ORIGINAL

IN THE SUPREME COURT OF OHIO

In re the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Supreme Court Case No. 14-1505
In re the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Second Appeal from the Public Utilities Commission of Ohio
In re the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	))))	Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, 12-672-EL-RDR
In re the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)))	
In re the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	

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MERIT BRIEF AND APPENDIX
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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") submits this brief, as the representative[1] of the 456,000 residential utility customers of the Dayton Power and Light Company ("DP&L" or "Utility"). These customers are paying higher electric bills because of certain decisions by the Public Utilities Commission of Ohio ("PUCO") that this Court should reverse on appeal.

Under Ohio law, a utility may not collect any generation revenues from distribution customers once the competitive generation market develops. Here, the PUCO authorized DP&L to collect a so-called "service stability rider" from distribution customers, costing them $330 million, after competitive generation developed. The PUCO approved the stability rider to support DP&L's financial integrity, as a whole, including its generation, distribution, and transmission operations. Did the PUCO err in permitting DP&L to collect the stability rider? Yes, it did.

In light of this error, the Court should reverse the PUCO. The PUCO should be directed to rescind its approval of the Utility's tariffs that implement the service stability rider. This will halt the utility from collecting these unlawful charges from customers.

II. STANDARD OF REVIEW

R.C. 4903.13 (OCC Appx. 124) governs this Court's review of PUCO Orders. It provides in pertinent part: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable***." The Court has

[1] R.C. Chapter 4911.

interpreted this standard as one turning upon whether the issue presents a question of law or a question of fact.

As to questions of fact, the Court has held that it will not reverse the PUCO unless the PUCO's findings are manifestly against the weight of the evidence or are so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E.2d 1, 8 (1975) (syllabus), writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.302, appeal after remand (1976), 46 Ohio St.2d 105, 75 O.O.2d 172, 346 N.E.2d 778. With a mixed question of law and fact, the Court must judicially review the evidence to determine whether the findings of fact are reasonable and lawful. But it must also review whether the legal principles have been properly applied. *Motor Freight, Inc. v. Pub. Util. Comm.* (1929), 120 Ohio St. 1, 6, 165 N.E.355.

Questions of law are held to a different standard of review. This Court has complete, independent power of review on questions of law. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.W.2d 1370 (1979). Accordingly legal issues are subject to a more intensive examination than are factual questions. OCC's Propositions of Law No. 1, 3, and 4 are purely questions of law.

Proposition of Law No. 1 challenges the PUCO's approval of the "service stability rider." This proposition asserts that the stability charge enables DP&L to collect a generation subsidy, violating R.C. 4928.38, 4928.39, and 4928.02(H), among other things. Proposition of Law No. 2 asserts that the stability charge enables DP&L to unlawfully collect generation revenues from distribution customers after the competitive generation market developed. In addressing these errors the Court will need to interpret and apply the "transition charge laws" -- R.C. 4928.38, 4928.39 --- and the state policy against cross-subsidization, R.C. 4928.02(H). R.C. 4928.38 and

4928.39 preclude utilities from collecting generation revenues that are "transition revenues" or "any equivalent revenues." R.C. 4928.02(H) establishes a state policy against anti-competitive subsidies from noncompetitive service (distribution) to competitive service (generation). These questions of law demand a de novo review. *Consumers' Counsel v. Pub. Util. Comm.*, 4 Ohio St.3d 111, 112, 447 N.E.2d 749 (1983). Indeed the Court has ruled that it is not bound by PUCO precedent on questions of law. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶42.

Under Proposition of Law No. 3, OCC contends that the PUCO exceeded its authority and violated the law when it issued an Entry Nunc Pro Tunc. That Entry charged customers $110 million more than originally authorized, without providing facts or reasons prompting its revisions. A de novo review of the PUCO's finding is required.

Proposition of Law No. 4 focuses on the PUCO's decision to accept an application for rehearing that failed to present specific grounds for rehearing, violating R.C. 4903.10. This presents an issue of law. It requires a de novo review.

Proposition of Law No. 2 presents mixed questions of law and fact. That proposition addresses the PUCO's factual findings that the service stability rider stabilizes and provides certainty, as required under R.C. 4928.143(B)(2)(d). The Court will have to review the evidence to determine whether these factual findings are reasonable and lawful. Proposition of Law No. 2 also presents an issue of law as well: did the PUCO properly determine that the service stability rider relates to default service and bypassability as those terms are used in R.C. 4928.143(B)(2)(d)? The Court will need to determine if the PUCO properly interpreted and applied the law, which entails a de novo review.

With these standards in mind, the Court must consider and resolve the errors alleged by the OCC.

III. STATEMENT OF FACTS

On October 5, 2012, DP&L applied for a standard service offer in the form of an Electric Security Plan ("ESP"). (R. 62-68). Under R.C. 4928.141 (OCC Appx. 129), a standard service offer consists of all competitive retail electric services necessary to maintain electric services to consumers, including a firm supply of generation.

More than two months later, on December 12, 2012, DP&L filed a Second Revised ESP Application ("Revised ESP Application"). (R. 97, 100-101). The reason given by DP&L for filing the Revised ESP Application is that it had discovered errors in the projected revenues and expenses incorporated in the ESP application filed in October 2012. (R. 97 at 2). The Revised ESP application was the subject of the proceeding below.

In its Revised ESP Application, DP&L proposed a five-year electric security plan with a blending plan that annually increases the percentage of competitively acquired rates being incorporated into its standard service offer rates. (R. 97 at 2, 7). DP&L also proposed six new rates that customers would pay to implement the blending plan. One of the new rates was a non-bypassable service stability rider which DP&L claimed was needed to provide stable and reliable electric service. (R. 97, ESP Blending Plan at 21.)

On January 14, 2013, the PUCO established a procedural schedule for its Revised ESP Application. The PUCO ordered that local public hearings be held in Dayton on January 29, 2013 and that an evidentiary hearing be held at the PUCO offices in Columbus on March 11, 2013. (R. 121 at 2, 4). On February 28, 2013 the PUCO revised the schedule and ordered the evidentiary hearing to begin on March 18, 2013. (R. 147 at 3). The hearing began on March 18, 2013 and concluded on April 3, 2013. Initial post-hearing briefs were filed on May 20, 2013 and reply briefs were filed on June 5, 2013.

On September 4, 2013, the PUCO issued its Opinion and Order ("Order") regarding DP&L's Revised ESP Application. In the Order, the PUCO approved the Revised ESP Application for a term beginning January 1, 2014, and ending December 31, 2016, with some modifications. (OCC Appx. 25; R. 280 at 15). The PUCO ordered that blending of auction rates in the generation rates would increase each year, with full auction rates effective January 1, 2017. (OCC Appx. 25-26; R. 280 at 15-16). The PUCO also ordered DP&L to divest its generation assets no later than December 31, 2016. (OCC Appx. 37; R. 280 at 27).

The PUCO also determined that the service stability rider meets the criteria of R.C. 4928.143(B)(2)(d), as it is a charge related to default (i.e., SSO) service and bypassability that has the effect of stabilizing and providing certainty regarding retail electric service. (OCC Appx. 31; R. 280 at 21). The PUCO found that the service stability rider is a non-bypassable stability charge for the purpose of maintaining DP&L's financial integrity so that it may continue to provide default service. (OCC Appx. 31-32; R. 280 at 21-22). The PUCO stated that it believes the service stability rider would have the effect of stabilizing or providing certainty regarding retail electric service. (OCC Appx. 32; R. 280 at 22). The PUCO also found that the service stability rider is not a transition charge and that authorization of the service stability rider is not the equivalent of authorizing transition revenue. (OCC Appx. 32; R. 280 at 22). The PUCO authorized DP&L to collect the service stability rider from customers in the amount of $110 million for each of the years 2014 and 2015, to be imposed when the blending of market rates begins. (OCC Appx. 35; R. 280 at 25). And because the reliability of financial projections significantly declines over time, the PUCO authorized the service stability rider only until December 31, 2015. (OCC Appx. 36; R. 280 at 26).

The PUCO also determined that DP&L should have the opportunity to seek relief if its financial integrity remains compromised beyond 2015. (OCC Appx. 37; R. 280 at 27). The PUCO ruled that DP&L may file, in a separate proceeding, to extend the service stability rider. through October 31, 2016. (OCC Appx. 37; R. 280 at 27). In addition, as a condition of implementing the extended service stability rider the PUCO stated that DP&L must file an application for a distribution rate case no later than July 1, 2014, and must file an application to modernize its electric distribution infrastructure through implementation of a smart grid plan and advanced metering infrastructure. (OCC Appx. 37-38; R. 280 at 27-28).

On September 6, 2013, the PUCO issued an Entry Nunc Pro Tunc to correct what it called "an administrative error" in the original Order. (OCC Appx. 66; R. 281 at 2). The PUCO changed the modified ESP's end date from December 31, 2016 to May 31, 2017, thus making the length of the modified ESP 41 months instead of 36 months. (OCC Appx. 66; R. 281 at 2). As a result, the PUCO changed the date that DP&L is expected to divest its generation assets to May 31, 2017. (OCC Appx. 66; R. 281 at 2). In the Entry Nunc Pro Tunc, the PUCO also changed the end date of the service stability rider from December 31, 2015 to December 31, 2016, meaning that the service stability rider will be in effect for three years, instead of two years, at an annual amount of $110 million. (OCC Appx. 66; R. 281 at 2). Regarding the service stability rider extension, the PUCO changed the start date from January 1, 2016, to January 1, 2017, meaning that the term of the extended service stability rider would be five months and the extended service stability rider would end on May 31, 2017. (OCC Appx. 66; R. 281 at 2). The

PUCO also reduced the amount of the extended service stability rider from $92 million to $45.8 million. (OCC Appx. 66; R. 281 at 2).

In addition, the PUCO amended the competitive bid auction products to 10 tranches of a 41-month product beginning January 1, 2014, 30 tranches of a 29-month product beginning January 1, 2015, and 30 tranches of a 17-month product beginning January 1, 2016. (OCC Appx. 66-67; R. 281 at 2-3). The 10 percent/40 percent/70 percent blending percentages contained in the Order remained the same. (OCC Appx. 67; R. 281 at 3).

Applications for rehearing were filed by several parties. Except for ruling on issues regarding the upcoming competitive bid auction, the PUCO granted rehearing on October 23, 2013 for the purpose of giving itself additional time to consider the issues. (R. 298).

On March 19, 2014, the PUCO issued its Second Entry on Rehearing. The PUCO denied almost all the arguments on rehearing concerning the service stability rider. In response to IEU-Ohio's contention that the service stability rider is an unlawful compensation structure for DP&L to charge customers for above-market capacity and energy revenue, the PUCO stated that the service stability rider is not a generation charge. Instead, the PUCO found it to be a financial integrity charge authorized pursuant to R.C. 4928.143(B)(2)(d). (OCC Appx. 70; R. 316 at 3). Regarding IEU-Ohio's assertion that the ESP is anticompetitive and violates Ohio antitrust law under R.C. 1331, the PUCO stated that R.C. 1331 is inapplicable to the case below and that jurisdiction over R.C. 1331 lies with state courts rather than the PUCO. (OCC Appx. 72; R. 316 at 5).

IEU-Ohio, OCC, Kroger and FirstEnergy Solutions ("FES") argued that the Order violates R.C. 4928.38, because it authorizes transition revenue or equivalent revenue. (*See* OCC

Appx. 72; R. 316 at 5). The PUCO responded that the service stability rider is not a transition charge because it is not designed to recover specific costs. (OCC Appx. 72-73; R. 316 at 5-6).

IEU-Ohio, OCC and FES also argued that the Order is unlawful and unreasonable because the service stability rider cannot be authorized pursuant to R.C. 4928.143(B)(2). All three parties argued that the service stability rider is not 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. (*See* OCC Appx. 73; R. 316 at 6). IEU-Ohio also asserted that the service stability rider is a non-bypassable generation-related rider, which is not one of the permitted charges under R.C. 4928.143(B)(2). (*See* OCC Appx. 73; R. 316 at 6). In rejecting the arguments, the PUCO stated that the record evidence demonstrates that the service stability rider is necessary for DP&L to provide stable and reliable distribution, transmission, and generation service. (OCC Appx. 74; R. 316 at 7). The PUCO also cited *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 ¶26, for the proposition that a finding of necessity is not a requirement pursuant to R.C. 4928.143(B)(2)(d). (OCC Appx. 75; R. 316 at 8). Rather, the PUCO stated, 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. (OCC Appx. 75; R. 316 at 8).

IEU-Ohio, FES, and OHA contended that the Order is unlawful and unreasonable because the service stability rider amount lacked record support. (*See* OCC Appx. 75; R. 316 at 8). The PUCO, however, said that it determined that the evidence, taking into account a reasonable balance between the differing forecasts and projections, supported an service stability rider amount of $110 million per year over the term of the ESP. (OCC Appx. 76; R. 316 at 9). In addition, the PUCO stated that it 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 service stability rider amount. (OCC Appx. 76; R. 316 at 9).

As for the extended service stability rider, the PUCO made several changes requested in applications for rehearing. The PUCO changed the end date for the extended service stability rider to April 30, 2017, one month prior to the end of the ESP. (OCC Appx. 83; R. 316 at 16). The PUCO, however, rejected DP&L's argument that the Order was unlawful and unreasonable because it limited the amount that DP&L could receive through the extended service stability rider. (OCC Appx. 79-80; R. 316 at 12-13). The PUCO also rejected DP&L's arguments that it was unlawful for the PUCO to place conditions on the extended service stability rider. (OCC Appx. 81-83; R. 316 at 14-16).

The PUCO also moved up the date that DP&L would be required to divest its generation assets. Based on new evidence presented in Case No. 13-2420-EL-UNC, the PUCO determined that DP&L should divest its generation assets no later than January 1, 2016, instead of May 31, 2017 as provided in the Order. (OCC Appx. 84-85; R. 316 at 17-18). And because the new divestiture deadline, the PUCO revised the competitive bid process blending schedule. (OCC Appx. 85-86; R. 316 at 18-19). In addition, the PUCO denied rehearing regarding whether its Entry Nunc Pro Tunc was unlawful because it substantively modified the Order. (OCC Appx. 98; R. 316 at 31).

On April 17 and 18, 2014, separate applications for rehearing of the Second Entry on Rehearing were filed by IEU-Ohio, OEG, DP&L, and OCC. (R. 318-321). On May 7, 2014, the PUCO issued a Third Entry on Rehearing granting the applications for the purpose of giving the PUCO additional time to consider the arguments. (R. 325).

On June 4, 2014, the PUCO issued a Fourth Entry on Rehearing denying the applications for rehearing filed by OCC, IEU-Ohio, and OEG in their entirety. The PUCO granted DP&L's application for rehearing in part and denied it in part.

DP&L claimed that the Second Entry on Rehearing was unreasonable or unlawful because it accelerated the competitive bid process auction schedule, which will cause substantial financial harm to DP&L. (*See* OCC Appx. 104; R. 326 at 3). The PUCO denied DP&L rehearing on the basis that DP&L failed to persuade the PUCO that the auction schedule is impracticable or that it jeopardizes DP&L's financial integrity. (OCC Appx. 104; R. 326 at 3). The PUCO also noted that the extended service stability rider mechanism provides DP&L with an opportunity to recover a financial integrity charge if it demonstrates, at that time, that its financial integrity has been jeopardized and if it has satisfied the other conditions the PUCO established. (OCC Appx. 104-105; R. 326 at 3-4).

DP&L also argued that the Second Entry on Rehearing was unlawful or unreasonable because it resulted from a miscommunication regarding DP&L's ability to divest its generation assets. (*See* OCC Appx. 105; R. 326 at 4). DP&L claimed that since the hearing, changed circumstances have forced DP&L to explore different business courses than that which it had planned at the time of hearing. (*See* OCC Appx. 105; R. 326 at 4). One possibility is the potential sale of DP&L's generation assets to a third party, which could occur as early as 2014. (*See* OCC Appx. 105; R. 326 at 4). DP&L contended 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. (*See* OCC Appx. 105; R. 326 at 4). The PUCO granted DP&L rehearing on this issue. (OCC Appx. 106; R. 326 at 5). The PUCO noted that market conditions are inherently unpredictable and subject to significant fluctuations over time. (OCC Appx. 106; R. 326 at 5). The PUCO also stated that it intended to retain oversight over the divestiture as provided by R.C 4928.17(E), while providing DP&L with the flexibility to transfer its generation assets to an affiliate or to a third-party. (OCC Appx. 106; R. 326 at 5). Based on evidence presented at the hearing in this case, the PUCO modified the deadline and directed DP&L to divest its generation assets no later than January 1, 2017. (OCC Appx. 106; R. 326 at 5).

The PUCO also rejected arguments by OEG, IEU-Ohio, and OCC that it is unreasonable for DP&L to collect the service stability rider after divestiture occurs. The PUCO found that the arguments were moot in light of its decision to establish January 1, 2017, as the deadline for DP&L to divest its generation assets. (OCC Appx. 110; R. 326 at 9). The PUCO also stated that the arguments rest on the false premise that the service stability rider and the extended service stability rider are generation-related charges intended to maintain the financial integrity of DP&L's generation business. (OCC Appx. 110; R. 326 at 9). Instead, the PUCO said, the service stability rider and extended service stability rider are financial integrity charges intended to maintain the financial integrity of the entire company, not just the generation business. (OCC Appx. 110; R. 326 at 9). In addition, the PUCO stated that its treatment of the service stability rider and the extended service stability rider is consistent with the treatment of stability riders approved for other electric utilities. (OCC Appx. 110; R. 326 at 9).

Both IEU-Ohio and OCC argued 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. (*See* OCC Appx. 110-111; R. 326 at 9-10). The PUCO rejected these arguments as procedurally improper, stating that they had previously been addressed in the Second Entry on Rehearing. (OCC Appx. 111-112; R. 326 at 10-11).

IEU-Ohio and OCC also asserted that the Second Entry on Rehearing is unreasonable because it failed to reduce the amount of the extended service stability rider, even though the term of the extended rider was reduced. (*See* OCC Appx. 112; R. 326 at 11). The PUCO denied this argument. The PUCO stated that because the extended service stability rider is a financial integrity charge rather than a generation-related charge, it scheduled the extended service stability rider to end before the ESP ends. This was to ensure that DP&L would not continue to collect the extended service stability rider in case a new SSO was not established at the end of the ESP term. (OCC Appx. 112; R. 326 at 11). The PUCO stated that the amount of the extended service stability rider is not contingent upon the period of collection, but instead is based upon the term of the ESP (i.e., 41 months), the final five months of which were used to determine the prorated amount for the cap on the extended service stability rider. (OCC Appx. 112; R. 326 at 11). Also, the PUCO noted that DP&L will need to demonstrate the financial need for the extended service stability rider to be authorized by the PUCO so that DP&L may be able to continue to provide stable and reliable retail electric service. DP&L must also satisfy the additional conditions for the extended service stability rider established by the PUCO. (OCC Appx. 112; R. 326 at 11). In addition, the PUCO stated that, if DP&L files an application to recover an extended service stability rider amount, interested parties will have a full and fair opportunity to present their arguments on the proper amount to be authorized at that time. (OCC Appx. 112-113; R. 326 at 11-12).

OCC filed an application for rehearing of the PUCO's Fourth Entry on Rehearing. OCC argued that DP&L's application for rehearing lacked the specificity required by R.C. 4903.10, and thus the PUCO acted unlawfully in granting DP&L rehearing in the Fourth Entry on Rehearing. (OCC Appx. 251-254; R. 328 at 4-7). The PUCO denied OCC rehearing on this issue. The PUCO stated that the absence of the words "unreasonable" or "unlawful" in an application for rehearing does not violate R.C. 4903.10. (OCC Appx. 117; R. 330 at 4).

IEU-Ohio filed an Appeal of the PUCO's orders with this Court on August 29, 2014. (R. 335). DP&L filed a Cross-Appeal on September 19, 2014 (R. 336), and on September 22, 2014, OCC filed a Second Notice of Appeal. (R. 337).

IV. ARGUMENT

PROPOSITION OF LAW NO. 1: The Public Utilities Commission acted unreasonably and unlawfully when it authorized an electric utility to charge customers for subsidies to competitive generation in an electric security plan.

In the proceeding below, DP&L sought to charge customers $330 million over the term of its electric security plan. The Utility styled its request for $330 million a "service stability rider." But it's a subsidy. As discussed below, a more apt name (and one OCC will use for purposes of its Brief) is "competitive service subsidy" charge.

DP&L structured its competitive service subsidy to collect revenues needed to maintain a return on equity ("ROE") of 7 to 11 percent. (R. 280 at 25). DP&L proposed that the charge be non-bypassable. That means all of DP&L's distribution customers pay the Utility for this charge, even if the customer is purchasing electric generation service from a competitive retail electric service supplier ("marketer"), and not from DP&L.

The PUCO approved DP&L's request and authorized DP&L to implement tariffs to collect the competitive service subsidy. (OCC Appx. 31-36; 62). It found that generation competition had caused the Utility's retail generation service revenues and overall profitability to decline. DP&L's Chief Financial Officer, Craig Jackson, described the "primary drivers" of DP&L's declining generation revenues and lower profits as (1) increased customer shopping (meaning retail competition), (2) declining wholesale energy prices, and (3) declining capacity prices. (OCC Supp. 192, 197, 209, 210). In other words, DP&L – under the Ohio General Assembly's electric restructuring -- isn't able to retain the generation revenues that it previously realized from providing regulated generation service. DP&L claimed that it suffered declining profits (measured by a declining return on equity) since 2010. (OCC Supp. 192).

It is indisputable that the decline in DP&L's profitability was from declining generation revenues related to the factors identified by Mr. Jackson. Yet the PUCO found that the proposed charge was not a generation charge (which would be disallowed by Ohio law). Instead, the PUCO called it a financial integrity charge directed to the utility as a whole (which the PUCO believes is allowed by Ohio law). It noted that if DP&L's financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service. (OCC Appx. 31). The PUCO observed that even though DP&L's businesses (transmission, generation, distribution) had been unbundled, DP&L is still not structurally separated. (OCC Appx. 32). Thus, it surmised that the losses in any of DP&L's businesses --including generation-- are financial losses for the entire utility. (*Id.*). And the PUCO noted that if one of the businesses suffers financial harm, it may impact the entire utility, adversely affecting its ability to provide electric service. (*Id.*).

But as explained below, the PUCO acted unreasonably and unlawfully in making customers pay the competitive service subsidy charge. The PUCO's defining of the charge is mere semantics. And that mislabeling of the charge is costing monopoly customers $330 million in subsidies to DP&L's competitive generation business that customers should not be paying under Ohio's electric law. The Court should reverse the PUCO. The PUCO should be directed to rescind its approval of the Utility's tariff that implements the competitive service subsidy charge.

A. Under R.C. 4928.38 a utility is "wholly responsible for whether it is in a competitive position" and must be "fully on its own in the competitive market" once the market development period ends.

Since October 5, 1999, retail electric generation service has been declared a competitive service under R.C. 4928.03. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 871 N.E.2d 1176, 2011-Ohio-4164, ¶50. As a competitive service, retail electric generation is no longer subject to traditional cost-based regulation. (R.C. 4928.03, OCC Appx. 127). Instead, retail electric generation in Ohio and the charges for it are to be established through the competitive market.

But for a period of time (until December 31, 2005), under R.C. 4928.38 (OCC Appx. 148), utilities were afforded some assistance in transitioning to the competitive market. That assistance was through "transition revenues," collected from utilities'customers. R.C. 4928.38 gave utilities the opportunity to apply for and collect transition revenues to cover "transition costs," as defined under R.C. 4928.39. (OCC Appx. 149).

DP&L seized the opportunity provided by R.C. 4928.38 and 4928.39. It applied for and was allowed to charge customers $441 million of transition revenues. (OCC Supp. 7). In receiving the transition revenues, DP&L became "wholly responsible for whether it is in a competitive position" following its market development period. (R.C. 4928.38). Under the law, DP&L may not continue to receive transition revenues or "any equivalent revenues" after the end of its market development period. R.C. 4928.38 (OCC Appx. 148). DP&L's market development period ended on December 31, 2005. (OCC Supp. 9).

On that date DP&L's transition to competition was supposed to be over. And the PUCO's authority to allow "transition revenues or any equivalent revenues" also ended:

> With the termination of that approved revenue source [transition revenues], the utility shall be on 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 ***.[2]

By definition, being "fully on its own in the competitive market" (the generation market), means that electric utilities' rates for retail generation service (and other services declared competitive) are no longer subject to cost-based regulation. It also means that electric utilities' generation service rates are no longer subsidized by their monopoly customers. Instead, if electric utilities continue to provide retail electric generation services, they must compete with other generation market participants for profits. And like other competitors, they must compete in a market that allows customers to switch providers and where wholesale energy prices fluctuate and capacity prices are uncertain. In other words, the General Assembly allowed electric utilities like DP&L a limited transition to competition, and then made them subject to the opportunities and risks of competition. The electric utilities are responsible for whether they succeed or fail in the new generation market.

A competitive service subsidy charge (the utility's so-called service stability rider) cannot be approved because it protects the utility, at its customers' expense, against the very market forces that the General Assembly intends to promote in Ohio. But the PUCO allowed DP&L to collect transition revenues or any equivalent revenues. The PUCO did not recognize the end to its authority. It violated R.C. 4928.38. (OCC Appx. 148).

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[2] The only exception to this prohibition relates to express authorizations found in R.C. 4928.31 through 4928.40. (OCC Appx. 137-151).Those provisions specifically relate to a utility's electric transition plan. DP&L's electric transition plan expired long ago. The exceptions, thus no longer apply.

B. The Public Utilities Commission acted unlawfully, violating R.C. 4928.38, when it authorized a utility to collect "transition revenues or any equivalent revenues," after the utility's market development period expired.

1. The competitive service subsidy charge allowed DP&L to unlawfully charge customers for transition revenue.

Under R.C. 4928.38 (OCC Appx. 148), utilities were given the opportunity to receive "transition revenues" beginning on the starting date (in 1999) of competitive retail electric service. Under the statute these "transition revenues" ended when the market development period ended. The General Assembly defined that end as December 31, 2005. DP&L and the PUCO are, in reality, extending the General Assembly's competitive transition end date into 2016, at tremendous and unauthorized cost to Ohio consumers.

The PUCO must determine the total amount of the "transition costs of the utility to be received as transition revenues***." The transition costs "shall be the just and reasonable transition costs" meeting certain criteria. The costs must be 1) prudently incurred; 2) legitimate, net, verifiable, and directly assignable or allocable to retail generation service provided to electric consumers in the state; 3) unrecoverable in a competitive market; and 4) costs that the utility would be otherwise entitled to an opportunity to recover. R.C. 4928.39 (OCC Appx. 149).

OCC witness Dr. Rose testified that the service stability charge collects transition revenues. (OCC Supp. 11). IEU-Ohio Witness Hess also testified that the service stability charge was nothing but an attempt to collect transition revenues to cover stranded investment costs. (OCC Supp. 105, 117-127). IGS Witness White similarly testified that the service stability charge amounted to another attempt to collect transition revenues. (OCC Supp. 166-168). Even DP&L Witness Chambers testified that if the service stability charge was designed to compensate the utility for its generation business, then it would be equivalent to a transition charge. (OCC Supp. 217-218).

But this testimony was rejected. The PUCO concluded instead that "the service stability rider is not the equivalent of authorizing transition revenue." (OCC Appx. 32). The PUCO offered as explanation that "DP&L does not claim its ETP [electric transition plan] failed to provide sufficient [transition] revenue." (OCC Appx. 32). As further support for its holding that the service stability charge does not constitute transition revenue, the PUCO stated that "DP&L continues to be responsible for offering SSO service to its customers and has demonstrated that the service stability rider is the minimum amount necessary to maintain its financial integrity to provide such service." (OCC Appx. 32). Finally, the PUCO concluded that its holding is consistent with its decision in the AEP ESP II case where it held that "AEP Ohio's RSR did not allow for the collection of inappropriate transition revenues or stranded costs." *Id.*

But the law does not allow a utility to collect additional transition revenues on such a basis. Transition revenues, such as the $441 million DP&L collected from customers through its 1999 electric transition plan, were designed to subsidize generation services during the transition to a competitive generation market. A firm deadline for their recovery was established. That deadline has passed.

