IN THE SUPREME COURT OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan, etc.	:	Case No. 14-1505
	:	Appeal from the Public Utilities Commission of Ohio
	:	
	:	Public Utilities Commission of Ohio Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, and 12-672-EL-RDR
	:	

BRIEF OF CROSS-APPELLANT
THE DAYTON POWER AND LIGHT COMPANY

PUBLIC VERSION

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BRIEF OF CROSS-APPELLANT
THE DAYTON POWER AND LIGHT COMPANY

I. INTRODUCTION AND SUMMARY

The Public Utilities Commission of Ohio ("Commission") conducted a three-week evidentiary hearing in this case, in which it heard testimony from 45 witnesses. The principal issue at the hearing was whether the Commission should approve a Service Stability Rider ("SSR") that was requested by The Dayton Power and Light Company ("DP&L").

Specifically, R.C. 4928.143(B)(2)(d) authorizes the Commission to approve a charge that "would have the effect of stabilizing or providing certainty regarding retail electric service." (OCC Appx. 131.) Evidence at the hearing showed that due to substantial changes in the generation market, DP&L's financial integrity was in jeopardy. The evidence further showed that DP&L was an integrated utility -- meaning that it provides distribution, transmission and generation service -- and that DP&L would not be able to provide safe and stable service without a stability charge under R.C. 4928.143(B)(2)(d). Based on the evidence, the Commission found that DP&L needed the SSR to enable it to provide "stable" and "safe" service:

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

Sept. 4, 2013 Opinion and Order ("9/4/14 Order"), pp. 21-22 (emphasis added). (OCC Appx. 31-32.) The Commission thus approved DP&L's request for an SSR.

The Appellants have raised three principal issues. *First*, The Office of the Ohio Consumers' Counsel ("OCC") and Industrial Energy Users-Ohio ("IEU") argue that there was not sufficient evidence in the record to support the Commission's factual findings that the SSR satisfies the elements of R.C. 4928.143(B)(2)(d). That assertion is simply not true. Indeed, DP&L proffered evidence from its Chief Financial Officer, its Director of Regulatory Operations and a financial expert that, without the SSR, DP&L would not have sufficient revenue to allow it to provide safe and stable distribution, transmission and generation service.

Second, OCC and IEU argue that the SSR violates other sections in Title 49. However, the statute authorizing the SSR states that a charge authorized under that section is lawful "[n]othwithstanding any other provision of Title [49] of the Revised Code to the contrary." R.C. 4928.143(B). (OCC Appx. 130.) The "[n]othwithstanding" clause unambiguously bars OCC's and IEU's arguments that the SSR violates other provisions of Title 49.

Third, the SSR was one component of DP&L's Electric Security Plan ("ESP"). The Commission can approve an ESP if its "pricing *and all other terms and conditions* . . . is more favorable *in the aggregate* as compared to [a Market Rate Offer ("MRO")] under section 4928.142 of the Revised Code." R.C. 4928.143(C)(1) (emphasis added). (OCC Appx. 132.) The Commission found that on a price basis, an MRO would be $250 million more favorable than DP&L's ESP. However, the Commission made a factual finding that "other terms and conditions" in DP&L's ESP that would not be available under an MRO "significantly outweigh[]" the price benefits of an MRO, and that DP&L's ESP was thus "more favorable in the aggregate" than an MRO. 9/4/13 Order, p. 52. (OCC Appx. 62.) As demonstrated below, there was ample evidence in the record to support that factual finding.

In addition, DP&L has filed a cross-appeal that raises three issues. *First*, the Commission violated R.C. 4928.143(B)(2)(d) by imposing conditions upon DP&L's ability to receive a stability rider in the future. *Second,* the Commission unreasonably accelerated the deadline for DP&L to transfer its generation assets to an affiliate. *Third,* the Commission unreasonably accelerated the schedule under which competitive bidding would be implemented in DP&L's service territory.

II. STATEMENT OF FACTS

This section: (a) provides background regarding the development of deregulation in Ohio, including the 2008 enactment of legislation permitting Ohio utilities to recover stability charges; and (b) summarizes the evidence regarding DP&L's need for a stability charge.

A. SECTION 4928.143(B)(2)(d) ALLOWS UTILITIES TO RECOVER CHARGES SO THAT THEY CAN CONTINUE TO PROVIDE STABLE AND CERTAIN SERVICE

Utility service has three principal components -- generation, transmission and distribution. Starting January 1, 2001, an electric utility customer could acquire its generation from either its utility or from an alternative generation supplier. R.C. 4928.03. (OCC Appx. 127.) If a customer decided to switch to an alternative generation supplier, then that customer would pay for generation at a price to which the parties agreed. *Id.* However, transmission and distribution service (sometimes called the "wires business") have not been deregulated; therefore, regardless of who supplied the generation, the local utility would continue to deliver the generation to its customers via its transmission and distribution lines. *Id.*

If a customer did not switch to an alternative generation supplier, then its utility was required to supply generation to that customer pursuant to a standard service offer ("SSO"). The price that a utility could charge for generation was frozen (with exceptions not relevant here) during a five-year Market Development Period (*i.e.*, until December 31, 2005). R.C. 4928.34(A)(6). (OCC Appx. 140.) After that five-year period, the utility's price was to be deregulated – a utility was permitted to charge a market-based rate. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 15, quoting prior version of R.C. 4928.14(A). (IEU Appx. 157.)

The expectation in 2001 was that deregulation would lead to lower generation prices. However, the generation market has been volatile and unpredictable. This Court acknowledged that "the cost of generating power increased significantly, due primarily to increases in the costs of the underlying fuel sources." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 3 (internal quotation marks and citation omitted). Therefore, competition did not develop in the generation market as expected. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 14 ("the competitive market in DP&L's service territory had not developed as the commission had expected"); *In re Application of Columbus S. Power Co.*, 2011-Ohio-1788, at ¶ 2. Consumers thus faced the prospect of increased generation prices when the rate freeze expired after 2005, and utilities were free to charge market-based rates.

To protect customers from the "price volatility and rate shock" that would occur after 2005 if customers were required to pay a market-based rate for generation, the Commission approved Rate Stabilization Plans for the various Ohio utilities. *Ohio Consumers' Counsel*, 2007-Ohio-4276, at ¶ 15. *Accord*: *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 3. Generally, those Rate Stabilization Plans extended the generation rate freeze for several years beyond 2005.

In 2008, the General Assembly passed S.B. 221, which substantially amended Chapter 4928. Customers retained their right to switch to an alternative generation supplier. However, S.B. 221 eliminated the requirement that utilities charge a market-based rate to the customers that did not switch. Instead, S.B. 221 required Ohio utilities to offer generation service to those customers at a price that would be established in an SSO. R.C. 4928.141(A). (OCC Appx. 129.) The SSO could be either an MRO or an ESP. S.B. 221 thus protected customers from the volatile and unpredictable nature of the generation market by requiring utilities to provide generation service at a price set through an MRO or ESP.

The volatile nature of the generation market also created risks for utilities -- for example, the financial integrity of a utility could be threatened if there was a significant decrease in generation prices, which would cause customers to switch from utility SSO service to alternative generation suppliers. The General Assembly therefore included provisions in S.B. 221 that would protect utilities. For example, an ESP may include a charge to allow a utility to provide "stabl[e]" or "certain[]" service. R.C. 4928.143(B)(2)(d). (OCC Appx. 131.)

B. AFTER A THREE-WEEK HEARING, THE COMMISSION FOUND THAT THE SSR WOULD STABILIZE AND PROVIDE CERTAINTY IN DP&L'S RETAIL ELECTRIC SERVICE

On March 30, 2012, DP&L filed its initial Application in this matter. Thirty-four parties were granted leave to intervene in the proceedings (collectively, "Intervenors"). 9/4/13 Order, p. 5. (OCC Appx. 15.) After extensive discovery, the Commission conducted a three-week evidentiary hearing in March-April 2013. At that hearing, the Commission heard testimony from 11 DP&L witnesses, 7 Intervenor witnesses, and 10 witnesses from its own Staff.

DP&L is an integrated utility -- meaning that it owns distribution, transmission and generation equipment. 9/4/13 Order, pp. 21-22. (OCC Appx. 31-32.) The evidence submitted by DP&L showed that due to significant changes in generation market conditions, DP&L faced serious threats to its financial integrity and, consequently, to its ability to provide safe and reliable distribution, transmission and generation service. DP&L Ex. 1, CLJ-1 (Public Version at DP&L Supp. 46); Tr. 2822-23 (DP&L Supp. 332-33). DP&L's declining earnings (and the corresponding threats to DP&L's financial integrity and ability to provide safe and reliable service) were being driven principally by three factors: (1) increased customer switching; (2) declining wholesale generation prices; and (3) declining capacity prices for generation. DP&L Ex. 1A, p. 13 & CLJ-1; Tr. 135-36. (IEU Supp. 76-77.)

Without a stability charge, DP&L would earn negative projected ROEs during the proposed ESP term:

Year	ROE
2013	[redacted]
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]

DP&L Ex. 4A, WJC-5. (DP&L Supp. 337.)

Pursuant to R. C. 4928.143(B)(2)(d), DP&L requested an SSR of $137.5 million per year, for five years to allow DP&L to provide stable and certain distribution, transmission and generation service. Dec. 12, 2012 Second Revised Application, ¶ 12. (DP&L Supp. 34.) The evidence showed that DP&L needed the SSR to maintain its financial integrity, and that without the SSR, DP&L would not be able to provide safe and stable distribution, transmission and generation service. For example, DP&L's Chief Financial Officer testified:

> "Q. [An Intervenor witness] discusses the Company's proposed SSR . . . . Please comment on his assertion and the SSR.
>
> A. . . . *[The SSR] is the minimum that DP&L needs* to allow it to satisfy its obligations, operate efficiently *so as to provide adequate and reliable service* and otherwise continue operating as an ongoing entity." DP&L Ex. 16, pp. 7-8 (emphasis added). (DP&L Supp. 84-85.)

