BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

FIRSTENERGY SOLUTIONS CORP.'S APPLICATION FOR REHEARING OF THE SEPTEMBER 4, 2013 OPINION AND ORDER, AS MODIFIED BY THE SEPTEMBER 6, 2013 ENTRY

Public Version

Pursuant to R.C. § 4903.10 and O.A.C. 4901-1-35, FirstEnergy Solutions Corp. ("FES") seeks rehearing of the Commission's September 4, 2013 Opinion and Order, as modified by the Entry Nunc Pro Tunc issued on September 6, 2013 (the "Entry") (the Opinion and Order and Entry are referred to collectively as the "Order") on the following grounds:

1. The Order is unlawful and unreasonable because it approves an electric security plan ("ESP") that is not more favorable in the aggregate than the expected results of a market-rate offer ("MRO");

2. The Order is unlawful and unreasonable because it approved a Service Stability Rider ("SSR") that is unauthorized and unsupported;

3. The Order is unreasonable and unlawful in that it transitions to market later than even as proposed by Dayton Power & Light ("DP&L");

4. The Order is unreasonable and unlawful in that it fails to identify with specificity the competitive enhancements which DP&L is required to make;

5. The Order is unreasonable and unlawful in that it fails to require immediate structural separation;

6. The Order is unreasonable and unlawful in that it authorizes DP&L to participate in auctions through affiliates and subsidiaries while receiving a generation subsidy through the SSR.

A memorandum in support of this Application is attached hereto and made a part hereof.

Respectfully submitted,

/s/ *Mark A. Hayden*

Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
talexander@calfee.com

Attorneys for FirstEnergy Solutions Corp.

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM IN SUPPORT OF FIRSTENERGY SOLUTIONS CORP.'S APPLICATION FOR REHEARING OF THE SEPTEMBER 4, 2013 OPINION AND ORDER, AS MODIFIED BY THE SEPTEMBER 6, 2013 ENTRY

TABLE OF CONTENTS

I. INTRODUCTION

The Commission approved an ESP for DP&L which is harmful for customers and Ohio's electric market. The Commission's own calculations, which underestimate the ESP's cost, show that customers will pay an above-market subsidy to DP&L of at least $300 million under the ESP as compared to a blended MRO.[1] And when properly compared to a fully market-based MRO as required by Ohio law, DP&L's customers will pay approximately $588 million more under the Commission-approved ESP than they would if allowed access to market pricing.[2] This is more than four times the above-market subsidy that the Commission approved in the AEP Ohio ESP II case on a per customer basis.[3] In essence, the Commission is needlessly imposing a $588 million tax on the Southwest Ohio economy, which already is struggling, in order to protect DP&L's shareholders and DP&L's generating assets from market risk. This is both unlawful and unreasonable.

The Commission made three fundamental errors in its analysis. First, the Commission's two primary bases for approving an ESP that overcharges customers by more than $300 million are both erroneous and unfounded. The Commission's belief that this ESP moves faster to market than a blended MRO is belied by the plain language of R.C. § 4928.142(D), which imposes a five-year move to market only for the first MRO application filed by an EDU. Yet the Commission refuses to compare this ESP to the 100% market-based MRO required by R.C. §

[1] Order p. 50 (finding that an MRO is more favorable by "approximately $250 million"); Entry p. 2 (adding an additional year of guaranteed SSR revenue at $110 million and reducing the SSR-E from $92 million to $45.8 million, and adjusting to account for blending through May 31, 2017).

[2] *See* Attachment A hereto, which updates the calculations in Turkenton Direct, Ex. TST-1. *See also* Ruch Direct, pp. 30-32 and RDR-2 (using 100% market pricing for MRO).

[3] *See* Section I.C, infra; Ruch Direct, pp. 28-29; Case No. 11-346-EL-SSO, August 8, 2012 Opinion and Order, p. 75 (finding MRO more favorable by $386 million).

4928.142(A) because any such MRO would not be a good enough deal for DP&L's generating assets.[4] But this is precisely the comparison mandated by the General Assembly when it enacted S.B. 221. When the proper comparison is made, the ESP as modified by the Commission will cost customers $588 million more than the comparable MRO between January 1, 2014 and May 31, 2017. The Commission cannot avoid its statutory duty to deliver DP&L customers an ESP that is either fully market based or is more favorable than a market outcome.

Indeed, the second "qualitative" benefit described by the Commission – the protection afforded to DP&L's generating assets until they are divested in 2017 – is demonstrative of the Commission's failure to properly implement S.B. 221's goals for market based solutions. Despite the acknowledged failure of the ESP by more than $300 million, the Commission nevertheless found the ESP more favorable in the aggregate because the SSR provides a "qualitative" benefit of ensuring "DP&L can provide adequate, reliable and safe retail electric service until it divests its generation assets."[5] In other words, DP&L is using its failure to move its generating assets to an affiliate as required by Ohio law, and its refusal to do so for at least another 3 ½ years, to pressure the Commission for the SSR. The SSR is not a "benefit" of the ESP when all it does is perpetuate a problem that it is fully within DP&L's control to alleviate at a much lower cost to its customers than the SSR. This position directly conflicts with one of S.B. 221's policy objectives, which is to provide the benefits of competitive market pricing to customers. Under the logic used in the Commission's Order in this case, the more market prices fall and the more the cost of an ESP exceeds an MRO, the more a subsidy is justified to protect the EDU's legacy generating assets. This flawed logic, that flips the policy goals of S.B. 221 on their ear, would make the MRO comparison meaningless and would permit a subsidy of any size

[4] Order, p. 51.

[5] Order, p. 51.

to pass the ESP v. MRO test. If the Commission believes this course is lawful, it should at least attempt to provide a level playing field by equally subsidizing all generation in Ohio, not just DP&L's and AEP Ohio's.[6] Otherwise, S.B. 221 requires the Commission to revise its order finding that protecting DP&L's generating assets, which should be corporately separated under the law, from market pricing is a "qualitative benefit". The SSR is clearly a cost.

Second, the Commission accepted DP&L's completely unsupported financial integrity claim. DP&L provided no evidence that it needs huge above-market charges in order to provide safe and reliable service. Instead, DP&L offered evidence that its return on equity ("ROE") would be lower than it would like. This is not a valid financial integrity claim, as acknowledged by the Commission: "DP&L has not persuaded us that it is facing a financial emergency."[7] The Commission went on to find that "we are not convinced that DP&L could not undertake O&M reductions, a distribution rate increase, or other steps to improve its financial position."[8] Based on these findings, it appears that the Commission found that DP&L is not facing a financial emergency. Ironically, the Commission also found that DP&L should nonetheless receive an $8/MWh subsidy in order to protect its financial "integrity". However, there is no evidence to support such a finding. DP&L's projections were flawed and, even if the projections were accurate, DP&L offered no probative evidence that low ROEs correlated to an inability to offer safe and reliable distribution and transmission service. What DP&L submitted, and what the

[6] DP&L SSR produces an above-market subsidy of approximately $8.00/MWh. AEP Ohio's RSR produces an above-market subsidy of $2.50/MWh through May 31, 2014, and $3.00/MWh from June 1, 2014 through May 31, 2015, not counting the $1/MWh allocated toward AEP Ohio's capacity deferral for its FRR obligation. Case No. 11-346-EL-SSO, August 8, 2012 Opinion and Order, p. 36. At minimum, a level playing field between AEP Ohio and DP&L would require that DP&L's SSR be reduced by more than half and expire on May 31, 2015. Regardless, these subsidies still discriminate against all other unregulated generation in Ohio.

[7] Order, p. 49.

[8] Order, p. 49.

Commission relied upon, is speculation, not evidence. Without such evidence, there is no record support for any "stability" subsidy whatsoever, let alone one which amounts to several multiples of the per-customer subsidy provided to AEP Ohio.

Finally, in subsidizing DP&L's generating assets the Commission overstated its authority under Ohio law. DP&L admitted that its distribution and transmission revenues were sufficient.[9] The Commission cited this admission in the Order.[10] Despite this undisputed fact, the Commission granted DP&L a subsidy for its generating assets because "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."[11] This analysis ignores the limitations placed on the Commission's authority under Ohio law. Post S.B. 3, generation must be on its own in the competitive market.[12] Ohio law does not authorize the Commission to subsidize generating assets out of a fear that reduced generation revenues may, indirectly, affect other functions of an integrated company. No other reading of Ohio law makes sense. R.C. § 4928.38 becomes meaningless if the Commission could subsidize generating assets in this manner, as no utility would be "fully on its own in the competitive market" so long as it owns generation assets along with its distribution and transmission assets. This is not Ohio law, and there is no legal authority under which the Commission is authorized to approve a generation subsidy in this manner.

---

[9] Tr. Vol. XII, p. 2914. Tr. Vol. I, p. 117 ("Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct? A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections."); Tr. Vol. I, p. 118 ("Q. And you believe the transmission revenues would be adequate over the five-year proposed ESP period, correct? A. That is my expectation."); *see also*, Tr. Vol. I, p. 150 ("I believe that the T and D business has sufficient revenue included in it so I do not believe it would have a financial integrity issue for the T and D business.").

[10] Order, pp. 18-19.

[11] Order, p. 22.

[12] R.C. § 4928.38.

The Commission's ESP v. MRO analysis is flawed and fails to properly apply Ohio law to the facts in the record. Thus, the Commission should grant rehearing so that it can rectify its errors.

II. THE ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE IT APPROVES AN ESP THAT IS NOT MORE FAVORABLE IN THE AGGREGATE THAN THE EXPECTED RESULTS OF AN MRO.

A. Following The Material Changes Made In The Entry, The Commission Failed to Determine Whether The ESP Passes The Statutory Test.

In the Order, the Commission found that the ESP was less favorable than an MRO by $250 million.[13] The Entry made substantial changes to several factors relating to the price test, including the length of the ESP, the length of the SSR, the length of the SSR-E, and the length of the last period of the auction blending period.[14] After making these changes, the Commission found that "the amount that the modified ESP fails the quantitative analysis should be corrected accordingly" but did not quantify the amount of that correction.[15] Most importantly, the Commission fatally erred by not revisiting its conclusions reached in the Order to incorporate the Entry's material changes.

The Commission must determine "that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results" of an MRO.[16] The Commission did not make this finding after making the adjustments to the ESP reflected in

[13] Order, p. 50.

[14] Entry, pp. 2-3.

[15] Entry, p. 3.

[16] R.C. § 4928.143(C)(1).

the Entry.[17] This is plain error, as the Entry's changes to the ESP were significant. The Entry added $63.8 million in SSR revenue,[18] along with increased generation revenues during the period from January 1, 2017 through May 31, 2017. As the revisions in the Entry were material, the Commission erred by failing to make a finding as to whether an ESP that overcharges retail customers by more than $300 million (actually by $588 million) is more favorable in the aggregate than an MRO.

B. Following The Material Changes Made In The Entry, The Commission Made No Findings Supporting Approval Of The ESP As Required By R.C. § 4903.09.