DP&L's competitive service subsidy charge is designed to subsidize generation services that were supposed to be "fully on their own" by the end of 2005. The fact that the proposed service stability rider charge relates solely to generation service is well-established by the record below, which includes the testimony of DP&L's Chief Financial Officer, Mr. Jackson. He testified that DP&L's transmission and distribution revenues are adequate and would likely continue to be adequate through the term of the ESP. (Tr. Vol. I at 117-118).

The PUCO is a creature of statute. It may only exercise the authority given to it by the General Assembly. *Columbus S. Power Co. v. Pub. Util. Comm.,* 67 Ohio St. 3d 535, 620 N.E.2d

835 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St. 2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444 (1981). It had no authority to authorize DP&L to collect transition revenues after the market development period ended on December 31, 2005. Yet, nine years after the end of the market development period, the PUCO granted DP&L's application to collect $330 million from customers for transitioning to a competitive generation market. That competitive service subsidy charge once again gave DP&L transition revenues from its monopoly distribution customers. The law does not allow for the PUCO to grant electric utilities a series of transitions to the competitive market, funded by captive customers. One transition was more than enough for customers. The PUCO's decision should be reversed by this Court.

2. The service stability rider allows DP&L to unlawfully charge customers for "any equivalent revenues."

Under R.C. 4928.38 after the market development period, the PUCO "shall not authorize the receipt of transition revenues *or any equivalent revenues* by an electric utility." (OCC Appx. 148), emphasis added). The prohibition on collecting "any equivalent revenues" precludes a wide range of revenues from being collected. "Any" is used to refer to one or some of a thing or number of things, no matter how much or many.[3] "Equivalent" when used as an adjective, refers to being equal in force, amount, or value.[4] Thus, the PUCO is prohibited from authorizing the collection of the competitive service subsidy charge if it is designed to collect any revenues that are similar to the transition revenues precluded from further recovery by R.C. 4928.38.

As discussed above, because the competitive service subsidy charge compensates DP&L for costs that it cannot collect in the competitive generation market, it has the same purpose as customer-funded transition revenues. The competitive service subsidy charge will permit DP&L

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[3] *See, e.g.*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/any.

[4] *See, e.g.*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/equivalent.

to collect customer-funded revenues to compensate it for less generation revenues it is collecting due to competition. DP&L has lost customers due to retail competition. (OCC Supp. 191-192).

But stranded costs were supposed to be addressed through transition revenues authorized under R.C. 4928.38. In fact, the PUCO, back in 1999, authorized DP&L to collect $441 million of transition revenues from customers. *In the Matter of the Application of Dayton Power & Light Company for Approval of Transition Plan, Pursuant to 4928.431, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized under 4928.31 to 4928.40, Revised Code*, Pub. Util. Comm. Case No. 99-1687-EL-ETP, Opinion and Order (Sept. 21, 2000). In that case the PUCO authorized DP&L to collect transition revenues, through a "customer transition charge," for its stranded generation costs. (OCC Supp. 7-8).

Mr. Luciani, DP&L's witness in the 1999 case, explained the need for transition revenues, tying them to the retail market price for electricity, customer switching, and the rates established through PUCO regulation:

> With customer choice, if the utility's rates for retail generation service exceed the retail market price of electricity, it is reasonable to expect customers to switch to another generation supplier. As a result, the utility may be unable to recover the plant investment costs that it prudently incurred to meet its obligation as a regulated utility to serve retail customers in reliance upon its ability to charge the customers the rates established by the PUCO. (OCC Supp. 8, 138).

Fast forwarding 13 years to the present, the PUCO has again authorized DP&L to collect revenues that are equivalent to transition revenues under R.C. 4928.38. DP&L's competitive service subsidy charge is now linked to "financial integrity" claims—claims that stem from competitive generation service or "customer choice." Like its claims in 1999, DP&L's financial integrity claims emanate solely from the risk associated with generation. DP&L defined these risks as including the risk that the forward gas curve will decrease (causing lower electric prices); the risk that there will be increased competition in DP&L's service territory (customer switching); and the risk associated with transitioning to a 100% competitive process (loss of standard service offer regulated revenues). (OCC Supp. 12).

DP&L's proposed rates for retail generation service (standard service) exceed the projected market price for electricity. (OCC Supp. 60). DP&L will lose revenues as a result. DP&L's competitive service subsidy charge combats this revenue loss, with customers on the losing end. It provides DP&L with $330 million in revenues (collected from customers), based on achieving profits of between 7% and 11%.

The competitive service subsidy revenues are the equivalent of transition revenues. They have the same effect as the transition revenues. The competitive service subsidy revenues are designed to compensate the utility as it faces the challenges of competition for retail generation service. The additional revenues provided under the competitive service subsidy charge are necessitated by the Utility's generation business. In Ohio retail electric generation is subject to competition. The PUCO is precluded by law from authorizing utilities to collect "any equivalent revenues."

Here we have a sad irony. DP&L was successful in obtaining a subsidy to increase customers' rates so it could offset expected declines in what customers could be charged for electric generation (due to lower prices for the natural gas that is burned in power plants). But these price declines that DP&L is thwarting are precisely the sort of benefit from the restructured market that the General Assembly allowed for customers. The Court should reverse to give customers the benefit of the market that they are losing.

The Court should reverse the PUCO's Order allowing transition revenues or any equivalent revenues to be collected through a $330 million competitive service subsidy charge.

C. **The Public Utilities Commission acted unlawfully, violating R.C. 4928.02(H), when it required a utility's captive distribution customers to subsidize the utility's costs of providing competitive retail electric generation service.**

R.C. 4928.02(H) (OCC Appx. 125) declares that it is the state's policy to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa." The PUCO violated this state policy when it required DP&L's distribution customers to subsidize DP&L's generation service.

Retail electric generation is a competitive retail electric service under R.C. 4928.03. (OCC Appx. 127). Retail electric distribution is a non-competitive service under R.C. 4928.15(A). (OCC Appx. 134). R.C. 4928.02(H) specifically prohibits public utilities from using revenues from non-competitive retail electric service components (such as distribution service) to subsidize the cost of providing competitive retail electric service (such as generation service), or vice versa. "In short, each service component was required to stand on its own." *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶4. The unbundling of components required by S.B.3 "ensured that an electric utility would not subsidize the competitive generation portion of its business by allocating generation expenses to the regulated distribution service provided by the utility. Conversely, it ensured that distribution service would not subsidize the generation portion of the business." *Id.*

A standard service offer provided under a utility's electric security plan is an offer to provide all retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. R.C. 4928.141. As part of its standard service offer, DP&L sought and received PUCO approval of the non-bypassable competitive service subsidy charge. (OCC Appx. 32). All customers pay this charge, including distribution-only customers (shopping customers). Thus, the competitive service subsidy charge is unquestionably a charge imposed on all of DP&L's distribution customers. Yet, the need for the competitive service subsidy charge is tied to only one component of service—generation. (OCC Supp. 197, 210). Allowing DP&L to use non-competitive distribution revenues to subsidize the costs of providing competitive generation service violates R.C. 4928.02(H).

The PUCO attempts to side-step the law by characterizing the service stability charge exclusively as a "financial integrity charge" and not a "generation" charge (OCC Appx. 32, OCC Appx. 70). But the PUCO's semantics are contradicted by the evidence adduced at the hearing.

The record shows the competitive service subsidy has been granted solely because the profits from the generation portion of DP&L's business are down. (OCC Supp. 51, 116, 197, 210-212). DP&L Witness Mr. Jackson testified that the revenues DP&L receives from its other business lines (transmission and distribution) are "adequate today" and "adequate over the five-year proposed ESP period." (OCC Supp. 212-215). That leaves only generation service as the cause of DP&L's lower profits – profits that the PUCO pumped up when it ordered customers to pay $330 million in competitive service subsidies.

And even if one were to accept the claim that the competitive service subsidy charge is a "financial stability" charge (and not a "generation" charge), it is indisputable that the charge is paid by distribution customers. And if considered a financial stability charge, it supports DP&L as a whole. It would support all three of DP&L's services: generation, transmission, and distribution. Thus, calling it a "financial integrity charge" does not preclude this Court from finding that there is an unlawful subsidy. This is because the competitive service subsidy is paid for by distribution customers, and if it supports the Utility as a whole (as Appellees claim), it must by definition support the generation component of DP&L's services.

To conclude that there is no subsidy where the revenues theoretically (but not factually) support all three of the Utility's bundled services would undermine the statutory unbundling mandate under S.B. 3. The purpose of the unbundling mandate was to prevent cross-subsidization which impedes competition. *Migden-Ostrander v. Pub. Util. Comm.,* 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶4. But here, the PUCO's ruling permits a utility which has not unbundled its services to profit from cross-subsidization—something that it is prohibited from under R.C. 4928.02(H).

When the PUCO allowed DP&L to collect a competitive service subsidy charge from all customers, including distribution-only customers, it authorized what S.B. 3 and R.C. 4928.02(H) prohibit: cross-subsidization between two of the three major electric service components. OCC Witness Rose recognized this and testified that the stability charge would subsidize DP&L's generation service. (OCC Supp. 15). OCC Witness Duann also identified the service stability rider as an anti-competitive subsidy from non-competitive service (distribution) to a competitive service (generation). (OCC Supp. 57-58). Dr. Duann described the anti-competitive nature of the subsidy:

> No other business entity competing to supply generation service in DP&L's service territory receives this kind of subsidy. The collection of money through the service stability rider by DP&L gives DP&L an unfair advantage in competing with other electricity suppliers providing electric generation service within DP&L's service territory. (OCC Supp. 58).

This Court has in the past recognized the importance of the state policy against cross-subsidization. In *Elyria Foundry Corp. v. Pub. Util. Comm.,* 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, the Court was asked to strike down a subsidy from distribution customers to a utility's competitive service offering (generation). The PUCO had permitted a utility to either defer fuel costs (generation costs) for later collection from distribution customers or apply fuel revenues to decrease distribution case deferrals. *Id.* at ¶¶43-45. The Appellant claimed the PUCO authorized an unlawful and unreasonable subsidy violating R.C. 4928.02(G).[5] *Id.* at ¶47. This Court agreed. *Id.* at ¶50.

Here too, the PUCO violated the law when it allowed DP&L to charge distribution customers a $330 million "financial stability" charge solely necessitated by the Utility's competitive offering of generation service. The Court should reverse the PUCO's Order on this issue and remand to the PUCO with an order to modify the electric security plan to remedy the statutory violation.

D. The Public Utilities Commission acted unlawfully and unreasonably when it required customers to underwrite a utility's service that has been declared competitive under R.C. 4928.03.

DP&L's generation business was declared a competitive service under R.C. 4928.03. (OCC Appx. 127). It was deregulated. In other words, competitive generation service is no longer subject to traditional cost-based regulation. (OCC Supp. 48). When the PUCO approved the competitive service subsidy charge, it undermined that objective by authorizing an overall profit for DP&L's combined competitive (generation) and non-competitive (transmission and distribution) services. The PUCO authorized a Return on Equity ("ROE") target of 7 to 11 percent. (OCC Appx. 35). The PUCO approved a competitive service subsidy charge of $110 million per year for each of three years from January 2014 through December 2016. (OCC Appx. 66).

While the PUCO claimed that it did not exactly determine the profits (ROE) the Utility will collect (OCC Appx. 35), it nonetheless established a pot of dollars for the Utility. That pot of dollars represents guaranteed revenues for the Utility. This is regulation. Undoubtedly.

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[5] Under S.B. 221, new subsections were inserted into R.C. 4928.02, and thus the subsections were redesignated. Subsection (G) became the current subsection (H).

Instead of requiring DP&L to tackle the challenges of market forces on its own (like other competitors), the PUCO awarded DP&L $330 million to be collected from captive distribution customers. As OCC Witness Dr. Rose testified, setting the competitive service subsidy charge to ensure DP&L's "overall creditworthiness" re-introduces regulatory protection for the deregulated portion of DP&L's business. (OCC Supp. 6).

Protecting DP&L, by guaranteeing revenues and profits, conflicts with the goals of S.B. 221. As Dr. Rose testified, requesting that all customers ensure the financial integrity of DP&L requires customers to guarantee earnings for both the regulated (i.e., distribution) and non-regulated (i.e., generation) portions of DP&L's business. This interferes with how a competitive market should operate. (*Id.* at 16).

Each participant in Ohio's generation services market is supposed to be responsible for its own loss or profit. (OCC Supp. 73). This is the premise of R.C. 4928.38. Each utility, after the market development period, "shall be fully on its own in the competitive market."

But the PUCO's ruling authorizing the competitive service subsidy disregards the statutes and the premise of the entire statutory scheme. Instead of deregulating retail electric generation, the PUCO's Order regulates. But the General Assembly has spoken. Generation is no longer regulated. It is to be provided through a competitive market. The PUCO erred when it disregarded the clear legislative purpose underlying these laws. The Court should reverse.

PROPOSITION OF LAW NO. 2: The General Assembly did not permit the PUCO to allow electric security plans to include items for cost recovery that are not enumerated in R.C. 4928.143(B)(2). ***In re: Columbus S. Power Co.*****, 128 Ohio St.3d 512.**

R.C. 4928.143(B)(2) (OCC Appx. 131) permits an electric distribution utility to include certain enumerated provisions in its electric security plan. This Court has ruled that electric security plans can only include provisions that are listed following R.C. 4928.143(B)(2). *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶32. The PUCO approved a charge to safeguard the financial integrity of DP&L's consolidated operations – including generation. Does this charge meet the requirements of R.C. 4928.143(B)(2)? No, it does not. The Court should reverse the PUCO in this regard.

In its Order, the PUCO found that the Utility's competitive service subsidy charge meets the criteria of R.C. 4928.143(B)(2), because the charge satisfies subsection (d). (OCC Appx. 31). Under R.C. 4928.143(B)(2)(d), in order for a provision such as the competitive service subsidy charge to be lawful under a utility's electric security plan, it must satisfy three criteria. First, the provision must be a term, condition, or charge. Second, the provision must relate to one of the following categories: 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. Third, the provision must also have the effect of stabilizing or providing certainty regarding retail electric service.

The PUCO determined that DP&L's competitive service subsidy charge met these three criteria. (OCC Appx. 31). The PUCO found the provision was a term, condition or charge, meeting the first criteria. The PUCO ruled that the competitive service subsidy relates to "default service" and "bypassability" -- meeting the second criteria. And the PUCO also found that the competitive service subsidy charge satisfies the third criteria because it stabilizes and provides certainty for retail electric service. (OCC Appx. 31).

But as explained below, the PUCO misconstrued the statute and the evidence in this case. To the contrary, the competitive service subsidy charge can only satisfy the first criterion-- not the second and third criteria. Consequently the Court should reverse the PUCO's decision that

R.C. 4928.143(B)(2)(d) permits DP&L to collect its competitive service subsidy charge from customers.

A. The PUCO erred in finding that the service stability charge relates to "default service" which is a listed item under R.C. 4928.143(B)(2)(d).

The PUCO found that "default service" as used in subsection (d) of R.C. 4928.143(B)(2) is an electric utility's standard service offer provided either through an ESP or MRO. (OCC Appx. 31). The PUCO then held that because the competitive service subsidy charge enables DP&L to provide SSO service, it is related to "default service." But it is wrong for the PUCO to engage in statutory construction when there is a clear and definite meaning to the term "default service." And the PUCO's interpretation of the term is inconsistent with how other statutes have defined both default service and "standard service offer."

1. Default service is defined under R.C. 4928.14 as provider of last resort service. Since the utility failed to produce measurable and verifiable evidence of its provider of last resort costs, the PUCO erred in approving it.

It is well settled that where the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory construction. *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d. 413 (1944), ¶5, syllabus). An unambiguous statute is to be applied, not interpreted. *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 404 N.E.2d 159 (1980). "In such a case, we do not resort to rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in * * * a particular statute--we rely only on what the General Assembly has actually said." *Muenchenbach v. Preble Cty.*, 91 Ohio St.3d 141, 149, 742 N.E.2d 1128 (2001) (Moyer, C.J., dissenting). Thus, legislative intent may be inquired into only if the statute is ambiguous on its face.[6]

Here, there is no ambiguity in the law. "Default service" is legislatively defined. Under R.C. 4928.14 (OCC Appx. 128), "default service" is defined as the provision of retail electric generation service by the utility where the non-utility supplier (marketer) fails to provide retail electric generation service to customers. According to the statute, if a supplier fails to provide retail electric generation service to customers within the utility's service territory, the customers of the supplier "default" to the utility's standard service offer until they choose an alternative supplier.

This Court has on a number of occasions addressed the default service requirements of R.C. 4928.14 (OCC Appx. 128). *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.,* 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195; *In re Columbus S. Power Co., et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶22-30; *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶18-26. This Court has recognized that "default service" is related to a utility's provider of last resort ("POLR") obligations. For instance, the Court explained that provider of last resort costs are "charges incurred by an incumbent electric distribution utility for risks associated with its statutory

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[6] *See Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96-97, 573 N.E.2d 77 (1991), where this Court summarized the rules of statutory construction as follows: "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation * * *. However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent * * *. The primary rule in statutory construction is to give effect to the legislature's intention * * *. Legislative intent must be determined from the language of the statute itself * * *, as well as from other matters, see R.C. 1.49. In determining intent, it is the duty of the court to give effect to the words used, not to delete words used or insert words not used." (Citations omitted).

obligation under R.C. 4928.14(C), as the *default provider*, or provider of last resort, for customers who opt for another provider who then fails to provide service." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶4, footnote 2 (citation omitted). *See also Constellation New Energy, Inc. v Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶39, footnote 5 (describing POLR cost as costs incurred by the electric distribution utility for risks associated with its obligation as the default provider for customers who shop and then return for generation service).

Even the PUCO itself has determined that the default service requirements under R.C. 4928.14 relate to provider of last resort obligations. (OCC Appx. 128). The PUCO made this finding just a few years ago in another electric security plan proceeding. *In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Pub. Util. Comm. No. 08-917-EL-SSO, Order on Remand at 18 (Oct. 3, 2011). The law has not changed since the PUCO last applied the default service language to mean provider of last resort. Since the law is unchanged, the PUCO's application of the law should not have changed.

As indicated, R.C. 4928.14 clearly defines default service as pertaining to the need to serve returning customers. Definitions provided by the General Assembly are to be given great deference in deciding the scope of particular terms. *Good Samaritan Hospital v. Porterfield*, 29 Ohio St.2d 25, 30, 278 N.E.2d 26 (1972). Indeed, this Court has noted that "the General Assembly's own construction of its language, as provided in definitions, controls in the application of a statute." *Ohio Civil Rights Comm. v. Parklawn Manor*, 41 Ohio St.2d 47, 50, 322 N.E.2d 642 (1975).

"Default service" as defined by the General Assembly, the Ohio Supreme Court, and the PUCO means service provided by the electric distribution utility that must be offered if suppliers are unable to continue to serve customers who have switched from the utility to a supplier. And default service can include competitive and non-competitive components. *See Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 492, 2008-Ohio-990, 885 N.E.2d 195, ¶27 (the Court found that rate base recovery to build and operate a generation facility was an allowable *non-competitive* cost associated with POLR, and determined that the PUCO's approval must be given under R.C. Chapters 4905 and 4909).

In contrast, a standard service offer can only consist of "competitive" components of retail electric generation service. In R.C. 4928.141 (OCC Appx. 129), the General Assembly defines the standard service offer as "all *competitive* retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." (Emphasis added). (R.C. 4928.141, OCC Appx. 129). This distinction alone shows the fallacy of the PUCO's conclusion that standard service offer equals default service. A standard service offer cannot mean the same as default service because of how the General Assembly has limited the standard service offer to competitive components; at the same time the Court has construed default service to include competitive and non-competitive components.

This Court should conclude that there is no need to construe "default service" because it is clearly defined under R.C.4928.14. (OCC Appx. 128). As defined in that statute, "default service" means provider of last resort service; it does not mean standard service offer service. And the Court has held that for a provider of last resort charge to be authorized, the electric utility must show measurable and verifiable evidence of POLR costs. *In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan, an Amendment* *to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Pub. Util. Comm. No. 08-917-EL-SSO, et. al. Order on Remand at 29 (Oct. 3, 2011). But DP&L did not produce measurable and verifiable evidence of its provider of last resort costs, as the PUCO has ruled it must, to justify a competitive service subsidy charge as provider of last resort related.

Thus, the PUCO erred when it allowed DP&L to charge customers $330 million for a competitive service subsidy, on a premise that the standard service offer equates to default service under the statute. (OCC Appx. 31). There is no statutory justification for approving the competitive service subsidy charge as "default service" under R.C. 4928.143(B)(2)(d).

2. If statutory construction is necessary, the Court should construe the statute in light of R.C. 1.47 and 1.49. In doing so, it should find that the PUCO erred as a matter of law in equating default service with the standard service offer.

As explained above, the term "default service" has meant a service related to the utility's obligation as the provider of last resort. The term was defined this way by the General Assembly. It has been applied this way by the Court. And, prior to this case, it has been applied this way by the PUCO. Thus, there is no need for this Court to interpret the term "default service."

If, however, the Court determines that "default service" as used in the context of R.C. 4928.143(B)(2)(d) (OCC Appx. 131) requires further interpretation, it should look to the rules of statutory construction in Ohio. Those standards include R.C. 1.47 (OCC Appx. 119) and 1.49 (OCC Appx. 120). *Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 190, 404 N.E.2d 159 (1980) (where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke the rules of statutory construction to arrive at the legislative intent).

In statutory construction, the primary rule is to give effect to the legislature's intention. *Carter v. Division of Water*, 146 Ohio St. 203, 65 N.E.2d 63, syllabus (1946). To ascertain the legislature's intent, courts rely upon ordinary principles of statutory construction including those principles in the Ohio Revised Code. *Stewart v. Trumbull Cty. Bd. of Elections*, 34 Ohio St.2d 129,130, 296 N.E.2d 676 (1973). Although there are many rules of statutory construction, for purposes of this case, the Court should focus on two standards in particular: R.C. 1.47 and 1.49. (OCC Appx. 119-120).

Under R.C. 1.47 (OCC Appx. 119), when a statute is enacted it is presumed, inter alia, that the entire statute is intended to be effective and a just and reasonable result is intended. This Court has construed this to mean that "words in statutes should not be construed to be redundant, nor should any words be ignored." *East Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988).

Further this Court has acknowledged that words in the statute do not exist in a vacuum. *D.A.B.E. Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 255, 2002-Ohio-4172, 773 N.E.2d 536. Indeed the Court has noted that it is "axiomatic in statutory construction that words are not inserted into an act without some purpose." *State ex rel. Carmean v. Board of Education*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960). Accordingly, courts must give effect to the words expressly used in a statute rather than deleting words used, or inserting words not used, in order to interpret an ambiguous statute. *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995).

R.C. 1.49 (OCC Appx. 120) provides that when a statute is ambiguous, a court may consider, inter alia, the consequences of a particular construction in determining the intent of the legislature. If the construction of the statute produces unreasonable or absurd results it should be avoided. *State ex rel. Bolin v. Ohio Environmental Protection Agency*, 82 Ohio App.3d 410, 413, 612 N.E.2d 498 (1992) (holding that a strong presumption exists in favor of statutory construction which avoids absurd results).

Under these rules of statutory construction the PUCO's statutory analysis is in error. If "default service" merely means the standard service offer, then the General Assembly would have used "standard service offer" instead of "default service." Under R.C. 1.47(B) (App. 119), the entire statute is intended to be effective. "The presumption always is that every word in a statute is designed to have some legal effect, and putting the same construction on a statute, every part of it is to be regarded and so expounded if practicable, as to give some effect to every part of it." *Richards v. Market Exch. Bank Co.,* 81 Ohio St. 348, 90 N.E. 1000 (1910). One must presume that the General Assembly specifically chose the term "default service" for a purpose. Instead of inserting a new term—standard service offer —for the original term "default service" the Court must leave the statute intact. Otherwise, the meaning of the statute changes and the legislative intent is disregarded.

Additionally, if one were to accept the PUCO's legal analysis—whereby "default service" means "standard service offer"—then absurd results could be expected. "Standard service" encompasses much more than" default service" or provider of last resort.

Under R.C. 4928.141 (OCC Appx. 129), a standard service offer is defined as "all competitive retail electric services" necessary to maintain essential electric service to customers. "Retail electric services" include a whole host of components including generation, aggregation, power marketing, power brokerage, transmission, distribution, ancillary service, metering service, and billing and collection service. (R.C. 4928.01(A)(27) (OCC Appx. 124 A-G). "Competitive" retail electric service is further defined as retail electric service components that have been declared competitive.

And if default service means "standard service offer," any electric security plan provision related to standard service -- generation, aggregation, power marketing, power brokerage, transmission, distribution, ancillary service, metering service, and billing and collection service. -- would be permissible under subsection (d). That type of interpretation virtually renders subsection (d) and the entirety of R.C. 4928.143(B)(2) meaningless. If the electric security plan may include charges simply relating to the standard service offer (in lieu of "default service") then there is no limit on charges under subsection (d), other than that the charges stabilizes or provide certainty. Indeed, under an electric security plan, all provisions are by definition related to the standard offer.

The PUCO's interpretation, if accepted, would open the floodgates to all sorts of charges. The PUCO and the Court should consider the consequences of this particular construction when construing the statute. *See* R.C. 1.49 (E) (OCC Appx. 120). Additionally, this approach is contrary to the General Assembly's express intent limiting the provisions of an electric security plan. The Court's precedent is to limit the electric security plan provisions to the express terms contained in the law. *In re Columbus S. Power Co., et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 32. The PUCO's interpretation is inconsistent with the Court's holding.

Thus, the Court should find that "default service" as used in R.C. 4928.143 is not synonymous with "standard offer service." It should reject the PUCO's interpretation and find as a matter of law that the PUCO erred in equating default service with standard service. *See, e.g., East Ohio Gas Co. v. Pub. Util. Comm.,* 39 Ohio St.3d 295,299,530 N.E.2d 875 (1988) (where the Court found that the PUCO erred in construing R.C.4905.03(A)(6) when it treated the phrase "affiliated with" as synonymous with "under the control of.").

B. The PUCO erred in finding that the service stability charge relates to "bypassability," which is a listed item for recovery under R.C. 4928.143(B)(2)(d).

The PUCO determined that the service stability charge is related to "bypassability"—one of the listed items under R.C. 4928.143(B)(2)(d) that can be allowed for charges to customers.

(OCC Appx. 131). This conclusion is apparently based on the PUCO's finding that the service stability rider is a non-bypassable charge. (OCC Appx. 31).

Unlike "default service," "bypassability" is not defined by the General Assembly. Thus, the PUCO can engage in statutory interpretation. But in undertaking this task, the PUCO must do so in a reasonable manner. And it should consider Ohio's Rules of Statutory Construction and the case law that has developed under those rules.

As discussed earlier under R.C. 1.49(E) (OCC Appx. 120), if statutes are construed, one must consider the consequences of a construction. Unreasonable or absurd results should be avoided. But the PUCO did not consider the consequences of interpreting the term "bypassability." It failed to realize the unreasonable or absurd results from if its statutory analysis. All utility charges are either bypassable or non-bypassable. And if the PUCO's interpretation is adopted there is no limit to the charges that may be sought.

That type of interpretation is unreasonable. It renders subsection (d) virtually meaningless and is contrary to the General Assembly's express intent (as construed by the Ohio Supreme Court) to place limits on the provisions that an electric utility may include in its electric security plan. *In re Columbus S. Power Co., et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 32. For these reasons, the PUCO erred. The Court should reverse the PUCO's Order.

C. The PUCO erred in finding that the service stability charge has the effect of stabilizing or providing certainty regarding electric service.

As stated above, the PUCO erred in finding that the competitive service subsidy charge is related to "default service" or "bypassability" under R.C. 4928.143(B)(2)(d). Thus, the second part of the three-part analysis – determining that the charge fits within the categories enumerated in the statute – was not met. But the PUCO also erred in finding that the competitive service subsidy charge met the third criterion of the statute. That criterion requires the provision to stabilize or provide certainty regarding retail electric service.

