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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the matter of the 2010 Long-Term)
Forecast Report of the Duke Energy Ohio,) Case No. 10-503-EL-FOR
Inc.)

PUCO

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JOINT MOTION FOR AN EXTENSION AND CONTINUANCE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
NATURAL RESOURCES DEFENSE COUNCIL,
AND
THE SIERRA CLUB

The Office of the Ohio Consumers' Counsel ("OCC"), Natural Resources Defense Council ("NRDC"), and the Sierra Club (collectively "Movants"), pursuant to Ohio Adm. Code 4901-1-13(A), jointly move the Public Utilities Commission of Ohio ("PUCO" or "Commission") for an extension and continuance of the currently-scheduled deadlines for the submission of pre-filed testimony by the PUCO Staff and intervenors that is currently set for February 1, 2011 and the hearing date that is currently set for February 8, 2011 in order to allow Movants adequate time to prepare their cases. These dates should be continued until after the Commission rules on the OCC's pending Motion to Compel and the Movants have a reasonable opportunity to review discovery responses by Duke Energy Ohio, Inc. ("Duke" or "Company"). For the foregoing reasons, the Commission should grant this Joint Motion for an Extension and Continuance so that pre-filed testimony by the PUCO Staff and intervenors is not due until at least four weeks after Duke has completely responded to all currently pending discovery requests. Also,

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the hearing should be continued until one week after the newly established date for the submission of expert testimony by the PUCO Staff and intervenors.

Good cause exists, under Ohio Adm. Code 4901-1-13(A), for granting this Joint Motion for an Extension and Continuance as set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

/s/ Jeffrey L. Small (with permission by Kase)
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Ann M. Hotz

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the matter of the 2010 Long-Term)
Forecast Report of the Duke Energy Ohio,) Case No. 10-503-EL-FOR
Inc.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Good cause exists for an extension and continuance, under Ohio Adm. Code 4901-1-13(A), of the currently-scheduled deadline for pre-filed (expert) testimony and the hearing date because Duke has consistently failed to timely and fully respond to discovery requests.¹ As a result of Duke's untimely responses, the OCC, NRDC, and the Sierra Club have been deprived of the time needed to thoroughly and adequately prepare their cases. An extension and continuance should be granted so that pre-filed testimony is not due until at least four weeks after Duke has completely responded to all currently pending discovery requests, including those by the OCC that are the subject of a fully-briefed Motion to Compel filed with the Commission on December 23, 2010.²

¹ The on-going hearing regarding Duke's Market Rate Offer ("MRO") filing, Case No. 10-2586-EL-SSO, seems to have contributed to Duke's lack of cooperation with discovery requests. See, e.g., Duke Memorandum Contra OCC Motion to Compel at 1 (December 29, 2010) (referring to R.C. 4928.142, the statutory provision associated with MROs). Duke's Revised LTFR is inconsistent with its MRO filing, and does not excuse the Company's failure to timely complete discovery.

² The Motion to Compel was subject to the expedited pleading practice application to this proceeding. No ruling has been issued.

II. ARGUMENT

A. Ohio Law Provides for Ample Discovery and the Opportunity to Prepare for this Proceeding.

An extension and continuance is necessary to provide all parties with a fair opportunity to thoroughly and adequately prepare for participation in the hearing in this proceeding. The Commission's discovery rules are intended to aid "full," "broad," and "reasonable" discovery, *Ohio Consumers' Counsel v. Public Utilities Comm'n*, 111 Ohio St.3d 300, 320 (2006), "in order to facilitate thorough and adequate preparation for participation in commission proceedings." Ohio Adm. Code 4901-1-16(A) and (B). Unfortunately, Duke's continued delay in responding to Movants' discovery requests has hindered Movants' ability to thoroughly and adequately prepare for hearing.

B. A Continuance is Necessary To Provide Time For a Ruling on, and Completion of, Discovery Regarding the OCC's Pending Motion To Compel.

