

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY OF INDUSTRIAL ENERGY USERS-OHIO
TO MIDWEST INDEPENDENT TRANSMISSION SYSTEM OPERATOR, INC.'S
MEMORANDUM CONTRA MOTION TO COMPEL DISCOVERY**

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November 12, 2010

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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 Public Utilities Commission of Ohio ("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 "... shall be 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. On September 27, 2010, IEU-Ohio sent a Second Set of Interrogatories and Request for Production of Documents to MISO. According to Commission rules, the deadlines for responding to these discovery requests have come and passed.¹ MISO does not dispute these facts.

On October 21, 2010, IEU-Ohio filed a Motion to Compel Discovery Responses (hereinafter "Motion to Compel") after it became evident that MISO would not answer discovery requests in the absence of a Commission order. MISO filed a Memorandum Contra IEU-Ohio's Motion to Compel Discovery Responses ("hereafter "Memorandum Contra") on November 4, 2010. IEU-Ohio is exercising its right to reply to the Memorandum Contra.

¹ On October 15, 2010, MISO filed a Motion to Stay Discovery (hereinafter "Motion to Stay").

The Commission should grant IEU-Ohio's Motion to Compel. MISO is attempting to thwart the Commission's ability to determine if MISO meets the criteria in Section 4928.12, Revised Code, and, in the present context, pursuing this objective by refusing to respond to discovery that was properly served and specifically targeted to elicit relevant evidence. As discussed below, MISO's jurisdictional claims are without merit and cannot excuse MISO's failure to respond to discovery. Moreover, MISO has not followed the procedural steps required to challenge IEU-Ohio's discovery. MISO has not exhausted all other reasonable means of resolving any differences with IEU-Ohio regarding discovery. MISO provides no legitimate legal basis for not responding to IEU-Ohio's discovery requests. Instead, MISO attempts to distract the Commission with inapplicable case law and out-of-context quotations. The Commission should grant IEU-Ohio's Motion to Compel 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 MISO fails to provide a legitimate basis for not responding. MISO'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 anticipated and directly addressed many of the arguments that MISO includes in its

² On September 21, 2010, IEU-Ohio sent a First Set of Interrogatories and Request for Production of Documents to MISO, pursuant to and consistent with Rules 4901-1-19, 4901-1-20, and 4901-1-22, Ohio Administrative Code ("O.A.C."). On September 27, 2010, IEU-Ohio sent a Second Set of Interrogatories and Request for Production of Documents to MISO. Instead of responding within the required 20 days, MISO filed a Motion to Stay. That Motion fails to comply with Rule 4901-1-24, O.A.C., because MISO 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 MISO's Motion to Stay.

Memorandum Contra. This Reply focuses on the handful of new contentions and citations that appear in MISO's Memorandum Contra.

IEU-Ohio's response to MISO's Memorandum Contra necessarily addresses MISO's new arguments regarding its status as a legitimate party to this proceeding, because MISO attempts to hide behind jurisdictional claims to defend its non-response to IEU-Ohio's discovery. Those claims are incorrect as a matter of law and provide no basis for MISO's failure to respond to discovery. IEU-Ohio's Motion to Compel must be granted.

A. MISO Provides No Legitimate Basis For Its Failure To Respond To IEU-Ohio's Discovery Requests

MISO acknowledges that it has not responded and will not respond to IEU-Ohio's discovery. MISO instead seeks shelter under its Motion to Stay. MISO alleges that "because this case cannot proceed to hearing, there is no basis to allow discovery."³ MISO contends that its still-pending assertion that the Commission lacks subject matter jurisdiction shields it from its obligation to respond timely to IEU-Ohio's discovery requests.⁴

Rule 4901-1-24(B), O.A.C., which the Commission cited in its October 7, 2010 Entry, requires that a party that is seeking to avoid responding to discovery requests must show that it has "...exhausted all other reasonable means of resolving any differences with the party seeking discovery." MISO does not even purport to have engaged in any such discussions. The only written responses from MISO are its Motion

³ See Midwest ISO's Reply Memorandum in Support of Motion to Dismiss and Motion to Stay Discovery, and Memorandum Contra Motion to Compel Discovery at 9 (November 4, 2010).

