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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Duke)
Energy Ohio for Approval of a Market)
Rate Offer to Conduct a Competitive)
Bidding Process for Standard Service) Case No. 10-2586-EL-SSO
Offer Electric Generation Supply,)
Accounting Modifications, and Tariffs for)
Generation Service.)

DUKE ENERGY OHIO, INC.'S MEMORANDUM

IN OPPOSITION TO THE MOTION TO COMPEL

OF INDUSTRIAL ENERGY USERS-OHIO

By its Motion to Compel (Motion) filed at 5:30 p.m. on Friday, December 3, 2010, Industrial Energy Users-Ohio (IEU) seeks to compel Duke Energy Ohio, Inc., (Duke Energy Ohio) to spend its time and ratepayer dollars to respond to a set of interrogatories and requests for production of documents for which IEU has sought answers, to no avail, in a separate proceeding that is currently before the Public Utilities Commission of Ohio (Commission) on motions to dismiss. The issues related to regional transmission organizations (RTOs) that are under consideration in this market rate offer (MRO) proceeding are extremely circumscribed and do not reach to the queries by IEU. The additional rationales raised by IEU in its vain attempt to show any relevance to this proceeding are mere misstatements of law and fact. Thus, Duke Energy Ohio respectfully submits that IEU's Motion should be denied.

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IEU's motion is a series of generalizations, with no effort to show how any single, individual interrogatory or document request is related to this proceeding. Duke Energy Ohio will review each and every interrogatory and document request and discuss its objections. However, the general assertions by IEU must first be addressed.

IEU's Assertions

IEU's Description of Duke Energy Ohio's Position.

IEU, in its generalized discussion of the issues, states that Duke Energy Ohio's objections "state that [Duke Energy Ohio] is refusing to provide substantive responses because of the position [Duke Energy Ohio] has taken in Case No. 10-1398-EL-CSS." Although it is true that Duke Energy Ohio referenced, in its responses, the fact that IEU propounded the exact same discovery on Duke Energy Ohio in this proceeding as it did in that complaint case, that fact is a far cry from IEU's allegation. First, as even a cursory glance at Duke Energy Ohio's objections will reveal, the objections raised to this discovery include a number of issues, not just one. In addition, even the reference to the IEU complaint proceeding is not a statement that Duke Energy Ohio is objecting here because of the position that Duke Energy Ohio has taken in that case. Rather, Duke Energy Ohio has pointed out to IEU that it is a perversion of the discovery process for IEU to take discovery from one case, where dismissal and a corresponding stay of discovery are under consideration, and simply drop it into a new proceeding on unrelated matters.

Issues Included in MRO Proceeding.

Although IEU implies otherwise, Duke Energy Ohio agrees that both state policy, as set forth in R.C. 4928.02, and corporate separation issues are matters to be considered by the Commission in the course of an MRO proceeding. However, this application most certainly is

not one that is asking for the Commission to consider and approve of Duke Energy Ohio's transfer of functional control of transmission facilities from one RTO to another.

Similarly, IEU attempts, in its Motion, to raise corporate separation issues as the connection between its discovery and this proceeding. Although corporate separation is at issue in a limited manner, this is not an audit of Duke Energy Ohio's corporate separation compliance. If IEU had wished to raise compliance issues, it should have done so in a proceeding that was intended to address such matters.

In addition, Duke Energy Ohio is at a loss to find any legitimate corporate separation compliance issues, even if such were appropriately under consideration here. In IEU's motion, page 8, it suggests that its discovery "seeks information that will identify whether [Duke Energy Ohio's] RTO elections are being improperly influenced by an affiliated company engaged in offering competitive services or otherwise managing generation assets." IEU offers no explanation as to what "affiliated company" it is referencing. Later, on pages 11 and 12 of its Motion, IEU includes slightly more information. It is apparently seeking information regarding communications between a Midwest Independent System Operator (Midwest ISO) official and Keith Trent, who IEU describes as "an employee who is not an employee of [Duke Energy Ohio]." Is this the source of the corporate separation concern? Keith Trent is an employee of Duke Energy Business Services LLC, the service company by which most employees in the Duke Energy Corporation businesses are employed. Mr. Trent serves as the President of Commercial Businesses for Duke Energy Corporation. As this Commission is well aware, Ohio law and regulations anticipate that large companies may operate in this manner, with personnel being employed, in large part, by one entity and being "shared" among the various operating

entities. That Mr. Trent is employed by DEBS does not create a corporate separation violation and does not mean that his discussions with the Midwest ISO were on behalf of an entity other than the one that owns and operates generation assets. Indeed, Ohio law provides that transmission services are nonregulated at the state level.

