dr. Chambers only examined the potential reduction to DP&L's credit rating. Dr. Chambers made no effort to determine whether DP&L could provide

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[27] DP&L Brief, p. 7.

[28] Tr. Vol. XI, p. 2822.

[29] Tr. Vol. XI, p. 2823.

[30] DP&L Brief, p. 14.

safe and reliable service without a generation subsidy, and failed to examine almost all of the factors required by his own financial integrity test. As Dr. Chambers' testimony is limited in scope, it provides no support for DP&L's claim that a subsidy is required to maintain safe and reliable service.

- "[The SSR] is the minimum that DP&L needs to allow it to satisfy its obligations, operate efficiently so as to provide adequate and reliable service and otherwise continue operating as an ongoing entity." (citing Jackson Rebuttal, p. 8)[31]

Mr. Jackson's quote above was eviscerated on cross examination. Mr. Jackson admitted that he did no analysis to determine that the SSR was the minimum amount needed to ensure DP&L's financial integrity.[32] Moreover, the quoted statement was not supported by Mr. Jackson's testimony. Mr. Jackson never provides any explanation of why a generation subsidy is necessary to ensure adequate distribution service, which specific O&M spending projects were necessary to ensure adequate service, or how customers would be affected if DP&L were not granted a subsidy. Other than the ROE and credit rating testimony discussed above, there is absolutely nothing in the record which establishes <u>how</u> customers would be harmed if DP&L were exposed to the competitive market. Without any testimony on this point, Mr. Jackson's extremely general and unsupported statement is not persuasive.

- "O&M savings do not come without a risk, and that risk is a threat to reliability due to, among other things, potential performance issues that DP&L could see with its <u>generation</u> facilities as a result of the reductions." (citing testimony of witness Jackson and witness Herrington)[33]

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[31] DP&L Brief, p. 13.

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

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

[33] DP&L Brief, p. 14 (emphasis added).

The quote above captures several flaws in DP&L's argument. It cites potential performance issues for generation facilities which have been competitive for more than a decade. Even if generation-related performance issues were something the Commission should consider, DP&L has offered no support for its assertion. Instead, DP&L quotes Mr. Jackson's ROE discussion, and Mr. Herrington's completely unsupported statement regarding outages. Much like Mr. Jackson's general statements, Mr. Herrington never provides any support or data for his assertion. Indeed, the quoted language above was in response to a cross examination question regarding whether or not DP&L should "look even harder" for O&M expense reductions (Mr. Herrington eventually agreed that DP&L should look harder for expense reductions[34]). The Commission should not award nearly a billion dollars in above-market revenue to DP&L when DP&L's witnesses have failed to explain how customers would be affected by DP&L reducing expenditures from its original budget.

As shown by this review of the testimony relied on by DP&L's brief, DP&L's witnesses relied on ROE and credit rating to support DP&L's financial integrity claim. DP&L provided no detail explaining how a lower credit rating or ROE would impact customers. For example, DP&L has not provided the Commission with a list of specific O&M project deferrals which would harm reliability or even representative examples of how expense reduction would harm customers. Without this evidence, there is nothing for the Commission to rely upon when evaluating DP&L's financial integrity claim. Therefore, DP&L has utterly failed to meet its burden of proof and the financial integrity argument must be rejected.

[34] Tr. Vol. IV, p. 1119-20.

2. Even If The Commission Were to Consider DP&L's Financial Integrity, DP&L's Projections Are Unreliable.

As discussed in detail in FES's post-hearing brief at pages 46-54, DP&L's projections from Mr. Jackson are stale and unreliable.

a. DP&L's Projected Costs Are Overstated.

DP&L's projections are flawed because they fail to take into account cost savings already identified by DP&L which are undisputed. These include: (1) reduce capex for generation assets by [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] annually;[35] (2) reduce generation O&M expenditures by [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]; [36] and reduce depreciation expense accordingly. The total effect of these changes would increase "cash and cash equivalents" by [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] per year.[37] Obviously, this more than [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].

On brief, DP&L claims that the cost reductions should not be relied upon because the cost reductions should be considered "a potential supplement to the SSR" so that DP&L can achieve a ROE in excess of 9%.[38] This argument perfectly captures the problems with DP&L's position. DP&L is asking for a financial integrity charge not to maintain safe and reliable service or address an emergency, but instead to pad its balance sheet. There is no justification in Ohio law for a generation subsidy of this type.

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

[36] Tr. Vol. I, p. 87, 90; Lesser Direct, p. 18 (2013 expense reductions also include an additional $6 million identified by Mr. Jackson. Tr. Vol. I, p. 90).

[38] DP&L Brief, p. 40-41.

[38] DP&L Brief, p. 40-41.

DP&L also claims that the already identified cost reductions should not be considered because the 2014-2017 budgets have not been approved by DP&L's Board.[39] This argument does not pass the laugh test. Mr. Jackson admitted that the CLJ-2 cost-projections in this proceeding were created for the sole purpose of this litigation.[40] The projections are hardly specific or reliable, as the projections include massive projected spending increases and are based on projects which have not even been identified yet.[41] Moreover, the cost reductions discussed above were utilized in DP&L's October of 2012 goodwill impairment analysis for each year of the proposed ESP.[42] DP&L's claim that the cost reductions are less reliable than the projections it created solely for use in this proceeding in August of 2012 is simply not credible. It becomes even less credible given the fact that the cost reductions were identified by DP&L, and relied upon by DP&L's witness Jackson, two months <u>before</u> he filed his supplemental testimony.

DP&L next claims that there are "substantial risks" associated with the cost savings it identified.[43] However, DP&L does not ever identify what these risks are or how the cost savings

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[39] DP&L Brief, p. 41.

[40] Tr. Vol. I, p. 151 ("Q. Would you agree that the information compiled on Exhibit CLJ-2 was created exclusively for this case? A. The financials that are shown here were prepared for this case. I guess I'm not- I may ask you to restate that question. I'm not sure that I understood it correctly. Q. Does this exhibit have any other purpose outside of this case, Mr. Jackson? A. This exhibit is for this case.")

[41] By way of example, for 2016 and 2017 DP&L's projected capex includes [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. Lesser Direct, p. 19.

[42] Tr. Vol. I, p. 91-94.

[43] DP&L Brief, p. 41. DP&L claims that the O&M savings already identified by DP&L "would lower DP&L's O&M expenses below DP&L's historic averages, and reduce maintenance may impair the operation of DP&L's. [sic]" DP&L Brief, p. 41. As this sentence appears incomplete, it is impossible to say which DP&L operation may be impacted by reduced maintenance. However, the remainder of this sentence is misleading. DP&L's quotes do not reference actual historic O&M maintenance expenses. Instead, the quoted statements state that DP&L's "O&M forecasts that were included in the filing are based on the historic operation of DP&L as an enterprise." Tr. Vol. IV, pp. 1176-77 (cited at DP&L Brief, p. 41). There is a significant difference between creating a forecast based on historic operating

could impact DP&L. Both the record and DP&L's brief are completely silent on the issue. While there are risks related to achieving budget efficiencies, these are risks that entities operating in competitive markets fail to manage at their own peril because these risks are properly the responsibility of the company, not its customers. Yet DP&L is so tradition-bound and operating in a pre-S.B. 3 world that its budgeting process for its competitive generation assets actually ignores generation revenues.[44] Once again, rather than providing actual record evidence, DP&L simply speaks in vague generalities and demands hundreds of millions of dollars in unwarranted subsidies from customers.

The foregoing shows that DP&L already identified significant cost savings which are available to address its financial integrity issues. The Commission should consider these cost savings, as well as DP&L's failure to present testimony establishing that no additional cost savings are possible, when evaluating DP&L's financial integrity claim.

b. DP&L's Projected Revenues Are Understated.

DP&L significantly understated its potential revenues. As explained in the FES Brief at pp. 50-53, DP&L could file a distribution rate case as early as 2013, does not project any revenues from bidding into other utilities' SSO auctions, and assumes that it will sell energy to DPLER at the LMP price for zero margin.

DP&L also uses stale data which incorporates forward price curves as of August 2012. DP&L admits that it failed to update these forecasts when it revised its testimony in December of 2012, and further admits that it reviews this data on a daily basis because timeliness is

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experience and actually presenting previous years expenditures. By way of example, DP&L projections claim that RTEP capex will increase from [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. An increase of this magnitude is hardly consistent with a claim that DP&L's projections are in line with historic averages.

