BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO APPLICATIONS FOR REHEARING FILED BY INTERVENORS
PUBLIC VERSION

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I. INTRODUCTION AND SUMMARY

In the Commission's Opinion and Order ("Order") and its Entry Nunc Pro Tunc ("Entry"), the Commission struck a reasonable balance between the interests of The Dayton Power and Light Company ("DP&L") and the interests of the various Intervenors in the case. The Commission approved a stability charge for DP&L at an amount that was substantially lower than the amount that DP&L and Staff had supported. As the Commission found, that rider will enable DP&L to provide safe and reliable distribution, transmission and generation service to its customers. The Commission also ordered DP&L to implement competitive bidding in its service territory, which will allow all of DP&L's customers to benefit from low market rates and which will result in substantial rate decreases for DP&L's standard service offer customers over the term of the ESP.

In their applications for rehearing, the Intervenors argue that the Commission erred in numerous respects. They assert that the Commission should not have approved a stability charge for DP&L, or that the level of that charge should be substantially lower. They argue that DP&L should implement 100% competitive bidding immediately. They ask the Commission to order DP&L to separate its generation assets immediately.

The most notable point about their applications, however, is what they do not contain. The Intervenors do not cite to any evidence in the record that demonstrates that DP&L could provide safe and reliable distribution, transmission and generation service if the Commission were to grant any (much less all) of their requests. The Commission is charged with ensuring that DP&L can provide safe and reliable service. The Intervenors make many arguments, but at the end of the day, they presented no evidence at the hearing demonstrating that DP&L would be able to provide safe and reliable service under their proposals.

The reason that the Intervenors did not present evidence on that point is that DP&L could not provide safe and reliable service if their various proposals were adopted. DP&L presented substantial -- and unrebutted -- evidence that its financial integrity is in jeopardy, and that DP&L would not be able to provide such service if the Intervenors' proposals were adopted.

The Intervenors complain at length about the Commission's rate decisions in this case, but they entirely ignore the fact that DP&L's ESP actually results in a rate decrease over its term for nearly all SSO customers. Specifically, due to implementation of competitive bidding, the evidence shows that DP&L's ESP plan is projected to result in lower rates for nearly all SSO customers over its term. DP&L Ex. 9, p. 7 (Seger-Lawson); Schedule 10. The Commission can read every word in the Intervenors' applications, but it will not find that fact mentioned.

The most persistent argument in the Intervenors' applications is that the cause of DP&L's financial integrity issues is generation-related, but that the Commission cannot approve rate riders that are intended to allow DP&L to continue providing stable, safe and reliable generation service. Not only are the Intervenors wrong on the law on that point (as DP&L shows below), but also, the Intervenors ignore entirely the fact that DP&L is an integrated company that owns distribution, transmission and generation assets. The Intervenors never explain how DP&L -- as an integrated company -- could provide safe and reliable distribution, transmission and generation service without enough revenue to maintain its financial integrity. The Intervenors offer no explanation on that point because the facts show that it cannot be done. DP&L Ex. 16A, p. 8 (Jackson Rebuttal); DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal); DP&L Ex. 4A, p. 53 (Chambers).

The evidence demonstrates that the Commission's Order and Entry strike a reasonable balance. The Order and Entry result in lower rates for SSO customers over the ESP term, while allowing DP&L to maintain its financial integrity and provide safe and reliable service. The Commission should therefore reject the arguments made by the Intervenors.

II. THE SSR

The Commission authorized DP&L to recover a Service Stability Rider ("SSR") of $110 million for the period January 1, 2014 through December 31, 2016, which it found to be the minimum amount necessary to ensure DP&L's financial integrity. Order, pp. 25-26; Entry, p. 2. Intervenors argue that (a) there is no basis in the Ohio Revised Code for the Commission to approve an SSR; and (b) the amount of the SSR approved by the Commission is not supported by the evidence. As demonstrated below, the Commission should reject those arguments.

A. SECTION 4928.143(B)(2)(d) AUTHORIZES THE COMMISSION TO APPROVE A STABILITY CHARGE

1. The Evidence Showed That DP&L's SSR Satisfies the Statutory Elements

A lawful charge under Ohio Rev. Code § 4928.143(B)(2)(d) must satisfy only three criteria: (1) it must be a "[t]erm[], condition[], or charge[]"; (2) it must "relat[e]" to one of the items listed in that statute; and (3) it must "have the effect of stabilizing or providing certainty regarding retail electric service." None of the Intervenors dispute that the SSR satisfies the first element, that the SSR is a charge. As demonstrated below, the Commission should reject the Intervenors' arguments that the SSR does not satisfy the second and third criteria.

a. <u>"Relating to"</u>

The SSR must be a charge:

> "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 . . . ."

Ohio Rev. Code § 4928.143(B)(2)(d).

The Commission found that DP&L's SSR related to both default service and to bypassability:

> "The Commission finds that the SSR is related to default service. The SSR is a nonbypassable stability charge for the purpose of maintaining DP&L's financial integrity so that it may continue to provide default service. DP&L is required under Section 4928.141, Revised Code, to provide an SSO for customers in its service territory. The SSO is the default service provided by the electric utility and may be provided through either an ESP or an MRO. In fact, even if DP&L were to propose an MRO, DP&L would still need to maintain its generation assets for some time because it would be required to blend the MRO with its previous SSO rate over five years or such other period of time as determined by the Commission, pursuant to Sections 4928.142(D) and 4928.142(E), Revised Code. Therefore, we find that Section 4928.143(B)(2)(d), Revised Code, authorizes a financial integrity charge to the extent that such charge is necessary to ensure stability and certainty for the provision of SSO service.
>
> Moreover, Section 4928.142(B)(2)D), Revised Code, authorizes electric utilities to include in an ESP terms related to bypassability of charges to the extent that such terms have the effect of stabilizing or providing certainty regarding retail electric service. The Commission finds that based upon the record of this proceeding, the SSR should be nonbypassable. Both shopping and non-shopping customers benefit from the existence of the standard

> service offer, which is available even if market conditions become unfavorable for the retail shopping customers over the term of the ESP. Thus, the Commission believes that the second criterion of Section 4928.143(B)(2)(d), Revised Code, is satisfied."

Order, p. 21.

The Commission's finding is consistent with and is supported by the evidence submitted at hearing; namely, DP&L witness Seger-Lawson testified that the SSR related both to default service and to bypassability. DP&L Ex. 12, p. 23. Accord: Tr. 2023 (Rose).

OCC (pp. 12-15) argues that the SSR does not relate to default service. Specifically, OCC argues that the terms "default service" and "provider of last resort" are synonymous, and that the SSR is unlawful because there is no evidence that quantified the costs that DP&L would incur to provide "provider of last resort" service to returning customers.

As an initial matter, OCC's claim (p. 12) that "default service" is "legislatively defined" is false. There is no provision in the Ohio Revised Code that defines default service. The fact that § 4928.14 refers to customers "defaulting" to SSO service if their CRES provider fails to provide service does not mean that provider of last resort service (i.e., standing ready to provide service to switched customers) is the same as default service. Indeed, customers that have never elected to switch to a CRES provider will receive SSO service by default, even though the statute does not use the word "default." Ohio Rev. Code § 4928.141(A).

The Commission correctly found that the "SSO is the default service," because that is the service customers will receive if they do not elect to receive another service. Order, p. 21. The Commission also correctly found that the SSR relates to default service because the

SSR would maintain DP&L's financial integrity so that DP&L could provide default service. Id. The Commission should thus reject OCC's argument.

OCC (pp. 15-16) also argues that the SSR does not relate to "bypassability." OCC claims that, under the Commission's interpretation of that word, any charge would satisfy the "related to" criterion because all charges are either bypassable or nonbypassable. OCC's argument has two significant defects.

First, OCC (p. 15) states correctly that the term "bypassability" is not defined by statute, and although OCC (pp. 16-17) criticizes the Commission's interpretation of the term, OCC does not offer a different interpretation of the term. The reason that OCC did not offer a different interpretation of the term "bypassability" is that OCC does not have a different interpretation, and the Commission's interpretation was correct.

Second, the Commission did not hold that any charge would satisfy the "bypassability" criterion. The Commission specifically found that "[b]oth shopping and non-shopping customers benefit from the existence of the SSR," so that the SSR therefore relates to bypassability. Order, p. 21. OCC's argument that any charge would satisfy the Commission's test is therefore erroneous and should be rejected by the Commission.

b. Stability and Certainty

The Commission also found that the SSR would have the effect of stabilizing and providing certainty regarding retail electric service, and thus satisfies the third criterion in § 4928.143(B)(2)(d):

> "the Commission believes that the SSR would have the effect of stabilizing or providing certainty regarding retail electric service.

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

Order, pp. 21-22.

OCC (pp. 17-18), IEU (pp. 47-52) and OHA (p. 2) argue that the SSR is unlawful because the evidence did not demonstrate that the SSR was necessary to allow DP&L to provide stable and certain retail electric service. The Commission should reject those arguments because there was ample evidence demonstrating that the SSR was needed to permit DP&L to provide stable retail electric service.

For example, DP&L's Chief Financial Officer testified:

> "Q. On Pages 10 and following in Witness Jonathan Lessers' Direct Testimony, he discusses the Company's proposed SSR and on Page 11 indicates that 'If a company is told its financial integrity is guaranteed, then the economic incentive to improve its operations and reduce costs is reduced.' Please comment on his assertion and the SSR.
>
> A. . . . I strongly disagree that the SSR requested in this proceeding will 'guarantee' the financial integrity of the Company. Instead, <u>it is the minimum that DP&L needs</u> to allow it to satisfy its obligations, operate efficiently <u>so as to provide adequate and reliable service</u> and otherwise continue operating as an ongoing entity." DP&L Ex. 16A, p. 8 (Jackson Rebuttal) (emphasis added).

DP&L's Director of Regulatory Operations also testified as follows:

> "Q. Is the SSR a charge that would have the effect of stabilizing or providing certainty regarding retail electric service?
>
> A. Yes it is. It would stabilize retail electric service provided by DP&L because it would help to assure DP&L's financial integrity, which is <u>important to the company's ability to provide stable, safe, and reliable electric service</u>. It would provide certainty regarding retail electric service because it would help to strengthen DP&L's financial integrity, and because the SSR is important to allowing a multi-year ESP, which itself provides certainty regarding retail electric service." DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal) (emphasis added).

Dr. William Chambers, an economic consultant for the Analysis Group, explained further:

> "Q. Will the SSR have the effect of stabilizing and providing certainty regarding retail electric service?
>
> A. Yes. The SSR will provide DP&L with a relatively stable element in its revenue mix. As discussed above, it is an important factor in maintaining the Company's financial integrity and thus <u>permits it to provide quality service to its customers</u>. Alternatively, removal of the SSR will damage DP&L's financial position and integrity substantially, <u>imperiling its ability to provide such quality service to its customers</u>." DP&L Ex. 4A, p. 54 (emphasis added).

Intervenor witnesses conceded numerous critical points related to DP&L's request for an SSR. For example, many Intervenor witnesses agreed that it was important that DP&L be able to maintain its financial integrity and provide safe and reliable service. Tr. 2056 (Chriss); Tr. 1970 (Collins); Tr. 1658-59 (Higgins); Tr. 2434 (Noewer); Tr. 2577-78 (Walz); Tr. 2611-12 (White); Tr. 2097 (Hixon); OCC Ex. 17, pp. 10-11 (Wilson).[1]

[1] Mr. Wilson's deposition was filed with the Commission on March 20, 2013. Pursuant to agreement of counsel, his prefiled testimony and his deposition were admitted into the record without Mr. Wilson taking the stand. Tr. 1439-40.

Many witnesses also conceded that DP&L would need to earn a reasonable ROE or have reasonable earnings to maintain its financial integrity. Tr. 1000 (definition of financial integrity is "whether the company's able to generate revenue, meet its expenses, and provide a reasonable return to its investors") (Mahmud); Tr. 1878-80 (Choueiki); Tr. 1936 (Gorman);[2] Tr. 1984 (Kollen);[3] FES Ex. 14A, pp. 10-11 (Lesser); Tr. 2519-20 (Duann).[4]

However, not a single Intervenor witness – not one – sponsored any analysis showing that DP&L could maintain its financial integrity and continue to provide safe and reliable service without the SSR during the ESP term. Indeed, in their applications for rehearing, the Intervenors do not cite to any evidence -- none at all -- showing that DP&L could provide safe and reliable service if the SSR was rejected. Further, numerous Intervenor witnesses opposed the SSR, but conceded that they did no analysis regarding whether the elements of Ohio Rev. Code § 4928.143(B)(2)(d) were satisfied. Tr. 1210 (Fein); Tr. 1706-07 (Hess); Tr. 2054 (Chriss); Tr. 2423 (Noewer); Tr. 2600-01 (White).

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[2] FEA witness Gorman defined financial integrity with a rate case cost-of-service definition; his definition is that financial integrity refers to setting rates at a level on regulated cost of service reflecting prudent and reasonable costs that are adequate to provide earnings and cash flow that are sufficient to maintain the credit standing of the utility and that allows it to attract additional capital to make investments to maintain high quality reliable service of the utility company. Tr. 1936.

[3] Mr. Kollen defined financial integrity as the company's ability to pay its bills and continue as a going concern, and agreed that financial integrity is generally defined by earnings. Tr. 1984.

[4] OCC witness Duann, whose testimony was shot through with legal opinions, Tr. 2507-12, testified with regard to financial integrity that (1) his definition of financial integrity is that a utility providing monopoly service is allowed to have an opportunity to earn a reasonable rate of return so that it can continue its operations and attract capital, Tr. 2519-20; (2) oddly, that "Financial integrity is only applicable in a case of a utility providing monopoly service." Tr. 2520; (3) he believes that his definition is the one used in traditional cost-based regulation such as is the case with rate cases, but he concedes that DP&L's request for an SSR and its claim of deteriorating financial integrity are not based on the data and the methodology used in a traditional rate case, Tr. 2520-21; (4) based on the legal advice that he received from OCC, it is his belief that financial integrity is irrelevant, Tr. 2508. He did not calculate returns on equity for the period of the ESP, Tr. 2515, because he thinks "that the ROE of Dayton Power & Light Company is irrelevant in this proceeding." Tr. 2516.

