

controls, Direct Energy now seeks monetary compensation from Duke Energy Ohio in an amount approximating \$2 million, the same amount it claims to have overpaid PJM for wholesale market settlements. Even if the Commission had the statutory authority to award monetary damages, which it does not, such an outcome is wholly improper. Duke Energy Ohio has not erred in connection with the metering services provided to the one customer identified in this Complaint. It has fully complied with its certified supplier tariff and is entitled to be held harmless thereunder for functions provided as an agent of Direct Energy for purposes of PJM wholesale market settlements. And, critically, any award of monetary damages would be unlawful and, as Direct Energy now admits, inequitable as Duke Energy Ohio has not been unjustly enriched by virtue of any purported overpayments to PJM. As even Direct Energy concedes, the appropriate remedies are those that are jurisdictional to the Federal Energy Regulatory Commission (FERC) and PJM.⁴ Its complaint must be dismissed.

II. FACTUAL BACKGROUND

A. PJM-Administered Wholesale Market Settlements Govern the Issues Raised in This Proceeding.

1. Compulsory and Non-Compulsory Settlement Procedures.

PJM is a regional transmission organization (RTO) that coordinates and directs the operation of a transmission grid that covers all or parts of Delaware, Indiana, Illinois, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia. It also administers competitive wholesale markets and plans those improvements necessary to maintain grid reliability and relieve congestion. PJM's operations and interactions with members are governed by, among other FERC-approved tariffs and agreements, its OATT, Operating Agreement (OA), and Reliability Assurance

⁴ Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, at pg. 51.

Agreement (RAA).⁵ All entities that are members of and participate in PJM are subject to these tariffs and agreements. Importantly, entities within PJM have different roles. Transmission owners are those PJM members that own or lease transmission facilities. Effective January 1, 2012, Duke Energy Ohio became a transmission owner in PJM. Transmission customers receive transmission services within PJM and a load serving entity, or LSE, serves end-use customers in a PJM Control Area and has authority, via state law, regulation, or franchise, to sell energy to end-users in a PJM Control Area. Direct Energy is both a transmission customer and an LSE in the Duke Energy Ohio load zone within PJM.

The OATT delineates the rates, terms, and conditions that allow transmission customers to use the transmission facilities owned by a transmission owner and operated by PJM to deliver power to end-users.⁶ PJM bills its transmission customers and LSEs consistent with the provisions of its OATT and OA.⁷ As summarized by PJM, “[b]illing and payment are coordinated processes under the terms of the [OA] of PJM and the PJM [OATT].”⁸

PJM Settlement, Inc., (PJM Settlement), a subsidiary of PJM, is responsible for administering the accounting of all aspects of the wholesale market and the grid. In connection with this obligation, PJM Settlement invoices each market participant on a regular basis for all grid services provided under the OATT, OA, and RAA. As a general proposition, these charges are based upon the load served by each LSE in a PJM load zone.⁹

The process of invoicing LSEs for energy, capacity, transmission service, and ancillary services is generally known as settlement and, under PJM’s controlling tariffs and agreements, is comprised of two separate components. The first, known as Settlement A, provides for invoicing

⁵ Duke Energy Ohio Exhibit 8, Direct Testimony of Timothy Abbott, at pg. 6.

⁶ Id.

⁷ Id.

⁸ Duke Energy Ohio Exhibit 5, PJM Manual 29, Billing, at pg. 4 (January 1, 2012).