Ohio law requires that the Commission file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."[19] Here, the Commission made significant changes to the ESP which have the net effect of increasing the amount by which the ESP fails the quantitative analysis. However, the Commission failed to make a finding of fact in the Entry relating to the amount that the ESP fails the price test. This error is material, as the Supreme Court must be able to evaluate whether the Commission reached the appropriate decision in this case, which it cannot do without a finding of fact regarding the amount by which the ESP overcharges customers as compared to market rates.

The Commission also violated R.C. § 4903.09 by failing to set forth its reasons for approving an ESP that overcharges customers by more than $300 million (if incorrectly compared to a blended MRO) or by $588 million (if correctly compared to a market-priced

[17] Perhaps the Commission's error was influenced by the improper description of the Entry as a nunc pro tunc entry. Because the Entry created additional rights for DP&L and did not merely correct a clerical error, it was not a nunc pro tunc entry. *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, et al., Entry on Rehearing ¶¶ 11-12 (Feb 14, 2012); *Perfection Stove Co. v. Scherer*, 120 Ohio St. 445, 448-49, 166 N.E. 376 (1929).

[18] $110 million increase in SSR revenue less $46.2 million SSR-E revenue decrease.

[19] R.C. § 4903.09.

MRO). In order to satisfy R.C. § 4903.09, the Commission should grant rehearing to provide its findings of fact and reasons supporting approval of the ESP pursuant to the statutorily-mandated ESP v. MRO test.

C. The Commission Did Not Properly Quantify The ESP's Costs.

In the Order, the Commission found that the ESP failed the price test by approximately $250 million.[20] The Entry added $63.8 million in SSR revenue, for a total ESP failure of $313.8 million.[21] Under Staff's blending assumptions for 2017, the ESP would fail by approximately $304 million.[22] The Commission compared the ESP to an MRO that would start on January 1, 2014 and include the blending percentages in R.C. § 4928.142(D).[23] The use of the blending percentages for what would be a comparison to DP&L's second application for an MRO was unlawful and unreasonable.

The blended MRO pricing found in R.C. § 4928.142(D) is authorized only for "[t]he first application filed under this section."[24] It is undisputed that DP&L's first application filed under R.C. § 4928.142 was filed on March 30, 2012 and later withdrawn.[25] Therefore, under the plain terms of R.C. § 4928.142(D), DP&L's ESP application should not be compared to an MRO with gradually increasing auction percentages, but should instead be compared to an MRO with an

[20] Order p. 50. Witness Turkenton's calculations as modified by the Commission show that the ESP actually failed the test by $257 million. *See* Attachment B (showing arithmetic of the changes to Witness Turkenton's calculations based on the Order). .

[21] $110 million in SSR revenue increase less $46.2 million SSR-E decrease.

[22] Turkenton Direct, Ex. TST-1 (as modified to accept the Commission's $250 million calculation provided in the Order, to incorporate the incremental SSR and SSR-E revenues, and to estimate the impact of blending for an additional five months).

[23] Order, p. 49.

[24] *See also* R.C. § 4928.142(D) ("The standard service offer price for retail electric generation service *under this first application* shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load" (emphasis added)).

[25] *See* Malinak Rebuttal, p. 12.

immediate 100% transition to market pricing through the competitive bid process ("CBP") mandated by R.C. § 4928.142(A).

Using Staff's market price projections and accepting the Commission's modifications to the ESP, the ESP with its slow transition to market as compared to a market-priced MRO fails the statutory test by approximately $588 million.[26] More specifically, the ESP as approved will cost each DP&L customer an average of $1,146 over the ESP period as compared to an MRO with 100% market pricing.[27] On a dollar per megawatt hour basis, the ESP as modified by the Commission will cost DP&L's customers an extra $12.46 for every megawatt hour used, which, incredibly, is more than four times the additional cost imposed on AEP Ohio's retail customers by its ESP.[28]

The Commission found that "we are not convinced by FES that DP&L has already filed its 'first application' for an MRO within the meaning of Section 4928.142(D)."[29] The Commission does not explain why FES has failed to convince the Commission on this point. In fact, FES simply relies on the text of the statute. It is beyond dispute that DP&L's first application filed under R.C. § 4928.142 was filed on March 30, 2012 and subsequently withdrawn.[30] Thus, DP&L's pending ESP must be compared to the expected results of a future MRO that could be implemented for the equivalent January 1, 2014 through May 31, 2017 period. Any such MRO would not result from the first application filed by DP&L under R.C. §

[26] *See* Attachment A hereto, which updates the calculations in Turkenton Direct, Ex. TST-1. *See also* Ruch Direct, pp. 30-32 and RDR-2 (using 100% market pricing for MRO).

[27] *See* Ruch Direct, p. 30 and Attachment A hereto (513,524 customers divided into $588,405,709).

[28] *See* Ruch Direct, p. 29 and Attachment A hereto (Annual MWh sales of 13,822,395 for 41-month ESP = 47,226,516 MWh, divided into $588,405,709). Even if an MRO with blending is considered, the ESP would still cost customers approximately $6.44/MWh (47,226,516 MWh divided into $304,000,000). This is more than double the per MWh cost of the AEP Ohio ESP.

[29] Order, p. 51.

[30] Malinak Rebuttal, p. 12; Tr. Vol. IV, p. 1146.

4928.142. Statutes should be given their plain meaning, and the plain language of the statute limits the blending of market and SSO pricing only to the first application filed by an EDU. The General Assembly certainly could have made the first Commission-*approved* MRO the trigger for the blending in division (D), but it did not.[31] In fact, **DP&L witness Herrington admitted that DP&L was not asking the Commission to compare its ESP proposal to its first MRO application**.[32] The Commission does not need to be convinced that DP&L already filed and withdrew its first application – it is an undisputed fact.

Perhaps the Commission is questioning why the plain language of the statute is what it is, and a quick review of S.B. 221's history makes this apparent. When S.B. 221 passed in 2008, the General Assembly was concerned that utilities that had not transferred their generating assets would seek to take advantage of what was then higher energy prices by moving immediately to full market pricing through an MRO.[33] However, after that first application was implemented, or after an ESP was implemented instead, the General Assembly ensured that all future SSO plans would either receive full market pricing or be measured against full market pricing.[34] The expectation in 2008 was that division (D) would limit the first application for an MRO to a blending period that would slowly increase the utility's rates to market, while allowing the Commission to adjust those rates upward more rapidly at its discretion. Because competition was eventually expected to reverse what was then higher energy prices and the General Assembly intended that customers receive the benefit of those lower prices in the future, division

[31] *See* R.C. § 4928.142(F), which prohibits the future filing of an ESP if the Commission approves the first MRO application filed by an EDU.

[32] Tr. Vol. IV, p. 1147 ("Q. Fair to say you are not asking the Commission to compare this ESP to the MRO that was filed last March? A. That's correct.").

[33] *See* Tr. Vol. IX, p. 2383.

[34] If the Commission approves the first application for an MRO, R.C. § 4928.142(F) ensures that customers receive the benefit of market pricing after that first MRO ends.

(D) was expressly limited to the first MRO application filed. For DP&L, that was its March 30, 2012 application. The Commission recognized in the Order that this withdrawn MRO is not before it[35] and DP&L's President agrees.[36] DP&L's first MRO application is not relevant to the ESP v. MRO test required in this proceeding other than as evidence that DP&L has already filed its first MRO application.

The Commission found that the comparison to immediate market rates was not appropriate because "we are not convinced that DP&L could immediately divest its generation assets and still provide stable, safe, and reliable retail electric service."[37] This finding is irrelevant. First, an MRO with full market pricing does not require immediate divestiture. Second, the ESP v. MRO comparison required by R.C. § 4928.143(C)(1) is simple. The Commission is required to compare the results of the ESP with the results which would otherwise occur under R.C. § 4928.142. If the MRO bidding process satisfies the competitive market criteria set out in the statute, the Commission shall select the winning bidders and the winning bids converted to retail rates shall be the SSO.[38] Nothing in R.C. § 4928.142 authorizes the Commission to delay an immediate transition to market pricing pending generating asset divestiture. Instead, R.C. § 4928.142(D) imposes a delay in the transition to market pricing for only the "first application" for an MRO. As the Commission is not authorized to consider DP&L's preferred asset divestment strategy when conducting the ESP v. MRO test, this portion of the Commission's decision is unlawful.

[35] Order. p. 49 ("While we note that an MRO is not currently before us, ...").

[36] Tr. Vol. IV, p. 1147.

[37] Order, p. 51.

[38] R.C. § 4928.142(C).

The Commission also found fault with FES's position because it believed that an MRO going immediately to 100% market rates would "create substantial quantifiable and non-quantifiable costs to DP&L and its customers, and we do not expect that such an MRO would be proposed by DP&L or authorized by the Commission."[39] The Commission never explains why the likelihood of such a proposal being made or accepted is relevant. Neither R.C. § 4928.142 nor R.C. § 4928.143 reference either of these factors, and they are in fact irrelevant to the statutory test. The test mandated by the General Assembly requires that an ESP be compared to the result of an MRO that adheres to the process set out in R.C. § 4928.142. An EDU or the Commission may fear that market pricing might be too low (ironically, a situation in which customers would actually benefit from substantial savings), but that fear does not and cannot alter the expected MRO result. Indeed, if an EDU's unwillingness to file an MRO when generation prices are low were a valid consideration, then customers would always be denied the benefits of competitive market pricing by DP&L and other vertically-integrated EDUs. And the Commission's unwillingness to implement the pro-market policies it is required by S.B. 221 to implement also cannot be a valid consideration. The Commission's selective dislike of competitive market pricing (i.e., bad for AEP Ohio and DP&L customers, but good for FirstEnergy customers) is not a legitimate excuse for selectively assigning costs to that pricing when conducting the ESP v. MRO test.

The law is clear. DP&L has already filed and withdrawn its first MRO application, and the statutory blending percentages in R.C. § 4928.142(D) apply only to the first MRO application. Therefore, the Commission was legally required to compare DP&L's ESP to a true

[39] Order, p. 51.

MRO with 100% market pricing. The Commission's failure to do so was unlawful and unreasonable.

D. The Non-Quantifiable Benefits Of The ESP Do Not Outweigh The Costs Of The ESP.

Although the Commission did not make any findings of fact regarding how badly the ESP fails the statutory price test, there is no dispute that the ESP will result in hundreds of millions of dollars in above-market charges to customers. The question becomes whether the ESP offers non-quantifiable benefits which outweigh more than $588 million in direct costs of the ESP.

1. The ESP Transitions To Market Slower Than An MRO.

The primary benefit of the ESP, as cited by the Commission, is that it "moves more quickly to market rate pricing than under the expected MRO."[40] In fact, the reverse is true. The Commission's finding is based on the misunderstanding that the blending percentages in R.C. § 4928.142(D) would apply to a future MRO. As discussed above, any future MRO would provide retail customers the immediate benefit of 100% market pricing from day one. In comparison, the Commission approved an ESP that slowly transitions from 10% to 70% market pricing through May 31, 2017, and never achieves 100% market pricing.[41] Thus, the ESP transitions to market pricing much slower than an MRO.

Because an MRO would transition to market pricing more rapidly than the ESP favored by the Commission, the Commission plainly erred in finding that a faster transition to market pricing was a non-quantifiable benefit of the ESP.