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

> "Q. Is the SSR a charge that would have the effect of stabilizing or providing certainty regarding retail electric service?
>
> A. Yes it is. It would stabilize retail electric service provided by DP&L because it would help to assure DP&L's financial integrity, which is *important to the company's ability to provide stable, safe, and reliable electric service.*" DP&L Ex. 12, p. 23 (emphasis added). (DP&L Supp. 56.)

An economist from the Analysis Group, testified:

> "Q. Will the SSR have the effect of stabilizing and providing certainty regarding retail electric service?
>
> A. Yes. . . . As discussed above, it is an important factor in maintaining the Company's financial integrity and thus *permits it to provide quality service to its customers.* Alternatively, removal of the SSR will damage DP&L's financial position and integrity substantially, *imperiling its ability to provide such quality service to its customers.*" DP&L Ex. 4A, p. 54 (emphasis added). (DP&L Supp. 48.)

The Commission approved in part and rejected in part DP&L's request. Specifically, the Commission approved DP&L's request for the SSR, but set the SSR at $110 million (thus rejecting DP&L's request that the SSR be $137.5 million), and limited the SSR to three years (thus rejecting DP&L's request that the SSR be approved for five years). Sept. 6, 2013 Entry Nunc Pro Tunc, p. 2. (OCC Appx. 66.) The Commission found the evidence submitted by DP&L (quoted above) to be credible:

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

9/4/13 Order, pp. 21-22 (emphasis added). (OCC Appx. 31-32.)

III. STANDARD OF REVIEW

"[T]his court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show that the PUCO's determination . . . is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777 (1988). Although "this court has complete, independent power of review" as to all questions of law, that authority "does not prevent the court from acknowledging and, in certain instances, utilizing the specialized expertise of an agency in interpreting the law." *Office of Consumers' Counsel v. Pub. Util.Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979). "These situations arise where there exists disparate competence between the respective tribunals in dealing with highly specialized issues and where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Id.*

ARGUMENT

IV. THE SSR IS AUTHORIZED BY OHIO REV. CODE 4928.143(B)(2)(d)

Proposition of Law 1: The Commission's factual findings that the SSR satisfied the elements of R.C. 4928.143(B)(2)(d) are supported by the evidence

This Court has held that the ESP state "does not provide a detailed mechanism for establishing rates" and that an ESP "may contain any number of provisions within a variety of categories." *In re Application of Columbus S. Power Co. for Admin. of Significantly Excessive Earnings Test*, 134 Ohio St.3d 392, 2012 Ohio-5690, 938 N.E.2d 276, ¶ 4. As demonstrated below, the SSR falls well within the few limits imposed by 4928.143. (OCC Appx. 130-33.)

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

A charge under R.C. 4928.143(B)(2)(d) must satisfy three criteria: (1) it must be a "[t]erm[], condition[], or charge[]"; (2) it must "relat[e]" to one of the items listed in that statute; and (3) it must "have the effect of stabilizing or providing certainty regarding retail electric service." R.C. 4928.143(B)(2)(d). (OCC Appx.131.) As shown below, the Commission's factual findings that the SSR satisfied those three criteria are supported by the record.

1. **A "charge"**

The first criterion in R.C. 4928.143(B)(2)(d) is that the SSR must be a "term[], condition[], or charge[]." There is no dispute that the SSR is a charge.

2. **"Relating to"**

The SSR must be a charge "relating to . . . *bypassability* . . . or . . . *default service* . . . ." R.C. 4928.143(B)(2)(d) (emphasis added). (OCC Appx. 131.) The Commission found that DP&L's SSR related to both default service and to bypassability:

> "The Commission *finds that the SSR is related to default service.* The SSR is a nonbypassable stability charge for the purpose of maintaining DP&L's financial integrity so that it may continue to provide default service. DP&L is required under Section 4928.141, Revised Code, to provide an SSO for customers in its service territory. The SSO is the default service provided by the electric utility and may be provided through either an ESP or an MRO. . . .
>
> 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."

9/4/13 Order, p. 21 (emphasis added). (OCC Appx. 31.)

The Commission's factual findings that the SSR relates both to default service and bypassability are supported by the evidence. For example, DP&L's Director of Regulatory Operations testified that the SSR related both to default service and to bypassability. DP&L Ex. 12, p. 23. (DP&L Supp. 56.) *Accord*: Tr. 2023. (DP&L Supp. 306.)

OCC argues that the SSR does not relate either to default service (pp. 28-35) or to bypassability (pp. 35-36). As demonstrated below, the Commission's findings that it related to both are supported by the record.

a. <u>The SSR relates to default service</u>

The Commission found that DP&L's "SSO is the default service," and "that the SSR relat[ed] to" SSO service. 9/4/13 Order, p. 21. (OCC Appx. 31.) OCC does not dispute the Commission's factual finding that the SSR related to SSO service. Instead, OCC asserts (p. 29) that "'[d]efault service' is legislatively defined" and that the definition of default service does not include SSO service. OCC thus asserts (pp. 28-35) that the Commission erred when it concluded that default service was the same as SSO service. The Court should reject OCC's argument for the following separate and independent reasons:

1. <u>"Default Service" is not defined</u>: OCC's claim (p. 29) that "'[d]efault service' is legislatively defined" in R.C. 4928.14 is not true. That section provides that if a customer has selected an alternative generation supplier, but that alternative generation supplier fails to

provide service, then that failure "shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer." R.C. 4928.14. (OCC Appx. 128.) Contrary to OCC's assertion, R.C. 4928.14 contains no definition of "default service."

Indeed, that section shows that "default service" is synonymous with SSO service. Specifically, since a failure by an alternative generation supplier to provide service results in its customers "defaulting to the utility's standard service offer," that section shows that SSO service is the "default service."

2. SSO is the "default standard service offer": In fact, OCC's claim that SSO service is not default service is directly contradicted by R.C. 4928.141(A), which provides that an SSO "shall serve as the utility's *default standard service offer.*" (Emphasis added.) (OCC Appx. 129.) That section's plain meaning is that SSO service is "default service." The fact that an SSO is the utility's "*default* standard service offer" demonstrates that SSO service is the "default service," a point that OCC entirely ignores.

3. Section 4928.64(C)(4)(a) uses the term "default service" to mean SSO service: Under R.C. 4928.64(B)(1), a utility "shall provide from qualifying renewable energy resources . . . a portion of the electricity supply required for its standard service offer." DP&L Appx. 26.) (An example of a renewable energy resource is solar power. R.C. 4928.01(A)(37)(a)(i).) OCC Appx. 124E.) The percentage of the utility's SSO that is required to be from renewable energy resources is set by statute. R.C. 4928.64(B)(2). (DP&L Appx. 26-27.)

However, a utility can be relieved of the obligation to provide renewable energy as part of its SSO by a "force majeure" event. R.C. 4928.64(C)(4)(a). (DP&L Appx. 29.) Critically for our purposes here, that section further provides that "[t]he commission may require the electric distribution utility . . . to make solicitations for renewable energy resource credits as part of its *default service* before the utility's . . . request of force majeure under this division can be made." *Id.* (emphasis added). Thus, R.C. 4928.64(C)(4)(a) uses the term "default service" as synonymous with SSO service. Specifically, a utility is required to include renewable energy as part of its "standard service offer." R.C. 4928.64(B). (DP&L Appx. 26-28.) The fact that a utility may be required "to make solicitations for renewable energy resource credits as part of its *default service*" before a force majeure event would be recognized shows that "default service" is synonymous with "standard service offer." R.C. 4928.64 (C)(4)(a). (DP&L Appx. 29.)

In short, OCC's claim that the term "default service" is "legislatively defined" is false. There is no definition of the term in Title 49. The Commission's interpretation of "default service" is reasonable because Title 49 refers to SSO service as the "default standard service offer" (R.C. 4928.141(A)) (OCC Appx. 129), and uses the term "default service" synonymously with the term "standard service offer" (R.C. 4928.64(C)(4)(a)). (DP&L Appx. 29.)

b. <u>The SSR relates to bypassability</u>

Even if the SSR did not relate to default service, the SSR is still lawful as a charge "relating to . . . bypassability." R.C. 4928.143(B)(2)(d). (OCC Appx. 131.) The Commission found that the SSR related to bypassability because the "SSR should be nonbypassable" (*i.e.*, customers should pay it whether they take service from DP&L or an alternative generation supplier). 9/4/13 Order, p. 21. (OCC Appx. 31.) OCC admits (p. 36) that "'bypassability' is not defined by the General Assembly. Thus, the PUCO can engage in statutory interpretation." OCC nevertheless argues (p. 36) that the Commission's determination that the SSR related to bypassability is "unreasonable or absurd" because "[a]ll utility charges are either bypassable or non-bypassable." OCC's argument has two significant defects.

First, the premise of OCC's argument -- that all charges are bypassable or nonbypassable -- is false. Specifically, the term "bypassable" refers to whether a customer can avoid the charge by switching to an alternative generation supplier. 9/4/13 Order, p. 21. (OCC Appx. 31.) A charge is bypassable if a customer can avoid it by switching to an alternative generation supplier (*e.g.*, a utility charge for generation). *Id.* A charge is nonbypassable if all customers must pay it (*e.g.*, the SSR or a charge for distribution service). *Id.*

However, utilities have various charges that do not fall into either category. For example, utilities charge customers to have distribution lines extended to their homes or businesses. Ohio Admin.Code 4901:1-9-07. (DP&L Appx. 32-34.) Utilities charge third parties (*e.g.*, cable or telephone companies) to attach wires to utility poles. R.C. 4905.51 and 4905.71. Utilities charge customers in certain instances things such as deposits, late payment charges, reconnection charges, charges associated with damages relating to fraudulent or damaging practices by the customer.