[44] Tr. Vol. I, p. 85.

important.[45] The use of stale price curves is important not just to the revenue DP&L anticipates from dispatched units, but also to whether or not the units will dispatch at all. Apparently, the importance of timeliness only applies when the updates are favorable. As shown in FES Exhibits 2 and 3, from 2009 through 2011 (the most recent year data was available), DP&L had output of approximately [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] megawatt-hours.[46] Despite this historic average, Mr. Jackson's testimony in this case projects that DP&L will sell approximately [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] less megawatt-hours in 2013 than it did in prior years. DP&L's projections do not anticipate that plant output will return to 2011 levels until [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. Mr. Jackson explained that the most significant cause of the decrease in output is the forward curve price of energy.[47] As this energy price increases, plant output would increase.[48] By using the stale August of 2012 data, Mr. Jackson utilized stale, artificially low forward curve prices which understate the revenue which DP&L will receive.

More persuasive was the testimony of Staff witness Benedict, who predicted generation dispatch much more in line with historical averages. He ran his model in December of 2012 (rather than the August of 2012 modeling from DP&L).[49] Mr. Benedict found that DP&L's generation would produce [**BEGIN CONFIDENTIAL**] [redacted]

[45] Tr. Vol. I, p. 45; Tr. Vol. II, p. 372.

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

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

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

[49] Direct Testimony of Staff Witness Benedict, Staff Ex. 3A, ("Benedict Direct") p. 5; Tr. Vol. VII, p. 1531.

[redacted] [**END CONFIDENTIAL**].[50] Using this more recent data, Staff witness Benedict predicted revenue increases of [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] over that projected by DP&L.[51]

DP&L took issue with Staff witness Benedict's generation dispatch forecast, claiming that Mr. Benedict's forced outage projections were not compared to DP&L's historic average forced outage rates.[52] Interestingly, despite filing rebuttal testimony in this proceeding, DP&L chose not to provide any evidence of the alleged problems with Mr. Benedict's forced outage projections or quantify how that projection differed from historical averages. Additionally, the end result of Staff witness Benedict's analysis, how much generation will dispatch, is in line with historic averages. DP&L's average generation output from 2009 through 2011 (the most recent year data was available) was [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**][53] It is not credible for DP&L to attack Staff witness Benedict's conclusion when it has failed to present any relevant contrary testimony and Staff's conclusion is much closer to historic averages than DP&L's projections.

In addition to the generation dispatch testimony from Staff witness Benedict, Staff witness Choueiki testified that DP&L's financial projections rely on forward power prices which are understated by approximately $3 to $5/MWH over the term of the ESP recommended by

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[50] Benedict Direct, p. 5, FES Ex. 2 and 3.

[51] Benedict Direct, p. 10.

[52] DP&L Brief, p. 23.

[53] Tr. Vol. I, p. 58; Benedict Direct, p. 5.

Staff.[54] When these higher power prices are combined with Staff witness Benedict's generation dispatch forecast it becomes clear that DP&L has significantly understated its revenue over the ESP term.

DP&L's projections also significantly overstate switching. Staff witness Choueiki provided a more realistic estimate, estimating that switching will be [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. Correcting DP&L's overstated switching projections would increase DP&L's revenue by [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].[55] DP&L takes issue with Staff's switching projections, relying on DP&L witness Hoekstra to claim that Staff's switching projections fail to adequately predict residential switching.[56] There are two problems with Mr. Hoekstra's analysis.

First, Mr. Hoekstra projected switching on a forward looking basis.[57] Mr. Hoeskra's analysis "uses historical data annual usage for those [switched] accounts to provide a forward-looking estimate."[58] While this is undoubtedly something that DP&L is interested in, it is not the correct measure to establish the revenue impact on DP&L of increased switching. If a customer switches in December, then DP&L received revenue from that customer for 11 months. There is no justification for ignoring that 11 months of historic revenue by using forward looking switching analysis. Staff used the correct historical switching analysis which actually looks at

[54] Tr. Vol. VII, p. 1871-73.

[55] Tr. Vol. VII, p. 1846.

[56] DP&L Brief, p. 22

[57] Tr. Vol. II, p. 294.

[58] Tr. Vol. II, p. 294.

the true amount of load served by DP&L in any given period.[59] This more accurately reflects DP&L's revenue, and therefore Staff's switching assumptions should be used.

Second, Mr. Hoekstra was completely unable to explain how he calculated his switching assumptions. While DP&L makes broad claims about the potential dangers of residential aggregation, Mr. Hoekstra was unable to explain his own projections. For example, Mr. Hoekstra sponsored an interrogatory response which purported to provide support for DP&L's switching projections.[60] Despite claiming the response and accompanying exhibit were prepared under his direction,[61] Mr. Hoekstra was unable to provide any support for his calculation. He was "not exactly sure" what customers were in the various groups identified on the exhibit.[62] He was unable to explain the differences between the various groups identified on the exhibit. "I cannot explain specifically what the difference is."[63] It is not credible for DP&L to take issue with Staff's projections when its own witness could not provide any explanation for his own projections.

DP&L's brief does not address the majority of the potential revenue enhancements which are available to it. The only issue it addresses on brief is the potential distribution rate case it may file in the future.[64] DP&L claims that potential additional distribution revenue is not relevant because the distribution rate case has not yet actually been filed, and because it may need the additional revenue in order to meet its financial goals.[65] This is precisely why the

[59] Choueiki Direct, p. 13.

[60] FES Ex. 10.

[61] Tr. Vol. II, p. 389.

[62] Tr. Vol. II, p. 389.

[63] Tr. Vol. II, p. 390.

[64] DP&L Brief, p. 42.

[65] DP&L Brief, p. 42.

Akron Thermal standard requires cost and revenue enhancements be considered <u>before</u> the Commission will consider granting emergency rate relief. The Commission further held in another case:

> "[M]ost importantly, the Commission believes that the companies absolutely must take very aggressive steps to enhance their revenues and minimize their expenses particularly during this interim period in order to avoid the negative consequences of the current financial emergency. . . . What has been presented in terms of reduction of expenses in this record does not inspire us to the belief that these companies as yet comprehend the concept of 'austerity' - a concept which is mandatory in a financial emergency such as the one these companies face."[66]

It is inappropriate for DP&L to demand a revenue guarantee from customers while cost reductions and revenue increases are available. DP&L's projected costs and revenues simply do not support DP&L's claim that its financial integrity is threatened.

D. DP&L Has Not Established That Additional Funds Are Needed To Provide Safe And Reliable Service.

1. DP&L Has Ignored The Distinctions Drawn By Witnesses Addressing Its "Safe And Reliable Service" Argument.

DP&L repeatedly claims that additional funds are needed for it to provide safe and reliable service. Using questionable citations, DP&L claims that multiple intervenor witnesses "agreed that it was important that DP&L be able to maintain its financial integrity and provide safe and reliable service."[67] As discussed extensively below, there is a significant difference between being able to provide safe and reliable service and receiving a massive annual subsidy. However, before delving into that discussion it is worthwhile to see what the witnesses cited by DP&L actually said.

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

[67] DP&L Brief, p. 28.

DP&L claims that FES witness Noewer "agreed that it was important that DP&L be able to maintain its financial integrity and provide safe and reliable service."[68] On the page cited by DP&L, FES witness Noewer actually said:

> "Q. And you agree with me that it's in FES's best interest that DP&L continue to have sufficient funds that it can provide reliable distribution service, right?
>
> A. That it can provide reliable **distribution** service, and if it can't, **it should file a distribution case**."[69]

Wal-Mart witness Chriss was also quoted by DP&L as agreeing with its position. Once again on the page cited by DP&L, he actually said:

> "Q. Sure. Would you agree that it's in DP&L's customers best interest that DP&L be able to provide reliable and stable service as I've just defined it ['It would be regular distribution service so that the power lines are up and power could flow']?
>
> A. I would agree that's important and I would also state that we pay for that reliable service through our **distribution** rates, and to the extent that DP&L has a need there, that **it could file a base rate case**."[70]

In a continuation of the theme, Kroger witness Higgins was also quoted by DP&L as agreeing that DP&L needed to maintain its financial integrity to provide safe and reliable service. On the page cited by DP&L, he actually said:

> "Q. You would agree with me that long-term shoppers, short-term shoppers, and nonshoppers all have an interest in ensuring that DP&L maintains its ability to provide stable service, correct."
>
> A. Yes, because DP&L is the **distribution** company and as a **distribution** company it's, you know, it's- there's importance for the company to be able to provide stable service."[71]

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[68] DP&L Brief, p. 28.

