IN THE SUPREME COURT OF OHIO

ORIGINAL

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	:	Supreme Court Case No. 14-1505
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	:	Public Utilities Commission of Ohio Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, and 12-672-EL-RDR
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	:	
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Industrial Energy Users-Ohio, Appellant, v. Public Utilities Commission of Ohio, Appellee.	:	

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JOINT MOTION FOR A STAY
BY INDUSTRIAL ENERGY USERS-OHIO AND
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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JOINT MOTION FOR A STAY
BY INDUSTRIAL ENERGY USERS-OHIO AND
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The appeal before this Court is of the Public Utilities Commission of Ohio's ("Commission)" orders permitting a utility to collect $330 million from customers over a three-year period ending December 31, 2016, through a non-bypassable charge called the Service

Stability Rider ("SSR"). The Industrial Energy Users-Ohio ("IEU-Ohio") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively "Joint Movants") respectfully move this Court to grant a stay, pursuant to R.C. 4903.16, of the Opinion and Order issued September 4, 2013 ("Opinion and Order") (Attachment A), the Entry *Nunc Pro Tunc* issued September 6, 2013 ("*Nunc Pro Tunc* Entry") (Attachment B), the Entry on Rehearing issued October 23, 2013 ("Entry on Rehearing") (Attachment C), the Second Entry on Rehearing issued March 19, 2014 ("Second Entry on Rehearing") (Attachment D), the Fourth Entry on Rehearing issued June 4, 2014 ("Fourth Entry on Rehearing") (Attachment E), and the Fifth Entry on Rehearing issued July 23, 2014 ("Fifth Entry on Rehearing") (Attachment F) (collectively "ESP Orders") of the Commission in Case Nos. 12-426-EL-SSO, *et al.*[1] Pursuant to R.C. 4903.20, "[a]ll actions and proceedings in the supreme court" under the Revised Code Chapters at issue in this appeal "shall be taken up and disposed of by the court out of their order on the docket." Under R.C. 4903.16 and the Court's inherent powers, the Court is authorized to grant the stay. A stay is necessary in order to prevent irreparable harm to DP&L's customers during the pendency of the appeal of the ESP Orders.

For the reasons set forth in the following Memorandum in Support, the requested stay should be granted.

[1] The ESP Orders are attached to IEU-Ohio's Notice of Appeal, filed in this docket on August 29, 2014.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 4, 2013, the Commission issued its Opinion and Order in the above-captioned matter. In that Opinion and Order, DP&L was authorized to collect from customers

$330 million in so-called "stability" charges through a non-bypassable charge called the SSR. The Commission upheld (through several entries on rehearing) its Opinion and Order that permitted DP&L to collect $330 million in unlawful charges through the SSR. The ESP Orders, however, violate R.C. Chapter 4928. Specifically, the above-market, non-bypassable, generation-related SSR charge violates R.C. 4928.38, R.C. 4928.02(H), R.C. 4928.17, and R.C. 4928.143(B)(2).,

If there is no stay of the collection of these charges during the pendency of Joint Movants' appeal, then DP&L will continue to collect this unlawful charge from customers. And if this Court finds that the charge is unlawful or unreasonable, then DP&L will be unjustly enriched because the amounts it collects likely cannot be returned to customers. *In re Application of Columbus S. Power Co.,* 138 Ohio St.3d 448, 2014-Ohio-462, ¶54 (hereinafter "*Columbus S. Power Co. II*"). To prevent continuing irreparable injury to customers that are currently being billed the SSR, the Court should grant a stay of the collection of the charge while the appeal is pending.

II. THE COURT SHOULD GRANT A STAY TO PROTECT DP&L'S CUSTOMERS DURING THE PROCESS OF AN APPEAL

A. Joint Movants Meet the Legal Requirements for Granting a Stay Necessary to Protect Customers from Paying Unlawful Charges

Ohio law provides "any person who feels aggrieved by such order [an order of the PUCO] a right to secure a stay of the collection of the new rates after posting a bond." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, ¶17 (2011) (hereinafter "*Columbus S. Power Co. I*") (quoting *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957)). R.C. 4903.16 provides for the issuance of a stay of execution regarding the Commission's final orders:

> A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

This section imposes three conditions on the Court's exercise of its power to stay: application to the Court; notice to the Commission; and, upon approval by the Court, the movant's execution of an appropriate bond. As discussed below, all three conditions are or can be met in this case.

The first two requirements are satisfied. First, Joint Movants have applied for a stay from this Court by filing this motion. Second, Joint Movants have served the Commission with the required notice.[2] Attachment A to this motion contains a copy of that notice, with the electronic filing confirmation. The third requirement, the posting of a bond, is inapplicable because it is constitutionally infirm, does not apply to OCC acting as a public officer of the state,[3] or can be satisfied if Joint Movants are directed to post a nominal bond.

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[2] IEU-Ohio interprets the notice requirement in R.C. 4903.16 as only requiring the Court to provide notice to the Commission if it grants a stay of a Commission order. Nonetheless, consistent with the practice of other litigants, IEU-Ohio and OCC have filed letters with the Commission providing three days' notice to this motion.

[3] IEU-Ohio is not participating in this section of the Motion.

1. **No bond is necessary to obtain the stay that is necessary to protect customers from paying unlawful charges.**

a. ***The bond requirement in R.C. 4903.16 is unconstitutional under the separation of powers doctrine. Therefore, no bond is necessary to effect the stay that Joint Movants seek in order to protect customers from unlawful charges.***

Because the bond requirement of R.C. 4903.16 restricts this Court's ability to exercise its inherent authority to issue a stay, that requirement violates the separation of powers under the Ohio Constitution. Accordingly, the bond requirement is unconstitutional and unenforceable.

The Ohio Constitution embraces the separation of powers doctrine. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶40; *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶114; *State v. Hochhausler*, 76 Ohio St.3d 455, 466 (1996). Through this doctrine, our State Government preserves the independence of each of the three branches of the government and prevents the encroachment by one branch upon the powers of another. "The reason the legislative, executive, and judicial powers are separate and balanced is to protect the people * * *." *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135 (2000) (statute authorizing parole board to try, convict, and sentence inmates for crimes committed while in prison violated separation of powers doctrine).

The proper administration of justice requires that the judicial branch remain independent and free from interference by other branches. *State ex rel. Foster v. Bd. Of Cty. Commr. of Lucas Cty.*, 16 Ohio St.2d 89, 92 (1968) (a board of county commissioners could not interfere with the operations of the court by denying essential funding). The judicial branch's power to administer justice cannot be impeded or controlled through another branch's exercise of its respective powers. "The legislative branch has no right to limit the inherent powers of the judicial branch of the government." *Hochhausler*, 76 Ohio St.3d at 464. The judicial branch's "inherent authority includes the power to issue or to deny stays." *City of Norwood,* 110 Ohio St.3d at ¶118.

A stay prevents some action by temporarily suspending the authority to act. The stay power is "'a power as old as the judicial system of the nation'" and "part of a court's 'traditional equipment for the administration of justice.'" *Nken v. Holder,* 556 U.S. 418, 428-429 (2009), *quoting Scripps-Howard Radio, Inc. v. Fed. Communications Comm.*, 316 U.S. 4, 17 (1942) (distinguished on other grounds). A stay prevents irreparable injury to the parties and to the public pending the outcome of an appeal. *Id.* at 432.

The power to grant or deny a stay is "essential to the orderly and efficient administration of justice." *Hochhausler*, 76 Ohio St.3d at 464. As such, this Court has stated that the legislative branch may not impose limitations on the judiciary's inherent power to grant or deny stays. *City of Norwood,* 110 Ohio St.3d at ¶117 (*quoting Smothers v. Lewis*, 672 S.W.2d 62, 64 (1984) ("[I]t is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied.")).

In *City of Norwood*, this Court held that a statute's proscription of stays was unconstitutional as it violated the separation of powers doctrine. *City of Norwood*, 110 Ohio St.3d at ¶117. The statute prohibited courts from issuing stays or injunctions against the taking of property pending review of an eminent domain action. The Court noted that numerous jurisdictions recognize a court's inherent power to stay the effect of a lower court's decision. *Id.* at ¶118. The significance of "the rights and risks implicated by eminent-domain actions" also factored into the Court's order. *Id.* at ¶125. Moreover, the Court distinguished its decision that the statute unconstitutionally violated the separation of powers doctrine from its decisions in prior cases applying the same statute. *Id.* at ¶128-133. The Court noted that the prior cases had not considered whether the statute infringed on judicial authority and violated the separation of powers doctrine. *Id.* at ¶132.

In *Hochhausler*, the Court also held a statute's bar on judicial stays was unconstitutional because it violated the separation of powers doctrine. *Hochhausler*, 76 Ohio St.3d at 464. The statute's bar denied any court the ability to stay an administrative driver's license suspension imposed for operating a motor vehicle while intoxicated. *Id.* at 463. Although legislation enacted by the General Assembly is presumed constitutional, legislation that usurps the powers of the judicial branch violates the separation of powers doctrine and is unconstitutional. *Id.* at 458, 464. The Court found that "[t]o the extent that [the statute] deprives courts of their ability to grant a stay of an administrative license suspension, it improperly interferes with the exercise of a court's judicial functions." *Id.* at 463. The Court struck down the unconstitutional statute.

Further, the legislature may not limit the authority of the Court to issue a stay because the legislature has created the appellate right. As this Court recognized in *City of Norwood*, the legislature may not control a subsequent judicial review once an administrative action has ended and the right to appeal is triggered. "The statutorily granted right to appeal under [state statutes] was [appellant's] basis for this action * * *. However, the fact that the legislature statutorily provided for this appeal does not give it the right to encroach upon the constitutionally granted powers of the judiciary. Once the administrative action has ended and the right to appeal arises the legislature is void of any right to control a subsequent appellate judicial proceeding. The judicial rules have come into play and have preempted the field." *City of Norwood*, 110 Ohio St.3d at ¶121 (*quoting Smothers*, 672 S.W.2d at 64-65).

Like the statutes scrutinized in *City of Norwood* and *Hochhausler*, the bond requirement of R.C. 4903.16 prevents the Court from freely exercising its power to stay the Commission's orders on appeal. Under R.C. 4903.16, the Court may stay the execution of an order, only if the party seeking the stay posts a bond undertaking sufficient to pay for damages caused by the delay of the order in the

event that the order is upheld. Essentially, the statute prohibits the Court from issuing stays if a party fails to post a bond in an amount sufficient to pay for damages caused by the delay of the Commission order regardless of the lawfulness or injury caused by the Commission's order under appeal and without consideration of the harm caused by the unlawful orders. *See, e.g., Columbus S. Power Co. I,* 128 Ohio St.3d at ¶17; *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105 (1959) syllabus.

The inability or failure to post bond for the millions of dollars at stake in utility cases often results in the unjust outcomes a stay would prevent. In *Columbus S. Power Co. I,* for example, the Court found that parties were without a remedy for an unlawful retroactive increase in electric security plan ("ESP") charges because the appellant did not (and could not) post the bond required by R.C. 4903.16. *Columbus S. Power Co. I* at ¶18. Indeed, the Court characterized the statute as the legislature attaching "a significant requirement to the *court's stay power*." *Id.* at ¶20 (emphasis added.) Similarly, in *City of Columbus*, the City's application for a stay was denied because the City was unwilling to furnish an undertaking in more than a nominal amount. *City of Columbus*, 170 Ohio St. at 109-110.[4]

Although *Columbus S. Power* Co. *I, Columbus S. Power Co. II,* and *City of Columbus* consider R.C. 4903.16, none examined whether R.C. 4903.16 violated the separation of powers doctrine. As in *City of Norwood*, the prior decisions considering R.C. 4903.16 do not provide authority to continue to enforce the unconstitutional bonding requirement. As the Court stated in *City of Norwood*, the legislative branch may not impose limitations on the judiciary's inherent power to grant or deny stays. *City of Norwood*, 110 Ohio St.3d at ¶118.

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[4] The Court also upheld the Commission's refusal to remove the effects of an illegal charge from the deferral balance the Commission authorized Ohio Power Company to amortize under rates

Finally, *Columbus S. Power Co. I* illustrates the need for judicial discretion in granting stays. As in *City of Norwood*, the Court should consider the rights and risks implicated by the Commission's orders. *Id.* at ¶132. In *Columbus S. Power Co. I,* this Court recognized that the public was irreparably harmed. *See Columbus S. Power Co. I* at ¶11-21. Before the Court reversed the Commission's order, customers paid higher rates to the utility under that order. *Id.* at ¶15. ("The unlawful rate increase lasted until the end of 2009 and has been fully recovered."). Under the Court-devised "no refund rule," it did not order that amounts collected under the unlawful order be returned to customers. The no refund rule, coupled with the absence of a stay, transformed a "win on the merits into a somewhat hollow victory." *See id.* at ¶17. As a result, the utility was enriched by $68 million because the Court could not protect customers even though customers prevailed on the merits.[5]

In this case, if the legislative bond requirement prevents the Court from issuing a stay and the Court eventually reverses the ESP Orders, then DP&L's customers will once again be irreparably harmed because they will have paid the charges without an expectation of a refund. Under the ESP Orders, customers of DP&L are required to pay higher utility bills that include charges of $330 million during the term of the ESP. When the unlawful ESP Orders are reversed, the customers that have paid for the SSR will be left without a remedy to recover those payments if the Court again refuses to direct a refund. DP&L will benefit from the windfall. On the other hand, if the Court stays the collection of the rates and eventually reverses the Commission decision, then neither the customers nor the utility is harmed.

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on the basis that appellants had not secured a stay of the Commission's order. *Columbus S. Power Co. II* at ¶ 56-57.

[5] Justice Pfeifer has highlighted the unrealistic nature of the bonds. *State ex rel. Indus. Energy Users of Ohio v. Pub. Util. Comm.*, 135 Ohio St.3d 367, 2013-Ohio-1472, 987 N.E.2d 645, ¶ 2 (Pfeifer and O'Neill, J., dissenting) (stating that "bond in that amount [$144 million] to stay the rate increase pursuant to R.C. 4903.16 is unrealistic.").

When the Ohio General Assembly enacted R.C. 4903.16, it unconstitutionally encroached upon the Court's authority. The statute prevents the Court from exercising its judgment and utilizing its inherent stay powers to avert irreparable injury to the public pending the outcome of an appeal. To prevent further injury to DP&L's customers represented by OCC and IEU-Ohio resulting from the Commission's unlawful ESP Orders, Joint Movants respectfully request that the Court declare the bond requirement in R.C. 4903.16 unconstitutional and stay the ESP Orders as they pertain to the SSR.

b. The public office exemption to the bond requirement should apply to OCC.[6] Therefore, no bond is necessary to effect the stay that OCC seeks in order to protect customers from unlawful charges.

Ohio law provides for an exemption that relieves the OCC from having to post a bond – or "execute an undertaking" as bonding is referred to in R.C. 4903.16 – in furtherance of a requested stay. A public officer is not required to post a supersedeas bond when acting in a representative capacity for the State.[7] R.C. 2505.12 provides:

> An appellant is *not required to give a supersedeas bond* in connection with any of the following:
>
> (A) An appeal by any of the following:
>
> * * *

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[6] IEU-Ohio is not participating in this section of the Motion.

[7] It is easy to understand why the Ohio General Assembly has exempted State public officers from having to post a bond to effect a stay pending an appeal. In this case, DP&L's collection of nearly $330 million from its customers is the subject of this appeal. If OCC were required to post a $330 million bond in order to obtain a stay, OCC understands that it would have to pay an annual premium for the bond of approximately $4.5 million during the first year the appeal is pending plus a pro-rated amount for increments of a year after the first year that the appeal remains pending. In addition to this cost that is not affordable for OCC, in order to get a bond OCC would be subject to an indemnification provision that would put the OCC (or possibly the State) at risk of having to pay up to $330 million in the event the bond was forfeited. R.C. 2505.12 removes that cost and potential liability to the State when a stay is sought during an appeal.

> (3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.

R.C. 2505.12. (Emphasis added).

According to R.C. 4911.06, the OCC "shall be considered a state officer * * *." R.C. 4911.06. Furthermore, according to R.C. 4911.02, the OCC may "institute, intervene in, or otherwise participate in proceedings in both state and federal courts * * * on behalf of the residential consumers." R.C. 4911.02. Thus, in filing a request for a stay of execution, the OCC acts in a representative capacity and, as a public officer, is not required to post a supersedeas bond. Most recently, the Court granted a stay to OCC and other parties, without the posting of a bond.[8]

In fact, the Court has even granted a stay for an entity other than a public officer without requiring that a bond be posted by the appellant. In *MCI Telecommunications Corp. v. PUCO*, (1987), a stay was granted in a utility case by the Ohio Supreme Court without the posting of a bond despite the fact that the appellant was not a public entity. 31 Ohio St.3d 604, 605 (1987). Similarly, the Court should grant OCC's request for stay of execution in this case pursuant to R.C. 4903.16.

R.C. 2505.12 should be read in *pari materia* with R.C. 4903.16 as noted by Justice Herbert in his dissent in *Columbus v. Pub. Util. Comm. of Ohio,* 170 Ohio St. 105, 111 (1959) (Herbert, J., dissenting). There, Justice Herbert concluded that the City of Columbus, as a political subdivision of the State of Ohio, should not be required to post a bond to obtain a stay, or that a nominal bond should be sufficient.[9] Thus, this Court should stay the collection of rates pending final decision, without bond by the OCC or with only a nominal bond.[10] Justice Herbert

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[8] *In re Application of Duke Energy Ohio*, Case No. 2014-0328.

[9] *Columbus v. Pub. Util. Comm. of Ohio*, 170 Ohio St. at 111 (Herbert, J., dissenting).

[10] *Id.*

wrote, "It is the view of the writer * * * that the Legislature never intended to handicap in this manner a municipality seeking to protect its citizens who are consumers of public utility products."[11]

The OCC is not required to post a supersedeas bond because the OCC is acting in a representative capacity as a public officer of the State. Accordingly, no bond is necessary to obtain a stay.

3. If this Court determines that a bond is required, then the posting of a nominal bond will meet the requirements of R.C. 4903.16 to obtain a stay of the collection of an unlawful rate that is being charged to customers.

If the Court determines that R.C. 4903.16 is constitutional, then Joint Movants should be ordered to post a nominal bond to effect the stay. The law in question states that a bond must be "conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of." R.C. 4903.16. The amount DP&L may collect under the Commission's ESP Orders is $330 million. There is no interest component. Whether DP&L collects $330 million over three years or some other period may create some lost interest, but that loss must be weighed against the value of the funds already collected. DP&L has had approximately one year of use of ratepayer funds through amounts collected through the SSR. It will not be materially harmed by a stay. Thus, a nominal bond should be sufficient.

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[11] *Id.* at 112.

B. Under the Court's Inherent Power, the Court Should Stay its Order Authorizing DP&L to Collect the SSR from Customers. Joint Movants Can Show a Strong Likelihood of Prevailing on the Merits, DP&L's Customers Represented by OCC and IEU-Ohio Will Be Irreparably Harmed if the Stay is Not Ordered, DP&L Will Not Be Harmed if the Stay is Ordered, and There is a Strong Public Interest in Favor of the Stay.

In granting a stay, the Court is guided by a four factor test to determine if justice requires a stay of the ESP Orders.[12] Because there is a strong likelihood that Joint Movants' will prevail on the merits of their challenge of the SSR, DP&L's customers represented by OCC and IEU-Ohio are irreparably harmed by the ESP Orders, and the public interest supports an order granting a stay, the Court should grant the requested relief based on its inherent authority.

1. There is a strong likelihood that Joint Movants will prevail on the merits of their positions to protect Ohio customers from paying a stability charge that subsidizes DP&L's generation business.

Based on the plain violations of R.C. 4928.38, 4928.02(H), and 4928.17, the ESP Orders are unlawful because they authorize DP&L to collect unlawful transition revenue and provide a subsidy for the generation-related assets held by it and its affiliate during the term of the ESP. Further, the SSR is not authorized by R.C. 4928.143 as a term of an ESP.

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[12] Justice Douglas, in a dissenting opinion, endorsed the use of this same four factor test in the context of reviewing a motion to stay a Commission decision. *MCI Telecommunications Corp. v. Pub. Util. Com.,* 31 Ohio St.3d 604, 606 (1987) (Douglas, J., dissenting). The four factor test requires a showing that there is a strong likelihood of success on the merits, the customers of DP&L would suffer irreparable harm if the stay is not granted, the stay would not cause irreparable harm to DP&L, and a stay advances the public interest.

a. The ESP Orders are unlawful and unreasonable because they authorize DP&L to increase the prices paid by customers to compensate DP&L for transition revenues. The SSR provides DP&L with customer-funded transition revenue or its equivalent at a time when Ohio law commands that DP&L's generation business be fully on its own in the competitive market.

The Commission approved the collection of the additional transition revenue (above-market revenue to support generation-related assets) from customers through the SSR. Ohio law, however, prohibits the collection of transition revenue.

Under Ohio law, an EDU had a single opportunity to secure transition revenue. Each EDU was required to file an electric transition plan ("ETP") by January 3, 2000.[13] As part of that plan, it could request transition revenue.[14] Transition revenue was based on a determination of transition costs. Before authorizing collection of any transition revenue, the Commission had to find that the costs were "prudently incurred," "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state," "the costs [were] unrecoverable in a competitive market" and the EDU "would otherwise be entitled an opportunity to recover the costs."[15]

If the Commission determined that the EDU had a legitimate claim to transition revenue, then it could authorize the collection of transition revenue for a finite period. For certain transition revenue recovery, the period was defined by the market development period ("MDP") that could not extend beyond 2005.[16] For transition costs identified as regulatory assets, the collection period could not extend beyond 2010.[17] R.C. 4928.141, enacted as part of Amended

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[13] R.C. 4928.31(A).

[14] *Id.*

[15] R.C. 4928.39.

[16] *Id.*

[17] *Id.*

Substitute Senate Bill 221 ("SB 221"), precluded any further recovery of transition costs "effective on and after the date that the allowance is scheduled to end under the utility's rate plan."[18] Thus, Ohio law now bars DP&L and all other EDUs from collecting transition revenue.[19] Further, the Commission-approved settlement regarding DP&L's ETP bars the collection of additional transition revenue recovery after December 31, 2003.[20]

To justify the SSR, DP&L itself demonstrated that the rider would collect transition revenue or its equivalent. DP&L sought to justify the SSR because it needed additional revenue to produce a total company return on equity ("ROE") to assure its "financial integrity."[21] The financial problems, however, are limited to the generation segment: DP&L's financial projections showed that its generation business cannot stand on its own in the competitive market.[22] The alleged threat to the financial integrity of DP&L arose from the reduced revenue DP&L was realizing from its competitive generation resources. The reduced revenue was caused by two factors – customer migration to competitive retail electric service ("CRES") providers and reduced prices for capacity and energy in the wholesale market supervised by PJM

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[18] R.C. 4928.141.

[19] R.C. 4928.40. As R.C. 4928.38 states:

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

[20] *In the Matter of the Application of The Dayton Power & Light Company for Approval of Transition Plan, Pursuant to 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized Under 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.,* Stipulation and Recommendation at 10 (Jun. 2, 2000), available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=HVI$J2ONKZQ2$LTK.

[21] Opinion and Order at 17; DP&L Ex. 1 at 5.

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

Interconnection, LLC ("PJM") under federally-approved tariffs.[23] In contrast to the generation segment of its business, the chief financial officer of DP&L stated that distribution and transmission revenues were adequate and would remain so.[24] The evidence provided by DP&L, therefore, indicated that the SSR is based on the "lost" revenue associated with customer shopping, lower wholesale revenue, and lower capacity prices.[25] DP&L similarly argued that a proposed switching tracker was necessary to make up for lost revenue associated with customer migration.[26] (The switching tracker was rejected by the Commission because it would have provided DP&L an anticompetitive subsidy in violation of R.C. 4928.02(H)).[27]

Further, DP&L confirmed that a revenue charge to recover a deficiency driven by the generation business amounted to transition revenue. DP&L's witness, Mr. Chambers, stated, from an economic standpoint, the purpose of a transition charge is to compensate a utility when its assets would not be competitive when subjected to market prices.[28] Mr. Chambers also agreed that, if DP&L's ROE deficiency is being driven by lower-than-desired generation revenue (which is DP&L's claim), and the SSR is designed to make up the difference, then the SSR is equivalent to a transition charge.[29] But, under R.C. 4928.38, the Commission cannot authorize the recovery of transition revenue or its equivalent.

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[23] *Id.*, DP&L Ex. 1 at Second Revised Exhibit CLJ-1.

[24] Tr. Vol. I at 118-119; Tr. Vol. 1 at 150-151.

[25] DP&L Ex. 1 at 13, Second Revised Exhibit CLJ-1.

[26] DP&L Ex. 1 at 11-12; DP&L Ex. 4 at 3 n.2.

[27] *See* Opinion and Order at 30.

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

[29] Tr. Vol. II at 540-541; *id.* at 541-542 (Q: If DP&L was adequately compensated on its distribution business, adequately compensated on its transmission business, but DP&L was not adequately compensated on its generation business, and the SSR was designed to provide compensation for DP&L's generation business, would you agree that the SSR is equivalent to a transition charge? ***A: "Under the terms of the hypothetical, yes, I would agree.*** I haven't seen

In violation of R.C. 4928.38, however, the Commission authorized DP&L to bill and collect an additional $110 million annually under the SSR.[30] The ESP Orders held that the SSR does not represent additional transition revenue recovery because DP&L has not requested additional transition revenue or claimed that it did not receive sufficient revenue under its ETP.[31] Further, the ESP Orders found that authorization of the SSR is consistent with the Commission's determination in Ohio Power Company's ("AEP-Ohio") ESP case.[32] The Commission's rationalizations are without merit.

Initially, DP&L's past recovery of transition revenue under its ETP is not relevant to the question of whether the Commission can lawfully authorize additional transition revenue. By law, it cannot. Further, the ETP settlement barred additional transition revenue recovery after December 31, 2003.[33] Thus, by the express terms of both Ohio law and the Commission-approved Stipulation and Recommendation,[34] DP&L is prohibited from proposing and charging

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any evidence that that, indeed, is the basis for the SSR that has been proposed by DP&L.") (emphasis added). Of course, it is not disputed that DP&L has requested the SSR because, in DP&L's view, the generation business is not receiving adequate compensation. DP&L Ex. 1 at 13.

[30] The Commission also left open the door for additional charges through an additional non-bypassable rider, the Service Stability Rider–Extension ("SSR-E"), if certain conditions are satisfied and DP&L requires additional "financial stability." Opinion and Order at 26-28.

[31] *Id.* at 22.

[32] *Id.*

[33] *In the Matter of the Application of The Dayton Power & Light Company for Approval of Transition Plan, Pursuant to 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized Under 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.*, Stipulation and Recommendation at 10 (Jun. 2, 2000), available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=HVI$J2ONKZQ2$LTK.

[34] *In the Matter of the Application of The Dayton Power & Light Company for Approval of Transition Plan, Pursuant to 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized Under 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.*, Opinion and Order at 29 (Sep. 21, 2000), available at: http://dis.puc.state.oh.us/TiffToPDf/V3RZ002ZED9IH92Z.pdf.

a generation-related lost revenue charge, regardless of what it is called or the methodology by which it is computed.[35]

Additionally, reliance on the AEP-Ohio ESP case is misplaced. That case is premised on the same illegal reasoning that infects the decision in this case.[36] In that case, the Commission also ignored the restriction on Commission authority to provide transition revenue or its equivalent set out in R.C. 4928.38 and AEP-Ohio's ETP settlement. Additionally, the orders that the Commission relies upon from the AEP-Ohio ESP case are currently on appeal with the Court.[37] Thus, the AEP-Ohio ESP case cannot provide a lawful basis for the unlawful SSR.

b. The ESP Orders are unlawful and unreasonable because they authorize DP&L to charge customers for costs that are not included in the list of permissive provisions contained in R.C. 4928.143(B)(2).

In the ESP Orders, the Commission held that it could authorize the SSR under R.C. 4928.143(B)(2)(d).[38] Because that section does not allow for the creation of a non-bypassable rider, the ESP Orders are unlawful and unreasonable.

It is well-settled "that the General Assembly's own construction of its language, as provided by definitions, controls in the application of a statute."[39] Operating as a definitional

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[35] R.C. 4928.38.

[36] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 32 (Aug. 8, 2012) (hereinafter "*AEP-Ohio ESP*"), available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H08B40046F08138.

[37] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, S.Ct. Case No. 2013-521.

[38] Opinion and Order at 21-22.

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

section, R.C. 4928.143(B) limits the terms of an ESP to those specified in the section.[40] R.C. 4928.143(B)(2) provides only two instances in which the Commission may authorize a non-bypassable, generation-related rider, divisions (b) and (c). Under those two divisions, a non-bypassable charge is available to recover costs associated with generating facilities under construction or constructed after 2009 that meet additional statutory requirements.

By authorizing a non-bypassable generation rider in only two instances, the General Assembly did not provide the Commission with authority to approve a non-bypassable, generation-related rider under R.C. 4928.143(B)(2)(d). As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another.[41] This principle is especially pertinent if, as in the cases *sub judice,* the statute involved is a definitional provision. Had the General Assembly intended to allow the utilities to recapture other types of generation-related expenses through a non-bypassable charge, it would have expanded the definitions. Despite the limitations on the Commission's authority to authorize non-bypassable riders, it unlawfully authorized the SSR as a non-bypassable rider.

c. The ESP Orders are unlawful and unreasonable because the SSR requires customers to fund an anticompetitive subsidy in violation of R.C. 4928.02(H) and 4928.17.

According to DP&L, switching, low wholesale capacity prices, and low wholesale energy prices are driving its earnings erosion.[42] The ESP Orders have approved the SSR to improve the earnings of DP&L's generation business. By approving a generation-related charge that is non-

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[40] *Columbus S. Power Co. I*, 128 Ohio St.3d at 519-20.

[41] *See* generally the doctrine of *expressio unius est exclusion alterius*, which stands for the maxim that a statute that specifies one exception to the general rule is assumed to exclude all other exceptions. *See, e.g., Thomas v. Freeman*, 79 Ohio St. 3d 221, 224-225, 680 N.E.2d 997 (1997).

[42] DP&L Ex. 1 at 13; Opinion and Order at 17.

bypassable, the Commission provided DP&L with a competitive advantage that CRES providers simply do not have.[43] As a result, the SSR is structured to provide an unlawful subsidy to DP&L's generation business and the generation business of its affiliate. This subsidy to the generation-related businesses of DP&L and its affiliate are unlawful under R.C. 4928.02(H) and 4928.17.

R.C. 4928.02(H) prohibits anticompetitive subsidies. As the Court explained, "each service component [is] required to stand on its own."[44] To that end, R.C. 4928.02(H) "prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa."[45] In *Elyria Foundry*, for example, the Court reversed the Commission on the basis that it was providing the EDU with an illegal subsidy when the Commission authorized FirstEnergy EDUs ("FirstEnergy") to defer generation-related expenses (fuel) for future recovery in a distribution rate case, stating that the deferred charge provided "cross-subsidization between two of the three major electric-service components."[46]

In two recent cases, the Commission has refused to cross-subsidize an EDU's generation business segment through a distribution-like charge because the charge would be anticompetitive. In AEP-Ohio's *Sporn Case*, the Commission held that pursuant to R.C. 4928.02(H), AEP-Ohio was not entitled to a non-bypassable rider through which it sought to

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[43] *See generally* Tr. Vol. II at 528-532.