The PUCO found that the competitive service subsidy would stabilize or provide certainty regarding retail electric service. (OCC Appx. 31-32). It also found that if DP&L's financial integrity "becomes further compromised, it may not be able to provide stable or certain retail electric service." (OCC Appx. 32). The PUCO noted that DP&L is not structurally separated and thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility. (OCC Appx. 32). The PUCO then concluded that the competitive service subsidy charge will provide stable revenue to DP&L to maintain its financial integrity.

But the PUCO misses the point. The statute is directed to providing *certainty regarding retail electric service, not certainty of revenues for the utility*. The words of the statute state that the "terms, conditions, or charges" must "have the effect of stabilizing or providing certainty regarding retail electric service." But the PUCO reads the language to allow any provision that enriches the utility so long as the utility can show that it needs revenues in order to provide service. In other words, under the PUCO's interpretation, as long as the provision stabilizes the utility's earnings, it is permissible.

Such a liberal construction of the statute conflicts with Ohio's rules of statutory construction. Had the General Assembly wanted to allow more permissive structuring of an electric security plan, it would have inserted language to that effect. It did not. The statute is written from the perspective of the customer and requires certainty regarding retail electric service, not certainty of earnings for the utility.

The doctrine of *expressio unius est exclusio alterius* provides that to express or include one thing implies the exclusion of the other or of the alternative.[53] Under that doctrine, the General Assembly provided authority to the PUCO to approve specific provisions that promote *stability and certainty regarding retail electric service.* It did not authorize a provision that promotes *stability and certainty of earnings for the utility.*

The PUCO cannot rewrite the law. "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts." *Thompson Elec., Inc. v. Bank One, Akron, N.A.*, 37 Ohio St.3d 259, 264, 525 N.E.2d 761 (1988) (remaining citation omitted). R.C. 4928.143(B)(2)(d) is clear and unambiguous.

The PUCO's attempt to interpret the words in the statute to justify approving the stability charge under R.C. 4928.143(B)(2)(d) is unlawful and unreasonable. The Court should reverse the PUCO.

PROPOSITION OF LAW NO. 3: The Public Utilities Commission acted unlawfully when it amended its Opinion and Order by an Entry Nunc Pro Tunc that authorized an additional $110 million in rate increases, delayed giving consumers the benefit of a competitive bid auction for the standard service offer price, and failed to state the findings of fact required by R.C. 4903.09.

A. The PUCO's September 6, 2013 Entry Nunc Pro Tunc exceeded the allowable scope of a nunc pro tunc order.

Through its September 6, 2013 Entry Nunc Pro Tunc, the PUCO made broad substantive changes to its September 4, 2013 Order – not merely corrections for typographical errors and the like. The PUCO: 1) delayed the SSO being 100% competitively bid by an additional five months—from January 1, 2017 until June 1, 2017; 2) gave DP&L an additional five months—from December 31, 2016 until May 31, 2017—to divest its generation assets; 3) extended the period of the ESP for an additional five months, also from December 31, 2016 until May 31, 2017; 4) extended the service stability rider a full year, which means that customers have to pay

DP&L an additional $110 million in 2016; and 5) made the extended service stability rider available to DP&L in 2017 in the amount of $45.8 million. (OCC Appx. 65-67; R. 281). The Nunc Pro Tunc Entry cost consumers money.

These changes constituted substantial amendments to the PUCO's Order, exceeding the allowable scope of a nunc pro tunc order. Ohio law has been clear since this Court's holding in 1928 in *Helle v. Pub. Util. Comm.* that "[t]he province of a *nunc pro tunc* entry is to correct the record of the court in a case so as to make it set forth an act of the court, which though actually done at a former term thereof, was not entered upon the journal; and it cannot lawfully be employed to amend the record so as to make it show that some act was done at a former term, *which might or should have been,* but was not, then performed." *Helle v. Pub. Util. Comm.*, 118 Ohio St. 434, 440, 161 N.E. 282 (1928), citing *Cleveland Leader Printing Co. v. Green*, 52 Ohio St. 487, 40 N.E. 201, 49 Am. St. Rep. 725 (1895) (emphasis in original). The Court further held, "the proper office of a *nunc pro tunc* order is to correct the record so as to cause it to show an act of the court which, though actually done at a former term, was not entered on the journal." Id., citing *Huber Mfg. Co. v. Sweny,* 57 Ohio St. 169, 48 N.E. 879 (1897).

In *Interstate Motor Transit v. Pub. Util. Comm. of Ohio*, 119 Ohio St. 264, 163 N.E. 713 (1928), this Court further explained the proper use of a nunc pro tunc order. There, the PUCO had orally granted a certificate to a common carrier, but before the certificate was written, the PUCO amended the route the certificate covered. 119 Ohio St. at 268. The Court considered the *Helle* case and stated:

> [W]hen an irregular route certificate is applied for, and an irregular route certificate is in fact granted, the commission may not at a later date, by a *nunc pro tunc* entry, change that which was done from an irregular to a regular route, **by merely saying that it was the intention of the commission** to issue a certificate for a regular instead of an irregular route, * * * The office of a *nunc pro tunc* is

> **not to change** what the court or the commission **in fact did and recorded**, but is to record that which was in fact done, but was not recorded.

Id. at 270. (Emphasis added). The Court, in *Interstate*, held that the *Helle* holding did not apply because in *Interstate* the PUCO had never memorialized its decision so it was authorized to amend it prior to issuing the certificate. *Id.* That is not the case in this proceeding, however.

In this case, the PUCO issued a written Order on September 4, 2013, and then two days later, on September 6, 2013, issued a Nunc Pro Tunc Entry amending its September 4 Order. The Nunc Pro Tunc Entry made multiple substantive changes to the Order, including among other things extending the term of the ESP from 36 to 41 months, extending the competitive service subsidy a full year and making the extended service stability rider available to DP&L in 2017. The impact of these changes to the September 4, 2014 Opinion and Order is a higher price tag—by more than $100 million—to DP&L's customers.

Notwithstanding the magnitude of these changes, the PUCO explained only that the changes were "[d]ue to an administrative error * * *." (OCC Appx. 66; R. 281 at 2). Because of this "administrative error," according to the PUCO, the September 4, 2013 Order "does not reflect the decision that the Commission **intended** to issue, including the length of the modified ESP period." (Emphasis added.) (*Id.*)

The PUCO's statement that the Entry Nunc Pro Tunc was designed to reflect its *intended* decision is, consistent with *Helle* and *Interstate*, indicative that it exceeded the permitted use of an Entry Nunc Pro Tunc to correct the entry to reflect the action that was actually taken. The Entry Nunc Pro Tunc reflected a significantly different result than that voted upon at the PUCO's public meeting and could not reasonably be construed to be the action taken on September 4, 2013.

To modify its Order in such a substantive way required adherence to a different law with unique procedures. That different law is R.C. 4903.10, for applications for rehearing. *Discount Cellular, Inc. v. Pub. Util. Comm.,* 112 Ohio St. 3d 360, 859 N.E. 2d 957, 2007 Ohio 53 (2007); R.C. 4901.08. Further, the PUCO's rule, Ohio Admin. Code 4901-1-35(B), would have allowed for parties such as the Consumers' Counsel to file a memorandum contra opposing an application for rehearing that proposed what was considered in the Entry Nunc Pro Tunc. No entry for rehearing from DP&L or any party was pending to change the PUCO's Order at the time it issued its Entry Nunc Pro Tunc. And the Entry Nunc Pro Tunc reflected a significantly different result than that voted upon by the PUCO in its public meeting of September 4, 2014. It cannot reasonably be construed to be the same action taken on September 4, 2014. Consequently, the Entry Nunc Pro Tunc is unlawful and should be vacated by the Court.

B. The PUCO's September 6, 2013 Entry Nunc Pro Tunc is unlawful because it did not state the reasons prompting amendment of the PUCO's September 4 Opinion and Order or the findings of fact upon which such amendment was based as required by R.C. 4903.09.

Ohio law requires the PUCO to base all of its decisions on facts in the record and then explain the rationale behind its decision. R.C. 4903.09 (OCC Appx. 122) states, "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

This Court has also further delineated the requirements of R.C. 4903.09. The Court stated, "we have held that in order to meet the requirements of R.C. 4903.09, therefore, the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusions. Although strict compliance with the terms of R.C. 4903.09 is not required, a legion of cases establishes that the commission abuses its discretion if it renders an opinion without record support." *Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶23. (Citations omitted.)

In this case, the PUCO offered no rationale in the Entry Nunc Pro Tunc for the modifications it made to its September 4, 2013 Order beyond stating that the changes were "[d]ue to an administrative error***." (OCC Appx. 66; R. 281 at 2). However, an "administrative error" cannot justify the magnitude of changes that the PUCO announced in its Entry Nunc Pro Tunc. All of those changes were made with no reasoning offered and no mention of the record, despite costing customers more than $100 million in charges and delaying the date by which customers could receive the benefit of lower market prices in DP&L's standard service offer.

In its September 4, 2013 Order, the PUCO stated each party's position on a given issue and then gave, in most cases, some explanation as to why it was making its decision. But in the Entry Nunc Pro Tunc the PUCO merely set forth changes based on a general statement that it was correcting an administrative error that did not reflect what it intended. This did not constitute adequate explanation or factual support of the reasons prompting its decision. The PUCO's Entry Nunc Pro Tunc violated the law in making substantive changes to the September 4, 2013 Order without setting forth findings of fact or reasons for such changes.

The Court has stated that it would not reverse an order of the PUCO unless the challenging party proves prejudicial effect. *Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶48. Here, the Entry Nunc Pro Tunc has a prejudicial effect on DP&L's customers and the parties to the case (other than DP&L). Customers will have to pay an additional $110 million over the term of the ESP because of the

September 6, 2013 Entry. That Entry also further delays DP&L's transition to a 100% competitively bid SSO, which means a delay in the potential for customers to receive lower market prices. Furthermore, the complete lack of rationale behind those changes inhibits parties' ability to challenge them (and the Court's ability to review them) because there is no basis for the changes.

But even if a prejudicial effect could not be so easily demonstrated, the Court has also held that if the PUCO's failure to provide a record "stymies" the complaining party's ability to demonstrate prejudice, the Court will remand the case "for the development of an appropriate record as the basis for its decision, and for possible further appeal by the appellant if he can then demonstrate prejudice." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 92, 1999-Ohio-206, 706 N.E.2d 1255. Although the prejudice is evident in this case, the Court should make clear that any subsequent decision must be supported by an appropriate record.

The changes memorialized in the September 6, 2013 Entry obligate customers to pay more money for their electric service. Such significant changes require more than a single non-substantive sentence of explanation.

The PUCO amended some portions of the Order and the Entry Nunc Pro Tunc through its Second Entry on Rehearing. (OCC Appx. 68-101; R. 325). But the PUCO retained some of the changes made through the Entry Nunc Pro Tunc: extension of the ESP's end date to May 31, 2017; extension of the service stability rider to three years; and the delay in the competitive bidding auction. (OCC Appx. 98-99; R. 325 at 31-32). And it did so without citing any specific evidence to support the Entry Nunc Pro Tunc.

The PUCO's September 6, 2013 Entry Nunc Pro Tunc is an unlawful amendment of a previously journalized Order without the findings and rationale required by R.C. 4903.09. The

September 6, 2013 Entry is in direct contravention of this Court's established precedent governing the use of nunc pro tunc orders. Hence, the September 6, 2013 Entry Nunc Pro Tunc is unlawful, and the Court should vacate it.

PROPOSITION OF LAW NO. 4: The PUCO acted unreasonably and unlawfully when it considered a utility's application for rehearing that failed to comply with R.C. 4903.10.

Under R.C. 4903.10 (OCC Appx. 123), a party may file an application seeking rehearing of a PUCO decision. An application for rehearing must specify how the PUCO Order was unreasonable or unlawful. Otherwise, the PUCO may not consider the application. DP&L sought rehearing of the PUCO's Second Entry on Rehearing, but did not specify how the PUCO's decision was unreasonable or unlawful. Did the PUCO err in considering DP&L's application?

Yes. DP&L's application for rehearing did not comply with the law, R.C. 4903.10. The PUCO's Fourth Entry on Rehearing (OCC Appx. 102-113), denying DP&L's request to slow down the phase-in of the competitive bid auction, must stand. Additionally, the PUCO's decision in that Rehearing Entry requiring DP&L to divest its generation assets by January 1, 2017, should remain. DP&L has not complied with the rehearing requirements under the law.

Rehearing may be sought by any party who has entered an appearance in the proceeding on any matter determined in the proceeding. (R.C. 4903.10). In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear." (*Id.*). Further, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same ***." *(Id.)*

But before the PUCO can grant rehearing on any matter, the requirements of R.C. 4903.10 must be met. R.C. 4903.10 mandates that the application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." (*Id.*). The Ohio Supreme Court has held that "when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met." *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 375, 2007-Ohio-53, 59 (citations omitted).

The Court has further mandated that there be "strict compliance with such specificity requirement." *Office of Consumers' Counsel v. Public Util. Comm.* (1994), 70 Ohio St.3d 244, 247-248 (citations omitted); s*ee also Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St.3d at 360 (citations omitted) (stating that "[w]e have strictly construed the specificity test set forth in R.C. 4903.10.").

DP&L's Application for Rehearing did not meet these requirements. DP&L's Application for Rehearing merely requested that the PUCO grant rehearing on its decision in its Second Entry on Rehearing. (R. 320). "Unreasonable" and "unlawful" were not found in DP&L's application for rehearing. Neither are grounds on which DP&L considers the PUCO's Second Entry on Rehearing to be unreasonable or unlawful. DP&L's rehearing claims were:

> 1. The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 17-18) to accelerate the deadline for DP&L to transfer its generation assets to January 1, 2016. The Commission should restore the May 31, 2017 deadline that it established in its September 6, Entry Nunc Pro Tunc." (R. 320 at 1-2).
>
> 2. The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 18-19) to accelerate blending of the competitive bidding process. The Commission should restore the blending schedule that it established in its September 6, 2013 Entry Nunc Pro Tunc." (*Id.* at 2).

Below, OCC filed against DP&L's application for rehearing. (R. 323). OCC argued that DP&L's application was defective and should be denied. (R. 323 at 4-25). And OCC applied for rehearing (OCC Appx. 246-256; R. 328) after the PUCO's Fourth Entry on Rehearing granted, in part, DP&L's defective application. (R. 326).

But the PUCO denied OCC's application for rehearing. (OCC Appx. 117; R. 330 at 4). The PUCO found that "the grounds upon which DP&L sought rehearing and the relief requested were clearly set forth with specificity and detail." (OCC Appx. 117; R. 330 at 4). It concluded that "DP&L complied with the plain language of R.C. 4903.10." (*Id.*).

The PUCO was wrong. DP&L must allege in what respect the PUCO's Orders are unjust and unreasonable. *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St.3d at 375, (citations omitted). It did not do this.

Yet R.C. 4903.10 demands specificity. *City of Marion v. Pub. Util. Comm.*, 161 Ohio St. 276, 279-80, 119 N.E.2d 67 (1954) (*citing City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949). It has not been provided by DP&L in its application for rehearing. Because the requirements of R.C. 4903.10 have not been met, the PUCO erred in accepting the Utility's application for rehearing.

V. CONCLUSION

Customers of DP&L, through the unlawful orders of the PUCO, must pay $330 million (plus financing charges) in increased rates for a "service stability rider" charge. This charge is a competitive generation subsidy. The PUCO sanctioned the subsidy and allowed DP&L to offset declining generation prices with revenues funded by captive customers.

But these price declines that DP&L was protected from are precisely the sort of benefit from the restructured market that the General Assembly allowed for customers. The Court should reverse the PUCO to give customers the benefit of the market that they are losing.

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IN THE SUPREME COURT OF OHIO

In re the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Supreme Court Case No. 14-1505
In re the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Second Appeal from the Public Utilities Commission of Ohio
In re the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	))))	Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, 12-672-EL-RDR
In re the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)))	
In re the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	

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SECOND NOTICE OF APPEAL

At issue in this appeal are approximately $330 million in unjustified Service Stability Rider charges that will be collected from nearly 500,000 utility customers over the next three years.[1] Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(A)(2), 3.11(C)(2), and 10.02, hereby gives notice to this Court and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this second appeal from decisions of the PUCO issued in the Electric Security Plan proceedings of The Dayton Power and Light Company ("DP&L"), Case No. 12-426-EL-SSO et al. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on September 4, 2013 (Attachment A), the PUCO's Entry Nunc Pro Tunc entered in its Journal on September 6, 2013 (Attachment B), and the four Entries on Rehearing entered in the PUCO's Journal on October 23, 2013, March 19, 2014, June 4, 2014, and July 23, 2014 in Case No. 12-426-EL-SSO et al (Attachments C, D, E, and F).[2]

Appellant is the statutory representative, as established under R.C. Chapter 4911, of DP&L's 500,000 residential customers. OCC was a party of record in the above-referenced PUCO cases.

On October 4, 2013, OCC filed, in accordance with R.C. 4903.10, an Application for Rehearing from the PUCO's September 4, 2013 Opinion and Order. Two days later, on September 6, 2013, the PUCO issued a *Nunc Pro Tunc* Entry making multiple substantive

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[1] The PUCO authorized DP&L to collect the Service Stability Rider from customers at $110 million for calendar years 2014, 2015 and 2016. September 6 Entry Nunc Pro Tunc at 2. DP&L may seek up to an additional $45.8 million by applying for a Service Stability Rider-Extension. See *id.*

[2] Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

changes to its September 4, 2013 Opinion and Order. Under these changes, customers will pay an additional $110 million for electric service.

By Entry dated October 23, 2013, the PUCO granted rehearing for further consideration of the matters specified in numerous parties' applications for rehearing. The PUCO issued its first substantive Entry on Rehearing on March 19, 2014, granting in part and denying in part, OCC's Application for Rehearing. On April 18, 2014, OCC filed a second Application for Rehearing, in accordance with R.C. 4903.10. This application for rehearing was limited to the PUCO's new findings pertaining to the Service Stability Rider. On June 4, 2014, the PUCO denied OCC's second Application for Rehearing. On July 1, 2014, OCC filed a third Application for Rehearing, in accordance with R.C. 4903.10. On July 23, 2014, the PUCO denied OCC's third Application for Rehearing.

Appellant files this Notice of Appeal complaining of errors in the PUCO's September 4, 2013 Opinion and Order, the September 6, 2013 Entry *Nunc Pro Tunc* and the four PUCO Entries on Rehearing. OCC alleges that the decisions are unlawful and unreasonable in that the PUCO failed to follow the law and its decisions were unjust and unreasonable. In particular, the PUCO erred in the following respects, all of which were raised in OCC's Applications for Rehearing:

1. The PUCO erred in unreasonably and unlawfully approving, under R.C. 4928.143(B)(2)(d), a $330 million Service Stability Rider charge. In particular:
    a. The PUCO erred in determining that the Service Stability Rider has the effect of stabilizing and providing certainty regarding retail electric service, and thus the Opinion and Order violates R.C. 4928.143(B)(2)(d), resulting in unlawful charges to customers.

b. The PUCO erred by finding that the Service Stability Rider is a charge related to default service, as defined under R.C. 4928.14, and bypassability, and thus the Opinion and Order violates R.C. 4928.143(B)(2)(d), resulting in unlawful charges to customers.

c. The PUCO erred in establishing a Service Stability Rider Charge to ensure the financial integrity of DP&L as a whole, when, under R.C. 4928.38, utilities are to be fully on their own in the competitive generation market after the market development period. The PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period, which for DP&L ended December 31, 2005.

d. The PUCO erred in unreasonably and unlawfully determining that the Service Stability Charge to customers is not a cost-based charge, and thus not a transition charge under R.C. 4928.39. The PUCO's finding violates R.C. 4903.09.

e. The PUCO erred in establishing a Service Stability Rider that is based on allowing the utility to achieve a return on equity between 7% to 11% (at customer expense) for generation service that has been declared a competitive retail electric service under R.C. 4928.03.

f. The PUCO erred in authorizing the Service Stability Rider because the Rider is an anti-competitive subsidy (paid by customers) that violates R.C. 4928.02(H).

2. The PUCO's September 6, 2013 Entry Nunc Pro Tunc is unlawful. In particular:

   a. The PUCO exceeded the allowable scope of a *Nunc Pro Tunc* Entry when it granted substantial additional benefits to DP&L at customer expense.

   b. The PUCO did not comply with the requirements of R.C. 4903.09.

3. The PUCO unreasonably and unlawfully erred in granting DP&L's request for rehearing of the PUCO's March 19, 2014 Second Rehearing Entry. DP&L's April 18, 2014 Application for Rehearing did not assert the specific grounds for rehearing and therefore does not comply with the applicable statutory and administrative requirements as mandated in Ohio Revised Code 4903.10 and Ohio Administrative Code 4901-1-35.

WHEREFORE, OCC respectfully submits that the PUCO's September 4 Opinion and Order, its Entry *Nunc Pro Tunc*, and its four Entries on Rehearing, are unreasonable and unlawful, and should be reversed or modified with instructions to the PUCO to correct the errors complained of herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Second Notice of Appeal by the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 22nd day of September 2014.

Maureen R. Grady
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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

Maureen R. Grady

Maureen R. Grady, Counsel of Record
Counsel for Appellant
The Office of the Ohio Consumers' Counsel

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

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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Joseph M. Clark and Jennifer Lause, 21 East State Street, Suite 1900, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC, and Direct Energy Business, LLC.

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M. Anthony Long, 24000 Honda Parkway, Marysville, Ohio 43040, on behalf of Honda of America Manufacturing, Inc.

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Jeanne W. Kingery, 155 East Broad Street, 21st Floor, Columbus, Ohio 43215; Thompson Hine, LLC, by Philip B. Sineneng, 41 South High Street, Suite 1700, Columbus, Ohio 43215, on behalf of Duke Energy Sales, LLC, and Duke Energy Commercial Asset Management, Inc.

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. <u>ESP Term, Competitive Bid Process, and Master Supply Agreement</u>

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. <u>Alternative Energy Rider</u>

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. <u>FUEL Rider</u>

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. <u>Storm Damage Recovery Rider</u>

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

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

Todd A. Snitchler, Chairman

Lynn Slaby

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

M. Beth Trombold

Asim Z. Haque

GAP/sc

Entered in the Journal

SEP 06 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

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

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

Barcy F. McNeal
Secretary

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

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

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

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

BAM/GAP/sc

Entered in the Journal
JUL 2 3 2014

Barcy F. McNeal
Secretary

1.47 Presumptions in enactment of statutes.

In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.

Effective Date: 01-03-1972

1.49 Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

Effective Date: 01-03-1972

4901.08 Quorum.

A majority of the public utilities commissioners constitutes a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the public utilities commission. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all powers of the commission. The act of a majority of the commission, when in session as a board, is the act of the commission. Any investigation, inquiry, or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for such purpose by the commission, and every finding, order, or decision made by a commissioner so designated, pursuant to such investigation, inquiry, or hearing, and approved and confirmed by the commission and ordered filed in its office, is the finding, order, or decision of the commission.

Effective Date: 10-01-1953

4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

Effective Date: 10-26-1953

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application 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. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

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

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM);

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

"Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy;

(ii) Wind energy;

(iii) Power produced by a hydroelectric facility;

(iv) Power produced by a run-of-the-river hydroelectric facility placed in service on or after January 1, 1980, that is located within this state, relies upon the Ohio river, and operates, or is rated to operate, at an aggregate capacity of forty or more megawatts;

(v) Geothermal energy;

(vi) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion;

(vii) Biomass energy;

(viii) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census;

(ix) Biologically derived methane gas;

(x) Heat captured from a generator of electricity, boiler, or heat exchanger fueled by biologically derived methane gas;

(xi) Energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors.

"Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, September 10, 2012, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the better utilization of a renewable energy resource; or distributed generation system used by a customer to generate electricity from any such energy.

"Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(38) "Waste energy recovery system" means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) "Smart grid" means capital improvements to an electric distribution utility's distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) "Combined heat and power system" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

Amended by 130th General Assembly File No. TBD, SB 310, §1, eff. 9/12/2014.

Amended by 129th General AssemblyFile No.125, SB 315, §101.01, eff. 9/10/2012.

Amended by 128th General AssemblyFile No.47, SB 181, §1, eff. 9/13/2010.

Amended by 128th General AssemblyFile No.48, SB 232, §1, eff. 6/17/2010.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 10-05-1999; 01-04-2007; 2008 SB221 07-31-2008

4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

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

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM);

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

"Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy;

(ii) Wind energy;

(iii) Power produced by a hydroelectric facility;

(iv) Power produced by a run-of-the-river hydroelectric facility placed in service on or after January 1, 1980, that is located within this state, relies upon the Ohio river, and operates, or is rated to operate, at an aggregate capacity of forty or more megawatts;

(v) Geothermal energy;

(vi) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion;

(vii) Biomass energy;

(viii) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census;

(ix) Biologically derived methane gas;

(x) Heat captured from a generator of electricity, boiler, or heat exchanger fueled by biologically derived methane gas;

(xi) Energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors.

"Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, September 10, 2012, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the better utilization of a renewable energy resource; or distributed generation system used by a customer to generate electricity from any such energy.

"Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(38) "Waste energy recovery system" means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) "Smart grid" means capital improvements to an electric distribution utility's distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) "Combined heat and power system" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

Amended by 130th General Assembly File No. TBD, SB 310, §1, eff. 9/12/2014.

Amended by 129th General AssemblyFile No.125, SB 315, §101.01, eff. 9/10/2012.

Amended by 128th General AssemblyFile No.47, SB 181, §1, eff. 9/13/2010.

Amended by 128th General AssemblyFile No.48, SB 232, §1, eff. 6/17/2010.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 10-05-1999; 01-04-2007; 2008 SB221 07-31-2008

4928.02 State policy.

It is the policy of this state to do the following throughout this state:

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

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

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

(D) 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, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

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

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

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

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Amended by 129th General AssemblyFile No.125, SB 315, §101.01, eff. 9/10/2012.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.03 Identification of competitive services and noncompetitive services.

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

Effective Date: 10-05-1999

4928.14 Failure of supplier to provide service.

The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under sections 4928.141 , 4928.142 , and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(A) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(B) The supplier is no longer capable of providing the service.

(C) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(D) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

Effective Date: 2008 SB221 07-31-2008

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20 , division (E) of section 4928.64 , and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

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

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

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

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve

an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, 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. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141 , division (B) of section 4928.64 , or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

Amended by 129th General AssemblyFile No.61, HB 364, §1, eff. 3/22/2012.

Effective Date: 2008 SB221 07-31-2008

4928.15 Schedules for provision of noncompetitive service.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code. The schedule shall provide that electric distribution service under the schedule is available to all consumers within the utility's certified territory and to any supplier to those consumers on a nondiscriminatory and comparable basis. Distribution service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code. The schedule shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(B) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and except as preempted by federal law, no electric utility shall supply the transmission service or ancillary service component of noncompetitive retail electric service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the commission under section 4909.18 of the Revised Code. The schedule shall provide that transmission or ancillary service under the schedule is available to all consumers and to any supplier to those consumers on a nondiscriminatory and comparable basis. Service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code.

(C) A self-generator shall have access to backup electricity supply from its competitive electric generation service provider at a rate to be determined by contract.

Effective Date: 10-05-1999

4928.17 Corporate separation plans.

(A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.31 Transition plan.

(A) Not later than ninety days after the effective date of this section, an electric utility supplying retail electric service in this state on that date shall file with the public utilities commission a plan for the utility's provision of retail electric service in this state during the market development period. This transition plan shall be in such form as the commission shall prescribe by rule adopted under division (A) of section 4928.06 of the Revised Code and shall include all of the following:

(1) A rate unbundling plan that specifies, consistent with divisions (A)(1) to (7) of section 4928.34 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, the unbundles components for electric generation, transmission, and distribution service and such other unbundled service components as the commission requires, to be charged by the utility beginning on the starting date of competitive retail electric service and that includes information the commission requires to fix and determine those components;

(2) A corporate separation plan consistent with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(3) Such plan or plans as the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service consistent with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(4) An employee assistance plan for providing severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter;

(5) A consumer education plan consistent with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. A transition plan under this section may include tariff terms and conditions to address reasonable requirements for changing suppliers, length of commitment by a customer for service, and such other matters as are necessary to accommodate electric restructuring. Additionally, a transition plan under this section may include an application for the opportunity to receive transition revenues as authorized under sections 4928.31 to 4928.40 of the Revised Code, which application shall be consistent with those sections and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. The transition plan also may include a plan for the independent operation of the utility's transmission facilities consistent with section 4928.12 of the Revised Code, division (A)(13) of section 4928.34 of the Revised Code, and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. The commission may reject and require refiling, in whole or in part, of any substantially inadequate transition plan.