⁹ Id.

on an estimate of supplier usage. For LSEs in the Duke Energy Ohio service territory, the estimate can fairly be described as a “backcast” in that it is predicated upon a forecast algorithm that uses weather and load from a prior period. Duke Energy Ohio completes this backcast on a daily basis to determine an estimate for each individual account in its system and, thereafter, an aggregate, estimated total is calculated for each supplier in the Duke Energy Ohio service territory. These estimates are submitted to PJM, which, in turn, invoices LSEs on a weekly basis.¹⁰

The second component – Settlement B – involves the use of final data and permits the reconciliation of weekly invoices. As applicable to LSEs in the Duke Energy Ohio service territory, this final data is comprised of actual meter usage for the period sixty days prior. This information is used by PJM, to adjust prior invoices issued under the Settlement A process.¹¹ Importantly, adjustments occurring within this sixty-day period are unique to one LSE and are completed only with regard to the invoices previously sent by PJM to such LSE. Settlement B billings and adjustments incorporate final data. Therefore, purported PJM billing discrepancies that arise after this sixty-day period implicate all LSEs in a load zone.¹²

The aforementioned settlement process – comprised only of Settlement A and Settlement B – is PJM’s formal and only documented process for billings and reconciliations related thereto. However, PJM also made available an informal, voluntary process that, if able to be invoked, allows for reconciliation or resettlement outside of PJM’s mandated settlement process. This option, known as Settlement C, is neither compulsory nor included in any of PJM’s FERC-approved tariffs or agreements. It is, instead, a voluntary process in which all affected LSEs must

¹⁰ Duke Energy Ohio Exhibit 4, PJM Operating Agreement, OA Schedule 1, Section 3.5.

¹¹ *Id.* OA Schedule 1, Section 3.6.

¹² Duke Energy Ohio Exhibit 8, Direct Testimony of Timothy Abbott, at pg. 10.

affirmatively agree to participate.¹³ Notably, Duke Energy Ohio is not required to initiate a Resettlement C and it cannot compel participation in same on the part of any LSE.¹⁴

Direct Energy admits that the Commission cannot force any CRES provider to engage in PJM's Settlement C process. Indeed, as it now finds itself on the other side of a resettlement issue – being asked to engage in Settlement C in order to enable an exchange of dollars as between CRES providers – Direct Energy affirms that no such outcome can be compelled.¹⁵

2. Direct Energy's Access to Billing Data and Related Waivers.

In respect of Duke Energy Ohio's realignment to PJM effective January 1, 2012, PJM needed to be able to calculate loads and load ratio shares of LSEs within the Duke Energy Ohio load zone. Consequently, LSEs within the Duke Energy Ohio load zone, including Direct Energy, needed PJM subaccounts. When Direct Energy established such a subaccount, it voluntarily elected a "buyer unilateral" confirmation, meaning that it waived the right to review data before it was submitted to PJM and Direct Energy assumed the risk associated therewith.¹⁶ Direct Energy has not disputed this waiver and, since making it, has not sought to have it rescinded. Notwithstanding this waiver, Direct Energy had, and continues to have, access to PJM's electronic settlement tools, the purpose of which is unambiguous:

¹³ Duke Energy Ohio Exhibit 4, PJM Operating Agreement, at Schedule 1, Section 3.6.2 (observing that all LSEs must agree to adjustments). See also, *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, *et al.*, Opinion and Order, at pp. 90-91 (refusing to modify Certified Supplier Tariff to require participation in Resettlement C on the basis that it is "unreasonable to force a CRES provider's consent where it may not exist").

¹⁴ Duke Energy Ohio Exhibit 8, Direct Testimony of Timothy Abbott, at pg. 11. See also, Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, at pg. 38 (noting her belief that Resettlement C is a more informal process) and pg. 47 (admitting that all affected suppliers must consent).

¹⁵ *Direct Energy Business v. Ohio Edison Company and Cleveland Electric Illuminating Company*, Case No. 17-0791-EL-CSS, Complaint, at pg. 1. ("Respondents have no authority to compel resettlement, nor Direct any obligation to agree to resettlement.")

¹⁶ *Id.*, at pg. 8. See also Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach at pp. 15-16 (admitting that a buyer unilateral confirmation means that Direct Energy was agreeing to, and accepting, whatever data was provided).

