BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO (PUBLIC VERSION)

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REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

The initial briefs,[1] submitted by a diverse group of customer parties and marketers, show that the Dayton Power and Light Company's ("DP&L") proposed

[1] An astonishing fifteen briefs were filed in opposition to DP&L's nonbypassable proposals: Initial Brief of Industrial Energy Users-Ohio ("IEU-Ohio"), Post-Hearing Brief of the Office of the Ohio Consumers' Counsel ("OCC"), Post-Hearing Brief of FirstEnergy Solutions Corp.("FES"), Brief of Honda of America MFG, Inc., Initial Brief of the Federal Executive Agencies, Post-Hearing Brief of the Ohio Partners for Affordable Energy and the Edgemont Neighborhood Coalition, Post-Hearing Brief of the Ohio Energy Group, Initial Brief of the Ohio Hospital Association, Initial Brief of the Kroger Co., Post-Hearing Brief of Ohio Manufacturers' Association Energy Group, Post-Hearing Brief of Wal-Mart Stores East, LP and Sam's East, Inc. ("Wal-Mart"), Initial Brief of Retail Energy Supply Association, Initial Post-Hearing Brief of Interstate Gas Supply, Inc. D/B/A IGS Energy, Initial Post-Hearing Brief of Exelon Generation Company, LLC, Constellation New Energy, Inc., and Post-Hearing Brief of SolarVision, LLC. (hereinafter "Initial Briefs").

electric security plan ("ESP") is unreasonable and unlawful because, among other things, it is designed to erect barriers that deprive consumers of their "customer choice" rights and insulate DP&L's competitive generation business from the market discipline mandated by Ohio law. The Initial Briefs confirm that the proposed ESP would raise prices further above market for all customers and provide DP&L's competitive generation business with several hundred million dollars in unlawful subsidies which are funded by nonbypassable charges imposed on shopping and nonshopping customers. The Initial Briefs also confirm that DP&L's proposed ESP is not, in the aggregate, more favorable than the expected results that would otherwise apply under Section 4928.142, Revised Code (the Market Rate Offer or "MRO").

Notwithstanding the record evidence and commands of Ohio law, DP&L's Initial Brief maintains that the Public Utilities Commission of Ohio ("Commission") may nonetheless approve DP&L's proposed ESP based on a "financial integrity" scenario that is, at best and as a matter of fact, rooted in speculation. DP&L's Initial Brief invokes the words financial integrity as if they will, once uttered, allow its proposed ESP and the Commission to bypass Ohio law and due process under Ohio law. But, attempts to rewrite Ohio law cannot change the nature or content of DP&L's proposed ESP. And, of course, the Commission is obligated to follow the law.

All of the Initial Briefs, including the Initial Brief of DP&L, state that the nonbypassable generation-related Service Stability Rider ("SSR") and Switching Tracker ("ST") are directly dependent on DP&L's financial integrity legal theory. All of the Initial Briefs, including the Initial Brief of DP&L, acknowledge that DP&L's financial integrity legal theory requires the Commission to evaluate DP&L's proposed ESP not based on the explicit requirements of Ohio law but based on a total company return on common equity ("ROE") computation that includes the financial performance of DP&L's Commission-regulated distribution business, its transmission business, and its competitive generation business. DP&L's Initial Brief concedes that its ESP-related effort to rebundle competitive and noncompetitive electric services is simply a device to obtain financial benefits for its competitive generation business that are not otherwise available in the market:

> DP&L's declining return on equity (and the corresponding threats to DP&L's financial integrity and ability to provide safe and reliable service) is being driven principally by three factors: (1) increased switching; (2) declining wholesale prices; and (3) declining capacity prices.[2]

In other words, DP&L's financial integrity legal theory calls for the Commission to, all at once,: (1) ignore the service unbundling mandated by Ohio law; (2) ignore the separation of competitive and noncompetitive services mandated by Ohio law; (3) ignore the legal fact that the Ohio General Assembly has precluded the Commission from exercising regulatory or supervisory authority over DP&L's competitive generation business; and, (4) ignore the command of Ohio law that DP&L's competitive generation business must fully stand on its own in the competitive market. DP&L's Initial Brief asserts that its request that the Commission comprehensively ignore the explicit requirements of Ohio law can be legitimized by generalized references to the provision of safe and reliable service.[3]

More specifically, the Initial Brief of DP&L claims that it is legally appropriate to prop up the earnings of DP&L's competitive generation business through

[2] The Dayton Power and Light Company's Initial Post-Hearing Brief at 7 (citing DP&L Ex. 1A at 13) (citations omitted) (hereinafter "DP&L Initial Brief").

[3] DP&L's Initial Brief at 7-10, 34-36.

nonbypassable barriers to customer choice because to do otherwise might affect DP&L's ability to provide noncompetitive distribution service:

> In addition, the SSR and ST are necessary to allow DP&L to provide stable distribution service. The intervenors focus on cause, while ignoring the effects. It would not matter in this case that the primary causes of DP&L's financial integrity issues were generation related (increased switching, decreased wholesale generation prices, decreased capacity prices), because the intervenor witnesses fail to consider the effects that DP&L's financial integrity issues will have on DP&L's ability to provide stable distribution service.
>
> Specifically, DP&L still, at this point, is an integrated company that provides distribution, transmission and generation service. ***DP&L witness Malinak explained that the cause of DP&L's financial integrity issues may be generation related, but that those issues will affect all of DP&L's businesses.***[4]

In effect, DP&L's Initial Brief threatens to compromise the performance of its unbundled and traditionally regulated distribution service business unless the Commission embraces DP&L's legal theory that calls for shopping and nonshopping consumers to support DP&L's competitive generation business in the style to which it has become accustomed. This threat, itself, is unlawful under Ohio law and those parties who make or indulge the threat ignore the readily available elements of traditional regulation that can be invoked to ensure that DP&L is provided an opportunity to collect just and reasonable compensation for its unbundled distribution service.

In other words, the central legal theory and related reasoning upon which DP&L relies to support its request that the Commission approve its proposed ESP are unlawful and unreasonable. Accordingly, the Commission must modify the proposed ESP to remove the unlawful and unreasonable elements and then approve the as-modified ESP or reject the proposed ESP.

[4] DP&L Initial Brief at 35-36 (citations omitted) (emphasis in original) (emphasis added italics).

II. ARGUMENT

A. DP&L's proposed ESP fails the ESP versus MRO test

In its Initial Brief, DP&L argues that the ESP satisfies the ESP versus MRO test because the ESP is $112 million more favorable than DP&L's version of an MRO.[5] DP&L's version of the MRO to which it compares its proposed ESP includes the new nonbypassable SSR and ST riders that DP&L has included in its proposed ESP. By importing the newly proposed SSR and ST into the MRO from the proposed ESP, DP&L has concocted an ESP versus MRO comparison that effectively ignores the SSR's and ST's significant nonbypassable cost to consumers for purposes of making the ESP versus MRO comparison. According to DP&L's Initial Brief, importing the newly proposed SSR and ST into the MRO is legally permissible under Section 4928.142(D), Revised Code.[6]

Additionally, DP&L's Initial Brief makes two alternative arguments in support of its claim that its proposed ESP is, in the aggregate, more favorable than the expected results that would otherwise apply under the MRO. The first alternative argument is a reprise of DP&L's threat to compromise unbundled distribution service; DP&L asserts that if the MRO did not include the proposed SSR and ST, there would be "substantial non-quantifiable costs associated with the fact that DP&L could not provide safe and reliable service."[7] It then asserts that the alleged nonquantifiable costs arising from the

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[5] DP&L Initial Brief at 77-91.

[6] *Id.* at 79-86.

[7] *Id.* at 87.

threatened service degradation associated with an MRO that does not include the proposed SSR or ST "would exceed the quantifiable benefits of a hypothetical MRO."[8]

In the second alternative argument, DP&L's Initial Brief implicitly concedes that the ESP is quantifiably worse in the aggregate than an MRO, but argues that the "difficult to quantify" benefits from a faster move to a market-based standard service offer ("SSO") outweigh the higher quantifiable costs of the proposed ESP.[9] In this second alternative argument, DP&L's Initial Brief ignores the substantial amount of shopping that has already taken place in DP&L's distribution service territory and the fact that its proposed nonbypassable SSR and ST will impose new costs on shopping customers that deprive them of the benefits they have secured by obtaining generation and transmission supply from a competitive retail electric services ("CRES") provider. DP&L's Initial Brief asserts that the Commission must, nonetheless, find that the proposed ESP's phased-in introduction of an auction based SSO for the minority of nonshopping customers provides sufficient benefits to permit the Commission to approve the proposed ESP.

Section 4928.143, Revised Code, states that an ***electric distribution company*** ("EDU") must successfully carry the burden of proof before the Commission can entertain ESP-related proposals. DP&L, the EDU, has not carried its burden of proof to show that the ESP is more favorable in the aggregate than an MRO. Even assuming that its proposed SSR and ST could be lawfully included as part of an ESP (and they cannot), the inclusion of the cost of the proposed SSR and ST into the MRO alternative is unlawful and without record support.

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[8] *Id.* at 80.

[9] *Id.* at 87-89.

1. DP&L's claim that the SSR and ST should be included on the MRO side of the ESP versus MRO test is not supported by Section 4928.142(D), Revised Code, or the facts in this case

Although DP&L's Initial Brief is somewhat sketchy on details regarding the handling of the proposed SSR or ST for purposes of conducting the ESP versus MRO test, the Brief's reliance on witness Malinak's testimony indicates that DP&L is using his methodology. That methodology included the effects of the proposed SSR on both the MRO and ESP sides of the test. Mr. Malinak did not include the ST in his quantification of the ESP versus MRO test, but stated that he would assign equal values for the ST to both the MRO and ESP. Because he treats the SSR, and by implication the ST, as a cost of both the ESP and MRO, the costs of these nonbypassable riders offset one another.[10] Based on this methodology, DP&L's Initial Brief concludes that the ESP passes the ESP versus MRO test by $112 million.[11]

DP&L must demonstrate that the ESP, including all of its terms and conditions, including any deferrals and the collection of those deferrals, is more favorable in the aggregate than an MRO.[12] The issue presented by DP&L is whether DP&L can increase the MRO by the revenue that it would realize under the SSR an ST, thereby neutralizing the effect of those riders in the comparison with the proposed ESP. DP&L's Initial Brief states that it must satisfy two conditions to support its inclusion of the revenue effect of the proposed SSR and ST into the MRO for purposes of conducting the ESP versus MRO test.

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[10] DP&L Ex. 5 at 10-11.

[11] DP&L Initial Brief at 79. DP&L's calculation assumes a $120 million benefit from the competitive bidding process ("CBP") and then offsets that benefit from the effects of the competitive retail enhancements and the Alternative Energy Rider-Non-Bypassable ("AER-N"). *Id.* at 77-78.

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

As the first step, DP&L claims it is entitled to include and increase the nonbypassable charge in its current ESP (the legacy ESP) that is blended with the results of a CBP through the introduction of the SSR and ST because the legacy ESP contains a Rate Stabilization Charge ("RSC").[13] As IEU-Ohio demonstrated in its Initial Brief, Section 4928.142(D), Revised Code, provides a limited number of adjustments that may be made to the price of the most recent SSO. None of those adjustments provides for a new nonbypassable charge. Thus, DP&L's claim that the expected MRO to which its proposed ESP must be compared may include the revenue effect of new nonbypassable riders is groundless.

Additionally, DP&L does not adjust the current RSC through its proposed modifications of the expected MRO. The current RSC is bypassable by government aggregation programs that elect to return to default generation supply service at a market-based price.[14] DP&L's adjustments, however, seeks to impose the rate effects in the MRO of the nonbypassable SSR and ST.[15] DP&L did not consider whether these charges would be avoidable in any context.[16] Clearly, importing the revenue effect of the proposed nonbypassable SSR and ST into the expected MRO is not an adjustment to the current RSC revenue.

As the second step to support its inclusion of the SSR and ST revenue in the MRO, DP&L claims that it may increase the legacy ESP to prevent an emergency that

[13] DP&L Initial Brief at 82.

[14] *In Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, *et al.*, Opinion and Order at 5 (June 24, 2009).

[15] DP&L Ex. 5 at 10 ("Under both the proposed ESP and an MRO, the SSR non-bypassable charge would remain the same.")

[16] Tr. Vol. XI at 2838-40.

threatens its financial integrity or to prevent a taking.[17] Regardless of the lawfulness of replacing the current RSC as part of the legacy ESP for purposes of conducting the ESP versus MRO test, DP&L's assertion that the revenue effect of the proposed SSR and ST must be imported into the MRO for purposes of conducting the test are without merit.[18]

In support of its argument that the revenue effect of the newly proposed nonbypassable SSR and ST must be imported into the expected results of the MRO, DP&L relies on the last paragraph of Section 4928.142(D)(4), Revised Code, that provides:

> [T]he 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 or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer **price** is proper in accordance with this division.

However, the opportunity to adjustment the MRO provided by this sentence is explicitly limited to 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

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[17] DP&L Initial Brief at 81-82.