(B) The electric utility shall provide public notice of its filing under division (A) of this section, in a form and manner that the commission shall prescribe by rule adopted under division (A) of section 4928.06 of the Revised Code. However, the adoption of rules regarding the public notice under this division, regarding the form of the transition plan under division (A) of this section, and regarding procedures for expedited discovery under division (A) of section 4928.32 of the Revised Code are not subject to division (D) of section 111.15 of the Revised Code.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.32 Procedures for expedited discovery in proceeding initiated to consider transition plan.

(A) The public utilities commission shall establish reasonable procedures for expedited discovery in any proceeding initiated to consider a transition plan filed under section 4928.31 of the Revised Code.

(B) Not later than forty-five days after the date on which an electric utility files a transition plan under section 4928.31 of the Revised Code, any person having a real and substantial interest in the transition plan may file with the commission preliminary objections to the transition plan, which shall identify with specificity issues pertaining to any aspect of the transition plan, and any such person may propose specific responses to those issues. The commission shall address those objections and responses in its final order. In addition, not later than ninety days after the plan's filing, the commission staff shall file with the commission a report of its recommendations with respect to the plan. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing.

(C) The commission shall maintain a complete record of all proceedings relative to a transition plan filed under section 4928.31 of the Revised Code and shall issue and file with the record of the case findings of fact and written opinions setting forth the reasons for any modification to or its approval of a transition plan.

Effective Date: 10-05-1999

4928.33 Transition plan approval.

(A) Not later than two hundred seventy-five days after the date an electric utility files a transition plan under section 4928.31 of the Revised Code, but, in any event, not later than October 31, 2000, the public utilities commission shall issue a final order approving the transition plan as filed under section 4928.31 of the Revised Code or an order modifying and approving that plan. The order is subject to section 4903.15 of the Revised Code and is subject to review and appeal under Chapter 4903. of the Revised Code.

(B) If the commission fails to issue, by October 31, 2000, a final order approving a transition plan, or such a final order has been enjoined in whole or in part pending appeal to a court, the commission shall issue an interim order prescribing a transition plan, to have effect on an interim basis only, and containing the plan components required by division (A) of section 4928.31 of the Revised Code and providing for the opportunity for transition revenue receipt if such an application were included in the plan filed by the utility under that section. The interim order is subject to section 4903.15 of the Revised Code but is not subject to review and appeal under Chapter 4903. of the Revised Code. An interim plan prescribed under the interim order shall be effective for the electric utility beginning on the starting date of competitive retail electric service and shall continue in effect until such time as any other replacement transition plan takes effect pursuant to a final commission order or resolution of an appeal. Any interim plan so prescribed shall comply with the applicable provisions of section 4928.34 of the Revised Code. A final commission order shall provide for a reconciliation of those amounts determined in the final order relative to division (A) of section 4928.31 of the Revised Code as compared to the interim amounts as determined under this division.

(C) No electric utility required to file a transition plan under section 4928.31 of the Revised Code shall fail to implement a transition plan approved or prescribed for the utility by a commission order issued under division (A) or (B) of this section. No electric utility shall provide retail electric service in this state during the market development period except pursuant to such an approved or prescribed transition plan.

Effective Date: 10-05-1999

4928.34 Determinations for approval or prescribing of plan.

(A) The public utilities commission shall not approve or prescribe a transition plan under division (A) or (B) of section 4928.33 of the Revised Code unless the commission first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan required by division (A)(1) of section 4928.31 of the Revised Code, equal the tariff rates determined by the federal energy regulatory commission that are in effect on the date of the approval of the transition plan under sections 4928.31 to 4928.40 of the Revised Code, as each such rate is determined applicable to each particular customer class and rate schedule by the commission. The unbundled transmission component shall include a sliding scale of charges under division (B) of section 4905.31 of the Revised Code to ensure that refunds determined or approved by the federal energy regulatory commission are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the effective date of this section, based upon the record in the most recent rate proceeding of the utility for which the utility's schedule was established, and the tariff rates for electric transmission service determined by the federal energy regulatory commission as described in division (A)(1) of this section.

(3) All other unbundled components required by the commission in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the effective date of this section.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any adjustments necessary to reflect the effects of the amendment of section 5727.111 of the Revised Code by Sub. S.B. No. 3 of the 123rd general assembly.

(5) All unbundled components in the rate unbundling plan have been adjusted to reflect any base rate reductions on file with the commission and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the effective date of this section. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a commission order prior to the effective date of this section are void.

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd General Assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in

effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

(7) The rate unbundling plan complies with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(8) The corporate separation plan required by division (A)(2) of section 4928.31 of the Revised Code complies with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(9) Any plan or plans the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(10) The employee assistance plan required by division (A)(4) of section 4928.31 of the Revised Code sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter.

(11) The consumer education plan required under division (A)(5) of section 4928.31 of the Revised Code complies with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(12) The transition revenues for which an electric utility is authorized a revenue opportunity under sections 4928.31 to 4928.40 of the Revised Code are the allowable transition costs of the utility as such costs are determined by the commission pursuant to section 4928.39 of the Revised Code, and the transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to section 4928.40 of the Revised Code.

(13) Any independent transmission plan included in the transition plan filed under section 4928.31 of the Revised Code reasonably complies with section 4928.12 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, unless the commission, for good cause shown, authorizes the utility to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code.

(14) The utility is in compliance with sections 4928.01 to 4928.11 of the Revised Code and any rules or orders of the commission adopted or issued under those sections.

(15) All unbundled components in the rate unbundling plan have been adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code. In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

(B) Subject to division (E) of section 4928.17 of the Revised Code, if the commission finds that any part of the transition plan would constitute an abandonment under sections 4905.20 and 4905.21 of the Revised Code, the commission shall not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under section 4905.21 of the Revised Code. Sections 4905.20 and 4905.21 of the Revised Code otherwise shall not apply to a transition plan under sections 4928.31 to 4928.40 of the Revised Code.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.35 Schedules containing unbundled rate components set in approved plan.

(A) Upon approval of its transition plan under sections 4928.31 to 4928.40 of the Revised Code, an electric utility shall file in accordance with section 4905.30 of the Revised Code schedules containing the unbundled rate components set in the approved plan in accordance with section 4928.34 of the Revised Code. The schedules shall be in effect for the duration of the utility's market development period, shall be subject to the cap specified in division (A)(6) of section 4928.34 of the Revised Code, and shall not be adjusted during that period by the public utilities commission except as otherwise authorized by division (B) of this section or as otherwise authorized by federal law or except to reflect any change in tax law or tax regulation that has a material effect on the electric utility.

(B) Efforts shall be made to reach agreements with electric utilities in matters of litigation regarding property valuation issues. Irrespective of those efforts, the unbundled components for an electric utility's retail electric generation service and distribution service, as provided in division (A) of this section, are not subject to adjustment for the utility's market development period, except that the commission shall order an equitable reduction in those components for all customer classes to reflect any refund a utility receives as a result of the resolution of utility personal property tax valuation litigation that is resolved on or after the effective date of this section and not later than December 31, 2005. Immediately upon the issuance of that order, the electric utility shall file revised rate schedules under section 4909.18 of the Revised Code to effect the order.

(C) The schedule under division (A) of this section containing the unbundled distribution components shall provide that electric distribution service under the schedule will be available to all retail electric service customers in the electric utility's certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service. The schedule also shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(D) During the market development period, an electric distribution utility shall provide consumers on a comparable and nondiscriminatory basis within its certified territory a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service priced in accordance with the schedule containing the utility's unbundled generation service component. Immediately upon approval of its transition plan, the utility shall file the standard service offer with the commission under section 4909.18 of the Revised Code, during the market development period. The failure of a supplier to deliver retail electric generation service shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under this division until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to deliver such service if any of the conditions specified in section 4928.14 of the Revised Code is met.

(E) An amendment of a corporate separation plan contained in a transition plan approved by the commission under section 4928.33 of the Revised Code shall be filed and approved as a corporate separation plan pursuant to section 4928.17 of the Revised Code.

(F) Any change to an electric utility's opportunity to receive transition revenues under a transition plan approved in accordance with section 4928.33 of the Revised Code shall be authorized only as provided in sections 4928.31 to 4928.40 of the Revised Code.

(G) The commission, by order, shall require each electric utility whose approved transition plan did not include an independent transmission plan as described in division (A)(13) of section 4928.34 of the Revised Code to be a member of, and transfer control of transmission facilities it owns or controls in this state to, one or more qualifying transmission entities, as described in division (B) of section 4928.12 of the Revised Code, that are planned to be operational on and after December 31, 2003. However, the commission may extend that date if, for reasons beyond the control of the utility, a qualifying transmission entity is not planned to be operational on that date. The commission's order may specify an earlier date on which the transmission entity or entities are planned to be operational if the commission considers it necessary to carry out the policy specified in section 4928.02 of the Revised Code or to encourage effective competition in retail electric service in this state. Upon the issuance of the order, each such utility shall file with the commission a plan for such independent operation of the utility's transmission facilities consistent with this division. The commission may reject and require refiling of any substantially inadequate plan submitted under this division. After reasonable notice and opportunity for hearing, the commission shall approve the plan upon a finding that the plan will result in the utility's compliance with the order, this division, and any rules adopted under division (A) of section 4928.06 of the Revised Code. The approved independent transmission plan shall be deemed a part of the utility's transition plan for purposes of sections 4928.31 to 4928.40 of the Revised Code.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.36 Complaint concerning transition plan.

The public utilities commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint by any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility has failed to implement, in conformance with an order under section 4928.33 of the Revised Code or in ongoing compliance with applicable provisions of the policy specified in section 4928.02 of the Revised Code, a transition plan approved under section 4928.33 of the Revised Code. If, after reasonable notice and opportunity for hearing as provided in section 4905.26 of the Revised Code, the commission determines that the utility has failed to so comply, the commission, in addition to any other remedies provided by law, may use the remedies specified in divisions (C)(1) to (3) and (D)(1) and (2) of section 4928.18 of the Revised Code to enforce compliance.

Effective Date: 10-05-1999

4928.37 Receiving transition revenues.

(A)

(1) Sections 4928.31 to 4928.40 of the Revised Code provide an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market. An electric utility for which transition revenues are approved pursuant to sections 4928.31 to 4928.40 of the Revised Code shall receive those revenues through both of the following mechanisms beginning on the starting date of competitive retail electric service and ending on the expiration date of its market development period as determined under section 4928.40 of the Revised Code:

(a) Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service during the market development period by the customer's electric distribution utility, which rates shall be specified in schedules filed under section 4928.35 of the Revised Code;

(b) Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service during the market development period by an entity other than the customer's electric distribution utility, as such transition charge is determined under section 4928.40 of the Revised Code. The transition charge shall be payable by each such retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved and shall be billed on each kilowatt hour of electricity delivered to the customer by the electric distribution utility as registered on the customer's meter during the utility's market development period as kilowatt hour is defined in section 4909.161 of the Revised Code or, if no meter is used, as based on an estimate of kilowatt hours used or consumed by the customer. The transition charge for each customer class shall reflect the cost allocation to that class as provided under bundled rates and charges in effect on the day before the effective date of this section. Additionally, as reflected in section 4928.40 of the Revised Code, the transition charges shall be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service. To the extent possible, the level and structure of the transition charge shall be designed to avoid revenue responsibility shifts among the utility's customer classes and rate schedules.

(2)

(a) Notwithstanding division (A)(1)(b) of this section, the transition charge shall not be payable on electricity supplied by a municipal electric utility to a retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, if the municipal electric utility provides electric transmission or distribution service, or both services, through transmission or distribution facilities singly or jointly owned or operated by the municipal electric utility, and if the municipal electric utility was in existence, operating, and providing service as of January 1, 1999.

(b) The transition charge shall not be payable on electricity supplied or consumed in this state except such electricity as is delivered to a retail customer by an electric distribution utility and is registered on the customer's meter during the utility's market development period or, if no meter is used, is based on an estimate of kilowatt hours used or consumed by the customer. However, no transition charge shall be payable on electricity that is both produced and consumed in this state by a self-generator.

(3) The transition charge shall not be discounted by any party.

(4) Nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter.

(B) The electric utility shall separately itemize and disclose, or cause its billing and collection agent to separately itemize and disclose, the transition charge on the customer's bill in accordance with reasonable specifications the commission shall prescribe by rule under division (A) of section 4928.06 of the Revised Code.

Effective Date: 10-05-1999

4928.38 Commencing and terminating transition revenues.

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

Effective Date: 10-05-1999

4928.39 Determining total allowable transition costs.

Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:

(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs. Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section. Further, the commission's order under this section shall separately identify regulatory assets of the utility that are a part of the total allowable amount of transition costs determined under this section and separately identify that portion of a transition charge determined under section 4928.40 of the Revised Code that is allocable to those assets, which portion of a transition charge shall be subject to adjustment only prospectively and after December 31, 2004, unless the commission authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to division (B)(2) of section 4928.40 of the Revised Code. The electric utility shall have the burden of demonstrating allowable transition costs as authorized under this section. The commission may impose reasonable commitments upon the utility's collection of the transition revenues to ensure that those revenues are used to eliminate the allowable transition costs of the utility during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage, in the provision by the utility of regulated or unregulated products or services.

Effective Date: 10-05-1999

4928.40 Establishing transition charge for each customer class.

(A) Upon determining under section 4928.39 of the Revised Code the allowable transition costs of an electric utility authorized for collection as transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided in division (A)(1)(b) of section 4928.37 of the Revised Code during a market development period for the utility, ending on such date as the commission shall reasonably prescribe. The market development period shall end on December 31, 2005, unless otherwise authorized under division (B)(2) of this section. However, the commission may set the utility's recovery of the revenue requirements associated with regulatory assets, as established pursuant to section 4928.39 of the Revised Code, to end not later than December 31, 2010. The commission shall not permit the creation or amortization of additional regulatory assets without notice and an opportunity to be heard through an evidentiary hearing and shall not increase the charge recovering such revenue requirements associated with regulatory assets. Factors the commission shall consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to, the total allowable amount of transition costs of the electric utility as determined under section 4928.39 of the Revised Code; the relevant market price for the delivered supply of electricity to customers in that customer class and, to the extent possible, in each rate schedule as determined by the commission; and such shopping incentives by customer class as are considered necessary to induce, at the minimum, a twenty per cent load switching rate by customer class halfway through the utility's market development period but not later than December 31, 2003. In no case shall the commission establish a shopping incentive in an amount exceeding the unbundled component for retail electric generation service set in the utility's approved transition plan under section 4928.33 of the Revised Code, and in no case shall the commission establish a transition charge in an amount less than zero.

(B)

(1) The commission may conduct a periodic review no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility as initially established under division (A) of this section or subsequently adjusted under this division. Any such adjustment shall be in accordance with division (A) of this section and may reflect changes in the relevant market.

(2) For purposes of this chapter, the market development period shall not end earlier than December 31, 2005, unless, upon application by an electric utility, the commission issues an order authorizing such earlier date for one or more customer classes as is specified in the order, upon a demonstration by the utility and a finding by the commission of either of the following:

(a) There is a twenty per cent switching rate of the utility's load by the customer class.

(b) Effective competition exists in the utility's certified territory.

(C) Notwithstanding any provision of this chapter, the commission shall issue an order under section 4928.33 of the Revised Code approving a transition plan for an electric utility that contains a rate reduction for residential customers of that utility, provided that the rate reduction shall not increase the rates or transition cost responsibility of any other customer class of the utility. The rate reduction shall be in effect only for such portion of the utility's market development period as the commission shall specify and shall be applied to the unbundled generation component for retail electric generation service as set in the utility's approved transition plan under section 4928.33 of the Revised Code subject to the price cap for residential customers required under division (A)(6) of section 4928.34 of the Revised Code. The amount of the rate reduction shall be five per cent of the amount of that unbundled generation component, but shall not unduly discourage market entry by alternative suppliers seeking to serve the residential market in this state. The commission, after reasonable notice and opportunity for hearing, may terminate the rate reduction by order upon a finding that the rate reduction is unduly discouraging market entry by such alternative suppliers. No such termination of the rate reduction shall take effect prior to the midpoint of the utility's market development period.

(D) Beginning on the starting date of competitive retail electric service, no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service.

(E) Notwithstanding any provision of Title XLIX [49] of the Revised Code to the contrary, any customer that receives a noncompetitive retail electric service from an electric distribution utility shall be a retail electric distribution service customer, irrespective of the voltage level at which service is taken.

Effective Date: 10-05-1999

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

PUBLIC VERSION

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October 4, 2013

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BEFORE
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In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the September 4, 2013 Opinion and Order ("September 4, 2013 Order") and the September 6 2013, Entry *Nunc Pro Tunc* ("September 6, 2013 Entry") (collectively "Orders") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). This case involves the rates that Dayton Power & Light Company ("DP&L" or "Utility") will be permitted to charge its customers for generation service.

Through this filing, OCC seeks rehearing of the PUCO's Orders pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The September 4, 2013 Order and September 6, 2013 Entry were unjust, unreasonable, and unlawful because:

A. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Exceeded The Allowable Scope Of A *Nunc Pro Tunc* Order.

B. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Did Not Comply With The Requirements Of R.C. 4903.09.

C. The PUCO Erred In Determining That The Service Stability Rider Meets The Criteria Of R.C. 4928.143(B)(2)(D), Resulting In Unlawful Charges To Customers.

   1. The PUCO erred in finding that the Service Stability Rider is a charge related to default service and bypassability.

      a. "Default service" is already defined under R.C. 4928.14 as provider of last resort service. Since DP&L failed to produce measurable and verifiable evidence of its provider of last resort costs that comprise the Service Stability Rider charge, the PUCO erred in approving it.

      b. Construing the Service Stability Rider to be related to bypassability leads to absurd and unreasonable results—something that should be avoided in statutory interpretation.

   2. The PUCO erred in finding that the Service Stability Rider is a charge that has the effect of stabilizing and providing certainty regarding retail electric service.

D. The PUCO Erred In Establishing A Service Stability Rider Charge To Ensure The Financial Integrity Of DP&L As A Whole, When, Under R.C. 4928.38:

   1. utilities are to be fully on their own in the competitive generation market after the market development period; and

2. the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.

E. The PUCO Erred In Establishing A Service Stability Rider To Achieve A Return On Equity Target (At Customer Expense), In Violation of R.C. 4928.03 Under Which Generation Service Has Been Declared A Competitive Retail Electric Service.

F. The PUCO Erred In Authorizing The Service Stability Rider Because It Is An Anti-Competitive Subsidy (Paid By Customers) That Violates R.C. 4928.02(H).

G. The PUCO Erred In Basing Its Opinion And Order On Facts Not Within The Record, Violating R.C. 4903.09.

H. The PUCO Erred In Determining The Amount Of The Service Stability Rider That Customers Will Be Required to Pay By:

1. Overstating the amount of the Service Stability Rider over the Electric Security Plan period because it failed to offset the Service Stability Rider by the amount of capital expenditure reductions that were approved as part of DP&L's round 2 budget/long term forecast.

2. Failing to reduce the amount of the Service Stability Rider because reasonable switching projections indicated less lost revenue from switching.

a. The PUCO should reduce the Service Stability Rider by the capital reductions approved under DP&L's round 2 budget/long term forecast.

b. The PUCO erred when it unreasonably failed to reduce the Service Stability Rider revenue requirement by incorporating reasonable assumptions about the level of switching.

I. The PUCO Erred In Authorizing A Service Stability Rider-Extension, Through Which DP&L Can Seek To Collect An Additional $45.8 Million In Stability Charges From Its Customers.

1. The PUCO's decision to give DP&L the opportunity to seek to collect an additional $45.8 million from its customers was made without record support and contains no findings of fact with respect to the need for such an extension of the Service Stability Rider, thus violating R.C. 4903.09.

2. The PUCO failed to identify how the Service Stability Rider-Extension is a provision allowed under R.C. 4928.143(B)(2), and failed to provide authority that permits the PUCO to modify a utility's Electric Security Plan if a utility can show its financial integrity is "at risk."

3. The PUCO erred in determining that the Service Stability Rider-Extension should be set in order to maintain DP&L's financial integrity when, under R.C. 4928.38:

    a. utilities are to be fully on their own in the competitive generation market after the market development period; and

    b. the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.

4. The PUCO erred in establishing a Service Stability Rider-Extension to address the financial losses DP&L will allegedly incur from its provision of competitive generation services because the Service Stability Rider-Extension is an anti-competitive subsidy violating R.C. 4928.02(H).

5. The PUCO erred by giving DP&L a second opportunity to provide more reliable data on its financial integrity related to year four of its Electric Security Plan term, when DP&L failed to satisfy its burden of proof under R.C. 4928.143(C)(1).

J. The PUCO Erred When It Found That Under R.C. 4928.143(C)(1) The Modified Electric Security Plan Is More Favorable In The Aggregate For Customers Than The Expected Results Under A Market Rate Offer.

1. The PUCO erred by failing in its analysis required by R.C. 4928.143 (C)(1) to determine how much more customers will have to pay under the PUCO-modified electric security plan than under a market rate offer.

2. The PUCO erred in finding that qualitative benefits of the electric security plan significantly outweigh the results of the quantitative analysis.

3. The PUCO erred when it considered "qualitative benefits" in its analysis required by R.C. 4928.143 (C)(1).

K. The PUCO Erred In Failing To Find That It Must, Under R.C. 4928.143(E), Test The PUCO-Modified Electric Security Plan In The Fourth Year (2017) To Determine Whether It Continues To Be More Favorable In The Aggregate For Customers As Compared To The Expected Results That Would Otherwise Apply Under R.C. 4928.142.

L. The PUCO Erred When It Failed To Find That The Standard Service Offer Should Be 100% Competitively Bid Over The Entire Electric Security Plan Period, Which Would Provide Customers With The Benefit of Currently Low Market Prices For Lowering Their Electric Bills.

M. The PUCO Erred In Authorizing DP&L To Defer The Costs Of The Competitive Retail Enhancements For Collection From Customers In A Future Distribution Rate Case.

N. The PUCO Erred In Delaying Structural Divestment Of DP&L's Generation Assets Until May 31, 2017 (Which Continues to Expose Customers To DP&L's Requests for Above-Market Prices).

O. The PUCO Erred In Adopting A 1 Coincident Peak Demand Cost Allocation For The Service Stability Rider.

P. The PUCO Erred In Failing To Consider Or Address Whether The PUCO-Modified Electric Security Plan Ensures The Availability to Consumers Of Reasonably Priced Retail Electric Service As Required By R.C. 4928.02(A). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(A).

Q. The PUCO Erred In Failing To Address Whether The PUCO-Modified Electric Security Plan Protects At-Risk Populations As Required By R.C. 4928.02(L). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(L).

The bases for this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its September 4, 2013 Order and September 6, 2013 Entry.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Fourteen years after the 1999 law that was to secure for Ohioans the benefits of electric competition, electric customers in the Dayton area will continue to pay hundreds of millions of dollars to Dayton Power & Light Company ("DP&L" or "Utility") above the low market price for electricity that customers should instead be enjoying. OCC seeks rehearing of the PUCO's September 4, 2013 Opinion and Order (September 4, 2013 Order) and the September 6, 2013 Entry *Nunc Pro Tunc* (September 6, 2013 Entry), amending the September 4, 2013 Order (collectively "Orders").

On September 4, 2013,, the PUCO approved an Electric Security Plan ("ESP") for DP&L that the PUCO itself calculated will cost customers at least $250 million more than a Market Rate Offer ("MRO").[3] But things got much worse for customers two days later. In an Entry *Nunc Pro Tunc*, the PUCO: 1) delayed the competitive bidding of the Standard Service Offer ("SSO") by an additional five months—until June 1, 2017; 2) gave DP&L an additional five months—until May 31, 2017—to divest its generation assets; 3) extended the period of the ESP for an additional 5 months; 4) extended the Service Stability Rider ("SSR") an additional full year which means that customers have to pay DP&L an additional $110 million in 2016; and 5) made the Service Stability Rider – Extension ("SSR-E") available to DP&L in 2017 in the amount of $45.8 million.[4] Despite these major amendments to its September 4, 2013 Order, the PUCO does not even calculate the additional costs to customers (as compared to an MRO) of these changes.

Moreover, the PUCO's decision to approve an ESP (that will cost customers $250 million more than a MRO) ignores the impact of the resulting rates on customers' bills. In particular, the PUCO's Orders are unlawful in approving DP&L's proposed Service Stability Rider, which is intended to subsidize its provision of competitive generation services. Under Ohio law 3, DP&L is to be "fully on its own" in the competitive generation market by the end of its market development period – which ended almost nine years ago, on December 31, 2005.[5] Since that date, subsidies of generation services have been prohibited under the law.

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[3] September 4, 2013 Order at 50.

[4] September 6, 2013 Entry at 2-3.

[5] R.C. 4928.38.

The SSR is also, contrary to the PUCO's holding,[6] a transition charge as defined by the law. The authorization for DP&L to bill its customers for transition charges -- $441 million – ended in 2005.[7] Subsidies to competitive generation services that make-up for the under-recovery of costs – or lack of profitability -- of DP&L's generation assets are transition charges under the law.[8] It is unlawful for the PUCO to authorize such transition charges, let alone $110 million per year for 3 years.

DP&L's customers have waited too long for the benefits of generation competition in a market with historically low energy prices. The PUCO's Order fails to give customers what DP&L has withheld, the benefit of competition today.

Finally, the PUCO's September 4, 2013 Order further harms residential customers, including low-income customers, by approving an allocation for the Service Stability Rider based on peak demands of customer classes.[9] This conclusion is at odds with the PUCO's determination that the SSR is attributable to "financial integrity" issues that DP&L has claimed are primarily related to the amount of kWh load switching to competitive generation providers.[10] It is also inconsistent with the PUCO's finding that the SSR is not a transition charge – and, therefore, not related to the recovery of generation costs.[11]

The PUCO should grant rehearing to undo an outcome that will deprive DP&L's customers of the vast majority of the benefits intended by Senate Bill 221 and that

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[6] September 4, 2013 Order at 22.

[7] *See* Direct Testimony of Kenneth Rose at 7, 12.

[8] R.C. 4929.39.

[9] September 4, 2013 Order at 26.

[10] September 4, 2013 Order at 21, 25.

[11] September 4, 2013 Order at 22.

unlawfully extends subsidies to DP&L's provision of generation service that were required by Senate Bill 3 to end in 2005.

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the PUCO, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[12] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[13]

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear."[14] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *."[15]

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO's rule on applications for

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[12] R.C. 4903.10.

[13] R.C. 4903.10(B).

[14] *Id.*

[15] *Id.*

rehearing.[16] Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

III. LAW AND ARGUMENT

A. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Exceeded The Allowable Scope Of A *Nunc Pro Tunc* Order.

As discussed above, through its Entry *Nunc Pro Tunc*, the PUCO made substantive changes to its September 4, 2013 Order. The PUCO: 1) delayed the implementation of the SSO being 100% competitively bid by an additional five months—until June 1, 2017; 2) gave DP&L an additional five months—until May 31, 2017—to divest its generation assets; 3) extended the period of the ESP for an additional 5 months; 4) extended the SSR an additional full year which means that customers have to pay DP&L an additional $110 million in 2016; and 5) made the SSR-E available to DP&L in 2017 in the amount of $45.8 million.[17]

However, the scope of the changes accomplished by the September 6, 2013 Entry exceeded the allowable scope of a *nunc pro tunc* order. Ohio law has been clear since the Ohio Supreme Court's holding in *Helle v. Pub. Util. Comm.*, that "[t]he province of a *nunc pro tunc* entry is to correct the record of the court in a case so as to make it set forth an act of the court, which though actually done at a former term thereof, was not entered upon the journal; and it cannot lawfully be employed to amend the record so as to make it show that some *act was done at a former term, which might or should have been, but was*

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[16] *See* Ohio Adm. Code 4901-1-35.

