

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

Direct Energy Business, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. 14-1277-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent.)	

**REPLY BRIEF OF
DUKE ENERGY OHIO, INC., AND
MOTION TO STRIKE**

I. Introduction

Now finding itself embroiled in similar litigation and hoping to avoid an approximate \$5 million refund to or on behalf of another competitive retail electric service (CRES) provider,¹ Direct Energy Business, LCC (Direct Energy) improperly insists on redefining itself as a customer of Duke Energy Ohio, Inc., (Duke Energy Ohio) and, under this new definition, recasting the allegations in its complaint. It further attempts to deflect attention away from its own conduct, which contributed to the position in which it now finds itself. But misapplication of the law and misinterpretation of valid tariffs approved by the Public Utilities Commission of Ohio (Commission) cannot cure the defects in Direct Energy's complaint. The facts and circumstances giving rise to this action are outside the jurisdiction of the Commission and there are no viable causes of action against Duke Energy Ohio on which Direct Energy may prevail. Its complaint must be dismissed with prejudice.

¹ *Direct Energy Business Services, LLC, v. Ohio Edison Company and The Cleveland Illuminating Company*, PUCO Case No. 17-0791-EL-CSS, Complaint, at pg. 1 (March 20, 2017).

II. Discussion

A. This Proceeding Undeniably Concerns Wholesale Market Settlement Processes Outside the Jurisdiction of the Public Utilities Commission of Ohio.

Direct Energy now contends that this proceeding does not concern the wholesale market settlement procedures administered by PJM Interconnection, L.L.C. (PJM), as approved by the Federal Energy Regulatory Commission (FERC). But this re-characterization of the dispute cannot be reconciled with the record evidence.

In its complaint, Direct Energy's request for relief focuses on resettlement. Indeed, it seeks an order from the Commission "directing [Duke Energy Ohio] to initiate resettlement with PJM" and "directing all affected CRES providers to consent to resettlement...".² It seeks remuneration for Duke Energy [Ohio]'s "failure to resettle...".³ In her Direct Testimony, Direct Energy witness Teresa Ringenbach outlines the solutions available to the Commission, focusing on the Resettlement C process administered through PJM.⁴ And as its own witnesses further confirm, Direct Energy understood that a FERC complaint and resettlement via the PJM process were the correct mechanisms to pursue recovery of dollars exchanged in connection with PJM wholesale market settlements.⁵ And this understanding was further acknowledged via conversations with Commission representatives; conversations in which Direct Energy appreciated that it would have to take any order from the Commission to the FERC to enforce the resettlement with PJM.⁶ More recently, in its Initial Post-Hearing Brief, Direct Energy argues that Duke Energy Ohio violated Section 14.1 of its Supplier Tariff; a section that addresses the billing processes pertinent to membership in a non-jurisdictional regional

² Direct Energy Complaint, at pg. 9 (July 22, 2014).

³ *Id.*

⁴ Direct Energy Ex. 1, Direct Testimony of Teresa Ringenbach, at pp. 7-9.

⁵ Duke Energy Ohio Ex. 9, Deposition of Teresa Ringenbach, at pg. 45.

⁶ *Id.*

transmission organization. This proceeding is clearly about wholesale market resettlements. As discussed at length in Duke Energy Ohio's Merit Brief, issues concerning wholesale market resettlements are administered by PJM, with oversight of the FERC, and are wholly outside the jurisdiction of the Commission.⁷ The complaint, therefore, must be dismissed.

B. Duke Energy Ohio Fulfilled its Obligations Under the Supplier Tariff.

Direct Energy contends that Duke Energy Ohio violated its obligations under Section 14.1 of the Supplier Tariff because it failed to "ensure the accuracy of data" provided to PJM for wholesale market settlements.⁸ In advancing this contention, Direct Energy impermissibly rewrites the plain and unambiguous language of the tariff, contrary to well-established principles of Ohio law.

