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December 28, 2018

**VIA E-MAIL**

Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

**Re: Omission of Shareholder Proposal Submitted by Steven J. Milloy**

Dear Sir or Madam:

Pursuant to Rule 14a-8(j)(1) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), Duke Energy Corporation (the "Corporation") requests confirmation that the staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission ("SEC") will not recommend any enforcement action if the Corporation omits from its proxy solicitation materials ("Proxy Materials") for its 2019 Annual Meeting of Shareholders (the "2019 Annual Meeting") a proposal (the "Proposal") submitted to the Corporation by Steven J. Milloy (the "Proponent").

This letter provides an explanation of why the Corporation believes that it may exclude the Proposal and includes the attachments required by Rule 14a-8(j). In accordance with *Staff Legal Bulletin* No. 14D (Nov. 7, 2008), this letter and its exhibit are being delivered by e-mail to [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov). A copy of this letter and its exhibit are also being sent on this date to the Proponent in accordance with Rule 14a-8(j), informing the Proponent of the Corporation's intention to omit the Proposal from the 2019 Annual Meeting Proxy Materials. We also wish to take this opportunity to inform the Proponent that if he submits additional correspondence to the Staff with respect to the Proposal, a copy of that correspondence should also be furnished to the Corporation, addressed to the undersigned, pursuant to Exchange Act Rule 14a-8(k). This letter is being submitted not less than 80 days before the filing of the Corporation's Proxy Materials, which the Corporation intends to file on or around March 21, 2019.

## THE PROPOSAL

The Proposal states:

### Greenwashing Audit

#### Resolved:

Shareholders request that, beginning in 2019, Duke Energy annually publish a report of actually incurred company costs and associated actual/significant benefits accruing to shareholders, public health and the environment from Duke's environment-related activities that are voluntary and exceed federal/state regulatory requirements. The report should be prepared at reasonable cost and omit proprietary information.

A copy of the Proposal and related correspondence is attached hereto as Exhibit A.

## REASONS FOR EXCLUSION OF PROPOSAL

### 1. Rule 14a-8(i)(3)

The Corporation believes that the Proposal may be properly omitted pursuant to Rule 14a-8(i)(3) because the Proposal is impermissibly vague and indefinite so as to be inherently misleading.

### 2. Rule 14a-8(i)(7)

The Corporation believes that the Proposal may be properly omitted pursuant to Rule 14a-8(i)(7) because it relates to the ordinary business of the Corporation.

### 3. Rule 14a-8(i)(10)

The Corporation believes that the Proposal may be properly omitted pursuant to Rule 14a-8(i)(10) because the Proposal has been substantially implemented.

## DISCUSSION

### 1. The Proposal may be excluded under Rule 14a-8(i)(3) because it is impermissibly vague and indefinite so as to be inherently misleading.

The Proposal fails to define critical terms and otherwise provide guidance on what is necessary to implement it. The Staff has, on numerous occasions, concurred that shareholder proposals that are vague and indefinite are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because shareholders cannot make an informed decision on the merits of a proposal without at least knowing what they are voting on. *See Staff Legal Bulletin No. 14B* (Sep. 15, 2004) (noting that "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.") Furthermore, the Staff has

concurred that a shareholder proposal was sufficiently misleading to justify its exclusion where a corporation and its shareholders might interpret the proposal differently. *See Fuqua Industries, Inc.* (Mar. 12, 1991) (noting that any action taken by the corporation upon implementation of the proposal could be significantly different from the actions envisioned by the shareholders voting on the proposal).

