

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for the Establishment of a) Case No. 12-2400- EL-UNC
Charge Pursuant to Revised Code Section)
4909.18.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 12-2401-EL-AAM
Accounting Methods.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for the Approval of a) Case No. 12-2402- EL-ATA
Tariff for a New Service.)

**DUKE ENERGY OHIO, INC.’S MOTION TO COMPEL
(EXPEDITED RULING REQUESTED)**

Pursuant to Ohio Admin. Code Rule 4901-1-23 and other applicable authority, Applicant Duke Energy Ohio, Inc. (Duke Energy Ohio) respectfully moves for an order compelling FirstEnergy Solutions Corp. (FES) to provide complete responses to Duke Energy Ohio’s First Set of Interrogatories and Requests for Production of Documents (First Discovery Requests). As demonstrated in the attached Memorandum in Support, FES failed to answer Interrogatory No. 14, seeking its communications with other intervenors by improperly invoking the common interest privilege, even though it readily admits that it has no Joint Defense Agreement—either oral or written—with any other intervenor. For the reasons set forth below, the common interest privilege does not apply to the information being sought by Duke Energy Ohio, and FES should be directed to provide complete responses to all outstanding discovery requests immediately. All efforts to resolve this dispute are set forth in the attached Affidavit of Counsel.

Pursuant to Ohio Admin. Code Rule 4901-1-12(C), Duke Energy Ohio also requests an expedited ruling on this Motion to Compel. Given that the hearing is already underway, an

expedited ruling is necessary to allow Duke Energy Ohio a fair opportunity to review and prepare its cross-examination of FES witnesses based on FES's discovery responses.

Dated: April 17, 2013

Respectfully submitted,



Amy B. Spiller
Rocco O. D'Ascenzo
Jeanne W. Kingery
Elizabeth H. Watts
Duke Energy Business Services LLC
139 E 4th Street, 1303-Main
Cincinnati, Ohio 45202-4003
amy.spiller@duke-energy.com
rocco.dascenzo@duke-energy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com

Attorneys for Applicant Duke Energy Ohio, Inc.

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In the Matter of the Application of Duke)
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Energy Ohio, Inc. for the Approval of a) Case No. 12-2402- EL-ATA
Tariff for a New Service.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

FES has asserted inconsistent and contradictory positions regarding its interests in this proceeding to delay providing complete, non-privileged responses to Duke Energy Ohio’s First Discovery Requests. When FES and all other parties intervened in these proceedings, they represented that none of the other intervening parties adequately represented their interests.¹ When Duke Energy Ohio asked FES to provide a list of each meeting, teleconference or communication it had with any intervenor, FES asserted it shared a common interest privilege with all intervening parties. *See* Ex. ABS-1². at p. 7. When Duke Energy Ohio asked if FES had entered any oral or written agreements with any intervenor—including any joint defense agreement, or agreements to support or oppose any item or position—FES responded that it had no such agreements. *Id.*

¹ Motion to Intervene of FirstEnergy Solutions Corp., September 10, 2012, at p.1.

² “ABS” refers to the Affidavit of Amy B. Spiller being filed contemporaneously herewith.

Interrogatory No. 14: Provide a list of each meeting, teleconference, or communication (written or oral), between FES and any Intervening party, or member of any Intervening Party, regarding the above-referenced matter . . .

RESPONSE: Objection . . . FES further objects to the extent the Request seeks information protected by the common interest privilege . . .

Interrogatory No. 15: Please state whether there are any agreements between FES and any Intervening Party to the above-captioned proceeding, or any member or affiliate of an Intervening Party to the proceeding, that concern said proceeding. The term “Agreements” means written or oral terms agreed upon by the participants and includes, but is not limited to, protective agreements, confidentiality agreements, joint defense agreements, agreements to support or oppose any item or position, and any other commitments made between FES and any Intervening Party . . .

RESPONSE: . . . Subject to its objections, FES states that FES has not entered into any such agreements.

Id. (emphasis added).

