STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION COMMISSION

2006 MAY 18 PM 4 32

IN THE MATTER OF THE APPLICATION
OF DUKE ENERGY FIELD SERVICES, LP FOR
APPROVAL OF AN ACID GAS INJECTION WELL
LEA COUNTY, NEW MEXICO CASE NO. 13589

REPLY
PURSUANT TO
SECOND MOTION TO DISMISS

Madison M. Hinkle, Randolph M. Richardson, Morris E. Schertz, Rolla R. Hinkle III, Oscura Resources, Inc. and R.R. Hinkle Company, Inc., ("Intervenors"), and Randall Smith, Dean "Beach" Snyder and AC Ranches Partnership in this matter, (together, "Opponents"), for their Reply pursuant to the Second Motion To Dismiss, state:

1. Duke Energy Field Services contends incorrectly that the Second Motion To Dismiss is moot for the reason that Order No. R-12546 was entered on May 5, 2006. Notably, the Second Motion To Dismiss was timely filed with the Commission on May 3, 2006, thus preceding the Commission's action on the Order. Order No. R-12546 does not reflect whether the Commission took the Second Motion To Dismiss into consideration when it approved the Order.

In any event, the matters raised in the motion are not moot. The Commission always has jurisdiction to act to address matters falling within the zone of interests set forth in the Oil and Gas Act that the agency is statutorily mandated to protect. This means that the Commission has continuing, ongoing jurisdiction. It is for this reason that Order No. R-12546 expressly provides "*Jurisdiction of this case is retained for entry of such further orders as the Commission may deem necessary.*" Order No. R-12546, para. V.

2. The Applicant's objections to the standing of the parties has been obviated by the Notice of Intervention filed on behalf of the six mineral interest owners, Madison M. Hinkle, et al. These Intervenors have also joined in and adopted the Second Motion To Dismiss. The Intervenors have also demonstrated that their interests will be adversely affected by the Applicant's proposed injection operations and that they have the requisite standing as a result.

To acquire standing, a party must demonstrate "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *John Does I Through III v. Roman Catholic Church of The Archdiocese, Inc.*, 1996-NMCA-094, 122 N.M. 307, 924 P.2d 273. The threat of injury is also sufficient to establish standing. *Am. Civil Liberties Union v. City of Albuquerque*, 1999-NMSC-044, 128 N. M. 315, 992 P. 2d 866. In addition, a party must also establish "that the injury alleged is within the zone of interests to be protected by a... statute." *Forest Guardians v. Powell,* 2001-NMCA-028, 130 N.M. 368, 375, 24 P. 3d 803, citing to *Key v. Chrysler Motors Corp.,* 121 N.M. 764, 774, 918 P.2d 350, 360 (1996).

The Intervenors' interest in this proceeding was previously made known to the Commission by their letter dated March 24, 2006. In their notice to the Commission, the Intervenors made clear that their acreage "*definitely has potential for further oil and gas development and that [their] mineral interests will be adversely affected by Duke Energy's proposed operation if approved by the Commission.*"

During the course of the March 13, 2006 hearing on its C-108 Application, Duke Energy stated that it proposes to inject an average of 2200 barrels of acid gas per day over an initial thirty-five year period resulting in cumulative injection volumes of 28,105,000 barrels. The acid gas volumes will be injected at pressures of between 2600 to 2800 psi. In testimony and exhibits

introduced at the hearing, the Applicant acknowledged that at the average rate of injection, the injection formation underlying the SW/4 of Section 30 would be full in approximately one year. Applicant's geologist witness also acknowledged that sometime in 2007, the "acid gas front" resulting from the planned injection would move more than 660' away from the injection well and would intrude into the Intervenors' minerals located in the N/2 of Section 30. The Applicant's geologist witness also acknowledged that by the year 2025, the acid gas would extend approximately 1,240' beyond the northern boundary of the SW/4 of Section 30, well into the Intervenors' minerals lands. *See* Tr. pp. 205-206.

The Movants have thus clearly satisfied all the requirements for standing in this matter.

3. Duke Energy's representation that it gave "proper notice pursuant to Division rules and the additional requirements imposed by the Division" has been demonstrated to be incorrect. There is no evidence that the Applicant notified the Intervenors. Further, the testimony of Duke Energy's witness, Mr. Gutierrez, established that the Applicant did not conduct a sufficient search of title for the lands in the adjoining tract. *See* Tr. pp. 179-180. Duke Energy clearly failed to exercise the "reasonable diligence" or make the "good-faith diligent effort" to identify affected persons required under the agency's rules. *See* Rule 1210 B and C. The failure to provide notice violates due process. *See Uhden v. New Mexico Oil Conservation Commission*, 112 N. M. 528, 817 P. 2d 721 (1991).

Finally, it should be remembered that in this proceeding, the traditional procedures for entertaining objections to a C-108 injection application were bypassed and the matter proceeded directly to a Commission hearing. As a consequence, the parties did not have the opportunity to participate in a Division examiner hearing as is typically the case. Instead of two opportunities to present their objections at a hearing, the opponents had only one and in this case, that hearing

was convened without proper notice. Under these circumstances, both fairness and agency precedent require that the matter be dismissed.

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By: J. Scott Hall

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was faxed to counsel of record on the 17 day of May, 2006 as follows:

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