The Staff has consistently concurred with the exclusion of proposals that do not define critical terms or phrases or otherwise provide guidance on what is required to implement the proposals. In *Bank of America Corp.* (Feb. 25, 2008), the Staff concurred with the exclusion of a proposal requesting that the corporation amend its policies to “observe a moratorium on all financing, investment and further involvement in activities that support MTR” (mountain top removal) projects but did not define what would constitute “further involvement” and “activities that support MTR [projects].” *See also Cisco Systems, Inc.* (Oct. 7, 2016) (proposal demanding that board not take actions to prevent the effectiveness of a shareholder vote is excludable as neither shareholders nor the corporation would be able to determine what actions or measures the proposal requires); *Eastman Kodak Co.* (Mar. 3, 2003) (proposal seeking to cap executive salaries at \$1 million, including bonus, perks and options, failed to define various terms and how options were to be valued and was therefore excludable) and *American Telephone and Telegraph Company* (Jan. 12, 1990) (proposal seeking to prohibit a corporation from “interfering” with “government policy” of foreign governments was excluded as it would require, if implemented, subjective determinations regarding what is considered to be “interference” and “government policy” as well as when the proposal would apply).

The Proposal fails to give necessary details to define several key terms, including “associated significant and actual benefits” accruing to shareholders, “public health” and “Duke’s environment-related activities,” which is a key piece of the Proposal upon which the rest of the Proposal hinges. Each of these terms are broad and could be construed to mean several things. For example, the term “associated significant and actual benefits” is inherently subjective and forces the Corporation to determine what a “significant and actual” benefit is to the Proponent. Is the Proponent only considering the receipt of funds or decrease in corporate expenditures as a “significant and actual” benefit? What is the timeframe which the Corporation should use to make the determination? Is a benefit only considered “significant and actual” if it happens in the next twelve months? Are long-term benefits to customers and/or shareholders to be considered?

With respect to the phrase “environment-related activities,” the Proponent’s supporting statement talks a great deal about greenhouse gas emissions, but almost all of Duke Energy’s operations have some relationship to the environment, not simply its coal generation. Should the Corporation focus its report on greenhouse gas emissions only, even though the Proposal contains no limitations whatsoever? Because of the vagueness of the Proposal, it would be impossible for Duke Energy shareholders to make an informed decision on what they are being asked to vote. Furthermore, the Corporation would be unable to determine whether it has been responsive in implementing the Proposal, thereby leaving the Corporation to a great amount of subjective interpretation which could lead to differing conclusions by the Corporation and its shareholders.

**Conclusion.** For the reasons stated above, we respectfully submit that the Proposal is impermissibly vague and indefinite so as to be inherently misleading and may therefore be excluded from the Corporation's Proxy Materials for the 2019 Annual Meeting pursuant to Rule 14a-8(i)(3).

**2. The Corporation may omit the Proposal pursuant to Rule 14a-8(i)(7) because it relates to the Corporation's ordinary business operations.**

Rule 14a-8(i)(7) permits the omission of a shareholder proposal that deals with a matter relating to the ordinary business of a corporation. When evaluating whether a proposal may be excluded, the Staff evaluates whether the subject matter of the resolution and the supporting statement taken as a whole involves a matter of ordinary business to the company. (*Staff Legal Bulletin No. 14C* (June 28, 2005) ("*SLB 14C*").) The core basis for exclusion under Rule 14a-8(i)(7) is to protect the authority of a corporation's board of directors to manage the business and affairs of the corporation. In the adopting release to the amended shareholder proposal rules, the Staff stated that the "general underlying policy of this exclusion is consistent with the policy of most state corporate laws: to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." *Exchange Act Release No. 34-40018* (May 21, 1998) ("1998 Release").

A shareholder proposal involves "ordinary business" when it relates to matters that are so fundamental to management's ability to run the corporation on a day-to-day basis that, as a practical matter, they are not appropriate for shareholder oversight. *See id.* The Staff has also stated that a proposal should not attempt to "micro-manage" a corporation by "probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." *See id.* (citing *Exchange Act Release No. 34-12999* (Nov. 22, 1976)).

Further, to constitute ordinary business, the proposal must not involve a significant social policy issue that would override its ordinary business subject matter. *See id.* The Staff considers "both the proposal and the supporting statement as a whole" in determining whether a significant social policy issue exists. *Staff Legal Bulletin No. 14C*. Although the Staff has found certain environmental issues to constitute significant social policy issues, the reference to an environmental issue within a proposal has not always been determinative of its excludability if the focus of the proposal is not on the significant policy issue but rather the day-to-day operations of the corporation.