[17] September 6, 2013 Entry at 2-3.

not, then performed."[18] (Citations omitted.) The Court further held, "the proper office of a *nunc pro tunc* order is to correct the record so as to cause it to show an act of the court which, though actually done at a former term, was not entered on the journal.

In another Ohio Supreme Court case the Court further explained the proper use of a *nunc pro tunc* order.[19] In *Interstate*, the Court was considering an appeal from a common carrier that was orally granted a certificate by the PUCO but then, before the certificate was written, the PUCO amended the route the certificate covered.[20] The Court considered the *Helle* case and stated:

> [W]hen an irregular route certificate is applied for, and an irregular route certificate is in fact granted, the commission may not at a later date, by a *nunc pro tunc* entry, change that which was done from an irregular to a regular route, **by merely saying that it was the intention of the commission** to issue a certificate for a regular instead of an irregular route, * * * The office of a *nunc pro tunc* is **not to change** what the court or the commission **in fact did and recorded**, but is to record that which was in fact done, but was not recorded.[21]

The Court, in *Interstate*, held that the *Helle* holding did not apply because in *Interstate* the PUCO had never memorialized its decision so it was authorized to amend it prior to issuing the certificate.[22]

Both cases are applicable to the facts at bar. The PUCO issued an Order on September 4, 2013, and then on September 6, 2013 issued a *nunc pro tunc* Entry amending the September 4 Order. The PUCO made multiple changes to the original

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[18] *Helle v. Pub. Util. Comm.*, 118 Ohio St. 434, 440, 161 N.E. 282 (1928).

[19] *The Interstate Motor Transit Co. v. Pub. Util. Comm. of Ohio*, 119 Ohio St. 264, 163 N.E. 713 (1928).

[20] *Id.* at *268.

[21] *Id.* at *270. (Emphasis added.)

[22] *Id.*

order and offered little justification for those changes. According to the PUCO, because of an "administrative error the [September 4, 2013] Opinion and Order does not reflect the decision that the Commission **intended** to issue, including the length of the modified ESP period."[23] By the PUCO's own admission it is engaging in the exact behavior that the Ohio Supreme Court explicitly stated was unlawful. It has amended a written and filed Order so that it better reflects the intended decision of the PUCO. According to both *Helle* and *Interstate* that is unlawful.

The PUCO issued an unlawful *nunc pro tunc* Entry that changed what it previously journalized. Such action is contrary to the laws of the State as explained by the Ohio Supreme Court and therefore the Entry *Nunc Pro Tunc* is unreasonable, unlawful, and invalid.

B. The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* Is Unlawful Because, In Granting Substantial Additional Benefits To DP&L At Customer Expense, The PUCO Did Not Comply With The Requirements Of R.C. 4903.09.

Ohio law requires the PUCO to base all of its decisions on facts in the record and then explain the rationale behind its decision. R.C. 4903.09 states, "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

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[23] September 6, 2013 Entry at 2. (Emphasis added.)

The Ohio Supreme Court has also made similar statements regarding the requirements of R.C. 4903.09.[24] The Court stated, "We have held that in order to meet the requirements of R.C. 4903.09, therefore, the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusions. (Citations omitted.) Although strict compliance with the terms of R.C. 4903.09 is not required, a legion of cases establishes that the commission abuses its discretion if it renders an opinion without record support."[25] (Citations omitted.) Additionally, the Court stated that it would not reverse an order of the PUCO, even if it was found to be an abuse of discretion, unless the challenging party proves prejudicial effect.[26]

In this case the PUCO offered no rationale for the changes it made to its September 4, 2013 Order beyond stating that the changes were rectifying an administrative error.[27] However, an administrative error cannot justify the magnitude of changes that the PUCO announced in its *nunc pro tunc* Entry (discussed above).[28] All of those changes were made with no reasoning offered and no mention of the record.

In its September 4, 2013 Order the PUCO stated each party's position on a given issue and then gave, in most cases, some explanation as to why it was making its decision. But in the Entry *Nunc Pro Tunc* the PUCO merely set forth changes based on a

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[24] *Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶23.

[25] *Id.* at ¶23.

[26] *Id.* at ¶31.

[27] September 6, 2013 Entry at 2.

[28] September 6, 2013 Entry at 2-3.

general statement that it was correcting an administrative error that did not reflect what it intended. This is not an adequate explanation of the changes made.

Additionally, the Entry *Nunc Pro Tunc* has a prejudicial effect on DP&L's customers and the parties to the case. Customers will have to pay an additional $110 million over the term of the ESP because of the September 6, 2013 Entry. That Entry also further delays DP&L's transition to a 100% competitively bid SSO. Furthermore, the complete lack of rationale behind those changes inhibits the parties' ability to challenge them because they do not know the basis for the changes.

Essentially, the changes memorialized in the September 6, 2013 Entry require customers to pay more money for their electric service. Such significant changes require more than a single non-substantive sentence of explanation and those changes must be supported by the record. However, this did not occur in this case. Instead, the PUCO changed at least five crucial decisions contained in its September 4, 2013 Order with five words, "due to an administrative error," as its sole rationale. In its September 4, 2013 Order, the PUCO states that the ESP time frame selected gives DP&L "sufficient time" to handle certain matters before moving to a fully competitive SSO.[29] Yet, the September 6, 2013 Entry does nothing to address why that time frame is no longer sufficient; instead, it just summarily extends it by five months. The PUCO made major changes to key portions of the ESP and failed to justify those changes in any substantive manner or cite to the record a single time. Because the PUCO has failed to support the changes announced in its Entry *Nunc Pro Tunc*, those changes are unreasonable and unlawful.

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[29] September 4, 2013 Order at 15.

The PUCO's September 6, 2013 Entry *Nunc Pro Tunc* is an unlawful amendment of a previously journalized Order. The September 6, 2013 Entry is in direct contravention of established Ohio Supreme Court precedent governing the use of *nunc pro tunc* orders. For all these reasons, the September 6, 2013 Entry *Nunc Pro Tunc* is unlawful. Accordingly, the PUCO should grant rehearing on this issue.

C. The PUCO Erred In Determining That The Service Stability Rider Meets The Criteria Of R.C. 4928.143(B)(2)(D), Resulting In Unlawful Charges To Customers.

Under R.C. 4928.143(B)(2)(d), in order for a provision such as the Service Stability Rider to be lawful under a utility's electric security plan, it must satisfy three criteria. First, the provision must be a term, condition, or charge. Second, the provision must relate to one of the following categories: 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. Third, the provision must also have the effect of stabilizing or providing certainty regarding retail electric service.

The PUCO determined that the SSR met these three criteria. But as explained below, the PUCO erred in its findings.

1. The PUCO erred in finding that the Service Stability Rider is a charge related to default service and bypassability.

In its Opinion and Order, the Commission found that the Service Stability Rider is a term, condition, or charge, thus meeting the first statutory condition.[30] But the PUCO

[30] September 4, 2013 Order at 21

then found the Service Stability Rider met the second and third criteria of the statute, conclusions that were disputed by nearly every party in the case, but the Utility.

The PUCO ruled that the standard service offer is the default service for DP&L customers who choose not to shop.[31] The PUCO also found that the SSR charge is a stability charge that maintains the Utility's financial integrity so that it may continue to provide the SSO, or "default service."[32] For both of these reasons, the PUCO concluded that the SSR is related to default service. In a similar vein, the PUCO concluded that the SSR relates to bypassability because it is a non-bypassable charge.[33] It appears that the PUCO merely accepted DP&L's claim that the SSR relates to the terms "default service" and "bypassability". DP&L's interpretation of these terms, in turn, appears to be based in large part on the PUCO's findings in the Ohio Power Company ("AEP Ohio") electric security plan case, Case No. 11-346-EL-SSO.[34]

The PUCO's interpretation of these terms, however, is wrong. It has misconstrued the statute in question—R.C. 4928.143(B)(2)(d). The SSR is not related to "default service." Nor is the SSR related to bypassability. The PUCO has statutorily construed "default service" when that term has a clear and definite meaning to it. In doing so, the PUCO erred.

When the language of the statute is clear and unambiguous, it is to be applied, not interpreted.[35] And when the PUCO construed the Service Stability Rider to relate to

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] OCC and others have appealed the Ohio Power Company ESP decision. The appeal is in the briefing stages.

bypassability it engaged in statutory construction that leads to unreasonable or absurd results. The PUCO should grant rehearing on these matters

a. "Default service" is already defined under R.C. 4928.14 as provider of last resort service. Since DP&L failed to produce measurable and verifiable evidence of its provider of last resort costs that comprise the Service Stability Rider charge, the PUCO erred in approving it.

It is well settled that where the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory construction.[36] An unambiguous statute is to be applied, not interpreted.[37] "In such a case, we do not resort to rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in * * * a particular statute--we rely only on what the General Assembly has actually said." [38] Thus, legislative intent may be inquired into only if the statute is ambiguous on its face.[39]

Here, there is no ambiguity in the law. "Default service" is legislatively defined. Under R.C. 4928.14, default service is defined as the provision of generation by the utility where the non-utility supplier (marketer) fails to provide retail generation service to customers. According to the statute, if a supplier fails to provide electric generation

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[36] *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), ¶5, syllabus).

[37] *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 404 N.E.2d 159 (1980).

[38] *Muenchenbach v. Preble Cty.*, 91 Ohio St.3d 141, 149, 742 N.E.2d 1128 (2001) (Moyer, C.J., dissenting).

[39] *See Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96-97, 573 N.E.2d 77 (1991), where the Ohio Supreme Court summarized the rules of statutory construction as follows: "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation * * *. However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent * * *. The primary rule in statutory construction is to give effect to the legislature's intention * * *. Legislative intent must be determined from the language of the statute itself * * *, as well as from other matters, see R.C. 1.49. In determining intent, it is the duty of the court to give effect to the words used, not to delete words used or insert words not used." (Citations omitted).

service to customers within the utility's service territory, the customers of the supplier default to the utility's standard service offer until the customer chooses an alternative supplier.

The Ohio Supreme Court has on a number of occasions addressed the default service requirements of R.C. 4928.14.[40] The Court has recognized that "default service" is related to a utility's provider of last resort ("POLR") obligations as provided in R.C. 4928.14. [41] Specifically, the Court explained that provider of last resort costs are "charges incurred by an incumbent electric distribution utility for risks associated with its statutory obligation under R.C. 4928.14(C), as the *default provider*, or provider of last resort, for customers who opt for another provider who then fails to provide service."[42]

The PUCO itself has also recognized that the default service requirements under R.C. 4928.14 relate to provider of last resort obligations. The PUCO concluded that POLR costs are costs incurred by the electric distribution utility for risks associated with its legal obligation as the default provider for customers who shop and then return to the utility for generation service. The PUCO made this finding just a few years ago.[43] The law has not changed since the PUCO last applied the default service language to mean

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[40] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶22-30, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶18-26.

[41] *See, e.g., Constellation New Energy, Inc. v Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶39, footnote 5.

[42] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶4, footnote 2 (citation omitted).

[43] *In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand at 18 (Oct. 3, 2011).

provider of last resort. Since the law is unchanged, the PUCO's application of the law should not change.

As indicated, R.C. 4928.14 clearly defines default service as pertaining to the need to serve returning customers. Definitions provided by the General Assembly are to be given great deference in deciding the scope of particular terms.[44] Indeed, the Ohio Supreme Court has noted that "the General Assembly's own construction of its language, as provided in definitions, controls in the application of a statute.* * *."[45]

Default service as defined by the General Assembly, the Ohio Supreme Court, and the PUCO means service provided by the electric distribution company that must be offered if generation suppliers are unable to continue to serve customers who have switched from the utility to a supplier. No more and no less.

A standard service offer can only consist of "competitive" components of retail electric service, while default service (provider of last resort) can have competitive and non-competitive components.[46] Thus, the two terms are not synonymous. In R.C. 4928.141 the General Assembly defines the standard service offer in broad terms as "all *competitive* retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." For a component of retail electric service to be deemed "competitive" there must be a declaration by the Revised Code or the PUCO that the service component is competitive.[47]

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[44] *Good Samaritan Hospital v. Porterfield*, 29 Ohio St.2d 25, 30, 278 N.E.2d 26 (1972).

[45] *Ohio Civil Rights Comm. v. Parklawn Manor*, 41 Ohio St.2d 47, 50, 322 N.E.2d 642 (1975).

[46] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 492, 2008-Ohio-990, 885 N.E.2d 195, ¶27(Court found that the PUCO may allow a distribution utility's non-competitive costs associated with POLR, and determined that the PUCO's approval must be given under R.C. Chapters 4905 and 4909).

[47] *See* R.C. 4928.01(B).

Thus, this Commission should not construe default service because it is clearly defined under R.C.4928.14. And as defined in that statute, default service means provider of last resort. Default service does not mean standard service.

But DP&L failed to prove that that the costs charges to customers through the Service Stability Rider are comprised of costs of DP&L being the provider of last resort. The PUCO has ruled that in order to collect POLR charges, the Utility must produce measurable and verifiable evidence of its provider of last resort costs.[48] Here, the Utility clearly failed to produce such evidence. Yet the PUCO approved the Service Stability Rider as a stability charge that maintains the Utility's financial integrity so that it may continue to provide SSO service, which it defined as "default service."

The PUCO violated the law when it allowed the Utility to charge customers $330 million for rate stability, on a premise that the standard service offer equates to default service under the statute. There is no statutory justification for approving the SSR under R.C. 4928.143(B)(2)(d). There is no evidence in the record that there are measurable and verifiable costs of the Utility's POLR obligations. The PUCO erred.

b. Construing the Service Stability Rider to be related to bypassability leads to absurd and unreasonable results—something that should be avoided in statutory interpretation.

Similarly, the PUCO erred in determining that the SSR is related to bypassability. Notably, it came to this conclusion without any explanation. Unlike "default service," "bypassability" is not a term defined by the General Assembly. Thus, the PUCO can

[48] *See In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan, an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO, et al., Order on Remand at 29 (Oct. 3, 2011) (holding that POLR costs should be readily measurable and verifiable).

engage in statutory interpretation. But when the PUCO construes the statute it must do so in a reasonable manner and should consider Ohio's Rules of Statutory Construction and the case law that has developed under those rules.

One of Ohio's Rules of Statutory Construction is R.C. 1.49. Under R.C. 1.49 when a statute is ambiguous, a court or agency may consider, inter alia, the consequences of a particular construction in determining the intent of the legislature. If the interpretation of the statute produces unreasonable or absurd results it should be avoided. *State ex rel. Bolin v. Ohio Environmental Protection Agency*, 82 Ohio App.3d 410, 413, 612 N.E.2d 498 (1992) (holding that a strong presumption exists in favor of statutory construction which avoids absurd results).

But the PUCO did not consider the consequences of its interpretation of bypassability. It failed to consider that unreasonable or absurd results are likely if its statutory analysis holds. This is because all utility charges are either bypassable or non-bypassable and hence, under the PUCO's interpretation, all charges can be said to relate to bypassability. That type of interpretation renders subsection (d) and the entirety of R.C. 4928.143(B)(2) virtually meaningless.

The PUCO's interpretation, if accepted, would open the floodgates to all sorts of charges. This is contrary to the General Assembly's express intent (as construed by the Ohio Supreme Court)[49] to place limits on the provisions that an electric utility may include in its electric security plan. For these reasons, the PUCO erred. Rehearing should be granted on this issue.

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[49] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 32.

2. The PUCO erred in finding that the Service Stability Rider is a charge that has the effect of stabilizing and providing certainty regarding retail electric service.

As stated above, the PUCO erred in finding that the Service Stability Rider fits as a charge related to "default service" or "bypassability" under the statute. Thus, the second criteria – determining that the charge fits within the categories enumerated in the statute – was not met. But the PUCO also erred in finding that the SSR met the third criteria of the statute—that it has the effect of stabilizing or providing certainty regarding retail electric service.

The PUCO found that the SSR would have the effect of stabilizing or providing certainty regarding retail electric service.[50] It also found that if DP&L's financial integrity "becomes further compromised, it may not be able to provide stable or certain retail electric service."[51] The PUCO noted that DP&L is not structurally separated and thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility.[52] The PUCO then concluded that the SSR will provide stable revenue to DP&L for the purpose of maintaining its financial integrity.

But the PUCO misses the point. The statute is directed to providing *certainty regarding retail electric service, not certainty of revenues for the utility.* The words of the statute state that the "terms, conditions, or charges" must "have the effect of stabilizing or providing certainty regarding retail electric service." But the PUCO reads the language to allow any provision that enriches the utility so long as the utility can

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[50] September 4, 2013 Order at 21.

[51] *Id.*

[52] *Id.* at 22.

make a case that it needs revenues in order to continue to provide service. In other words, under the PUCO's interpretation, as long as the provision stabilizes the utility's earnings, it is permissible.

Such a liberal construction of the statute conflicts with the Ohio rules of statutory construction. Had the General Assembly wanted to allow more permissive structuring of an electric security plan, it would have inserted language to that effect. It did not. The statute is written from the perspective of the customer and requires certainty regarding retail electric service, not certainty of earnings for the utility.

The doctrine of *expressio unius est exclusio alterius* provides that to express or include one thing implies the exclusion of the other or of the alternative.[53] Under that doctrine, the General Assembly's provision of authority to the PUCO to approve specific provisions that promote *stability and certainty regarding retail electric service* means just that. It does not mean that a provision is permissible so long as it promotes *stability and certainty of earnings for the utility.*

The PUCO cannot rewrite the law. "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts."[54] R.C. 4928.143(B)(2)(d) is clear and unambiguous.

The PUCO's attempt to interpret the words in the statute to justify approving the SSR under R.C. 4928.143(B)(2)(d) is unlawful and unreasonable. The PUCO should grant rehearing on this issue and reverse its holding.

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[53] *Black's Law Dictionary* 661 (9th Ed.2009).

[54] *Thompson Elec., Inc. v. Bank One, Akron, N.A.*, 37 Ohio St.3d 259, 264, 525 N.E.2d 761 (1988) (remaining citation omitted).

D. The PUCO Erred In Establishing A Service Stability Rider Charge To Ensure The Financial Integrity Of DP&L As A Whole, When, Under R.C. 4928.38:

1. **utilities are to be fully on their own in the competitive generation market after the market development period; and**

2. **the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.**

The PUCO noted that the Service Stability Rider will provide revenue to DP&L for purposes of maintaining its financial integrity.[55] The PUCO acknowledged that because DP&L had not structurally separated, its financial losses in generation, transmission or distribution are financial losses for "DP&L," the entire utility. Thus, the PUCO justified the SSR as supporting all of the utility's lines of business—generation, transmission, and distribution. But the SSR is not necessary to support the utility's transmission and distribution businesses, which DP&L's Chief Financial Officer, Mr. Jackson, acknowledged are financially stable.[56] Consequently, the SSR is really designed to just support DP&L's ***competitive*** generation services. The record in the proceeding bears this out. DP&L witness Jackson testified that DP&L's alleged financial integrity woes have been driven by three factors, all pertaining to the generation business: increased customer switching, declining wholesale prices, and declining capacity prices.[57]

But requiring customers of a utility to subsidize competitive generation services is contrary to the law. Under R.C. 4928.38, the General Assembly expressly limited

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[55] September 4, 2013 Order at 22.

[56] Transcript Volume I-public, at pages 117-118.

[57] DP&L Ex. 1A at 13.

customer funding of generation services. The law clearly provides that with the termination of transition revenues at the end of the market development period, "the utility shall be fully on its own in the competitive market." By definition, being "fully on its own in the competitive market" (the generation market), means that a utility no longer receives funds from customers that support, either directly or indirectly, its generation operations. Rather the utility must compete with other generation market participants and face customer switching, fluctuating wholesale prices, and uncertain capacity prices, without subsidy. This should mean that the SSR cannot be approved because it is used as an unjustified "protection" or "insulation" for the Utility against the very market forces that the General Assembly intends to promote in Ohio.

But the PUCO never addressed the fact that the SSR is intended to unlawfully subsidize competitive generation services. Rather, it focused on addressing intervenor arguments that the SSR is an unlawful transition charge.[58] While the illegality of further transition charges is a critical inquiry, it involves a separate inquiry, apart from the inquiry as to whether the SSR is an illegal subsidy of competitive generation services.

Being fully on its own in the competitive market means there can be no subsidy of the utility's generation business. The Service Stability Rider is a subsidy, directed solely at ensuring the revenues or the "financial integrity" of DP&L's generation business. The PUCO's authorization of the Service Stability Rider was unlawful and violated R.C. 4928.38. The PUCO should reverse its decision.

But there are more reasons the PUCO should reverse its decision. Under R.C. 4928.38, once the market development period is over, there can be no further collection

[58] *See* September 4, 2013 Order at 22.

of transition revenues from the utility's customers. Additionally, the law precludes "any equivalent revenues" from being given to the utility. As OCC Witness Rose testified, the market development period for DP&L ended on December 31, 2005.[59] This means that all transition revenues or "any equivalent revenues" may not be authorized by the PUCO.

The only exception to this prohibition relates to express authorizations found in R.C. 4928.31 through 4928.40. Those provisions specifically relate to a utility's electric transition plan. DP&L's transition plan expired long ago. The exceptions, thus, no longer apply.

The PUCO however, concludes summarily that its authorization of the SSR is not the equivalent of authorizing transition revenues.[60] The PUCO appears to believe that because DP&L has not claimed that its electric transition plan ("ETP") failed to provide sufficient revenues, then the Service Stability Rider cannot be a claim for transition revenues or any equivalent revenues. This makes little sense. Transition charges were charges designed to subsidize generation services (during the transition to a competitive generation market). The SSR is a charge designed to subsidize generation services (that are supposed to be "fully on their own"). The SSR is an illegal transition charge.

Under R.C. 4928.37(A)(1), transition charges were initially permitted to provide a utility with the opportunity to receive revenues "that may assist it in making the transition to a fully competitive retail electric generation market."[61] Dr. Rose, who is very familiar with the transition cost legislation through his work with the Ohio Legislative

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[59] Direct Testimony of OCC witness Kenneth Rose at 12.

[60] September 4, 2013 Order at 22.

[61] *See* R.C. 4928.37.

Services Commission,[62] identified the SSR request as a request for transition revenues or any equivalent revenues.[63]

The law which uses the expansive phrase "any equivalent revenues" does not differentiate between ETP claims and post-ETP claims. DP&L's present claim is that it needs assistance in order to complete the transition to a fully competitive market when 100% of its SSO will be competitively bid.[64] It needs the assistance because of: increased customer switching, declining wholesale prices, and declining capacity prices.[65] This assistance the SSR provides to DP&L is the equivalent of receiving transition revenues, albeit in a different period of time—i.e. post-ETP.

The Commission erred in allowing DP&L to collect transition revenues or the equivalent revenues from customers through the SSR, above and beyond the $441 million already paid for by customers. [66] The Commission is a creature of statute. It may only exercise the authority given to it by the General Assembly.[67] It cannot authorize DP&L to collect any revenues equivalent to transition revenues after the end of the market development period. The PUCO should reverse its finding in this regard, and deny the

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[62] Dr. Rose was employed by the Legislative Services Commission to assist in the drafting of S.B.3, which contained the transition cost provisions that became R.C. 4928.37-39. See Direct Testimony of Kenneth Rose at 2; Transcript Volume VIII-public, pages 2026-2030.

[63] Direct Testimony of OCC witness Kenneth Rose at 10.

[64] *See* Direct Testimony of DP&L witness Craig L. Jackson at 2-3; Second Revised Testimony of Craig L. Jackson at 6.

[65] DP&L Ex. 1A at 13.

[66] Direct Testimony of OCC witness Kenneth Rose at 7; *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 No. 99-1687-EL-ETP, Opinion and Order (Sept. 21, 2000).

[67] *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

Utility the ability to collect hundreds of millions of dollars more in new (or additional) transition revenues from its customers during 2014 through 2016, and possibly through May 31, 2017.

E. The PUCO Erred In Establishing A Service Stability Rider To Achieve A Return On Equity Target (At Customer Expense), In Violation of R.C. 4928.03 Under Which Generation Service Has Been Declared A Competitive Retail Electric Service.

In its Opinion and Order, the PUCO authorized a Service Stability Rider to achieve a Return on Equity ("ROE") target of 7 to 11 percent.[68] On this basis the PUCO approved a Service Stability Rider of $110 million per year for each of three years from January 2014 through December 2016.[69]

While the PUCO claims that it did not exactly determine the ROE the utility will recover,[70] it cannot escape the fact that it set a level of guaranteed revenues for the Utility, which is nothing short of regulation. Instead of allowing DP&L to address the challenges of market forces on its own, the PUCO set regulated electric utility charges for DP&L to collect from captive customers.

But DP&L's generation business was declared a competitive service under R.C. 4928.03, and as a competitive service, it was deregulated. In other words, competitive generation service is no longer subject to traditional cost-based regulation.[71] OCC Witness Rose testified that setting the SSR (and the switching tracker) to ensure DP&L's

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[68] September 4, 2013 Order at 25.

[69] September 6, 2013 Entry at 2.

[70] September 4, 2013 Order at 25.

[71] Direct Testimony of OCC witness Daniel J. Duann at 5.

"overall creditworthiness" is an attempt to re-introduce regulatory protection for the generation portion of DP&L's business that has been deregulated.[72]

Guaranteeing revenues for DP&L in order to meet a targeted return on equity conflicts with the goals of S.B.221. As Dr. Rose testified, requesting that all customers ensure the financial integrity of DP&L is equivalent to requiring customers to guarantee a certain level of earnings for both the regulated and non-regulated (i.e. generation) portions of DP&L's business. This interferes with the operation of a competitive market.[73]

Dr. Rose testified that, from an economic perspective, it is not sound regulatory policy to guarantee that DP&L receive a certain level of generation revenues.[74] Retail customers should no longer protect the Utility from competitive generation market risks. DP&L has had sufficient time to prepare for a competitive generation market. In a competitive market setting, DP&L should not receive compensation from customers for market losses, just as it does not share profits with customers from market gains.

Each market participant in Ohio's generation services market is responsible for its own loss or profit.[75] This is the premise of R.C. 4928.38—each utility, after the market development period, "shall be fully on its own in the competitive market."

But the Commission's ruling allowing the SSR disregards the statutes and the premise of the entire statutory scheme. The Commission erred. On rehearing it should

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[72] Direct Testimony of OCC witness Kenneth Rose at 5.

[73] *Id.* at 16.

[74] *Id.* at 5.

[75] Direct Testimony of OCC witness Daniel J. Duann at 30.

reverse its ruling guaranteeing a ROE to a utility whose generation operations were deregulated.

F. The PUCO Erred In Authorizing The Service Stability Rider Because It Is An Anti-Competitive Subsidy (Paid By Customers) That Violates R.C. 4928.02(H).

When the PUCO approved the Service Stability Rider it created an anti-competitive subsidy to one competitive generation service supplier -- DP&L. DP&L will receive a customer-funded subsidy to enrich its generation business. Collection from customers of SSR revenues will give DP&L an unfair advantage because it will provide a subsidy of DP&L's competitive generation service by DP&L's captive distribution customers.[76]

Such a subsidy violates R.C. 4928.02(H). Under that statute, the PUCO must ensure effective competition by avoiding anti-competitive subsidies flowing between competitive and non-competitive retail service. That provision also prohibits the recovery of generation-related costs through distribution rates. In fact, the Ohio Supreme Court struck down a PUCO Order where the PUCO violated this policy provision of R.C. 4928.02.[77] There, the Commission had permitted a utility to collect generation costs through future distribution rate cases or fuel cost recovery mechanisms to reduce distribution related expenses. The Court found that R.C. 4928.02(G),[78] prohibiting anti-competitive subsidies, had been violated. The Court reversed the PUCO and remanded the case to the PUCO to modify the rate plan to remedy the statutory violation.

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[76] *Id.* at 15.

