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 MEMORANDUM IN OPPOSITION TO APPLICATIONS FOR REHEARING

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I. INTRODUCTION

The Dayton Power and Light Company received something extraordinary from the Commission: an ESP which provided four times the above-market subsidy that the Commission approved in the AEP Ohio ESP II case on a per customer basis.[1] Despite this largess from the Commission, DP&L has challenged the Commission's authority to place restrictions on the "financial integrity" subsidy. DP&L is wrong. There is nothing in R.C. § 4928.143(B)(2)(d) which prohibits the restrictions on the SSR-E imposed by the Commission. If the Commission has the authority to approve the SSR-E, then the Commission has the authority to place restrictions on DP&L's receipt of those funds.

If DP&L were correct, and the Commission may only approve the SSR-E if it is expressly authorized by statute, then the appropriate remedy is simple. The Commission must eliminate the SSR-E entirely. R.C. § 4928.143(B)(2)(d) does not authorize a contingent financial subsidy. Instead, R.C. § 4928.143(B)(2)(d) only authorizes stability charges if the Commission finds that the charges promote stability and certainty. If the Commission cannot establish the amount of the SSR-E today, and the circumstances by which the SSR-E will be implemented, then it cannot find that the SSR-E promotes stability and certainty. Therefore, if DP&L's argument is accepted, the SSR-E must be eliminated in its entirety. If DP&L can establish a "financial emergency" under Ohio law in 2017, then it can justify its request at that time.

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[1] FES Application for Rehearing, p. 1, fn 3.

II. THE COMMISSION HAS AUTHORITY TO PLACE LIMITS ON THE SSR-E (DP&L NO. I)

A. If DP&L's Argument Is Accepted, The SSR-E Must Be Eliminated Entirely.

DP&L argues that R.C. § 4928.143(B)(2)(d) does not authorize the Commission to place any limits on DP&L's receipt of the SSR generation subsidy.[2] The audacity of this argument is impressive, but it is curious that DP&L is the party making this argument. If the SSR-E may only include terms which are expressly authorized in R.C. § 4928.143(B)(2)(d), then it should not be authorized. R.C. § 4928.143(B)(2)(d) expressly requires the Commission to find that the charge will promote stability and certainty. If the Commission cannot set the amount of the SSR-E today (which is one of DP&L's allegations of error), then it cannot find that the SSR-E would promote stability and certainty. If the Commission cannot determine today that the SSR-E will promote stability and certainty, then it must reject the SSR-E entirely.

R.C. § 4928.143(B)(2)(d) provides that the Commission may approve an ESP containing, among other things:

> 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.

Nothing in this definition limits the Commission's discretion regarding how stability charges will be structured, what limitations will be placed on those charges, or what DP&L will have to establish in order to continue receiving these funds. The structure of the stability charge is left to

[2] DP&L Application, p. 2.

the discretion of the Commission, so long as the Commission finds that the charge "would have the effect of stabilizing or providing certainty regarding retail electric service."[3]

DP&L argues that the Commission may not limit the amount of the stability charge which DP&L may seek in the future.[4] DP&L claims that it may need a higher subsidy in 2017 than is currently authorized, and so the Commission should not set the amount of the SSR-E until that proceeding has been filed. DP&L argues that unless a restriction on the SSR-E is expressly authorized by R.C. § 4928.143(B)(2)(d), then the Commission is prohibited from "rewriting the statute" to impose such a restriction or to set the dollar amount of the SSR-E today.[5]

It is unclear why DP&L would make this argument, as it appears to be directly contrary to DP&L's interests to do so. If the Commission is not expressly authorized by statute to set an SSR-E amount at this time, then the SSR-E should be eliminated entirely as beyond the Commission's statutory authority. If the Commission cannot set the amount of the SSR-E today, then it cannot authorize an SSR-E today since it would be unable to determine that DP&L needed this amount of revenue in order to provide stability and certainty to the market. If the Commission cannot make this determination, then it cannot authorize the SSR-E.

The SSR-E should be eliminated entirely (along with the SSR). Because DP&L argues that the SSR-E has no statutory justification, it should not object to the elimination of the SSR-E. More importantly, eliminating the SSR-E will not cause any harm to DP&L's financial integrity, either now or in 2017. If DP&L requires additional funds to maintain safe and reliable service in 2017 (even after completing its distribution rate case), it can file a proceeding seeking

[3] R.C. § 4928.143(B)(2)(d).

[4] DP&L Application, pp. 1-2.

[5] DP&L Application, p. 2.

emergency rate relief.[6] There is well established Ohio law establishing this process. Given that DP&L has the option of applying for emergency relief if it truly needs additional revenue in 2017, the SSR-E should be eliminated.

