BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SIERRA CLUB'S POST-HEARING REPLY BRIEF

INTRODUCTION

Sierra Club respectfully submits this reply to the Joint Post-Hearing Brief submitted by Intervenors Murray Energy Corporation and the Citizens to Protect DP&L Jobs ("Murray Energy brief"). Murray Energy's brief is comprised of arguments that attempt to produce a visceral response and elicit a self-serving restriction in the multi-party Amended Stipulation. Murray Energy's entire brief has framed the approval of the Amended Stipulation as a referendum on the possible retirement of the Stuart and Killen plants. But Murray Energy is improperly trying to insert an issue that is not part of the Amended Stipulation, which does not mention these plants at all, let alone prohibit their sale or require their closure; and in doing so Murray Energy relies heavily on assumptions that are unsupported by the factual record. The Commission should refuse Murray Energy's suggestion and deny its request—which is not joined by any party representing electric customers—to mandate that Dayton Power & Light ("DP&L") undertake a potentially onerous process to sell the Killen and Stuart plants.

ARGUMENT

I. Murray Energy's premise that Killen and Stuart plants are at issue in this proceeding is a red herring.

Without any foundation in the Amended Stipulation itself, Murray Energy has attempted to frame this case as a Commission vote on whether to close the Stuart and Killen plants. Murray Energy has produced a lot of conjecture seeking to provoke a visceral response from the Commission. For instance, Murray Energy discusses how proper maintenance of coal ash impoundments at the Stuart and Killen sites is necessary so that aquifers are not contaminated,[1] or how the possible closure of these plants would financially impact Adams County.[2] While each of these issues presents a compelling justification for future state action, these issues are simply outside the scope of this matter.

The matter before the Commission is review of an Amended Stipulation put forth by ten supporting parties and four non-opposing parties intended to settle this case. While the Amended Stipulation commits DP&L or an affiliate to sell its ownership interest in the Conesville, Miami Fort, and Zimmer generating stations, the Amended Stipulation says nothing about the Stuart and Killen plants.[3] The Stipulation does not require the closure of Stuart and Killen[4] or prohibit DP&L from selling them.[5] The Stipulation does not prevent a third party, including Murray Energy, from starting negotiations with DP&L to purchase Stuart and Killen.[6] Other than reaffirming DP&L's prior commitment to transfer all of its interest in all of its coal plants to an affiliate generation company, the Stipulation is silent about Stuart and Killen.

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[1] Murray Energy Initial Br., p. 29.
[2] Murray Energy Initial Br., pp. 25-31.
[3] Amended Stipulation (filed March 14, 2017), ¶ 1.d.; also Tr. II at 402 (Schroder cross-examination).
[4] Tr. III at 504. Note: All Transcript references are to cross-examination of witness Medine unless stated otherwise.
[5] Tr. III at 504-505.
[6] Tr. III at 505.

II. Murray Energy has failed to coherently explain how DP&L, by not agreeing to a Commission-mandated process for offering the Stuart and Killen plants for sale, is violating any requirement related to affiliate transactions.

In its initial brief, Murray Energy argues that Ohio legal standards concerning transactions between regulated electric utilities and their affiliates compel the Commission to reconsider its 2014 approval of DP&L's application to transfer its generating plants to an affiliated generation company (GenCo).[7] Murray Energy hopes that, if it can convince the Commission to reconsider its prior approval of the transfer, it can then convince the Commission to re-approve the transfer, but with the added condition that DP&L be required to offer the Stuart and Killen plants for sale via a Commission-mandated process. Murray Energy needs to take the Commission on such a long walk because the Amended Stipulation that is the subject of this case says nothing about selling or closing the Stuart and Killen plants. Murray Energy's arguments should be rejected, because none of the authority that Murray Energy relies on directs the outcome that Murray Energy seeks; and because Murray Energy's characterizations of the 2014 order approving the transfer are by turns irrelevant and misleading.

