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.	: : :	Supreme Court Case No. 2014-1505
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	: : :	Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	: : : :	Public Utilities Commission of Ohio Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, and 12-672-EL-RDR
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	: : :	
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	: : :	
Industrial Energy Users-Ohio, Appellant, v. Public Utilities Commission of Ohio, Appellee.	: : : : : : : : :	

THIRD MERIT BRIEF
OF APPELLANT/CROSS-APPELLEE
INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

As demonstrated in Appellant Industrial Energy Users-Ohio's ("IEU-Ohio") First Merit Brief, Appellee the Public Utilities Commission of Ohio ("Commission") acted unlawfully and unreasonably when it authorized a nonbypassable charge (termed the Service Stability Rider) to subsidize Cross-Appellant The Dayton Power and Light Company's ("DP&L") competitive wholesale and retail generation business. First Merit Brief of IEU-Ohio, *in passim*. DP&L, argues in its cross-appeal that not only does the Commission have jurisdiction to subsidize its generation business, but that the Commission lacks jurisdiction to condition its ability to seek further generation subsidies during the term of its electric security plan. DP&L also argues that the Commission established an unreasonable timeframe to implement competitive auctions and transfers its generation assets. DP&L's cross-appeal is without merit.

Accordingly, the Court should deny DP&L's cross-appeal and grant IEU-Ohio's appeal and direct the Commission to remove the unlawful and unreasonable Service Stability Rider from customers' bills.

II. ARGUMENT

IEU-Ohio's appeal presents four independent grounds for the Court to find that the Commission acted unlawfully and unreasonably in the case below. First, the Service Stability Rider, which collects the unlawful subsidy, is not authorized by the terms of R.C. 4928.143(B)(2). First Merit Brief of IEU-Ohio at 11-15. Second, the Service Stability Rider is barred by the statutory prohibitions contained in R.C. 4928.02(H), 4928.17, and 4928.38. *Id.* at 15-24. Third, the Commission's authorization of the Service Stability Rider is preempted by the Federal Power Act because the Commission may not provide a revenue supplement to DP&L's compensation for wholesale electric services. *Id.* at 25-29. Finally, the approved electric security plan is at least $250 million less favorable than a market rate offer in violation of R.C. 4928.143(C)(1), primarily due to the inclusion of the unlawful $330 million Service Stability Rider subsidy as a term of the electric security plan. *Id.* at 29-40.

R.C. 4928.143(B)(2)(d) requires a showing that a charge will have the effect of stabilizing or providing certainty regarding retail electric service. The Commission and DP&L attempt to satisfy this statutory requirement by claiming that the Service Stability Rider will help ensure that DP&L's consolidated business operations remain profitable.[1] Second Merit Brief of DP&L at 1, 6-9; Second Merit Brief of Commission at 8-11. They then imply (without analysis or record support) that that service reliability could become affected if DP&L's consolidated business operations do not produce consistent and robust earnings (of between 7 to 11%). *Id.* Thus, they conclude that the $330 million Service Stability Rider subsidy has some effect on service reliability and satisfies the statutory requirement that the charge "has the effect of stabilizing or providing certainty regarding retail electric service." *Id.* The plain language of the statute, however, does not allow a nonbypassable rider to subsidize DP&L's generation business. Further, the manifest weight of the evidence does not support the Commission's finding that the reliability of service will be adversely affected if the Service Stability Rider is not authorized.

The Commission and DP&L also assert that R.C. 4928.143(B)(2) provides that the Commission may ignore the prohibitions in R.C. 4928.02(H), 4928.17, and 4928.38 in adopting provisions that may be included in an electric security plan. Second Merit Brief of Commission

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[1] The financial integrity claim presented by DP&L and relied upon by the Commission looks at the consolidated finances of DP&L's generation, transmission, and distribution businesses. The "financial integrity" claim also is essentially a request to enjoy the benefits of the market without risk, *i.e.* Commission-approved regulation backstopping market losses. Between 2001 and 2011, DP&L's average unweighted annual return on equity was 19.4%. IEU-Ohio Ex. 1 at 13 (2nd Supp. at 15); *see also* Tr. Vol. I at 143 (2nd Supp. at 144) (over three years prior to case, DP&L's earnings were 18%, 20%, and 14%). From 2001 to 2011, DP&L also paid out dividends to its sole shareholder totaling $2.26 billion. IEU-Ohio Ex. 1 at 14 (2nd Supp. at 16). This figure represents 86% of DP&L's net income during this timeframe. Over the three years preceding this case, 2009 to 2011, DP&L paid out dividends greater than its net income. *Id.* at Ex. JGB-4 (2nd Supp. at 32); *see also* Tr. Vol. I at 143 (2nd Supp. at 144). In 2012, the year this case began and DP&L asserted it would be facing financial integrity issues, DP&L reported earnings of 10.8% and paid out dividends totaling $145 million, which exceeded 2012 net income of $143.7 million. IEU-Ohio Ex. 1 at Ex. JGB-4 (2nd Supp. at 32).

at 20; Second Merit Brief of DP&L at 17-18. They also argue that the charge does not violate these statutes. Second Merit Brief of Commission at 12-20; Second Merit Brief of DP&L at 18-23. Their statutory interpretation of R.C. 4928.143(B)(2), however, would lead to an absurd result that conflicts with the plain meaning of the statute and the Commission's prior, contemporaneous, and subsequent interpretation of the statute.

The Commission and DP&L further argue that the Commission's authorization of the Service Stability Rider is not preempted by the Federal Power Act because the charge is calculated in reference to the consolidated operations of DP&L, and not solely its wholesale generation business. Second Merit Brief of Commission at 20-23; Second Merit Brief of DP&L at 24-27. They also argue that because the Service Stability Rider is a retail rider, it is not within the Federal Energy Regulatory Commission's ("FERC") exclusive regulation of wholesale electric services. *Id.*

Because two of the three factors driving DP&L's generation revenue shortfall were related to wholesale generation services, however, the Commission is without jurisdiction to supplement DP&L's revenue for those services through the Service Stability Rider. Second Merit Brief of Commission at 3 (the Service Stability Rider is driven by three factors: "increased switching to alternative suppliers; declining [wholesale] market prices for energy; and declining [wholesale] capacity prices."). As the United States Third and Fourth Circuit Court of Appeals have found, the preemptive effect of the Federal Power Act is not altered by the fact that a revenue supplement related to a wholesale service is collected through a retail charge. *PPL Energy Plus, LLC v. Solomon,* 766 F.3d 241, 254 (3d Cir. 2014) (States cannot authorize "supplements [to] what the generators receive from PJM with an additional payment financed by payments from electric distribution companies."); *id.* (*quoting PPL EnergyPlus, LLC v.*

Nazarian, 753 F.3d 467, 477 (4th Cir. 2014)) (“"[t]he fact that [these sorts of payments] do[] not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same.").

Finally, the Commission and DP&L assert that while the approved electric security plan is more expensive than a market rate offer, the electric security plan is, in the aggregate, more favorable than a market rate offer. Second Merit Brief of Commission at 26-34; Second Merit Brief of DP&L at 27-35. To reach this conclusion, the Commission and DP&L rely on several qualitative factors that the Commission subjectively found on a combined basis outweighed at least $250 million of additional costs imposed by the electric security plan.[2] The Commission is prohibited from approving cases based upon subjective belief. *Office of the Ohio Consumers’ Counsel v. Pub. Util. Comm.,* 61 Ohio St.3d 396, 405-406 (1991); R.C. 4903.09 (Appx. at 142). IEU-Ohio also demonstrated in its First Merit Brief that the so-called qualitative benefits are unsupported by the record.