There was thus ample evidence submitted to support the Commission's finding that the SSR was needed to allow DP&L to provide stable and certain retail electric service, and that the third criterion of § 4928.143(B)(2)(d) was satisfied.

2. <u>The SSR Is Not a Transition Charge</u>

OCC (pp. 19-23), IEU (pp. 30-35), FES (pp. 25-26) and Kroger (pp. 10-11) argue that the SSR is a transition charge under Ohio Rev. Code § 4928.38, and is thus unlawful. The Commission correctly rejected that argument, stating:

> "The Commission further finds that the 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 that the SSR allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010, pursuant to Amended Substitute Senate Bill 3, 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 minimum amount necessary to maintain its financial integrity to provide such service. Moreover, our holding today is consistent with our decision in the *AEP ESP II Case*, in which we determined that AEP-Ohio's proposed RSR did not allow for the collection of inappropriate transition revenues or stranded costs. *AEP ESP II Case*, Opinion and Order (August 8, 2012) at 32."

Order, p. 22.

In addition to the reasons identified by the Commission, the Commission should reject the Intervenors' argument by for the following two separate and independent reasons: (1) the SSR is not a "transition charge" as that term is defined by Ohio law; and (2) even if the SSR was a transition charge, the charge is authorized by Ohio Rev. Code § 4928.143(B)(2)(d), which was enacted <u>after</u> the statute that bars the recovery of transition charges.

a. **Under Ohio law, the SSR is not a transition charge**

As an initial matter, the statute authorizing the recovery of transition charges states:

> "[T]he public utilities commission . . . shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues . . . . Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:
>
> (A) The costs were prudently incurred.
>
> (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.
>
> (C) The costs are unrecoverable in a competitive market.
>
> (D) The utility would otherwise be entitled an opportunity to recover the costs."

Ohio Rev. Code § 4928.39 (emphasis added).

Transition revenues thus recover specific "costs." The Supreme Court of Ohio has recently held that a cost-based charge must be "related to a[] cost[] [that the utility] will incur." In re Application of Columbus S. Power Co., 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 25 (reversing Commission decision approving POLR charge for AEP because there was no evidence supporting the Commission's holding that the charge would compensate AEP for POLR costs).

In contrast, the SSR was not designed to allow DP&L to recover any specific costs. Instead, it was designed to allow DP&L the opportunity to earn a reasonable ROE. Tr. 209 (Jackson); Tr. 552 ("the SSR is not a cost-based from that standpoint . . . it is a general amount of money that contributes significantly to the ongoing financial integrity of the company") (Chambers); Tr. 823 (Parke); Tr. 1304-05, 1433 (Seger-Lawson); Tr. 2871 (Malinak).

The rebuttal testimony of DP&L witness Malinak explains the fact that the SSR was not a cost-based transition charge:

> "Q: Numerous intervenor witnesses claim that the SSR is a mechanism to recover transition costs under Ohio law. Ohio Rev. Code 4928.39 states that transition costs are costs that meet the following criteria, quoted at p. 10 of OCC Witness Rose's testimony:
>
> '(A) The costs were prudently incurred.
>
> (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.
>
> (C) The costs are unrecoverable in a competitive market.
>
> (D) The utility would otherwise be entitled to an opportunity to recover the costs.'
>
> <u>Does the SSR proposed by DP&L meet these criteria?</u>
>
> A: <u>No</u>. The proposed SSR is a charge that is designed and intended to provide DP&L as a whole with the financial wherewithal to continue to provide safe, reliable service to its customers at reasonable rates. This goal is furthered if DP&L has the opportunity to earn an ROE that will assist it in maintaining its financial integrity on a going-forward basis. Moreover, the level of the SSR is set based on projections of the future financial results of DP&L as a whole, not with regard to historical costs. <u>The process of setting the SSR has nothing to do with</u> whether certain 'generation costs' were 'prudently incurred,' nor <u>whether 'the utility would otherwise be entitled to an opportunity to recover these costs</u>.' It is set purely with regard to whether it is sufficient to allow DP&L to continue to provide safe, reliable service, a goal which is furthered if DP&L has an opportunity to earn a reasonable ROE. Thus, the <u>justification for the charge and the level at which it is set</u>

are not based on the transition charge criteria specified above."

DP&L Ex. 14A, pp. 17-18 (emphasis added) (footnote omitted). Accord: Tr. p. 2871 ("Q. Is the SSR . . . designed to recover any particular costs? A. No. Those charges are designed to increase the probability that DP&L, as a whole, will be able to maintain its financial integrity going into the future or under certain assumptions.") (Malinak).

Further, numerous intervenor and Staff witnesses conceded that the SSR was designed to allow DP&L to recover a targeted ROE. Tr. 1707 (Hess); Tr. 2035 (Rose); Tr. 2518 (Duann); Tr. 1808-09 (Turkenton). Those concessions thus demonstrate that the SSR was not designed to recover any specific "costs," and thus is not a transition charge as defined in Ohio Rev. Code § 4928.39.

b. The SSR is permissible under § 4928.143(B)(2)(d), which was enacted after SB 3

Even assuming for the sake of argument that the SSR was a transition charge, it would still be lawful because SB 221 was enacted after SB 3. As the Commission knows, SB 3 was enacted in 1999. As the Commission also knows, SB 3 provided that "[t]he 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." Ohio Rev. Code § 4928.38. Nine years later, the General Assembly passed SB 221, which included Ohio Rev. Code § 4928.143(B)(2)(d).

If the Commission were to conclude that the SSR was barred by § 4928.38 (as a transition charge) but was authorized under § 4928.143(B)(2)(d) (as a stability charge), then the Commission should conclude that § 4928.143(B)(2)(d) controls because it was enacted after

§ 4928.38. It is well settled that if two statutes conflict, then the later-passed statute controls. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."); Summerville v. City of Forest Park, 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E.2d 522, at ¶ 33 (holding that two statutes conflicted and that "the more recent . . . statute . . . prevails"); Stutzman v. Madison County Bd. of Elections, 93 Ohio St. 3d 511, 517, 757 N.E.2d 297 (2001) ("the statute later in date of enactment, prevails").

Thus, even if the SSR was a transition charge (as demonstrated above, it is not), it would still be lawful because § 4928.143(B)(2)(d) was enacted after § 4928.38.

3. Section 4928.143(B)(2)(d) Authorizes a Generation-Related Charge

OCC (pp. 23-26), IEU (pp. 38-42), FES (pp. 20-25), Kroger (pp. 10-11) and OHA (pp. 2-3) argue that the SSR is unlawful and is violative of Ohio's policies because it would support DP&L's generation business. The Commission correctly rejected that argument, finding:

> "the Commission believes that the SSR would have the effect of stabilizing or providing certainty regarding retail electric service. We agree with DP&L that if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service . . . . Although generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service. The Commission finds that the SSR will provide stable revenue to DP&L for the purpose of maintaining its financial integrity."

Order, pp. 21-22.

The Commission should reject the arguments made by Intervenors in their applications for rehearing for the following separate and independent reasons:

a. The evidence in the case supports the Commission's factual finding that the SSR is needed to support DP&L's distribution, transmission, and generation business

There was ample evidence to support the Commission's factual finding that the SSR was necessary to support DP&L's distribution, transmission and generation businesses. Specifically, DP&L currently is an integrated company that provides distribution, transmission and generation service. Tr. 1865-66 (Choueiki); Tr. 2635-36 (Bowser). DP&L witness Malinak explained that the cause of DP&L's financial integrity issues may be generation-related, but that those issues will affect all of DP&L's businesses. Tr. 2871-72. Staff witness Choueiki explained that if DP&L cannot maintain its financial integrity, then all of its services – including distribution service – would be affected. Tr. 1865-66. Dr. Choueiki further explained that the SSR thus relates to transmission, distribution and generation service. Id. IEU witness Bowser also conceded that the SSR would provide cash flow support for DP&L's distribution, transmission and generation businesses. Tr. 2636.

The Commission should thus reject the arguments by Intervenors and affirm its finding that the SSR is necessary to allow DP&L to provide safe and reliable distribution, transmission and generation service.

b. Chapter 4928 authorizes the SSR to allow DP&L to provide stable generation service

In addition, Section 4928.143(B)(2)(d) authorizes the Commission to approve an SSR to allow DP&L to provide stable and certain "retail electric service." The term "retail electric service" is defined in Section 4928.01 to include "generation service":

> "'Retail electric service' means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, <u>from the point of generation</u> to the point of consumption. For the purposes of this chapter, <u>retail electric service includes</u> one or more of the following 'service components': <u>generation service</u>, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service."

Ohio Rev. Code § 4928.01(A)(27) (emphasis added).

The Intervenors' argument that the Commission cannot approve a charge to allow DP&L to provide stable generation service is thus incorrect as a matter of law. Section 4928.143(B)(2)(d) expressly authorizes the Commission to approve charges to allow a utility to provide stable "retail electric service," and "retail electric service" is defined in Section 4928.01(A)(27) to include "generation service."

c. The SSR will promote state policies and is not anti-competitive

OCC (pp. 25-26), IEU (pp. 35-38 and 42-45) and FES (pp. 20-25 and 45-48) also argue that the SSR violates state policies and that it is anti-competitive because it is generation-related. The Commission should reject that argument for the following separate and independent reasons.

First, the Intervenors ignore the policy in § 4928.02(A) of ensuring that DP&L can provide "reliable [and] safe . . . retail electric service." As demonstrated above, "retail electric service" is defined to include generation service. Ohio Rev. Code § 4928.01(A)(27). As also demonstrated above, the SSR is reasonable to allow DP&L to provide safe and reliable distribution, transmission and generation service. The SSR thus promotes the important state policy of providing "reliable [and] safe" service, as the Commission found. Order, p. 51.

Second, the SSR is not anti-competitive because, as demonstrated above, DP&L could not provide reliable distribution, transmission and generation service without the SSR. Many witnesses in this case agreed that it was important that DP&L be able to provide safe and reliable service. Tr. 2056 (Chriss); Tr. 1970 (Collins); Tr. 1658-59 (Higgins); Tr. 2434 (Noewer); Tr. 2577-78 (Walz); Tr. 2611-12 (White); Tr. 2097 (Hixon); OCC Ex. 17, pp. 10-11 (Wilson).

Third, Section 4928.143(B)(2)(d) was enacted after Section 4928.02. Therefore, even if the Commission were to conclude that there was a conflict between the two sections (there is none), Section 4928.143(B)(2)(d) would control as the latter-enacted Section.

Finally, IEU (p. 36) relies on the Supreme Court's decision Elyria Foundry Co., v. Pub. Utils. Comm'n, 114 Ohio St. 3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, but that case is not on point. In Elyria, the Commission approved a Stipulation that permitted FirstEnergy to defer fuel costs for later recovery in distribution rates. Id. at ¶ 45. The Court ruled that recovery of fuel costs through distribution rates violated § 4928.02(G), which bars a subsidy flowing from a non-competitive retail electric service to a competitive retail electric service, and vice versa. Id. at ¶ 50-57.

Elyria is not on point for several reasons. First, the Elyria court rejected the argument that the deferral was authorized by other sections of the Revised Code. Id. at ¶ 56-57. Here, in contrast, the SSR is expressly authorized by § 4928.143(B)(2)(d). Second, in any event, § 4928.02(G) is inapplicable here because the SSR is not (as IEU asserts) a distribution charge that will be used to support a generation business. The evidence at the hearing showed that DP&L needed the charge to support its distribution, transmission and generation businesses. Tr. 1865-66 (Choueiki); Tr. 2635-36 (Bowser); Tr. 2871-72 (Malinak). There is thus no subsidy flowing between non-competitive and competitive services, because the charge is needed to support distribution, transmission and generation service.

d. The Valentine Act is inapplicable

IEU's reliance (pp. 42-45) upon Ohio's antitrust law, the Valentine Act, is badly misplaced, for multiple separate and independent reasons.

i. "Combination": The Valentine Act makes unlawful certain actions by a "trust," which is defined as a "combination" of "two or more persons." Ohio Rev. Code § 1331.01(B). Section 1 of the federal Sherman Act (15 U.S.C. § 1) contains similar language, and the Valentine Act is to be interpreted according to precedents under the Sherman Act. McGuire v. Ameritech Servs., Inc., 253 F. Supp. 2d 988, 1010 (S.D. Ohio 2003); In re Title Ins. Antitrust Litig., 702 F. Supp. 2d 840, 861-62 (2010). It is well settled that the actions of a single entity do not satisfy the "combination" element of a claim. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) ("Section 1 of the Sherman Act . . . reaches unreasonable restraints of trade effected by a contract, combination . . . or conspiracy between separate entities.") (emphasis omitted) (omission of text in original) (internal quotation marks and citation omitted); 1 ABA Section of Antitrust Law, Antitrust Law

Developments at 31 (7th ed. 2012) (the Sherman Act "is not violated by an 'agreement' between a corporation and one of its unincorporated divisions").

IEU (p. 45) argues that the "combination" element is satisfied because "DP&L itself consists of separate distribution, transmission, generation, regulated and unregulated lines of business having different interests that operate under one management." However, the Commission expressly found that "DP&L is not a structurally separated utility." Order, p. 22. DP&L is thus not a "combination" of "two or more persons" and is instead a single entity. The Valentine Act, therefore, is inapplicable. This IEU argument is frivolous.

ii. State Action Doctrine: The State Action Doctrine has been described as follows:

> "The Sherman Act was not intended to restrain states from conducting their affairs as they see fit. See Parker v. Brown, 317 U.S. 341, 351, 87 L. Ed. 315, 63 S. Ct. 307 (1943). An otherwise monopolistic restraint of trade will not give rise to a Sherman Act violation where it stems from a clearly articulated and affirmatively expressed state policy, and where said policy is actively supervised by the state itself. See California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed 2d 233, 100 S. Ct. 937 (1980). Where an actively supervised state policy is identified, the immunity extends not only to the state, but to the private parties acting pursuant to and in conformity with the state policy. See Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)."