[69] Tr. Vol. IX, p. 2434 (emphasis added).

[70] Tr. Vol. VII, p. 2056 (emphasis added).

[71] Tr. Vol. VII, p. 1658-59 (emphasis added).

These are only representative examples, as almost all of the witnesses questioned by DP&L made clear that DP&L the distribution utility needed to provide safe and reliable service.[72] Though not reflected in DP&L's citation of these supposed admissions, these witnesses make a critical distinction. As the distribution utility, DP&L is responsible for providing safe and reliable service. DP&L's generation assets, which are the cause of any purported financial integrity issue, are not relevant to whether DP&L the distribution utility can provide safe and reliable service.

2. DP&L Has Not Established That Any Threat To Its Financial Integrity Would Affect Its Ability To Provide Safe And Reliable Service.

DP&L asserts the straw man argument that no intervenor witness opined that DP&L "could maintain its financial integrity and continue to provide safe and reliable service without the SSR and ST during the ESP term."[73] As discussed above, DP&L has the burden of proof to establish that it needs the SSR and ST to continue to provide safe and reliable service. However, it presented nothing establishing this point.

After its extensive five-page discussion of all the intervenor witnesses who oppose the SSR and ST,[74] DP&L's brief offers only one paragraph of analysis purporting to establish that the massive subsidy it requests has any relationship to safe and reliable service.[75] DP&L claims that it is still an integrated company, and that any issues affecting its generation assets would, by

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[72] *See, e.g.*, Duke witness Walz, Tr. Vol. X, p. 2577-78 (question limited to distribution service); IGS witness White, Tr. Vol. X, p. 2612 ("A. I believe that its in the best interest of distribution customers that DP&L is able to maintain reliable service through its distribution network").

[73] DP&L Brief, p. 29.

[74] DP&L Brief, p. 29-34.

[75] DP&L Brief, p. 36.

necessity, affect the entire company.[76] That is the entirety of DP&L's analysis on this issue. This analysis leads to a host of questions. Hasn't generation been "on its own" in the competitive market for years? Isn't functional separation intended to protect customers from this sort of economic blackmail? Why doesn't DP&L manage its generation assets in a manner that would avoid such a large drain on distribution revenues? While these questions are addressed in detail elsewhere in the brief, there is no need to address them to refute DP&L's argument.

There is no evidence in this record establishing that a low ROE or a decreased credit rating would cause DP&L the distribution utility not to be able to provide safe and reliable service. Instead DP&L only offers general and unsupported statements of an unspecified future harm without any explanation or supporting data. Not one DP&L witness offered testimony establishing that the subsidy requested was the minimum necessary in order to provide safe and reliable service. Without this evidence there is simply no support for DP&L's position, and the Commission should not find that a subsidy is warranted to ensure safe and reliable service.

3. DP&L's Generation Assets Are Not Needed For DP&L's Customers To Receive Safe And Reliable Service.

DP&L has not argued that its generation assets are required for it to provide safe and reliable service for good reason. It is beyond dispute that DP&L the EDU could procure generation from the wholesale market. Competitive auctions are common in Ohio, and DP&L itself proposes to procure generation through a CBP during the ESP term. Moreover, as recognized by DP&L, generation dispatch is handled by PJM, and DP&L's generation is not needed for DP&L's customers to receive safe and reliable service:

> "Q. Would you agree that even if DP&L's generating assets were not to operate, customers would still receive stable service because

[76] DP&L Brief, p. 36.

> PJM would dispatch electricity to meet the load from other resources?
>
> A. Yes. We- if our units do not dispatch, we are procuring from the market to supply, so yes, that's correct."[77]

DP&L acknowledges that its generation units are not required in order to provide customers with stable service, there are no grounds to consider the economic viability of DP&L's generation assets in connection with DP&L's financial integrity claim.

4. DP&L's Failure To Complete Corporate Separation While Receiving Extraordinary Earnings Is Relevant To Its Financial Integrity Claim.

Apparently acknowledging its inability to provide any tie between generation-related financial issues and safe and reliable service, DP&L provides five pages of analysis of its historical pricing while functionally separated to claim that a generation subsidy is appropriate for the next five years because DP&L provided below-market generation pricing in the past.[78] DP&L then spends two pages attempting to explain why its earnings during the same period are irrelevant.[79] DP&L's arguments miss the mark. There is nothing in Ohio law which allows the Commission to award a subsidy because DP&L offered attractive pricing in the past. Nothing in R.C. § 4928.143 permits this to be a consideration for the Commission. Instead, the Commission is to compare the proposed ESP to a market-based MRO. Regardless of what DP&L did or did not do in the past, a massive generation subsidy is contrary to Ohio law.

However, DP&L's attempt to use its failure to achieve corporate separation as a shield against competitive markets, and its failure to prepare for those competitive markets, is directly relevant to DP&L's financial integrity claim. Indeed, DP&L's premise that its failure to achieve corporate separation allowed it to provide below-market pricing to its customers is doubly false.

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[77] Tr. Vol. I, p. 172.

[78] DP&L Brief, pp 5-6, 36-39.

[79] DP&L Brief, pp. 47-48.

DP&L's claim is easily belied by the FirstEnergy Ohio utilities' experience with their rate stabilization plan, rate certainty plan and subsequent ESPs, each of which benefitted customers despite the FE Ohio utilities completing corporate separation in 2005. Plus, by DP&L's own admission, substantially all of the commercial and industrial customers in its territory have chosen to shop, along with many residential customers.[80] With so many customers shopping, it is unclear whether DP&L actually provided below-market prices in the past, or whether it simply took a few years for competitors to overcome the barriers to entry in DP&L's service territory and provide customers with the benefits of competition.[81] What matters today is not whether DP&L should have completed corporate separation on the same timeline as the FE Ohio utilities (another straw man argument of DP&L's), but whether DP&L completing corporate separation on the same timeline as AEP Ohio and Duke Energy Ohio would eliminate DP&L's fears of substantial financial harm in years 2015-17. There is every reason to believe it would, and no reason to allow DP&L to continue to drag its feet in completing corporate separation on the ground that its foot-dragging may have benefitted customers in the 2000s.

Additionally, although DP&L claims that its historical "below market" prices should be considered by the Commission, it is vehemently opposed to the Commission considering the 18-20% year-over-year returns that DP&L earned while providing those "below market" rates.[82] This truly is having your cake and eating it too. Although DP&L argues that revenue received in prior years is not relevant in a regulated environment to determine future rates,[83] this is not a

[80] Hoekstra Direct, p. 6 (finding that as of August 30, 2012, either 83% (using historical shopping calculation) or 84% (using forward looking calculation) of non-residential customers were shopping.)

[81] The projected base generation rate during the ESP period is well above expected market pricing. Malinak Direct, Ex. RJM-1.

[82] DP&L Brief, pp. 47-48.

[83] DP&L Brief, pp. 47-48.

traditional rate case. Historic earnings are not relevant to the ESP vs. MRO comparison required by law, but they are relevant to the Commission's consideration of DP&L's claim that it needs a massive generation subsidy in order to maintain its financial integrity and to fund its corporate separation.[84] Despite its extraordinary returns in recent years, DP&L did not complete structural separation at any point from 1999 to the present. DP&L similarly did not address its debt structure and First Mortgage obligation issue at any point during that period. DP&L also did not make necessary improvements to its generation assets in order to ensure that its fleet would be economic in coming years. DP&L instead booked record profits. While DP&L is free to make those choices in a competitive market, the fact that DP&L has done so is relevant to determining whether or not the Commission should find DP&L's financial integrity claim credible.

III. BOTH THE SSR AND ST ARE NOT LEGALLY JUSTIFIED

A. The SSR And ST Are Inappropriate Generation Subsidies.

1. R.C. § 4928.143(B)(2)(d) Does Not Authorize Nonbypassable Charges To Subsidize Generation Assets.

DP&L claims that R.C. § 4928.143(B)(2)(d) authorizes generation subsidies.[85] Specifically, DP&L claims that since R.C. § 4928.143(B)(2)(d) references "retail electric service," and "retail electric service" includes generation service, that a subsidy can be approved.[86] However, this is not the correct reading of R.C. § 4928.143(B)(2)(d).