[18] As discussed in IEU-Ohio's Initial Brief and detailed in witness Murray's testimony, the inclusion of the revenue effect of the SSR and ST in the expected MRO is not warranted based on the adjustments that are recognized by Section 4928.142(D), Revised Code. That section permits four cost based adjustments to the price of the most recent SSO to account for prudently incurred costs of fuel, purchased power, compliance with alternative energy portfolio requirements, and compliance with environmental legal requirements. IEU-Ohio Initial Brief at 64. The SSR and ST do not fit within any of these categories; DP&L has asserted that the SSR and ST are designed to address generation-related earnings erosion that it attributes to low energy and capacity prices and customer migration to CRES providers, including its affiliate, offering lower prices. DP&L Initial Brief at 7 ("DP&L proposed the SSR and the ST as one step toward allowing DP&L an opportunity to earn a reasonable ROE."). Thus, DP&L has not demonstrated any cost basis to adjust the price in its most recent SSO.

facilities."[19] As the record and the Commission's docket demonstrate, DP&L previously filed an Application for an MRO on March 30, 2012.[20] Thus, the expected MRO to which the ESP must be compared for purposes of conducting the ESP versus MRO test cannot arise from DP&L's **first MRO Application**. Accordingly, the adjustment language in Section 4928.142(D), Revised Code, cannot, as a matter of law, be applied in this case to adjust the price in DP&L's current ESP for purposes of identifying the expected results of the MRO to which DP&L's proposed ESP must be compared.

If, for purposes of argument, Section 4928.142(D)(4), Revised Code, could be read as DP&L claims, DP&L's claim nonetheless fails.

Any adjustment permitted by Section 4928.142(D)(4), Revised Code, must be an adjustment that is explicitly confined to the price of the most recent SSO. And any such adjustment to that price must be shown to be the just and reasonable amount required to address a financial emergency or confiscation claim demonstrated by the EDU. However, DP&L's version of the MRO does not simply adjust the price of the most recent SSO; it imports the revenue effect of two new nonbypassable riders into the MRO for purposes of conducting the ESP versus MRO test. In addition, DP&L's Initial Brief confirms that its speculation about potential financial or confiscation problems is directly tied to the expected performance of its competitive generation business, not its traditionally regulated distribution business. According to DP&L, it is the decline in generation-related revenue that DP&L attributes to shopping inspired by lower market-

[19] Section 4928.142(D), Revised Code (emphasis added).

[20] *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, *et al., (hereinafter "MRO* Application") (Mar. 30, 2012); FES Ex. 17 at 7. On September 7, 2012, DP&L filed its Notice of Withdrawal of Market Rate Offer Application in which it withdrew its March 30, 2012 MRO Application.

based capacity and energy prices that is behind its proposal to include the nonbypassable SSR and ST into its new ESP and then import the revenue effect of the new nonbypassable charges into the MRO.[21] If the Commission were permitted to make an adjustment to the most recent SSO price to address DP&L's claim that there has been too much shopping, the adjustment would have to consist of a **reduction** in the most recent SSO price that brings the SSO price in line with the market price. DP&L's complaint that there is too much shopping is an indication that the price in the most recent SSO is too high, not too low.

Under the MRO option, an EDU's separated generation business still must be fully on its own in the competitive market[22] and any competitive generation business that may be under common ownership cannot receive a noncomparable or discriminatory benefit relative to other competitive generation suppliers. Yet, DP&L claims that the Commission can or should use the emergency or confiscation related adjustment opportunity in Section 4928.142(D)(4), Revised Code, to uniquely provide DP&L's unbundled and separate competitive generation business with above-market compensation and to do so through new nonbypassable charges which are, at best, tied to a proposed ESP, not the most recent SSO. The logic implied by DP&L's proposition cuts against everything else that is in Chapter 4928, Ohio Revised Code ("Chapter 4928"), that enables customer choice and reliance upon the discipline of market forces to serve the public interest. If DP&L's propositions regarding the ESP versus MRO test are correct, Ohio electric consumers would always be condemned to pay the EDU the higher of market or such other price that works to protect the EDU's competitive

[21] DP&L Ex. 5 at 10-12.

[22] Section 4928.38, Revised Code.

generation business from the very competition that is the foundation of Chapter 4928.[23] Indeed, if the Commission rejects DP&L's proposed ESP, DP&L's so-called generation-related financial problems will largely remain because they are a consequence of the fact that the current ESP generation supply **price** is so far above market that it can no longer be collected from customers who have choices (including those customers of Dayton Power & Light Energy Resources ("DPLER") to which DP&L is supplying wholesale generation service at a market-based price).

Finally, **even if** this language could be read to allow the Commission to adjust the most recent SSO's generation supply **price** upward based on the EDU's total company financial performance, the adjustment language in Section 4928.142(D)(4), Revised Code, says nothing that would allow the Commission to transform the most recent SSO **price** into new nonbypassable charges that are then embedded into the expected MRO. Any adjustments permitted by Section 4928.142(D)(4), Revised Code, must be confined to the price of the most recent SSO. Nothing in Section 4928.142(D)(4), Revised Code, allows the Commission to conclude that the expected MRO may include the revenue effect of two nonbypassable riders which are part of a newly proposed ESP and not part of the price of the most recent SSO.

Thus, DP&L's claim that it is lawful and reasonable to import the revenue effect of the SSR and the ST into the expected results of an MRO for purposes of conducting the ESP versus MRO test is without legal merit. The claim is precluded because

[23] See, also, IEU-Ohio Initial Brief at 66 (the inclusion of the SSR revenue in the expected MRO prevents the proposed ESP from being subject to a market-based test). The logical implications of DP&L's efforts to impose prices on consumers that are the higher of market or the prices that support a target return on common equity also means that DP&L would maintain an ongoing opportunity to recover transition costs beyond the term and without regard to conditions specified by Ohio law or the Commission-approved settlements in which DP&L agreed to limit its transition costs to the amount previously authorized.

DP&L's expected MRO would not arise from its first MRO Application and Section 4928.142(D)(4), Revised Code, precludes the Commission from allowing the revenue effect of the proposed SSR and the ST riders to be imported into the expected results of an MRO for purposes of conducting the ESP versus MRO test. Once the revenue effect of the proposed SSR and ST is removed from DP&L's version of the expected MRO, DP&L's analysis concedes that its proposed ESP is worse, not better than, the expected results of an MRO.[24]

2. Increasing DP&L's current SSO to enhance the financial performance of its competitive generation business is not authorized by Ohio law and DP&L has not shown that it would face a financial emergency under an expected MRO without the SSR or ST revenue

As discussed above, DP&L does not have a legitimate basis for invoking Section 4928.142(D)(4), Revised Code, to import the revenue effect of the proposed SSR and ST into the expected MRO results for purposes of the ESP versus MRO test. But even if Section 4928.142(D)(4), Revised Code, did permit such revenue importation in a just and reasonable amount to remedy a financial emergency or confiscation as a theoretical matter, no such adjustment is possible because DP&L has failed to show that any such remedy is warranted.

On the implementation side of its legal theory about the meaning of Section 4928.142(D)(4), Revised Code, DP&L's Initial Brief asserts that the requirements applicable to an emergency rate increase proceeding under Section 4909.16, Revised Code, are appropriate to define the basis and scope of the relief that the Commission

[24] Tr. Vol. III at 619 (Malinak cross-examination).

may grant under Section 4928.142(D)(4), Revised Code.[25] DP&L, however, failed to satisfy the substantive requirements applicable to requests for emergency rate relief.

When utilities have presented requests for rate increases to remedy a financial emergency under Section 4909.16, Revised Code, the Commission has held that the ultimate question for it to decide is "whether, absent emergency rate relief, the public utility will be financially imperiled or its ability to render service will be impaired."[26] Further, the utility must demonstrate that the relief it is requesting is not the result of its business decision making; relief is not available unless the EDU has taken aggressive steps to enhance its revenue and minimize expenses.[27] "If the applicant fails to sustain its [heavy] burden of proof on this issue, the Commission's inquiry is at an end."[28] Even if the utility demonstrates an emergency, the Commission will grant rate relief only at the minimum level necessary to avert or relieve the emergency.[29] Further, relief in an emergency rate case is not a substitute for what could be sought through a standard rate case proceeding.[30]

Based on these well-understood Commission-established requirements, DP&L has failed to show that it would prevail if it filed, pursuant to Section 4909.16, Revised Code, an application for emergency rate relief in the amount of the revenue it attributes

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[25] DP&L Initial Brief at 82-83.

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

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

[28] *Akron Thermal* at 6.

[29] *Id.*

[30] *Id.*

to the SSR and ST. Nor would it be permitted to secure such revenue through a nonbypassable rider. Thus, when measured by the emergency rate relief criteria which DP&L has advanced for use in the application of Section 4928.142(D)(4), Revised Code, DP&L's proposal to import the revenue effect of the SSR and ST into the expected results of an MRO is also unreasonable and unlawful.

DP&L's witness, Mr. Malinak, offered the only evidence to support DP&L's claim that it may experience a financial problem and service quality could not be improved in the event that the MRO did not include the revenue of an SSR and ST. In doing so , he relied on the projections presented by witnesses Jackson and Chambers and then concluded that DP&L would, on a total company basis, experience negative ROEs and, as a result, management would be diverted to address the adverse financial situation and efforts to improve safety and reliability may be delayed.[31] Based on the criteria of Section 4909.16, Revised Code, that DP&L urges the Commission to apply, however, Mr. Malinak's broad assertions that management attention would be diverted and creditworthiness would be weakened[32] fall well short of the clear and convincing case of a financial emergency that the Commission may attempt to remedy pursuant to its emergency ratemaking authority.[33] Mr. Malinak's assertion that DP&L will be required

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

[32] DP&L has asserted its credit rating may influence its ability to refinance long-term debt, but a recent AES Corporation ("AES") presentation demonstrates that AES does not share that concern. In its Memorandum Contra IEU-Ohio's Motion for Administrative Notice of the presentation, DP&L attempted to downplay the presentation's discussion of debt refinancing, claiming that the refinancing is related to short term revolvers rather than long-term debt. Even if that is true, DP&L neglects to mention that AES represented in the presentation that DP&L anticipates being able to refinance its first mortgage bonds, stating, "[t]he one thing we do have, we have about 400 in change DP&L first mortgage bond maturity late-summer, early fall, that we think is quite reasonable for finance and we'll do that." Webcast found at http://investor.aes.com/phoenix.zhtml?p=irol-eventDetails&c=76149&eventID=4922819 3:38:30 to 3:38:48. *See also* 3:37:30 to 3:38:30.

[33] *Akron Thermal* at 6.

to delay "improving" service quality if the Commission does not require customers to fund DP&L's desired earnings from its competitive generation business is not up to the challenge created by the Commission's emergency ratemaking criteria.[34]

Additionally, DP&L's claim that it faces an emergency associated with the performance of its competitive generation business ignores that any such emergency is a consequence of choices made by DP&L. For example, DP&L, the EDU, could have transferred or structurally separated its competitive generation business as is required by Ohio law. For example, it was DP&L's choice to proactively provide wholesale generation supply at market-based prices to its unregulated CRES provider so that its affiliate could successfully compete in the retail market inside and outside of DP&L's distribution service area.[35] In the words of the Commission's emergency ratemaking criteria, the forecasted effect of shopping and lower capacity and energy prices on DP&L's total company return on common equity is the result of DP&L's business decisions. DP&L, the EDU, had and has the means of eliminating the forecasted total company financial problems without securing emergency rate relief and, therefore is, not entitled to such relief.

Further, DP&L did not identify the just and reasonable compensation or minimum level of financial support that the Commission might authorize in an MRO for the purpose of addressing the alleged financial problem. It also did not identify the extent to which the financial problem could have been avoided or mitigated through actions other

[34] DP&L Ex. 14 at 6. DP&L has stated that its current transmission and distribution rates are sufficient. See, e.g., Tr. Vol. I at 242. Thus, DP&L has also failed to demonstrate that its regulated rates for these services require an emergency adjustment. An emergency case is not a substitute for seeking rate relief when such relief is appropriate. *Akron Thermal* at 6.

[35] See IEU-Ohio Initial Brief at 40-43.

than importing the SSR and ST revenue into the MRO and making such revenue nonbypassable. While DP&L has made clear its ROE goal in defining its version of an MRO,[36] it has not uttered one word about the minimum amount of emergency relief that might be required to assure adequate and reliable distribution service or any other service. DP&L's assertion that the Commission would authorize an increase of the MRO to protect DP&L's total company ROE by allowing the revenue effect of the SSR and ST to be imported into the expected MRO results fundamentally misstates the relief that would be available even if the MRO could be adjusted in accordance with the Commission's emergency ratemaking precedent to address an EDU's forecasted financial problems.

3. DP&L's claim that the SSR and ST revenue can be imported into the expected results of the MRO to avoid a "taking" is unreasonable and unlawful

DP&L's Initial Brief also asserts that the Commission should include the revenue effect of the SSR and ST into the expected MRO because "a taking would occur under a hypothetical MRO without the SSR and ST."[37] Along the way to this assertion, DP&L first claims that there is a constitutional requirement for a reasonable rate of return. DP&L then opines that a reasonable rate of return is [redacted] and that an MRO without the

[36] In its Initial Brief, DP&L wrongly asserts that the Commission must grant DP&L sufficient revenue to allow it to "earn a reasonable ROE" as a consequence of a hypothetical application for emergency rate relief. DP&L Initial Brief at 83. In support of that conclusion, DP&L relies on *Cambridge v. Public Utilities Commission of Ohio*, 159 Ohio St. 88 (1953). Of course, *Cambridge* deals with bundled and traditionally regulated service, which is a distinction with a difference. As discussed below, the revenue available from the market is the just and reasonable compensation for DP&L's unbundled, separate, competitive generation business. Also, since the Court's decision in *Cambridge*, the Commission has found that *Cambridge* does not prevent the Commission from prohibiting the payment of a dividend in a rate case when the utility lacked sufficient surplus. *In the Matter of the Application of The Toledo Edison Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service*, Case Nos. 95-299-EL-AIR, *et al.*, Opinion and Order at 41 n.18 (Apr. 11, 1996), *dismissed sub nom., Toledo v. Pub. Utilities Comm'n*, 80 Ohio St.3d 1474 (1997).

[37] DP&L Initial Brief at 84.