[40] Order, p. 50.

[41] Entry, pp. 2-3.

2. The Benefits Of A "Faster Transition To Market" Have Been Quantified.

As discussed above, an MRO should immediately transition to 100% market pricing, and therefore there is no "transition to market" benefit associated with this ESP. Even if this argument were rejected, the Commission's reliance on the ESP's allegedly faster transition to market pricing as a non-quantifiable benefit fails for another reason: any alleged benefit is quantifiable. In fact, the price benefits associated with a faster transition to market were incorporated into the price test conducted by all parties, including Staff and DP&L, that compared the proposed ESP to a proposed MRO with blended SSO rates.[42] That analysis quantifies the benefit to customers from transitioning to market pricing. Therefore, the "faster" transition to market is not a non-quantifiable benefit of the ESP and cannot be used to outweigh its obvious cost to customers.

3. The SSR Is Not Necessary To Maintain DP&L's Financial Integrity Until It Divests Its Generating Assets.

The second non-quantifiable benefit of the ESP, according to the Commission, is that DP&L's receipt of a $375.8 million subsidy in the form of the SSR and SSR-E will ensure that it can provide reliable electric service until it divests its generating assets.[43] Such a subsidy would not be available to DP&L if it applied for an MRO, because, as the Commission found, DP&L failed to demonstrate that it would face a financial emergency without a $375.8 million infusion.[44] However, the Commission determined that it could approve the SSR simply to promote stability, which, the Commission found, is a lesser standard than financial emergency.[45]

---

[42] *See, e.g.*, Turkenton Direct, Ex. TST-1; Ruch Direct, Ex. RDR-1; Malinak Direct, Ex. RJM-1 (Second Revised).

[43] Order, p. 51.

[44] Order, p. 49.

[45] *See* Order, p. 49.

Although the SSR has an ascertainable cost, the Commission determined that the stability benefit outweighs the cost of the ESP to customers.[46]

The Commission's reasoning is faulty on numerous grounds, not the least of which is its conclusion that it must subsidize DP&L's generating assets until divestiture as the only option for DP&L's customers to obtain "the benefits of market pricing as soon as possible under the circumstances."[47] Even if we assume DP&L cannot achieve structural separation of its generating assets until May 2017 (which is a false assumption), that assumption does not lead to the conclusion that DP&L's customers cannot obtain market pricing under an SSO until then. DP&L can conduct a 100% CBP for SSO supply starting January 1, 2014, regardless of whether it owns generating assets. Under S.B. 221, customers are entitled to receive market pricing or better, and generating asset divestiture is unrelated to this mandate. Indeed, if DP&L's continued ownership of generating assets is the problem, the obvious solution is a clear Commission order directing structural separation within a reasonable time, such as within the next twelve months in order to provide time for FERC approval. DP&L was willing to achieve full separation on that time schedule in 2000, and there is no legitimate obstacle to doing so now.[48]

a. No record evidence shows that the SSR is needed to prevent service degradation.

Although not made clear in the Commission's Order, presumably the Commission believes that DP&L will not be able to provide reliable electric service but for the financial boost DP&L will obtain from the SSR subsidy. However, there is no record evidence to support this

[46] Order, p. 51. As noted above, the Commission has not determined whether the stability benefit of the SSR outweighs the actual $588 million cost of the ESP.

[47] Order, p. 51.

[48] FES Ex. 11 (1999 DP&L corporate separation plan); Tr. Vol. III, p. 714. To the extent DP&L complains of obstacles to achieving structural separation, those same obstacles existed in 2000.

belief. In the Order, the Commission cites conclusory statements by DP&L witnesses claiming that "if [DP&L's] financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service."[49] Yet the testimony of these witnesses is nothing more than support for the proposition that huge above-market subsidies would make life easier for DP&L and harder for its customers. The Commission cites to Mr. Jackson's rebuttal testimony, Ms. Seger-Lawson's rebuttal testimony, and Mr. Chamber's direct testimony,[50] but none of these citations provide actual evidence that DP&L's retail service will suffer but for the SSR revenue. The most that can be gleaned from this testimony is that low generation revenues are expected to result in a temporary reduction in DP&L's ROE until such time as DP&L completes structural separation of its generating assets.

However, nothing cited by the Commission makes the connection between a lower ROE for DP&L's generation function during the ESP period and destabilization of DP&L's electric service. None of DP&L's witnesses explained how lower returns on equity would **destabilize** electric service. For example, Mr. Jackson simply stated in conclusory fashion that it needs SSR revenues to separate its generating assets by December 31, 2017.[51] Ms. Seger-Lawson simply restated the language of R.C. § 4928.142(B)(2)(d); she said nothing about whether DP&L's service would be inadequate without the SSR subsidy.[52] Mr. Chambers erroneously testified that utilities operating in competitive markets cannot be guaranteed a specific rate of return but should have an opportunity to earn an adequate rate of return.[53] He admitted that, even without the SSR and ST and with increased switching, DP&L will have that opportunity, although its

[49] Order, p. 21.

[50] Order, pp. 21-22, citing DP&L Ex. 16A, DP&L Ex. 12, and DP&L Ex. 4A, respectively.

[51] Jackson Rebuttal, p. 7.

[52] Seger-Lawson Rebuttal, p. 23.

[53] Chambers Direct, p. 54.

credit rating could fall to BB with an additional downgrade to B by 2017.[54] The Commission makes the leap from "financial stress" to service degradation without any evidence in support. And even more importantly, none of DP&L's witnesses provided concrete, probative evidence as to the magnitude or existence of any risk of service degradation. Certainly, DP&L's witnesses provided no evidence valuing any harm to customers caused by that risk at more than $588 million. Speculation is not evidence.

The Commission has long held that conclusory assertions, without evidentiary support, are not sufficient to support a valid claim. *See, e.g., In re Columbus Southern Power Co.*, Case No. 11-346-EL-SSO et al., Entry on Rehearing, p. 6 (Jan. 30, 2013) (rejecting IEU factual assertion which was "conclusory in nature"); *In the Matter of the Complaint of Ohiotelnet Inc. v. Windstream Inc.*, Case No. 09-515-TP-CSS, Opinion and Order, p. 21 (Sept. 20, 2011) (rejecting complaint supported only with conclusory allegations). Conclusory statements are not a substitute for real empirical evidence. *In re East Ohio Gas Co.*, 98-594-GA-COI et al., 2000 WL 1751530, Finding and Order, p. 5 (Aug. 24, 2000) (Concurring opinion of Commissioner Glazer pointing out that the utility had not established the fact at issue or provided evidence of the constraints on its system, but instead had offered only the conclusory assertion that reliability was "at risk"). This standard is hardly unique to Commission proceedings, and is also often seen in civil cases. *See, e.g., Suleiman v. Ohio Edison Co.*, 146 Ohio App.3d 41, 47 (7th Dist. 2001) (finding that unsupported factual assertion regarding a meter's operation was conclusory and not sufficient to defeat a motion for summary judgment). DP&L's attempts to tie SSR revenue to service stability are equally unfounded and conclusory.

[54] Chambers Direct, p. 48, Appendix B and Second Revised WJC-8 (showing that impact of no SSR or ST is possible credit rating downgrade but that DP&L will maintain capacity to meet its financial commitments); Tr. Vol. II, pp. 460-63 (Chambers discussing credit ratings listed in his Appendix B).

The Commission cites to the same testimony, Jackson, Seger-Lawson and Chambers, to support the proposition that "the proposed SSR amount is the minimum that DP&L would need to provide stable, safe, and reliable service"[55] The citation is completely inaccurate. None of these witnesses provided an opinion on this point, and certainly none of these witnesses provided actual evidence that would support such an opinion. In fact, Mr. Jackson admitted that he did **no analysis** to determine that the SSR proposed by DP&L was the minimum amount needed to ensure DP&L's financial integrity.[56] DP&L's witnesses did not provide any explanation of why a generation subsidy is necessary to ensure adequate distribution service, which specific O&M spending projects were necessary to ensure adequate service, or how customers would be affected if DP&L were not granted a subsidy. Other than testimony regarding DP&L's ROE and credit rating, there is absolutely nothing in the record which establishes how customers would be harmed if DP&L were exposed to the competitive market as mandated by Ohio law. Without any evidence on this point, the Commission erred in concluding that the SSR outweighs the cost of the ESP.

Although the Commission stated that lower revenue earned by DP&L's generation function "***may*** impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service", this is purely speculation.[57] Why would this be the case? Why would temporary generation losses cause the distribution function of this functionally separated utility to degrade fourteen years after S.B. 3 became law in Ohio? Is the Commission ignoring that DP&L's distribution function remains subject to Commission regulatory authority, and that DP&L's service quality is governed by the Electric Service and Safety Standards, O.A.C.

[55] Order, p. 17.

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

[57] Order, p. 22 (emphasis added).

4901:1-10-10? DP&L failed to offer answers to these essential questions, and the Commission did not address them in the Order. DP&L offered no evidence that it would be unable to meet its basic obligations as an EDU. To the contrary, while Ohio law requires that DP&L's generation revenues be dependent upon market pricing, DP&L's distribution function is not relieved of its obligation to meet reliability targets.[58] DP&L's belief that market pricing will result in lower ROEs than it would like simply is not evidence of service quality degradation.

DP&L never provided any details in support of its financial integrity claim, or even explained how its purported financial integrity issues could possibly affect customers. Therefore, it was unreasonable and unlawful for the Commission to funnel hundreds of millions of customer dollars to DP&L's generation function to ensure "stable" electric distribution service when there is no evidentiary support for such a claim.

b. The Commission's conclusion that the SSR outweighs the cost of the ESP conflicts with governing law.

The Commission found that "DP&L has not persuaded us that it is facing a financial emergency pursuant to the MRO statute."[59] In light of this finding, there is no justification for considering DP&L's financial integrity to be a non-quantifiable benefit of the ESP. If DP&L has not established that a financial emergency exists, then DP&L's alleged financial distress has no bearing on the test whatsoever.

Any EDU would benefit from a subsidy in the form of a nonbypassable charge, and therefore any subsidy could by definition be included in the ESP v. MRO test as a non-quantifiable benefit outweighing its cost. This conjecture is not based on facts or evidence. The

[58] *See* PUCO Case No. 12-1832-EL-ESS (updating DP&L's reliability targets).

[59] Order, p. 49.

General Assembly could not have intended that EDUs in Ohio receive massive subsidies when it instructed the Commission to approve an ESP only if it is better than market pricing.

The logical reading of R.C. § 4928.143(C)(1) is simple. If there is a valid financial emergency affecting an EDU, then this financial emergency would affect customers under either an MRO or an ESP. It would be in customers' best interests to ensure the continued operation of the EDU, and therefore this may be an appropriate consideration in the ESP v. MRO test – only so long as the EDU met the statutory requirements for a financial emergency. If there is not a financial emergency under R.C. § 4928.142(D), then "financial integrity" should not be considered a non-quantifiable benefit under R.C. § 4928.143(C)(1), since there would be no similar charge on the MRO side of the test.

The Commission has already determined that DP&L has not established such a financial emergency under R.C. § 4928.142(D), so "financial integrity" cannot be a benefit of the ESP.