Utility charges for pole attachments, line extensions or other items do not relate to "bypassability," since they are neither bypassable (they cannot be avoided by switching to an alternative generation supplier) nor nonbypassable (all customers do not have to pay them). The premise of OCC's argument (p. 36) -- that "[a]ll utility charges are either bypassable or nonbypassable" -- is thus false.

Second, OCC criticizes the Commission's interpretation of the term "bypassability," but does not offer a different (much less better) interpretation of the term. The Commission concluded that a charge related to bypassability if the charge was nonbypassable (9/14/13 Order, p. 21 (OCC Appx. 31)), and as that interpretation is the plain meaning of the words of the statute, the Court should conclude that that interpretation is consistent with R.C. 4928.143(B)(2)(d).

3. <u>Stability and Certainty</u>

The third criterion in R.C. 4928.143(B)(2)(d) is that the SSR permits DP&L to provide stable and certain service. OCC (pp. 36-38) and IEU (pp. 12-15) argue that the SSR is unlawful because the evidence did not demonstrate that the SSR was necessary to allow DP&L to provide stable and certain retail electric service. The Court should reject those arguments because there was ample evidence supporting the Commission's factual findings. Specifically, as demonstrated above, DP&L's Chief Financial Officer, Director of Regulatory Operations and a financial expert all testified that DP&L needed the SSR to allow DP&L to provide stable and certain service. DP&L Ex. 16, p. 8 (DP&L Supp. 85); DP&L Ex. 12, p. 23 (DP&L Supp. 56); DP&L Ex. 4A, p. 54 (DP&L Supp. 48). Indeed, at the hearing, Intervenor witnesses conceded numerous critical points. For example, many Intervenor witnesses agreed that it was important that DP&L be able to maintain its financial integrity and provide safe and reliable service.[1] Many witnesses also conceded that DP&L needs reasonable earnings to maintain its financial integrity.[2]

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[1] Tr. 2056 (Wal-Mart witness) (DP&L Supp. 308); Tr. 1970 (DP&L Supp. 303); Tr. 1658-59 (Kroger witness) (DP&L Supp. 287-88); Tr. 2434 (DP&L Supp. 313); Tr. 2577-78 (DP&L Supp. 320-21); Tr. 2611-12 (DP&L Supp. 322-23); Tr. 2097 (OCC witness) (DP&L Supp. 310); OCC Ex. 17, pp. 10-11 (OCC witness) (DP&L Supp. 104-05).

[2] Tr. 1000 (definition of financial integrity is "whether the company's [sic] able to generate revenue, meet its expenses, and provide a reasonable return to its investors") (Staff witness) (DP&L Supp. 264); Tr. 1878-80 (Staff witness) (DP&L Supp. 296); Tr. 1936 (DP&L Supp. 302); Tr. 1984 (industrial customers) (DP&L Supp. 304); FES Ex. 14, pp. 10-11 (DP&L Supp. 157-58); Tr. 2519-20 (OCC witness) (DP&L Supp. 317-18).

Significantly, in their Briefs, *OCC and IEU do not cite to any evidence -- none -- that DP&L could provide safe and stable service without the SSR.* In fact, the testimony of the IEU and OCC witnesses who opposed the SSR demonstrated that they did not conduct any analysis regarding whether DP&L could provide stable service without the SSR:

1. Joe Bowser, IEU: Mr. Bowser recommended that the Commission reject the SSR. IEU Ex. 1, p. 20. (DP&L Supp. 142.) However, he admitted that he did not conduct any analysis regarding whether DP&L could provide safe and reliable service without the SSR. Tr. 2633 (DP&L Supp. 324).

2. Ed Hess, IEU: Mr. Hess recommended that the Commission reject the SSR. IEU Ex. 3, pp. 4-6. (DP&L Supp. 152-54.) However, he admitted that he did no analysis of whether DP&L would have reasonable earnings if the Commission adopted his approach. Tr. 1707. (DP&L Supp. 289.)

3. Kevin Murray, IEU: Mr. Murray opined that the Commission should not approve DP&L's request for an SSR. IEU Ex. 2, pp. 21-27. (Public Version at DP&L Supp. 144-50.) However, he admitted that he had not done any analysis of DP&L's financial integrity. Tr. 1460-62. (DP&L Supp. 281-83.)

4. Dan Duann, OCC: Dr. Duann recommended that the Commission reject DP&L's request for an SSR. OCC Ex. 28, pp. 3-28. (Public Version at DP&L Supp. 115-40.) However, he did no analysis of DP&L's projected earnings during the ESP. Tr. 2515, 2548. (DP&L Supp. 315, 319.)

5. <u>Ken Rose, OCC</u>: Dr. Rose opined that the Commission should reject DP&L's request for an SSR. OCC Ex. 21, pp. 2-3. (DP&L Supp. 109-10.) However, he admitted that he was not sponsoring any testimony regarding DP&L's financial integrity. *Id.* at 5; Tr. 2002. (DP&L Supp. 305.)

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

B. THE STATUTORY SECTIONS CITED BY OCC AND IEU DO NOT BAR THE SSR

OCC (pp. 15-26) and IEU (pp. 15-29) assert that the SSR violates R.C. 4928.38 (OCC Appx. 148) and 4928.141 (as a transition charge) (OCC Appx. 129), 4928.02(H) (as an anticompetitive generation subsidy) (OCC Appx. 125), 4928.03 (as a generation-related charge) (OCC Appx. 127), and 4928.17 (as an undue preference for generation) (OCC Appx. 135). As demonstrated below, the Court should reject those arguments because: (1) the section authorizing the SSR states that it is lawful "[n]otwithstanding" the sections cited by OCC and IEU; and (2) in any event, the SSR does not violate those sections.

1. The SSR Charge is Lawful "Notwithstanding" the Sections That Appellants Cite

The section authorizing the SSR states that a stability charge is lawful "*Notwithstanding any other provision of Title XLIX [49] 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." R. C. 4928.143(B) (emphasis added). (OCC Appx. 130.) A charge under that section is thus lawful "[n]otwithstanding any other provision of Title XLIX [49]," with certain limited exceptions. Those exceptions are for R.C. 4928.143(D) (OCC Appx. 132), 4928.20(I), (J), and (K) (DP&L Appx. 23-24), 4928.64(E) (DP&L Appx. 30), and 4928.69 (DP&L Appx. 31). OCC and IEU claim that the SSR violates R.C. 4928.38, 4928.141, 4928.02(H), 4928.03 and 4928.17. Those sections are within Title 49, but are not listed in the "except" clause in R.C. 4928.143(B).

A charge authorized by R.C. 4928.143(B) is lawful "[n]otwithstanding any other provision of Title XLIX," and the Sections that IEU and OCC cite are within Title 49, but are not included in the "except" clause. The Court therefore should conclude that the SSR is lawful even it if would otherwise be barred by those sections.

2. The SSR Does Not Violate the Sections That Appellants Cite

Even if the "notwithstanding" clause did not bar OCC's and IEU's arguments, this section demonstrates that the SSR does not violate the sections that OCC and IEU cite.

a. The SSR is not a transition charge

OCC (pp. 15-21) and IEU (pp. 15-21) argue that the SSR is a transition charge under R.C. 4928.38, and is thus unlawful. The Commission found that the SSR was not a transition charge. 9/4/13 Order, p. 22. (OCC Appx. 32.) As demonstrated below, the Commission's factual findings are supported by the record.

1) Under Ohio law, the SSR is not a transition charge

The statute authorizing the recovery of transition charges authorizes a utility to recover "costs" that were "prudently incurred," that are "verifiable," that are "unrecoverable in a competitive market," and that the utility would otherwise be entitled to recover. R.C. 4928.39. (OCC Appx. 149.) Transition revenues thus recover specific "costs."

Here, the SSR was not designed to allow DP&L to recover any specific "costs." Instead, it was designed to allow DP&L the opportunity to have reasonable earnings so that it could provide stable and certain service. The rebuttal testimony of a DP&L financial expert explained the fact that the SSR was not a cost-based transition charge.[3] Further, numerous Intervenor and Staff witnesses conceded that the SSR was designed to allow DP&L to recover targeted earnings.[4] Those concessions thus demonstrate that the SSR was not designed to recover any specific "costs," and thus is not a transition charge.

The Commission's factual finding that the SSR does not satisfy the criteria in R.C. 4928.39, and thus is not a transition charge, is thus amply supported by the record.

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

Even assuming for the sake of argument that the SSR was a transition charge, it would still be lawful because SB 221 was enacted after SB 3. SB 3 was enacted in 1999, and provides that "[t]he commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code." R.C. 4928.38. (OCC Appx. 148.) Nine years later, the General

[3] DP&L Ex. 14, pp. 17-18 (DP&L Supp. 65-66). *Accord*: Tr. 209 (DP&L Supp. 231); Tr. 552 (DP&L Supp. 243); Tr. 823 (DP&L Supp. 257); Tr. 1304-05 (DP&L Supp. 275-76), Tr. 1433 (DP&L Supp. 277); Tr. 2871 (DP&L Supp. 329).

[4] Tr. 1707 (Staff witness) (DP&L Supp. 289); Tr. 2035 (OCC witness) (DP&L Supp. 307); Tr. 2518 (OCC witness) (DP&L Supp. 316); Tr. 1808-09 (Staff witness) (DP&L Supp. 292-93).