PJM issues numerous accounting reports electronically throughout the billing month as well as month-end reports along with the monthly billing statements. The purpose of providing the reports is to enable the PJM Members and Transmission Customers to verify the charges and credits that appear on their billing statement.¹⁷

Direct Energy admitted to having access to these settlement tools. As its witness, acknowledged, there were no system limitations that prevented Direct Energy from comparing load data posted by PJM on its electronic tools to the historical, customer usage data in Direct Energy's possession.¹⁸

B. Duke Energy Ohio's Certified Supplier Tariff Defines Its Role Vis-à-Vis Direct Energy.

As confirmed in its Commission-approved certified supplier tariff, Duke Energy Ohio serves only as an agent in respect of the wholesale markets settlements administered by PJM.¹⁹ Its undisputable role is that of a Meter Data Management Agent, which is defined as "the party designated by the [Transmission Scheduling Agent] to provide hourly metered load data to the [Regional Transmission Organization]."²⁰ As established in the certified supplier tariff and relevant to this proceeding, the TSA, or Transmission Scheduling Agent, is Direct Energy and the RTO, or Regional Transmission Organization, is PJM.

Importantly, the certified supplier tariff also summarizes the PJM-administered settlement process and the specific functions of Duke Energy Ohio relative thereto. With regard to meter data collection, the tariff provides:

The Company, acting as the designated Meter Data Management Agent for the Certified Supplier, will supply hourly load data to Transmission Provider, for the Certified Supplier. The Company will provide this data in accordance with the OATT, including estimates where necessary. The Company will be held harmless

¹⁷ Duke Energy Ohio Exhibit 5, PJM Manual 29, Billing, at pg. 15.

¹⁸ Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, at pg. 44.

¹⁹ Direct Energy Ohio Exhibit 7, Deposition of Timothy Abbott, at pg. 7. See also, Duke Energy Ohio Exhibit 2.

²⁰ Duke Energy Ohio Exhibit 2. Direct Energy has also offered this tariff as Direct Energy Exhibit 4, Certified Supplier Tariff, Sheet No. 20.3, at pg. 3. See also, Sheet 44.2.

for any actions taken while performing Meter Data Management Agent responsibilities. Meter data collected by the Company shall be used to calculate the quantity of energy actually consumed by a Certified Supplier's End-use Customers for a particular period. Such collection shall occur at the time of an End-use Customer's monthly meter read. Thus, in order to measure the energy consumed by all End-use Customers on a particular day, at least one month is required for data collection. Typically, the Company is able to calculate and provide hourly usage data for a Certified Supplier's load, for a calendar month, forty-five to sixty days after the end of that calendar month. It is the responsibility of the Certified Supplier to understand this process.²¹

Direct Energy admits that it was aware of this provision, and its obligation to understand the process, prior to the time it enrolled the single customer referenced in its Complaint.²²

C. The Metering Facilities Relevant to This Proceeding Function Properly.

As is readily apparent from the Complaint and direct testimony filed in support thereof, Direct Energy's claims are founded solely on the PJM wholesale market settlement process. Indeed, as reflected in its Request for Relief, Direct Energy seeks an order from the Commission compelling Duke Energy Ohio to initiate Settlement C and further compelling non-parties to acquiesce to reconciliations thereunder.²³ Because wholesale market settlements are beyond the Commission's jurisdiction, Direct Energy creatively seeks to position itself as a Duke Energy Ohio retail customer in order to claim metering violations. Consequently, it is necessary to discuss the metering configuration for the customer named by Direct Energy in its complaint – SunCoke.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²¹ *Id.*, Sheet No. 44.2, at pg. 1.

²² Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, at pg. 23.

²³ Direct Energy Complaint, at pg. 9.

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24 [REDACTED]

25 Id.

26 [REDACTED] See also, [REDACTED]

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[REDACTED]

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²⁸ Id. at pg. 5.

There is no legitimate dispute that the meters at the SunCoke facility operated correctly and recorded accurate data – data that was properly validated and used for customer billing purposes. Indeed, the customer has not alleged any improper billings and Direct Energy has offered no evidence tending to suggest that the customer received unjust or reasonable services from Duke Energy Ohio.