R.C. § 4928.143(B)(2)(d) authorizes an ESP to include charges associated with "Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service . . ." As shown by this language, the statute referenced by DP&L does not authorize a

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[84] DP&L Brief, p. 26 (claiming that DP&L needs the SSR and ST over 5 years in order to "position ourselves for generation separation in 2017 as we proposed").

[85] DP&L Brief, p. 35.

[86] DP&L Brief, p. 35.

subsidy for retail generation service generally. Instead, the statute only allows terms and conditions relating to "limitations on customer shopping for retail electric generation service.."[87] There is nothing in the massive generation subsidies that relates to limitations on customer shopping. Instead, the SSR and ST are simple generation subsidies, thus R.C. § 4928.143(B)(2)(d) does not apply.

Though not made in the relevant portion of its brief,[88] DP&L also argues that the SSR and ST are authorized since they relate to "default service."[89] DP&L claims that the Commission held that the AEP Ohio Retail Stability Rider ("RSR") was authorized under this portion of the statute, and therefore by analogy any rider included in a proposed ESP would thus necessarily relate to default service.[90] DP&L does not mention that the Commission's decision regarding the RSR is currently on appeal to the Ohio Supreme Court and that several parties, including FES, are challenging the legal justification for the AEP Ohio RSR.[91]

As briefed by FES extensively in the AEP Ohio proceedings, R.C. § 4928.143(B)(2)(d) does not authorize the Commission to impose nonbypassable subsidies to guarantee returns to a utility or to subsidize generation assets. Section 4928.143(B)(2)(d) authorizes ESPs to include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.[92]

[87] R.C. § 4928.143(B)(2)(d) (emphasis added).

[88] DP&L Brief, p. 35.

[89] DP&L Brief, p. 11.

[90] DP&L Brief, p.11.

[91] *See* Ohio Supreme Court Case No. 13-0521.

[92] R.C. § 4928.143(B)(2)(d) (emphasis added).

Fixed based generation rates do not promote stability when they are accompanied by nonbypassable charges which operate to increase SSO customers' generation-related prices. Simply because the increase is recharacterized as a stability charge rather than a base generation rate is meaningless. Moreover, imposing a stability charge rather than a simple base generation rate increase operates to artificially lower the price to compare, acting as an anti-competitive subsidy. The SSR should therefore be soundly rejected as contrary to Ohio law, "stability charges" are not authorized by any section of R.C. § 4928.143(B).

2. A Generation Subsidy Violates The Policy Guidelines Governing Commission Action.

DP&L's proposed generation subsidy violates several Ohio statutes. Each is discussed briefly below.

a. R.C. § 4928.38

Generation in Ohio has been competitive for more than a decade. R.C. § 4928.38 provides that:

> "The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, **the utility shall be fully on its own in the competitive market**. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code."[93]

DP&L's requested SSR and ST generation subsidies violate the R.C. § 4928.38 statutory prohibition on generation subsidies.

R.C. § 4928.38 prohibits the recovery of transition revenues or "any equivalent revenues." DP&L claims that the SSR and ST do not violate this statute because they are "not

[93] R.C. § 4928.38 (emphasis added)

cost-based."[94] However, this is a distinction without a difference. R.C. § 4928.38 clearly states that electric utilities are "on their own in the competitive market" after the transition period with respect to their generation assets. There is no statutory justification for awarding non-cost based generation subsidies when a cost-based generation subsidy would be prohibited. Indeed, this claim makes no sense. If the Commission is prohibited from awarding DP&L a charge for its generation costs, then the Commission is certainly prohibited from awarding DP&L a charge based on the generation ROE which is calculated based on those same costs.

DP&L also claims that R.C. § 4928.38 does not apply to its nearly one billion dollar subsidy request because R.C. § 4928.143(B)(2)(d) allows the Commission to authorize stability charges and any conflict should be resolved in favor of R.C. § 4928.143.[95] This statutory interpretation is incorrect—there is no inherent conflict between these statutes. R.C. § 4928.143(A) allows an electric distribution utility to file an ESP. As part of that ESP, the EDU may include any provision authorized by R.C. § 4928.143(B)(2). This includes, among other things, charges that "would have the effect of stabilizing or providing certainty regarding retail electric service."[96] R.C. § 4928.38, on the other hand, does not apply to electric distribution utilities. Instead, R.C. § 4928.38 applies to an "electric utility." This distinction is critically important, and shows the flaw in DP&L's argument. The General Assembly created a statute which authorized transition revenues for all electric utilities. After the recovery of transition costs, all electric utilities were prohibited from recovering transition revenues or "any equivalent costs" and generation was "on its own in the competitive market."[97] In R.C. §

[94] DP&L Brief, p. 43.

[95] DP&L Brief, p. 46.

[96] R.C. § 4928.143(B)(2)(d).

[97] R.C. § 4928.38.

4928.143(B)(2)(d) the General Assembly correctly recognized that distribution utilities could potentially need revenue in order to provide retail electric service. This does not conflict with R.C. § 4928.38, because nothing in R.C. § 4928.143 obligates the distribution utility to own its own generation assets, let alone to subsidize its generation assets in disregard of competitive market revenues. Therefore, these statutes must be read in concert, and DP&L's SSR and ST should be rejected under R.C. § 4928.38 as unlawful generation subsidies.

b. R.C. § 4928.02(H)

R.C. § 4928.02(H) prohibits improper generation subsidies, like those requested by DP&L, which distort the market.

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

As discussed above, DP&L has freely admitted that it is seeking the nonbypassable SSR and ST generation subsidies due to losses associated with its generation assets. R.C. § 4928.02(H) mandates that the Commission prevent "anticompetitive subsidies" which flow "from a noncompetitive retail electric service to a competitive retail electric service." DP&L's proposed SSR and ST violate this prohibition in a grand fashion.

There can be no dispute that the SSR and ST are anticompetitive. DP&L is not seeking an increase in its base generation rates. Instead, it is seeking to impose massive nonbypassable charges on all customers. By imposing large generation charges on customers who no longer take generation service from DP&L and by reducing the motivation of SSO customers to shop the charges are undoubtedly anticompetitive.[98]

In addition to being anticompetitive, the SSR and ST also improperly flow funds from a noncompetitive retail electric service (distribution customers who are forced to pay the nonbypassable charges) to a competitive retail electric service (the DP&L generation assets which are the cause of DP&L's financial integrity concern). There is no legal justification for using DP&L's status as the distribution utility to force shopping customers to pay a nonbypassable charge intended to supplement DP&L's generation assets.

It is well established under Ohio law that nonbypassable charges are not permitted to subsidize competitive generation assets. Indeed, S.B. 3 was drafted to ensure "that distribution service would not subsidize the generation portion of the business."[99] Nothing in S.B. 221 changed this legal standard.[100] The Commission is obligated to avoid subsidies which would flow from a noncompetitive retail electric service to a competitive retail electric service.[101] R.C. § 4928.02(H) codifies that requirement, making clear that public utilities are prevented "from using revenues from competitive generation-service components to subsidize the cost of

[98] Tr. Vol. IX, p. 2392 (FES witness Noewer discussing improper "subsidies and cross-subsidies for generation assets through the nonbypassable service stability rider and switching tracker.")

[99] *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.2d 451, 453 (2004).

[100] *See, e.g.*, R.C. § 4928.02(H).

[101] *See, e.g.*, *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, p. 19 ("OP's recovery of the closure costs would be contrary to the state policy found in Section 4928.02(H), Revised Code. That policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. OP seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR. Approval of such a charge would effectively allow the Company to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of the statute. Accordingly, we find that OPs request for cost recovery should be denied.")

providing noncompetitive distribution service, or vice versa."[102] Both the Commission and the Ohio Supreme Court have recognized this basic standard of Ohio law, and there is no reason for the Commission to contravene the law by subsidizing DP&L"s generation assets under the guise of protecting DP&L's "financial integrity." Instead, the Commission should follow Supreme Court precedent and allow each service component "to stand on its own."[103]

IV. THE PROPOSED ESP FAILS THE ESP V. MRO TEST

A. The Proposed ESP Fails The Price Test.

FES's adjustments to DP&L's calculations are shown in the following table:

[BEGIN CONFIDENTIAL]

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

[END CONFIDENTIAL]

DP&L does not contest the vast majority of these revisions on brief, and so FES hereby incorporates by reference the discussion at pages 2-24 of its brief addressing each of these corrections in detail.

The only substantive issues addressed by DP&L in its brief are whether: (1) the SSR and ST should be included on the MRO side of the ESP v. MRO price test; (2) whether the proposed

[102] *Elyria Foundry Co., et al v. Public Utilities Commission of Ohio, et al*, 114 Ohio St.3d 305, 315 (2007)(citing R.C. § 4928.02(G), which was later renumbered R.C. § 4928.02(H)).