DP&L also presents two issues in its cross-appeal. Initially, DP&L argues that the Commission may not place limitations on its ability to seek further subsidies. Second Merit Brief of DP&L at 40-49. Specifically, DP&L claims that the conditions imposed by the Commission relative to the Service Stability Rider-Extension are unlawful because they are not enumerated in R.C. 4928.143(B)(2)(d). *Id.* at 40-42. If the Commission has authority to authorize the subsidy, as DP&L argues, then the Commission is required to authorize such a

[2] In the Opinion and Order, the Commission found that the electric security plan, as modified and approved by the Commission, was $250 million less favorable than a market rate offer based upon price. Opinion and Order at 50 (Appx. at 58). The Commission found that five qualitative factors offset the $250 million. In its Entry *nunc pro tunc,* the Commission modified the terms of the electric security plan, increasing its cost by another $63.8 million relative to a market rate offer. Entry *nunc pro tunc* at 2-3 (Appx. at 64-65); *see also* First Merit Brief of IEU-Ohio at 30. The Commission did not address whether the qualitative factors also offset the additional $63.8 million in costs of the electric security plan. Entry *nunc pro tunc* at 2-3 (Appx. at 64-65).

charge in a reasonable manner based upon the facts of the case. However, because the statute does not provide the Commission with authority to authorize financial subsidies, neither the Service Stability Rider nor the Service Stability Rider–Extension is lawful. Thus, the Court need not decide whether the Commission can condition the collection of the nonbypassable Service Stability Rider-Extension.

DP&L also challenges the timing of competitive auctions to price generation service provided to non-shopping customers under the electric security plan and the deadline imposed on DP&L to transfer its generating assets to a separate company. DP&L, however, fails to demonstrate that the Commission's revised auction schedule or transfer deadline were against the manifest weight of the evidence.

These matters are discussed in more detail below.

A. The nonbypassable Service Stability Rider is not included in the list of permissive electric security plan provisions

1. R.C. 4928.143(B)(2)(d) does not allow for the authorization of nonbypassable generation-related charges

In the ESP Orders on appeal here,[3] the Commission held that it could authorize a nonbypassable generation-related rider, the Service Stability Rider, under R.C. 4928.143(B)(2)(d). Opinion and Order at 21 (Appx. at 29); Second Entry on Rehearing at 3, 7-8 (Appx. at 74, 78-79). As demonstrated in the First Merit Brief of IEU-Ohio, that division does not allow for the creation of a nonbypassable generation-related rider as only divisions (B)(2)(b)

[3] These decisions are the Commission's Opinion and Order issued September 4, 2013 ("Opinion and Order"), the Entry *Nunc Pro Tunc* issued September 6, 2013 ("Entry Nunc Pro Tunc"), the Entry on Rehearing issued October 23, 2013 ("Entry on Rehearing"), the Second Entry on Rehearing issued March 19, 2014 ("Second Entry on Rehearing"), the Fourth Entry on Rehearing issued June 4, 2014 ("Fourth Entry on Rehearing"), and the Fifth Entry on Rehearing issued July 23, 2014 ("Fifth Entry on Rehearing") and are collectively referred to herein as the "ESP Orders".

& (c) allow for a nonbypassable charge. First Merit Brief of IEU-Ohio at 11-12; *see also In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 32. In response, the Commission argues that charges authorized under (B)(2)(b) & (c) _must_ be nonbypassable while all other charges in R.C. 4928.143 _may_ be nonbypassable. Second Merit Brief of Commission at 16-17. The Commission begins by asserting that the doctrine of *inclusio unius est exclusion alterius* (the inclusion of one is the exclusion of another) does not apply. *Id.* The Commission then asserts that no provision in R.C. 4928.143 prohibits the authorization of nonbypassable charges. *Id.* The Commission also argues that the Court should defer to the Commission's discretion as it has typically done in areas of rate design. *Id.* at 17.

However, a proper reading of R.C. 4928.143(B)(2) identifies only two instances, (B)(2)(b) & (c), where a nonbypassable generation-related rider may be authorized. The Commission may not, under the guise of rate design, ignore the limited authority it has to authorize only those terms permitted by R.C. 4928.143(B)(2). *In re Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 32-35. Accordingly, the Commission's arguments are without merit.

B. The manifest weight of the evidence does not support the Commission's finding that the Service Stability Rider will have the effect of stabilizing or providing certainty regarding retail electric service.

To authorize a charge under R.C. 4928.143(B)(2)(d) the charge must "have the effect of stabilizing or providing certainty regarding retail electric service." As demonstrated in IEU-Ohio's First Merit Brief, the Service Stability Rider will not "have the effect of stabilizing or providing certainty regarding retail electric service" in either a physical or financial sense. First Merit Brief of IEU-Ohio at 12-15. It is reversible error for the Commission to authorize a provision of an electric security plan that is against the manifest weight of the evidence. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 29.

In a physical sense, the Service Stability Rider will not have the effect of stabilizing or providing certainty regarding retail electric service. Initially, DP&L did not introduce any evidence that its generation, transmission, or distribution businesses face any current reliability issues or that any reliability issues were expected to occur without the Service Stability Rider during the term of the electric security plan. On cross-examination, DP&L also admitted that even if all of its generation plants close, PJM Interconnection, L.L.C. ("PJM") would still dispatch other plants to ensure that there was enough generation supplied to the grid to meet the demand of DP&L's customers. Tr. Vol. I at 172 (Supp. at 84). This admission is fatal to the claimed statutory basis for the Service Stability Rider since DP&L's financial woes are tied to its generation business and DP&L admits that regardless of the financial condition of its generation business there will not be any generation reliability issues for its customers.

Moreover, the Commission does not have jurisdiction to address such issues. The reliability, operation, and dispatch of generation and transmission resources in Ohio is governed and controlled by PJM, a regional transmission organization ("RTO").[4] PJM is governed by FERC, and PJM carries out its reliability objectives pursuant to FERC-approved tariffs.[5] Thus, there is no evidence that the Service Stability Rider will have the effect, in a physical sense, of stabilizing or providing certainty regarding retail electric service.

Financially, the Service Stability Rider also fails to provide certain or stable retail electric service to customers. The total price that non-shopping customers are charged for retail electric

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[4] PJM's operational territory covers all or part of 13 states and the District of Columbia. A map of PJM's operational territory is available on PJM's website at: http://www.pjm.com/~/media/about-pjm/pjm-zones.ashx.

