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

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF THE OPINION AND ORDER ENTERED OCTOBER 20, 2017 BY INTERVENORS MURRAY ENERGY CORPORATION AND THE CITIZENS TO PROTECT DP&L JOBS

I. INTRODUCTION

On February 22, 2016, pursuant to R.C. 4928.141 and 4928.143, the Dayton Power and Light Company ("DP&L") filed an Application For Approval of Its Electric Security Plan (the "Original Application") with the Public Utilities Commission of Ohio (the "Commission"), Case No. 16-0395-EL-SSO. On January 30, 2017, DP&L filed a proposed Stipulation and Recommendation by which DP&L proposed to transfer its generation plants to an affiliated company and to sell DP&L's ownership interest in the Conesville, Miami Fort and Zimmer stations. Subsequently, the January 30, 2017 Stipulation and Recommendation was replaced by the Amended Stipulation and Recommendation filed on March 14, 2017. Paragraphs 1(c), (d) and (e) provide:

> c. 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.

d. 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.

e. AES Corporation will use all proceeds from any sale of the coal generation assets to make discretionary debt repayments at DP&L and DPL Inc.

The Stuart and Killen stations are conspicuously absent from Paragraph 1(d) of the Amended Stipulation, which addresses a proposed sale process for only the Conesville, Miami Fort and Zimmer stations. Both DP&L witnesses Schroder and Malinak confirmed DP&L's intention to close the Stuart and Killen plants by June, 2018 without including these plants in the proposed sale process provided in Paragraph 1(d). (Schroder, Tr. Vol. II, 402; Malinak, DPL Ex. 2A, p. 27)

Significantly, DP&L sought authority in the Amended Stipulation to transfer the generation <u>assets</u> to AES Ohio Generation but to leave behind the generation <u>debt</u> with DP&L. The net book value of these generation assets is $545.8 million and the associated debt totals $938.7 million. (Malinak, DPL Ex. 2A, pp. 27, 68; RJM – 19A). Transferring the generation assets but leaving the associated debt with DP&L will increase DP&L's leverage ratio which will be a credit negative. (Malinak, DPL Ex. 2A, p. 68). Further, DP&L ratepayers will be required to provide the funds to service the debt associated with the transferred generation assets which will no longer provide service to these ratepayers. (Malinak, DPL Ex. 2A, p. 30). Indeed, DP&L represents that cash flow from the Distribution Modernization Rider (DMR) will be used to pay interest obligations on existing debt at DPL Inc. and DP&L. (Amended Stipulation and Recommendation, Paragraph 2(b)). DP&L resorts to this rider in lieu of any cash infusion by AES.

The supposed benefit of any sale of the generating plants provided in the Amended Stipulation is that AES Corporation will use the proceeds from any sale to make discretionary debt repayments at DP&L and DPL Inc. However, outright closure of the Stuart and Killen stations, without first undergoing a possible sale in the sale process, will obviously generate no sale proceeds to apply to the debt. Jurisdictional customers will be required to provide revenues to service the debt associated with these plants that will not provide any service to them. (Malinak, DPL Ex. 2A, p. 68; Tr. Vol. I, 221, 222).

The evidence in this case convincingly established that there is no rational justification for outright closure of the Stuart and Killen stations without at least attempting a sale through the sale process already provided in Paragraph 1(d) of the Amended Stipulation. DP&L witnesses failed to justify omission of the Stuart and Killen stations from the sale process. Intervenor witness Emily Medine, on the other hand, explained why DP&L's unilateral decision to close the Stuart and Killen power plants, omitting the plants from the sale process, has not been justified, is not in the public interest and is likely to have extreme negative economic consequences for DP&L ratepayers and the public interest. (Direct Medine, Int. Ex. 2, p. 2). Specifically, Ms. Medine concluded:

- The closure of Killen and Stuart is likely to increase power prices to DP&L customers.
- The closure of Killen and Stuart will have severe economic consequences on the communities in which the plants reside.
- Both the Killen and Stuart stations could be sold. Potential buyers include private equity, merchant generators, and strategic players including coal producers.
- There is no reason why a sales process to which DP&L has agreed for its other coal assets cannot be extended to include Killen and Stuart.
- Absent a demonstration by DP&L that including Killen and Stuart in a sale process is not in the public interest, the Amended Stipulation should be revised to include an obligation by DP&L to commence a sale process for these units as well.

(Direct Medine, Int. Ex. 2, p. 7).