4. The Retail Enhancements Do Not Outweigh The Cost Of The ESP Under Any Reasonable Analysis.

The Commission required DP&L to upgrade its billing system and make some competitive retail enhancements, and it claimed that these enhancements constitute a non-quantifiable benefit of the ESP.[60] Though FES agrees that these enhancements will benefit customers, there is no way that they benefit customers enough to justify the massive above-market cost of this ESP. The ESP as approved by the Commission costs customers at least $588 million when compared to an MRO with 100% market prices. Even if the ESP is compared to a blended MRO, the ESP fails the statutory price test by more than $300 million over the ESP term. While competitive enhancements are important, under no reasonable evaluation could those retail enhancements offset the hundreds of millions of above-market costs included in this

[60] Order, p. 51.

ESP. This is particularly true given that DP&L customers will pay for these enhancements directly.

It also is inappropriate to consider the retail enhancements to be a benefit of the proposed ESP because these enhancements should be made regardless of the ESP filing. The enhancements should have been made years ago.[61] R.C. § 4928.02 supports the development of the competitive market and customer choice in Ohio. It is the obligation of every EDU to fulfill these state policy goals. DP&L's barriers to competition are inconsistent with these goals and should be removed no matter what SSO plan DP&L ultimately pursues. Therefore, the "enhancements" to retail competition that DP&L's customers pay for (which should have been in place in any event) should not be considered to be a benefit of the proposed ESP, but rather viewed as delayed compliance.

III. THE ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE IT APPROVED AN SSR THAT IS UNAUTHORIZED AND UNSUPPORTED.

A. As Both DP&L And The Order Admitted That Distribution And Transmission Revenues Are Sufficient, The SSR Is An Unlawful Generation Subsidy.

As acknowledged by DP&L and the Commission, there is no dispute that DP&L's distribution and transmission revenues are sufficient.[62] Therefore, there is no dispute that the SSR is intended to subsidize DP&L's generating assets until divestiture. Indeed, the Commission authorized the SSR because "DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial

[61] Noewer Direct, p. 7.

[62] Tr. Vol. XII, p. 2914. Tr. Vol. I, p. 117 ("Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct? A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections."); Tr. Vol. I, p. 118 ("Q. And you believe the transmission revenues would be adequate over the five-year proposed ESP period, correct? A. That is my expectation."); *see also*, Tr. Vol. I, p. 150 ("I believe that the T and D business has sufficient revenue included in it so I do not believe it would have a financial integrity issue for the T and D business."); Order, pp. 18-19.

losses for the entire utility."[63] This analysis ignores the plain fact that the Commission has no authority to authorize a generation subsidy like the SSR.

S.B. 3 completely changed Ohio's regulatory structure. S.B. 3 required that generation service become truly competitive. Each utility was authorized to receive certain transition revenues, and at the end of the market development period each utility was required to be "fully on its own in the competitive market."[64] The Commission was prohibited from authorizing further "transition revenues or equivalent revenues" except as "expressly authorized in sections 4928.31 to 4928.40 of the Revised Code."[65]

Logically following this requirement, each utility was required to abide by corporate separation requirements.[66] Even after the changes made by S.B. 221, each utility is prohibited from operating absent an approved corporate separation plan.[67] This corporate separation plan must provide, "at minimum," that competitive retail electric service be provided through a "fully separated affiliate" of the utility which maintains its own accounting ledgers.[68] The plan must also effectuate the policies of R.C. § 4928.02.[69] The plan must also ensure that the utility will not provide any "undue preference or advantage" to the affiliate or division engaged in the provision of competitive retail electric service.[70] While R.C. § 4928.17 also authorizes an interim period of functional separation, even a functional separation plan like DP&L's must comply with the

[63] Order, p. 22.

[64] R.C. § 4928.38.

[65] R.C. § 4928.38.

[66] *See* R.C. § 4928.17.

[67] R.C. § 4928.17.

[68] R.C. § 4928.17(A)(1).

[69] R.C. § 4928.17(A)(1).

[70] R.C. § 4928.17(A)(3).

policy requirements of R.C. § 4928.02, which are reflected in the pro-competition policies contained in R.C. § 4928.17.[71]

In approving the SSR, the Commission effectively provided DP&L with guaranteed generation-related revenue in violation of R.C. § 4928.38 and R.C. § 4928.17. The Order specifically states that it is intended to guarantee DP&L's "financial integrity" through a guaranteed ROE "target" of "7 to 11 percent."[72] The Order also specifically states that it relates to financial integrity for DP&L's generating assets.[73] Ohio law requires that DP&L's distribution and generation functions must be treated separately and that the generating assets of EDUs be fully on their own in the competitive market.[74] Nothing in Ohio law provides for guaranteed returns -- or even an opportunity to earn a targeted return -- on generating assets. The Order is thus unlawful.

The Commission's Order approves the SSR based on the authority provided in R.C. § 4928.143(B)(2)(d), but that statute does not authorize the subsidy provided to DP&L through the SSR.[75] Section 4928.143(B)(2)(d) authorizes ESPs to include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.[76]

[71] R.C. § 4928.17(C).

[72] Order, p. 25.

[73] Order, p. 22.

[74] *See* R.C. § 4928.17; R.C. § 4928.38.

[75] Order, p. 21.

[76] R.C. § 4928.143(B)(2)(d).

The Commission cannot reasonably justify using R.C. § 4928.143(B)(2)(d) to subsidize DP&L's generating assets.

First, the Commission finds that the SSR promotes retail stability by "maintaining DP&L's financial integrity so that it may continue to provide default service."[77] This is incorrect because competitive generation service is subject to the competitive market and not cost-based rate regulation.[78] The Commission then finds that such a charge will "ensure stability and certainty for the provision of SSO service."[79] Yet, in approving the SSR, the Commission is authorizing DP&L to increase SSO customers' generation-related prices. Simply because the increase is re-characterized as the SSR rather than the base generation rate is meaningless. SSO customers' rates are increasing through the SSR and, thus, the SSR does not provide any "stability" in retail rates. The SSR, as a nonbypassable rider, shifts the revenues required for DP&L to provide generation service to shopping customers, who do not use DP&L's generation. The SSR is simply an anti-competitive subsidy.

The Commission also attempts to justify the SSR's approval under R.C. § 4928.143(B)(2)(d) by finding that the SSR will incentivize shopping by making SSO service available "even if market conditions become unfavorable for retail shopping customers over the

[77] Order, p. 21.

[78] *See* R.C. § 4928.06(B) (Only if "there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions").

[79] Order, p. 21.

term of the ESP."[80] A nonbypassable generation-related rider, of course, does not serve to increase shopping opportunities.[81]

Under the Commission's analysis, **any** charge could be considered to provide "certainty" if it provides revenue to the utility. There is no basis for such an expansive reading of the statute. Instead, charges approved under R.C. § 4928.143(B)(2)(d) should be directly related to stability and certainty beyond just being undefined revenue for the utility.

The Ohio Supreme Court's decision in *Office of Consumers Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 372, 424 N.E.2d 300 (1981), is on point. In *Office of Consumers Counsel*, the Commission sought to evade the plain language of the statutory test year standard by relying on a more general grant of authority from the legislature to fix a "just and reasonable rate."[82] The Court rejected the Commission's attempt to use a general grant of discretion to provide itself with unlimited and unreviewable authority over customer rates.[83] If the Commission is permitted to use R.C. § 4928.143(B)(2)(d) to authorize any and all subsidies to EDUs, the Commission would have unlimited and unreviewable authority to deprive customers of the benefits of competitive markets.

The SSR provides neither stability nor certainty and, thus, is not authorized by R.C. § 4928.143(B)(2)(d). The SSR is not authorized by any other provision of R.C. § 4928.143(B) and, indeed, the Commission did not identify any other statutory support for the rider. After S.B. 3, generation is to be on its own in the competitive market. Absent a financial emergency, Ohio law does not authorize the Commission to subsidize generating assets because they ***may***,

[80] Order, p. 21.

[81] Noewer Direct, p. 15. An increase in costs to shopping customers does not provide "increased shopping opportunities."

[82] *Id*., p. 375.

[83] *Id*.

indirectly, affect other functions of an integrated company. The SSR violates state law and the state's policy to ensure effective competition. Accordingly, the Order's approval of the SSR is unlawful and unreasonable.

B. The SSR Includes Transition Revenues That DP&L Is Not Entitled To Recover.

The Commission's attempt to distinguish the SSR from the improper recovery of transition revenues also fails. Pursuant to S.B. 3, EDUs had a limited period of time in which to recover transition costs and that time period has closed:

> Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after 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.[84]

Thus, the Commission cannot authorize DP&L to recover any "transition revenues or any equivalent revenues." However, the Commission has done just that in approving the SSR.

In trying to distance the SSR from transition revenues, the Commission states:

> [t]he SSR is not a transition charge and the Commission's authorization of the SSR is not the equivalent of authorizing transition revenue. We reject the claim . . . as DP&L does not claim its ETP failed to provide sufficient revenues. Further, we note that DP&L continues to be responsible for offering SSO service to its customers and has demonstrated that the SSR is the

[84] R.C. § 4928.38 (emphasis added).

> minimum amount necessary to maintain its financial integrity to provide such service.[85]

Whatever the Commission or DP&L may call it, the SSR provides for "transition revenue or other related revenue." The Commission's Order expressly links the SSR to corporate separation. "[A]s an additional condition of implementing the SSR-E, DP&L must file, by December 31, 2013, an application to divest its generating assets. Such plan must propose that divestment be completed by December 31, 2016."[86] DP&L witness Mr. Jackson also directly tied SSR revenues over a five-year transition period to structural separation of DP&L's generating assets.[87] This makes clear that the SSR provides revenues that purportedly are required for DP&L's **transition** to the competitive market.

DP&L witnesses repeatedly acknowledged that its "financial integrity" concern was completely caused by its generating assets. By granting a subsidy to DP&L to account for this "financial integrity" concern, the Commission is directly subsidizing generating assets (aka providing transition revenues) after the transition period has terminated in violation of R.C. § 4928.38.

The SSR is equivalent to improper transition revenues that DP&L is precluded from recovering and the Commission is prohibited from authorizing. Thus, the Commission's approval of the SSR is unlawful and unreasonable.

[85] Order, p. 22.

[86] Order, p. 28.

[87] Jackson Rebuttal, p. 7.

C. The Commission's Calculation Of The SSR Is Unsupported.

1. There Is No Evidence That $110 Million/Year Is The Minimum Amount Necessary To Ensure DP&L's Financial Integrity And Thereby Ensure Reliable Service.

The Order references three DP&L witnesses who purportedly testified that the proposed $137.5 million/year SSR is the "minimum that DP&L would need to provide stable, safe, and reliable service."[88] The Commission later makes this same finding after adjusting the SSR to $110 million/year: "The Commission finds that this is the minimum amount necessary to ensure the Company's financial integrity and provide the Company with the opportunity to achieve a reasonable ROE during the ESP."[89]

a. No evidence in the record connects a minimum ROE with financial integrity or stable service.

