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

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

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October 4, 2013 **Attorneys for Industrial Energy Users-Ohio**

TABLE OF CONTENTS

Page

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In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 12-427-EL-ATA
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APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

On September 4, 2013, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("ESP II Order") modifying and approving the Dayton Power and Light Company's ("DP&L") Amended Application to Establish an Electric Security Plan ("ESP").[1] On September 6, 2013, the Commission issued an Entry Nunc Pro Tunc ("September 6th Entry") (the ESP II Order and September 6th Entry are collectively referred to as the "ESP II Orders") altering the duration of the Modified ESP

[1] The ESP approved by the Commission is hereinafter referred to as the "Modified ESP."

as well as the duration in which the Commission authorized DP&L to collect the nonbypassable Service Stability Rider ("SSR"). Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing. The ESP II Order and September 6th Entry are unlawful and unreasonable in the following respects:

A. The ESP II Orders are unlawful and unreasonable because the Modified ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is not more favorable in the aggregate for consumers as compared to the expected results that would otherwise apply under R.C. 4928.142

1. **The ESP II Orders are unlawful and unreasonable because they assign subjective value to allegedly qualitative benefits of the Modified ESP in violation of the requirement of R.C. 4928.143(C)(1) and R.C. 4903.09 that the Commission provide reasoned decision making**

2. **The ESP II Order is unlawful and unreasonable because it fails to address contrary positions and support its decision with appropriate evidence in violation of R.C. 4903.09**

3. **The ESP II Order is unlawful and unreasonable because the record does not support the Commission findings that there are qualitative benefits that will result from the Modified ESP. As a result, the ESP II Orders fail to comply with the requirements of R.C. 4928.143(C)(1) and R.C. 4903.09**

    a. **There is no benefit from the alleged faster move to a market-based ESP**

    b. **The alleged improvements in service reliability are based on faulty factual assumptions and an illegal charge**

    c. **The alleged benefits of separation of the competitive generation business from the noncompetitive lines of business are based on faulty legal and factual assumptions**

d. **There is no demonstration that the alleged benefit of competitive retail enhancements exceeds the costs paid by customers**

e. **There is no demonstration that the alleged benefit in competitiveness exceeds the costs paid by customers and the alleged benefit is based on a fundamental misunderstanding of the effect of increased electric bills on the ability of customers to compete in the global economy**

f. **The ESP II Orders are not based on reasoned decision making in violation of the requirements of R.C. 4903.09**

4. **The September 6th Entry is unlawful and unreasonable because the Commission increased the total compensation of DP&L without addressing whether the Modified ESP, as revised by the September 6th Entry, is more favorable in the aggregate for consumers as compared to the expected results that would otherwise apply under R.C. 4928.142**

B. The ESP II Order is unlawful and unreasonable because the SSR cannot be lawfully approved in an ESP

1. **The ESP II Order is unlawful and unreasonable because the Commission is preempted from increasing DP&L's total compensation for the provision of wholesale energy and capacity service under the Federal Power Act. In violation of the preemptive effect of the Federal Power Act, the Commission has increased DP&L's total compensation for the provision of wholesale energy and capacity through the SSR**

2. **The ESP II Order is unlawful and unreasonable because it authorized DP&L to increase SSO prices to collect above-market generation-related revenue through the nonbypassable SSR, thereby providing DP&L with the ability to collect transition or equivalent revenue in violation of a Commission-approved settlement obligation and at a time when Ohio law commands that DP&L's generation business be fully on its own in the competitive market. Because the ESP II Order failed to address IEU-Ohio's argument that the SSR represents transition revenue or equivalent revenue, the ESP II Order also violated R.C. 4903.09**

and Court precedent that holds that the Commission must address issues raised and positions asserted by parties

3. **The ESP II Order is unlawful and unreasonable because the SSR provides DP&L with an anticompetitive subsidy in violation of R.C. 4928.02(H)**

4. **The ESP II Order is unlawful and unreasonable because it permits DP&L, an EDU, to evade statutory corporate separation requirements contained in R.C. 4928.17 and Chapter 4901:1-37, OAC that prohibit an EDU from providing a competitive advantage or preference to its competitive business, or abusing market power, require strict separation between competitive and non-competitive lines of business and services, and because it approves an SSO which insulates DP&L's competitive generation business from the discipline of the electricity market. Similarly, the ESP II Order is unlawful and unreasonable because the SSR is designed to compensate DP&L for revenue that it will lose as a result of its power sales agreement with its affiliate DPLER. The ESP II Order is also unlawful and unreasonable because it failed to provide a reasoned explanation in violation of R.C. 4903.09 and Court precedent that requires the Commission to address parties' positions and issues raised in the proceeding**

5. **The ESP II Order is unlawful and unreasonable because it violates the procompetitive policies of Chapter 4928 and Chapter 1331 of the Revised Code (the Valentine Act). The authorization of the SSR allows DP&L to fix electricity prices at a level that would not occur in a competitive market**

6. **The ESP II Order is unlawful and unreasonable because the SSR cannot be approved under R.C. 4928.143(B)(2)**

   a. **The ESP II Order is unlawful and unreasonable because it authorized a nonbypassable generation-related rider which is not included on the list of permissive ESP provisions in R.C. 4928.143(B)(2)**

   b. **The ESP II Order is unlawful and unreasonable because it concluded that the SSR can be authorized under R.C. 4928.143(B)(2)(d) even though the SSR will not have the effect**

of stabilizing or providing certainty regarding retail electric service

7. **The ESP II Order is unlawful and unreasonable because the record does not support authorizing DP&L to collect a $110 million per year SSR and the ESP II Order failed to provide a reasoned explanation for its authorization of the SSR. As a result, the ESP II Order failed to comply with the requirements of R.C. 4928.143(C)(1) and unlawfully shifts the burden of proof from the EDU and R.C. 4903.09 and Court precedent that requires the Commission to address parties' positions and issues raised in the proceeding**

C. The authorization of the nonbypassable Reconciliation Rider is unlawful and unreasonable

1. **The RR-N is unlawful and unreasonable because it is not authorized by the provision of R.C. 4928.143(B)(2)**

2. **The RR-N is unlawful and unreasonable because it authorizes DP&L to potentially recover generation-related costs through distribution rates**

3. **The RR-N is unlawful and unreasonable because it will allow DP&L to collect costs of compliance with the alternative energy portfolio requirements on a nonbypassable basis in violation of R.C. 4928.64(E)**

D. The TCRR-N and TCRR True-Up Riders are unlawful and unreasonable

1. **The TCRR-N is unlawful and unreasonable because it has the potential to cause shopping customers to be double-billed for transmission service on a going-forward basis. The ESP II Order failed to address arguments that customers will be doubled-billed; thus, the ESP II Order failed to comply with the requirements of R.C. 4928.143(C)(1) and R.C. 4903.09 and Court precedent that requires the Commission to address parties' positions and issues raised in the proceeding**

2. **The TCRR-N and TCRR True-Up Rider are unlawful and unreasonable because they violate Rule 4901:1-36-04(B), OAC, and good cause for waiving the Rule was not demonstrated**

3. **The TCRR True-Up Rider is unlawful and unreasonable because there is no record support for the rider**

4. **The TCRR True-Up Rider is unlawful and unreasonable because there is no need for the rider; the TCRR is already a reconcilable rider**

5. **The TCRR-N and TCRR True-Up Rider to the extent it is made nonbypassable are unlawful and unreasonable because collecting costs associated with serving SSO customers from both shopping and non-shopping customers provides DP&L an unlawful anticompetitive subsidy in violation of R.C. 4928.02(H), and also violate Commission precedent, which requires bypassable charges to be reconciled through bypassable charges**

E. The September 6th Entry is unlawful and unreasonable because it substantively modified the ESP II Order. Without granting an application for rehearing, the Entry unlawfully and unreasonably extended the duration of the ESP and increased the amount of nonbypassable charges that customers will pay

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing and correct the errors identified herein. Specifically, the Commission should amend the Modified ESP to bring it into compliance with the requirements of R.C. 4928.143(B) and (C)(1). Moreover, IEU-Ohio urges the Commission to abrogate its authorization of the SSR, the SSR Extension ("SSR-E"), the nonbypassable Reconciliation Rider ("RR-N"), the nonbypassable Transmission Cost Recovery Rider ("TCRR-N"), and the TCRR True-Up Rider. Given the material legal problems that are presented in this Application for Rehearing, IEU-Ohio requests that the Commission order as part of the Entry on Rehearing that rates be collected subject to reconciliation during the pendency of the Commission's review of this Application for Rehearing and any appeals that may follow.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

DP&L's financial integrity legal theory, which rebundles competitive and non-competitive 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 claims that its return on equity (ROE) is declining and that its declining ROE, as well as the corresponding threats to DP&L's financial integrity and ability to provide safe and reliable service, is being driven principally by three factors: increased switching, declining wholesale prices, and declining capacity prices. DP&L witness Chambers testified that, due to these factors, the Company would not be able to maintain its financial integrity without the SSR. DP&L avers that its financial integrity is compromised, and if it becomes further compromised the generation,

> transmission, and distribution functions of DP&L will not be capable of providing stable, safe, and reliable retail electric service.[2]

The ESP II Order's indulgence of DP&L's financial integrity legal theory and authorization of the SSR: (1) ignores the Supremacy Clause, which preempts the Commission from increasing DP&L's compensation for the provision of wholesale capacity and energy; (2) ignores the service unbundling mandated by Ohio law; (3) ignores the separation of competitive and noncompetitive services mandated by Ohio law; (4) ignores the legal fact that the Ohio General Assembly ("General Assembly") has precluded the Commission from exercising regulatory or supervisory authority over DP&L's competitive generation business; (5) ignores the command of Ohio law that DP&L's competitive generation business must fully stand on its own in the competitive market; (6) ignores the requirement that an ESP be more favorable than a market rate offer ("MRO"); and (7) further ignores this requirement when the unlawful September 6th Entry extended the ESP period and the unlawful SSR.

As a result of the errors in the ESP II Order, shopping and non-shopping customers will pay above-market nonbypassable charges for years to come. The ESP II Order works to deprive customers of the consumer choice dividend embedded in Ohio law at a time when market prices are at ten-year lows. Thus, the ESP II Order subordinates the interests of customers to provide DP&L's competitive generation business with more time to transition to a competitive electric market even though Ohio law states that the time for such a transition ended long ago.

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[2] ESP II Order at 17 (citations omitted).

II. ARGUMENT

A. The ESP II Orders are unlawful and unreasonable because the Modified ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is not more favorable in the aggregate for consumers as compared to the expected results that would otherwise apply under R.C. 4928.142

The Commission may approve or modify and approve an ESP if the ESP, including its pricing and all other terms including any deferrals and the collection of those deferrals, is more favorable in the aggregate than an MRO (the ESP versus MRO test).[3] The electric distribution utility ("EDU") has the burden to demonstrate that the ESP meets the statutory requirements governing an ESP.[4] If the ESP does not satisfy the ESP versus MRO test, the Commission must reject it or modify it so that the ESP as modified satisfies the test.[5]

Based on the record in this case, there is no dispute that the Modified ESP is more costly to customers than an MRO. The testimony of all the intervenors that addressed the ESP versus MRO test and the Commission Staff ("Staff") showed that the Amended ESP was less favorable in the aggregate than an MRO.[6] DP&L's witness in support of its variation of the test, which the Commission found unpersuasive,[7] admitted that the Amended ESP was worse than an MRO if the effects of the proposed nonbypassable charges were not included in the MRO.[8]

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

[4] *Id*.

[5] *Id*.

[6] IEU-Ohio Ex. 2 at 28-36; FES Ex. 13 at 5; OCC Ex. 23 *passim*; Staff Ex. 8 at 7.

[7] ESP II Order at 49.

[8] Tr. Vol. III at 619.

In the ESP II Order, the Commission correctly concluded that the Modified ESP was quantitatively worse than an MRO. To reach this result, the Commission identified the modifications it ordered to the Amended ESP.[9] It then quantified the amount the Modified ESP failed the ESP versus MRO test and determined that the ESP as modified was $250 million worse than an MRO.[10] The Commission's estimate, however, does not include the effects of the Commission's September 6th Entry. In the September 6th Entry, the Commission added $64 million in nonbypassable charges to the Modified ESP that directionally appear to make the Modified ESP even less favorable than an MRO.[11]

Once the Commission determined that the Modified ESP was at least $250 million worse than an MRO, the Commission should have rejected it or made additional modifications to bring the Modified ESP into compliance with the law. Instead, the Commission erred by injecting subjectively valued and unsupported qualitative benefits to offset the substantial amount that the ESP failed the test. The ESP II Order's reliance on qualitative benefits to justify its conclusion that the ESP is more favorable than an MRO was unlawful and unreasonable.

1. The ESP II Orders are unlawful and unreasonable because they assign subjective value to allegedly qualitative benefits of the Modified ESP in violation of the requirement of R.C. 4928.143(C)(1) and R.C. 4903.09 that the Commission provide reasoned decision making

[9] ESP II Order at 49.

[10] *Id*. at 49-50.

[11] September 6th Entry at 2. The Commission does not provide any estimate of the effect of extending the auction-based SSO for an additional five months; thus, it is unclear what the net effect of the Commission's changes will be on the ESP versus MRO test other than to make the Modified ESP less favorable.

