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. 16-0395-EL-SSO
In the Matter of the Application of the Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case No. 16-0396-EL-ATA
In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to R.C. 4905.13	))))	Case No. 16-0397-EL-AAM

MURRAY ENERGY CORPORATION'S REPLY TO DP&L'S MEMORANDUM IN OPPOSITION TO MURRAY ENERGY'S MOTION TO INTERVENE

I. INTRODUCTION

Applicant Dayton Power and Light Company ("DP&L") opposes Murray Energy Corporation's ("Murray Energy") Motion to Intervene on two completely contradictory, and specious, grounds: (1) that Murray Energy should have known for nearly a year that DP&L would close the Killen and Stuart coal-fired electric generation plants; and (2) that Murray Energy's interests are not implicated by DP&L's January 30, 2017 Stipulation and Recommendation because DP&L has not yet decided whether to shutter those plants – despite the filed testimony of DP&L's own witnesses and DP&L's public pronouncements to the contrary. Both of DP&L's arguments are without merit. Moreover, DP&L has unwittingly demonstrated in its opposition to Murray Energy's motion that "good cause" indeed exists to justify Murray Energy's intervention after the Hearing Examiner's original June 30, 2016 deadline for seeking intervention. See *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Nos., 16-395-EL-SSO, 16-396-EL-

ATA, & 16-397-EL-AAM, Entry at ¶3(b) (PUCO April 11, 2016). Accordingly, the Commission should, in the prudent exercise of its discretion, grant Murray Energy's Motion to Intervene in these proceedings.

II. ARGUMENT

Initially, it must be observed that DP&L does not seriously contend that Murray Energy has failed to satisfy any of the factors to be considered by the Commission in deciding the motion to intervene, *i.e.,* that Murray Energy "has a real and substantial interest in the proceeding, and . . . [Murray Energy] is so situated that the disposition of the proceeding may, as a practical matter, impair or impede . . . [its] ability to protect that interest, unless . . . [its] interest is adequately represented by existing parties." R.C. 4901.13(A)(2). Although DP&L makes a blanket assertion in the last two sentences of its opposition that Murray Energy has not met the applicable intervention factors, *see* Memorandum in Opposition at 6, it completely fails to offer any substantive rebuttal to Murray Energy's showing that it has met **each** of the intervention factors.

Murray Energy, as established by this Commission's prior decisions, possesses a substantial interest in these proceedings as a supplier of coal for the Killen and Stuart Plants. See *In the Matter of the Two-Year Review of Centerior Energy Corp.'s Environmental Compliance Plan,* No. 94-1698-EL-ECP (PUCO April 13, 1995) (granting the Ohio Valley Coal Company's motion to intervene where OVCC asserted its interests "due to its position as a supplier of coal to Centerior."). Moreover, with DP&L's filing of its proposed Stipulation and Recommendation with the Commission on January 30, 2017, and DP&L's **newly-announced** proposal to close the Killen and Stuart plants, the disposition of these proceedings, **for the first time**, directly puts at risk Murray Energy's substantial financial interests in the continuing operation of the Killen and

Stuart plants, and threatens to impair and impede Murray Energy's ability to protect those substantial interests. Furthermore, no current party to these proceedings represents the interests of Murray Energy or any other coal supplier. Absent such representation, the Commission cannot come to a full and equitable resolution of the material issues in these proceedings – proceedings that may adversely affect Murray Energy's interests and the interests of the more than 1,300 Ohio families who depend on Murray Energy for their livelihoods.

Rather than presenting any substantive rebuttal to Murray Energy's compelling showing that it is entitled to intervene in these proceedings, DP&L resorts to baldly asserting, without any support in fact or law, that Murray Energy has failed to establish "good cause" or "extraordinary circumstances" for not seeking to intervene in these proceedings until after DP&L first revealed, on January 30, 2017, its intention to shutter the Killen and Stuart plants. DP&L also baldly asserts that Murray Energy's intervention after DP&L's "game-changing" January 30, 2017 announcement will somehow (DP&L does not explain how) unduly delay these proceedings. But contrary to DP&L's hollow assertions, Murray Energy has established extraordinary circumstances and good cause for its **now-timely** motion to intervene: the "extraordinary circumstances" and "good cause" **arise from DP&L's own conduct** in initiating these proceedings by filing an application and supporting testimony urging the Commission that it **cannot allow** the shuttering of DP&L's coal-generating plants (for the devastating economic hardships, electricity cost increases, and grid instability that such shuttering would cause), and then after these cases had been pending for a year with no plant closure proposed, completely reversing the course of these proceedings by proposing the very shuttering of the Killen and Stuart plants that DP&L initially urged the Commission it could not allow. Murray Energy's Motion to Intervene is timely.

