

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for the Establishment of a)	
Charge Pursuant to Revised Code Section)	Case No. 12-2400-EL-UNC
4909.18.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Approval to Change)	Case No. 12-2401-EL-AAM
Accounting Methods.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for the Approval of a)	Case No. 12-2402-EL-ATA
Tariff for a New Service.)	

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA INDUSTRIAL ENERGY
USER-OHIO'S MOTION FOR ORDER PERMITTING MEMORANDUM CONTRA**

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and tenders the following Memorandum in Opposition to Industrial Energy Users-Ohio's (IEU) Motion for an Order Permitting Memorandum Contra. As discussed herein, under the guise of a procedural motion, IEU continues to improperly assert substantive arguments well past the deadline for the submission of briefs in these proceedings and, consequently, its motion should be denied.

Respectfully submitted,



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I. IEU's motion is untimely.

As IEU concedes, there is a scheduling order applicable to these proceedings – an order that affixed time periods for motion practice. Now, almost three months after reply briefs were filed in these proceedings, as directed by the Attorney Examiner, IEU improperly and contrary to applicable Commission regulation, seeks to submit cases from foreign jurisdictions that it contends resolve the issue of subject matter jurisdiction. In response to this defective and impermissible “notice” filing, Duke Energy Ohio submitted a motion to strike. IEU now hopes to cure its procedural deficiencies through a motion for leave to file a responsive pleading. But the filing in question, regardless of its caption, improperly injects legal argument into these proceedings, in contravention of the established deadlines. Further, IEU offers no justification for its failure to comply with the existing scheduling orders. Instead, IEU maintains that subject matter jurisdiction can be attacked at any time and through any mechanism and that Duke Energy Ohio's suggestion that procedural rules must be followed is without merit. Finally, IEU contends that Duke Energy Ohio will not be prejudiced by improper filings that seek to assert issues already resolved by the Ohio Supreme Court. But reopening the briefing process will not cure any such deficiencies. Instead it results in unnecessary delay, administrative inefficiencies occasioned by having to review the filings prompted by IEU's acts, and prejudice to Duke Energy Ohio. IEU's blatant disregard for the Commission's management of its dockets should not be encouraged and its belated submissions should thus be rejected.

II. IEU improperly challenges the subject matter jurisdiction of the Commission.

IEU maintains that it can challenge the Commission's subject matter jurisdiction at any time and, as such, its notice of additional authority was timely. But IEU ignores the broad authority afforded the Commission, as well as existing Supreme Court precedent.

Subject matter jurisdiction defines those types of cases that the Commission may hear.¹ Only where the Commission's lack of subject matter jurisdiction is patent and unambiguous will its decision be void.² In the absence of a patent and unambiguous lack of jurisdiction, the Commission can determine its own jurisdiction.³ Here, it cannot be disputed that the Commission has subject matter jurisdiction over Ohio's public utilities; authority that the Ohio Supreme Court has characterized as "broad and complete."⁴ In this regard, the Commission has "exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service."⁵ And as the Ohio Supreme Court has found, the Commission does not exceed its jurisdiction where it establishes a state compensation mechanism for the provision of noncompetitive capacity service by a fixed resource requirement entity.⁶ Indeed, even the Federal Energy Regulatory Commission has acknowledged the express right of the Commission to establish a state compensation mechanism for the provision of noncompetitive, wholesale capacity service.⁷ The cases cited by IEU, which do not pertain to a state compensation mechanism or the establishment of a deferral mechanism involving retail rates, do not divest the Commission of its subject matter jurisdiction over these proceedings.

¹ *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11 (internal citations omitted).

² *Id.*, at ¶12 (internal citations omitted).

³ *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 51, 1997-Ohio-244.

⁴ *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, the Public Utilities Commission of Ohio, at pg. 6 (Sept. 25, 2012).

⁵ *State ex rel. Illum. Co. v Cuyahoga County Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, ¶ 18 (internal citations omitted).

⁶ *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, 135 Ohio St.3d 367, 2013-Ohio-1472 (IEU's request for a writ of prohibition against the PUCO for exercising its subject matter jurisdiction in the establishment of a state compensation mechanism dismissed).

⁷ *American Electric Power Service Corp.*, FERC Docket No. ER11-2183, 134 FERC ¶ 61,039 (Filing for costs for capacity service rejected by the FERC in light of prevailing state compensation mechanism, consistent with the Reliability Assurance Agreement).

III. There is no regulation or scheduling order allowing IEU to submit filings out of time.

IEU seeks a broad and impractical interpretation of the Attorney Examiner's scheduling order and Commission regulation, arguing that the failure to expressly identify the submission of "notice" filings at any stage in a regulatory proceeding implicitly authorizes same. But the rules cannot be so interpreted. As the Commission has observed, reasonable deadlines must be established so that decisions can be rendered.⁸ Under IEU's reasoning, however, such a deadline could not be achieved, as there would always be the potential for an untimely and, as in this instance, irrelevant filing. Neither the Attorney Examiner nor the Commission has waived compliance with established procedure and authorized IEU's "notice" filing.

IV. Duke Energy Ohio will be prejudiced by an enlargement of the briefing schedule to address matters on which the Ohio Supreme Court has already ruled.

IEU maintains that the Commission should reopen the briefing schedule and that no prejudice would result to Duke Energy Ohio from such a circumstance. IEU is wrong. As discussed above, the Ohio Supreme Court has found that the Commission has subject matter jurisdiction over the rates, charges, and services of Ohio's public utilities, including the establishment of a state compensation mechanism. And the FERC has similarly acknowledged the prevailing effect of state compensation mechanisms, as established by state regulators. As this issue has been decided, it is indeed prejudicial to Duke Energy Ohio to prolong these proceedings to address a jurisdictional issue on which the Supreme Court has already opined.

⁸ See, e.g., *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-5010EL-FOR, *et al.*, Opinion and Order, pp. 13-14 (Jan. 9, 2013); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, *et al.*, Opinion and Order, pg. 6 (Sept. 4, 2013).

V. Conclusion.

For the reasons stated herein and in Duke Energy Ohio's Motion to Strike, the Company respectfully requests that the Commission reject IEU's untimely "notice" filing and motions related thereto.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 30th day of October 2013, to the parties listed below.


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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/30/2013 4:37:57 PM

in

Case No(s). 12-2400-EL-UNC, 12-2401-EL-AAM, 12-2402-EL-ATA

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Industrial Energy User-Ohio's Motion for Order Permitting Memorandum Contra electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Kingery, Jeanne W.