Movants seek an extension and continuance in order to provide time for the Commission to rule on, and for completion of discovery regarding OCC's pending Motion to Compel. As explained in OCC's December 23 Motion to Compel, Duke has failed to respond to the following discovery requests:

- OCC's Interrogatory 31, served on Duke on June 25, 2010, which seeks the "input assumptions" that Duke used with its PAR model. (OCC Mot. to Compel at 7-8). Such input assumptions are necessary for OCC to be able to assess the validity of the resource modeling upon which Duke based its Revised LTFR.
- Large portions of OCC's Fourth Set of Discovery, served on Duke on September 17, 2010, which seek information and documents necessary to analyze the cost of and need for the nuclear power plant that Duke included among the generation resources in the Revised LTFR's "Optimized Plan[s]." (*Id.* at 8-9).

- OCC's Fifth Set of Discovery, served on Duke on October 26, 2010, which seeks information and documents regarding any changes to Duke's responses to OCC's previous discovery requests in light of the Revised LTFR that Duke filed on October 7, 2010. (*Id.* at 9-10). While Duke submitted a response on December 29 asserting that the revision of the LTFR did not require changes to any of the Company's previous discovery responses, such response cannot be fully provided until Duke responds to Interrogatory 31 and all of the Fourth Set of Discovery.

Assuming the Commission grants OCC's Motion to Compel, Duke would, presumably, need some time to answer and produce all of the documents responsive to the OCC's outstanding discovery requests. Yet, little time is available under the current schedule for the OCC's experts to prepare their testimony (due in less than two weeks from the day this motion is being filed). The hearing starts a week after that testimony is due.

Good cause exists for a continuance to allow Movants time to thoroughly and adequately prepare for hearing given the importance of the requested information and documents to Movants' ability to assess the Revised LTFR, the time needed for Movants to review whatever information and documents are produced, and the fact that OCC served these as yet unanswered discovery requests between two-and-a-half and six months ago.

C. Duke's Continued Failure to Timely Respond to NRDC and Sierra Club's Discovery Requests also Constitutes Good Cause for an Extension and Continuance.

Good cause for a continuance is also provided by Duke's failure to timely respond to NRDC and Sierra Club's discovery requests. NRDC and Sierra Club served their first set of discovery on Duke on August 6, 2010. Rather than comply with the 20-day deadline for discovery responses set forth in Ohio Adm. Code 4901-1-19(A) and 4901-1-

20(C), Duke submitted responses in a staggered fashion over a four-month period ending December 16, 2010. In doing so, Duke neglected to produce to NRDC and Sierra Club many of the responses and attachments that the company had produced to the other parties in the proceeding, despite NRDC and Sierra Club specifically requesting all such responses in their first set of discovery. A complete set of those responses and attachments were finally produced via five e-mails sent by Duke on January 13 and 14, and four CDs delivered on January 17, 2011, which is months after they were initially produced to the other parties. In addition, as NRDC and Sierra Club informed Duke in a January 16, 2011 e-mail,³ the company's responses to at least four of NRDC and Sierra Club's first set of discovery requests are inadequate. As of the time this Motion was finalized on the morning of January 19, Movants have not received a response to that January 16 e-mail.

Duke also failed to timely respond to NRDC and Sierra Club's second set of discovery requests, which were served on December 16, 2010. On January 7, 2011, Duke responded to most of those requests. At least two of those responses are inadequate, as NRDC and Sierra Club informed Duke's counsel in a January 18 e-mail.⁴ In addition, the company provided no response to four multi-part requests for production of documents submitted by NRDC and Sierra Club, stating simply that they would "supplement" the response.⁵ After two follow up e-mails to Duke's counsel, Duke informed NRDC and Sierra Club on January 14 that they are "targeting the outstanding

³ Attachment 1.

⁴ Attachment 2.

⁵ Attachment 3.

discovery responses . . . to be finalized and sent out on Monday” January 17.⁶ On that day, however, Duke informed NRDC and Sierra Club that the documents would not be produced on January 17 because Duke’s counsel was involved in the MRO hearing.⁷ No alternative date for production has been identified as of the time this motion was finalized.⁸

In light of Duke’s failure to timely respond to NRDC and Sierra Club’s discovery requests and the time needed for Movants to review the information and documents that have been or may be produced, good cause exists for an extension and continuance to allow Movants time to thoroughly and adequately prepare pre-filed testimony and for the hearing.

