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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Complaint of)	
)	
Industrial Energy Users-Ohio ("IEU-Ohio"),)	
)	Case No. 10-1398-EL-CSS
Complainant,)	
)	
v.)	
)	
The Midwest Independent Transmission)	
System Operator, Inc. ("MISO"),)	
)	
and)	
)	
Duke Energy Ohio, Inc. ("DEO"),)	
)	
Respondents.)	

**REPLY OF INDUSTRIAL ENERGY USERS-OHIO
TO DUKE ENERGY OHIO, INC.'S
MEMORANDUM CONTRA MOTION TO COMPEL DISCOVERY**

Samuel C. Randazzo, Esq.
McNEES WALLACE & NURICK LLC
21 East State Street, Suite 1700
Columbus, OH 43215-4228
Telephone: (614) 719-2840
Fax: (614) 469-4653
sam@mwncmh.com

Robert A. Weishaar, Jr.
McNEES WALLACE & NURICK LLC
777 North Capitol Street, N.E.
Suite 401
Washington, DC 20002-4292
Telephone: (202) 898-5700
Fax: (717) 260-1765
rweishaa@mwn.com

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Attorneys for Industrial Energy Users-Ohio

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I. PROCEDURAL HISTORY

On September 20, 2010, the Industrial Energy Users-Ohio ("IEU-Ohio") filed a Complaint in this proceeding naming the Midwest Independent Transmission System Operator, Inc. ("MISO") and Duke Energy Ohio, Inc. ("DEO") as Respondents. The Complaint was filed pursuant to Section 4905.26, Revised Code. Among other things, Section 4928.16 (A)(2), Revised Code, gives the Commission subject matter jurisdiction to address failures to comply with any provision of Sections 4928.01 to 4928.15, Revised Code. IEU-Ohio's Complaint alleges that DEO has violated and is violating Section 4928.12, Revised Code, due to its reliance on a regional transmission entity (MISO) that does not satisfy the criteria that must be satisfied before DEO can meet its

Section 4928.12, Revised Code, affirmative duty by placing control over its transmission facilities with a regional transmission entity.

Section 4928.06 (A), Revised Code, states that the Commission must ensure that the policy in Section 4928.02, Revised Code, which is also invoked by IEU-Ohio's Complaint, is effectuated. Section 4928.06(A), Revised Code, also states that proceedings and orders under Chapter 4928, Revised Code "...are subject to and governed by Chapter 4903 of the Revised Code" including Section 4903.22, Revised Code, that obligates the Commission to follow and apply the rules applicable to civil proceedings in Ohio.

On September 21, 2010, IEU-Ohio sent a First Set of Interrogatories and Request for Production of Documents to MISO and, separately, a First Set of Interrogatories and Request for Production of Documents to DEO. According to Commission rules, the deadlines for responding to these discovery requests have come and passed.¹ Neither MISO nor DEO dispute this fact.

On October 21, 2010, IEU-Ohio filed a *Motion to Compel Discovery* after it became evident that neither DEO nor MISO would answer discovery requests in the absence of a Commission order. DEO filed a Memorandum Contra on October 27, 2010. IEU-Ohio is exercising its right to reply to the Memorandum Contra.

The Commission should grant IEU-Ohio's Motion to Compel Discovery. DEO's actions manipulate Commission rules and processes to cause undue delay: DEO has failed to answer interrogatories and requests for documents that are related to

¹ On October 12, 2010, DEO filed a Motion to Stay Discovery.

allegations in the Complaint. DEO has not exhausted all other reasonable means – an obligation that is required by the Commission's rules – of resolving any differences with IEU-Ohio regarding discovery. DEO provides no legitimate legal basis for not responding to IEU-Ohio's discovery requests. Instead, DEO attempts to distract the Commission with inapplicable fact patterns, non-persuasive citations to federal rules and case law, and meritless jurisdictional challenges. The Commission should grant IEU-Ohio's Motion to Compel Discovery promptly, to enable the Complaint to proceed, so that IEU-Ohio can protect the interests of its members.