The Commission previously approved the transfer of DP&L's generation assets in 2014 in Case No. 13-2420.[8] Key features of the Commission's approval included:

- DP&L would transfer the assets to an affiliated GenCo.[9]
- DP&L would transfer the assets to the GenCo but would not transfer any debt to the GenCo.[10]
- DP&L would transfer the assets to the GenCo at net book value.[11]

[7] See generally, Murray Energy Initial Br., pp 32-35.
[8] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets,* Case No. 13-2420-EL-UNC, Opinion and Order (Sept. 17, 2014). Henceforth, "Order in Case No. 13-2420."
[9] Order in Case No. 13-2420, p 3, ¶ 10.
[10] DP&L's Amended Supplemental Application in Case No. 13-2420 (May 23, 2014), p 4, ¶ 10.

- DP&L would be required to transfer the environmental liabilities associated with the assets to the GenCo.[12]

The Amended Stipulation in this case states:

> Assuming FERC approval, DP&L agrees to transfer its generation assets and non-debt liabilities to AES Ohio Generation, LLC, an affiliated subsidiary of DPL Inc., within 180 days following final Commission approval of this Stipulation, provided that the Commission approves this Stipulation without material modifications.[13]

The Amended Stipulation also states:

> DP&L (or the affiliate to whom the generation assets are transferred) will commit to commence a sale process to sell to a third party its ownership in Conesville, Miami Fort, and Zimmer Stations.[14]

In the affiliate transactions section of its initial brief, Murray Energy begins by announcing that R.C. 4928.17(E) prohibits any electric utility from selling any generating asset it wholly or partially owns without prior Commission approval.[15] While that is a true statement of law, it is also a moot point. DP&L asked the Commission for approval under R.C. 4928.17(E) to transfer its generating units in Case No. 13-2420, and the Commission granted that request.[16]

Murray Energy also quotes provisions of OAC Rule 4901:1-37-09(C), which sets forth the requirements for an application to transfer or sell generating assets; and OAC Rule 4901:1-37-04(C), which sets forth restrictions concerning affiliate transactions.[17] However, Murray Energy never specifically explains which of these provisions the Amended Stipulation allegedly

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[11] Order in Case No. 13-2420, p 9, ¶ 22.
[12] Order in Case No. 13-2420, p 12, ¶ 27.
[13] Amended Stipulation, ¶ 1.c.
[14] *Id*. at ¶ 1.d.
[15] Murray Energy Initial Br., p 32.
[16] *See* DP&L's Amended Supplemental Application in Case No. 13-2420 (May 23, 2014), p 1, ¶ 2 (stating that the application was brought under R.C. 4928.17(E)).
[17] Murray Energy Initial Br., p 33.

violates. Moreover, Murray Energy fails to acknowledge that DP&L addressed both OAC Rule 4901:1-37-09(C) and Rule 4901:1-37-04(C) in its application in Case No. 13-2420;[18] and that the Commission stated in its Order in Case No. 13-2420: "We find that DP&L has satisfied the requirements of Ohio Adm.Code Chapter 4901:1-37."[19]

Next, Murray Energy argues that by submitting the Amended Stipulation, "DP&L essentially reopens the prior divestiture cases, particularly Case No. 13-2420-EL-UNC;" because "the proposal in the Amended Stipulation is at odds with the Commission September 7, 2014 finding and Order in Case No. 13-2420-EL-UNC in several significant respects."[20] Murray Energy then lists five reasons why the Amended Stipulation is supposedly at odds with the Order in Case No. 13-2420.

There are two problems with Murray Energy's argument. First, "essentially reopens" is not a legal or regulatory standard. Murray Energy cites no statute or rule that is used to determine when an act in one case "essentially reopens" a prior case; or what is to be done when that happens. Murray Energy is just making up legal arguments out of whole cloth.

Second, Murray Energy's list of reasons why the Amended Stipulation is allegedly at odds with the Order in Case No. 13-2420 does not withstand scrutiny. Of the five reasons given, three are either misleading or just wrong, and the other two are irrelevant. Each is addressed in turn below.