In analyzing whether the Modified ESP satisfies the ESP versus MRO test, the Commission must engage in reasoned decision making. In a contested case, R.C. 4903.09 requires the Commission to issue "findings of fact and [a] written opinion [] setting forth the reasons prompting the decision [] arrived at, based on said findings of fact." As the Ohio Supreme Court ("Court") has stated, the Commission in assessing the record must explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.[12] "The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom."[13] Thus, R.C. 4903.09 imposes on the Commission a requirement to apply an objective standard to the ESP versus MRO test.

Because the Modified ESP is substantially less favorable than the MRO on a quantitative basis for all customers, the ESP II Order assigns some indeterminate, but apparently significant, weight to qualitative benefits attributed to the Modified ESP. The Commission does not explain in what way it values the five "qualitative benefits" so as to offset the substantial amount that the Modified ESP fails the ESP versus MRO test.

As demonstrated in more detail below, the Commission's unlawful failure to comply with the requirement to apply the ESP versus MRO test in a reasoned manner supported by the record extends to the September 6th Entry. In that Entry, the Commission increased the cost of the ESP by extending the term of the SSR, but does not discuss whether the Modified ESP, as further Modified by the September 6th Entry, passes the ESP versus MRO test. Clearly, the Modified ESP does not pass on an

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[12] *In re Application of Columbus Southern Power Co.,* 128 Ohio St.3d 512, 519 (2011) (hereinafter "*Remand Decision*").

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

objective basis as, directionally, the quantitative amount by which the Modified ESP is worse than an MRO is increased by $64 million in additional SSR charges.[14] Thus, by any reasoned analysis based on the quantitative results of the ESP versus MRO test, the Commission could not approve the Modified ESP as further modified by the September 6th Entry. Without any further discussion of the effect of the Entry on the ESP versus MRO test, the Commission, nonetheless, approved the Modified ESP. Thus, it again failed to comply with the requirements of R.C. 4903.09.

R.C. 4903.09 requires more than the "trust me" reasoning contained in the ESP II Orders.[15] Without an objective and articulated explanation of how each of the so-called qualitative benefits was weighted, the ESP II Order's subjective qualitative benefits test prevents the parties, the Court, and the public from assessing the validity of the Commission's decision. As a result, the ESP II Orders' conclusion that the Modified ESP is more favorable in the aggregate than an MRO based on subjective and unexplained belief violates the requirements of R.C. 4903.09 that require the Commission to make findings of fact, to base its decisions on those findings, explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.

2. The ESP II Order is unlawful and unreasonable because it fails to address contrary positions and support its decision with appropriate evidence in violation of R.C. 4903.09

The requirements of R.C. 4903.09 also require the Commission to address the merits of the issues presented by the parties. As the Court has stated, the Commission

[14] In the quantitative calculation performed by the Commission the Commission correctly recognized that the full effects of the SSR and the SSR-E must be counted on the ESP side of the test. ESP II Order at 49.

[15] *Remand Decision* at 519.

"should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."[16] With regard to the "qualitative" benefits of the Modified ESP, the ESP II Order failed to address arguments of IEU-Ohio demonstrating that the so-called "qualitative" benefits of the Amended ESP did not support a finding that the ESP, as proposed by DP&L, was more favorable in the aggregate than an MRO.

For example, IEU-Ohio demonstrated that there is no positive benefit for shopping customers from the Amended ESP.[17] The "faster" transition to market-based standard service offer ("SSO") prices is more than offset by the substantial shopping tax DP&L requested and the ESP II Order authorized. For shopping customers, there is only a rate increase. As IEU-Ohio witness Murray correctly observed:

> The reality is the vast majority of DP&L's business customers are already shopping. As of the end of the third quarter 2012, which is the most recent report available, the Commission's electric switching report… shows that 94.31% of DP&L industrial sales are being supplied through CRES providers. For these customers, DP&L's proposed ESP will result in a significant increase in their overall price of electricity.[18]

Nowhere in the Commission's ESP II Order does the Commission address the substantial negative impact that the implementation of nonbypassable charges will have on shopping customers, which make up the majority of DP&L's service territory customer base.

Additionally, IEU-Ohio identified offsetting "costs" associated with the Amended ESP.[19] As with the adverse effects of the Modified ESP on shopping customers, the

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[16] *Id*.

[17] IEU-Ohio Initial Brief at 69.

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

[19] IEU-Ohio Initial Brief at 70.

Commission did not address the offsetting costs when it found that the Modified ESP was more favorable in the aggregate.

Further, IEU-Ohio demonstrated that the so-called benefits of a faster move to a market-based SSO that were advanced by DP&L based on the testimony of DP&L witness Malinak were unsupported by any study or investigation.[20] Mr. Malinak offered nothing specific to the DP&L service territory and was not aware of any change in product mix in any Ohio service territory that resulted from moving to a competitive bidding process ("CBP").[21] Thus, his broad assertion that the Amended ESP Application would provide "difficult to quantify" benefits was nothing more than a subjective guess. In the ESP II Order, the Commission failed to address the actual testimony that provides no objective evidence to support the Commission's conclusion that there will be benefits from the faster move to a CBP-based SSO.

When the ESP II Order concludes that the Modified ESP is more favorable than an MRO, it does so without addressing the material demonstrations that show most customers in the DP&L service territory will not benefit from the Modified ESP, that there are offsetting costs, and that the "qualitative" benefits offered by DP&L are nothing more than an unsubstantiated opinion. Each of these problems with the Amended ESP was squarely presented to the Commission, and the Modified ESP does not eliminate or mitigate any of the concerns raised by these objections. The Commission, however, failed to address them in its order. Because it failed to respond to contrary positions and support its findings with appropriate evidence, the ESP II Order did not satisfy the requirements of reasoned decision making that govern Commission proceedings.

[20] *Id*.

[21] Tr. Vol. III at 652.

Accordingly, the finding that the Modified ESP is more favorable in the aggregate than an MRO is unlawful and unreasonable.

3. The ESP II Order is unlawful and unreasonable because the record does not support the Commission findings that there are qualitative benefits that will result from the Modified ESP. As a result, the ESP II Orders fail to comply with the requirements of R.C. 4928.143(C)(1) and R.C. 4903.09

The Commission identified five "qualitative benefits" and concluded that those offset the $250 million that the Commission found the Modified ESP was worse than an MRO.[22] The various so-called qualitative benefits of the Modified ESP, however, are variously unsupported by the record, rest on faulty factual and legal assumptions, and are largely illusory.

a. There is no benefit from the alleged faster move to a market-based ESP

The Commission asserts that the faster move to a market-based ESP is a qualitative benefit that is "consistent with Section 4928.02(A) and (B), Revised Code."[23] This "finding" that the faster move to a market-based ESP is a qualitative benefit ignores the fact that the Staff calculation the Commission relies upon already incorporates the effects of the use of an auction to set the SSO price. Embedded in the Staff's calculation are the same alleged benefits of "accelerating" the use of an auction to set the price of the ESP that are contained in DP&L's testimony supporting its rejected version of the ESP versus MRO test.[24] Thus, the "qualitative" benefit of the faster move to a market-based SSO is both quantifiable and fully incorporated into the calculation of

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[22] ESP II Order at 50-52.

[23] *Id*.

[24] Staff witness Turkenton relied on an exhibit provided by DP&L to test the Amended ESP. Staff Ex. 8 at 4. The base case calculations DP&L provided incorporated the results of an auction for a portion of the ESP. DP&L Ex. 5 at RJM-1R.

the ESP versus MRO test. The Commission does not explain what additional benefit is not reflected in the quantification already included in the test. As a result, 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 the faster move.

Further, the ESP II Order assumes that the Modified ESP will produce a qualitative "benefit" through a quicker transition to market when that outcome is not within the control of the Commission. Chapter 4928, Revised Code, does not require DP&L to agree to the terms of the Modified ESP or to submit an SSO that establishes default generation supply prices based on a capacity and energy auction.[25] Under these circumstances, it is unreasonable and unlawful for the ESP II Order to conclude that the Modified ESP provides a future qualitative benefit greater than its near-term quantitative disadvantage on the unsupported assumption that DP&L will provide an auction-based SSO on June 1, 2017.

Additionally, the ESP II Order's assumption that a move (faster or otherwise) to a CBP to set the default generation supply price will yield a qualitative benefit demonstrates that the ESP II Order is based on a fundamental misconception about the statutory outcomes required by Chapter 4928, Revised Code. The General Assembly has declared retail generation service to be a competitive service.[26] The General

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[25] R.C. 4928.143(C)(2)(a) permits an EDU to withdraw its ESP application, thereby terminating it, if the Commission modifies and approves the application. The inability of the Commission to dictate the terms of the "next" ESP has recently become an issue with AEP-Ohio. See *In the Matter of the Commission's Review of Customer Rate Impacts from Ohio Power Company's Transition to Market Based Rates*, Case No. 13-1530-EL-UNC, AEP-Ohio Comments at 2-3 (Aug. 12, 2013). The Commission has no control or assurance that the alleged benefits associated with the changes it cannot order will result from the ESP II Order.

[26] R.C. 4928.03.

Assembly's expressed goal is to encourage customer choice through actions by individual customers having comparable and non-discriminatory access to a diverse group of competitive retail electric service ("CRES") providers.[27] The SSO, whether based on an ESP or MRO, contains a default generation supply component for those customers not receiving competitive service from a CRES provider.[28] The statutory scheme specifically limits the role of the EDU to that of a default supplier of competitive services and prohibits an EDU from being directly engaged in the business of providing competitive services except as provided by law.[29] Yet, the ESP II Order authorizes an SSO that stabilizes DP&L's earnings and does not meet the ESP versus MRO test on the belief that a future SSO may produce someday a better default generation supply outcome. In other words, the ESP II Order wrongly elevates a future qualitative goal regarding the default generation supply available from an EDU and the near-term success of DP&L's competitive generation business above the present goal of providing customers with meaningful access to the electricity market at a time when market prices are the lowest they have been in ten years.

By assigning some subjective, but apparently substantial, benefit to the move to a competitively bid SSO, the ESP II Order unreasonably and unlawfully reverses the priorities clearly expressed in Ohio law. The Commission's role in setting the SSO's default generation supply price is specifically limited by R.C. 4928.141 through R.C. 4928.143. That role does not permit the Commission to subordinate the customer choice rights of individual customers because the Commission wants to help an EDU

[27] R.C. 4928.02(A).

[28] R.C. 4928.14.

[29] R.C. 4928.17.

and its generation business evade the discipline provided by customer choice or because the Commission believes that a future default generation supply option may be better, qualitatively speaking. So the fundamental premise of the ESP II Order (a premise that permits future qualitative benefits associated with an unknown default generation supply option outcome to override a clear, near-term quantitative customer choice disadvantage) unreasonably and unlawfully conflicts with the driving purpose of Ohio's electric restructuring legislation contained in Chapter 4928, Revised Code.

The price of the SSO must be set by either a CBP, in the form of an MRO, or tested against the results of an MRO, in the case of an ESP. Under the ESP versus MRO test, the approved pricing and other terms of the ESP must be more favorable than what would result from a CBP.[30] In the ESP II Order, however, the Commission assumes that there is some qualitative benefit to providing customers at some future date an SSO with terms and conditions to which they are already entitled. This assumption that drives the "qualitative" benefit of the Modified ESP turns the statutory structure of the ESP versus MRO test on its legal head and results in a finding that there is a qualitative benefit when customers are actually harmed by the results of the ESP II Order.

b. The alleged improvements in service reliability are based on faulty factual assumptions and an illegal charge

The Commission states that the expensive and unlawful SSR will produce adequate and reliable retail electric service, another qualitative benefit. The reliability

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[30] This conclusion is couched in the limitation that the MRO may include some blending of the prior SSO price; nonetheless the ESP versus MRO test does not permit the Commission to permit a worse result than would result from the blending process provided by R.C. 4928.142(D).

benefit, however, does not and should not arise because of the terms of the Modified ESP.

Retail electric service encompasses both competitive and non-competitive services.[31] Non-competitive services including distribution services remain subject to the Commission's traditional rate regulation.[32] DP&L's distribution service reliability is a distribution function for which DP&L is compensated based on traditional cost-based regulation.[33] Distribution reliability, therefore, is not a function of the Modified ESP.

Further, the record does not support the finding that the SSR will result in improved generation service reliability. DP&L is presently bidding all of its generation assets into the wholesale market and being compensated at market-based prices.[34] Other than some general and unsupported claims by DP&L's witness Malinak,[35] there is no indication in the record that rejecting DP&L's efforts to make its retail customers responsible for subsidizing DP&L's effort to protect the return on equity of its competitive generation business will negatively affect the reliability of the generation supply (or its distribution service, or the transmission grid). Thus, the ESP II Order's finding that the SSR provides some qualitative benefit of service reliability to customers that offsets at least $250 million is unsupported.

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[31] R.C. 4928.01(A)(27) defines retail electric service to include "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption." R.C. 4928.03 declares that retail electric generation service is a competitive service.

[32] R.C. 4928.05(A).

[33] The Commission recognized that DP&L's distribution service remain subject to traditional regulation and ordered DP&L to file a distribution rate case as a condition to any approval of an extension of the SSR. ESP II Order at 27.

[34] Tr. Vol. I at 172.