FES cannot have it both ways. Even if it did claim to have a Joint Defense Agreement with other parties—which it does not—the information requested in Duke Energy Ohio’s First Discovery Requests is not protected under any common interest privilege because the parties do not share an identity of interests and the sought-after information includes meetings and communication not in the presence of counsel.

II. ARGUMENT

A. No Common Interest Privilege Attaches To Communications Among The Intervenors Because They Do Not Share An Identity Of Interests.

In order for a communication to be subject to a common interest privilege, the parties to that communication must share an identical legal interest. *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (“[F]or a communication to be protected, the interests must be identical, not similar, and be legal, not solely commercial.”) (citation omitted); *see also Square D. Co. v. E.I. Elecs., Inc.*, 264 F.R.D. 385, 391 (N.D. Ill 2009) (rejecting “common interest” or “joint defense” privilege claims because entity “has not demonstrated that its interest

is identical to [other entity's] interest); *Net2Phone, Inc. v. eBay, Inc.*, No. 06-2469, 2008 U.S. Dist. LEXIS 50451, *23 (D. N.J. June 26, 2008) (“Parties have a ‘community of interest’ where they have an identical legal interest with respect to the subject matter of a communication between an attorney and client concerning legal advice[.]”) (inner quotation omitted); *In re Diet Drugs Prod. Liab. Litig.*, No MDL 1203, 2001 U.S. Dist. LEXIS 5494 *15 (E.D. Pa. April 19, 2001) (“[T]he subject matter [of communications] must be of a legal nature—something more than mere concurrent legal interest or concerns—and there may not exist any divergence in the interests[.]”) (emphasis added); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) (“The key consideration is that the nature of the interest be identical, not similar[.]”).

FES seeks to avoid answering Duke Energy Ohio’s First Discovery Requests by objecting—conveniently—that its interests are identical with other intervenors to support a common interest privilege. However, that was not the case when FES intervened in these proceedings. To intervene, FES—and all other successful intervenors—were required to demonstrate that existing parties in this proceeding did not adequately represent their interests. Ohio Admin. Code Rule 4901-1-11(B)(5). Indeed, in opposing DEO’s application, the intervenors represented—and were found by the Commission—to not have identical interests. Thus, it is a matter of sheer convenience that FES now contends that its interests are not only similar to those of the other intervenors, but that those interests are identical.

Moreover, FES bears the burden of proving that it shares a common interest with each of the other intervenors. *Leader Techs.*, 719 F. Supp. 2d at 377. As a matter of hornbook law, parties seeking to protect a common interest usually enter a joint defense agreement. *See generally State ex rel. Bardwell v. Cordray*, 181 Ohio App. 3d. 661, 680 (10th Dist. 2009)

(“Another step beyond the joint client situation is in the instance where two or more clients, each represented by their own lawyers, meet to discuss matter of common interest—commonly called a joint defense agreement or pooled information situation.”) (citing *McCormick on Evidence* (6th ed.) § 91.1). Here, there is no “joint client situation” because FES’s counsel does not represent any other intervening party. *See* ABS-1. Moreover, by FES’s own admission, it has no joint defense agreement with any other intervening party. Therefore, it is mere pretext for FES to assert a common interest privilege as the basis to block Duke Energy Ohio from reasonable discovery. FES should be compelled to provide a complete response to Duke Energy Ohio’s First Discovery Requests.

B. The Common Interest Privilege Does Not Apply To Communications That Do Not Involve Counsel.

Neither the common interest nor joint defense privilege attaches to communications that do not include attorneys. *United States v. Lucas*, 2009 U.S. Dist. LEXIS 123884, *15 (N.D. Ohio 2009) (“The court agrees that this joint defense privilege requires the involvement of counsel.”); *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (“The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in the law nor logic and is rejected.”).

Duke Energy Ohio Interrogatory No. 14 seeks the identification of all meetings, teleconferences, or communications between FES and any intervening party, regardless of whether counsel is present. *See* ABS-1. In the absence of a joint defense agreement, FES should be compelled to identify or produce document sufficient to identify all such meetings and communications. At the very least, FES should be compelled to identify all meetings and communications between FES and the other intervenors outside the presence of counsel.