[5] FERC also has exclusive jurisdiction over DP&L's unbundled transmission business; the Commission's only authority with regard to transmission pricing is to authorize a retail rider to collect the federally-authorized transmission rates. R.C. 4928.05(A) (Appx. at 153); *New York v. F.E.R.C.*, 535 U.S. 1, 11-28 (2002).

service under DP&L's electric security plan will vary, unpredictably, throughout the term of the electric security plan. Competitive auctions will be held throughout the term of the electric security plan, and the unknown auction results will be blended with DP&L's existing electric security plan rates to produce one component of the total price charged to customers. *See* Opinion and Order at 15-16 (Appx. at 23-24). The remainder of the price charged to standard service offer customers under the electric security plan is a function of various riders that have been, and will continue to be, updated periodically over the term of the electric security plan. The riders authorized as part of the electric security plan include: the Alternative Energy Rider; the Transmission Cost Recovery Rider–Bypassable; the Transmission Cost Recovery Rider Non-Bypassable; the Reconciliation Rider; the FUEL Rider; the Storm Damage Recovery Rider; the Competitive Bid True-up Rider; the Service Stability Rider; and the Service Stability Rider-Extension. Opinion and Order, *in passim* (Appx. at 9-62). The only fixed component of the electric security plan is the unlawful Service Stability Rider charge. For shopping customers, the Service Stability Rider does not modify the price and structure of a shopping customer's contract with its competitive supplier and therefore does not create any financial stability or predictability. Accordingly, from a financial standpoint, the Service Stability Rider does not stabilize or provide certainty regarding customers' bills.

In their briefs, the Commission and DP&L concede that the purpose of the Service Stability Rider subsidy is to make up for revenue that DP&L's competitive generation business cannot collect in the retail and wholesale generation markets.[6] Nonetheless, the Commission

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[6] Second Merit Brief of Commission at 10 ("While ... DP&L's financial instability may be attributable to its generation business ... ."); *id.* at 14 ("The generation side of DP&L's integrated business may have been responsible for its financial instability"); *id.* at 15 (the Service Stability Rider is lawful because "R.C. 4928.143(B)(2)(d) ... permit[s] utilities to assess charges that support generation functions"); *id.* at 3 (DP&L's financial problem arises due to three

and DP&L argue that the Service Stability Rider was lawfully authorized under R.C. 4928.143(B)(2)(d) because the rider will have the effect of stabilizing or providing certainty regarding retail electric service. The Commission begins its argument in support of the Service Stability Rider claiming that it is finally fulfilling the General Assembly's desire that the generation market in Ohio become fully competitive, but doing so in a manner that ensures customers receive safe and reliable service. Second Merit Brief of the Commission at 1-2, 28-29. To this end, the Commission argues that DP&L needs another transition to market to provide time and capital to allow DP&L to undo the financial interrelationship between its generation business and its distribution and transmission businesses. *See id.* at 1, 3, 10-11, 31. And, until DP&L separates its generation business through a transfer of its assets to a separate company, the Commission argues that the financial performance of DP&L's generation business can affect the financial performance and operation of all of DP&L's lines of business. *Id.* at 10-11.[7] This, the

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generation-related factors: "increased switching to alternative suppliers; declining market prices for energy; and declining capacity prices."); Second Merit Brief of DP&L at 1 (DP&L's financial issues are "due to substantial changes in the generation market"); *id.* at 20 ("R.C. 4928.143(B)(2)(d) authorizes a stability charge to support DP&L's generation business").

DP&L witnesses also testified during the hearing that its transmission and distribution revenue was sufficient and was expected to remain so during the term of the electric security plan. DP&L witnesses further testified that if either its transmission revenue or distribution revenue became insufficient, it could file an application with FERC (for transmission) or the Commission (for distribution) to increase its revenue for the affected service. Further evidence that DP&L's financial woes are unrelated to its distribution service is DP&L's failure to file a distribution rate case. As part of the Opinion and Order, the Commission directed DP&L to file a distribution rate case no later than July 1, 2014 as a condition precedent to an extension of DP&L's generation subsidy through the Service Stability Rider-Extension. DP&L has not filed a distribution rate case since the Commission issued its order below.

[7] Ohio law required DP&L to achieve this separation over a decade ago, but DP&L sought and received Commission approval to operate, for an interim period, under functional corporate separation as provided by R.C. 4928.17(C). The Commission's argument is premised on the failure of DP&L to functionally separate its generation business from its distribution business as required by Ohio law and Commission rules. This is discussed in additional detail in section II.D.2 below and in First Merit Brief of IEU-Ohio at 4, 21-24.

Commission concludes, <u>*could*</u> threaten customers' ability to receive safe and reliable service. *Id*. DP&L asserts a similar argument, concluding in its Second Merit Brief that it "would not be able to provide safe and stable service without" the Service Stability Rider subsidy. Second Merit Brief of DP&L at 1; *see also id.* at 15-17. The evidence cited by the Commission and DP&L, however, does not support their conclusions.

To support their claims that DP&L's service reliability would be affected, the Commission and DP&L rely on only three statements in the record. Second Merit Brief of DP&L at 15 (*citing* DP&L Ex. 16 at 8, DP&L Ex. 12 at 23, DP&L Ex. 4A at 54) (DP&L Supp. at 85, 56, & 48); Second Merit Brief of Commission at 3 (*citing* Opinion and Order at 21-22 (Appx. at 29-30)). The first statement comes from the rebuttal testimony of DP&L's Chief Financial Officer, Mr. Jackson. In response to a question regarding whether the Service Stability Rider will guarantee a certain level of earnings, he responded that the Service Stability Rider would only provide an opportunity to reach those earnings and then concluded:

> I strongly disagree that the SSR requested in this proceeding will "guarantee" the financial integrity of the Company. Instead, it 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 at 7-8 (DP&L Supp. at 84-85). Operating efficiently "so as to provide adequate and reliable service" does not actually address whether or not a reliability issue exists. Nor does the conclusory statement add anything as to whether in the absence of the Service Stability Rider a reliability issue is likely to occur. Nor does it include any analysis on how the Service Stability Rider subsidy "has the <u>***effect***</u> of stabilizing or providing certainty regarding retail electric service." R.C. 4928.143(B)(2)(d) (emphasis added) (Appx. at 164).

The second statement relied upon by DP&L and the Commission comes from the rebuttal testimony of DP&L's Director of Regulatory Operations, Ms. Seger-Lawson. Ms. Seger-Lawson was asked if "the SSR [is] a charge that would have the effect of stabilizing or providing certainty regarding retail electric service?" DP&L Ex. 12 at 23 (DP&L Supp. at 56). She responded:

> 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. It would provide certainty regarding retail electric service because it would help to strengthen DP&L's financial integrity, and because the SSR is important to allowing a multi-year ESP, which itself provides certainty regarding retail electric service.

Id. This statement does not include any analysis as to the effect the Service Stability Rider has on reliability or stabilizing or providing certainty regarding retail electric service. This statement also says nothing as to whether a reliability issue exists now, is likely to exist in the future, and whether the revenue generated by the Service Stability Rider subsidy will address an expected reliability issue.

The final statement relied upon by DP&L and the Commission comes from DP&L witness Mr. Chambers. On direct examination, Mr. Chambers was asked the same question as Ms. Seger-Lawson, "[w]ill the SSR have the effect of stabilizing and providing certainty regarding retail electric service?" DP&L Ex. 4A at 54 (DP&L Supp. at 48). In response, he testified:

> Yes. The SSR will provide DP&L with a relatively stable element in its revenue mix. As discussed above, it is an important factor in maintaining the Company's financial integrity and thus 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.

