

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The attorney examiner finds:

- (1) On March 25, 2010, the Commission initiated this case, involving the electric long-term forecast report (LTFR) of Duke Energy Ohio, Inc. (Duke).
- (2) On June 15, 2010, as amended October 7, 2010, Duke filed its 2010 electric LTFR in this docket.
- (3) On December 23, 2010, Ohio Consumers' Counsel (OCC) filed a motion to compel discovery. OCC argues that Duke has failed to provide adequate substantive responses to three separate discovery items:
 - (a) Interrogatory 31 contained in OCC's first set of discovery;
 - (b) OCC's fourth set of discovery; and
 - (c) OCC's fifth set of discovery.

Duke filed its memo contra to OCC's motion to compel on December 29, 2010. On January 3, 2011, OCC filed its reply to Duke's memo contra.

- (4) In Interrogatory 31, OCC seeks input assumptions utilized in Duke's planning and risk (PAR) model to evaluate Duke's resource portfolio. OCC argues that this information is necessary so that OCC can challenge whether the assumptions are appropriate and whether they are fundamental to the subject matter of the proceeding. According to OCC, Duke communicated that these assumptions were "hard-wired" into the model and that some of the information was proprietary.

further states that, after discussion between Duke and OCC, Duke believes that OCC is seeking proprietary data and that Duke should not provide the requested input assumptions used in its PAR model because the assumptions are "hard-wired" into the model and the model is proprietary.

The attorney examiner notes that, in Duke's initial response to Interrogatory 31, Duke appeared to state that it had already provided this information in response to another discovery request. Later in discussions, Duke states that it could not provide the requested information because it is "hard-wired" into a proprietary model. However, Duke, after discovering that it did not provide the requested information, does not elaborate on why it believes this information is proprietary and did not file a motion for a protective order in accordance with Rule 4901-1-24, Ohio Administrative Code (O.A.C.). Moreover, no party discusses whether any confidentiality agreements have been executed and whether OCC has received other information that Duke believes is proprietary in the course of discovery. Assuming that any necessary confidentiality agreements can be executed, OCC's motion to compel, with respect to Interrogatory 31, is reasonable and should be granted.

- (5) In its fourth set of discovery requests, OCC seeks information on the subject of the nuclear power plant that is included in the generation resources contained in Duke's LTFR. According to OCC, Duke objects to the fourth set of discovery requests stating that they were not relevant to the instant proceeding and were not likely to lead to the discovery of admissible evidence. According to OCC, Duke asserts in its discovery responses that the potential construction of a nuclear generation facility is not relevant due to the filing of Duke's market rate offer (MRO) application in Case No. 10-2586-EL-SSO. Finally, Duke responds to the discovery request stating that it is not seeking a finding of need in the present case, nor is it seeking cost recovery for any nuclear-related matters. OCC argues that Duke is not entitled to withhold discovery based on its objections. Specifically, OCC asserts that the filing of the MRO application does not modify the filing in the instant case, and that the MRO application has not yet been approved by the Commission.

In response, Duke argues that these discovery requests are no longer relevant and that it is unreasonable and irrational for OCC

to request information relevant to construction of nuclear generation when such information is not germane to this docket.

In considering OCC's motion, with regard to its fourth set of discovery requests, the attorney examiner is mindful of the discovery standard contained in Rule 4901-1-16, O.A.C., which provides that "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Based on a reading of Rule 4901-1-16, O.A.C., the attorney examiner does not agree that the information sought by OCC is irrelevant to the instant proceeding. Moreover, the fact that Duke has filed an MRO application that has not yet received Commission approval, does not change the composition of the LTFR under consideration in the instant filing. Therefore, OCC's motion to compel regarding its fourth set of discovery requests should be granted,

- (6) In its fifth set of discovery requests, OCC seeks information regarding whether any of Duke's responses to OCC's discovery requests have changed based on the filing of the amended LTFR. OCC asserts that Duke has never formally responded to this request and instead counsel has stated, informally, that Duke's responses have not been affected by the filing of the amended LTFR. In addition to requesting a formal response, OCC argues that the responses to the fifth set of discovery requests are also incomplete because Duke has not fully responded to OCC's other requests and, therefore, could not fully have responded to this request.

In response, Duke asserts that it has, since the filing of OCC's instant motion, formally responded to this discovery request.