[77] *Elyria Foundry Co. v. Pub. Util. Comm.*, (2007), 114 Ohio St.3d 305.

[78] Under S.B. 221, new subsections were inserted into R.C. 43928.02, and thus the subsections were re-designated. Subsection (G) became the current subsection (H).

Similarly, here, the Service Stability Rider violates this provision of R.C. 4928.02. Thus, the SSR is an improper and illegal subsidy of DP&L's generation services, which have been declared to be competitive and may not be subsidized. The PUCO should reverse and reject the Service Stability Rider.

G. The PUCO Erred In Basing Its Opinion And Order On Facts Not Within The Record, Violating R.C. 4903.09.

In its Order, the PUCO summarizes the testimony and arguments of intervenors and Staff on numerous issues including the SSR. On page twenty of the Order, the PUCO refers to the testimony of Staff Witness Choueiki claiming that "Staff witness Choueiki noted that the Commission has granted similar charges [stability 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."

But, Mr. Choueiki's testimony citing the Duke Energy Ohio Case as an example of the PUCO granting similar charges to other utilities was withdrawn, in response to OCC's motion to strike.[79] Thus, the Commission erred in citing to testimony that is not within the record. When the PUCO did so, it violated R.C. 4903.09. That statute requires the PUCO to make factual findings in its written opinions based on evidence in the record. The PUCO should grant rehearing and correct its opinion and order, consistent with the record in this proceeding.

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[79] Transcript Volume VII-public, page 1827.

H. The PUCO Erred In Determining The Amount Of The Service Stability Rider That Customers Will Be Required to Pay By:

1. Overstating the amount of the Service Stability Rider over the Electric Security Plan period because it failed to offset the Service Stability Rider by the amount of capital expenditure reductions that were approved as part of DP&L's round 2 budget/long term forecast.

And

2. Failing to reduce the amount of the Service Stability Rider because reasonable switching projections indicated less lost revenue from switching.

The PUCO authorized DP&L to collect an SSR from its customers over the term of DP&L's electric security plan. As argued, above, the PUCO erred in doing so, and it should reverse itself. In the event the PUCO does not grant rehearing on that issue, it should nonetheless grant rehearing on its findings pertaining to the amount of the SSR because the amount of the SSR needed to ensure DP&L's financial integrity is unreasonably overstated.

When considering the amount of revenues needed to ensure DP&L's financial integrity, the PUCO made two errors, which unreasonably overstate the calculation of the SSR. First, the PUCO failed to offset the SSR amount with the capital expenditure reductions that were approved as part of DP&L's round 2 budget/long term forecast. Second, it failed to reduce the SSR to reflect less revenue loss associated with reasonable switching assumptions. The failure to adjust the SSR downward for these errors resulted in an SSR that is unreasonably overstated and inconsistent with the PUCO's intent that the SSR is the "minimum amount necessary to ensure the Company's financial integrity and provide it with the opportunity to achieve a reasonable ROE during the ESP."[80]

[80] September 4, 2013 Order at 25.

a. The PUCO should reduce the Service Stability Rider by the capital reductions approved under DP&L's round 2 budget/long term forecast.

In the September 4, 2013 Order, the PUCO explained that it did not offset the proposed SSR by future capital expenditure reductions because it was not persuaded that the potential capital expenditure reductions have as significant an impact on the Company's ROE as the potential O&M savings.[81] While the Commission is correct that the capital expenditure reductions have less of a direct impact on the Company's ROE than potential O&M savings, there is still a distinct impact that translates to [redacted] in reduced depreciation expense, and consequently reduced revenue requirements over the term of the ESP.

The record reflects that DP&L did not include in its [redacted].[82] But as part of the round 2 budget/long term forecast, which was recently approved,[83] DP&L Inc. [redacted][85] DP&L witness Malinak testified that, assuming the mid-point of the capital expenditure reduction of [redacted]

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[81] *Id.*

[82] Transcript Volume I-confidential, pages 102-103.

[83] Transcript Volume I-public, page 217.

[84] Transcript Volume I-confidential, page 95; FES Exhibit 4.

[85] Transcript Volume I-confidential, pages 96-97; FES Exhibit 4.

[redacted][86] [redacted] (per year).[87] Multiplying that reduced depreciation expense each year for the three year ESP period translates into [redacted] of reduced depreciation expenses. These reductions to depreciation expense equate dollar for dollar to reduced revenue requirements. These reduced revenue requirements should have been used to offset the SSR, but they were not. It was unreasonable for the PUCO to disregard these reductions. Doing so significantly overstates the amount of the SSR by [redacted] ([redacted] million/$110million), to the detriment of all customers who are being forced to pay it. The PUCO should grant rehearing to recalculate the SSR to take into account the reduced capital expenditures.

b. The PUCO erred when it unreasonably failed to reduce the Service Stability Rider revenue requirement by incorporating reasonable assumptions about the level of switching.

In starting with DP&L's SSR calculation of $137.5 million per year, and adjusting it for the O&M reductions, the PUCO unreasonably accepted the Utility's switching assumptions. As Staff Witness Choueiki testified, the projected annualized switch rates that DP&L Witness Chambers relied upon to estimate the utility's retail revenues were not reasonable.[88] The PUCO Staff advocated using more reasonable switch rates that would be in the [redacted] range, as compared to [redacted] overall switching rates incorporated into the Utility's SSR calculation.[89] When PUCO Staff adjusted the switch rates to more reasonable levels, it concluded that there would be a significant increase in

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[86] Assuming straight line depreciation over 25 years.

[87] Rebuttal and Supplemental Testimony of DP&L witness R. Jeffrey Malinak at 27.

[88] Prefiled Testimony of PUCO Staff witness Hisham M. Choueiki at 13.

[89] *See* Second Revised Testimony of DP&L witness Aldyn W. Hoekstra at 8; Exhibit WJC-3.B. Remarkably, the Utility projects an almost [redacted] increase in yearend overall switching from 2012 through 2013. The latest actual overall switching rates, as of February 28, 2013, was [redacted] showing no indication of a jump in overall switching as projected by Mr. Hoekstra. Transcript Vol. II –confidential, at page 293.

DP&L's retail revenues as compared to revenues projected by DP&L.[90] The increase in retail revenues would in turn decrease the need for SSR revenues. But the PUCO ignored this issue. That was unreasonable and resulted in an overstated SSR. The PUCO should grant rehearing on this issue to determine the revised revenue requirement for the SSR, using realistic switching rates.

I. The PUCO Erred In Authorizing A Service Stability Rider-Extension, Through Which DP&L Can Seek To Collect An Additional $45.8 Million In Stability Charges From Its Customers.

1. The PUCO's decision to give DP&L the opportunity to seek to collect an additional $45.8 million from its customers was made without record support and contains no findings of fact with respect to the need for such an extension of the Service Stability Rider, thus violating R.C. 4903.09.

The PUCO authorized DP&L to create an SSR Extension ("SSR-E") which it initially set at zero.[91] Under the PUCO's Order, DP&L can use the SSR-E to collect from its customers up to $45.8 million for the five months ending May 31, 2017.[92] The PUCO determined that the SSR-E mechanism will give DP&L the opportunity to provide more reliable data on its financial integrity.[93] The SSR-E will function like the SSR the PUCO approved—to inappropriately ensure stability and certainty regarding the *utility's earnings* during 2017. The PUCO noted that the SSR-E will ensure stability and certainty regarding electric service because DP&L will provide more clear and reliable data for the later months of the ESP.[94]

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[90] Prefiled Testimony of PUCO Staff witness Hisham M. Choueiki at 13.

[91] September 4, 2013 Order at 26.

[92] September 6, 2013 Entry at ¶4.

[93] September 4, 2013 Order at 27.

[94] *Id.*

As discussed previously, under R.C. 4903.09, the Commission must decide the case before it based on evidence in the record. It must make "findings of fact," and issue "written opinions setting forth the reason prompting the decisions" "based upon said finding of fact."[95]

But the facts cited by the PUCO and the record developed in the case do not support the need for SSR-E. In fact, the PUCO found that it was "persuaded by the testimony at the hearing that the reliability of financial projections significantly declines over time." For that reason it authorized the SSR only until December 31, 2016.[96] Thus, if there are no reliable financial projections for 2017 that justify collecting the SSR over that time frame, there can be no facts that justify allowing DP&L to seek additional customer funding in 2017 through a similar mechanism, the SSR-E. Rehearing should be granted and the PUCO should reverse its decision to authorize rider SSR-E.

2. The PUCO failed to identify how the Service Stability Rider-Extension is a provision allowed under R.C. 4928.143(B)(2), and failed to provide authority that permits the PUCO to modify a utility's Electric Security Plan if a utility can show its financial integrity is "at risk."

In approving the SSR-E, the PUCO found that the SSR-E 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 the financial integrity of DP&L will be maintained without granting DP&L significantly excessive earnings."[97] But the PUCO nonetheless

[95] R.C. 4903.09.

[96] September 6, 2013 Entry at ¶4.

[97] September 4, 2013 Order at 27.

authorized the SSR-E without making a finding that the rider is a permissible provision of an electric security plan.

In order for a provision to be authorized as part of a utility's electric security plan, it must fall within the purview of R.C. 4928.143(B)(2).[98] If a provision of an electric security plan does not fit within one of the categories listed in R.C. 4928.143(B)(2), the PUCO cannot authorize it. Here the PUCO appears to be relying upon its primary finding that the SSR is a charge authorized under R.C. 4928.143(B)(2); thus, the SSR-E, which is an extension of the SSR, must also be authorized.

But as explained above, the PUCO erred in finding that the Service Stability Rider is a charge related to default service and bypassability. The SSR is not related to default service. Nor is it related to bypassability. And the SSR does not stabilize or provide certainty regarding retail electric service. The SSR-E fares no better. It is not related to "default service." Nor is it related to bypassability. And it does not stabilize or provide certainty regarding retail electric service. Thus, the PUCO had no authority to approve the SSR-E, even as a "zero" rider.

Moreover, it appears that the PUCO has agreed to allow DP&L to collect (through the rider) up to $45.8 million of extra revenues from customers so long as DP&L can meet certain conditions[99]and show that its financial integrity will be compromised or is "at risk."[100] This enables the PUCO to adjust an approved ESP after three years have passed.

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[98] *In re: Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶32.

[99] DP&L must also meet the following conditions: it must file an application for a distribution rate case; it must file an application to divest its generation assets; it must file an application to modernize its electric distribution infrastructure; and it must establish and begin implementing a plan to modernize its billing system. September 4, 2013 Order at 27-28.

[100] September 4, 2013 Order at 27.

While the PUCO possesses the authority to adjust a market rate offer ("MRO") to address an emergency that threatens a utility's financial integrity under R.C. 4928.143(D), the PUCO does not possess the same authority for an electric security plan. Any adjustments to an ESP are limited to those that can occur under R.C. 4928.143(E).

Under R.C. 4928.143(E), when there is an ESP with a term greater than three years, the PUCO must test the plan to determine if the plan still meets the "more favorable in the aggregate" standard. Additionally, the PUCO must test whether the prospective effect of the ESP is substantially likely to provide the EDU with a significantly excessive return on equity. Notably, missing from the statute is any reference to reviewing whether the plan places the utility's financial integrity at risk.

Thus, by approving an SSR-E, and permitting the utility the opportunity to collect another $45.8 million from customers, the PUCO has rewritten the law to create another layer of protection for the Utility. The General Assembly could have included the "financial emergency" language of R.C. 4928.142(D) in the ESP statute (R.C. 4928.143). But it did not. Under the doctrine of *expressio unius est exclusio alterius*, because the General Assembly did not include that language, the Commission cannot rewrite the law.[101]

Additionally, the protection from a financial emergency threatening a utility's financial integrity is not needed under an electric security plan.[102] Utilities have ultimate

[101] *See State ex rel v. Evatt* (1944), 144 Ohio St. 65 (no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend, or improve the provisions of a statute to meet a situation not provided for).

[102] A utility filing an MRO does not have the same unilateral veto power over modifications made by the PUCO to the MRO. Thus, protections to the utility may be considered a quid pro quo for being unable to withdraw and terminate.

veto power over any modifications made to the ESP.[103] If the Commission modifies and approves, or disapproves the ESP, a utility may withdraw its application, thereby terminating it and may file a new SSO.[104] And there are other opportunities for utilities to terminate the ESP, for example, if the PUCO orders a return of significantly excessive earnings under R.C. 4928.143(E) or (F). These provisions already protect the utilities far beyond the means of other parties. No further protection is needed. Nor is further protection provided under the statutes. The PUCO erred here and should grant rehearing on this matter, reversing its findings.

3. **The PUCO erred in determining that the Service Stability Rider-Extension should be set in order to maintain DP&L's financial integrity when, under R.C. 4928.38:**

   a. **utilities are to be fully on their own in the competitive generation market after the market development period; and**

   b. **the PUCO cannot authorize a utility to receive transition revenues or "any equivalent revenues" after the market development period.**

The PUCO approved the SSR-E as a means for DP&L to "maintain its financial integrity."[105] And the PUCO has made no finding that revenues collected from the SSR-E cannot be used to support all of the utility's lines of business -- generation, transmission, and distribution.

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[103] Indeed Former Commissioner Roberto referred to the balance of power created by an EDU's authority to withdraw from a Commission modified and approved plan and concluded it created a dynamic that is impossible to ignore. *In the Matter of the Application of FirstEnergy to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan,* Case No. 08-935-EL-SSO, Dissent at 59-60 (Mar. 25, 2009).

[104] R.C. 4928.143(C)(2)(a).

[105] September 4, 2013 Order at 27.

As explained in discussion of the SSR above, under R.C. 4928.38, the General Assembly expressly limited customer funding of generation services. After the market development period is over, "the utility shall be fully on its own in the competitive market." Thus, the utility can no longer receive funds that support, directly or indirectly, its generation operations. A supplemental rider such as the SSR-E, however, provides protection from competitive market forces. The PUCO authorization of the SSR-E, like its authorization of the SSR, was unlawful and violated R.C. 4928.38. The PUCO should reverse its decision.

Moreover, under R.C. 4928.38, once the market development period is over, a utility cannot collect any more transition revenues or "any equivalent revenues." For DP&L the market development period ended on December 31, 2005.[106] Thus, the PUCO cannot authorize DP&L to collect any more transition revenues or any equivalent revenues.

But that is just what the PUCO has done here. Revenues to maintain the utility's financial integrity, collected through the SSR-E, are transition revenues or equivalent revenues. Numerous witnesses, including OCC Witness Rose, identified the SSR proposal as a proposal to collect these unlawful revenues.[107] The SSR-E proposal is merely an extension of the SSR. Thus, it is as unlawful as the SSR, for the exact same reasons. The PUCO erred here, and should reverse on rehearing.

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[106] Direct Testimony of OCC witness Kenneth Rose at 12.

[107] *See id.* at 10.

4. The PUCO erred in establishing a Service Stability Rider-Extension to address the financial losses DP&L will allegedly incur from its provision of competitive generation services because the Service Stability Rider-Extension is an anti-competitive subsidy violating R.C. 4928.02(H).

When the PUCO approved the SSR-E, it created an anti-competitive subsidy for DP&L. DP&L will receive a customer-funded subsidy that it can use to support its generation business. This violates R.C. 4928.02(H), just as the SSR does. Under that statute, the PUCO must ensure effective competition by avoiding anti-competitive subsidies flowing between competitive and non-competitive retail service. The PUCO erred in approving the SSR-E to subsidize competitive generation services. Rehearing should be granted.

5. The PUCO erred by giving DP&L a second opportunity to provide more reliable data on its financial integrity related to year four of its Electric Security Plan term, when DP&L failed to satisfy its burden of proof under R.C. 4928.143(C)(1).

Under R.C. 4928.143(C), DP&L had the burden of proof in this proceeding. It failed to meet that burden of proof, with respect to, inter alia, its need for more customer funding to ensure its financial integrity for year four of its proposed ESP.[108] Instead of outright rejecting the utility's request for additional funding, the PUCO gave the utility a tool to collect more money from customers. It approved the SSR-E, a rider that no party presented as part of the evidentiary record in this proceeding.

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[108] *See* September 4, 2013 Order at 27.

Under the SSR-E, DP&L will be able to request additional customer funding to maintain its financial integrity during year four of its ESP. It will be afforded a second chance to "provide more reliable data on its financial integrity."[109]

But the law is not written to afford the Utility a further opportunity to meet its burden of proof. A utility has the "burden of proof *in the proceeding*."[110] "The proceeding" being referred to is the utility's ESP proceeding, not a supplemental proceeding. DP&L failed to prove that in year four it would need more customer-funding for its financial integrity. Allowing DP&L to apply for an SSR-E during the term of the ESP, when it did not justify its need for funding the first time around, is unlawful, unjust, and unreasonable. Rehearing should be granted.

J. The PUCO Erred When It Found That Under R.C. 4928.143(C)(1) The Modified Electric Security Plan Is More Favorable In The Aggregate For Customers Than The Expected Results Under A Market Rate Offer.

1. The PUCO erred by failing in its analysis required by R.C. 4928.143 (C)(1) to determine how much more customers will have to pay under the PUCO-modified electric security plan than under a market rate offer.

In its September 4, 2013 Order, the PUCO found that DP&L's customers would pay $250 million more under the PUCO-modified ESP than under a MRO.[111] To arrive at that amount, the PUCO used the PUCO Staff's quantitative analysis (using a three year ESP) and adjusted it 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 MRO, the SSR would be in the amount of $110 million

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[109] *Id.*

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

[111] September 4, 2013 Order at 50.

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."[112] The PUCO also made an adjustment to the PUCO Staff's analysis because the PUCO-modified ESP did not match up with the PJM planning year.[113] But then a lot of that changed just two days later.

Through its Entry *Nunc Pro Tunc*, the PUCO made significant substantive changes to its September 4, 2013 Order. The PUCO: 1) delayed the implementation of the SSO being 100% competitively bid by an additional five months—until June 1, 2017; 2) gave DP&L an additional five months—by May 31, 2017—to divest its generation assets; 3) extended the period of the ESP for an additional 5 months to match up with the PJM planning period; 4) extended the SSR an additional full year which means that customers have to pay DP&L an additional $110 million in 2016; and 5) made the SSR-E available to DP&L in 2017 in the amount of $45.8 million.[114]

That Entry changed the amount that the PUCO-modified ESP failed the quantitative analysis. And the PUCO acknowledged this.[115] However, the PUCO did not re-calculate the amount that the ESP (as modified by the September 6, 2013 Entry) fails the quantitative analysis. This is an error. The PUCO has failed to perform the analysis required by R.C.4928.143(C). The PUCO's action is unlawful and OCC's application for rehearing should be granted for consideration of this issue.

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[112] *Id.*

[113] *Id.*

[114] September 6, 2013 Entry at 2-3.

[115] September 6, 2013 Entry at 3.

2. The PUCO erred in finding that qualitative benefits of the electric security plan significantly outweigh the results of the quantitative analysis.

The PUCO erred in finding, in its September 4, 2013 Order, that "qualitative benefits" of DP&L's ESP, as modified, "significantly outweigh[] the results of the quantitative analysis and that the modified ESP is more favorable" than an MRO.[116] The PUCO inappropriately attributes "weight" to "qualitative benefits" that are not supported by evidence. And, most problematically, it improperly considers requiring DP&L to comply with requirements of the law (through the ESP) to be a "qualitative benefit." In sum, the PUCO's decision to approve a modified ESP that will cost DP&L's customers $250 million or more than the rates paid under a MRO is unreasonable and unlawful.[117]

In reaching its conclusion, the PUCO identified six benefits which it deemed to be qualitative benefits of the ESP which would not be available with an MRO: (1) more rapid implementation of market rates[118]; (2) facilitation of complete divestment of DP&L's generation assets by the end of the term of the modified ESP, i.e. by May 31, 2017, which it considers necessary to "implement a fully competitive retail market in DP&L's service territory while providing "stable, safe and reliable retail electric service"[119]; (3) competitive retail enhancements, which it believes have a qualitative benefit that "is substantially greater than the cost of implementation"[120]; (4) incentives for billing

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[116] September 4, 2013 Order at 52.

[117] As discussed previously, because the PUCO has not yet "corrected" its calculation of the quantitative detriments resulting from the revisions made to the ESP through its September 6, 2013 Entry, it is not possible to know how much more customers will have to pay under the ESP. However, the increase in the SSR by $110 million would likely add to the $250 million cost to customers as the SSR was a primary driver for the original $250 million amount.

[118] September 4, 2013 Order at 50-51.

[119] September 4, 2013 Order at 51; September 6, 2013 Entry at 2.

[120] September 4, 2013 Order at 51.

system modernization allowing CRES providers to "offer a more diverse range of products to customers"[121]; (5) economic development provisions to improve state's competitiveness in the global market,[122] and (6) incentives to submit a plan to modernize DP&L's distribution infrastructure.[123]

One of the PUCO's "qualitative benefits" of the proposed ESP is the facilitation of complete divestment of DP&L's generation assets by the end of the term of the modified ESP, i.e. by May 31, 2017.[124] The PUCO considers divestment over this time frame to be necessary to "implement a fully competitive retail market in DP&L's service territory while providing "stable, safe and reliable retail electric service."[125] But facilitation of complete divestment should not be viewed by the PUCO as a qualitative benefit since divestment was legally mandated by Senate Bill 3 in 1999.[126] While the PUCO may now view DP&L's complete divestment as a qualitative benefit of the ESP, Senate Bill 3's legal mandate for divestment established this endpoint track long ago. Thus, divestment is a requirement of the law and cannot reasonably be considered a "qualitative benefit" of an ESP.

R.C. 4928.17(C), provides for "functional separation" only for an "interim period prescribed" as ordered by the PUCO "for good cause shown" and to the extent consistent with the policies set forth in R.C. 4928.02. The PUCO has appropriately determined that such a "functional separation" period should come to an end, and structural separation, or

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[121] September 4, 2013 Order at 51.

[122] September 4, 2013 Order at 52.

[123] September 4, 2013 Order at 52.

[124] September 4, 2013 Order at 51; September 6, 2013 Entry at 2.

[125] September 4, 2013 Order at 51.

[126] R.C. 4928.17(A)(1).

divestment, as prescribed by R.C. 4928.17(A)(1) should be implemented. But the modified ESP itself does nothing that the PUCO could not otherwise do under R.C. 4928.17 to advance the date of divestment or provide appropriate guidelines under which divestment could be completed. Thus, the PUCO is in error in indicating that structural separation of DP&L is a "qualitative benefit" of the modified ESP that would not be available with a MRO.

Further, while the PUCO suggests that, under the ESP, this divestment will be completed while DP&L is able to continue providing "stable, safe, and reliable electric service,"[127] there is no evidence that divestment could not be completed over the same time frame under an MRO. There is also no evidence that divestment concurrent with an MRO would jeopardize the provision of stable, safe, and reliable retail electric service.

With respect to DP&L's proposed "competitive retail enhancements," the PUCO points to no basis for its conclusion that the "qualitative benefits" of DP&L's proposed $2.5 million in competitive retail enhancements are "substantially greater than the cost of implementation."[128] The fact tha[redacted] of DP&L's load is with competitive suppliers[129] – and DP&L is projectin[redacted][130] -- indicates that competitive retail enhancements are unlikely to have substantial benefit beyond the cost of implementation.

Similarly, the PUCO points to no evidence of substantial "qualitative benefits" associated with its requirement for billing system modernization. Nor is there any

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[127] September 4, 2013 Order at 51.

[128] September 4, 2013 Order at 51.

[129] Transcript Vol. II-Confidential, page 293 (DP&L witness Aldyn Hoekstra).

[130] Direct Testimony of DP&L witness Aldyn Hoekstra at 8 (Confidential).

evidence that there are substantial "qualitative benefits" to the PUCO's proposed shareholder-funded Economic Development Fund, or that such benefits would exceed the $2 million per year proposed funding for 2014-2016.[131] Accordingly, the PUCO should grant rehearing on this issue and find that the ESP is not more favorable in the aggregate for customers than a MRO.

3. The PUCO erred when it considered "qualitative benefits" in its analysis required by R.C. 4928.143 (C)(1).

The PUCO erred in finding, in its September 4, 2013 Order, that "qualitative benefits" of DP&L's ESP, as modified, "significantly outweigh[] the results of the quantitative analysis and that the modified ESP is more favorable" than an MRO.[132] The PUCO inappropriately considered alleged "qualitative benefits" resulting from the ESP. The plain language of the statute does not authorize the PUCO to consider qualitative factors. And the PUCO does not provide any support for its statement that it "must consider the qualitative benefits of the modified ESP, in order to view the proposed plan in the aggregate."[133] Accordingly, the PUCO should grant rehearing on this issue.

K. The PUCO Erred In Failing To Find That It Must, Under R.C. 4928.143(E), Test The PUCO-Modified Electric Security Plan In The Fourth Year (2017) To Determine Whether It Continues To Be More Favorable In The Aggregate For Customers As Compared To The Expected Results That Would Otherwise Apply Under R.C. 4928.142.

The PUCO erred in failing to find that it must, under R.C. 4928.143(E), test the PUCO-modified ESP in the fourth year (2017) to determine whether it continues to be more favorable in the aggregate as compared to the expected results that would otherwise

[131] September 4, 2013 Order at 52.

[132] September 4, 2013 Order at 52.

[133] September 4, 2013 Order at 50.

apply under R.C. 4928.142. In the September 4, 2013 Order, the PUCO approved a three year ESP term.[134] Specifically, the PUCO found that "DP&L's ESP should be approved for a term beginning January 1, 2013, and terminating December 31, 2016."[135] Subsequently, the PUCO amended the September 4, 2013 Order. Through the September 6, 2013 Entry, the PUCO changed the end date of DP&L's ESP from December 31, 2016 to May 31, 2017.[136] The PUCO-modified ESP is now 41 months.[137] In other words, the PUCO expanded the length of DP&L's ESP from three years to three years and five months. This change has statutory consequences.

When the term of an ESP exceeds the length of three years from the effective date of the plan, Ohio law places an additional duty upon the PUCO. Under R.C. 4928.143(E), "the commission shall test the plan in the fourth year." That test is performed to determine whether the ESP "continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."[138] By expanding the length of DP&L's ESP into a fourth year, the PUCO is bound by Ohio law to test the plan in 2017, the fourth year.

Yet, the September 6, 2013 Entry fails to address the consequences of the PUCO's approval of an ESP term beyond three years. The PUCO erred by failing to find that it must, consistent with Ohio law, test DP&L's ESP in 2017, the fourth year of the ESP's term.

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[134] September 4, 2013 Order at 15.

[135] *Id.*

[136] September 6, 2013 Entry at 2.

[137] *Id.*

[138] R.C. 4928.143(E).

L. The PUCO Erred When It Failed To Find That The Standard Service Offer Should Be 100% Competitively Bid Over The Entire Electric Security Plan Period, Which Would Provide Customers With The Benefit of Currently Low Market Prices For Lowering Their Electric Bills.

Fourteen years after the General Assembly implemented Senate Bill 3 and five years after Senate Bill 221 became effective, the PUCO holds that only 10% of DP&L's Standard Service Offer ("SSO") load will be served by a competitive auction effective January 1, 2014.[139] While the PUCO's September 6, 2013 Entry follows this 10% auction with a 40% auction for service beginning on January 1, 2015 and a 70% auction for service beginning on January 1, 2016, these delays in providing customers with the benefits of a competitive market are unreasonable. As a result of such delays, the PUCO's Entry deprives SSO customers of the full benefits of current and near-term low market prices of electric generation.

The PUCO's failure to require that the SSO be 100% competitively bid over the entire ESP period is unreasonable.[140] The blending ratio and schedule adopted by the PUCO will deprive DP&L's SSO customers of the full benefits (savings) of a competitive generation market in Ohio that has been a state policy for many years.[141] And the PUCO's blending schedule is contrary to current Commission policies which encourage a faster transition to market-based rates for SSO services.[142]

In its September 4, 2013 Order, the PUCO delays the implementation of the SSO being 100% provided through a competitive bid until January 1, 2017.[143] Two days later,

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[139] September 4, 2013 Entry at 2.

[140] September 4, 2013 Order at 15; September 6, 2013 Entry at 2-3.

