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 MOTION TO STRIKE PORTIONS OF MURRAY ENERGY'S REPLY BRIEF

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

i. On Page 7, beginning with the text, "DP&L got it right in its Original Application . . . ," continuing, on the same page, through the text, ". . . operating through December 31, 2026. Original Application at ¶¶ 6, 9."
ii. On Page 14 and 15, the sentence that begins with the text, "Furthermore, on April 25, 2017, Dynegy filed . . . ."
iii. On Page 17, the sentence that begins with the text, "Coal-fired generation is experiencing a rebound . . . ."

The Commission should strike these materials from Murray Energy's Reply Brief because they rely on information that is not part of the record and, in the case of withdrawn statements from Dayton Power & Light's ("DP&L") Original Application, the information constitutes inadmissible hearsay.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 Reply Brief referenced above.

Dated: May 16, 2017

Respectfully submitted,

Christopher Bzdok
OLSON, BZDOK & HOWARD, P.C.
420 E. Front St.
Traverse City, MI 49686
231.946.0044
chris@envlaw.com

_____/s/ Tony Mendoza_____
Gregory Wannier
Kristin Henry
Tony Mendoza
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
415.977.5646 (Wannier)
415.977.5716 (Henry)
415.977.5589 (Mendoza)
greg.wannier@sierraclub.org
kristin.henry@sierraclub.org
tony.mendoza@sierraclub.org

Richard C. Sahli (Ohio Bar #0007360)
Richard Sahli Law Office, LLC
981 Pinewood Lane
Columbus, Ohio 43230-3662
(614) 428-6068
rsahli@columbus.rr.com

Attorneys for Sierra Club

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**

MEMORANDUM IN SUPPORT OF SIERRA CLUB'S MOTION TO STRIKE PORTIONS OF MURRAY ENERGY'S REPLY BRIEF

Introduction

Throughout its Reply Brief, Murray Energy again improperly cites and comments upon two sources of extra-record evidence: i) withdrawn statements from DP&L's now-superseded Original Application (dated Feb. 22, 2016) filed in this proceeding and ii) a federal securities filing made by Dynegy, Inc. in April 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 Reply Brief is prejudicial to Sierra Club, because Sierra Club has had no opportunity to respond. Further, as an alternative ground, the referenced withdrawn statements from the now-superseded Original Application are inadmissible hearsay.[1] The Commission should grant this motion and strike the identified outside-the-record and hearsay materials from Murray Energy's Reply Brief.

[1] 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 FirstEntergy 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.[2] The same reasoning applies to the referenced information in Murray Energy's Reply Brief.

First, the statements in Murray Energy's Reply 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 page 7 of its Reply 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 two places in its Reply Brief, Murray Energy comments on an April 2017 securities filing made by Dynegy. This is a blatant attempt to submit new 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

[2] *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*, Opinion and Order, March 31, 2016, page 37.

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 the price 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 Reply Brief, found on page 7, that refer to withdrawn statements from DP&L's Original Application should be stricken for the alternative reason that they are inadmissible hearsay. As the Attorney Examiners have ruled in this proceeding,[3] 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 withdrawn by DP&L; and if Sierra Club had attempted to cross examine witnesses on the withdrawn statements, DP&L would likely have objected on relevance grounds and this objection would likely have been sustained. Sierra Club would be prejudiced if any of these out-

[3] Tr. Vol III, pages 501-503 (striking various sections of the Medine Direct Testimony as inadmissible hearsay).

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 16, 2017

Respectfully submitted,

Christopher Bzdok
OLSON, BZDOK & HOWARD, P.C.
420 E. Front St.
Traverse City, MI 49686
231.946.0044
chris@envlaw.com

_____/s/ Tony Mendoza_____
Gregory Wannier
Kristin Henry
Tony Mendoza
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
415.977.5646 (Wannier)
415.977.5716 (Henry)
415.977.5589 (Mendoza)
greg.wannier@sierraclub.org
kristin.henry@sierraclub.org
tony.mendoza@sierraclub.org

Richard C. Sahli (Ohio Bar #0007360)
Richard Sahli Law Office, LLC
981 Pinewood Lane
Columbus, Ohio 43230-3662
(614) 428-6068
rsahli@columbus.rr.com

Attorneys for Sierra Club

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 Reply Brief, and the accompanying Memorandum in Support, upon the following parties via electronic mail.

Date: May 16, 2017

s/ Tony Mendoza
Tony Mendoza

JSharkey@ficlaw.com	jkylercohn@bkllawfirm.com
CFaruki@ficlaw.com	laurac@chappelleconsulting.net
djireland@ficlaw.com	lhawrot@spilmanlaw.com
chollon@ficlaw.com	mfleisher@elpc.org
ajay.kumar@occ.ohio.gov	mkeaney@calfee.com
amy.spiller@duke-energy.com	mcrawford@djflawfirm.com
andrew.garver@occ.ohio.gov	mpritchard@mwncmh.com
paul@carpenterlipps.com	mwarnock@bricker.com
prosecutorkelley@usa.com	mswhite@igsenergy.com
crtamm@classicconnectors.com	mdortch@kravitzllc.com
charris@spilmanlaw.com	mkurtz@bkllawfirm.com
cpirik@dickinsonwright.com	mjsettineri@vorys.com
chris@envlaw.com	Michelle.d.grant@dynegy.com
cmooney@ohiopartners.org	mleppla@theoec.org
dana.whalen@adamscountyoh.gov	talexander@calfee.com
dboehm@bkllawfirm.com	natalia.messenger@ohioattorneygeneral.gov
dwilliamson@spilmanlaw.com	ocollier@beneschlaw.com
dparram@bricker.com	rseiler@dickinsonwright.com
dborchers@bricker.com	rparsons@kravitzllc.com
elizabeth.watts@duke-energy.com	rick.sites@ohiohospitals.org
ejacobs@ablelaw.org	stheodore@epsa.org
ebetterton@igsenergy.com	smhoward@vorys.com
evelyn.robinson@pjm.com	Stephen.Chriss@walmart.com
fdarr@mwncmh.com	slesser@calfee.com
Greg.Tillman@walmart.com	todonnell@dickinsonwright.com
glpetrucci@vorys.com	thomas.mcnamee@ohioattorneygeneral.gov
ibatikov@vorys.com	tdougherty@theoec.org
perko@carpenterlipps.com	william.michael@occ.ohio.gov
Jeanne.kingery@duke-energy.com	wasieck@vorys.com
jeffrey.mayes@monitoringanalytics.com	wvorys@dickinsonwright.com
Sechler@carpenterlipps.com	david.lipthratt@puco.ohio.gov
jdoll@djflawfirm.com	doris.mccarter@puco.ohio.gov
jstock@beneschlaw.com	hisham.choueiki@puco.ohio.gov
joliker@igsenergy.com	patrick.donlon@puco.ohio.gov
kevin.moore@occ.ohio.gov	patrick.tully@puco.ohio.gov

schmidt@sppgrp.com Bojko@carpenterlipps.com kfield@elpc.org kboehm@bkllawfirm.com	tamara.turkenton@puco.ohio.gov theresa.white@puco.ohio.gov Attorney Examiner Gregory.Price@puc.state.oh.us Nicholas.Walstra@puco.ohio.gov

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