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

[45] *Elyria Foundry Company v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶50. In *Elyria Foundry*, the Court addressed what was formerly R.C. 4928.02(G). The language in that section is now codified in R.C. 4928.02(H).

[46] *Id.* at ¶54.

recover costs it alleged resulted from the closure of the Sporn 5 generating unit.[47] The Commission concluded that such a rider would subsidize AEP-Ohio's generation business in violation of R.C. 4928.02(H).[48] Likewise, in Duke Energy Ohio, Inc.'s ("Duke") market rate offer ("MRO") case, the Commission rejected a non-bypassable "circuit breaker" provision that would recover generation-related charges through a non-bypassable charge. Referencing R.C. 4928.02(H), the Commission stated:

> [I]t is the policy of the state to avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service and vice versa. If Duke were permitted to recover the costs included in Rider SCR from shopping customers, under any circumstances, we believe that it would create an anticompetitive subsidy.[49]

As shown by the Commission's own reasoning, the ESP Orders permit DP&L to subsidize its generation business through a distribution-like charge:

> 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.*[50]

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[47] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) (hereinafter "*Sporn Case*"), available at: http://dis.puc.state.oh.us/TiffToPDf/A1001001A12A11B35831F43601.pdf.

[48] *Id.*

[49] *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 63 (Feb. 23, 2011) (hereinafter "Duke MRO Order"), available at: http://dis.puc.state.oh.us/TiffToPDf/A1001001A11B23B23737C09965.pdf.

[50] Opinion and Order at 21-22 (emphasis added) (internal citations omitted).

The Commission, however, cannot lawfully authorize non-bypassable charges to protect the distribution and transmission services from losses incurred by the generation business. Distribution and transmission service, like generation service, must stand on their own.[51] Because the Commission ignored this prohibition when it authorized the SSR, the Commission acted unlawfully.

Further, the ESP Orders' authorization of the SSR violates corporate separation requirements. This is because the Commission has allowed DP&L to provide a competitive advantage and preference to its competitive generation service and rebundle competitive and non-competitive services when the law requires competitive services to stand on their own in the competitive market.

An EDU may not provide both competitive and non-competitive electric service unless it operates under a corporate separation plan that is consistent with state policy enumerated in R.C. 4928.02 and that ensures that the EDU does not provide a competitive advantage or preference to any part of its business that supplies competitive retail electric service.[52] The corporate separation plan must prevent an EDU from abusing market power,[53] "the ability to impose on customers a sustained price for a product or service above the price that would prevail in a

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[51] R.C. 4928.02(H); *see also,* R.C. 4928.38.

[52] *See, e.g.*, R.C. 4928.17(A)(2) and (3); Ohio Adm.Code Chapter 4901:1-20, IEU-Ohio Ex. 3 at 6-12. *See also* Tr. Vol. III at 708. As DP&L witness Rice, a DP&L attorney that provided testimony regarding DP&L's corporate separation compliance, stated in simpler terms, one of the purposes of corporate separation is to prevent an incumbent utility from favoring or providing an advantage to its generating assets. Tr. Vol. III at 707.

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

competitive market."[54] Moreover, transactions between an EDU and its affiliate must be based upon fully embedded costs.[55]

These requirements also apply to an EDU that has retained generating assets and operates under functional separation during an interim period such as DP&L. The Commission has determined that it must stringently review EDUs operating under functional separation because "functional separation allows greater opportunity for cross-subsidization and other forms of anti-competitive behavior as compared with structural separation."[56] To prevent EDUs from abusing functional separation, the Commission's rules require an EDU to treat its generating assets as if they were operated by an affiliate. Accordingly, the Commission's rules provide that "[t]he affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service."[57] Thus, DP&L is prohibited from providing a competitive advantage or preference to either its owned generating assets or those of an unregulated competitive affiliate. Likewise, DP&L's corporate separation plan must ensure that DP&L does not attempt to impose on its customers (for the benefit of itself or its generating assets) electricity prices above the price that would prevail in a competitive market.

The ESP Orders allow DP&L to evade corporate separation requirements pertaining to its own generating assets and the sales it makes to its competitive unregulated affiliate, DPL Energy Resources ("DPLER"). The cause of DP&L's financial integrity concern is self-inflicted and is the direct result of its improper business relationship with DPLER. As of August 30, 2012,

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

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

[56] *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, Case No. 99-1141-EL-ORD, Finding and Order at 26 (Nov. 30, 1999) (hereinafter "*ETP Rulemaking*"), available at: http://dis.puc.state.oh.us/TiffToPDf/OE5KIVJ3UHN72@$9.pdf.

approximately 62% of DP&L's retail load had switched to a CRES provider.[58] The majority of the switched load has been retained by DPLER.[59] The contract between DP&L and DPLER to provide DPLER with generation resources is set at market-based prices.[60] Because the contract is set at a price that is lower than DP&L's cost, DP&L suffers from reduced revenue compared to what it would receive under the traditional, but since 2001 unavailable, cost-plus pricing. To supplant the lost revenue, the Commission authorized the SSR. Not only does the SSR authorize transition revenue and a subsidy, it also supports a contract between DP&L and DPLER that violates the requirement that transactions between an EDU and its affiliate be based upon fully loaded embedded costs.[61]

2. The collection of the SSR charge is causing and will continue to cause irreparable harm to customers.

Harm is irreparable "when there could be no plain, adequate, and complete remedy at law for its occurrence and when any attempt at monetary restitution would be 'impossible, difficult, or incomplete.'" *FOP v. City of Cleveland*, 141 Ohio App.3d 63, 81, 749 N.E.2d 840 (8th Dist. 2001) citing *Cleveland v. Cleveland Elec. Illuminating Co.*, 115 Ohio App.3d 1, 12, 684 N.E.2d 343 (8th Dist. 1996), *appeal dismissed*, 78 Ohio St.3d 1419 (1997). To determine if harm is irreparable, this Court traditionally looks to whether there is an effective legal remedy if the order takes effect. If there is not, the Court has approved a stay while the appeal is pending.

Although "the temporary loss of income, *ultimately to be recovered,* does not usually constitute irreparable injury," *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (emphasis added),

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[57] Ohio Adm.Code 4901:1-37-01(A); Ohio Adm.Code 4901:1-20-16(B)(1).

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

[59] *Id.*

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

[61] R.C. 4928.17(A)(3); Ohio Adm.Code 4901:1-37-04; Ohio Adm.Code 4901:1-37-08.

economic injury may be irreparable. In *Tilberry v. Body*, 24 Ohio St.3d 117, 122 (1986), for example, this Court found that the effect of a court order calling for the dissolution of a business partnership would cause "irreparable harm" to the partners because "a reversal * * * on appeal would require the trial court to undo the entire accounting and to return all of the asset distributions" – a set of circumstances that would be "virtually impossible to accomplish." *Tilberry v. Body*, 24 Ohio St. 3d at 121. As a result, the Court determined that the Court order dissolving a partnership was final and appealable. *Tilberry* thus illustrates that economic harm does become irreparable if the injury to a party cannot be rectified after a successful prosecution of an appeal.

Because of the no refund rule, DP&L's customers are unlikely to recover their losses in the event that the Commission's decision is found to be unlawful.[62] As noted previously, the court in *Columbus S. Power Co. I* determined that customers were without a remedy to recover the amounts unlawfully billed and collected by another utility company, AEP-Ohio.

The injury from applying the no refund rule has also been recognized recently by this Court. This year it refused to adjust the deferred balance that another utility company, AEP-Ohio, is currently collecting for provider of last resort ("POLR") charges that both the Court and the Commission earlier determined were unsupported by the record. The Court noted the harsh result of its decision was a "windfall" to the utility and "unfair" to customers.[63] Because of the no refund rule, the "parties must seek to stay orders of the Public Utilities Commission on the front end in order to prevent unreasonable fees from being collected. Otherwise, customers

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[62] *See, e.g., Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 407, 575 N.E.2d 157 (1991).

[63] *Columbus S. Power Co. II*, 2014-Ohio-462, ¶ 56.

cannot achieve a real remedy. A mea culpa from the commission or the utility coupled with a statement from this court that our hands are tied is not enough."[64]

If the Court refuses to grant a stay but subsequently reverses the Commission's authorization of the SSR, the injury to customers also deprives them of a right protected by the Ohio Constitution. Under the Ohio Constitution, "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."[65] "When the Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted *at a meaningful time and in a meaningful manner.*"[66] Under the Court's application of the filed rate doctrine, customers may succeed on the merits of their claims that the rates are unlawful and unreasonable, as is the case with the SSR, but fail to secure any meaningful remedy. Without a stay, this fundamental constitutional protection will be denied to customers.

In this case, in which the Commission has authorized current collection of the SSR before an appeal could be filed. This was a consequence of the inordinate delays associated with the Commission's rehearing process. As a result, DP&L has already collected approximately one-third of the SSR revenues ($110 million). Under *Columbus S. Power Co. I* precedent, it is likely that those financial stability charges already collected may not be returned to customers. Additional collections will likely not be reparable as well.

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[64] *In re Application of Duke Energy Ohio*, Case No. 2014-0328, 07/29/14 Case Announcements #2, 2014-Ohio-3298, Pfeiffer, J., dissenting (July 29, 2014).

[65] Ohio Constitution, Article 1, Section 16.

[66] *Gaines v. Preterm-Cleveland, Inc.*, (1987), 33 Ohio St.3d 54, 60, 514 N.E.2d 709 (emphasis in original) (holding unconstitutional a medical malpractice statute of repose because it failed to provide adequate time to file actions).

3. The stay that is needed to protect customers during the process of an appeal will not cause irreparable harm to DP&L.

If the Court orders a stay of the SSR, DP&L will not suffer an irreparable injury. "An irreparable injury is one for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete."[67] DP&L, however, has alternatives to the SSR if it faces a financial emergency. For example, DP&L could seek relief through an emergency rate case if its distribution rates are so insufficient as to threaten its reliable and safe provision of service.[68] Alternatively, it could seek relief through a rate case if its distribution rates are unjust or unreasonable.[69] Since it has not exercised either of the lawful alternatives, it cannot complain that a stay will injure its financial well-being.

Even if it were appropriate to consider the financial well-being of DP&L's generation-related business in the decision to grant the stay, DP&L's generalizations regarding the financial need for the SSR do not justify denying the stay. DP&L failed to demonstrate a financial emergency warranting Commission intervention. Additionally, the financial shortfall that DP&L might face will result from the self-inflicted and continuing determination to retain generation-related assets when those assets could and should have been divested.[70] As the Court balances the need for a stay versus the claims that DP&L will be injured if the stay is granted, the balance must be struck in favor of customers. It is inequitable to force customers to pay for a self-inflicted injury (if there is one). As between the irreparable injury that would be imposed on the

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[67] *Ohio Turnpike Comm'n v. Texaco, Inc.*, 35 Ohio Misc. 99, 105 (1973).

[68] R.C. 4909.16.

[69] R.C. 4909.15(E); R.C. 4909.18; R.C. 4909.19.

customers of DP&L if the stay is not ordered and the remediable injury that DP&L might suffer if it does nothing to address financial concerns through available and legitimate alternative means, the balance squarely falls in favor of granting the stay. *Internat'l Diamond Exchange Jewelers, Inc. v. U.S. Diamond and Gold Jewelers, Inc.*, 70 Ohio App. 3d 667, 885 (1991) (addressing the relative harm affecting the parties in ordering that an injunction of the airing of an advertisement be stayed pending appeal).

4. A stay to prevent DP&L from collecting increased rates from customers during the process of an appeal would further the public interest.

Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is "above all in these types of cases, where lies the interest of the public" and that "the public interest is the ultimate important consideration for this court in these types of cases."[71] Based on this well understood requirement supporting the grant of the stay, he noted that Commission orders "have effect on everyone in this state -- individuals, business and industry."[72]

In this case, the public interest supports a grant of the motion. As discussed above, the stay would prevent irreparable harm to DP&L's customers—residential, commercial, and industrial. In addition, the stay would provide some relief to customers who are already burdened by the fragile state of the economy. Customers can ill afford unjustified increases in essential services. The public interest, therefore, would be furthered by a stay of the collection of the SSR.

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[70] For the discussion related to DP&L's claimed need for the SSR, *see, e.g.*, Initial Brief of Industrial Energy Users-Ohio at 8-43 (May 20, 2013), available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A13E20B72620A61108.

[71] *MCI v. Pub. Util. Comm.*, 31 Ohio St.3d at 606.

[72] *Id.*

III. CONCLUSION

The Court has the authority to grant a stay of the Commission's ESP Orders authorizing the SSR. The lawful and constitutional requirements of R.C. 4903.16 are satisfied by this Motion. Moreover, there is a strong likelihood that Joint Movants will prevail on the merits of their appeals, customers will be irreparably harmed if the stay is not granted, and a strong public interest in favor of the stay supports an order granting the stay. Therefore, the Court should grant the requested relief.

Respectfully submitted,

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BEFORE

ATTACHMENT A

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 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

OPINION AND ORDER

The Commission, considering the above-entitled applications, and the record in these proceedings, hereby issues its opinion and order in these matters.

APPEARANCES:

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Mike DeWine, Ohio Attorney General, by William Wright, Section Chief, and Thomas W. McNamee, Werner L. Margard III, and Devin D. Parram, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

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OPINION:

I. HISTORY OF THE PROCEEDING

A. MRO Application

On March 30, 2012, The Dayton Power and Light Company (DP&L or Company) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. The application was for approval of a market rate offer (MRO) in accordance with Section 4928.142, Revised Code. As filed, the MRO would have commenced on January 1, 2013, at the scheduled end of DP&L's existing electric security plan (ESP). On September 7, 2012, DP&L filed a notice of withdrawal of its MRO application.

B. ESP Application

On October 5, 2012, DP&L filed a second application for an SSO pursuant to Section 4928.141, Revised Code. This second application was for approval of an ESP in accordance with Section 4928.143, Revised Code. As filed, the ESP would have commenced on January 1, 2013.

C. Revised ESP Application

On December 12, 2012, DP&L filed a revised application for an SSO pursuant to Section 4928.141, Revised Code. The revised application was for approval of a revised ESP in accordance with Section 4928.143, Revised Code. DP&L's revised ESP application was filed to correct errors discovered in the initial ESP application. The errors included revenues/load expense errors, a fuel rider rate error, a property tax error, and a competitive bidding process (CBP) auction price error. The revised ESP application is the proposed ESP application presently before the Commission and addressed by this Order.

D. Summary of the Hearings

1. Local Public Hearings

Two local public hearings were held in order to allow DP&L customers the opportunity to express their opinions regarding the issues raised within the application. The first local public hearing was held in Dayton, Ohio, on January 29, 2013, at 1:00 p.m. At the first local public hearing, four witnesses offered testimony on DP&L's ESP

application. The second local public hearing was held in Dayton, Ohio, on January 29, 2013, at 6:00 p.m. At the second local public hearing, two witnesses offered testimony on DP&L's ESP application. In addition to the public testimony, numerous letters were filed in the docket regarding DP&L's proposed application.

At the local public hearings and in the letters filed in the docket, numerous witnesses testified in support of DP&L and its application. Specifically, many witnesses praised DP&L's community partnerships, charitable contributions to community groups and non-profit organizations, and promotion of economic development in the region. However, numerous witnesses also testified in opposition to DP&L's ESP application. Specifically, many witnesses disputed DP&L's need to raise rates during a time of economic hardship, its need to raise rates in lieu of downsizing or cutting back in other areas, and the impact that a rate increase would have on electric reliability.

2. Evidentiary Hearing

The following parties were granted intervention in the proceedings: Industrial Energy Users-Ohio (IEU-Ohio), OMA Energy Group (OMA), Honda of America Manufacturing, Inc. (Honda), Duke Energy Retail, Duke Energy Commercial Asset Management, Duke Energy Ohio, Inc. (collectively, Duke), FirstEnergy Solutions Corp. (FES), AEP Retail Energy Partners, LLC, (AEP Retail), Ohio Energy Group (OEG), the Ohio Hospital Association (OHA), the Kroger Company (Kroger), Ohio Partners for Affordable Energy (OPAE), EnerNOC, Inc., the Ohio Consumers' Counsel (OCC), Interstate Gas Supply, Inc. (IGS), the City of Dayton (City of Dayton), Retail Energy Supply Association (RESA), the Ohio Environmental Council (OEC), Wal-Mart Stores East, LP, Sam's East, Inc. (collectively, Wal-Mart), Direct Energy Services, LLC, Direct Energy Business, LLC, Edgemont Neighborhood Coalition, Border Energy Electric Services, Inc., Exelon Generation Company, LLC, Exelon Energy Company, Inc., Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc. (collectively, Constellation), Ohio Power Company, SolarVision, LLC (SolarVision), Council of Smaller Enterprises, Border Energy Electric Services, Inc., Federal Executive Agencies (FEA), and People Working Cooperatively, Inc.

The evidentiary hearing for DP&L's proposed ESP application commenced on March 18, 2013. At the hearing, 11 witnesses offered testimony on behalf of DP&L, 10 witnesses offered testimony on behalf of Staff, and 23 witnesses offered testimony on behalf of various intervenors to the case. In addition, DP&L offered three witnesses on rebuttal. The evidentiary hearing concluded on April 3, 2013. Initial briefs and reply briefs were filed on May 20, 2013, and June 5, 2013, respectively.

E. Procedural Matters

1. IEU-Ohio Motion to Take Administrative Notice or to Reopen the Proceeding or to Supplement the Record

On May 20, 2013, IEU-Ohio filed a motion to take administrative notice or to reopen the proceeding or to supplement the record. IEU-Ohio filed a memorandum in support with an exhibit that IEU-Ohio contends should be admitted into the record. The exhibit contained excerpted pages from a May 9, 2013, AES Corporation (AES) investor day presentation. IEU-Ohio believes that the investor day presentation is relevant to DP&L's financial integrity, specifically with regards to the service stability rider (SSR) and switching tracker (ST), as well as to DP&L's ability to refinance long-term debt. IEU-Ohio contends that the investor day presentation has been made public on the AES website and it contains information that AES has held out to the investment community as being reliable. Furthermore, at the time of hearing, the information contained in the investor day presentation was not available and could not have, with reasonable diligence, been presented during the hearing.

On May 28, 2013, DP&L filed a memorandum in opposition to IEU-Ohio's motion. DP&L asserts that the investor day presentation should not be admitted into the record because it was not timely prepared or discovered. DP&L claims that in other Commission proceedings, the Commission has ruled that it would be improper to take administrative notice or otherwise consider information offered late in a proceeding and that in every case there is, at some point, a reasonable cut-off for the Commission to confine its analysis to the data that is already reflected in the record. *In Re Ohio Power Company*, Case No. 10-501-EL-FOR, Opinion and Order (January 9, 2013) at 27-29.

The Commission notes that the Supreme Court of Ohio has held that there is neither an absolute right for nor a prohibition against the Commission's taking administrative notice of facts outside the record in a case. Instead, each case should be resolved on its facts. The Court further held that the Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction. *Canton Storage and Transfer Co v. Pub. Util. Comm.*, 72 Ohio St.3d 8, 647 N.E.2d 136 (1995). IEU-Ohio's motion to take administrative notice would have the Commission review information that was not presented at hearing and has not been admitted into the record. No witness has sponsored the exhibit and no party has had an opportunity to cross-examine a sponsoring witness. DP&L's only opportunity to prepare and respond to the evidence was through its memorandum in opposition to IEU-Ohio's motion. Furthermore, the Court's decision indicates that the Commission has the discretion to determine whether to take administrative notice of facts outside the record. In this instance, the Commission finds that IEU-Ohio's motion should be denied.

2. Requests for Review of Procedural Rulings

a. IEU-Ohio Motions to Strike

IEU-Ohio asserts that motions to strike the testimonies of witnesses Chambers and Mahmud should have been granted. IEU-Ohio contends that its motion to strike the testimony of witness Chambers should have been granted because witness Chambers created financial projections based upon a spreadsheet titled "CLJ Second Revised Exhibits with DETAIL - incremental switching." The financial projections based upon the spreadsheet were admitted at hearing as Exhibits WJC-3 and WJC-5. IEU-Ohio moved to strike the exhibits and any portion of witness Chambers' testimony that relied on those exhibits (Tr. Vol. II at 423-427). At hearing, the attorney examiners initially took IEU-Ohio's motion to strike under advisement and subsequently denied IEU-Ohio's motion (Tr. Vol. III at 593). IEU-Ohio later moved to strike the testimony of witness Mahmud for relying on WJC-3. At hearing, the attorney examiner also denied that motion to strike. (Tr. Vol. IV at 1037-1038). IEU-Ohio claims that the attorney examiners' rulings were in error based upon Ohio Rule of Evidence 703. Ohio Rule of Evidence 703 requires that facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing. IEU-Ohio argues that witness Chambers used a spreadsheet that contained the facts or data that he relied upon, but that in this case the spreadsheet was neither perceived by witness Chambers nor admitted into evidence at the hearing. The spreadsheet was actually created by witness Jackson, but IEU-Ohio asserts that DP&L failed to sponsor or move the facts or data contained in the spreadsheet into evidence during his testimony. Next, IEU-Ohio avers that the spreadsheet is hearsay because it is an out-of-court statement made by witness Jackson being offered by witness Chambers for the truth of the matter asserted. Finally, IEU-Ohio contends that expert testimony must be based upon reliable scientific, technical, or other specialized information, and the spreadsheet is not reliable. In total, the motions to strike made by IEU-Ohio include DP&L Ex. 4A, WJC-3, and WJC-5.

DP&L claims that IEU-Ohio's motions to strike were properly denied. First, DP&L indicates that Ohio Rule of Evidence 103(A) states that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. DP&L avers that IEU-Ohio failed to indicate or demonstrate that a substantial right has been affected. Furthermore, DP&L contends that IEU-Ohio was granted the opportunity to recall the witness and IEU-Ohio failed to avail itself of the opportunity to further question the witness. Second, DP&L asserts that IEU-Ohio failed to appropriately apply Ohio Rule of Evidence 703. Ohio Rule of Evidence 703 states that the facts or data in the case upon which the expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing. DP&L posits that

IEU-Ohio made the improper argument that DP&L witness Chambers did not perceive the information because he did not create or verify the information. According to DP&L, a witness may perceive information without creating or verifying it. Third, DP&L contends that sufficient discovery was offered and taken in this case, and that it would be unduly burdensome for all supporting data to be filed with the Commission. DP&L claims that, in a Commission proceeding of this scope, a reasonable line must be drawn between sufficient discovery and undue burden, and the attorney examiners drew a reasonable line. Fourth, DP&L notes that Ohio Rules of Evidence do not apply in Commission proceedings. *Greater Cleveland Welfare Rights Organization, Inc. v. Pub. Util. Comm'n*, 2 Ohio St.3d 62, 68, 442 N.E.2d 1288(1982).

The Commission affirms the attorney examiners' ruling denying IEU-Ohio's motions to strike. The Commission first notes that while it is not strictly bound by the Ohio Rules of Evidence, the Commission seeks to maintain consistency with the Ohio Rules of Evidence to the extent practicable. *Greater Cleveland*, 2 Ohio St.3d 62, 68, 442 N.E.2d 1288 (1982). In this instance, we believe the attorney examiners' ruling was consistent with the Ohio Rules of Evidence and Commission practice. In this case, DP&L witness Jackson created a spreadsheet using underlying data, titled the spreadsheet "CLJ Second Revised Exhibits with DETAIL - incremental switching," and then referenced the spreadsheet in his testimony. Other witnesses then used the same data for the purposes of using the data as a constant to compare with their own calculations and projections.

The Commission notes that, in this proceeding, parties had a full and fair opportunity to conduct discovery of all facts relied upon by the witnesses who presented testimony at the hearing, and the spreadsheet at issue was disclosed in discovery (Tr. Vol. III at 592-593). Further, the witnesses disclosed the data in their pre-filed testimony and provided notice that they had used it. In addition, in order to avoid any prejudice to any party adversely affected by the ruling, the attorney examiners provided parties the opportunity to recall DP&L witness Jackson and cross-examine him on the contents of the spreadsheet (Tr. Vol. III at 593). No party availed itself of the opportunity to recall the witness to conduct further cross-examination regarding the spreadsheet and data.

b. IEU-Ohio's Motions to Compel

IEU-Ohio also seeks review of the attorney examiners' ruling denying the motions to compel made at hearing. IEU-Ohio argues that the attorney examiners should have granted the motions to compel DP&L to disclose information regarding DP&L's ability to increase its revenue through increases in distribution or transmission rates. IEU-Ohio contends that the attorney examiners improperly ruled that DP&L's responsive studies regarding its ability to increase its revenue were protected by the attorney-client privilege

and work-product doctrine. Furthermore, IEU-Ohio claims that the attorney examiners also improperly ruled that DP&L's claim of privilege had not been voluntarily waived.

DP&L asserts that the analysis of DP&L's ability to increase its revenue through increases in distribution or transmission rates was conducted at the request of legal counsel and was provided to counsel so that it could provide legal advice to DP&L regarding the potential filing of distribution and transmission rate cases. DP&L believes that this makes the requested information privileged. DP&L further contends that it did not waive the privilege by providing a witness to testify on the same subject matter. DP&L argues that providing testimony on the same subject matter is not the same as voluntarily disclosing the confidential or privileged communications. Furthermore, the analyses of distribution and transmission rates were prepared in anticipation of litigation, specifically in anticipation of yet to be filed distribution and transmission rate cases. DP&L avers that this makes the analyses protected under the work product doctrine.

The Commission affirms the attorney examiners' rulings denying IEU-Ohio's motions to compel. We find that DP&L's analyses contained information protected by the attorney-client privilege and the work-product doctrine. The attorney examiners also properly ruled that DP&L had not voluntarily waived privilege and confidentiality by providing witness testimony on distribution and transmission rates. To waive privilege or confidentiality, the witness would have to do more than reveal the existence of the analyses and testify on the same subject matter. The attorney client privilege is a statutory privilege and can only be waived if the client expressly consents or voluntarily testifies to the communications. *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487. In this case, the witness testified on the same subject matter but did not expressly consent or voluntarily testify to the communications at issue. Further, the communications are protected under the work-product doctrine. Discovery of documents prepared in anticipation of litigation will be compelled for disclosure only upon a showing of good cause. Good cause requires a demonstration of need for the materials, which means a showing that the materials or information they contain are relevant or otherwise unavailable. Civ. R. 26(B)(3); *Jackson v. Greger*, 2006-Ohio-4968, 854 N.E.2d 487. IEU-Ohio failed to demonstrate good cause for discovery of the documents. The Commission finds that the attorney examiners properly denied IEU-Ohio's motion to compel. The information in this case is protected by the attorney-client privilege and the work-product doctrine.

II. DISCUSSION

A. Applicable Law

Chapter 4928, Revised Code, provides an integrated system of regulation in which specific provisions are designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing DP&L's application, the Commission is cognizant of the challenges facing Ohioans and the electric industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by Amended Substitute Senate Bill 221 (SB 221).

Section 4928.02, Revised Code, states that it is the policy of the state, *inter alia*, to:

(1) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.

(2) Ensure the availability of unbundled and comparable retail electric service.

(3) Ensure diversity of electric supplies and suppliers.

(4) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management (DSM), time-differentiated pricing, and implementation of advanced metering infrastructure (AMI).

(5) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems in order to promote both effective customer choice and the development of performance standards and targets for service quality.

(6) Ensure effective retail competition by avoiding anticompetitive subsidies.

(7) Ensure retail consumers protection against unreasonable sales practices, market deficiencies, and market power.

(8) Provide a means of giving incentives to technologies that can adapt to potential environmental mandates.

(9) Encourage implementation of distributed generation across customer classes by reviewing and updating rules governing issues such as interconnection, standby charges, and net metering.

(10) Protect at-risk populations including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource.

In addition, SB 221 enacted Section 4928.141, Revised Code, which provides that effective January 1, 2009, electric utilities must provide consumers with an SSO consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default service.

Section 4928.143, Revised Code, sets out the requirements for an ESP. Pursuant to Section 4928.143(B), Revised Code, an ESP must include provisions relating to the supply and pricing of generation service. The ESP, according to Section 4928.143(B)(2), Revised Code, may also provide for the automatic recovery of certain costs, a reasonable allowance for certain construction work in progress, an unavoidable surcharge for the cost of certain new generation facilities, charges relating to certain subjects that have the effect of stabilizing or providing certainty regarding retail electric service, automatic increases or decreases of components of the SSO price, provisions to allow securitization of any phase-in of the SSO price, provisions relating to transmission-related costs, provisions related to distribution service, and provisions regarding economic development.

The statute provides that the Commission is required to approve, or modify and approve the ESP, if the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

B. Analysis of the Application

DP&L proposes a five year ESP with a blending plan that annually increases the percentage of competitively acquired rates being incorporated into its SSO rates. DP&L also proposes six new rates to implement the ESP blending plan. First, DP&L proposes a new competitive bid (CB) rate that it will charge customers for the portion of the SSO load that is procured through the auction process. Second, DP&L proposes a Competitive Bid True-Up (CBT) Rider that will true-up the actual costs of energy, capacity, and market-based Transmission Cost Recovery Rider (TCRR) costs with the revenues collected from customers for those costs. Third, DP&L proposes a

non-bypassable service stability rider (SSR) for DP&L to be able to provide stable and reliable electric service. Fourth, DP&L proposes a reconciliation rider (RR) to recover costs of conducting a competitive bidding process (CBP), the costs of implementing competitive retail enhancements, and any remaining over or under-collection in the true up trackers remaining at the end of the blending period. Fifth, DP&L proposes a switching tracker (ST) that would defer for later recovery from customers the difference between the level of switching experienced as of August 30, 2012, and the actual level of switching during the ESP term. Sixth, DP&L proposes an Alternative Energy Rider - Nonbypassable (AER-N) as a placeholder to recover costs DP&L has incurred from building and operating the Yankee Solar Generating Facility (Yankee). (DP&L Ex. 9 at 9-11.)

DP&L proposes four changes to rates to implement the ESP blending plan. First, DP&L proposes to split the TCRR into bypassable and nonbypassable rates. Second, DP&L proposes to merge the Environmental Investment Rider (EIR) into base generation rates. Third, DP&L proposes to phase-out the maximum charge provisions contained in DP&L's current generation tariffs. Fourth, DP&L proposes to move from its current fuel methodology to a system average cost methodology. (DP&L Ex. 9 at 10.)

1. ESP Term, Competitive Bid Process, and Master Supply Agreement

DP&L proposes a five year ESP term, with annual blending percentages of 10 percent, 40 percent, 70 percent, and 100 percent, respectively. DP&L contends that it needs the five year ESP term to maintain its financial integrity and that a five year ESP term will mitigate DP&L's need for an increased SSR amount. (DP&L Ex. 8 at 2-3; DP&L Ex. 9 at 9; DP&L Ex. 1 at 10.) DP&L witness Jackson indicated that the five year ESP term is critical for DP&L to have the necessary cash flows needed to separate its generation assets by December 31, 2017 (DP&L Ex. 16 at 7). DP&L chose Charles River Associates (CRA) to conduct the CBP auction due to CRA's experience with the Commission in administering and conducting structured procurement auctions for other Ohio utilities (DP&L Ex. 9 at 18).