II. LAW AND ARGUMENT

IEU-Ohio properly served interrogatories and requests for documents.² DEO fails to provide a legitimate basis for not responding. DEO's Memorandum Contra displays a fundamental misunderstanding of the purpose of the Complaint and of the meaning and purpose of Section 4928.12, Revised Code. IEU-Ohio's Motion to Compel Discovery anticipated and directly addressed many of the arguments that DOE includes in its Memorandum Contra. This Reply focuses on the handful of new contentions that appear in DEO's Memorandum Contra.

² On September 21, 2010, IEU-Ohio sent a First Set of Interrogatories and Request for Production of Documents to DEO, pursuant to and consistent with Rules 4901-1-19, 4901-1-20, and 4901-1-22, Ohio Administrative Code. Instead of responding within the required 20 days, DEO filed a Motion to Stay Discovery at the eleventh hour. That Motion fails to comply with Rule 4901-1-24, Ohio Administrative Code, because DEO did not exhaust all reasonable means of resolving any differences with IEU-Ohio regarding discovery. On October 28, 2010, IEU-Ohio filed a Memorandum Contra DEO's Motion to Stay.

A. DEO's Memorandum Contra Relies on Federal Law that is Inapplicable to this Case

To support its argument for a stay, DEO relies on dissimilar fact patterns and a hodgepodge of disconnected legal reasoning. DEO relies, in one instance, on *Wilkes v. Ohio Edison Co.*³ That case does not apply here because the parties were already involved in a parallel proceeding, which is not the case here, and the complainant did not oppose the motion to stay discovery, which is not the case here. DEO cited that same case in prior pleadings, and IEU-Ohio addressed the case in detail in its Memorandum Contra. See IEU-Ohio's Memorandum Contra DEO's Motion to Stay at 17.

DEO now attempts to rely on a U.S. Court of Appeals decision, from a distant circuit, to bolster its meritless position. DEO cites to *Wenger v. Monroe*, 282 F.3d 1068 (9th Cir. 2002). *Wenger* does not serve as applicable or controlling precedent, for several reasons.

First, *Wenger* is an opinion issued by the U.S. Court of Appeals for the Ninth Circuit, which has no direct or indirect jurisdiction over the Commission or any aspect of IEU-Ohio's Complaint.

Second, *Wenger* concerns application of the Federal Rules of Civil Procedure. The Commission, by contrast, is limited to the provisions of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. While there may be some overlap between Ohio and Federal rules, the Ohio Rules control.

³ Case No. 09-682-EL-CSS, Entry (December 15, 2009).

Third, the fact pattern in *Wenger* is very different from the fact pattern here. In *Wenger*, the plaintiff, a retired Colonel in the Army National Guard, challenged decisions by military personnel. The Defendant moved to dismiss the complaint and filed a motion to stay discovery pending the resolution of its motion to dismiss. The court in *Wenger* noted that it would review military decisions only if the plaintiff satisfied the very strict test set forth in *Mindes v. Seaman*, 453 F.2d 197. The court was convinced that the plaintiff could not state a case for relief, so it granted defendant's motion to stay discovery. *Id.* at 1077. Importantly, the court stated, "... we have emphatically denied invitations to review military personnel decisions in circumstances similar to those in the present case." *Id.* at 1075. In short, the court in *Wenger* granted the motion to stay discovery because the court was essentially granting the motion to dismiss. The court in *Wenger* was certain that, based on a dearth of case law, the complaint failed to state a cause for relief. Those circumstances do not exist here. IEU-Ohio has stated a cause for relief and no other court or agency has asserted jurisdiction over the matters raised by IEU-Ohio's Complaint.

In fact, the Federal Energy Regulatory Commission ("FERC"), in its recent Realignment Order approving an initial step in DEO's move from MISO to PJM, explicitly stated that "... nothing in this order should be interpreted as interfering with state regulatory authority or requirements."⁴ Unlike the plaintiff in *Wenger*, IEU-Ohio has made out a prima facie case relative to Ohio law, and has presented the Commission with a valid complaint that legitimately challenges DEO's compliance with, and MISO's legitimacy relative to, Section 4928.12, Revised Code. No grounds exist for either

⁴ See *Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, 133 FERC ¶ 61,058 at P 18 (2010) ("Realignment Order").

dismissing that Complaint or allowing DEO to continue thumbing its nose at valid discovery requests.