Id. This evidence addresses DP&L's consolidated financial integrity (which DP&L and the Commission define relative to DP&L's earnings). Mr. Chambers does not testify that a reliability issue exists currently or that one is expected in the absence of the Service Stability Rider subsidy. The testimony fails to include any analysis on the connection between financial integrity and reliability. And, the testimony fails to include any analysis of the effect the Service Stability Rider will have on stabilizing or providing certainty regarding retail electric service.

The evidence cited by the Commission and DP&L and their analysis incorporating these facts do not demonstrate that the Service Stability Rider will have any effect on reliability or that the rider will have the effect of stabilizing or providing certainty regarding retail electric service. Instead, both simply assert that maintaining DP&L's profits between 7 to 11% is important to preventing future events which may reduce DP&L's ability to maintain reliable service. But DP&L testified that it could take other actions in the future to address a revenue deficiency before that deficiency led to a reliability issue. Tr. Vol. XI at 2804 (2nd Supp. at 115). And, as part of a recent merger involving DP&L's parent company, DP&L's parent DPL Inc. committed to intervene in the future, if necessary, to maintain DP&L's financial creditworthiness. IEU-Ohio Ex. 19 at 4 (2nd Supp. at 133). Thus, the legal theory and evidence that the Commission and DP&L rely on do not support a finding that the Service Stability Rider subsidy will enhance reliability, prevent reliability issues from occurring, or have any effect on stabilizing or providing certainty regarding retail electric service.

The Court has previously reversed the Commission when the Commission claimed it was attempting to prevent future reliability issues but the remedy was beyond its statutory powers. In response to the Commission's authorization of the recovery of research and design costs through a retail charge associated with building a new generating facility, the Court stated:

> While we appreciate the commission's concern with respect to the future reliability of the electric-generation market as Ohio's market-development period comes to an end, a laudable and practical concern for all Ohio utility consumers, we have previously stated that a concern for the future of the competitive market does not empower the commission to create remedies beyond the parameters of the law. *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 38.

Indus. Energy Users-Ohio v. Pub. Util. Comm., 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 23.

In sum, the evidence relied upon by the Commission and DP&L does not indicate that there are any reliability issues or support a finding that the Service Stability Rider subsidy will have any effect on stabilizing or providing certainty regarding retail electric service. The Commission's claimed concerns for the future, which lacks record support, do not empower the Commission to create remedies beyond what Ohio law authorizes. *Id*. Because the facts do not provide a basis for the authorization of the Service Stability Rider, the Court should reverse the Commission.

C. The Commission incorrectly asserts that the Service Stability Rider relates to bypassability and default service and incorrectly asserts that IEU-Ohio's position supports the Commission's argument

In its First Merit Brief, Appellant the Office of the Ohio Consumers' Counsel ("OCC") argues that the Service Stability Rider does not relate to bypassability or default service. First Merit Brief of OCC at 26-36. In response, the Commission asserts that the Service Stability Rider relates to bypassability and default service. Second Merit Brief of Commission at 5-8. Subsequently, the Commission confirmed that "since nearly any charge may be bypassable or non-bypassable, 'bypassability' alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d)." *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 22 (Feb. 25, 2015)

("AEP-Ohio ESP III Order").[8] Thus, the issue for the Court is whether the Service Stability Rider relates to default service. It does not.

In response to OCC's argument that the Service Stability Rider does not relate to default service, the Commission presents an argument that is not clear. First, it asserts that the obligation to provide the standard service offer to non-shopping customers is the provider of last resort ("POLR") obligation. *See* Second Merit Brief of Commission at 7. The Commission also asserts that the Service Stability Rider is necessary to "allow [DP&L] to continue to function and 'so that it may continue to provide default service'" under the standard service offer. *Id.* at 8. Thus, it would appear that the Commission is attempting to justify the Service Stability Rider on the basis that it is a provider of last resort charge. However, the Commission also asserts that unlike a provider of last resort charge, a financial integrity charge such as the Service Stability Rider (that allows DP&L to fulfill its provider of last resort obligation) need not be based on actual costs. *Id.* at 7. The Commission also asserts that IEU-Ohio's First Merit Brief supports the Commission's position. *Id.*

While it is entirely unclear what the Commission is arguing relative to its provider of last resort analysis, it is clear that IEU-Ohio's position does not support the Commission's conclusion that the Service Stability Rider is related to default service. *See, e.g.*, First Merit Brief of IEU-Ohio at 20 ("Furthermore, DP&L's obligation to provide standard service offer service, *i.e.* its provider of last resort obligation, is unrelated to the Service Stability Rider."); *see also id*. at 6, 17-21.

If the Commission is attempting to justify the Service Stability Rider on the basis that it operates as a provider of last resort charge, the authorization of the rider would conflict with the

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[8] Available at:
http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A15B25B40110J73365.

Court's and Commission's precedent on provider of last resort charges. *See id.* at 20. The Court has "admonished the commission to 'carefully consider what costs it is attributing' to 'POLR obligations.'" *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 23 (*quoting Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶ 26)). The Court has found that ""POLR costs are those costs incurred by [the utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort." *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 23. The Court has also held that noncompetitive cost recovery associated with meeting the provider of last resort obligation must comply with the statutory requirements of R.C. Chapter 4909. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 31. The Commission has also held that a utility may not seek to recover revenue lost due to customer switching through a provider of last resort charge. *In the Matter of 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 Nos. 08-917-EL-SSO, *et al*., Order on Remand at 31-32 (Oct. 3, 2011) ("AEP-Ohio POLR Order on Remand").[9]

As IEU-Ohio demonstrated in its First Merit Brief, the record does not support a charge to compensate DP&L for its provider of last resort obligation because DP&L admitted during the hearing it was not seeking compensation for this obligation, that it does not account for its provider of last resort costs, and that it had not reviewed its provider of last resort costs or risks since 2005. First Merit Brief of IEU-Ohio at 20 (*citing* Tr. Vol. V at 1357-1359 (Supp. at 103-105)).

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[9] Available at:
http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11J03B20528I67558.

In conclusion, the Service Stability Rider is unrelated to default service. *See supra*, at 9, n. 6 (charge is related to replacing revenue lost to customer switching and low wholesale electric prices). The Commission's arguments otherwise and its reliance on a statement in the First Merit Brief of IEU-Ohio are without merit.

D. R.C. 4928.02(H), 4928.17, and 4928.38 prohibit authorization of the nonbypassable Service Stability Rider because the rider results in an anticompetitive subsidy, provides DP&L's internal generation business an unfair competitive advantage and undue preference, and allows for the collection of transition revenue

As demonstrated in IEU-Ohio's First Merit Brief, the authorization of the Service Stability Rider violates R.C. 4928.02(H), 4928.17, and 4928.38. IEU-Ohio Merit Brief at 15-24. R.C. 4928.02(H) prohibits DP&L from subsidizing its generation service through its distribution business and specifically prohibits a nonbypassable, *i.e.* a distribution-like, charge to collect generation-related costs. First Merit Brief of IEU-Ohio at 21-24; R.C. 4928.02(H) (Appx. at 150). R.C. 4928.17 prohibits DP&L from providing any undue preference or advantage to its generation business, and the Commission's rules adopted under this statute specifically prohibit charges to support the financial viability of DP&L's generation business. First Merit Brief of IEU-Ohio at 21-24; R.C. 4928.17 (Appx. at 168-169); Rule 4901:1-37-04(C)(2), O.A.C. (Appx. at 131). R.C. 4928.38 prohibits the Commission from authorizing DP&L to collect transition revenue or its equivalent, *i.e.* above-market generation-related revenue. First Merit Brief of IEU-Ohio at 15-21; R.C. 4928.38 (Appx. at 174).