D. Requests to Invoke Resettlement C and Direct Energy's Contribution to its Purported Financial Harm Confirm the Lack of the Commission's Jurisdiction Over this Proceeding.

Although retail billings for SunCoke were and are correct and the meters at this customer premises recorded accurate data, the load data on which PJM billed Direct Energy for certain months in 2013 was not initially adjusted to account for the unique configuration at the SunCoke facilities.²⁹ Relevant to this proceeding are only two months – January and February 2013 – and any discussion of subsequent months is immaterial. Because these two months were outside the sixty-day period applicable to PJM's Resettlement B, Direct Energy's only proper recourse was an adjustment under Resettlement C. Although under no obligation to do so, Duke Energy Ohio acquiesced to a request by Direct Energy and initiated Resettlement C on its behalf.³⁰ Specifically, Duke Energy Ohio contacted the more than fifty CRES providers³¹ then active in its service territory to solicit their consent. But it did not receive affirmative consent from all such providers. Indeed, it did not receive any response from most of the CRES providers.³² And it informed Direct Energy of its efforts in February 2014.³³ In that correspondence, Duke Energy Ohio expressly requested from Direct Energy a response with regard to the potential of pursuing

²⁹ Duke Energy Ohio Exhibit 10, Deposition of Robert Kennelly, at pg. 51 (admitting that the issue was not one of reading and reporting but of netting).

³⁰ Duke Energy Ohio Exhibit 8, Direct Testimony of Timothy Abbott, at pp. 13-14.

³¹ *Id.*, at pg. 13.

³² Duke Energy Ohio Exhibit 10, Deposition of Robert Kennelly, at pp. 54-55 (admitting that not all LSEs responded and, of the few that did, some refused resettlement).

³³ Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, Exhibit 4.

a partial resettlement.³⁴ But Direct Energy failed to respond until it instituted this Complaint proceeding some five months later. And in this Complaint, Direct Energy continues to advocate for a FERC-jurisdictional resolution. That is, the Complaint is merely a vehicle through which Direct Energy hopes to obtain a Commission order that will assist in either future interactions with PJM or in prosecuting a complaint at the FERC.³⁵

III. DISCUSSION

A. The Commission is Without Authority to Direct Reconciliation of PJM-Administered Wholesale Market Processes.

The Commission is “a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.”³⁶ Further, the Ohio Supreme Court has confirmed that the Commission “has no power to judicially ascertain and determine legal rights and liabilities, since such power has been vested in the courts by the General Assembly pursuant to Article IV of the Constitution.”³⁷

Although it attempts to portray this proceeding as implicating state statutes and Commission regulation, it is undeniable that Direct Energy’s Complaint is based on the PJM settlement process and Direct Energy’s efforts at recovering amounts it believes to have been overbilled by PJM.³⁸ Indeed, Direct Energy’s witnesses admit that this is a “settlement issue”³⁹

³⁴ *Id.*

³⁵ *Id.*, at pp. 68-69 (admitting that Direct Energy needs a Commission order that directs affected LSEs to consent to resettlement or, in the alternative, that their lack of response would be deemed a consent; such order would be needed for a FERC complaint as PJM informed Direct Energy that it is not likely to institute resettlement without an LSE’s express consent).

³⁶ *Penn Central Transportation Co. v. Public Utilities Commission*, (1973), 35 Ohio St. 2d 97, 99.

³⁷ *Milligan v. Ohio Bell Telephone Co.*, (1978) 56 Ohio St. 2d, at pg. 195. See also, *Werlin Corp. v. Public Utilities Commission of Ohio*, (1978) 53 Ohio St. 2d 76, at pg. 80 (Commission’s jurisdiction “does not include the power to determine rights of parties growing out of agreements”).

³⁸ Complaint, at Request for Relief, para. A (seeking an order directing Duke Energy Ohio initiate resettlement and directing all affected CRES providers to consent to resettlement). See also Direct Energy Exhibit 1, Direct Testimony of Teresa Ringenbach, at pp. 5-6.