III. CONCLUSION

For the good cause shown, the Commission should grant this Joint Motion for an Extension and Continuance so that expert testimony by the PUCO Staff and intervenors is not due until at least four weeks after Duke has completely responded to all currently pending discovery requests. The hearing should be continued until one week following the new date set for the filing of expert testimony by the PUCO Staff and intervenors. The discovery requests include those subject to the fully-briefed Motion to Compel that the OCC filed with the Commission on December 23, 2010.

⁶ Attachment 4.

⁷ Attachment 5.

⁸ While NRDC and Sierra Club are attempting to work out these ongoing discovery disputes without involving the Commission, they reserve the right to file a Motion to Compel Duke to adequately respond.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

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Jeffrey L. Small, Counsel of Record
Ann M. Hotz

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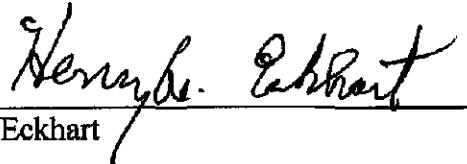
NATURAL RESOURCES DEFENSE COUNCIL
AND SIERRA CLUB

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Motion was served via electronic transmission to the persons listed below, on this 19th day of January 2011.



Henry Eckhart

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Attorneys for the Environmental Law & Policy Center

From: Fisk, Shannon
To: Watts, Elizabeth H;
cc: Kuhnell, Dianne B;
Subject: Duke Energy Ohio IRP - Inadequate Responses to NRDC & SC Discovery
Date: Sunday, January 16, 2011 9:03:00 PM

Elizabeth,

We believe that Duke's responses to the following NRDC and Sierra Club's discovery requests are inadequate, and write in an effort to resolve such inadequacies.

First, the response to NRDC & SC INT-01-014 is incomplete. That interrogatory sought "the annual CO₂ prices, natural gas prices, coal prices, and power plant construction costs that you assumed as part of this planning process." Duke's response, however, only provides such data with regards to one of the four resource portfolio alternatives that Duke modeled – the Low Carbon SB221EE Scenario. The requested data used in the other resource portfolio alternatives is also responsive to NRDC & SC INT-01-014. The Resource Plan also explains that varying coal and gas prices were evaluated, apparently in analyses that look at additional scenarios rather than just the four selected resource portfolio alternatives (Revised Resource Plan at 193). Such varied prices are responsive to NRDC & SC INT-01-014 and must be provided.

Second, Duke's answer to NRDC & SC POD-01-031 is not responsive to the request. That POD sought "a copy of any assessment of the potential for or cost of renewable resources within the Duke service territory, in the State of Ohio, or in one of the five states contiguous to Ohio performed by or for Duke as part of this planning process." In response, Duke provided an Excel spreadsheet that simply identifies various cost data regarding some renewable and non-renewable resources. Such spreadsheet is non-responsive because it does not constitute an assessment of the potential for renewable resources, and simply provides cost data without providing any assessment of that data or how it was derived. Please provide all such responsive documents, or a verified supplemental response that Duke does not have any such assessments.

Third, Duke's objection to NRDC & SC POD-01-041 is improper because the Resource Plan includes a new nuclear facility in each of the four resource portfolio alternatives that Duke modeled. POD-01-041 sought "a copy of any cost estimate, economic analysis, or other document regarding the relative costs and benefits of the nuclear power plant being considered for the Piketon site." Duke objected on

the ground that “issues related to the construction of nuclear generation are not relevant” because of positions that Duke has taken in a filing in a different proceeding pending before the Commission. But this objection fails because Duke itself has made construction of nuclear generation relevant to this proceeding by including a 400MW or 800MW nuclear facility as a primary portion of each of its four “optimized plans.” Unless and until Duke submits a revised Resource Plan that does not include new nuclear generation, discovery regarding such nuclear generation are relevant to this proceeding and must be responded to. Duke also states in response to POD-01-041 that it used the cost estimate developed by its affiliate Duke Energy Carolinas for the proposed Lee Nuclear Station as the basis for its modeling of nuclear generation in this proceeding, and notes that the Lee Nuclear Station estimate “provides greater detail for a nuclear cost estimate than would otherwise be available.” Given that Duke is using that cost estimate in this proceeding, such cost estimate and the information supporting it are responsive to POD-01-041 and must be produced.