The unrebutted evidence also firmly establishes that the closure of the Stuart and Killen generating plants will not only severely harm coal production and destroy jobs in the Ohio Valley region but will absolutely <u>devastate</u> Adams County and the local communities where the plants are located. The Stuart and Killen stations are the largest employer in Adams County and provide significant tax revenues to the county, townships, and school districts. The loss of these plants is particularly devastating to Adams County which is a rural, sparsely populated county. The closure of these plants will have a rippling effect throughout the community impacting businesses, commercial enterprises, health care, schools and education and governmental resources. Ultimately, the entire State of Ohio will be impacted as the State will be required, one way or the other, to step in to provide unemployment and welfare benefits, to support the local schools, to support health care through Medicaid or other sources and to support the local infrastructure, including roads and other resources that cannot be supported any more through local tax revenues.

This Commission has previously recognized that the "public interest" encompasses more than just the interests of the utility or ratepayers. See In re the Application of Ohio Edison et al., Case No. 14-1297-EL-SSO, Opinion and Order dated March 31, 2016, p. 88.

This Commission has jurisdiction to not only approve a transfer or sale of generation assets under R.C. 4928.17(E) but to also review the particular circumstances of a proposed transfer or sale, to address necessary conditions to the proposed transfer or sale, and to assess the financial impact and costs associated with such proposed transfer or sale. This Commission has jurisdiction to review a proposed transfer or sale of generating assets under OAC Rule 4901:1-37-09(C) which requires the Commission to review the object and purpose of the sale or transfer, the impact on a standard service offer, how the sale or transfer will affect the public interest and the basis for determination of fair market and book value of the transferred assets. The Commission also has jurisdiction under OAC Rule 4901:1-37-04(C) to review transactions between an electric utility and its affiliates. Indeed, this Commission has previously addressed the proposed transfer of DP&L generation assets to an affiliate with certain conditions imposed. See In the Matter of the Application of Dayton Power and Light Company for Authority To Transfer Or Sell Its Generation Assets, Case No. 13-2420-EL-UNC, Finding and Order dated September 7, 2014 at ¶¶22, 27-29, and 33 where the Commission directed the transfer of DP&L generation assets at net book value with environmental liabilities, set a deadline of January 1, 2017 for the transfer, approved the deferral and staff review of separation costs and authorized a temporary adjusted capital structure until January 1, 2018. The Amended Stipulation inserts new conditions to the transfer and sale of generation assets which were not previously approved by the Commission and which are at odds with the Commission's prior order.

Finally, and most importantly, this Commission has jurisdiction to review the Amended Stipulation and Recommendation, including the transfer and sale of generation assets as addressed in Paragraphs 1(c), (d) and (e) and specifically the omission of the Stuart and Killen stations from the proposed sale process for the plants in Paragraph 1(d). As with any stipulation, this Commission must consider whether the settlement, as a package, violates any important regulatory principle or practice and benefits ratepayers and the public interest. Industrial Energy Consumers of Ohio Power v. Pub. Util. Comm., 68 Ohio St. 3d 559, 629 NE, 2d 423 (1994).

II. LAW AND ARGUMENT

A. THE COMMISSION UNREASONABLY AND UNLAWFULLY FAILED TO EXERCISE ITS JURISDICTION TO REQUIRE THAT THE STUART AND KILLEN STATIONS BE INCLUDED IN THE PROPOSED SALE PROCESS AS A CONDITION OF APPROVAL OF THE AMENDED STIPULATION.

Given the peculiar circumstances of this case, DP&L's omission of the Stuart and Killen plants from the proposed sale process provided in Paragraph 1(d) of the Amended Stipulation is subject to this Commission's review and jurisdiction. Significantly, DP&L proposes to transfer these generating assets to an affiliate but proposes to leave the associated debt with DP&L. If Stuart and Killen are not marketed through a legitimate and open sale process, there will obviously be no sale proceeds to apply to reduce the associated debt left behind. Omission of the Stuart and Killen plants from the sale process when jurisdictional customers of DP&L are being asked to provide revenues to service the associated debt left behind is a substantial failing of the Amended Stipulation which cannot be justified under the circumstances. Omission of these plants from the sale process is not in DP&L's interest, is not in the ratepayer's interest, is not in the interest of the coal production industry in Ohio, is not in the interest of the local communities which will be devastated by the premature closing of these plants and is not in the public interest.