³⁹ Duke Energy Ohio Exhibit 10, at pp. 57-58.

and that they engaged PJM in 2014 to explore options related to resettlement.⁴⁰ But the PJM settlement process is outside the jurisdiction of the Commission. The controlling agreements, including PJM's OATT and OA, are subject to approval by the FERC. And, as Direct Energy admits, the FERC has "jurisdiction over the tariff."⁴¹

PJM's settlement processes concern wholesale transactions – charges applicable to the use of the transmission system controlled by PJM. As it has previously recognized and as conceded by Direct Energy, the Commission cannot direct Duke Energy Ohio to initiate another Settlement C process and it certainly cannot force non-parties to this proceeding to participate. The legal rights and liabilities of LSEs, including Direct Energy, cannot be ascertained by the Commission. Furthermore, assuming the Commission would depart from its prior position and mandate CRES providers' participation in Resettlement C, the matter will not be resolved. Rather, as Direct Energy admits, such an unlikely order from the Commission would "help," but an order from the FERC directing PJM to resettle would still be required.⁴² The Complaint raises issues outside the scope of the Commission's jurisdiction and it must, therefore, be dismissed.

B. Direct Energy Does Not Have Standing to Assert Any Violation of Title 49 or Commission Regulation Promulgated Thereunder.

Any complaint proceeding before the Commission must be filed under R.C. 4905.26. This is the only statutory provision pursuant to which the General Assembly authorized the Commission to address complaints against jurisdictional utilities. Importantly, this provision does not entitle any entity to file a complaint before the Commission seeking to advance any grievance against an Ohio public utility. Rather, as the Commission has determined, R.C. 4905.26 limits "the Commission's jurisdiction to hearing service-quality complaints by

⁴⁰ Duke Energy Ohio Exhibit 12, Deposition of Marjorie Philips, at pg. 24 (acknowledging engagement of PJM and need for FERC order before PJM would resettle).

⁴¹ *Id.* at 38.

⁴² Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, at pg. 45.

customers of Ohio utilities and consumers of electricity in Ohio, against the providers of that electricity.”⁴³ Direct Energy is not a retail customer of Duke Energy Ohio⁴⁴ and it does not consume the electric services that this utility provides. As such, it does not have standing to pursue any complaint under R.C. 4905.26 for the services provided by Duke Energy Ohio and the present matter must be dismissed.

C. Direct Energy Has Failed to Meet its Burden to Prove Metering Violations.

In Count I of its Complaint, Direct Energy alleges that Duke Energy Ohio violated O.A.C. 4901:1-10-05(B) and 4901:1-10-05(F). But the undisputed evidence in this proceeding does not support these contentions.

O.A.C. 4901:1-10-05(B) provides that:

A customer's electric energy usage shall be metered by commercially acceptable measuring devices that comply with “American National Standards Institute” (ANSI) standards. Metering accuracy shall comply with the 2008 version of ANSI C 12.1 standards. No metering device shall be placed in service or allowed to remain in service if it does not comply with these standards.⁴⁵

O.A.C. 4901:1-10-05(F) pertains to metering accuracy and tests as may be requested by a customer.

In addition to the lack of standing because it is, admittedly, not a customer of Duke Energy Ohio, Direct Energy has not met its burden to prove that Duke Energy Ohio violated O.A.C. 4901:1-10-05(B) or (F). Indeed, Direct Energy has offered no facts tending to suggest that the meters in place at SunCoke did not comply with ANSI C 12.1 standards dated 2008 or that they were inaccurate. Rather, the only evidence of record is that the meters were functioning

⁴³ Case No. 04-28-EL-CSS, *et al.*, Entry, at pg. 24 (March 7, 2006). (R.C. 4905.26 limits “the Commission’s jurisdiction to hearing service-quality complaints by customers of Ohio utilities and consumers of electricity in Ohio, against the providers of that electricity.”)