[141] Direct Testimony of OCC witness Daniel Duann at 45; *see also* R.C. 4928.02.

[142] Direct Testimony of OCC witness Daniel Duann at 45.

[143] September 4, 2013 Order at 15, 16

through its Entry *Nunc Pro Tunc*, the PUCO delayed that customer benefit by an additional five months—until June 1, 2017.[144] The PUCO states that its approved CBP schedule 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."[145] The PUCO states no other reason for delaying the transition to competition. Nor does the PUCO explain how delaying the benefits to SSO customers of the competitive generation market is necessary for DP&L to refinance its long-term debt and transfer its generation assets.

It is wrong to condition the SSO being 100% competitively bid on the divestiture of DP&L's generation assets for two reasons. First, there is no evidence in the record that the SSO cannot be 100% competitively bid while DP&L still owns generation assets. Second, the idea that a SSO cannot be 100% competitively bid while the distribution utility also owns generation assets is contrary to what other Ohio electric utilities have done. Specifically, Duke Energy Ohio, Inc. ("Duke") has been providing a SSO that is 100% competitively bid (since January 1, 2012)[146] while it still owns generating assets.[147]

For the reasons stated above, the PUCO should grant rehearing on this issue. The PUCO should ultimately reverse its decision to unnecessarily delay the benefits that DP&L's customers would receive with an immediate transition to full competition for its generation service.

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[144] September 6, 2013 Entry at 2-3.

[145] September 4, 2013 Order at 15.

[146] See PUCO Case No. 11-6000.

[147] FERC authorized the divestiture of Duke's generating assets in an order issued on September 5, 2012. *Cinergy Corp. et al.*, EC12-90-000, 140 FERC ¶ 61,180 (FERC September 5, 2012).

M. The PUCO Erred In Authorizing DP&L To Defer The Costs Of The Competitive Retail Enhancements For Collection From Customers In A Future Distribution Rate Case.

In its September 4, 2013 Order, the PUCO approved DP&L's proposed $2.5 million in competitive enhancements and also required DP&L to implement EDI processes, standards, interfaces, and competitive retail enhancements that have been "adopted by every other EDU in Ohio."[148] The PUCO also held that the costs of competitive retail enhancements "should be deferred for recovery in DP&L's next distribution rate case" and that DP&L may seek recovery of such costs in that forum.[149] This finding is not reasonable.

Competitive retail enhancements are "projects that will improve the interaction of CRES providers with DP&L to ensure a smoother customer choice administrative process."[150] CRES providers should pay for all costs associated with enhancing the service that CRES suppliers provide.[151] It is error for the PUCO to decide otherwise.

DP&L sought to collect the costs of competitive retail enhancements from its customers through its Reconciliation Rider.[152] The PUCO rejected DP&L's proposal. But instead of then ordering the primary beneficiary (CRES providers) of the competitive retail enhancements to pay for those enhancements[153] -- the PUCO granted DP&L an unlawful deferral.

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[148] September 4, 2013 Order at 38.

[149] September 4, 2013 Order at 35, 39.

[150] Direct Testimony of DP&L witness Dona Seger-Lawson at 13-14.

[151] Direct Testimony of OCC witness Kathy Hagans at 6.

[152] Direct Testimony of DP&L witness Emily Rabb at 8-10; Direct Testimony of DP&L witness Dona Seger-Lawson at 12-14.

[153] Direct Testimony of OCC witness Kathy Hagans at 6; Direct Testimony of DP&L witness Emily W. Rabb at 8.

Deferral authorization should be limited to "exigent circumstances" and for "good reason" because such authorization is a departure from standard accounting procedures as provided by R.C. 4905.13.[154] Thus, in connection with FirstEnergy's request for deferral of an estimated $450 million in distribution expenses projected to be incurred from 2006-2008, the PUCO stated:

> Standard application of public utility rate making and accounting policies would require that ordinary expenses incurred by a regulated public utility must be recovered, if at all, through annual revenues. The instant proposal, as it relates to the capitalization and deferral of distribution related expenses is a departure from those generally recognized policies. Although the granting of such deferral authority is within the discretion of the Commission, we believe that to approve such a measure requires that we find there to be both exigent circumstances and good reason demonstrated before such amounts should be treated differently from ordinary utility expenses. In the current case, because the companies are clearly in need of significant and costly improvements to their infrastructure, including vegetation management practices, maintenance practices, and storm damage repairs, we believe that it is important for the utilities to be encouraged through regulatory incentives to quickly accomplish those improvements. Thus, we find that exigent circumstances exist to deviate in a controlled way from the above stated public utility regulatory principles.[155]

These principles have been recognized and confirmed by the Supreme Court of Ohio.[156] Thus, utilities requesting deferral authorization must demonstrate both exigent circumstances and good reason why the amounts should be treated differently from

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[154] *See In the Matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a Generation Charge Adjustment Rider*, 05-704-EL-ATA, 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, Opinion and Order (Jan. 4, 2006), *aff'd in part and rev'd in part, and remanded* ***(aff'd in relevant part)*** *Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St. 3d 305; 2007-Ohio-4164; 871 N.E.2d 1176; [hereinafter *"Elyria Foundry" case].*

[155] *Id.*

[156] *Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St.3d at 310-312., 2007-Ohio-4164.

ordinary utility expenses.[157] Furthermore, the costs must be subject to review before they are incorporated into rates, ensuring the costs are reasonable, appropriately incurred, clearly and directly related to the exigent circumstances for which they were authorized, and in excess of expense amounts already included in the rates of the utility. [158]

In this case, the PUCO did not cite to any exigent circumstances justifying deferral accounting for competitive retail enhancements. The PUCO merely indicated that these enhancements "would promote further development of the competitive retail electric service market." But it did not indicate that there is significant urgency to these enhancements, stating only that they "should be implemented as soon as practicable."[159] Furthermore, unlike in *Elyria Foundry,* the costs are extremely small compared to DP&L's annualized revenues at current rates of over $510 million.[160] Approximately [redacted][161] and thus there is no evidence that the retail market is impaired because of the absence of such

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[157] While the Supreme Court of Ohio recognized that FirstEnergy had not demonstrated exigent circumstances for approval of deferral, it found that current rates are not affected by the accounting deferrals and other parties could challenge the recovery of deferred distribution expenses in FirstEnergy's next distribution rate cases. The Supreme Court emphasized that "[t]he commission made it clear that "deferred amounts will be reviewed before they are incorporated into future rates" and thus the "commission's accounting order was not conclusive for ratemaking purposes." *Elyria Foundry, citing Cincinnati v. Pub. Util. Comm.*, 63 Ohio St.3d 366, 588 N.E.2d 775 (1992) (no prejudice resulting from an accounting order having a ratemaking effect where rate proceeding was still pending and appellant had a right of appeal). The Supreme Court of Ohio also emphasized that the commission provided "a process to ensure that the deferred expenses for improvements to and maintenance of its infrastructure are in fact necessary costs related to improving the reliability of its distribution system." The Supreme Court stated that the "commission will scrutinize these deferred expenses to determine whether the 'costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of [FirstEnergy], and in excess of expense amounts already included in the rate structures of each of the [FirstEnergy] Companies.'" Among other things, the Court noted that the commission required FirstEnergy to establish separate accounts for each project for which they proposed to defer expenses and that commission staff would then review the reasonableness and necessity of the deferred expenses in those accounts annually.

[158] *Id.*

[159] September 4, 2013 Order at 38-39.

[160] DP&L Sch. 1.

[161] Transcript Vol. II-confidential, page 293.

enhancements. The PUCO erred in allowing such a deferral in the absence of a showing of exigent circumstances and good reason.

Alternatively, if the PUCO allows deferral of these expenses, it should make clear that, before any collection of costs from customers is allowed, DP&L must 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.

N. The PUCO Erred In Delaying Structural Divestment Of DP&L's Generation Assets Until May 31, 2017 (Which Continues to Expose Customers To DP&L's Requests for Above-Market Prices).

The PUCO's decision that DP&L should not be required to divest its generation assets before May 31, 2017 is in error for several reasons. First, Ohio's other electric utilities have either divested or committed to divesting in the near future, long before DP&L indicates that it is able or willing to divest. FirstEnergy has been divested since 2005,[162] and AEP Ohio and Duke Energy will likely complete divestment of their generation assets in the near future, since FERC has approved their requests to divest their assets to non-utility affiliates.[163]

Second, DP&L has indicated that it could divest its generating assets earlier than 2017. Specifically, DP&L has stated that it can divest its generation assets as early as

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[162] *See* Ohio Edison 2005 Annual Report to Shareholders, pages 3-4, "FirstEnergy Intra-System Generation Asset Transfers."

[163] FERC authorized the divestiture of Duke's generating assets in an order issued on September 5, 2012. *Cinergy Corp. et al.*, EC12-90-000, 140 FERC ¶ 61,180 (FERC September 5, 2012). FERC authorized Ohio Power Company's divestiture of its generating assets on April 29, 2013. *Ohio Power Company; AEP Generation Resources Inc.*, Docket No. EC13-26-000, 143 FERC ¶ 61,075 (FERC April 29, 2013).

September 1, 2016.[164] It is therefore error for the PUCO to unnecessarily grant DP&L additional time to divest.

Third, DP&L carries the burden of proof that it cannot reasonably divest at an earlier date. DP&L argued that it could not divest before September 1, 2016 because of provisions in its first and refunding mortgage bonds that prohibit calling such bonds at an earlier date.[165] This was based on the testimony of DP&L's Chief Financial Officer, Craig L. Jackson. The PUCO found that defeasement and release of the first and refunding mortgage bonds are the only options for earlier divestment and that these options "present significant financial risk to DP&L."[166]

But Mr. Jackson's testimony was unconvincing and the PUCO should not rely upon it. Divestment of EDUs' generation assets to a separate affiliate was mandated in 1999 by Senate Bill 3 with "functional separation" intended only as an "interim" measure.[167] Fourteen years later, DP&L has not yet filed its plan for divestment and has only committed to do so by the end of the current year.[168] To the extent that further postponement is the result of refinancing its first and refunding mortgage bonds, the PUCO erred in approving DP&L's delaying tactic. In conducting its review, the PUCO should be cognizant that the non-callable status of DP&L's then-extant first and refunding mortgage bonds expired in 2002.[169] But DP&L refinanced those bonds with

[164] DP&L witness Jackson testified that the no-call provisions that impose an impediment on divestment expire in September 2016. Transcript Volume I-public, page 126. The PUCO acknowledged this time frame in its September 4, 2013 Order at 15.

[165] Transcript Volume I-public, page 126; DP&L Exhibit 16 at 2-4.

[166] September 4, 2013 Order at 15, *citing* DP&L Exhibit 16 at 2-4.

[167] R.C. 4928.17.

[168] Direct Testimony of DP&L witness Timothy Rice at 4.

[169] OCC Exhibit 10 at 17-18.

other non-callable bonds,[170] imposing the limitations to which DP&L now points to justify the postponement of its divestment. Mr. Jackson testified that DP&L saved money by refinancing with non-callable bonds as compared to callable bonds.[171] He also testified that at the time of refinancing these bonds, DP&L was not anticipating "full legal separation" – despite the law's mandate for full legal separation.[172] However, he was unable to identify the differential in cost that justified refinancing with non-callable bonds and the continuation of this impediment to divestment. [173]

Finally, it is DP&L's claimed financial integrity issues which drive its SSR claim, and which are directly attributable to the generation assets that DP&L has not yet divested. Without evidence that the costs of achieving an earlier divestment exceed the financial impact of retaining the generation assets on DP&L, the PUCO erred in postponing the date of divestment.

In light of these facts, the PUCO should not accept DP&L's claim that it cannot divest at an earlier date. The PUCO erred in finding that DP&L met its burden of proof. DP&L did not show that its non-callable bonds prevent divestment earlier than September 1, 2016. Nor did the PUCO's determination to postpone divestment until the even later date of May 31, 2017 have any evidentiary basis. OCC notes that the PUCO's September 6, 2013 Entry *Nunc Pro Tunc* extended the date for divestment from December 31, 2016 as provided in its September 4, 2013 Order, without explanation.[174]

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[170] FES Exhibit 5.

[171] Transcript Volume III-public, pages 696, 772.

[172] Transcript Volume I-public, page 124; R.C. 4928.17.

[173] Transcript Volume III-public, page 772.

[174] September 6, 2013 Entry at 2.

As discussed earlier, the PUCO erred in extending this date without the findings required by R.C. 4903.09.

The PUCO erred in postponing DP&L's divestment until May 31, 2017. Ohio's other electric utilities will be divested years before the PUCO has required DP&L to divest. And even DP&L has indicated that it could divest earlier. The PUCO should grant rehearing and find that DP&L has not met its burden of proof to show that it could not divest in the near future. Consequently, the PUCO should direct DP&L to promptly divest its generation assets.[175]

O. The PUCO Erred In Adopting A 1 Coincident Peak Demand Cost Allocation For The Service Stability Rider.

The PUCO erred when it allocated the costs of DP&L's proposed Service Stability Rider between customer classes based on a 1 coincident peak ("1 CP") demand allocation, as recommended by OEG witness Lane Kollen.[176] In support of such allocation, the PUCO stated that this "reflects the underlying character of the SSR charges."[177] This PUCO finding is wrong.

First, and most importantly, a 1 CP demand allocation should be rejected because OEG is wrong in its position that the SSR "represent[s] recovery of 100% demand-related production costs aimed at enhancing the return on equity the Company would earn on its fixed and unregulated generation assets."[178] The PUCO rejected OEG's position that DP&L's SSR claim is related to the recovery of generation-related

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[175] Post-Hearing Initial Brief of OCC at 97; Post-Hearing Reply Brief of OCC at 65.

[176] September 4, 2013 Order at 26.

[177] September 4, 2013 Order at 26, *citing* to OEG Exh. 1 at 7-8.

[178] Post-Hearing Brief of OEG at 14.

"costs."[179] Further, the PUCO held that the proposed SSR charges do not represent "transition revenues or stranded costs" but is "the minimum amount necessary to maintain [DP&L's] financial integrity to provide" SSO service.[180] Thus, the PUCO has itself rejected OEG's position that it is production-related costs, driven by customers' peak demand, that are responsible for DP&L's SSR claim. Instead, it is the ***volumes of energy switching and the volumes which will be subject to competitive bid pricing***, that are driving DP&L's claim. OCC's expert on class allocation and rate design, OCC witness Scott Rubin, explained the reasons that underlie DP&L's proposed "financial integrity" charges:

> The purpose of the SSR is to compensate DP&L for the impact on its financial integrity of its allegedly "lost" margin on electricity sales that it would have made if customers had not switched to another supplier to purchase electricity, coupled with the market price for generation being lower than DP&L's embedded generation-related cost of service. That is, the proposed SSR is solely related to costs associated with electricity sold to customers. Consequently, it is properly allocated to each customer class on a KWh basis.[181]

It would be inappropriate to allocate any of these costs on a peak demand basis when it is not production-related costs or customer peak demands related to such costs that are driving the charge. It is kWh usage. The PUCO erred in adopting a production demand allocator when the SSR relates to usage, not to generation costs.

Second, DP&L's generation assets are no longer subject to cost-based regulation. Capacity costs associated with generation are now allocated through PJM and energy is

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[179] September 4, 2013 Order at 21-22 (the PUCO held that DP&L's proposed SSR is related to "financial integrity," not stranded generation costs that should have been collected prior to December 2010).

[180] September 4, 2013 Order at 22.

[181] Direct Testimony of OCC witness Scott Rubin at 9.

priced volumetrically.[182] Since DP&L's own rationale for needing an SSR is "solely related to electricity consumption,"[183] any revenues authorized under the SSR "should be allocated to the customer classes – both shopping and non-shopping – in proportion to each class's consumption of electricity."[184] Charging the SSR on a production allocator of any kind would make such charges related to the cost of generating capacity. Since an EDU's generating capacity is not subject to cost-based regulation,[185] the PUCO's authorization of a production cost allocator is tantamount to imposing an illegal generation charge on customers.[186]

Third, it should be emphasized that OEG witness Kollen, who sponsored OEG's recommendation lacks expertise in cost allocation. He could not recall ever testifying on any cost allocation study for production plant.[187] He had no knowledge of testifying to a 1 CP methodology or any other allocation methodology for production plant.[188] Additionally, Mr. Kollen did not prepare a proposed revenue allocation or any quantitative analysis of each customer class's responsibility for these charges.[189] Mr. Kollen described his recommendation as "simplistic."[190]

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[182] Transcript Volume VII-Public, pages 1831-37 (Direct Testimony of PUCO Staff witness Hisham Choueiki).

[183] Direct Testimony of OCC witness Scott J. Rubin at 12.

[184] *Id.* at 13.

[185] R.C. 4928.38 (providing that EDUs are "fully" on their own in the competitive generation market as of the end of their market development periods).

[186] *Id.*

[187] Transcript Vol. VIII-public at 1975-76. OEG witness Mr. Kollen testified that the last time he performed a cost allocation study was more than five years ago and that the testimony he presented in this proceeding was actually prepared by his associate, Stephen Baron.

[188] Transcript Vol. VIII-public at 1976.

[189] Transcript Vol. VIII-public at 1977.

[190] Transcript Vol. VIII-public at 1976.

The PUCO's reliance on Mr. Kollen's class allocation recommendation is in error. And the PUCO should not inadvertently revisit an AEP Ohio-type customer back-lash by approving a class allocation methodology[191] without the benefit of knowing the impact of such a decision.

Finally, OCC would emphasize that, regardless of the customer class allocator determined to be appropriate, the PUCO should analyze and consider customer bill impact in its decision. OEG's witness provided no analysis of customer bill impact from his proposed 1 CP allocator. This is important information for the PUCO to know. But OEG's witness failed to present either a revenue allocation or bill impact analysis. The PUCO erred in accepting Mr. Kollen's unsupported 1 CP methodology without any evidence in the record of the impact the allocation will have on customers' bills.

The PUCO erred in allocating costs based on a production demand allocator when DP&L's claim for the SSR is based on the financial impact of customer load switching and is unrelated to production costs. The PUCO also erred in adopting Mr. Kollen's analysis, given his limited experience performing cost allocation studies and his failure to perform a revenue allocation or bill impact analysis. The result is the imposition of unlawful and unreasonable charges on customers. Any "financial integrity" charge should be allocated and collected on a per-kWh basis. Accordingly, the PUCO should grant rehearing on this issue.

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[191] *See 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 No. 11-346-EL-SSO at al., Entry on Rehearing (January 23, 2012) at ¶19.

P. The PUCO Erred In Failing To Consider Or Address Whether The PUCO-Modified Electric Security Plan Ensures The Availability to Consumers Of Reasonably Priced Retail Electric Service As Required By R.C. 4928.02(A). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(A).

The PUCO erred in failing to evaluate the affordability of the rates that it authorized DP&L to charge customers beginning in 2014. The Ohio General Assembly declared affordability of electric service to be one of the key policies to be implemented as the State transitions to a competitive retail electric marketplace. Specifically, R.C. 4928.02(A) provides that it is state policy to:

> (A) *Ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and* ***reasonably priced*** *retail electric service; (Emphasis added).*

R.C. 4928.06(A) requires the PUCO to ensure that the policies specified in section R.C. 4928.02 are effectuated beginning on the starting date of competitive retail electric service. Despite a number of parties' presentation of evidence and/or briefs on this issue,[192] the PUCO neglected to even mention the state's affordability policy in its September 4, 2013 Order or its September 6, 2013 Entry *Nunc Pro Tunc*. This is troubling. The absence of a determination, based on evidence of record, that the PUCO-approved ESP produces reasonably priced electric service is fatal to the validity of any rate-setting order under Chapter 49 of the Revised Code.

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[192] *See* Post-Hearing Initial Brief of OCC at 97-103; Post-Hearing Initial Brief of Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition at 14-15; Post-Hearing Initial Brief of City of Dayton at 4 (focused on impact on low-income customers); Post-Hearing Initial Brief of OMA Energy Group at 2-3 (stating that "DP&L's SSR does not comply with Ohio's policy of ensuring the availability of reasonably priced retail electric service); Post-Hearing Initial Brief of Ohio Hospital Association at 6-7 (stating that DP&L's proposed SSR "runs counter" to R.C. 4928.02(A).

The PUCO failed to address the evidence presented in this case that DP&L's current electric rates are high and that some of DP&L's customers are struggling to pay their electric bills. Specifically, that (1) DP&L's bills are 10.9% higher than the average electric bill in the state when they were 5.8% lower than them 5 years ago[193]; (2)32.5% of DP&L's customers were struggling to pay, or unable to pay, their electric bills in 2012[194]; (3) DP&L disconnected 34,389 customers in 2012 and has an average disconnection rate of 7.5% compared to an average disconnection rate of 4.8% for Ohio electric utilities,[195] and (4) DP&L's filed proposal would make the average electric bill of DP&L customers 13.8% higher than the average electric bill of other customers.[196] Thus, the PUCO should grant rehearing on the issue of affordability.

Q. The PUCO Erred In Failing To Address Whether The PUCO-Modified Electric Security Plan Protects At-Risk Populations As Required By R.C. 4928.02(L). And The PUCO Erred By Adopting An Electric Security Plan That Violates R.C. 4928.02(L).

There are numerous factors which contribute to the current unaffordability of DP&L's rates to at-risk populations.[197] The PUCO should grant rehearing of its September 4, 2013 Order to review how DP&L's rates can be moderated to lessen the

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[193] Direct Testimony of OCC witness James D. Williams at 21.

[194] Direct Testimony of OCC witness James D. Williams at 7.

[195] Direct Testimony of OCC witness James D. Williams at 7.

[196] Direct Testimony of OCC witness James D. Williams at 21. This would increase to 16.0% (higher than the average electric bill) if DP&L's proposed storm cost charges to customers at Case No. 12-3062-EL-RDR are approved. *Id.*

[197] These include (1) the high level of DP&L's residential customer bills that are nearly 11% higher than the average Ohio residential electric bill; (2) the significant increase in DP&L's charges over the last five years – increasing from 10¢/kWh to 14¢/kWh; (3) DP&L's credit and collection policies that, in 2012, contributed to nearly 150,000, or 32.5%, of customers on Commission-ordered payment plans and 7.5% of total customers, or 34,389 being disconnected; and (4) the unavailability of bill payment assistance. Direct Testimony of OCC witness James D. Williams at 7-21. These factors, among others, caused a 68% increase in the number of DP&L customers on PIPP and a 90% increase in the number of PIPP customers disconnected for non-payment. Direct Testimony of OCC witness James D. Williams at 10.

impact on at-risk populations, how its credit and collection practices and policies might be modified, and to encourage DP&L shareholders to increase their contribution to alleviating the difficult circumstances facing such at-risk populations in DP&L's service territory. Notably, the PUCO has directed DP&L's shareholders to fund an economic development program in the amount of $2 million per year for 2014-2016.[198] And the PUCO has approved ESPs of other Ohio electric utilities that contained shareholder funding of low-income assistance programs.[199] The PUCO should not ignore the needs of at-risk populations while directing shareholder funding of private sector investment.

The Ohio General Assembly also declared the protection of "at-risk populations" to be one of the key policies to be implemented as the State transitions to a competitive retail electric marketplace. Specifically, R.C. 4928.02(L) provides that it is state policy to:

> (L) ***Protect at-risk populations****, including, but not limited to, when considering implementation of any new advanced energy or renewable energy resources; (Emphasis added).*

As indicated above, R.C. 4928.06(A) requires the PUCO to ensure that the policies specified in section R.C. 4928.02 are effectuated beginning on the starting date

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[198] September 4, 2013 Order at 42-43.

[199] *In the matter of the application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan on behalf of Ohio Edison Company and The Toledo Edison Company and The Cleveland Electric Illuminating Company,* Case No. 12-1230-EL-SSO, Opinion and Order at 16, 42-43 (July 18, 2012) ($8 million in shareholder-funded low-income assistance over two years); *In the matter of the application and stipulation and recommendation of Ohio Edison Company, The Cleveland Electric Illuminating and The Toledo Edison Company for authority to establish a standard service offer pursuant to R.C. 4928.143 in the form of an electric security plan,* Case No. 10-0388-EL-SSO, Opinion and Order at 44 (August 25, 2010) (providing $12 million in shareholder-funded low-income assistance over 3 years); *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 No. 11-346-EL-SSO, Opinion and Order at 24, 64 (December 14, 2011) (providing $3 million annually in low-income assistance).

of competitive retail electric service. But the PUCO did not address whether the PUCO-modified ESP protects at-risk populations.

Specifically, the PUCO erred in failing to discuss the impacts on at-risk populations and limit any charges to such customers. The facts regarding the poverty in DP&L's service territory, the number of disconnections, and the already high level of customer bills compel reconsideration of the impact, as well as justification for, the rate increases that the PUCO approved.[200]

The PUCO also erred in failing to initiate a review of DP&L's credit and collection policies and practices with the PUCO Staff and OCC, to seek cost-effective ways to reduce the number of disconnections.[201] While Ohio Admin Code 4901:1-18 provides minimum service standards, Mr. Williams testified that DP&L "can adopt other policies that are more conducive in helping reduce the number of disconnections."[202] Given the 90% increase in the number of PIPP customers disconnected from 2007 to 2012, and the 32.5% rate of default on Commission-ordered payment plans (compared to 16.9% for other Ohio electric utilities), the PUCO erred in failing to take appropriate measures to reduce the high number of DP&L customers being disconnected. The PUCO erred in failing to direct an assessment of other cost-effective policies and practices that

[200] These facts were detailed by OCC witness Mr. Williams in his testimony. They include an increase in the number of PIPP customers from 21,242 in 2007 to 35,715 in 2012; a 90% increase in the number of PIPP customers disconnected from 2007 to 2012; an increase in the number of customers on Commission-ordered payment plans because of inability to pay their electric bills; a 32.5% rate of default on Commission-ordered payment plans, compared to 16.9% for other Ohio electric utilities; the significant number of medical certifications in 2012 for customers who would have otherwise been disconnected (6,316 DP&L customers).

[201] Direct Testimony of OCC witness James D. Williams at 25.

[202] Direct Testimony of OCC witness James D. Williams at 25.

could be implemented to reduce disconnections.[203] Such an assessment should consider not only families that qualify for the low-income PIPP Plus program but families that are above these income levels and still experience difficulty making their payments.[204]

Finally, the PUCO erred in failing to encourage DP&L to initiate a shareholder-funded bill payment assistance program until such time as the DP&L disconnection rate is more closely aligned with other Ohio electric utilities.[205] Shareholder funding at a level of $1.5 million per year could help provide an incentive for reducing disconnections and potentially reduce the DP&L disconnection rate from the current 7.5 percent to a level closer to that of other utilities.[206] Such shareholder funding would be consistent with the PUCO's requirement for economic development funding to ensure the vitality of the Dayton region.[207]

IV. CONCLUSION

For all the reasons discussed above, the PUCO should grant rehearing on OCC's claims of error and modify or abrogate its September 4, 2013 Opinion and Order and September 6, 2013 Entry *Nunc Pro Tunc* consistent with Ohio law and reason.

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[203] Direct Testimony of OCC witness James D. Williams at 25. OCC witness Williams identified a range of possible remedies, including suspending disconnections during inclement weather, adjusting due dates when possible, reducing payment plan costs, suspension of delayed payment charges, and reducing bill payment charges. *Id. at 26-27.* Suspension of disconnections during times of especially hot or cold weather is necessary given the health and safety concerns mentioned earlier. *Id.* The review should also consider suspending disconnections when temperatures are below 32 degrees or higher than 90 degrees Fahrenheit. *Id.* Furthermore, the review should include an examination of the effectiveness of medical certifications for customers who have chronic illnesses. *Id.*

[204] Direct Testimony of OCC witness James D. Williams at 25-26. Mr. Williams detailed how payment plans can be better customized to customers' payment needs. *Id. at 27.* Changes to payment plans might include "lower out-of pocket upfront payments and the use of ceiling amounts," as well as the adjustment of due dates and the limitation of "additional bill payment charges" (such as late payment charges) in order to "make more resources available for actual payment of electric charges." *Id.*

[205] Direct Testimony of OCC witness James D. Williams at 28.