C. Expedited Treatment Is Warranted.

Duke Energy Ohio's First Discovery Requests were timely served on February 22, 2013. Despite counsels' efforts, FES has refused to provide a response to Interrogatory No. 14. It is now past time for FES to respond. With the hearing underway, and FES's witnesses expected to take the stand next week, FES should be compelled to provide complete responses to Duke Energy Ohio's First Discovery Requests immediately.

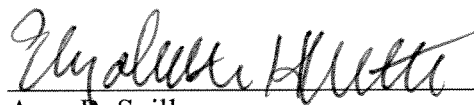
Pursuant to Ohio Admin. Code Rule 4901-1-12(C), Duke Energy Ohio also requests an expedited ruling on this Motion to Compel. Given that the hearing is already underway, an expedited ruling is necessary to allow Duke Energy Ohio a fair opportunity to review and prepare its cross-examination of FES witnesses based on FES's discovery responses. Under the circumstances, the Company has not had an opportunity to consult with other Parties.

III. CONCLUSION

For the foregoing reasons, Duke Energy Ohio respectfully requests that the Commission grant its Motion to Compel in its entirety.

Dated: April 17, 2013

Respectfully submitted,

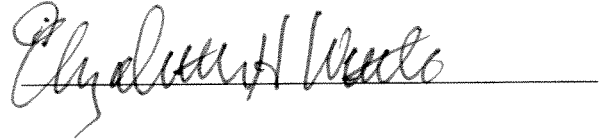


Amy B. Spiller
Rocco O. D'Ascenzo
Jeanne W. Kingery
Elizabeth H. Watts
Duke Energy Business Services LLC
139 E 4th Street, 1303-Main
Cincinnati, Ohio 45202-4003
amy.spiller@duke-energy.com
rocco.dascenzo@duke-energy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com

Attorneys for Applicant Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Compel by Duke Energy Ohio, Inc. was served this 17th day of April, 2013, via electronic mail on the parties below.



Steven Beeler
John Jones
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
Steven.beeler@puc.state.oh.us
John.jones@puc.state.oh.us

Counsel for Staff of the Commission

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
cmooney2@columbus.rr.com

Counsel for Ohio Partners for Affordable Energy

David F. Boehm
Michael L. Kurtz
Jody M. Kyler
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkyler@BKLawfirm.com

Counsel for the Ohio Energy Group

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202

Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com; fdarr@mwncmh.com;
joliker@mwncmh.com;
mpritchard@mwncmh.com

Counsel for Industrial Energy Users-Ohio

Maureen R. Grady
Kyle L. Kern
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
grady@occ.state.oh.us; kern@occ.state.oh.us

Counsel for the Ohio Consumers' Counsel

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202
dhart@douglasshart.com

Counsel for the Greater Cincinnati Health Council

Kimberly W. Bojko
Mallory M. Mohler
Carpenter Lipps & Leland LLP

dhart@douglasshart.com

Counsel for Cincinnati Bell Inc.

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com

Counsel for City of Cincinnati

James F. Lang
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland, Ohio 44114
jlang@calfee.com; talexander@calfee.com

Counsel for FirstEnergy Solutions Corp.

Jay E. Jadwin
Yazen Alami
American Electric Power Service Corporation
155 Nationwide Avenue
Columbus, Ohio 43215
jejadwin@aep.com
yalami@aep.com

Counsel for AEP Energy

David Stahl
Eimer Stahl LLP
224 S. Michigan Avenue, Suite 1100
Chicago, Illinois 60604
dstahl@eimerstahl.com

**For Constellation NewEnergy, Inc. and
Exelon Generation Company, LLC**

David I. Fein
Constellation Energy Group, Inc.

280 North High Street, Suite 1300
Columbus, Ohio 43215
Bojko@CarpenterLipps.com
Mohler@CarpenterLipps.com

Counsel for The Kroger Company

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com

Counsel for FirstEnergy Solutions Corp.

David A. Kutik
Lydia M. Floyd
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114
dakutik@jonesday.com; lfloyd@jonesday.com

Counsel for FirstEnergy Solutions Corp.