Assembly passed SB 221, which included R.C. 4928.143(B)(2)(d), the section under which the Commission approved the SSR.

If the Court were to conclude that the SSR was barred by R.C. 4928.38 (as a transition charge) but was authorized under R.C. 4928.143(B)(2)(d) (as a stability charge), then the Court should conclude that R.C. 4928.143(B)(2)(d) controls because it was enacted *after* R.C. 4928.38. It is well settled that if two statutes conflict, then the later-passed statute controls. R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."). (DP&L Appx. 19.)

b. <u>Section 4928.143(B)(2)(d) Authorizes a Generation-Related Charge</u>

OCC (pp. 22-26) and IEU (pp. 21-24) assert that the SSR is a generation charge. From that premise, they assert that the SSR violates R.C. 4928.02(H) (Ohio policy against anticompetitive generation subsidies), R.C. 4928.03 (generation service is competitive), and R.C. 4928.17 (requiring separation between generation and distribution businesses).

The Court should reject those arguments for two separate and independent reasons: (1) the Commission found as a factual matter that the SSR was necessary to allow DP&L to provide stable and certain distribution, transmission and generation service; and (2) R.C. 4928.143(B)(2)(d) authorizes a stability charge to support DP&L's generation business.

1) <u>The SSR is necessary for DP&L's generation, transmission and distribution businesses</u>

As background: R.C. 4928.17 requires a utility to separate its generation business from its distribution and transmission businesses. That section permits two different types of separation. *First*, a utility could transfer its generation assets to "a fully separated affiliate."

R.C. 4928.17(A)(1). (OCC Appx. 135.) *Second*, in the alternative, a utility can comply with "functional separation requirements as the commission authorizes to apply for an interim period." R.C. 4928.17(C). (OCC Appx. 136.) The Commission enacted rules regarding functional separation that permit the utility to retain its assets, but require that the generation assets be operated separately. Ohio Adm.Code 4901:1-37-04. (IEU Appx. 131-33.)

Here, since 2001, DP&L has been operating under a "functional separation" plan pursuant to R.C. 4928.17(C) that the Commission authorized in prior cases. In its Order in this case, the Commission ordered DP&L to divest its generation assets by January 1, 2017 (*i.e.*, achieving compliance with R.C. 4928.17(A)(1)). June 4, 2014 Fourth Entry on Rehearing ("6/4/14 Entry"), p. 5. (OCC Appx. 106.)

The Commission found that the SSR was necessary to allow DP&L to provide stable and certain distribution, transmission and generation service. 9/4/13 Order, pp. 21-22. (OCC Appx. 31-32.) There was ample evidence to support the Commission's factual finding that the SSR was necessary to support DP&L's distribution, transmission and generation businesses.

Specifically, DP&L currently is an integrated company that provides distribution, transmission and generation service. Tr. 1865-66 (DP&L Supp. 294-95); Tr. 2635-36. (DP&L Supp. 325-26.) The evidence showed that a *cause* of DP&L's financial integrity issues may be generation-related, but that those issues will *affect* all of DP&L's businesses. Tr. 2871-72. (DP&L Supp. 329-30.) A Staff witness explained that if DP&L could not maintain its financial integrity, then all of its services – including distribution service – would be affected. Tr. 1865-66. (DP&L Supp. 294-95.) That Staff witness further explained that the SSR thus relates to distribution, transmission and generation service. *Id.* An IEU witness also conceded that the

SSR would provide cash flow support for DP&L's distribution, transmission and generation businesses. Tr. 2636. (DP&L Supp. 326.)

The defect in OCC's and IEU's arguments is that they focus on the generation-related *causes* of DP&L's financial integrity issues, but ignore the *effects* of those issues (which preclude DP&L from providing safe and stable distribution, transmission and generation service). The evidence supports the Commission's finding that the SSR was necessary to allow DP&L to provide safe and stable distribution, transmission and generation service (9/4/13 Order, pp. 21-22 (OCC Appx. 31-32)), and the Court should thus reject the argument that the SSR is a generation-only charge.

2) <u>Chapter 4928 authorizes the SSR to allow DP&L to provide stable generation service</u>

Even assuming for the sake of argument that the SSR was a generation-only charge, such a charge is authorized by R.C. 4928.143(B)(2)(d). Specifically, R.C. 4928.143(B)(2)(d) authorizes the Commission to approve an SSR to allow DP&L to provide stable and certain "retail electric service." (OCC Appx. 131.) The term "retail electric service" is defined in Chapter 4928's definition section to include "generation service". R.C. 4928.01(A)(27). (OCC Appx. 124C.)

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

3. *Elyria* Is Not on Point

OCC (p. 24) relies on the Court's decision *Elyria Foundry Co., v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, but that case is not on point. In *Elyria*, the Commission approved a Stipulation that permitted FirstEnergy to defer fuel costs for later recovery in distribution rates. *Id.* at ¶ 45. This Court ruled that recovery of fuel costs through distribution rates violated R.C. 4928.02(G) (OCC Appx. 125), which bars a subsidy flowing between non-competitive and competitive retail electric services. *Id.* at ¶ 50-57.

Elyria is not on point for two separate reasons. *First*, *Elyria* rejected FirstEnergy's argument that the deferral was authorized by other sections of the Revised Code. *Id.* at ¶ 56-57. Here, in contrast, the SSR is expressly authorized by R.C. 4928.143(B)(2)(d). *Second*, R.C. 4928.02(G) is inapplicable here because the SSR is not (as OCC asserts) a distribution charge that will be used to support a generation business. As demonstrated above, the Commission found that DP&L needed the SSR to support its distribution, transmission and generation businesses. 9/4/13 Order, pp. 21-22. (OCC Appx. 31-32.)

C. THE SSR MAY BE NONBYPASSABLE

IEU argues (pp. 11-12) that the SSR may not be nonbypassable. IEU's theory is that the SSR is a generation-related charge, and that customers that switch to an alternative generation supplier should not have to pay the SSR. The Court should reject that argument for three separate reasons.

First, R.C. 4928.143(B)(2)(d) authorizes a charge "relat[ed] to . . . bypassability." (OCC Appx. 131.) As a nonbypassable charge, the SSR is plainly related to bypassability. Indeed, IEU does not dispute that point. That section thus authorizes a nonbypassable charge.

Second, the SSR would not achieve its purpose -- allowing DP&L to provide safe and stable service -- if it were bypassable. Specifically, DP&L's financial integrity is in jeopardy because a large number of its customers have switched to alternative generation suppliers. DP&L Ex. 1, p. 13 & CLJ-1. (Public Version at DP&L Supp. 45-46.) If the SSR could be avoided by switching, then even more customers would switch, which would further undermine DP&L's financial integrity. *Id.* A statute should not be interpreted to achieve an absurd result.[5]

Third, as demonstrated above, DP&L needs the SSR so that it can provide stable distribution and transmission service. All customers within DP&L's service territory receive distribution and transmission service from DP&L, regardless of which generation provider they use. It is therefore reasonable that all customers pay the SSR.

D. THE COMMISSION EXPLAINED ITS REASONS FOR REJECTING IEU'S ARGUMENTS

IEU (p. 24) argues that the Commission did not respond to IEU's argument that SSR was an unlawful generation subsidy, in violation of R.C. 4928.17 (OCC Appx. 135-36) and 4928.02(H) (OCC Appx. 125). Not true. The Commission explicitly described IEU's argument on that point (9/4/13 Order, p. 19) (OCC Appx. 29), and explicitly rejected it as a factual matter. (*Id.* at 22.) (OCC Appx. 32.)

E. THE SSR IS NOT PREEMPTED BY FEDERAL LAW

IEU also argues (pp. 25-29) that the SSR is preempted by the Federal Power Act, 16 U.S.C. 824, *et seq.* (IEU Appx. 178-79.) This Court begins its preemption analysis "with the

[5] *AT&T Commc'ns of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶ 18 (holding that "when interpreting a statute, courts must avoid an illogical or absurd result") (internal quotation marks and citations omitted).

presumption that the states' historic police powers shall not be superseded by federal law unless that is shown to be the clear and manifest purpose of Congress." *City of Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St.3d 79, 2012-Ohio-5370, 979 N.E.2d 1273, ¶ 15. "The party seeking to overcome the presumption against preemption bears a heavy burden." *Id.*

Under the Federal Power Act, the Federal Energy Regulatory Commission ("FERC") has "exclusive authority to regulate the transmission and sale *at wholesale* of electric energy in interstate commerce." *New England Power Co. v. N.H.*, 455 U.S. 331, 340, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982) (emphasis added). However, "[s]tates retain jurisdiction over *retail* sales of electricity and over local distribution facilities." *Niagara Mohawk Power Corp. v. Fed. Energy Regulatory Comm.*, 452 F.3d 822, 824 (D.C. Cir. 2006), *cert. denied*, 550 U.S. 918, 127 S.Ct. 2129 (2007) (emphasis added). Congress has "allowed state regulation of a sale [of electricity] at local retail rates to ultimate customers." *Fed. Power Comm. v. S. Cal. Edison*, 376 U.S. 205, 214, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964) (internal quotation marks and citation omitted). Indeed, this Court has held that "*retail deals are explicitly excluded from FERC's exclusive jurisdiction.*" *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm., 76 Ohio St.3d 521, 525, 668 N.E.2d 889,* (1996) (emphasis added). *Accord*: *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Assn., Inc.*, 707 F.3d 883, 887 (7th Cir. 2013) ("In general, the federal government through FERC regulates the interstate wholesale electricity market, while the *states regulate the retail sale of this power to consumers*.") (emphasis added).