SSR and ST would result in returns "[redacted]."[38] Based on this before and after ROE comparison, DP&L argues that the "result would constitute a taking."[39]

Once again, DP&L has not demonstrated that Section 4928.142(D)(4), Revised Code, authorizes the Commission to import the revenue effect of the SSR and ST into the expected results of the MRO for purposes of conducting the ESP versus MRO test. As explained above, the expected MRO that the Commission must use in this case cannot arise from DP&L's first MRO Application. Therefore, any adjustment permitted by this Section is unavailable in DP&L's case. Also, this Section cannot be used to authorize above-market compensation through new nonbypassable charges since any adjustment permitted by Section 4928.142(D)(4), Revised Code, is to the **price** of the most recent SSO.

Even if the Commission could entertain DP&L's proposal to import the revenue effect of the SSR and ST into the expected results of the MRO, DP&L's testimony and Initial Brief do not satisfy the heavy burden of demonstrating that a taking would occur if the expected MRO did not include the SSR and ST. Additionally, if DP&L had shown that an expected MRO without the SSR and ST revenue would cause a taking, DP&L would only be entitled to obtain market-based compensation for its competitive generation business since both federal and Ohio law deem such market-based compensation to be just and reasonable.

Nothing in Ohio law of takings suggests that the Constitution insulates an EDU's total company earnings from the effects of competition in general or, more specifically,

[38] *Id.* at 85.

[39] *Id.*

with regard to its competitive or unregulated lines of business.[40] "The due process clause has been applied to prevent governmental destruction of existing economic values. **It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.**"[41]

DP&L's takings theory cannot legitimize the inclusion of the revenue effect of the proposed SSR and ST in the expected results of the MRO. The SSR and ST are designed to produce a level of ROE and are DP&L's proposed ESP's response to shopping and low market-based power and capacity prices.[42] Without the inclusion of the SSR and ST revenue into the MRO, DP&L claims its ROE under an MRO would be so low as to result in a taking.[43]

Under Ohio law, however, DP&L's generation resources are no longer required to be dedicated to the provision of service to retail customers.[44] Indeed, these generation resources are required to stand on their own in the competitive market.[45] For SSO service, moreover, DP&L is entitled to rates for SSO service that are either market-based or market-tested, and nothing more.[46] If a market-based MRO price produces a low total company ROE, the low ROE is not the result of government action;

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[40] *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 592, 603 (1944) (hereinafter "*Hope*" case).

[41] *Market Street Railway Co. v. Railroad Comm'n of California*, 324 U.S. 548, 567 (1945) (emphasis added).

[42] DP&L Ex. 1 at 5-6 and CLJ-1 and 2.

[43] DP&L Initial Brief at 85.

[44] Sections 4928.03 and 4928.05, Revised Code.

[45] Section 4928.38, Revised Code. Again, if it were possible for an EDU to legitimately assert a taking claim to evade the discipline of the market on its competitive generation business prices, an EDU could evade the prohibition on further collection of transition revenue. As part of the implementation of Ohio's electric restructuring legislation that is contained in Chapter 4928, DP&L was fully compensated for the value of its generation property that may not be recoverable in the competitive market. DP&L's takings claims ignore this reality, but the Commission may not.

[46] Sections 4928.141 to 4928.143, Revised Code.

it is the result of market forces. If customer switching produces low EDU ROEs in an expected MRO, it is because the legacy ESP that is blended into the MRO is too high and customers are taking advantage of the market opportunities available to them under Ohio law. In either case, DP&L cannot legitimately demonstrate that low earnings from its competitive generation business that may arise from an MRO can amount to a taking by government.

If, nonetheless and for purposes of argument, DP&L had shown that deleting the SSR and ST revenue from the expected results of the MRO could amount to a taking, its potential remedy under the Constitution would be to secure just compensation for property value taken by government. Market-based pricing for generation supply is clearly just and reasonable under federal and state law. [redacted].[47] Indeed, DP&L is presently selling all of its generation into the PJM Interconnection LLC ("PJM") market and receives compensation at market-based prices subject to the regulatory jurisdiction and approvals by the Federal Energy Regulatory Commission ("FERC").[48] So, the remedy DP&L might be able to claim and secure for any taking having Constitutional significance would be compensation at a market-based price. DP&L's remedy for a proven taking would be limited to the property value taken by government and does not reach any loss of value that occurs by the operation of economic forces.[49]

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[47] [redacted]

[48] Tr. Vol. I at 172.

[49] *Market Street Railway Co. v. Railroad Comm'n of California*, 324 U.S. 548, 567 (1945).

DP&L's own witness contradicted its theory that customer migration and low generation prices can cause a taking. During cross-examination, Dr. Chambers testified that a regulatory scheme is not confiscatory if an EDU has the right to charge market-based rates.[50] Additionally, Dr. Chambers stated that if DP&L has the opportunity to file a distribution rate case, and if it does not exercise that right, "it loses its ability to be able to complain."[51]

If the Commission uses Dr. Chambers approach to a taking, it cannot find that DP&L is entitled, thereby, to include the revenue effect of the SSR and ST in expected results of the MRO.

With regard to DP&L's default generation supply provided under an expected MRO, the price is established based on the results of a CBP, which are then blended with the above-market current ESP generation supply price. The blending of the above-market current ESP generation supply price and the results of the CBP would mathematically produce an average expected MRO default generation price that is above the price established by the market-based CBP. Thus, the expected MRO without the SSR and ST revenue provides DP&L with the opportunity to obtain compensation for default generation supply that is higher than market-based compensation.

With regard to DP&L's noncompetitive distribution service, [redacted],[52] and it recovers its

[50] Tr. Vol. II at 550-51.

[51] *Id.* at 517.

[52] DP&L Initial Brief at 42; Tr. Vol. V at 1360-1367; IEU-Ohio Ex. 27.

transmission costs through a rider that is annually reconciled to its costs.[53] Thus, it can neither claim nor show that a taking of the value of its distribution or transmission related property rights will occur by omitting the SSR and ST revenue effect from the expected results of an MRO.

In the aggregate, an expected MRO that omits the revenue effect of the SSR and ST leaves DP&L free to obtain market-based compensation or higher for its generation supply and cost-based compensation for its distribution and transmission services. Accordingly, an expected MRO that omits the SSR and ST revenue cannot result in a taking based upon the "taking" framework advanced by Dr. Chambers.

DP&L's claim that it would face a taking if the MRO did not include the SSR and ST revenue also lacks credible record support. To support his forecast of low future ROEs, Mr. Malinak relies on the results of Mr. Jackson's pro forma analysis.[54] That analysis overstates expenses and understates revenue, as demonstrated in IEU-Ohio's Initial Brief and, therefore, cannot be relied upon for purposes of forecasting DP&L's total company ROEs.[55]

Additionally, DP&L's reliance on Mr. Malinak to support its claim that it will suffer a taking is a misuse of the record. On cross-examination, Mr. Malinak indicated repeatedly that he was not offering an opinion on whether a constitutional or legal taking would occur if the SSR and ST revenue were not imported into the expected MRO.[56] Nonetheless, DP&L has cited Mr. Malinak's testimony to support the conclusion that an

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[53] *In the Matter of the Application of The Dayton Power and Light Company to Update its Transmission Cost Recovery Rider and PJM RPM Rider*, Case No. 13-404-EL-RDR, Finding and Order (Apr. 24, 2013).

[54] DP&L Ex. 14 at 5.

[55] IEU-Ohio Initial Brief at 31-37.

[56] *See, e.g.*, Tr. Vol. XI at 2833.

MRO that does not provide an ROE of [redacted] or higher would constitute a taking with legal significance.[57] Based on the record, DP&L's reliance on Mr. Malinak for this conclusion is improper, and the Commission should reject it on this basis alone.

In summary, DP&L has neither demonstrated a legal basis for importing the SSR and ST revenue into the expected results of an MRO to avoid a taking, nor made the required showing that a taking prohibited by the Constitution would occur unless such revenue is imported into the expected MRO results. Therefore, DP&L's assertion that the revenue effect of the proposed SSR and ST must be imported into the expected results of the MRO is without merit.

4. There is no legal or factual basis to discount the benefits of the expected MRO for nonquantified costs so as to allow DP&L to satisfy the ESP versus MRO test

In the first of the two alternative arguments DP&L advances to support its claim that its proposed ESP passes the ESP versus MRO test, DP&L states that the Commission should discount the quantified benefits of the expected MRO by an amount of forecasted nonquantifiable costs which DP&L threatens to impose on consumers if the revenue effect of the proposed SSR and ST is not imported into the results of the expected MRO. According to DP&L, an MRO without an SSR and ST would result in "substantial non-quantifiable costs because DP&L would not be able to provide safe and reliable distribution, transmission and generation service."[58] DP&L asserts that the Commission should conclude "that those non-quantifiable costs would exceed any quantifiable benefits associated with a hypothetical MRO."[59]

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[57] DP&L Initial Brief at 85-86.

[58] *Id.* at 86.

[59] *Id.* at 87.

In its Initial Brief, DP&L offers no legal basis for identifying the nonquantified costs associated with an MRO that is not inflated by the SSR or ST revenue. In fact, there is nothing in the statutory ESP versus MRO test that calls for the Commission to discount the benefits of the expected MRO. The MRO is the default generation supply price determined through the blended results of a CBP and the price established by the most recent SSO.[60] DP&L has not and cannot point to any Commission decision that supports a different result.[61]

Like so many of DPL's arguments in this case, DP&L's attempt to discount the benefits of the expected MRO also presumes that the Commission could adjust the MRO to protect DP&L's total company ROE from earnings erosion solely related to customer migration and declines in the market price of generation supply.[62] By its logic, DP&L is essentially asserting that its distribution service reliability will degrade because its competitive generation business is not making enough profit. Thus, DP&L concludes that the Commission must find that the nonquantified costs of the distribution service degradation that DP&L attributes to an expected MRO that excludes the nonbypassable SSR and ST revenue overwhelm the quantified benefits of the expected MRO relative to the proposed ESP. This argument is one, among many, where DP&L's advocacy in favor of an unlawful and unreasonable proposed ESP ignores the legally required

[60] Section 4928.142(A), Revised Code.

[61] In his testimony, Mr. Malinak quotes from an American Electric Power Company ("AEP-Ohio") Opinion and Order that addresses alleged nonquantifiable benefits of an ESP. DP&L Ex. 14 at 9.

[62] DP&L Initial Brief at 87. Mr. Malinak does not explain whether the risk arises due to reduced maintenance on the transmission and distribution system or generation. For purposes of his argument, it does not matter since reductions in either would not justify the result that Mr. Malinak reaches based upon total company returns. According to Mr. Malinak, the Commission should judge the loss of reliability that is driven by the generation function's inability to produce adequate returns.

unbundling and separation of its noncompetitive and competitive functions and the requirement that the generation service stand on its own in the competitive market.[63]

Even if the ESP versus MRO test required the Commission to identify and offset the benefits of the expected MRO with the nonquantified costs that DP&L threatens it would deliver on consumers, DP&L does not explain how the expected MRO's quantifiable benefits would be reduced by the costs which DP&L associates with an expected MRO missing the SSR and ST revenue production. Mr. Malinak states that DP&L would have less revenue if the SSR and ST were omitted (as they should be) from the results of an expected MRO. The only evidence on service quality that Mr. Malinak offered is that DP&L would not be able to improve service quality. He does not explain why reliability could, would, or should degrade. DP&L however, jumps to the conclusion that DP&L's service quality would suffer. Its claim is unsupported.

Further, DP&L's claim that service quality risks would increase under an MRO lacking the SSR and ST revenue assumes that DP&L would do nothing while its earnings declined. In fact, such indifference would violate the fiduciary duties of DP&L's management.[64] Mr. Malinak agreed that management would not sit on its hands in this imaginary world under an MRO,[65] and DP&L's recent efforts to [redacted] demonstrate that DP&L is not content to let the wheels come off while it prosecutes its case to transfer its competitive generation business risks to

[63] Sections 4928.17 and 4928.38, Revised Code.

[64] *Apicella v. PAF Corp.*, 17 Ohio App. 3d 245 (8th Dist. Ct. App. 1984) (management has a duty to prevent waste of corporate assets).

[65] Tr. Vol. XI at 2836-37.

consumers.[66] The Commission cannot presume such indifference by DP&L's management to its fiduciary obligations.

In effect, DP&L is again threatening it would violate the law and compromise the quality of unbundled distribution service unless the Commission approves the proposed nonbypassable SSR and ST for the benefit of DP&L's stand alone, competitive generation business. DP&L's unlawful theory for supporting its first alternative is not a basis for concluding that the ESP is more favorable in the aggregate than an MRO.

DP&L's service reliability is a distribution function for which DP&L is compensated based on traditional cost-based regulation. DP&L is presently bidding all of its generation assets into the wholesale market and being compensated at market-based prices.[67] DP&L is presently providing its affiliated CRES provider with reliable generation supply at market-based prices. There is no indication anywhere that rejecting DP&L's efforts to make its retail customers uniquely responsible for subsidizing DP&L's ROE goals for its competitive generation business will negatively affect the reliability of the generation supply or the transmission grid that are both under the reliability control of PJM. Like DP&L's competitive generation business, DP&L's distribution business stands on its own, and DP&L cannot financially starve its distribution service (thereby degrading service quality) to offset the earnings impact associated with its competitive generation business's confrontation with the same market in which it is selling all of its generation supply. DP&L's threat of a decline in service quality is itself an unlawful deviation from the unbundling and separation

[66] IEU-Ohio Ex. 3 at 18-19.

[67] Tr. Vol. I at 172.

requirements in Ohio law; a deviation that is conveniently timed so as to, one way or another, deprive consumers of the benefit of market-based prices.