Finally, Murray Energy has firmly committed to abide by all Commission deadlines in these proceedings and to present its information in a clear and succinct manner. This Commission should, therefore, in the exercise of its sound discretion, grant Murray Energy's Motion to Intervene.

A. DP&L'S JANUARY 30, 2017 FILING OF THE STIPULATION AND RECOMMENDATION AND SUPPORTING TESTIMONY FUNDAMENTALLY ALTERED THE NATURE OF THESE PROCEEDINGS AND, FOR THE FIRST TIME, IMPLICATED MURRAY ENERGY'S IMPORTANT INTERESTS.

R.C. 4903.221(A) provides that "[a]ny other person ***who may be adversely affected by a public utilities commission proceeding*** may intervene in such proceeding . . . ." (emphasis added). See also *Toledo Coalition for Safe Energy v. Public Utilities Comm'n of Ohio,* 69 Ohio St.3d 559 (1982). The Commission has recognized that a proposed intervenor's interest as a coal supplier is sufficient to warrant intervention. See *In the Matter of the Two-Year Review of Centerior Energy Corp.'s Environmental Compliance Plan,* No. 94-1698-EL-ECP (PUCO April 13, 1995). Moreover, this Commission has discretion to grant untimely motions to intervene "for good cause shown," R.C. 4903.221(A)(2), and will do so "under extraordinary circumstances." Ohio Admin. Code §4901-1-11(F).

As noted in Murray Energy's Memorandum in Support of its Motion to Intervene, its interests as a coal supplier simply were not implicated by DP&L's February 22, 2016 Application for Approval of Its Electric Security Plan (the "Original Application"), wherein DP&L stated its firm commitment to keep the Killen and Stuart plants operational through at least December 31, 2026. Original Application at ¶¶6, 9. Indeed, because the Original Application resolutely proposed the long-term continued operation of the critical Killen and Stuart plants, as well as the other three coal-fired electric generation plants in which DP&L has

an interest (collectively, the "Coal Generation Plants"), no entities representing the interests of Ohio's important coal industry sought to intervene to challenge the Original Application.

Nevertheless, DP&L now asserts that Murray Energy should have had reason to believe, as far back as the filing of the Original Application, that DP&L may, at some later point, do an "about-face" and, contrary to what DP&L told the Commission it could **not** permit to happen, seek to close the Coal Generation Plants. DP&L notes that it indicated in its application that the plants were "at a risk of closure," Original Application at ¶4, and Murray Energy, therefore, should have intervened prior to the original June 30, 2016 deadline to address those purported risks. This argument strains credulity.

In its Original Application, DP&L ardently asserted that Coal Generation Plants "***are critical to Ohio's economic stability because they are necessary to ensure the reliability of the economic grid, ensure fuel diversity of Ohio generation plants, keep prices low and produce millions of dollars of benefits in the state and in the local communities***." Original Application at ¶3. (emphasis added). It then outlined the "significant adverse effects" that Ohio would suffer "[i]f the plants were retired prematurely . . . ." Original Application at ¶5. Those adverse effects included $26.5 billion in adverse economic impacts resulting from decreased electric supply and a corresponding increase in market prices, the loss of 19,000 Ohio jobs, a reduction in consumers' and businesses' disposable income, and $1.5 billion in lost tax revenue. Original Application at ¶¶5.a.i-iv. In addition, closure of the Coal Generation Plants would occasion "adverse impacts to reliability across the region," necessitating an approximately $112 million "investment in new transmission facilities to accommodate serving Ohio customers from other sources," Original Application at ¶5.b, which investment would still not alleviate the "future reliability risks" caused by "the closure of 8,137 MW of coal-fired capacity in Ohio . . . ."

Original Application at ¶5.c. For these compelling reasons, DP&L indicated its steadfast intention to keep the plants operational through at least December 31, 2026, Original Application at ¶¶6, 9, which would "strengthen Ohio's economy" and further the State's "distinct policy interests in having generation supply physically located in the state . . . ." Original Application at ¶8.

Moreover, the written testimony DP&L submitted to support its Original Application underscored its commitment to keep the Coal Generation Plants open. *See, e.g.*, Testimony of Carlos Grande-Moran (filed February 22, 2016). Thus, neither Murray Energy nor any other coal supplier had reason to believe that DP&L was not being forthright in its filings and would later completely change course and seek closure of the very same Coal Generation Plants that it was assuring the Commission were indispensable. Quite simply, there was no reason for Murray Energy to seek intervention upon the filing of the Original Application pledging to keep the coal-fired generation plants operational through 2026.