1. *"DP&L proposes to transfer the generation assets at an unspecified "net book value" and does not explicitly address the transfer of "environmental liabilities" associated with these assets. The proposed set off to debt from sale proceeds is of questionable enforceability since AES is not a party to the Amended Stipulation."*

[18] *Id*, p 1, ¶¶ 2-3 (as to OAC Rule 4901:1-37-09; and p 6, ¶ 18 (as to OAC Rule 4901:1-37-04(C).
[19] Order in Case No. 13-2420, p 6, ¶ 17.
[20] Murray Energy Initial Br, pp. 34-35.

Murray Energy makes three assertions in this paragraph, and all three are misleading. First, the transfer of the assets at net book value was expressly approved in Case No. 13-2420.[21] Second, environmental liabilities are indeed addressed in the Amended Stipulation. The stipulation provides that DP&L will "transfer its generation assets and non-debt liabilities…"[22] Environmental liabilities are non-debt liabilities. Third, there was no set-off to debt required by the Order in Case No. 13-2420; so Murray Energy's allegation that the set-off in the Amended Stipulation is of questionable enforceability is not germane to the question of whether the Amended Stipulation is "at odds" with the Order in Case No. 13-2420.

2. *"DP&L proposes to transfer undefined "non-debt liabilities" but proposes to leave at DP&L all generation associated debt. This was neither addressed nor authorized in Case No. 13-2420-EL-UNC."*

This assertion is just wrong. Transferring generation assets to the GenCo while retaining debt was explicitly part of DP&L's application in Case No. 13-2420:

> Given the merchant nature of the unregulated affiliates' future cash flow stream, an unregulated generation Company affiliated with DPL Inc. would likely have little or no debt-carrying capacity. As a result, DP&L cannot plan to transfer any debt into or issue debt from that affiliate. Instead, the Company plans to reduce the debt currently held in the utility prior to the time of transfer.[23]

The Commission then ordered that "DP&L's application as supplemented on February 25, 2014, and amended on May 23, 2014, to divest its generation assets be approved, subject to the conditions set forth in this Finding and Order."[24] Therefore, the requests in DP&L's

[21] Order in Case No. 13-2420, p 9, ¶ 22.
[22] Amended Stipulation, ¶ 1.c.
[23] DP&L's Amended Supplemental Application to Transfer or Sell its Generation Assets, Case No. 13-2420-EL-UNC, p 4, ¶ 10 (May 23, 2014).
[24] Order in Case No. 13-2420, p 23.

application that were not denied or modified were approved. Such approval included the request to transfer assets but not debt.

3. *"The proposed transfer is now conditioned on FERC approval."*

As Murray Energy itself recognizes earlier in its brief,[25] any transfer of generating units requires FERC approval under Section 203(a) of the Federal Power Act:

> No public utility shall, without first having secured an order of the Commission authorizing it to do so –
>
> (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000…[26]

DP&L and AES Ohio Generation, LLC have an application pending before FERC requesting approval of the transfer of the generating assets.[27] The application specifically states that the purpose of the transfer is to comply with the Order in Case No. 13-2420:

> In 2014, the Public Utilities Commission of Ohio ("PUCO") approved a plan for DP&L to divest its generation on or before January 1, 2017. That PUCO order, referred to herein as the Divestiture Plan Order, is attached hereto at Exhibit L. The proposed Transaction is intended to conform to the Divestiture Plan Order.[28]

Since FERC approval is legally required to transfer the units, and DP&L is seeking that approval to comply with the Order in Case No. 13-2420, it is inexplicable how Murray Energy can assert that conditioning the transfer on FERC's approval is "at odds" with that order.

4. *"DP&L now proposes to extend the deadline for transfer of facilities to 180 days after final Commission approval of the*

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[25] Murray Energy Initial Br., p. 34.
[26] 16 USC § 824b(a).
[27] Application for Authorization Under Section 203 of the Federal Power Act by The Dayton Power and Light Company and AES Ohio Generation, LLC and Requests for Waivers, FERC Docket No. EC16-173-000 (August 25, 2016). Henceforth, "DP&L FERC Application."
[28] DP&L FERC Application, pp 1-2, citing the Order in Case No. 13-2420.