To support its preemption argument, IEU (pp. 26-27) first relies on *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp.2d 790 (2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014), *petition for cert. filed* (U.S. Nov. 25 and 26, 2014) (Nos. 14-614 and 14-623). In that case, the Maryland Public Service Commission had expressed concern that there was insufficient capacity inside the state and insufficient transmission lines to transport generation into the state. *Id.* at 804-05. To address this issue, the Maryland Public Service Commission issued a request for proposal ("RFP") for the construction of generation resources within Maryland that were to be designed to guarantee the supplier's capacity price. *Id.* at 821. Under the RFP, each bidder proposed a price at which it would provide energy and capacity into the wholesale PJM markets. *Id.* at 821-22. The RFP also provided that the winning bidder would enter into a "Contract for Differences" ("CfD") with local electric distribution companies ("EDCs"). *Id.*

One of the issues that the trial court considered was whether the price mechanism in the CfDs was preempted by the Federal Power Act. *Id.* at 825-29. The trial court held that the Maryland Public Service Commission's order providing that the EDCs sign the CfD with the winning bidder was unlawful because it "fixed the price for *wholesale* energy and capacity sales." *Id.* at 833 (emphasis added). The charge at issue in *PPL Energy Plus* was thus a *wholesale* charge between generators and utilities.

Here, in contrast, an SSO establishes the rate that a utility will charge to "consumers." R.C. 4928.141(A). (OCC Appx. 129.) The SSR was approved pursuant to R.C. 4928.143(B)(2)(d), which expressly authorizes a charge for "*retail* electric service." R.C. 4928.143(B)(2)(d) (emphasis added). (OCC Appx. 131.) The Commission's order in this case authorizing the SSR states that it is to be paid by "DP&L customers," *i.e.*, it is a retail rate. 9/4/13 Order, p. 17. (OCC Appx. 27.) As demonstrated above, FERC preemption does not extend to *retail* rates. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 525, 668 N.E.2d 889 (1996) ("retail deals are explicitly excluded from FERC's exclusive jurisdiction."). As the SSR is a "retail" rate that will be charged to "consumers," the SSR is not preempted by FERC.

IEU also relies (pp. 27-28) on the similarly irrelevant *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372 (D.N.J. 2013), *aff'd*, 766 F.3d 241 (3d Cir. 2014), *petition for cert. filed* (U.S. Nov. 26, 2014 and Dec. 10, 2014) (Nos. 14-634 and 14-694). In that case, the issue was whether the New Jersey Long-Term Capacity Pilot Project Act ("LCAPP") was preempted by the exclusive jurisdiction of FERC. *Id.* at 375. By establishing the price that LCAPP generators would receive for capacity *(i.e.,* for a wholesale sale), the trial court found that New Jersey was "interfering with the [FERC's] exclusive authority to regulate *wholesale* sales of electricity in interstate commerce." *Id.* at 410 (emphasis added).

In affirming that judgment, the Third Circuit began its analysis "with the basic assumption that Congress did not intend to displace state law." *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 250 (3d Cir. 2014) (internal quotation marks and citations omitted), *petition for cert. filed* (U.S. Nov. 26, 2014 and Dec. 10, 2014) (Nos. 14-634 and No. 694). The court nevertheless held that the state regulation at issue was preempted because it "strayed into the exclusive federal area of interstate wholesale rates" because it "sets a price for *wholesale* energy sales." *Id.* at 253 (emphasis added) (internal quotation marks and citation omitted).

Here, as demonstrated above, the SSR is a retail rate, not a wholesale rate. It thus is not preempted by FERC.

V. <u>DP&L'S ESP PASSES THE ESP V. MRO TEST</u>

Proposition of Law 2: The Commission's factual finding that DP&L's ESP was more favorable in the aggregate than an MRO was supported by the evidence

The Commission can approve an ESP if the Commission "finds that the electric security plan so approved, 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 section 4928.142 of the Revised Code." R.C. 4928.143(C)(1) (emphasis added). (OCC Appx. 132.) In its evaluation of whether DP&L's ESP was more favorable "in the aggregate" than an MRO, the Commission considered both quantitative elements (*i.e.*, price) and qualitative elements (*i.e.*, "other terms and conditions"). 9/4/13 Order, pp. 48-52. (OCC Appx. 58-62.)

On a price basis, the Commission concluded that an MRO would be $250 million more favorable than DP&L's ESP. 9/4/13 Order, p. 50. (OCC Appx. 60.) The reason that an MRO was $250 million more favorable than an ESP on a price basis is that the SSR would not be available under an MRO. *Id.*

However, that is not the end of the Commission's analysis. The statute required the Commission to consider "pricing and all other terms and conditions" to determine whether DP&L's ESP was more favorable "in the aggregate" than an MRO. R.C. 4928.143(C)(1). (OCC Appx. 132.) The Commission is required to "consider more than price." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 27.

Based upon the evidence, the Commission made factual findings that there were qualitative benefits of DP&L's ESP that would not be available under an MRO, and that those qualitative benefits of DP&L's ESP "significantly outweigh[]" the price benefit of an MRO. 9/4/13 Order, pp. 50-52. (OCC Appx. 60-62.) In support of that factual finding, the Commission identified five qualitative benefits of DP&L's ESP that would not be available under an MRO. *Id.* In the block quote below of the Commission's factual findings, DP&L has added numbers in brackets to assist the Court to differentiate the specific qualitative benefits of DP&L's ESP that would not be available under an MRO:

"[First,] [t]he 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.

[Second,] 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. . . . [W]itnesses have testified that this is essential to the implementation of a fully competitive retail market . . . . [Third,] 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 [with] Sections 4928.02(B) and (C), Revised Code. . . .

* * *

[Fourth,] 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. . . .

[Fifth,] 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. . . .

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.*"

9/4/13 Order, pp. 50-52. (OCC Appx. 60-62.)

IEU (pp. 29-40) argues that those factual findings were not supported by the evidence. Not true. There was ample evidence to support them.

1. <u>More rapid move to market pricing</u>: The first qualitative benefit of DP&L's ESP is that DP&L's "ESP moves more quickly to market rate pricing than under the expected MRO." 9/4/13 Order, p. 50. (OCC Appx. 60.) Specifically, under the MRO statute, competitive bidding would be phased in over a five-year time period, with 100% of the utility's rates being set through competitive bidding in year six. R.C. 4928.142(D). (IEU Appx. 161.) In contrast, 100% competitive bidding will be reached in DP&L's ESP in year three. March 19, 2014 Second Entry on Rehearing, pp. 18-19. (OCC Appx. 85-86.)

There was ample evidence to support the Commission's finding that a more rapid move to 100% competitive bidding was a qualitative benefit of DP&L's ESP. For example, an economic witness for DP&L testified that a more rapid transition to 100% competitive bidding would create a "more-favorable climate for business and more choices for consumers" and that such benefits were difficult to quantify. DP&L Ex. 5, p. 14. (DP&L Supp. 50.) Indeed, witnesses for OCC and IEU conceded that a more rapid move to 100% competitive bidding was a qualitative benefit that needed to be considered. Tr. 2094 (OCC witness) (DP&L Supp. 309) ("Q. You don't disagree with [DP&L's expert] that a more rapid move to competition would constitute a nonquantifiable benefit in DP&L's service territory, do you? . . . . A. I don't disagree with his general understanding that a more rapid move to market rates is a nonquantifiable element that needs to be considered. Q. And it's a benefit, right? A. Yes.");

Tr. 1485 (IEU witness) (DP&L Supp. 285) ("Q. Okay. As I understand your testimony, still on this test now, you are not objecting to consideration of a faster transition to market being considered as a nonquantifiable benefit under this test; is that right? A. That's correct."). Other witnesses agreed that a more rapid transition to 100% competitive bidding would provide qualitative benefits. OCC Ex. 16, p. 3 (OCC witness) (DP&L Supp. 102); Tr. 1046-49 (Staff witness) (DP&L Supp. 265-68); Tr. 1253-54 (DP&L Supp. 272-73); Tr. 1803-04 (Staff witness) (DP&L Supp. 290-91).

There was thus ample evidence supporting the Commission's factual finding that a more rapid move to 100% competitive bidding was a qualitative benefit of DP&L's ESP.

2. <u>Qualitative benefit of "adequate, reliable and safe" service</u>: The second qualitative benefit of DP&L's ESP as compared to an MRO is that "the SSR will ensure that DP&L can provide adequate, reliable and safe retail electric service until it divests its generation assets." 9/4/13 Order, p. 51. (OCC Appx. 61.) Specifically, the Commission found that DP&L could not receive the SSR under an MRO. *Id.* at 49. (OCC Appx. 59.) As demonstrated at length above, the evidence showed that DP&L could not provide safe and reliable service to its customers without the SSR.

The testimony further showed that DP&L would suffer from significant financial distress under an MRO in which it did not receive the SSR. DP&L Ex. 14, pp. 5-9 (Public Version at DP&L Supp. 58-62); Tr. 637-38, 645, 663 (DP&L Supp. 245-46, 249, 250) (without the SSR, "the viability of the company would be really greatly threatened" and there would be "severe financial distress which could lead to significant difficult-to-quantify costs"); Tr. 2709 (DP&L Supp. 328). If the SSR were to be removed from DP&L's revenue, then DP&L would need to make drastic cuts to its maintenance expenses, creating substantial reliability risks. DP&L Ex. 14, pp. 5-9 (Public Version at DP&L Supp. 58-62); Tr. 637-38 (DP&L Supp. 245-46).