McGuire, 253 F. Supp. 2d at 1006. That doctrine applies to Valentine Act claims. Id. at 1010.

Here, the Ohio General Assembly enacted Chapter 4928 (including its policy plan in § 4928.02), and charged this Commission with enforcing that Chapter. Further, the existence of this proceeding demonstrates that the "policy is actively supervised by the state itself."

McGuire, 253 F. Supp. 2d at 1006. DP&L's conduct is thus immunized from the Valentine Act by the State Action Doctrine.

iii. Filed Rate Doctrine: The Filed Rate Doctrine has been described as follows:

> "The filed rate doctrine made its first substantial appearance in an antitrust context in 1922, in Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). In Keogh, the Supreme Court held that a private shipper could not maintain a cause of action against an association of freight carriers that had collectively agreed on shipping rates that had been filed with, and approved by, the Interstate Commerce Commission ('ICC') under authority derived by the Interstate Commerce Act ('ICA'). Id. at 161. The rates were approved by the ICC as reasonable and non-discriminatory, and were therefore legal under the ICA. Id. The Court reasoned that once the ICC approved the rate, it became legal -- and a legal rate is not actionable as an antitrust injury, even if the rate resulted from an illegal combination of the carriers to fix rates. Id. at 162-3."

In re Title Ins. Antitrust Litig., 702 F. Supp. 2d 840, 846-47 (2010) (emphasis in original). The Filed Rate Doctrine applies to Valentine Act claims. Id. at 861-62.

The rates at issue here have been approved by the Commission, and will be incorporated into DP&L's tariffs. They are thus immunized from Valentine Act scrutiny under the Filed Rate Doctrine.

iv. Jurisdiction: Jurisdiction to adjudge Valentine Act challenges is conferred on the courts, not this Commission. Ohio Rev. Code § 1331.11.

v. Later Enacted: The Valentine Act was last amended in 1976. Ohio Rev. Code § 1331.01. Section 4928.143(B)(2)(d) was enacted in 2008. Thus, even if there was a conflict between the two sections, the latter-enacted section would control.

4. The Commission's Authority to Authorize the SSR Is Not Preempted

IEU (pp. 26-30) argues that the Commission's Order approving the SSR is preempted by FERC's exclusive jurisdiction. IEU relies upon a decision by a federal district court in Maryland, PPL Energyplus, LLC v. Nazarian, Case No. MJG-12-1286 (Sept. 30, 2013). As demonstrated below, the PPL Energyplus decision is not on point.

In that case, the Maryland Public Service Commission ("PSC") had stated that it was concerned that Maryland was within a constrained area as defined by PJM (i.e., that there was insufficient capacity in the state and that there were insufficient transmission lines to transport generation into the state), which was leading to higher energy and capacity prices. Id. at 52-53. The PSC thus issued a request for proposals ("RFP") that was intended to solicit proposals to construct new generation resources within the state. Id. at 61-63.

The RFP required the winning bidder to propose a price at which it would provide energy and capacity into the PJM markets. Id. at 65. The RFP also provided that the winning bidder would enter a "Contract for Differences" ("CfD") with the local electric distribution companies ("EDCs"). Id. at 64-66. The Court explained the CfD as follows:

> "under the CfD the actual revenue received by the supplier for its sale of energy and capacity in the PJM Markets is compared to what the supplier would have received for those sales had the contract prices been controlling, and any difference is settled between the supplier and the EDC(s). If the contract prices are higher than the market prices, the EDC(s) pays the difference to the supplier. If the market prices are higher than the contract prices, the supplier pays the difference to the EDC(s). In the event the EDC(s) have to make payments to the supplier, the EDCs would able [sic] to recoup their losses through increases in the rates paid by Maryland SOS customers. Correspondingly, the EDC(s) would be required to pass on any gains to the SOS ratepayers."

Id. at 66.

The issue in the case related to the federal doctrine of field preemption, which the court explained applied when there was:

> "[A] 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"

Id. at 75 (alterations and omission of text in original) (citations omitted).

The court explained that "Congress intended to use the [Federal Power Act] to give FERC exclusive jurisdiction over setting wholesale electric energy and capacity rates or prices and thus intended this field to be occupied exclusively by federal regulation." Id. at 83. The court elaborated that "the prices or rates received by [a] generator in exchange for wholesale energy and capacity sales are within the sole purview of the federal government." Id. at 85.

The court held that the PSC's order that the EDCs sign the CfD with the winning bidder was unlawful under the doctrine of field preemption because the order:

> "through the CfD, establishes the price ultimately received by [the winning bidder] for its actual physical energy and capacity sales to PJM in the PJM Markets. However, under field preemption principles, the PSC is impotent to take regulatory action to establish the price for wholesale energy and capacity sales. FERC has exclusive domain in that field and has fixed the price for wholesale energy and capacity sales in the PJM Markets as the market-based rate produced by the auction processes approved by FERC and utilized by PJM."

Id. at 93.

Here, there is nothing in the Commission's Order or Entry that would alter the wholesale energy or capacity rates that DP&L will receive. Unlike the winning bidder in PPL Energyplus, LLC, DP&L will receive the market rates for wholesale energy and capacity that are established by PJM. The Commission's Order thus does not establish or affect the rates for wholesale energy or capacity, and is not preempted. The court's decision in PPL Energyplus is thus entirely inapplicable.

5. The Commission Should Reject Intervenor Arguments Related to the SSR-E

The Commission authorized DP&L to apply for an SSR Extension ("SSR-E") for the period January 1, 2017 through May 31, 2017, in an amount up to $45.8 million. Order, pp. 26-28; Entry, p. 2. As demonstrated in DP&L's application for rehearing, the Commission's decision related to the SSR-E is unlawful and unreasonable for the following reasons: (1) Section 4928.143(B)(2)(d) does not authorize the Commission to limit the amount of a stability rider in advance; (2) the conditions listed in the Commission's Order for DP&L to recover the SSR-E are not contained in Section 4928.143(B)(2)(d); (3) there is no basis in the record for the Commission to condition the SSR-E upon DP&L implementing Advanced Metering Infrastructure or SmartGrid; (4) the deadline set by the Commission for DP&L to file a distribution rate case is unreasonable; and (5) the Commission should clarify its Order relating to rate-ready billing. DP&L Application for Rehearing, pp. 1-6.

OCC (pp. 30-37) argues that the SSR-E is unlawful for a variety of reasons that are different from the reasons identified by DP&L. As demonstrated below, the Commission should reject OCC's arguments.

a. Most of OCC's SSR-E arguments are the same as its SSR arguments

Most of the arguments that OCC makes relating to the SSR-E are identical to the arguments that it made relating to the SSR. Specifically, OCC argues that the SSR-E is generation-related (pp. 34-35), that the SSR-E did not relate to default service or bypassability (p. 32), that the SSR-E is a transition charge (p. 35), and that the SSR-E is an anti-competitive subsidy that violates Ohio policy (p. 36). The Commission should reject those arguments for the reasons identified above, in section II.A.

b. The SSR-E protects customers

OCC (p. 33) argues that the SSR-E is unlawful because it "create[s] another layer of protection for the Utility." The Commission should reject that argument because the SSR-E protects customers, not DP&L.

Specifically, as demonstrated above, there was ample evidence that DP&L needed the SSR so that it could provide stable and reliable service. See section II.A.1.b. supra. Further, that evidence demonstrated that DP&L needed the SSR through December 31, 2017.

Based upon that evidence, the Commission could have approved an SSR through December 17, 2017. Instead, the Commission approved the SSR only through December 31, 2016, and required DP&L to make a filing to show that it was entitled to the SSR-E. Order, pp. 26-28. Among the facts that DP&L must show to receive the SSR-E is that DP&L needs the SSR-E to maintain its financial integrity. Id. at 27. The Commission had the power to do the greater (approve the SSR through December 31, 2017) and thus necessarily had the power to do the lesser (grant the SSR through December 31, 2016, and the SSR-E through May 31, 2017).

c. The purpose of the SSR-E is to allow the Commission to have access to more current information

OCC (pp. 30-31) argues that the SSR-E is unreasonable because financial projections for 2017 are insufficiently unreliable. That argument is flawed because the reason that the Commission ended the SSR on December 31, 2016 and approved the SSR-E was that financial projections become less reliable in later years. By allowing DP&L to apply for the SSR-E, the Commission can more accurately assess 2017 financial conditions if and when DP&L files for the SSR-E. The SSR-E is not unreasonable due to the fact that financial projections in later years are less reliable. Instead, the SSR-E is a response to the fact that financial projects are less reliable, and this fact disposes of OCC's argument.

B. THE COMMISSION SHOULD REJECT INTERVENOR ARGUMENTS RELATING TO THE AMOUNT OF THE SSR

DP&L requested an SSR amount of $137.5 million for five years. The Commission approved an SSR for DP&L, but only in the amount of $110 million, and only for 2014-2016. Order, pp. 25-26; Entry, p. 2. OCC (pp. 27-29), IEU (pp. 52-57) and FES (pp. 27-31) assert that the SSR amount established by the Commission was too high and should be lowered.

As an initial matter, the SSR amount established by the Commission in consistent with -- and lower than -- the amount for the SSR that was supported by the evidence. Specifically, without the SSR, DP&L would earn negative ROEs during the ESP term.

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[redacted]	[redacted]
[redacted]	[redacted]

DP&L Ex. 4A, WJC-5 (Chambers).[5]

The evidence showed that under DP&L's as-filed case (including: (1) a $137.5 million SSR; (2) a Switching Tracker; and (3) that the fuel rider would be calculated on an average system basis), DP&L would earn an ROE of [redacted]. DP&L Ex. 14A, p. 23 (adjusted capital structure) (Malinak Rebuttal). Further, as demonstrated above, the evidence showed that DP&L needs the $137.5 million SSR so that it could continue to provide safe and reliable service. DP&L Ex. 16A, p. 8 (Jackson Rebuttal); DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal); DP&L Ex. 4A, p. 53. The evidence submitted by DP&L would thus have supported a Commission Order authorizing an SSR of $137.5 million. The Commission's Order establishes an SSR that is lower than that amount, and is thus supported by the evidence.

IEU (pp. 52-57), OCC (pp. 27-29) and FES (pp. 27-31) argue that the Commission should make various adjustments to the SSR. DP&L responds below to specific arguments made by Intervenors.

1. <u>O&M Expenditures</u>

The Commission should reject FES' (pp. 28-31) argument that the Commission failed to consider potential O&M expenditure reductions in setting the SSR because the Commission expressly considered those potential reductions. Order, p. 25.

[5] That exhibit shows the ROE that DP&L would earn without the SSR and DP&L's proposed switching tracker. The Commission denied DP&L's request for the Switching Tracker. Order, p. 30.

2. <u>Switching Projections</u>

IEU (p. 55) cites to the testimony of Staff witness Choueiki to support an argument that DP&L's switching projections are overstated. However, IEU and Dr. Choeuiki failed to address the significant effects that governmental aggregation is projected to have upon DP&L's switching rates. As explained in the testimony of DP&L witness Hoekstra, currently there are numerous communities in DP&L's service territory that are considering aggregation efforts; those governmental aggregation efforts are likely to lead to significant increases in residential switching. DP&L Ex. 2A, pp. 8-9; Tr. 293-96, 389-94 (Hoekstra); FES Ex. 10. The Commission should thus reject IEU's argument that DP&L's switching projections are unreasonable.

3. <u>Generation Dispatch</u>

IEU (p. 54) and OCC (pp. 27-29) argue that the Commission should use Staff witness Benedict's adjustments to DP&L's projections of revenues expected from its generating facilities. However, Mr. Benedict used forced outage rates that are lower than the forced outage rates used by DP&L; he described that difference as one of "the most important factors that explain[s] the differences in the generation forecasts." Staff Ex. 3A, p. 8; Tr. 1535. On cross-examination, Mr. Benedict admitted that he was unaware that DP&L's modeled forced outage rates at the DP&L-operated generation units are in line with the historic five-year average of those rates. Tr. 1538. Evidence submitted by DP&L showed that its projected O&M expenses were consistent with its historic O&M expenses. DP&L Ex. 1A, p. 7; Tr. 85 (Jackson). <u>Accord</u>: Tr. 1176-77 ("The O&M forecasts that were included in the filing are based on the historic operation of DP&L as an enterprise.") (Herrington).

Further, Mr. Benedict modeled higher generation output, but then assumed that in each hour that the generation units ran, they would receive the average annual revenue per mWh. Tr. 1538. However, he conceded that (a) the margin for a generation unit is lower in off-peak or shoulder periods, and (b) in the hours in which these units are running and in which they make a positive contribution to the annual average revenue, those units are already running at full capacity. Tr. 1539.

In addition, Mr. Benedict was unable to explain why he forecasted an <u>increase</u> in generation output in 2013 (more than a 6% increase), but he forecasted a <u>decline</u> in O&M expenditures of over $2.1 million in 2013 (Tr. 1542-44), concluding that his proffered explanation for that disparity is just "my best guess" (Tr. 1543) and that he does not know in fact why his figures show such an illogical result (Tr. 1544). Thus the record does not support his suggested adjustments.