B. If The Commission Rejects DP&L's Statutory Interpretation, Then The Restrictions Placed On The SSR-E Are Appropriate.

As explained in FES's Application for Rehearing, the Commission does not have the authority to authorize the SSR or SSR-E because they are subsidies for DP&L's generation assets.[7] Moreover, the SSR and SSR-E are an improper second bite at the transition revenue apple, and thus should be rejected on that basis as well.[8] If the Commission finds that it does have the power to subsidize generation assets in direct contradiction of R.C. § 4928.38 (requiring generation assets to be "fully on its own in the competitive market" and prohibiting recovery of transition revenues), then the Commission can place reasonable restrictions on its grant of this massive subsidy.

As recognized by DP&L, the Commission imposed five common sense restrictions on the SSR-E. The restrictions related to: (1) DP&L's financial integrity; (2) a distribution rate case; (3) an application to complete corporate separation; (4) a proposal to implement SmartGrid and AMI infrastructure; and (5) modernization of DP&L's billing structure.[9] Nothing in R.C. § 4928.143(B)(2)(d) prohibits the Commission from requiring DP&L to meet these requirements before receiving the SSR-E. Therefore, if the Commission has the authority to approve the SSR-E, then it has the authority to place reasonable limitations on this charge.

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[6] R.C. § 4909.16.

[7] FES Application, pp. 21-25.

[8] FES Application, pp. 25-27.

[9] DP&L Application, p. 1.

DP&L has identified no authority suggesting that the restrictions imposed by the Commission are improper in any way. Instead, DP&L has cited authority that the Commission "may not legislate in its own right."[10] DP&L's analysis never explains how the Commission is "legislating" by placing restrictions on the SSR-E. If the Commission believes, which it obviously does, that restrictions on the SSR-E are necessary in order to ensure that the SSR-E relates to stability and certainty, then those restrictions are completely within the Commission's statutory authority. In other words, without the restrictions the SSR-E would not "have the effect of stabilizing or providing certainty regarding retail electric service."[11] The Commission is not "adding" to the statute by imposing these restrictions since the statute does not even discuss what conditions are appropriate for stability subsidies. DP&L has not carried its burden of demonstrating that the restrictions are outside of the Commission's statutory authority.

C. The Commission Order Appropriately Addressed Rate-Ready Percentage Off Price-to-Compare Billing.

During the hearing there was extensive testimony regarding DP&L's billing issues from FES witness Noewer and Constellation witness Fein which was relied on by the Commission.[12] To address these issues, the Order found:

> DP&L's billing system needs to be modernized to facilitate competition in this state. At a minimum, the billing system modernization should include rate-ready billing, percentage off price-to compare (PTC) pricing and the ability to support AMI.[13]

[10] DP&L Application, pp. 2-3.

[11] R.C. § 4928.143(B)(2)(d).

[12] Order, p. 28.

[13] Order, p. 28.

DP&L has requested "clarification" as to the meaning of the requirement to implement rate-ready billing, claiming that its "billing system already performs that function."[14] DP&L's confusion may result from the Order's description of "rate-ready billing, percentage off price-to compare (PTC) pricing", which suggests that rate-ready billing is a service that is separate and distinct from percentage off PTC billing. While DP&L does generally offer rate-ready billing, DP&L does not currently offer rate-ready percentage off PTC billing.[15]

Each time DP&L changes its price-to-compare components (some on a bill rendered basis and others on a service rendered basis), DP&L requires CRES providers with percentage-off offers to recalculate all their customer bills and resubmit to DP&L. DP&L requires this despite the fact that the price-to-compare components are in DP&L's system and could be re-calculated by DP&L in the same way as Ohio Power Company, Duke Energy Ohio and the FirstEnergy Ohio utilities do today.[16] With rate-ready percentage off PTC billing, CRES providers give the EDU the percentage discount and the EDU's billing systems generate customer bills by applying that discount to the EDU's price-to-compare components. DP&L's refusal to provide rate-ready percentage off PTC billing continues to be a barrier to competition. The Commission should affirm its order that DP&L must provide rate-ready percentage off PTC billing in its territory.

III. THE COMMISSION APPROPRIATELY ORDERED DP&L TO MODERNIZE ITS BILLING SYSTEMS (DP&L NO. IV).

The Order takes the reasonable step of requiring DP&L to implement the retail enhancements which already have been implemented by every other EDU in Ohio.[17] DP&L

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[14] DP&L Application, p. 6.

[15] Tr. Vol. IX, pp. 2427-28.

[16] Noewer Direct, p. 20; Tr. Vol. IX, pp. 2428.

