BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its electric Security Plan, Approval of Revised Tariffs, Approval of Certain Accounting Authority, Waiver of Certain Commission rules, and to Establish Tariff Riders.	)))))))	CASE NO. 12-426-EL-SSO CASE NO. 12-427-EL-ATA CASE NO. 12-428-EL-AAM CASE NO. 12-429-EL-WVR CASE NO. 12-672-EL-RDR

REPLY BRIEF OF

EXELON GENERATION COMPANY, LLC
CONSTELLATION NEWENERGY, INC.

June 5, 2013

TABLE OF CONTENTS

Pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-31, Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. (collectively, "Constellation") hereby submit this Reply Brief in the above-captioned proceedings to establish a standard service rate offer in the form of an electric security plan ("ESP").

INTRODUCTION

Constellation will focus its Reply Brief on issues affecting the development of an appropriate standard service offer ("SSO") construct and the design, as well as terms and conditions of, a Competitive Bidding Plan ("CBP") as The Dayton Power & Light Company ("DP&L") is the last Ohio electric distribution utility to make the transition to a fully competitive retail and wholesale market model. Constellation will specifically respond to DP&L's Initial Brief (Br., p. 63-71) and the Initial Briefs of other parties regarding the following key issues:

- Appropriate blending time period and percentages for the auctions;
- Timing regarding spinoff of generation assets into a separate affiliate;
- Participation of DP&L and its affiliates in the auctions prior to the transfer of the generating assets;
- Adopting important improvements to the Master SSO Supply Agreement ("MSA"); and
- Including all DP&L load in the CBP, including legacy special contract customers.

Constellation's failure to address any particular topic in this Reply Brief should not be construed as agreement with the position of any party, unless otherwise stated. As discussed in Constellation's Initial Brief, and detailed in the Direct Testimony of

Constellation witness David Fein, the record also supports the following modifications to the ESP:

- Clarifications on the specific PJM line items included to be recovered under Transmission Cost Recovery Rider-Nonbypassable ("TCRR-N");
- Providing auction participants and winning wholesale suppliers with additional data and information to that proposed in the Application;
- Providing additional clarity regarding the authority of the CBP Manager; and
- Using collaborative processes for all stakeholders to discuss potential improvements or other refinements to future CBPs.

(Constellation Ex. 1 at 12-19, 41-42; Constellation Initial Br. at 5-11)

Additionally, DP&L should be required to take steps to preserve and enhance the competitive retail market, as detailed in the Direct Testimony of David Fein, and discussed in Constellation's Initial Brief:

- DP&L should be precluded from imposing generation-related nonbypassable charges on Competitive Retail Electric Suppliers ("CRES") customers should be rejected, as should DP&L's attempt to initiate a switching tracker.
- DP&L should be required to provide data and information to CRES, and to implement business processes, that support the retail environment.

(Constellation Ex. 1 at 43, 45-50; Constellation Initial Br. at 12-15)

The Initial Briefs of other parties do not alter Constellation's recommendations. Consequently, Constellation will not re-state those arguments from its Initial Brief in this Reply Brief; rather, Constellation would direct the Commission to its Initial Brief and the testimony of Constellation witness David Fein on the above issues, as well as to the Initial

and Reply Briefs of the Retail Energy Supply Association on certain retail market enhancements.

ARGUMENT

I. DP&L Should Be Required To More Rapidly Transition to 100% Competitive Bidding

The Commission should require that DP&L adopt a more accelerated blending schedule to competitive SSO supply than DP&L proposes. DP&L offers a scant 10% of load for competitive bidding in the January 1, 2013-May 31, 2014 period, and a mere 40% through the period ending May 31, 2015. DP&L's proposed slow transition to competitive SSO rates is unwarranted, particularly when measured against the transition to fully competitive SSO rates that other Ohio utilities have been able to achieve or are on their way to achieving. The law that originally contemplated a transition to competitive markets for electricity (SB 3) was enacted back in 1999, and was followed by a second law (SB 221) in 2008 that provided specific guidance regarding market-based pricing. The first to transition to 100% competition for SSO supply did so in May 2009. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 08-935-EL-SSO, et al, Finding and Order (May 11, 2009). DP&L has lagged behind other utilities on the road to competition, and customers in DP&L's service territory should not continue to be denied the benefits of competitive SSO pricing any longer than necessary.

There should be no doubt that customers can achieve more attractive generation pricing through competitive procurement than through DP&L-supplied generation. DP&L's

claims that it will suffer from financial harm as SSO load transfers via competitive auction (DP&L Br., pp. 63-64) is simply another way of saying that DP&L is charging, and customers are paying, above-market rates for SSO generation supply. That is not to say that Constellation is not sympathetic to the importance of providing a smooth, orderly transition to fully competitive rates. However, that transition can be achieved in a shorter time period, and with higher percentages of load being procured at auction in the near term, than what DP&L proposes.