B. DEO's Mere Filing of a Motion to Dismiss Does Not Excuse DEO's Refusal to Comply With Valid and Timely Served Discovery Requests

DEO attempts to shield its non-response to IEU-Ohio's discovery requests by repeatedly pointing to claims in its Motion to Dismiss. As IEU-Ohio has contended, a motion to dismiss does not provide the shield that DEO has used as an excuse for not responding to IEU-Ohio's discovery. IEU-Ohio's Complaint states a case for relief. The Complaint requests that the Commission find that DEO has not complied and is not complying with Section 4928.12, Revised Code. Such an order is within the Commission's jurisdiction.⁵

The Complaint alleges that MISO and DEO engaged in secret negotiations and activities for purposes and objectives that preclude MISO's eligibility as a regional transmission entity identified in Section 4928.12, Revised Code, and as that eligibility is measured by the criteria in Section 4928.12, Revised Code. If, as IEU-Ohio alleges in its Complaint, MISO cannot meet the criteria in Section 4928.12, Revised Code, then Ohio law says that DEO cannot rely on MISO to satisfy its Section 4928.12, Revised Code, duty. Accordingly, IEU-Ohio's Complaint alleges that DEO is in direct violation of 4928.12, Revised Code, because its transmission facilities are not controlled by a transmission entity meeting the qualifications laid out in Section 4928.12, Revised

⁵ "The Commission believes that the legislature included Section 4928.12, Revised Code, to assure that RTEs appropriate for Ohio are established. The nine qualifying specifications were established and the Commission is required to assure that the RTEs meet those specifications and the needs of the state of Ohio." *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, Case No. 99-1141-EL-ORD, Finding and Order at 44-45 (November 30, 1999).

Code. IEU-Ohio's discovery is designed to obtain information that is essential to its ability to prosecute its Complaint. As IEU-Ohio has previously explained, the information that IEU-Ohio seeks through discovery (including information on secret meetings and negotiations between DEO and MISO) is uniquely in the possession of DEO and MISO.

C. IEU-Ohio's Discovery Requests Are Directly Relevant to Whether DEO and MISO Comply with Section 4928.12, Revised Code

DEO alleges that IEU-Ohio is on a fishing expedition. This is not true. Each of IEU-Ohio's interrogatories and request for production of documents is related to allegations in the Complaint. The May 4, 2010 Bear letter (which DEO has relied upon in other regulatory proceedings to support its claims) is clear evidence that MISO is not independent and is not meeting the independence requirement in Section 4928.12, Revised Code. IEU-Ohio seeks responses and documents from DEO to discover the full depth and scope of the communications between MISO and DEO, MISO's understanding of what it was offering secretly to DEO, and evidence of other MISO conduct that violated Section 4928.12, Revised Code.

IEU-Ohio seeks responses and documents from DEO that are designed to secure evidence that MISO offered commitments or concessions to DEO in an attempt to influence DEO to remain a member of MISO.⁶ Obviously, this question and request for documents is related to the allegation that MISO is not a qualified transmission entity based on the criteria in Section 4928.12, Revised Code.

⁶ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. Nos. 1 and 2 (attached to IEU-Ohio's Motion to Compel).

IEU-Ohio seeks responses and documents from DEO that will help determine whether DEO solicited commitments or concessions from MISO in exchange for DEO to remain a member of MISO.⁷ IEU-Ohio is attempting to discover the full extent to which MISO has failed to satisfy its obligations to act independently of market participants and qualify as a transmission entity based on the criteria in Sections 4928.12, Revised Code, and in light of the policy set forth in Section 4928.02, Revised Code. Additionally, IEU-Ohio is attempting to establish that DEO had full knowledge that MISO was not a qualifying transmission entity based on the criteria in Section 4928.12, Revised Code.

By its discovery, IEU-Ohio seeks responses and documents that provide evidence that MISO offered DEO's affiliated companies commitments or concessions in an attempt to influence DEO to remain a member of MISO.⁸ The May 4 Bear Letter is addressed to Keith Trent, Group Executive and President – Commercial Business. IEU-Ohio believes that its evidence will show that Mr. Trent is not an employee of DEO, but rather an employee of a Duke Energy affiliated company engaged in the business of providing competitive services. Thus, IEU-Ohio is attempting to determine whether information conveyed to one of DEO's affiliates was used to make decisions in violation of DEO's corporate separation plan.⁹ Additionally, these discovery requests also seek information that is related to IEU-Ohio's allegation that MISO is not eligible as a qualifying transmission entity as such eligibility is measured by Section 4928.12, Revised Code.