⁴ *Id.* at 8-9.

to Dismiss and Motion to Stay, which merely contain erroneous and self-serving claims regarding the merits of IEU-Ohio's Complaint.

MISO has not taken any steps to comply with the Commission's discovery rules, and neither has MISO undertaken any efforts to identify any objections to the discovery requests or pursue amicably any alternatives for responding to the discovery requests (e.g., committing to respond to some, but not all, of the discovery requests). These circumstances require that the Commission issue an order compelling MISO to respond expeditiously to all outstanding discovery requests.

MISO does not contend that IEU-Ohio's discovery violates the purpose of the Commission's discovery process which, as specified in Rule 4901-1-16, O.A.C., "... is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings" and to "minimize the commission's intervention in the discovery process."

MISO does not allege that IEU-Ohio's discovery is outside the scope of discovery permitted by Rule 4901-1-16, O.A.C. MISO does not allege that IEU-Ohio's discovery seeks privileged information or that IEU-Ohio's discovery is not reasonably calculated to lead to the discovery of relevant information.

MISO's Memorandum Contra cites several Commission orders that are not relevant to the circumstances in this proceeding. For example, In the Matter of the Applications of The East Ohio Gas Company d.b.a. Dominion East Ohio and Columbia Gas of Ohio Inc. for Adjustment of Their Interim Emergency and Temporary Percentage of Income Payment Plan Riders, Case Nos. 05-1421-GA-PIP, *et al.*, Entry on Rehearing

at 8 (March 7, 2006) (hereinafter "East Ohio Gas"), involves a completely different set of facts. Memorandum Contra at 10. In that case, the Commission denied the Ohio Consumers' Counsel's ("OCC") motion to intervene, so it also denied OCC's Motion to Compel Discovery. The Commission noted that it did not compel discovery because Section 4903.082, Revised Code, only permits intervenors to conduct discovery. In the Matter of the Joint Application of Cinergy Corp., on Behalf of The Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company, Case Nos. 05-732-EL-MER, *et al.*, Entry on Rehearing at 4 (December 7, 2005) involved a set of facts very similar to those in the East Ohio Gas case. The Commission stated:

Section 4903.082, Revised Code, states that ample discovery must be granted to intervenors. Although OCC has filed a motion to intervene, it is not an intervenor, as its motion for intervention has not been granted. Therefore, the Commission finds that it is not necessary to allow discovery to commence.

Id. Obviously, IEU-Ohio has not filed a motion to intervene and Section 4903.082, Revised Code, is inapplicable. In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for the Adjustment of its Interim Emergency and Temporary Percentage of Income Payment Plan Rider, Case No. 09-2011-GA-PIP, Finding and Order (March 24, 2010) (hereinafter "East Ohio Gas 2") is similarly inapplicable. In that case, The East Ohio Gas Company ("East Ohio") filed an application to modify its Percentage of Income Payment Plan ("PIPP") Rider. OCC filed a motion to intervene. The Commission, however, chose to grant East Ohio's application before ruling on the motion to intervene. *Id.* at 4. Moreover, the Commission noted in the order that such applications are automatically approved if the

Commission does not act upon them within forty-five days. *Id.* at 2. Consequently, the Commission denied OCC's motion to compel not because it had pending before it a motion to dismiss or motion to stay, but because OCC's motion to intervene in the proceeding was still pending when East Ohio's application was granted, thus rendering moot any discovery that OCC had propounded.

In short, the cases referenced by MISO's Memorandum Contra are completely irrelevant to the circumstances here – again, IEU-Ohio is not an intervenor, nor is IEU-Ohio's right to discovery based on Section 4903.082, Revised Code. The Commission should grant IEU-Ohio's Motion to Compel promptly.