[103] *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.2d 451, 453 (2004).

ESP should be compared to the expected results of an actual MRO or to a hypothetical MRO which DP&L might prefer; and (3) whether the proposed ESP should be compared to 100% competitive blending since DP&L has already filed an MRO application. Each of these issues is addressed in detail below.

1. The SSR And ST Should Not Be Included On The MRO Side Of The Test.

DP&L argues that the SSR and ST should be included on the MRO side of the price test.[104] This issue was anticipated by FES and addressed at pages 3-15 of the FES brief. It will accordingly only be briefly addressed here. Recent Commission precedent in the AEP and Duke Energy Ohio ESP cases makes clear that stabilization charges like the SSR and ST are distinctly a cost of a proposed ESP but would never appear in a market-based MRO.[105] Ohio's statutory framework does not anticipate that new nonbypassable charges should be included on both sides of the test. Instead of comparing the proposed ESP to a "hypothetical MRO," Commission precedent – and the plain language of R.C. § 4928.142(A) – makes clear the proposed ESP must be compared to a market-based MRO.[106] Staff and every relevant intervenor witness agrees that the SSR and ST should not be considered on the MRO side of the test.[107] Indeed, even DP&L's own witness did not opine that the SSR and ST should be included on the MRO side of the test, but instead testified that he was instructed to do this by counsel.[108] Based on settled Commission precedent and the evidence presented at hearing, there is no justification for including the SSR and ST on the MRO side of the test.

[104] DP&L Brief, pp. 79-86.

[105] FES Brief, pp. 7-8.

[106] FES Brief, pp. 4-5.

[107] FES Brief, pp. 8-9.

[108] FES Brief, p. 9 (citing Tr. Vol. III, p. 604).

2. The Proposed ESP Should Be Compared To Market Rather Than A "Hypothetical MRO."

DP&L's brief imagines that an MRO approved under R.C. § 4928.142 would mimic a traditional regulated market from the pre-S.B. 3 world. We no longer live in that world. In the post-S.B. 3 and post-S.B. 221 world, the only circumstance where an argument that the Commission had set generation prices in a confiscatory manner would hold is when: (i)it is an electric utility's first MRO application; (ii) that requires blending; (iii) that artificially suppresses the SSO price below comparable market pricing; and (iv) does so in a manner that threatens the utilities' financial integrity.[109] None of these four criteria exist here. Thus, confiscatory rate making doctrine does not require that the expected results of an MRO include SSR and ST charges.

The primary argument asserted in DP&L's brief regarding the SSR and ST is that the MRO statute authorizes an adjustment to address an emergency affecting the utility's financial integrity.[110] Therefore, under DP&L's "hypothetical MRO" construct the Commission may adjust the MRO side of the test to include both the SSR and ST.[111] This argument was anticipated by FES on brief at pages 8-14, and should be rejected.

To briefly summarize, DP&L's witness Malinak failed to consider the significant differences between R.C. § 4928.143(B)(2)(d) and R.C. § 4928.142(D) when presenting his hypothetical MRO.[112] This is critically important, because the legal standards of R.C. § 4928.143(B)(2)(d) and R.C. § 4928.142(D) are very different. There is no evidence that DP&L meets the requirements of R.C. § 4928.142(D) – not the least of which is that division (D)

[109] *See* R.C. § 4928.142(D).

[110] DP&L Brief, pp. 80-84.

[111] DP&L Brief, p. 80 (citing R.C. § 4928.142(D)(4)).

[112] FES Brief, pp. 9-10.

applies only to the first MRO application filed by an EDU. Even under Mr. Malinak's hypothetical MRO there is no reason to assume that the Commission would adjust the most recent standard service offer price component of the MRO as permitted by division (D), let alone include the SSR and ST on the MRO side of the test.

In its brief, DP&L claims that it complies with R.C. § 4928.142(D) since it needs the SSR and ST to avoid a threat to its financial integrity, citing R.C. § 4909.16 and the Commission standards for emergency rate relief.[113] As discussed in FES's brief at pages 13-14, DP&L does not meet the standard for emergency rate relief. DP&L offered testimony only that its credit rating may be slightly lowered due to its alleged degrading financial performance. DP&L offered no testimony that the SSR and ST subsidies were at the minimum level necessary to avert or relieve an emergency. DP&L offered no testimony explaining exactly what purported "emergency" was being addressed. DP&L offered no testimony explaining the amount needed to address the "emergency" or the length of time the rate adjustment was needed. Instead, even on brief after citing the standard for emergency rate relief DP&L merely claims that it would not receive a sufficient ROE if it is not granted a subsidy.[114] DP&L failed to present any testimony on these key points and so it does not meet the standard for emergency rate relief, because of this there is no justification for including the SSR and ST on the MRO side of the test.

DP&L also claims that a taking would occur under a hypothetical MRO without an SSR and ST.[115] This argument was anticipated in the FES brief at pages 13-14 and 42-44. If the "expected results" of an MRO the Commission were examining was based on DP&L's first application filed in 2008, at a time when the blending required by division (D) of R.C. §

[113] DP&L Brief, p. 82.

[114] DP&L Brief, p. 83.

[115] DP&L Brief, p. 84.

4928.142 would have artificially restricted the SSO price below market pricing, and if this below-market pricing would have harmed DP&L's financial integrity, then DP&L would have been entitled to an upward adjustment of its SSO price closer to market (not the imposition of a nonbypassable charge; only an upward adjustment in its SSO price).[116] But that was 2008, and this is 2013. In this ESP proceeding, market prices are lower than the current SSO price. DP&L witness Chambers admitted that exposing competitive generation assets to market pricing is inherently not confiscatory, because the Commission is not limiting DP&L's use of those assets or dictating rates.

> "Q. But it is your opinion [Dr. Chambers,] that market pricing is not economically confiscatory, correct?
>
> A. **Inherently not**."[117]

In addition to Dr. Chambers' admission, the cases cited by DP&L are also distinguishable because it is impossible for the government to confiscate property by exposing it to market forces. The U.S. Supreme Court has held that the due process clause "has not and cannot be applied to insure values or restore values that have been lost by the operation of economic forces."[118] Other commissions have followed this well-established principle since, finding that "the government is not required to protect utilities against losses caused by the operation of market forces."[119] DP&L's citation of *Bluefield* and its progeny is simply not relevant where market forces, not government action, have rendered their assets less valuable. Thus, there

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[116] *See* R.C. § 4928.142(D) ("the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity . . . .").

[117] Tr. Vol. II, p. 568 (emphasis added).

[118] *Market Street Railway v. Railroad Commission of State of Cal.*, 324 U.S. 548, 567 (1945).

[119] *In re Southern California Edison Co.*, 2002 WL 407297, Decision 02-01-001 (Cal. P.U.C., January 2, 2002), *8.

cannot possibly be a taking in this case, and the expected results of an MRO cannot include an above-market subsidization of DP&L's generation assets.

3. The Proposed ESP Should Be Compared To 100% Market Prices Rather Than The Statutory Blending Percentages.

As explained in FES's brief at pp. 11-12, the statutory blending percentages under R.C. § 4928.142(D) are limited to "[t]he first application filed under this section" only. DP&L's first application filed under R.C. § 4928.142 was filed on March 30, 2012 and later withdrawn.[120] Therefore, under the plain meaning of the statute, the "emergency adjustment" provisions of R.C. § 4928.142(D) no longer apply, and the statutory blending percentages no longer apply to the MRO side of DP&L's statutory test.

DP&L contests the plain meaning reading of R.C. § 4928.142, claiming that R.C. § 4928.142(D) is invalid on its face. Specifically, DP&L takes issue with the following language:

> "(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one . . ."

DP&L claims that "applications cannot 'require' anything – only a Commission order approving an Application can impose requirements."[121] DP&L then concludes that the MRO application must be approved in order for the terms of the statute to have meaning.[122]

DP&L's argument is creative, but flawed. The "shall require" language quoted above modifies the word "application," and does not require Commission approval in order for it to be effective. The General Assembly made clear in 2008 that it was an EDU's filing of its first

[120] Malinak Rebuttal, p. 12.

[121] DP&L Brief, p. 90.

[122] DP&L Brief, p. 90.