[17] Order, p. 38.

objects to meeting the same standards which already have been implemented throughout the state because no intervenor witness did a cost-benefit analysis for these competitive enhancements.[18]

DP&L's argument is a red herring. No party, other than DP&L, could possibly calculate the cost of making enhancements to DP&L's systems. Therefore, DP&L is asking intervenors to do the impossible as a precondition of DP&L implementing the systems which every other EDU in Ohio has already implemented. There is no requirement that a complete cost-benefit analysis be conducted before DP&L is required to update its systems. The enhancements should have been made years ago.[19] Barriers to competition are contrary to the intent of R.C. § 4928.02(A),[20] (B),[21] (C),[22] and (H).[23] Each of these statutory provisions support the development of the competitive market and customer choice in Ohio. It is the obligation of every EDU to fulfill these state policy goals. Therefore, the Commission has the statutory authority to require DP&L to meet a minimum standard for the development of the competitive market and appropriately did so here.

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[18] DP&L Application, pp. 11-12.

[19] Noewer Direct, p. 7.

[20] "(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;"

[21] "(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;"

[22] "(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;"

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

In addition to the statutory authority, there was extensive testimony from the intervenor witnesses about the need for significant retail enhancements in DP&L's service territory. For example, FES witness Noewer provided extensive testimony regarding barriers to retail competition in DP&L's territory, including issues relating to customer metering, billing, enrollment, switching fees, and eligibility file.[24] She went into great detail on each of these topics. For example, she testified that DP&L's unique 100 kW interval meter requirement "reduces, if not eliminates, the savings that customers can enjoy from shopping" and that removing this charge would promote competition.[25] She also testified that DP&L was the only utility in Ohio which did not offer rate-ready percentage off PTC billing in its territory, to the significant harm of large scale governmental aggregation.[26] She also testified about DP&L's excessive consolidated and dual billing charges, providing testimony from 24 EDU service territories showing that DP&L's charges are well outside the norm.[27] Ms. Noewer also testified regarding DP&L's initial set up and billing change fees, once again establishing that DP&L's charges exceed the charges of 24 other EDUs by a large margin.[28]

These are only representative examples, as the record is filled with extensive evidence regarding barriers to competition in DP&L's service territory. Ms. Noewer also testified regarding DP&L's customer enrollment process, customer switching fee, eligibility file, and billing practices.[29] Witnesses for Constellation, DERS, IGS, and RESA also provided extensive testimony on these points. Each of the non-DP&L witnesses agreed that there were extensive

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[24] Noewer Direct, pp. 19-26.

[25] Noewer Direct, p. 20.

[26] Noewer Direct, pp. 20-21.

[27] Noewer Direct, p. 22.

[28] Noewer Direct, p. 22.

[29] Noewer Direct, pp. 22-26.

issues regarding competition in DP&L's service territory, and that the competitive market would be improved if these issues were addressed. The Commission appropriately relied on this testimony, and so DP&L's argument should be rejected.

IV. THE COMMISSION APPROPRIATELY INCLUDED REASONABLE ARRANGEMENTS IN AUCTION LOAD (DP&L NO. V).

The Commission ordered that load associated with reasonable arrangement and special contract customers be included in the auction process.[30] DP&L seeks rehearing of this decision because it "would not result in any cost savings to any customers."[31] As the Commission determined in its October 23, 2013 Entry on Rehearing, this is not accurate. DP&L recovers the difference between the contract rate and tariff rate from all customers on a nonbypassable basis.[32] While DP&L is likely correct that this delta will decrease as the auction process progresses, DP&L incorrectly claims "that delta recovery would decrease whether the contracts were included in the competitive bid or not."[33] This is not accurate, because increasing the load included in the competitive auction process will increase bidder interest, thus lowering prices.[34] As such, the Commission correctly ordered DP&L to bid reasonable arrangement load into the auctions.

Including reasonable arrangement load in the auction process is particularly important for DP&L since it has a large portion of its load served through reasonable arrangements. As explained by FES witness Noewer:

> The DP&L customer load associated with reasonable arrangements represents a significant portion of DP&L's total load. It is my

[30] Order, p. 16.

[31] DP&L Application, pp. 13-14.

[32] R.C. § 4905.31(E); DP&L Application, p. 13.

[33] DP&L Application, p. 14.

[34] Noewer Direct, pp. 13-14.