5. DP&L's claim that the Commission should consider "difficult to quantify" benefits of the ESP inserts an unlawful subjective test into the objective requirements of the ESP versus MRO test and is not supported by the record

In its second alternative argument, DP&L offers that there are "difficult to quantify" benefits in the form of a four year transition to competitive bidding of the proposed ESP. According to DP&L, the Commission should conclude that the benefits of a so-called quicker move to a CBP-based SSO exceed any quantifiable benefits of the expected MRO.[68]

In the context of its overall advocacy, DP&L's assertion that the CBP component of its proposed ESP will somehow quicken the movement towards market-based pricing for generation supply is laughable. DP&L's fundamental business goal in this proceeding is to secure Commission approval of an ESP that helps DP&L overcome the financial consequences of its customers' movement to the market. This customer migration has and will continue to take place because DP&L's default generation supply prices are significantly above current and anticipated market prices and DP&L's current nonbypassable charge (the RSC) is not big enough to keep CRES providers, including DP&L's affiliated CRES, from gaining retail market share. In the context of DP&L's overall advocacy, it is effectively claiming that its proposed ESP will shelter it from the market's verdict on its default generation supply prices by providing DP&L with another

[68] *Id.* at 89. DP&L does not identify any other benefits associated with the ESP, and apparently concedes that the other "benefits" identified by Mr. Malinak are insufficient. *Id.* at 88 (DP&L relies on only the move to an auction-based SSO as a "difficult to quantify" benefit).

slug of transition revenue and slowing down the effect of this migration on its financial performance. If the Commission and DP&L are interested in accelerating the movement to market, DP&L's proposed ESP, with the slow-walked introduction of a CBP, cannot, under any lawful and reasonable scenario, be an improvement upon the current ESP or a properly specified expected MRO.

As DP&L, IEU-Ohio and others demonstrated in their Initial Briefs, the benefits of including a portion of the results of a CBP in the SSO price are readily quantifiable. The benefits are quantified in the $120 million difference between the proposed ESP and expected MRO in Mr. Malinak's exhibits. Thus, the Commission need not and should not count the alleged benefits of the faster transition to an auction-based SSO by assigning some additional indeterminate value for so-called "difficult to quantify" benefits. Those benefits are already captured in the quantification used by Mr. Malinak and other parties.

Further, an objective standard for applying the ESP versus MRO test is embedded in Ohio law. The Commission has no legal basis to subjectively revalue the "benefits" of the ESP to offset the millions of dollars of SSR and ST revenue. By law, the Commission must engage in reasoned decision making.[69] Based on the requirement of reasoned decision making, the Commission must assess the record, explain its rationale, and support its decision with appropriate evidence.[70] "The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom."[71]

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[69] Section 4903.09, Revised Code.

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

[71] *Consumers' Counsel v. Pub. Util. Comm'n.*, 61 Ohio St.3d 396, 406 (1991).

The Commission would violate the requirement for reasoned decision making if it agreed with DP&L's argument that the Commission offset the objective benefits of the MRO with the alleged additional benefit of a quicker move to an SSO based on auction results. The ESP, with all of its transition charges, is $200 to $600 million dollars less favorable than an MRO, according to Mr. Murray's calculations.[72] This calculation already accounts for the $120 million of alleged benefits associated with the CBP contained in the proposed ESP. (The only additional benefits of the faster move to an auction-based SSO that Mr. Malinak identified, improved customer choice and an improved business climate, were, respectively, unsupported by the record[73] and demonstrably wrong[74] and are not advanced by DP&L in its Initial Brief.) Because DP&L has not identified any other benefits of the quicker transition other than the $112 million that are already embedded in the calculation of the ESP versus MRO test, the Commission would have to conclude that the benefits of the faster transition are hundreds of millions of dollars for the ESP to satisfy the ESP versus MRO test. There is no legal basis for the Commission to engage in such wild speculation.

DP&L's claim that there are "difficult to quantify" benefits from a faster move to an auction based SSO also turns the legislative scheme on its head. The Ohio General Assembly ("General Assembly ") has declared retail generation service to be a competitive service.[75] The SSO, whether based on an ESP or MRO, contains a default generation supply component for those customers not receiving competitive service

[72] IEU-Ohio Ex. 2 at 34-35.

[73] Tr. Vol. III at 652 (Mr. Malinak did not identify or analyze a change in product mix in any of the other Ohio EDU service territories as a result of those EDUs' moving to a fully competitive bidding process).

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

[75] Section 4928.03, Revised Code.

from a CRES provider.[76] The goal, clearly expressed by the General Assembly, is to encourage customer choice through actions by individual customers having comparable and nondiscriminatory access to a diverse group of CRES providers.[77] The goal includes a statutory scheme that specifically limits the role of the EDU to that of a default supplier of competitive service and prohibits an EDU from being directly engaged in the business of providing competitive services.[78]

Customers in the DP&L service territory have already demonstrated that they understand the benefits of customer choice. Most of DP&L's distribution service customers have already selected a CRES provider to meet their service reliability and price needs as they have a right to do under Ohio law. Yet, DP&L's ESP would degrade that choice through new and increased nonbypassable charges that ride into existence based on a claim that a relatively smaller population of customers might benefit by the CBP proposed as part of DP&L's ESP. Further, DP&L's proposed ESP will likely discourage customers that are presently not shopping from exercising their customer choice rights because the proposed ESP purposefully reduces the savings that shopping customers can otherwise obtain from CRES providers including DP&L's affiliated CRES provider.

In asserting that the proposed ESP's CBP offers "difficult to quantify" benefits, DP&L ignores the priorities clearly expressed in Ohio law. The Commission's role in setting the SSO's default generation supply price is specifically limited by Sections 4928.141 through 4928.143, Revised Code. That role does not permit the Commission

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[76] Section 4928.141, Revised Code.

[77] Section 4928.02(A), Revised Code.

[78] Section 4928.17, Revised Code.

to subordinate the customer choice rights of individual and aggregated customers, most of which are already shopping, because the Commission wants to help an EDU and its generation business evade the discipline provided by customer choice. Approval of an ESP that cannot objectively pass the ESP versus MRO test based on "difficult to quantify" benefits that are somehow attributed to the proposed ESP would rest on blind faith rather than the record evidence and reverse the policy directive to encourage customer choice, a two-fold failure and violation of law.

6. **Conclusion**

DP&L has failed to demonstrate that its ESP passes the ESP versus MRO test. As the intervenors and Staff showed, its proposed ESP would fail the ESP versus MRO test by hundreds of millions of dollars under any lawful and reasonable application of the test. DP&L has sought to avoid a lawful application of the test by arguing that the expected MRO must include the revenue effect of the newly proposed SSR and ST riders. Its arguments to include SSR and ST revenue on the MRO side of the test based on Section 4928.142(D)(4), Revised Code, are not supported by Ohio law or facts. Alternatively, DP&L has argued that the Commission should either discount the benefits of the MRO by the alleged costs of an MRO without SSR and ST revenue or subjectively imply benefits of a "quicker" move to an auction-based SSO to balance the benefits of a properly calculated MRO. Once again, neither the law nor the facts support DP&L's arguments.

DP&L's arguments seeking to manipulate the ESP versus MRO test, however, expose DP&L's ESP for what it is: a poorly veiled attempt to ignore the separation of the generation and distribution functions and to frustrate customer choice. Because neither the law, the facts, nor state energy policy encouraging choice provides a basis for the Commission to alter the ESP versus MRO test in any of the ways DP&L argues, the Commission must find that DP&L's ESP fails the ESP versus MRO test and either reject the ESP or substantially revise it by removing the unlawful and unreasonable nonbypassable riders.

B. There is no legal or factual basis to authorize the SSR and ST

DP&L asserts that, although the ESP statute contains some limits, "the Supreme Court of Ohio has explained that a wide range of provisions is permissible under an ESP" so long as the proposed ESP is more favorable than an MRO.[79] DP&L states that its proposed ESP "falls well within the few 'limits' imposed by § 4928.143."[80]

As stated above, DP&L's proposed ESP is ***not*** more favorable in the aggregate than the expected results of an MRO, and Ohio law and policy contain clear prohibitions against provisions such as the SSR and ST which are designed to tilt the playing field against customers and competition.

1. The SSR and ST are untimely requests for transition revenue

DP&L does not dispute that Substitute Senate Bill 3 ("SB 3") (Section 4928.39, Revised Code) prohibits the recovery of transition revenue or any equivalent revenue after the end of the market development period ("MDP").[81] Rather, DP&L claims that Section 4928.39, Revised Code, refers to the recovery of transition *costs*; thus, DP&L claims that a transition charge must be a cost-based charge, and the SSR and ST are

[79] DP&L Initial Brief at 6.

[80] *Id.*

[81] Section 4928.38, Revised Code.

not cost-based charges. DP&L claims that "the SSR and ST were not designed to allow DP&L to recover any specific costs, instead, they were designed to allow DP&L the opportunity to earn a reasonable ROE."[82] Additionally, DP&L claims that the SSR and ST cannot be transition charges because they do not specifically fit within the criteria in Section 4928.39, Revised Code, that must be satisfied to obtain transition cost recovery. Staff asserts a similar argument with respect to the SSR[83] but suggests that the ST should be rejected, in part, because DP&L collected transition costs to "'assist it in making the transition to a fully competitive retail electric generation market'" and has had thirteen years to come to grips with the impact of customer switching.[84] DP&L also asserts that "even if the SSR and ST were transition charges, the charges are specifically authorized by Ohio Rev. Code § 4928.143(B)(2)(d), which was enacted after the statute that bars recovery of transition charges."[85] DP&L's and Staff's arguments lack merit.

Staff's Initial Brief states that transition costs were related to the recovery of historical costs and that the SSR has nothing to do with historical costs, it is related to "future solvency."[86] The statutory definition of transition cost recovery, however, provides that transition revenue recovery must be based upon the net, verifiable, legitimate generation related cost which is not otherwise recoverable in a competitive retail or wholesale market. Thus, the focus of transition costs was to identify and provide transition revenue to help the EDU's competitive generation business transition

[82] DP&L Initial Brief at 43.

[83] Staff Initial Brief at 18-21.

[84] Staff Initial Brief at 4.

[85] DP&L Initial Brief at 42 (emphasis removed).

[86] Staff Initial Brief at 18-19.

from compensation determined in accordance with traditional regulation to compensation determined by market forces.

DP&L's Electric Transition Plan ("ETP") testimony demonstrated that the transition revenue calculation was forward looking.[87] DP&L's stranded cost/transition revenue calculation was performed by witness Ralph Luciani.[88] Under the "Lost Book Value Under Continued Ownership" method ("Lost Book Value"), Mr. Luciani netted the projected after-tax forward stream of market-based cash flows (based upon forward market prices) against DP&L's projected operating costs.[89] DP&L compared the present value of the projected cash flows against its net investment to determine DP&L's transition cost/revenue amount.[90] *To determine the present value of the cash flows, DP&L used a 9.2% discount rate,*[91] *which DP&L claimed was "based on the cost of capital in a competitive generation market."*[92] Thus, DP&L's transition costs calculation was designed to ensure that DP&L recovered revenue—**including the cost of debt and equity**—that would not be recoverable in a competitive market.

Further proof that the issue of cost and revenue are the same was verified by DP&L's own witness, Mr. Luciani, in its ETP case. Mr. Luciani testified that a comparable transition cost recovery methodology that he titled "Lost Revenue Under Continued Ownership" ("Lost Revenue") would yield the same result as the "Lost Book

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[87] Staff implicitly suggests, however, that the ST is an unlawful transition charge. Staff Initial Brief at 4.

[88] IEU-Ohio Ex. 3A at Attachment K.

[89] IEU-Ohio Ex. 3A at Attachment K at 10-11.

[90] *Id.*

[91] IEU-Ohio Ex. 3 at Attachment K at 20.

[92] *Id.* at 16.

Value" calculation.[93] The Lost Revenue method nets the projected future revenue streams under market pricing against the projected revenue requirement that would exist under a regulated environment.[94] Mr. Luciani provided his proof as his Exhibit RLL-2.[95]

Similar to the stranded cost calculations described above (Lost Book Value and Lost Revenue), the SSR and ST are designed to provide revenue to DP&L that it projects it will lose as a result of competition and switching.[96] DP&L also calculates the SSR in similar fashion,[97] netting its projected revenue streams against its projected costs.[98] DP&L then calculates the SSR amount as the difference between its projected net income and the level of net income necessary to allow DP&L to achieve its desired ROE (or cost of equity). Thus, both the SSR and transition costs/revenue were calculated using a revenue requirement calculation that includes both the cost of debt and the cost of equity.

Even if the SSR and ST were not calculated under the specific criteria in Section 4928.39, Revised Code, the purpose and result are the same—to provide revenue to DP&L that it will lose as a result of generation competition. That is why DP&L witness Dr. Chambers testified that if DP&L's ROE deficiency is being driven by lower-than-desired generation revenue (which is not disputed), and the SSR was designed to make

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[93] IEU-Ohio Ex. 3A at Attachment K at 11.

[94] *Id.*

[95] IEU-Ohio Ex. 3A at Attachment K at Ex. RLL-2.

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

[97] The ST calculates transition revenue similar to the Lost Revenue method, comparing the revenue that would be recovered through regulated rates (the legacy SSO rate) to the revenue that will be recovered through competitive wholesale rates.

[98] *See* DP&L Ex. 1 at Ex. CLJ-2; DP&L Ex. 4A at Ex. WJC-1 to WJC-5.

up the difference, then the SSR is equivalent to a transition charge.[99] DP&L's claim that Dr. Chambers testified otherwise[100] is a misstatement of the record.[101] Ohio law prohibits the Commission from authorizing additional transition revenue ***or any equivalent revenue***.[102] Based on the unequivocal restriction on the Commission's authority and the unrebutted testimony that DP&L's proposed SSR and ST are designed to provide DP&L's competitive generation business with revenue that DP&L believes is not recoverable in the market, the Commission cannot authorize the SSR and ST.