The Commission and DP&L concede that the Service Stability Rider is designed to replace generation-related revenue DP&L cannot secure in the market. *See supra,* at 9 n. 6.[10] Nonetheless, the Commission and DP&L argue that the Service Stability Rider does not violate

[10] DP&L also testified that its transmission and distribution revenues were sufficient and were expected to remain so over the term of the electric security plan. Tr. Vol. I at 242 (Supp. at 90).

R.C. 4928.02(H) because the rider does not subsidize DP&L's generation business. Second Merit Brief of Commission at 13-15; Second Merit Brief of DP&L at 20-23. They also argue that even if the rider violated the prohibitions in these sections, R.C. 4928.143(B) allows the Commission to ignore these prohibitions when authorizing a charge as part of an electric security plan. The Court should reject these arguments.

1. In its Opinion and Order, the Commission confirms that R.C. 4928.02(H) prohibits the Commission from authorizing a charge in an electric security plan case that would result in an anticompetitive subsidization of DP&L's generation business

The Commission argues that the Service Stability Rider does not violate R.C. 4928.02(H) because the rider does not collect any specific generation cost. Second Merit Brief of Commission at 13-15. DP&L argues that the rider does not subsidize DP&L's generation business because the Commission found it "was necessary to allow DP&L to provide stable and certain distribution, transmission and generation service." Second Merit Brief of DP&L at 20-23. Their arguments are without merit.

First, their argument that the Service Stability Rider is unrelated to DP&L's generation costs is inconsistent with the record and the Commission's and DP&L's statements in their briefs. *Supra*, at 9, n.6. The Service Stability Rider is related to the generation-related revenue that DP&L projected to lose due to customers switching to a competitive supplier and to the wholesale price of capacity and energy. *Id.* Thus, the Service Stability Rider is related to DP&L's generation business.

Additionally, in the Opinion and Order, the Commission rejected a similar generation-related rider that would have allowed DP&L to collect additional revenue lost due to customer switching. In its application, DP&L had requested to implement a second nonbypassable generation-related rider, the Switching Tracker, which would have provided DP&L additional revenue to replace generation-related revenue lost due to customers switching to a competitive supplier. Opinion and Order at 28-30 (Appx. at 36-38). The Commission found that DP&L's rationale for this charge was nearly identical to its rationale for the requested Service Stability Rider. *Id.* at 28-29 (Appx. at 36-37).[11] The Commission concluded that such a charge could not be authorized under R.C. 4928.143(B)(2)(d) because it violated the State policy in R.C. 4928.02:

> The Commission finds that the [Switching Tracker] 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 [Switching Tracker], 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 [Switching Tracker] 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 [Switching

[11] The Opinion and Order provided:

> DP&L witnesses Jackson and Seger-Lawson explained that the *costs* subject to DP&L's [Switching Tracker] would equal the difference between the blended SSO rate and the [competitive bidding] 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 [Switching Tracker] 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 [Switching Tracker] are similar, and often identical, to its arguments in support of the [Service Stability Rider]*. DP&L witness Jackson testified that DP&L's [return on equity] is declining and that its declining [return on equity], 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 [Switching Tracker] would mitigate the effects of increased switching on DP&L's financial integrity and ability to provide safe and reliable service. (emphasis added).

Id.

> Tracker] anticompetitive because it may discourage customers from shopping for a retail electric supplier.

Id. at 30 (Appx. at 38). The State policy prohibiting "anticompetitive" results is found in R.C. 4928.02(H).

In sum, the State policy in R.C. 4928.02(H) prohibits the Commission from authorizing a nonbypassable generation-related charge. Further, as the Commission found in this case, the nonbypassable recovery of revenue lost due to customer switching is anticompetitive and violates State policy. Because the Service Stability Rider is a nonbypassable generation-related charge that collects revenue lost due to customer switching, the charge is unlawful.

2. The Commission's brief confirms that a subsidy flowing from an electric distribution utility to its affiliated generation business, which is the situation present in this case, violates Ohio's corporate separation requirements contained in R.C. 4928.17

Ohio's corporate separation requirements prohibit a utility from providing an undue preference or advantage or providing financial integrity payments to its affiliates. R.C. 4928.17 prohibits electric utilities "either directly or through an affiliate," from "supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or . . . supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service," unless the electric utility operates under a corporate separation plan. R.C. 4928.17(A) (Appx. at 168). The corporate separation plan must "provide[], 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." R.C. 4928.17(A)(1) (Appx. at 168). The corporate separation plan also must be "sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate." R.C. 4928.17(A)(3) (Appx. at 168). R.C. 4928.17(C) allows an electric utility to functionally separate the generation business from the distribution and transmission businesses, upon good cause shown and for an interim period, only if the functional separation provides for ongoing compliance with the State policy in R.C. 4928.02 and the Commission's rules regarding corporate separation. Relying on division (C), DP&L operates under functional separation.

Because the Service Stability Rider violates R.C. 4928.02(H), as demonstrated above, DP&L is in violation of the corporate separation requirements contained in R.C. 4928.17. Furthermore, DP&L may be in violation of the corporate separation requirements of R.C. 4928.17(C) if it violates the Commission's rules regarding corporate separation.

The Commission's rules on corporate separation (Chapter 4901:1-37, O.A.C.) apply to interactions between the electric distribution utility and its affiliate. Rule 4901:1-37-01(A), O.A.C., contains the definition of affiliate under the Commission's rules and provides "[t]he affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service." (Appx. at 129). Thus, for purposes of the corporate separation rules, DP&L's internal generation business is treated as an affiliate.

An affiliate of the utility cannot receive funding from the utility to sustain its financial viability. Rule 4901:1-37-04(C)(2), O.A.C. (Appx. at 131). Thus, DP&L, the electric distribution utility (the legal entity required to offer a standard service offer), may not commit to maintain the financial viability of its generation business.

While attempting to rebut IEU-Ohio's demonstration that the authorization of the Service Stability Rider violates R.C. 4928.17 and Commission rules, the Commission supports the conclusion that its order violates its rules on corporate separation. The Commission states that a charge to maintain the financial viability of an affiliate would violate Rule 4901:1-37-04(C)(2), O.A.C. Second Merit Brief of Commission at 14. While the Commission agrees that a payment to DP&L's affiliate by means of the Service Stability Rider would be unlawful, it then ignores its own rules defining DP&L's internal (*i.e.* functionally separated) generation business as an affiliate. Rule 4901:1-37-01(A), O.A.C. (Appx. at 129). A charge such as the Service Stability Rider that sustains the financial viability of the utility's affiliated generation business violates the Commission's rules.

R.C. 4928.17(C) allows an electric utility to operate under functional separation only if it complies with the State policy and the Commission's corporate separation rules. As discussed in the preceding paragraphs, the Service Stability Rider amounts to an anticompetitive subsidy in violation of state policy and authorizes DP&L to secure revenue for the purpose of protecting the financial viability of an "affiliate," its internal generation business, in violation of the corporate separation rules. Because the Service Stability Rider violates R.C. 4928.02(H), 4928.17, and Commission rules, it is unlawful.