⁴⁴ Duke Energy Ohio Exhibit 10, Deposition of Robert Kennelly, at pg. 59 (admitting that Direct Energy is not a customer of Duke Energy Ohio).

⁴⁵ O.A.C. 4901:1-10-05(B)(emphasis added).

properly and as intended for this unique configuration and that the recorded data successfully passed applicable validation tests. Furthermore, the record is devoid of any evidence that SunCoke – the customer of record – requested a meter test, the results of which were inaccurate. Direct Energy has not met its burden of proof in respect of Count I of its Complaint.

D. Direct Energy Has Failed to Meet its Burden to Prove a Violation of the Certified Supplier Tariff.

Direct Energy alleges that Duke Energy Ohio violated R.C. 4905.32 and 4928.359(C) by unjustly and unreasonably discriminating against it. But these statutory provisions have no application to the facts at issue in this proceeding.

R.C. 4905.32 provides, in relevant part, that

[n]o public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

Significantly, there are no rates, rentals, tolls, or charges applicable to the Meter Data Management services performed by Duke Energy Ohio under its certified supplier tariff. Moreover, Duke Energy Ohio did not collect any of the amounts that Direct Energy claims it overpaid PJM. Quite simply, there was no financial transaction to which Duke Energy Ohio was a party, as even Direct Energy concedes. Indeed, as it now finds itself mired in other litigation rooted in the PJM settlement process, Direct Energy has acknowledged that the electric distribution utility is not financially involved in the wholesale market transactions between PJM and any given LSE.⁴⁶ Rather, the billings are initiated by PJM to Direct Energy and dollars

⁴⁶*Ohio Edison Company v. Direct Energy Business, LLC*, U.S. District Court Case No. 5:17-CV-00746, Defendant's Motion to Dismiss, at pg. 3 (May 12, 2017)(Direct Energy admitting that whole market settlement transactions are between PJM and the LSE and asserting that, where there are no ill-gotten gains, equity cannot be marshalled against an entity).

remitted by Direct Energy to PJM.⁴⁷

In what is perhaps its most creative allegation, Direct Energy contends that Duke Energy Ohio discriminated against it in violation of R.C. 4928.35(C). But this statutory provision has no bearing on PJM wholesale market settlements or Duke Energy Ohio's certified supplier tariff. Rather, this provision, which was critical to the long-since expired market development period, merely requires electric distribution companies to separate, or unbundle, rate components and, with regard to distribution charges, make the schedule of such unbundled charges available on a non-discriminatory basis.

The schedule under division (A) of this section containing the unbundled distribution components shall provide that electric distribution service under the schedule will be available to all retail electric service customers in the electric utility's certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service. The schedule shall also include an obligation to build distribution facilities when necessary to provide adequate distribution service.⁴⁸

Duke Energy Ohio's transition plan was approved and its distribution rate schedules unbundled long ago.⁴⁹ The evidentiary record is silent with regard to Duke Energy Ohio's retail rate schedules for distribution service or that Direct Energy was somehow deprived of access to them.

Further, Duke Energy Ohio's certified supplier tariff expressly provides that it shall be held harmless relative to its performance of meter data management activities. Thus, where, as here, the CRES provider voluntarily relinquished its right to confirm data provided to PJM, had access to the data posted to PJM through its electronic tools, and knew it needed to understand how the PJM settlement process functioned, such a hold harmless provision must be enforced.

⁴⁷ Duke Energy Ohio Exhibit 10, Deposition of Robert Kennelly, at p.75.

⁴⁸ R.C. 4928.35(C).

⁴⁹ *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues*, Case No. 99-1658-EL-ETP, Opinion & Order (August 31, 2000).

The record in this proceeding, as well as Direct Energy's positions as advanced in other litigations, confirm that dismissal is warranted.