2. DP&L incorrectly claims that Section 4928.143(B)(2)(d), Revised Code, authorizes the collection of transition revenue

In the alternative, DP&L claims that Section 4928.143(B)(2)(d), Revised Code, authorizes the Commission to provide DP&L with another opportunity to collect transition revenue. More specifically, DP&L claims that there is a conflict between Sections 4928.143(B)(2)(d) and 4928.38, Revised Code, and when two statutes are irreconcilable, the more recently adopted statute prevails.[103] Additionally, DP&L claims that because the SSR and ST satisfy the criteria in Section 4928.143(B)(2)(d), Revised Code, they should be approved.[104]

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

[100] DP&L Initial Brief at Note 8.

[101] *See id.* at 541-542 (Q: If DP&L was adequately compensated on its distribution business, adequately compensated on its transmission business, but DP&L was not adequately compensated on its generation business, and the SSR was designed to provide compensation for DP&L's generation business, would you agree that the SSR is equivalent to a transition charge? ***A: "Under the terms of the hypothetical, yes, I would agree***. I have not seen any evidence that that, indeed, is the basis for the SSR that has been proposed by DP&L.") (emphasis added). Of course, it is not disputed that DP&L has requested the SSR and ST because, in DP&L's view, the generation business is not receiving adequate compensation. DP&L Ex. 1 at 13.

[102] Section 4928.38, Revised Code.

[103] DP&L Initial Brief at 46.

[104] *Id.* at 10-14.

"Pursuant to Ohio Rev. Code § 4928.143(B)(2)(d), DP&L seeks approval of an SSR and an ST, which would allow DP&L an opportunity to earn a projected ROE of [redacted] (under an adjusted capital structure)."[105] DP&L claims that the Commission should conclude that the SSR and ST may be approved because they are "charges" relating to "default service" and/or "bypassability."[106] Finally, DP&L claims that the SSR and ST stabilized retail electric service because: (1) they allow DP&L to freeze non-fuel based generation rates throughout the ESP period; (2) DP&L's default generation supply price will eventually be set by a CBP, which will allow DP&L to establish its pricing based on market pricing (which is lower than legacy SSO rates) that will mitigate nonbypassable costs; (3) DP&L's partially fixed ESP prices will protect customers who have switched in the event that market prices increase (something that is not expected to happen during the period of the proposed ESP); (4) without an SSR and ST, DP&L will not be able to provide safe and reliable retail electric service.[107]

As a sub-argument to the claim that the SSR and ST are necessary to provide safe and reliable service, DP&L claims that, although DP&L's projected revenue erosion is occurring to the generation business, Ohio law permits provisions that stabilize generation service, and customers have historically received substantial benefits from DP&L's generation service in the form of below-market rates.[108] Moreover, DP&L claims that "while the decline in DP&L's generation revenue is a <u>cause</u> of DP&L's financial integrity issues, the <u>effect</u> of that decline in revenue (without the SSR and ST)

[105] *Id.* at 7.

[106] *Id.* at 10-12.

[107] *Id.* at 12-14.

[108] *Id.* at 34-36.

will be that DP&L cannot provide stable distribution, transmission and generation service."[109] DP&L suggests that the revenue it receives from its competitive and noncompetitive services is fungible, and, as generation revenue declines, it will divert a portion of the revenue collected through its noncompetitive distribution and transmission services to support the continued operation of its competitive generation business. Once the total revenue that is available to DP&L, an EDU that continues to own generation assets, becomes insufficient to meet the expenses of the totality of DP&L's lines of business (generation, transmission, and distribution), DP&L will no longer be able to maintain safe and reliable retail electric service for any of its businesses.[110] Staff joins the view that DP&L's ability to maintain its operations is dependent on its total company ROE.[111]

Without arguing that Substitute Senate Bill ("SB 221") authorized the recovery of transition charges, Staff claims that SB 221 "set rather a low bar for the availability of an SSR-type charge." Staff also claims that any SSR charge "must still be squared with the requirement that, in anything the Commission does under Chapter 4928, it must" avoid anticompetitive subsidies.[112] Staff claims that it is a difficult task to set the SSR at an appropriate level because DP&L owns distribution, generation, and transmission assets, and "[a]ny effort to stabilize DP&L inherently stabilizes all three activities. At this time, it is not possible to separate them."[113] Thus, the SSR, according to the Staff, must be set at a level which is "sufficient, but only just sufficient, to maintain the utility's

[109] *Id.* at 34-35.

[110] DP&L Initial Brief at 35-36.

[111] Staff Initial Brief at 7.

[112] *Id.* at 6-7.

[113] *Id.* at 7.

financial integrity."[114] Staff thus concedes that the SSR is a subsidy, but claims that it would be lawful if set at such a level that it is not anticompetitive.[115]

In contrast to its conceptual support for the SSR, Staff claims that the ST should be rejected outright because it would violate three different state policies contained in Section 4928.02, Revised Code, which require the Commission to ensure unbundled and comparable retail electric service, diversity of suppliers and effective choice of suppliers, and effective competition by avoiding anticompetitive subsidies flowing from noncompetitive retail electric service to competitive retail electric service.[116] Staff claims that generation service was declared competitive thirteen years ago, and DP&L is "*supposed* to be subject to the stresses of shopping."[117] Staff further claims that the General Assembly considered the impact of shopping on an EDU's revenue and "included the possibility of transition charges intended to '. . . assist it in making the transition to a fully competitive retail electric generation market.'"[118] Staff claims that DP&L had "sufficient time and resources to come to grips with the occurrence of switching."[119] "Assuring the profit margin of one player in a competitive market is clearly anti-competitive."[120]

As discussed below, DP&L's arguments are without merit, Staff's position on the SSR is unreasonable and unlawful and the Staff's positions on the SSR and ST are irreconcilable.

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[114] Staff Initial Brief at 7.

[115] *Id.*

[116] *Id.* at 3 (citing Section 4928.02(B) and (C) and (H), Revised Code).

[117] *Id.* at 3.

[118] *Id. at 3-4.*

[119] *Id. at 4.*

[120] *Id.*

a. There is no conflict between Sections 4928.38 and 4928.143(B)(2)(d), Revised Code, and DP&L's reading of Section 4928.143(B)(2)(d), Revised Code, violates state policy prohibiting anticompetitive cross-subsidies, violates corporate separation requirements, and violates the bar against an EDU requesting or the Commission providing another opportunity to collect transition revenue

DP&L's claim that there is a conflict between Sections 4928.143(B)(2)(d) and 4928.38, Revised Code, is simply not true. A direct comparison of these statutes, state policy, history, and the balance of Chapter 4928 demonstrate that DP&L is wrong.

There is no legal basis for the Commission to authorize the SSR or ST on a nonbypassable basis under Section 4928.143, Revised Code. The only provisions of Section 4928.143(B)(2), Revised Code, that authorize a nonbypassable rider are (B)(2)(b)-(c), and the SSR and ST do not fit under those provisions because they do not relate to the construction of new generation.[121]

Further, the undisputed purpose of SB 3 was to provide consumers with the right to select the supplier of a competitive retail electric service including generation supply based on their preferences and to change Ohio's electric laws for the purpose of enabling retail competition.[122] To enable a competitive market, the General Assembly took steps to ensure that the incumbent utilities could not provide their competitive lines of business with an advantage not available to other generators.[123] An EDU was provided the "opportunity to receive transition revenues that may assist it in making the

[121] IEU-Ohio Initial Brief at 57-61.

[122] Tr. Vol. III at 709.

[123] DP&L witness Timothy Rice, a DP&L attorney that provided testimony regarding DP&L's corporate separation compliance, stated in simpler terms, one of the purposes of corporate separation is to prevent an incumbent utility from favoring or providing an advantage to its generating assets. Tr. Vol. III at 707. Moreover, DP&L witness Chambers agreed that, as a general rule, ratepayers should not be expected to protect the financial integrity of a utility's non-regulated lines of business. Tr. Vol. II at 549.

transition to a fully competitive retail electric generation market."[124] But, after the market development period, "the utility shall be fully on its own in the competitive market."[125]

SB 3 required EDUs to structurally separate their competitive and noncompetitive lines of business, but permitted an EDU to operate under functional separation during an interim period. Nonetheless, functionally separated EDUs are held to the same standards as legally or structurally separated EDUs.[126] Moreover, EDUs, whether legally or functionally separated, are required to operate pursuant to a corporate separation plan that promotes state policy (including prohibitions against subsidies) and prevents the EDU from providing a competitive advantage or undue preference to "any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service."[127]

These core policies and prohibitions were not altered by SB 221. No provision of Section 4828.143(B)(2)(d), Revised Code, states that DP&L may seek another opportunity to collect transition or equivalent revenue or, more generally, to collect above-market generation revenue. Although SB 221 altered the manner in which an EDU meets its SSO responsibilities, SB 221 did not modify the competitive mission of SB 3 or override the prohibition against further transition revenue recovery. Indeed, Section 4928.141, Revised Code, confirmed that the right to seek and obtain above-market generation revenue has come and gone, stating, "[a] standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously

[124] Section 4928.37, Revised Code.

[125] Section 4928.38, Revised Code.

[126] Section 4928.17, Revised Code.

[127] Section 4828.17(A)(3), Revised Code.

authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan." Thus, Section 4928.143(B)(2)(d), Revised Code, cannot be read to override the specific legal prohibition that precludes the recovery of transition revenue.

Effectively, DP&L has requested that the Commission ignore the balance of Chapter 4928 and interpret Section 4928.143(B)(2)(d), Revised Code, as authorizing an ROE floor supported by its proposed SSR and ST. DP&L's reading would lead to a world where EDUs have the ability to collect compensation for the default generation supply role that is at the higher end of a market-based price or price that is driven by its total company ROE objectives. This interpretation must be rejected because it runs afoul of Ohio's procompetitive policies and would lead to an absurd result.[128]

Whether the proposed SSR and ST are transition revenue collection riders, violations of corporate separation requirements, or anticompetitive subsidies, one thing is clear: the General Assembly has prohibited the Commission from approving proposals such as the SSR and ST. Despite corporate separation requirements that prevent an EDU from providing a competitive advantage to its competitive lines of business, DP&L has proposed that the Commission approve the nonbypassable SSR and ST to prop up the earnings of DP&L's competitive generation business. DP&L's and Staff's indifference to the requirements of Ohio law is exhibited by their claim that denial of the SSR and ST will cause the reliability of the distribution and transmission

[128] *The State, ex rel. Dispatch Printing v. Wells, Secretary, Logan Civil Service Comm'n.*, 18 Ohio St.3d 382, 384 (1985).

services to fail.[129] This threatened degradation in reliability could only occur as a result of DP&L violating the law and the Commission doing nothing in return. Witness Jackson testified that the distribution and transmission services received adequate revenue to provide reliable service over the term of the ESP.[130] Thus, the only scenario where distribution and transmission service quality might degrade is one in which DP&L elects to cannibalize the adequate compensation for the distribution and transmission functions to offset the effect of the market on the earnings from its competitive generation business. Such an election by DP&L would be a clear anticompetitive subsidy from a noncompetitive service to a competitive service, as well as an extension of a competitive advantage from the unbundled noncompetitive lines to the competitive line in violation of corporate separation requirements.

DP&L's lack of respect for prohibitions against anticompetitive subsidies is further evidenced by its claim that it is not required to maintain separate accounting for its competitive and noncompetitive services. DP&L asserts in its Initial Brief that there is no benefit to requiring an EDU to maintain separate accounting for its competitive and noncompetitive services, and it should not have to "incur significant additional costs to prepare useless records."[131] DP&L also claims that Commission rules and its corporate separation plan do not require it to account separately for its competitive and noncompetitive services because the reference to separate business units was first used in 2008 with respect to a part of its business that is no longer in operation.[132]

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[129] DP&L Initial Brief at 34-36; Staff Initial Brief at 7-8.

[130] Tr. Vol. I at 242.

[131] DP&L Initial Brief at 76.

[132] *Id. at 77*

DP&L claims that DP&L is not subject to the rule that its generation service be treated as a separate affiliate because "DP&L does not provide [competitive service]."[133] DP&L is wrong on all accounts.

DP&L's claim that it does not provide competitive retail electric service is incredible. Section 4928.03, Revised Code, defines competitive service to include "retail electric generation."[134] DP&L's generation business clearly provides retail electric generation service; thus, the affiliate standards apply to DP&L's generation service. DP&L is also engaged in providing competitive wholesale electric services to its affiliated CRES provider and thus is obligated to account separately for the affiliate transactions.[135]

DP&L's claim that the term "business unit" was added to its corporate separation plan in 2008 is simply not true. DP&L's initial corporate separation plan, in the Section titled "Functional Separation" contemplated "assigning employees to specific ***business units*** or functions separate from other units or functions . . . . and (b) internally charging costs of employees and other resources to the account and books of the appropriate ***business units***."[136]

In addition to the rules and corporate separation plan obligations discussed above, there are clear benefits to requiring separate accounting of competitive and noncompetitive services. The competitive generation business must stand on its own in the competitive market, regardless of whether DP&L operates under functional

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[133] *Id.*

[134] *See also* Section 4928.141, Revised Code, which states that an EDU shall provide a "standard service offer of all *competitive retail electric services* necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." (emphasis added).

[135] Section 4928.17, Revised Code; DP&L Ex. 100 at 7, 15; DP&L Ex. 101 at 7, 11.