3. R.C. 4928.38 prohibits the Commission from authorizing DP&L to collect above-market transition revenue through the Service Stability Rider

R.C. 4928.38 prohibits the Commission from authorizing transition revenue, or its equivalent. Through a utility's electric transition plan, the Commission could temporarily authorize a utility to collect transition revenue.[12] If requested by the utility as part of that plan, the Commission was required to determine "the total allowable amount of the transition costs of the utility to be received as transition revenues." R.C. 4928.39 (Appx. at 175). Transition costs were defined in part as costs that were unrecoverable in a competitive market. R.C. 4928.39 (Appx. at 175).[13] The time for the collection of transition revenue has ended, but the Service

[12] The recovery of one type of transition revenue recovery had to end no later than December 31, 2005; the recovery of the other type had to end no later than December 31, 2010. R.C. 4928.40 (Appx. at 176-177).

[13] R.C. 4928.39 further required that the costs were "prudently incurred," "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to

Stability Rider allows DP&L to replace revenue that DP&L cannot collect in the competitive retail and wholesale generation markets. First Merit Brief of IEU-Ohio at 15-21. Thus, the Service Stability Rider collects transition revenue or its equivalent in violation of the prohibition contained in R.C. 4928.38.

The Commission argues that the Service Stability Rider does not collect transition revenue because transition costs related to historic costs, not projected costs. Second Merit Brief of Commission at 19. The Commission also asserts that the Service Stability Rider does not collect unlawful transition revenue because DP&L did not claim it had transition costs or request transition revenue. *Id.* DP&L argues that the Service Stability Rider does not collect unlawful transition revenue because transition revenue relates to specific costs while the Service Stability Rider is not related to any specific costs. Second Merit Brief of DP&L 18-19. As demonstrated by the testimony of IEU-Ohio witness Hess, however, DP&L's calculation for the Service Stability Rider was equivalent to the methodologies presented by DP&L in calculating transition revenue. *See* IEU-Ohio Ex. 3 at 26 & Attachment K (2nd Supp. at 40 & 80-129); *see also* First Merit Brief of IEU-Ohio at 15-21; First Merit Brief of OCC at 19-21. Thus, the Service Stability Rider collects transition revenue or its equivalent.

DP&L further seeks to avoid the jurisdictional bar on transition revenue by asserting that Amended Substitute Senate Bill 221 ("SB 221") "repealed" the prohibition on the Commission's authorization of transition revenue or its equivalent. Second Merit Brief of DP&L at 19-20. Initially, DP&L asserts that R.C. 4928.143(B)(2)(d) allows financial integrity charges. *Id.* at 10-17. DP&L then avers that if a financial integrity charge is considered transition revenue it is

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electric consumers in this state," and "[t]he utility would otherwise be entitled an opportunity to recover the costs." (Appx. at 175).

nonetheless permissible because R.C. 4928.143(B)(2)(d) was enacted after R.C. 4928.38. *Id.* at 19-20.

DP&L's assumption that the statute allows a charge to replace revenue DP&L cannot collect in the competitive market is incorrect, as discussed herein. Further, R.C. 4928.141, enacted at the same time as R.C. 4928.143(B)(2)(d), provides that "[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." Had the General Assembly intended R.C. 4928.143(B)(2)(d) to allow a utility to collect transition revenue, it could have repealed the prohibition in R.C. 4928.38. The General Assembly, however, did not repeal R.C. 4928.38.

Further, as discussed above, the structure of R.C. Chapter 4928 highlights that the General Assembly did not intend to allow utilities the opportunity to collect transition revenue under R.C. 4928.143(B)(2)(d). R.C. 4928.03 declares retail electric generation service as competitive. R.C. 4928.05(A) provides that the Commission may not regulate the price of competitive retail electric generation service, except through its limited authority to regulate default service provided to non-shopping customers under the standard service offer. R.C. 4928.02(H) and 4928.17 prohibit the utility from subsidizing its own generation business. Accordingly, DP&L's argument that R.C. 4928.143(B)(2)(d) allows the collection of transition revenue and that this statute "repeals" the statutory prohibition in R.C. 4928.38 because it was enacted later in time are without merit.

In sum, the Service Stability Rider collects transition revenue or its equivalent in violation of R.C. 4928.38 and is therefore unlawful.

4. The prohibitions in R.C. 4928.02(H), 4928.17, and 4928.38 still apply to provisions of an electric security plan authorized by the Commission under R.C. 4928.143(B)(2)

As discussed in the preceding sections, R.C. 4928.02(H), 4928.17, and 4928.38 prohibit the Commission from authorizing the Service Stability Rider. In their briefs, the Commission and DP&L assert a new argument that neither raised in the case below and argue that the phrase "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary" allows the Commission to ignore the statutory prohibitions in R.C. 4928.02(H), 4928.17, and 4928.38 when it authorized the Service Stability Rider. Second Merit Brief of Commission at 20; Second Merit Brief of DP&L at 17 (emphasis omitted). Because they failed to raise this argument below, the Court should not address the argument. *Zawahiri v. Alwattar*, 10th Dist. Franklin No. 07AP–925, 2008-Ohio-3473, ¶ 11-18; *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997) ("Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed."); *State ex rel. Ohio Civil Serv. Emp. Assn., AFSCME, Local 11, AFL–CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004–Ohio–6363, at ¶ 10; *see also*, *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992) ("Appellant cannot change the theory of his case and present these new arguments for the first time on appeal."); *State ex rel. PIA Psychiatric Hosps., Inc. v. Ohio Certificate of Need Review Bd.*, 60 Ohio St.3d 11, 17, fn. 4 (1991) ("Generally, an issue need not be considered on appeal if the issue was apparent at the time of trial and was not raised before the trial court."). However, as discussed below, the argument is also without merit.

The "paramount concern in construing a statute is legislative intent." *Ohio Neighborhood Finance, Inc. v. Scott.*, 139 Ohio St.3d 536 , 2014-Ohio-2440, ¶ 22. "Notwithstanding" clauses such as R.C. 4928.143(B)(2) therefore must be read in light of the "paramount concern" of the legislation. *Id.*; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 37 (*quoting State v.*

Cook, 83 Ohio St.3d 404, (1998)) ("A cardinal rule of statutory interpretation is that '[a] court must look to the language and purpose of the statute in order to determine legislative intent.'"); *Kewalo Ocean Activities and Kahala Catamarans v. Ching*, 243 P.3d 273 (2010); *Yates v. U.S.*, 574 U.S. __, 2015 WL 773330 at *6 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (term "tangible object" in Sarbanes-Oxley Act did not include fish because "'[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'"). In this instance, the clause must be read in light of the clear legislative intent to maintain the prohibitions of unlawful subsidies, unfair competitive advantages and preferences, and transition revenue contained in R.C. 4928.02(H), 4928.17, and 4928.38.

As part of SB 221, the General Assembly modified the State policy by revising and renumbering R.C. 4928.02(H) to provide that it is the policy of the State of Ohio to:

> 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*.

(emphasis on the additional statutory language).[14] In enacting SB 221, the General Assembly also did not repeal R.C. 4928.06 which obligates the Commission to effectuate the State policy

[14] Prior to SB 221, the statutory section was numbered as division (G) and provided 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." *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 315, 2007-Ohio-4164, ¶ 48; *see also* Ohio General Assembly Archives, SB 221, available at: http://archives.legislature.state.oh.us/bills.cfm?ID=127_SB_221.

contained in R.C. 4928.02. The General Assembly's actions reflect an intent to maintain the applicability of the prohibitions in R.C. 4928.02(H), R.C. 4928.17, and R.C. 4928.38.