B. The Commission Has Jurisdiction To Determine Whether Transmission Entities Satisfy Section 4928.12, Revised Code

MISO's chief response to IEU-Ohio's Motion to Compel is its attempt to hide behind a weak jurisdictional challenge. The Commission previously rejected MISO's position that the Commission lacks subject matter jurisdiction over regional transmission entities. Indeed, each time the Commission has been asked to adjudicate the status of a regional transmission entity under Section 4928.12, Revised Code, the Commission claimed jurisdiction. See In the Matter of the Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan, et al., Case Nos. 02-3310-EL-ETP, *et al.*, Entry on Rehearing at 3 (April 17, 2003) (hereinafter "CSP Independent Transmission Plan"); 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, Opinion and Order at 44 (November 30, 1999) (hereinafter "Promulgation of Rules Pursuant to

Chapter 4928”). MISO’s attempt to rely on Case No. 99-1141-EL-ORD must be rejected because MISO takes the case completely out of context. The Commission dispelled any question regarding its jurisdiction over regional transmission entities stating:

The Commission has addressed the issue of our jurisdiction related to transmission matters when we adopted rules for the filing of ETPs. The Commission found that the Ohio legislature included Section 4928.12, Revised Code, in the electric restructuring legislation **to assure that transmission entities meet certain specifications that fulfill the needs of Ohio.**

CSP Independent Transmission Plan, Entry on Rehearing at 3 (April 17, 2003) (emphasis added) [citing Promulgation of Rules Pursuant to Chapter 4928, Case No. 99-1131-EL-ORD, Opinion and Order at 44 (November 30, 1999)]. It is clear that the General Assembly granted the Commission jurisdiction to determine whether regional transmission entities satisfy the requirements of Section 4928.12, Revised Code. It is clear that the General Assembly granted the Commission jurisdiction to determine whether transmission owners in the State – such as DEO – satisfy the requirements of Section 4928.12, Revised Code. Although MISO obsesses with the definition of “public utility,” it is clear that the statute is focused on regional transmission entities, and whether they meet the needs of the people of Ohio. It is apparent that MISO has failed in that respect.

MISO’s reliance on Lucas Cty. Commr’s v. Public Util. Comm’n, 80 Ohio St. 3d 344 (1997), is also misplaced. The Commission’s jurisdiction is conferred by statute. *Id.* at 347. But it is apparent that Section 4928.12, Revised Code, gave the Commission jurisdiction over the subject matter in the Complaint. The Commission is uniquely and unquestionably positioned to determine whether an entity qualifies as a transmission

entity under Section 4928.12, Revised Code. No other court or body in Ohio or outside Ohio is qualified or authorized to make that determination.

MISO's allegation that the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over interstate transmission is equally unavailing. Indeed, the Commission previously stated:

We also noted that the specifications found in Section 4928.12, Revised Code, are largely compatible with those established by FERC for the establishment of RTOs. Consequently, the Commission is not acting beyond its jurisdiction conferred by the state legislature in considering the complaints.

CSP Independent Transmission Plan, Entry on Rehearing at 3 (April 17, 2003). FERC, in its recent realignment order, reaffirmed the authority of the Commission: "We note, however, that nothing in this order should be interpreted as interfering with state regulatory authority or requirements."⁵ The Commission should assert the authority it has been given, exercise subject matter jurisdiction over the Complaint, and order MISO to respond to IEU-Ohio's outstanding discovery requests.

C. MISO May Be Joined As A Party Under The Civil Rules

MISO misconstrues the applicability of the Civil Rules pertaining to joinder of parties. MISO claims that Section 4903.22, Revised Code, is a "dead letter" and that the Civil Rules do not apply in any Commission proceedings. MISO's understanding boils down to the following: If an action is not capable of being filed in a court of law, then Section 4903.22, Revised Code, does not apply. Then MISO merely cites to a few cases that say the Commission has jurisdiction over actions arising under Title 49. See

⁵ See Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc., 133 FERC ¶ 61,058 (2010) ("Realignment Order").

generally State ex rel. Columbia Gas of Ohio, Inc. v. Henson, 102 Ohio St. 3d 349 (2004); State ex rel. Northern Ohio Tel. Co. v. Winter, 23 Ohio St. 2d 6; State ex rel. Cleveland Electric Illuminating Co., v. Cuyahoga County Court of Common Pleas, 88 Ohio St. 3d 447. MISO has a warped understanding of Section 4903.22, Revised Code. Not one of the above cases cited by MISO even mentions Section 4903.22, Revised Code.