M. Howard Petricoff
Lija Kaleps-Clark
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
lkalepsclark@vorys.com

**Counsel for Constellation NewEnergy, Inc.
and Exelon Generation Company, LLC**

Stephen Bennett
Exelon Corporation
300 Exelon Way
Kennett Square, Pennsylvania 19348
Stephen.bennett@exeloncorp.com

**For Constellation NewEnergy, Inc. and
Exelon Generation Company, LLC**

Cynthia Fonner Brady
Constellation Energy Resources, LLC

550 W. Washington Blvd., Suite 300
Chicago, Illinois 60661
David.fein@constellation.com

**For Constellation NewEnergy, Inc. and
Exelon Generation Company, LLC**

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
stnourse@aep.com
mjsatterwhite@aep.com

Counsel for Ohio Power Company

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mhpeticoff@vorys.com

**Counsel for Miami University and the
University of Cincinnati**

Kevin J. Osterkamp
Roetzel & Andress LPA
PNC Plaza, 12th Floor
155 East Broad Street
Columbus, Ohio 43215
kosterkamp@ralaw.com

**Counsel for Wal-Mart Stores East, LP, and
Sam's East, Inc.**

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
BarthRoyer@aol.com

Counsel for Dominion Retail, Inc.

550 W. Washington Blvd., Suite 300
Chicago, Illinois 60661
Cynthia.brady@constellation.com

**For Constellation NewEnergy, Inc. and
Exelon Generation Company, LLC**

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mhpeticoff@vorys.com
smhoward@vorys.com

Counsel for Interstate Gas Supply, Inc.

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mhpeticoff@vorys.com;
smhoward@vorys.com

**Counsel for the Retail Energy Supply
Association**

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
Judi.sobecki@DPLINC.com
Randall.griffin@DPLINC.com

**Counsel for The Dayton Power and Light
Company**

Rick D. Chamberlain
Behrens, Wheeler & Chamberlain
6 N.E. 63rd Street, Suite 400
Oklahoma City, Oklahoma 73105
Rdc_law@swbell.net

Counsel for Wal-Mart Stores East, LP, and

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, Pennsylvania 15212-5817
Gary.A.Jeffries@dom.com

Counsel for Dominion Retail, Inc.

Andrew J. Sonderman
Margeaux Kimbrough
Kegler Brown Hill & Ritter Co, LPA
Capitol Square, Suite 1800
65 East State Street
Columbus, Ohio 43215
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com

Counsel for DPL Energy Resources, Inc.

Sam's East, Inc.

J. Thomas Siwo
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
tsiwo@bricker.com
mwarnock@bricker.com

**Counsel for The Ohio Manufacturers'
Association**

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Tariff for a New Service.)

AFFIDAVIT OF AMY B. SPILLER

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Amy B. Spiller, being first duly sworn, states as follows:

1. I am counsel for the Applicant Duke Energy Ohio, Inc. (Duke Energy Ohio) in the above-captioned proceedings and have personal knowledge of the matters contained herein.
2. On February 22, 2013, Duke Energy Ohio's First Set of Interrogatories and Requests for Production of Documents were served by first-class mail and electronic mail on counsel for FirstEnergy Solutions Corp. (FES).
3. FES provided its responses and objections to Duke Energy Ohio's First Discovery Requests on March 14, 2013.
4. On March 23, 2013, I sent an email to FES's counsel outlining the deficiencies in FES's discovery responses. On April 8, 2013, FES's counsel agreed to supplement certain of its responses, but insisted that a "common interest privilege applies to all parties opposing [DEO's]

request for a new capacity charge” and that it would not provide a further response to Interrogatory No. 14. A true and accurate copy of the April 8, 2013 email exchange is attached hereto as Exhibit ABS-1.


5. On April 14, 2013, on the eve of this hearing, FES’s counsel further clarified that it believes that it has a “common interest with all parties that seek to dismiss [DEO’s] Application.” A true and accurate copy of the April 14, 2013 email is attached hereto as Exhibit ABS-2.