Pursuant to R.C. 4928.17(E), no electric distribution utility shall sell or transfer any generating asset it wholly or partially owns at any time without obtaining prior Commission approval. This section explicitly provides:

> No electric distribution utility shall sell or transfer any generating assets it wholly or partially owns at any time without obtaining prior commission approval.

OAC Rule 4901:1-37-09 addresses the sale or transfer of generating assets subject to Commission approval under R.C. 4928.17(E). OAC Rule 4901:1-37-09(C) provides:

> (C) An application to sell or transfer generating assets shall, at a minimum:
>
> > (1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.
> >
> > (2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.
> >
> > (3) Demonstrate how the proposed sale or transfer will affect the public interest.
> >
> > (4) State the fair market value and the book value of the property to be transferred from the electric utility and state how the fair market value was determined.

Additionally, OAC Rule 4901:1-37 addresses transactions between an electric utility and affiliates. OAC Rule 4901:1-37-04(C) provides restrictions against affiliate transactions unless otherwise approved by the Commission. OAC Rule 4901:1-37-04(C) provides in relevant part:

> Unless otherwise approved by the Commission, the financial arrangements of an electric utility are subject to the following restrictions:
>
> (1) Any indebtedness incurred by an affiliate shall be without recourse to the electric utility.
>
> (2) An electric utility shall not enter into any agreements with terms under which the electric utility is obligated to commit funds to maintain the financial validity of an affiliate.
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> * * *
>
> (6) An electric utility shall not pledge, mortgage, or use as collateral any assets of the electric utility for the benefit of an affiliate.

In this case, DP&L proposed in the Amended Stipulation to transfer $545.8 million of generating assets to the affiliate but to leave behind $938.7 million of debt associated with the generation assets. That debt includes $300 million in Ohio Air Quality debt. DP&L cites no explicit authority under Title 49, and particularly Chapter 4928, Ohio Revised Code, for the proposed transfer of generating <u>assets</u> to an affiliate but leaving the associated <u>debt</u> with the electric distribution utility. This provision of the Amended Stipulation addressed in Paragraphs 1(c), (d) and (e), a proposed transaction with an affiliate, is at least subject to Commission review and approval as an affiliate transaction subject to Commission approval under OAC Rule 4901:1-37-04(C).

In submitting the Amended Stipulation for Commission approval and adoption, DP&L essentially reopened the prior divestiture cases, particularly Case No. 13-2420-EL-UNC. In the Amended Stipulation, DP&L proposed to transfer its generation assets to an affiliate but subject to different circumstances than existed in Case No. 13-2420-EL-UNC and subject to different terms and conditions than those addressed in Case No. 13-2420-EL-UNC. Contrary to the Commission's conclusion, at the time of the October 20, 2017 Order, the generating assets had not been transferred and remained assets of DP&L on the books and records of DP&L. The proposal in the Amended

Stipulation, adopted by the Commission, is at odds with the Commission September 7, 2014 Finding and Order in Case No. 13-2420-EL-UNC in several significant respects:

> 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.
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> 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.
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> 3. DP&L now proposes to extend the deadline for transfer of facilities to 180 days after final Commission approval of the 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.
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> 4. 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.

Accordingly, by virtue of the proposed Amended Stipulation and Recommendation, this Commission has jurisdiction to again review the proposed transfer of generating assets <u>under the requirements of OAC Rule 4901:1-37-09(e) and OAC Rule 4901:1-37-04(C) given the change in circumstances that existed when the Commission approved the transfer of assets to the affiliate in its September 7, 2014 Finding and Order in Case No. 13-2420-EL-UNC and given new conditions that were not addressed by the Commission in its September 7, 2014 Finding and Order</u>.

In approving and adopting the Amended Stipulation and Recommendation without reviewing the transfer of the generation plants to an unregulated subsidiary without including the Stuart and Killen stations in the proposed sale process, the Commission unreasonably and unlawfully failed to exercise its jurisdiction to review the transactions under the requirements of R.C. 4928.17(E) and OAC Rule 4901:1-37.

B. THE COMMISSION UNREASONABLY AND UNLAWFULLY APPROVED AND ADOPTED THE AMENDED STIPULATION SINCE OMISSION OF THE STUART AND KILLEN PLANTS FROM THE SALE PROCESS VIOLATES IMPORTANT REGULATORY PRINCIPLES AND PRACTICES, DOES NOT BENEFIT RATEPAYERS AND DOES NOT PROMOTE THE PUBLIC INTEREST.