[136] DP&L Ex. 100 at 14-15 (emphasis added).

separation or structural separation. As the Commission has stated, "functional separation allows greater opportunity for cross-subsidization and other forms of anti-competitive behavior as compared with structural separation. Therefore, more stringent oversight is justified."[137]

Separate accounting provides a safeguard against an EDU using noncompetitive services to cross-subsidize its competitive services — just as DP&L proposes to do in its proposed ESP and threatens to do in the event the Commission follows the law and rejects the proposed ESP or modifies the proposed ESP by removing the SSR and ST and then approving the proposed ESP. In addition to rejecting DP&L's proposed unlawful and unreasonable requests for SSR and ST subsidies, the Commission should direct DP&L to maintain separate accounting for its competitive and noncompetitive lines of businesses so that DP&L's attempts to subsidize its competitive lines business can be easily identified.

b. Staff's positions regarding the SSR and ST are without merit and irreconcilable, respectively

Although Staff correctly identifies that the ST would violate Ohio law, Staff claims that the Commission may approve an ESP containing the proposed SSR. Staff's explanation for why the proposed ST is unreasonable or unlawful applies equally to the proposed SSR but Staff's Initial Brief mostly ignores the conflict in its advocacy.

Staff's one attempt to address this irreconcilable conflict is found in footnote 15 of its Initial Brief: "The switching tracker goes to switching and is, therefore, inherently anticompetitive. The SSR goes to financial integrity and thus does not harm

[137] *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, Case No. 99-1141-EL-ORD, Finding and Order at 26 (Nov. 30, 1999).

competitors if properly limited." There are several problems with Staff's meager effort to reconcile the conflict in its advocacy and, ultimately, the Staff's views about the lawfulness and reasonableness of the ST work to equally condemn the proposed SSR to its warranted rejection.

Despite claiming that the ST is, among other things, an anticompetitive subsidy that should be rejected because DP&L should not be compensated for revenue lost due to competition and switching, Staff used DP&L witness Chambers' Exhibit WJC-3B as the baseline for its two calculations of a potential SSR charge.[138] Because WJC-3B models the impact of additional switching without an ST,[139] Staff's proposed SSR level compensates DP&L for the impact of future switching and insulates DP&L from competition as if the ST were granted. Thus, Staff's rejection of the ST is meaningless.

Moreover, there are no material differences between the SSR and ST. The SSR and ST are both generation-related nonbypassable charges that DP&L has proposed to insulate DP&L's competitive generation business from the effects of competition and switching.

Staff cannot reconcile its positions by claiming that the ST insulates DP&L from the risk of switching and market prices while the SSR supports DP&L's total company ROE, which cannot be separated by function. Staff's claim that DP&L's distribution, transmission, and generation businesses cannot be separated[140] is contrary to the current corporate separation requirements embedded in statutory law as well as the Commission's rules. These requirements, call for the competitive lines of business to

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[138] Staff Initial Brief at 9.

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

[140] Staff Initial Brief at 7.

stand on their own separate and apart from any noncompetitive services provided by the EDU.

Staff's claim that the Commission can approve the SSR-subsidy at a level that is not anticompetitive lacks merit. The Commission cannot establish the SSR at any level without harming competition. As DP&L witness Chambers stated, subsidies tilt the playing field in the favor of the recipient and affect markets.[141] Staff has identified that even the appearance of a subsidy will harm competition. Staff thus recommended that, if the Commission authorizes the SSR, DP&L should not be able to participate in its own auction.[142] Otherwise bidders will not show up because there would be a "perception by other bidders that they would be bidding against subsidized generation resources."[143] Contrary to Staff's claim, there is no "sweet spot"[144] at which the Commission can lawfully or reasonably set the SSR to prevent the subsidy which is a purposeful part of the SSR from having an anticompetitive impact.

c. The Commission has no authority to approve an ESP containing the proposed SSR and ST under Section 928.143(B)(2)(d), Revised Code

Even assuming that law and policy do not foreclose DP&L's request to insulate its generation business from the effects of competition, DP&L has not satisfied the requirements of Section 4928.143(B)(2)(d), Revised Code. DP&L has failed to demonstrate how approval of the SSR and ST "would have the effect of stabilizing or providing certainty regarding retail electric service."

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

[142] Staff Ex. 2 at 4.

[143] Staff Ex. 2 at 4; Tr. Vol. IV at 1051-1053.

[144] Staff Initial Brief at 8.

As the Commission has held, "[t]he definition of 'retail electric service' in Section 4928.01(A)(27), Revised Code, clearly distinguishes the 'generation service' component from the 'distribution service' component.[145] Neither DP&L's Initial Brief nor Staff's Initial Brief explain how or to what extent Section 4928.143(B)(2)(d), Revised Code provides the Commission with authority to approve an ESP containing either or both of the proposed generation-related SSR and ST riders because such approval "would have the effect of stabilizing or providing certainty regarding retail electric service."

As discussed previously, DP&L is bidding all of its generation supply into PJM's organized wholesale market and receiving market-based compensation and PJM is responsible for maintaining reliability of the transmission grid as well as ensuring that there are adequate resources available to meet demand. PJM's responsibilities remain the same regardless of whether the proposed SSR or ST is approved as part of an ESP. DP&L agrees that it operates within the PJM system, and the reliability of retail generation service is a function of PJM's practices and reliability assurance responsibilities. Because DP&L operates in the PJM system, DP&L witness Jackson agreed that if DP&L did not have any generating facilities or if DP&L's generating facilities were not operable, PJM would still dispatch resources under its control to satisfy the needs of DP&L's customers.[146] Thus, the record evidence confirms that the presence of the proposed SSR or ST will not cause the generation component of retail service to be more stable or more certain. On the other hand and for shopping customers, the proposed SSR and ST would work to deprive them of the generation-

[145] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Second Entry on Rehearing, at page 25, (Jan. 30, 2013).

[146] Tr. Vol. I at 92.

related savings available from their CRES provider and the proposed ST would introduce additional volatility into electric bills for both shopping and nonshopping customers.

With regard to the separate distribution component within the definition of "retail electric service" and the separate unbundled transmission function, DP&L has acknowledged that the expected compensation for both of these unbundled services is expected to be adequate in the future without the SSR and ST.[147] While DP&L has claimed that the SSR will enhance its ability to provide safe and reliable distribution and transmission service,[148] that does not legitimize the proposed SSR or ST based on the list of ESP provisions in Section 4928.143, Revised Code.

As discussed previously, DP&L's Initial Brief claims that the SSR is necessary to maintain safe and reliable service because, without the SSR and ST, DP&L's total company financial integrity will be at risk.[149] DP&L's claim is founded on the legal assertion that DP&L's total company financial integrity must be maintained or else DP&L may not be able to *enhance* its ability to continue to offer safe and reliable distribution and transmission service. Likewise, Staff claims that if the Commission determines that DP&L's total company financial integrity is at risk, the Commission can approve an SSR at some level.

Neither DP&L nor Staff demonstrate how the proposed SSR's or ST's potential impact on DP&L's total company financial performance "would have the effect of stabilizing or providing certainty regarding retail electric service" as "retail electric

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[147] Tr. Vol. I at 242.

[148] DP&L Ex. 14 at 17.

[149] DP&L Initial Brief at 7-9, 34-36.

service" must be defined in accordance with Ohio law. More specifically, there has been no demonstration that DP&L's total company financial performance has any relationship to the stability or certainty of such retail electric service. As discussed above, DP&L witness Malinak indicated that the SSR enhances its ability to provide safe and reliable retail electric service. That assertion, even if true, does not show how inclusion of the proposed SSR or ST in a Commission-approved ESP ". . . would have the effect of stabilizing or providing certainty regarding retail electric service."

DP&L's claim that the SSR and ST allow it to freeze non-fuel generation rates is also without merit. The structure of the proposed ESP includes a deferral mechanism (ST), several riders that are periodically trued up (Reconciliation Rider, Fuel Rider, Transmission Cost Recovery Rider), and a placeholder rider initially set at zero (AER-N), that preclude the proposed ESP from having the effect of stabilizing or providing certainty regarding retail electric rates. Thus, the SSR or SSR and ST in combination with frozen base generation rates do not promote "stable retail electric service prices" for nonshopping customers as the prices customers will see over the term of the ESP and thereafter, as a result of proposed the deferral mechanisms, may and likely will vary dramatically. And as discussed throughout this Reply Brief, the new nonbypassable SSR and ST riders work to deprive shopping customers of the benefit of their bargain with CRES suppliers for the benefit of DP&L's competitive generation business.

DP&L's Initial Brief also makes the claim that establishing a portion of the ESP through a CBP will mitigate the impact of the SSR and ST.[150] But, bidding out a portion of the default generation supply demand and passing the cost of this CBP supply on to

[150] DP&L Initial Brief at 12-14.

customers will cause the SSO price to *change* and not be stable or more certain. Even assuming that generation suppliers will bid at a price that is lower than the SSO price (which would potentially decrease the average SSO rate), the potential of another component of the proposed ESP to mitigate the damage done by the SSR or ST does not demonstrate that the SSR or ST will make service stable or certain. At best, it shows that nonshopping customers paying the SSR or SSR and ST will receive less of a benefit from the CBP than would otherwise exist in the absence of the proposed SSR and ST. And, whatever damage control potential may be provided by the CBP component of the proposed ESP in the case of nonshopping customers, such CBP component does nothing to mitigate the impact of the proposed nonbypassable SSR and ST on shopping customers (which form the majority of DP&L's distribution service customers).

DP&L also claims that shopping customers will benefit from DP&L's proposed ESP's frozen non-fuel generation price in the event that market prices rise and shopping customers return to the SSO. For obvious reasons, DP&L claims that the SSR and ST are not provider of last resort charges ("POLR") charges.[151] A closer examination, however, reveals that the justification offered by DP&L for the SSR and ST fits squarely within the definition of a POLR charge.

The Supreme Court of Ohio ("Supreme Court") has described a POLR obligation as the "obligation to stand ready to accept returning customers" and defined POLR costs as "those costs incurred by [the utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and

[151] DP&L witness Seger-Lawson claimed during cross-examination that "the SSR is not a POLR charge." Tr. Vol. V at 1357.

then return to [the utility] for generation service."[152] The Commission has described the underlying POLR obligation as the requirement that an EDU "stand ready to provide SSO service to returning customers" which then allows customers to "return at any time" to the SSO,[153] and has defined POLR charges as "charges related to standby and default service, [which] provide certainty for both the [EDU] and [its] customers regarding retail electric service."[154] Although DP&L witness Seger-Lawson claimed the SSR is not a POLR charge, providing "fixed SSO rates, which will protect customers who have switched in the event that market prices increase"[155] fits squarely within the definition of a POLR charge.

Approval of the SSR or ST as a POLR charge is not warranted in this case. The Supreme Court has admonished the Commission to consider carefully what costs it is attributing to POLR obligations.[156] A POLR charge must relate to a cost incurred by the EDU.[157] DP&L conceded that the SSR or ST do not recover specific costs;[158] rather,

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[152] *In re Columbus Southern Power Co.*, 128 Ohio St.3d at 517-18.

[153] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 18 (Oct. 3, 2011) (hereinafter "*ESP I Case*").

[154] *Id.*

[155] DP&L Initial Brief at 12.

[156] *In re Columbus Southern Power Co.*, 128 Ohio St.3d at 518. *See also, Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990 at ¶¶ 31-33.

[157] *ESP I Case*, Order on Remand at 22 (company failed to demonstrate out-of-pocket cost of serving POLR obligation). If viewed as a stand-by charge, Section 4928.20, Revised Code, requires that the charge be bypassable for customers served by governmental aggregation programs upon election by the relevant unit of government.

[158] Tr. Vol. V at 1357-58 (Q: "But you have not proposed in any part of your application or testimony any analysis or study regarding DP&L's costs and risks of POLR service, correct" A: "No we have not").

the SSR is designed to supplement DP&L's generation-related revenue in a manner that provides DP&L a [redacted] ROE on a total company basis.[159]

And the Commission has held that a POLR obligation relates only to the cost of returning customers, not migration risk.[160] As identified by witness Jackson, the SSR and ST are related to revenue lost due to customer migration. Therefore, the SSR and ST fail to meet the criteria for a POLR charge.

As part of its argument that it should be permitted to secure additional revenue to protect its financial integrity, DP&L also states that it should be permitted to increase rates because it has historically provided below-market rates to customers through its owned generation assets. Relying on DP&L witness Seger-Lawson's rebuttal testimony containing her rendition of DP&L's rate plan extending the MDP, its rate stabilization plan ("RSP") orders, and its first ESP, DP&L claims that the criticism is unfair because it agreed to provide below market rates to customers and was able to do so because it owned generation.[161] Because customers benefited from DP&L's ownership of generation assets, DP&L concludes that "[t]he Commission should not let the intervenors have it both ways. Many of them received substantial benefits associated with the fact that DP&L owned generation assets, and until this proceeding, none of them were [*sic*] critical of the fact that DP&L owned those assets. The Commission should therefore reject the assertions by the intervenor witnesses that the Commission

[159] DP&L Ex. 14A at 24.

[160] *ESP I Case*, Order on Remand at 31-32.

[161] DPL Initial Brief at 36 & 39.

should disregard the effect of changing market conditions upon DP&L's financial integrity."[162]

Although not stated, the apparent conclusion that DP&L would have the Commission draw from the argument above is that it should authorize nonbypassable charges sufficient to provide DP&L a reasonable return on these generation assets because DP&L provided below market rates until market prices for power fell. This equitable argument, however, fails to demonstrate how its past acts have anything to do with providing stability and certainty for future retail electric service. This crucial oversight, of course, renders DP&L's argument irrelevant to Section 4928.143(B)(2)(d), Revised Code. Regardless, as discussed below, DP&L's argument must be put into context with what actually occurred over the past thirteen years.