MRO application that would trigger the blending percentages, and that the Commission would then have discretion to establish the actual percentages.[123] If DP&L's interpretation were correct then the Commission would be forced to "require" the application to conform to the statutory blending percentages, but the statute expressly provides to the contrary. Division (D) further provides that the SSO price "for retail electric generation service **under this first application** shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load . . . ."[124] If the General Assembly intended that only a Commission order approving the first application would trigger this provision, it would have written it that way.[125] Obviously, when the General Assembly appended this process onto what is otherwise a straight market-based pricing regime, the intent was to prevent EDUs that had not completed corporate separation as of July 31, 2008 from taking advantage of a short-term of the spike in energy prices. The General Assembly could not have intended that division (D) would be used by EDUs several years in the future as a shield to protect their generation operations and thereby prevent retail customers from accessing market-based pricing. DP&L's reading of the statute turns the intent of the law on its head and demonstrates a complete lack of understanding of the genesis of division (D) of R.C. § 4928.142. This division was triggered by DP&L's first MRO application filed in March of last year and, as a result, does not apply to the expected results of any future MRO.

DP&L's interpretation is also flawed on its face. DP&L claims that R.C. § 4928.142(D) only applies to applications which have been accepted by the Commission.[126] However, the

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[123] R.C. § 4928.142(D).

[124] *Id.*

[125] The General Assembly clearly understands the difference between an SSO application and an order. *See* R.C. §§ 4928.141, 4928.143(C)(1), (C)(2).

[126] DP&L Brief, p. 90.

statute refers to the “first application” filed by an EDU.[127] Once the Commission adopts an MRO, the EDU can not go back to an ESP.[128] As there can never be a “second application” for ESP v. MRO blending purposes after an MRO is accepted by the Commission, DP&L’s interpretation of the statute would render the word “first” meaningless. This is obviously improper, and FES’s correct interpretation of the statute should be adopted.

Apparently recognizing this flaw in its interpretation, DP&L next argues that FES’s plain reading of the statute would lead to “absurd results.”[129] DP&L claims that a utility could game the system by filing an MRO application, withdrawing it an hour later, and filing a second MRO application.[130] There is no record evidence that DP&L’s filing was fraudulent or a sham, and DP&L’s witnesses denied its MRO filing was a sham.[131] We also are no longer operating in the energy markets of 2008 when any sham filing, if one had been made, could have been addressed by the Commission. Therefore this argument is an irrelevant effort to turn the Commission’s attention away from DP&L’s flawed interpretation.

Finally, DP&L argues that “[t]here is nothing in R.C. § 4928.142 that would bar the Commission from using the blending percentages for a second MRO application.”[132] Once again, this is incorrect. The Commission’s authority to adjust the statutory MRO blending percentages is found in R.C. § 4928.142(D), the same subsection which is limited by its terms to

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[127] R.C. § 4928.142(D)

[128] R.C. § 4928.142(F) (“An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.”)

[129] DP&L Brief, p. 90.

[130] DP&L Brief, p. 90.

[131] Tr. Vol. IV, p. 1146 (“Q. And you have no reason to believe that the MRO that was filed in March of 2012 was a sham filing, do you? A. I'm not sure what the definition of a "sham filing" is, but absolutely not. It was a real filing and the intent was to secure an MRO.”)

[132] DP&L Brief, p. 91.

the "first application filed under this section by an electric distribution utility." Division (D) is a one-and-done exception to what is otherwise the default market-based pricing mandated by R.C. § 4928.142(A)-(C). As stated in R.C. § 4928.142(C), once a valid CBP has been completed and the Commission has selected the least-cost bid winners, "such selected bid or bids, as prescribed as retail rates by the commission, **shall be** the electric distribution utility's standard service offer." The Commission has no discretion to include an above-market subsidy on top of what **shall be** the SSO. And why would it retain this discretion when the state's policy is to ensure that retail customers receive the benefits of market-based rates? The state's policy is not, as suggested by DP&L's argument, to subsidize the generation assets of a vertically-integrated utility that refuses to structurally separate. The Commission's discretion to adopt blending percentages is limited to the first MRO application. Therefore, DP&L's proposed ESP must be compared to the 100% market pricing that results from the CBP process under R.C. § 4928.142(A)-(C).

B. Non-Quantifiable Costs And Benefits Do Not Justify Almost A Billion Dollars In Above Market Charges To Customers.

1. Nonquantifiable Benefits Do Not Justify The Proposed ESP.

FES addresses the alleged nonquantifiable benefits of the proposed ESP in its brief at pages 25-29. DP&L's brief reiterates the issues previously addressed by FES when comparing DP&L's proposed ESP to the recent AEP Ohio ESP decision currently on appeal with the Ohio Supreme Court.[133] As discussed in the FES brief, the nonquantifiable benefits of DP&L's proposal are nonexistent, and certainly do not outweigh almost a billion dollars in above-market costs being imposed on customers. Moreover, there is a significant cost difference between DP&L's proposal and the AEP Ohio ESP approved by the Commission. AEP Ohio's ESP costs

[133] DP&L Brief, pp. 87-88.

$264 per customer and DP&L's proposal costs $1,923 per customer as compared to an MRO which transitions to 100% market pricing immediately. [134] There is no nonquantifiable justification for imposing these substanitally higher costs on customers.

2. The Proposed Nonquantifiable Costs Of Rejecting DP&L's Proposal Are Overstated.

As anticipated in the FES Brief at pages 29-37, DP&L's brief repeats its financial integrity argument and claims this should be considered a "cost" of the hypothetical MRO.[135] Yet DP&L's financial integrity claim is not factually supported in the record and conflicts with the plain language of R.C. § 4928.142. Moreover, it is irrelevant. DP&L as a distribution utility is obligated to provide a SSO. There is no requirement in Ohio law that DP&L own generation assets, let alone that customers subsidize those assets in an MRO as if generation service in Ohio was not competitive.

V. MISCELLANEOUS RIDERS

A. Fuel Rider

As explained in the FES brief at pages 87-88, DP&L proposes to change its Fuel Rider from a "least cost" methodology to an "average cost" methodology. This proposal should be rejected. An "average cost" methodology would be an inappropriate cross subsidy to DPLER and MC Squared, to be paid for by SSO customers. Staff and FES explained why there is no reason to subsidize DPLER in this manner.[136]

On brief, DP&L argues that it has no statutory or Commission-based obligation to allocate least-cost fuel to SSO customers, and should be permitted to sell least-cost fuel to

[134] Ruch Direct, p. 26, 29, 31-32

[135] DP&L Brief, pp. 86-87.

[136] Gallina Direct, p. 3, Lesser Direct, p. 70.

DPLER customers rather than SSO customers.[137] However, Staff witness Galina explained that DP&L's generation assets are still on the books of DP&L and have not been corporately separated.[138] DP&L SSO customers receive no benefit from the additional power that DP&L sells to DPLER for resale to non-SSO customers. Therefore, there is no reason why DP&L SSO customers should be forced to pay a fuel rate which includes the higher-cost fuel used to serve non-SSO load.

DP&L also makes much of the fact that it sells generation in the wholesale market at market rates, and may not be able to recover its fuel costs at market rates.[139] This argument is confusing, as there is no direct relationship between fuel cost and wholesale market rates. One would assume that if DP&L's fuel costs are higher than the wholesale market rate for energy then DP&L's generation would not dispatch, but it is not necessary to address this issue to solve DP&L's problem. If DP&L conducts an immediate 100% CBP for SSO load then it will be free to sell its generation to the highest bidder, as it will no longer need a Fuel Rider. If DP&L is as concerned as it implies with the wholesale market for electricity, then FES invites DP&L to conduct an immediate 100% CBP for SSO load and to sell its least-cost fuel generation to whomever it sees fit while SSO customers receive the benefits of competition.

B. Reconciliation Rider

The majority of the issues associated with DP&L's proposed Reconciliation Rider ("RR") were anticipated and discussed in the FES brief at pages 79-83. The only argument offered by DP&L on brief relates to the deferral balances which DP&L suggests should be

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[137] DP&L Brief, p. 50.

[138] Gallina Direct, p. 3.

[139] DP&L Brief, p. 50.

included in the RR.[140] DP&L claims that it faces the risk that it will not fully recover its costs due to the alleged "death spiral" problem, and further claims that the current TCRR balance is an example of the death spiral.[141] This analysis is incomplete, and ignores DP&L's role in this process. DP&L witness Seger-Lawson acknowledged that there are only two causes for a deferral balance: inaccurate projections of costs and inaccurate projections of load.[142] DP&L's inaccurate TCRR forecasts have caused the deferral balance in this rider to rise, not any death spiral.