Perhaps IEU's corporate separation concern is actually based on the discussion found on page 10 of its Motion. IEU proposes that, if the Midwest ISO (because of alleged misconduct) does not satisfy the requirements of R.C. 4928.12, then Duke Energy Ohio's corporate separation, of necessity (as the Midwest ISO is referenced as Duke Energy Ohio's RTO), is invalid. Therefore, IEU concludes, Duke Energy Ohio's MRO application must be denied.

Of course, there are several flaws in this logic. First, this is most definitely not a proceeding to determine whether the Midwest ISO is a suitable RTO for any utility in Ohio to belong to. Second, as IEU is well aware, Duke Energy Ohio has obtained approval from the Federal Energy Regulatory Commission (FERC) to transfer functional control of its transmission assets to PJM Interconnection LLC (PJM). The transfer to PJM is planned to occur effective January 1, 2012, the same date on which the proposed MRO would go into effect. Membership terms and conditions, including those involving the withdrawal of an RTO member, are jurisdictional to the FERC. Duke Energy Ohio must abide by those conditions and cannot accelerate its withdrawal. Therefore, not only are IEU's claims in this regard irrelevant vis-à-vis Duke Energy Ohio, they are also moot. If IEU is concerned with Midwest ISO's suitability as an RTO, this is an issue to be decided by the FERC and IEU must make its case in that forum.

It is undeniable that Duke Energy Ohio's corporate separation plan will have to be updated to reflect this RTO change once it is effective, and Duke Energy Ohio said as much in

its application. Such amendment of the plan cannot occur until the Commission has acted on the amendment of the plan that is currently before it and the language of the plan cannot indicate alignment with PJM until the change is completed. Thus, amendment of the plan on this basis is not yet ripe. It is absurd to suggest that the MRO application must be denied because Duke Energy Ohio has not yet amended the plan to reflect the change that has been, elsewhere, approved and is not even effective under the FERC-governed process. It is, similarly, absurd to suggest that discovery that addresses issues related to the suitability of Midwest ISO, which will not be Duke Energy Ohio's RTO after 2011, to serve as an RTO at all are relevant to Duke Energy Ohio's application for its new standard service offer.

IEU also raises the specter of state policy violations in its attempt to show relevance of its discovery. However, the only actual policy issue that IEU asserts is to suggest "that DEO and its affiliates have essentially conducted a CBP to see which RTO offers the best generation revenue opportunity in exchange for DEO agreeing to transfer operational control over transmission facilities to the winning RTO bidder. This is not the type of CBP that is consistent with the public interest or the policy objectives set forth in [R.C. 4928.12]." Motion at p. 12. IEU's justification is dubious at best and intentionally misstates the facts at worst. There was no CBP to determine which RTO Duke Energy Ohio would condition its future membership upon. RTO membership is voluntary and the terms and conditions of membership are FERC-regulated. RTO membership is, however, required under Ohio law. Ohio law does not prescribe any conditions to a utility's RTO membership decision, just the obligation to be a member.

The justification for Duke Energy Ohio to realign its RTO membership is not at issue in the case *sub judice*. It is entirely irrelevant to this proceeding. Realignment with PJM provides

the Company with many operational benefits with its jointly owned generation whose co-owners are already in PJM. Realignment also puts all competitive suppliers of retail electric service in Ohio in the same RTO, thereby allowing the participants to operate under the same set of rules. Duke Energy Ohio fully explained its reasoning as part of its filing before the FERC, which was ultimately approved pending the Company's satisfaction of certain regulatory conditions. IEU could have raised its concerns at the FERC. It did not.

Despite its curious claims regarding state policy, even IEU has not alleged that Duke Energy Ohio has actually conducted such a competitive bidding process; these are IEU's fanciful allegations, created out of whole cloth.

Duke Energy Ohio's Objections

Irrelevance.

All of the interrogatories and requests for production of documents propounded by IEU were overly broad and unduly burdensome, given that they seek information that is neither relevant to this proceeding nor likely to lead to the discovery of evidence that would be admissible in this proceeding. A number of aspects of this issue have been discussed above, but Duke Energy Ohio addresses these arguments with reference to the various issues identified in the discovery requests. In doing so, Duke Energy Ohio first reiterates the intended purpose and scope of discovery as contemplated under Commission rules.