4. <u>**Capital Expenditures**</u>

OCC (p. 27) and FES (pp. 28-29) assert that the Commission should adjust the SSR associated with potential capital expenditure reductions that DP&L has identified. The Commission should reject that argument for several reasons. <u>First</u>, as the Commission found, DP&L may need the capital expenditure reductions to maintain its financial integrity; the potential capital expenditure reductions are potential additions to DP&L's ROE and should be used to reduce the SSR. Order, p. 25. <u>Second</u>, there is no approved budget for 2014 and beyond; potential capital expenditure reductions for later years are thus speculative. Tr. 1118 (Herrington). <u>Third</u>, the capital expenditure reductions carry significant risks; however, the amounts of the potential reductions are not risk adjusted. Tr. 192 (Jackson). <u>Fourth</u>, in any event, capital expenditure reductions will have little impact on DP&L's earnings or ROE. DP&L Ex. 14A, pp. 27-28 (Malinak Rebuttal).

5. <u>The Transfer Price Between DP&L and DPLER Is Reasonable</u>

IEU (pp. 38-42) argues that the SSR amount is unreasonable because DP&L is subsidizing DPL Energy Resources, Inc. ("DPLER") by selling generation to DPLER at wholesale market prices, which IEU claims are below DP&L's costs. FES (p. 30) similarly argues that DP&L's projected revenue is understated because DP&L assumes that energy will be transferred to DPLER at zero margin. The Commission should reject those arguments for the following separate and independent reasons.

a. <u>IEU has not sponsored any evidence that the transfer price is below DP&L's costs</u>

Although IEU (p. 41) claims that DP&L sells power to DPLER at market rates that are lower than DP&L's costs, IEU failed to submit any evidence showing that that was true. IEU's argument is thus without factual basis.

b. <u>The Commission does not have jurisdiction over wholesale transactions</u>

This Commission does not have jurisdiction to review the reasonableness of the rates that DP&L charges to DPLER because those rates fall within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Regulation by this Commission is therefore preempted.

Specifically, it is well settled that FERC's jurisdiction "extend[s] . . . to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." <u>Nantahala Power & Light Co. v. Thornburg</u>, 476 U.S. 953, 966, 106

S. Ct. 2349, 90 L. Ed. 2d 943 (1986) (internal quotation marks and citation omitted). Accord: Pub. Util. Dist. No. 1 of Grays Harbor County Wash. v. Idacorp. Inc., 379 F.3d 641, 646-47 (2004). Pursuant to that authority, FERC has issued decisions and promulgated rules regarding the sale of power by utilities to their affiliates. Order No. 697, 119 FERC ¶ 61,295 ¶¶ 464-603 (June 21, 2007); Order No. 697-A, 123 FERC ¶ 61,055 ¶¶ 181-259 (April 21, 2008); 18 C.F.R. § 35.39.

Further, FERC has granted DP&L authority to sell wholesale generation at market-based rates. Dayton Power & Light Co., et al., 76 FERC ¶ 61,367 (Sept. 30, 1996). FERC has also ruled that DP&L need not comply with the affiliate transfer rules in 18 C.F.R. § 35.39. Order Accepting Updated Market Power Analysis and Accepting Order No. 697 Compliance Filing and Directing Further Compliance Filing, 123 FERC ¶ 61,231, ¶ 21 (June 3, 2008) ("[W]e find that, based upon Dayton's representations, its wholesale customers are adequately protected from affiliate abuse. Additionally, based on Dayton's representation that under Ohio law every retail customer has retail choice, we find that there are no captive retail customers. Accordingly, we find that the affiliate abuse restrictions of 18 C.F.R. § 35.39 do not apply.") (footnote omitted) (Docket No. ER96-2601-020)).

In addition, DP&L has a FERC-approved tariff for the sale of generation, which states:

> "This Tariff is applicable to all wholesale sales of electric capacity, energy and ancillary services to the extent authorized by the Commission and not otherwise subject to another tariff that is in effect.
>
> * * *

All sales pursuant to this Tariff shall be made at rates established by and subject to the terms and conditions of a service agreement between Buyer and Seller."

Wholesale Market-Based Rate Tariff Providing for Sales of Capacity and Energy, p. 2 (emphasis added).[6] DP&L's FERC-approved tariff extends to "all wholesale sales" and thus covers DP&L's sales to DPLER. Staff Witness Choueiki agreed that DP&L's transactions with its affiliates are governed by DP&L's market-based rate authority from FERC. Tr. 1918.

It is well settled that the Federal Power Act grants FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." New England Power Co. v. New Hampshire, 455 U.S. 331, 340, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982) (emphasis added). Accord: Pub. Util. Dist. No. 1, 379 F.3d at 646. The United States Supreme Court has further held:

> "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."

Nantahala, 476 U.S. at 966 (emphasis added) (internal quotation marks and citation omitted).

The Court's decision in Nantahala demonstrates that this Commission has no jurisdiction over wholesale energy sales between affiliates. In that case, FERC had approved a contract between two affiliates. Id. at 956-59. The North Carolina Utilities Commission ("NCUC") concluded that the contract terms were unfair to the retail affiliate, and ordered the

[6] Available at http://etariff.ferc.gov/TariffList.aspx , typing in Dayton Power, clicking "Find Tariffs," then clicking on the Tariff Title of "Wholesale Market Based Rate Tariff," then clicking on "View/Export Tariff," then clicking on "View/Export to RT."

retail affiliate to allocate costs to customers under terms that were inconsistent with FERC's decision. Id. at 959-62.

The Court held that the NCUC did not have jurisdiction to conclude that the FERC-approved terms were unreasonable in setting retail rates. Id. at 965-66. The Court stated:

> "Many of these cases involved purchases by closely related entities, but these courts have uniformly concluded that FERC's regulation still pre-empted review by state utility commissions of FERC-approved rates.
>
> * * *
>
> Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."

Id. Accord: Pub. Util. Dist. No. 1, 379 F.3d at 647-51 (finding that state regulation of wholesale transaction price was barred by doctrines of field preemption, conflict preemption and the filed rate doctrine).

The Commission must thus conclude that the rate that DP&L charges to DPLER falls within the scope of FERC's exclusive jurisdiction, and any finding by this Commission that that rate was unreasonable would be preempted.

c. No preference or advantage

Not only does the Commission lack jurisdiction, but also IEU (p. 41, n.103) misconstrues Section 4928.17(A)(3). That section provides that "the utility will not extend any undue preference or advantage to any affiliate . . . without compensation based upon fully loaded embedded costs charged to the affiliate." Ohio Rev. Code § 4928.17(A)(3). A utility is thus required to charge "fully loaded embedded cost[]" only if it provides an "undue preference or advantage" to an affiliate.

The Commission should conclude that a "preference" would exist only if DP&L was providing a benefit to DPLER that DP&L was not willing to provide to CRES suppliers under the same terms, and that an "advantage" would exist only if DPLER received a benefit that was not available to CRES suppliers under the same terms. An example of a preference or an advantage would be if a DP&L employee provided services to DPLER; that benefit would not be available to other CRES suppliers, and thus under § 4928.17(A)(3), DP&L must charge the fully-loaded embedded cost associated with those services to DPLER. Ohio Rev. Code § 4928.17(A)(3).

DP&L witness Hoekstra explained that DP&L does not provide a preference or advantage to DPLER by selling generation to DPLER at market rates:

> "Q. Using the methodology that you used for setting the transfer price as you do, is there any pricing preference or advantage to DPLER in so doing?
>
> A. No. As I noted, DPLER's alternative cost, if it were to buy from an unaffiliated third party, would be based on wholesale market prices at the time, and conversely, DP&L's alternative of selling power to a nonaffiliated counterparty would be based on the same wholesale market price. There is no affiliate preference or advantage for either business line."

Tr. 410. Accord: Tr. 727-28 (no undue preference occurs when DP&L sells generation to DPLER at market rates) (Rice). Mr. Hoekstra further explained that DP&L would offer the same terms to other suppliers that it offers to DPLER. Tr. 409. Accord: DP&L Ex. 16A, p. 9

("DP&L sells power to DPLER at arm's length and at market costs. This is consistent with how DP&L would sell power to any affiliated or unaffiliated CRES provider.") (Jackson Rebuttal).

The Commission should thus conclude that there is no preference or advantage when DP&L sells power to DPLER at market rates, and that DP&L does not have an obligation to sell generation to DPLER at a fully loaded embedded cost.

d. It is reasonable to set the transfer price based upon market rates

In any event, IEU's and FES' argument on this point is incorrect and misleading because they fail to address the fact that DP&L has fully accounted for the expected gross margin available from projected future generation sales. When DP&L sells power to DPLER, there are actually three transactions, not one. Specifically:

(1) DP&L sells all of its generation to PJM at a price called the locational marginal price ("LMP"). Tr. 38-41, 172 (Jackson). The LMP at which DP&L sells its generation to PJM varies on an hourly basis and is established by PJM.

(2) DP&L then pays to PJM LMP-based charges, to meet its load obligations (for its SSO retail customers, as well as for its wholesale customers including DPLER). Tr. 38-41, 172. The charges from PJM for meeting these load obligations, including the applicable LMP, also vary on an hourly basis. (The amount of generation that DP&L buys from PJM to satisfy its load obligations may be greater than, equal to or less than the amount of generation that it sold to PJM.)

(3) DP&L then charges its customers for the load that it has supplied, both to SSO retail customers (at SSO tariff rates) and to wholesale customers, including DPLER (at contract prices). Tr. 38-41, 172.

As to the first transaction -- DP&L's sale of all of its generation to PJM -- DP&L earns a margin (i.e., profit). That margin generally equals the LMP that DP&L receives from PJM minus DP&L's fuel and other variable costs. Tr. 74-75.

After DP&L buys the power that it needs from PJM to satisfy its retail and wholesale load obligations (transaction two), DP&L then charges DPLER for its sales to DPLER at contract prices (transaction three). Tr. 38-41, 172. DP&L and DPLER sign contracts that establish the price for these transactions (Tr. 69); it is undisputed that the contract price, at the time signed, is at a market rate (i.e., the projected cost to serve the DPLER load, based on then-expected LMP prices during the contract term). IEU Ex. 2A, p. 15; Tr. 1489 (Murray).

However, as the Commission knows, market prices (including the LMP) may change after a contract has been signed. In fact, the LMP varies on an hourly basis and only by coincidence would the PJM charges to serve the load based on hourly LMPs be equal to the contract price. Thus, during the term of the DP&L/DPLER contract, the LMP-based charges that DP&L pays to PJM to serve the DPLER load (in transaction two) may be equal to, less than, or greater than the DP&L/DPLER contract price. Tr. 164 (Jackson).

At the time that DP&L and DPLER sign a contract (for transaction three), it would be irrational for DP&L and DPLER to agree to a price that was higher than or lower than the projected cost to serve the DPLER load based on then-expected LMP (i.e., the market rate). From DP&L's perspective, it would not agree to a price that was lower than the projected cost to serve the load at the then-expected LMP, because DP&L would expect to take losses on the transaction. From DPLER's perspective, it would not agree to a price that was higher than the projected cost to serve the load based on the then-expected LMP (i.e., the market rate), because DPLER (like any other CRES provider) could buy the power from another generation provider at prices based on the then-expected LMP.

Indeed, IEU's suggestion that DP&L should sell generation to DPLER at a price above the projected cost to serve the load based on then-expected LMP would result in DPLER subsidizing DP&L and would harm DPLER's ability to compete with CRES providers. Specifically, CRES providers (including DPLER) can acquire generation from other generation providers at prices reflecting the projected cost to serve the load based on the then-expected LMP. DPLER would be subsidizing DP&L if DPLER paid more than what the generation was worth in the market, and DPLER would be at a competitive disadvantage if it agreed to pay more for generation than the amount that CRES providers paid for it.

Some of DP&L's projected sales to DPLER are under contract, but DP&L projects that it will make additional sales to DPLER during 2013-2017 that are not currently under contract. Tr. 302-03 (Hoekstra); IEU Ex. 5, pp. 3-4. As to the proposed sales that are not currently under contract, for the reasons explained above, DP&L expects to enter contracts with DPLER at the projected cost to serve the DPLER load based on the then-expected LMP. Tr. 164 (Jackson). The reason that DP&L shows zero margin on those projected sales (IEU Ex. 5, p. 4, Chart 2) is thus the fact that DP&L expects to pay PJM LMP-based charges to serve the load (transaction two), and expects to sell power to DPLER at a contract price that exactly equals the identical LMP-based charge (transaction three), thus resulting in a zero margin. Tr. 68-69 (Jackson), 308 (Hoekstra).

Accordingly, the Intervenors' claims that DP&L is subsidizing DPLER by selling generation to it below cost and at zero margin are incorrect and highly misleading. The Intervenors neglect to mention that they are discussing only transactions two and three and that DP&L earns a margin on its sales of generation to PJM (transaction one). More importantly, the Intervenors neglect to address whether it is rational for DP&L and DPLER to sign contracts at prices that reflect the then-expected LMP; instead, they make cryptic references to sales at "zero margin" and insinuate that there is an impropriety without ever explaining the nature of the transactions. As demonstrated above, the fact that DP&L and DPLER sign contracts at prices that reflect the then-expected LMP is rational and appropriate.

6. Slower Move to Market

IEU (pp. 55-56) also criticizes the Commission for failing to consider the fact that the Commission's Order authorized a slower transition to competitive bidding than proposed by DP&L. IEU argues that the Commission's decision resulted in a slower move to market rates than proposed by DP&L, and that the SSR should thus be reduced. The Commission should reject that argument because it ignores procedural issues in the case.

Specifically, when DP&L prepared its filing in this case, it did not know when the ESP would start, and DP&L used January 1, 2013 as an estimate.[7] Due to various procedural issues in this case, it turned out to be impossible to begin DP&L's ESP on that date, and given the timing of the issuance of the Order, the Commission reasonably set January 1, 2014 as the start date of DP&L's ESP. However, the Commission implemented the same blending schedule proposed by DP&L, just one year later.[8]

Indeed, the Commission approved an SSR for DP&L that would begin on January 1, 2014 and extend through December 31, 2016. Order, pp. 25-26; Entry, p. 2. DP&L originally proposed an ESP through 2017, and submitted evidence demonstrating that it needed the SSR so that it could provide safe and reliable service through 2017, see section II.A.1.b. supra. The

[7] DP&L Ex. 8, p. 2 (Herrington).