Duke Energy Ohio's Supplier Tariff has "the same binding effect of law."⁹ As such, interpretation of the tariff is governed by Ohio's rules on statutory construction. As the Ohio Supreme Court has directed:

The first rule of statutory construction is that a statute which is clear is to be applied, not construed. 'There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.' [The Court's] obligation is to apply the statute as written.¹⁰

Here, Direct Energy completely ignores the Court's direction and inserts words that do not exist in an attempt "to meet a situation not provided for." But when one considers the language as a whole, including that language intentionally omitted by Direct Energy, it is undeniable that Duke Energy Ohio has not violated Section 14.1 of the Supplier Tariff.

⁷ Direct Energy Initial Post-Hearing Brief, at pp.11-12.

⁸ *Id.* at pg. 11.

⁹ *City of Reynoldsburg v. Columbus Southern Power*, 134 Ohio St.3d 29, 2012-Ohio-5270, ¶ 41.

¹⁰ *Vought Industries, Inc., v. Tracy, Tax Comm'r*, 72 Ohio St.3d 261, 265 (internal citations omitted).

The Supplier Tariff confirms that Duke Energy Ohio will provide data in accordance with PJM's Open Access Transmission Tariff, or OATT, and that such data may be estimated.¹¹ The tariff provisions further confirm that, in supplying this data, Duke Energy Ohio is functioning as a meter data management agent, a term given precise definition under the approved Supplier Tariff that precludes the creation of a customer/public utility relationship. Moreover, the relevant tariff provisions establish obligations on the part of CRES providers, including Direct Energy, to understand this billing process for non-jurisdictional services. Notwithstanding this clear and decisive language, Direct Energy urges the Commission to re-write the Supplier Tariff; to impose upon Duke Energy Ohio obligations not otherwise contemplated or approved.¹² But this outcome is untenable. The tariff does not suffer from ambiguity and, as Ohio's rules of construction mandate, must be applied as written. And as written, the Supplier Tariff confirms that Duke Energy Ohio is an agent of Direct Energy that provides data (including estimated data) on which PJM billings will be issued and for which it will be held harmless for any actions taken in regard thereof.

That Duke Energy Ohio may provide estimated data while functioning as an agent and is to be held harmless in connection with its actions as an agent is entirely consistent with Ohio's regulatory scheme and Direct Energy cannot now transform that regulatory scheme into one predicated only upon total certainty.

Ohio's regulatory framework is complex, which is an undeniable testament to the multifaceted business of engaging in the provision of utility service. Adding to this complexity is customer choice and both the relationship between electric distribution utilities and CRES

¹¹ The plain meaning of "estimate" is "to produce a statement of the approximate cost." www.merriam-webster.com/dictionary/estimate.

¹² See, e.g., Direct Energy Initial Post-Hearing Brief, at pg. 11 (Direct Energy mistakenly describes the Supplier Tariff as imposing upon Duke Energy Ohio the obligation to ensure the provision of accurate hourly load data. No such heightened standard is reflected in the tariff).

providers and the interaction between distribution utilities, CRES providers, and PJM. Many systems are implicated by these interactions. Different tariffs and operating agreements become relevant at different points in time and can trigger adherence to criteria administered by PJM, as approved by the FERC. Standards of reasonableness permeate Ohio's regulatory framework, as reflected in the Supplier Tariff. Direct Energy is now advocating a sea change in this framework, urging absolute assurances and unconditional guarantees. But even Direct Energy recognizes the implausibility of such an outcome, given the admitted flaws in its own systems used in billing operations.¹³ The Supplier Tariff, as approved by the Commission, appropriately reflects Ohio's regulatory framework and Direct Energy's desire to transform that framework must be rejected.

C. Direct Energy Does Not Have Standing to Assert a Claim of Inadequate Service Against Duke Energy Ohio.

Direct Energy admits that it cannot prevail on its claims that Duke Energy Ohio violated the metering standards as set forth in Commission regulation.¹⁴ Notably, these metering standards govern only the relationship between Duke Energy Ohio and its customer. As such, Direct Energy's admissions necessarily include concession that it is not a customer of Duke Energy Ohio and that Duke Energy Ohio's meters were not in any way functioning incorrectly. Hoping to salvage some legitimacy to its pleadings, however, Direct Energy now contends that Duke Energy Ohio erred only in failing to provide it – a CRES provider – with adequate service.¹⁵ Although perhaps creative, this effort cannot be reconciled with existing Commission precedent.