Intervenors opposed the Amended Stipulation and Recommendation to the extent that DP&L proposed the outright closure of the Stuart and Killen station and omitted these plants from the proposed sale process addressed in Paragraph 1(d). Closure of these plants without at least first exhausting a legitimate and open sale process for these plants cannot be justified under any circumstances. This proposal violates important regulatory principles and practices, does not benefit either DP&L or ratepayers and does not promote the public interest.

The linchpin of the entire Amended Stipulation and Recommendation is the transfer of generation assets to the affiliate, the proposed sale of the assets and the payment of any sale proceeds to reduce the associated debt left behind at DP&L as provided in Paragraphs 1(c), (d) and (e) of the Amended Stipulation. This is a significant proposal as the net book value of the generation assets exceeds $545 million and the associated debt exceeds $938 million, $300 million of which is State of Ohio Air Quality Debt directly related to pollution control at the generating stations. (Direct Malinak, DPL Ex. 2A, p. 27; RJM – 19A; Tr. Vol. I, 221, 222).

Transferring generation assets to an affiliate but leaving the associated debt with the regulated utility is an extraordinary circumstance. Jurisdictional customers of DP&L will be required to pay revenues to service debt for generation assets that provide no service to them. Indeed, the cash flow expected from the proposed DMR Rider will be used to pay interest obligations on existing debt at DP&L and DPL, Inc. (Jackson, Tr. Vol. I, 35; Amended Stipulation, ¶2(b)). This transaction was not addressed or approved by the Commission in its September 7, 2014 Finding and Order in Case No. 13-2420-EL-UNC. The proposal is, on its face, contrary to fundamental regulatory principles since the proposal imposes costs, the debt service, on jurisdictional customers that will no longer benefit from the transferred generation assets. (Medine, Tr. Vol. III, 555).

The supposed benefit is that AES will apply any sale proceeds to make discretionary debt payments to reduce the debt left behind at DP&L. (Amended Stipulation, ¶1(e)). However, outright closure of the Stuart and Killen stations, without first undergoing a possible sale in the sale process, will obviously generate no sale proceeds to apply to the debt. Jurisdictional circumstances will be required to provide revenues to service the debt associated with the Stuart and Killen plants without the benefit of any set-off. (Malinak, DPL Ex. 2A, p. 68; Tr. Vol. I, 221, 222).

Omission of the Stuart and Killen plants from the sale process is not in the interest of either DP&L or ratepayers. DP&L's own expert, Mr. Malinak, testified that since the generation assets would be transferred without the associated debt, the effect would be to increase DP&L's leverage rates which would be a credit negative, all else equal. (Direct Malinak, DPL Ex. 2A, p. 68). Indeed, on March 20, 2017, Standard & Poors downgraded DP&L's credit rating to BB- due in part to DP&L's announced closure of the Stuart and Killen plants. (DP&L Ex. 105; Tr. Vol. I, pp. 114, 200). Mr. Malinak further testified that if Stuart and Killen are closed, the plants would not undergo the sale process in the Amended Stipulation and would generate no sale proceeds which would be used to pay debt left behind with DP&L. (Tr. Vol. I, 202, 203). However, if Stuart and Killen were not closed and generated some sale proceeds in a sale process, those sale proceeds would be used to pay debt – <u>benefitting both DP&L and ratepayers</u>. (Tr. Vol. I, 213, 215).

The justification offered by DP&L to close the Stuart and Killen plants and omit the plants from the sale process is negative cash flow from plant operation. This assertion is not supported by the record and is irrelevant to the issue of whether the plants should be included in the sale process to produce proceeds to reduce the debt borne by jurisdictional circumstances.

First of all, notwithstanding the announced closure of the Stuart and Killen stations and the proposed transfer of generation assets, Mr. Malinak's financial analysis assumes that the generation assets remain assets of DP&L, including the revenues, costs of operation and CAPEX for generation assets. (Malinak, Tr. Vol. I, 149).

Second, the generation assets will not be transferred for 180 days until after the Commission approves the Amended Stipulation and after FERC approval. (Amended Stipulation, Paragraph 1(c)). DP&L itself proposes continued operation of the Stuart and Killen plants until June, 2018. DP&L witnesses could not explain any reason for the timing of a June, 2018 closure of the Stuart and Killen stations. That date may relate to PJM requirements as PJM provides capacity support for generators based on prices three (3) years in advance. (Direct Malinak, Int. Ex. 2, p. 32). In any event, there is more than sufficient time for DP&L to exhaust a sale process for the Stuart and Killen stations within the time frames provided in the Amended Stipulation and before final closure of these plants.