[8] Order, p. 15; DP&L Ex. 8, p. 2 (Herrington).

Commission approved an SSR for a shorter period than proposed by DP&L, and is thus supported by the evidence.

7. **Changes to Market Rates**

IEU (p. 55) and FES (pp. 30-31) argue that the Commission should consider the fact that market rates for generation were higher at the time of the hearing than they were at the time that DP&L filed its case. They thus argue that DP&L will have more revenue than it projected, and that it therefore needs a lower SSR. The Commission should reject that argument for the following separate reasons:

a. <u>No Evidence Quantifies the Alleged Higher Market</u>: As an initial matter, IEU and FES did not submit any evidence that quantifies the effect that the alleged increased market rates would have upon DP&L's earnings or the amount of the SSR that DP&L would need so that it could provide safe and reliable service. The Commission must base its decisions on the evidence submitted to it, and IEU and FES failed to submit any evidence.

b. <u>One Point in Time</u>: As the Commission knows, actual costs and market projections change on a daily or hourly basis. The pattern in any rate-setting case will be that the utility files its cost data, then the hearing occurs, and then the Commission issues its decision. The cost data will always have changed by the time of the hearing and the Commission's decision. The Commission thus should pick a point in time to evaluate the utility's requests, and stick to that point in time. The Commission should not consider updated data. In effect, the argument of IEU and FES would make it impossible for the Commission to do its job, as it would forever be chasing more-recent data.

c. All Data: If the Commission were to consider updated data regarding the forward curve for generation, then the Commission would need to consider updated data for all of DP&L's projected costs and revenues. The Commission should not consider one change in isolation, since the effect of that change may be offset or even exceeded by other changes to costs and related issues that go the other way. Neither FES nor IEU offered any evidence that updated the actual and projected changes to all of DP&L's costs and revenues. The Commission should not consider the change in forward curves in isolation, and should thus reject their argument. IEU and FES ought not to be able to pick and choose which data they want the Commission to use.

Indeed, as one example, DP&L projected that it would be able to sell capacity during the 2016/2017 PJM planning year at a price of $174.25/MW-day. FES Ex. 1, p. 53808. DP&L projected that it would earn capacity revenues in 2016 of $146 million and in 2017 of $168 million. Id. However, publicly available market-price data show that the PJM capacity price for the 2016-2017 delivery year cleared on May 24, 2013 at a price of $59.37 (i.e., one-third of DP&L's projected price).[9] DP&L is not seeking to reopen the record in this case to admit this new data or to address this issue. However, the change in capacity pricing does confirm the risk of considering updated data in isolation.

8. Distribution Rate Case

FES (p. 30) argues that the Commission should consider the possibility of DP&L filing a distribution rate case in setting the SSR amount. The Commission should reject that argument for the following separate and independent reasons. First, on page 20 of its brief, FES

[9] http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx.

states "there is no dispute that DP&L's distribution and transmission revenues are sufficient." (Emphasis added.) FES' argument on page 30 that the Commission should consider a potential distribution rate case in setting the SSR amount is entirely inconsistent with that argument. Second, there is no record evidence quantifying the effects of such a future distribution case. Third, as with the potential cost reductions, DP&L may need a distribution rate case in the future to give it an opportunity to earn a reasonable ROE. A potential distribution rate case is thus not a substitute for the SSR. Fourth, no such case has been filed, and the Commission should not speculate on the results of an unfiled case.

9. The Intervenors Failed to Account for Other Adjustments Made By the Commission

As demonstrated above, if the Commission had approved DP&L's ESP as filed, then DP&L would have had an opportunity to earn an ROE of [redacted]. DP&L Ex. 14A, p. 23 (Malinak Rebuttal). As also demonstrated above, the Intervenors argue that DP&L's revenue projections in its ESP filing are too low, and that DP&L's expense projections are too low. The Intervenors thus claim that the Commission should make adjustments to DP&L's projections, and that the result would be a lower SSR amount.

Even assuming that those adjustments were appropriate, the Intervenors' arguments are still flawed because they fail to take account of the fact that the Commission rejected DP&L's request for a Switching Tracker, and rejected DP&L's request that it implement average system cost to calculate the fuel rider. Order, pp. 30, 41. Those decisions by the Commission would significantly reduce DP&L's projected revenue, which means that the amount of the SSR would need to increase to offset those decisions for DP&L to have an opportunity to earn a reasonable ROE in the 7% to 11% range.

C. THE SSR SHOULD NOT FLUCTUATE BASED UPON DP&L'S PERFORMANCE

FES (pp. 31-32) argues that the SSR should fluctuate based upon DP&L's actual financial performance. The Commission should reject that argument for the following reasons.

First, FES did not make that argument in post-hearing briefing, and does not cite to any testimony supporting the reasonableness of it. The Commission should reject arguments made for the first time on rehearing.

Second, as demonstrated above, the Commission's Order will give DP&L an opportunity to earn an ROE only at the low end of the reasonable 7% to 11% range. As the Commission acknowledged (Order, p. 25), DP&L should have the opportunity to improve that ROE through potential capital expenditure reductions, additional O&M reductions or through other measures.

Third, FES' proposal would result in substantial additional filings and hearings. The SSR amount is reasonable based upon the evidence submitted in this hearing, and the Commission should not implement a process that would require additional filings and hearings.

Fourth, in any event, the Commission has implemented a significantly excessive earnings test threshold for DP&L of 12% during the ESP. Order, p. 26. The Commission has already imposed a mechanism to address FES' concerns.

D. THE SSR SHOULD NOT TERMINATE PRIOR TO THE END OF THE ESP

FES (pp. 32-33) also argues that the SSR should terminate before the end of DP&L's ESP. Kroger (pp. 14-16) similarly argues that the Commission should establish a "sunset date" for the SSR. The Commission should reject that argument for the following separate and independent reasons.

First, FES did not make that argument in post-hearing briefing, and does not cite to any testimony supporting the reasonableness of it. The Commission should reject arguments made for the first time on rehearing.

Second, FES and Kroger state that their concern is that the Commission will authorize the SSR to continue after the ESP term. However, that speculative concern is not a valid reason to end the SSR before the end of the ESP term. Specifically, if DP&L needs the SSR to enable it to provide safe and reliable service after the end of the ESP, then the Commission should at that time approve an SSR of an appropriate amount. The Commission should not issue an Order now that may make it impossible for DP&L to provide safe and reliable service in the future. The Commission should, instead, decide whether to continue the SSR if DP&L asks the Commission to do so in the future.

Indeed, the Commission stated that it was limiting the time that the SSR would be in place because "the reliability of financial projections significantly declines over time." Order, p. 26. For the same reason, the Commission should not now limit its ability to act in the future.

III. THE COMMISSION'S DECISION NOT TO IMPLEMENT 100% COMPETITIVE BIDDING FOR DP&L WAS NOT UNREASONABLE

In its Order, the Commission implemented competitive bidding for DP&L:

> "The Commission finds that DP&L's ESP should be approved for a term beginning January 1, 2014, and terminating December 31, 2016. We agree with the parties that CBP-based prices should be implemented during this ESP. We find that the annual blending percentages of the CBP auction rate shall be 10 percent for the

> period January 1, 2014, to December 31, 2014; 40 percent for the period January 1, 2015, to December 31, 2015; and 70 percent for the period January 1, 2016, to December 31, 2016. The Commission finds that this schedule for DP&L to implement full CBP procurement will move DP&L rates to market while granting DP&L sufficient time to refinance its long term debt to facilitate the divestment of the Company's generation assets."

Order, p. 15.

OCC argues (pp. 44-45) that the Commission's decision not to implement 100% competitive bidding at the beginning of DP&L's ESP was unreasonable. The Commission should reject OCC's argument over the facts, because a more rapid transition to 100% competitive bidding would cause substantial financial harm to DP&L and would require a significantly higher SSR.

Specifically, DP&L proposed the following blending schedule to implement rates from a competitive auction:

Date	**Existing Rates**	**Competitive Bid**
January 1, 2013 - May 31, 2014	90%	10%
June 1, 2014 - May 31, 2015	60%	40%
June 1, 2015 - May 31, 2016	30%	70%
June 1, 2016	0%	100%

DP&L Ex. 8, p. 2 (Herrington).

Staff witness Strom initially recommended that a more accelerated blending schedule that would use 40% of the competitive bid rates in the blend in year one; 60% in year two; and 100% in year three. Tr. 1077-78 (Strom). In his rebuttal testimony, DP&L's CFO, Craig Jackson, modeled the financial effect of that Staff proposal, including the Staff's 40%/60%/100% suggestion. DP&L Exhibit 16A, pp. 6-7. Mr. Jackson explained that "in order to allow the Company the opportunity to realize a three year average ROE of 7% if the Staff proposals above are implemented, we have estimated the [SSR] would have to be at a level of approximately [redacted] million per year compared to the [redacted] million per year noted in Witness Choueiki's testimony." Id. Accord: DP&L Ex. 14A, pp. 5-9 (Malinak Rebuttal); Tr. 637-38, 640-41 ("[A] faster transition to market results in lower revenues . . . . [T]hat factor would tend to lead to, all else equal, point to a higher SSR.") (Malinak); Tr. 1096 ("But certainly to the extent that you move on the blend percentage either to accelerate it or decelerate it for that matter, it changes how all of those features hang together and it could have an impact on the SSR.") (Herrington); Tr. 1298 (Seger-Lawson).

In his rebuttal testimony, DP&L witness Malinak explained that the Staff's suggested 3-year ESP plan would adversely affect DP&L's financial condition:

> "For example, as shown in Chambers Exhibit WJC-3, DP&L's ROE is expected to be just [redacted] percent in 2015 and [redacted] percent in 2016 with an SSR set at $137.5 million, which is indicative of a precarious financial position as noted by Witness Chambers. In light of this potential situation, it would be prudent for DP&L to request additional funds through an SSR for Years 1 to 3, a request that it mitigated through awarding the full five-year plan. Instead, Dr. Choueiki proposes to accelerate the transition to market rates with more aggressive blending of CBP auction rates than is proposed by DP&L, a proposal that compounds the effect of the shorter three year ESP term."

DP&L Exhibit 14A, pp. 28-29.

The witnesses -- including OCC witness Duann -- who recommended a more accelerated blending schedule admitted that they did not study the effect that their proposal would have on DP&L's financial integrity. Tr. 1080-81 (Strom), Tr. 1201 (Fein); Tr. 2416 (Noewer); Tr. 2545-46 (Duann). Dr. Choueiki admitted that the Staff recognizes that going to market two years earlier than the company proposes would result in a loss to DP&L of "a little bit under a hundred million dollars over the three-year period." Tr. 1908.

The Commission should thus reject OCC's argument because the evidence showed that DP&L could not maintain its financial integrity and provide safe and reliable service if OCC's proposal was implemented. The evidence showed that if accelerated blending was implemented, then DP&L would need a substantially higher SSR. Indeed, OCC's witness admitted that he failed to consider the effect that his proposal would have upon DP&L's financial integrity and ability to provide safe and reliable service. Tr. 2545-46 (Duann).

FES (pp. 33-35) argues that DP&L "proposed a very conservative auction schedule" and that the Commission erred in approving a slower transition to market than DP&L originally proposed. FES argues that the Commission should thus implement the schedule that DP&L proposed. The Commission should reject that argument because it would be impossible to implement. Specifically, as demonstrated above, DP&L proposed auctions that would begin on January 1, 2013. That date has already passed. The Commission's Order in this case was issued on September 4, 2013, and its decision to implement competitive bidding starting on January 1, 2014 was reasonable. Further, as demonstrated above, accelerating the auction schedule would require a higher SSR. The Commission's Order and Entry struck a reasonable balance between the auction schedule and the SSR amount, and the Commission should not alter that balance.

IV. THE COMMISSION DID NOT ERR IN ITS ORDER REGARDING SEPARATION OF GENERATION ASSETS

The Commission ordered DP&L to divest its generation assets:

> "The Commission notes that DP&L witness Jackson demonstrated that DP&L could not divest its generation assets before September 1, 2016. DP&L witness Jackson testified that defeasement and release of the first and refunding mortgage would be the only two options to divest sooner than September 1, 2016 (DP&L Ex. 16 at 2-4). Both defeasement and release of the first and refunding mortgage present significant financial risk to DP&L. DP&L witness Jackson indicated that, even if DP&L could defease or amend its first and refunding mortgage, DP&L would have to maintain or refinance all $884 million of indebtedness at the regulated business, call a portion of this indebtedness and repay it with cash, or call a portion of the indebtedness and refinance it with proceeds raised by the new unregulated business (DP&L Ex. 16 at 4). However, the Commission also believes that DP&L has failed to demonstrate that it necessarily cannot divest its generation assets sooner than December 31, 2017. Therefore, the ESP term will end on December 31, 2016, and the Commission expects DP&L to file a generation divestment plan that divests all of its generation assets by that date."

Order, pp. 15-16. In its Entry, the Commission stated that the deadline to divest is May 31, 2017. Entry, p. 2.

OCC (pp. 49-52) and FES (pp. 39-48) argue that the Commission erred by not ordering DP&L to separate its assets sooner. The Commission should reject those arguments because the Commission's Order is consistent with the evidence.