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

Additionally, the Commission has ignored the role of PJM Interconnection LLC ("PJM") in maintaining system reliability. PJM is responsible for maintaining the real time reliability of the electric grid in a thirteen state region that includes the DP&L service territory.[36] Because the reliability of DP&L's service to its customers as it relates to generation and transmission service is no longer within the control of DP&L, the ESP II Orders' assumption that there is some qualitative benefit to propping up DP&L's return on equity for its generation assets is inconsistent with the actual operation of the electric grid.

Even if authorization of the SSR did affect service reliability, the ESP II Order rests on the fundamentally flawed position that DP&L may cross-subsidize its competitive and non-competitive business segments. (The violation of this policy in regard to the SSR, TCRR, and RR is discussed separately below.) The State energy policy (on which the ESP II Order relies to find that there are qualitative benefits to the Modified ESP[37]) provides that the Commission is to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a non-competitive retail electric service to a competitive retail electric service … *and vice versa*, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."[38] Under this provision of the State energy policy, DP&L's generation, transmission, and distribution segments must stand on their own;

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[36] IEU-Ohio Ex. 2 at 7-8. DP&L does not dispute that PJM is responsible for both supply and transmission service reliability. Tr. Vol. I at 172.

[37] ESP II Order at 50.

[38] R.C. 4928.02(H) (emphasis added).

subsidies between various business segments are unlawful.[39] If retail electric service reliability were a problem (there has been no demonstration that it is), then the correct solution under Ohio law would be for DP&L to file a distribution rate case, not to saddle customers with an unlawful generation-related nonbypassable charge designed to prop up the earnings of DP&L's generation business. The ESP II Order, however, turns the unlawful and unreasonable subsidization of the SSR charge into a supposed "qualitative" benefit of improved service quality.[40] The ESP II Orders' attempt to treat an illegal cross-subsidy as a qualitative benefit is plainly unlawful.

c. The alleged benefits of separation of the competitive generation business from the noncompetitive lines of business are based on faulty legal and factual assumptions

The Commission points to the ESP II Order's requirement that DP&L legally separate its generation as a benefit because it will provide "customers the benefits of market pricing as soon as possible under the circumstances."[41] (The Commission in the September 6th Entry delayed the introduction of a full auction-based ESP until June 1, 2017, several months after the generation assets are to be divested. Under the Commission's logic, this extension should be a qualitative harm, but that harm is not recognized in the September 6th Entry.)

The assumption that customers will somehow benefit from legal corporate separation of generation assets initially suggests the Commission's own confusion

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[39] See *Elyria Foundry Co. v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 305, 315 (2007) (hereinafter *"Elyria Foundry")* (the predecessor of Section 4982.02(H), Revised Code, "prohibits public utilities from using revenues from competitive generation-service components to subsidize the costs of providing distribution service, or vice versa.").

[40] ESP II Order at 51.

[41] *Id*. at 51.

regarding the requirements of Ohio law. Ohio law deems the generation business segment of DP&L's business as competitive now,[42] and it further requires that the EDU may no longer engage either directly or through an affiliate in supplying a competitive retail electric service and a non-competitive retail electric service except under an approved corporate separation plan and only to the extent otherwise permitted by law.[43] If DP&L is in compliance with Ohio law, there should not be any benefit from divestiture that does not already exist.

If there is a "benefit" associated with divestiture, then the benefit is the result of correcting unlawful actions by DP&L. The record does demonstrate that the relationship between the EDU and its generation affiliate is not the arm's length relationship Ohio law requires.[44] If legal separation corrects the anticompetitive behavior that is occurring, competition may improve, but it is unreasonable to assign any "benefit" to separation because it may correct actions by DP&L that are not permitted by Ohio law.

Moreover, the fact that DP&L currently owns generation resources does not legally or logically prevent DP&L's customers from benefiting from market pricing through auctions to set the SSO price. DP&L, like Duke Energy Ohio, Inc. ("Duke"), could offer an auction-based SSO today, without resorting to legal separation of EDU-

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[42] R.C. 4928.03.

[43] R.C. 4928.17(A). R.C. 4928.17(C), permits the Commission to issue an order approving a corporate separation plan that does not comply with the separation legal requirement of subsection (A) for "good cause shown" if the functional separation complies with Commission rules and the policies set out in Section 4928.02, Revised Code. Commission rules require that structural and accounting safeguards to "create competitive equality, prevent unfair competitive advantage, prohibit the abuse of market power and effectuate the policy of the state of Ohio embodied in section 4928.02 of the Revised Code." Rule 4901:1-37-02(B), OAC.

[44] IEU-Ohio Ex. 1 at 6-16; IEU-Ohio Ex. 2 at 11-21.

owned generation assets.[45] It is the Commission's order requiring customers to shore up DP&L's revenue through nonbypassable charges that is preventing DP&L's shopping and non-shopping customers from realizing the benefits of historically low wholesale generation prices by imposing nonbypassable generation-related riders. Once again, the Commission has permitted an EDU to strip away the consumer benefit associated with shopping for the sake of illegal transition revenue or its equivalent. Thus, the claimed benefit from the legal separation of generation assets is illusory.

d. There is no demonstration that the alleged benefit of competitive retail enhancements exceeds the costs paid by customers

The Commission states that the benefits of the competitive retail enhancements it has ordered DP&L to complete will have benefits that exceed their cost of $2.5 million (plus carrying charges). If that is the case, then there should be some evidence in the record indicating the quantitative benefit of these enhancements, but there is not.

e. There is no demonstration that the alleged benefit in competitiveness exceeds the costs paid by customers and the alleged benefit is based on a fundamental misunderstanding of the effect of increased electric bills on the ability of customers to compete in the global economy

The ESP II Order states that the competitive retail enhancements, billing system modernization, and economic development provisions will improve Ohio's competitiveness in the global market.[46] Once again, the ESP II Order fails to point to anything in the record to support this finding. Further, both the competitive retail

[45] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al*., Opinion and Order (Nov. 22, 2011).

[46] ESP II Order at 52.

enhancements and the billing system modernization will be paid for by customers. There is no demonstration that the benefits are in fact any greater than the costs that customers will incur to implement these changes. Moreover, the ESP II Orders ignore the effect of the substantial rate increases the Commission has authorized DP&L to bill and collect. As IEU-Ohio pointed out in its testimony, "It is axiomatic that an ESP that results in higher electricity prices for the vast majority of commercial and industrial customers cannot be properly characterized as creating a more favorable business climate."[47]

f. The ESP II Orders are not based on reasoned decision making in violation of the requirements of R.C. 4903.09

As noted above, the Commission must engage in reasoned decision making.[48] In this case, however, the ESP II Orders do not comply with the requirements of R.C. 4903.09. The ESP II Order is based on nothing more than wishful thinking and unsupported and mistaken conclusions of fact when it finds that the Modified ESP provides a future qualitative benefit greater than its near-term quantitative disadvantage. As a result, the Commission's conclusion that they Modified ESP is more favorable in that aggregate than an MRO is unlawful and unreasonable.

4. The September 6th Entry is unlawful and unreasonable because the Commission increased the total compensation of DP&L without addressing whether the Modified ESP, as revised by the September 6th Entry, is more favorable in the aggregate for consumers as compared to the expected results that would otherwise apply under R.C. 4928.142

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

[48] R.C. 4903.09; *Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 61 Ohio St.3d 396, 406 (1991) (*quoting Columbus v. Pub. Util. Comm'n of Ohio*, 58 Ohio St.2d 103, 104 (1979) (Brown, J., dissenting)).

In the September 6th Entry, the Commission extended the term of the Modified ESP to May 31, 2017, extended the term of its guarantee of transition revenue through the SSR by an additional year (a net increase in the SSR of nearly $20 million over what might be authorized under the SSR-E provided by the ESP II Order for the calendar year of 2016), and permitted DP&L to seek to secure an additional $45.8 million through the SSR-E. Despite the fact that the Commission increased nonbypassable charges by $64 million, the Commission did not address the effect that this increase had on the cost of the Modified ESP in the ESP versus MRO test. Instead, the Commission stated that "the amount that the modified ESP fails the quantitative analysis should be corrected accordingly."[49] Though one might presume that the Commission-ordered changes to the terms of the Modified ESP increased the amount that the Modified ESP failed the ESP versus MRO test, the Commission's September 6th Entry does not indicate how the changes affect the quantitative portion of the ESP versus MRO test in amount or even their direction. Further, the September 6th Entry does not address how, if at all, the increase in the nonbypassable charges altered the Commission's analysis of the "qualitative benefits" of the Modified ESP.

R.C. 4928.143(C)(1) requires the Commission to make a finding that the ESP, as modified, is more favorable in the aggregate than an MRO. R.C. 4903.09 requires the Commission to explain its decision with sufficient detail to enable the Court to determine how the Commission reached its decision.[50] Despite these statutory requirements, the Commission has not provided any explanation as to how the Modified ESP, as

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[49] September 6th Entry at 3.

[50] *Cleveland Electric Illum. Co. v. Pub. Util. Comm'n of Ohio*, 4 Ohio St.3d 107, 110 (1983). For example, the Commission must provide references to the transcript and its reasoning to satisfy the statutory requirements. *Id*.

amended by the September 6th Entry, satisfies the ESP versus MRO test. Because the September 6th Entry provides no findings as to the extent of the changes on the ESP versus MRO test, neither the Court on review of the September 6th Entry nor the parties at this stage of the proceeding have any means of discerning how the Commission reached its conclusion that the as-approved Modified ESP passes the ESP versus MRO test.

Further, there is no legal basis to offset the substantial quantitative amount that the Modified ESP fails the ESP versus MRO test. As demonstrated above, the Commission may not apply unexplained subjective "benefits" when it applies the ESP versus MRO test. Even if there were a legal basis for considering the subjective qualitative benefits, DP&L has not demonstrated and the Commission has not made any findings to show how an ESP that is worse than an MRO by an amount in excess of $250 million can meet the statutory test.

Additionally, there is no basis for the Commission to make a finding that the qualitative "benefits" outweigh the additional costs of the ESP that the September 6th Entry imposes on all customers because the Commission's findings regarding the qualitative benefits are legally insufficient, as discussed in the prior section. In fact, the illusory benefits will financially injure all DP&L customers and undermine the ability of commercial customers to compete locally, nationally, and globally. Accordingly, the Commission should grant rehearing and find that the Modified ESP, as further modified by the September 6th Entry, fails the ESP versus MRO test.

B. The ESP II Order is unlawful and unreasonable because the SSR cannot be lawfully approved in an ESP

1. The ESP II Order is unlawful and unreasonable because the Commission is preempted from increasing DP&L's total

compensation for the provision of wholesale energy and capacity service under the Federal Power Act. In violation of the preemptive effect of the Federal Power Act, the Commission has increased DP&L's total compensation for the provision of wholesale energy and capacity through the SSR

Because DP&L projected that it would receive inadequate wholesale energy and capacity revenue, the Commission authorized the SSR to fill the shortfall.[51] The ESP II Order authorized the SSR at an annual amount of $110 million to enable DP&L to achieve a total company ROE is in the range of 7 to 11 percent. The SSR is unlawful and unreasonable because the Commission is preempted by the Supremacy Clause from increasing DP&L's total compensation for the provision of wholesale energy and capacity.

Under the Supremacy Clause of the United States Constitution, federal law is supreme.[52] Pursuant to the doctrine of preemption, "[i]t is a familiar and well-established principle that the Supremacy Clause U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law."[53] Preemption may be either express or implied through field or conflict preemption.[54]

In a recent decision, *PPL Energyplus, LLC, et al., v. Douglas R.M. Nazarian*, *et al*., Civ. Action No. MJG-12-1286 (decided Sept. 30, 2013) (hereinafter "*PPL Energy*"), the Maryland District Court determined that the actions of the Maryland Public Service Commission ("MPSC") approving a compensation structure that permitted a generator to recover above-market capacity and energy revenue are preempted under the

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[51] DP&L Ex. 1 at 13; ESP II Order at 17.

[52] U.S. Const. Art. VI, Cl. 2.

[53] *Hillsborough County, Fla. V. Automated Med. Labs, Inc.* 471 U.S. 707, 712-13 (1985) (internal citations omitted (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

[54] *Hillsborough* at 713.

Supremacy Clause because the pricing of wholesale capacity and energy sales invades a field occupied exclusively by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act (“FPA”).

Like Ohio, Maryland adopted legislation restructuring its retail electric generation in 1999. The legislation required vertically integrated electric distribution companies to divest their generation and permitted retail customers to shop for retail electric generation service. In 2007, the Maryland legislature directed the MPSC to study re-regulation options.[55] In subsequent proceedings, the MPSC questioned the ability of the wholesale market to relieve a potential capacity shortage, and it issued a request for proposals to secure additional capacity resources.[56] Under the request for proposals, the generator would have to offer its capacity and energy to PJM and be compensated, in part, by PJM.[57] In addition to the compensation for capacity and energy it received from PJM, the generator would also receive an additional payment from the local distribution utilities under a long-term contract that enabled the generator to receive a proposed contract price. As explained by the successful bidder in its response to the request for proposals, the total costs it used to calculate the total charge included costs of construction of the generating plant, the fixed operating costs of going forward such as labor, property taxes and maintenance, financing costs of construction, and a reasonable rate of return.[58] The electric distribution companies that paid the generator amounts in excess of the amounts the generator recovered from PJM for energy and

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[55] *PPL Energy* at 52.