> *Stipulation without material modification. There is no indication as to treatment of closing costs for the Stuart and Killen stations if the plants are closed prior to Commission or FERC approval."*

This "reason" is seemingly the hardest one to comprehend. It is wholly unclear how setting a deadline of 180 days after Commission approval of the Stipulation is at odds with the Order in Case No. 13-2420. Nor does Murray Energy explain how the lack of a provision addressing closing costs in the hypothetical contingency wherein Stuart and Killen are closed before Commission or FERC approval renders the Amended Stipulation "at odds" with the Order in Case No. 13-2420.

5. *"DP&L, or the affiliate, commits to an undefined sale process to an unaffiliated third party without determination of fair market value thirty (30) days prior to any sale."*

First, it is not true that DP&L or the affiliate will sell the plants to an unaffiliated third party without a determination of fair market value 30 days before the sale. The Order in Case No. 13-2420 required DP&L to provide the Commission with the fair market value of the assets 30 days prior to the transaction. Nothing in the Amended Stipulation retracts that requirement.

Second, Murray Energy is not opposing the sale of Conesville, Miami Fort, and Zimmer, so it is unclear how Murray Energy would be aggrieved by the lack of a determination of fair market value for these plants 30 days before the sale—even if that was the case (which, as just explained, it is not).

Third, Murray Energy's request in this case is that the Commission compel DP&L to <u>add</u> the Stuart and Killen plants to the Commission-mandated sale process that will be used for Conesville, Miami Fort, and Zimmer. In fact, Murray Energy may even be trying to use this case as leverage to buy one or both of these plants.[29] Murray Energy offers no explanation for how

[29] Tr. III at 526-531.

correcting the absence of a requirement to provide fair market value within 30 days of selling Conesville, Miami Fort, and Zimmer (if such a requirement were absent, which it is not) would redress Murray Energy's grievance concerning Stuart and Killen not being included in the sale process in the stipulation.

In sum, paragraph 1.c of the Amended Stipulation reaffirms DP&L's commitment to carry out the transfer of its generating assets to an affiliate, which was already approved by the Commission in Case No. 13-2420. Paragraph 1.d of the Amended Stipulation in this case states that DP&L will offer its interest in the Conesville, Miami Fort, and Zimmer plants for sale to an unaffiliated third party. Nothing in the Amended Stipulation addresses sale or closure of Stuart and Killen. Neither paragraphs 1.c or 1.d—nor the absence of a provision regarding Stuart and Killen—violate any statute, rule or order related to affiliate transactions. Murray Energy's initial brief offers no comprehensible explanation otherwise.

Further, Murray Energy's novel request that the Commission rule the Amended Stipulation to "essentially reopen" Case No. 13-2420 and invite reconsideration of the terms of that approval is unsupported by authority, and premised on a series of mischaracterizations of the order in that case. Murray Energy's arguments regarding affiliate transactions offer nothing of value to the Commission's review of the Amended Stipulation, and those arguments should either be disregarded, or they should be rejected outright.

III. Murray Energy fails to fully consider the costs and lack of any benefits of requiring a sale process for the Killen or Stuart plants.

Murray Energy's request that the Killen and Stuart plants be placed into a compulsory sale process relies on economic assumptions that are not supported by its expert, or by the facts in this case. In particular, Murray Energy provides no reasonable evidence demonstrating that a compulsory sale process would open the door for potential sales that are not already possible due to DP&L's status as a rational market actor; and Murray Energy fails to acknowledge the cost that such an endeavor would impose on DP&L.

a. Requiring a sales process would not create any economic opportunities that do not already exist.

As part of its support for the request to mandate a sales process for Killen and Stuart, Murray Energy offers the Medine testimony for the proposition that "[t]he only way to determine if the Stuart and Killen plants had value on the market is to test the market by going to a legitimate, open sale process."[30] But this statement misstates the key obstacle to a sale, which is the value of the plants themselves: to the extent the plants had value, Medine admits, as she must, that DP&L and the other owners could sell these plants even without a sales process,[31] because generation assets are generally bought and sold outside of any compulsory sale processes. Even in this case, Medine acknowledges specifically that nothing in the proposed Amended Stipulation would prevent a third party from contacting DP&L (or AES if the stipulation and transfer are approved) and offering to buy Killen or Stuart.[32] And in fact, she testified herself that DP&L has periodically solicited bids for all of its coal-generation assets.[33]