6. To date, FES has not represented that it will provide any response to Interrogatory No. 14.



Amy B. Spiller

Sworn to before me this 17th day
of April, 2013



Elizabeth H. Watts, Attorney at Law
Notary Public – My Commission does not expire.

Watts, Elizabeth H

From: Spiller, Amy B
Sent: Wednesday, April 17, 2013 3:55 PM
To: Watts, Elizabeth H
Subject: Fw: Duke Energy Ohio Capacity Case - FES discovery responses

From: Spiller, Amy B
Sent: Tuesday, April 16, 2013 07:38 PM Eastern Standard Time
To: Sineneng, Philip <Philip.Sineneng@thompsonhine.com>
Subject: FW: Duke Energy Ohio Capacity Case - FES discovery responses

Amy B. Spiller

Deputy General Counsel
Duke Energy Business Services
139 E. Fourth Street, 1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)

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From: Lydia M Floyd [mailto:lfloyd@jonesday.com]
Sent: Monday, April 08, 2013 10:12 AM
To: Spiller, Amy B
Cc: Kingery, Jeanne W; D'Ascenzo, Rocco O
Subject: Fw: Duke Energy Ohio Capacity Case - FES discovery responses

Amy,

Please see the response below.

Best regards,

Lydia



Lydia M. Floyd

North Point • 901 Lakeside Avenue • Cleveland, OH 44114.1190 U.S.A.
DIRECT 216.586.7241 • FAX 216.579.0212
LFLOYD@JONESDAY.COM

----- Forwarded by Lydia M Floyd/JonesDay on 04/08/2013 09:05 AM -----

From: Lydia M Floyd/JonesDay
To: "Spiller, Amy B" <Amy.Spiller@duke-energy.com>
Cc: "Kingery, Jeanne W" <Jeanne.Kingery@duke-energy.com>, Mark Hayden <haydenm@firstenergycorp.com>, David A. Kutik/JonesDay@JonesDay, J.Lang@Calfec.com, talexander@calfec.com
Date: 03/26/2013 06:26 PM
Subject: Re: Duke Energy Ohio Capacity Case - FES discovery responses

Amy,

We plan to supplement our Responses to Interrogatories Nos. 4, 6, 7, 8, 9 and 12 and Requests for Production Nos. 3 and 8 tomorrow. Regarding your questions concerning our Response to Interrogatory No. 14, it is our position that the common interest privilege applies to all parties opposing Duke's request for a new capacity charge. In addition, as indicated in our Response to Interrogatory No. 14, the discovery emails have been exchanged with Duke.

Best regards,

Lydia



Lydia M. Floyd

North Point • 901 Lakeside Avenue • Cleveland, OH 44114.1190 U.S.A.
DIRECT 216.586.7241 • **FAX** 216.579.0212
LFLOYD@JONESDAY.COM

From: "Spiller, Amy B" <Amy.Spiller@duke-energy.com>
To: Lydia M Floyd <lfloyd@jonesday.com>
Cc: "Kingery, Jeanne W" <Jeanne.Kingery@duke-energy.com>
Date: 03/23/2013 01:48 PM
Subject: Duke Energy Ohio Capacity Case - FES discovery responses

Lydia

In reviewing FirstEnergy Solutions' responses to the discovery requests served upon it, I wanted to share some observations with certain of the responses and further ascertain whether FES intends to supplement its responses. These observations are noted below.

Interrogatory No. 4

I can appreciate that FES may not have known, on March 14, whether it would submit testimony in these proceedings. But as intervenor testimony is due on Tuesday, I anticipate that such a decision has since been made. We would therefore ask that FES supplement this interrogatory.

Interrogatory No. 6

Please advise whether this interrogatory will be supplemented to provide information applicable to FES's testifying witnesses.

Interrogatory Nos. 7 & 8

Please advise whether FES will supplement these interrogatories with regard to its testifying witnesses. I would further note that these interrogatories are not written in a way to divulge any privileged information. They are merely seeking an identification.