While the Commission did not explain how it reached its conclusions, it appears the Commission accepted the testimony of DP&L's witnesses regarding revenues necessary to obtain at least a 7% ROE after accounting for the O&M revisions made by the Commission. This reliance is misplaced, because none of the witnesses cited by the Commission ever explained how a temporary decrease in ROE related to the minimum amount necessary to ensure financial integrity or to provide reliable service. As discussed in detail above, there is a significant difference between ROE and financial integrity. And there's a further step, lacking any evidentiary support, from weakened financial status to inadequate distribution service. DP&L's witnesses only addressed projected ROE and credit rating, and failed to explain how those factors related to the financial integrity of the company.

[88] Order, p. 17.

[89] Order, p. 25.

Ohio law provides certain defined steps for an EDU facing an emergency affecting its financial integrity.[90] DP&L did not even attempt to satisfy these criteria, and instead merely represented to the Commission that its credit rating may be lowered slightly due to its alleged degrading financial performance.[91] DP&L has offered no testimony establishing that the SSR is temporary relief "only at the minimum level necessary to avert or relieve the emergency."[92] DP&L presented only conclusory evidence that the SSR was needed to address its ROE concerns without evidentiary support of any kind. There is no record evidence explaining why $110 million/year is the minimum amount needed to ensure DP&L's financial integrity and to prevent inadequate retail electric service. Therefore, the Order is unlawful and unreasonable.

b. DP&L Has Overstated Its Expected Costs.

Additionally, there is no record evidence supporting the Commission's decision because DP&L overstated its expected costs. The Commission relied on DP&L's projections in the Order when evaluating whether DP&L needed additional revenue in order to maintain safe and reliable service.[93] By DP&L's own admission, DP&L's expense projections are significantly overstated. These projections are not only relevant to the SSR (where the Commission correctly determined that the requested SSR should be reduced to reflect O&M overstatements), they are also relevant to whether DP&L has a financial integrity issue in the first place.

By way of example, DP&L's future return on equity is largely dependent on future costs. However, at hearing DP&L's testimony did not take into account any potential capex or O&M

[90] R.C. § 4909.16.

[91] *See* Chambers Direct, pp. 6-50.

[92] *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

[93] Order, pp. 21-22 (relying on DP&L testimony).

cost savings which would reduce those costs.[94] While some of this error is offset by the Commission O&M reduction to the proposed SSR, that reduction does not address the entirety of the problem. The errors in projected expenditures flow through DP&L's financial projections and forecasts.

The cost overstatements are significant and undisputed. DP&L already identified these savings but failed to incorporate them into the pro forma analysis prepared by Mr. Jackson and relied upon by the Commission.[95] DP&L already determined that it can reduce capex by [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] annually.[96] DP&L also has identified reductions in O&M expenditures of [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].[97] In addition to these already identified and partially implemented savings DP&L has identified yet more savings are possible. DP&L also identified additional reductions in O&M expenditures of [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**].[98] None of these cost savings were incorporated into Exhibit CLJ-2, the source of the data relied on by the Commission when evaluating DP&L's financial integrity.[99]

Had these cost savings been incorporated into DP&L's projected financials, the impact on the financial integrity analysis would have been significant. FES witness Dr. Lesser discusses

[94] Lesser Direct, p. 33 (citing CLJ-2).

[95] Lesser Direct, p. 34.

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

[97] Tr. Vol. I, p. 87; Lesser Direct, p. 18.

[98] Tr. Vol. I, p. 90.

[99] Tr. Vol. I, p. 90; Order, pp. 21-22.

how a reduction in capex and O&M expenses would affect DP&L's projected financials. After making only the DP&L-provided cost adjustments, Dr. Lesser found that DP&L's annual "cash and cash equivalents"[100] could increase by [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] per year.[101] Obviously, this more than [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. **DP&L has not identified a single project it would be unable to complete or a single negative outcome for customers associated with these expense reductions**. In light of DP&L's overstated cost projections and failure to identify a single negative customer outcome associated with expense reductions, DP&L's "financial integrity" claim lacks merit.

c. DP&L Has Understated Expected Revenue

DP&L's projections also understate its potential revenue. The flaws in the revenue projections include DP&L's failure to anticipate a distribution rate case, anticipate any revenue available to DP&L from bidding into other competitive auctions, and assume energy is transferred to DPL Energy Resources, Inc. at zero margin.

DP&L's projections are also stale, as they rely on August 30, 2012 forward curves instead of more recent (and higher) forward energy price curves as of the date DP&L revised its testimony in this case.[102] These errors and omissions impact not just the expected price of energy, but also whether units will dispatch at all. This is particularly important for DP&L, because as shown in FES Exhibits 2 and 3, from 2009 through 2011 (the most recent year data was available), DP&L had output of approximately [**BEGIN CONFIDENTIAL**] [redacted]

[100] Capital expenditures do not necessarily correlate to a dollar for dollar reduction in ROE. O&M expenditures do. See Order, p. 25 (citing Tr. Vol. I, p. 189). "Cash and cash equivalents" are relevant to evaluate financial integrity since DP&L's cash on hand is relevant in determining whether DP&L has the ability to pay current expenses.

[101] Lesser Direct, p. 21.

[102] Tr. Vol. I, pp. 43-44.

[**END CONFIDENTIAL**] megawatt-hours.[103] Despite this historic average, Mr. Jackson's testimony in this case projects that DP&L will sell approximately [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] less megawatt-hours in 2013 than it did in prior years. In fact, Mr. Jackson does not anticipate that plant output will return to 2011 levels until [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]. Mr. Jackson explained that the most significant cause of the decrease in output is the forward curve price of energy.[104] As this energy price increases, plant output would increase.[105] By using the stale August of 2012 data, Mr. Jackson utilized stale, artificially low forward curve prices which understate the revenue which DP&L will receive.

d. After Correcting DP&L's Flawed Projections, There Is No Evidentiary Support For The $110 Million/Year SSR Calculated By The Commission.

As DP&L has already identified generation cost savings which will provide it with the same annual "cash and cash equivalents" which it is requesting in this proceeding, DP&L's flawed cost projections alone show that the SSR should be rejected. When DP&L's stale energy projections are incorporated as well, this becomes even more clear. DP&L has overstated its "financial integrity" concern, and there is no evidentiary support for the $110 million/year SSR calculated by the Commission.

2. If The Commission Does Approve A SSR, That SSR Should Fluctuate Based On DP&L's Performance.

In approving the SSR, the Commission has taken the extraordinary step of subsidizing DP&L's generating assets in order to ensure DP&L's financial integrity. In light of that determination, certain restrictions on the future grant of those funds are appropriate.

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

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

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

By way of example, the Commission acknowledged that DP&L has overstated its capex projections, but declined to take those capex reductions (from DP&L's projections) into account because those reductions may not "have as significant an impact on the Company's ROE as the potential O&M savings" and because "DP&L should retain the ability to impact its ROE."[106] This analysis is flawed for two reasons. First, the Order claims that the SSR was granted to ensure that DP&L maintained its financial integrity so that customers could have access to SSO service. This has nothing to do with ROE, and instead relates to whether DP&L's financial integrity is threatened. Therefore, limiting consideration of capital expenditures to their effect on ROE is improper. The proper analysis would examine financial integrity instead, where cash flow is more important than ROE.

D. The SSR-E Should Terminate Prior To The End Of The ESP Period.

In the Order, the Commission terminated the SSR-E prior to the end of the ESP period. The Commission modified the ESP so that the SSR terminated on December 31, 2015.[107] The SSR-E was scheduled to terminate on October 31, 2016, two months before the end of the ESP period.[108] However, the termination mechanism for the SSR-E was changed in the Entry. The Commission modified the ESP term to end on May 31, 2017.[109] The SSR was extended through December 31, 2016 and the SSR-E was extended through the end of the ESP period, and no longer terminated two months before the end of the ESP period.[110]

The Commission's original Order reached the appropriate decision. The SSR-E should terminate before the end of the ESP period in order to avoid potential confusion and expense to

[106] Order, p. 25.

[107] Order, p. 26.

[108] Order, p. 26.

[109] Entry, p. 2.

[110] Entry, p. 2.

customers. The SSR has been specifically designed by the Commission to compensate DP&L for specific financial integrity concerns for a specific period. If the ESP term were extended for some reason, then DP&L could continue to collect the SSR-E funds indefinitely, well past the period intended by the Commission.

If DP&L needs a financial stability charge after the ESP period ends, the Commission can address that issue then with full knowledge of the relevant facts. There is no reason to continue the SSR-E charge through the end of the ESP period when it could lead to significant future problems in later ESP proceedings; it should end on March 31, 2017. In the alternative, the Commission should make clear that the SSR-E charge will not continue past May 31, 2017 even if DP&L does not have another SSO approved by that point.

IV. THE ORDER IS UNREASONABLE AND UNLAWFUL IN THAT IT TRANSITIONS TO MARKET SLOWER THAN AS PROPOSED BY DP&L.

DP&L's ESP Application proposed a very conservative auction schedule, ultimately resulting in a 100% competitive auction starting in June of 2016. The Commission Order imposed an entirely new auction schedule, including a much slower transition to competitive auctions in all relevant periods.[111] By way of example, the Order never reaches a 100% competitive auction, and instead reaches a maximum 70% competitive auction starting in 2016.[112]

While the Commission certainly has discretion to modify the ESP as proposed by DP&L, the modification appears to be contrary to other portions of the Commission's Order. As discussed above, DP&L requested an SSR in order to maintain its financial integrity of $137.5

[111] *See* Order, p. 15.

[112] Order, p. 16.

million/year.[113] The Commission rejected this proposal, finding that DP&L did not require this much revenue in order to ensure its financial integrity.[114] Instead, the Commission found that DP&L could collect an SSR of $110 million/year for years 2014-2016, calculated by reducing the $137.5 million requested by DP&L by the potential O&M savings available in those years.[115] The Commission found that "this is the minimum amount necessary to ensure the Company's financial integrity and provide the Company with the opportunity to achieve a reasonable ROE during the ESP."[116]

As shown through the Commission's reliance on DP&L and Staff witness Mahmud's calculations, the Commission's calculation of DP&L's anticipated financial integrity was based on DP&L's proposed auction schedule.[117] To put it another way, when the Commission calculated DP&L's projected ROE during the ESP period, it did so based on DP&L's proposed auction schedule. By changing the auction schedule, but not including that change in its calculation of the minimum amount necessary to ensure DP&L's financial stability, the Commission overstated the need for an SSR because slowing the auction schedule increased DP&L's projected ROE, but that increase was not incorporated into the Commission's calculation of the SSR.

By slowing the auction blending schedule from that proposed by DP&L, the Commission significantly overstated the amount of SSR revenue needed to hit the ROE target established by the Commission. While FES believes that the SSR should not have been granted, if the SSR is

[113] Order, p. 25.

[114] Order, pp. 25-26.

[115] Order, p. 25; Entry, p. 2.

[116] Order, p. 25.