Specifically, the testimony of DP&L witnesses demonstrated that DP&L is restricted from transferring its generation assets at an earlier date due to: (1) restrictions in its First and Refunding Mortgage; and (2) limitations on its ability to refinance the bonds. DP&L Ex. 16A, pp. 2-4 (Jackson). DP&L maintains a First and Refunding Mortgage, which creates a lien on all of the assets (transmission, distribution and generation) of DP&L for the purposes of securing approximately $884M of current indebtedness ("Secured Bonds"). Id. So long as this First and Refunding Mortgage remains in existence in its current form, DP&L is prevented from effectuating a legal separation of the generation assets from the transmission and distribution assets. Id. The First and Refunding Mortgage cannot be extinguished until Secured Bonds are called (i.e., redeemed prior to maturity) by DP&L and either refinanced or re-paid in cash. Id. Given certain "no-call" provisions on certain outstanding bonds, the earliest possible date that all the Secured Bonds could be called is September 1, 2016. Id.; Tr. 2911 (Jackson). The debt issuances containing the no-call provisions benefitted ratepayers by yielding a lower interest rate, and were approved by the Commission at the time of issuance. Tr. 801-05 (Rice). DP&L witness Jackson further explained that very little if any of DP&L's existing debt could be supported by the generation business, and that if DP&L were compelled to transfer its generation assets now, then DP&L's transmission and distribution businesses would be supporting the full amount of the debt, which would lead to a very unbalanced capital structure. Tr. 260-61. DP&L's transmission and distribution businesses would have difficulty providing safe and reliable service in that circumstance. Tr. 261-62, 2897 (Jackson); Tr. 1148-50 (Herrington).

Significantly, the Intervenor witnesses uniformly concede that they did not study (1) whether DP&L's mortgages would permit DP&L to refinance those bonds on the schedule that they prefer, or (2) whether DP&L could obtain the financing necessary to accomplish the transfer at an earlier date. Tr. 1197-98 (Fein); Tr. 1485 (Murray); Tr. 1937-38 (Gorman); Tr. 1986 (Kollen); Tr. 2400-01 (Noewer). Those witnesses thus have no factual basis to support their opinions that DP&L can and should transfer its generation assets at a sooner date.

For example, FES witness Lesser's proposal that DP&L separate its generation by 2014 is made without any independent analysis of whether that separation is legally or financially feasible to be accomplished by 2014. Tr. 1636. Asked on cross examination whether he has done an independent analysis as to how feasible it is to accomplish generation separation by 2014, he first tried to dodge the question, and then admitted: "No, I have not done an independent analysis of that." Tr. 1637. He also made no independent analysis or determination about the effect on DP&L's financial integrity of separation of generation assets by the end of 2014. Tr. 1637-38. Thus his recommendation of generation separation by 2014 is without adequate factual support.

FES (pp. 43-44) criticizes DP&L for issuing no-call bonds, but Mr. Rice explained that the issuance of no-call bonds benefitted customers because they were issued at lower interest rates (Tr. 803-04), and this Commission approved those issuances (Tr. 804-05). Indeed, Staff acknowledged that it was reasonable for DP&L to issue no-call bonds:

> "It was recognized in DP&L's 1999 ETP case that no-call financing prevented the transfer of DP&L's generating assets at that time. Subsequently all of the debt that existed then has been refinanced with new no call provisions. On this basis it will be argued that the Company made its own problem. This argument ignores history and should be rejected.
>
> In fact the world changed between 1999 and when the debt was refinanced. It appeared that transferring the generating plant was unnecessary, even unwise. The Commission itself approved the debt issuances which included the new no-call provisions. The general assembly repealed the provision mandating transfer of generating plant ownership and replaced it with a requirement that Commission approval be obtained before any generating plan *could* be transferred. Given this change in circumstance, and the fact that no-call provisions lower the required debt rate, the refinancings were reasonable at the time. That the world has changed yet again, making it appear necessary to transfer [the] generating plant as soon as possible, does not mean that the Company has done anything wrong; it is merely Monday morning quarterbacking."

Staff Initial Post-Hearing Brief, p. 20 (footnotes omitted; emphasis in original).

The Commission should thus reject the arguments by FES and OCC that DP&L should be ordered to transfer its generation assets before May 31, 2017. Neither FES nor OCC submitted any evidence that the transfer could be accomplished any sooner, and the evidence submitted by DP&L demonstrates that the Commission's Order was reasonable.

V. STATE POLICIES ARE NOT VIOLATED BY THE COMMISSION'S ORDER

OCC (pp. 25-26, 36, 56-60), IEU (pp. 35-38, 42-45) and OPAE (pp. 7-16) argue that DP&L's ESP does not achieve various state policies. Generally, they focus on particular policies that they believe promote their insular interests, and argue that the Commission should reject DP&L's ESP because it does not promote (or does not do enough to promote) a policy that they favor.

The principal defect in their arguments is that they entirely ignore the many state policies that DP&L's ESP does promote. As explained in the testimony of DP&L witness Herrington, DP&L's ESP promotes the following state policies:

1. The policy in § 4928.02(A) to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service";

2. The policy in § 4928.02(B) to "[e]nsure 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";

3. The policy in § 4928.02(H) 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 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";

4. The policy in § 4928.02(I) to "[e]nsure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power";

5. The policy in § 4928.02(L) to "[p]rotect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource";

6. The policy in § 4928.02(N) to "[f]acilitate the state's effectiveness in the global economy."

DP&L Ex. 8, pp. 4-7 (Herrington).

In particular, the Intervenors ignore the policy in § 4928.02(A) related to the "reliable" and "safe" provision of "retail electric service." Retail electric service is defined to include distribution, transmission and generation services. Ohio Rev. Code § 4928.01(A)(27). As demonstrated at length above, DP&L's ESP -- including the SSR, the ESP term, and the blending percentages -- are critical to allowing DP&L to maintain its financial integrity, and thus allowing it to provide safe and reliable retail electric service.

OCC and OPAE assert that DP&L's ESP will not achieve the policy in § 4928.02(A) regarding reasonably priced retail electric service, but that assertion is not true. OCC has admitted that a typical residential customer uses 750 kWh a month.[10] DP&L's typical bill comparisons show that a customer that uses 750 kWh per month will receive substantial savings during DP&L's ESP. Schedule 10, p. 1 (2.61% increase for period 1), p. 13 (1.05% decrease for period 2), p. 25 (4.04% decrease in period 3). Accord: DP&L Ex. 9, p. 7 (Seger-Lawson) ("Most tariff classes are expected to experience SSO rate decreases for periods 2 through 5 as market prices are blended into current rates."). The Commission should thus conclude that DP&L's ESP promotes the policy of providing reasonably priced service.

[10] OCC Initial Post-Hearing Brief, p. 58 n.267.

OCC and IEU also argue that DP&L's ESP does not achieve the policy in § 4928.02(L) regarding protecting at-risk populations, but, again, in light of the fact that DP&L's plan provides an overall rate decrease for residential customers, they are incorrect on this point. Indeed, low income customers actually tend to have <u>higher</u> usage than typical customers. Tr. 1431 (Seger-Lawson). Schedule 10, pp. 1, 13, and 25 shows that higher usage customers will experience greater savings as a result of DP&L's ESP. DP&L's ESP thus protects at-risk customers by providing them rate discounts that are greater than those received by typical customers.

There is no requirement in the statute that an ESP be rejected unless it fulfills every single one of the policies in § 4928.02. The statute could have been written that way, but was not. The Commission should conclude that DP&L's ESP promotes the policies of the state of Ohio -- and in particular, the policies of promoting "reliable" and "safe" service in § 4928.02(A).

VI. THE COMMISSION SHOULD REJECT OTHER ARGUMENTS BY INTERVENORS

A. THE COMMISSION HAD NO OBLIGATION TO FIND THAT § 4928.143(E) WAS APPLICABLE

OCC (pp. 42-43) argues that the Commission erred by failing to hold that Ohio Rev. Code § 4928.143(E) is applicable to DP&L's ESP. Section 4928.143(E) provides that if an ESP "has a term . . . that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year . . . to determine whether the plan . . . continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." OCC argues that DP&L's ESP is 41 months, and since that is longer than three years, the Commission is obligated to test DP&L's ESP in the fourth year under § 4928.143(E).

The Commission should reject that argument because there is no requirement in § 4928.143(E) that the Commission state in its Order implementing the ESP that it will test the ESP under that section. In other words, while the Commission is obligated under § 4928.143(E) to test DP&L's ESP in its fourth year, there is no requirement in that Section that the Commission hold that that section is applicable in its Order implementing an ESP for DP&L.

B. THE RR-N IS LAWFUL AND CONSISTENT WITH THE EVIDENCE

The Commission approved a nonbypassable Reconciliation Rider ("RR-N") for DP&L:

> "The RR-N should recover any deferred balance that exceeds 10 percent of the base amount of riders FUEL, RPM, AER, and CBT, as proposed by DP&L. However, DP&L must file an application with the Commission, in a separate proceeding, seeking specific approval to defer for future recovery any amounts exceeding the 10 percent threshold for each individual riders."

Order, p. 35.

IEU (pp. 57-62) and Kroger (pp. 18-20) argue that the Commission's Order granting the RR-N is unreasonable and unlawful. The Commission should reject those arguments for the reasons stated below.

1. The RR-N Was Supported By the Evidence

There was ample evidence that was introduced to support the RR-N. Specifically, DP&L faces a risk that it will not fully recover costs under the listed riders in one period due to switching. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal). DP&L is then left to attempt to recover those costs from a smaller group of customers in the next period, but may again be unable to do so due to ever-increasing switching rates. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson). There is thus a significant risk that DP&L will be in a position that it has to recover a very large deferral balance from a very small group of customers. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson). Including deferral balances from those riders that exceed 10% of the base amount to be recovered under those riders eliminates that risk. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson).

In addition, numerous witnesses conceded that there was a real risk that DP&L may be left to recover a very large deferral balance from a very small group of customers if something was not done to address the issue. Tr. 1747-48, 1753-54 (Donlon); Tr. 1960 (Collins); Tr. 2049 (Chriss).

The Commission should thus conclude that the RR-N was supported by the evidence and was reasonable.

2. The RR-N Is Authorized By Ohio Rev. Code § 4928.143(B)(2)(d)

IEU (pp. 57-60) argues that the RR-N is not authorized by Ohio Rev. Code § 4928.143(B)(2)(d). Not so. The rider is lawful under Ohio Rev. Code § 4928.143(B)(2)(d).

Specifically, the RR-N satisfies the first criterion of that Section because it is a charge. The RR-N relates to both default service and bypassability, for the same reason that the SSR relates to those items. See section II.A.1.a. supra. The RR-N also satisfies the third criterion since it will allow DP&L to provide service to SSO customers at stable prices;

specifically, as demonstrated above, without the RR-N, SSO customers would not pay stable prices due to the "death spiral" effect. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson).

IEU (pp. 60-62) also argues that the RR-N is unlawful because it will allow DP&L to recover generation-related costs through a distribution rider. The Commission should reject that argument because Ohio Rev. Code § 4928.143(B)(2)(d) authorizes the Commission to implement a charge to provide stable "retail electric service" and "retail electric service" is defined to include generation service, as shown in section II.A.3.b. supra.

C. COMPETITIVE ENHANCEMENTS

1. The Commission Should Reject OCC's Arguments Relating to Deferrals

The Commission ordered DP&L to implement certain competitive enhancements "as soon as practicable." Order, pp. 38-39. The Commission further stated that "the costs of the competitive retail enhancements should be deferred for recovery in DP&L's next distribution rate case" and that "DP&L may seek recovery of the costs of implementation of the competitive retail enhancements in its next distribution rate case." Order, pp. 35, 39.

OCC argues (pp. 46-49) that the Commission erred in ordering that the costs of competitive enhancements should be recovered from customers, and OCC argues that the costs should instead be recovered from CRES providers. DP&L takes no position on that issue.

However, OCC further argues that if the costs are to be recovered from customers, then DP&L should not be permitted to defer them. Specifically, OCC (p. 48) argues that the competitive enhancements are "ordinary utility expenses" that should not be deferred.

The Commission should reject that argument because the competitive enhancements are not ordinary utility expenses, but are instead capital improvements and expenses related solely to the competitive market. Specifically, many competitive enhancements would require changes to DP&L's billing system. Those enhancements are thus capital in nature, and it is appropriate for DP&L to treat them as such and to seek to recover them in its next distribution rate case.

2. The Commission Should Reject FES' Arguments Relating to Competitive Enhancements

FES (pp. 35-39) argues that the Commission should order DP&L to implement various competitive enhancements. The Commission should reject those arguments for the following separate and independent reasons.

a. No evidence of costs or benefits

As demonstrated in DP&L's Application for Rehearing in this matter (pp. 11-12), the Commission should grant rehearing on its Order (p. 38) that DP&L implement certain competitive enhancements because there was no evidence submitted that the benefits of those enhancements exceeded their costs. The Commission should, instead, decide which competitive enhancements would be implemented through the Commission's Retail Markets Roundtable process, Case No. 12-3151-EL-COI.[11] The Commission should reject FES' argument that DP&L should implement competitive enhancements for the same reason.

b. Competitive enhancements identified by RESA

In the Commission's Order, it stated:

[11] Contrary to the claims made by FES in this matter, that roundtable process has revealed that DP&L has established a favorable process for interacting with CRES providers, and that many CRES providers prefer the manner in which DP&L performs certain functions over the way other Ohio utilities perform those functions.

> "RESA has identified certain EDI processes, EDI 876 HU Standards, and standard EDI interfaces that have been implemented by the other Ohio public utilities (RESA Ex. 6 at 7). If an EDI process, standard, or interface, as well as any other competitive retail enhancement, has been adopted by every other EDU in Ohio, then DP&L shall also implement that EDI process, standard, interface, or competitive retail enhancement. The Commission believes that requiring DP&L to adopt competitive retail enhancements, which have been adopted by every one of the other Ohio EDUs, will eliminate barriers and facilitate competition in DP&L's service territory. The Commission notes that these competitive enhancements should be implemented as soon as practicable and may not be delayed until DP&L files the billing system modernization plan discussed above. DP&L may seek recovery of the costs of implementation of the competitive retail enhancements in its next distribution rate case."

Order, pp. 38-39 (emphasis added).

FES (p. 36) argues that the Commission's Order was not sufficiently specific, and that the Commission should order DP&L to implement a list of specific competitive enhancements identified by RESA. As an initial matter, DP&L has already agreed to implement items (b) (SYNC-list) and (c) (cancel/re-bill) on RESA's list. DP&L Ex. 9, pp. 13-14 (Seger-Lawson). There is thus no need for the Commission to address those items. The Commission should reject FES' arguments as to the other items on RESA's list for the following separate reasons.