Where the meaning of a statute is subject to interpretation, the Court will look to the Commission's interpretation with regard to matters within its subject matter expertise. *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 181 (1972). The Commission in this case, prior cases, and in orders subsequent to its decisions below, has found that R.C. 4928.143(B)(2) does not authorize a violation of R.C. 4928.02(H). *Infra*, at 27-28. As discussed previously, in the Opinion and Order the Commission rejected another nonbypassable charge proposed by DP&L under R.C. 4928.143(B)(2)(d) because it "violates the policies of the state of Ohio, is anticompetitive, and would discourage further development of Ohio's retail electric services market." Opinion and Order at 30 (Appx. at 38).

The Commission has also argued, albeit implicitly, to this Court that R.C. 4928.17 also applies to charges authorized under R.C. 4928.143(B)(2)(d). In its Second Merit Brief, the Commission argued that on the facts there was no violation of the prohibitions in Rule 4901:1-37-04(C)(2), O.A.C., and R.C. 4928.17. Second Merit Brief of Commission at 14. The Commission implied, however, that if the facts were different, a violation of the rule would have occurred. *Id.* By implication, therefore, the Commission agrees that R.C. 4928.17 and the Commission's rules promulgated under this statute apply to charges authorized under R.C. 4928.143(B)(2).

The Commission's and DP&L's statutory interpretation is also inconsistent with prior Commission orders. In 2010, for example, AEP-Ohio requested that the Commission authorize a charge under R.C. 4928.143(B)(2)(c) & (d) to allow it to collect costs associated with closing a generation plant. *In the Matter of the Application of Ohio Power Company for Approval of the*

Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider, Case No. 10-1454-EL-RDR, Finding and Order at 7, 17-18 (Jan. 11, 2012) ("Sporn Order").[15] The Commission rejected AEP-Ohio's application, finding that it did not have the authority under R.C. 4928.143(B)(2) to allow for such recovery ***and*** that the recovery of such costs was prohibited by R.C. 4928.02(H). *Id.*

Subsequent to issuing the ESP Orders, and subsequent to filing its Second Merit Brief in this appeal, the Commission issued a decision that again confirms the State policy in R.C. 4928.02 applies to charges authorized under R.C. 4928.143(B)(2). AEP-Ohio ESP IIII Order at 7, 26, 65, 69, 91, 95.[16] In fact, in this decision, the Commission held that it was required to modify a rider proposed by AEP-Ohio under R.C. 4928.143(B)(2) because as proposed the rider would violate the prohibition in R.C. 4928.02(H):

> We note that, as proposed by AEP Ohio, the [bad debt rider] would flow the bad debt of both shopping and non-shopping customers, whether generation- or distribution-related, through a single rider, which may cause the type of subsidy that the Commission must avoid under R.C. 4928.02(H).

Id. at 81. In this same order, the Commission further held an additional statutory requirement contained in R.C. 4928.10(D)(3) could not be ignored when authorizing a charge under R.C. 4928.143(B)(2). *Id.* at 82.

When R.C. 4928.143(B)(2) is read in the context of the authorizing legislation (SB 221) and in the broader context of R.C. Chapter 4928, it is clear that the General Assembly did not intend to rewrite the Commission's authority to regulate competitive retail electric generation service and repeal numerous statutory prohibitions. The Commission's interpretation of R.C.

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[15] Available at:
http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12A11B35831F43601.

[16] Available at:
http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A15B25B40110J73365.

4928.143(B)(2) confirms that this statute does not suspend the prohibitions in R.C. 4928.02(H), 4928.17, and 4928.38. Because it is clear that the General Assembly did not intend for R.C. 4928.143(B)(2) to provide the Commission with authority to ignore the prohibitions in R.C. 4928.02(H), 4928.17, and 4928.38, the Court should reject the Commission's and DP&L's argument that the Commission can authorize a rider that violates those statutory limits on Commission authority.

E. The Commission's authorization of the Service Stability Rider is preempted by the Federal Power Act

As IEU-Ohio demonstrated in its First Merit Brief, the Commission is preempted from taking action that effectively sets the wholesale price for capacity and energy as FERC has exclusive jurisdiction over these matters. First Merit Brief of IEU-Ohio at 27-29 (*citing PPL Energy Plus, LLC v. Nazarian*, 974 F.Supp.2d 790 (D. Md. 2013); *PPL Energy Plus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D. N.J. 2013)). The Commission and DP&L respond, arguing that the Commission's authorization of the Service Stability Rider is not preempted because the charge is not generation-related or a wholesale charge. Second Merit Brief of Commission at 20-23; Second Merit Brief of DP&L at 24-27.

Their argument that the charge is not a generation charge, however, wholly ignores that the Service Stability Rider replaces DP&L's lost generation revenue due to customer switching and low wholesale prices for energy and capacity. *Supra*, at 9, n.6. The record and the Commission's and DP&L's briefs demonstrate that the Service Stability Rider is a charge related to DP&L's generation business. *Id.*

The Third and Fourth Circuit Court of Appeals also rejected schemes implemented in New Jersey and Maryland similar to what the Commission authorized for DP&L as being preempted by the Federal Power Act. *PPL Energy Plus, LLC v. Solomon*, 766 F.3d 241, 254 (3d

Cir. 2014); *PPL Energy Plus, LLC v. Nazarian*, 974 F.Supp.2d 790, 832 (D.Md. 2013), *affirmed by PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467, 477 (4th Cir. 2014). For example, in New Jersey, the state's Board of Public Utilities authorized a scheme to promote generation development. *Solomon*, 766 F.3d at 11, 16-17. Under the scheme, retail customers were assessed a charge by the utility that represented an amount above the authorized wholesale capacity price, and the utility then passed that revenue supplement on to the generation owner. *Id.* at 11, 24-28. The Third Circuit Court of Appeals held that New Jersey was preempted from authorizing a retail charge that effectively set the wholesale price for capacity by providing a revenue supplement to the generation owner. *Id.* at 254 (States cannot authorize "supplements [to] what the generators receive from PJM with an additional payment financed by payments from electric distribution companies."); *id.* (*quoting PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d 467, 477 (4th Cir.2014)) (""[t]he fact that [these sorts of payments] do[] not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same."). Thus, the fact that DP&L's revenue supplement to its wholesale compensation for energy and capacity is collected through a retail charge does not isolate the Commission's order from the preemptive effect of the Federal Power Act.

The relevant preemption analysis asks whether the rider effectively sets the wholesale price for energy and capacity. As discussed in IEU-Ohio's First Merit Brief and above, the Service Stability Rider provides DP&L with an unlawful revenue supplement in excess of the wholesale price for capacity and energy and therefore effectively sets the wholesale price for capacity and energy. First Merit Brief of IEU-Ohio at 27-29; *Solomon*, 766 F.3d at 252, 254. Because the Commission is preempted from setting the wholesale price for capacity and energy, the Service Stability Rider is unlawful.