DP&L argues that its ESP term should be authorized and that a more rapid move to market-based rates should be denied. DP&L contends that Section 4928.143, Revised Code, does not provide for the authorization of the implementation of competitive bidding, and especially not at rates more rapid than DP&L proposes. DP&L then notes that the Commission is bound by statute and has only the jurisdiction given to it. *Columbus S. Power Co. v. Pub. Utils. Comm'n*, 67 Ohio St. 3d 535, 537, 620 N.E.2d 835 (1993)(per curiam). DP&L asserts that it could lose significant revenue if it were to move to market-based rates more rapidly or immediately implement 100 percent competitive bidding. Furthermore, DP&L witness Jackson testified that DP&L may not be capable of providing safe and reliable service if it were to implement 100 percent competitive

bidding immediately. DP&L claims that it could not immediately implement 100 percent competitive bidding because it would have to structurally separate, and structural separation is precluded by a trust indenture and a first and refunding mortgage on DP&L's long-term debt (DP&L Ex. 16A at 2-5; Tr. Vol. I at 149-150; Tr. Vol. III at 694-695). DP&L witness Jackson testified DP&L's first and refunding mortgage creates a lien on all of the assets (transmission, distribution, and generation) of DP&L for the purposes of securing approximately $884 million of secured bonds. DP&L witness Jackson then stated that divestment could not take place until the first and refunding mortgage is either defeased or amended. Defeasement would require the secured bonds be called, and the earliest they could be called is September 1, 2016. As for amending the bonds, DP&L witness Jackson indicated that the bonds could be amended to release the generation assets but it would require existing bondholders to willingly consent to release of the generation assets from the mortgage. DP&L witness Jackson indicated that both scenarios present significant financial risk to DP&L. (DP&L Ex. 16 at 2-5.) DP&L points out that intervenors conceded that they did no analysis of whether DP&L could structurally separate and divest its generation assets. (Tr. Vol. VII at 1637-1639; Tr. Vol. IX at 2400-2401.)

DP&L also claims that the load from reasonable arrangement customers and special contract customers should be excluded from the CBP. First, DP&L contends that the reasonable arrangements and special contracts have been approved by the Commission and the contracts may not even permit DP&L to include the load in the CBP. Second, DP&L witness Seger-Lawson claimed that customers served through a reasonable arrangement or special contract are not actually SSO customers because they are being served pursuant to the reasonable arrangement or special contract. DP&L contends that this makes their load ineligible for the CBP. (Tr. Vol. V at 1414-1415, 1418-1419.)

FES, OCC, Duke Energy Retail, and Constellation assert that DP&L should make a more rapid transition to market rates to take advantage of historically low market prices. FES, OCC, and Duke Energy Retail posit that DP&L's ESP should immediately be 100 percent competitively bid to take full advantage of low market prices. FES witness Noewer stated that there is no reason that DP&L could not immediately implement a fully market-based SSO. She also stated that if, in the first year of the ESP plan, the Commission approves a CBP for 100 percent of DP&L's load, it would create significant value for DP&L's customers and allow them to take full advantage of the current low market prices. (FES Ex. 17 at 6-7, 10-11.) However, Constellation witness Fein recommended that DP&L should move to 100 percent competitive bidding beginning in June of 2015. Constellation contends that the ESP blending percentages be 35 percent, 85 percent, and 100 percent, respectively. (Constellation Ex. 1 at 10.)

To facilitate the immediate move to 100 percent competitive bidding, intervenors argue that DP&L should immediately structurally separate. Constellation witness Fein opined that DP&L has offered no valid justification for delaying the transition to fully competitive market rates (Constellation Ex. 1 at 10). Likewise, FES witness Noewer alleged that DP&L has not provided a compelling reason why its generation assets could not be transferred out of the EDU before DP&L's proposed date of December 31, 2017. FES witness Noewer then recommended that DP&L should be required to structurally separate as soon as possible. (FES Ex. 17 at 9-10.) FES and intervenors contend that this would eliminate DP&L's financial integrity problems because DP&L's distribution and transmission businesses could provide stable and reliable distribution and transmission service while earning a reasonable regulated rate of return.

FES claims that extending the ESP term only permits DP&L to collect an SSR and other charges for the purpose of supporting its competitive generation business. FES witness Noewer alleged that, by ordering DP&L to structurally separate, the Commission would eliminate any financial integrity problems affecting the regulated distribution and transmission businesses. Thus, FES contends that structural separation would eliminate the need to collect the SSR and other charges. (FES Ex. 14 at 32.)

FES and Constellation assert that DP&L should not be permitted to bid into its own auction until it completes structural separation. FES witness Noewer recommended that, if DP&L's ESP is not rejected by the Commission, the ESP should be modified to prohibit DP&L and its related entities from bidding into Ohio SSO auctions until corporate separation has taken place and DP&L is not receiving any generation-related charges. (FES Ex. 17 at 5.) Furthermore, FES witness Lesser testified that if DP&L is allowed to bid into the auctions it could have the effect of reducing participation in the auction and raising the ultimate price paid by SSO customers. (FES Ex. 14 at 80.) Constellation witness Fein recommended that neither DP&L nor any of its affiliates should be eligible to participate in the CBP until DP&L achieves full structural separation. (Const. Ex. 1 at 6.)

FES and Constellation aver that DP&L's reasonable arrangements and special contracts should be included in the CBP. FES witness Noewer noted that the difference between the SSO price and the reasonable arrangement price is covered by customers; therefore decreasing the difference between the two prices would ease the burden on customers. Moreover, FES witness Noewer claimed that including the load in the CBP makes the auction product more attractive to potential bidders and benefits all customers. (FES Ex. 17 at 13-14.) Constellation witness Fein opined that including special contract and reasonable arrangement load in the CBP auction would send a market signal that the days of special contracts are over in Ohio. Constellation also proffered that excluding the load would isolate that portion of the load from the reduction in energy prices anticipated by the CBP, which would miss the opportunity to

lower the economic development rider costs paid by all customers. (FES Ex. 17 at 13-14; Const. Ex. 1 at 13.)

Constellation recommends on brief that DP&L should be required to use a Master Supply Agreement (MSA) that is consistent with or improves upon the ones adopted for other Ohio utilities. Specifically, Constellation argues that Network Integration Transmission Service (NITS) charges should be excluded from the auction product, independent credit requirements should be removed, a weekly settlement process should be implemented, and any compulsory notional quantity language should be eliminated. Constellation witness Fein testified that DP&L should be required to revise its MSA in order to make it more consistent with industry-standard agreements for wholesale supply, and to provide greater clarity with respect to its terms (Constellation Ex. 1 at 20-22, 23-30).

Staff recommends that the Commission approve a three year ESP term. Staff witness Choueiki testified that a three year ESP term is beneficial because the quality of information for years four and five of a five year ESP is insufficient to warrant committing ratepayer dollars to DP&L for those years (Staff Ex. 10 at 5). Staff witness Choueiki further stated that a three year ESP term is beneficial because market rates are volatile, projections of capital expenditures are unreliable, projections of shopping are unreliable, and the future financial integrity of the Company is unpredictable (Staff Ex. 10 at 9). A three-year ESP also provides a faster transition to market than either an MRO or DP&L's proposed ESP.

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. 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. We also note that the ESP term to implement full CBP procurement proceeds more quickly than provided by Section 4928.142(D), Revised Code.

Accordingly, the Commission directs that, by November 1, 2013, DP&L should conduct an auction for 10 tranches of a 36 month product commencing January 1, 2014. By November 1, 2014, DP&L should conduct an auction for 30 tranches of a 24 month product commencing January 1, 2015. By November 1, 2015, DP&L should conduct an auction for 30 tranches of a 12 month product commencing January 1, 2016. DP&L shall file its application for a subsequent SSO, pursuant to Section 4928.141, Revised Code, by March 1, 2016. If a subsequent SSO is not authorized by the Commission by November 1, 2016, DP&L shall procure, through the CBP auction process, 100 tranches of a full-requirements product for a term that is not less than quarterly or more than annually to be deliverable on January 1, 2017, until a subsequent SSO is authorized.

The Commission finds that DP&L's CBP and MSA should be approved, and that the first auction for the CBP will be conducted by CRA. Consistent with our treatment of other utilities, affiliates and subsidiaries of DP&L shall be permitted to participate and compete in the CBP auctions in the same fair and nondiscriminatory manner as all other participants. DP&L shall not give any competitive advantage to an affiliate or subsidiary participating in the CBP auctions. However, DP&L itself shall not participate in the CBP auctions, as we are persuaded by FES witness Lesser that this may chill participation in the CBP auctions (FES Ex. 14 at 80).

CRA will select the winning bidder(s), but the Commission may reject the results within 48 hours of the auction conclusion based upon a recommendation from the independent auction manager or the Commission's consultant that the auction violated the CBP rules. The Commission will not establish a starting price or opening bid price cap. As with other electric utilities' CBP, the Commission finds a load cap should apply to each auction, with no one supplier being able to bid upon or be awarded more than 80 percent of the tranches in any one auction. Further, the CBP and the blending percentages will cover DP&L's entire customer load; no customer load should be excluded from the CBP, regardless of whether the customer's load is being served pursuant to a reasonable arrangement or special contract. The Commission believes that including DP&L's entire customer load in the CBP will promote full development of competitive rates and encourage participation in the auction. Finally, the Commission notes that we reserve the right to modify and alter the load cap or any other feature of the CBP process for future auctions as the Commission deems necessary based upon our

continuing review of the CBP process, including the reports on the auction provided to the Commission by the independent auction manager, the Commission's consultant, DP&L, and Staff.

2. Service Stability Rider

DP&L proposes an SSR pursuant to Section 4928.143(B)(2)(d), Revised Code, which would be assessed on all DP&L customers for the purpose of stabilizing and providing certainty regarding retail electric service by maintaining DP&L's financial integrity. DP&L claims that its return on equity (ROE) is declining and that its declining ROE, as well as the corresponding threats to DP&L's financial integrity and ability to provide safe and reliable service, is being driven principally by three factors: increased switching, declining wholesale prices, and declining capacity prices (DP&L Ex. 1A at 13, Tr. Vol. I at 135-136). DP&L witness Chambers testified that, due to these factors, the Company would not be able to maintain its financial integrity without the SSR (DP&L Ex. 4A at 45-47). DP&L avers that its financial integrity is compromised, and if it becomes further compromised the generation, transmission, and distribution functions of DP&L will not be capable of providing stable, safe, and reliable retail electric service. Numerous DP&L witnesses stated that the proposed SSR amount is the minimum that DP&L would need to provide stable, safe, and reliable service. (DP&L Ex. 16A at 7-8; DP&L Ex. 12 at 23; DP&L Ex. 4A at 54.)

A. Compliance with Section 4928.143(B)(2)(d), Revised Code.

DP&L posits that, for a charge to be lawful under Section 4928.143(B)(2)(d), Revised Code, it must satisfy three criteria: it must be a term, condition, or charge; it must relate 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 or future recovery of deferrals; and it must have the effect of stabilizing or providing certainty regarding retail electric service. DP&L avers that the SSR is a charge that relates to default service and bypassability and has the effect of stabilizing or providing certainty regarding retail electric service (DP&L Ex. 4A at 53, DP&L Ex. 9 at 8-10, DP&L Ex. 12 at 23, DP&L Ex. 16A at 8). First, DP&L alleges that it is essentially undisputed that the SSR is a term, condition, or charge (DP&L Ex. 12 at 23; Tr. Vol. VI at 1463; Tr. Vol. VIII at 2053-2054; Tr. Vol. X at 2600). Second, DP&L claims that the SSR is related to default service and bypassability. DP&L notes on brief that the SSR is substantially similar to AEP's Rate Stabilization Rider (RSR) approved by the Commission, which was found to relate to default service and bypassability. *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 11-346-EL-SSO (*AEP ESP II Case*) Entry on Rehearing (October 3, 2012) at 15. Further, DP&L contends that the SSR is related to bypassability because it is a nonbypassable charge. Thus, DP&L claims that the second statutory criterion has been

satisfied. Third, DP&L contends that the SSR has the effect of stabilizing or providing certainty regarding retail electric service. DP&L asserts that the SSR would provide the same benefits as AEP's RSR because it would permit DP&L to freeze non-fuel generation rate increases, it would permit DP&L to conduct auctions to set its SSO rate, and it would permit DP&L to have fixed SSO rates (DP&L Ex. 9 at 8-10; DP&L Ex. 13). Further, DP&L contends that it needs the SSR so that it can continue to provide safe and reliable service (DP&L Ex. 16A at 8; DP&L Ex. 12 at 23; DP&L Ex. 4A at 53). DP&L avers that a charge for DP&L to be able to provide stable, safe, and reliable service necessarily has the effect of stabilizing and providing certainty regarding retail electric service. Without the SSR, DP&L claims that it would not be capable of providing stable, safe, and reliable service (DP&L Ex. 4 at 54).

IEU-Ohio, OHA, OEG, OCC, and others claim on brief that the SSR is not permitted under Section 4928.143(B)(2)(d), Revised Code. OCC witness Rose testified, and numerous intervenors contend, that the SSR fails to satisfy Section 4928.143(B)(2)(d), Revised Code (OCC Ex. 21 at 12-13). Intervenors believe that DP&L has failed to meet its burden of demonstrating that the SSR is a term, condition, or charge, related to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service. Intervenors contend that the SSR does not relate to default service because default service is a provider of last resort (POLR) service. OCC argues on brief that the SSR does not relate to bypassability because, though bypassability is not defined, a reasonable interpretation of bypassability would be costs incurred as a result of customer switching. Intervenors then posit that the SSR provides neither certainty nor stability regarding retail electric service. Intervenors contend that, since DP&L's transmission and distribution businesses receive adequate revenues, and generation is available on the wholesale market, an SSR to support DP&L's competitive retail generation business fails to provide certainty or stability regarding retail electric service.

FES, IEU-Ohio, Honda, and OEG claim that DP&L failed to meet its burden of demonstrating that it would not be able to provide stable, safe, and reliable service without the SSR. The premise of intervenors' argument is that the SSR would support DP&L's competitive generation assets, yet those competitive generation assets are not necessary for DP&L to maintain reliable distribution and transmission service. Intervenors contend that DP&L could maintain reliable distribution and transmission service without the SSR because if DP&L's generation assets are divested, DP&L's distribution and transmission businesses receive adequate revenue to ensure reliable service. Intervenors point out that DP&L witness Jackson testified that he believed that DP&L's transmission and distribution businesses would received adequate revenue to ensure reliable service (Tr. Vol. I at 241-242). Therefore, intervenors argue that DP&L's

generation assets could be divested, and DP&L would be a regulated distribution and transmission utility capable of providing stable, safe, and reliable distribution and transmission service. Further, intervenors contend on brief that DP&L should file a distribution rate case to determine if the distribution business really is earning sufficient revenue. OCC points out that DP&L witness Malinak even testified that the filing of a distribution or transmission rate case could be a way to enhance DP&L's ability to continue offering safe and reliable service (Tr. Vol. XI at 2804). Furthermore, OCC witness Duann claimed that the generation side of DP&L's business is what is causing DP&L's financial integrity problems, therefore if the SSR is necessary to maintain DP&L's financial integrity then it must be a generation-related charge (OCC Ex. 28 at 28; Tr. Vol. I at 240-241; Tr. Vol. XI at 2804). Divesting the generation from DP&L would negate the need for a generation-related charge and allow DP&L the distribution and transmission utility to provide stable, safe, and reliable service. Therefore, intervenors believe that the SSR should be denied by the Commission because DP&L failed to demonstrate that it is necessary for DP&L to provide stable, safe, and reliable service. (FES Ex. 14A at 16-17, OCC Ex. 28A at 29, OEG Ex. 1 at 9.)

FES, IEU-Ohio, OCC, FEA, Kroger, OEG, OHA, and Wal-Mart claim that the SSR is a generation-related charge, the granting of which would be anticompetitive. According to FES witness Lesser, DP&L's generation assets have been competitive for over a decade (FES Ex. 14 at 32; see also, Tr. Vol. III at 709). If DP&L's transmission and distribution businesses receive adequate revenues, as indicated by DP&L witness Malinak, intervenors claim the SSR revenues must be for the purpose of supporting DP&L's generation business (Tr. Vol. I at 240-241; Tr. Vol. XI at 2804). OEG witness Kollen explained that DP&L's projected financial health could be transformed and improved simply by transferring its generation assets to an affiliate or selling them to a third party (OEG Ex. 1 at 11). Not only would divestiture allow DP&L to provide stable, safe, and reliable service, but without divestiture DP&L would need an anticompetitive SSR to remain financially viable. Intervenors contend that granting the SSR to support DP&L's competitive generation assets would be anti-competitive because it would support DP&L's competitive generation business over other competitive generation providers operating in DP&L's service territory (Tr. Vol. II at 479-480, 528-532). Furthermore, supporting DP&L's generation business would be at the expense of all customers since the SSR would be a nonbypassable charge. This presents the problem of shopping customers paying for both their own competitive generation service as well as for DP&L's competitive generation assets through the SSR. IEU-Ohio witness Murray equated the SSR to an unlawful subsidy of DP&L's competitive generation assets (IEU-Ohio Ex. 2 at 22).

IEU-Ohio, IGS, Kroger, and OCC contend that the SSR is an unlawful and unreasonable transition charge. DP&L was permitted to collect transition charges during its market development period (MDP), but the MDP ended in 2005. Intervenors claim

that the SSR is a transition charge because it is designed to provide DP&L with generation-related revenue that it would otherwise lose as a result of customers shopping to obtain better retail generation supply prices. IEU-Ohio witness Murray indicated that during the market development period (MDP), EDUs were provided an opportunity to protect themselves in the event that they judged the revenue from unbundled generation prices to be above the revenue that could be obtained from providing generation services in the competitive market. The EDU could then file with the Commission for transition revenue, which was the difference between the unbundled default supply generation prices and prices for generation services in the market. (IEU-Ohio Ex. 2 at 25-26). While the SSR does not carry the title of a transition charge, intervenors assert that it has the effect of a transition charge because it would deny customers the benefits of shopping in the competitive retail electric services market (IEU-Ohio Ex. 2A at 24-27; IEU-Ohio Ex. 3A at 16-26; OCC Ex. 21 at 6-12; IGS Ex. 1 at 3-6).

Intervenors also note that DP&L was permitted to collect transition revenues in its electric transition plan (ETP) proceeding. *In re Dayton Power and Light Company*, Case Nos. 99-1687-EL-ETP, et. al. (*DP&L ETP Case*). IEU-Ohio witness Hess estimated that DP&L recovered approximately $441 million in transition revenues through default generation supply service and the nonbypassable consumer transition charge (CTC) (IEU-Ohio Ex. 3 at 22). Furthermore, DP&L was permitted to recover revenues for generation-related regulatory assets that were transition costs. These revenues were recovered through a regulatory transition charge (RTC). Both the CTC and RTC ended on December 31, 2003. According to IEU-Ohio witness Hess, DP&L's market development period, the period after which it would not be permitted to collect further transition revenues, was supposed to end on December 31, 2003 (IEU-Ohio Ex. 3 at 23). However, the MDP was extended until December 31, 2005, pursuant to *In re Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, et. al., (*DP&L RSP I Case*), Opinion and Order (September 2, 2003) at 13. Intervenors conclude that, since the SSR is a transition charge and the MDP for collection of transition charges has ended, the SSR should be denied. (IEU-Ohio Ex. 2A at 24-27, IEU-Ohio Ex. 3A at 16-26, OCC Ex. 21 at 6-12, IGS Ex. 1 at 3-6.)

Staff agrees that the SSR is permitted under Section 4928.143(B)(2)(d), Revised Code, and is substantially similar to charges previously approved by the Commission. Staff contends on brief that maintaining DP&L's financial integrity means more than simply avoiding a cash flow emergency or bankruptcy; maintaining a utility's financial integrity is necessary to ensure that the utility is able to function in a normal way, serving its obligations and maintaining its normal operations. Staff notes that it is up to the Commission to determine if DP&L's financial integrity is threatened but indicates that DP&L would have financial losses in several years without an SSR (Tr. Vol. I at 221-222). Staff witness Choueiki noted that the Commission has granted similar charges to other

utilities based upon Section 4928.143(B)(2)(d), Revised Code (Staff Ex. 10 at 11). *AEP ESP II Case; In Re Duke Energy Ohio,* Case No. 11-3549-EL-SSO.

The Commission finds that the SSR meets the criteria of Section 4928.143(B)(2)(d), Revised Code, as it is a charge related to default service and bypassability that has the effect of stabilizing and providing certainty regarding retail electric service. Pursuant to Section 4928.143(B)(2)(d), Revised Code, an ESP may include terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals or future recovery of deferrals that would have the effect of stabilizing or providing certainty regarding retail electric service. The Commission first notes that it is essentially undisputed that the SSR is a term, condition, or charge; therefore, the first criterion of Section 4928.143(B)(2)(d), Revised Code, is satisfied.

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 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.

Finally, 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 (DP&L Ex. 16A at 7-8, DP&L Ex. 12 at 23, DP&L Ex. 4A at

54). 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.

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.

B. SSR Amount

DP&L asserts that the SSR amount should be sufficient for DP&L to achieve an ROE within a reasonable range of 7 to 11 percent. DP&L witness Chambers testified that based on market information, his analysis leads him to believe that a range of 7.7 percent to 10.4 percent is a reasonable ROE for DP&L to be able to function effectively and maintain its financial integrity (DP&L Ex. 4 at 2). He also noted that intervenors and Staff applied an adjusted capital structure of 50 percent debt to 50 percent equity when presenting their ROE forecasts and SSR proposals (Staff Ex. 1A at 3-5, Tr. Vol. IV at 915-916, 935, 1026). However, DP&L witness Chambers claimed that DP&L's actual capital structure is 40 percent debt to 60 percent equity and explains that the projected ROE target is different depending on the capital structure used to calculate the projection (DP&L Ex. 4A at 30). DP&L witness Malinak testified that the SSR should be set to target an ROE no lower than seven percent under an adjusted capital structure and explained that an ROE target of seven percent would be sufficient to maintain DP&L's financial integrity (DP&L Ex. 14A at 23-24).

FES, IEU-Ohio, OCC, FEA, Honda, and OEG contend that the SSR should be denied because DP&L should undertake operations and maintenance (O&M) savings and capital expenditure reductions before collecting stability revenues to maintain DP&L's financial integrity. FES witness Lesser claimed that DP&L's financial integrity

concerns are overstated because it has not included O&M savings and capital expenditure reductions in its calculations (FES Ex. 14 at 33-34; Tr. Vol. I at 256). He then concluded that these O&M savings and capital expenditure reductions would provide savings to DP&L to mitigate its financial integrity concerns and decrease the need for substantial stability revenues, if not eliminate the need for stability revenues altogether. Furthermore, intervenors claim on brief that DP&L has already identified numerous O&M savings and capital expenditure reductions, yet DP&L has failed to implement them, failed to identify a single project that it would be unable to complete, and failed to identify a single negative outcome for customers associated with the reductions. Intervenors recommend that, if an SSR is authorized, it should be reduced by the amount of O&M savings and capital expenditure reductions that DP&L can undertake. Intervenors argue that O&M savings and capital expenditure reductions should be implemented before a charge is imposed upon customers to maintain DP&L's financial integrity. Intervenors claim that DP&L's financial integrity might not even be compromised once it implements O&M savings and capital expenditure reductions, thus negating the need to impose financial integrity charges at all. (FES Ex. 14A at 17-22, FEA Ex. 1 at 7, OCC Ex. 28A at 41, OEG Ex. 1 at 10, IEU-Ohio Ex. 1A at 18-19.)

DP&L responds that O&M savings and capital expenditure reductions should not be considered when setting the SSR. DP&L witness Jackson claimed that O&M savings and capital expenditure reductions are in addition to the SSR, not in place of it, so that it can earn a reasonable ROE (DP&L Ex. 16A at 10; DP&L Ex. 16A at CLJ-7; Tr. Vol. I at 256-257). He, as well as DP&L witness Herrington, noted that potential O&M savings have not been approved by DP&L's board of directors for the full term of the ESP (DP&L Ex. 16A at 9; Tr. Vol. IV at 1118). DP&L witnesses Jackson and Herrington alleged that, even if the O&M savings and capital expenditure reductions were approved and implemented, implementing them could present substantial risks to the Company and its ability to provide stable, safe, and reliable service (DP&L Ex. 16A at 9-10; Tr. Vol. IV at 1113-1114, 1176-1177). These risks include lowering DP&L's O&M expenses below DP&L's historic averages and impairment of DP&L's operations through reduced maintenance expenditures (DP&L Ex. 16A at 9-10; Tr. Vol. IV at 1176-1177). DP&L witness Jackson testified that some of the potential O&M savings measures are generation-related and that, if implemented, the operational performance of the Company's generation fleet would deteriorate, resulting in lower wholesale revenue and gross margin attributable to those plants, potential PJM RPM capacity penalties, and higher future O&M costs due to unforeseen and unplanned outages. He further testified that the SSR does not guarantee that DP&L will earn a given ROE; therefore, if the SSR alone is insufficient to meet DP&L's ROE target, O&M savings could then be implemented to meet the ROE target. (DP&L Ex. 16 at 7, 10.) Further, DP&L witness Malinak claimed that capital expenditure reductions would have little impact on DP&L's earnings or ROE, so the consequences of O&M savings and capital expenditure reductions would outweigh any benefit (DP&L Ex. 14A at 27-28).

OEG and Honda recommend that, if the SSR is authorized, the revenue requirement should be limited to no more than DP&L's present $73 million annual rate stabilization charge (RSC). OEG witness Kollen alleged that there are numerous flaws with DP&L's application, but reducing the SSR to the amount of the RSC would reduce the risk that DP&L will over-recover costs from customers through the SSR in violation of Section 4928.02(A), Revised Code. Further, OEG witness Kollen opined that the SSR should be allocated using a one coincident peak (1CP) demand allocation method that reflects the underlying demand-related character of the SSR charges. This allocation method would align SSR revenues with the cost responsibility of the appropriate customer class (OEG Ex. 1 at 7-8). Furthermore, OEG witness Kollen recommended that the SSR should be recovered through a kilowatt (kW) demand charge (OEG Ex. 1 at 3-5, 20-21).

OCC asserts that, if an SSR is authorized, the collection of the SSR should not start until the blending with auction-based rates begins. OCC witness Duann recommended that collection of the SSR start once blending with the auction based rates begins, which would match potential savings to DP&L's customers with the costs, in the form of the SSR, of accelerating the blending of auction based rates (OCC Ex. 28 at 44). However, OCC witness Duann then claimed that the ESP should immediately move to a 100 percent market rate (OCC Ex. 28 at 45).

OCC avers that, if an SSR is authorized, DP&L should be prohibited from paying dividends. OCC witness Duann recommended that DP&L should not be permitted to pay dividends to its parent companies without Commission approval while it collects the SSR (OCC Ex. 28 at 48). OCC claims on brief that prohibiting DP&L from paying dividends would not be a taking and that, even if it were a taking, constitutional issues are not within the jurisdiction of the Commission. OCC asserts that the Supreme Court of Ohio has clearly indicated that the Commission can prohibit a utility from paying dividends where the utility lacks sufficient surplus for paying dividends. *Ohio Central Tel. Corp. v. Pub. Util. Comm.*, 127 Ohio St. 556 (1934). OCC contends that DP&L's argument that it needs an SSR to maintain its financial integrity, and even to avoid a financial emergency, sufficiently demonstrates that it lacks sufficient surplus for paying dividends. OCC concludes that prohibiting DP&L from paying dividends while it collects the SSR is essential to protecting DP&L's customers and shareholders (Tr. Vol. X at 2551-2552).

Staff witness Choueiki recommended that DP&L's ESP should be a three year term, because projections for capacity, energy, and capital expenditures in years four and five of DP&L's proposed ESP are inherently unreliable (Staff Ex. 10 at 4-5). Staff witness Mahmud recommended that, if the Commission adopts a three year ESP and approves an SSR, the SSR should fall within a range of $133 million to $151 million per year (Staff

Ex. 1 at 4). Staff witness Mahmud recommended an SSR of $133 million to arrive at DP&L's proposed average ROE, or an SSR of $151 million to arrive at an ROE in the reasonable range of 7 to 11 percent. For both recommendations, Staff witness Mahmud adjusted DP&L's debt to equity ratio to 50 percent debt and 50 percent equity (Staff Ex. 1 at 5). However, Staff concedes that compared to the proposed ESP, DP&L would receive about $100 million less under Staff's proposal (Tr. Vol. VII at 1908). Staff believes that this $100 million deficiency would be offset by Staff's switching projections, which Staff contends are more reliable and indicate less lost revenue from switching.

The Commission finds that DP&L may collect the SSR in the amount of $110 million for each of the years 2014 and 2015. We note that DP&L proposed an SSR in the amount of $137.5 million per year over the term of the ESP (DP&L Ex. 1A at 11-13). However, taking into consideration potential O&M savings for years 2014 through 2016, the Commission finds that the SSR should be established at $110 million per year (Tr. Vol. I at 189). The Commission finds that this is the minimum amount necessary to ensure the Company's financial integrity and provide the Company with the opportunity to achieve a reasonable ROE during the ESP. The Commission did not offset the proposed SSR by potential capital expenditure reductions because, based upon the record, we are not persuaded that the potential capital expenditure reductions have as significant an impact on the Company's ROE as the potential O&M savings (Tr. I at 257-258; DP&L Ex. 14A at 27-28). Further, we believe that DP&L should retain the ability to impact its ROE through additional measures such as capital expenditure reductions.

We agree with OCC that the increase in the SSR from the amount of the RSC in the previous ESP to $110 million annually should not be imposed until the blending of market rates begins, since current lower-priced market rates will offset the SSR increase. Therefore, we have established January 1, 2014, as the effective date of the ESP. However, DP&L may continue to collect the RSC, prorated monthly, over the remaining months of 2013. Once the blending of market rates begins, DP&L should establish rates to collect the SSR amount of $110 million per year for the years 2014 and 2015.

The Commission finds that authorizing an SSR to achieve an ROE target of 7 to 11 percent is reasonable. We previously found in the *AEP ESP II Case* that an ROE target range of 7 to 11 percent is in a range of reasonableness. *AEP ESP II Case*, Opinion and Order (August 8, 2012) at 33. However, we note that an ROE target outside of the 7 to 11 percent range is not *per se* unreasonable. The test is one of reasonableness, based upon the facts of the case and the law and policy of the state of Ohio. Furthermore, it is an ROE target and not an exact determination of the ROE that the utility will recover. In this case, there are a number of factors that impact projections regarding DP&L's financial position. These factors stem from the significant length of time since DP&L's last distribution rate case and the potential ability to seek an increase in distribution rates, the ability of DP&L to reduce its O&M costs and capital expenditures without

sacrificing service stability and reliability, the unpredictability of future switching rates, and the unpredictability of future energy and capacity markets. We find that the record of this proceeding demonstrates that, when the approved SSR, O&M savings, capital expenditure reductions, adjusted capital structure, and the potential for a future distribution rate case are considered, DP&L will have a reasonable opportunity to achieve an actual ROE in the 7 to 11 percent range.