In considering the arguments regarding the fifth set of discovery requests, the attorney examiner believes that, in light of the rulings set forth above, Duke should again formally respond to OCC's fifth set of discovery requests based on its other discovery responses provided pursuant to this entry. Accordingly, OCC's motion to compel should be granted with respect to its fifth set of discovery requests.

- (7) By entry issued October 21, 2010, the attorney examiner granted the motion for continuance of the procedural schedule filed by Duke and established the following schedule: January 25, 2011, Duke shall file its testimony; February 1, 2011, Staff and intervenors shall file their testimony; February 8, 2011, the evidentiary hearing shall commence.
- (8) On January 19, 2011, the Natural Resources Defense Council, the OCC, the Environmental Law and Policy Center, and the Sierra Club (collectively, joint movants) filed a joint motion to continue the dates for the filing of intervenor testimony and the hearing. In support of their motion, the joint movants submit that these dates should be continued until after the Commission rules on OCC's motion to compel and the joint movants have a reasonable opportunity to review the discovery responses. Specifically, the joint movants request that testimony from Staff and intervenors not be due until at least four weeks after Duke has completely responded to all currently pending discovery requests.
- (9) On January 24, 2011, Duke filed a memorandum contra the motion to continue the dates for the filing of intervenor testimony and the hearing filed by the joint movants. Duke states that it believes a continuance in this case is warranted, although for reasons different than those stated by the joint movants. According to Duke, it intends to submit an additional amended resource plan in this case within the next 30 days, which it believes will resolve the outstanding discovery requests of the joint movants. Therefore, Duke asks that the filing dates for the its testimony, as well as the dates for the filing of Staff and intervenor testimony, and the hearing, be continued to allow Duke time to submit its amended filing.
- (10) The joint movants filed a reply to Duke's memorandum contra on January 24, 2011, acknowledging Duke's statement that the revised filing alluded to by Duke may assist in narrowing the scope of disputed issues in this case.
- (11) Initially, the attorney examiner notes that Duke waited until January 24, 2011, to make the examiner aware of the fact that it intends to amend its application in this case and request a continuance of the filing of its testimony, which was due to be filed

the day after Duke made the request. Furthermore, Duke made its request in the context of a memorandum contra, rather than appropriately filing a motion for continuance. Even though Duke has neglected to properly process this case, it appears that Duke and the joint movants are in agreement that a continuance of the procedural schedule should be granted. Therefore, the attorney examiner finds that the motion for extension of the procedural schedule should be granted, to the extent set forth below. Accordingly, the following procedural schedule should be adhered to by the parties:

- (a) February 14, 2011 – Deadline for Duke to file its amended application.
 - (b) February 18, 2011 – After reviewing Duke's amended application, this is the deadline for OCC to notify Duke regarding which of the discovery requests that are the subject of OCC's December 23, 2010, motion to compel still need responses.
 - (c) February 23, 2011 – Deadline for Duke to provide responses to OCC's discovery requests that are the subject of OCC's December 23, 2010, motion to compel.
 - (d) February 28, 2011 – Deadline for Duke to file its testimony.
 - (e) March 14, 2011 – Deadline for Staff and intervenors to file testimony.
 - (f) The evidentiary hearing will commence on March 21, 2011, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th floor, Hearing Room 11-A, Columbus, Ohio 43215.
- (12) The attorney examiner notes that Duke will be required to file another LTFR on April 15, 2011. In light of the fact that this is the third time that the procedural schedule has been extended, the attorney examiner finds that the parties have been given a reasonable amount of time to conduct discovery in this matter and engage in settlement negotiations. Accordingly, the attorney examiner will not grant additional continuances in this proceeding,

absent a showing of extraordinary circumstances outside the control of the parties. In addition, in the event Duke comes to an agreement with some or all of the parties in this case on some or all of the facts or issues in this case, the attorney examiner finds it appropriate to set forth a schedule for the filing of such stipulations prior to the commencement of the hearing in this case. Accordingly, Duke must file any applicable stipulation, by 9:00 a.m., on March 18, 2011.

It is, therefore,

ORDERED, That OCC's motion to compel is granted. It is, further,

ORDERED, That the motion for continuance filed by the joint movants be granted, to the extent set forth in this entry. It is, further,

ORDERED, That the parties adhere to the deadlines established in finding (11). It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Katie L. Stenman

By: Katie L. Stenman
Attorney Examiner

SP/dah

Entered in the Journal

JAN 25 2011

Renee J. Jenkins

Renee J. Jenkins
Secretary