Third, events in the energy industry are dynamic and are changing dramatically. The Stuart and Killen stations are base load generating plants providing both energy and capacity service. Killen has had a capacity factor greater than 60% in every year during the 1999 through 2016 period. Stuart historically had a capacity factor greater than 60% but has had operating challenges in recent years. These operating challenges in 2014 are being addressed by DP&L management. (Direct Malinak, Int. Ex. 2, pp. 14-15).

The recent temporary reduction in natural gas prices has not adversely impacted Killen's capacity factor. The capacity factor for Killen in 2014 was over 70% which was not only high but higher than the capacity factor in 2013. (Direct Malinak, Int. Ex. 2, p. 15). Ms. Medine's analysis indicates that both the Stuart and Killen stations fall within the lower cost part of the PJM West Stack. (Direct Medine, Int. Ex. 2, p. 22-23; Int. Ex. 2A).

With the recent election of President Trump, the energy industry is changing dramatically with the elimination of many of the Obama-era EPA regulations inimical to the interests of coal and coal-fired generation. The Clean Power Plan has been stayed and will be reassessed. The Stuart and Killen stations are already compliant with MATS regulations and the Coal Combustion Residual (CCR) regulations. The Efficient Limitation Guidelines (ELG) are currently in litigation and are subject to reassessment by the U.S. EPA. (Direct Medine, Int. Ex. 2, pp. 24-26; Tr. Vol. III, 512).

In any event, DP&L's perception of the value of Stuart and Killen stations is irrelevant. As DP&L witness Malinak agreed, the price a willing buyer would be willing to pay for the Stuart and Killen plants depends on what assets are actually put up for sale and the motivation of that buyer at time of sale. That can only be determined at an actual sale. (Malinak, Tr. Vol. I, 213, 214).

Intervenor Medine was steadfast in her position that the reality is that third parties would value plant based on their own synergies, their own assumptions with respect to regulation and their own circumstances. The only way to measure the value of the Stuart and Killen plants on the market is to test the market by going to a legitimate, open sale process. A perceived low value for the Stuart and Killen stations would only serve to increase potential buyer interest. (Medine, Tr. Vol. III, 567-568, 569).

The fact remains that there are potential buyers in the market for coal fired generation. DP&L itself delayed divestiture to pursue a sale of generation assets to a third party which was to occur as early as 2014. (Second Entry on Rehearing, Case No. 12-426-EL-SSO, March 19, 2014). On April 25, 2017, Dynergy filed a Form 8-K with the SEC disclosing that on April 20, 2017, Dynergy affiliates executed an Asset Purchase Agreement to require DP&L's ownership share in the Zimmer and Miami Fort stations. Other Ohio utilities sold generation assets. Potential buyers include private equity, merchant generators and strategic players. (Direct Medine, Int. Ex. 2, p. 31).

Given that jurisdictional customers are asked to service the debt associated with the generation assets transferred, this Commission should have required DP&L to maximize every effort to sell the plants in a legitimate and open sale process. The Commission has the authority to impose a condition in the Amended Stipulation to require that the Stuart and Killen stations be included in the sale process. Pursuant to OAC Rule 4901:1-37-09(C), this Commission can establish terms and conditions of any transfer or sale, can ensure that there are no adverse impacts on jurisdictional customers and can ensure that the sale and transfer will promote the public interest. This Commission also has jurisdiction under OAC Rule 4901:1-37-04(C) to review affiliate transactions to ensure that an electric utility does not subsidize an affiliate by committing funds to benefit an affiliate or maintain its financial viability. Transferring generation <u>assets</u> to an affiliate but leaving the associated <u>debt</u> with the electric utility imposes costs, the debt service, on jurisdictional customers that will no longer benefit from the transferred generation assets. (Medine, Tr. Vol. III, 555). This Commission should have, at least, require that sale proceeds be maximized to include the Stuart and Killen stations under Paragraphs 1(c), (d) and (e) of the Amended Stipulation to benefit jurisdictional customers.