Many witnesses in this case agreed that it is important that DP&L be able to provide safe and reliable service. Tr. 2056 (Wal-Mart witness) (DP&L Supp. 308); Tr. 1970 (DP&L Supp. 303); Tr. 1658-59 (Kroger witness) (DP&L Supp. 287-88); Tr. 2434 (DP&L Supp. 313); Tr. 2577-78 (DP&L Supp. 320-21); Tr. 2611-12 (DP&L Supp. 322-23); Tr. 2097 (OCC witness) (DP&L Supp. 310); OCC Ex. 17, pp. 10-11 (OCC witness) (DP&L Supp. 104-05). Further, *none* of the witnesses addressing the ESP v. MRO test sponsored testimony showing that DP&L could maintain its financial integrity and provide safe and reliable service under an MRO without the SSR. Tr. 1260 (DP&L Supp. 279); Tr. 1484-85 (IEU witness) (DP&L Supp. 284-85); Tr. 2097 (OCC witness) (DP&L Supp. 310); Staff Ex. 8, pp. 3-12 (Staff witness) (DP&L Supp. 91-100).

The Commission's factual finding that a qualitative benefit of DP&L's ESP as compared to an MRO was that "the SSR will ensure that DP&L can provide adequate, reliable and safe retail electric service until it divests its generation assets" (9/4/13 Order, p. 51 (OCC Appx. 61)) is thus amply supported by the evidence.

3. <u>Generation Asset Divestiture</u>: The third qualitative benefit of DP&L's ESP that the Commission identified is the fact that DP&L will divest its generation assets under its ESP. 9/4/13 Order, p. 51. (OCC Appx. 61.) IEU does not dispute that DP&L's divestiture of its generation assets is a benefit. Indeed, at the hearing, Intervenors claimed that it was critical to

the development of a competitive market that DP&L transfer its generation assets. FES Ex. 14, pp. 63-79. (DP&L Supp. 159-75.) FES Ex. 17, pp. 9-10. (DP&L Supp. 177-78.)

However, IEU (pp. 37-38) argues that separation of DP&L's generation assets is required by R. C. 4928.17 (OCC Appx. 135-36), and that the benefit is thus equally available under either an ESP or an MRO. The defect in that argument is that DP&L could not separate its generation assets under an MRO.

Specifically, the evidence shows that DP&L's assets (including generation assets) are security for $884 million of secured bonds. DP&L Ex. 16, p. 2. (Public Version at DP&L Supp. 79.) Those bonds prohibit DP&L from transferring its generation assets without the bondholders' consent. *Id.* Further, since there are thousands of bondholders, it would be impractical for DP&L to obtain the consent of all of the bondholders. *Id.* at 3-4. (DP&L Supp. 80-81.) Those bonds have "no-call" provisions that prohibit DP&L from paying off the bonds before September 1, 2016. *Id.* It is thus impossible for DP&L to transfer its generation assets before September 1, 2016. *Id.*

Further, for DP&L to call the bonds on or after September 1, 2016, DP&L would need to have sufficient money to pay them off. *Id.* at 4. (DP&L Supp. 81.) In other words, the only way that DP&L could transfer its generation assets is for DP&L to have sufficient money to pay off the bonds, and thus eliminate the prohibition in the bonds against DP&L transferring its generation assets. *Id.* However, as shown at length above, DP&L's financial integrity would be jeopardized without the SSR. The evidence showed that without the SSR, DP&L would not have sufficient revenue to pay off the bonds. *Id.* at 4-5. (DP&L Supp. 81-82.)

The SSR is thus necessary to DP&L's ability to transfer its generation assets, and in light of the Commission's ruling that the SSR would not be available under an MRO (9/4/13 Order, p. 49 (OCC Appx. 59)), DP&L could not transfer its generation assets under an MRO. The fact that DP&L will transfer its generation assets is thus a substantial benefit under DP&L's ESP that is not available under an MRO. *Id.* at 51. (OCC Appx. 61.)

4. Competitive Enhancements: The Commission also found that the requirement that DP&L implement certain competitive enhancements was a qualitative benefit of DP&L's ESP that would not be available under an MRO. 9/4/13 Order, p. 51. (OCC Appx. 61.) Specifically, the Commission ordered DP&L to implement various measures that are designed to make it easier for alternative generation suppliers to do business in DP&L's service territory. *Id.* at 37-39, 51. (OCC Appx. 47-49, 61.) Intervenors admitted that the competitive enhancements are a benefit. Tr. 2396. (DP&L Supp. 312.) Tr. 1211. (DP&L Supp. 271.)

There is no provision in the MRO statute that requires a utility to implement any competitive enhancements. R.C. 4928.142. (IEU Appx. 160-66.) The competitive enhancements are thus a qualitative benefit of DP&L's ESP that would not be required under an MRO.

5. Qualitative Benefits of Economic Development and Ohio's Competitiveness in Global Markets: The fifth qualitative benefit of DP&L's ESP that the Commission identified is that it would "encourage economic development and improve the state's competitiveness in the global market as provided by Section 4928.02(N), Revised Code." The General Assembly declared that "[i]t is the policy of this state to . . . [f]acilitate the state's effectiveness in the global economy." R.C. 4928.02(N). (OCC Appx. 125-26.) The Commission found that DP&L's ESP

would promote that policy in ways that an MRO would not. 9/4/13 Order, p. 52. (OCC Appx. 62.) That factual finding is supported by the record -- testimony from witnesses showed that the competitive enhancements would help to develop the overall Ohio economy. DP&L Ex. 5, p. 15 (DP&L Supp. 51) ("Competitive retail enhancements . . . will facilitate competitive retail markets by reducing administrative barriers and transaction costs . . . ."); Fein Test., pp. 45-54 (Constellation Ex. 1) (DP&L Supp. 188-97) (describing various competitive enhancements, and that they would be part of "a steadying force in the continued evolution of the competitive electric market in Ohio"); FES Ex. 17, pp. 19-26 (DP&L Supp. 179-86) (describing benefits of various competitive enhancements).

In short, R.C. 4928.143(C)(1) requires the Commission to consider "pricing and all other terms and conditions" of DP&L's ESP to determine whether the ESP was "more favorable in the aggregate" than an MRO. (OCC Appx. 131-32.) The Commission's factual finding that the qualitative benefit of DP&L's ESP "significantly outweigh[]" any price benefits of an MRO was amply supported by the evidence.

VI. THE COMMISSION'S NUNC PRO TUNC ORDER WAS NOT UNLAWFUL

Proposition of Law 3: The Commission's Entry Nunc Pro Tunc lawfully corrected an administrative error.

The Commission issued its Order in this case on September 4, 2013, and two days later, the Commission issued its Entry Nunc Pro Tunc in which it amended certain aspects of the Order. In the Entry Nunc Pro Tunc, the Commission explained that "[d]ue to an administrative error, the Opinion and Order does not reflect the decision that the Commission intended to issue." 9/6/13 Entry, p. 2. (OCC Appx. 66.) OCC (pp. 41-44) argues that the Commission's Entry Nunc Pro Tunc was unlawful because it contained substantive changes to the

Commission's Order. The Court should reject that argument for the following three separate and independent reasons.

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

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

Here, the Commission's Entry Nunc Pro Tunc was not issued to allow the Commission to consider additional evidence. Instead, as described by the Commission, it issued an Order that it did not intend to issue simply "[d]ue to an administrative error," and the Entry Nunc Pro Tunc corrected that error. 9/6/13 Entry , p. 2. (OCC Appx. 66.) It is well-settled that nunc pro tunc entries may be issued to correct such errors. *Miller*, 2010-Ohio-5705, at ¶ 15 (nunc pro tunc entry may be issued to correct a "clerical error"); *Leskovyansky*, 77 Ohio St.3d at

100 (nunc pro tunc entries may be used so that the record "reflect[s] what the court actually decided").

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

Third, even assuming for the sake of argument that the Entry Nunc Pro Tunc was unlawful, the Commission can issue an entry on rehearing that contains the same terms as its Entry Nunc Pro Tunc. Specifically, R. C. 4903.10 provides that "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is *in any respect* unjust or unwarranted, or should be changed, the commission may abrogate or modify the same." (Emphasis added.) (OCC Appx. 123.) The Commission may thus alter its original Order "in any respect" in its entry on rehearing to the extent that the original Order was "unjust or unwarranted, or should be changed." In its Second Entry on Rehearing (pp. 30-31) (OCC Appx. 97-98), the Commission expressly approved the alternations to its original order that were made in its Entry Nunc Pro Tunc.

VII. DP&L'S APPLICATION FOR REHEARING SATISFIED R.C. 4901.10

Proposition of Law 4: DP&L's Application for Rehearing was sufficiently specific

OCC argues (pp. 44-46) that the Commission erred in considering DP&L's April 18, 2014 Second Application for Rehearing ("4/18/14 Second App. for Rehearing") (DP&L

Appx. 68), because the application for application for rehearing was insufficiently specific under R.C. 4903.10. (OCC Appx. 123.)[6] That assertion is false.

In the Second Application for Rehearing, DP&L sought rehearing on the following grounds:

> "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, 2013 Entry Nunc Pro Tunc.
>
> 2. The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 18-19) to accelerate blending in the competitive bidding process. The Commission should restore the blending schedule that it established in its September 6, 2013 Entry Nunc Pro Tunc."

4/18/14 Second App. for Rehearing, pp. 1-2. (DP&L Appx. 68-69.)[7] The Second Application for Rehearing thus set forth both (1) the specific matters on which DP&L sought rehearing, including the specific pages of the entry at issue, and (2) the specific relief that DP&L requested. DP&L's Second Application for Rehearing was supported by a lengthy memorandum that explained in detail the grounds supporting DP&L's Application. *Id.* at 1-9. (DP&L Appx. 71-79.)