Nor did any of the other DP&L-cited "milestones" in these proceedings give Murray Energy reason to intervene. The Sierra Club's April 6, 2016 intervention to challenge DP&L's commitment to keep the plants open in no way suggested that DP&L would completely abandon its vow to keep the plants open and, instead, impose upon Ohio, its businesses, and its consumers all of the adverse impacts of closure that DP&L railed **against** in its Original Application.

Moreover, DP&L's September 23, 2016 Notice of Withdrawal of Reliable Electricity Rider Proposal gave no indication that DP&L would seek to close the very Coal Generation Plants it pledged to keep running. It merely withdrew the proposal as contained in the Original Application to pursue "an alternative to the RER, which has been named the Distribution Modernization Rider ("DMR")," Notice of Withdrawal at 1, which was not then—or at any

time—laid out in any detail, and which did not foretell the 180-degree change in direction ultimately outlined in DP&L's January 30, 2017 Stipulation and Recommendation.

That is especially true given another filing cited by DP&L as evidence that Murray Energy's interests as a coal supplier to the Killen and Stuart plants were at risk—the November 21, 2016 Direct Testimony of Tyler Comings submitted by the Sierra Club. Indeed, in his testimony, Comings indicated that DP&L was "planning to invest significant capital in these [Coal Generation Plants] assets," which he described as "mostly low-value coal generation," Comings Testimony at 3, ¶2, and that DP&L intended to rely "on coal generation into the future." *Id.* at 3, ¶3. Comings described the DMR as including "the continued operation of these plants and further investment of [amount redacted] of dollars in capital projects (including for environmental compliance) . . ." and constituting "the path forward," a path with which he did not agree. Comings Testimony at 7. Thus, contrary to DP&L's argument, the testimony the Sierra Club submitted in opposition to DP&L's DMR does not suggest that DP&L intended to abandon its commitment to keep the Coal Generation Plants operational, but rather, **reaffirms** that DP&L fully intended to keep those plants open.[1]

Finally, the last piece of "evidence" cited by DP&L as indicating that the closure of the Coal Generation Plants was at risk—a November 17, 2016 article appearing in the *Dayton Daily News* (Murray Energy's headquarters is in St. Clairsville, Ohio) attached as Exhibit A to DP&L's Memorandum in Opposition – is equally unavailing. That article merely indicates that "various parties to the ESP case have raised the subject of the closure of the Killen and Stuart Stations."

[1]The Sierra Club also filed the Direct Testimony of Christopher C. Walters on November 21, 2016. Walters' testimony focused primarily on the fact that funds generated by the DMR would largely be used to pay down DP&L's debt without improving its sagging credit rating. The testimony contained no indication that DP&L would seek the closure of its Coal Generation Plants.

DP&L's spokesperson is quoted in the article as indicating that "[a]t this time, no decision has been reached." The article in no way suggested that DP&L was backtracking on its commitment to keep the plants operational to prevent the significant adverse effects of their closure as outlined in DP&L's Original Application.

Despite its efforts to construct a *post hoc* case for Murray Energy's earlier intervention in these proceedings, none of the "evidence" cited by DP&L in any way implies that it intended to pursue a course of action that involved something other than the continued operation of the Killen and Stuart plants. That revelation did not occur until the filing of the Stipulation and Recommendation on January 30, 2017, and the accompanying DP&L press release, attached as Exhibit B to DP&L's Memorandum in Opposition. It was not until that date that DP&L completely repudiated what it had represented to the Commission and to the public in its Original Application – that the Commission could not allow the Coal Generation Plants to be shuttered.

Because of what DP&L persuasively set forth as the adverse effects that would be caused by the Coal Generation Plant closures, it fully intended to keep the plants operational, and the issue of such closure was not raised in these proceedings until the proposed Stipulation and Recommendation was filed with the Commission on January 30, 2017. The Commission must acknowledge the complete and fundamental change that these proceedings have undergone as a result of the January 30, 2017 filing of the Stipulation and Recommendation and DP&L's public disclosure—for the first time—that it intends to close the Killen and Stuart facilities. This belated disclosure by DP&L in itself constitutes "good cause" and "extraordinary circumstances" for Murray Energy's intervention at this time. Accordingly, the Commission should grant Murray Energy's Motion to Intervene.

B. DP&L, WITH THE FILING OF THE STIPULATION AND RECOMMENDATION AND SUPPORTING TESTIMONY, HAS NOW DISCLOSED ITS INTENTION TO CLOSE THE KILLEN AND STUART PLANTS AS A KEY ELEMENT OF ITS AGREED RESOLUTION OF THESE PROCEEDINGS AS THEY RELATE TO THE SIGNATORY AND NON-OPPOSING PARTIES.