The Commission has previously confirmed the narrow scope of R.C. 4905.26. Indeed, the Commission has read R.C. 4905.26:

¹³ Duke Energy Ohio Ex .10, Deposition of Robert Kennelly, at pp. 17-18 (admitting that Direct Energy's usage validation systems were flawed).

¹⁴ Direct Energy Initial Post-Hearing Brief, at pg. 7.

¹⁵ Id.

[T]o limit 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. In the event of a complaint by any other category of person, the [public utility] would not be in the business of supplying electricity to a consumer within this state.¹⁶

As it has admitted, Direct Energy is not a customer of Duke Energy Ohio.¹⁷ And its suggestion now that it is a customer under the Supplier Tariff is illusory. Notably, the very document on which Direct Energy relies for this misplaced assertion succinctly distinguishes between parties and does not, in any way, create a customer relationship between Duke Energy Ohio and Direct Energy. The Supplier Tariff, as approved by the Commission, clearly defines a "Certified Supplier" as "any person, corporation, or other entity, other than the Company, that is authorized by the Commission to sell electricity to End-use Customers, utilizing the jurisdictional distribution facilities of the Company and registered in the Company's Customer Choice Program."¹⁸ And an "End-use Customer" is "the final user of generation and regulated service delivery."¹⁹ Conversely, the "Meter Data Management Agent," pursuant to the Supplier Tariff, is the party designated to provide hourly metered load data to the regional transmission organization, in this instance, PJM.²⁰ Relative to the actions giving rise to this complaint, as confirmed by Direct Energy's sole focus on Section 14.1 of the Supplier Tariff, Direct Energy is a Certified Supplier and Duke Energy Ohio's relationship with it is one of agency. Direct Energy cannot now artificially create a customer relationship where one does not exist²¹ and, it cannot

¹⁶ *In the Matter of the Complaint of S.G. Foods, Inc.*, Case No. 04-28-EL-CSS, Entry at pg. 24 (March 7, 2006). See also, *Kazmaier Supermarket, Inc., v. Toledo Edison Co.*, (1991), 61 Ohio St.3d 147, 151 (General Assembly conferred the Commission with jurisdiction over complaints involving customer rates and services).

¹⁷ Duke Energy Ohio Ex. 10, Deposition of Robert Kennelly, at pg. 59.

¹⁸ Duke Energy Ohio Ex. 2, Certified Supplier Tariff, Definitions of Terms and Explanation of Abbreviations, at pg.

1.

¹⁹ *Id.* at pg. 2.

²⁰ *Id.* at pg. 3.

²¹ O.A.C. 4901:1-10(I) and O.A.C. 4901:1-21.

now transform its status into something else to achieve a result that is not otherwise attainable in a state regulatory proceeding.²²

D. Direct Energy Does Not Have Standing to Assert Purported and Unsubstantiated Allegations on Behalf of SunCoke.

Standing is a jurisdictional requirement that must be determined at the commencement of suit.²³ Relatedly, Ohio law requires that “[e]very action be prosecuted in the name of the real party in interest.”²⁴ Hoping to unfairly prejudice the Commission against Duke Energy Ohio, Direct Energy injects in this proceeding allegations for which it does not have standing and is not the real party in interest. Specifically, Direct Energy contends that Duke Energy Ohio mismanaged a retail customer’s enrollment in consolidated billing in 2014, more than one year after the facts giving rise to this complaint.²⁵ But Direct Energy has no personal stake in any claims concerning Duke Energy Ohio and SunCoke and it is not the real party in interest relative thereto. Procedural defects thus bar Direct Energy’s attempts to impugn the actions of Duke Energy Ohio as a meter data management agent of Direct Energy and the allegations and inferences intended thereby must be stricken as they serve only to unfairly and unduly prejudice Duke Energy Ohio.²⁶

E. The Hold Harmless Provision in the Supplier Tariff is Enforceable.

Direct Energy contends that the hold harmless language in the Supplier Tariff, which pertains to the relationship between equally sophisticated and knowledgeable parties, is

²² *Ohio Edison Company v. Direct Energy Business, LLC*, U.S. District Court Case No. 5:17-CV-00746, Defendant’s Motion to Dismiss and Memorandum in Support, at pg. 4 (May 12, 2017) (Direct Energy distinguishes between utilities, certified suppliers and customers, defining itself as a certified supplier.)