D. The Commission Cannot Award Monetary Damages.

In its Request for Relief, Direct Energy seeks an order from the Commission directing Duke Energy Ohio to pay "restitution," for allegedly failing to initiate PJM's voluntary Settlement C process, for attorneys' fees, and cost of capital. Boldly and ignoring its own conduct, Direct Energy requests that "per diem" financial penalties be assessed against Duke Energy Ohio. But Direct Energy cannot prevail on this demand, as confirmed by its own recent admissions.

Direct Energy is seeking damages, purportedly intended to penalize Duke Energy Ohio for its alleged failure to provide unbundled distribution service.⁵⁰ And it attempts to justify this request on a factually inapposite case.⁵¹ But as confirmed herein, Direct Energy's creative pleading cannot cure the flaws in this requested relief.

R.C. 4928.35(C) applies only to the filing of unbundled rate components during the market development period and subsequent to the approval of a transition plan. As discussed above, this provision merely required Duke Energy Ohio to make available rate schedules showing its unbundled rates. And this, it did.⁵² There is no substantiated claim by Direct Energy that Duke Energy Ohio's rate schedules are not properly unbundled or that such rate schedules in any way contributed to the PJM wholesale market settlement process. Thus, this provision simply does not give rise to an order, monetary or otherwise, against Duke Energy Ohio.

Further problematic to Direct Energy's request for monetary relief is its misplaced

⁵⁰ Complaint at Count I, para. B.

⁵¹ *Id.*

⁵² *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues*, Case No. 99-1658-EL-ETP, Opinion & Order (August 31, 2000).

reliance on a retail customer complaint case involving power surges. The Commission's commentary in *Santos v. The Dayton Power and Light Company*⁵³ is limiting and of no relevance here. As the Commission observed in that prior case, it is authorized under R.C. 4928.16(B) to order damages due to electric power fluctuations.⁵⁴ But this statute is not applicable here and thus the Commission's decision of no consequence to claims involving wholesale market resettlements.

The *Santos* case does not negate the general prohibition against the Commission awarding monetary damages.⁵⁵ Thus, any award of restitution is legally barred. It is also inequitable. Indeed, borrowing from the equity arguments raised by Direct Energy as it resists participation in Settlement C, the absence of a financial transaction between it and an electric distribution utility, as is the case with PJM settlements, should preclude an award of damages.⁵⁶

IV. CONCLUSION

Direct Energy's Complaint cannot stand. The Commission is not vested with jurisdiction over disputes involving PJM's administration and control a regional transmission system. And it is a PJM-administered process that gives rise to Direct Energy's circumstances. Consequently, and as Direct Energy now insists, it must pursue relief via federal channels.⁵⁷

⁵³ *Edward J. Santos v. The Dayton Power and Light Company*, Case No. 03-1965-EL-CSS, Opinion and Order at pp. 6-11 (March 2, 2005).

⁵⁴ *Id.*, Opinion and Order at pg. 7.

⁵⁵ *In the Matter of the Complaint of Natural Power Corp. v. The Ohio Bell Telephone Company*, Case No. 86-196-TP-CSS, Entry, at pg. 2 (April 8, 1986); *In the Matter of the Complaint of Sherry A. Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, Entry, at pg. 13 (October 10, 2012); and, *In the Matter of the Complaint of Shoneil and Sharon Cunningham v. Duke Energy Ohio, Inc.*, Case No. 11-5584-GE-CSS, Entry at pg. 3 (April 5, 2012).

⁵⁶ *Ohio Edison Company v. Direct Energy Business, LLC*, U.S. District Court Case No. 5:17-CV-00746.

⁵⁷ *Direct Energy Business Services, LLC, v. Ohio Edison Company and The Cleveland Illuminating Company*, PUCO Case No. 17-0791-EL-CSS, Complaint, at para. 23 (March 20, 2017).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Respondent, Duke Energy Ohio, Inc., was served on the following parties this 11th day of August, 2017 by hand-delivery or electronic delivery.



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Summary: Brief Merit Brief of Duke Energy Ohio, Inc. - PUBLIC VERSION electronically filed by Mrs. Adele M. Frisch on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B and Watts, Elizabeth H