Similar to Constellation, Staff recommends a schedule that, while differing in the percentages that Constellation recommends, would bring the benefits of competition (and current low prices) to SSO customers more quickly than DP&L proposes. (Staff Br., p. 16) Constellation continues to believe that its proposed blending schedule to implement rates from a competitive auction is optimal, and provides the greatest benefit to customers to gain the benefits of competitive supply sooner (rather than later), while still providing DP&L with a measured approach to 100% fully competitive SSO rates. Constellation's proposed blending schedule is:

Period	Non-CBP%	CBP%
June 2013 – May 2014	65%	35%
June 2014 – May 2015	15%	85%
June 2015 – May 2016	0%	100%

(Constellation Ex. 1 at 5)

II. DP&L Should Be Required To More Rapidly Transfer Its Generation Assets

On a related topic, DP&L should be required to transfer its generation assets before its proposed date of December 31, 2017. In a classic "chicken and egg argument," DP&L

first suggests that it should not be required to transfer its generation assets because it has not asked the Commission for permission to do so. (DP&L Br., p. 69) Other parties and ratepayers should not be held hostage to DP&L and its self-imposed delay on the transfer of its generation assts. DP&L's second reason why it claims that it cannot transfer its generation assets at an earlier date is due to existing mortgages and bonds (*Id.*). Once again this a problem of DP&L's own making, as it entered into the obligations creating those liens even after utilities were directed to transition to a fully competitive model. (Hearing Transcript, ("Tr.") p. 121-123; FirstEnergy Solutions Exhibit. 5).

The General Assembly made generation a competitive service in Senate Bill 3 which became effective in 1999. Section 4928.03, Revised Code. Since then Ohio major utility companies have been on notice that separation of competitive generation assets from the utility company was inevitable. All the other electric distribution utilities are scheduled to complete transfer of their generation assets by June of 2015. Not only did they face the problems of financing as raised by DP&L, but in the case of American Electric Power, separation of generation facilities required approval of disbanding a multistate power pool at the Federal Energy Regulatory Commission. In the case of FirstEnergy, it required moving generation assets from three different utility companies - Ohio Edison, Toledo Edison and Cleveland Electric Illuminating Company. Constellation is not challenging DP&L's assertion that it has to make financial arrangements to complete the transfer of the generation assets to an affiliate, only pointing out that with the same amount of notice as was given to other utilities, it is asking for an additional two years beyond what was required to address other, more complex, issues.

III. DP&L and Its Affiliates Should Be Excluded From Bidding Into the Auctions During the Transition Period

The Commission should reject DP&L's attempts to permit it and its affiliates from bidding into the auction until after DP&L completes the transfer of its generating assets into a separate affiliate. DP&L's contention that Commission precedent supports DP&L's and its affiliates' participation in the auctions (DP&L Br., p. 65) ignores more recent precedent. *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service,* Case Nos. 11-3549-EL-SSO et al., Opinion and Order (November 22, 2011). In fact, based on the construct adopted by the Commission in the recent Duke ESP proceeding, it is perfectly appropriate that neither DP&L nor any affiliate should be eligible to participate in the CBP until DP&L achieves full structural separation of the competitive and non-competitive business units. Furthermore, during such time as DP&L is allowed to collect the proposed Service Stability Rider ("SSR"), or any other form of rate stability rider[1], it should be required to sell the energy from its generation assets into the Day Ahead or Real Time PJM energy markets, or on a forward basis through a bilateral agreement. (Constellation Ex. 1 at 6) This is the same construct that the Commission adopted for Duke. As Dr. Lesser noted, permitting DP&L to participate in the auction while it is still receiving subsidies creates an anti-competitive effect, the outcome of which will be higher auction closing prices. (FES Ex. 14 at 80-82).

[1] DP&L has also requested a Switching Tracker Rider designed to provide the utility with additional revenues if shopping exceeds 62% for the expressed purpose of "alleviat[ing] some of the pressure related to incremental switching". (Tr. at 114, 203, 251)

Likewise, DP&L's claims that there is no evidentiary support for prohibiting DP&L's and its affiliates' participation in the auctions (DP&L Br., p. 65) is without merit. DP&L's argument appears to be that, absent specific evidence that a CRES provider would be injured, DP&L and its affiliates should be free to participate in the auctions, without reservation. (*Id.)* DP&L's focus on harm to CRES providers to determine if the closing auction price will be affected ignores the fact that it will be wholesale suppliers, not CRES providers, participating in the CBP. As noted above, Dr. Lesser articulated that wholesale suppliers will be deterred from bidding in the DP&L supply auction if they are required to bid against a subsidized supplier. Furthermore, one should not need specific scientific proof of injury to a particular provider (be they CRES or wholesale) when the potential conflict and pitfalls are apparent on its face. The above-cited evidence in this record establishes that allowing DP&L to bid into the auction for retail customer default service, while it is receiving subsidies from those very customers, will skew the auction results in a manner that will harm the retail customers. At every turn, DP&L attempts to insulate itself from the risks of customer switching by imposing new and additional costs on customers. The Commission should prevent DP&L and its affiliates from seeking to participate in the auction and collecting revenues from customers through SSO generation rates, while simultaneously recovering "rate stability" charges on all customers.