Moreover, to ensure that DP&L does not reap disproportionate benefits from the ESP as a result of the approved SSR, the Commission finds that a significantly excessive earnings test (SEET) threshold of 12 percent should be established. The record of this case demonstrates that an ROE of 12 percent would be above the high end of the range of reasonableness (DP&L Ex. 4 at 2). Moreover, a SEET threshold of 12 percent is consistent with our holding in the *AEP ESP II Case*. *AEP ESP II Case*, Opinion and Order (August 8, 2012) at 37. Furthermore, the SSR is being authorized to maintain DP&L's financial integrity; therefore, we find that all SSR revenues should remain with DP&L, and not be transferred to any of DP&L's current or future affiliates through dividends or any other means.

Further, the Commission is not persuaded by DP&L's testimony that the SSR is properly collected through a flat customer charge. We find that the Staff's proposed rate design, which would minimize rate impacts upon customers, should be adopted (Staff Ex. 8 at 14). However, we agree with OEG that the SSR revenues should be allocated using a 1CP demand allocation method that reflects the underlying character of the SSR charges (OEG Ex. 1 at 7-8). Therefore, we will adopt the rate design recommended by Staff and the class allocation methodology recommended by OEG of a 1 CP demand allocation method.

Finally, the Commission is persuaded by the testimony at the hearing that the reliability of financial projections significantly declines over time (Staff Ex. 10 at 4-5). Thus, we will authorize the SSR only until December 31, 2015. However, we also find that DP&L should have the opportunity to seek relief if its financial integrity remains compromised beyond 2015. Therefore, DP&L may file, in a separate proceeding, for an extension of the SSR through October 31, 2016, subject to certain conditions as discussed below.

3. SSR Extension

The Commission, through this ESP, authorizes DP&L to create an SSR Extension rider (SSR-E) and initially set the rider to zero. At least 275 days prior to the termination of the SSR on December 31, 2015, DP&L may seek approval of an increase in the SSR-E in an amount not to exceed $92 million for the year 2016. The SSR-E will expire on its own terms on October 31, 2016.

If DP&L seeks to implement the SSR-E, DP&L must show that the SSR-E is also necessary to maintain the financial integrity of the Company, and that the amount requested is the necessary amount to maintain DP&L's financial integrity, not to exceed $92 million for the first 10 months of the year 2016. When considering whether the SSR-E is necessary to maintain the financial integrity of the Company, the Commission will consider any dividends paid to parent companies, as well as all other relevant financial information, including O&M savings undertaken and any capital expenditure reductions made by DP&L.

We note that Staff and other intervenors contend that there is insufficient information available to commit ratepayer dollars to DP&L for years four and five of a five year ESP (Staff Ex. 10 at 5, 6). The Commission finds that the SSR-E mechanism provides an opportunity for DP&L to provide more reliable data on its financial integrity by fulfilling the Commission's conditions for authorization of the SSR-E. The SSR-E conditions will ensure that customer charges are being assessed based upon current and reliable information, that stability charges will continue to have the effect of stabilizing or providing certainty regarding retail electric service, and that the financial integrity of DP&L will be maintained without granting DP&L significantly excessive earnings. The SSR-E proceeding will ensure stability and certainty regarding retail electric service because it will provide more clear and reliable data for the later months of the ESP, which should alleviate concerns raised by intervenors and Staff.

Further, the Commission agrees with intervenors' arguments that DP&L should exhaust its opportunities for rate relief in order to ensure its financial integrity. Therefore, as a condition of implementing the SSR-E, DP&L must file an application for a distribution rate case, in accordance with Section 4909.18, Revised Code, no later than July 1, 2014. Pursuant to the Commission's determination in *In re Aligning Electric Distribution Utility Rate Structure with Ohio's Public Policies*, Case No. 10-3126-EL-UNC, Finding and Order (August 21, 2013) at 20, DP&L is encouraged to utilize the straight-fixed variable (SFV) rate design or SFV principles in its distribution rate case. The Commission will then consider the impact of any adjustment in rates resulting from the distribution rate case in determining the amount of the SSR-E. The Commission believes that conducting a distribution rate case before authorizing the SSR-E will provide the Commission and parties with the increased certainty necessary to evaluate whether DP&L's financial integrity is at risk and whether the SSR-E is necessary.

Moreover, as an additional condition of implementing the SSR-E, DP&L must file, by December 31, 2013, an application to divest its generation assets. Such plan must propose that divestment be completed by December 31, 2016. We note that DP&L has already committed to filing an application by December 31, 2013, to divest its generation assets. Furthermore, DP&L has argued in this case that the earliest it could divest its

generation assets is September 1, 2016, due to DP&L's first and refunding mortgage (DP&L Ex. 16 at 2-4). Thus, the Commission believes that it is reasonable for DP&L to divest its generation assets no later than December 31, 2016.

Additionally, for the Commission to authorize the SSR-E, DP&L must also file an application to modernize its electric distribution infrastructure through implementation of a smart grid plan and advanced metering infrastructure (AMI). Section 4928.02(D), Revised Code, states that it is the policy of the state of Ohio to encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of AMI. To promote the policy of the state of Ohio and further enhance the competitive retail electric service market in this state, the Commission finds that DP&L should file an application by July 1, 2014, for implementation and deployment of smart grid technology and advanced metering infrastructure, as well as other cost-effective initiatives or programs that DP&L reasonably believes would promote the policy of the state of Ohio to further enhance the competitive retail market.

As the final condition for the Commission to authorize the SSR-E, DP&L must establish and begin implementation of a plan to modernize its billing system. Constellation witness Fein and FES witness Noewer both testified to barriers to competition resulting from DP&L's billing system (Constellation Ex. 1 at 49-54; FES Ex. 17 at 19-26). The Commission believes the testimony indicates that DP&L's billing system needs to be modernized to facilitate competition in this state. At a minimum, the billing system modernization should include rate-ready billing, percentage off price-to-compare (PTC) pricing and the ability to support AMI. To begin implementation of its billing system modernization, DP&L should file with the Commission a billing system modernization plan approved by Staff by December 31, 2014, that includes, at a minimum, the above improvements to DP&L's billing system.

4. Switching Tracker (ST)

DP&L proposes a switching tracker (ST) account that would defer for later recovery, from all customers, the difference between the level of switching experienced as of August 30, 2012, and the actual level of switching (DP&L Ex. 1 at 11, 12; DP&L Ex. 9 at 16-17). DP&L witnesses Jackson and Seger-Lawson explained that the costs subject to DP&L's ST would equal the difference between the blended SSO rate and the CB rate in effect, which would then be calculated as dollars per megawatt-hour (MWh) and multiplied by the quantity of additional switched load in MWh and will be the amount that will be included in the ST regulatory asset account for the month (DP&L Ex. 1 at 11-13; DP&L Ex. 9 at 17). DP&L's arguments in support of the ST are similar, and often identical, to its arguments in support of the SSR. DP&L witness Jackson testified that DP&L's ROE is declining and that its declining ROE, as well as the corresponding threats

to its financial integrity and ability to provide safe and reliable service, are being driven principally by three factors: increased switching, declining wholesale prices, and declining capacity prices (DP&L Ex. 1A at 13; Tr. Vol. I at 135-136). The ST would mitigate the effects of increased switching on DP&L's financial integrity and ability to provide safe and reliable service. DP&L calculates the level of switching experienced as of August 30, 2012, as 62 percent of retail load. Therefore, DP&L proposes to be compensated for any switching over 62 percent of retail load. The proposed switching tracker would begin at the start of the ESP and continue until DP&L procures 100 percent of its supply needs through the CBP. (DP&L Ex. 1 at 11.) DP&L contends that the two significant benefits of the ST are that it would eliminate the need for the Commission to attempt to forecast switching and it would avoid the over or under recovery resulting from actual switching not matching projected switching.

DP&L's justification for the ST falls primarily under Section 4928.143(B)(2)(d), Revised Code. Numerous DP&L witnesses claim that the ST is a charge that relates to default service and has the effect of stabilizing or providing certainty regarding retail electric service (DP&L Ex. 4A at 53, DP&L Ex. 9 at 8-10, DP&L Ex. 12 at 23, DP&L Ex. 16A at 8). First, DP&L indicates that it is undisputed that the ST is a term, condition, or charge (DP&L Ex. 12 at 23, Tr. Vol. VIII at 2053-2054, Tr. Vol. X at 2600). Second, DP&L claims that the ST is related to default service. Third, DP&L asserts that the ST has the effect of stabilizing or providing certainty regarding retail electric service. DP&L then contends that the ST should be approved so that DP&L's ROE target will be in the reasonable range of 7 to 11 percent.

Numerous intervenors including OCC, Wal-Mart, Kroger, Constellation, IEU-Ohio, FES, IGS, RESA, and OEG, argue that the ST should be denied by the Commission (IEU-Ohio Ex. 3 at 5, 15, 26; OCC Ex. 28 at 22-28; OEG Ex. 1 at 11-12; Kroger Ex. 1 at 5, 14-15; Staff Ex. 10 at 7-10). Principal among the arguments against the ST is that it is anti-competitive. Intervenors posit that the ST is anticompetitive because it would capture the entire economic benefit of shopping for customers through a nonbypassable charge. The more SSO customers that switch to a competitive retail electric service provider, the more all customers will be required to pay. This would discourage further switching and inhibit further development of Ohio's competitive retail electric services market. Intervenors also assert on brief that the ST would violate the policies of the state of Ohio set forth in Section 4928.02, Revised Code. Intervenor also argue that it is an unlawful transition charge, that it is simply unjust and unreasonable, that it could lead to double recovery, and that DP&L failed to meet its burden of proving the legal basis or the financial need for the ST. RESA also points out that the ST serves the same purpose as the SSR of maintaining DP&L's financial integrity and that DP&L is unaware of any other EDU with a switching tracker like the one proposed by DP&L (Tr. Vol. I at 252).

Staff contends that the Commission should deny the ST because it is an anticompetitive charge. Staff witness Choueiki testified that insulating DP&L from further switching through the ST would violate the policies of Section 4928.02, Revised Code, and would be anti-competitive (Staff Ex. 10 at 9). Further, Staff witness Choueiki noted that DPL Energy Resources (DPLER), which is DP&L's unregulated generation affiliate, is a significant CRES provider in DP&L's service area. He believes that a request for relief by DP&L for lost retail sales to its unregulated affiliate is an unreasonable request (Staff Ex. 10 at 10). Furthermore, Staff notes on brief that authorizing an ST, which would be adjusted based upon the level of switching, would make the quantitative analysis inherently difficult to conduct.

The Commission finds that the ST should be denied because it violates the policies of the state of Ohio, is anticompetitive, and would discourage further development of Ohio's retail electric services market. Further, the Commission finds that the Company has not demonstrated that the ST, which would be incrementally increased when customers leave the SSO, is related to default service under Section 4928.143(B)(2)(d), Revised Code. One of the principal aspects of a market is the opportunity for consumers to shop for a diversity of products offered by a multitude of suppliers. When a customer purchases a product from a new supplier, the previous supplier will necessarily lose that customer's representative market share. DP&L's proposed ST would provide DP&L a stream of revenue to directly compensate it for market share lost when a customer switches to a competitive retail electric service provider. The Commission believes that this makes the proposed ST anticompetitive because it may discourage customers from shopping for a retail electric supplier. Furthermore, the Commission notes that, since DP&L's financial integrity is supported through the SSR, and potentially the SSR-E, the ST would serve no purpose other than to provide DP&L with additional revenues in proportion to declines in the number of customers of DP&L's generation business. As discussed above, the Commission believes that revenues from the SSR, capital expenditure reductions, O&M savings, a distribution rate case, and potentially an SSR-E, are sufficient to maintain DP&L's financial integrity, without an additional ST to insulate DP&L from market risk.

5. Alternative Energy Rider

DP&L proposes that the AER continue in its current form but be trued-up on a quarterly basis (DP&L Ex. 7 at 3). By moving to a quarterly true-up, DP&L intends to better align the AER costs with the customers that cause the costs to be incurred. The AER, like other riders, would be trued-up on quarters, with new rates effective March 1, June 1, September 1, and December 1. DP&L further proposes to establish an AER rate at which DP&L would be deemed to have met the statutory three percent threshold pursuant to Section 4928.64(C)(3), Revised Code. DP&L proposes that when the AER meets or exceeds $0.0012813 per kWh, DP&L will be deemed to have met the three

percent cost threshold and will not need to continue to meet future renewable targets. (DP&L Ex. 7 at 3-4.)

Solarvision claims on brief that the Commission should deny the three percent threshold. Solarvision asserts that establishing a specific dollar per kilowatt hour (kWh) threshold that will remain fixed throughout the ESP period, regardless of the annual renewable portfolio standard or kWh sales, violates Section 4928.64(C)(3), Revised Code. The renewable portfolio standard requirements in Section 4928.64, Revised Code, increase annually. Solarvision believes that a three percent threshold that does not vary or fluctuate based upon the increasing renewable portfolio standard requirements is inconsistent with Section 4928.64, Revised Code.

Staff and OCC assert that the three percent threshold issue is not ripe for Commission decision in this case. Staff notes that the three percent threshold was an issue in the case of *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case No. 11-5201-EL-RDR (*FirstEnergy AER Case*). Furthermore, the three percent threshold may be reviewed in the case of the Commission's pending rulemaking on this issue. *In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code,* Case No. 13-652-EL-ORD (*AEPS Rules Case*). Staff claims on brief that the *AEPS Rules Case* would be the proper context to review the threshold. Staff then avers that if the Commission addresses the three percent threshold in this proceeding, it is not reasonable as proposed by DP&L. Staff contends that the threshold is not reasonable because it is based on an estimate of the first auction and then never fluctuates or adjusts for future auctions, despite the fact that the renewable portfolio standard requirements adjust annually. Therefore, Staff and OCC argue that the three percent threshold should be denied.

The Commission finds that the AER should be trued-up on a quarterly basis but DP&L's proposal for the three percent cost threshold should be denied. The Commission has addressed the proper methodology for determining the three percent cost threshold in the *FirstEnergy AER Case*. *FirstEnergy AER Case,* Opinion and Order (August 7, 2013) at 30-34. DP&L is directed to comply with the methodology set forth in the *FirstEnergy AER Case* using the blended rate for each year rather than auction-based rate only. Therefore, the Commission finds that DP&L's proposal for the three percent cost threshold should be denied.

6. Alternative Energy Rider-Nonbypassable (AER-N)

DP&L proposes an Alternative Energy Rider–Nonbypassable (AER-N) to recover the costs of DP&L's Yankee Solar Generating Facility (Yankee). DP&L witness Seger-Lawson testified that the AER-N is permitted pursuant to Section 4928.143(B)(2)(c),

Revised Code, because it satisfies the four criteria for a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the EDU (DP&L Ex. 9 at 15-16). She claimed that Yankee is owned and operated by a utility, that it was sourced through a competitive bidding process, that it was used and useful after January 1, 2009, and that it was found by the Commission to be needed as a result of the resource planning process (DP&L Ex. 9 at 15, Tr. Vol. V at 1311). DP&L witness Seger-Lawson then argued that the AER-N is essentially identical to AEP's Generation Resource Rider (GRR), which was approved by the Commission in the *AEP ESP II Case*. DP&L proposes that the AER-N initially be set at zero, and then DP&L be permitted to file supporting evidence for the appropriate amount in a subsequent case (DP&L Ex. 9 at 16, Tr. Vol. V at 1316).

FES and IEU-Ohio contend on brief that the AER-N violates Section 4928.143(C)(1), Revised Code. FES and IEU-Ohio allege that Section 4928.143(C)(1), Revised Code, requires that if the Commission approves an application that contains a surcharge, the Commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. FES avers that since DP&L wouldn't provide CRES providers a pro rata share of the renewable resources based upon their share of the load, shopping customers would get no benefit from the AER-N (Tr. Vol. V at 1340). Intervenors assert the AER-N should be denied because it would be a nonbypassable charge imposed on customers who are already paying their own retail electric service provider for renewable resources.

IEU-Ohio, Solarvision, and RESA argue that the AER-N violates Sections 4928.64(E) and 4928.143(B), Revised Code. Section 4928.143(B), Revised Code, states that the Commission cannot approve a provision of an ESP that is contrary to Section 4928.64(E), Revised Code. Section 4928.64(E), Revised Code, states that all costs incurred by an EDU in complying with the renewable energy requirements of that section must be bypassable by any consumer that has switched to a CRES provider. DP&L witness Seger-Lawson indicated it was DP&L's intent moving forward to use any renewable energy credits generated from Yankee to comply with the renewable energy requirements of Section 4928.64, Revised Code (Tr. Vol. IX at 2305). IEU-Ohio and Solarvision posit that the nonbypassability of the AER-N makes it unlawful because it would compensate DP&L for Yankee, which was constructed for the purpose of complying with the renewable energy requirements. Furthermore, IEU-Ohio contends the AER-N violates Section 4928.143(B)(2)(c), Revised Code, because the need for the facility was not demonstrated in the ESP proceeding, the facility has not been sourced through a competitive bid process, and the energy and capacity would not be dedicated to the customers paying the AER-N (Tr. Vol. V at 1323-1325; Tr. Vol. V at 1340). Furthermore, RESA witness Bennett claimed that the intent of the nonbypassable renewable rider is for the recovery of new construction costs once the statutory requirements for need and competitive procurement are met, not for retroactive recovery

of construction costs. RESA witness Bennett pointed out that AEP's Turning Point Solar Facility would have been new construction, whereas Yankee has already been constructed. (RESA Ex. 6 at 12, 13; Tr. Vol. IX at 2483.)

FES, IEU-Ohio, and RESA make the assertion on brief that the Commission should deny the AER-N because DP&L did not provide the necessary information to the Commission for establishment of the AER-N. FES and IEU-Ohio argue that DP&L failed to satisfy, in this proceeding, the requirements of Rule 4901:5-5-06(B), O.A.C., because DP&L provided very little data regarding its proposal or the associated costs. Intervenors believe that without this information, the Commission does not have the opportunity to weigh the costs and benefits of Yankee. FES and IEU-Ohio contend that the AER-N should be denied because DP&L has not provided sufficient information for the Commission to review the facility and has improperly avoided substantive review of the proposed AER-N.

The Commission finds that the AER-N should be denied. Section 4928.143(C)(1), Revised Code, requires the Commission to ensure that the benefits derived from a charge are made available to those that bear the charge. In this instance, DP&L has not made a detailed proposal to ensure that all customers in its service territory equally benefit in the benefits derived from the Yankee facility. Instead, the Commission is concerned that all customers could pay for the costs of Yankee, despite only DP&L SSO customers receiving the benefit of the solar renewable energy credits (S-RECs) produced by the facility. Competitive retail electric service providers compete directly with DP&L's generation related service, including in the S-REC market, and are not permitted to recover their capital expenditures when building generation facilities (Tr. Vol. VIII at 21-5, Tr. Vol. IX at 2295). Competitive retail electric service providers are required to supply S-RECs for their customers; under the AER-N, as proposed, shopping customers could end up subsidizing the S-RECs supplied to SSO customers.

Furthermore, the AER-N would permit Yankee, which is a generation asset, to remain with the regulated distribution and transmission company instead of divesting with the rest of DP&L's generation assets. DP&L has committed to filing a generation asset divestiture plan before December 31, 2013. The Commission believes that Yankee should be included in DP&L's generation asset divestiture plan and divest with the rest of DP&L's generation assets. Approving the AER-N would add the cost of Yankee to the rate base for the extended future, instead of requiring DP&L, and the subsequent generation asset owner, to recover the costs of the facility through the competitive generation market and sales of S-RECs. Notwithstanding whether the AER-N satisfies Section 4928.143(B)(2)(c), Revised Code, the Commission finds that it would be inconsistent with DP&L's plan to divest its generation assets for Yankee to remain with the transmission and distribution utility.

The Commission notes that nothing in this finding prohibits DP&L from recovering the cost of past renewable energy resources used to serve its SSO customers. DP&L is directed to consult with Staff to determine an appropriate methodology to recover through the AER the cost of past renewable energy resources used to serve its SSO customers.

7. Reconciliation Rider (RR)

DP&L proposes a nonbypassable reconciliation rider (RR) that would include the costs of administering the CBP, the costs of competitive retail enhancements, and any deferred balance associated with particular riders (DP&L Ex. 10 at 8). DP&L contends that the CBP benefits all customers and it is therefore appropriate to recover the costs of the CBP through a nonbypassable rider. DP&L then asserts that to the extent the Commission approves competitive retail enhancements and concludes that the associated costs should be recoverable from customers in a nonbypassable rider, the costs should be included in the RR. DP&L witness Seger-Lawson proposed that DP&L recover through the RR any deferred balance that exceeds 10 percent of the base amount of riders FUEL, RPM, AER, and CBT (DP&L Ex. 10 at 8-11). DP&L believes that recovery of the deferred balance amounts is necessary to prevent the potentially catastrophic situation of having too few remaining SSO customers to cover the costs of a very large deferral balance (DP&L Ex. 12 at 7, 8, Tr. Vol. V at 1432-1433, Tr. Vol. IX at 2242-2244).

IEU-Ohio argues that the RR is not approvable as a nonbypassable rider and would provide DP&L with an anticompetitive subsidy. IEU-Ohio avers on brief that the RR cannot be authorized pursuant to Section 4928.143(B)(2)(d), Revised Code, because that section does not authorize the Commission to create a nonbypassable rider. Furthermore, IEU-Ohio asserts that even if the RR could be approved under Section 4928.143(B)(2)(d), Revised Code, it does not have the effect of making the physical supply of retail electric service more stable or certain. IEU-Ohio avers that the RR actually has the effect of making retail electric service more unstable and uncertain because the revenue requirement for the rider is unknown and the magnitude of the CBP auction administration costs is unknown. Furthermore, IEU-Ohio notes that DP&L failed to identify the rate impacts to customers that authorization of the RR would have.

FES, FEA, and RESA claim that SSO customers should pay for all costs of competitive bidding. FES witness Lesser testified that the costs of competitive bidding should be recovered on a bypassable basis because the principle of cost causation requires that SSO customers pay the CBP administrative costs necessary to procure power for SSO customers. FES witness Lesser then explained that the CBP is undertaken for SSO customers, not customers who take service from CRES providers, therefore, under the principle of cost causation, the charges should be recovered on a bypassable

basis. (FES Ex. 14 at 60). FES, FEA, and RESA believe that the competitive bidding costs in the RR should apply only to SSO customers.

FES, FEA, IGS, and RESA also contend that DP&L's proposal to collect the deferral balances above 10 percent on certain riders through the RR should be denied. FES witness Lesser opposed DP&L's proposal to collect deferral balances above 10 percent associated with the FUEL Rider, the RPM Rider, the TCRR-B Rider, the AER, and the CBT Rider. He indicated that the deferral balances are currently recovered on a bypassable basis and that allowing DP&L to collect deferral balances above 10 percent on a nonbypassable basis incentivizes DP&L to allow its deferral balances to exceed 10 percent. (FES Ex. 14 at 59-60). FES witness Lesser then went on to add that permitting DP&L to recover the deferral balances violates the principle of cost causation, that it would not stabilize rates, and that recovery of the deferred costs should continue on a bypassable basis (FES Ex. 14 at 60). IGS witness White noted that CRES suppliers also face migration risk, yet CRES suppliers are not able to recover the costs of customers migrating (IGS Ex. 1 at 8).

Staff supports recovery of the costs that DP&L has indicated, yet disagrees on the manner of recovery. Specifically, Staff witness Donlon testified that CBP auction costs should be bypassable, that the costs of competitive retail enhancements should be attributed based upon relative burden and recovered through a nonbypassable rider, and the deferred balance amounts should be recoverable through a bypassable charge (Staff Ex. 7 at 5, 7-9). Staff then recommends on brief that the Company be permitted to petition the Commission to true-up any over or under recovery of bypassable riders at the end of the ESP term. Staff also notes that the Commission should be free to determine at the end of the ESP term how to best permit recovery of deferred costs without imposing them on the potentially few remaining SSO customers.

The Commission finds that the RR should be divided into an RR Nonbypassable (RR-N) and RR Bypassable (RR-B). The RR-B should recover the bypassable components of DP&L's proposed RR, and the CBP auction costs, CBP consultant fees, Commission consultant fees, audit costs, supplier-default costs, and carrying costs. 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. The TCRR-B deferral balance and the competitive retail enhancements shall be excluded from the RR-B and the RR-N. The Commission will address the TCRR below while the costs of the competitive retail enhancements should be deferred for recovery in DP&L's next distribution rate case.

8. Transmission Cost Recovery Rider (TCRR)

IEU-Ohio, Wal-Mart, and FEA contend that DP&L's proposed non-bypassable transmission cost recovery rider (TCRR-N) is unlawful and unreasonable. IEU-Ohio witness Murray testified that DP&L's proposal to bifurcate the TCRR into bypassable and non-bypassable components could cause shopping customers to be billed multiple times for transmission service (IEU-Ohio Ex. 2 at 37-38; Tr. Vol. V at 1356-1357). IEU-Ohio claims that double billing could occur because shopping customers are already paying their CRES provider for the non-market-based transmission service, which DP&L would be charging to shopping customers through the TCRR-N. Further, IEU-Ohio argues that a TCRR under-recovery balance exists, but it only exists because of DP&L's failure to accurately forecast its load and transmission costs (Tr. Vol. IX at 2208; Tr. Vol. IX at 2343).

Constellation supports DP&L's proposal to separate the TCRR into a market-based bypassable rider and a non-market-based non-bypassable rider. Constellation witness Fein testified that he supports the proposal to separate the TCRR and makes recommendations that he believes would add greater clarity to the specific non-market-based charges that would be recovered under the TCRR-N (Constellation Ex. 1 at 12).

DP&L claims that customers are not actually at risk of paying the same cost twice, and that its proposal more accurately reflects how transmission costs should be billed to customers. DP&L witness Hale testified that DP&L proposes to separate the cost components of the TCRR into market-based and non-market-based subsets and to recover the costs separately. She testified that the new TCRR-N would recover NITS, regional transmission expansion planning (RTEP), and other non-market-based FERC/RTO charges. (DP&L Ex. 11 at 3.) DP&L points out on brief that intervenors made no showing as to whether CRES providers would remove the TCRR charges from customer bills and failed to demonstrate that the impact on a customer being double billed would be a material amount.

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. Further, to the extent necessary, DP&L should file with the Commission a proposal at the end of the ESP term for appropriate collection of any uncollected TCRR balance, including whether the uncollected TCRR balance should be collected through a bypassable or nonbypassable TCRR true-up rider.

9. Competitive Retail Enhancements

DP&L proposes to implement six competitive retail enhancements to improve the interaction of CRES providers with DP&L to ensure a smoother customer choice process. The six competitive retail enhancements proposed by DP&L are to eliminate the minimum stay and return-to-firm provisions in the generation tariffs, to implement a web-based portal for CRES providers to obtain DP&L customer information in more usable and manageable fashion, to implement an auto-cancel feature to DP&L's bill-ready billing function, to remove the enrollment verification that requires a CRES provider to have the first two digits of the customer name on the account as well as the correct account number, to support historical interval usage data (HIU) data requests via Electronic Data Interchange (EDI), and to provide CRES providers a standardized sync list on a monthly basis. DP&L estimates that these enhancements will require DP&L to incur approximately $2.5 million in capital improvements to its systems. DP&L claims that neither the Company nor its shareholders benefit from these system enhancements. (DP&L Ex. 9 at 13-15.)

DP&L contends that multiple parties have proposed additional competitive retail enhancements but no party is willing to pay for those enhancements (Tr. Vol. IX at 2191, 2310-2311, 2440-2441, 2445-2447, Tr. Vol. X at 2654). Furthermore, DP&L asserts on brief that additional competitive retail enhancements would violate rate-making principles, would provide no benefit to DP&L, would not be completed in a timely manner for lack of incentive, and would not be economical for DP&L. Finally, DP&L contends that there is no Commission rule requiring DP&L to implement the additional competitive retail enhancements and that insufficient evidence was presented at hearing to determine if the benefit of any additional competitive retail enhancement would surpass the cost.

IGS, RESA, and Constellation posit that a purchase of receivables (POR) program should be offered by DP&L as a competitive retail enhancement. A POR program is a competitive retail enhancement that requires a utility to purchase the accounts receivable of the competitive suppliers and shifts the burden of responsibility for collecting accounts to the utility. RESA witness Bennett testified that adoption of a POR program advances Ohio policy by promoting the efficient provision of service, by eliminating the application of needless cost-of-service and credit-standard distinctions to different customers, by increasing the availability of reasonably priced electric retail service, by promoting diversity of electricity supply and suppliers, by increasing consumer options and market access, by encouraging market access for CRES suppliers, by recognizing flexible regulatory treatment, and by providing other benefits to customers. (RESA Ex. 6 at 11). IGS witness White argued that a POR program would be more efficient and economical for DP&L's customers, regardless of whether they receive generation service from DP&L or a CRES supplier. Further, he contended that the costs associated with the systems, labor, and information-technology resources to manage all aspects of the billing

and collections process are being paid for by all customers through distribution rates. (IGS Ex. 1 at 9-10.) RESA witness Bennett added that a POR program would completely eliminate the complexity of payment allocation, the ambiguity over special arrangements, and the obscurity of information both from the customer and the CRES provider (RESA Ex. 6 at 12).

RESA also requests other competitive retail enhancements, including a web-based electronic system, choice-eligible customer lists, standard EDI interfaces, customer-specific information, alteration of certain EDI processes, addition of other EDI 876 HU standards, changes to billing options and charges, and other competitive retail enhancements. (RESA Ex. 6 at 5-9.) Furthermore, RESA notes on brief that cost-recovery of competitive retail enhancements should remain consistent with Commission precedent.

Constellation asserts on brief that greater access to data should be granted to CRES providers and that a web-based, electronic portal with key customer usage and account data be developed that allows CRES providers access, via a supplier website, to the data and information in a format that can be automatically scraped. Furthermore, Constellation also recommends the Commission direct DP&L to implement a standard, non-recourse POR program, notify CRES providers before a drop occurs, provide legacy account numbers, provide regular electronic mail notifications of tariff supplements, modifications, or changes when filed with the Commission, and conduct semi-annual or quarterly meetings with CRES providers to discuss proposed tariff changes, business practices, or other information.

FES contends that, despite competitive retail enhancements, other barriers to retail competition exist in DP&L's distribution service territory. FES witness Noewer stated that some of these barriers include issues regarding customer metering, billing, enrollment, switching fees, and eligibility file. FES witness Noewer testified that eliminating these barriers would enhance the competitive retail environment in DP&L's distribution service territory. (FES Ex. 17 at 19-22.)

The Commission finds that DP&L's proposed competitive retail enhancements should be adopted. The record indicates that the competitive retail enhancements proposed by DP&L would promote further development of the competitive retail electric service market in DP&L's distribution service territory (DP&L Ex. 10 at 8, OCC Ex. 18 at 5-6). 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.