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[6] OCC and IEU raised the same argument in their October 31, 2014 Joint Motion to Dismiss Assignments of Error in Cross-Appeal of The Dayton Power and Light Company. DP&L thus incorporates by reference the arguments raised in its November 10, 2014 Memorandum in Opposition to Joint Motion to Dismiss Assignments of Error in Cross-Appeal of The Dayton Power and Light Company.

[7] These assignments of error are reflected in DP&L's Assignments of Error II and III. September 19, 2014 Notice of Cross-Appeal of The Dayton Power and Light Company, p. 3.

Under R.C. 4903.10(B), 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." (OCC Appx. 123.) As the Commission found, "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.*" July 23, 2014 Fifth Entry on Rehearing, p. 4 (emphasis added). (OCC Appx. 117.)

OCC (pp. 45-46) relies on *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957 and *City of Marion v. Pub. Util. Comm.*, 161 Ohio St. 276, 278, 119 N.E.2d 67 (1954) (*per curiam*). In *Discount Cellular*, this Court found that the appellants could not challenge a standard that the Commission had used to dismiss a complaint because the appellants' application for rehearing had stated only generally that "'[t]he commission erred in dismissing the complaint because the commission is required by R.C. 4905.26 to hear complaints alleging violations of Ohio utility law.'" *Discount Cellular*, 2007-Ohio-53, at ¶ 57. In *Marion*, the insufficiently-specific assignment of error argued that the Commission "'did not have jurisdiction to hear the application of the company for increases in rates and charges and to make an order therein.'" *Marion*, 161 Ohio St. at 277.

Here, in contrast, DP&L's Application for Rehearing was specific as to both the exact error that DP&L complained of (including a citation to the page on which the error occurred) and the exact relief that DP&L sought, and was supported by a memorandum that explained in detail the grounds for DP&L's Application. (DP&L Appx. 68-79.) The *Discount Cellular* and *Marion* decisions are thus not on point.

A finding that DP&L's Second Application for Rehearing was not sufficiently specific would be inconsistent with established precedent of the Commission. The Commission has held that when an application for rehearing identifies what an applicant "consider[s] problematic with the Commission's decision and what [the applicant] want[s] the ultimate Commission decision to conclude[,]" then the application satisfies the specificity requirements of R.C. 4903.10(B). *In re Columbia Gas of Ohio, Inc.*, Pub. Util. Comm. Nos. 94-987-GA-AIR, *et al.*, Entry on Rehearing, ¶ 11 (June 9, 2004). The Commission has further recognized that when an application for rehearing does not require the Commission "to examine the document minutely, merely to discover the questions raised," the application satisfies R.C. 4903.10(B). *In re Complaint of Yerian*, Pub. Util. Comm. No. 02-2548-EL-CSS, Entry on Rehearing, ¶ 15 (May 19, 2004), citing *Agin v. Pub. Util. Comm.*, 12 Ohio St.2d 97, 232 N.E.2d 828 (1967) (*per curiam*).

This Court should not upend that precedent. Moreover, requiring even more detailed information than DP&L provided would elevate form over substance and, thereby, impose an unjustified procedural barrier.

VIII. THE COMMISSION'S DECISION RELATING TO THE SSR-E IS INCONSISTENT WITH OHIO REV. CODE 4928.143(B)(2)(d)

Proposition of Law 5: The limitations that the Commission placed upon the SSR-E are inconsistent with R.C. 4928.143(B)(2)(d)

The Commission authorized DP&L to seek an extension of the SSR (an SSR-E) of $45.8 million from January 1, 2017 through May 31, 2017. 9/6/13 Entry, p. 2. (OCC Appx. 66.) To receive the SSR-E, DP&L would have to satisfy the following five conditions: (1) DP&L must demonstrate that its financial integrity is threatened (9/4/13 Order, p. 27) (OCC Appx. 37); (2) DP&L must file a distribution rate case no later than July 1, 2014 (*id.*); (3) DP&L

must file by December 31, 2013, an application to separate its generation assets by January 1, 2017 (*id.*; 6/4/14 Fourth Entry on Rehearing, p. 5) (OCC Appx. 106); (4) DP&L must file by July 1, 2014 a proposal to implement SmartGrid and Advanced Metering Infrastructure ("AMI") (9/4/13 Order, p. 28) (OCC Appx. 38); and (5) DP&L must file by December 31, 2014, a plan to modernize its billing system (*id.*). The limitations that the Commission placed on DP&L's ability to recover a stability charge under R.C. 4928.143 (B)(2)(d) are unlawful and unreasonable for the following separate reasons.

A. SECTION 4928.143(B)(2)(d) DOES NOT AUTHORIZE THE COMMISSION TO LIMIT THE AMOUNT OF A STABILITY CHARGE THAT DP&L WOULD SEEK IN A FUTURE PROCEEDING

As the Commission correctly held, R.C. 4928.143(B)(2)(d) authorizes DP&L to seek a charge that would allow DP&L to provide stable and reliable service. The Commission's Order and its Entry permit DP&L to file a proceeding to seek an SSR-E under that section for the period January 1, 2017 through May 31, 2017, but limit the amount of the SSR-E to $45.8 million. 9/4/13 Order, pp. 27-28 (OCC Appx. 37-38); 9/6/13 Entry, p. 2 (OCC Appx. 66).

The Commission's decision to limit the amount of the 2017 SSR-E to $45.8 million is unlawful because there is nothing in R.C. 4928.143(B)(2)(d) that authorizes the Commission to decide <u>now</u> the level of a stability charge that DP&L would seek in a future (yet-to-be-filed) proceeding. In other words, in 2016, if DP&L can show that in 2017 it needs a stability charge greater than $45.8 million, then the Commission should authorize a higher stability charge. The Commission cannot now limit DP&L's ability to seek such a charge. Indeed, market conditions can be unpredictable, and DP&L may need a stability charge that is higher than the $45.8 million SSR-E in order to allow DP&L to continue to provide stable and certain service in the future; it is thus unlawful for the Commission to limit the amount of the SSR-E that DP&L can seek in a future proceeding.

It is well settled that "the commission may not legislate in its own right" and that the Commission does not have "the authority to rewrite the statutes." *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166-67, 423 N.E.2d 820 (1981). In light of the fact 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 could recover in a future proceeding, the Court should hold that the Commission cannot engraft upon the statute conditions that the General Assembly did not write into it.

B. THE CONDITIONS LISTED IN THE COMMISSION'S ORDER ARE NOT CONTAINED IN SECTION 4928.143(B)(2)(d)

The conditions in the Commission's Order (pp. 27-28) (OCC Appx. 37-38) for DP&L to receive the SSR-E are not authorized by R.C. 4928.143(B)(2)(d). The conditions to grant a stability charge under that section are that it: (1) is a charge; (2) is related to one of the items listed in the statute; and (3) would promote stable and reliable service. There is nothing in 4928.143(B)(2)(d) that authorizes the Commission to add to the statute, or to impose additional conditions that are not contained in that section. As R.C. 4928.143(B)(2)(d) does not contain the five conditions that the Commission imposed for DP&L to seek an SSR-E, the Court should hold that DP&L does not need to satisfy those conditions to recover a stability charge.

C. THERE IS NO BASIS IN THE RECORD FOR THE COMMISSION TO CONDITION DP&L'S RECOVERY OF A STABILITY CHARGE ON THE IMPLEMENTATION OF ADVANCED METERING INFRASTRUCTURE AND SMARTGRID

Even assuming for the sake of argument that the Commission had jurisdiction to impose additional conditions that are not listed in R.C. 4928.143(B)(2)(d), the Commission's decision to impose a condition that DP&L file an application to implement AMI and SmartGrid is both unlawful and unreasonable.

AMI and SmartGrid are relatively new technologies that might improve the efficiency and performance of DP&L's distribution system. As to AMI, meters are used to measure customer usage of electricity, and most of the meters that customers use are owned by DP&L; currently those meters simply measure the amount of electricity that a customer uses, and require a meter reader periodically to check the meter in person. Implementing AMI would require DP&L to replace those meters with new (and more expensive meters) that would communicate directly with a DP&L computer; those meters thus would not need to be checked in person and would provide additional information (*e.g.*, hourly usage) that the current meters do not provide. SmartGrid is another expensive technology that monitors the performance of DP&L's distribution system, so that DP&L would have more information about the performance of and any problems with its distribution lines.

The condition that DP&L implement AMI and SmartGrid is unlawful because there is no basis in the record for it. It was not a trial issue. It is well settled that the Commission's decisions must have "record support" and that a Commission order is unlawful if "no evidence" supports the decision. *In re Application of Columbus S. Power Co.,* 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 25, 29.[8]

Here, there is no record support whatsoever for the Commission to condition DP&L's receipt of a stability charge upon the filing of an application to implement AMI/SmartGrid. No party asked that DP&L be ordered to implement AMI/SmartGrid. There is no evidence in the record regarding how much AMI/SmartGrid would cost, or the benefits that would result. The Commission's Order does not cite to any evidence supporting the reasonableness of the AMI/SmartGrid condition. The Order is thus unlawful in this respect.

D. THE DEADLINE SET BY THE COMMISSION FOR DP&L TO FILE A DISTRIBUTION RATE CASE IS UNREASONABLE

Again, assuming that the Commission may lawfully impose conditions on DP&L's receipt of the SSR that are not contained in R.C. 4928.143(B)(2)(d), the deadline that the Commission imposed for DP&L to file a distribution rate case is unreasonable. Specifically, one of the conditions that the Commission placed upon DP&L's ability to receive the SSR-E is that DP&L file a distribution rate case no later than July 1, 2014. 9/4/13 Order, p. 27. (OCC Appx. 37.) That deadline is unreasonable for three separate reasons. First, no record was made at trial concerning a rate case filing and there is thus no record support for the Order. Second, DP&L needs to do an extraordinary amount of work to prepare a distribution rate case for filing.