Finally, no party took the position that excluding DP&L and its affiliates from participation in the auction would necessarily result in higher prices to customers, as DP&L suggests. (DP&L Br., p. 66) Of note, DP&L's record citations omit important facts. For example, DP&L cites to testimony from Staff witness Strom for the general proposition that it is more desirable to have more bidders rather than fewer bidders. (*Id.*) However, having

more bidders participate in a given auction only results in a more competitive auction if those bidders are placed on a level playing field. If one bidder is receiving subsidies that are unavailable to another bidder, it should come as no surprise that a multitude of otherwise qualified potential bidders may choose not to participate in the auction, given the skewed starting point. This potential participation by DP&L was specifically addressed by Mr. Fein during the hearing:

> Q. * * * [W]ould the presence of DP&L as a potential bidder in a future auction for DP&L SSO load, would that cause Exelon to participate or not? Would it have an effect on their participation?
>
> A. It would have an effect and it would be something to consider. If that was to be allowed, we're unaware of any jurisdiction in the U.S. that conducts competitive auctions that would allow the incumbent utility owning generation assets to participate in a similar type of procurement event.

(Tr., 1213; *See also* Tr., 1218-1219). Accordingly, the resulting auction is less, rather than more, competitive than would be the case if the bidder receiving subsidies was excluded.

Moreover, considering the issue only with regard to SSO prices is a mistake. In order to consider the real impact on customers, the Commission must consider what customers would be paying to DP&L and its affiliates not only through SSO rates, but through other generation-related components of the ESP. When viewed through that lens, it is obvious that customers should not be required to subsidize DP&L's generation business through a variety of costs, while the generation affiliate is seeking to maximize its profits through auction.

IV. The Commission Should Implement Proposed Changes to DP&L's Competitive Bidding Plan

DP&L's argument that, absent a clear violation of any rules or regulations, its CBP and MSA should be automatically approved without modification (DP&L Br., p. 66), should

be rejected. The Commission now has the benefit of a number of competitive auctions in Ohio. Rather than approving a MSA and other components of a CBP that are merely borrowed from previous cases (*Id.* at 67), the parties and the Commission should seek to improve upon the process and the underlying related documents. Such was the point made by Constellation witness Mr. Fein, when he explained in the following exchange that, while there is some benefit to uniformity, there is greater benefit when such uniformity reflects improvements to the auction process and the MSAs:

> Q. Mr. Fein, the Bench asked you the question about whether uniformity in master supply agreements would be a good thing. Would it be even better if the uniform master supply agreement contained the additions that you're suggesting for credits and notational accounting?
>
> A. We certainly believe those improvements to the MSA would be preferred in some sort of uniform master agreement, yes.

(Tr., 1214). DP&L's discussion of costs and benefits similarly mischaracterizes the record. Although DP&L claims that Mr. Fein did not sponsor any analysis that quantifies the costs of the various proposals (DP&L Br., p. 68), there was never any contention from DP&L or any other party that there would be any cost associated with any of the recommended changes that Constellation proposed. And, contrary to DP&L's argument, Mr. Fein described the benefits associated with Constellation's recommendations (Constellation Ex. 1 at 8-40); DP&L presented no evidence regarding any quantifiable harm resulting from any of the suggested modifications. Nor did DP&L provide testimony refuting the fact that Constellation's recommendations are consistent with other industry-standard agreements for wholesale electric supply. Similarly, DP&L cannot dispute that wholesale suppliers have an increasing array of opportunities and markets within which to sell their products.

Therefore, the Commission should strive to make Ohio an attractive opportunity for competitive wholesale suppliers to compete for selling power and energy.

With respect to reasonable arrangements, DP&L has presented no credible evidence why the load associated with its two customers with special contracts should be excluded from the SSO auction. The fact that special contracts were approved by the Commission (DP&L Br., p. 68) should not mean that those contracts should automatically be excluded, particularly when those customers may be more economically served if that load were included in the CBP. Those customers are, in fact, bundled-service customers of DP&L and, as such, the load should be included in the CBP auctions.