The Commission also notes that it has initiated *In re The Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, for CRES providers and EDUs to discuss proposed tariff changes, business practices, and other information for development of Ohio's competitive retail electric services market. Since POR programs have not been universally adopted by Ohio EDUs, we believe that the issue of whether POR programs should be ordered to be implemented is better addressed in Case No. 12-3151-EL-COI. Further, the Ohio EDI Working Group meets on a monthly basis for the purpose of developing EDI transaction standards and procedures to develop Ohio's retail electric services market. The competitive retail enhancements adopted in this ESP, in conjunction with the initiatives taken by the Commission, will spur development of the competitive retail electric services market in DP&L's distribution service territory. Furthermore, 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.

10. Maximum Charge Phase-out Provision

DP&L proposes to phase out the maximum charge provision by increasing the maximum charge by 10 percent every quarter of the blending period. DP&L indicates that its maximum charge is contained in the secondary and primary rates and works to limit the rate per kWh charged to customers that have a poor load factor. Customers with poor load factors are those that have high demand and low energy consumption. DP&L witness Parke testified that it is appropriate to eliminate the maximum charge provision because the customers who benefit from the maximum charge provision do not pay their fair share of costs. Furthermore, he argued that a maximum charge provision is inconsistent with competitive markets. (DP&L Ex. 7 at 8-10).

OCC posits on brief that it supports DP&L's maximum charge phase-out proposal. OCC contends that it is unjust, unreasonable, and unduly discriminatory for the maximum charge provision to continue. Furthermore, OCC argues that no evidence was presented that phasing out the maximum charge provision would provide any harm to customers. OCC claims that the maximum charge phase-out provision should be adopted because there is neither a cost justification for continuing the maximum charge

provision nor any evidence that the rate without the maximum charge provision would harm any customers. OCC presented no testimony addressing the cost justification or rate impacts of the maximum charge provision.

Staff asserts that the maximum charge phase-out provision should be either denied outright or modified so that the maximum charge increases by 2.5 percent per quarter over the term of the ESP. Staff witness Turkenton noted that the maximum charge provision appears to apply to customers that have load factors of around 12 percent and below. She then noted that outright elimination of the maximum charge provision could lead to an up to 65 percent increase in the average secondary customer's bill. Staff witness Turkenton then recommended that, if the Commission were to phase out the maximum charge, it should be phased out by 2.5 percent per quarter instead of the 10 percent per quarter proposed by DP&L. (Staff Ex. 8 at 14). Staff notes on brief that it is concerned about the risks involved with eliminating the maximum charge provision, including the unpredictable consequences. Staff believes that the maximum charge provision should be reevaluated at the end of the ESP term when more information may be available regarding who bears the cost of the maximum charge.

The Commission finds that DP&L's proposed maximum charge phase-out provision should be denied and that the maximum charge should be increased only by 2.5 percent per year over the term of the ESP. The first 2.5 percent increase to the charge should take place on January 1, 2014, and then on January 1 for each remaining year of the ESP. The Commission believes that raising it 2.5 percent per year, which is equivalent to just over one half of one percent per quarter, will minimize rate impacts. The Commission notes that the maximum charge increase will be an increase to the charge and should apply to all new riders.

11. FUEL Rider

DP&L proposes to change its FUEL rider from a least cost methodology to a system average cost methodology. DP&L witness Hoekstra indicated that DP&L proposes to use a system average cost method to set its fuel rate, which would determine DP&L's total fuel cost and total generation sales for the period (DP&L Ex. 3 at 5-6). The witness noted that DP&L would then determine its average fuel costs and use that average to establish the fuel rider to be charged to SSO customers. DP&L contends on brief that the Commission should conclude that the system average cost methodology is the appropriate methodology because DP&L has no obligation to allocate its least cost fuel to SSO customers, DP&L would not be able to recover all of its fuel costs under a least cost stacking methodology, and the least cost stacking methodology may have negative impacts on DP&L's financial integrity.

OCC, FES, and Staff contend that DP&L should continue to use a least cost stacking methodology. Staff witness Gallina and OCC witness Slone testified that under the least cost stacking methodology, the fuel rider would be lower than under a system average cost methodology because the least cost fuel would be allocated to retail customers (Tr. Vol. VI at 1576; Tr. Vol. VIII at 2120). Staff witness Gallina testified that the least cost approach is currently being used by DP&L. He then testified that DP&L should continue to use the least cost methodology except that load from DPL Energy Resources (DPLER) should be excluded. Furthermore, both OCC and Staff assert on brief that the system average cost methodology would unfairly subsidize DP&L's affiliate DPLER and violates Section 4928.02(H), Revised Code. OCC witness Slone explained that for purposes of calculating the fuel rider, the retail load is made of existing DP&L SSO customer load and DPLER customer load. However, he contended that the fuel rider rate is only charged to SSO customers, whereas DPLER does not pay the fuel rider rate. He then noted that under DP&L's current stacking methodology, the costs associated with providing electricity to the wholesale market are currently treated as DP&L's highest costs to generate electricity, and are not calculated in the existing fuel rider. (OCC Ex. 24 at 6). Staff and OCC claim that the system average cost methodology should be denied because it would reduce DP&L's cost to generate electricity that would be sold into the wholesale market, which would grant DP&L and its affiliates a competitive advantage in the wholesale market at the expense of SSO customers.

The Commission finds that DP&L's proposed system average cost methodology should be denied. DP&L should utilize the least cost stacking methodology and should exclude DPLER load. The Commission agrees with Staff witness Gallina and OCC witness Slone that authorizing the system average cost methodology, as proposed in the ESP, could drive up costs on SSO customers to grant DP&L and its affiliates a competitive advantage in the wholesale market (Staff Ex. 5 at 3; OCC Ex. 24 at 6-8).

12. Storm Damage Recovery Rider

Staff proposes a storm damage recovery rider to be used by DP&L on a going-forward basis to defer O&M costs associated with destructive or major storms over an annual baseline (Staff Ex. 6 at 5). Staff witness Lipthratt testified that a baseline should be set at $4 million and the rider should be used to collect those amounts of major storm O&M costs that exceed the baseline, or to refund the difference between the amount expensed for major storm O&M restoration and the baseline, if the annual expense is less than the baseline (Staff Ex. 6 at 5). He claimed that the $4 million baseline is appropriate because from 2002 to 2011, the 10 year average of service restoration O&M expenses associated with major events was $3,977,641. Furthermore, the three year average of service restoration O&M expenses from 2009 to 2011 was $3,704,352. Staff witness Lipthratt believed that based upon the 10 year average and the three year average, a $4 million baseline would be appropriate. (Staff Ex. 6 at 6). Staff also claims that

$4 million baseline is consistent with other utilities' storm recover rider baselines, with AEP having a baseline of $5 million and Duke having a baseline of $4.4 million.

DP&L argues that DP&L's O&M expenses for 2005, 2008, and 2011, were outliers and that the storm rider baseline should be set at $1.1 million. DP&L witness Seger-Lawson then asserted that setting the baseline at $4 million would not be consistent with AEP or Duke because their O&M expenses were significantly higher than DP&L's (DP&L Ex. 12 at 19, 20). She then testified that adjusting DP&L's baseline based upon a ratio comparing the Company's total O&M expenses with that of AEP and Duke would give baselines of $1.46 million and $1.09 million, respectively.

The Commission finds that Staff's proposed storm damage recovery rider in this case should be denied. On December 21, 2012, DP&L filed an application in *In re The Dayton Power and Light Company*, Case No. 12-3062-EL-RDR (*DP&L Storm Damage Case*), seeking authority to recover storm O&M expenses for all major event storms in 2011 and 2012, as well as certain 2008 storm O&M expenses. DP&L also sought recovery of the related capital revenue requirements for Hurricane Ike in 2008 and major storms in 2011 and 2012. Finally, DP&L requested authority to implement a storm cost recovery rider to recover all costs associated with major storms going forward and to defer O&M costs until they are recovered through the rider. The Commission finds that the storm damage recovery rider and Staff's proposed baseline would be better addressed in the *DP&L Storm Damage Case*.

13. Economic Development Fund (EDF)

City of Dayton claims that a declining economic climate exists in DP&L's service territory and that DP&L's economic development initiatives should continue to offset the impact of increasing rates. The economic hardships faced by the communities in DP&L's service territory include declining population, declining employment, declining tax revenues, and increasing poverty. Dayton asserts that the decline in DP&L's service territory have significantly increased the need to create and maintain economic development initiatives (Dayton Ex. 1 at 3-6).

The Commission notes that Section 4928.143(B)(2)(i), Revised Code, specifically authorizes the inclusion of economic development programs in ESPs, and we will modify the ESP to include an economic development program. The Commission finds that DP&L should implement an Economic Development Fund (EDF), to be funded by shareholders at a minimum of $2 million per year, or not less than $6 million dollars for the years 2014, 2015, and 2016. Any EDF funds that are not allocated during a given year shall remain in the EDF and carry over to be allocated in subsequent years. This economic development funding is consistent with our treatment of other Ohio electric utilities and shall not be recoverable from customers. *AEP ESP II Case*, Opinion and

Order (August 8, 2012) at 67. The EDF funds should be allocated for the purpose of creating private sector economic development resources to attract new investment and improve job growth in Ohio. DP&L shall collaborate with Staff to determine the proper manner of allocation of the EDF funds to best accomplish their stated purpose. DP&L and Staff should collaborate to ensure that all EDF funds pursuant to this Opinion and Order are allocated by December 31, 2016. Furthermore, the EDF funding is in addition to and exclusive of DP&L's prior unrecoverable funding commitments. The Commission believes that, given the financial integrity charge approved by the Commission in this case, it is appropriate for DP&L to support economic development in its service territory and to continue the positive contributions to ensuring the vitality of the Dayton region.

III. IS THE PROPOSED ESP MORE FAVORABLE IN THE AGGREGATE AS COMPARED TO THE RESULTS THAT WOULD OTHERWISE APPLY UNDER SECTION 4928.142, REVISED CODE.

A. Arguments of the Parties

DP&L contends that the ESP, as proposed, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. DP&L witness Malinak testified that in conducting the statutory price test (quantitative analysis), the Commission should consider other provisions that are quantifiable, as well as consider the non-quantifiable aspects of the ESP. In evaluating all of these criteria, he concludes that the proposed ESP, in the aggregate, is more favorable than the results that would otherwise apply under an MRO by approximately $112 million. (DP&L Ex. 5 at 3-15, DP&L Ex. 14A at 4-140).

In conducting the quantitative analysis, DP&L includes the SSR and the ST in both the ESP and the hypothetical MRO. DP&L believes that the SSR and ST would be permitted under an MRO pursuant to Section 4928.142(D)(4), Revised Code. This section states that the Commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the Commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the SSO is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. Pursuant to this section, DP&L contends that the Commission must make two determinations; what is DP&L's most recent standard service offer that is subject to adjustment, and whether it is necessary to adjust those charges either to address an emergency that threatens DP&L's financial integrity or ensure the resulting revenue available to DP&L for providing the SSO to avoid a taking of property without compensation.

First, DP&L asserts that its most recent standard service offer is its existing ESP, including its bypassable generation charges and its non-bypassable RSC. On December 28, 2005, the Commission issued an Opinion and Order approving a stipulation that extended DP&L's existing rate stabilization plan through December 31, 2010. The Commission's Opinion and Order adopting the stipulation also extended and modified DP&L's rate stabilization surcharge (RSS).[1] *In re Dayton Power and Light Company,* Case No. 05-276-EL-AIR (*RSP II Case*), Opinion and Order (December 28, 2005) at 3, 16. On October 10, 2008, DP&L filed its first application for an ESP and, pursuant to Section 4928.143(D), Revised Code, the application for an ESP incorporated the terms of the 2005 stipulation. On June 24, 2009, the Commission issued an Opinion and Order adopting a stipulation for the ESP (Co. Ex. 102) and extending the ESP for two years, through December 31, 2012. *In re Dayton Power and Light Company,* Case Nos. 08-1094-EL-AIR et al. (*ESP I Case*), Opinion and Order (June 24, 2009, at 4, 13). The Opinion and Order adopting the stipulation continued the RSC with the ESP. On December 12, 2012, the Commission issued an entry holding that DP&L's RSC is a provision, term, or condition of the ESP. Therefore, DP&L believes that, if it had filed an MRO application, then the Commission could have modified DP&L's RSC to preserve DP&L's financial integrity or to prevent a taking. This, DP&L contends, would make DP&L's most recent SSO its existing ESP, including the RSC.

Next, DP&L claims that it would be entitled to an SSR or ST to preserve its financial integrity or to prevent a taking in a hypothetical MRO. DP&L indicates that there are not any decisions from the Supreme Court of Ohio or the Commission that interpret Section 4928.142(D)(4), Revised Code, regarding an emergency that threatens the utility's financial integrity. However, DP&L contends that an emergency threatening the utility's financial integrity in Section 4928.142(D)(4), Revised Code, is analogous to Section 4909.16, Revised Code, which allows the Commission to increase a utility's rates when it is necessary to prevent injury to the business or interests of the public utility in case of an emergency. The Supreme Court of Ohio has held that an emergency exists if the utility would be unable to pay its operating expenses, dividends on preferred stock and debt obligations absent an emergency rate case. Furthermore, the Supreme Court of Ohio held that rates set under the emergency rate statute should be sufficient to yield a reasonable return. *City of Cambridge v. Pub. Util. Comm.,* 159 Ohio St. 88, 92-94, 111 N.E.2d 1 (1953). DP&L posits that without an SSR or an ST in an MRO, it would suffer from significant financial distress, would experience substantial difficulties paying its bills, and would not be able to earn a reasonable ROE. For these reasons, DP&L contends that the Commission should find that the SSR and ST would be approved under a hypothetical MRO.

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[1] The modified RSS was redesignated the RSC in the *RSP II Case. Ohio Consumers Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 2007 Ohio-4276, ¶ 25; *ESP I Case,* Opinion and Order (June 24, 2009) at 5, footnote 2).

Furthermore, DP&L avers on brief that the Commission should conclude that a taking would occur under a hypothetical MRO without an SSR and an ST, and therefore the charges would be permissible under Section 4928.142(D)(4), Revised Code. In making this argument, DP&L posits that, without a reasonable ROE, a taking without just compensation would occur under well established Supreme Court of Ohio and United States Supreme Court precedent.

Intervenors including FES, OCC, and IEU-Ohio claim on brief that the SSR and ST should not be included with the MRO when conducting the quantitative analysis. Intervenors contend that when conducting the test, the ESP should not be compared to a hypothetical MRO but to market prices. Therefore, they aver that any new ESP charges should not be included on the MRO side of the test. Intervenors contend that the goal of the ESP and MRO statutes is to ensure that customers have the benefit of market pricing or better. Intervenors assert that the SSR is substantially identical to AEP's RSR, which was approved in the *AEP ESP II Case*, and Duke's ESSC, which was approved in *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO (*Duke ESP Case*). In both cases, the Commission considered the financial stability charges solely as a cost of the proposed ESP. Intervenors contend that the SSR and ST do not fall within any of the categories of costs that the Commission is authorized to adjust to an EDU's legacy SSO generation price.

FES further claims on brief that Section 4928.142(D)(4), Revised Code, applies only to a first-time MRO applicant. DP&L filed an application for an MRO on March 30, 2012, and the application was later withdrawn. Therefore, FES speculates that DP&L is not a first-time MRO applicant and that Section 4928.142(D)(4), Revised Code, does not apply to it. Furthermore, FES argues that adjustments under Section 4928.142(D)(4), Revised Code, are to the most recent SSO price. According to FES, this means that the adjustment would be to the base generation price, not a new nonbypassable charge.

FES then avers on brief that, if an emergency charge is authorized under Section 4928.152(D)(4), Revised Code, the utility should be held to the same burden of proof required for emergency rate relief pursuant to Section 4909.16, Revised Code. Thus, FES believes that DP&L failed to demonstrate what the emergency is, the precise amount necessary to relieve the emergency, the length of time for which the rate adjustment is needed, and that the SSR and ST are the minimum level necessary to avert or relieve the emergency. FES also argued that the ESP should end on December 31, 2017; that the blending percentages in Section 4928.142(D), Revised Code, no longer apply; that switching was not taken into consideration because the ST was on both sides of the test; and that the ST should not be included on the MRO side of the test.

OCC notes on brief that Section 4928.143(C)(1), Revised Code, sets forth the standard of review for an ESP and claims that there is no standard of review for the financial integrity of the utility. OCC contends that financial integrity is only reviewable under Section 4928.142(D)(4), Revised Code. Therefore, the financial integrity charges may only be considered in an MRO and not in an ESP.

FES and OCC asserts that the quantitative analysis should be conducted for the period starting from the issuance of this Order. Intervenors aver that consistent with the Commission's finding in the *AEP ESP II Case*, the Commission cannot compare prices during a time period that has elapsed prior to the issuance of the Order. *AEP ESP II Case*, Opinion and Order (August 8, 2012) at 74. Furthermore, intervenors believe that December 31, 2017, should be used as the ending point for the test.

Staff contends on brief that the ST should be rejected; therefore it should not be included in the quantitative analysis. Staff claims that including an ST in an ESP would be problematic because the adjustable nature of the ST would make it remarkably difficult to establish what it would cost if authorized. Without knowing the cost of the ST, it would be difficult to calculate whether the ESP is more favorable in the aggregate than an MRO. Staff then asserts that the SSR is permissible in an ESP and should be considered on the ESP side of the quantitative analysis. Staff recognizes that the MRO statute contains a provision for the approval of a charge in an emergency and posits that maintaining financial integrity in an emergency is a much higher standard than demonstrating that a charge has the effect of stabilizing or providing certainty regarding retail electric service. However, Staff takes no position on whether the SSR meets that higher standard and belongs on the MRO side of the quantitative analysis. Staff avers that for the ESP to pass the quantitative analysis, the Commission must reduce the SSR rate calculated by the Staff, conclude that the Staff-projected market rates are too high, and consider other qualitative benefits of the ESP.

Numerous intervenors conducted their own quantitative analyses of the ESP. Staff calculated that in a three year ESP, if the RSC of $73 million is included on the MRO side of the quantitative analysis, ratepayers would pay approximately $25 million more in an ESP over an expected MRO. Staff's analysis uses Staff's projected market rates and blending percentages for the term of the ESP (Staff Ex. 8 at 6-10, Attachment TST-1a). IEU-Ohio uses a similar calculation as Staff by including the RSC of $73 million on the MRO side of the quantitative analysis, but used a term of five years with blending percentages of 10 percent, 40 percent, 70 percent, 100 percent, and 100 percent, respectively. IEU-Ohio's calculations indicate that the ESP would be less favorable than an MRO by approximately $204 million. FES and OCC also conducted quantitative analyses and found the ESP to be less favorable than the expected MRO. When conducting the quantitative analyses, intervenors generally found that the ESP will be less favorable than an MRO. No intervenor conducted a quantitative analysis adopting

DP&L's position that a charge should be included in the MRO pursuant to Section 4928.142(D)(4), Revised Code, but several witnesses acknowledged that, if the SSR and ST were included under both an ESP and the expected MRO, then DP&L's ESP would likely pass the quantitative analysis (Tr. Vol. VII at 1813-1817, Tr. Vol. VIII at 2090-2092, Tr. Vol. V at 1238, IEU Ex. 2A at KMM-17). Furthermore, intervenors generally did not conduct a qualitative analysis, to coincide with their quantitative analysis because they did not believe that any non-quantifiable benefits exist in a qualitative analysis.

However, DP&L contends that a qualitative analysis should be conducted because there are both non-quantifiable costs of an MRO and non-quantifiable benefits of the ESP. DP&L claims on brief that there would be substantial non-quantifiable costs under a hypothetical MRO without the SSR or ST because DP&L would not able to provide safe and reliable distribution, transmission, and generation service. DP&L argues that the lesser revenue it would receive under an MRO without the SSR and ST as compared to the proposed ESP would require drastic cuts to O&M expenses, thus creating a substantial non-quantifiable cost of less reliable service. DP&L also believes that there are significant non-quantifiable benefits of the ESP. DP&L notes that its proposed ESP accelerates the move to 100 percent competitive bidding over an MRO. Specifically, DP&L indicates that its proposal would lead to 100 percent competitively bid market pricing in four years, whereas DP&L contends that under an MRO it would take five years after a Commission decision approving an MRO to get to 100 percent competitively bid market pricing. Including the non-quantifiable benefits, DP&L witness Malinak claimed that DP&L's proposed ESP, in the aggregate, will result in customers paying approximately $120 million less under DP&L's proposed ESP than under the results that would otherwise apply (DP&L Ex. 5 at 13-14, Ex. RJM-1, Tr. Vol. VIII at 2080-2081). DP&L witness Malinak explained on rebuttal that, in his opinion, a proper consideration of the non-quantifiable costs and benefits would lead to the ESP being more favorable than the expected results that would otherwise apply under an MRO (DP&L Ex. 16 at 9). DP&L contends that the non-quantifiable benefit of more rapidly transitioning to 100 percent competitive bidding exceeds any quantifiable benefit that a hypothetical MRO might have over the ESP. Thus, DP&L believes that the favorable aspects of the ESP pursuant to the qualitative analysis are greater than any potential deficiency in the quantitative analysis. DP&L believes that the ESP, as modified, is more favorable in the aggregate than the results that would otherwise apply.

FES asserts on brief that non-quantifiable costs of an MRO should not be considered because any financial distress is related to DP&L's generation assets, DP&L has failed to meet the statutory requirements for emergency rate relief, DP&L's financial integrity claims are incorrectly calculated, and DP&L overstates the impact to customers associated with financial integrity issues.

FES and RESA argue that the non-quantifiable benefits of the ESP are minimal and do not justify the ESP over an MRO, whereas IEU-Ohio goes further and argues that the non-quantifiable benefits are nonexistent. FES, RESA, and IEU-Ohio claim that any benefit of a faster move to market-based rates is negated by the corresponding nonbypassable charges, specifically the ST. IEU-Ohio avers that there are no non-quantifiable benefits of the ESP over an MRO because the ST offsets any non-quantifiable benefit of a faster move to market based rates. FES then contends that charging above market charges to customers would slow business development and job growth, which also negates any benefit of a faster move to market-based rates. Similarly, IEU-Ohio witness Murray surmises that the ESP fails to provide a more favorable business climate because he believes that it will result in higher electricity prices to the vast majority of customers in DP&L's service territory (IEU-Ohio Ex. 2 at 36). Staff posits that it is up to the Commission whether the non-quantifiable benefits of the ESP counterbalance the quantifiable costs of the ESP.

FES and IEU-Ohio believe that the competitive retail enhancements are not a non-quantifiable benefit because they will be paid for with a nonbypassable charge. They note on brief that the competitive retail enhancements represent receipt for services paid and therefore are not a non-quantifiable benefit of the ESP. They go on to add that the competitive retail enhancements should be implemented despite the ESP proceeding (FES Ex. 17 at 7).

B. Commission Conclusion

Pursuant to Section 4928.143(C)(1), Revised Code, the Commission must determine whether DP&L has sustained its burden of proof of demonstrating that the proposed ESP, as modified by the Commission, including its pricing, and other terms and conditions, is more favorable in the aggregate as compared to results that would otherwise apply under Section 4928.142, Revised Code. As a preliminary matter, we believe that the term "statutory price test" may have been misinterpreted by parties in this proceeding as a separate test applied prior to determining whether, in the aggregate, an ESP is more favorable as compared to results that would otherwise apply under Section 4928.142, Revised Code. Instead, we must ensure that our analysis looks at the entire modified ESP as a total package, which includes a quantitative and a qualitative analysis. The Supreme Court of Ohio has held that Section 4928.143(C)(1), Revised Code, does not bind the Commission to a strict price comparison, but rather, instructs the Commission to consider other terms and conditions, as there is only one statutory test that looks at an entire ESP in the aggregate. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 402, 2011-Ohio-958, 945 N.E.2d 501.

In conducting the quantitative analysis, we first consider the modifications we have made to the ESP. The Commission made numerous modifications to the proposed

ESP, including denying the ST, adjusting the term of the ESP to 36 months, adjusting the proposed blending percentages, adjusting the SSR to $110 million per year effective January 1, 2014, and denying the proposed rider AER-N. Each of these adjustments and revisions has an effect in the quantitative analysis on the projected cost of the modified ESP approved by the Commission.

The second step of our analysis for the quantitative analysis is to analyze the expected results that would otherwise apply pursuant to Section 4928.142, Revised Code. Based upon the record and review of the statute, the Commission believes that we cannot compare this ESP with what would otherwise apply under Section 4928.142, Revised Code, beginning today, as it would be impossible for DP&L to immediately establish an alternate plan under Section 4928.142, Revised Code, which meets all of the statutory criteria. Therefore, we believe that we should begin comparing the ESP to the expected MRO beginning on January 1, 2014. We note that this approach is consistent with the Commission's decision in the *AEP ESP II Case*. *AEP ESP II Case*, Opinion and Order (August 8, 2012) at 74. The MRO blending would then proceed consistent with Section 4928.142(D), Revised Code. However, the Commission notes that, pursuant to Section 4928.142(D), Revised Code, the SSO price for retail electric generation service should be a proportionate blend of the bid price and the "generation service price" for the remaining standard service offer load. The Commission finds that "generation service price" relates solely to bypassable charges paid by SSO customers; therefore, the RSC should not be included in the expected MRO as a legacy rate.

While we note that an MRO is not currently before us, an equivalent financial charge to the SSR should not be included in the expected MRO. DP&L alleged that the SSR should be included in the MRO pursuant to Section 4928.142(D)(4), Revised Code, as a financial integrity charge to address a financial emergency (DP&L Ex. 16 at 8). However, DP&L has not persuaded us that it is facing a financial emergency pursuant to the MRO statute, which is a different standard than the standard for a stability charge under Section 4928.143(D)(2)(d), Revised Code. While DP&L witness Malinak testified that the hypothetical situation of an MRO without any financial integrity-based non-bypassable charges would put DP&L in a highly compromised financial position, we are not convinced that DP&L could not undertake O&M reductions, a distribution rate increase, or other steps to improve its financial position (DP&L Ex. 16 at 5-6). We find that, based upon the record in this case, DP&L has not demonstrated that it faces a financial emergency as contemplated by Section 4928.142, Revised Code.

The third step of our analysis is to compare the ESP to the expected MRO to determine the quantifiable benefit or cost of the ESP. To begin the comparison, the Commission assumes that blended rates resulting from the CBP begin for both the ESP and the expected MRO on January 1, 2014. The Commission applied the SSR of $110 million per year beginning on January 1, 2014, for the first two years of the ESP, as

well as the SSR-E of approximately $92 million for the first 10 months of 2015 although the SSR-E is contingent upon certain conditions as discussed above.

Staff's quantitative analysis indicated that the ESP was less favorable than an MRO by approximately $243 million over Staff's proposed three-year ESP. Staff's quantitative analysis for the three year ESP used a $133 million SSR instead of a $110 million SSR (Staff Ex. 8 at 8; Staff Ex. 8 Attachment TST-1). Staff's quantitative analysis using a three year ESP needs to be adjusted to reflect that blending would begin on January 1, 2014, the blending percentages would be 10 percent, 40 percent, and 70 percent, the ST would be removed from both the ESP and the MRO, the SSR would be in the amount of $110 million for the first two years of the ESP, and the SSR-E would be authorized for the first ten months of the third year of the ESP. Furthermore, Staff's analysis needs adjusted to reflect that the ESP will not match up with the PJM planning year. Despite these necessary adjustments to Staff's quantitative analysis, the Commission believes that the Staff's final quantifiable calculation is substantially correct because the increased revenue to DP&L pursuant to the change in blending percentages in the modified ESP is offset by the decreased SSR and SSR-E amount. Staff found that the quantifiable cost of the ESP would be approximately $243 million and we believe that with the Commission's modifications to the ESP, the MRO is more favorable by approximately $250 million.

We note that DP&L's quantitative analysis demonstrated that its proposed ESP would be approximately $112 million more favorable than the expected results that would otherwise apply (DP&L Ex. 5 at 3-15, DP&L Ex. 14A at 4-14). Although the elimination of the ST from the ESP and the reduction in the annual SSR from DP&L's proposed $137.5 million to the approved $110 million would reduce the costs of the ESP, we note that elimination of the financial integrity charge from the expected MRO more than offsets that reduction in the costs of the ESP. Accordingly, we find that, even under DP&L's methodology, the quantifiable costs of the ESP as modified would exceed the costs of the expected MRO in the quantitative analysis.

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 34, 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.

We are not persuaded by intervenors that we should compare the ESP to an expected MRO that goes immediately to 100 percent market rates because, as we have indicated previously, we are not convinced that DP&L could immediately divest its generation assets and still provide stable, safe, and reliable retail electric service. Moreover, based upon the record of this case, we are not convinced by FES that DP&L has already filed its "first application" for an MRO within the meaning of Section 4928.142(D), Revised Code (Tr. Vol. IX 2377-2384). We believe that an MRO that goes immediately to 100 percent market rates would create substantial quantifiable and non-quantifiable costs to DP&L and its customers, and we do not expect that such an MRO would be proposed by DP&L or authorized by the Commission.

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.

IV. CONCLUSION

Upon consideration of the ESP application filed by DP&L and the provisions of Section 4928.143(C)(1), Revised Code, the Commission finds that the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, as modified by this Order, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Therefore, the Commission finds that the proposed ESP should be approved, with the modifications set forth herein. As modified herein, the plan provides rate stability for customers, revenue certainty for DP&L, and facilitates the development of the retail electric market. Further, DP&L is directed to file proposed revised tariffs consistent with this Opinion and Order. To the extent that intervenors have proposed modifications to DP&L's ESP that have not been specifically addressed by this Opinion and Order, the Commission concludes that the requests for such modifications should be denied.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) DP&L is a public utility as defined in Section 4905.02, Revised Code, and, as such, DP&L is subject to the jurisdiction of this Commission.

(2) On December 12, 2012, DP&L filed an amended application for an SSO in accordance with Section 4928.141, Revised Code.

(3) Notice was published and public hearings were held in Dayton where a total of six witnesses offered testimony.

(4) The following parties filed for and were granted intervention in DP&L's SSO proceeding: IEU-Ohio, OMA, Honda, Duke Energy Retail, Duke Energy Commercial Asset Management, Duke Energy Ohio, Inc., FES, AEP Retail Energy Partners, LLC, Ohio Energy Group (OEG), OHA, Kroger, OPAE, EnerNOC, Inc., OCC, IGS, City of Dayton, RESA, OEC, Wal-Mart, Direct Energy Services, LLC, Direct Energy Business, LLC, Edgemont Neighborhood Coalition, Border Energy Electric Services, Inc., Exelon, Constellation, Ohio Power Company, SolarVision, Council of Smaller Enterprises, Border Energy Electric Services, Inc., FEA, and People Working Cooperatively, Inc.

(5) The evidentiary hearing on the ESP was called on March 18, 2013, and concluded on April 3, 2013.

(6) Briefs and reply briefs were filed on May 20, 2013, and June 5, 2013, respectively.