Furthermore, nothing in Medine's subsequent testimony provides any support for her claim that a sales process is necessary for sale of the assets. In its opening brief, Murray Energy tries to justify Medine's failure to conduct any sort of valuation of the plants by arguing that her valuation of the plants is "irrelevant because ultimately what determines what the value is what somebody is willing to pay for it."[34] This statement is a truism, but it does not explain why a sales process is necessary for an outside party to value the plants. On redirect, Medine spoke

[30] Murray Energy Initial Br., p. 25.
[31] Tr. III at 504-05.
[32] Tr. III at 505.
[33] *Id.*
[34] Tr. III at 568.

extensively about how a sale price could be established, and what information would be needed to establish that price.[35] Notably absent from that entire line of testimony is why exactly a mandatory sales process would be needed for potential buyers to collect that information. To the contrary, the fact that DP&L already has solicited prospective buyers demonstrates DP&L's apparent willingness to provide information to prospective buyers as needed to help them make their valuations of the plants. Thus, Medine's testimony fails to support Murray Energy's assertion that a compulsory sales process will provide any meaningful benefit that would not otherwise be available.

b. Mandating a sale process could have significant, negative financial consequences for DP&L that would undermine the purpose of the Amended Stipulation.

Instead, the effect of a mandated sale process would be to hamstring DP&L's ability to make the best economic choices for itself and its customers, by requiring the company to undergo a formal process DP&L has stated on the record that it opposes.[36] In response, another of Murray Energy's central factual claims in its brief, which it offers repeatedly both in its briefing and in the testimony of Witness Medine, is that there is "no downside" to subjecting the Killen and Stuart plants to a mandatory sale process parallel to that DP&L proposes to follow for its three other coal plants.[37] This claim demonstrates a disregard for the practical economics of operating, and closing, a coal plant.

Importantly, Medine does not contest DP&L witness Malinak's testimony that both plants have severe negative cash flows; she freely acknowledges that they exist, while trying to explain them away by arguing that cash flows are "not how third parties would typically value

[35] *Id.* at 568-70.
[36] Dayton Power & Light Initial Br., p. 50.
[37] Murray Energy Initial Br., p. 23.

that [sic] plant."[38] However, negative cash flows at Killen and Stuart do not just impact their possible sale value: by definition, they indicate that DP&L may be losing money for every day they operate and maintain the two plants. Murray Energy has not given any real indication what a forced sale process might look like, but any process that lengthened the operational timeframe for either plant would impose costs simply by extending the time over which either plant loses money. Again, this was addressed by witness Malinak when cross-examined by Murray Energy: as he testified that the plants' "free cash flows are negative. And so when you close the plant, you no longer are facing the negative free cash flows, so that's a form of economic proceeds."[39]

Nor is this concern alleviated by Murray Energy's argument that, because the plants are not scheduled to close until 2018, there is that much time to find a new owner. Closing a coal plant requires significant lead time and preparation—and that process will be undermined, and probably delayed, if DP&L is required simultaneously to try to find buyers for the plant. In short, Murray Energy entirely fails to consider the significant detrimental impacts that a forced sales process could have on DP&L's ability to minimize costs and maximize net revenue. If there were some compelling reason to believe the plants could be sold, perhaps that risk might be worth it. But Witness Medine's testimony is highly conjectural and overly broad; in claiming that both plants theoretically could be sold for a small profit, she relies on broad generalizations and conjecture instead of a data-driven, specific analysis focused on the actual economics of either plant. As such, her testimony fails to meaningfully support Murray's request, and should be disregarded here.

[38] Tr. III at 567-68.
[39] Tr. I at 203.

IV. Conclusion

For these reasons, and those offered in Sierra Club's Initial Post-Hearing Brief, Sierra Club respectfully asks that the Commission reject Murray Energy's suggestion to mandate an unnecessary, unwarranted, and potentially onerous sale process for the Killen and Stuart plants.

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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 Post-Hearing Reply Brief upon the following parties via electronic mail.

Date: May 15, 2017

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