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[8] *Accord: Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 29 (a Commission order is unlawful if there was no "factual basis supporting the commission's finding"); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 ("[I]n order to meet the requirements of R.C. 4903.09 * * *, the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based . . . .") (emphasis added) (first omission of text in original) (internal quotation marks and citation omitted).

That work is time consuming, and it would have been impossible for DP&L to complete by the July 1, 2014 deadline set by the Commission. Third, the Commission's Order required DP&L to do a substantial amount of work on other matters (including filing an application to separate its generation assets), and it would have been impossible for DP&L to file a distribution rate case by July 1, 2014 in light of the other work that it was ordered to perform.

IX. THE COMMISSION'S DECISIONS TO ACCELERATE THE DEADLINE FOR DP&L TO TRANSFER ITS GENERATION ASSETS AND IMPLEMENT COMPETITIVE BIDDING WERE UNREASONABLE

Proposition of Law 6: The Commission's decisions to accelerate deadlines for DP&L to transfer its generation assets and to implement competitive bidding were unreasonable

In its September 6, 2013 Entry (p.2) (OCC Appx. 66), the Commission set a date of May 31, 2017 for DP&L to transfer its generation assets. Further, the Commission ordered DP&L to implement a competitive bidding process, and that the prices established through that process would be blended with DP&L's existing rates over a period of three years. 9/4/13 Order, p. 15. (OCC Appx. 25.)

In its Second Entry on Rehearing, the Commission accelerated the deadline for DP&L to transfer its generation assets to January 1, 2016 (pp. 17-18) (OCC Appx. 84-85), and accelerated the blending schedule for DP&L to implement competitive bidding (pp. 18-19). (OCC Appx. 85-86.) The Commission stated that it set the asset transfer deadline and blending schedule in its prior orders in reliance upon testimony by a DP&L witness that DP&L could not transfer its generation assets before September 1, 2016. *Id.* at 17-19. (OCC Appx. 84-86.) The Commission further stated that it had decided to accelerate the asset transfer deadline and the blending schedule, due to statements made by DP&L in its Supplemental Application in its generation asset transfer case (Commission Case No. 13-2420-EL-UNC) that DP&L may transfer its generation assets as soon as 2014. *Id.*

DP&L sought rehearing on those two issues -- DP&L asked the Commission to restore the May 31, 2017 generation asset transfer date, and to restore the prior blending schedule. In its Fourth Entry on Rehearing (p. 5) (OCC Appx. 106), the Commission implemented January 1, 2017 as a modified deadline for DP&L to transfer its generation assets. The Commission denied DP&L's request for re-hearing on the blending schedule. *Id.* at 3. (OCC Appx. 104.) As demonstrated below, the Commission's decisions to accelerate the asset separation date from May 31, 2017, and to accelerate the blending process were unreasonable.

A. DP&L'S EVIDENCE AT THE HEARING RELATED TO DP&L'S PLAN TO TRANSFER ITS GENERATION ASSETS TO AN AFFILIATE

The hearing in this case occurred in March 2013. As DP&L's President explained, DP&L planned, at that time, to transfer its generation assets to an affiliate. DP&L Ex. 8, pp. 5-6 (DP&L Supp. 53-54.) *Accord*: Tr. 1141, 258-59. (DP&L Supp. 259, 232-33.) The evidence at the hearing showed that DP&L could not transfer its generation assets to an affiliate before May 31, 2017 for two reasons: (1) DP&L has terms and conditions in certain Pollution Control Bonds and First Mortgage Bonds that significantly impede upon its ability to transfer its generation assets before September 1, 2016; and (2) due to adverse market conditions, DP&L would not have sufficient cash flow to refinance the bonds before May 31, 2017. DP&L Ex. 16, pp. 2-4. (DP&L Supp. 79-81.) *Accord*: Tr. 260-62 (DP&L Supp. 234-36), 2897, 2911 (DP&L Supp. 335, 336); Tr. 1148-50 (DP&L Supp. 260-62); Tr. 800-05 (DP&L Supp. 251-56).

After the hearing in DP&L's ESP case, there were material adverse changes in market conditions. For example, at the time of the ESP hearing, DP&L projected that capacity prices during the 2016/2017 PJM delivery year would be $174.25/MW-day. FES Ex. 1, p. 53808. (DP&L Supp. 155.) DP&L projected that it would earn capacity revenues in 2016 of $146 million and in 2017 of $168 million. *Id.* However, after the hearing, publicly available market-price data showed that the PJM capacity price for the 2016/2017 delivery year cleared on May 24, 2013 at a price of $59.37 (i.e., only one-third of DP&L's projected price).[9]

After the hearing was completed in this case, in light of volatile market conditions, DP&L decided to explore the possibility of selling its generation assets to a third party. The Commission ordered DP&L to file an amendment to transfer its generation assets by December 31, 2013. 9/4/13 Order, p. 27. (OCC Appx. 37.) Pursuant to that Order, DP&L filed a separate proceeding at the Commission regarding the transfer of its generation assets. DP&L described its plan to either transfer its generation assets to an affiliate or to sell those assets to a third party in its February 25, 2014 Supplemental Application of The Dayton Power and Light Company to Transfer or Sell Its Generation Assets, ¶¶ 5-7 (Case No. 13-2420-EL-UNC).

That application stated that DP&L might sell its generation assets to a third party as early as 2014. *Id.* The reason that DP&L might have been able to transfer the assets as part of

[9] http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx. (DP&L Supp. 198-228.) The Court may take judicial notice of published reports of market prices. Evid.R. 201(B) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.") (DP&L Supp. 35); Evid.R. 201(D) ("A court shall take judicial notice if requested by a party and supplied with the necessary information.") (DP&L Supp. 35); Evid.R. 803(17) (excepting from the general rule against hearsay "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations"). (DP&L Supp. 38.)

a third party sale process as early as 2014, but that it could not transfer the assets to an affiliate before May 31, 2017, is that a third party might be willing to purchase those assets at a price that would help DP&L to offset costs of releasing the generation assets from the Company's mortgage and otherwise restructuring/refinancing its debt. (DP&L eventually announced that it did not intend to sell its generation assets to a third party.)

The Commission stated in its Second Entry on Rehearing, pp. 17-18 (OCC Appx. 84-85), that the reason that it accelerated the deadline for DP&L to transfer its generation assets was the Commission's belief that DP&L could transfer those assets as soon as 2014. However, as DP&L demonstrated at the hearing, there are both structural and financial obstacles which prevent DP&L from transferring its generation assets to an affiliate before May 31, 2017. DP&L Ex. 16, pp. 2-4. (DP&L Supp. 79-81.) *Accord*: Tr. 260-62 (DP&L Supp. 234-36), 2897 (DP&L Supp. 335), 2911 (DP&L Supp. 336), 1148-50 (DP&L Supp. 260-62), 800-05 (DP&L Supp. 251-56). DP&L may be able to transfer its generation assets before May 31, 2017 if it is able to negotiate a sale of those assets to a third party, but no third party has offered to purchase those assets at a reasonable price. The Court should thus order the Commission to restore the May 31, 2017 asset transfer deadline.

B. THE COURT SHOULD ORDER THE COMMISSION TO RESTORE THE BLENDING SCHEDULE THAT THE COMMISSION ESTABLISHED IN ITS ENTRY NUNC PRO TUNC

In its Second Entry on Rehearing (pp. 18-19) (OCC Appx. 85-86), the Commission also altered the blending schedule that it had previously approved. The Commission stated "[i]n 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. . . . 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." *Id.* at 18. (OCC Appx. 85.) The Commission then established a blending schedule that was substantially accelerated from the blending schedule established in its September 6, 2013 Entry Nunc Pro Tunc. *Id.* at 18-19. (OCC Appx. 85-86.)

The new blending schedule will cause substantial financial harm to DP&L. The evidence at the hearing showed that DP&L would lose substantial revenue if the blending schedule was accelerated. Tr. 1849. (DP&L Supp. 300.) DP&L demonstrated at the hearing that its financial integrity would be jeopardized if accelerated blending was implemented. DP&L, Ex. 16, p. 6 and CLJ-6. (Public Version at DP&L Supp. 83, 89.) *Accord*: DP&L Ex. 14, pp. 5-9, 28-29 (Public Version at DP&L Supp. 58-62, 76-77); Tr. 637-38 (DP&L Supp. 245-46), 640-41 (DP&L Supp. 247-48) ("[A] faster transition to market results in lower revenues . . . . [T]hat factor would tend to lead to, all else equal, point to a higher SSR."); Tr. 1096 (DP&L Supp. 264); Tr. 1298 (DP&L Supp. 274). There was no contrary testimony, so the Court should not defer to the Commission's ruling.

The Court should reverse the Commission's decision to accelerate the blending schedule because, as explained above, the basis for the Commission's decision on rehearing -- that DP&L could transfer its generation assets sooner than DP&L had stated at the hearing -- is not accurate. As demonstrated above, a sale to a third party was evaluated but was not feasible. Consequently, the Court should order the Commission to restore the original blending schedule.

X. <u>CONCLUSION</u>

OCC and IEU simply do not like factual findings that were made by the Commission. Those factual findings are supported by the extensive record developed in the three-week evidentiary hearing, and this Court should not indulge OCC's and IEU's requests that this Court second-guess those findings.

Further, it was unlawful and unreasonable for the Commission to: (1) limit the amount of, and require DP&L to satisfy conditions to receive, the SSR-E; (2) accelerate the deadline for DP&L to transfer its generation assets; and (3) accelerate the blending schedule.

Respectfully submitted,

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