For the reasons set forth below, we believe that the Proposal may be excluded pursuant to Rule 14a-8(i)(7).

***The Proposal impermissibly seeks to micro-manage the Corporation's choice of technologies.*** The Proposal's supporting statement states that "maintaining coal plants is the least expensive option for generating power" and insinuates that Duke Energy's plan to "shutter its coal plants" is not in the best interests of its shareholders but rather are being done to benefit the Corporation's public image. The Staff has previously found that proposals relating to a corporation's choice of technologies fall under the ordinary business exception found in Rule

14a-8(i)(7) and are generally excludable. For instance, in *Dominion Resources, Inc.* (Feb. 14, 2014), a proposal that requested the corporation's board appoint a team to review the risks associated with developing solar generation and report on those risks and the benefits of increased solar generation was found to relate to the corporation's ordinary business operations – specifically “the corporation's choice of technologies for use in its operations” – and was excludable pursuant to Rule 14a-8(i)(7). The Staff in *FirstEnergy Corp.* (Mar. 8, 2013) also found a proposal to relate to the corporation's choice of technologies and thus be excludable pursuant to Rule 14a-8(i)(7) where the proposal requested a report regarding the Corporation's actions to diversify its energy resources to include energy efficiency and renewable energy sources. *See also AT&T Inc.* (Feb. 13, 2012) (proposal that requested a report disclosing corporate actions being taken in connection with electrically inefficient set-top boxes and the development of more energy efficient ones was excludable under Rule 14a-8(i)(7)).

The Proposal seeks to involve shareholders in decisions regarding the Corporation's choice of technologies for the generation of energy. The determination of which technologies the Corporation utilizes is a complex decision involving fuel cost and reliability, in addition to environmental concerns, that requires management expertise and regulatory review and approval to ensure that all customers are being provided cost-efficient, reliable service. The Corporation's determinations regarding its technology plans are discussed in the Integrated Resource Planning reports (“IRPs”) which the Corporation is required to periodically file with each of its state regulators in order to justify its generation plans, including the timing of its retirement of generation assets and the type and timing of replacement generation. These detailed, highly technical plans are based on the Corporation's thorough analyses of numerous factors that can impact the cost of producing and delivering electricity and influence long-term resource planning decisions. The IRP process helps to evaluate a range of options, considering forecasts of future electricity demand, fuel prices, transmission improvements, new generating capacity, integration of renewables, energy storage, energy efficiency and demand response initiatives. The IRP process also helps evaluate potential environmental and regulatory scenarios to better mitigate policy and economic risks. These determinations are far too complex for shareholders without a deep understanding of the issues and the technologies to make informed judgments.

As shown above, the Staff has routinely found that proposals concerning a corporation's choice of technologies for use in its operations are generally excludable under Rule 14a-8(i)(7). We consequently believe that the Proposal is therefore excludable pursuant to Rule 14a-8(i)(7) as it involves decisions regarding the Corporation's choice of technology which are most appropriate for management who have the experience, training and resources to evaluate the complex choices of technology necessary to provide a diverse mix of generation technologies to meet customer needs.

***Although the Proposal references certain social issues such as climate change, it does not raise a significant policy issue.*** The Staff has stated that certain proposals related to significant social policies may transcend day-to-day business matters if the proposal raises policy issues that are so significant that they are appropriate for shareholder consideration. The Staff considers “both the proposal and the supporting statement as a whole” in determining whether a significant social policy issue exists. *SLB 14C*. Although the Staff has found certain environmental issues to constitute significant social policy issues, the reference to an environmental issue within a proposal is not determinative of its excludability. *See id.*; *see also, CVS Health Corporation*