[56] *Id.* at 58.

[57] *Id.* at 64.

[58] *Id.* at 65.

capacity would then be authorized to recover that amount from their Standard Offer Service customers.[59]

The court held that a State regulator is preempted from authorizing a mechanism that increases the total compensation that a utility receives for wholesale energy and capacity sales in PJM markets. While acknowledging that the MPSC retained jurisdiction over matters such as siting, the court went on to state that "after a generator physically comes into existence and operation and participates in the wholesale electric energy market, the prices or rates received by that generator in exchange for wholesale energy and capacity sales are within the sole purview of the federal government."[60]

The court determined that the crux of the problem with the MPSCs actions was the Contract for Differences ("CfD"), which allowed the generator to receive compensation for the difference between an authorized revenue requirement and the revenue that the generator received from participating in the PJM capacity and energy markets. The court determined that because the MPSC had established the total amount of wholesale capacity and energy compensation available to the generator, the MPSC had impermissibly established a wholesale rate within the exclusive jurisdiction of FERC:

> [T]he Generation Order fixes the monetary value of the energy and capacity generated by CPV's facility and actually sold by CPV into the PJM Markets. The monetary value of CPV's wholesale energy and capacity sales dictated by the PSC in the Generation Order is determined outside of the auction mechanisms approved by FERC and utilized by PJM.
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> ***Accordingly, the Court finds that the Generation Order, through the CfD, establishes the price ultimately received by CPV for its actual physical energy and capacity sales to PJM in the PJM***

[59] *Id.* at 66.

[60] *Id*. at 85.

> ***Markets. However, under field preemption principles, the PSC is impotent to take regulatory action to establish the price for wholesale energy and capacity sales.*** FERC has exclusive domain in that field and has fixed the price for wholesale energy and capacity sales in the PJM Markets as the market-based rate produced by the auction processes approved by FERC and utilized by PJM.[61]

Additionally, the court rejected the claim that the CfD was merely a financing arrangement outside the purview of FERC's jurisdiction. Specifically, the court determined that the MPSC had regulated wholesale rates because the payment scheme "is in return, at least in part, for CPV's wholesale sales of capacity and energy in the PJM Markets."[62]

In this case, DP&L is receiving compensation under what it claims are FERC-approved bilateral contracts and FERC-approved PJM prices for its energy and capacity.[63] The Commission has authorized the SSR to increase the total compensation that DP&L receives for its wholesale energy and capacity sales. Similar to the CfD, the SSR is designed to make up the difference between a Commission-authorized revenue requirement and the revenue that DP&L projects it will receive in the PJM markets. By approving an increase in DP&L's total compensation for wholesale energy and capacity, the Commission has acted unlawfully by invading a field exclusively left to federal regulation. On rehearing, the Commission must abrogate its authorization of the SSR.

2. The ESP II Order is unlawful and unreasonable because it authorized DP&L to increase SSO prices to collect above-market generation-related revenue through the nonbypassable SSR, thereby providing DP&L with the ability to collect

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[61] *Id.* at 93 (emphasis added).

[62] *Id.* at 100.

[63] DP&L Initial Brief at 71-74.

transition or equivalent revenue in violation of a Commission-approved settlement obligation and at a time when Ohio law commands that DP&L's generation business be fully on its own in the competitive market. Because the ESP II Order failed to address IEU-Ohio's argument that the SSR represents transition revenue or equivalent revenue, the ESP II Order also violated R.C. 4903.09 and Court precedent that holds that the Commission must address issues raised and positions asserted by parties

DP&L's financial projections indicated that its generation business cannot stand on its own in the competitive market.[64] To staunch the revenue shortfall and to prop up DP&L's total company earnings, DP&L proposed the SSR. Over IEU-Ohio's objection that the SSR would provide DP&L with unlawful transition revenue or its equivalent, the ESP II Order authorized the SSR and the September 6th Entry extended its duration. The ESP II Order is unlawful and unreasonable because the SSR would provide DP&L with untimely transition revenue.

A transition charge may recognize the market value of an asset is less than its book value and provide some means for a utility to recover the differential in cost.[65] As part of the transition to customer choice in the provision of retail electric generation services, Amended Substitute Senate Bill ("SB 3") provided a one-time opportunity for EDUs to recover transition revenue through a transition revenue charge.[66] A transition revenue charge could be authorized if the EDU filed a request within 90 days of the effective date of SB 3 and demonstrated that it had transition costs. Transition costs were: (1) costs that were prudently incurred; (2) costs that were legitimate, net verifiable, and directly assignable or allocable to retail electric generation service

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

[65] Tr. Vol. II at 536.

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

provided to electric consumers in this state; (3) costs that were unrecoverable in a competitive market; and (4) costs that the utility would otherwise have been entitled an opportunity to recover.[67]

Ohio law, R.C. 4928.38, bars the Commission from authorizing additional transition revenue or equivalent revenue after December 31, 2005 outside of what was permitted during the Market Development Period:

> The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues ***or any equivalent revenues*** by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.[68]

Additionally, R.C. 4928.141 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 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, DP&L had one opportunity to collect transition revenue, and the Commission could not lawfully authorize additional transition revenue under the statutory formula described above or on any equivalent basis once that opportunity ended.

To assess whether a charge provides transition revenue or "any equivalent revenues," the Commission must address the purpose of the charge. As DP&L witness Chambers stated, from an economic standpoint, the purpose of a transition charge is to compensate a utility when its assets would not be competitive when subjected to market

[67] R.C. 4928.39. Ohio law permitted recovery of regulatory assets until December 31, 2010. R.C. 4928.40.

[68] R.C. 4928.38 (emphasis added).

prices.[69] Specifically, he agreed that, if DP&L's ROE deficiency is being driven by lower-than-desired generation revenue (which is DP&L's claim), and the SSR is designed to make up the difference, then the SSR is equivalent to a transition charge.[70] Other purposes include ensuring that a utility can pay the legacy debt on its books[71] or to protect the financial integrity of a utility.[72]

Under Ohio law and DP&L witness Chambers' reasoning, the SSR provides DP&L with transition revenue or equivalent revenue. The differential used to calculate the SSR is based on the "lost" revenue associated with customer shopping, lower wholesale revenue, and lower capacity prices.[73] Thus, as a means of providing DP&L with generation-related revenue it could not recover in the market, the SSR is nothing more than an unlawful and unreasonable source of transition revenue or its equivalent.

The ESP II Order held that the SSR does not represent additional transition cost recovery because DP&L has not requested additional transition revenue or claimed that it did not receive sufficient revenue under its electric transition plan ("ETP").[74] Further,

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

[70] Tr. Vol. II at 540-541; *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.

[71] Tr. Vol. II at 537.

[72] *Id.*

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

[74] ESP II Order at 22.

the ESP II Order found that authorization of the SSR is consistent with the Commission's determination in Ohio Power Company's ("AEP-Ohio") ESP case.[75]

Neither of the Commission's rationalizations for the SSR provides a lawful basis for its authorization. DP&L's past recovery of transition revenue under its ETP is not relevant to the question of whether the Commission can lawfully authorize additional transition revenue. By law, it cannot. DP&L must stand on its own in the competitive market. Further, the ETP settlement barred additional transition revenue recovery after December 31, 2003.[76] Thus, by the express terms of both the Commission-approved Stipulation and Recommendation[77] and Ohio law, DP&L is prohibited from proposing and charging a generation-related lost revenue charge, regardless of what it is called or the methodology by which it is computed.[78]

Additionally, reliance on the AEP-Ohio ESP case is misplaced. That case is premised on the same illegal reasoning that infects the decision in this case.[79] In that case, the Commission similarly ignored the restriction on Commission authority to provide transition revenue or its equivalent set out in R.C. 4928.38 and AEP-Ohio's ETP

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[75] *Id.*

[76] *In the matter of the application of The Dayton Power & Light Company for approval of Transition Plan, pursuant to 4928.31, Revised Code and for the opportunity to receive transition revenues as authorized under 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.,* Stipulation and Recommendation at 10 (Jun. 2, 2000).

[77] *In the matter of the application of The Dayton Power & Light Company for approval of Transition Plan, pursuant to 4928.31, Revised Code and for the opportunity to receive transition revenues as authorized under 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.,* Opinion and Order at 29 (Sep. 21, 2000).

[78] R.C. 4928.38.

[79] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO*, et al.*, Opinion and Order at 32 (Aug. 8, 2012) (hereinafter AEP-Ohio ESP).

settlement. Thus, the AEP-Ohio ESP case cannot provide a lawful basis for the unlawful SSR.

Further, the Commission failed to address the merits of the evidence and arguments presented by IEU-Ohio in opposition to the unlawful SSR. IEU-Ohio and others provided substantial and detailed evidence demonstrating that the SSR was a time-barred claim for transition revenue. The Commission failed to address this evidence, instead asserting without discussion that DP&L had not claimed that its ETP failed to provide sufficient revenue.[80] As noted above, this conclusion does not address the evidence presented by IEU-Ohio and others that the above-market generation-related revenue sought by DP&L, and as demonstrated by DP&L's own testimony, is nothing more than transition revenue designed to protect the shortfall in revenue effected by generation competition. The ESP II Order simply ignores this evidence.

In a contested case, R.C. 4903.09 requires the Commission to issue "findings of fact and [a] written opinion [] setting forth the reasons prompting the decision [] arrived at, based on said findings of fact." As the Court has stated, the Commission in assessing the record must explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.[81] In regard to the SSR, the Commission failed to carry out this legal obligation required by R.C. 4903.09.

3. The ESP II Order is unlawful and unreasonable because the SSR provides DP&L with an anticompetitive subsidy in violation of R.C. 4928.02(H)

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[80] ESP II Order at 22.

[81] *Remand Case,* at 519.

According to DP&L, switching, low wholesale capacity prices, and low wholesale energy prices are driving its earnings erosion.[82] The ESP II Order has approved the SSR to improve the earnings of DP&L's generation business. By approving a generation-related charge that is nonbypassable, the Commission has provided DP&L with a competitive advantage that CRES providers simply do not have.[83] As a result, the SSR is structured to provide an unlawful subsidy to DP&L's generation business.

R.C. 4928.02(H) prohibits anticompetitive subsidies. As the Court explained, "each service component [is] required to stand on its own."[84] To that end, R.C. 4928.02(H) "prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing non-competitive distribution service, or vice versa."[85] In *Elyria Foundry*, for example, the Court reversed the Commission on the basis that it was providing the EDU with an illegal subsidy when the Commission authorized FirstEnergy Solutions Corporation ("FirstEnergy") to defer generation-related expenses (fuel) for future recovery in a distribution rate case, stating that the deferred charge provided "cross-subsidization between two of the three major electric-service components."[86] The reason for Ohio's prohibition on subsidies is clear. As stated by DP&L witness Chambers, subsidies have a negative effect on competition.[87]

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[82] DP&L Ex. 1 at 13; ESP II Order at 17.

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

[84] *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St.3d 451, 453 (2004).

[85] *Elyria Foundry*.

[86] *Id.* at 316.

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

In two recent cases, the Commission has refused to cross-subsidize an EDU's generation business segment through a distribution-like charge because the charge would be anticompetitive. In AEP-Ohio's *Sporn* proceeding, the Commission held that pursuant to R.C. 4928.02(H) AEP-Ohio was not entitled to a nonbypassable rider through which it sought to recover costs it alleged resulted from the closure of the Sporn 5 generating unit.[88] The Commission concluded that such a rider would subsidize AEP-Ohio's generation business in violation of R.C. 4928.02(H).[89] Likewise, in Duke's MRO case, the Commission rejected a nonbypassable "circuit breaker" provision—a provision similar to the RR discussed below. Again in reliance on R.C. 4928.02(H), the Commission stated:

> [I]t is the policy of the state to avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service and vice versa. If Duke were permitted to recover the costs included in Rider SCR from shopping customers, under any circumstances, we believe that it would create an anticompetitive subsidy.[90]

By authorizing the SSR, the ESP II Order permits DP&L to subsidize its generation business through a distribution-like charge. The charge is to make up the shortfall in generation-related revenue and it is recovered through a nonbypassable charge.[91]

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

[89] *Id.*

[90] *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) (hereinafter "Duke MRO Order").

[91] ESP II Order at 21-22 (citations omitted). The unlawful intent and effect of the ESP II Order is demonstrated by the Commission's reasoning. The ESP II Order reasoned that it was appropriate to authorize the SSR because DP&L would subsidize its competitive generation service business with

Under R.C. 4928.02(H), the Commission may not authorize a subsidy of DP&L's generation segment, and DP&L agrees. DP&L's expert on this subject, witness Rice, agreed, if the SSR was designed to provide financial support to DP&L's generation business, it would be a subsidy due to its nonbypassable nature.[92] DP&L's own testimony stated that this is exactly what the SSR was designed to do.[93] Because the SSR requires DP&L distribution customers to support DP&L's generation business, the SSR is an unlawful anticompetitive, non-comparable and discriminatory subsidy that must be rejected by the Commission on rehearing.

Under Ohio law, the Commission cannot authorize nonbypassable charges to protect the distribution and transmission services from losses incurred by the generation business. Distribution and transmission service, like generation service, must stand on their own. The authorization of the SSR, however, ignores this prohibition and is thus unlawful and unreasonable.