As expressly set forth in O.A.C. 4901-1-16, discovery may be obtained in respect of any matter, "not privileged, which *is relevant* to the subject matter of the proceeding." (Emphasis added.) However, discovery into matters or about information that is not reasonably calculated to lead to the discovery of admissible evidence is not permitted. *Id.* See also *In the Matter of the*

Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Case No. 99-1658, 2000 PUC LEXIS 337, *4. In this regard, the Commission has found that the rules applicable to the discovery process will not be liberally interpreted. *In the Matter of the Complaint of David Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 PUC LEXIS 634, *6-7. Applying these general principles to IEU's discovery requests at issue undeniably confirms that said requests are well beyond the intended scope of discovery.

Interrogatories 1 through 8 and Document Requests 1 through 4 seek information concerning whether the Midwest ISO offered, or Duke Energy Ohio requested, any "commitments or concessions" in an attempt to convince Duke Energy Ohio to remain in the Midwest ISO. To determine whether this issue has relevance to Duke Energy Ohio's Application for approval of its MRO, it is critical to review the questions that must be answered by the Commission in order to evaluate that Application. Division (D) of R.C. 4928.142 sets forth the aspects of RTO membership that are relevant to the MRO determination:

An application under this division shall . . . demonstrate that all of the following requirements are met:

- (1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.
- (2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

The administrative rules promulgated by the Commission to amplify this statutory language include the same substantive requirements. O.A.C. 4901:1-35-03(B)(1)(a) and (b).

Does the existence or nonexistence of any "commitments or concessions" by the Midwest ISO impact, in any way, whether or not Duke Energy Ohio belongs to an RTO? No. Does it impact, in any way, whether or not the Midwest ISO or PJM has a market-monitor function and the ability to identify and mitigate market power? No.

IEU asserts, in its Motion, that state policy issues *may* support its requests. It is unclear, however, how state policy goals can possibly be impacted by the existence of any alleged "commitments or concessions" that may have been offered by the Midwest ISO to convince Duke Energy Ohio to remain in the Midwest ISO, or similarly requested by Duke Energy Ohio, when ultimately Duke Energy Ohio decided to transfer control of its transmission assets to PJM. Any such "commitments or concessions" must have been, by definition, of no effect and could not have had any impact on state policies. Duke Energy Ohio is leaving the Midwest ISO and realigning with PJM. Assuming such offers were made, how could an ineffective offer by the Midwest ISO, in the face of Duke Energy Ohio's move to PJM, be relevant or have any impact on the availability of reasonably priced retail electric service? It cannot and IEU has thus failed to establish a basis to compel discovery now.

IEU also asserts that its discovery requests *may* reveal information that is relevant to corporate separation issues in the MRO proceeding. Again, it is necessary to start with a clear understanding of what corporate separation issues are actually relevant to an MRO application. The statute governing such applications does not mention corporate separation plans in any way. The administrative rules that amplify that statute include the following subsection:

The electric utility shall provide a description of its corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code, including but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its

corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to Chapter 4901:1-37 of the Administrative Code.

O.A.C. 4901:1-35-03(B)(3). Discovery questions concerning “commitments or concessions” by MISO are unquestionably not directed toward uncovering any information about a description of the plan, its status, a list of waivers, or anticipated revisions. This filing requirement cannot be the justification for these discovery requests.¹

State policy, again, could be looked to for justification on the corporate separation issue raised by IEU, if there were state policies that could conceivably be impacted by any answer to these questions. Reviewing the state policies enumerated in R.C. 4928.02, the most relevant are:

- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power[.]

Once again, it is clear that supposed “commitments or concessions” proposed by the Midwest ISO and rejected by Duke Energy Ohio, or the reverse, are entirely unrelated to the avoidance of subsidies and protection against unreasonable sales practices, market deficiencies, and market power.

Discovery questions are required, at least, to be “reasonably calculated to lead to the discovery of admissible evidence.” O.A.C. 4901-1-16(B). The answers to these questions cannot, by any stretch of the imagination, lead to the discovery of information that would be relevant to Duke Energy Ohio’s application for an MRO.

¹ It is also noteworthy that the corporate separation issue was apparently a last-ditch effort by IEU, in the complaint case. Corporate separation was not initially discussed by IEU but was added, later, in a supplemental filing.