(Mar. 8, 2016) and *The TJX Companies, Inc.* (Mar. 8, 2016) (proposals requesting the relevant corporation set “quantitative targets ... to increase renewable energy sourcing and/or production” found excludable pursuant to Rule 14a-8(i)(7) as relating to “ordinary business operations” of the corporation, despite such proposals involving the environmental issue of renewable energy sources); *Papa John’s International, Inc.* (Feb. 13, 2015) (proposal encouraging the corporation to expand its menu offerings to include vegan options “in order to advance animal welfare [and] reduce its ecological footprint” among other items did not focus on a significant policy issue and was excludable as relating to the corporation’s ordinary business operations (i.e., “products offered for sale”) under 14a-8(i)(7)); and *FirstEnergy Corp.* (Mar. 7, 2013) (proposal requesting the corporation to “adopt strategies and quantitative goals to reduce the company’s impacts on, and risks to, water quantity and quality” involved ordinary business operations under Rule 14a-8(i)(7) and did not “focus on a significant policy issue”). Unlike proposals that the Staff has found to have an environmental issue that overrides a corporation’s ordinary business concerns due to the social policy issue, such as *NorthWestern Corporation* (Jan. 8, 2016), where the proposal sought a report on how the corporation could generally adapt its business model to enable the increased use of low-carbon electricity generation to reduce greenhouse gas emissions, the Proposal does not focus on any significant policy issues at all but rather focuses solely on the economic viability of the Corporation’s choice of technologies.[NMW: This last part would seem to be contrary to your argument that this doesn’t involve a significant policy issue.]

**Conclusion.** For the reasons stated above, we respectfully submit that the Proposal constitutes a matter of ordinary business that is not appropriate for shareholder oversight and may therefore be excluded from the Corporation’s Proxy Materials for the 2019 Annual Meeting pursuant to Rule 14a-8(i)(7).

**3. The Proposal may be excluded pursuant to Rule 14a-8(i)(10) because it has been substantially implemented.**

Rule 14a-8(i)(10) permits the exclusion of a proposal that the Corporation has substantially implemented. The Corporation has numerous disclosures that discuss the costs and benefits of action that relate to greenhouse gas emissions reductions, renewable energy, energy efficiency measures and other measures that the Proponent might characterize as “voluntary” “environment-related” activities.

The Commission has previously stated that Rule 14a-8(i)(10) was designed to “avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management....” *Exchange Act Release No. 12598* (July 7, 1976). The Staff has also stated that in determining whether a shareholder proposal has been substantially implemented, it will look at whether a corporation’s policies, practices and procedures “compare favorably with the guidelines of the proposal.” *Medtronic, Inc.* (June 13, 2013).

The Proposal requests that the Corporation publish a report of costs and benefits to shareholders, public health and the environment from its voluntary, environment-related activities. The

Corporation extensively discusses costs and benefits in its annual Sustainability Report, in its 2017 Climate Report<sup>1</sup> and, most significantly, in the IRPs publicly filed by its utility subsidiaries.

The 2017 Sustainability Report<sup>2</sup> details much of Duke Energy's efforts to reduce greenhouse gases as well as to other initiatives the Corporation takes to reduce its environmental footprint. For example, page 16 of the 2017 Sustainability Report includes a discussion of the Corporation's energy efficiency measures and the benefits to customers.<sup>3</sup> Page 29 discusses the Corporation's investment of \$25 billion between 2017 and 2026 to create a smarter energy grid to accommodate additional renewable energy and improve system performance in many aspects as well as \$11 billion in the same timeframe to invest in cleaner natural gas-fired power plants, solar energy and other renewable generation sources.<sup>4</sup> Furthermore, the cost of reducing greenhouse gases in Duke Energy's system is discussed throughout the 2017 Climate Report to explain that the Corporation must balance customer affordability and reliability along with clean generation in order to have the support of its customers, stakeholders and regulators.<sup>5</sup>

In addition to the disclosures in the Corporation's Sustainability Report and 2017 Climate Report, the IRPs also provide a long-range quantitative analysis of the costs and benefits to customers of the planned Duke Energy generation, transmission and distribution system. For example, page 31 of Duke Energy Carolinas, LLC's North Carolina Integrated Resource Plan discusses that one of the many reasons for a diverse generation portfolio is because of increasing demands by customers: "Many Duke Energy customers have come to realize the benefits that technology can provide and are no longer inactive recipients of a simple commodity at the least possible cost. These customers are now expecting more choices and services to control their energy use and desire active interaction with their energy choices. Duke Energy Carolinas is committed to serving its customers in new and improved ways that recognize the increasing differences between its customers."<sup>6</sup> There are also detailed cost analyses detailing the scenario planning and assumptions that the Corporation uses to create its generation plans.