F. The Commission and DP&L concede that the approved electric security plan costs more than the alternative market rate offer, and the manifest weight of the evidence does not support a finding that qualitative factors outweigh the known costs

The Commission must find that an electric security plan is more favorable in the aggregate than a market rate offer before the plan can be approved. R.C. 4928.143(C)(1) (Appx. at 164-165). The Commission and DP&L concede that the electric security plan is more costly than a market rate offer by at least $250 million, but allege that certain qualitative benefits offset these costs. Opinion and Order at 50 (Appx. at 58); Second Merit Brief of DP&L at 28. Neither the Commission nor DP&L, however, explain the objective basis by which the Commission can find that these qualitative benefits "outweigh" the at least $250 million by which the electric security plan is worse than a market rate offer. As identified in IEU-Ohio's First Merit Brief, the various so-called qualitative benefits of the electric security plan are variously unsupported by the record, rest on faulty factual and legal assumptions, and are largely illusory. First Merit Brief of IEU-Ohio at 33-41.

The arguments raised by the Commission and DP&L in their Second Merit Briefs have largely already been addressed in IEU-Ohio's First Merit Brief and therefore will not be repeated here. However, the Commission also raises a new argument and asserts that a strict quantitative analysis is not required by R.C. 4928.143(C)(1) because an electric security plan "will virtually always cost more than a[] [market rate offer]." Second Merit Brief of Commission at 27. The Commission is not correct, as indicated by its findings in prior electric security plan cases. *In the Matter of 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 Nos. 08-917-EL-SSO, *et al.* Opinion and Order at 72 (Mar. 18, 2009) (finding cost of electric security plan was $1.4 billion compared to market rate offer costs of $2.9 billion);[17] AEP-Ohio ESP III Order at 95 (finding, on February 25, 2015, that quantitatively the cost of the approved electric security plan was $44 million more favorable than a market rate offer).[18] Accordingly, the Commission's new argument should not be given any weight.

In sum, R.C. 4903.09 requires the Commission to engage in decision making that is objective. (Appx. at 142); *see also City of Columbus v. Pub. Util. Comm.*, 58 Ohio St.2d 103, 104 (1979) (Commission decisions must contain "sufficient probative evidence to show that the commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty."); *Office of the Ohio Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 405-406 (1991), J. Brown *dissenting* (R.C. 4903.09 and Court precedent prohibit the Commission from deciding "cases on subjective belief, wishful thinking, or folk wisdom."). The Commission's decision is based on nothing more than a subjective guess that exposes customers to an electric security plan that is at least $250 million worse than a market rate offer. Accordingly, the Commission's authorization of DP&L's electric security plan was unlawful and unreasonable.

III. DP&L'S CROSS-APPEAL IS WITHOUT MERIT

DP&L raises two issues in its cross-appeal. Initially, DP&L argues that the Commission abused its discretion by imposing unreasonable conditions on its ability to seek a further subsidy through the Service Stability Rider-Extension. Second Merit Brief of DP&L at 40-42. DP&L

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[17] Available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A09C18B42525F08513.

[18] Available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A15B25B40110J73365.

also argues that the Commission's decision to accelerate the deadline to transfer DP&L's generating assets and to implement competitive auction results were unreasonable. *Id.* at 43-50. The Court should reject both arguments.

Initially, DP&L argues that the Commission may not place limitations on its ability to seek further subsidies. Second Merit Brief of DP&L at 40-49. Specifically, DP&L claims that the conditions imposed by the Commission relative to the Service Stability Rider-Extension are unlawful because they are not enumerated in R.C. 4928.143(B)(2)(d). Second Merit Brief of DP&L at 40-42. If the Commission has authority to authorize the subsidy, as DP&L argues, then the Commission is required to authorize such a charge in a reasonable manner based upon the facts of the case. *See* R.C. 4928.02(A) (Appx. at 150) (it is the policy of the State to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."); *City of Columbus v. Pub. Util. Comm.*, 58 Ohio St.2d 103, 104 (1979) (Commission decisions must be supported by record). However, because the statute does not provide any authority related to financial subsidies, the Commission may not authorize the Service Stability Rider or the Service Stability Rider–Extension. Thus, the Court need not decide whether the Commission can condition the collection of the nonbypassable Service Stability Rider-Extension.

DP&L also argues that it was against the manifest weight of the evidence for the Commission to alter the timing and implementation of the competitive auctions and the deadline for DP&L to transfer its generating assets. As to the first item, DP&L argues that the faster implementation of the auctions will reduce DP&L's revenue and would, "all else equal," have prompted DP&L to have requested a larger subsidy through the Service Stability Rider. *See* Second Merit Brief of DP&L at 49 (*quoting* Tr. Vol. III at 640-641) (DP&L Supp. at 247-248)).

On rehearing, the Commission responded to DP&L's argument by asserting that a faster implementation of competitive auctions under the electric security plan than a market rate offer was consistent with the State policy in R.C. 4928.02, that the Commission was not persuaded by DP&L's claim that its financial integrity would be jeopardized by the ordered auction schedule, and that DP&L could seek an additional $45.8 million through the Service Stability Rider-Extension if DP&L's financial integrity was threatened in the future. Fourth Entry on Rehearing at 4 (Appx. at 109).[19] The Commission weighed the evidence presented by DP&L and rejected it. DP&L has failed to demonstrate that the conditions and limitations adopted by the Commission are against the manifest weight of the evidence.

DP&L also challenges the deadline ordered by the Commission to transfer its generation assets. Originally, the Commission had established a transfer deadline of May 31, 2017, but in its Second Entry on Rehearing moved the deadline to no later than January 1, 2016. DP&L sought rehearing of the January 1, 2016 deadline (arguing for a reinstatement of the May 31, 2017 deadline), and in the Fourth Entry on Rehearing, the Commission granted DP&L's assignment of error in part and established a transfer deadline of January 1, 2017. The Commission explained the reasons for moving the deadline to January 1, 2017 and not the May 31, 2017 date requested by DP&L. Second Entry on Rehearing at 17-18 (Appx. at 88-89).

DP&L did not challenge the January 1, 2017 deadline in an application for rehearing; therefore, the Court should not consider DP&L's argument. Appellants IEU-Ohio and OCC have moved to strike this proposition of law from DP&L's appeal due to DP&L's failure to seek rehearing of the January 1, 2017 deadline. DP&L's appeal presents the same arguments that the Commission rejected when it established the January 1, 2017 deadline; the Commission weighed

[19] Here again, the Commission confirms that R.C. 4928.02 applies to the authorization of charges under an electric security plan.

the evidence presented by DP&L and determined that a reasonable transfer deadline was different than what DP&L requested. DP&L again fails to demonstrate that the Commission's January 1, 2017 deadline is against the manifest weight of the evidence.

IV. CONCLUSION

For the reasons stated above, the Commission lacks jurisdiction under Ohio and federal law to authorize the Service Stability Rider. The authorization of the electric security plan is further unlawful because it is less favorable in the aggregate than a market rate offer. Additionally, DP&L's cross-appeal is without merit because it has failed to demonstrate the orders it challenges are against the manifest weight of the evidence. Accordingly, the Court should grant IEU-Ohio's appeal and deny DP&L's cross-appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Third Merit Brief of Appellant/Cross-Appellee Industrial Energy Users-Ohio* was served upon the parties of record *via* electronic transmission this 11th day of March 2015.

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