4. The ESP II Order is unlawful and unreasonable because it permits DP&L, an EDU, to evade statutory corporate separation requirements contained in R.C. 4928.17 and Chapter 4901:1-37 OAC that prohibit an EDU from providing a competitive advantage or preference to its competitive business, or abusing market power, require strict separation

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revenue from its non-competitive distribution business until the whole company ran out of money and each service component failed:

> We agree with DP&L that if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service. Although generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, ***if one of the businesses suffers financial losses, it may impact the entire utility***, ***adversely affecting its ability to provide stable, reliable, or safe retail electric service***.

Id. (emphasis added).

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

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

between competitive and non-competitive lines of business and services, and because it approves an SSO which insulates DP&L's competitive generation business from the discipline of the electricity market. Similarly, the ESP II Order is unlawful and unreasonable because the SSR is designed to compensate DP&L for revenue that it will lose as a result of its power sales agreement with its affiliate DPLER. The ESP II Order is also unlawful and unreasonable because it failed to provide a reasoned explanation in violation of R.C. 4903.09 and Court precedent that requires the Commission to address parties' positions and issues raised in the proceeding

The ESP II Order determined that it was appropriate to authorize the SSR to prop up the earnings of DP&L's competitive generation business until DP&L divests those assets to an affiliate. DP&L requested the SSR to support its competitive generation business, in part, because it is selling power to its affiliate, DPL Energy Resources ("DPLER"), at market-based prices that do not provide DP&L with adequate compensation. The ESP II Order's authorization of the SSR violates corporate separation requirements because the Commission has allowed DP&L to provide a competitive advantage and preference to its competitive generation service and rebundle competitive and non-competitive services when the law requires competitive services to stand on their own in the competitive market.

An EDU may not provide both competitive and non-competitive electric service unless it operates under a corporate separation plan that is consistent with state policy enumerated in R.C. 4928.02 and that ensures that the EDU does not provide a competitive advantage or preference to any part of its business that supplies competitive retail electric service.[94] The corporate separation plan must prevent an

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[94] *See, e.g.*, R.C. 4928.17(A)(2) and (3); Chapter 4901:1-20, OAC; IEU-Ohio Ex. 3 at 6-12. *See also* Tr. Vol. III at 708. As DP&L witness 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

EDU from abusing market power,[95] "the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market."[96] Moreover, transactions between an EDU and its affiliate must be based upon fully embedded costs.[97]

These requirements also apply to an EDU that has retained generating assets and operates under functional separation during an interim period. The Commission has determined that it must stringently review EDUs operating under functional separation because "functional separation allows greater opportunity for cross-subsidization and other forms of anti-competitive behavior as compared with structural separation."[98] To prevent EDUs from abusing functional separation, the Commission's rules require an EDU to treat its generating assets as if they were operated by an affiliate. Accordingly, the Commission's rules provide that "the affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service."[99] Thus, DP&L is prohibited from providing a competitive advantage or preference to either its owned generating assets or DPLER. Likewise, DP&L's corporate separation plan must ensure that DP&L does not attempt to

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to prevent an incumbent utility from favoring or providing an advantage to its generating assets. Tr. Vol. III at 707.

[95] R.C. 4928.17(A)(2). *See also* R.C. 4928.02(I) "[e]nsure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and ***market power***." (emphasis added).

[96] R.C. 4928.01(18).

[97] R.C. 4928.17(A)(3).

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

[99] Rule 4901:1-37-01(A), OAC; Rule 4901:1-20-16(B)(1), OAC.

impose on its customers (for the benefit of itself or its generating assets) electricity prices above the price that would prevail in a competitive market.

The ESP II Order allows DP&L to evade corporate separation requirements pertaining to its own generating assets and DPLER. The cause of DP&L's financial integrity concern is self-inflicted and is the direct result of its improper business relationship with DPLER. As of August 30, 2012, approximately 62% of DP&L's retail load had switched to a CRES provider.[100] The majority of the switched load has been retained by DPLER.[101] The contract between DP&L and DPLER to provide DPLER with generation resources is set at market-based prices.[102] Because the contract is set at a price that is lower than DP&L's cost, the contract violates the requirement that transactions between an EDU and its affiliate be based upon fully loaded embedded costs.[103]

The ESP II Order's authorization of the SSR to offset revenue lost by the portion of DP&L's business that provides competitive retail electric service allows DP&L to abuse market power to impose an above market price on customers to provide a competitive advantage and subsidy to the portion of its business that provides competitive retail electric services. Thus, the SSR provides DP&L's generating assets a nonbypassable revenue stream to insulate it from having to stand on its own in the competitive market. Ohio law prohibits DP&L from abusing market power, extending a

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

[101] *Id.*

[102] *Id.* at 11-13.

[103] R.C. 4928.17(A)(3); Rule 4901:1-37-04, OAC; Rule 4901:1-37-08, OAC.

competitive advantage, preference, or subsidy to its owned generating assets in the form of SSR-like charges.[104]

Each of the arguments above were presented in IEU-Ohio's testimony, Initial Brief, and Reply Brief.[105] Because the ESP II Order failed to address IEU-Ohio's arguments, the ESP II Order failed to provide a reasoned explanation as required by R.C. 4903.09 and Court precedent.

5. The ESP II Order is unlawful and unreasonable because it violates the procompetitive policies of Chapter 4928 and Chapter 1331 of the Revised Code (the Valentine Act). The authorization of the SSR allows DP&L to fix electricity prices at a level that would not occur in a competitive market

Under Ohio law, the Commission is required to ensure that the State policy is effectuated.[106] State policy requires the Commission avoid subsidies, ensure that customers have access to reasonably priced electricity, and protect against market power.[107]

Likewise, as a matter of law and public policy in unregulated markets, Ohio law has long promoted competitive outcomes as reflected in the Valentine Act[108] (Chapter 1331, Revised Code). The Valentine Act declares "trusts" to be unlawful and against public policy. A trust is "a combination of capital, skills or acts by two or more persons . . ." for any of six enumerated anticompetitive purposes.[109]

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[104] R.C. 4928.17(A)(2) and (3); R.C. 4928.02(H); Rule 4901:1-37-01(A), OAC. *See also* IEU-Ohio Ex. 3 at 12.

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

[106] R.C. 4928.06(A).

[107] R.C. 4928.02(A) and (B).

[108] *See generally Google, Inc. v. myTriggers.com, Inc.*, Case No. 11AP-1003, Court of Appeals, Tenth Appellate District, On Appeal from the Franklin County Common Pleas Court.

[109] R.C. 1331.01. The circumstances surrounding the passage of the Valentine Act in 1898 make it clear that this broad language was intended to encompass a much wider array of anticompetitive combinations

The Valentine Act's prohibition of "trusts" was a codification of well-established common law principles, consistent with those embodied in the Sherman Act passed at the federal level eight years earlier.[110] At the heart of those common law principles is the idea that monopolies—concentrations of power in a single entity—are antithetical to the public interest and should be prohibited. *See Central Ohio Salt Co. v. Guthrie,* 35 Ohio St. 666, 672 (1880) (public policy "unquestionably" favors competition and opposes monopolies); *Crawford & Murray v. Hugh B. Wick,* 18 Ohio St. 190, 126 (1868) (voiding a bond that restrains trade because it "tends to a [monopoly] and is against the public good").[111]

In *State v. Standard Oil Co*, the Court found Standard Oil to be a combination "whereby many separate interests being united under one management, form a virtual monopoly through the power acquired of so controlling the production and price of petroleum and its products, as to destroy competition."[112] In 1905, the Court considered the appeal of Perley W. Gage from his criminal conviction under Ohio's new antitrust law for participating in the Delaware Coal Exchange, "an association of persons organized for the purpose of preventing competition in the sale, and to maintain a uniform and graduated figure for the sale of coal . . . ."[113] In *Gage*, the Court recognized

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[everything from a powerful single firm wielding its power to control production or prices (*i.e.*, a combination of the "capital" of shareholders), to collusive agreements among multiple firms in the market (*i.e.*, a combination of "acts" by conspiring firms)].

[110] *See United States Telephone Co. v. Central Union Telephone Co*., 202 F.2d 66, 70 (6th Cir. 1913) (common law principles regarding restriction of competition are codified for Ohio in the Valentine Act and for the United States in the Sherman Act).

[111] *See Salt Co. v Guthrie*, 35 Ohio St. 666, 672 (1880) (public policy "unquestionably" favors competition and opposes monopolies); *Crawford & Murray v. Hugh B. Wick* 18 Ohio St. 190, 126 (1868) (voiding a bond that restrains trade because it "tends to a [monopoly] and is against the public good").

[112] *State v. Standard Oil Co.*, 49 Ohio St. 137, 186 (1892) (hereinafter cited as "*Standard Oil*").

[113] *State of Ohio v. Gage*, 72 Ohio St. 210 (1905) (hereinafter cited as "*Gage*").

that Ohio's new Valentine Act, like the common law on which it was based, proscribed combinations such as those the Court in *Standard Oil* described as "many separate interests being united under one management."[114]

R.C. 1331.01(B)(5)[115] makes it clear that the types of agreements that are unlawful and void under the Valentine Act include pool agreements and other contracts:

> [O]f any kind by which they bind or have bound themselves not to sell, dispose of or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish the price of an

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[114] *Standard Oil* at 183.

[115] R.C. 1331.04 states:

> A violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code, is a conspiracy against trade. No person shall engage in such conspiracy or take part therein, or aid or advise in its commission, or, as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, or rates, or furnish any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violate said sections. Each day's violation of this section is a separate offense.

R.C. 1331.06 states:

> A contract or agreement in violation of sections 1331.01 to 1331.04, inclusive, of the Revised Code, is void.

R.C. 1331.08 states:

> In addition to the civil and criminal penalties provided in sections 1331.01 to 1331.14 of the Revised Code, the person injured in the person's business or property by another person by reason of anything forbidden or declared to be unlawful in those sections, may sue therefor in any court having jurisdiction and venue thereof, without respect to the amount in controversy, and recover treble the damages sustained by the person and the person's costs of suit. When it appears to the court, before which a proceeding under those sections is pending, that the ends of justice require other parties to be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside in the county where the action is pending.

R.C. 1331.99 states:

> (A) Whoever violates section 1331.02 or 1331.05 of the Revised Code is guilty of a felony of the fifth degree.
>
> (B) Whoever violates section 1331.04 or division (L) of section 1331.16 of the Revised Code is guilty of a misdemeanor of the first degree.
>
> (C) Whoever violates section 1331.15 of the Revised Code is guilty of a misdemeanor of the second degree.

> article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected.

DP&L itself consists of separate distribution, transmission, generation, regulated and unregulated lines of business having different interests that operate under one management. These separate lines of business have acted jointly to fix electricity prices at a level that would otherwise not occur in the absence of the SSR. Thus, DP&L's request to establish the SSR is a request to establish the price of one or more electric services "between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of . . ."[116] electricity. It is clear that the ESP II Order authorizes DP&L raise its generation prices to above-market levels, a restraint of commerce that would not otherwise occur. The ESP II Order's approval of the SSR is, by the force of the Valentine Act in addition to the commands in R.C. 4928, unlawful and unreasonable.

6. The ESP II Order is unlawful and unreasonable because the SSR cannot be approved under R.C. 4928.143(B)(2)

a. The ESP II Order is unlawful and unreasonable because it authorized a nonbypassable generation-related rider which is not included on the list of permissive ESP provisions in R.C. 4928.143(B)(2)

The Commission approved the SSR under R.C. 4928.143(B)(2)(d), finding that the mention of "bypassability" in that subdivision permitted the Commission to authorize

[116] R.C. 1331.01(B)(5).

a nonbypassable charge.[117] In approving a nonbypassable charge under division (d), the Commission acted unlawfully.

In addition to the mandatory terms that must be contained in an ESP under division (B)(1) of R.C. 4928.143, the Commission may authorize an ESP that contains only terms authorized by R.C. 4928.143(B)(2). "[I]f a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[118] DP&L has the burden of proof to establish the right to a charge in an ESP.[119]

By authorizing nonbypassable riders in only two instances, the General Assembly did not provide the Commission with authority to approve a nonbypassable rider under R.C. 4928.143(B)(2)(d). The only provisions of R.C. 4928.143(B)(2) that permit the Commission to authorize a nonbypassable rider are subdivisions (b) and (c) that authorize a charge related to post-2009 construction and construction work in progress. Because the section defines particular instances in which a nonbypassable charge may be authorized, by implication other provisions do not.

> As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another. This principle is especially pertinent where … the statute involved is a definitional provision. Had the General Assembly intended to allow the utilities to recapture other types of expenses through this rate, it would have expanded the definitions. In addition, it is well-settled "that the General Assembly's own construction of its language, as provided by definitions, controls in the application of a statute."[120]

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[117] ESP II Order at 21.

[118] *Remand Decision* at 520.

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

[120] *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm'n of Ohio*, 28 Ohio St.3d 171, 175 (1986) (citations omitted).

Because the only authority under which the Commission may authorize a nonbypassable charge is either subdivision (b) or (c), by implication, the Commission has no authority to authorize a nonbypassable charge under subdivision (d).