Fourth, Duke’s response to NRDC & SC POD-01-042 is improper for the same reasons as discussed above with regards to NRDC & SC POD-01-042.

Please let me know as soon as possible if Duke intends to revise its responses to these discovery requests or if you wish to discuss these issues further, as we would like to resolve these issues without having to involve the Commission.

Shannon

Shannon Fisk
Senior Attorney
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
(312) 651-7904

From: Fisk, Shannon
To: "Watts, Elizabeth H";
cc: "Kuhnell, Dianne B";
Subject: RE: Duke Energy Ohio IRP - Inadequate Responses to NRDC & SC Discovery
Date: Tuesday, January 18, 2011 5:22:00 PM

Elizabeth,

In addition to the responses discussed below, we also believe that the following Duke responses to NRDC and Sierra Club's second set of discovery are inadequate, and we write in an effort to resolve such inadequacies.

First, Duke's response to NRDC & SC POD-02-075 is inadequate. In that POD, we requested "a copy of any assessment of energy efficiency potential in Duke's service area in Ohio or nationwide created by the Rocky Mountain Institute." Duke responded that there were "none available." The attached document, however, describes how Duke Energy engaged with the Rocky Mountain Institute to evaluate options for reducing Duke's carbon footprint. According to that document, the Rocky Mountain Institute's analysis looked at a number of planning scenarios for Duke, including "the potential and costs of a number of low-carbon resources, including energy efficiency . . .".

The same statement can be found on the description of the Rocky Mountain Institute analysis provided on Duke's website at <http://sustainabilityreport.duke-energy.com/environmental/rocky-mtn.asp>. Documents from such analysis regarding Duke's energy efficiency potential are responsive to NRDC & SC POD-02-075 and must be provided.

Second, Duke's response to NRDC & SC POD-02-076 is inadequate. In that POD, we requested "a copy of any assessment since 2005 of the potential for or cost of combined heat and power within the Duke service territory, in the State of Ohio, or in one of the five states contiguous to Ohio performed by Duke or by any affiliate or subsidiary of Duke, including but not limited to, Duke Energy Generation Services." Duke first objected on the grounds that this request is "overly broad, unduly burdensome, and not designed to lead to the discovery of admissible evidence." This objection fails, however, because combined heat and power ("CHP") is an available option for Duke to satisfy energy needs and, therefore, the cost and potential for CHP are relevant to the sufficiency and reasonableness of the resource planning at

issue in this proceeding. Duke next objects on the grounds that Duke Energy Ohio affiliates are not within the jurisdiction of the Commission. The relevant test, however, is not whether the entity creating a responsive document is within the jurisdiction of the Commission. Instead, the test is whether a responsive document is "in the possession, custody, or control of the party upon whom the request is served." O.A.C. 4901-1-20(A)(1). In addition, we note that Duke Energy's own website identifies at least six CHP projects that Duke is engaged, including one in Cincinnati (Procter & Gamble), one in Kentucky (Lafarge Gypsum), and two in Michigan. <http://www.de-gs.com/projects-manufacturing.asp> Any documents "in the possession, custody, or control" of Duke regarding the cost or potential for those CHP projects, or regarding the potential for or cost of CHP more generally, are responsive to NRDC & SC POD-02-076 and must be produced.

Please let me know as soon as possible if Duke intends to revise its responses to these discovery requests or if you wish to discuss these issues further, as we would prefer to resolve these issues without having to involve the Commission. As you know, the current deadlines for expert reports and the hearing date are rapidly approaching in this proceeding, so we expect a response to the issues addressed above and those addressed in our previous e-mail below by COB on Thursday, January 20.