[117] *See* Order, p. 25 (citing Staff witness Mahmud's ROE calculation and DP&L witness Jackson's testimony regarding his exhibit CLJ-2 which used DP&L's proposed auction blending percentages).

going to be granted then the Commission should make one of two adjustments so that the Order is internally consistent. The Commission should either: (a) reduce the SSR value to take into account the slower blending percentages in each period created by the Order; or (b) order DP&L to conduct the auctions as proposed in its ESP Application. Failing to make one of these two adjustments would increase DP&L's ROE significantly beyond that targeted by the Commission.

V. THE ORDER IS UNREASONABLE AND UNLAWFUL IN THAT IT FAILS TO IDENTIFY WITH SPECIFICITY THE COMPETITIVE ENHANCEMENTS WHICH DP&L IS REQUIRED TO MAKE.

The Commission correctly determined that retail competition in DP&L's service territory would benefit from certain competitive retail enhancements.[118] The Commission approved the retail enhancements proposed by DP&L, and required that DP&L implement all EDI processes, standards, interfaces, and other retail enhancements which had been adopted by every other EDU in Ohio.[119]

While FES agrees with the Commission's ultimate conclusion, the Order erred by failing to identify the required enhancements with specificity. The Order also erred by differentiating the retail enhancements identified by FES from every other possible retail enhancement in place at other Ohio EDU's. Therefore, on rehearing the Commission should identify the relevant retail enhancements with specificity and treat all retail enhancements similarly.

A. The Commission Should Specifically Identify The Enhancements Identified By RESA Which DP&L Is Required To Incorporate.

The Order specifically references RESA testimony identifying "certain EDI processes, EDI 876 HU Standards, and standard EDI interfaces that have been implemented by other Ohio

[118] Order, p. 38.

[119] Order, p. 38.

utilities" as part of its decision regarding retail enhancements.[120] The Order then requires DP&L to implement all EDI processes, standards, interfaces, and other retail enhancements which had been adopted by every other EDU in Ohio.[121] However, the Order does not make clear that DP&L is obligated to make all of the enhancements identified in the RESA testimony. This omission should be corrected, and DP&L should be required to make the following enhancements identified in RESA's testimony:

> (a) Accounts requested together should come back together, unless it would create an unnecessary delay for a particular subset of accounts; and
>
> (b) A monthly updated sync-list should be provided to CRES providers on a confidential basis showing the accounts that are enrolled with the CRES provider. The list should contain information such as service start date, bill method, and PLC values.
>
> (c) DP&L should modify their cancel/re-bill process so that the total usage of a customer across all service points is cancelled and re-billed rather than doing so only for individual service points.
>
> (d) DP&L should accept supplier initiated drops if received during the customer's 7 day enrollment rescission period;
>
> (e) DP&L should effectuate a supplier initiated drop for the current meter read cycle if the drop is received after the enrollment rescission period but prior to the start of the 12 day switching window;
>
> (f) DP&L should apply a usage percentage adjustment for customers with Primary, Secondary, or High Voltage rates in order to obtain the correct 'billed' consumption data;
>
> (g) DP&L should modify its bankrupt customer process to simply drop the bankrupt account rather than sending an 814 LDC Account Number change for bankrupt customers then writing off the balance on the 'old' account.[122]

[120] Order, p. 38 (referencing RESA Ex. 6, p. 7).

[121] Order, p. 38.

[122] RESA Ex. 6, p. 7.

B. The Competitive Issues Raised By FES Have Already Been Adopted By Every Other Ohio EDU, And Should Be Addressed In This Proceeding.

While the Commission addressed EDI and retail enhancements generally at page 38 of its Order, the Order treated the competitive enhancements identified by FES differently from all others.[123] The Order held that the issues raised by FES were "related to the distribution function" of DP&L, and therefore should be raised in DP&L's next distribution rate case. [124] This was an error, because the competitive issues raised by FES were more appropriately included with the EDI and competitive retail enhancements identified at page 38 of the Order. There is no difference between the "distribution functions" relating to EDI and the enhancements identified by FES, and therefore there is no reason to treat the issues raised by FES differently from every other possible retail enhancement.

At page 38, the Commission required DP&L to incorporate all competitive retail enhancements which had already been incorporated by the other Ohio EDU's. This requirement includes many of the issues raised by FES. The following competitive retail enhancements have already been incorporated by the other Ohio EDU's, and should therefore be explicitly addressed on rehearing.

1. Percent Off PTC Billing

Percent-off PTC billing is a very popular program with customers, and is the predominant product offered through governmental aggregation programs in Ohio. [125] Every other Ohio EDU offers rate ready percentage off PTC billing in its territory.[126] DP&L's systems would allow it to offer this service as well, but DP&L refuses to do so because it claims that CRES providers

[123] Order, p. 39.

[124] Order, p. 39.

[125] Noewer Direct, p. 21.

[126] Noewer Direct, p. 20.

could do this themselves.[127] There is no justification for DP&L's refusal to offer this service. On rehearing DP&L should be ordered to offer this service just like every other Ohio EDU.

2. Consolidated And Dual Rate Ready Billing Charges

Neither the FirstEnergy utilities nor AEP Ohio charge per bill fees for consolidated or dual billing.[128] Duke Energy Ohio does not have any per bill charge for rate ready consolidated billing.[129] As no Ohio EDU includes any per bill charge for rate ready consolidated or dual billing, DP&L should be ordered to remove its current $0.20 per bill charge for rate ready bills.

Similarly, the FirstEnergy utilities and AEP Ohio do not include any per bill charge for bill ready consolidated billing. Duke Energy Ohio does not currently offer bill ready consolidated billing. Once this service is offered by Duke Energy Ohio, it will be priced at $0.056 per bill,[130] well below the $0.20 per bill charged by DP&L.[131] As DP&L is well out of the norm for bill ready billing fees, at minimum DP&L should be required to match the highest bill ready billing fees in the state at $0.056 per bill.

3. Switching Fees

Every other Ohio EDU has a $5 switching fee which can be paid by the supplier instead of the customer.[132] DP&L charges a $5 fee to customers rather than suppliers.[133] DP&L should

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

[128] Noewer Direct, p. 21.

[129] Case No. 11-3549-EL-SSO, et al., p. 40.

[130] Duke Energy Ohio Certified Supplier Tariff, Sheet 52.3,

[131] Noewer Direct, p. 22.

[132] Noewer Direct, p. 24 (addressing FES and DEO fees); Case No. 11-346-EL-SSO, et al., Entry on Rehearing dated January 31, 2013, p. 43 (requiring AEP Ohio to permit suppliers to pay the $5 fee instead of customers).

[133] Noewer Direct, p. 24.

be required to join every other Ohio EDU and permit the switching fee to be paid by the supplier instead of the customer.

4. Interval Meters

The FirstEnergy utilities have no interval meter threshold. Both Duke Energy Ohio and AEP Ohio have a 200 kW interval meter threshold.[134] DP&L requires customers who have a maximum peak demand of 100 kW to install an interval meter.[135] This much lower peak demand threshold has the effect of requiring customers to install a costly interval meter unnecessarily. While it would be best for DP&L to adopt no interval meter threshold, at minimum, DP&L should be required to comply with the 200 kW threshold used by other Ohio utilities.

5. Rate Ready Set-Up

DP&L's fees for rate ready billing set-up are also excessive. The FirstEnergy utilities have no related fees. AEP Ohio has a $100 annual consolidated billing fee and a $95/hr set-up fee.[136] Duke Energy Ohio has a $75/hour fee.[137] DP&L charges a $5,000 initial set up fee and $1,000 for each change to its billing system – even where only a single rate code is added. [138] At minimum, DP&L should be required to bring its costs in line with other Ohio EDUs.

VI. THE ORDER IS UNREASONABLE AND UNLAWFUL IN THAT IT FAILS TO REQUIRE IMMEDIATE STRUCTURAL SEPARATION.

A. It Is Unclear When, Or If, DP&L Is Required To Structurally Separate.

The Order addresses DP&L's structural separation in several different sections. The Commission first finds that "DP&L has failed to demonstrate that it necessarily cannot divest its

[134] Duke Energy Ohio, Sheet No. 38.2 § 9.3(a); AEP Ohio, Sheet No. 103-41(D)

[135] Noewer Direct, p. 20.

[136] AEP Ohio, Sheets No. 103-43(D); 103-51(D).

[137] Duke Energy Ohio Certified Supplier Tariff, Sheet 52.3.

[138] Noewer Direct, p. 22.

generating assets sooner than December 31, 2017."[139] Despite that finding, the Commission did not provide a date certain by which DP&L was required to complete corporate separation. Instead, the Commission held that it "expects" DP&L to file a generation divestment "plan" that divests all assets by December 31, 2016.[140]

The Commission next addressed structural separation in connection with the SSR-E. The Commission made DP&L's receipt of SSR-E revenues expressly dependent on DP&L's filing an application to divest its generation assets by December 31, 2013.[141] The Commission mandated that this divestiture plan propose "that divestment be completed by December 31, 2016."[142] Based on DP&L's testimony, the Commission stated that it "believes that it is reasonable for DP&L to divest" its generating assets by the end of 2016.[143] This appears to clarify that the Commission intended structural separation to be complete by 2016, but once again there is no mandatory language in the Order requiring DP&L do to so.

Finally, the Commission also addressed structural separation in its Entry. In the Entry, the Commission held that DP&L was "expected to divest its generation assets by May 31, 2017."[144] Once again, there is no mandatory language in the Order requiring structural separation to be completed by this date.

Based on these portions of the Order, it is unclear whether DP&L is required to structurally separate and when this structural separation must be completed. The Commission "expects" DP&L to file an application for structural separation by December 31, 2013, but does

[139] Order, p. 16.

[140] Order, p. 16.

[141] Order, p. 27.

[142] Order, p. 27.

[143] Order, p. 28.

[144] Entry, p. 2.

this expectation create any requirement for DP&L to do so? Is there any penalty if DP&L fails to comply with the Commission expectation? Similarly, nothing in the Commission decision provides a date by which DP&L must complete structural separation. Instead, the Order expressly requires a "plan" which "proposes" structural separation by a date certain.[145] The Entry provides no clarity, changing the date of performance and stating that the Commission "expects" performance by that date.[146]

As explained below, FES believes that DP&L can, and should, structurally separate immediately. However, if a delay in separation is approved, the Commission should clarify the Order in three respects. First, the Commission should make clear that DP&L is actually required to complete structural separation by a date certain, rather than stating that the Commission "expects" this to take place. This will eliminate any uncertainty regarding the Commission's intent. Second, regardless of what date is selected by the Commission, the Commission should clarify the impact of non-compliance, most likely the loss of any SSR revenues which are granted to DP&L. Finally, FES suggests that the Commission require that certain steps towards structural separation (such as a FERC filing) be completed by dates certain, and tie these checkpoints to SSR revenues as well.

B. DP&L Can And Should Structurally Separate Immediately.

The Commission did not require immediate structural separation in its Order, but its discussion as to why this delay was appropriate was extremely brief. The Commission found that "DP&L witness Jackson demonstrated that DP&L could not divest its generation assets before September 1, 2016" due to its first and refunding mortgage.[147] The Commission found

[145] Order, pp. 27-28.

[146] Entry, p. 2.

[147] Order, p. 15.

that refinancing this debt would present significant financial risk to DP&L.[148] The record evidence does not support the Commission's conclusion.