As noted above, DP&L's two arguments against Murray Energy's intervention are completely contradictory. On the one hand, DP&L argues that Murray Energy should have intervened sooner because the threat of the closure of the Killen and Stuart plants was real and imminent, despite DP&L's original representations to the contrary. On the other hand, DP&L also argues that the threat of plant closures is **not yet** at issue because no decision has been made to close the plants. This latter argument defies logic.

DP&L asserts in its Memorandum in Opposition that "[t]he Stipulation does not even provide for the closure of the Killen or Stuart, the only stated interest of Murray Energy." Memorandum in Opposition at 5. While it is true that the Stipulation and Recommendation itself does not call for the closure of the Killen and Stuart plants, DP&L simultaneously issued a press release outlining the agreement that resulted in the Stipulation and Recommendation; that agreement requires that:

> [i]f approved by the PUCO, the plan . . . calls for the Company to exit 100 percent of its interest in 2,093 MW of coal-fired generation. ***Specifically, the Company will begin the closure process of the two coal-fired, co-owned plants it operates in Adams County. The Stuart and Killen plants are anticipated to close in mid-2018.*** Additionally, DP&L committed to commence a sales process for its ownership shares in the Conesville, Miami Fort and Zimmer plants.

DP&L Press Release (Jan. 30, 2017) (emphasis added) (attached as Exhibit B to DP&L's Memorandum in Opposition). Thus, contrary to DP&L's specious assertion that no plant closure decision has yet been made, DP&L, in its own press release, states the exact opposite, *i.e.,*

DP&L's agreed-upon "plan," the course of action outlined in the Stipulation and Recommendation, requires DP&L to close the Killen and Stuart plants.

If there were any further doubt as to what DP&L's "plan" requires, that doubt is dispelled by the written testimony of DP&L employee Sharon R. Schroder ("Schroder"), DP&L's Director of Regulatory Affairs, filed by DP&L at 4:50 p.m. on February 6, 2017. On the final page of her testimony, Schroder stated that "DP&L has also ***committed to closing its other two coal-fired generation assets*** (1210MW total), ***assuming that the Stipulation is approved without material modification***." Schroder Testimony at 21 (emphasis added). In short, the Commission's approval of the Stipulation and Recommendation will result in the closure of the Killen and Stuart plants, **both** actions being material terms of DP&L's agreed-upon "plan" with the parties to the Stipulation and Recommendation.

Similarly, DP&L filed the written testimony of R. Jeffrey Malinak, a Managing Principal of Analysis Group, Inc. and an expert engaged by DP&L, on February 6, 2017. In that testimony, Malinak also acknowledged that "***as part of the Stipulation, DP&L has agreed to close certain of these coal generation facilities by June, 2018*** and that it also has committed to commence a sale process to sell its interests in the remaining plants." Malinak Testimony at 24 (emphasis added). Thus, DP&L has unequivocally agreed that, if the Stipulation and Recommendation is approved by the Commission, **as a term of the parties' agreement under the Stipulation and Recommendation**, DP&L will, in fact, close both the Killen and Stuart plants. For DP&L to assert otherwise is simply wrong. Thus, Murray Energy's interests are **now** clearly in jeopardy, a situation that did **not** exist prior to the filing of the Stipulation and Recommendation in these proceedings on January 30, 2017.

Accordingly, DP&L's present assertion that no decision on closure of the Killen and Stuart plants has been made is completely at odds with its filings with this Commission and its public pronouncements. It has stipulated to a course of action which, if approved by the Commission, will **require** it to shutter those plants. For DP&L to assert that it has not agreed to the closure of the Killen and Stuart plants, thereby directly threatening Murray Energy's substantial interests, is absurd. Should Murray Energy be prevented from participating in these proceedings, its substantial interests not only "may" be impaired, those interests **will** be impaired.

The Commission should allow the interests of Murray Energy—as a supplier of coal to the Killen and Stuart plants and as a business headquartered in Ohio, employing 1,300 Ohioans and contracting with numerous other Ohio businesses, all of whom will be harmed by the plan to close the coal-fired generation plants—to be represented in these proceedings as they relate to the Commission's consideration of the Stipulation and Recommendation. Only with such participation by Murray Energy can there be a full development of the record with regard to all of the interests at stake under the Stipulation and Recommendation, allowing the Commission to come to an equitable resolution of these proceedings. Accordingly, Murray Energy urges the Commission to grant its Motion to Intervene.

For the foregoing reasons, and for the reasons set forth in its Memorandum in Support of its motion, Murray Energy respectfully requests the Commission to grant its Motion To Intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons listed in Exhibit A via electronic mail this 23rd day of February 2017.

/s/ John F. Stock
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EXHIBIT A

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Summary: Reply Murray Energy Corporation's Reply to DP&L's Memorandum in Opposition to Murray Energy's Motion to Intervene electronically filed by John F Stock on behalf of Murray Energy Corporation