²³ *Federal Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶¶ 22, 24 (internal citations omitted).

²⁴ *Id.*, at ¶ 30, citing Civ.R. 17(A).

²⁵ Direct Energy Initial Post-Hearing Brief, at pp. 7 and 13-15.

²⁶ See Evid. R. 402 (only relevant evidence is admissible) and Evid. R. 403 (even relevant evidence is inadmissible when its probative value is outweighed by its unfairly prejudicial effect).

unenforceable. In doing so, Direct Energy ignores the history of the very provision at issue, in favor of factually inapposite circumstances.

In reliance upon an Ohio Supreme Court decision, the Commission found it appropriate to eliminate “exculpatory clauses from electric utilities’ tariffs that purport to limit or eliminate an electric utility’s liability for **customer losses** as a result of the electric utility’s own negligence when providing a regulated service.”²⁷ Importantly, the precedent upon which the Commission relied reflects a distinction between exculpatory clauses that are void as against public policy and those that are valid and enforceable. And this distinction is critical here.

In *Berjian v. Ohio Bell Tel. Co.*, (1978) 54 Ohio St. 2d 147, 153-154, the Court confirmed that exculpatory clauses are not, as a general proposition, void as against public policy.²⁸ The Court further found that a public utility may, in certain circumstances, properly limit its liability through such clauses.²⁹ Significantly, such clauses are only void as against public policy in a discrete situation. As the Court explained:

The reason for the rule is that the situation where the public utility is granted a monopoly in providing a specific service, it should not be able through its superior bargaining position to dictate unfair or oppressive terms and conditions with customers who have no choice but to accept the conditions along with the service.³⁰

The hold harmless provision at issue in this proceeding does not function to limit Duke Energy Ohio’s exposure in respect of customer losses or relative to the provision of a regulated service. As such, the rationale on which the Commission previously relied is not applicable here. Further, after the Commission’s decision in 2008 to eliminate exculpatory clauses where such clauses limit liability for customer losses, the Commission has reviewed and approved Duke

²⁷ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Extension of Electric Facilities Tariff*, Case 06-653-EL-ORD; November 5, 2008, Order. (emphasis added).

²⁸ 54 Ohio St.2d 147, 154.

²⁹ *Id.*

³⁰ *Id.* at 153-154.

Energy Ohio's Supplier Tariff in connection with its prior standard service offer proceedings. And in each such proceeding, Direct Energy, a knowledgeable and sophisticated entity, intervened and thus availed itself of the opportunity to contest any aspect of the Supplier Tariff, including the hold harmless provisions.³¹ But Direct Energy made no such challenge. It did not claim the provision to be unfair or oppressive. Although Direct Energy believes that the Commission does not fully understand how tariffs may actually function,³² that the Commission twice approved the Supplier Tariff – and the hold harmless provision – included therein confirms that it fully understands how tariffs function and that the hold harmless provision in the Supplier Tariff is valid. This valid provision bars Direct Energy's complaint.

F. The Commission is Without Jurisdiction to Order Restitution.

Continuing to misinterpret unambiguous state law and wrongly labeling itself a customer, Direct Energy insists that the Commission may order restitution in this proceeding. This conclusion runs afoul of well-established precedent. It further conflicts with the very relief that Direct Energy now seeks, as well as its representations to the federal bench.

R.C. 4928.16 provides, in relevant part, that the Commission may order restitution to **customers**, including damages due to electric power fluctuations, in any complaint brought pursuant to division (A)(1) or (2) of this section. As previously admitted, Direct Energy is not a customer of Duke Energy Ohio. However, even assuming the Commission ignores the record evidence in favor of legal argument, Direct Energy cannot prove entitlement to restitution. In this

³¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, Testimony of Daniel L. Jones, at pp.4-7 and *Motion for Leave to Intervene of Direct Energy Services, LLC and Direct Energy Business, LLC* (July 6, 2011); *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, *et al.*, Testimony of Daniel L. Jones, at pp. 6-7 and *Motion for Leave to Intervene of Direct Energy Services, LLC and Direct Energy Business, LLC* (June 12, 2014).