To the contrary, the Commission often applies the Civil Rules for joinder in Commission proceedings. In the Matter of PS Executive Center, Inc. v. Ameritech Ohio and XO Ohio, Inc., Case No. 01-2771-TP-CSS, Entry (January 22, 2002), is particularly enlightening. PS Executive Centers ("Executive Centers") had contacted XO Communications ("XO") to take over its telephone service from Ameritech Ohio ("Ameritech"). XO informed Executive Centers that it would notify Ameritech of the transfer in service. That never happened, so Executive Centers received two bills. Executive Centers filed a Complaint against Ameritech. Ameritech, in turn, filed a motion to join XO as a party respondent. The Commission determined that XO may have important information relevant to the case, and that XO should be joined as a necessary party under Ohio Civil Rule 19(A) because, in XO's absence, complete relief cannot be accorded among those already a party to the proceeding. *Id.* at 2; see also In the Matter of the Complaint of Whitehorne Enterprises, Inc. v. XO Ohio, Inc. and Ameritech Ohio, Case No. 01-2801-TP-CSS, Entry at 2 (December 10, 2001) (finding that Ameritech is a necessary party under Ohio Civil Rule 19(A) because, in its absence, complete relief cannot be accorded among those already a party to the proceeding). In The Matter of the Complaint of Crown Mold & Machine v. D&L Gas

Marketing and Columbia Gas of Ohio, Inc., Case No. 01-772-GA-CSS, Entry (December 4, 2001), Crown Mold & Machine ("Crown") alleged that D&L Gas Marketing ("D&L") wrongfully terminated a contract to deliver natural gas to Crown. D&L was in the business of providing natural gas to consumers of Columbia Gas of Ohio. The Commission found "... given that D&L offers its marketing services pursuant to Columbia's aggregation service as outlined in Columbia's tariff, that Columbia is a necessary party. Under Ohio Civil Rule 19(A), Columbia is a necessary party...." *Id.* at 1.

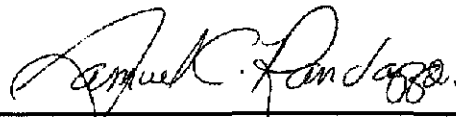
MISO must be joined as a party to the proceeding because MISO's inevitable disqualification as a regional transmission entity will affect its rights in Ohio and eliminate DEO's ability to comply with regional transmission operator participation obligations. Section 4928.12(C), Revised Code, grants specific powers to transmission entities that satisfy the criteria of Section 4928.12, Revised Code. MISO will lose these rights once the Commission determines that MISO fails to satisfy the criteria of Section 4928.12, Revised Code.

MISO attempts to distract the Commission by alleging that the Civil Rules do not provide an independent basis for jurisdiction. This mischaracterizes the Complaint and does not accurately portray the applicability of the Civil Rules to Commission proceedings. The Commission has subject matter jurisdiction, pursuant to Section 4928.12, Revised Code, to determine whether MISO qualifies as a regional transmission entity. The Commission should properly exercise that jurisdiction, and compel MISO to respond promptly to IEU-Ohio's outstanding discovery requests.

III. CONCLUSION

The Commission should grant IEU-Ohio's Motion to Compel Discovery. MISO has provided no legitimate basis for not responding, and MISO has not exhausted all other reasonable means of resolving any differences with IEU-Ohio regarding discovery. MISO's allegation that the Commission lacks subject matter jurisdiction is extremely repetitive and lacks merit. The Commission has subject matter jurisdiction to determine whether MISO satisfies the requirements of Section 4928.12, Revised Code. MISO should be joined as a party to ensure complete relief. The Commission should grant IEU-Ohio's Motion to Compel promptly.

Respectfully submitted,



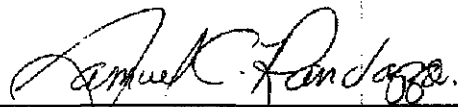
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply of Industrial Energy Users-Ohio to Midwest Independent Transmission System Operator, Inc.'s Memorandum Contra Motion to Compel Discovery*, was served upon the following parties of record this 12th day of November 2010, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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