First, FES did not file any testimony regarding those items, and did not address them in its post-hearing briefing. It thus had no standing to raise this argument.

Second, the Commission ordered DP&L to implement only those RESA proposals that have "been adopted by every other EDU in Ohio." Order, p. 38. RESA submitted evidence that some "other Ohio utilities" have implemented the items on its list, but did not submit evidence that every other Ohio utility had done so. RESA Ex. 6, p. 7. Thus there is no record evidence to support the order sought by FES.

Third, it is unclear what items (a) and (d)-(f) on RESA's list are, or what they would require from an implementation standpoint. RESA's testimony does not clearly explain the detailed parameters around each item that RESA is proposing. The Commission should not require DP&L to implement processes when it is not clear what those processes are and the cost/benefit to customers that those processes create.

c. Competitive enhancements identified by FES

The Commission rejected FES' request that DP&L be ordered in this case to implement certain enhancements:

> "FES witness Noewer identified constraints to the development of the competitive retail electric market in DP&L's service territory regarding customer metering, billing, enrollment, switching fees, and eligibility file (FES Ex. 17 at 19-22). The Commission finds that these constraints are related to the distribution function of DP&L; therefore, these issues should be raised in DP&L's next distribution rate case."

Order, p. 39.

FES (pp. 37-39) asks the Commission to grant rehearing on that decision. The Commission should reject that request for the following separate and independent reasons.

First, the Commission correctly identified those items as being "related to the distribution function of DP&L," and correctly decided that they should not be addressed in this proceeding. Order, p. 39.

Second, as to percentage off PTC billing, DP&L currently supports that function for CRES providers. Tr. 2230.

Third, as to billing charges and rate-ready set up charges, those charges were approved by the Commission in another proceeding. Opinion and Order, p. 8 (Case No. 03-2405).

Fourth, as to switching fees, FES does not dispute that DP&L's $5 charge is reasonable; nor does it provide any evidence that charging that fee to customers (as opposed to CRES providers) deters switching.

Fifth, the evidence shows that DP&L's interval metering policy was reasonable. Tr. 2256-62 (Seger-Lawson).

D. THE COMMISSION'S TCRR RULINGS ARE LAWFUL AND ARE SUPPORTED BY THE RECORD

IEU argues that the Commission made various errors related to transmission costs regarding (a) the Commission's decision to authorize a TCRR-N and a TCRR-B; and (b) the Commission's decision to authorize a TCRR true-up rider. As demonstrated below, the Commission should reject IEU's arguments.

1. IEU Has Not Demonstrated That There Is A Risk That Shopping Customers May Be Required to Pay the Same Costs Twice

DP&L proposed to split its current bypassable Transmission Cost Recovery Rider ("TCRR") into non-bypassable ("TCRR-N") and bypassable ("TCRR-B") riders. DP&L Ex. 11, pp. 3-11 (Hale). DP&L sought a waiver of Ohio Administrative Code § 4901:1-36-04(B), to permit it to charge a non-bypassable TCRR-N. The Commission has previously approved similar structures for FirstEnergy Corp. and Duke Energy Ohio. July 18, 2012 Opinion and Order, pp. 11, 58 (Case No. 12-1230-EL-SSO); May 25, 2011 Opinion and Order, pp. 7, 17 (Case No.11-2641-EL-RDR).[12] The evidence showed that splitting the TCRR into a TCRR-N and TCRR-B is reasonable because the utility pays the nonbypassable components to PJM. DP&L Ex. 11, p. 6 (Hale). Constellation witness Fein supported DP&L's request to split the TCRR into a TCRR-N and TCRR-B. Constellation Ex. 1, p. 12.

The Commission approved DP&L's proposal:

> "The Commission finds that the TCRR should be removed from the RR and should be bifurcated by market-based and nonmarket-based elements, as proposed by DP&L, effective January 1, 2014. The Commission is persuaded that bifurcating the TCRR more accurately reflects how transmission costs are billed to customers."

Order, p. 36.

IEU speculates (p. 63) that splitting the TCRR into a TCRR-N and TCRR-B creates the "potential" that shopping customers will have to pay the same TCRR costs twice. Specifically, IEU argues that shopping customers "could be billed" by both DP&L (through the TCRR-N) and their CRES provider (through their contract) for the same transmission costs. The Commission should reject that argument for the following reasons:

First, IEU has not made any showing that customers in fact have contracts that create a risk of double payment. IEU witness Murray merely identifies the hypothetical possibility of double payment, but offered no proof that double payment would in fact occur. IEU Ex. 2A, p. 38. Further, DP&L's request to split its TCRR into a TCRR-N and TCRR-B was

[12] Both the FirstEnergy and Duke proceedings were resolved via Stipulation. The Commission found in both cases that the Stipulation did not violate any important regulatory principle or practice.

included in DP&L's March 30, 2012 Application (p. 10) in this matter; the request has been pending for over a year, and customers have thus had ample notice of the proposed change. Tr. 1356-57 (Seger-Lawson).

Second, even assuming for the sake of argument that customers were parties to contracts that placed them at risk of paying the same cost twice, Mr. Murray does not claim to have contacted the applicable CRES provider to ask whether it would agree to remove the charge from the customer's bill.

Third, Mr. Murray failed to identify the magnitude of the potential double charges for the customers that IEU represents. There has been no showing that the impact may be material for any customers who may be affected.

2. There Is Good Cause to Waive Ohio Admin. Code § 4901:1-36-04(B)

IEU (pp. 65-67) also argues that there is no evidence to find that there is good cause to waive the requirement in Ohio Admin. Code § 4901:1-36-04(B) that transmission costs should be bypassable. Not true. DP&L submitted evidence showing that splitting the TCRR into a TCRR-N and a TCRR-B is reasonable because the utility pays the nonbypassable components to PJM (DP&L Ex. 11, p. 6 (Hale)), and Constellation's witness supported DP&L's proposal. Constellation Ex. 1, p. 12 (Fein). The Commission agreed with DP&L's position: "The Commission is persuaded that bifurcating the TCRR more accurately reflects how transmission costs are billed to customers." Order, p. 36. There was thus ample basis in the record for the Commission to grant a waiver of Rule § 4901:1-36-04(B).

3. There Was Record Support for the TCRR True-Up Rider

As discussed above, DP&L proposed to recover through its Reconciliation Rider any deferred balance that exceeded 10% of the base amount associated with the TCRR-B. DP&L Ex. 10, pp. 8, 10, 11 (Rabb). As also addressed above, the reason that DP&L made that request is that DP&L faces a risk that it will not fully recover TCRR-B costs in one period due to switching. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal). DP&L is then left to attempt to recover those costs from a smaller group of customers in the next period, but may again be unable to do so due to ever-increasing switching rates. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson). There is thus a significant risk that DP&L will be in a position that it has to recover a very large TCRR-B deferral balance from a very small group of customers. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson). Additionally, both the TCRR-B and TCRR-N were proposed as true-up riders (DP&L Ex. 11, p. 7-8 (Hale)). At the end of the ESP period, a deferral balance may remain for the TCRR-B. Allowing the Company to recover those incurred costs as a part of a continued TCRR true-up rider (whether bypassable or nonbypassable) is consistent with the Company's proposal to true-up all transmission-related costs from customers. Thus, the Commission should reject IEU's argument (pp. 67-68) that there was no record support for the TCRR true-up rider because the "rider was not requested by DP&L or any other party."

4. The TCRR True-Up Rider Is Not Unlawful or Unreasonable

IEU (p. 68) also claims that the TCRR true-up rider is unlawful because DP&L's transmission costs are already recovered through the TCRR. IEU ignores the substantial evidence submitted by DP&L that it is not able to recover all of its deferred costs through the existing process, and that as that process already exists, DP&L may be left to recover a very large deferral balance from a very small group of customers. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson). Indeed, numerous witnesses conceded that there was a real risk that DP&L may be left to recover a very large deferral balance from a very small group of customers if something was not done to address the issue. Tr. 1747-48, 1753-54 (Donlon); Tr. 1960 (Collins); Tr. 2049 (Chriss). The rider is thus lawful and appropriate.

5. DP&L May Lawfully Recover Transmission Costs from Shopping Customers

IEU argues (pp. 68-70) that it violates the policy in Ohio Rev. Code § 4928.02(H) for DP&L to recover the TCRR-N and TCRR True-Up Rider from shopping customers. Not true.

As to the TCRR-N, as discussed above, the evidence shows (DP&L Ex. 11, p. 6 (Hale)) and the Commission found (Order, p. 36) that those costs should be nonbypassable. It is reasonable that shopping customers should pay costs that are fairly allocable to them.

As to the TCRR true-up rider, those costs should be nonbypassable to avoid the possibility that an ever-shrinking group of non-shopping customers would pay an ever-growing deferral balance. DP&L Ex. 12, pp. 7-8 (Seger-Lawson Rebuttal); Tr. 1432-33, 2242-44 (Seger-Lawson); Tr. 1747-48, 1753-54 (Donlon); Tr. 1960 (Collins); Tr. 2049 (Chriss). In any event, the Commission did not decide whether the rider in place at the end of the ESP would be bypassable or nonbypassable (Order, p. 36), so IEU's argument is premature.

VII. DP&L'S ESP PASSES THE ESP V. MRO TEST

As the Commission knows, it can approve an ESP only if the Commission "finds that the electric security plan so approved, including its pricing and <u>all other terms and conditions</u>, including any deferrals and any future recovery of deferrals, is more favorable <u>in the aggregate</u> as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." Ohio Rev. Code § 4928.143(C)(1) (emphasis added). The Commission found that on a quantitative basis, an MRO would be $250 million more favorable than DP&L's ESP. Order, p. 50.

However, the Commission further stated:

> "By statute, our analysis does not end with the quantitative analysis, however, as we must consider the qualitative benefits of the modified ESP, in order to view the proposed plan in the aggregate. The Commission notes that many of the provisions of the modified ESP advance the state policies enumerated in Section 4928.02, Revised Code. The modified ESP moves more quickly to market rate pricing than under the expected MRO, DP&L will be delivering and pricing energy at market prices by January 1, 2017, and if DP&L were to apply for an MRO, it is likely that DP&L would not deliver and price energy at full market prices until 2019. The Commission believes that the more rapid implementation of market rates is consistent with Section 4928.02(A) and (B), Revised Code.
>
> Moreover, although there is a quantifiable cost to the SSR, the SSR will ensure that DP&L can provide adequate, reliable and safe retail electric service until it divests its generation assets. Several witnesses have testified that this is essential to the implementation of a fully competitive retail market (Tr. Vol. VII at 1865-1866). Several witnesses also faulted DP&L for failing to divest its generation assets more quickly. However, we note that many, but not all, of those witnesses were sponsored by parties who agreed to a stipulation in 2009 in DP&L's first ESP which provided that DP&L would retain ownership of its generation assets (*ESP I Case*, Opinion and Order (June [2]4, 2009) at 4; Co. Ex. 102 at 17-18). In any event, the modified ESP contains provisions that will facilitate the complete divestment of DP&L's generation assets by

> the end of the term of the modified ESP and implement a fully competitive retail market in DP&L's service territory in accordance Sections 4928.02(B) and (C), Revised Code. Accordingly, we believe that the ESP obtains for customers the benefits of market pricing as soon as possible under the circumstances.
>
> * * *
>
> Further, while intervenors contend that competitive retail enhancements are not a qualitative benefit of the ESP over the expected MRO, we disagree. Although costs associated with the competitive retail enhancements represent a quantifiable cost of the modified ESP, the record evidence in the hearing demonstrates that both consumers and CRES providers believe that the implementation of the competitive retail enhancements would benefit the development of Ohio's retail electric service market and that such benefit is substantially greater than the cost of implementation. Moreover, the Commission has modified the ESP to provide DP&L with incentives to modernize its billing system. As discussed above, at the hearing, witness testimony indicated that DP&L's billing system is essentially antiquated and incapable of supporting rate ready billing and percentage off PTC pricing (Constellation Ex. 1 at 49-54; FES Ex. 17 at 19-26). The billing system modernization will allow CRES providers to offer a more diverse range of products to customers consistent with the provisions of Section 4928.02(B), Revised Code.
>
> Further, we find that the competitive retail enhancements, the billing system modernization, and the economic development provisions encourage economic development and improve the state's competitiveness in the global market as provided by Section 4928.02(N), Revised Code. Moreover, the modified ESP provides DP&L with incentives to submit a plan to modernize its distribution infrastructure in accordance with Section 4928.02(D) and (E), Revised Code.
>
> Accordingly, we find the ESP, as modified, accelerates the implementation of full market rate pricing, facilitates competition in the retail electric service market in the state of Ohio, and maintains DP&L's financial integrity to continue to provide stable, safe, and reliable service to its customers. We believe that these qualitative benefits of the ESP significantly outweighs the results of the quantitative analysis and that the modified ESP is more favorable in the aggregate than the expected results that would otherwise apply under Section 4928.142, Revised Code."

Order, pp. 50-52.

OCC (pp. 37-42), IEU (pp. 9-26) and FES (pp. 5-20) argue that the Commission erred in concluding that DP&L's ESP passed the ESP v. MRO test. As demonstrated below, the Commission should reject those arguments.

A. THE COMMISSION IS REQUIRED TO CONSIDER QUALITATIVE BENEFITS

OCC (pp. 39-42), IEU (pp. 10-12) and FES (pp. 12-20) argue that the Commission should not have considered qualitative benefits of DP&L's ESP in conducting the ESP v. MRO test. Not so. In fact, the Supreme Court of Ohio has found that the Commission is required to consider such benefits:

> "while it is true that the commission must approve an electric security plan if it is 'more favorable in the aggregate' than an expected market-rate offer, that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider 'pricing and all other terms and conditions.' Thus, <u>the commission must consider more than price</u> in determining whether an electric security plan should be modified."