DP&L's argument that it is entitled to an SSR and ST because it would be equitable also exposes DP&L's Application for what it is: an attempt to extract revenue in excess of what is permitted in an SSO. Under Section 4928.141, Revised Code, an SSO must be either a market-based MRO or a market-tested ESP. There is no third category that authorizes an SSO that results in rates that are less favorable than an MRO.

Additionally, DP&L's claim that customers benefited from below-market rates conflicts with the Supreme Court's determination that DP&L's RSP rates were market-based rates.[163] Even if true, DP&L also was well-compensated for these allegedly below-market generation rates. From the introduction of competitive choice in Ohio in

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[162] *Id.* at 39.

[163] *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530 ¶47-48 (2004).

2001 to 2011, DP&L earned an average unweighted ROE of 19.4%.[164] It paid dividends to its parent company in each year, and its ratio of common stock dividends to net income has ranged from a low of 35.2% to a high of 151.1%.[165] Even though DP&L was earning these extraordinary ROEs, and paying substantial dividends to its parent company, customers did not have a remedy to lower the rates based on excessive returns on equity.[166] Thus, DP&L did not suffer financially while it was providing what it claims were below market rates to customers.

3. DP&L's financial projections cannot be relied upon even if the Commission has authority to approve an ESP containing provisions that are designed to subsidize DP&L's competitive generation business

Even if the Commission has authority approve ESP provisions that are designed to uniquely benefit an EDU's competitive generation business and set ESP compensation so as to produce a target total company ROE (which it does not), that authority cannot be applied in this case because DP&L's financial projections are unreliable and unreasonable. More specifically, DP&L's financial projections [redacted]

The foundation of DP&L's financial integrity claim is built upon DP&L witness Jackson's financial projections; specifically, Exhibit CLJ-2. Witness Jackson testified that six key assumptions impact his financial projections.[167] A closer examination of

[164] IEU-Ohio Ex. 3, Ex. JGB-4.

[165] *Id.*

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

[167] Distribution baseline sales volumes and SSO sales volumes, O&M expense forecast, generation dispatch forecast, commodity prices, capital expenditures forecast, and switching forecast.

each of these assumptions reveals that DP&L's financial integrity claim is unfounded — [redacted] of the assumptions that are embedded in the results portrayed by Exhibit CLJ-2 are incorrect. The evidence in this case demonstrates that the following incorrect assumptions are embedded in Exhibit CLJ-2:

[redacted]

By correcting DP&L's incorrect assumptions, DP&L's net income and projected ROE would change drastically. Indeed, the effect of these adjustments can be easily determined by multiplying the total operating income adjustments identified above by one minus the tax rate (35%) (adjustment value *.65) and adding the resulting value to the net income levels reflected on Witness Chambers Exhibit WJC-5 (incremental switching, no SSR, and no ST).[168]

4. If the Commission authorizes an SSR based upon Staff's recommendation, it should consider additional revenue available to DP&L and reject Staff's proposed acceleration of the CBP

Staff calculated a potential SSR that it believed would allow DP&L to reach a [redacted] ROE (adjusted capital structure). Staff's analysis included an adjustment for increased generation output, but recognized "[t]here may be adjustments to Staff's computation that would be appropriate. For example, it became clear through the hearing that the Company can achieve certain cost savings in operations and maintenance."[169] Thus, even if the Commission indulges DP&L's unlawful request to subsidize its generation earnings, the Commission should consider adjusting Staff witness Mahmud's calculation of a potential SSR based upon the corrections identified above related to: [redacted], additional revenue available to DP&L as a result of increased [redacted].[170]

Staff also recognized that DP&L overstated the amount of switching that will occur, which understated retail revenue by [redacted] Staff witness Choueiki reasoned that the [redacted]

[168] Tr. Vol. IV at 1009; Tr. Vol. I at 188-191.

[169] Staff Initial Brief at Note 21.

[170] IEU-Ohio Initial Brief at 36.

[redacted].[171]

While approving the SSR or ST at any level would be unlawful, if the Commission establishes an SSR or ST, it must reject Staff's proposal to speed up the CBP and consider the [redacted]. Otherwise, under DP&L's legal theory, the size of DP&L's nonbypassable request would increase. Accelerating the CBP will not benefit shopping customers, especially not commercial and industrial customers that have been shopping for several years. It would be unreasonable for the Commission to increase the size of the SSR that shopping customers bear in order to provide a potential benefit to the minority SSO customers that have refrained from exercising their consumer choice rights. Thus, the Commission should reject Staff's proposal to accelerate the CBP, and [redacted]

5. DP&L should not be compensated for self-inflicted harm in violation of Ohio law

DP&L asserts three arguments in response to IEU-Ohio's position[172] that DP&L should not be compensated for the self-inflicted harm caused by its market-based sales to its affiliated CRES provider, DPLER, that violate the requirement that transactions between an EDU and its affiliate be based upon fully embedded cost.[173] First, DP&L

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[171] Tr. Vol. VII at 1868-1870.

[172] DP&L witness Chambers, the primary sponsor of the SSR and ST, testified, if the transfer price was the cause of DP&L's financial harm and the price was established in violation of Ohio law, then DP&L should not be compensated for that harm. Tr. Vol. II at 523-24. Because both conditions identified by witness Chambers have been demonstrated, the Commission must reject the SSR and ST.

[173] DP&L Initial Brief at 71-75.

claims that rates charged to affiliates fall within the exclusive jurisdiction of FERC.[174] DP&L claims that FERC has granted DP&L authority to sell wholesale generation at market based rates, and, in accepting DP&L's Order 697 compliance filing, in 2008, FERC held that, based upon DP&L's representations, DP&L does not have captive customers.[175] DP&L claims that because the affiliate abuse standards do not apply, it need not make sales to DPLER at the higher of cost or market.

Second, DP&L claims that even if the Commission is not preempted by federal law, Section 4928.17, Revised Code, does not apply because DPLER is not receiving an undue preference from market-based rates. DP&L further argues that the Commission should conclude that a preference would exist only if DP&L was providing a benefit to DPLER that DP&L was not willing to provide to CRES providers under the same terms, and an advantage would exist only if DPLER received a benefit that was not available to CRES suppliers under the same terms."[176]

Third, DP&L claims that IEU-Ohio has failed to provide evidence regarding DP&L's fully embedded cost. Each of DP&L's arguments lacks merit.

DP&L's competitive generation business sells generation supply to its affiliate, DPLER, at market-based rates so that DPLER can satisfy the needs of its customers.[177] DPLER has, by a large measure, the largest share of the retail market in DP&L's distribution service territory.[178]

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[174] *Id.*

[175] *Id.* at 72.

[176] *Id.* at 74.

[177] Tr. Vol. XII at 2955.

[178] IEU-Ohio Ex. 21 at numbered page 86.

DP&L has acknowledged that its forecasted decline in its total company ROE is predicted on lower market-based capacity and energy prices and the shopping inspired by these lower prices. The forecasted decline in DP&L's total company ROE recognizes the revenue that DP&L projects to collect from sales to its affiliated CRES, DPLER.[179] [redacted]

DP&L's response to IEU-Ohio's demonstration that DP&L's bilateral agreement to accept market-based prices [redacted] from its affiliated CRES consists of an attempt to incorrectly reframe IEU-Ohio's position as one which challenges the legality of the pricing arrangement that DP&L has agreed to with DPLER. But questions about whether the Commission is preempted by federal law or whether Ohio law bars market-based sales by an EDU to an affiliated CRES, do not change the fact that DP&L's forecasted total company financial performance includes the effect of making a substantial amount of sales to DPLER at market-based prices that [redacted].

DP&L's proposed ESP seeks to obtain compensation from shopping and nonshopping customers through nonbypassable charges that are computed to allow DP&L, on a total company basis, to achieve a targeted ROE. Since the transfer price which DP&L has agreed to for purposes of selling generation supply to DPLER includes [redacted], DP&L's proposed ESP seeks to make its retail distribution customers responsible for ensuring that DP&L's total company financial performance is insulated

[179] IEU-Ohio Ex. 2 and 2A at 11-20.

from the pricing choices made by DP&L in its supply arrangement with DPLER whether that supply arrangement is lawful or otherwise. It is IEU-Ohio's position that DP&L's proposed ESP is unreasonable and unlawful because, among other things, DP&L is proposing an ESP that is designed to sustain its total company financial performance at a targeted ROE while DP&L is uniquely providing its affiliated CRES generation supply at prices that include [redacted] The Commission has held that generation-related costs should not be borne by customers that do not receive generation service from the EDU "under any circumstances" because it "would create an anticompetitive subsidy in violation of R.C. 4928.02(H)."[180] But that is exactly what DP&L has attempted to achieve through the SSR and ST, which ensures that customers not taking generation service from DP&L pay for DP&L's generation costs.

Moreover, DP&L's arguments that federal preemption forecloses Commission action and that Ohio law does not bar market-based transactions between an EDU and its affiliate fail as well. DP&L incorrectly claims that an EDU is required to make sales to an affiliate based upon fully embedded costs only when that cost structure is necessary to prevent the affiliate from receiving an undue preference or advantage.[181] Although Section 4828.17(A)(3), Revised Code, also prohibits an EDU from providing an advantage to an affiliate, there is no indication in the statute that an advantage must exist before a transaction must be priced based upon fully embedded costs. Rather, the statute contains a blanket prohibition against non-cost-based transactions. DP&L's

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

[181] DP&L Initial Brief at 74-75.

interpretation of Section 4928.17(A)(3), Revised Code, would shift the burden of demonstrating that DP&L is in compliance with corporate separation away from itself by allowing DP&L to enter into non-cost-based transactions until another party demonstrates that DP&L provided a benefit to its affiliate.

DP&L's claim that IEU-Ohio failed to submit evidence regarding DP&L's embedded costs is a red herring. It is not disputed that DP&L sells electricity to DPLER at market-based rates rather than fully embedded costs, as the statute requires. As discussed above, and as evidenced by the statements and representation contained DP&L's and DPLER's 10K, the effect of DP&L's purchase power contract is to shift the margin collection opportunity from DP&L to DPLER.[182]

DP&L's federal preemption argument is also a red herring. Even if federal preemption prevents the Commission from altering the price of DP&L's sales to DPLER, the Commission need not regulate the price of sales between DP&L and DPLER to remedy the effect of those sales on DP&L's income statement. The Commission should require DP&L to allocate a portion of the embedded cost of producing electric wholesale sales to DPLER to ensure that they are not an undue drag on DP&L's financial performance. Moreover, the Commission could direct DP&L to transfer its generating assets to DPLER.[183] The remaining EDU would not have a financial integrity concern.[184] Although IEU-Ohio does not oppose the concept of functional separation,

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[182] IEU-Ohio Ex. 21 at numbered page 48.

[183] Functional separation may be granted by the Commission only for good cause and "upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code." Section 4928.17, Revised Code. DP&L has failed to demonstrate good cause for a waiver. And, DP&L's requests for generation subsidies demonstrate that DP&L's corporate separation plan is not doing its job. Without a waiver, DP&L would be under an obligation to immediately transfer its generating assets.

[184] Tr. Vol. I at 150-51.

clearly that method of corporate separation is not properly separating DP&L's competitive and noncompetitive services.

Even if federal preemption applies to prevent the Commission from regulating the price of DP&L's wholesale sales, under the federal affiliate abuse standards, DP&L would be required to establish its sales to DPLER at the higher of cost or market.[185] DP&L has avoided such standards only because DP&L has represented to FERC that it does not have captive customers.[186] Because DP&L collects the RSC, an unavoidable generation charge, DP&L has captive customers. Thus, the affiliate standards should apply. Under the affiliate standards, DP&L would be required to charge the higher of cost or market.

Moreover, the Pike County doctrine provides an exception to federal preemption when a utility is requesting recovery of a retail rate that is related to a wholesale transaction. In *Pike County Light and Power Company v. Penn. Pub. Util. Comm.*, 465 A.2d 735 (1983), the Pennsylvania Public Utilities Commission ("Pennsylvania Commission") denied Pike County Light and Power's request to flow through retail rates an above-market purchase power contract because the utility should have procured power through a lower cost option. The Pennsylvania Commission determined that, given two options, the utility imprudently acquired power and should not be compensated above the least-cost option. In the case at bar, DP&L could have either sold power to DPLER at cost-based or market rates. DP&L chose market rates, and requested that ratepayers supplement, through nonbypassable charges, the revenue

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[185] 18 C.F.R. § 35.39

[186] *Order accepting updated market power analysis and accepting Order 697 compliance filing, and directing further compliance filing re Dayton Power and Light Co*, 123 FERC ¶61, 231 at ¶21 (June 3, 2008).

erosion caused by its sales to DPLER. Ratepayers should not pick up the tab for DP&L's imprudent self-inflicted harm.

Finally, if federal preemption operates to prevent the Commission from regulating the price of DP&L's wholesale sales, the Commission should be completely preempted from providing DP&L compensation related to its wholesale sales. DP&L's financial concern is being driven by DP&L's choice to make sales to DPLER at market-based rates. DP&L cannot, on the one hand, claim that the Commission is preempted from altering DP&L's market-based rates, and, on the other hand, request that the Commission make DP&L whole when such market-based sales do not provide adequate compensation.

6. If the Commission authorizes an SSR, it should approve the rate design proposed in the Amended Application

As discussed above, DP&L's proposed SSR is unlawful and unreasonable. However, if the Commission authorizes DP&L to implement the proposed SSR, it should do so using DP&L's proposed rate design. In addition to DP&L's proposed rate design for the SSR, OCC and Staff each propose their own rate design. It is important to note that neither OCC nor Staff recommends that the Commission approve the SSR, but are only offering recommendations regarding the rate design of the SSR in the event that the Commission approves the proposed SSR.[187] However, because OCC's and Staff's SSR rate design proposals are unreasonable, the Commission should reject them.