⁷ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. Nos. 3 and 4 (attached to IEU-Ohio's Motion to Compel).

⁸ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. Nos. 5 and 6 (attached to IEU-Ohio's Motion to Compel).

⁹ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. Nos. 7 and 8 (attached to IEU-Ohio's Motion to Compel).

IEU-Ohio seeks responses and documents from DEO that provide evidence that DEO's affiliates requested commitments or concession from MISO to remain a member of MISO. IEU-Ohio is attempting to establish that DEO is acting in violation of its corporate separation plan.

By its discovery, IEU-Ohio seeks responses and documents from DEO pertaining to studies or analyses that identify what revenues it may receive if DEO migrates to PJM Interconnection, LLC ("PJM") or stays a member of MISO.¹⁰ IEU-Ohio seeks information that is needed to prove that, as it alleges in its Complaint, MISO made commitments and concessions to DEO that were designed to keep DEO and its affiliates at least revenue-neutral relative to the dollar streams that would be available to it if it joined PJM. Any commitments or concession made by MISO would likely be calibrated to match the revenues that DEO would receive by migrating to PJM. Obtaining DEO's internal estimates of the revenue impact of its migration, and obtaining DEO's studies and analyses to that end, is necessary to confirm that MISO's commitments and concessions to DEO were intended to at least match the revenues available to DEO from PJM.

IEU-Ohio seeks responses and documents pertaining to DEO's internal protocols or guidelines for communications with management or directors at regional transmission organizations, including MISO and PJM.¹¹ As discussed above, the May 4 Bear Letter is addressed to Keith Trent, Group Executive and President – Commercial Business.

¹⁰ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. Nos. 9-12 (attached to IEU-Ohio's Motion to Compel).

¹¹ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. No. 13 (attached to IEU-Ohio's Motion to Compel).

IEU-Ohio is attempting to determine whether this communication was in compliance with any internal protocols that DEO and its affiliates may have in place (or, if none are in place, why they are not in place) and whether DEO violated its corporate separation plan which must, in accordance with Ohio law, separate DEO's functions between competitive and noncompetitive services.

By its discovery, IEU-Ohio seeks responses and documents that DEO conveyed to MISO or to PJM regarding DEO's proposed move from MISO to PJM.¹² This information is either relevant to or will lead to the collection of information that is relevant to IEU-Ohio's allegation that DEO has sought concessions and commitments from one or more regional transmission entity for purposes that violate provisions in Ohio law. IEU-Ohio is also attempting to discover the full extent to which MISO has failed to satisfy its obligations to act independently of market participants and qualify as a transmission entity based on the criteria in Section 4928.12, Revised Code.

IEU-Ohio seeks responses and documents from DEO regarding any studies or analyses pertaining to the impact on MISO, MISO's remaining members, and the members of PJM of DEO's proposed move to PJM.¹³ IEU-Ohio is attempting to establish a baseline for the amount of concessions or commitments that MISO attempted to extract from DEO and what, if any, concessions or commitments may have been included in an equally illegal counteroffer by DEO to MISO.

¹² Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. No. 14 (attached to IEU-Ohio's Motion to Compel).

¹³ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. Nos. 15-20 (attached to IEU-Ohio's Motion to Compel).

By its discovery, IEU-Ohio seeks written responses and documents from DEO regarding any studies or analyses pertaining to what revenues Duke Energy's affiliated companies may receive if DEO migrates to PJM or remains a member of MISO.¹⁴ As discussed above, the May 4 Bear Letter is addressed to Keith Trent, Group Executive and President – Commercial Business. Mr. Trent is not an employee of DEO, but rather an employee of a Duke Energy affiliated company engaged in providing competitive services. IEU-Ohio's discovery is designed to provide IEU-Ohio with information that is tied to IEU-Ohio's allegation that DEO has violated its corporate separation duties.