Outright closure of the Stuart and Killen plants without at least pursuing a possible sale process is not in DP&L's interest, is not in the ratepayers interest, is not in the interest of Ohio's coal production industry and is not in the interest of the local communities and the State of Ohio. The evidence convincingly establishes that the closure of the Stuart and Killen generating plants will not only severely harm coal production and destroy jobs in the Ohio Valley region but will absolutely <u>devastate</u> Adams County and the local communities. The Stuart and Killen stations are the largest employer in Adams County and provide significant tax revenues to the county, townships, and school districts. The loss of these plants is particularly devastating to Adams County which is a rural, sparsely populated county. The closure of these plants will have a rippling effect throughout the community impacting businesses, commercial enterprises, health care, schools and education and governmental resources. Ultimately, the entire State of Ohio will be impacted as the State will be required, one way or the other, to step in to support the local schools, provide unemployment and welfare benefits, support health care through Medicaid or other sources and support the local infrastructure, including roads and other resources that cannot be supported any more through local tax revenues. (See Citizen Exs. 1 and 2; Other Intervenor Exhibits).

There are other issues with the Amended Stipulation that were not addressed. Specifically:

> 1. FERC regulations require disclosures of <u>specific</u> generating assets and liabilities to be transferred specific to FERC plant accounts. Any transfer of assets approved in this case should be consistent with any transfer conditions addressed by FERC. (Schroeder, Tr. Vol. II, 294, 389, 390; Malinak, Tr. Vol. I, 194).
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> 2. There is no specific description or designation of generation assets to be transferred, including whether land will be transferred, what associated facilities such as coal ash disposal facilities and transmission lines will be transferred, or what equipment, inventories or materials will be transferred. (Malinak, Vol. I, 194, 195).
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> 3. There is no explicit requirement that "environmental liabilities" be transferred consistent with the Commission's September 7, 2014 Findings and Order in Case No. 13-2420-EL-UNC. And, there is no definition of what those "environmental liabilities" will entail. (Schroeder, Vol. II, 296, 398; Malinak, Vol. I, 196). This is significant as there is no specific decommissioning plan for the Stuart and Killen stations, no indication of how on-going maintenance will be provided and no provision for clean-up of environmental hazards. This is of particular concern to the Adams County residents and the Adams County Regional Water District.
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> 4. There is no definition of the "sale process" under Paragraph 1(d) of the Amended Stipulation. There should be a legitimate and open sale process to assure coal generation is fair marketed in good faith. (Medine, Vol. III, 569, 570).

C. THE COMMISSION'S CONCLUSION IN THE OCTOBER 20, 2017 OPINION AND ORDER THAT THE OMISSION OF THE STUART AND KILLEN STATIONS FROM THE AMENDED STIPULATION AND RECOMMENDATION BENEFITS RATEPAYERS, IS IN THE PUBLIC INTEREST AND DOES NOT VIOLATE IMPORTANT REGULATORY PRINCIPLES AND PRACTICES IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND IS <u>UNREASONABLE AND UNLAWFUL ON THAT BASIS.</u>

There is no question that DP&L in the proposed Amended Stipulation will transfer the Stuart and Killen plants to the unregulated subsidiary but will leave the associated debt with DP&L to be serviced by DP&L's jurisdictional customers. The exclusion of the Stuart and Killen plants from the proposed site process, with proceeds to partially offset the debt services, is not justified under any circumstance. DP&L witnesses wholly failed to justify the exclusion of these plants from the sale process.

DP&L witness Schroder confirms that the generation assets, including the five (5) generating stations, had not yet been transferred from DP&L to any entity. (Tr. Vol. II, 294). She did not know what the "non-debt" liabilities were or what were the "environmental liabilities" addressed in the September 17, 2014 Finding and Order in Case No. 13-2420-EL-UNC. (Tr. Vol. II, 296, 398). She was not familiar with the operation of the plants or permit compliance status. (Tr. Vol. II, 400). She did not address in her testimony the operational profitability of any plants or the capacity utilization factors for the plants. (Tr. Vol. II, 406). She performed no study or analysis of the operating cash flow less capital expenditures for any plant on an annual basis. She did not know of the required approval by PJM of a request for deactivation of any plant. (Tr. Vol. II, 404). She did not address any negative impacts of the announced closure of the Stuart and Killen stations by June, 2018 on the local community. (Tr. Vol. II, 407, 410, 412).