Interrogatory No. 9

This interrogatory is also seeking a listing of documents on which an expert has relied. For immediate purposes, we will limit the request to witnesses FES intends to present in these proceedings. With that limitation in mind, please confirm whether it is FES's position that such a listing is protected from discovery.

Interrogatory No. 12

We will limit the scope of this question to witnesses FES intends to present in these proceedings. As such, the request is relevant and likely to lead to admissible evidence. Further, the request does not seek to elicit any attorney-client exchanges, but, instead, exchanges between FES and third parties. Please advise whether FES will supplement this response, as limited here, with an affirmative answer.

Interrogatory No. 14/Document Request Nos. 3 and 4

I am struggling somewhat with the response to Interrogatory No. 14. FES has asserted a common interest privilege with regard to communications between it and third parties. As to this claimed privilege, please identify all parties with whom FES believes it has an identical legal interest as well as the identical legal interest. Furthermore, please confirm whether the discovery-related e-mails were exchanged between all parties. If not, we'd like copies.

We'd appreciate a response on whether FES will provide supplemental information by the end of the day on Tuesday. And to the extent you'd like to discuss further, we're happy to do so.

Thank you.

Amy B. Spiller

Deputy General Counsel
Duke Energy Business Services
139 E. Fourth Street, 1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)

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sender by reply e-mail, so that our records can be corrected.

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Watts, Elizabeth H

From: Spiller, Amy B
Sent: Wednesday, April 17, 2013 4:25 PM
To: Watts, Elizabeth H
Subject: Fw: Duke Energy Ohio Capacity Case - FES discovery responses

From: Lydia M Floyd [mailto:lfloyd@jonesday.com]
Sent: Sunday, April 14, 2013 05:49 PM Eastern Standard Time
To: Spiller, Amy B
Cc: Mark Hayden <haydenm@firstenergycorp.com>; David A. Kutik <dakutik@JonesDay.com>; JLang@Calfee.com <JLang@Calfee.com>; talexander@calfee.com <talexander@calfee.com>
Subject: RE: Duke Energy Ohio Capacity Case - FES discovery responses

Amy,

We have a common interest with all parties that seek to dismiss Duke's Application.

Best regards,

Lydia



Lydia M. Floyd

North Point • 901 Lakeside Avenue • Cleveland, OH 44114.1190 U.S.A.
DIRECT 216.586.7241 • **FAX** 216.579.0212
LFLOYD@JONESDAY.COM

From: "Spiller, Amy B" <Amy.Spiller@duke-energy.com>
To: "Spiller, Amy B" <Amy.Spiller@duke-energy.com>, Lydia M Floyd <lfloyd@jonesday.com>
Cc: "Kingery, Jeanne W" <Jeanne.Kingery@duke-energy.com>, "D'Ascenzo, Rocco O" <Rocco.D'Ascenzo@duke-energy.com>
Date: 04/12/2013 04:45 PM
Subject: RE: Duke Energy Ohio Capacity Case - FES discovery responses

Lydia

I wanted to follow up on this request for clarification. Can you please advise?

Thank you.

Amy B. Spiller
Deputy General Counsel
Duke Energy Business Services
139 E. Fourth Street, 1303-Main

Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)

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From: Spiller, Amy B
Sent: Monday, April 08, 2013 10:53 AM
To: 'Lydia M Floyd'
Cc: Kingery, Jeanne W; D'Ascenzo, Rocco O
Subject: RE: Duke Energy Ohio Capacity Case - FES discovery responses

Lydia

Thank you for resending this note again.

To be sure I understand your position, are you saying that FES believes that (1) it has a common interest privilege with all parties in the case that oppose the capacity charge and (2) the common interest is simply that opposition?

We'd appreciate confirmation on the above.

Thank you.

Amy B. Spiller

Deputy General Counsel
Duke Energy Business Services
139 E. Fourth Street, 1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)

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From: Lydia M Floyd [<mailto:lfloyd@jonesday.com>]
Sent: Monday, April 08, 2013 10:12 AM
To: Spiller, Amy B
Cc: Kingery, Jeanne W; D'Ascenzo, Rocco O
Subject: Fw: Duke Energy Ohio Capacity Case - FES discovery responses

Amy,

Please see the response below.