Accordingly, the Commission's authorization of the SSR under subdivision (d) was unlawful. Further, there is no alternative basis for approving the SSR. The SSR cannot be authorized under either subdivision (B)(2)(b) or (c) because the SSR does not relate to the construction of new generation.[121] Therefore, the Commission should grant rehearing and abrogate its authorization of the SSR as a nonbypassable rider.

b. The ESP II Order is unlawful and unreasonable because it concluded that the SSR can be authorized under R.C. 4928.143(B)(2)(d) even though the SSR will not have the effect of stabilizing or providing certainty regarding retail electric service

The ESP II Order authorized the SSR under R.C. 4928.143(B)(2)(d). Under that Section, the EDU must demonstrate that the provision has the effect of stabilizing or providing certainty regarding retail electric service.[122] Retail electric service is defined by R.C. 4928.01(A)(27) to mean "any service involved in the supplying or arranging of electricity to ultimate customers in this state." Thus, subdivision (d) requires that the EDU demonstrate that the charge will have the effect of making the delivery of electric service more certain or stable.

The ESP II Order determined that "even if DP&L were to propose an MRO, DP&L would still need to maintain its generating assets . . . ."[123] "Therefore, [the Commission found] that Section 4928.143(B)(2)(d), Revised Code, authorizes a financial integrity

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

[122] R.C. 4928.143(C)(1).

[123] *Id.*

charge to the extent that such charge is necessary to ensure stability and certainty for the provision of SSO services."[124] The ESP II Order stated that "DP&L continues to be responsible for offering SSO service to its customers and has demonstrated that the SSR is the minimum amount necessary to maintain its financial integrity to provide such service.[125]

The ESP II Order included one paragraph to discuss how the SSR would provide stability or certainty regarding retail electric service. Specifically, the ESP II Order determined that service may be affected if the financial integrity of DP&L's generation business is compromised, stating: "if one of the businesses suffers financial losses, it *may* impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service."[126] As is evident in the Commission's findings, it did not determine that the SSR was required to effect the stability or certainty of retail electric service; instead, the Commission only found that service quality may be affected if DP&L does not receive additional compensation. This conditional finding does not satisfy the statutory requirement that the charge will have the effect of making retail electric service more certain or stable.

Further, there is no basis in the record for a finding that an additional annual above-market charge is necessary to provide certain and stable delivery of retail electric service because DP&L's service reliability is within the control and supervision of PJM. As DP&L admitted, the performance and ongoing operation of DP&L's generation

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[124] *Id.*

[125] ESP II Order at 22.

[126] *Id*. (emphasis added). Although the ESP II Order stated that an ESP may include terms related to bypassability that provide stability and certainty, the ESP II Order did not specifically hold that the SSR would ensure stability and certainty for retail electric service. Rather, the ESP II Order stated that the SSR satisfies the "second criterion." (relates to bypassability).

business will have no effect on the stability and certainty of default service.[127] Because DP&L operates within the PJM system, the reliability of retail generation service is a function of PJM's management practices and reliability assurance responsibilities.[128] DP&L witness Jackson conceded that PJM would still dispatch resources under its control to satisfy the needs of DP&L's customers if DP&L did not have any generating facilities or if DP&L's generating facilities did not run.[129] In fact, DP&L's Amended ESP Application proposed that DP&L would procure generation service through a CBP during the last year of the ESP. Thus, the record contradicts the ESP II Orders' conclusion that the continued operation or financial performance of DP&L's generation service will have **any** impact on the stability and certainty of retail electric service.

Rather than addressing the record evidence, the ESP II Order has assumed that DP&L's financial integrity, defined as a certain level ROE, is a prerequisite to providing stable and certain retail electric service. As discussed above, it is not necessary to prop up the compensation of DP&L's generating business to ensure that DP&L may provide stable and certain service. And, as discussed below, that reading of the law would lead to an absurd result.

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.[130] To enable a competitive market, the General Assembly

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[127] Tr. Vol. I at 172.

[128] *Id*.

[129] *Id.*

[130] Tr. Vol. III at 709.

took steps to ensure that the incumbent utilities could not provide their competitive lines of business with an advantage not available to other generators.[131] Amended Substitute Senate Bill 221 ("SB 221") did not modify the pro-competitive mission of SB 3; rather, it reinforced the prohibition against recovery of further transition revenue.[132] Whether the SSR provides transition revenue, violates corporate separation requirements, or provides an anticompetitive subsidy, one thing is clear: the General Assembly has prohibited the Commission from approving proposals such as the SSR.

The ESP II Order's authorization of the SSR to support an ROE floor leads to an absurd reading of R.C. 4928.143(B)(2)(d) to the detriment of the balance of Chapter 4928, Revised Code. The ESP II Order leads to a world where EDUs have the ability to collect compensation for default service at the higher of "cost" or market. Under either scenario, customers lose. On rehearing, the Commission must reject this absurd interpretation of the law.[133]

Likewise, the SSR is not necessary to ensure stable and certain transmission and distribution service. DP&L witness Jackson testified that he believed that DP&L's transmission and distribution businesses received adequate revenue to ensure reliable service.[134] Despite this reality, the ESP II Order incorrectly assumes that if DP&L's generation service does not receive its desired level of compensation, it will cannibalize

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[131] DP&L witness 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, customers should not be expected to protect the financial integrity of a utility's non-regulated lines of business. Tr. Vol. II at 549. *See also id.* at 452-53.

[132] R.C. 4928.141.

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

[134] Tr. Vol. I at 242.

revenue from its regulated distribution and transmission services. Ohio law and Court precedent prohibit such conduct.[135] Thus, the ESP II Order justifies the SSR to ensure that DP&L will not violate the law. That justification is unlawful and unreasonable.

Even if the Commission has authority to authorize a nonbypassable financial integrity charge and if DP&L's total company earnings is relevant to such charge, the ESP II Order overstates the level of revenue (a 7 to 11 percent ROE) necessary for DP&L to provide *stable and certain* retail electric service. That level of revenue is the amount that EDUs have traditionally earned under cost-based regulation, but there has been no demonstration that once an EDU's ROE falls below 7 percent its service quality will falter. The ESP II Order failed to identify the minimum level of revenue support DP&L requires to provide stable and certain retail electric service. And, DP&L has not identified the minimum level of financial support that is necessary to address the alleged financial problem or the extent to which the financial problem could have been avoided or mitigated through actions other than increased electric rates.[136]

To the extent that the Commission reasoned, as in the AEP-Ohio ESP case, that the SSR allows DP&L to provide a stable priced SSO, the Commission's determination is unlawful and unreasonable. R.C. 4928.143(B)(2)(d) does not permit provisions that provide price stability—it requires a provision to provide stability or certainty regarding the physical delivery of retail electric service. Additionally, there is nothing certain or

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[135] *Elyria Foundry*, (R.C. 4928.02(H) "prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa.").

[136] Tr. Vol. I at 142. Additionally, DP&L witness Chambers indicated at page 2 of his Second Revised Direct Testimony that an ROE range of 7.7 percent to 10.4 percent is a reasonable ROE for DP&L to maintain its financial integrity, but he did not specify a minimum level of financial support that would avoid, as Mr. Chambers noted at page 1 of his testimony, a severe impact on DP&L's survival probability. IEU-Ohio Ex. 1 at 17.

stable in the above-market rates that would result from the Modified ESP. The proposed multi-year ESP contains several riders that fluctuate and cause uncertainty to customers' electric bills. Those rates will further fluctuate because the ESP II Order directed DP&L to procure a portion of its SSO supply requirements through a competitive bid, in increasing amounts over the term of the ESP, with 100 percent of the SSO ultimately being established by a CBP on June 1, 2017.

Moreover, the ESP II Order's conclusion that shopping and non-shopping customers benefit from the SSO is incorrect and irrelevant. The statutory requirement is that the provision must provide stability and certainty *in an ESP*. Shopping customers will receive no benefit from the nonbypassable price increase imposed upon them by the Modified ESP. The ESP II Order claims that shopping customers and non-shopping customers will benefit from the SSO if market conditions become unfavorable, but the ESP II Order fails to mention that the SSO is designed to move toward market rates. Thus, the SSO will mimic the market rates that the ESP II Order alleges that the SSO provides a safeguard against.

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

7. The ESP II Order is unlawful and unreasonable because the record does not support authorizing DP&L to collect a $110 million per year SSR and the ESP II Order failed to provide a reasoned explanation for its authorization of the SSR. As a result, the ESP II Order failed to comply with the requirements of R.C. 4928.143(C)(1) and unlawfully shifts the burden of proof from the EDU and R.C. 4903.09 and Court precedent that requires the Commission to address parties' positions and issues raised in the proceeding

Not only did DP&L fail to demonstrate that it requires a 7 to 11 percent ROE to maintain stable and certain retail electric service, the record does not support authorizing DP&L to collect a $110 million nonbypassable charge to reach a 7 percent threshold ROE. Ruling on an issue without record support is an abuse of discretion and reversible error.[137]

The ESP II Order's unsupported reasoning assumes that DP&L will achieve an ROE between 7 to 11 percent, but contains no analysis of the contested issues or how it made that determination. In the order, the Commission states:

> [I]t is an ROE target and not an exact determination of the ROE that the utility will recover. In this case, there are a number of factors that impact projections regarding DP&L's financial position. These factors stem from the significant length of time since DP&L's last distribution rate case and the potential ability to seek an increase in distribution rates, the ability of DP&L to reduce its O&M costs and capital expenditures without sacrificing service stability and reliability, the unpredictability of future switching rates, and the unpredictability of future energy and capacity markets. We find that the record of this proceeding demonstrates that, when the approved SSR, O&M savings, capital expenditure reductions, adjusted capital structure, and the potential for a future distribution rate case are considered, DP&L will have a reasonable opportunity to achieve an actual ROE in the 7 to 11 percent range.[138]

Although the ESP II Order recognizes that several factors will influence DP&L's ROE, the ESP II Order failed to address the contested issues or explain how the $110 million per year will allow DP&L to achieve an ROE between 7 and 11 percent.

DP&L witness Jackson indicated that the following factors will impact DP&L's financial performance: SSO sales, switching, wholesale energy prices, generation dispatch, operations and maintenance expenses ("O&M"), and capital expenditures.[139]

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[137] *Remand Decision at* ¶29.

[138] ESP II Order at 26.

[139] *See* DP&L Ex. 1.

The evidence presented in the hearing in this case demonstrates that DP&L provided incorrect projections in each of these categories.[140] The record evidence demonstrates that DP&L will achieve the 7 percent ROE threshold with a nonbypassable charge that is much smaller than $110 million per year. The ESP II Order, however, contains no explanation regarding the manner in which it arrived at the $110 million per year amount or the evidentiary weight it gave to DP&L's incorrect financial projections.

In reaching that result, the ESP II Order does not address several contested issues. The ESP II Order finds that its 7 to 11 percent revenue target is based upon a partial evaluation of the record, stating, "[w]e find that the record of this proceeding demonstrates that, when the approved SSR, O&M savings, capital expenditure reductions, adjusted capital structure, and the potential for a future distribution rate case are considered, DP&L will have a reasonable opportunity to achieve an actual ROE in the 7 to 11 percent range."[141] However, the ESP II Order failed to account for DP&L's incorrect switching forecast, understated generation dispatch, understated energy prices, and understated SSO sales.[142]

Staff witness Benedict testified that DP&L had understated its generation dispatch forecast. As a result, DP&L understated its operating income by $16,873,659 in 2014 and $25,023,407 in 2015.[143] The ESP II Order failed to consider DP&L's understated generation dispatch forecast and the associated revenue impact. The ESP II Order compounded its error by not taking into account the increased compensation

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

[141] ESP II Order at 26.

[142] *Id.* at 21-26.

[143] Staff Ex. 3 at 10. Witness Benedict indicated that he ran his model in December of 2012. Tr. Vol. VI at 1531. Witness Benedict did not forecast DP&L's generation dispatch beyond 2015.

available to DP&L from the increase in wholesale power prices. Staff witness Choueiki testified that DP&L's financial projections rely upon forward power prices that are understated by approximately $3 to $5 per megawatt-hour over the term of the ESP recommended by Staff.[144] The ESP II Order failed to consider the impact of the increased generation dispatch or the impact of increased wholesale energy prices on DP&L's financial projections.[145]

IEU-Ohio raised these arguments in its Initial Brief and the ESP II Order failed to address the arguments. That failure of the ESP II Order, in itself, violates R.C 4903.09.[146]

The impact of the Commission's failure is significant. Although the ESP II Order states that there is "unpredictability of future switching rates,"[147] the Commission did not indicate the weight, if any, it placed on DP&L's or Staff's switching forecasts in calculating the SSR. As Staff witness Choueiki testified, the lower switching projection provided by Staff would increase DP&L's revenue by over $100 million in the first three years of the ESP.[148]

Further, the ESP II Order failed to identify the impact of the slower SSO auction schedule authorized in the ESP II Orders on DP&L's ROE. DP&L proposed to set SSO rates using a phased-in CBP: 10 percent from January 1, 2013 to May 31, 2014; 40 percent from June 1, 2014 to May 31, 2015; 70 percent from June 1, 2015 to May 31, 2016; and, 100 percent starting in June 1, 2016. The ESP II Order, however,

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

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

[146] *Remand Decision* at 519.

[147] ESP II Order at 26.