Whether DP&L needs to refinance the debt, offer a premium to bondholders, or transfer the debt to another entity, debt structure issues can be resolved. DP&L admitted as much in its original corporate separation plan submitted to this Commission in 1999. DP&L's 1999 plan identified the same "complex indenture-related issues" DP&L hides behind today but also proposed common sense fixes to those issues.[149] DP&L had no-call provisions in its debt instruments then but nevertheless committed to complete corporate separation by December 31, 2000.[150] Just as was the case in 1999, there is no reason it should take DP&L more than a year to achieve corporate separation even with the "no call" debt instruments.

On cross-examination, DP&L witness Rice was asked about the original structural separation plan which DP&L submitted in 1999 and which was relied on by Dr. Lesser. Mr. Rice admitted that the 1999 corporate separation plan was "very similar" to the third amended corporate separation plan submitted in this proceeding.[151] In fact, the corporate separation plan text relating to indentures like the bonds referenced by DP&L and Staff as a cause for delaying structural separation was classified by Mr. Rice as "nearly identical."[152] Both plans reference a large number of indenture-related issues which must be resolved prior to structural separation, and specifically no-call provisions related to those bonds.[153] Despite those no-call provisions,

[148] Order, p. 15.

[149] Tr. Vol. III, pp. 700-05, and FES Exh. 12, pp. 15-17.

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

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

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

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

Mr. Rice admitted that none of the bonds which existed in 1999 were still operative, and that they all had either matured or been refinanced.[154]

DP&L's claim of hardship relating to no-call bonds is also not credible based on the timing of its debt issuances. DP&L issued these bonds after it knew it was required to structurally separate.[155] Mr. Rice testified that DP&L has been exploring how to complete structural separation since 1999.[156] Despite the clear obligation to structurally separate after S.B. 3, all of DP&L's outstanding long-term debt, which is secured by all assets of the company (distribution, generation, and transmission), was issued between the years 2003 and 2007.[157]

> Q. And so each of these bond issuances was issued after Ohio required corporate separation of generation assets, correct?
>
> A. Yes. These were issued, obviously, in the years that we've shown here, and I would note that they were -- yes, that is correct.[158]

Not only did DP&L issue these no-call bonds after Ohio law had changed, it issued these bonds after it had stopped using regulatory accounting for its generating assets.[159] Remarkably, DP&L's first corporate separation plan identified that it had, in 1999, five bond issuances with no-call provisions, but DP&L did not believe that these outstanding bond issuances would prevent it from achieving corporate separation prior to cancellation of the no-call provisions.[160]

---

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

[155] FES Ex. 5.

[156] Tr. Vol. III, p. 689.

[157] Tr. Vol. I, pp. 122-23. In 1999, DP&L had $550 million in debt that was tied to the first mortgage lien, and five of the six series of bonds had no call provisions. Tr. Vol. III, p. 704. All have been retired or refinanced. Today, DP&L has $904 million in debt outstanding as reflected in six series of bonds, many with no-call provisions. Tr. Vol. III, p. 705. Not only did DP&L continue its no-call debt issuances after corporate separation was mandated, but it substantially increased the debt level.

[158] Tr. Vol. I, p. 123.

[159] Tr. Vol. I, p. 123.

[160] Tr. Vol. III, p. 703 and FES Exh. 12, p. 17.

It is improper for DP&L to ask for additional time to complete structural separation to resolve its debt issues when the problem is entirely of its own making. By way of example, DP&L issued pollution control bonds (which relate only to generating assets) in 2005 with maturity dates of 2028 and 2034.[161] Amazingly, despite operating under functional separation at the time, DP&L issued most of these bonds with a no-call provision.[162] Other DP&L bonds run through 2040.[163] DP&L testified that it did not consider whether its functional separation would continue through 2040, and that it didn't "think there was a specific understanding one way or another" on that point.[164] DP&L chose to issue these no-call bonds while it was operating under temporary functional separation, and it should now be required to resolve this issue and structurally separate as soon as possible. DP&L should also not be heard to complain about the cost of redeeming these bonds when DP&L has not presented any evidence regarding how much redeeming these bonds would cost, and has not resolved any issues relating to its bonds to date.[165]

At the very least, the Commission should accelerate the deadline for structural separation to August 1, 2015. The September 2016 date relied on by the Commission relates only to one series of "no call" pollution control bonds with a principal amount of $100 million.[166] All other "no call" bonds lose their "no call" status in August 2015.[167] DP&L offered no evidence that releasing this one series of PCBs from the Indenture would negatively affect the bonding ratio.

[161] Tr. Vol. I, p. 124.

[162] Tr. Vol. I, p. 125.

[163] FES Ex. 5; Tr. Vol. III, p. 696.

[164] Tr. Vol. III, p. 696.

[165] Tr. Vol. III, pp. 691-93.

[166] Tr. Vol. III, p. 761.

[167] See FES Ex. 5; Tr. Vol. III, p. 761.

Regardless, since the Commission is giving DP&L $110 million a year so that it can have the cash flows necessary to separate its generating assets,[168] DP&L should be instructed to use this subsidy to purchase bondholders' consent to calling the one series that is not callable until September 2016. An incentive of 5-10% above face value is possibly all that will be required, which means divestiture can be achieved for a much lower cost than the cost of the SSR itself.

As shown by the foregoing, the record evidence establishes that DP&L had these same mortgage related issues in 1999, but proposed a corporate separation plan proposing to complete separation by the end of 2000. Adding insult to injury, after 1999 DP&L did refinance its debt, but once again included "no call" provisions despite the fact that its debt was primarily generation related. As DP&L has already admitted that it can address these mortgage issues in a timely manner, and these debts were all created after 1999, the Commission should not have authorized such a lengthy and unnecessary delay until corporate separation. Instead, the Commission should have required corporate separation in a timelier manner.

C. Delaying Structural Separation Creates Improper Cross-Subsidies In Violation Of Ohio Law.

By failing to require immediate structural separation, the Order allows continued unlawful cross subsidies of DP&L's generating assets prior to structural separation. The Order also apparently anticipates, but does not expressly address, DP&L purchasing energy from its affiliate after structural separation. Finally, the Order creates a generation subsidy (the SSR) and claims that this subsidy cannot be transferred to a DP&L affiliate during the ESP period. However, if DP&L completes corporate separation during the ESP period, then DP&L the EDU will receive a generation subsidy despite no longer owning generating assets. None of these

[168] *See* Jackson Rebuttal, p. 7.

outcomes is proper under Ohio law, and would all be addressed through immediate structural separation.

1. Cross-Subsidies Of DP&L's Generating Assets Are Improper.

DP&L's continued functional separation raises significant cross subsidy and transparency concerns. As an EDU, DP&L should be indifferent as to where it procures generation. Under no circumstances should an EDU seek recovery for a generation subsidy. Instead of acting in the best interests of its customers, DP&L has acted to subsidize its own generating assets at what would be a great expense to its customers through the SSR and above-market generation charges. This is not appropriate, and shows the dangers of allowing functional separation to continue.

As discussed above, by DP&L and the Commission's own admission, the SSR is intended to subsidize DP&L's generating assets. DP&L has failed to structurally separate over the last 14 years, and now demands that customers of the EDU subsidize its competitive generation arm. State law and policy expressly preclude cross-subsidies. It is the state's policy to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service."[169] The General Assembly directed that the Commission "shall ensure [that this policy, and all other state policy] is effectuated."[170] Permitting DP&L to receive an SSR subsidizing its generating assets violates this policy and should be rejected.

[169] R.C. § 4928.02(H) (emphasis added).

[170] R.C. § 4928.06(A) ("Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.")

2. DP&L Should Not Be Permitted To Pass Through Above-Market Generation Revenues After Corporate Separation.

Though the Order is unclear as to when DP&L is required to have completed corporate separation during the ESP period, the Commission does not expressly address how DP&L is to procure energy after corporate separation. The Commission should expressly address this issue on rehearing, and make clear that DP&L may not pass above-market generation revenues on to its competitive affiliate after structural separation.

Section 4928.143(B) limits the scope of purchased power costs that can be charged to customers through an SSO. Specifically, an ESP may only provide for the:

> Automatic recovery of any of the following costs of the electric distribution utility, **provided the cost is prudently incurred**: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and **including purchased power acquired from an affiliate**; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes.[171]

As an ESP may only provide for the pass through of prudently incurred purchased power costs, there is no justification for requiring DP&L the EDU to purchase power from its generation affiliate at an above-market rate. Ohio law prohibits DP&L, after its corporate separation, from "extend[ing] any undue preference or advantage to any affiliate . . . engaged in the business of supplying the competitive retail electric service."[172] Passing through above-market generation revenues (the portion of the SSO price not purchased through the auction process) would be an undue preference to DP&L's generation affiliate, and should be rejected.

[171] R.C. § 4928.143(B)(2)(a) (emphasis added).

[172] R.C. § 4928.17(A)(3) (setting forth requirements for corporate separation plans).

3. The SSR Should Not Continue After Corporate Separation

The Commission's Order made clear that the SSR is intended to subsidize DP&L's generating assets to ensure the company as a whole remains solvent. Recognizing this, the Commission held that "all SSR revenues should remain with DP&L, and not be transferred to any of DP&L's current or future affiliates. . ."[173] This Commission limitation is appropriate, because transferring the SSR to DP&L's generation affiliate would constitute an illegal cross-subsidy.

Although the Commission appropriately addressed this cross-subsidy issue, it failed to address whether the SSR was warranted after structural separation. DP&L's witnesses acknowledged that DP&L's distribution and transmission revenues were sufficient. Accordingly, the SSR is not needed to ensure safe and reliable service after corporate separation. The Commission should therefore make clear that the SSR shall terminate as of the date of corporate separation.

VII. THE ORDER IS UNREASONABLE AND UNLAWFUL IN THAT IT AUTHORIZES DP&L TO PARTICIPATE IN AUCTIONS THROUGH AFFILIATES AND SUBSIDIARIES WHILE RECEIVING A GENERATION SUBSIDY THROUGH THE SSR.

As explained by FES witness Lesser, permitting DP&L to participate in its own auctions could have the effect of chilling competition. Specifically, Dr. Lesser testified that permitting DP&L to receive a subsidy through the SSR could have a chilling effect on competition, since DP&L could use SSR revenues to subsidize its generating assets and offers in the competitive market.[174] In the auction context, Dr. Lesser explained that prospective bidders could be hesitant to participate in an auction against subsidized bids from DP&L, having the net effect of reducing

[173] Order, p. 26.

[174] Lesser Direct, p. 79.

participation and raising prices for customers.[175] Dr. Lesser therefore recommended that DP&L and DPLER (which receives cross-subsidies from DP&L) be prohibited from participating in the auction.[176]

The Commission cited Dr. Lesser's position in its Order, but adopted only a portion of his recommendation.[177] The Commission prohibited DP&L from participating directly in the auctions, but permitted DP&L's affiliates and subsidiaries to participate.[178] The Commission did not provide an extensive analysis regarding why DP&L's affiliates and subsidiaries should be permitted to participate in the auctions. Instead, the Commission merely held that this precedent was in accordance with other recent Commission decisions.[179]

The Commission's decision to allow affiliate and subsidiary participation in the auction is an error. For utilities that are only **functionally** separated, there is no difference between permitting DP&L to participate in the auction directly or through an affiliated or subsidiary entity. Through the SSR, the Commission has approved an above-market subsidy for DP&L's generating assets.[180] Those same generating assets will be used to participate in the auction whether owned by DP&L or a third party. Therefore, the distinction found by the Commission is erroneous and irrelevant. If it is inappropriate for DP&L to participate in the auction directly, it is also inappropriate for DP&L to participate in the auction through an affiliated or subsidiary proxy.