<u>In re Application of Columbus S. Power Co.</u>, 128 Ohio St. 3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 27 (emphasis omitted) (emphasis added) (citations omitted). Based on the Supreme Court's recent precedent, it was thus necessary and appropriate for the Commission to consider qualitative benefits.

B. THE EVIDENCE SUPPORTS THE COMMISSION'S FACTUAL FINDING THAT THE QUALITATIVE BENEFITS OF DP&L'S ESP EXCEED ANY QUANTITATIVE BENEFITS OF AN MRO

OCC (pp. 39-42), IEU (pp. 10-24) and FES (pp. 12-19) also argue that the evidence does not support the Commission's finding that the qualitative benefits of DP&L's ESP exceed any quantitative benefits of an MRO. Again, that assertion is not true.

1. The Qualitative Benefits of an ESP

The Commission's finding (Order, p. 51) that there were substantial qualitative benefits associated with the fact that DP&L's ESP moves to market faster than an MRO was consistent with the Commission's precedent and was supported by the record.

Specifically, in the Commission's decision approving AEP's ESP, the Commission concluded that a hypothetical MRO for AEP was $386 million more favorable on a quantifiable basis than AEP's proposed ESP. AEP Order, p. 75. The Commission nonetheless found that the non-quantifiable benefits of AEP's ESP exceeded that amount. Id. at 76. In particular, the Commission identified the fact that AEP's ESP would implement 100% competitive bidding years before that would occur under an MRO.

DP&L's proposed ESP contains the same benefit. Specifically, under the MRO statute, 100% competitive bidding would not be available in DP&L's service territory until six years after a Commission order approving a hypothetical MRO. Ohio Revised Code § 4928.142(D). In contrast, DP&L's approved ESP provides for 100% competitive bidding four years after Commission approval of DP&L's ESP. DP&L Ex. 8, p. 2 (Herrington).

Many witnesses agreed that a more rapid transition to 100% competitive bidding would provide non-quantifiable benefits. DP&L Ex. 5, p. 14 (Malinak); Tr. 646 (Malinak); OCC Ex. 16, p. 3 (Wilson); Tr. 1046-49 (Strom); Tr. 1253-54 (Ruch); Tr. 1485 (Murray); Tr. 1803-04 (Turkenton); Tr. 2094 (Hixon). DP&L's ESP thus provides substantial non-quantifiable benefits that would not be available under an MRO, and the Commission should reject the Intervenors' arguments that DP&L's ESP is not more favorable "in the aggregate" than an MRO.

2. Qualitative Costs of an MRO Without an SSR

The Commission found that DP&L could not receive the SSR under an MRO. Order, p. 49. At the hearing, the evidence showed that there would be substantial non-quantifiable costs associated with an MRO in which DP&L was not able to recover the SSR.

For example, DP&L's Chief Financial Officer testified that DP&L's proposed SSR was "the minimum that DP&L needs to allow it to satisfy its obligations, operate efficiently so as to provide adequate and reliable service and otherwise continue operating as an ongoing entity." DP&L Ex. 16A, p. 8 (Jackson Rebuttal). DP&L's Director of Regulatory Operations also testified that DP&L's proposed SSR was "important to the company's ability to provide stable, safe, and reliable electric service." DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal). An expert in the field of economics and finance explained further that DP&L's proposed SSR "permits it to provide quality service to its customers. DP&L Ex. 4A, p. 54 (Chambers).

The above cited-evidence shows that DP&L could not provide safe and reliable service under an ESP without the SSR. For the same reasons, DP&L could not provide safe and reliable service under an MRO without the SSR.

Indeed, as explained in the rebuttal testimony of DP&L witness Malinak, DP&L would suffer from significant financial distress under a hypothetical MRO in which it did not receive the SSR. DP&L Ex. 14A, pp. 5-9 (Malinak Rebuttal); Tr. 637-38, 645, 663 (without the SSR "the viability of the company would be really greatly threatened" and there would be "severe financial distress which could lead to significant difficult-to-quantify costs"), Tr. 2709 (Malinak). If the SSR was removed from DP&L's revenue, then DP&L would obviously need to make drastic cuts to its maintenance expenses, which would create substantial reliability risks. DP&L Ex. 14A, pp. 5-9 (Malinak Rebuttal); Tr. 637-38.

As demonstrated above, many witnesses in this case agreed that it is important that DP&L be able to provide safe and reliable service. Tr. 2056 (Chriss); Tr. 1970 (Collins); Tr. 1658-59 (Higgins); Tr. 2434 (Noewer); Tr. 2577-78 (Walz); Tr. 2611-12 (White); Tr. 2097 (Hixon); OCC Ex. 17, pp. 10-11 (Wilson). None of the witnesses addressing the ESP v. MRO test sponsored testimony showing that DP&L could maintain its financial integrity and provide safe and reliable service under a hypothetical MRO without the SSR. Tr. 1260 (Ruch); Tr. 1484-85 (Murray); Tr. 2097 (Hixon); Staff Ex. 8, pp. 3-12 (Turkenton).

The Commission's factual finding that "the SSR will ensure that DP&L can provide adequate, reliable and safe retail electric service until it divests its generation assets" (Order, p. 51) is thus amply supported by the evidence.

3. <u>Other Qualitative Benefits of DP&L's ESP</u>

The Commission's Order (pp. 51-52) identified other qualitative benefits of DP&L's ESP, and various Intervenors challenge the Commission's findings as to those benefits. As demonstrated below, the Commission's findings were amply supported by the record.

a. <u>Generation Asset Divestiture</u>

The Commission identified the fact that DP&L will divest its generation assets as a qualitative benefit of DP&L's ESP. Order, p. 51. The Intervenors readily admit that DP&L divesting its generation assets is a benefit -- indeed, numerous Intervenors asked the Commission to order DP&L to separate its generation assets as soon as possible. In that testimony, Intervenors claimed that it was critical to the development of a competitive market that DP&L

transfer its generation assets. E.g., FES Ex. 14A, pp. 63-79 (Lesser); FES Ex. 17A, pp. 9-10 (Noewer).

The Intervenors do, however, argue that separation of DP&L's generation assets is required by Ohio Rev. Code § 4928.17, and that the benefit is thus equally available under either an ESP or an MRO. The defect in the Intervenors' argument is that DP&L could not separate its generation assets under an MRO.

Specifically, the evidence shows that DP&L's assets (including generation assets) are security for $884 million of Secured Bonds. DP&L Ex. 16A, p. 2 (Jackson Rebuttal). After the no-call provision in those Secured Bonds expire on September 1, 2016, DP&L could seek to refinance those bonds under terms that would permit DP&L to transfer the generation assets to an affiliate. Id. at 2-4. However, DP&L could not maintain its financial integrity without the SSR, and thus would not be able to acquire new financing without the SSR. Id. DP&L thus needs the SSR so that it can obtain new financing that would permit it to transfer its generation assets. Id.

The SSR is thus necessary to DP&L's ability to transfer its generation assets, and in light of the Commission's ruling that the SSR would not be available under an MRO (Order, p. 49), DP&L could not transfer its generation assets under an MRO. The fact that DP&L will transfer its generation assets is thus a substantial benefit under DP&L's ESP that is not available under an MRO.

b. Competitive Enhancements

The Commission also identified the fact that DP&L will implement certain competitive enhancements as a benefit of DP&L's ESP that would not be available under an

MRO. Once again, the Intervenors have admitted that the competitive enhancements are a benefit. Tr. 2396 (Noewer); Tr. 1211 (Fein).

However, once again, the Intervenors argue that the benefits would be available under either an ESP or an MRO. That is not so. There is no provision in the MRO statute that requires a utility to implement any competitive enhancements. Ohio Rev. Code § 4928.142. The MRO statute is silent on the subject. The competitive enhancements are thus a qualitative benefit of DP&L's ESP that would not be required under an MRO.

C. THE COMMISSION SHOULD ADDRESS THE EFFECT THAT ITS ENTRY NUNC PRO TUNC HAD ON THE ESP V. MRO TEST

OCC (pp. 37-38), IEU (pp. 11-12) and FES (pp. 5-7) all argue that the Commission failed to address the effect that its Nunc Pro Tunc entry had on the ESP v. MRO test. DP&L's Application for Rehearing (pp. 6-8) explained the finding that the Commission should make on this point.

Specifically, in its Entry (p. 2), the Commission made two rulings that would affect the quantitative aspect of its analysis: (1) the Commission extended the SSR by one year, thus adding a $110 million cost on the ESP side; and (2) the Commission cut the potential SSR-E amount by $46.2 million (from $92 million to $45.8 million), thus subtracting $46.2 million in costs from the ESP side. If DP&L was authorized to receive the SSR-E, then the Commission's Entry thus effectively added $63.8 million in costs ($110 million minus $46.2 million) to the ESP side of the test.

However, in its Entry, the Commission did not explain that its Order added $63.8 million to the MRO side of the test, and did not address whether the qualitative benefits of the

ESP still exceeded the quantitative benefits of an MRO if $63.8 million in costs were added to the ESP. The Commission did state "the amount that the modified ESP fails the quantitative analysis should be corrected accordingly." Entry, p. 3.

The Supreme Court has repeatedly held that an order by the Commission must "state specific findings of fact, supported by the record" and must "state the reasons upon which the conclusions . . . were based." Tongren v. Pub. Utils. Comm'n of Ohio, 85 Ohio St. 3d 87, 91, 706 N.E.2d 1255 (1999) (internal quotation marks and citation omitted). Accord: Indus. Energy Users-Ohio v. Pub. Utils. Comm'n of Ohio, 117 Ohio St. 3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 ("[T]he PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.") (internal quotation marks and citation omitted).

The Commission's Entry did not disturb its earlier finding in the Order that the qualitative benefits of the ESP exceeded the quantitative benefits of an MRO; however, the Commission should simply clarify its Entry by explaining that the Commission added up to $63.8 million in costs to the ESP side of the test, and that the qualitative benefits of DP&L's ESP (as modified by the Entry) continue to exceed the quantitative benefits of an MRO. The Commission would therefore clarify that DP&L's ESP passed the ESP v. MRO test.

VIII. THE COMMISSION'S ENTRY NUNC PRO TUNC WAS LAWFUL

The Commission issued its Order in this case on September 4, 2013, and two days later, the Commission issued its Entry Nunc Pro Tunc in which it amended certain pages of the Order. In the Entry Nunc Pro Tunc, the Commission explained that "[d]ue to an administrative error, the Opinion and Order does not reflect the decision that the Commission intended to issue." Entry, p. 2. OCC (pp. 5-7) and IEU (pp. 70-71) argue that the Commission's Entry Nunc Pro Tunc was unlawful because it contained substantive changes to the Commission's Order. The Commission should reject that argument for the following three separate and independent reasons.

First, the Supreme Court has held that a nunc pro tunc order may be used to "reflect[] what the court actually decided":

> "While courts possess inherent authority to correct errors in judgment entries so that the record speaks the truth, nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide."

State ex rel. Litty v. Leskovyansky, 77 Ohio St. 3d 97, 100, 671 N.E.2d 236 (1996) (emphasis added). Accord: State v. Miller, 127 Ohio St. 3d 407, 2010-Ohio-5705, 940 N.E.2d 924, ¶ 15 (a nunc pro tunc entry may be used to "reflect what the trial court did decide but recorded improperly").

For example, the Supreme Court has held that it is improper for a court or the Commission to issue an order, then consider additional evidence, and then issue a nunc pro tunc order to change the prior order after considering new evidence. Helle v. Pub. Utils. Comm'n of Ohio, 118 Ohio St. 434, 441, 161 N.E.2d 282 (1928) (holding that Commission's nunc pro tunc entry unlawfully altered prior Commission order because the nunc pro tunc entry was issued after the Commission conducted additional hearings and was "based upon additional evidence"); Leskovyansky, 77 Ohio St. 3d at 100 (trial court had issued original order but in issuing that order, "had not considered the then-pending affidavit of disqualification"; the Supreme Court held that the trial court could not issue a nunc pro tunc order to correct the original order based upon that additional evidence).

Here, the Commission's Entry Nunc Pro Tunc was not issued to allow the Commission to consider additional evidence. Instead, as described by the Commission, it issued an Order that it did not intend to issue simply "[d]ue to an administrative error," and the Entry Nunc Pro Tunc corrected that error. Entry, p. 2. It is well-settled that nunc pro tunc entries may be issued to correct such errors. Miller, 127 Ohio St. 3d at ¶ 15 (nunc pro tunc entry may be issued to correct a "clerical error"); Leskovyansky, 77 Ohio St. 3d at 100 (nunc pro tunc entries may be used so that the record "reflect[s] what the court actually decided").

Second, in any event, the Supreme Court has held that "[t]he commission may change or modify earlier orders as long as it justifies any changes." Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio, 114 Ohio St. 3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 14 (citing Office of Consumers' Counsel v. Pub. Utils. Comm., 10 Ohio St. 3d 49, 50-51, 461 N.E.2d 303 (1984) (per curiam). Here, the Commission explained in its Entry Nunc Pro Tunc the reason that it changed its prior Order, and the Entry Nunc Pro Tunc is thus lawful.

Third, even assuming for the sake of argument that the Entry Nunc Pro Tunc was unlawful, the Commission can issue an entry on rehearing that contains the same terms as its Entry Nunc Pro Tunc. Specifically, Ohio Rev. Code § 4903.10 provides that "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same." (Emphasis added.) The Commission may thus alter its original Order "in any respect" in its entry on rehearing to the extent that the original Order was "unjust or unwarranted, or should be changed." To avoid any question on appeal as to the lawfulness of the Commission's Entry Nunc Pro Tunc, the Commission can state in its entry on rehearing that it is implementing the terms of its Entry Nunc Pro Tunc.

IX. CONCLUSION

The Commission should deny the applications for rehearing filed by Intervenors for the reasons stated above.

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