[148] *Id*. at 25; Tr. Vol. VII at 1908.

authorized a much slower move to a 100 percent CBP: 10 percent from January 1, 2014 to December 31, 2014; 40 percent from January 1, 2015 to December 31, 2015; 70 percent from January 1, 2016 to May 31, 2017. Thus, the ESP II Order authorizes DP&L to serve a larger number of SSO customers at above-market rates than DP&L forecasted in its financial projections. Accordingly, DP&L's ROE will outperform its own projections.

The benefit to DP&L from the slower move to market is substantial. Staff testified that its proposal[149] to speed up the movement to market would decrease DP&L's revenue by $100 million.[150] Staff, however, indicated that under its much lower projection of switching, DP&L would also have $100 million of additional SSO revenue.[151] Because the ESP II Order authorized a slower move to a CBP-based SSO, and DP&L assumed incorrect switching levels, the amount of SSO revenue available to DP&L will be much higher than the $100 million projected by Staff. The ESP II Order failed to account for this revenue.

By failing to address IEU-Ohio's arguments regarding DP&L's incorrect generation dispatch, increased energy revenue, and the impact of the slower move to market, the ESP II Order failed to provide a reasoned explanation to support the $110 million annual SSR charge in violation of R.C. 4903.09 and Court precedent.[152] Moreover, to the extent that the ESP II Order did not give weight to these factors

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[149] Staff proposed establishing SSO rates based upon a CBP in the following percentages: 40 percent from June 1, 2013 to May 31, 2014; 60 percent from June 1, 2014 to May 31, 2015; 100 percent from June 1, 2015 to May 31, 2016.

[150] Tr. Vol. VII at 1908.

[151] *Id.*

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

because their impact was uncertain, the Commission has shifted the burden of proof in the proceeding onto intervenors in violation of R.C. 4928.143(C)(1).

C. The authorization of the nonbypassable Reconciliation Rider is unlawful and unreasonable

As approved, the RR-N will collect deferred balances associated with the Fuel Rider, the Reliability Pricing Model ("RPM") Rider, Alternative Energy Rider ("AER"), and the Competitive Bid True-Up ("CBT") Rider, if any of these four riders accumulate a deferred balance that exceeds 10 percent of the respective rider's base rate.[153] These four riders are themselves bypassable, as is required by law. Because there is no statutory basis for the RR-N, because it provides DP&L with an unlawful and anticompetitive subsidy, and because it violates R.C. 4928.64(E), the Commission should grant rehearing.

1. The RR-N is unlawful and unreasonable because it is not authorized by the provision of R.C. 4928.143(B)(2)

Authorization of the nonbypassable RR-N is not supported by any provision of R.C. 4928.143(B)(2). As the Court has held, "[b]y its terms, R.C. 4928.143(B)(2) allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any provision.' So if a given provision does not fit within one of the categories listed "following" (B)(2), it is not authorized by statute."[154] In the ESP II Order, the Commission failed to identify any legal basis for the RR-N and likewise failed to offer any rationale supporting its decision to authorize the RR-N.[155] The Commission simply noted that it was modifying DP&L's request and was in turn creating a bypassable RR

[153] ESP II Order at 35.

[154] *Remand Decision* at ¶32.

[155] *See* ESP II Order at 34-35.

charge, the RR-B, and a nonbypassable charge, the RR-N. As identified in IEU-Ohio's Brief and as discussed below, the nonbypassable RR-N does not fit under any provision of R.C. 4928.143(B)(2) and therefore the nonbypassable charge cannot be authorized.

On brief, DP&L argued that the nonbypassable RR-N could be authorized under R.C. 4928.143(B)(2)(d).[156] DP&L, however, is incorrect. That Section does not provide for the authorization of a nonbypassable rider.[157] Furthermore, there is no evidence to suggest that the RR-N will have the effect of making "retail electric service more stable or certain," a prerequisite to authorizing a rider under that Section.

"Retail electric service" is defined as the physical "supplying or arranging for the supply of electricity to ultimate customers in this state, from the point of generation to the point of consumption."[158] The RR-N does not make the physical supply of retail electric service more stable or certain; the rider is merely a conditional cost-collection mechanism for already existing riders.

DP&L, however, claims that the RR-N can be authorized under R.C. 4928.143(B)(2)(d) because it would "stabilize retail electric service by stabilizing the rates that customers pay for that service."[159] DP&L's argument ignores the definition of retail electric service, and ignores the requirement that the charge must make the physical supply of electricity more stable or certain.

Even if it were assumed that price stability could meet the requirements of R.C. 4928.143(B)(2)(d), there is nothing stable or certain about the RR-N. The revenue

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[156] DP&L Reply Brief at 56.

[157] *Supra* Argument B.

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

[159] DP&L Reply Brief at 56.

requirement for the rider is completely unknown and DP&L failed to include any projections regarding the magnitude of costs that could be collected if the 10 percent circuit-breaker aspect of the RR-N is triggered.[160] Additionally, the circuit-breaker aspect of the RR-N will cause further rate instability and uncertainty as it switches the manner in which certain charges are billed to customers. Specifically, the RR-N will be billed on a kilowatt-hour ("kWh") basis but the four individual riders subject to the 10 percent circuit-breaker threshold are not all billed on a kWh basis.[161] For example, the RPM Rider, for non-residential customers consists of a demand charge, and the current TCRR, for non-residential customers, is billed on a demand and energy basis.[162] Because DP&L failed to model all of the effects of the RR-N on customers' bills, it is impossible to determine the true rate impacts associated with the RR-N. Furthermore, the instability and uncertainty associated with the circuit-breaker aspect of the rider is not strictly hypothetical: at least two of the four riders subject to the circuit-breaker provision of the RR-N currently have outstanding under-recoveries that would trigger the provision.[163]

Additionally, DP&L's bill impacts, which along with the Amended ESP Application and Rate Blending Plan were ***not*** moved into the record, include no projected costs for

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

[161] Tr. Vol. V at 1334.

[162] *Id*.

[163] IEU-Ohio Ex. 22 (showing the existing under-recovery balances for DP&L's TCRR and RPM riders). DP&L's proposal is to look at the under-recovery balances associated with the following bypassable riders on a quarterly basis: FUEL Rider, RPM Rider, TCRR-B, AER, and the CBT Rider. DP&L Ex. 10 at 8. And it will only be during those quarterly updates that DP&L will determine if any of these riders has an under-recovery balance greater than 10 percent of the base rate of the rider, and if so move the costs that exceed 10 percent of the base rate to the RR. Tr. Vol. V at 1341-43. Furthermore, DP&L's bill impacts, which were not moved into the record, include zero costs attributable to the circuit-breaker portion of the RR. Amended ESP Application at Schedule 7A.

the RR-N.[164] IEU-Ohio, along with numerous other intervenors, identified this issue in a joint pleading filed on October 22, 2012 (before DP&L filed its Amended ESP Application). Despite the issue being brought to DP&L's attention, DP&L did not update its bill impacts when it filed its Amended ESP Application on December 12, 2012. Furthermore, DP&L's bill impacts exclude any analysis of the effect of the RR-N on shopping customers' rates, despite the fact that the majority of the customers that would be billed under the RR-N are shopping.[165]

In sum, there is no statutory support to approve the RR-N on a nonbypassable basis. R.C. 4928.143(B)(2)(d) does not allow the creation of a nonbypassable rider. Furthermore, the RR-N fails to satisfy the requirement in R.C. 4928.143(B)(2)(d), which requires a charge under that provision to make the physical supply of electricity more stable or certain. Finally, even if price stability were somehow a relevant consideration under the provision, the record demonstrates that the RR-N will cause instability and uncertainty in prices. Accordingly, the RR-N is unlawful and unreasonable.

2. The RR-N is unlawful and unreasonable because it authorizes DP&L to potentially recover generation-related costs through distribution rates

The nonbypassable RR-N is unlawful and unreasonable because it provides DP&L with an anticompetitive subsidy in violation of R.C. 4928.02(H). Court and Commission precedent interpreting this Section also require that the true-up of the Fuel Rider, the RPM Rider, TCRR-B, AER and the CBT Rider, must occur on a bypassable basis.[166]

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[164] *Id.*

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

[166] *Elyria Foundry* ¶50. *Sporn Decision* at 16-17, 19 (Jan. 11, 2012).

Indeed, the Commission rejected a similar rider in Duke's MRO proceeding. Duke requested authority to true-up two of its existing riders through a new nonbypassable rider (the majority of the under-recovery balance was attributable to bypassable charges) and proposed a circuit-breaker provision that would make one of its existing bypassable riders nonbypassable.[167] The Commission held that neither of Duke's riders could be approved as proposed.[168] The Commission reasoned that true-ups of bypassable riders cannot be collected on a nonbypassable basis "under any circumstances" because it "would create an anticompetitive subsidy" in violation of R.C. 4928.02(H).[169] Moreover, the Commission also held that Duke's costs associated with serving SSO customers "should not be borne by customers who do not take ... service from Duke."[170]

In the ESP II Order, the Commission again, albeit implicitly, confirmed that costs associated with providing an SSO to non-shopping customers should be borne by the non-shopping customers. Specifically, the Commission split the RR into bypassable and nonbypassable components, and held that the CBP auction costs, CBP consultant fees, Commission consultant fees, audit costs, supplier default costs and carrying costs, (all related to procuring SSO service for non-shopping customers) should all be collected on a bypassable basis.

Despite the clear directive in R.C. 4928.02(H) and the Court's and Commission's clear and straightforward opinions applying that Section, the Commission authorized the

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[167] Duke MRO Order at 56.

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

[169] *Id.* at 63.

[170] *Id.* at 57.

RR-N. The RR-N will allow, if the 10 percent circuit-breaker clause is triggered, generation-related costs to be collected on a nonbypassable basis from all of DP&L's distribution customers. This is a clear violation of R.C. 4928.02(H), as well as the Court's and Commission's prior holdings.

Because the nonbypassable RR-N will result in an unlawful anticompetitive subsidy prohibited by R.C. 4928.02(H), the RR-N is unlawful and unreasonable.

3. The RR-N is unlawful and unreasonable because it will allow DP&L to collect costs of compliance with the alternative energy portfolio requirements on a nonbypassable basis in violation of R.C. 4928.64(E)

The RR-N is also unlawful and unreasonable because it would allow DP&L to collect costs of complying with the alternative energy portfolio requirements (currently collected through the AER) on a nonbypassable basis. R.C. 4928.64(E) provides that "***[a]ll*** costs incurred by an electric distribution utility in complying with the [alternative energy] requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code." (emphasis added). By allowing any under-recoveries associated with the AER, which collects the costs of complying with the alternative energy requirements to be collected on a nonbypassable basis, the RR-N violates R.C. 4928.64(E). Thus, the RR-N is unlawful and unreasonable.

D. The TCRR-N and TCRR True-Up Riders are unlawful and unreasonable

In the ESP II Order the Commission authorized DP&L to bifurcate its TCRR into bypassable and nonbypassable components, effective January 1, 2014.[171] The

[171] ESP II Order at 36.

Commission also unlawfully and unreasonably authorized the TCRR True-Up Rider. Specifically, the Commission held "to the extent necessary, DP&L should file with the Commission a proposal at the end of the ESP term for appropriate collection of any uncollected TCRR balance, including whether the uncollected TCRR balance should be collected through a bypassable or nonbypassable TCRR true-up rider."[172] As discussed below, the TCRR-N and TCRR True-Up Riders are unlawful and unreasonable.

1. The TCRR-N is unlawful and unreasonable because it has the potential to cause shopping customers to be double-billed for transmission service on a going-forward basis. The ESP II Order failed to address arguments that customers will be doubled-billed; thus, the ESP II Order failed to comply with the requirements of R.C. 4928.143(C)(1) and R.C. 4903.09 and Court precedent that requires the Commission to address parties' positions and issues raised in the proceeding

The TCRR-N is unlawful and unreasonable because shopping customers could be billed twice for non-market based transmission charges. IEU-Ohio identified the potential for shopping customers to be billed twice for transmission service. DP&L acknowledged that there is a potential for shopping customers to be billed multiple times for transmission service, yet DP&L did not propose any method to address the problem.[173] DP&L, and now the Commission, failed to set forth a solution to the issue.

The double billing can occur because shopping customers are already paying their CRES providers for non-market-based transmission services, which DP&L also proposes to charge shopping customers through the TCRR-N.[174] For instance, a typical high voltage tariff rate customer (15,000 kW demand, 82 percent load factor) will have

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[172] *Id.*

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

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

an additional $24,900 of transmission costs imposed on it each month.[175] To prevent this typical customer from being double-billed for transmission service, the charges imposed on this customer by its CRES provider need to be reduced by a corresponding amount. However, there have been no guarantees from DP&L or any CRES provider that DP&L and the CRES provider will work together to ensure customers are not double-billed.

The risk of double recovery was acknowledged by DP&L. DP&L witness Seger-Lawson testified that the double-billing issue was so obvious that customers and CRES providers should have already been working out a solution:

> [T]he company proposed this in its original MRO filing which was in March of 2012 and if the parties were drafting contracts for a CRES service anytime thereafter, they should have known that this is the proposal the company would be coming forward with. ***<u>It shouldn't be a surprise to anybody</u>*** because they've known at least since March of 2012 that the company was going to propose a nonbypassable TCRR. ... And I would encourage those customers to go back to their CRES provider and work out something as obviously provisions have changed since that contract was filed.[176]

Thus, the double-billing issue is real.