CRES providers face these same costs and the same risk of a customer leaving before the costs are fully recovered. CRES providers are not able to charge their customers and non-shopping customers for these costs if their forecasts are inaccurate. Instead, CRES providers must accurately forecast their costs and loads so they recover costs in a timely manner from their customer base. DP&L should do the same.

C. AER-N

All issues associated with the proposed Rider AER-N were anticipated by FES, and are addressed in FES's brief at pages 68-74. As discussed therein, proposed Rider AER-N should be rejected.

VI. COMPETITIVE ISSUES

A. DP&L And Its Affiliates Should Not Be Permitted To Bid Into CBP Auctions While Receiving A Generation Subsidy.

As discussed in the FES brief at page 84, Staff witness Strom, FES witness Noewer, and Constellation witness Fein all testified that DP&L should not be permitted to bid into CBP auctions while receiving a generation subsidy. DP&L opposes this recommendation on several

[140] DP&L Brief, pp. 52-53.

[141] DP&L Brief, pp. 52-53.

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

grounds.[143] First, DP&L cites to the AEP Ohio ESP decision which permitted AEP Ohio to bid into its anticipated CBP auctions as Commission precedent. DP&L ignores the recent Duke Energy Ohio ESP decision cited by FES, which prohibited Duke Energy Ohio from bidding into the CBP while it was receiving a generation subsidy through the ESSC.[144] Moreover, it ignores the substantial differences between AEP Ohio and DP&L. AEP Ohio committed to structurally separate in a timely manner, by no later than January 1, 2014.[145] DP&L offers no such guarantee. Instead, DP&L has been extremely careful to guarantee only that it would "file an application" to separate its generation assets in 2013, and that it "expects to request Commission authority to transfer its generation assets by December 31, 2017."[146] DP&L witness Rice agreed that DP&L does not commit to "a drop-dead date for when corporate separation itself would be achieved."[147] DP&L's refusal to commit to structural separation within the proposed ESP term is a significant difference between its proposal and AEP Ohio's firm commitment.

DP&L also claims that there is no evidentiary support conclusively establishing that allowing an incumbent utility receiving a large generation subsidy to bid into its own auction would scare off potential bidders, thus increasing prices.[148] This ignores the testimony from FES, Constellation, and Staff. Each of these witnesses testified that if DP&L receives a massive generation subsidy, then bidders in the CBP would be less likely to bid in the auction due to the fear that DP&L could use the subsidy to underbid its competition.

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[143] DP&L Brief, pp. 65-66.

[144] FES Brief, p. 84.

[145] Case No. 11-346-EL-SSO, Opinion and Order, August 8, 2012 p. 57.

[146] DP&L Brief, p. 68.

[147] Tr. Vol. III, p. 685.

[148] DP&L Brief, p. 65.

Finally, DP&L points to the testimony of FES witness Noewer to argue that it is desirable for customers to have as many bidders participating in an auction as possible.[149] This is true, and precisely why DP&L should not be permitted to bid into the auction while receiving a subsidy. If potential bidders do not incur the time and expense of participating in the auction due to DP&L's generation subsidy, then customers will pay higher prices. Accordingly, it makes sense to prohibit DP&L and its affiliates from bidding in their own or other utilities CBP auctions while DP&L is receiving a generation subsidy.[150]

B. Costs For Competitive Enhancements Should Be Compensated Through A Nonbypassable Rider.

DP&L argues that it should not be forced to pay for retail enhancements benefitting customers- a point recommended by Staff witness Donlon.[151] FES agrees. As an EDU, DP&L should make these competitive enhancements to make shopping possible for its customers and to encourage retail competition. Competitive enhancements benefit all SSO customers who receive the opportunity to shop. However, DP&L should be compensated for these costs through a nonbypassable rider in order to avoid any undue prejudice to DP&L.

OCC argues that CRES providers should pay for the competitive enhancements since they benefit directly through increased access to customers.[152] However, similar to Staff witness Donlon's proposal, OCC never develops this position or explains how it would work. As explained in the FES brief at pages 82-83, it is unclear when costs would be assessed, how costs would be split between current CRES providers (i.e., equal division, by load, or some other method), whether future CRES providers would pay something for these costs, or whether CRES

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[149] DP&L Brief, p. 66.

[150] Noewer Direct, p. 18.

[151] DP&L Brief, pp. 97-99.

[152] OCC Brief, p. 91.

providers would be able to determine what projects went forward since they were paying the costs of the enhancements. OCC's proposal is simply not administratively feasible. The better course of action is to allow DP&L to recover the costs of competitive enhancements through a nonbypassable rider. Nonbypassable cost recovery for competitive enhancements is appropriate because both shopping and SSO customers benefit from increased choice, and competitive enhancements encourage Ohio's developing competitive retail market.

C. Anti-Competitive Retail Practices Should Be Eliminated.

FES explains at pages 74-78 in its brief that anti-competitive retail practices should be eliminated. DP&L chose not to address the vast majority of the anti-competitive retail practices which were identified at hearing.[153] However, DP&L did mention two issues on brief which should be addressed.

DP&L argues that it should not be ordered to provide percent-off price-to-compare ("PTC") billing in its territory because CRES providers can perform those calculations themselves. This analysis is incomplete. DP&L admits that DP&L's systems would allow it to offer this service.[154] While it is theoretically possible for CRES providers to perform these calculations, requiring CRES providers to do the calculation themselves is overly burdensome, inefficient, and ineffective. DP&L's PTC changes several times each year.[155] Some of the components are calculated on a bills rendered basis, and some are calculated on a service rendered basis.[156] This calculation is additionally complicated by the multiple meter read dates which would need to be calculated to apply the rate. While it may be theoretically possible for a

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[153] DP&L Brief, pp. 99-103.

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

[155] Noewer Direct, p. 21.

[156] Noewer Direct, p. 21.

CRES provider to calculate a percent-off PTC offer for each customer, it is an administrative nightmare which would need constant revision and updating. Rather than forcing this popular offering to be so administratively burdensome, DP&L should join Ohio Power Company, Duke Energy Ohio, and the FirstEnergy Ohio utilities and offer this service.[157]

DP&L also argues that its billing charges, including a $0.20 per consolidated bill fee, a $0.12 per dual bill fee, a $5,000 initial set up fee, and a $1,000 change fee, should not be addressed in this proceeding.[158] DP&L's justification for these high fees is that they were set by a 2005 stipulation and there is no evidence that distribution costs have changed since that time.[159] However, this is completely irrelevant. The evidence presented at hearing was clear. Billing is a distribution function, and DP&L witness Jackson admitted that distribution revenues were currently adequate.[160] There is no justification for DP&L recovering huge fees from CRES providers when it is already compensated for billing through distribution charges. Moreover, as explained in detail in the FES brief at pages 76-77, DP&L's high fees are an extreme outlier. DP&L charges CRES providers $0.20 per consolidated bill and $0.12 per dual bill. [161] No other Ohio EDU charges similar fees. [162] In fact, of the six states (and 24 EDU service territories) in which FES operates, only one utility charges a per bill fee for consolidated billing. [163] That utility's fee of $0.03 per bill is significantly smaller than the $0.20 DP&L charge and is tied in

[157] Noewer Direct, p. 20.

[158] DP&L Brief, p. 103.

[159] DP&L Brief, p. 103.

[160] Tr. Vol. I, p. 117 ("Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct? A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections.").

[161] Noewer Direct, p. 22.

[162] Noewer Direct, p. 22.

[163] Noewer Direct, p. 22.

with the purchase of receivables program. Similarly, DP&L charges a $5,000 initial set up fee and $1,000 for each change to its billing system – even where only a single rate code is added.[164] No other EDU in Ohio applies this type of charge.[165] Out of the 24 EDU territories in which FES operates, only one other EDU imposes a large initial set up fee.[166] However, that utility's subsequent fee is $30/month, as opposed to the $1,000 per change fee charged by DP&L.[167] The Commission should order DP&L to comply with the industry standard and eliminate these large fees.

VII. THE COMMISSION SHOULD ORDER DP&L TO STRUCTURALLY SEPARATE.

A. DP&L's Debt Structure Does Not Prohibit It From Structurally Separating By December 31, 2014.

Despite longstanding Ohio law,[168] DP&L has not yet structurally separated its generation assets. Instead, DP&L has operated through functional separation and fought hard to favor its generation assets at the expense of retail customers and competitive markets. DP&L's failure to structurally separate to date is the cause of DP&L's current financial integrity claim, and the Commission should order DP&L to structurally separate as soon as possible in order to avoid future generation-related financial integrity claims.