Shannon

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Chicago, IL 60606
(312) 651-7904

From: Fisk, Shannon
Sent: Sunday, January 16, 2011 9:03 PM

To: Watts, Elizabeth H
Cc: Kuhnell, Dianne B
Subject: Duke Energy Ohio IRP - Inadequate Responses to NRDC & SC Discovery

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Please let me know as soon as possible if Duke intends to revise its responses to these discovery requests or if you wish to discuss these issues further, as we would like to resolve these issues without having to involve the Commission.

Shannon

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Fisk, Shannon

From: Cocanougher, Kristen [Kristen.Cocanougher@duke-energy.com]
Sent: Friday, January 07, 2011 4:14 PM
To: henryeckhart@aol.com; Fisk, Shannon
Cc: Heintz, Michael -elpc; Will Reisinger; thomas.mcnamee@puc.state.oh.us; rkelfer@elpc.org; Dan.Johnson@puc.state.oh.us; JEFF SMALL; ANN HOTZ
Subject: CONFIDENTIAL Duke Energy Ohio Responses to NRDC & Sierra Club 2nd Set POD and INT
Attachments: Scanned from a Xerox multifunction device001.pdf; DOC.PDF

Attached please find Duke Energy Ohio's responses to NRDC & SC 2nd set of discovery. Please note these are being produced pursuant to a confidentiality agreement. Duke will supplement POD 059 and 61-64. Attachments will be send in a separate email due to the size. Thank you.

PLEASE NOTE MY NEW OFFICE NUMBER IS 513-287-4315.

Kristen Cocanougher
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Fax (513) 287-4386
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Fisk, Shannon

From: Kuhnell, Dianne B [Dianne.Kuhnell@duke-energy.com]
Sent: Friday, January 14, 2011 2:48 PM
To: Fisk, Shannon
Subject: Duke Energy Ohio Responses STAFF & OCC, etc. Pt.5
Attachments: occ 3rd set int 10-503001.pdf; occ 3rd set pod 10-503001.pdf; occ 4th set int 10-503001.pdf; occ 4th set pod 10-503001.pdf; occ 5th set int 10-503 001.pdf; occ 5th set pod 10-503 001.pdf; DOC.PDF; DOC.PDF; NRDC -SC 2ND POD001.pdf; OCC POD15 EXCEL attac pg 1-2001.pdf

Pt. 5...

I am also sending via overnight mail for Monday delivery copies of four CDs with Confidential response to OCC and STAFF discovery requests.

The attached in Pt. 1-5 should be all the intervenor responses. If you find you are missing something, please let me know.

We are targeting the outstanding discovery responses POD-061- 064 to be finalized and sent out on Monday. The response to POD-059 is attached here as it requests all other discovery responses sent. My understanding is the responses to POD-02-061 are 062 are the similar attachments Elizabeth referred to in an earlier e-mail about coordinating with counsel in North Carolina in order to get them to you. The unredacted version of LTFR in response to POD-01-045 should also be sent out Monday.

Thank you
Dianne

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Fax: (513) 287-4386

Fisk, Shannon

From: Kuhnell, Dianne B [Dianne.Kuhnell@duke-energy.com]
Sent: Monday, January 17, 2011 12:58 PM
To: Fisk, Shannon
Subject: FW: Duke Energy Ohio Responses STAFF & OCC POD-01-045
Attachments: 10-503 Revised Confidential LTFR001.pdf; 10-503 Revised Confidential LTFR001.pdf

Shannon,

Attached is the response to POD-01-045, the Confidential Revised LTFR filed under seal in this case.

The responses to POD-02-061-064 may not be available today as our attorneys are still in the throes of the MRO hearing in Columbus during the beginning of this week.

Thank you
Dianne

From: Kuhnell, Dianne B
Sent: Friday, January 14, 2011 3:48 PM
To: 'Fisk, Shannon'
Subject: Duke Energy Ohio Responses STAFF & OCC, etc. Pt.5

Pt. 5...

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Thank you
Dianne

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