

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of</b>	)	
<b>The Dayton Power and Light Company</b>	)	<b>Case No. 16-395-EL-SSO</b>
<b>for Approval of its Electric Security Plan</b>	)	
<b>In the Matter of the Application of</b>	)	
<b>The Dayton Power and Light Company</b>	)	<b>Case No. 16-396-EL-ATA</b>
<b>for Approval of Revised Tariffs</b>	)	
<b>In the Matter of the Application of</b>	)	
<b>The Dayton Power and Light Company</b>	)	
<b>for Approval of Certain Accounting</b>	)	<b>Case No. 16-397-EL-AAM</b>
<b>Authority Pursuant to Ohio Rev.</b>	)	
<b>Code § 4904.13</b>	)	

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**SIERRA CLUB’S MOTION TO STRIKE PORTIONS OF  
MURRAY ENERGY’S POST-HEARING BRIEF**

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Sierra Club hereby moves to strike the designated portions of the Joint Post-Hearing Brief Submitted by Intervenors Murray Energy Corporation and the Citizens to Protect DP&L Jobs (“Murray Energy Post-Hearing Brief”). Specifically, Sierra Club moves to strike these materials from the Murray Energy Post-Hearing Brief:

- i. On Page 1, beginning with the text, “In its Original Application, . . .” continuing through Page 2, concluding with the text, “. . . operating through December 31, 2026. Original Application at ¶¶ 6, 9.”
- ii. On Page 3, the sentence that begins, “As the Commission is no doubt aware, . . . .”
- iii. On Page 12, the sentence that begins, “Presumably, this commitment applies to the sale of the Miami Fort and Zimmer . . . .”
- iv. On Page 23, the sentence that begins, “Indeed, as noted above, Dynergy [sic] affiliates have agreed . . . .”
- v. On Page 40, the sentence that begins, “On April 25, 2017, Dynergy [sic] filed a Form 8-K . . . .”
- vi. Appendix A to Murray Energy’s Post-Hearing Brief.

The Commission should strike these materials from Murray Energy’s Post-Hearing Brief because they rely on information that is not part of the record and, in the case of statements from

Dayton Power & Light's ("DP&L") withdrawn Original Application, the information constitutes inadmissible hearsay. For these reasons and as further set forth in the attached Memorandum In Support, the Commission should grant this motion and strike the portions of Murray Energy's Post-Hearing Brief referenced above.

Dated: May 15, 2017

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF SIERRA CLUB’S MOTION TO STRIKE  
PORTIONS OF MURRAY ENERGY’S POST-HEARING BRIEF**

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**Introduction**

Throughout its Post-Hearing Brief, Murray Energy improperly cites and comments upon two sources of extra-record evidence: i) DP&L’s withdrawn, now-superseded Original Application (dated Feb. 22, 2016) filed in this proceeding and ii) a federal securities filing made by Dynegy, Inc. on April 25, 2017. Neither of these documents has been admitted in evidence. Nor has Murray Energy moved to re-open the record to have them admitted. Murray Energy’s reliance on these materials in its Post-Hearing Brief is prejudicial to Sierra Club, because Sierra Club has had no opportunity to respond. Further, as an alternative ground, the referenced statements from the now-withdrawn Original Application are inadmissible hearsay.<sup>1</sup> The Commission should grant this motion and strike the identified outside-the-record and hearsay materials from Murray Energy’s Post-Hearing Brief.

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<sup>1</sup> The statements in the Dynegy federal securities filing are hearsay as well, but likely could have been admitted—had any party so moved to admit it—under a hearsay exception. Sierra Club accordingly does not move to strike these references on hearsay grounds.

### **Murray Energy's Reliance on Material Not in Evidence is Improper and Prejudicial.**

The Commission routinely grants motions to strike portions of a pleading that discuss evidence not admitted in the record of a proceeding. For example, in the FirstEnergy ESP IV proceeding (No. 14-1297), the Commission struck portions of certain intervenor briefs, finding that “new information should not be introduced after the closure of the record” and that “disputed portions [of a pleading that] reference information outside of the record” should be stricken.<sup>2</sup> The same reasoning applies to the referenced information in Murray Energy's Post-Hearing Brief.

First, the statements in Murray Energy's Post-Hearing Brief regarding the purported impact of coal-burning plant closures that are taken from the withdrawn, now-superseded portions of DP&L's Original Application are not part of the record in this proceeding. Murray Energy cites to these statements on the first two pages of its Post-Hearing Brief without acknowledging that these statements were withdrawn by DP&L and without asking that they be admitted into the record. If a party had moved to introduce this information into the record at the hearing, Sierra Club could have, for example, cross-examined the witness sponsoring such information or introduced other information on coal-plant closures in response. If this information were permitted to be introduced after the close of the record, Sierra Club would accordingly be prejudiced.

Second, in four places in its Post-Hearing Brief, Murray Energy comments on an April 27, 2017 securities filing made by Dynegy, and also attaches the referenced Dynegy securities filing as an “appendix” to its Post-Hearing Brief. This is a blatant attempt to submit new

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<sup>2</sup> In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, March 31, 2016 Opinion and Order, page 37.

information into the record after the close of the evidentiary hearing. Sierra Club is prejudiced by Murray Energy's attempt to re-open the record because Sierra Club has been denied the opportunity to submit evidence in response, or to cross-examine a witness who would sponsor such information. Sierra Club could have, for example, presented information to demonstrate that the Dynegy securities filing shows that prices paid by Dynegy is remarkably low for the size of the generation units involved and further that this Dynegy filing tends to disprove Murray Energy's speculation that there is a vibrant market for the purchase of coal-burning power plants.

The Commission should strike this information to preserve the integrity of this proceeding by ensuring that parties are not prejudiced by the introduction of new evidence in a post-hearing brief.

**Murray Energy Impermissibly Relies on Inadmissible Hearsay.**

The parts of Murray Energy's Post-Hearing Brief, found on pages 1 and 2, that refer to DP&L's withdrawn Original Application should be stricken for the alternative reason that they are inadmissible hearsay. As the Attorney Examiners have ruled in this proceeding,<sup>3</sup> out-of-hearing statements offered for the truth of the matter asserted are not permitted to be admitted into evidence. Here, Murray Energy offers statements from the Original Application—regarding purported economic impact from plant closures, purported reliability impact, etc.—to support its theory that DP&L must be required to undertake an onerous sale process for the Killen and Stuart plants. Each of these statements is hearsay and none were tested via, for example, cross examination of a witness at hearing. There was no reason to test them at the hearing, because they were from a withdrawn filing; and if Sierra Club had attempted to cross examine witnesses on statements in the filing, DP&L would likely have objected on relevance grounds and this

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<sup>3</sup> Tr. Vol III, pages 501-503 (striking various sections of the Medine Direct Testimony as inadmissible hearsay).

objection would likely have been sustained. Sierra Club would be prejudiced if any of these out-of-hearing statements were permitted in the record now, because Sierra Club has been denied the opportunity to confront the speaker of those statements.

## **Conclusion**

For the foregoing reasons, the Commission should grant Sierra Club's motion to strike.

Dated: May 15, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing Sierra Club's Motion to Strike Portions of Murray Energy's Post-Hearing Brief, and the accompanying Memorandum in Support, upon the following parties via electronic mail.

Date: May 15, 2017

s/ Tony Mendoza

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Summary: Motion to Strike Portions of Murray Energy's Post-Hearing Brief electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club