By definition, substantial implementation does not require that every aspect of a proposal be implemented exactly as requested. The Staff has found numerous proposals to have been substantially implemented where reports were requested by a proposal but much of the disclosure to be included in a report has previously been disclosed by a corporation. For example, in *Entergy Corporation* (Feb. 14, 2014), the Staff allowed the corporation to permit exclusion of a proposal requesting a report on policies the corporation could adopt to reduce its greenhouse gas emissions consistent with the national goal of 80% reduction in greenhouse gas emissions by 2050 because the corporation had previously disclosed much of the information in its sustainability and carbon disclosure reports. *See also Duke Energy Corporation* (Feb. 21, 2012) (permitting exclusion of a shareholder proposal requesting that the corporation assess potential actions to reduce greenhouse gas and other emissions where the requested information had been previously disclosed in the

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<sup>1</sup> [https://www.duke-energy.com/\\_media/pdfs/our-company/shareholder-climate-report.pdf](https://www.duke-energy.com/_media/pdfs/our-company/shareholder-climate-report.pdf)

<sup>2</sup> <https://www.duke-energy.com/our-company/sustainability/reports>

<sup>3</sup> <https://sustainabilityreport.duke-energy.com/downloads/17-duke-sr-customers.pdf>

<sup>4</sup> <https://sustainabilityreport.duke-energy.com/downloads/17-duke-sr-growth.pdf>

<sup>5</sup> [https://www.duke-energy.com/\\_media/pdfs/our-company/shareholder-climate-report.pdf](https://www.duke-energy.com/_media/pdfs/our-company/shareholder-climate-report.pdf)

<sup>6</sup> [http://www.energy.sc.gov/files/2018%20DEC%20Annual%20Plan\\_SC\\_Final.pdf](http://www.energy.sc.gov/files/2018%20DEC%20Annual%20Plan_SC_Final.pdf)

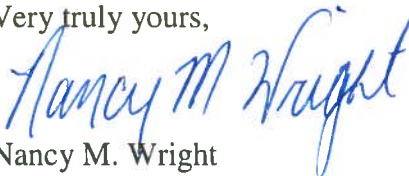
Form 10-K and its annual sustainability report.) Accordingly, although the disclosures requested in the Proposal have not been included in one single report, the Corporation has substantially implemented the Proposal by providing extensive information about the costs and benefits of its actions related to the environment and the reduction of greenhouse gases in its public disclosures.

**Conclusion.** For the reasons stated above, we respectfully submit that the Proposal has been substantially implemented and may therefore be excluded from the Corporation's Proxy Materials for the 2019 Annual Meeting pursuant to Rule 14a-8(i)(10).

### CONCLUSION

Based on the foregoing, the Corporation respectfully requests that the Staff advise that it will not recommend any enforcement action if the Corporation excludes the Proposal from its Proxy Materials for the 2019 Annual Meeting. If the Staff does not concur with the Corporation's positions, we would appreciate an opportunity to confer with the Staff concerning this matter prior to the issuance of a response. In such case, or if you have any questions or desire any further information, please contact the undersigned at (704) 382-9151.

Very truly yours,



Nancy M. Wright

CC: Julia S. Janson, Executive Vice President, External Affairs and Chief Legal Officer  
David B. Fountain, Senior Vice President, Legal, Chief Ethics and Compliance Officer  
and Corporate Secretary  
David S. Maltz, Vice President, Legal and Assistant Corporate Secretary  
Steven J. Milloy