CONCLUSION

This case affords the Commission an historic opportunity to provide DP&L customers the full benefits of competition. The modifications suggested by Constellation will transform the proposed ESP into a robust, workable plan for DP&L's transition to full competition. The Commission should adopt the following modifications to DP&L's proposed ESP:

- **Accelerate Competitive Wholesale Procurement** – DPL should be required to move to a more expedited blending schedule, such that 100% of the supply would be procured through a CBP beginning with the June 2015-May 2016 delivery period.

- **Accelerate Transfer of Generation Assets** – DPL should be required to transfer its generating assets no later than December 31, 2016. Neither DPL nor any affiliate should be eligible to participate in the CBP until DPL achieves full structural separation of the competitive and non-competitive business units. Furthermore, during such time as DPL is allowed to maintain the SSR, or any other form of rate stability rider, it should be required to sell the energy from its generation assets into the Day Ahead or Real Time PJM energy markets, or on a forward basis through a bilateral agreement.

- **Modify Rules and Parameters of Competitive Wholesale Procurement Process** – DPL should be required to make modifications to the bidding rules, communication protocols, MSA, wholesale product definitions, and other aspects of the CBP.

- **Reject Non-bypassable Generation-Related Riders** – The Commission should reject the imposition of riders, such as a Reconciliation Rider (RR) and Alternative Energy Rider-Nonbypassable Rider (AER-N), on shopping customers to the extent that they impose non-bypassable generation-related charges upon customers that are not taking generation service from DPL.

- **Remove Barriers to Retail Competition** – DPL should be required to implement market enhancements and remove obstacles in order to develop a more sustainable and more robust competitive retail electric market in its service territory.

The Commission should modify the proposed ESP as suggested by Constellation, and as supported by the record.

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Respectfully submitted,

M. Howard Petricoff (0008287)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P. O. Box 1008
Columbus, OH 43216
Tel. (614) 464-5414
Fax (614) 464-6350
mhpetricoff@vorys.com

Attorneys for Exelon Generation Company, LLC, and Constellation NewEnergy Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 5th day of June 2013 by electronic mail upon the persons listed below.

M. Howard Petricoff

Thomas.mcnamee@puc.state.oh.us
burk@firstenergycorp.com
haydenm@firstenergycorp.com
korkosza@firstenergycorp.com
elmiller@firstenergycorp.com
cmooney2@columbus.rr.com
jmclark@vectren.com
Asim.haque@icemiller.com
jlang@calfee.com
lmcbride@calfee.com
vparisi@igsenergy.com
mswhite@igsenergy.com
Randall.Griffin@dplinc.com
judi.sobecki@dplinc.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkyler@BKLlawfirm.com
lmcalister@bricker.com
rkelter@elpc.org
gkrassen@bricker.com
mwarnock@bricker.com
leslie.kovacik@toledo.oh.gov
trhayslaw@gmail.com
jaborell@co.lucas.oh.us
mdortch@kravitzllc.com
amy.spiller@duke-energy.com
callwein@wamenergylaw.com
sauer@occ.state.oh.us
etter@occ.state.oh.us
yost@occ.state.oh.us
jeanne.kingery@duke-energy.com
gas@bbrslaw.com
mkl@bbrslaw.com
sandy.grace@exeloncorp.com
william.wright@puc.state.oh.us
jsharkey@ficlaw.com
Campbell@whitt-sturtevant.com
Philip.sineneng@thompsonhine.com
cfaruki@ficlaw.com
sam@mwncmh.com
joliker@mwncmh.com
tobrien@bricker.com
dsullivan@nrdc.org
ccunningham@akronohio.gov
matt@matthewcoxlaw.com
Nolan@theOEC.org
Steven.huhman@morganstanley.com
rhorvath@city.cleveland.oh.us
jejadwin@aep.com
mparke@firstenergycorp.com
tsiwo@bricker.com
mjsatterwhite@aep.com
stnourse@aep.com
tmendelsohn@egccleveland.org
harge@cpa3030.org
lhernand@chnnet.com
Trent@theoec.org
Cathy@theoec.org
gpoulos@enernoc.com
dakutik@JonesDay.com
barthroyer@aol.com
kschmidt@ohiomfg.com
wttpmic@aol.com
henryeckhart@aol.com
greg.lawrence@cwt.com
dane.stinson@baileycavalieri.com
Robinson@citizenpower.com
jpmeissn@lasclev.org
ricks@ohanet.org
david.fein@constellation.com
Cynthia.brady@constellation.com
nmoser@theOEC.org
myurick@cwslaw.com
jvickers@elpc.org
chris.thompson2@tyndall.af.mil
stephanie.chmiel@thompsonhine.com
michael.dillard@thompsonhine.com
Bojko@carpenterlipps.com

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Summary: Reply Brief electronically filed by Mrs. Gretchen L. Petrucci on behalf of Exelon Generation Company LLC and Constellation New Energy Inc.