³² Duke Energy Ohio Ex. 9, Deposition of Teresa Ringenbach, at pg. 40. ("I believe that the PUCO may not fully understand how the tariffs that they approved function in real day-to-day activity.")

regard, the essential question is whether Direct Energy brought a complaint under R.C. 4928.16(A)(1) or (2). As discussed below and as confirmed by Direct Energy's own pleadings, that question must be answered in the negative.

R.C. 4928.16(A)(1) is limited to complaints regarding the provision, by any electric utility, electric services company, electric cooperative, or governmental aggregator, of any service for which it is subject to certification. The complaint in this proceeding does not raise allegations regarding the provision, by Duke Energy Ohio, of a service for which it is subject to certification. Indeed, there is no mention whatsoever (and certainly no evidence proving) that any service described in the complaint is one subject to certification.

R.C. 4928.16(A)(2) is admittedly broader in scope, but not so broad as to capture the creative assertions of Direct Energy. Rather, relevant to an electric utility such as Duke Energy Ohio, this section is directed to complaints under R.C. 4928.01 through 4928.15 and R.C. 4928.35 and any rule or order adopted under those specific sections. But here, Direct Energy does not seek a finding that Duke Energy Ohio violated any of the statutory provisions that are a prerequisite to the Commission's authority to order restitution in favor of a customer. Rather, Direct Energy, in altering its claim for relief, seeks only an order that Duke Energy Ohio violated R.C. 4905.22, R.C. 4905.30, and R.C. 4905.32.³³ But these three provisions are not included in R.C. 4928.16(A)(2) and, as such, Direct Energy's request for restitution must be dismissed as a matter of law.³⁴

³³ Direct Energy Initial Post-Hearing Brief, at pp. 8 and 15.

³⁴ *Id.* at pg. 17. See also, Duke Energy Ohio Merit Brief, which confirms that R.C. 4928.35 has no application to this proceeding. Such arguments, which are incorporated herein by reference, further demonstrate that restitution cannot be awarded against Duke Energy Ohio as it lawfully unbundled its generation, transmission, and distribution charges under its Commission-approved transition plan.

G. Equitable Principles Cannot Form the Basis of a Commission Complaint.

Direct Energy contends that equity warrants a finding adverse to Duke Energy Ohio.³⁵ But this statement cannot be reconciled with the evidence of record. Notably, Direct Energy's own witness has admitted that principles of fairness apply only among the CRES providers, as those are the entities involved in financial transactions with PJM regarding wholesale market settlements. As Ms. Ringenbach insisted:

[I]f you are a competitive retail electric supplier in this market, then everyone has responsibility to make sure that the market's functioning properly which also means if there's a situation in the market where one supplier may be disadvantaged because there needs to be some sort of resettlement, then everyone should come together and work through that whether it's Direct or another supplier.³⁶

But now facing large financial obligations of its own, Direct Energy states that principles of equity have no place in this sort of proceeding.³⁷ Notwithstanding its recent statements to the federal bench, as certified by counsel, Direct Energy advances yet a third view of equity, using misplaced attack on Duke Energy Ohio. Indeed, Direct Energy portrays Duke Energy Ohio's actions as irresponsible, inexcusable, and shocking. This hyperbole however, must be viewed for its true intent – to deflect attention away from Direct Energy and its conduct, which has undeniably contributed to its purported damages.

There is no dispute in this proceeding that, prior to January 2013, Direct Energy knew:

- Of the provisions contained in the Supplier Tariff.³⁸
- That Duke Energy Ohio's role was only that of a meter data management agent insofar as interaction with PJM (PJM) was concerned.³⁹

³⁵ Direct Energy Initial Post-Hearing Brief, at pg. 17.

³⁶ Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, at pg. 58.

³⁷ *Ohio Edison Company v. Direct Energy Business, LLC*, U.S. District Court Case No. 5:17-CV-00746, Defendant's Motion to Dismiss and Memorandum in Support, at pp. 7-8 (May 12, 2017).

