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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Industrial Energy Users-Ohio,)
)
Complainant,)
)
v.)
)
The Midwest Independent Transmission System)
Operator, Inc.,)
)
and)
)
Duke Energy Ohio, Inc.,)
)
Respondents.)

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Case No. 10-1398-EL-CSS

MIDWEST ISO'S RESPONSE TO THE JOINT MOTION TO DISMISS OF INDUSTRIAL ENERGY USERS-OHIO AND DUKE ENERGY OHIO, INC.

Pursuant to Rule 4901-1-12(B)(1) of the Ohio Administrative Code, Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") submits this Response to the Joint Motion to Dismiss filed by the Industrial Energy Users-Ohio ("IEU-Ohio") and Duke Energy Ohio, Inc. ("DE-Ohio").

The Joint Motion states that IEU-Ohio and DE-Ohio have settled their dispute, and on that basis requests that the Commission dismiss DE-Ohio from this case. A ruling on the Joint Motion should not limit dismissal to claims against DE-Ohio. The Commission should dismiss the Complaint in its entirety.

The Joint Motion states that notwithstanding the requested dismissal of DE-Ohio, IEU-Ohio intends to prosecute its claims against Midwest ISO. IEU-Ohio contends that, should its Complaint survive Midwest ISO's Motion to Dismiss,¹ the issues in the case "shall be confined to

¹ Midwest ISO filed Motions to Dismiss the Complaint and Stay Discovery with supporting Memoranda on October 15, 2010, and a Reply Memorandum in Support on November 4, 2010. Midwest ISO's Motion to Dismiss is pending before the Commission.

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issues regarding MISO's ability to satisfy the statutory criteria in Section 4928.12." (Mem. Sup., p. 4.) The Commission does not have the jurisdiction that IEU-Ohio asks it to exercise. This is so regardless of whether DE-Ohio remains in the case. It is especially so if DE-Ohio is dismissed.

The Commission is "a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." Dayton Communications Corp. v. Pub. Util. Comm. (1980), 64 Ohio St. 2d 302, 307. But IEU-Ohio consistently has implored the Commission to assert jurisdiction it simply does not have. IEU-Ohio has conceded that Midwest ISO is not a public utility. (Mem. Contra, Oct. 28, 2010, p. 5.) It has recognized that the Commission has dismissed complaints against RTOs for that very reason. (Id.) Yet it stubbornly maintains that jurisdiction for its claims exist and that "[m]aking determinations in these areas does not require the Commission to exercise regulatory jurisdiction over any RTO" (Id., p. 13 (emphasis added).)

IEU-Ohio has hung its jurisdictional hat on two underlying (and entirely flawed) assumptions: (i) the Commission has jurisdiction over the issue of whether Midwest ISO meets the eligibility criteria in Section 4928.12 (id., pp. 4-6); and (ii) Midwest ISO may be properly joined as a respondent to a complaint that claims that DE-Ohio cannot comply with Section 4928.12 (id., pp. 6-8). IEU-Ohio, however, cannot create Commission jurisdiction out of thin air based on this patchwork of ideas. The General Assembly has not authorized the Commission to assert jurisdiction over complaints against RTOs regarding Section 4928.12 eligibility; in fact, it has specifically excluded RTOs from Commission regulation altogether. (Mem. Sup., Oct. 15, 2010, pp. 4-8.) Nothing in Section 4928.12 of the Revised Code (or more importantly Section 4928.16 for that matter) extends the Commission's jurisdiction over RTOs for the limited purpose of determining whether a particular RTO meets eligibility requirements. That is a matter exclusively left for the Federal Energy Regulatory Commission under federal law, not the Ohio Commission. (Id., pp. 6-7 & n.1.) Nor can the Commission somehow expand the limits of its jurisdiction by using

Ohio's civil rules to join parties over which it has no regulatory authority. (Rep. Mem. Sup., Nov. 2, 2010, pp. 7-9.) The Commission's power to exercise jurisdiction over and adjudicate claims against entities comes from the scope of the authority granted by the General Assembly, not Ohio's civil rules. (Id.) The Commission has no legal authority to issue rulings against unregulated entities, even if their conduct is somehow related to a dispute between a consumer and a regulated entity. See, e.g., S.G. Foods, Inc. et al. v. FirstEnergy Corp., et al., Case No. 04-28-EL-CSS et al., Entry of Mar. 7, 2006, ¶¶ 49-57(explaining that complaint jurisdiction is limited to claims against Ohio public utilities by their customers, and on that basis dismissing claims against public utility holding companies, RTOs and entities supplying electricity outside Ohio); Entry of Sept. 27, 2006, ¶¶ 7, 9 (same; dismissing claims against municipal electric supplier).

Even if the Commission had jurisdiction to rule on the conduct of an RTO in the context of a consumer's dispute with a public utility (and it does not), IEU-Ohio's purported "hook" for jurisdiction will disappear with the dismissal of DE-Ohio. As made clear in S.G. Foods, the Commission is not in the business of ruling on the conduct of unregulated entities. It certainly is not in the business of issuing advisory opinions in a complaint proceeding on such conduct in the absence of a regulated entity as a respondent. Yet IEU-Ohio proposes that the Commission allow this action to survive, presumably to allow an errant discovery escapade that will turn up nothing. Even if it did, the Commission has no jurisdiction to receive evidence, make findings of fact or otherwise determine Midwest ISO's legal status as an eligible RTO.

IEU-Ohio claimed that Midwest ISO "must be joined as a party to the proceeding because [its] inevitable disqualification as a regional transmission entity will affect its rights in Ohio and eliminate [DE-Ohio's] ability to comply with regional transmission operator participation obligation." (Rep. to Midwest ISO's Mem. Contra Motion to Compel Discovery, Nov. 12, 2010, p. 11.) The Commission has no authority to litigate the "rights" of parties over which it does not have

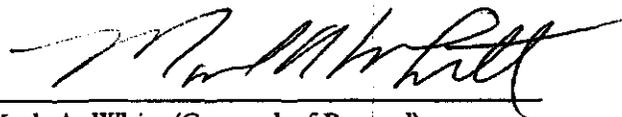
jurisdiction. Nor does the Commission need to litigate DE-Ohio's ability to comply with Section 4928.12. That claim has now apparently been settled. IEU-Ohio can no longer point to DE-Ohio's presence in this action as a basis for its tenuous argument to "join" claims against Midwest ISO.

The Commission was established to be "the intermediary between the citizen-consumer on one side and the public utility on the other." Cleveland v. Pub. Util. Comm. (1934), 127 Ohio St. 432, 435-436 (emphasis added). With DE-Ohio's dismissal from this case, not only will there not be a dispute between a consumer and a public utility, there will not even be a public utility left in the action. The Commission has no authority to adjudicate the dispute between IEU-Ohio and Midwest ISO regarding Midwest ISO's eligibility as a qualifying transmission entity, even if DE-Ohio had remained in the case. It certainly does not have that authority with DE-Ohio gone.

IEU-Ohio's Complaint should be dismissed in its entirety.

Dated: May 20, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MIDWEST ISO'S RESPONSE TO THE JOINT MOTION TO DISMISS OF INDUSTRIAL ENERGY USERS-OHIO AND DUKE ENERGY OHIO, INC., was served upon the following by U.S. first class mail this 20th day of May, 2011.

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