(7) The proposed ESP, as modified pursuant to this Opinion and Order, including the pricing and all other terms and conditions, deferrals and future recovery of the deferrals, and quantitative and qualitative benefits, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

VI. ORDER:

It is, therefore,

ORDERED, That DP&L's application for an electric security plan be approved, as modified by the Commission. It is, further,

ORDERED, That IEU-Ohio's request to review the procedural rulings is denied. It is, further,

ORDERED, That IEU-Ohio's motion to take administrative notice or to reopen the proceeding or to supplement the record is denied. It is, further,

ORDERED, That DP&L shall file proposed tariffs consistent with this Opinion and Order, subject to review and approval by the Commission. It is, further,

ORDERED, That a copy of this Opinion and Order by served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

BAM/GAP/sc

Entered in the Journal
SEP 04 2013

Barcy F. McNeal
Secretary

ATTACHMENT B

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 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

ENTRY NUNC PRO TUNC

The Commission finds:

(1) The Dayton Power and Light Company (DP&L) is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.

(2) On March 30, 2012, DP&L filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. The application was for a market rate offer in accordance with Section 4928.142, Revised Code. On September 7, 2012, DP&L withdrew its application for a market rate offer. On October 5, 2012, DP&L filed an application for an electric security plan (ESP) in accordance with Section 4928.143, Revised Code. Additionally, DP&L filed accompanying applications for approval of revised tariffs, for approval of certain

accounting authority, for waiver of certain Commission rules, and to establish tariff riders. On December 12, 2012, DP&L amended its application for an electric security plan.

(3) On September 4, 2013, the Commission issued its Opinion and Order in this proceeding.

(4) Due to an administrative error, the Opinion and Order does not reflect the decision that the Commission intended to issue, including the length of the modified ESP period. Therefore, the Commission finds that the Opinion and Order should be amended *nunc pro tunc*. The Opinion and Order incorrectly states that the modified ESP term should end on December 31, 2016. The end date of the modified ESP should be corrected to May 31, 2017, and the length of the modified ESP should be corrected to 41 months. Further, DP&L is expected to divest its generation assets by May 31, 2017. The date by which DP&L should file its subsequent SSO should be August 1, 2016, and, in the event such subsequent SSO is not authorized by April 1, 2017, DP&L will begin procuring generation deliverable on June 1, 2017.

Further, the Opinion and Order incorrectly states that the service stability rider (SSR) should end on December 31, 2015. The SSR will be in effect for three years at an annual amount of $110 million. Therefore, all references to the SSR end date should be corrected to December 31, 2016. Likewise, the service stability rider extension (SSR-E) start date should be corrected from January 1, 2016, to January 1, 2017. Further, the term of the SSR-E should be five months and end on its own terms on May 31, 2017. All references to the term of the SSR-E should be corrected accordingly. The amount of the SSR-E should be corrected from $92 million to $45.8 million. However, DP&L will still be required to file an application to implement the SSR-E.

Moreover, the CBP auction products should be corrected to 10 tranches of a 41 month product commencing January 1, 2014, 30 tranches of a 29 month product commencing January 1, 2015, and 30 tranches of a

> 17 month product commencing January 1, 2016. This will not change the 10 percent/40 percent/70 percent blending percentages contained in the Opinion and Order.
>
> Finally, the amount that the modified ESP fails the quantitative analysis should be corrected accordingly.

It is, therefore,

ORDERED, That the Opinion and Order issued September 4, 2013, be amended, *nunc pro tunc*, including, but not limited to, pages 15, 16, 25, 26, 27, 49, and 50, as set forth above. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

GAP/sc

Entered in the Journal

SEP 06 2013

Barcy F. McNeal
Secretary

ATTACHMENT C

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an 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 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

ENTRY ON REHEARING

The Commission finds:

(1) The Dayton Power and Light Company (DP&L) is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.

(2) On September 4, 2013, the Commission issued its opinion and order, approving DP&L's proposed electric security plan (ESP), with certain modifications.

(3) Pursuant to Section 4903.10, Revised Code, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters

determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On October 4, 2013, Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE/Edgemont), the Office of the Ohio Consumers' Counsel (OCC), Industrial Energy Users–Ohio (IEU-Ohio), FirstEnergy Solutions Corp. (FES), the Ohio Hospital Association (OHA), Ohio Energy Group (OEG), the Kroger Co. (Kroger), and DP&L filed applications for rehearing.

(5) On October 7, 2013, DP&L filed a motion and memorandum in support for an extension of time to file memoranda contra the applications for rehearing. By entry issued on October 8, 2013, the attorney examiner granted DP&L's motion and set the deadline for October 31, 2013.

(6) Despite the extension, the Commission notes that, pursuant to our September 24, 2013 opinion and order, DP&L is required to conduct an auction by November 1, 2013, for 10 tranches of its standard service offer load (SSO). Therefore, we will address the assignments of error set forth by DP&L and FES that bear directly upon this first auction.

AUCTION PROCESS

(7) DP&L argues in its fifth assignment of error that the Commission improperly ordered that the load associated with reasonable arrangement customers should be included in the competitive bidding process (CBP). DP&L argues that requiring DP&L to bid reasonable arrangement customer load, with the rest of its load, into the CBP auctions would unlawfully rewrite the parties' reasonable arrangement contracts. Further, DP&L adds that bidding the load into the auctions would not result in cost savings to customers. DP&L contends that its tariff rates are expected to decrease as a result of competitive bidding, which will decrease the delta recovery regardless of whether the load is bid into the auctions.

(8) The Commission finds that DP&L's assignment of error should be denied. First, the Commission disagrees with DP&L's contention that requiring DP&L to bid the reasonable arrangement load into the auctions will rewrite DP&L's contracts with those customers. DP&L will still be providing full requirements electric service, including generation service, to its reasonable arrangement customers, despite sourcing a portion of the generation service from the wholesale market. Second, the Commission disagrees with DP&L's contention that bidding the reasonable arrangement load into the auction will not result in cost savings to customers. The additional load being bid into the auction should encourage active participation in the auctions by potential bidders. This additional participation should put additional negative pressure on auction prices, resulting in cost savings to customers. DP&L's contention that the delta recovery will decrease irrespective of whether the load is included in the CBP auction or not fails to take into consideration that there may be a greater decrease in the delta revenue if that load is bid into the auctions. That greater decrease in the delta will then be passed through as savings to customers. Accordingly, the Commission finds that the fifth assignment of error set forth by DP&L in its application for rehearing should be denied.

(9) FirstEnergy Solutions Corp. (FES) contends in its sixth assignment of error that the Commission's opinion and order is unlawful in that it authorizes DP&L to participate in auctions through affiliates and subsidiaries while receiving a generation subsidy through the service stability rider (SSR). FES asserts that DP&L could use SSR revenues to subsidize its generating assets and offers in the competitive market, which could have a chilling effect on competition. FES argues that DP&L and its affiliates should be prohibited from participating in the auction.

(10) The Commission finds that FES fails to raise any new arguments for the Commission's consideration in support of its sixth assignment of error. The Commission ordered

that all SSR revenues should remain with DP&L and may not be transferred to any of DP&L's current or future affiliates through dividends or any other means. The Commission further ordered that DP&L may not provide any competitive advantage to any affiliate or subsidiary participating in the CBP auctions. Therefore, FES's argument that DP&L may collect SSR revenues and then compete in the auctions through its affiliates or subsidiaries has already been addressed by the Commission. Moreover, the Commission notes that the Commission has not precluded affiliates of other utilities from participating in CBPs held by the electric distribution utility. For example, the Commission has not precluded FES, which is the unregulated generation affiliate of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, from participating in those electric distribution utilities' CBP auctions. *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case Nos. 08-935-EL-SSO, 10-388-EL-SSO and 12-1230-EL-SSO. Moreover, we note that, in Case No. 08-835-EL-SSO, the Commission authorized the electric distribution utilities to collect a Delivery Service Improvement Rider, which was similar in effect to the SSR authorized in this proceeding, but FES was not precluded from participating in auctions in that ESP.[1] *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case Nos. 08-935-EL-SSO et al., Second Opinion and Order (March 25, 2009) at 11-12. Likewise, we did not preclude affiliates of Duke Energy Ohio from participating in CBPs in its most recent ESP. *In re Duke Energy Ohio,* Case No. 11-3549-EL-SSO et al., Opinion and Order (November 22, 2011) at 13. Accordingly, FES's sixth assignment of error in its application for rehearing should be denied. The Commission notes that numerous assignments of error

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1 The Commission notes that the parties to the stipulation in Case No. 08-835-EL-SSO agreed that the stipulation was binding only in that case and was not to be offered or relied upon in other proceedings. However, the Commission has consistently held that we are not bound by such agreements among the signatory parties to a stipulation.

have been asserted regarding the SSR, and at this time the Commission's finding is limited only to the extent that the Commission believes that subsidiaries and affiliates of DP&L may participate in the auction. The remaining assignments of error regarding the SSR will be addressed in a subsequent entry on rehearing.

(11) Accordingly, the Commission finds that, by November 1, 2013, DP&L should conduct the auction for 10 tranches of a 41-month product commencing on January 1, 2014. The Commission notes that this auction will not be affected by any subsequent determinations made by the Commission on rehearing, including, but not limited to, the timing of and products to be offered in any subsequent auctions.

(12) Further, the Commission believes that sufficient reason has been set forth by OPAE/Edgemont, OCC, IEU-Ohio, OHA, OEG, and Kroger, as well as DP&L and FES in their remaining assignments of error, to warrant further consideration of the matters specified in the applications for rehearing. Accordingly, the applications for rehearing filed by OPAE/Edgemont, OCC, IEU-Ohio, OHA, OEG, and Kroger should be granted for further consideration of the matters specified in the applications for rehearing. Further, the applications for rehearing filed by DP&L and FES should be granted, to the extent their assignments of error on rehearing were not already denied in this entry on rehearing, for further consideration of the matters specified in the applications for rehearing.

It is, therefore,

ORDERED, That the applications for rehearing filed by DP&L and FES be granted, in part, for further consideration of the matters specified in the applications for rehearing, and denied, in part, as set forth above. It is, further,

ORDERED, That the applications for rehearing filed by OPAE/Edgemont, OCC, IEU-Ohio, OHA, OEG, and Kroger be granted for further consideration of the matters specified in the applications for rehearing. It is, further,

ORDERED, That DP&L should conduct the auction for 10 tranches of a 41-month product by November 1, 2013, in accordance with the Commission's Opinion and Order and finding (11). It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

BAM/sc

Entered in the Journal
OCT 23 2013

Barcy F. McNeal
Secretary

ATTACHMENT D

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an 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 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

SECOND ENTRY ON REHEARING

The Commission finds:

(1) The Dayton Power and Light Company (DP&L) is a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

(2) On September 4, 2013, the Commission issued its Opinion and Order (Order), approving DP&L's proposed electric security plan (ESP), with certain modifications. On September 6, 2014, the Commission issued an Entry Nunc Pro Tunc to its Order.

(3) Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the

Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On October 4, 2013, Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE/Edgemont), the Ohio Consumers' Counsel (OCC), Industrial Energy Users–Ohio (IEU-Ohio), FirstEnergy Solutions Corp. (FES), the Ohio Hospital Association (OHA), Ohio Energy Group (OEG), the Kroger Co. (Kroger), and DP&L, filed applications for rehearing. On October 31, 2013, memoranda contra the applications for rehearing were filed by FES, OCC, DP&L, OEG, the Retail Energy Supply Association (RESA), Kroger, IEU-Ohio, and the City of Dayton.

(5) On October 7, 2013, DP&L filed a motion and memorandum in support for an extension of time to file memoranda contra to the applications for rehearing. By entry issued on October 8, 2013, the attorney examiner granted DP&L's motion for an extension of time and set the deadline for October 31, 2013.

(6) By entry issued October 23, 2013, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing on the September 4, 2013 Order. The Commission also denied two assignments of error filed by DP&L and FES, and ordered DP&L to conduct the initial auction.

(7) The Commission has now reviewed and considered all of the arguments on rehearing. Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied. The Commission will address the merits of the assignments of error by subject matter as set forth below.

I. SERVICE STABILITY RIDER

(8) IEU-Ohio contends that the ESP Order is unlawful and unreasonable because the Commission is preempted from increasing DP&L's total compensation for the provision of wholesale energy and capacity service under the Federal Power Act. IEU-Ohio asserts that the SSR will increase DP&L's total compensation for the provision of wholesale energy and capacity. IEU-Ohio contends that the SSR is an

unlawful compensation structure for DP&L to recover above-market capacity and energy revenue, which a Maryland District Court recently held to be unlawful in a similar case. *See PPL Energyplus, LLC, et al. v. Douglas R.M. Nazarian, et al.,* Civ. Action No. MJG-12-1286 (decided Sept. 20, 2013).

DP&L argues in its memorandum contra that rehearing on this assignment of error raised by IEU-Ohio should be denied. DP&L contends that *PPL Energyplus, LLC,* is entirely inapplicable because the ESP does not affect the rates for wholesale energy or capacity. DP&L notes that in *PPL Energyplus, LLC,* the court explained that Congress intended the Federal Power Act to give the Federal Energy Regulatory Commission (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. *PPL Energyplus, LLC et al.,* Civ. Action No. MJG-12-1286 (Sept. 20, 2013). Under the ESP, a portion of DP&L's load will be determined by market rates for wholesale energy and capacity that are established by PJM. DP&L contends that this is entirely different than setting the wholesale rates or prices.

(9) The Commission finds that rehearing on this assignment of error should be denied. The Commission initially notes that the SSR is a financial integrity charge authorized pursuant to R.C. 4928.143(B)(2)(d) and is not a generation charge. Order at 21-22. Furthermore, the Commission agrees with DP&L that the ESP does not affect the wholesale energy or capacity rates and does not conflict with the Federal Power Act or the decision in *PPL Energyplus, LLC.* Adopting an ESP in which DP&L sources a portion of its SSO load from the wholesale energy and capacity markets is not equivalent to setting wholesale energy and capacity rates.

(10) IEU-Ohio asserts as one of its assignments of error that the ESP is anticompetitive and violates Ohio antitrust law under R.C. 1331. IEU-Ohio points out that a trust is a combination of capital, skills or acts by two or more persons for any of six enumerated anticompetitive purposes. IEU-Ohio argues that DP&L is a monopoly of separate lines of business that have acted jointly to fix electricity prices at a level that

would otherwise not occur without the SSR. IEU-Ohio contends that the SSR is a request by DP&L to establish the price of one or more electric services between them and others, so as to preclude free and unrestricted competition in the sale or transportation of electricity.

DP&L claims in its memorandum contra to IEU-Ohio's application for rehearing that Ohio antitrust law is inapplicable to this case. DP&L initially posits that R.C. 1331 is to be interpreted according to precedents under the Sherman Antitrust Act, 15 U.S.C. 1. *McGuire v. Ameritech Servs., Inc.* 253 F. Supp.2d 988, 1010 (S.D. Ohio 2003); *In re Title Insurance Antitrust Litigation*, 702 F. Supp.2d 840, 861-62 (2010).

DP&L then contends that Ohio antitrust law requires a combination of entities working together as one, and DP&L is a single entity. DP&L avers that the Commission confirmed this in the Order when it found that DP&L is not a structurally separated utility. Order at 22.

Next, DP&L asserts that R.C. 1331 is inapplicable pursuant to the state action doctrine, which holds that an otherwise monopolistic restraint on trade will not give rise to an antitrust violation where it stems from a clearly articulated and affirmatively expressed state policy or where such policy is actively supervised by the state itself. *McGuire* at 1006. DP&L argues that state policy in R.C. 4928 is clearly articulated and affirmatively expressed, and the proceedings held by the Commission demonstrate that the policy is actively supervised by the state itself.

DP&L next argues that R.C. 1331 is inapplicable here pursuant to the filed rate doctrine, which holds that a rate approved by the Commission is a legal rate that is not actionable as an antitrust injury, even if the rate resulted from an illegal combination of carriers to fix the rate. *In re Title Insurance Antitrust Litigation*, at 840, 846-47. DP&L then contends that pursuant to R.C. 1331.11, jurisdiction over antitrust claims is conferred on the courts and not the Commission.

Further, DP&L avers that since the SSR is in accordance with, and authorized pursuant to, R.C. 4928.143(B)(2)(d), it must not conflict with R.C. 1331 since R.C. 4928.143(B)(2)(d) was enacted subsequent to R.C. 1331. Finally, DP&L argues that Commission precedent exists for the authorization of charges similar to the SSR under R.C. 4928.143(B)(2)(d).

(11) The Commission finds that IEU-Ohio's assignment of error should be denied. The Commission agrees with DP&L that R.C. 1331 is inapplicable to the present case and that jurisdiction over R.C. 1331 lies with state courts rather than the Commission.

(12) Also, IEU-Ohio, FES, Kroger, and OCC claim that the Order is unlawful because it authorizes transition revenue or equivalent revenue in violation of R.C. 4928.38. These parties assert that the purpose of transition revenues is to compensate a utility when its assets would not be competitive when subjected to market prices. They argue that, if DP&L's financial integrity is compromised as a result of lower than desired generation revenue, use of the SSR to make up the difference makes it equivalent to a transition charge. Parties then argue that the Commission failed to consider their substantial and detailed evidence demonstrating that the SSR is a time-barred claim for transition revenue.

DP&L opposes IEU-Ohio, FES, Kroger, and OCC's argument that the SSR unlawfully recovers transition costs. DP&L initially notes that the Commission specifically addressed this issue in the Order holding that the SSR is not a transition charge and does not recover transition costs. DP&L then contends that the SSR is not a transition charge because it does not recover transition costs as they are defined under R.C. 4928.39. DP&L argues that R.C. 4928.39 indicates that transition costs are cost-based charges related to a cost that will be incurred by the utility. DP&L asserts that the SSR is not a cost-based charge and does not recover transition costs.

(13) The Commission finds that this assignment of error should be denied. The Commission initially notes that intervenors fail to raise any new arguments for the Commission's

consideration in support of their assignment of error. We explained in the Order that the SSR is not a transition charge and authorizing the SSR is not the equivalent of authorizing transition revenue. Order at 22.

We also agree with the arguments advanced by DP&L that the SSR is not a transition charge for the recovery of transition costs. According to R.C. 4928.39, transition charges are cost-based charges, and cost-based charges must be related to a cost that the utility will incur. *See In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655. However, the SSR is not a cost-based charge; it was not designed for DP&L to recover specific costs. (Tr. I at 209; Tr. II at 552; Tr. III at 823; Tr. V. at 1304-05, 1433; Tr. XI at 2871.) The SSR was designed and authorized to provide DP&L stable revenue to maintain its financial integrity, in order to meet its obligation to provide an SSO, which has the effect of stabilizing and providing certainty regarding retail electric service (Tr. VII at 1707; Tr. VII at 1808-09; Tr. VIII at 2035; Tr. X at 2518.) Furthermore, the Commission notes that we considered the evidence provided by intervening parties, but we find that the argument that the SSR is the equivalent of a transition charge misplaced and unpersuasive.

(14) IEU-Ohio, FES, and OCC argue that the Order is unlawful and unreasonable because the SSR cannot be authorized pursuant to R.C. 4928.143(B)(2). IEU-Ohio contends that the SSR is a nonbypassable generation-related rider, which is not one of the permitted charges under R.C. 4928.143(B)(2).

Likewise, IEU-Ohio, FES, and OCC argue that the Commission erred in finding that the SSR is a permissible charge under R.C. 4928.143(B)(2)(d), because it does not have the effect of stabilizing or providing certainty regarding retail electric service. FES and OCC assert that the SSR provides certainty of revenues for DP&L but not certainty of retail electric service. Additionally, FES avers that the SSR does not provide stability in retail rates because it will result in an increase in customers' rates. IEU-Ohio also contends that the Commission did not determine that the SSR is required to affect the stability or certainty of retail electric service, only that the service quality may be affected without

the SSR. IEU-Ohio also contends that without the SSR, stability and certainty in retail electric service would be maintained in DP&L's service territory through PJM's dispatch of generation assets.

DP&L responds that the Commission may approve a generation-related charge to allow a utility to provide stable retail electric service because generation is included in the definition of retail electric service pursuant to R.C. 4928.01(A)(27). Additionally, DP&L claims that it could not provide reliable distribution, transmission, and generation service without the SSR.

(15) The Commission finds that rehearing on the assignments of error raised by IEU-Ohio, FES, and OCC should be denied. The Commission fully explained in the Order that the SSR, as well as the SSR-E, meets the definition of R.C. 4928.143(B)(2)(d) because the SSR is a charge related to default service and bypassability and the SSR will have the effect of stabilizing and providing certainty regarding retail electric service. Order at 21-22.

As the Commission explained in the Order, the evidence in the record of this proceeding demonstrates that the SSR is necessary for DP&L to provide stable and reliable distribution, transmission, and generation service (DP&L Ex. 16A at 7-8; DP&L Ex. 12 at 23; DP&L Ex. 4A at 54). Order at 22. Intervenors contend that only DP&L's generation business has financial losses; however, the evidence indicates that the entire company's financial integrity is at risk (See Tr. Vol. I at 241-242; Tr. Vol. XI at 2804; OCC Ex. 28 at 28). Order at 19. Although, the Commission did not hold that the SSR and SSR-E are solely related to the provision of generation service, we note that, even assuming, arguendo, that the SSR is a generation-related charge, the Supreme Court has held that the Commission may approve a generation-related charge to allow a utility to provide stable retail electric service because generation is included in the definition of retail electric service pursuant to R.C. 4928.01(A)(27). *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2014-Ohio-462 at ¶32.

Further, notwithstanding our determination that the SSR is necessary for DP&L to maintain its financial integrity, the Ohio Supreme Court has ruled that a finding of necessity is not a requirement pursuant to R.C. 4928.143(B)(2)(d). *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2014-Ohio-462 at ¶26. Instead, the Court found that a term, condition or charge authorized under R.C. 4928.143(B)(2)(d), must have the effect of stabilizing or providing certainty regarding retail electric service. *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2014-Ohio-462 at ¶27. As we found in the Order, the SSR is a charge related to bypassability and default service that has the effect of stabilizing and providing certainty regarding retail electric service. Order at 21.

(16) IEU-Ohio, FES, and OHA contend that the Order is unlawful and unreasonable because the SSR amount lacked record support. IEU-Ohio asserts that the evidence demonstrates that DP&L will achieve a seven percent ROE with a nonbypassable charge that is much smaller than $110 million per year. FES contends that DP&L overstated its expected costs and understated expected revenue and that, after adjusting for DP&L's projections, the record does not support the $110 million per year SSR authorized by the Commission. Additionally, IEU-Ohio, OCC, and FES also note that DP&L's switching projections are flawed, which should result in a downward adjustment to the SSR. OHA argues that any SSR revenues above the $73 million collected through the rate stabilization charge (RSC) is unlawful and unreasonable.

DP&L replies that the SSR amount authorized by the Commission is consistent with, and lower than, the amount supported by the evidence. DP&L asserts that without the SSR, it would earn negative ROEs during the ESP term. DP&L notes that the Commission specifically took into consideration O&M expenditure reductions when setting the SSR amount. DP&L avers that intervenors who disagree with DP&L's switching projections failed to consider the potential for large-scale aggregation to substantially increase shopping rates. Finally, DP&L argues that capital expenditure reductions may still be needed to maintain its

financial integrity and they have not yet been approved for future periods.

(17) The Commission finds that rehearing on the assignments of error raised by IEU-Ohio, FES, and OHA should be denied. The Commission determined that the evidence, taking into account a reasonable balance between the differing forecasts and projections, supported an SSR amount of $110 million per year over the term of the ESP. Order at 25. The evidence for the SSR amount ranged between DP&L's proposed $137.5 million and the prior $73 million RSC (DP&L Ex. 1A at 11-13; OEG Ex. 1 at 3-5; Staff Ex. 1 at 4-5; FES Ex. 14A at 17-22; FEA Ex. 1 at 7; OCC Ex. 28A at 41; IEU-Ohio Ex. 1A at 18-19; Tr. Vol. VII at 1908; Tr. Vol. I at 189). Moreover, the Commission took into consideration planned O&M expense reductions, potential capital expense reductions, adjustments to the capital structure, and the potential for a distribution rate increase in determining the $110 million SSR amount.

Although the Commission reduced DP&L's proposed SSR amount by planned O&M savings, which directly impact the ROE, we did not offset the proposed SSR amount to account for potential capital expenditure reductions. Capital expenditure reductions do not have as significant of an impact on ROE as O&M savings, and DP&L should retain some ability to improve its ROE. Order at 25. Thus, the Commission used DP&L's forecasts and projections as a starting point but then adjusted DP&L's $137.5 million proposed SSR downward to account for planned O&M expense reductions, as well as other factors. This resulted in an SSR amount of $110 million, which is the minimum amount necessary for DP&L to maintain stable and reliable retail electric service (Order at 25; DP&L Ex. 1A at 11-13; DP&L Ex. 14A at 27-28; Tr. Vol. I at 189, 257-258; Tr. Vol. VII at 1908).

In light of the uncertainty and differences between forecasts, the Commission arrived at an SSR amount that we found provided DP&L with a reasonable opportunity to earn a seven percent ROE. Order at 25. Further, the Commission has adopted similar charges in other utility SSO proceedings. *See In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order

(August 8, 2012) at 26-38; *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (November 22, 2011) at 26-38.

Additionally, the Commission notes that numerous intervenors assert that even if the Commission considers all of the numerous forecasts and projections, these forecasts and projections become less reliable as they project further into the future (Staff Ex. 10 at 5-6). However, the Commission authorized the SSR-E for this very reason. Order at 27. The SSR-E will provide updated and more accurate figures for determining the appropriate amount for a stability charge approaching the end of the ESP term. Further, the Commission established a cap on the SSR-E amount that may be authorized. This cap will provide rate protection and certainty for customers if DP&L is unable to improve its financial integrity.

(18) DP&L, OEG, and Kroger assert on rehearing that the Commission should clarify its decision regarding the SSR rate design and class allocation methodology. Kroger asserts that the Commission's Order unreasonably requires customers to pay the SSR through an energy charge when the costs are allocated on the basis of demand. OEG supports the Commission's finding that the SSR be allocated using a one coincident peak (1CP) demand allocation method but requests that the Commission add that the Primary and Primary-Substation rate classes should be grouped together for purposes of allocating the SSR charges. Furthermore, OEG asserts that the 1CP demand allocation method should apply to the entirety of the SSR, whereas DP&L proposes that the 1CP demand allocation method should only apply to the difference between the amount of the previously authorized RSC and the newly authorized SSR.

DP&L argues that the Commission should clarify that the rate design recommended by Staff and the class allocation methodology recommended by OEG is intended for DP&L to allocate only the increment of SSR that exceeds the current non-bypassable amount based on the single system peak. DP&L avers that, if the Commission intended that only the amount of the SSR that exceeds the current RSC should be

allocated based on 1CP, then the Street Lighting and Private Outdoor Lighting tariff classes would continue to pay the current non-bypassable charge and would not be assigned any incremental amount for the SSR. DP&L argues that the Commission indicated that its intent was to minimize rate impacts upon customers, and this rate design will accomplish that intent.

(19) The Commission finds that rehearing on the assignment of error raised by DP&L and Kroger should be granted and that rehearing on the assignment of error raised by OEG should be denied. The Commission finds that the 1CP demand allocation method is the appropriate rate design method. Order at 26; Staff Ex. 8 at 14; OEG Ex. 1 at 7-8. However, we agree with DP&L that applying the 1CP demand allocation method to the difference between the SSR and RSC will minimize rate impacts upon customers. Therefore, we find that the 1CP demand allocation method should apply only to the difference between the RSC and the SSR amount.

(20) Kroger contends that the Commission failed to address its recommendation for a sunset date for the SSR. Kroger proposes that any shopping customer who has been shopping with a CRES provider for five years or longer should no longer be subject to paying stability charges. This would create greater rate certainty and stability, while also being consistent with the principle of cost causation. Additionally, through the RSC, long-term shopping customers have already contributed to DP&L's generation costs while purchasing their full generation requirements from a CRES provider.

(21) The Commission finds that Kroger's request for a sunset date should be denied. Shopping customers also benefit from a stable and certain SSO because the SSO remains available to shopping customers should they choose to return to the SSO provider. Further, we note that similar stability charges recovered by Duke Energy Ohio and AEP Ohio have also been nonbypassable and did not include a sunset provision. *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order (August 8, 2012) at 26-38; *In re Duke Energy Ohio, Inc.*,

Case No. 11-3549-EL-SSO, et al., Opinion and Order (November 22, 2011) at 26-38.

II. SERVICE STABILITY RIDER - EXTENSION

(22) DP&L asserts as its first assignment of error that the Commission's Order was unlawful and unreasonable because it limited the amount that DP&L could receive through the SSR-E. DP&L contends that R.C. 4928.143(B)(2)(d) does not authorize the Commission to decide now the amount of a stability charge that DP&L can recover in a future proceeding.

FES responds that, if the Commission cannot set the amount of the SSR-E at this time, then it cannot determine at this time that the SSR-E is necessary to promote stability and certainty. OCC contends that the Commission rightfully limited the SSR-E amount so that it could properly consider whether the ESP is more favorable in the aggregate than the results that would otherwise apply.

(23) The Commission finds that rehearing on this assignment of error should be denied. The Commission notes that in this proceeding, we have authorized DP&L to establish the SSR-E and initially set the rider to zero. Further, the Commission established certain requirements that DP&L must meet and a maximum amount which will be authorized. Thus, the rider has been authorized in this ESP proceeding, and the terms and conditions regarding the SSR-E have been established for this ESP proceeding. The provision in the Commission's Order that DP&L may file an application, in a separate docket, to set the amount of the SSR-E, was for clarity of the record and administrative ease.

We note that it is not unusual to establish a rider in an ESP and to determine the amount of the rider in a separate docket. For example, in DP&L's previous ESP, the Commission authorized DP&L to implement a fuel adjustment charge and the amount of that clause has been adjusted in separate dockets. *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO et al., Opinion and Order (June 24, 2009); *In re The Dayton Power and Light Co.*, Case No. 09-1012-EL-FAC, Finding and Order (December 16, 2009).

Similarly, in AEP-Ohio's ESP, we approved a generation resource rider (GRR) with an initial rate of zero and noted that it is not unprecedented for the Commission to adopt a mechanism in an ESP with an initial rate of zero. *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Aug. 8, 2012) at 24-25, *citing In re AEP Ohio*, Case No. 08-917-EL-SSO (Mar. 18, 2009); *In re Duke Energy-Ohio*, Case No. 08-920-EL-SSO (Dec. 17, 2008); *In re FirstEnergy*, Case No. 08-935-EL-SSO (Mar. 25, 2009).

Similarly, in the previous ESP, the Commission authorized DP&L to establish an energy efficiency rider; the amount of that rider was set in a separate docket, and a maximum amount for that rider was established. *In re The Dayton Power and Light Co. for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO et al., Opinion and Order (June 24, 2009); *In re The Dayton Power and Light Co. to Update its Energy Efficiency Rider*, Case No. 11-2598-EL-RDR, Finding and Order (October 18, 2011).

The SSR-E has been authorized in this ESP proceeding, for the term of this ESP, and, based upon the record and financial projections provided by the parties to this proceeding. The Commission did not determine the level of stability charge that DP&L could seek in a future ESP. On the contrary, the Commission determined the maximum amount of stability revenues that DP&L may recover in this ESP.

(24) DP&L further contends in its first assignment of error that the Order is unlawful and unreasonable because the conditions for authorization of the SSR-E are not contained in R.C. 4928.143(B)(2)(d). DP&L asserts that by adding the conditions, the Commission has engaged in legislating in its own right and that it has essentially rewritten the statute.