³⁸ *Id.*, at pg. 23.

- That it was its obligation to understand the process of meter data collection in accordance with PJM's OATT and as described in the Supplier Tariff.⁴⁰
- When establishing a PJM subaccount effective January 1, 2012, that it could review the data submitted to PJM for billing purposes, but that it voluntarily waived the right to do so.⁴¹
- Of SunCoke's historical usage and that its systems enabled a more prompt review of billings.⁴²

There is further no dispute that Direct Energy knew:

- That a comprehensive resettlement under PJM's voluntary Resettlement C process would not occur, yet it waited approximately five months to respond to Duke Energy Ohio's inquiries regarding partial resettlement.⁴³
- That a Commission order directing CRES providers to consent to resettlement would, at best, possibly assist in a complaint proceeding at the FERC.⁴⁴
- When initiating this proceeding, of the Commission's reluctance to force CRES providers to engage in Resettlement C when they were not otherwise compelled to do so.⁴⁵

³⁹ Direct Energy Ohio Exhibit 7, Deposition of Timothy Abbott, at pg. 7. See also, Duke Energy Ohio Exhibit 2.

⁴⁰ Duke Energy Ohio Exhibit 9, Deposition of Teresa Ringenbach, at pg. 23.

⁴¹ *Id.* at pp. 15-16 (admitting that a buyer unilateral confirmation means that Direct Energy was agreeing to, and accepting, whatever data was provided).

⁴² *Id.* at pg. 44.

⁴³ *Id.* at Exhibit 4. See also, at pg. 45.

⁴⁴ *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).

⁴⁵ *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").

- That this complaint was dormant at the Commission for a substantial period before Direct Energy half-heartedly deferred to the Commission on whether a hearing date was necessary.⁴⁶
- That Duke Energy Ohio has not been unjustly enriched.⁴⁷

Thus, to the extent the Commission contemplates principles of equity, it must consider the doctrine of unclean hands. This doctrine “requires that whenever a party takes the initiative to set in motion the judicial machinery to obtain some remedy but has violated good faith by his or her prior-related conduct, the court will deny the remedy.”⁴⁸ Here, Direct Energy has not engaged in good faith; in seeking equity, it has not done equity.⁴⁹ And its complaint against Duke Energy Ohio is barred under Ohio law.

III. Conclusion

For the reasons stated herein and its Merit Brief, Duke Energy Ohio respectfully requests that the Commission issue an order finding that it lacks jurisdiction over the complaint or, in the alternative, that the complaint must be dismissed with prejudice as Direct Energy has failed to sustain its burden of proof.

⁴⁶ Correspondence regarding Status Update filed on behalf of Direct Energy Business, LLC and Direct Energy Services, LLC (February 8, 2017).

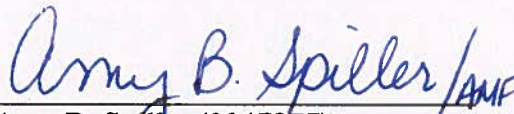
⁴⁷ *Ohio Edison Company v. Direct Energy Business, LLC*, U.S. District Court Case No. 5:17-CV-00746, Defendant’s Motion to Dismiss, at pg. 3 (May 12, 2017)(Direct Energy admitting that whole market settlement transactions are between PJM and the LSE and asserting that, where there are no ill-gotten gains, equity cannot be marshalled against an entity).

⁴⁸ See e.g., *Just Like Us Family Enrichment Center v. Easter*, 2010-Ohio-4893, ¶ 20 (Cuyahoga Cty. 2010).

⁴⁹ *Id.* at ¶ 19.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in blue ink that reads "Amy B. Spiller" followed by a stylized monogram "AMF".

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief and Motion to Strike of Respondent, Duke Energy Ohio, Inc., was served on the following parties this 1st day of September 2017 by regular mail or electronic delivery.


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Summary: Brief Reply Brief of Duke Energy Ohio, Inc., and Motion to Strike electronically filed by Mrs. Adele M. Frisch on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B and Kingery, Jeanne W and Watts, Elizabeth H