DP&L witness Malinak testified that DP&L has announced plans to close the Stuart and Killen stations by June, 2018 and committed in the Amended Stipulation to commence a sale process to sell its interests in the remaining plants. (Direct Malinak, DPL Ex. 2A, p. 27). Notwithstanding this provision of the Amended Stipulation, Mr. Malinak's financial analysis assumes that the generation assets remain assets of DP&L, including the revenues, costs of operation and CAPEX for generation assets. He testified:

> (Malinak) Yeah, I've not tried to model the sale of assets. It would be speculative to try to figure out when and how they will be sold and for how much. Same is true of the shutdown of the plants. (Tr. Vol. I, 149).

Mr. Malinak did not know what FERC approval for the transfer of assets was required (Tr. Vol. I, 194), did not know what "generation assets" were included with proposed transfer (Tr. Vol. I, 194), did not know if any land would transfer or whether coal and handling or landfill facilities would be included in the transfer (Tr. Vol. I, 195) and did not know what "non-debt" liabilities would transfer (Tr. Vol. I, 196).

Mr. Malinak testified that under the Amended Stipulation, the generation assets would be transferred without the transfer of any associated debt. That is, the debt associated with generation assets would be left behind with DP&L. (Direct Malinak, Ex. 2A, p. 68). The timely and full service of this debt would depend heavily on the cash flow from DP&L. (Direct Malinak, Ex. 2A, p. 30). Indeed, the cash flow expected from the proposed DMR Rider will be used to pay interest obligations on existing debt at DP&L and DPL Inc. (Amended Stipulation, ¶2(b); Jackson, Tr. Vol. I, 35).

Mr. Malinak testified that since the generation assets would be transferred without the associated debt, the effect would be to increase DP&L's leverage ratio which would be a credit negative, all else equal. He testified:

> I understand that the Companies have agreed that DP&L will transfer its generation assets to another DPL subsidiary and initiate a process to divest itself of its interest in certain of the transferred coal generation assets. This can be expected to have two offsetting effects on DP&L's credit ratings. First, I understand that the generation assets will be transferred without debt. That is, the debt will be left behind. This will increase DP&L's leverage ratio, which would be a credit negative, all else equal. However, the rating agencies also have described DP&L's co-ownership of coal assets as a "credit negative," separate from their near-term impact on DP&L's financial metrics, presumably due to their perceived riskiness. Furthermore, while the assets would be transferred out of DP&L, they still would be part of DPL until they are sold. Because DPL and DP&L are linked from a credit rating perspective, the assets still would have some effect on DP&L's credit ratings.

> Therefore, while DP&L's indicated credit rating in my model would decline, perhaps significantly, upon transfer, the credit rating that would be assigned to DP&L by the agencies is difficult to predict.

(Direct Malinak, DPL Ex. 2A, p. 68).

Indeed, on March 20, 2017, Standard & Poors downgraded DP&L's credit rating to BB-. (Tr. Vol. I, p. 114; DP&L Ex. 105). The downgrade was in part due to DP&L's announced closure of the Stuart and Killen plants. (Tr. Vol. I, 200).

Mr. Malinak testified that debt liabilities associated with generation assets on the balance sheet, whether fungible or not and whether allocated or not, remain with DP&L. (Tr. Vol. I, 198 199). Mr. Malinak made no effort to allocate any debt to generation assets. (Tr. Vol. I, 210). This debt is significant – a total of $938,691,000 as of December 31, 2016 (Direct Malinak, Ex. 2A, RJM – 19A). Of this $938 million in debt, $300 million is in State of Ohio, Ohio Air Quality Development Authority, 2006 and 2015 debt and directly relating to pollution control debt attributable to generation assets. (Tr. Vol. I, 221, 222).

Mr. Malinak testified that if Stuart and Killen are closed, the plants would not undergo the sale process in the Amended Stipulation and would generate no sale proceeds which could be used to pay debt left behind with DP&L. (Tr. Vol. I, 202, 203). However, if Stuart and Killen were not closed and generated some sale proceeds in a sale process, those sale proceeds would be used to pay debt – <u>benefitting both DP&L and ratepayers</u>. (Tr. Vol. I, 213, 215). What a potential buyer would be willing to pay for Stuart and Killen assets would depend on what generation assets were actually put up for sale (Tr. Vol. I, 213). And the price a willing buyer would be willing to pay would depend on the motivation of that buyer. (Tr. Vol. I, 214). That can only be determined at an actual sale. Absent a sale process, the financial results are speculative. (Tr. Vol. I, 149, 225).