Interrogatories 9 through 12 and 15 through 24 and Document Requests 5, 6, and 9 through 13 request information concerning studies or analyses that may have addressed the economic impact of Duke Energy Ohio's move to PJM on Duke Energy Ohio, the Midwest ISO, other Midwest ISO members, other PJM members, or Duke Energy Ohio's affiliates. The existence, or content, of any studies dealing with economic impacts of Duke Energy Ohio's move to PJM could not affect any the elements of the MRO Application review: membership of Duke Energy Ohio in an RTO that is approved by FERC, the existence of a market monitor function, the furthering of state policies, or the status of Duke Energy Ohio's corporate separation plan.

Interrogatories 13 and 14 and Document Requests 7 and 8 request information concerning internal protocols for communications with RTOs. Again, this information would not impact the Commission's review of Duke Energy Ohio's membership in an RTO approved by FERC, the existence of a market monitor function, the furtherance of state policies, or the status of the corporate separation plan.

As none of the interrogatories or requests for production of documents seek information that is directly relevant to this proceeding, nor are they likely to lead to the discovery of evidence that would be admissible in this proceeding, IEU's motion to compel should be denied.

Vagueness.

Duke Energy Ohio also objected to Interrogatories 9 through 12 and 21 through 24 and Document Requests 5, 6, 12, and 13 on the ground that they are vague and ambiguous and, therefore, unduly burdensome. The questions ask for information

concerning “revenues [Duke Energy Ohio] may receive... .” It is unclear to Duke Energy Ohio whether these questions are asking for information concerning revenues the Duke Energy Ohio would receive from customers or otherwise. This is an extremely broad question at best and, with its confusing wording, cannot reasonably be answered. Similarly, Interrogatories 17 through 20 and Document Requests 9 and 10 ask about the “impact” of the move to PJM – a vague and indecipherable term. What type of impact is IEU referencing? Duke Energy Ohio would not be able to answer without conjecture. The motion to compel should be denied.

Privilege.

The questions that ask for information concerning studies or analyses that may have been prepared are also subject to objections on the ground of privilege. Discovery in Commission proceedings is only allowed with regard to matters that are not privileged. O.A.C. 4901-1-16(B). To the extent that studies or analyses that could be responsive to these inquiries may be prepared, they were done so at the request of counsel, in preparation for litigation. They are, therefore, privileged matters.

Exceeding the Scope of Discovery.

The final category of objections relates to all interrogatories and request for production of documents and is based on the process under way in a complaint case filed by IEU, docketed at 10-1398-EL-CSS.

In that case, a complaint against the Midwest ISO and Duke Energy Ohio, IEU propounded a number of interrogatories and requests for production of documents on Duke Energy Ohio. Notably, IEU propounded here an identical set of these discovery requests. The

Midwest ISO and Duke Energy Ohio have both filed motions for a dismissal by the Commission, as well as motions to stay discovery pending the resolution of the dismissal request. IEU contemporaneously filed a motion to compel responses to its discovery. While these motions are pending, Duke Energy Ohio has not responded to IEU's discovery requests.

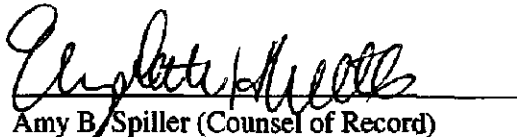
What IEU has been unable to obtain through its complaint docket, it apparently hopes to garner here. IEU simply changed the caption on its discovery requests and sent them out again. This is clearly an abuse of the discovery process and demonstrates IEU's intent simply to harass Duke Energy Ohio. IEU's motion to compel should be denied.

Conclusion

For the reasons discussed above, Duke Energy Ohio respectfully suggests that Duke Energy Ohio's objections should be upheld and IEU's motion to compel should be denied.

Respectfully submitted,


DUKE ENERGY OHIO



Amy B. Spiller (Counsel of Record)
Associate General Counsel
Elizabeth H. Watts
Assistant General Counsel
Rocco O. D'Ascenzo
Senior Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
P. O. Box 960
Cincinnati, Ohio 45202-0960
(513) 287-4359

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Duke Energy Ohio, Inc.'s Memorandum in Opposition to the Motion to Compel of Industrial Energy Users-Ohio has been served to the parties by regular U. S. Mail, overnight delivery or electronic delivery this 7th day of December, 2010.