On brief, DP&L argues that it should not be ordered to structurally separate because it has not yet sought authorization to structurally separate.[169] This position is contrary to Ohio law. R.C. § 4928.17(A) requires that EDUs complete structural separation:

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[164] Noewer Direct, p. 22.

[165] Noewer Direct, p. 22.

[166] Noewer Direct, p. 22.

[167] Noewer Direct, p. 22.

[168] R.C. § 4928.17.

[169] DP&L Brief, p. 69.

> "beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:"[170]

This authority proves that DP&L is statutorily prohibited from offering competitive service unless the Commission approves its corporate separation plan. DP&L has been operating under functional separation for years under Commission sufferance. To claim that it can continue operating under functional separation indefinitely so long as it does not file an application to transfer its assets is not warranted under Ohio law. Instead, Ohio law provides that the Commission "may approve" functional separation provided that certain conditions are met.[171] The Commission is not required to wait for DP&L to decide that it is finally ready to structurally separate before ordering DP&L to do so. The Commission can effect this change by simply ordering DP&L to structurally separate.

DP&L and Staff both argue that it is not feasible for DP&L to transfer its generation assets due to DP&L's current debt structure.[172] This is addressed in the FES brief at pages 65-67. Staff goes so far as to claim that "[u]ntil these no-call features lapse with the passage of time, there is simply no mechanism which would allow an earlier transfer of ownership of the generating assets."[173] This is incredibly inaccurate. Duke and AEP Ohio both faced issues with

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[170] R.C. § 4928.17(A).

[171] R.C. § 4928.17(B), (C).

[172] DP&L Brief, p. 69, Staff Brief, p. 19.

[173] Staff Brief, p. 19.

their bond structures as well, and agreed to corporately separate on a much faster timeline.[174] There are ways for structural separation to happen on a faster timeline even with the no-call provisions. Indeed, DP&L identified these solutions in 1999 when it filed its first corporate separation plan. DP&L had no-call provisions in its debt instruments then but nevertheless committed to complete corporate separation by December 31, 2000.[175] DP&L witness Rice testified that DP&L has already retained both legal and banking experts to assist it in calling these indenture-related issues.[176] DP&L is electing not to complete structural separation for at least another five years because, and only because, it prefers instead to receive a massive subsidy from the Commission during that time period in order to better position its generation assets for competing on their own in competitive markets sometime after 2017. DP&L's self-created problem is not insurmountable, and DP&L can structurally separate before 2017.

On brief, DP&L attacks FES witness Dr. Lesser's opinion that DP&L should structurally separate by the end of 2014.[177] In fact, DP&L states that Dr. Lesser "tried to dodge the question." Since Dr. Lesser's entire cross-examination is less than three pages of the transcript, it is interesting that DP&L chose to attack him in this way. It is worthwhile to examine what Dr. Lesser actually said:

> "Q. You have not done an analysis to determine how feasibility [sic] to - for DP&L to separate its generation assets by the end of 2014, have you?
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> A. <u>I have relied on the corporate separation plans that your client has filed</u>. I have not done an independent analysis; however, in reviewing the first corporate separation plan where I believe your witness Mr. Rice helped prepare that plan and talk about

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[174] *See* FES Brief, p. 65.

[175] FES Ex. 12; Tr. Vol. III, p. 701.

[176] Tr. Vol. III, pp. 694-95.

[177] DP&L Brief, p. 70.

> completing corporate separation within one year of that filing, and that would involve either restructuring some of the debt, calling in so-called uncallable bonds or no call bonds, or doing a beneficial transfer which would involve a lease of the generation assets.
>
> Q. You're talking about the original corporate separation plan?
>
> A. I am.
>
> Q. Okay. And you have not done your own independent analysis, however, as to how feasible it is to do that, have you?
>
> A. I would take the word of what your client wrote in their corporate separation plan."[178]

As shown by this quote that captures nearly the entirety of Dr. Lesser's cross examination, Dr. Lesser's recommendation that DP&L structurally separate by December 31, 2014 comes directly from DP&L's own corporate separation plan. It is hardly credible to attack Dr. Lesser form relying on something provided by DP&L's own witness Rice.

On cross-examination, DP&L witness Rice was asked about the original structural separation plan which DP&L submitted in 1999 and was relied on by Dr. Lesser. Mr. Rice admitted that he was a witness in that 1999 case on the corporate separation plan.[179] The corporate separation plan he sponsored was submitted into evidence in this proceeding as FES Ex. 12. Mr. Rice admitted that the 1999 corporate separation plan was "very similar" to the third amended corporate separation plan submitted in this proceeding.[180] In fact, the corporate separation plan text relating to indentures like the bonds referenced by DP&L and Staff as a cause for delaying structural separation was classified by Mr. Rice as "nearly identical."[181] Both plans reference a large number of indenture-related issues which must be resolved prior to

[178] Tr. Vol. VII, pp. 1636-37 (emphasis added).

[179] Tr. Vol. III, p. 697, 699.

[180] Tr. Vol. III, p. 701.

[181] Tr. Vol. III, p. 702.

structural separation, and specifically no-call provisions related to those bonds.[182] Despite those no-call provisions, Mr. Rice admitted that none of the bonds which existed in 1999 were still operative, and that they all had either matured or been refinanced.[183]

It is simply not credible for DP&L to present a corporate separation plan which contains the exact same language as it presented in 1999, and then attack Dr. Lesser for relying on DP&L's commitments in that plan as proof that DP&L can structurally separate by December 31, 2014. DP&L previously refinanced bonds which included no-call provisions when it was under an obligation to structurally separate, and should not now be permitted to further delay compliance with Ohio law through its reissuance of the same sort of bonds which it identified in 1999. The bonds themselves do not present any difficulty in this area, as DP&L's own past actions make clear that no-call bonds can be called prior to maturity.

B. Staff's Proposed Three-Year ESP Term Does Not Impact Structural Separation.

DP&L takes issue with Staff's proposed three-year ESP period, arguing that its ability to position its generation after structural separation would be compromised if it did not receive a massive subsidy for five years.[184] While FES is not opposed to Staff's suggested three-year ESP term proposal, it fails to address what would happen at the end of the three-year term. For example, Staff's brief claims that there is "no possibility of transferring the generating plant early",[185] which leaves DP&L's continued functional separation an open option for its next

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[182] Tr. Vol. III, pp. 702-03.

[183] Tr. Vol. III, p. 703.

[184] DP&L Brief, p. 26.

[185] Staff Brief, p. 21.

ESP.[186] Staff's brief further claims that "we must all simply live with the situation [inability to transfer generating plant]."[187] As discussed above, this is not accurate. DP&L can structurally separate by December 31, 2014, as shown by the history of structural separation in Ohio, DP&L's past statements, and DP&L's previous refinance of "no-call" bonds it identified in 1999.

Rather than having to "live with the situation," the Commission should adopt a reasonable ESP term and order DP&L to structurally separate by December 31, 2014. Issuing this order would force DP&L to structurally separate during the term of this ESP, and would prevent potentially significant future problems. For example, if DP&L is not ordered to structurally separate during this ESP term, then nothing would prohibit DP&L from seeking yet another generation-related subsidy three years from now since it would still own generation assets. Similarly, nothing would prohibit DP&L from proposing an ESP which contains no CBP, eliminating any benefit the Commission would seek from a move towards the wholesale market. To avoid these problems, the Commission could accept the three-year term of the ESP as proposed by Staff and order DP&L to structurally separate by no later than December 31, 2014.

VIII. CONCLUSION

DP&L's proposed ESP is flawed and should be rejected by the Commission for failing the ESP v. MRO test. If the Commission chooses to modify the proposed ESP, then FES respectfully requests that the proposed ESP be modified in accordance with the FES post-hearing brief.

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[186] Presumably, since DP&L says it needs to be paid nearly $1 billion in above market revenues over five years as an incentive to structurally separate, and Staff's proposed ESP would not result in DP&L receiving this subsidy, DP&L's next ESP likely would propose structural separation after another five-year term and another massive subsidy.

[187] Staff Brief, p. 21.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post Hearing Reply Brief Of FirstEnergy Solutions Corp.* was served this 5th day of June, 2013, via e-mail upon the parties below.

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