DP&L further argues that the SSR-E conditions, individually, are unlawful and unreasonable. DP&L contends that the requirement to file an application for implementation of advanced metering infrastructure (AMI)/Smartgrid is unlawful and unreasonable because AMI/Smartgrid are too expensive, and there is no record support for

implementation of AMI/ Smartgrid. DP&L then argues that the condition to file a distribution rate case by July 1, 2014, is overly burdensome and should be extended. Finally, DP&L contends that its billing system already has the capability to provide rate-ready billing so that SSR-E condition has already been satisfied and should not be a condition at all.

FES, OCC, IEU-Ohio and Kroger reply that, if the Commission authorizes the SSR-E, it should also authorize the SSR-E conditions as necessary to ensure that the SSR-E has the effect of providing stability and certainty regarding retail electric service. FES and IEU-Ohio argue that, by DP&L's logic, if the SSR-E conditions should be eliminated because they are not expressly contained in R.C. 4928.143(B)(2)(d), then the SSR-E itself should be eliminated. Additionally, FES notes that R.C. 4928.143(B)(2)(d) does not limit the Commission's discretion on how to structure authorized stability charges. FES asserts that the Commission may place restrictions on the stability charge so long as the Commission believes those restrictions are necessary to ensure that the charge has the effect of providing stability and certainty regarding retail electric service.

OCC asserts in its memorandum contra that the Commission appropriately implemented SSR-E conditions for the purpose of carrying out the policies of the state of Ohio set forth in R.C. 4928.02. OCC notes that requiring DP&L to file an application to implement AMI/Smartgrid carries out the policy set forth in R.C. 4928.02(D). Furthermore, OCC argues that the Commission rightfully established, as an SSR-E condition, that DP&L must file a distribution rate case and the Commission should not grant DP&L an extension of time to file its distribution rate case.

(25) The Commission finds that rehearing on DP&L's assignment of error regarding the SSR-E conditions should be granted, in part, and denied, in part. As a preliminary matter, the Commission notes that the end date for the SSR is independent of the existence of the SSR-E. Based upon the record of this proceeding, the SSR would end on December 31, 2016, and there would be no additional stability charge even if the Commission agreed with DP&L's arguments

regarding our ability to set conditions on the SSR-E. However, the Commission finds that R.C. 4928.143(B)(2)(d) authorizes the Commission to establish the SSR-E and does not limit our discretion or authority to make the SSR-E conditional for the purpose of providing stability and certainty to retail electric service or for the purpose of promoting the policy objectives of the state as set forth in R.C. 4928.02. The SSR-E conditions ensure that stability revenues collected by DP&L will continue to have the effect of providing certainty and stability regarding retail electric service in the future. As Staff testified at the hearing, financial projections beyond three years are inherently unreliable (Staff Ex. 10 at 4-5). Further, there is no evidence in the record regarding the potential magnitude of increases in distribution revenue if DP&L were to file a distribution rate case during the ESP and no evidence that a stability charge would continue to be necessary in the event of such distribution rate increase.

Further, we agree with OCC that requiring DP&L to file an application to implement AMI/Smartgrid carries out the state's policy as set forth in R.C. 4928.02(D). DP&L's contention that it may be unreasonably expensive to implement AMI/Smartgrid and that significant analysis is needed regarding the costs and benefits of AMI/Smartgrid supports the Commission's determination that DP&L should file an application for AMI/Smartgrid. The time for DP&L to conduct the analyses regarding the costs and benefits of AMI/Smartgrid is now. Every other electric utility in the state of Ohio has some form of AMI/Smartgrid deployment and it is time for DP&L to do likewise.

Finally, the Commission finds that DP&L should be required to provide rate-ready percentage off price to compare (PTC) billing, as directed by the Commission in the Order. Order at 28. The Commission notes that there was extensive testimony indicating that providing rate-ready percentage off PTC billing would improve the competitive environment in DP&L's service territory (Constellation Ex. 1 at 49-54; FES Ex. 17 at 19-26). Additionally, the Commission clarifies that, with DP&L's rate-ready percentage off PTC billing, DP&L should permit suppliers to submit percentages through a

rate-ready billing process, under which DP&L would apply the discount off the customer's price to compare.

(26) FES and Kroger assert that the SSR-E should terminate prior to the end of the ESP term. In the alternative, FES requests that the Commission clarify that the SSR-E ends, date certain, on May 31, 2017. FES also asserts that the SSR-E should end before the end of the ESP term, to mitigate any chance that the Commission will permit the SSR-E to continue beyond the ESP if the Commission has not authorized a subsequent SSO.

DP&L replies that rehearing on the assignments of error, and the corresponding requests, by FES and Kroger should be denied. DP&L initially argues that FES failed to raise this issue in post-hearing briefs and does not cite to any testimony supporting the reasonableness of its request. Subsequently, DP&L contends that if it needs the SSR-E to enable it to provide safe and reliable service after the end of the ESP term, 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.

(27) The Commission finds that rehearing on the assignments of error raised by FES and Kroger should be granted. The Commission finds that the SSR-E should end on April 30, 2017, one month prior to the end of the ESP. Pursuant to the Order, if a subsequent SSO has not been authorized by April 1, 2017, DP&L shall procure, through the CBP auction process, 100 tranches of a full-requirements product for a term that is not less than quarterly or more than annually until a subsequent SSO is authorized. Order at 16; Entry Nunc Pro Tunc at 2. Furthermore, DP&L must also divest all of its generation assets by no later than January 1, 2016. Therefore, since DP&L's SSO generation rates will be determined entirely by the market and all of its generation assets will have been divested, the Commission intends for the SSR-E to terminate date certain on April 30, 2017, if the Commission authorizes an amount for DP&L to recover.

III. GENERATION ASSET DIVESTITURE

(28) OCC and FES assert that the Order was unlawful or unreasonable because it should have ordered DP&L to divest its generation assets sooner.

DP&L replies that the Commission fully addressed this issue in its Order, and reiterates that it is restricted from transferring its generation assets sooner due to restrictions in its First and Refunding Mortgage and limitations on its ability to refinance bonds. Order at 15-16. DP&L reasserts that so long as the First and Refunding Mortgage remains in its current form, DP&L is prevented from effectuating a legal separation of the generation assets from the transmission and distribution assets. DP&L asserts that if it were compelled to transfer its generation assets now, then its transmission and distribution businesses would not be capable of supporting the full amount of the debt while providing safe and reliable service.

(29) The Commission finds that rehearing on this assignment of error should be granted. The Commission relied upon the testimony of DP&L witness Jackson that DP&L could not divest its generation assets before September 1, 2016. DP&L Ex. 16 at 4. Accordingly, the Commission ruled that DP&L must file a generation asset divestiture plan that divests its generation assets by May 31, 2017. Order at 15-16; Entry Nunc Pro Tunc at 2. However, on December 30, 2013, DP&L filed an application to divest its generation assets in Case No. 13-2420-EL-UNC. *In re The Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC (*DP&L Divestiture Plan*), Application (December 30, 2013).[1] Subsequently, DP&L filed a supplemental application in that case representing that it has begun to evaluate the divestiture of its generation assets to an unaffiliated third party through a potential sale that could occur as early as 2014. *DP&L Divestiture Plan*, Supplemental Application (February 25, 2014) at 2; DP&L Ex. 16 at 4. Based upon new information contained in DP&L's supplemental application in Case No. 13-2420-EL-UNC, the Commission finds that the deadline for DP&L to

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[1] The Commission hereby takes administrative notice of DP&L's application and supplemental application filed *In re The Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC.

divest its generation assets should be subject to modification by the Commission in Case No. 13-2420-EL-UNC, but in no case will such modification be later than January 1, 2016. Further, we note that any approval of an amount for recovery through the SSR-E will take into consideration the timing and disposition of DP&L's generation assets.

IV. CBP BLENDING SCHEDULE

(30) OCC and FES assert that the Commission erred by not implementing 100 percent competitive bidding at the beginning of the ESP term. Furthermore, OCC and FES contend that it was unlawful and unreasonable to extend the ESP term beyond what DP&L proposed.

DP&L responds that the Commission struck a reasonable balance between the SSR amount and the ESP term. According to DP&L, a shorter ESP term would have required a larger SSR amount to maintain DP&L's financial integrity. Additionally, DP&L contends that the Commission was right not to implement the schedule proposed by DP&L because that schedule began on January 1, 2013, and the Commission's Order was not issued until September 4, 2013. DP&L alleges that the Commission's decision to begin the auction schedule on January 1, 2014, was reasonable.

(31) The Commission finds that rehearing on the assignments of error raised by OCC and FES regarding the CBP blending schedule should be granted. In determining the CBP blending schedule in the Order, the Commission relied upon the fact that DP&L would be unable to divest its generation assets before September 1, 2016. Order at 15. However, the Commission's intent was to implement full market-based rates as soon as practicable. Based upon the new information contained in DP&L's supplemental application in Case No. 13-2420-EL-UNC, we find that DP&L's CBP blending schedule should be accelerated. Accordingly, the CBP products should be 10 tranches of a 41 month product commencing on January 1, 2014, 50 tranches of a 29 month product commencing on January 1, 2015, and 40 tranches of

a 17 month product commencing on January 1, 2016.[2] This blending schedule is consistent with Staff's proposal for DP&L to move to 100 percent market-based rates over three years, which we now believe can be accomplished pursuant to DP&L's ability to divest its generation assets (Staff Ex. 2 at 4; Staff Ex. 10 at 6). The acceleration of the CBP blending schedule will benefit consumers through a more rapid move to full market-based rates, and the move to full market-based rates will be accomplished in a shorter time period than could be accomplished through an MRO.

V. RECONCILIATION RIDER

(32) IEU-Ohio and Kroger contend that the Order unlawfully and unreasonably authorized a non-bypassable reconciliation rider (RR-N) that is not consistent with R.C. 4928.143(B)(2), would recover generation-related costs through distribution rates, and would allow DP&L to collect costs of compliance with the alternative energy portfolio requirements on a nonbypassable basis in violation of R.C. 4928.64(E).

DP&L argues in its memorandum contra that the RR-N was lawful and the assignment of error alleged by IEU-Ohio and Kroger should be denied. DP&L initially notes that sufficient evidence was presented at hearing to support the Commission's decision with the RR-N. DP&L asserts that it faces a significant risk that it will have to recover a very large deferral balance from a very small group of customers. Including deferral balances from those riders that exceed ten percent of the base amount to be recovered under those riders eliminates that risk.

Additionally, DP&L asserts that the RR-N is lawful pursuant to R.C. 4928.143(B)(2)(d). The RR-N is a charge related to both default service and bypassability that has the effect of providing certainty and stability regarding retail electric service. Without the RR-N, standard service offer customers would not pay stable or certain rates due to the effect of increasing deferral amounts on a smaller SSO customer base.

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2 On October 28, 2013, DP&L conducted the initial CBP auction for 10 tranches of a 41 month product commencing January 1, 2014. *In re The Dayton Power and Light Co.*, Case No. 13-2120-EL-UNC, Finding and Order (October 30, 2013) at 2.

Finally, DP&L argues that retail electric service includes generation service, so it is lawful even if it permits DP&L to recover generation-related costs.

(33) The Commission finds that rehearing on this assignment of error should be denied. The RR-N is supported by the record evidence, including testimony on the effects of increasing deferral balances on the decreasing SSO customer base (DP&L Ex. 12 at 7, 8; Tr. V at 1432-1433; Tr. IX at 2242-2244). Further, the Commission authorized the RR-N pursuant to R.C. 4928.143(B)(2)(d) because the charge relates to DP&L's default service and provides for stability and certainty in retail electric service. The ten percent threshold operates as a "safety valve" in the event of increasing deferral balances and a decreasing SSO customer base. Order at 34-35. Moreover, the Commission has established similar mechanisms in other utility ESPs to address similar issues. *See In re Ohio Edison Co., The Cleveland Electric Illum. Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 9.

VI. COMPETITIVE RETAIL ENHANCEMENTS

(34) DP&L asserts as its fourth assignment of error that there is no record support for the Commission's authorization of additional competitive retail enhancements. DP&L then contends that the proper context for reviewing and authorizing additional competitive retail enhancements is through the rule-making process.

RESA disagrees with DP&L and argues that there is substantial, probative, and reliable evidence in the record to support the Commission's decision. RESA points out the testimony of Stephen Bennett that multiple enhancements are needed beyond the six enhancements planned by DP&L, specifically to allow access to the minimum basic customer data, which RESA argues is fundamental to a competitive marketplace. Additionally, RESA points out that Mr. Bennett testified that more standardization across the industry would lead to more efficiency. Further, Constellation witness David Fein testified that competitive enhancements beyond the ones proposed by DP&L would better enable a sustainable and more robust marketplace.

Finally, RESA asserts that DP&L witness Dona Seger-Lawson even testified that DP&L's billing system would have to be improved to implement the proposed competitive retail enhancements. Accordingly, RESA asserts that the Commission should deny DP&L's assignment of error.

FES avers that the Commission was reasonable in requiring DP&L to implement the competitive retail enhancements which have already been implemented by every other electric distribution utility (EDU) in Ohio. According to FES, only DP&L would be in a position to conduct a cost-benefit analysis of additional competitive retail enhancements, and there is no requirement for a complete cost benefit analysis before implementing additional competitive retail enhancements.

(35) The Commission finds that rehearing on this assignment of error should be denied. As indicated by RESA and FES, substantial evidence was presented at hearing supporting the need for competitive retail enhancements to develop and support the competitive marketplace in DP&L's service territory (Tr. Vol. IX at 2191, 2310-2311, 2440-2441, 2445-2447; Tr. Vol. X at 2654). We find that DP&L has not demonstrated that competitive retail enhancements should be limited only to rule-making proceedings. The Commission has determined that the competitive retail enhancements will promote retail competition in DP&L's service territory (DP&L Ex. 10 at 8; OCC Ex. 18 at 5-6). Order at 38-39. This will facilitate the availability of supplier, price, terms, conditions, and quality options for consumers in furtherance of the state policy set forth in R.C. 4928.02(B).

(36) FES argues as its fifth assignment of error that the Commission's Order is unlawful and unreasonable because it fails to identify with specificity the competitive retail enhancements that DP&L is required to make. FES contends that the Commission should specifically identify which competitive retail enhancements DP&L is required to make.

DP&L opposes FES's request and asks the Commission to deny its assignment of error. DP&L asserts that it has already agreed to implement some of the competitive retail enhancements identified by intervenors. Further, DP&L

contends that FES did not address the additional competitive retail enhancements in its brief. DP&L asserts that since the Commission failed to clearly identify which additional competitive retail enhancements it was referring to, DP&L should not be required to implement any of them.

(37) The Commission finds that rehearing on FES's fifth assignment of error should be denied. However, we will clarify which electronic data interchange (EDI) processes, standards, or interfaces that we believe have been adopted by every other EDU in Ohio. Order at 38-39. Our intent in directing that DP&L adopt any competitive retail enhancement that has been adopted by every other EDU in Ohio was to bring consistency across the state of Ohio and to require DP&L to foster a more favorable competitive environment. We note that RESA witness Stephen Bennett, Constellation witness David Fein, and FES witness Sharon Noewer each provided testimony on barriers to competition in DP&L's service territory, as well as competitive retail enhancements that have been adopted by every other EDU in Ohio (RESA Ex. 6 at 14; Const. Ex. 1 at 45-53; FES Ex. 17 at 22).

Initially, the Commission notes that DP&L shall provide rate-ready percentage off PTC billing. The Commission believes that this will not only significantly advance competition in DP&L's service territory, but the Commission believes that it is necessary for stable and reliable service. It is for this reason that the Commission not only directed DP&L to adopt rate-ready percentage off PTC billing but also made it a condition of the SSR-E.

Additionally, DP&L should no longer charge a fee per bill for consolidated or dual billing, which are both unusual and excessive. RESA witness Bennett testified that DP&L is the only EDU in Ohio to assess a consolidated billing charge or a dual billing charge (RESA Ex. 6 at 14).

Additionally, FES witness Noewer and RESA witness Bennett testified that no other EDU in Ohio applies a charge to register rate codes for its consolidated billing system, whereas DP&L's tariff authorizes a $5,000 initial set up fee and $1,000 for each billing system change (FES Ex. 17 at 22;

RESA Ex. 6 at 14). Accordingly, DP&L should no longer charge an initial set up fee or a billing system change fee. Furthermore, the Commission finds that DP&L should permit the CRES providers to pay the switching fee consistent with the practice in the FirstEnergy, AEP-Ohio, and Duke Energy Ohio service territories. Additionally, DP&L's eligibility file should contain some form of identifier indicating whether a customer is shopping, DP&L should eliminate the supplier registration charge, and DP&L should eliminate the sync list charge.

DP&L should also either permit customer shopping on a per meter basis, or split customers with both a commercial and residential meter into two separate accounts. The Commission finds that customers with both a commercial and residential meter should be provided market access, consistent with the policies of R.C. 4928.02 to ensure market access and availability of competitive retail electric service.

Finally, DP&L should not require any customer to obtain an interval meter if the customer is below the 200 kW demand level. However, customers under the 200 kW threshold may install interval meters, at their expense, if they so choose. RESA witness Bennett testified that DP&L is the only EDU in Ohio to require a customer to obtain an interval meter if the customer is below the 200 kW demand level. (RESA Ex. 6 at 3-4.) DP&L should implement each of the competitive retail enhancements identified in this Second Entry on Rehearing as soon as practicable but not later than six months from the date of this Second Entry on Rehearing. Order at 38-39.

(38) OCC asserts that the Order is unlawful and unreasonable because it authorized DP&L to defer the costs of the competitive retail enhancements for collection in a future distribution rate case. OCC alleges that standard rate making and accounting policy is to require ordinary expenses to be recovered through annual revenues, except in instances of exigent circumstances and good reason. *In re Ohio Edison Co., The Cleveland Electric Illum. Co., and the Toledo Edison Co.*, 05-704-EL-ATA, et al., Opinion and Order (January 4, 2006) at 9; *Elyria Foundry Co. v. Public Util. Comm'n of Ohio*, 114 Ohio St.3d 305, 310-312, 2007-Ohio-4164.

OCC then alleges that CRES providers should cover the entirety of the cost of implementation of competitive retail enhancements. Finally, OCC contends that if the Commission permits deferral, DP&L should demonstrate that the deferred costs are reasonable, appropriately incurred, clearly and directly related to the circumstances for which they were authorized, and in excess of expense amounts already included in DP&L's rates at the time of approval.

DP&L responds that the costs of competitive retail enhancements are not ordinary utility expenses, but rather are capital improvements and expenses related solely to the competitive market. Specifically, many of the competitive retail enhancements will require changes to DP&L's billing system, which are capital in nature and should be recovered in a distribution rate case.

(39) The Commission finds that rehearing on OCC's assignment of error should be denied. First, the Commission notes that the granting of deferral authority is within the discretion of the Commission, and that quickly accomplishing distribution infrastructure improvements qualifies as exigent circumstances and good reason. *See In re the Ohio Edison Co., The Cleveland Electric Illum. Co. and the Toledo Edison Co.*, Case No. 05-704-EL-ATA, et al., Opinion and Order (Jan. 4, 2006) at 8-9; *Elyria Foundry Co. v. Public Util. Comm'n of Ohio*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176.

Further, the Commission specifically indicated the need for urgency when it stated that the competitive retail enhancements should be implemented as soon as practicable. Order at 39. As noted above, these enhancements have already been implemented by every other electric distribution utility in this state. Additionally, the competitive retail enhancements may be properly characterized as capital improvements. The Commission will determine, in a future distribution rate proceeding, if the costs are reasonable, appropriately incurred, clearly and directly related to the circumstances for which they were authorized, and in excess of expense amounts already included in DP&L's rates.

VII. TRANSMISSION COST RECOVERY RIDER

(40) IEU-Ohio asserts that the nonbypassable transmission cost recovery rider (TCRR-N) is unlawful and unreasonable because it could result in double-billing customers for transmission service on a going-forward basis.

DP&L argues that the Commission has adopted a similar transmission cost recovery rider (TCRR) structure for both FirstEnergy and Duke Energy Ohio. *In re Ohio Edison Co., The Cleveland Electric Illum. Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 11, 58; *In re the Application of Duke Energy Ohio, Inc.*, Case No. 11-2641-EL-RDR, et al., Opinion and Order (May 25, 2011) at 7, 17. DP&L then asserts that the record evidence in this case demonstrates that splitting the TCRR into a TCRR-N and a transmission cost recovery rider-bypassable (TCRR-B) is reasonable because the utility pays the nonbypassable components to the PJM Interconnection. Additionally, DP&L contends that IEU-Ohio has not demonstrated that customers actually will be double charged, even if customers were double charged the CRES providers may remove the charge from the customer's bill, and IEU-Ohio made no showing that any double charge would be a material amount.

(41) The Commission finds that rehearing on IEU-Ohio's assignment of error should be denied. The Commission is not persuaded that bifurcating the TCRR into the TCRR-N and TCRR-B poses a significant risk of double-billing customers. As the Commission indicated in the Order, the Commission believes that bifurcating the TCRR into market-based and nonmarket-based elements more accurately reflects how transmission costs are billed to customers. Order at 36. Additionally, the Commission notes that it has adopted a similar rate structure for other Ohio electric utilities. *In re Ohio Edison Co., The Cleveland Electric Illum. Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 11, 58; *In re Duke Energy Ohio, Inc.*, Case No. 11-2641-EL-RDR, et al., Opinion and Order (May 25, 2011) at 7, 17.

(42) IEU-Ohio contends that the TCRR true-up is unlawful and unreasonable because there is no record support for the rider and there is no need for the rider. Similarly, IEU-Ohio avers that both the TCRR-N and the potential TCRR true-up rider unlawfully and unreasonably violate R.C. 4928.02(H) by recovering costs associated with standard service offer customers through a nonbypassable rider. IEU-Ohio contends that it is well settled that costs incurred by a utility to serve SSO customers must be bypassable. IEU-Ohio contends that the TCRR-N would reconcile the current under-recovery balance of bypassable non-market-based transmission charges to the nonbypassable TCRR-N.

DP&L argues that both the TCRR-B and TCRR-N were proposed as true-up riders. DP&L asserts that at the end of the ESP period, a deferral balance may remain for the TCRR-B and DP&L should be permitted to recover those incurred costs as part of a continued TCRR true-up rider (whether bypassable or nonbypassable). Additionally, DP&L believes that allowing it to recover those costs is consistent with DP&L's proposal to true-up all transmission-related costs from customers. Finally, DP&L asserts that there is a very real and substantial risk that DP&L may be left to recover a very large deferral balance from a very small group of customers without the rider. Further, DP&L asserts that IEU-Ohio's contention that it would violate R.C. 4928.02(H) for DP&L to recover the TCRR-N and TCRR true-up rider from shopping customers is not true. DP&L argues that it demonstrated, and the Commission agreed in the Order, that certain transmission costs are derived from shopping and non-shopping customers alike, and are fairly allocable through a nonbypassable rider to both shopping and non-shopping customers.

(43) The Commission finds that rehearing on IEU-Ohio's assignments of error regarding the TCRR and the TCRR true-up rider should be denied. The Commission notes that no subsequent TCRR true-up rider was authorized in its Order; the Commission simply directed DP&L to file with the Commission a proposal for such a rider at the end of the ESP term for appropriate collection of any uncollected TCRR balance that may exist. Order at 36. If a TCRR true-up rider is not necessary and there is no uncollected TCRR balance,

as IEU-Ohio contends, then there will be a zero balance, and no application will be necessary. However, if there is an uncollected TCRR balance at the end of the ESP term, then DP&L's application should propose a rider for recovery of the uncollected balance. The Commission will address the uncollected TCRR balance, if one exists, and the true-up rider at that time.

VIII. MORE FAVORABLE THAN THE EXPECTED RESULTS THAT WOULD OTHERWISE APPLY

(44) DP&L argues on rehearing that the Commission should clarify its decision regarding why the ESP is more favorable in the aggregate than the expected results that would otherwise apply. Specifically, DP&L contends that the qualitative benefits of the ESP exceed the quantitative benefits of the expected MRO. Similarly, IEU-Ohio, OCC, and FES assert that the Commission's Order is unlawful and unreasonable because the ESP is not more favorable in the aggregate than the expected results that would otherwise apply under R.C. 4928.142.

(45) The Commission finds that the applications for rehearing should be denied. Except to the extent specifically noted below, the parties have raised no new arguments on rehearing, and the Commission thoroughly addressed those arguments in the order. Order at 48-52.

Nonetheless, the Commission finds that the qualitative benefits of the ESP make it more favorable in the aggregate than the expected results that would otherwise apply. DP&L and FES request that the Commission identify the specific dollar amount that the qualitative benefits overcome the quantitative shortcomings of the ESP, yet a dollar amount cannot be calculated because the qualitative benefits are non-quantifiable. Therefore, the Commission must compare the non-quantifiable benefits and determine if they overcome the quantifiable difference between the ESP and the expected results that would otherwise apply. In this case, the Commission found in the Order that they do. Order at 52. Further, the Commission notes that, in this Second Entry on Rehearing, we have further accelerated DP&L's implementation of full market rates by modifying

the CBP blending schedule, which enhances the qualitative benefits of the ESP. Thus, although the ESP fails the quantitative analysis the qualitative benefits overcome and far surpass this shortfall in the quantitative analysis.

(46) IEU-Ohio asserts that the Order is unlawful and unreasonable because it assigns subjective values to the qualitative benefits of the ESP. IEU-Ohio contends that the Commission must provide an objective and articulated explanation of how each of the qualitative benefits was weighted so that the parties, the Court, and the public may assess the validity of the Commission's decision.

(47) The Commission notes that IEU-Ohio claims that there are five qualitative benefits of the ESP, when, in fact, there are more qualitative benefits of the authorized ESP. The qualitative benefits of the authorized ESP identified by the Commission in the Order include the advancement of the state policies in R.C. 4928.02, the more rapid implementation of market rates, the preservation of the capability for DP&L to provide adequate, reliable, and safe retail electric service, funding for economic development, and numerous competitive retail enhancements. Order at 50-52.

The numerous competitive retail enhancements include the elimination of the minimum stay and return-to-firm provisions, a web-based portal for CRES providers, an auto-cancel feature to DP&L's billing system, removal of the enrollment verification, support for historical interval usage data (HIU) data requests, and a standardized sync list provided to CRES providers (DP&L Ex. 9 at 13-15). Additionally, the Commission has also required DP&L to implement those competitive retail enhancements that have been adopted by every other EDU in Ohio. These competitive retail enhancements include rate-ready percentage off PTC billing, elimination of the per bill fee for consolidated or dual billing, elimination of the charges to register rate codes, permitting CRES providers to pay the switching fee, raising the interval meter threshold, and requiring an identifier on the eligibility file (FES Ex. 17 at 19-26; RESA Ex. 6 at 14-15). Each of the competitive retail enhancements will further develop the competitive retail

electric market in DP&L's service territory, and provide substantial qualitative benefits of the authorized ESP.

The Commission believes that the advancement of the state policies in R.C. 4928.02, the more rapid implementation of market rates, and the preservation of the capability for DP&L to provide adequate, reliable, and safe retail electric service are substantial qualitative benefits of the ESP. These qualitative benefits, in conjunction with the numerous competitive retail enhancements, provide a qualitative benefit of the ESP that outweighs the $313.8 million quantitative deficit. Furthermore, the Commission notes that there are substantial benefits of the ESP to shopping and SSO customers alike. The competitive retail enhancements authorized by the Commission will primarily benefit shopping customers and CRES providers in developing the retail electric market in DP&L's service territory. We disagree with IEU-Ohio's contention that the more rapid implementation of market rates does not benefit customers. As we explained in the Order, the modified ESP moves more quickly to market rate pricing than under an expected MRO, and this more rapid implementation of market rates is consistent with the policy of the state as set forth in R.C. 4928.02(A) and (B). Order at 50. Accordingly, rehearing on IEU-Ohio's assignments of error should be denied.

(48) FES asserts that the Commission's Order is unlawful and unreasonable because it compared the ESP to what would be DP&L's first application for an MRO. FES contends that DP&L already filed its first application for an MRO; therefore, under the plain language of R.C. 4928.142(D), DP&L's ESP should be compared to an MRO with an immediate 100 percent transition to market pricing through the CBP.

(49) The Commission finds that rehearing on FES's assignment of error on this issue should be denied. We are not persuaded by FES that DP&L has already filed its first application for an MRO. The facts of this case do not demonstrate that DP&L has filed its "first application" under R.C. 4928.142. The Commission made no determinations on the completeness of the application, no evidentiary hearing was held on the application, and the Commission made no legal

or factual findings on the merits of the application. Instead, DP&L voluntarily withdrew its MRO application before any of these events could take place.

Further, R.C. 4928.142(D) protects customers by requiring that the portion of SSO load to be competitively bid start at 10 percent for the first year and gradually increase thereafter. We believe that it would violate the intent of the General Assembly for the Commission to find that a utility that submitted an application for an MRO into a docket, and then subsequently withdrew it before the Commission could consider it, could deprive consumers of the statutory protections found in R.C. 4928.142(D). Therefore, because DP&L has not filed its first application under R.C. 4928.142, an MRO for DP&L would be subject to the provisions of R.C. 4928.142(D) and only 10 percent of the load would be sourced through a competitive bid in the first year rather than 100 percent as FES assumes.

IX. OTHER ASSIGNMENTS OF ERROR

(50) IEU-Ohio and OCC argue as one of their assignments of error that the Commission's Entry Nunc Pro Tunc was unlawful because it substantively modified the Commission's Order. IEU-Ohio and OCC further contend that the Commission's Entry Nunc Pro Tunc was unlawful because it did not give parties an opportunity to file applications for rehearing before modifying the Commission's Order. OCC asserts that *Helle v. Pub. Util. Comm.* and *Interstate Motor Transit Co. v. Pub. Util. Comm.* establish that the Commission's Entry Nunc Pro Tunc was unlawful because it amends a prior Order to indicate what the Commission believes it should have done. *Helle v. Pub. Util. Comm.*, 118 Ohio St. 434, 440, 161 N.E. 282 (1928); *Interstate Motor Transit Co. v. Pub. Util. Comm. of Ohio*, 119 Ohio St. 264, 163 N.E. 713 (1928).

DP&L asserted in its reply comments that the Commission should deny the assignment of error presented by IEU-Ohio and OCC. DP&L contends that the Entry Nunc Pro Tunc was lawful because entries nunc pro tunc are permissible to reflect what was actually decided. Further, DP&L asserts that the Commission may change or modify its orders as

long as it justifies the changes. DP&L avers that, even if the Entry Nunc Pro Tunc is unlawful, the Commission could have achieved the same result on rehearing.

(51) The Commission finds that rehearing on the assignments of error alleged by IEU-Ohio and OCC on this issue should be denied. As a preliminary matter, the Commission notes that the precedents cited by OCC are not comparable to this case. In *Helle v. Pub. Util. Comm.*, the Commission issued an Entry Nunc Pro Tunc in 1927, after holding an evidentiary hearing to consider additional evidence, to amend a Commission Order that was issued in 1924. *Helle v. Pub. Util. Comm.*, 118 Ohio St. 434, 440, 161 N.E. 282 (1928). Similarly, in *Interstate Motor Transit Co. v. Pub. Util. Comm.*, which is also cited by OCC, the Commission took notice of other facts within its records and knowledge, before issuing an Entry Nunc Pro Tunc to revise its previous Order. *The Interstate Motor Transit Co. v. Pub. Util. Comm. of Ohio*, 119 Ohio St. 264, 163 N.E. 713 (1928).