Elizabeth H. Watts

John W. Bentine Mark Yurick Matthew S. White Counsel for the Kroger Company Chester, Wilcox & Saxbe, LLP 65 East State Street, Suite 1000 Columbus, Ohio 43215-4213 jbentine@cwsllaw.com myurick@cwsllaw.com mwhite@cwsllaw.com	David F. Boehm Michael L. Kurtz Counsel for Ohio Energy Group Boehm, Kurtz & Lowry 36 East Seventh Street, Suite 1510 Cincinnati, Ohio 45202 dboehm@bkllawfirm.com mkurtz@bkllawfirm.com
David C. Rinebolt Counsel for Ohio Partners for Affordable Energy 231 West Lima Street Findlay, OH 45840-3033 Drinebolt@ohiopartners.org	Colleen L. Mooney Counsel for Ohio Partners for Affordable Energy 1431 Mulford Road Columbus, OH 43212-3404 Cmooney2@columbus.rr.com

<p> Samuel C. Randazzo Joseph E. Olier Counsel for Industrial Energy Users-Ohio McNees Wallace & Nurick LLC 21 E. State Street, 17th Floor Columbus, Ohio 43215 sam@mwncmh.com joliker@mwncmh.com </p>	<p> William T. Reisinger, Counsel of Record Nolan Moser Trent A. Dougherty Ohio Environmental Council 1207 Grandview Avenue, Suite 201 Columbus, Ohio 43212-3449 will@theoec.org nolan@theoec.org trent@theoec.org </p>
<p> Mark A. Hayden, Counsel of Record FirstEnergy Service Company 76 South Main Street Akron, Ohio 44308 haydenm@firstenergycorp.com </p> <p> David A. Kutik, Attorney for FirstEnergy Solutions Corp. Jones Day North Point 901 Lakeside Avenue Cleveland, Ohio 44114 dakutik@jonesday.com </p> <p> Grant W. Garber, Attorney for FirstEnergy Solutions Corp. Jones Day 325 John H. McConnell Blvd., Suite 600 Columbus, Ohio 43215-2673 gwwgarber@jonesday.com </p>	<p> Douglas E. Hart Attorney for The Greater Cincinnati Health Council 441 Vine Street, Suite 4192 Cincinnati, OH 45202 dhart@douglasshart.com </p>

<p>M. Howard Petricoff Stephen M. Howard VORYS, SATER, SEYMOUR AND PEASE LLP 52 East Gay Street P.O. 1008 Columbus, Ohio 43216-1008 mhpetricoff@vorys.com smhoward@vorys.com</p> <p>Cynthia Fonner Brady Senior Counsel Constellation Energy Resources, LLC 550 W. Washington St., Suite 300 Chicago, Illinois 60661 cynthia.brady@constellation.com</p> <p>Attorneys for Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.</p>	<p>Ann M. Hotz, Counsel of Record Kyle L. Verrett Jody M. Kyler Assistant Consumer Counsels Office of the Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, Ohio 43215-3485 hotz@occ.state.oh.us verrett@occ.state.oh.us kyler@occ.state.oh.us</p>
<p>Steven Beeler John Jones Assistant Attorneys General Public Utilities Commission of Ohio 180 East Broad Street Columbus, Ohio 43215 Steven.beeler@puc.state.oh.us John.jones@puc.state.oh.us</p>	<p>Michael D. Dortch Counsel for Duke Energy Retail Sales, LLC Kravitz, Brown & Dortch, LLC 65 East State St., Suite 200 Columbus, OH 43215 mdortch@kravitzllc.com</p>
<p>Barth E. Royer Bell & Royer Co., LPA 33 South Grant Avenue Columbus, Ohio 43215 barthroyer@aol.com</p> <p>Gary A. Jeffries Senior Counsel Dominion Resources Services, Inc. 501 Martindale Street, Suite 400 Pittsburgh, PA 15212 Gary.A.Jeffries@dom.com</p> <p>Attorneys for Dominion Retail, Inc.</p>	<p>Thomas J. O'Brien Counsel for the City of Cincinnati Bricker & Eckler LLP 100 South Third Street Columbus, Ohio 43215 tobrien@bricker.com</p>

Douglas E. Hart
Counsel for Eagle Energy, LLC
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202
dhart@douglasehart.com

Mary W. Christensen
Counsel for People Working Cooperatively, Inc.
Christensen & Christensen LLP
8760 Orion Place, Suite 300
Columbus, Ohio 43240
mchristensen@columbuslaw.org