---

[175] Lesser Direct, p. 80.

[176] Lesser Direct, p. 82.

[177] Order, p. 16.

[178] Order, p. 16.

[179] Order, p. 16 ("Consistent with our treatment of other utilities. . .")

[180] Order, pp. 18-22.

VIII. CONCLUSION

FES respectfully requests that the Commission grant rehearing and amend the Order as specified herein.

Respectfully submitted,

/s/ *Mark A. Hayden*
Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
talexander@calfee.com

Attorneys for FirstEnergy Solutions Corp

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing Of FirstEnergy Solutions Corp.* was served this 4th day of October, 2013, via e-mail upon the parties below.

s/ N. Trevor Alexander
One of the Attorneys for FirstEnergy Solutions Corp.

Judi L. Sobecki
The Dayton Power & Light Company
1065 Woodman Drive
Dayton, OH 45432
judi.sobecki@dplinc.com

Charles J. Faruki
Jeffrey S. Sharkey
Faruki, Ireland & Cox, P.L.L.
500 Courthouse Plaza, S.W.
10 N. Ludlow Street
Dayton, OH 45402
cfaruki@ficlaw.com
jsharkey@ficlaw.com

Samuel C. Randazzo
Joseph E. Oliker
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Matthew W. Warnock
J. Thomas Siwo
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
mwarnock@bricker.com
tsiwo@bricker.com

M. Anthony Long
Honda of America Mfg., Inc.
24000 Honda Parkway
Marysville, OH 43040
tony_long@ham.honda.com

Jeanne W. Kingery
Amy B. Spiller
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
jeanne.kingery@duke-energy.com
amy.spiller@duke-energy.com

Robert A. McMahon
Eberly McMahon LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
bmcmahon@emh-law.com

Rocco D'Ascenzo
Elizabeth Watts
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
elizabeth.watts@duke-energy.com
rocco.d'ascenzo@duke-energy.com

Jay E. Jadwin
American Electric Power Service Corp.

David F. Boehm
Michael L. Kurtz

155 W. Nationwide Blvd., Suite 500
Columbus, OH 43215
jejadwin@aep.com

Boehm, Kurtz & Lowry
36 East Seventh Street. Suite 1510
Cincinnati, Ohio 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
cmooney2@columbus.rr.com

Mark A. Whitt
Andrew J. Campbell
Whitt Sturtevant LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com

Vincent Parisi
Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, Ohio 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister, LLP
65 E. State St., Suite 1000
Columbus, Ohio 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

Gregory J. Poulos
EnerNOC, Inc.
471 E. Broad Street, Suite 1520
Columbus, Ohio 43215
gpoulos@enernoc.com

Maureen Grady
Melissa R. Yost
Edmond J. Berger
Office of the Ohio Consumer's Counsel
10 West Broad St., Suite 1800
Columbus, OH 43215
grady@occ.state.oh.us
yost@occ.state.oh.us
berger@occ.state.oh.us

Christopher L. Miller
Gregory H. Dunn
Ice Miller, LLP
250 West Street
Columbus, Ohio 43215
christopher.miller@icemiller.com
gregory.dunn@ icemiller.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
mhpetricoff@vorys.com
smhoward@vorys.com

Trent A. Dougherty
Cathryn Loucas
Ohio Environmental Council

Stephanie M. Chmie
Michael L. Dillard, Jr.
Thompson Hine LLP

1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
trent@theoeg.org
cathy@theoec.org

41 S. High Street, Suite 1700
Columbus, Ohio 43215
stephanie.chmiel@ThompsonHine.com
michael.dillard@ThompsonHine.com

Matthew J. Satterwhite
Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com

Steven M. Sherman
Joshua D. Hague
Krieg DeVault, LLP
One Indiana Square, Suite 2800
Indianapolis, Indiana 46204
ssherman@kdlegal.com
jhague@kdlegal.com

Joseph M. Clark
6641 North High St., Suite 200
Worthington, Ohio 43085
jmclark@vectren.com

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
333 W. First Street, Suite 500B
Dayton, OH 45402
ejacobs@ablelaw.org

Kimberly W. Bojko
Joel E. Sechler
Carpenter Lipps & Leland, LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, OH 43215
(614) 365-4124
bojko@carpenterlipps.com
sechler@carpenterlipps.com

Matthew R. Cox
Matthew Cox Law, Ltd.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

Philip B. Sineneng
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
Philip.sineneng@thompsonhine.com

Bill C. Wells
Christopher C. Thompson
Bldg 266, Area A
Wright Patterson AFB, OH 45433
bill.wells@wpafb.af.mil
chris.thompson.2@tyndall.af.mil

Mary W. Christensen
Christensen Law Office, LLC
Columbus, OH 43240-2109
mchristensen@columbuslaw.org

Attachment A

Attachment TST-1 (PUCO Order Revised - 100% Market)

ESP v. MRO (cents per kWh)

Category	2014 Jan - 2014 Dec Proposed ESP	Staff Projected MRO	2015 Jan - 2015 Dec Proposed ESP	Staff Projected MRO	2016 Jan - 2016 Dec Proposed ESP	Staff Projected MRO	2017 Jan - 2017 May Proposed ESP	Staff Projected MRO
Base Generation w/ EICC *	4.3870		4.3870		4.3870		4.3870	
Transmission (TCRR-B) *	0.3130		0.3130		0.3130		0.3130	
RPM *	0.0590		0.0590		0.0590		0.0590	
Fuel (March 2013 Tariff Rate)	2.9980		2.9980		2.9980		2.9980	
Market Comparable Total Generation	7.7570	5.3165	7.7570	5.8379	7.7570	6.1406	7.7570	6.2910
AER-N (Yankee 1)								
SSR ($133M)	0.7958	0.0000	0.7958	0.0000	0.7958	0.0000	0.7952	0.0000

ESP			**ESP**			**ESP**		
Current Rate *	90%	6.9813	**Current Rate ***	60%	4.6542	**Current Rate ***	30%	2.3271
Market Rate *	10%	0.5317	**Market Rate ***	40%	2.3352	**Market Rate ***	70%	4.2984
Comparable ESP		7.5130	Comparable ESP		6.9894	Comparable ESP		6.6255
AER-N (Yankee 1)		0.0000	AER-N (Yankee 1)		0.0000	AER-N (Yankee 1)		0.0000
SR		0.7958	SR		0.7958	SR		0.7958
Total ESP		8.3088	Total ESP		7.7852	Total ESP		7.4213
MRO			**MRO**			**MRO**		
Current Rate *	0%	0.0000	**Current Rate ***	0%	0.0000	**Current Rate ***	0%	0.0000
Market Rate *	100%	5.3165	**Market Rate ***	100%	5.8379	**Market Rate ***	100%	6.1406
Comparable MRO		5.3165	Comparable MRO		5.8379	Comparable MRO		6.1406

ESP				
Current Rate *	30%	2.3271		
Market Rate *	70%	4.4037		
Comparable ESP		6.7308		
AER-N (Yankee 1)		0.0000		
SR		0.7952		
Total ESP		7.5260		
MRO				
Current Rate *	0%	0.0000		
Market Rate *	100%	6.2910		
Comparable MRO		6.2910		

ESP G Revenue (Comparable ESP Rate * Non-Shop kWhs)	$397,725,656	$370,007,845	$350,745,665	$148,466,528
SSR & AER-N Revnue (SSR + AER-N Rate * Distribution kWhs)	$110,000,000	$110,000,000	$110,000,000	$45,800,000
MRO Revenue (Comparable MRO Rate * Non-Shop kWhs)	$281,448,492	$309,051,602	$325,074,376	$138,765,515
Total (ESP G +SSR + Yankee 1 - MRO Rev)	$226,277,164	$170,956,243	$135,671,289	$55,501,013

Total Distribution MWHs 13,822,395
Total Non-Shop MWHs 5,293,868

Under the ESP option revised by Staff versus the MRO option, ratepayers would pay this much more over a 41 month period: $588,405,709

Attachment B **Attachment TST-1 (PUCO Order)**

ESP v. MRO (cents per kWh)

Category	2014 Jan - 2014 Dec Proposed ESP	Staff Projected MRO	2015 Jan - 2015 Dec Proposed ESP	Staff Projected MRO	2016 Jan - 2016 Dec Proposed ESP	Staff Projected MRO
Base Generation w/ EICC *	4.3870		4.3870		4.3870	
Transmission (TCRR-B) *	0.3130		0.3130		0.3130	
RPM *	0.0590		0.0590		0.0590	
Fuel (March 2013 Tariff Rate)	2.9980		2.9980		2.9980	
Market Comparable Total Generation	7.7570	5.3165	7.7570	5.8379	7.7570	6.1406
AER-N (Yankee 1)						
SSR ($133M)	0.7958	0.0000	0.7958	0.0000	0.6656	0.0000

ESP			**ESP**		**ESP**	
Current Rate *	90%	6.9813	**Current Rate ***	60%	4.6542	**Current Rate ***	30%	2.3271
Market Rate *	10%	0.5317	**Market Rate ***	40%	2.3352	**Market Rate ***	70%	4.2984
Comparable ESP		7.5130	Comparable ESP		6.9894	Comparable ESP		6.6255
AER-N (Yankee 1)		0.0000	AER-N (Yankee 1)		0.0000	AER-N (Yankee 1)		0.0000
SR		0.7958	SR		0.7958	SR		0.6656
Total ESP		8.3088	Total ESP		7.7852	Total ESP		7.2911
MRO			**MRO**			**MRO**		
Current Rate *	90%	6.9813	**Current Rate ***	80%	6.2056	**Current Rate ***	70%	5.4299
Market Rate *	10%	0.5317	**Market Rate ***	20%	1.1676	**Market Rate ***	30%	1.8422
Comparable MRO		7.5130	Comparable MRO		7.3732	Comparable MRO		7.2721

ESP G Revenue (Comparable ESP Rate * Non-Shop kWhs)	$397,725,656	$370,007,845	$350,745,665
SSR & AER-N Revnue (SSR + AER-N Rate * Distribution kWhs)	$110,000,000	$110,000,000	$92,000,000
MRO Revenue (Comparable MRO Rate * Non-Shop kWhs)	$397,725,656	$390,326,593	$384,974,051
Total (ESP G +SSR + Yankee 1 - MRO Rev)	$110,000,000	$89,681,252	$57,771,614

Total Distribution MWHs 13,822,395
Total Non-Shop MWHs 5,293,868

Under the ESP option revised by Staff versus the MRO option, ratepayers would pay this much more over a three year period: $257,452,866

Summary: Application for Rehearing electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.