No DP&L witness, including Mr. Malinak, addressed the economic detriment resulting from closure of the Stuart and Killen stations to Adams County, the local communities or the State of

Ohio generally (Tr. Vol. I, 192, Tr. Vol II, 412). No DP&L witness, including Mr. Malinak, addressed any impact on reliability of the grid due to closure of the Stuart and Killen stations. (Tr. Vol. I, 193).

On the other hand, Intervenor witness Emily Medine explained why DP&L's unilateral decision to close the Stuart and Killen power plants has not been justified, is not in the public interest and is likely to have extreme negative economic consequences for DP&L ratepayers and the public interest. (Direct Medine, Int. Ex 2, p. 2). Specifically, Ms. Medine concludes:

- The closure of Killen and Stuart is likely to increase power prices to DP&L customers.
- The closure of Killen and Stuart will have severe economic consequences on the communities in which the plants reside.
- Both the Killen and Stuart stations could be sold. Potential buyers include private equity, merchant generators, and strategic players including coal producers.
- There is no reason why a sales process to which DP&L has agreed for its other coal assets cannot be extended to include Killen and Stuart.
- Absent a demonstration by DP&L that including Killen and Stuart in a sale process is not in the public interest, the Amended Stipulation should be revised to include an obligation by DP&L to commence a sale process for these units as well.

(Direct Medine, Int. Ex. 2, p. 7).

This testimony was unrebutted.

The Stuart and Killen stations are base load generating plants. Killen has had a capacity factor greater than 60% in every year during the 1999 through 2016 period. Stuart historically had a capacity factor greater than 60% but has had challenges in recent years. Capacity factor is the ratio of actual generation to potential generation and a good indicator of plant performance. (Direct Medine, Int. Ex. 2, p. 13). Stuart's operating challenges in 2014 are being addressed by DP&L

including a significant restructuring of DP&L's management team. (Direct Medine, Int. Ex. 2, p. 14-15).

The recent, temporary reduction in natural gas prices have not adversely impacted Killen's capacity factor. The capacity factor for Killen in 2014 was over 70% which was not only high but higher than the capacity factor in 2013. Had low prices been an issue in 2014, Killen's capacity factor would have been adversely impacted. (Direct Medine, Int. Ex. 2, p. 15).

Ms. Medine concludes that the closure of Killen and Stuart without first attempting a sale of the units through the sale process is not in the public interest. She testified:

> There are two aspects of the closure economics that I question are in the best interest of DP&L ratepayers. First, a sale of these assets should generate positive value to DP&L both through a payment and a transfer of costs related to the ultimate closing of the plants thereby reducing the revenue needed to support DPL's heavy debt load. Second, while DP&L may own only 1100 MW of the two stations, including the ownership of other parties, the stations account for almost 3000 MW of generation. Historically and prospectively, this capacity has at most times been "in the money". If the capacity is retired, the supply curve contracts and power prices would be higher.
>
> (Direct Medine, Int. Ex. 2, pp. 22-23).

There are many benefits for ratepayers (and DP&L) if the Stuart and Killen stations are subject to the sale process rather than an outright closure. There is no downside. Ms. Medine testified the advantages of including Stuart and Killen in the site process are::

a. Possible positive value which would reduce DP&L's request for ESP riders

b. Transfer of plant closing costs

c. Reduced power costs to ratepayers

d. No economic destruction in the counties in which the power plants reside

e. Transfer of risk related to plant performance from DP&L or AES Ohio Generation LLC to a third party

(Direct Medine, Int. Ex. 2, p. 31, 32)

Ms. Medine was steadfast in her position that there was no justification for DP&L's exclusion of the Stuart and Killen stations from the proposed sale process in the Amended Stipulation.

> Q. All right. In summary at this point, Ms. Medine, do you see any justification for not including Stuart and Killen in a sale process?
>
> A. I see no justification. The only justification that's been provided is that there has been a negative cash flow, but the reality is that's not how third parties would typically value that plant based upon their own synergistic, their own assumptions with respect to regulation, with respect to the price they can buy their coal for, with respect to the power market. So as far as I'm concerned, for a company that's looking to add value, simply closing them without testing the market to see what somebody would pay is not a prudent strategy.
>
> (Tr. Vol. III, 567-568).

IV. <u>CONCLUSION</u>

For all of the above reasons, Intervenors request that the Commission grant rehearing and condition approval of the Amended Stipulation and Recommendation upon inclusion of the Stuart and Killen plants in the proposed sale process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the fling 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 20th day of November, 2017.

/s/ John F. Stock
John F. Stock

EXHIBIT A

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