> understanding, for example, that the reasonable arrangement load associated with Wright-Patterson Air Force Base – just one of DP&L's reasonable arrangements – accounts for a significant percentage of the SSO load. DP&L also has a reasonable arrangement with Caterpillar, Inc.[35] for a 1.4 million square foot distribution facility, which represents another significant percentage of DP&L's SSO load.[36]

If reasonable arrangements were excluded from the auction product, the remaining SSO load available for bid in the SSO auctions would be substantially smaller. This would render the CBP less attractive to potential bidders, lowering participation and ultimately precluding SSO customers from receiving the maximum benefits of competition. Therefore, including special contract load in the auction product will reduce the delta to be recovered from all DP&L customers and lower their costs.

Including special contract load in the auction product is consistent with well established Ohio precedent in the AEP Ohio, Duke Energy Ohio and FirstEnergy territories. AEP Ohio has made clear that special contract load will be included in the auction product.[37] Duke Energy Ohio has also included special contract load in its auction product.[38] The FirstEnergy utilities also include special contract load in the auction product.[39] As every other EDU in Ohio includes special contracts in their auction product, the Commission made the correct policy decision to include DP&L special contract load in the auction product.

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[35] *See* April 5, 2011 Opinion and Order in Case No. 10-0734-EL-AEC.

[36] Noewer Direct, p. 14; *see also,* June 8, 2011 Opinion and Order in Case No. 11-1163-EL-AEC.

[37] Case No. 12-3254-EL-UNC, Application filed December 21, 2012, Ex. A, p. 6 (defining CBP to serve all SSO load, and defining SSO load to include Special Contract customers).

[38] Case No. 11-3549-EL-SSO, Application filed June 20, 2011, Ex. C, p. 2 (pg. 141 of 200) (defining CBP to serve all SSO load, and defining SSO load as "SSO Load will include the requirements of any Special Contract customers of Duke Energy Ohio who are served under special contracts.")

[39] Case No. 08-0935-EL-SSO, et al., Stipulation filed February 19, 2009, p. 8 (including special contract load in CBP process).

DP&L claims that this part of the Commission's order would "frustrate" special contract customers because the order effectively awards a portion of the contracts to winning bidders.[40] This statement misses the mark. Bidding out a portion of the generation supply does not change any aspect of the contract and does not "award" part of the contract to CRES providers. DP&L remains the contracting party responsible for supplying full requirements electric service. Although DP&L suggests that evidence is lacking that its special contracts allow load associated with the contracts to be included in the competitive bid,[41] DP&L has produced no evidence demonstrating that the terms of any of its contracts limit generation supply to specific sources.

The order will not, as argued by DP&L, disturb DP&L's special contracts with its customers.[42] As the Commission noted in its October 23, 2013 Entry on Rehearing, including special contract load in the auction process does not affect the contract between DP&L and its special contract customers – DP&L will continue to provide full requirements electric service to those customers. Entry, p. 3. The fallacy of DP&L's argument can be seen by looking no further than the other Ohio EDUs. They each have special contracts which are served through the CBP process. As shown by this experience, there is no practical or contractual reason why DP&L special contract load should not be included in the auction product.

V. THE COMMISSION CORRECTLY ORDERED THAT DP&L COLLECT THE COSTS OF COMPETITIVE ENHANCEMENTS ON A NONBYPASABLE BASIS (OCC NO. III(M)).

OCC has taken issue with the Commission's decision to defer the costs of competitive retail enhancements to a future distribution rate case.[43] As part of its discussion of this deferral,

[40] DP&L Application, p. 14.

[41] DP&L Application, p. 13.

[42] DP&L Application, pp. 12-13.

[43] OCC Application, p. 46.

OCC claims that "CRES providers should pay for all costs associated with enhancing the service that CRES suppliers provide. It is error for the PUCO to decide otherwise."[44] While OCC never developed this argument further, it is important to correct this statement.

The Commission correctly determined that the cost of retail enhancements should be borne by all customers on a nonbypassable basis.[45] Competitive enhancements benefit all SSO customers who receive the opportunity to shop, and therefore it is appropriate that these costs are shared on a non-bypassable basis. While OCC may wish these costs could be borne by CRES providers, there is no practical way to accomplish this goal. It is unclear when costs would be assessed, how costs would be split between current CRES providers (i.e., equal division, by load, or some other method), whether future CRES providers would pay something for these costs, or whether CRES providers would be able to determine what projects went forward since they were paying the costs of the enhancements. As correctly determined by the Commission, OCC's proposal is not feasible and a nonbypassable charge is appropriate.

VI. CONCLUSION

FES respectfully requests that the Commission reject DP&L and OCC's Applications for Rehearing as discussed herein.

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[44] OCC Application, p. 46.

[45] Order, p. 35.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Opposition to Applications for Rehearing* was served this 31st day of October, 2013, via e-mail upon the parties below.

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