OCC proposes that if the Commission adopts the SSR, it should allocate the revenue responsibility for the rider on a kilowatt-hour ("kWh") basis.[188] OCC's proposal,

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[187] OCC Initial Brief at 42-60, 82-90; Staff Initial Brief at 8, 22.

[188] OCC Initial Brief at 82.

however, fails to include any bill impact analysis. Without a bill impact analysis, the Commission and customers are left in the precarious position that they faced when the Commission approved the stipulation regarding AEP-Ohio's second ESP on December 14, 2011. Following its initial approval of that stipulation, customers experienced significant rate shock leading, in part, to the Commission rejecting AEP-Ohio's stipulation on rehearing. To avoid a similar incident based on an incomplete record, OCC's rate design must be rejected.

Staff's proposed rate design should also be rejected. Staff proposes that the current rate design for the RSC be continued and each customer class' rider rates be increased proportionally to the increase from the RSC to the SSR.[189] Staff claims that its methodology would prevent unfair cost shifts.[190] Staff's proposal should be rejected because it would, contrary to Staff's claim, unfairly shift additional revenue responsibility to commercial and industrial customers.

During the hearing, DP&L witnesses Parke and Seger-Lawson explained that DP&L adopted its rate design methodology for the SSR because it took into account DP&L's application as a whole and mitigated the rate impact of the SSR by looking at all of DP&L's proposals.[191] DP&L's witnesses testified that DP&L's proposal to implement a CBP to establish SSO rates would likely reduce base generation rates for customers who remained on the SSO. Because commercial and industrial customer classes are almost entirely shopping at this point in time, the only customer class that would see a rate decrease in any portion of DP&L's proposed ESP is residential customers.

[189] Staff Initial Brief at 22.

[190] *Id.*

[191] DP&L Ex. 7 at 7; Tr. Vol. III at 821, 823, 858; Tr. Vol. V at 1278-79.

Therefore, adding a customer charge to the SSR rate design takes into account DP&L's proposal as a whole. Staff's proposal looks at the SSR in a vacuum and fails to take into account the fact that DP&L's proposed CBP auctions are a meaningless commitment to those customers that have already exercised their consumer choice rights.

For these reasons, if the Commission approves the SSR, it should adopt DP&L's proposed rate design for the rider.

C. Other unlawful riders

1. RR

The Commission should reject the RR because it is neither lawful nor reasonable. More specifically, there is no legal basis for the Commission to authorize the RR on a nonbypassable basis under Section 4928.143, Revised Code. As identified in IEU-Ohio's Initial Brief, the only provisions of Section 4928.143(B)(2), Revised Code, that authorize a nonbypassable rider are (B)(2)(b)-(c), and the RR does not fit under those provisions.[192]

Additionally, the Commission has held that generation-related costs should not be borne by customers that do not receive generation service from the EDU and held that true-ups of bypassable riders cannot occur on a nonbypassable basis "under any circumstances" because it "would create an anticompetitive subsidy in violation of R.C. 4928.02(H)."[193] Despite the Commission's prior holding, DP&L proposes to include CBP auction-related costs and true-ups of bypassable riders in the proposed

[192] IEU-Ohio Initial Brief at 57-61.

[193] *Id.* at 61-62 (*quoting* Duke MRO Order at 63)).

nonbypassable RR. Thus, the RR should be rejected because it violates Ohio law as previously applied by the Commission.

The design of the RR also unlawfully and unreasonably insures DP&L against revenue erosion due to migration risks. DP&L claims that if its deferral balances keep growing, it will become harder to recover these balances from SSO customers and it would be unjust to recover the entire amount from a small group of customers that remain on its SSO.[194] However, the Commission has previously held that risks associated with customer migration were risks that exist in the competitive marketplace, and allowing an EDU to be compensated for, or protected against, this risk would provide an EDU with an unlawful and unreasonable advantage over CRES providers.[195]

Further, DP&L has failed to identify any provision of Section 4928.143, Revised Code, which would allow the Commission to authorize the proposed rider.[196] Section 4948.143(C)(1), Revised Code, places the burden of proof upon DP&L in an ESP proceeding. Because DP&L has failed to identify any basis, through testimony or through its Initial Brief to support its proposed nonbypassable RR, the Commission must reject the rider.

Finally, DP&L's factual arguments to support the RR are without merit. DP&L argues that the RR should be approved because the CBP auction costs to be collected through the rider "benefit all customers."[197] Although DP&L claims that its proposed

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[194] DP&L Initial Brief at 52-53.

[195] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 32 (Oct. 3, 2011).

[196] DP&L Initial Brief at 51-53.

[197] *Id.*

CBP auctions will benefit all customers, this is not true.[198] DP&L witness Seger-Lawson stated that CBP auctions are expected to lower DP&L's overall ESP rates and thus benefit nonshopping customers.[199] The CBP auctions will not benefit shopping customers because they will not be returning to take service under the SSO; all witnesses in this proceeding who offered an opinion on the level of shopping over the term of the ESP projected that shopping will increase to some extent. Thus, DP&L's proposed ESP, including all of its unlawful and unreasonable riders, will drive up the bills of shopping customers and there is no potential that such customers will receive any benefit from the CBP unless they return to the SSO when it is set at a price that is lower than what can otherwise be achieved in the market.

DP&L also attempts to justify the RR on grounds that without the rider a "death spiral" could occur leaving "a very small group of customers" liable "to recover a very large deferral balance."[200] DP&L's claim is simply exaggerated and without record support. Deferral balances associated with the riders subject to the RR's circuit-breaker provision ***only*** exist if DP&L incorrectly forecasts its costs or shopping levels.[201] Many of the riders subject to the RR's circuit breaker provision are trued-up quarterly, and other riders allow for and require, DP&L to file interim updated applications if it determines its forecasts are not accurate.[202] Thus, there are already adequate

[198] Tr. Vol. V at 1279 (competitive bidding benefits nonshopping customers); *see* Tr. Vol. V at 1300, 1302.

[199] *Id.*

[200] DP&L Initial Brief at 52.

[201] Tr. Vol. IX at 2215-2217.

[202] The Fuel Rider for example is on a quarterly true-up cycle, and although DP&L's TCRR is on an annual true-up cycle, Commission Rule 4901:1-36-03(E), O.A.C., requires DP&L to file an interim application if a large over- or under-recovery is occurring.

mechanisms for DP&L to utilize to ensure that it does not accumulate large deferral balances.

In sum, there is no legal basis for the RR. Additionally, DP&L has failed to carry its statutory burden of proving that the RR can be authorized under an ESP. For these reasons, the Commission should reject the RR.

2. AER-N

In its Initial Brief, DP&L claims that the AER-N may be authorized under Section 4928.143(B)(2)(c), Revised Code, and claims DP&L has demonstrated that the AER-N satisfies the statutory requirements of that Section. Ohio law, however, requires that the costs DP&L seeks to include in the AER-N be recovered on a bypassable basis, and even if this statutory bar to a nonbypassable AER-N did not exist, DP&L has failed to satisfy the requirements of Section 4928.143(B)(2)(c), Revised Code.

The AER-N cannot be lawfully authorized because it violates Sections 4928.143(B) and 4928.64(E), Revised Code. During the hearing, DP&L witness Seger-Lawson stated that the purpose of the AER-N was to collect the costs associated with the Yankee 1 Solar Generating Facility ("Yankee 1"), and stated that Yankee 1 was constructed to comply with the solar alternative energy benchmark requirements.[203]

Section 4928.64(E), Revised Code, requires that all costs associated with complying with the solar alternative energy benchmarks be bypassable. Further, Section 4928.143(B), Revised Code, provides that the provisions in an ESP must conform to the requirements in Section 4928.64, Revised Code. Thus, an ESP may not contain a rider that violates Section 4928.64(E), Revised Code. All cost to comply with

[203] *See* Tr. Vol. IX at 2225, 2287-93, 2305.

solar requirements must be bypassable. Because the AER-N would violate Sections 4928.143(B) and 4928.64(E), Revised Code, it must be rejected.

Additionally, DP&L has failed to demonstrate that the requirements of Section 4928.143(B)(2)(c), Revised Code, have been met. Specifically, DP&L has failed to demonstrate in this proceeding that phase 1 of Yankee 1 is needed, as required by Section 4928.143(B)(2)(c), Revised Code. Although DP&L claims it has met its burden of proof, the only evidence DP&L cites are two statements made by DP&L witness Seger-Lawson where she merely states that the statutory requirements have been met.[204] DP&L failed to offer any evidence that Yankee 1 was sourced through a CBP process. In fact, DP&L admits that it has never submitted any CBP records to the Commission.[205] DP&L witness Seger-Lawson's conclusory statement in her testimony and during the evidentiary hearing that Yankee 1 was competitively sourced falls far short of satisfying DP&L's statutory burden of proof.[206]

Additionally, the evidence in this proceeding demonstrates that there is not a need for Yankee 1; DP&L witness Seger-Lawson admitted that without Yankee 1 DP&L still has enough energy and capacity to meet the needs of its SSO customers for at least the next 10 years.[207] These conclusory statements and the uncontradicted evidence demonstrate that DP&L falls well short of satisfying the statutory burden of proof imposed on DP&L by Section 4928.143(C)(1), Revised Code.[208]

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[204] DP&L Initial Brief at 54 (*citing* DP&L Ex. 9 at 15; Tr. Vol. V at 1311); *see also* Tr. Vol. V at 1324 (DP&L witness Seger-Lawson claimed, without any support, that Yankee 1 was sourced through a CBP).

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

[206] DP&L Initial Brief at 54; DP&L Ex. 9 at 15; Tr. Vol. V at 1324.

[207] Tr. Vol. IX at 2225.

[208] *Id.*

3. TCRR-N

DP&L's Initial Brief requests that the Commission authorize an ESP that bifurcates DP&L's TCRR into bypassable and nonbypassable components. To accomplish this result DP&L seeks a waiver of Rule 4901:1-36-04(B), Ohio Administrative Code ("O.A.C."), which requires the TCRR to be fully bypassable by all shopping customers. Because DP&L's proposal is unlawful and unreasonable, and because DP&L has failed to demonstrate good cause for the Commission to waive its Rule, the Commission should reject DP&L's proposal and should retain the TCRR in its current bypassable format.

As IEU-Ohio demonstrated in its Initial Brief, good cause ***does not*** exist for DP&L's requested waiver of Rule 4901:1-36-04(B), O.A.C.[209] Specifically, IEU-Ohio identified the potential for shopping customers who are presently receiving generation and transmission service from their CRES provider to be double-billed for transmission service if DP&L's proposed TCRR bifurcation is approved.[210] Despite DP&L's assertion in its Initial Brief that this claim is speculative and unproven, DP&L witness Seger-Lawson acknowledged that the risk exists.[211] In fact, Ms. Seger-Lawson testified that the risk was so readily apparent "that it shouldn't be a surprise to anybody," and argued

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[209] IEU-Ohio Initial Brief at 53-55.

[210] *Id.*

[211] DP&L Initial Brief at 56-57; Tr. Vol. V at 1356-57; IEU-Ohio Initial Brief at 54. [redacted] IEU-Ohio Ex. 12, 13; Tr. Vol. II at 352-360. [redacted]

that shopping customers and CRES providers "should have known that this is the proposal the company would be coming forward with."[212] Thus, despite the statements in DP&L's Initial Brief that the double-billing issue is speculative, DP&L's own witnesses have testified in this proceeding that everyone should know that the double-billing issue exists and has existed since March 2012. The Commission can easily avoid this problem by rejecting DP&L's request to make the TCRR nonbypassable.

Additionally, the only justification offered by DP&L for the waiver should not be given any weight. In its Initial Brief DP&L argues that good cause exists to support a waiver of the Rule because the Commission waived its Rule for FirstEnergy and Duke.[213] However, as discussed in IEU-Ohio's Initial Brief, the Commission waived its Rule for FirstEnergy and Duke in the context of stipulations that contained a bargained for package of terms and conditions.[214] DP&L does not propose to implement any of the other items agreed to in the stipulations it relies upon.[215] Thus, DP&L improperly relies upon these stipulations to advance a claim that good cause exists in this proceeding.

Finally, DP&L's Initial Brief implies that the Commission's Rule should be waived because intervenors, such as IEU-Ohio and Wal-Mart, failed to demonstrate that the waiver is unreasonable.[216] DP&L's argument is without merit because the burden to demonstrate good cause for a waiver is on the party seeking the waiver; not those

[212] Tr. Vol. V at 1356-1357.

[213] DP&L Initial Brief at 56-57.

[214] IEU-Ohio Initial Brief at 56-57; *see also* Tr. Vol. V at 1349-50.; IEU-Ohio Ex. 24; IEU-Ohio Ex. 26.

[215] IEU-Ohio Initial Brief at 57.

[216] DP&L Initial Brief at 56-57.

opposing the waiver.[217] Because DP&L admits that it has known about the issue since it filed its MRO in March 2012, and has not proposed anything to address the potential for shopping customers to be double-billed, DP&L has failed to demonstrate that good cause exists for the waiver.

For these reasons, the Commission should reject DP&L's proposal to bifurcate the TCRR into bypassable and nonbypassable components.

III. CONCLUSION

In its Amended ESP Application, DP&L has requested approval to collect in excess of $700 million in generation-related nonbypassable charges and electric bill escalating mechanisms that increase the cost of the ESP relative to the MRO option. The Commission must deny DP&L's requests because they are unlawful, unjust, and unreasonable. Accordingly, the Commission must modify the proposed ESP to remove the unlawful and unreasonable elements and then approve the as-modified ESP or reject the proposed ESP.

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Certificate Of Service

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 5th day of June, 2013, via hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

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