Best regards,

Lydia



Lydia M. Floyd

North Point • 901 Lakeside Avenue • Cleveland, OH 44114.1190 U.S.A.
DIRECT 216.586.7241 • **FAX** 216.579.0212
LFLOYD@JONESDAY.COM

----- Forwarded by Lydia M Floyd/JonesDay on 04/08/2013 09:05 AM -----

From: Lydia M Floyd/JonesDay
To: "Spiller, Amy B" <Amy.Spiller@duke-energy.com>
Cc: "Kingery, Jeanne W" <Jeanne.Kingery@duke-energy.com>, Mark Hayden <haydenm@firstenergycorp.com>, David A. Kutik/JonesDay@JonesDay, JLang@Calfee.com, talxander@calfee.com
Date: 03/26/2013 06:26 PM
Subject: Re: Duke Energy Ohio Capacity Case - FES discovery responses

Amy,

We plan to supplement our Responses to Interrogatories Nos. 4, 6, 7, 8, 9 and 12 and Requests for Production Nos. 3 and 8 tomorrow. Regarding your questions concerning our Response to Interrogatory No. 14, it is our position that the common interest privilege applies to all parties opposing Duke's request for a new capacity charge. In addition, as indicated in our Response to Interrogatory No. 14, the discovery emails have been exchanged with Duke.

Best regards,

Lydia



Lydia M. Floyd

North Point • 901 Lakeside Avenue • Cleveland, OH 44114.1190 U.S.A.
DIRECT 216.586.7241 • **FAX** 216.579.0212
LFLOYD@JONESDAY.COM

From: "Spiller, Amy B" <Amy.Spiller@duke-energy.com>
To: Lydia M Floyd <lfloyd@jonesday.com>
Cc: "Kingery, Jeanne W" <Jeanne.Kingery@duke-energy.com>
Date: 03/23/2013 01:48 PM
Subject: Duke Energy Ohio Capacity Case - FES discovery responses

Lydia

In reviewing FirstEnergy Solutions' responses to the discovery requests served upon it, I wanted to share some observations with certain of the responses and further ascertain whether FES intends to supplement its responses. These observations are noted below.

Interrogatory No. 4

I can appreciate that FES may not have known, on March 14, whether it would submit testimony in these proceedings. But as intervenor testimony is due on Tuesday, I anticipate that such a decision has since been made. We would therefore ask that FES supplement this interrogatory.

Interrogatory No. 6

Please advise whether this interrogatory will be supplemented to provide information applicable to FES's testifying witnesses.

Interrogatory Nos. 7 & 8

Please advise whether FES will supplement these interrogatories with regard to its testifying witnesses. I would further note that these interrogatories are not written in a way to divulge any privileged information. They are merely seeking an identification.

Interrogatory No. 9

This interrogatory is also seeking a listing of documents on which an expert has relied. For immediate purposes, we will limit the request to witnesses FES intends to present in these proceedings. With that limitation in mind, please confirm whether it is FES's position that such a listing is protected from discovery.

Interrogatory No. 12

We will limit the scope of this question to witnesses FES intends to present in these proceedings. As such, the request is relevant and likely to lead to admissible evidence. Further, the request does not seek to elicit any attorney-client exchanges, but, instead, exchanges between FES and third parties. Please advise whether FES will supplement this response, as limited here, with an affirmative answer.

Interrogatory No. 14/Document Request Nos. 3 and 4

I am struggling somewhat with the response to Interrogatory No. 14. FES has asserted a common interest privilege with regard to communications between it and third parties. As to this claimed privilege, please identify all parties with whom FES believes it has an identical legal interest as well as the identical legal interest. Furthermore, please confirm whether the discovery-related e-mails were exchanged between all parties. If not, we'd like copies.

We'd appreciate a response on whether FES will provide supplemental information by the end of the day on Tuesday. And to the extent you'd like to discuss further, we're happy to do so.

Thank you.

Amy B. Spiller

Deputy General Counsel
Duke Energy Business Services
139 E. Fourth Street, 1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)

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