[206] Direct Testimony of OCC witness James D. Williams at 29.

[207] September 4, 2013 Order at 42-43.

Respectfully submitted,

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[208] Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing* (Public Version), was served on the persons stated below via electronic transmission, this 4th day of October, 2013.

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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

SECOND APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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April 18, 2014

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
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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 APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

As part of our advocacy for residential consumers of Dayton Power and Light Company ("DP&L" or "Utility") to receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") files this Second Application for Rehearing. OCC seeks rehearing of the Second Entry on Rehearing ("Second Rehearing Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned proceedings on March 19, 2014. OCC is authorized to file this second application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

OCC seeks rehearing on the findings of the PUCO in its Second Rehearing Entry pertaining to the Service Stability Rider ("SSR") and the Service Stability Rider Extension ("SSR-E"). Through these riders, DP&L will collect hundreds of millions of dollars from its distribution customers over the next three years.[1]

Rehearing is sought of the March 19, 2014 Second Rehearing Entry based on the following Assignments of Error:

A. The PUCO unreasonably and unlawfully erred in permitting DP&L to collect a charge from customers to maintain its financial integrity (through the Service Stability Rider and the Service Stability Rider Extension) after it divests its generating assets. Once the Utility's generating assets are divested, the factual basis for charging customers for financial stability disappears. Because there is no factual basis to support these charges being collected from customers after divestiture, the PUCO's Second Entry on Rehearing violates R.C. 4903.09.

B. Assuming that it is lawful and reasonable for DP&L to collect charges from customers to maintain its financial integrity through the Service Stability Rider Extension, the amount of the potential charge ($45.8 million) is unreasonable and unlawful because the PUCO failed to reduce the potential charge (to $36.66 million) when it shortened the period for collecting that charge by one month. The PUCO's failure to reduce the potential Service Stability Rider Extension charge to customers was a mistake, in violation of R.C. 4903.09.

C. The PUCO erred in unreasonably and unlawfully determining that the Service Stability Rider charge to customers is not a cost-based charge, and thus not a transition charge under R.C. 4928.39. The PUCO's finding violates R.C. 4903.09.

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[1] The SSR, as approved, permits DP&L to collect $110 million per year from customers, for a three year period. The SSR-E, as approved, allows DP&L to seek authority to collect an additional $45.8 million from customers. See *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, Opinion and Order at 25-28 (Sept. 4, 2013), amended by Entry Nunc Pro Tunc at 2 (Sept. 6, 2013).

The basis of this Second Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its Second Rehearing Entry.

Respectfully submitted,

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In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Under Ohio law, Ohio customers are the intended beneficiaries of DP&L's entry into a competitive market. But instead, customers will be paying above-market prices for electric service primarily because of the financial stability charges the PUCO approved for collection from customers. The financial stability charges that the PUCO approved will cost customers hundreds of millions of dollars between now and the end of the Utility's electric security plan ("ESP") (May 31, 2017). OCC seeks rehearing asking the PUCO to find that customers should not have to pay financial stability charges to support DP&L's generation assets, once those assets have been divested.

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the PUCO, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[2] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[3]

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear."[4] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *."[5]

OCC meets both the statutory conditions applicable to an applicant for rehearing under R.C. 4903.10 and the requirements of the PUCO's rule on applications for

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[2] R.C. 4903.10.

[3] R.C. 4903.10(B).

[4] Id.

[5] Id.

rehearing.[6] Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

III. LAW AND ARGUMENT

ASSIGNMENT OF ERRORS:

A. The PUCO Unreasonably And Unlawfully Erred In Permitting DP&L To Collect A Charge From Customers To Maintain Its Financial Integrity (Through The Service Stability Rider And The Service Stability Rider Extension) After It Divests Its Generating Assets. Once The Utility's Generating Assets Are Divested, The Factual Basis For Charging Customers For Financial Stability Disappears. Because There Is No Factual Basis To Support These Charges Being Collected From Customers After Divestiture, The PUCO's Second Entry on Rehearing Violates R.C. 4903.09.

The PUCO's Second Rehearing Entry left intact the Service Stability Rider ("SSR") established in its earlier Opinion and Order.[7] Under the earlier PUCO Order, $110 million per year was to be collected from customers for three years ending on December 31, 2016.[8] DP&L was also authorized to request even more money from customers through a Service Stability Rider-Extension ("SSR-E") charge in the PUCO's earlier Opinion and Order. Under the PUCO's ruling, DP&L may seek to charge customers an additional $45.8 million for the last five months of the ESP Term (January through May, 2017) after the SSR has ended.[9] The PUCO's Second Entry on Rehearing

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[6] See Ohio Admin. Code 4901-1-35.

[7] See Opinion and Order at 22-26 (Sept. 4, 2013); amended by Entry Nunc Pro Tunc at ¶4 (Sept. 6, 2013). OCC applied for rehearing of that Order opposing the SSR and the SSR-E on numerous grounds. OCC's application was denied in this respect.

[8] Opinion and Order at 25; amended by Entry Nunc Pro Tunc at 2.

[9] DP&L's ability to do so is contingent upon it fulfilling certain conditions specified in the PUCO's Opinion and Order. See Opinion and Order at 26-28; Entry Nunc Pro Tunc at 2.

did not change DP&L's ability to seek an additional $45.8 million charge from customers through the SSR-E.

But the PUCO's Second Rehearing Entry did change other elements of the Opinion and Order, which impact the SSR and SSR-E charges. Notably, it required DP&L to divest its generation assets *by January 1, 2016*[10]--a full seventeen months earlier than previously ordered. In doing so, the PUCO removed any justification for charging the SSR, or the SSR-E, after divestiture (at the latest January 1, 2016). After divestiture occurs, there is no basis in the record to charge customers millions of dollars in financial stability charges. The PUCO thus erred in not ending the SSR and the SSR-E with divestiture (and no later than January 1, 2016).

In its Opinion and Order, the PUCO ruled that all customers should pay the SSR charge because the SSR relates to default service and bypassability and will stabilize and provide certainty regarding retail electric service.[11] The PUCO explained that because DP&L had not structurally separated its generation assets, the financial losses in all businesses (including generation) affect DP&L as a whole, potentially jeopardizing its ability to provide retail electric service:

> 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,

[10] Second Rehearing Entry at ¶27 and at ¶51 (Mar. 19, 2014).

[11] Opinion and Order at 21.

> 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.[12]

In its Opinion and Order, as modified by its Entry *Nunc Pro Tunc*, the PUCO also required DP&L to file a "generation divestment plan that divests all of its generation assets" *by May 31, 2017*.[13] This was based on the testimony of DP&L witness Craig Jackson, who had testified that DP&L could not divest earlier than September 1, 2016.[14]

But, in its Second Entry on Rehearing, the PUCO considered conflicting information that DP&L had recently filed in a separate docket—its application to transfer and sell its generating assets.[15] That information contradicted Mr. Jackson's testimony and indicated that DP&L could divest sooner than September 1, 2016.[16] Indeed, in its filings, DP&L indicated that a potential sale of its generation assets to an unaffiliated third party could occur as early as 2014![17] In light of the new information, the PUCO ordered DP&L to divest no later than *January 1, 2016*:[18]

> 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 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

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[12] Id. at 21-22.

[13] Opinion and Order at 16; Entry Nunc Pro Tunc at 2 (emphasis added).

[14] DP&L Exh. 16 at 4.

[15] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets*, Case No. 13-2420-EL-UNC, Application at 1-2 (Dec. 30, 2013); Supplemental Application at 2 (Feb. 25, 2014).

[16] Id.

[17] Id, Supplemental Application at 2 (Feb. 25, 2014).

[18] Second Entry on Rehearing at 17-18.

> for recovery through the SSR-E will take into consideration the timing and disposition of DP&L's generation assets.[19]

As clearly set forth in the PUCO's Opinion and Order, the basis for charging customers the SSR charge was that DP&L's financial integrity could be compromised if any one of its business segments – generation, transmission, or distribution "suffers financial losses." As the PUCO stated, the losses in one business segment could "impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service."[20]

But if the business segment that is expected to cause financial losses (i.e. generation) is no longer part of DP&L's business, then the basis for charging customers millions of dollars in SSR charges disappears. And with the PUCO's order that DP&L divest by *January 1, 2016*, the business that is the source of estimated financial losses—the generation business--will be gone. Because it is only the generation business that is "subject to financial losses," divestiture of the generation business eliminates any basis for charging customers millions of dollars in charges for the SSR and the SSR-E.

Consequently, the PUCO erred in not decreasing the amount of the SSR charge that customers will have to pay by shortening the collection period for the SSR. The collection period for the SSR should end with the divestiture of the generation assets so that DP&L does not continue to collect millions of dollars in stability charges from customers after it no longer is in the generation business. The PUCO should have ordered that customers should not have to pay the SSR once DP&L divests its generation

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[19] Id.

[20] Opinion and Order at 22 (Sept. 6, 2013).

assets. Similarly, there can be no basis for allowing any of the SSR-E to be charged in 2016 or 2017 because DP&L's generation business must be sold or transferred to another entity at or before January 1, 2016. The PUCO erred in not eliminating the SSR-E. Customers should be relieved of paying millions more to DP&L under a potential SSR-E charge.

There is no dispute, based on the record of the case, that it is only the generation business that is expected to sustain financial losses during the term of the ESP. Mr. Jackson testified that DP&L's financial integrity would be impaired without the SSR because of three factors: increased switching, declining wholesale prices, and declining capacity prices.[21] These factors have everything to do with generation, and nothing to do with transmission or distribution.

When questioned about the distribution business of DP&L, Mr. Jackson testified that distribution revenues were not the cause of expected financial losses:

> Q. Now, with regard to the distribution function of DP&L, you believe that distribution revenues are adequate today, right?
>
> A. Yes.
>
> Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct?
>
> A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections.
>
> Q. And you understand that if DP&L believes its distribution revenues are inadequate, it can file a distribution rate case, correct?
>
> A. Yes, that is my understanding.

[21] See Direct Testimony of Craig L. Jackson at CLJ-1.

> Q. And there is -- there's no commitment being made by DP&L as part of the ESP not to file a distribution rate case during the ESP term, correct?
>
> A. I don't believe we have indicated anything with regard to a distribution rate case.[22]

With respect to transmission revenues, Mr. Jackson again testified that they are adequate over the term of the ESP:

> Q. Now, with regard to transmission revenues, you also believe that those are adequate today, correct?
>
> A. Well, our transmission, obviously a portion of our transmission revenues are tied to the transmission cost recovery rider that's in effect today so that moves with costs, as costs go up or down, the revenue side of that changes as well. So that, yes, I believe that, that said, the recovery that we're getting on the transmission side would be adequate.
>
> Q. And you believe the transmission revenues would be adequate over the five-year proposed ESP period, correct?
>
> A. That is my expectation.[23]

Mr. Jackson's testimony as to the adequacy of transmission and distribution revenues over the term of the ESP is repeated later in the record of this case.[24]

There can be little question that, in light of DP&L's own testimony, DP&L's transmission and distribution operations are on sound footing through the term of the ESP from a financial integrity standpoint. It is clear that, if DP&L's financial integrity is at issue, then the generation operations are the cause and the only basis for the SSR and SSR-E charges. Consequently, if DP&L divests its generation assets by January 1, 2016, as the PUCO required in its Second Entry on Rehearing, then all "financial integrity"

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[22] Tr. Vol. I-public at 117.

[23] Tr. Vol. I-public at 118.

[24] Tr. Vol. I-public at 150, 270.

issues will no longer plague the remaining transmission and distribution utility. Thus, there is no basis to continue to charge customers millions of dollars after divestiture to ensure the financial stability of the transmission and distribution Utility.

But the PUCO failed to reverse its earlier holdings which will cause customers to bear millions of dollars in charges that are not factually supported by the record, as required by R.C. 4903.09. That section of the Revised Code mandates that the PUCO file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." When the PUCO ordered DP&L to divest by January 1, 2016, the PUCO's rationale for permitting DP&L to charge customers the SSR and SSR-E after divestiture no longer exists. Consequently, its order that permits such charges to continue after divestiture is not based on findings of fact or supported by the record.[25]

The PUCO erred in in allowing DP&L to continue charging customers the SSR and the SSR-E after divestiture (and after January 1, 2016). The PUCO should grant rehearing on this issue and hold that customers do not have to pay stability charges once DP&L is no longer in the generation business.

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[25] See *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.2d 305 (finding that because there was no factual basis to support the PUCO's finding, R.C. 4903.09 was violated).

B. Assuming That It Is Lawful And Reasonable For DP&L To Collect Charges From Customers To Maintain Its Financial Integrity Through The Service Stability Rider Extension, The Amount Of The Potential Charge ($45.8 Million) Is Unreasonable And Unlawful Because The PUCO Failed To Reduce The Potential Charge (To $36.66 Million) When It Shortened The Period For Collecting That Charge By One Month. The PUCO's Failure To Reduce The Potential Service Stability Rider Extension Charge To Customers Was A Mistake, In Violation Of R.C. 4903.09.

The PUCO allowed DP&L to request more money from customers in the last five months of its electric security plan, following the end of the SSR. The amount that DP&L can seek to collect from customers was capped at $45.8 million, for the period from January 1, 2017 through May 31, 2017.[26] That five-month cap was derived from the annual SSR amount. The SSR-E was calculated as 5/12 of the $110 million annual SSR ($110 million * (5/12) = $45.8 million) because the SSR-E was to be in effect for the last five months of the ESP.

But, in its Second Entry on Rehearing, the PUCO appropriately determined that the SSR-E should terminate after four months, on April 30, 2017 rather than May 31, 2017.[27] Given this decision, the amount of the SSR-E that can be sought from customers should also be capped to reflect only four months of collection ($110 million * (4/12) = $36.66 million). Consequently, the PUCO erred in not reducing the amount of SSR-E that may be collected from customers to $36.66 million, assuming it is lawful and reasonable to collect any amount of the SSR-E. Moreover, the PUCO failed to provide a basis for permitting the same amount of SSR-E to be sought from customers, while reducing the SSR-E period to four months. This too violated R.C. 4903.09. The PUCO

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[26] Opinion and Order at 26-28; Entry Nunc Pro Tunc at 2.

[27] Second Entry on Rehearing at 16.

should grant rehearing on this issue and reduce the amount of the SSR-E charge paid by customers to no more than $36.66 million.

C. The PUCO Erred In Unreasonably And Unlawfully Determining That The Service Stability Rider Charge To Customers Is Not A Cost Based Charge, And Thus Not A Transition Charge Under R.C. 4928.39. The PUCO's Finding Is A Violation Of R.C. 4903.09.

In its Application for Rehearing of the PUCO's September 4, 2013 Order, OCC (and others) challenged the PUCO's ruling permitting DP&L to charge customers a Service Stability Rider of $110 million per year for three years. The PUCO had authorized the Utility to charge customers hundreds of millions of dollars to maintain its financial integrity as the provider of generation, transmission, and distribution services.[28] OCC argued that these financial stability charges to customers are unlawful, inter alia, because the PUCO is precluded from giving DP&L additional transition revenues or "any equivalent revenues" by statute after a utility's market development period. That statute, R.C. 4928.38, requires that at the end of the market development period, "the utility shall be fully on its own in the competitive market." DP&L's market development period ended December 31, 2005.[29]

In its Second Entry on Rehearing, the PUCO addressed arguments that the Service Stability Rider is an unlawful transition charge. The PUCO reiterated its finding (in the original Order) that the SSR is not a transition charge.[30] However, the PUCO also presented a new rationale to support its Order. This time the PUCO found that under

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[28] *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, Opinion and Order at 21 (Sept. 4, 2013).

[29] Direct Testimony of OCC witness Kenneth Rose at 12.

[30] Second Entry on Rehearing at ¶13 (Mar. 19, 2014).

R.C. 4928.39, transition charges are "cost-based charges," which must relate to a cost that the utility will incur.[31] It then found that the SSR is not a cost-based charge, but rather a charge to provide the Utility stable revenues to maintain its financial integrity.

But the SSR is a cost-based charge, as the Utility's own calculations of SSR revenue requirements show. The SSR produces *revenues* that allow the Utility to maintain its financial integrity by enabling it to pay calculated *costs* as well as its *cost* of capital.[32]

Although financial stability is defined and measured by the earnings (or profits) of the Utility, the earnings (or profits) are determined by the revenues and the costs (or expenses) of providing electric services. Consequently, in the ESP proceeding, DP&L's SSR charge does relate specifically to the *costs* the utility will incur, or estimates that it will incur in providing electric services, contrary to the PUCO's conclusions otherwise.

A review of DP&L's calculations shows that the SSR is cost-based. Specifically, DP&L developed a projected net income based on estimated revenues and costs (expenses).[33] Then DP&L calculated a projected return on equity (ROE) based on its projected net income and estimated shareholder equity. These projected net incomes and resulting ROEs reflect the difference between estimated revenues and estimated costs, as can be seen on DP&L witness Jackson's Second Revised Exhibit CLJ-2, line 31. The projected ROEs (in the absence of an SSR charge) are shown in Second Revised Exhibit CLJ-2, line 45. DP&L then argued that the projected ROE (in the absence of an SSR

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[31] Id.

[32] See Direct Testimony of DP&L witness Chambers at 3-4; 42-44; WJC-4, DP&L witness Craig L. Jackson Direct Testimony at 3.

[33] See Direct Testimony of DP&L witness Chambers at WJC 1-5.

charge) produced an insufficient return for it. Thus, DP&L testified that it needed a stability charge (in the form of an SSR) so it could charge customers its estimated costs plus allow it to earn a reasonable return on equity.[34]

DP&L witness William J. Chambers then utilized Mr. Jackson's cost-based numbers to present his recommendations for the SSR charge in Second Revised WJC-2 through WJC-5. It is clear that any SSR charge approved by the PUCO is based on DP&L's projected costs and is designed to collect those costs of providing electric services.

To rule that the SSR is not a cost-based charge is incorrect. The PUCO's finding is not supported by the record and is in error. The PUCO violated R.C. 4903.09 in this respect. *Elyria Foundry Co. v. Pub. Util. Comm.*, 2007-164-4164, 114 Ohio St.3d 305, 871 N.E.2d 1176. For these reasons, rehearing should be granted.

IV. CONCLUSION

To protect consumers from having to pay millions more in charges that have no basis in the record, the PUCO should grant OCC' Second Application for Rehearing on the assignments of error raised here.

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[34] See Direct Testimony of DP&L witness Chambers at 3-4; 42-44; WJC-4, DP&L witness Craig L. Jackson Direct Testimony at 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Second** Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 18th day of April, 2014.

/s/ Maureen R. Grady
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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

THIRD APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

As part of our advocacy for residential consumers of the Dayton Power and Light Company ("DP&L" or "Utility") to receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") files this Third Application for Rehearing. OCC seeks rehearing of the Fourth Entry on Rehearing ("Fourth Rehearing Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned proceedings on June 4, 2014. OCC is authorized to file this Third Application for Rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

OCC seeks rehearing on the PUCO's decision to grant, in part, DP&L's April 18, 2014 Application for Rehearing that was statutorily deficient. Accordingly, OCC requests rehearing on the Fourth Rehearing Entry based on the following assignment of Error:

> The PUCO Unreasonably And Unlawfully Erred In Granting DP&L's Request For Rehearing of the PUCO's March 19, 2014 Second Rehearing Entry. DP&L's April 18, 2014 Application For Rehearing Did Not Assert The Specific Grounds For Rehearing And Therefore Does Not Comply With The Applicable Statutory And Administrative Requirements As Mandated In Ohio Revised Code 4903.10 And Ohio Administrative Code 4901-1-35.

The basis of this Third Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claim of error, the PUCO should modify its Fourth Entry on Rehearing.

Respectfully submitted,

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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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Third Application for Rehearing as to the Fourth Entry on Rehearing because of the error made by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in granting rehearing to the Dayton Power and Light Company ("DP&L" or "Utility"). The PUCO acted unlawfully and unreasonably by granting DP&L's request for rehearing as the Utility's Application for Rehearing did not fulfill the necessary statutory and administrative requirements for a rehearing application.[1] In its Application, DP&L failed to assert the specific grounds for rehearing required by the Ohio Revised Code and the Ohio Administrative Code.[2] As such, the PUCO could not have lawfully granted the Utility the rehearing requested. Therefore, the PUCO should grant rehearing here to undo the unlawful outcome of the June 4, 2014 Fourth Entry on Rehearing.

II. STANDARD OF REVIEW

Ohio law provides that, within thirty days after issuance of an order from the PUCO, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[3] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[4]

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear."[5] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *."[6]

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[1] *See* R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

[2] *See* R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

[3] R.C. 4903.10.

[4] R.C. 4903.10(B).

[5] *Id.*

[6] *Id.*

OCC meets both the statutory conditions applicable to an applicant for rehearing under R.C. 4903.10 and the requirements of the PUCO's rule on applications for rehearing.[7] Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matter specified below.

III. APPLICABLE LAW

The granting of an application for rehearing is governed by R.C. 4903.10. But before the PUCO can grant rehearing on any matter, the requirements of R.C. 4903.10 must be met. R.C. 4903.10 mandates that the application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[8] The Ohio Supreme Court has held that "when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met."[9] The Court has further mandated that there be "strict compliance with such specificity requirement."[10] In addition, the statute states, "No party shall in any court urge or rely on a ground for reversal, vacation, or modification not so set forth in the application."[11] With respect to this requirement, the Supreme Court has affirmed that setting forth

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[7] See Ohio Admin. Code 4901-1-35.

[8] *Id.*

[9] *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted).

[10] *Office of Consumers' Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted); *see also Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted) (stating that "[W]e have strictly construed the specificity test set forth in R.C. 4903.10.").

[11] R.C. 4903.10.

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."[12]

The PUCO has a rule related to the statute, Ohio Adm. Code 4901-1-35. Ohio Adm. Code 4901-1-35 addresses the form and timing of applications for rehearing and states, in part, that:

> An application for rehearing must set forth the *specific ground or grounds* upon which the applicant considers the commission order to be unreasonable or unlawful. An application for rehearing must be accompanied by a *memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing* and which shall be filed no later than the application for rehearing.[13]

Thus, the PUCO's administrative requirements contemplate and require two documents (i.e., the application required by statute and the memorandum in support), each with a specific purpose.

IV. LAW AND ARGUMENT

ASSIGNMENT OF ERROR:

The PUCO Unreasonably And Unlawfully Erred In Granting DP&L's Request For Rehearing of the PUCO's March 19, 2014 Second Rehearing Entry. DP&L's April 18, 2014 Application For Rehearing Did Not Assert The Specific Grounds For Rehearing And Therefore Does Not Comply With The Applicable Statutory And Administrative Requirements As Mandated In Ohio Revised Code 4903.10 And Ohio Administrative Code 4901-1-35.

As presented above, R.C. 4903.10 requires that all applications for rehearing present specific grounds for the PUCO's review.[14] Ohio Adm. Code 4901-1-35(A) requires that applications for rehearing present specific grounds for rehearing and that the

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[12] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St. 3d 340, 349, 2007-Ohio-4276.

[13] Ohio Adm. Code 4901-1-35(A). (Emphasis added).

[14] *See* R.C. 4903.10.

purpose of the corresponding memorandum is to "set forth an explanation of the basis for each ground for rehearing *identified in the application for rehearing*."[15] DP&L's Application for Rehearing did not meet these requirements. The Application for Rehearing did not state *any* grounds on which DP&L considered the PUCO's March 19, 2014 Second Entry on Rehearing to be unreasonable or unlawful. DP&L's Application for Rehearing merely requested that the PUCO grant rehearing on its decision in its Second Entry on Rehearing to accelerate: 1) the deadline for DP&L to transfer its generation assets to January 1, 2016, and 2) blending in the competitive bidding process[16] and restore the deadline and blending schedule that it established in its September 6, 2013 Entry *Nunc Pro Tunc*.[17] DP&L's Application for Rehearing was void of the words "unlawful" and "unreasonable."[18]

R.C. 4903.10 addresses the application for rehearing only. It does not refer to the filing of a memorandum in support of an application for rehearing.[19] The requirement for filing a memorandum in support is an administrative requirement of the PUCO for the purpose of setting "forth an explanation of the basis for each ground for rehearing *identified in the application for rehearing*."[20] DP&L's reliance, if any, on its Memorandum in Support cannot and did not cure the Application's statutory defect of failing to state, in accordance with R.C. 4903.10, the grounds on which DP&L considered the PUCO's March 19, 2014 Second Entry on Rehearing to be unreasonable or unlawful.

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[15] Ohio Adm. Code 4901-1-35(A). (Emphasis added).

[16] DP&L's Application for Rehearing.

[17] DP&L's Application for Rehearing.

[18] *See* DP&L's Application for Rehearing.

[19] *See* R.C. 4903.10.

[20] Ohio Adm. Code 4901-1-35(A). (Emphasis added).

The PUCO has acknowledged followed the well-established precedent of the Ohio Supreme Court discussed above. For example, in October 2009, the PUCO denied an Application for Rehearing filed by Aqua Ohio because the Application did not present the specific grounds on which rehearing was warranted.[21] In that case, the PUCO found that the Application for Rehearing did not fulfill either the statutory requirements of R.C. 4903.10 or the administrative requirements of Ohio Adm. Code 4901-1-35.[22] Specifically, the PUCO held that:

> [T]he application merely states that Aqua requests rehearing and refers to the attached memorandum in support for the specific grounds upon which Aqua considers the August 19, 2009, opinion and order to be unreasonable or unlawful. An application for rehearing that does not substantially comply with the statutory requirements of specificity was found inadequate by the Ohio Supreme Court in *Conneaut*, 10 Ohio St.2d at 270.
> For the foregoing reasons, Aqua's September 18, 2009, application for rehearing is denied.[23]

Furthermore, in a 2010 Entry on Rehearing denying rehearing, the PUCO found that an application for rehearing by Ohio American fulfilled "neither the statutory requirements of section 4903.10, Revised Code, nor the administrative requirements of Rule 4901-1-35, O.A.C."[24] In that case, the application merely stated "that the company requests rehearing" and referred "to the attached memorandum in support for the specific

[21] *See In the Matter of a Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio, the Office of the Ohio Consumers' Counsel, and Aqua Ohio, Inc. Relating to Compliance with Customer Service Terms and Conditions Outlined in the Stipulation and Recommendation in Case No, 07-564-WW-AIR and the Standards for Waterworks Companies and Sewage Disposal System Companies*, PUCO Case No. 08-1125-WW-UNC, Entry on Rehearing at 5 (October 14, 2009).

[22] *See id.*

[23] *Id.*

[24] *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, PUCO Case No. 09-391-WS-AIR, Entry on Rehearing at 2 (June 23, 2010).

grounds upon which Ohio American considers the May 5, 2010, opinion and order to be unreasonable or unlawful."[25]

In this case, DP&L's Application for Rehearing fulfills neither the statutory nor the administrative requirements for an application for rehearing. Therefore, consistent with the PUCO's denial of Aqua Ohio's Application for Rehearing,[26] and OAW's Application for Rehearing,[27] DP&L's Application should have been denied. DP&L' Application failed to comply with the specificity requirement of R.C. 4903.10[28] and the PUCO's specificity requirement mandated in Ohio Adm. Code 4901-1-35. Instead, the PUCO granted, in part, DP&L's request for rehearing. Such PUCO action was unlawful and unreasonable. OCC's request for rehearing should be granted so that the PUCO can correct that error.

V. CONCLUSION

The unlawful outcome of the June 4, 2014 Fourth Entry on Rehearing should not stand. Accordingly, the PUCO should grant OCC's Third Application for Rehearing.

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[25] *Id.*

[26] *See id.*

[27] Entry on Rehearing at 2 (June 23, 2010), PUCO Case No. 09-391-WS-AIR.

[28] *See Office of Consumers' Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted); *see also Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted) (stating that "we have strictly construed the specificity test set forth in R.C. 4903.10.").

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Third Application for Rehearing* was served via electronic transmission, to the persons listed below, on this 1st day of July, 2014.

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I hereby certify that a copy of the foregoing Merit Brief and Appendix by the Office of the Ohio Consumers' Counsel was served upon the below parties of record via electronic transmission this 1st day of December 2014.

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