IEU-Ohio's discovery requests are not overbroad. In fact, IEU-Ohio narrowly tailored its interrogatories and request for production of documents to establish the allegations in the Complaint. These interrogatories and documents are directly related to establishing that MISO is unfit for duty as a regional transmission entity based on the requirements of Section 4928.12, Revised Code, and that DEO's collaboration with affiliates engaged in providing competitive services as well as MISO conflicts with its corporate separation duties as those duties are specified by Ohio law.

IEU-Ohio has stated a prima facie case for relief, its discovery is narrowly focused based on the allegations in IEU-Ohio's Complaint, and DEO has provided no legitimate basis for failing to respond within the time specified by the Commission's rules.

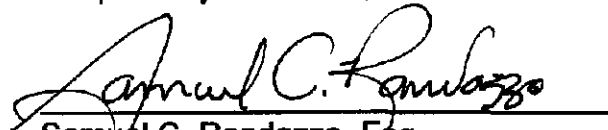
¹⁴ Industrial Energy Users-Ohio's Interrogatories and Requests for Production of Documents Upon Duke Energy Ohio, Inc. Nos. 21-24 (attached to IEU-Ohio's Motion to Compel).

III. CONCLUSION

IEU-Ohio's Complaint states a prima facie case for relief. DEO has not responded to IEU-Ohio's discovery requests within the time specified by the Commission's rules. DEO did not exhaust all reasonable means of resolving differences with IEU-Ohio regarding discovery and DEO has offered no legitimate basis for not responding. Instead, DEO has filed numerous pointless motions – wasting the Commission's time – solely to delay IEU-Ohio's ability to prosecute its Complaint. DEO has failed to cite to any applicable fact pattern or controlling precedent to support its position. IEU-Ohio, on the other hand, has demonstrated that DEO's positions conflict with the Commission's rules, Ohio law, and Commission precedent.

For the reasons previously expressed and those expressed herein, IEU-Ohio urges the Commission to promptly grant IEU-Ohio's Motion to Compel.

Respectfully submitted,



Samuel C. Randazzo, Esq.
MCNEES WALLACE & NURICK LLC
21 East State Street, Suite 1700
Columbus, OH 43215-4228
(614) 719-2840 (T)
(614) 469-4653 (Fax)
sam@mwncmh.com

Robert A. Weishaar, Jr.
MCNEES WALLACE & NURICK LLC
777 North Capitol Street, N.E. , Suite 401
Washington, DC 20002-4292
(202) 898-5700 (T)
(717) 260-1765 (Fax)
rweishaa@mwn.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply of Industrial Energy Users-Ohio to Duke Energy Ohio, Inc.'s Memorandum Contra Industrial Energy Users-Ohio's Motion to Compel Discovery* was served upon the following parties of record this 2nd day of November 2010, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.


Samuel C. Randazzo

Mark A. Whitt, Counsel of Record
Christopher T. Kennedy
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
whitt@carpenterlipps.com
kennedy@carpenterlipps.com

Keith L. Beall
Senior Attorney—State Regulatory
Midwest ISO – Legal Department
PO Box 4202
Carmel, IN 46082-4202
kbeall@midwestiso.org

**ON BEHALF OF THE MIDWEST INDEPENDENT
TRANSMISSION SYSTEM OPERATOR, INC.**

William L. Wright
Senior Assistant Attorney General
Ohio Attorney General's Office
Chief, Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
william.wright@puc.state.oh.us

**ON BEHALF OF THE STAFF OF THE PUBLIC
UTILITIES COMMISSION OF OHIO**

Elizabeth A. McNellie, Counsel of Record
Gregory R. Flax
Baker & Hostetler LLP
65 East State Street, Suite 2100
Columbus, OH 43215-4260
emcnellie@bakerlaw.com
gflax@bakerlaw.com

Amy B. Spiller
Associate General Counsel
Duke Energy Ohio, Inc.
139 East Fourth Street, EA025
Cincinnati, OH 45201-0960
Amy.Spiller@Duke-Energy.com

Elizabeth H. Watts
Assistant General Counsel
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, OH 43215
elizabeth.watts@duke-energy.com

ON BEHALF OF DUKE ENERGY OHIO, INC.

Greg Price
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215