In the present case, the Commission immediately recognized that a clerical error had been made and issued the Entry Nunc Pro Tunc a mere two days after the Order was issued. No additional evidence was considered and only two days had elapsed before the Commission issued the Entry Nunc Pro Tunc to correct the clerical error.

However, upon further review of the evidence on rehearing and as discussed in detail above, we find that the provisions of the ESP as set forth in our Order and the Entry Nunc Pro Tunc should be modified by the Commission. Accordingly, we find that the end date of the ESP should be May 31, 2017, and the length of the ESP should be 41 months. However, DP&L should divest its generation assets by no later than January 1, 2016. Further, the SSR will be in effect for three years at an annual amount of $110 million, and will end on December 31, 2016. The term of the SSR-E will be four months and end on its own terms on April 30, 2017, if DP&L files an application and the Commission authorizes DP&L to collect an SSR-E amount.

Finally, as discussed above, we find that the CBP blending schedule should be modified to be 10 tranches of a 41 month

product commencing on January 1, 2014, 50 tranches of a 29 month product commencing on January 1, 2015, and 40 tranches of a 17 month product commencing on January 1, 2016.

(52) DP&L asserts as its eighth assignment of error that the Commission's order failed to state that the significantly excessive earnings test (SEET) threshold should apply only during the term of DP&L's ESP.

(53) The Commission finds that rehearing on DP&L's assignment of error should be granted. The 12 percent SEET threshold that we established in the Order should be applicable only during the term of this ESP. Order at 26.

(54) DP&L contends as its third assignment of error that the Commission does not have jurisdiction or authority to order DP&L's shareholders to contribute to an economic development fund (EDF). DP&L asserts that contributions to an EDF should be voluntary and there is no record support for DP&L to contribute to an EDF.

The City of Dayton opposes DP&L's third assignment of error. The City of Dayton notes that R.C. 4928.143(B)(2)(i) authorizes the Commission to provide for, without limitation, provisions under which an EDU may implement economic development, job retention, and energy efficiency programs. The City of Dayton also notes that R.C. 4928.243(B)(2)(i) does not require that these provisions allocate program costs across classes of customers of the electric utility; therefore, they may be derived from shareholders. Finally, the City of Dayton asserts that significant record evidence was presented on economic development and the need for economic development funding.

(55) First, the Commission notes R.C. 4928.143(B)(2)(i) provides that ESPs may include provisions related to economic development. Further, DP&L's contributions to the EDF are voluntary, as DP&L is not required to accept the ESP authorized by the Commission. If DP&L accepts the authorized ESP, DP&L shall contribute to the EDF. Additionally, the Order thoroughly addressed the

evidentiary foundation for the EDF, as well as the continuing need for EDF funds. Order at 42-43; Dayton Ex. 1 at 3-6. Therefore, the Commission finds that rehearing on DP&L's third assignment of error should be denied.

(56) OPAE/Edgemont raise as their assignments of error, and OCC argues as its final assignment of error, that the Commission failed to consider the record evidence regarding the state policy to protect at-risk populations. OPAE/Edgemont also asserts that the Commission did not properly consider the issues raised by OPAE and Edgemont in their briefs.

(57) The Commission finds that rehearing on OPAE/Edgemont's assignments of error, and the assignment of error raised by OCC, should be denied. Initially, the Commission notes that it considered the record evidence presented by OPAE, Edgemont, and other intervening parties that DP&L should be required to protect at risk populations, including the testimony of OPAE witness David Rinebolt and OCC witness James Williams; however, the Commission found that providing certainty and stability to electric rates in DP&L's service territory benefits at-risk customers as well as all other customers. Order at 21-22, 52; see also OPAE Ex. 1 at 5-7; OCC Ex. 19 at 3-29. OCC witness Williams testified that any change in ESP rates that does not reduce the current rates will have a negative financial impact on residential customers, but Mr. Williams failed to examine the negative financial impacts on the electric utility, as well as customers, if the rates were further reduced (OCC Ex. 19 at 6; Tr. at 1504-1506.) The Commission determined that the failure to approve the SSR would decrease DP&L's capability to provide safe, reliable, and certain retail electric service. This would have severe negative consequences on at-risk customers as well as all other customers.

In addition, the Commission rejected changes proposed by DP&L to the maximum charge provision and the FUEL rider, as well as DP&L's proposed rate design for the SSR, which may have had a significant impact upon at-risk populations. Further, the testimony failed to consider that the ESP, as approved by the Commission, contained provisions to promote competition and provisions for

> shareholder funding for economic development, which will also benefit at-risk customers. Order at 42. Accordingly, we find that the testimony provided by OPAE/Edgemont and OCC was fully considered and that the ESP, as approved by the Commission, fulfills the policy in R.C. 4928.02(L).

It is, therefore,

ORDERED, That the applications for rehearing filed by OCC, FES, Kroger, and DP&L be granted, in part, and denied, in part, as set forth above. It is, further,

ORDERED, That the applications for rehearing filed by OPAE/Edgemont, IEU-Ohio, OHA, and OEG be denied, as set forth above. It is, further,

ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

GAP/BAM/sc

Entered in the Journal
MAR 19 2014

Barcy F. McNeal
Secretary

BEFORE

ATTACHMENT E

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an 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 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

FOURTH ENTRY ON REHEARING

The Commission finds:

(1) The Dayton Power and Light Company (DP&L) is a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

(2) On September 4, 2013, the Commission issued its Opinion and Order (Order), approving DP&L's proposed electric security plan (ESP), with certain modifications. On September 6, 2014, the Commission issued an Entry Nunc Pro Tunc modifying the Order.

(3) Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On October 4, 2013, Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE/Edgemont), the Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU-Ohio), FirstEnergy Solutions Corp. (FES), the Ohio Hospital Association (OHA), Ohio Energy Group (OEG), the Kroger Co. (Kroger), and DP&L filed applications for rehearing. On October 31, 2013, memoranda contra the applications for rehearing were filed by FES, OCC, DP&L, OEG, the Retail Energy Supply Association (RESA), Kroger, IEU-Ohio, and the City of Dayton.

(5) On October 23, 2013, the Commission issued an Entry on Rehearing granting rehearing for further consideration of the matters specified in the applications for rehearing. The Commission also denied two assignments of error filed by DP&L and FES, and ordered DP&L to conduct the initial auction for standard service offer load under the ESP.

(6) On March 19, 2014, the Commission issued a Second Entry on Rehearing granting, in part, and denying, in part, the applications for rehearing filed by OCC, FES, Kroger, and DP&L. Additionally, the Commission's Second Entry on Rehearing denied the applications for rehearing filed by OPAE/Edgemont, IEU-Ohio, OHA, and OEG.

(7) On April 17, 2014, IEU-Ohio and OEG filed second applications for rehearing, and, on April 18, 2014, DP&L and OCC filed their second applications for rehearing.

(8) The Commission has now reviewed and considered all of the assignments of error raised in the second applications for rehearing. Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied. The Commission will address the merits of the assignments of error as set forth below.

(9) In its first assignment of error, DP&L asserts that the Commission's Second Entry on Rehearing was unreasonable or unlawful because it accelerated the competitive bid process (CBP) auction schedule, which will cause substantial financial harm to DP&L. DP&L asserts that it will lose substantial revenue if the CBP auction schedule is accelerated and its financial integrity will be jeopardized. Additionally, DP&L avers that the Commission based its decision to accelerate the CBP auction schedule based upon the mistaken belief that DP&L could transfer its generation assets sooner than September 1, 2016. However, DP&L contends that, since it cannot transfer its generation assets to an affiliate sooner than September 1, 2016, the Commission should grant rehearing and reinstitute the previous CBP auction schedule. DP&L asserts that it demonstrated at hearing that its financial integrity would be jeopardized if the accelerated CBP auction schedule is implemented. DP&L Ex. 16A at 6, CLJ-6; DP&L Ex. 14A at 5-9, 28-29; Tr. Vol. III at 637-638, 640-641; Tr. Vol. IV at 1096; Tr. Vol. V at 1298.

OCC argues in its memorandum contra the application for rehearing that the Commission's decision to accelerate the CBP auction schedule was both lawful and reasonable. OCC asserts that the Commission should not further delay flowing through the benefits of the competitive market to DP&L's customers.

(10) The Commission finds that rehearing on DP&L's first assignment of error should be denied. We have held that a more rapid implementation of market rates is consistent with the policies of this state enumerated in R.C. 4928.02(A) and (B). Order at 50. Accordingly, in the Second Entry on Rehearing, we stated that our intent was to implement full market-based rates as soon as practicable and we noted that customers would benefit from a more rapid move to full market-based rates. Second Entry on Rehearing at 18, 19. DP&L has not persuaded the Commission that the CBP auction schedule established in the Second Entry on Rehearing is not practicable or that the CBP auction schedule jeopardizes DP&L's financial integrity. In addition, the Commission has established the SSR-E mechanism, which

provides DP&L with an opportunity to recover a financial integrity charge of up to $45.8 million in 2017 if DP&L demonstrates, at that time, that its financial integrity has been jeopardized and if DP&L has satisfied the other conditions established by the Commission. Order at 27-28.

(11) DP&L argues, in its second assignment of error, that the Commission's Second Entry on Rehearing was unlawful or unreasonable because it resulted from a miscommunication regarding DP&L's ability to divest its generation assets. DP&L asserts that at the time of hearing, it was DP&L's strategic plan to transfer its generation assets to an affiliate. DP&L avers that witnesses Herrington, Jackson, and Rice each testified at hearing that there were structural and financial obstacles that prevented DP&L from transferring its generation assets to an affiliate prior to the end of the ESP term. DP&L Ex. 16A at 2-4; Tr. Vol. I at 260-262; Tr. Vol. III at 800-805; Tr. Vol. V at 1148-1150; Tr. Vol. XI at 2897; Tr. Vol. XII at 2911. However, DP&L notes that since the hearing, circumstances have changed which have forced DP&L to explore different business courses than that which it had planned at the time of hearing. One of those different business courses was for DP&L to explore the potential sale of its generation assets to a third party, which could occur as early as 2014. DP&L contends that it might be capable of selling its generation assets to a third party in 2014, but it cannot transfer them to an affiliate before 2017. Further, DP&L argues that it is still unclear whether a sale to a third party can be accomplished in 2014, but if a sale does not occur, then the generation assets cannot be transferred to an affiliate before 2017 without additional financial resources.

DP&L argues that there are three main points regarding the potential transfer of its generation assets to an affiliate. First, DP&L does not know whether a third party will be willing to purchase the assets. Second, the reason that DP&L might be able to transfer the assets as part of a third party sale as early as 2014, but cannot transfer to an affiliate so early, is because a third party might be willing to purchase the assets at a price that would enable DP&L to offset costs of releasing generation assets from the Company's mortgage and enable the Company to restructure its debt. Third, the statements

made by DP&L's witnesses at hearing were true then as they are now; DP&L cannot transfer its generation assets *to an affiliate* before 2017.

IEU-Ohio argues in its memorandum contra the application for rehearing that the Commission's decision to order DP&L to divest its generation assets was not unlawful and that a miscommunication is insufficient grounds for granting rehearing. Further, IEU-Ohio asserts that even if the Commission's decision resulted from a miscommunication, DP&L has not demonstrated that the miscommunication led to an unreasonable result. Similarly, OCC argues that the Commission's decision was both lawful and reasonable, and that divestment of DP&L's generation assets is long overdue.

(12) The Commission finds that rehearing on DP&L's second assignment of error should be granted. The Commission notes that market conditions are inherently unpredictable and subject to significant fluctuations over time. We intend to provide DP&L with the flexibility to transfer its generation assets to an affiliate or to a third-party while retaining our oversight over the divestiture as provided by R.C. 4928.17(E). At the hearing in this case, DP&L witnesses testified that there are terms and conditions in certain bonds that significantly impede upon its ability to transfer its generation assets to an affiliate before September 1, 2016, and, due to adverse market conditions, DP&L will not have sufficient cash flow to refinance the bonds before 2017. DP&L Ex. 16A at 2-4; Tr. Vol. I at 260-262. Tr. Vol. III at 800-805; Tr. Vol. V at 1148-1150; Tr. Vol. XI at 2897. Therefore, a modified deadline of January 1, 2017, for the asset divestiture should alleviate any existing obstacles regarding the terms and conditions in DP&L's bonds and its ability to refinance such bonds. Further, a deadline of January 1, 2017, should allow DP&L to obtain terms and conditions to divest its generation assets while ensuring that the assets are divested during the period of this electric security plan. The Commission will review the specific terms and conditions of any proposed generation asset divestiture in DP&L's generation asset divestiture proceeding. *In re The Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC. Accordingly, the Commission will modify our decision in

the Second Entry on Rehearing and direct DP&L to divest its generation assets no later than January 1, 2017.

(13) IEU-Ohio asserts in its first assignment of error that the Commission failed to identify the findings of fact for its decision that there are qualitative, nonquantifiable benefits of the ESP that make it more favorable in the aggregate than the expected results that would otherwise apply under R.C. 4928.142.

DP&L argues in its memorandum contra the application for rehearing that the Commission should reject IEU-Ohio's argument because the Commission denied rehearing on this assignment of error in its Second Entry on Rehearing and the Commission has already identified the non-quantifiable benefits of the ESP. Additionally, DP&L asserts that the Commission cannot quantify a non-quantifiable benefit. DP&L also notes that R.C. 4928.143(C)(1) requires that the Commission consider whether the ESP is more favorable in the aggregate, which means the Commission must consider more than just price in determining whether an ESP should be modified.

(14) The Commission finds that rehearing on IEU-Ohio's first assignment of error should be denied as procedurally improper. In its application for rehearing filed on October 4, 2013, IEU-Ohio sought rehearing on the Commission's determination that the qualitative benefits of the ESP outweighed the quantitative analysis. The Commission thoroughly addressed IEU-Ohio's arguments and denied rehearing on this assignment of error in the Second Entry on Rehearing. Second Entry on Rehearing at 28-29. In its April 17, 2014, application for rehearing, IEU-Ohio simply recasts, with slight alterations, its arguments raised in its prior application for rehearing. R.C. 4903.10 does not allow parties to have "two bites at the apple" or to file rehearing upon rehearing of the same issue. *In re Ohio Power Company and Ormet Primary Aluminum Corporation*, Case Nos. 96-999-EL-AEC et al., Second Entry on Rehearing (Sept. 13, 2006) at 3-4. IEU-Ohio simply seeks rehearing of the same issue which was raised in its prior application for rehearing and denied by the Commission.

The Commission notes, however, that, even if the arguments raised by IEU-Ohio and were not procedurally improper, IEU-Ohio has not demonstrated that the Commission has violated R.C. 4903.09. The Supreme Court of Ohio has held that three things must be shown by a party to establish a violation of R.C. 4903.09: first, that the Commission initially failed to explain a material matter; second, that the party brought that failure to the Commission's attention through an application for rehearing; and third, that the Commission still failed to explain itself. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶71. The Commission fully explained that the qualitative benefits of the ESP outweighed the quantitative analysis in our Order issued on September 4, 2013. Order at 50-52. The Commission further explained our determination in the Second Entry on Rehearing. Second Entry on Rehearing at 28-29. IEU-Ohio has not met either the first prong or the third prong of the Court's test for a violation of R.C. 4903.09.

(15) OEG, IEU-Ohio, and OCC each argue that it is unreasonable for DP&L to collect the SSR after divestiture occurs. OEG argues as its sole assignment of error that DP&L does not need to continue collecting SSR revenues from customers in order to remain financially viable after its generation business is transferred to another entity because DP&L will become solely a transmission and distribution utility that is already receiving sufficient revenue. Further, OEG contends that the Commission contemplated in the Order that SSR and SSR-E revenues were only to ensure that DP&L could provide adequate, reliable, and safe retail electric service until it divests its generation assets. Order at 51. OEG argues that the Commission was correct to find that the SSR should only apply until DP&L's generation assets are divested. Since the Commission has recognized that DP&L may be capable of divesting its generation assets sooner, and since the Commission subsequently ordered DP&L to divest the assets sooner, OEG asserts that the Commission should not permit DP&L to collect SSR revenues beyond when it divests its generation assets.

Similarly, IEU-Ohio claims, in its third assignment of error, that the Second Entry on Rehearing was unreasonable

because it fails to terminate the authorization of the SSR no later than January 1, 2016, the deadline the Commission imposed by which DP&L's generation assets must be transferred. Moreover, in its fourth assignment of error, IEU-Ohio alleges that that the Second Entry on Rehearing was unreasonable because it fails to terminate the authorization of the SSR-E due to the Commission's order that DP&L transfer generation assets by January 1, 2016. IEU-Ohio and OEG argue that the alleged threat to DP&L's financial integrity resulted from the reduced revenue DP&L was realizing from its competitive generation resources. According to IEU-Ohio and OEG, after DP&L divests its competitive generation resources, the threat to DP&L's financial integrity will be removed and the SSR and SSR-E will no longer be needed.

OCC asserts that the Commission's Second Entry on Rehearing violates R.C. 4903.09 because the Commission failed to present findings of fact and the reasons prompting its decision to permit DP&L to charge customers the SSR and SSR-E after the Company divests its generation assets. OCC contends that the Commission's decision to require DP&L to divest its generation assets by January 1, 2016, removed any justification for charging the SSR, or SSR-E, after divestiture. Therefore, OCC argues that the Commission erred in not ending the SSR and SSR-E with divestiture, and failed to set forth the Commission's reasons for not ending or terminating the SSR and SSR-E.

DP&L argues in its memo contra the applications for rehearing that the Commission should restore the original generation asset divestiture date to May 31, 2017. However, DP&L asserts that if the Commission does not restore the original generation asset divestiture date, then the Commission should deny rehearing and not accelerate termination or elimination of the SSR or SSR-E. DP&L contends that without the SSR or SSR-E, it would earn unreasonably low returns on equity (ROE). Even if it divests its generation assets, DP&L contends that divestiture will not eliminate the threats to DP&L's financial integrity. Specifically, DP&L argues that it will need the SSR and SSR-E to pay remaining debt that may exist from the transfer

or sale of the generation assets. DP&L also argues that continuing the SSR and SSR-E after the deadline for DP&L to transfer its generation assets is consistent with Commission precedent.

(16) The Commission finds that rehearing on the assignments of error raised by OEG, IEU-Ohio, and OCC should be denied. In light of our decision above to modify our ruling in the Second Entry on Rehearing and to establish January 1, 2017, as the deadline for DP&L to divest its generation assets, the assignments of error raised by IEU-Ohio, OEG, and OCC are moot.

However, the Commission also notes that arguments raised by OEG, IEU-Ohio and OCC rest on the false premise that the SSR and SSR-E are generation-related charges intended to maintain the financial integrity of DP&L's generation business. As the Commission has previously noted, the SSR and SSR-E are financial integrity charges intended to maintain the financial integrity of the entire company, not just the generation business. Order at 21-22; Second Entry on Rehearing at 3. Therefore, when DP&L does, in fact, divest the generation assets, it does not necessarily follow that the SSR or the SSR-E must end. Instead, the structure of the SSR-E, and the conditions regarding its possible implementation, will ensure that, if the generation assets have been divested, DP&L must demonstrate a continuing need for a stability rider. If DP&L cannot demonstrate a need for the stability rider, the SSR-E will not be implemented. The Commission further notes that our treatment of the SSR and the SSR-E is consistent with the treatment of stability riders approved for other electric utilities. Both AEP Ohio and Duke were permitted to continue to recover stability riders authorized under R.C. 4928.143(B)(2)(d) after divestiture of their generation assets. *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, et al., Entry on Rehearing (January 30, 2013) at 26-27; *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (November 22, 2011) at 13, 21.

(17) IEU-Ohio claims in its second assignment of error, and OCC claims in its third assignment of error that the Order and the

Second Entry on Rehearing are unlawful because they authorize transition revenue or equivalent revenue in violation of R.C. 4928.38. IEU-Ohio asserts that DP&L has confirmed that the SSR and SSR-E are mechanisms that will provide DP&L transition revenue, or its equivalent, because in DP&L's Supplemental Application in Case No. 13-2420-EL-UNC, DP&L indicated that the SSR will be needed by the distribution and transmission utility to pay any remaining debt that may not transfer with the generation assets. *In re The Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC, Supplemental Application (February 25, 2014) at 2.

Similarly, OCC argues that the Commission is precluded from authorizing DP&L to collect additional transition revenues or any equivalent revenues pursuant to R.C. 4928.38. OCC concedes that the Commission has already addressed that the SSR and SSR-E are not transition charges or their equivalent, but OCC contends that the Commission presented a new rationale in its Second Entry on Rehearing. OCC avers that in the Second Entry on Rehearing the Commission found that the SSR and SSR-E were not cost-based charges. However, OCC contends that the SSR and SSR-E are cost-based charges that produce revenues that allow DP&L to maintain its financial integrity by enabling it to pay calculated costs, as well as its cost of capital.

DP&L argues in its memorandum contra the applications for rehearing that the Commission has already denied rehearing on this assignment of error. DP&L asserts that the SSR and SSR-E are not cost-based charges and that R.C. 4928.143(B)(2)(d) is the later-enacted statute.

(18) The Commission notes that we fully explained in the Order that the SSR is not a transition charge and that authorizing the SSR is not the equivalent of authorizing transition revenue. Order at 19-22. IEU-Ohio and OCC sought rehearing of this determination in their applications for rehearing filed on October 4, 2013. The Commission denied rehearing, once again finding that the SSR does not meet the statutory definition of a transition charge contained in R.C. 4928.39. Second Entry on Rehearing at 5-6. IEU-Ohio and OCC now seek rehearing on the same issue for which

the Commission has already denied rehearing. As we noted above, R.C. 4903.10 does not allow parties to file rehearing upon rehearing of the same issue. *In re Ohio Power Co. and Ormet Primary Aluminum Corp.*, Case Nos. 96-999-EL-AEC et al., Second Entry on Rehearing (Sept. 13, 2006) at 3-4. Therefore, the Commission finds that rehearing on the assignments of error raised by IEU-Ohio and OCC should be denied as procedurally improper.

(19) IEU-Ohio, in its fifth assignment of error, and OCC, in its second assignment of error, assert that the Commission's Second Entry on Rehearing is unreasonable because it failed to reduce the amount of the SSR-E, even though the term of the SSR-E was reduced. IEU-Ohio and OCC argue that the five month SSR-E cap was derived from the monthly SSR amount, which was approximately $9.167 million. Since the Commission decreased the term of the SSR-E from five months to four months, they argue the Commission should decrease the SSR-E cap from $45.8 million to $36.66 million.

(20) The Commission finds that rehearing on the assignment of error raised by IEU-Ohio and OCC should be denied. Because the SSR-E is a financial integrity charge rather than a generation-related charge, the Commission established the date for the SSR-E to end prior to the end of the ESP solely in order to ensure that DP&L would not continue to collect the SSR-E in the event a new SSO was not established at the end of the ESP term. The Commission did not intend on reducing the cap on the SSR-E. The amount of the SSR-E is not contingent upon the period of collection, as IEU-Ohio and OCC mistakenly infer. The amount of the SSR-E is based upon the term of the ESP. The ESP will be in effect for 41 months, the final five months of which were used to determine the prorated amount for the cap on the SSR-E.

Further, the Commission notes that the $45.8 million merely represents a cap on the SSR-E. DP&L will need to demonstrate the financial need for SSR-E to be authorized by the Commission so that the Company may be able to continue to provide stable and reliable retail electric service. DP&L must also satisfy the additional conditions for the SSR-E established by the Commission. Moreover, we note that, if DP&L files an application to recover an SSR-E

> amount, IEU-Ohio, OCC and other intervenors will have a full and fair opportunity to present their arguments on the proper amount to be authorized at that time. Accordingly, rehearing on IEU-Ohio's assignment of error is denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by OCC, IEU-Ohio, and OEG, be denied, as set forth above. It is, further,

ORDERED, That the application for rehearing filed by DP&L be granted in part and denied in part, as set forth above. It is, further,

ORDERED, That a copy of this Fourth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

GAP/BAM/sc

Entered in the Journal
JUN 04 2014

Barcy F. McNeal
Secretary

BEFORE

ATTACHMENT F

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an 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 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

FIFTH ENTRY ON REHEARING

The Commission finds:

(1) The Dayton Power and Light Company (DP&L) is a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

(2) On September 4, 2013, the Commission issued its Opinion and Order (Order), approving DP&L's proposed electric security plan (ESP), with certain modifications. On September 6, 2014, the Commission issued an Entry Nunc Pro Tunc modifying the Order.

(3) Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On October 4, 2013, Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE/Edgemont), the Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU-Ohio), FirstEnergy Solutions Corp. (FES), the Ohio Hospital Association (OHA), Ohio Energy Group (OEG), the Kroger Co. (Kroger), and DP&L filed applications for rehearing. On October 31, 2013, memoranda contra the applications for rehearing were filed by FES, OCC, DP&L, OEG, the Retail Energy Supply Association (RESA), Kroger, IEU-Ohio, and the City of Dayton.

(5) On October 23, 2013, the Commission issued an Entry on Rehearing granting rehearing for further consideration of the matters specified in the applications for rehearing. The Commission also denied two assignments of error filed by DP&L and FES, and ordered DP&L to conduct the initial auction for standard service offer load under the ESP.

(6) On March 19, 2014, the Commission issued a Second Entry on Rehearing granting, in part, and denying, in part, the applications for rehearing filed by OCC, FES, Kroger, and DP&L. Additionally, the Commission's Second Entry on Rehearing denied the applications for rehearing filed by OPAE/Edgemont, IEU-Ohio, OHA, and OEG.

(7) On April 17, 2014, IEU-Ohio and OEG filed second applications for rehearing, and, on April 18, 2014, DP&L and OCC filed their second applications for rehearing. On April 28, 2014, IEU-Ohio, DP&L, OCC, and DP&L filed memoranda contra the second applications for rehearing.

(8) Thereafter, on May 7, 2014, the Commission issued a Third Entry on Rehearing granting rehearing for further consideration of the matters specified in the applications for rehearing, and, on June 4, 2014, the Commission issued its Fourth Entry on Rehearing. In its Fourth Entry on Rehearing, the Commission denied the applications for rehearing filed by OCC, IEU-Ohio, and OEG, and granted, in part, and denied, in part, the application for rehearing filed by DP&L.

(9) On July 1, 2014, OCC filed a third application for rehearing. Subsequently, on July 11, 2014, DP&L filed a memorandum contra the third application for rehearing filed by OCC.

(10) The Commission has now reviewed and considered the assignments of error raised in OCC's third application for rehearing. Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied. The Commission will address the merits of the OCC's third application for rehearing below.

(11) In its first and only assignment of error, OCC argues that the Commission unreasonably and unlawfully erred in granting rehearing in DP&L's second application for rehearing because DP&L's second application for rehearing was defective. OCC argues that the Supreme Court has ruled that setting forth specific grounds for rehearing is a jurisdictional prerequisite for review and that an issue is waived by not setting it forth in its application for rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 349, 2007-Ohio-4276. OCC claims that the Commission followed this precedent in two recent cases involving water utilities. *In re Aqua Ohio, Inc.*, Case No. 08-1125-WW-UNC, Entry on Rehearing (October 14, 2009) (*Aqua Ohio*) at 5; *In re Ohio American Water Co.*, Case No. 09-391-WS-AIR, Entry on Rehearing (June 23, 2010) (*Ohio American Water*) at 2. OCC alleges that DP&L's second application for rehearing did not include the words "unlawful" and "unreasonable," and that an application for rehearing that does not allege that a Commission Order is unlawful or unreasonable does not comply with R.C. 4903.10 or Ohio Adm.Code 4901-1-35. Further, OCC alleges that DP&L's memorandum in support of its application for rehearing cannot cure the application's failure to comply with R.C. 4903.10 and Ohio Adm.Code 4901-1-35.

DP&L asserts in its memorandum contra that its application for rehearing complied with the specificity requirement of R.C. 4903.10 and Ohio Adm.Code 4901-1-35 by identifying the specific matters on which it sought rehearing. DP&L argues that the cases cited by OCC are distinguishable from the present case or do not support OCC's position. Additionally, DP&L argues that, pursuant to R.C. 4903.10(B), the Commission had the authority to modify or abrogate its Second Entry on Rehearing if it was of the opinion that the Second Entry on Rehearing was in any respect unjust or unwarranted. Finally, DP&L points out that OCC already

raised this assignment of error in its memorandum contra to DP&L's application for rehearing, and that by granting DP&L's application for rehearing the Commission has already denied OCC's arguments. Accordingly, DP&L requests that the Commission deny rehearing on DP&L's present application for rehearing.

(12) The Commission finds that rehearing on the assignment of error raised by OCC should be denied. R.C. 4903.10 requires that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." DP&L's second application for rehearing stated it was seeking rehearing on two specifically enumerated grounds. The grounds upon which DP&L sought rehearing and the relief requested were clearly set forth with specificity and detail. The Commission notes that DP&L did not use the exact words "unreasonable" or "unlawful" in its application for rehearing. However, we find that, when the application for rehearing has specifically set forth, in detail, the grounds upon which rehearing is sought and the relief requested, the absence of the words "unreasonable" or "unlawful" alone does not violate either R.C. 4903.10 or Ohio Adm.Code 4901-1-35. Therefore, we find that DP&L complied with the plain language of R.C. 4903.10 and Ohio Adm.Code 4901-1-35.

Additionally, we note that this case is distinguishable from the cases cited by OCC in its third application for rehearing. In *Ohio American Water*, the application for rehearing filed by Ohio American Water did not enumerate or provide detailed grounds on which Ohio American sought rehearing. *Ohio American Water* at 2. Likewise, in *Aqua Ohio*, Aqua Ohio filed an application for rehearing without specifying or detailing the grounds on which it was requesting rehearing in the actual application for rehearing; instead, the grounds for rehearing were included in the memorandum in support of the application for rehearing, which the Commission found was insufficient to substantially comply with the R.C. 4903.10 and Ohio Adm.Code 4901-1-35. *Aqua Ohio* at 5. However, in the present case, DP&L stated the specific, detailed grounds for rehearing in its second application for rehearing as well as the accompanying memorandum in support. Accordingly,

we find that DP&L satisfied the requirements under R.C. 4903.10 and Ohio Adm.Code 4901-1-35.

It is, therefore,

ORDERED, That the application for rehearing filed by OCC be denied, as set forth above. It is, further,

ORDERED, That a copy of this Fifth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

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Lynn Slaby

M. Beth Trombold

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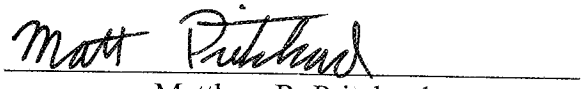
BAM/GAP/sc

Entered in the Journal
JUL 23 2014

Barcy F. McNeal
Secretary

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Joint Motion for Stay by Appellants Industrial Energy Users-Ohio and The Office of the Ohio Consumers'* Counsel was served upon the parties of record this 14th day of October 2014, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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