Simply put, authorization of the TCRR-N will require re-negotiation or adjustment to ***<u>all</u>*** shopping customers' contracts and bills. For a residential customer who pays an all-in price of, for example, six cents per kWh, the six cents includes recovery of non-market-based transmission charges. Thus, the CRES provider serving this hypothetical customer would need to decrease the all-in price, or this shopping customer would pay

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[175] A High voltage tariff rate customer with 20,000 kW demand, 68 percent load factor would have an additional $32,900/month imposed; a Primary Substation rate customer with 10,000 kW demand, 55 percent load factor would have an additional $13,600/month imposed; a Primary Substation rate customer with 30,000 kW demand, 68 percent load factor would have an additional $41,200/month imposed.

[176] Tr. Vol. V at 1356-57 (emphasis added).

the non-market-based transmission costs to its CRES provider, and would again pay DP&L for these same costs through the TCRR-N. Some customers may have contractual language that allows for an automatic reduction in transmission charges, but that is not necessarily the case, and it is highly unlikely the case for all customers. More importantly, DP&L did not introduce any evidence to this effect.

As things currently stand, shopping customers may in fact be billed twice for non-market-based transmission charges. Neither DP&L nor any CRES provider offered any guarantee that shopping customers would not be billed twice. Instead, DP&L asserted that shopping customers should figure it out on their own with their CRES providers.[177] But it is DP&L's request for a nonbypassable transmission rider that is the root of this problem.

Accordingly, the TCRR-N is unlawful and unreasonable. However, if the Commission does not abrogate its authorization of the TCRR-N, the Commission should direct DP&L to guarantee that shopping customers will not be double-billed for the non-market-based transmission costs and establish an audit process to ensure this result.

Although IEU-Ohio's Initial Brief raised the potential for customers to be double-billed, the ESP II Order failed to address IEU-Ohio's argument. As a result, the ESP II Order failed to comply with the requirements of R.C. 4903.09 and Court precedent that requires the Commission to address the parties' positions and issues raised in the proceeding through reasoned decision making.

2. The TCRR-N and TCRR True-Up Rider are unlawful and unreasonable because they violate Rule 4901:1-36-04(B), OAC, and good cause for waiving the Rule was not demonstrated

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

The TCRR-N and TCRR True-Up Rider are unlawful and unreasonable because they violate Rule 4901:1-36-04(B), OAC, which requires that transmission costs be fully avoidable by shopping customers. Although this rule may be waived for good cause, DP&L has not demonstrated good cause for the waiver.[178] Furthermore, in the ESP II Order the Commission did not find that good cause for a waiver exists.

DP&L's Amended ESP Application and pre-filed direct testimony of DP&L witness Seger-Lawson indicated DP&L was seeking a waiver of Rule 4901:1-36-04(B), OAC, but neither the Amended ESP Application nor Ms. Seger-Lawson's direct testimony offered any analysis to demonstrate that good cause existed for the waiver.[179] Based on the unreasonable results produced by DP&L's proposal, the direct testimony did not support a waiver of the Rule.

During her cross-examination, Ms. Seger-Lawson claimed that good cause existed for the waiver because the Commission had waived that Rule for Duke and FirstEnergy.[180] The two cases referenced by Ms. Seger-Lawson, however, do not demonstrate good cause for the Rule to be waived for DP&L. First, both of the cases referenced by Ms. Seger-Lawson were resolved by stipulations; and the stipulations, by their terms, stated that they could not be relied upon except for purposes of enforcement.[181] Furthermore, the stipulations are an agreed-upon package of terms

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

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

[180] Tr. Vol. V at 1349-51.

[181] IEU-Ohio Ex. 24 at 45 ("This Stipulation is submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding ... ."); IEU-Ohio Ex. 26 at 2. The Commission approved these two stipulations without modifying these provisions. *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012); *In the Matter of the Application of*

and conditions and DP&L has not proposed to implement any of the other agreed-upon terms and conditions from those stipulations.[182] For instance, FirstEnergy and Duke both agreed to not collect significant amounts of transmission-related costs from customers.[183] DP&L does not have a similar proposal containing valuable concessions to customers.

Accordingly, DP&L has not provided any substantive basis for the Commission to grant a waiver of its rules, nor did the Commission find that good cause for the waiver had been demonstrated. Furthermore, no evidence was offered to waive Rule 4901:1-36-04(B), OAC, in reference to the TCRR True-Up Rider because the rider was not created until the ESP II Order. Finally, good cause does not exist to waive the Rule because the costs DP&L incurs to serve SSO customers should not be borne by non-shopping customers.

Therefore, the TCRR-N and TCRR True-Up Riders are unlawful and unreasonable because they violate Rule 4901:1-36-04(B), OAC.

3. The TCRR True-Up Rider is unlawful and unreasonable because there is no record support for the rider

The TCRR True-Up Rider is unlawful and unreasonable because there is no record support for the rider. The rider was not requested by DP&L or any other party, and accordingly no evidence was offered during the evidentiary hearing to support its creation. R.C. 4928.143(C)(1), places the burden of proof on the EDU, and R.C.

Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariff Approval, Case Nos. 11-2641-RDR, *et al.*, Opinion and Order at 17 (May 25, 2011) (adopting the stipulation without modification).

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

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

4903.09 requires the Commission to base its decisions on the record before it. The Court has also held it is reversible error when the Commission acts without record support.[184] In authorizing the TCRR True-Up Rider the Commission did not point to any portion of the record that would support the rider, and as mentioned above, no party presented any evidence to support its creation. Accordingly, the Commission's authorization of the TCRR True-Up Rider is unlawful and unreasonable.

4. The TCRR True-Up Rider is unlawful and unreasonable because there is no need for the rider; the TCRR is already a reconcilable rider

The TCRR True-Up Rider is unlawful and unreasonable because it serves no apparent purpose and only serves to complicate the existing reconciliation process for the TCRR. Under current rules, DP&L's bypassable TCRR is trued-up on an annual basis. Commission Rule 4901:1-36-03(E), OAC, also requires interim applications to true-up a TCRR if a large over- or under-recovery is projected. As part of its proposal to bifurcate the TCRR, DP&L indicated that the TCRR-B would undergo an annual true-up process to reconcile the bypassable market-based transmission charges and the TCRR-N would undergo an annual true-up process to reconcile the nonbypassable non-market-based charges. Thus, all of DP&L's transmission charges will already be reconciled without the TCRR True-Up Rider. Accordingly, authorization of an additional True-Up Rider is unreasonable.

5. The TCRR-N and TCRR True-Up Rider to the extent it is made nonbypassable are unlawful and unreasonable because collecting costs associated with serving SSO customers from both shopping and non-shopping customers provides DP&L an unlawful anticompetitive subsidy in violation of R.C.

[184] *Tongren v. Pub. Util. Comm.* 85 Ohio St.3d 87, 90 (1999), *quoting Cleveland Elec. Illum. Co. v. Pub. Util. Comm.,* 76 Ohio St.3d 163 (1996).

4928.02(H), and also violate Commission precedent, which requires bypassable charges to be reconciled through bypassable charges

The TCRR-N and the TCRR True-Up Rider, to the extent it is nonbypassable, are unlawful and unreasonable because they violate R.C. 4928.02(H) by providing DP&L with an anticompetitive subsidy. Both the Court and the Commission have held that generation-related costs incurred to serve SSO customers cannot be recovered on a nonbypassable basis without violating the prohibition on anticompetitive subsides found in R.C. 4928.02.[185]

Similarly, the Commission has held that costs incurred by an EDU to serve its SSO customers should not be recovered from customers who do not receive SSO service.[186] The Commission's precedent requires bypassable costs associated with serving SSO customers to remain bypassable when trued-up. As authorized, DP&L's TCRR-N will reconcile the current under-recovery balance of ***bypassable*** non-market-based transmission charges to the ***nonbypassable*** TCRR-N.[187] The TCRR True-Up Rider may also involve a reconciliation of bypassable costs through a nonbypassable rider.

Despite this prior precedent, the Commission gave no reason for its deviation. According to the Court, the Commission should:

> respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law. This does not mean that the commission may never revisit a particular

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[185] *Elyria Foundry* ¶50; Duke MRO Order at 63.

[186] *Id*. at 57.

[187] DP&L's current TCRR under-recovery balance is $8.4 million and, according to DP&L, a majority of that balance is associated with non-market-based transmission costs. Tr. Vol. V at 1345-1347.

> decision, only that if it does change course, it must explain why. The new course also must be substantively reasonable and lawful.[188]

Further, as demonstrated herein, the Commission's deviation from its precedent is not substantively reasonable or lawful, and therefore the Commission's precedent must control the outcome of this proceeding.[189]

Accordingly, the TCRR-N and TCRR True-Up Rider are unlawful and unreasonable because they violate R.C. 4928.02(H) and also violate the Commission's precedent.

E. The September 6th Entry is unlawful and unreasonable because it substantively modified the ESP II Order. Without granting an application for rehearing, the Entry unlawfully and unreasonably extended the duration of the ESP and increased the amount of nonbypassable charges that customers will pay

An order by the Commission may be modified or reversed as a result of the Commission granting an application for rehearing or by the Court.[190] As stated by the Court, "R.C. 4903.10 appears to permit the PUCO to modify an order only after granting an application for rehearing."[191] Absent an application for rehearing, the Commission may issue an entry nunc pro tunc to correct clerical errors in judgment entries so that the record speaks the truth, but "nunc pro tunc entries 'are limited in proper use to reflecting what the court actually decided, not what the court might or should have

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[188] *Remand Decision* at ¶ 52 (internal citation omitted).

[189] When presented with a situation where an EDU (Duke) requested authority to true-up bypassable costs incurred to serve SSO customers on a nonbypassable basis the Commission (as recommended by Staff) found such a request was unlawful and unreasonable. Duke MRO Order at 61-62. Specifically, the Commission held that Duke's costs associated with serving SSO customers "should not be borne by customers who do not take ... service from Duke." *Id.* at 57.

[190] R.C. 4903.10; R.C. 4903.13.

[191] *Discount Cellular v. Pub. Util. Comm'n*, 112 Ohio St. 3d 360 112 Ohio St. 3d 360 ¶65 (2007).

decided.'" *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 357 (2006) (quoting *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164 (1995).

By its own admission, the September 6th Entry does not reflect what the Commission actually decided in the ESP II Order. The September 6th Entry modifies what the ESP II Order actually decided to "reflect the decision that the Commission intended to issue."[192]

The modifications to the ESP II Order contained in the September 6th Entry are significant and work to increase the duration of the Modified ESP, increase the amount of nonbypassable charges that DP&L may potentially collect from customers by $64 million, and delays the deadline for corporate separation.

While the September 6th Entry recognizes that the substantive modifications to the ESP II Order alter the ESP versus MRO test required by Ohio law, without explaining the impact of its modifications, the September 6th Entry states that "the amount that the modified ESP fails the quantitative analysis should be corrected accordingly."[193]

The modifications contained in the September 6th Entry do not reflect the Modified ESP that was approved by the Commission on September 4, 2013. That modification was not lawfully approved by the Commission and thus the Commission should grant rehearing and revoke the September 6th Entry.

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[192] September 6th Entry at 2.

[193] *Id.* at 3.

III. REQUEST FOR RELIEF

On rehearing, the Commission should find that the Modified ESP fails the ESP versus MRO test. As part of that determination, the Commission should not resort to unsupported findings that "qualitative" benefits outweigh the substantial objective amount that the Modified ESP fails the ESP versus MRO test.

Additionally, the Commission should amend the Modified ESP to bring it into compliance with the requirements of R.C. 4928.143(B) and (C)(1). The ESP II Order unlawfully and unreasonably authorizes the SSR, the SSR-E, the RR, the TCRR-N, and the TCRR True-Up Rider. If the Commission correctly finds on rehearing that the nonbypassable generation-related transmission riders are unlawful and removes them from the Modified ESP, the Modified ESP will conform with the requirement that the ESP is more favorable in the aggregate than an MRO.

Given the material legal problems that are presented in this Application for Rehearing, IEU-Ohio requests that the Commission order as part of the Entry on Rehearing that rates be collected subject to reconciliation. The Commission can and has ordered the collection of rates and charges subject to refund when the legality of the rates was in issue.[194] Under the circumstances presented in these cases, it similarly

[194] When the Commission authorized AEP-Ohio to complete phase I of its plan to construct an integrated gasification combined cycle electric generating facility, the Commission directed AEP-Ohio to collect rates subject to refund. *In the matter of the Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, Entry on Rehearing at 14-16 (Jun. 28, 2006). As a result of the remand of its Opinion and Order in AEP-Ohio's first ESP application, the Commission directed that then-current rates be collected subject to refund until such time as the Commission completed its review of the remanded issues. *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*., Entry at 3-4 (May 25, 2011).

would be proper to direct that the rates be collected subject to reconciliation until such time as the Commission has completed its review of IEU-Ohio's Application for Rehearing and the Court has completed its review of any appeals taken from the Entry on Rehearing. Without such an order, customers subject to the tariffs will be required to pay rates that should be found to be unlawfully and unreasonably authorized without recourse to refund.[195] Such a result would be unreasonable.

Respectfully submitted,

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[195] *Remand Decision*. While a stay of execution is statutorily available, *see* Section 4903.16, Revised Code, it is not practically available to customers due to the bonding requirements.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum In Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 4th day of October 2013, *via* electronic transmission..

/s/ Joseph E. Oliker
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