

**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. )

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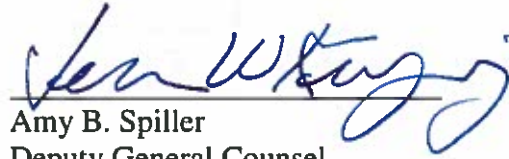
**MOTION OF DUKE ENERGY OHIO, INC., TO STRIKE  
UNAUTHORIZED NOTICE OF ADDITIONAL AUTHORITY**

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Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and hereby moves the Public Utilities Commission of Ohio (Commission) for an order striking the entirety of a procedurally inappropriate and prejudicial pleading, filed by Industrial Energy Users-Ohio (IEU) in the above-referenced dockets on October 18, 2013, two and a half months after the completion of briefing.

Duke Energy Ohio submits the following memorandum in support of its motion.

Respectfully submitted,



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## MEMORANDUM IN SUPPORT

These proceedings have been fully briefed and are currently before the Commission for decision. Nevertheless, IEU has filed a self-styled “Notice of Additional Authority,” purportedly to alert the Commission to certain recent extra-jurisdictional cases. This blatant effort by IEU to sidestep established procedures at the Commission and to prejudice Duke Energy Ohio’s ability to make appropriate substantive arguments should be rejected immediately and decisively.

### **Neither the Procedural Rules Nor the Procedural Schedule Makes Allowance for Filing Additional Material After Briefing**

The Commission’s procedural rules, set forth in O.A.C. Chapter 4901-1, provide a clear set of instructions for participants in Commission proceedings. Absolutely nothing in those rules allows for a filing such as the one made by IEU.

As an initial matter, IEU’s purported “Notice” filing must be viewed for what it is – a legal brief through which IEU attempts to advance its position in this case. There is no basis for such a filing, either under Commission regulation or the procedural schedule applicable to these proceedings.

O.A.C. 4901-1-31 allows for the filing of briefs or memoranda only (1) where specifically allowed by a procedural rule or (2) where permitted or required by the Commission, the legal director, the deputy legal director, or an attorney examiner.<sup>1</sup> IEU’s filing is not authorized by any procedural rule, as evident from IEU’s failure to identify any such rule in support of its submission.

With regard to the second basis, the Attorney Examiner provided detailed, carefully considered instructions concerning the timing, form, and content of briefs that would be allowed upon the conclusion of the hearing. Critically, her instructions allowed for each party to file only

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<sup>1</sup> O.A.C. Rule 4901-1-31(A).

an initial brief and a reply brief.<sup>2</sup> IEU complied with those deadlines, timely filing both an initial brief and a reply brief. Significantly, the Attorney Examiner did not make any allowance for further filings.

It is also noteworthy that IEU is attempting here to avoid the explicit requirements for filing of briefs, unlike its recent, failed attempts to inject additional information into the Commission's decision-making process. Unsuccessful through motion practice, IEU now resorts to a so-called "Notice" apparently hoping for a process by which it can avoid procedural niceties and get its late information into the docket.<sup>3</sup>

IEU's Notice was thus filed in clear violation of the Commission's procedural rules and the Attorney Examiner's directive. It must be stricken and should not be taken into consideration in any regard.

### **The Unauthorized Filing is Prejudicial to Duke Energy Ohio**

Through its unauthorized filing, IEU has prejudiced Duke Energy Ohio's rights in these proceedings. The Commission's procedural rules allow all parties to participate in a balanced fashion; no party has an inherent advantage over any other party. If IEU had chosen to file a motion, seeking the Commission's permission to file additional legal arguments, Duke Energy Ohio would have had the right, under the rules, to argue against the request. O.A.C. 4901-1-12(B) sets forth a standard process for the consideration of motions, allowing all other parties to respond. By failing to file a motion seeking permission to make additional arguments, IEU thus prohibited Duke Energy Ohio from arguing against allowing a new legal issue to be raised at this late stage in these proceedings.

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<sup>2</sup> Tr. Vol. XI, at p. 2813.

<sup>3</sup> *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-501-EL-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, Opinion and Order, pg. 6 (Sept. 4, 2013).

IEU's failure to obtain permission to file its late Notice, being prejudicial to Duke Energy Ohio, should result in the Notice being stricken.

**The Notice Filing, if Allowed, Would be Prejudicial**

In its Notice, IEU discusses recent decisions by district courts in New Jersey and Maryland. IEU suggests that such decisions provide authoritative bases for dismissal of Duke Energy Ohio's application as being beyond the Commission's jurisdiction.

Although the issue of the Commission's jurisdiction has already been copiously briefed, the decisions referenced in the Notice were published after completion of the briefing and were therefore not included in any arguments. Duke Energy Ohio will not address, here, the substance of those decisions, their clear and certain inapplicability, their lack of merit, their lack of relevance, or any other such issues, as the entire Notice should be stricken.

The prejudice to Duke Energy Ohio's position and the impact on due process resulting from IEU's blatant disregard of the Commission's regulations are unavoidable. A single party, providing purported "additional authority" to the Commission, cannot provide the Commission a full explanation of the issues. Indeed, such an outcome is the antithesis of due process. And if the result were otherwise – with one party being able to unilaterally and without opposition supplement the record – then all parties would be encouraged to disregard scheduling orders and to seek to control the timing of Commission decisions. But the administrative process requires finality – a reasonable date by which a record will be complete such that a Commission order can be issued.

Indeed, the applicant in a proceeding has a right to have its request ruled upon in a reasonable time period, consistent with the Commission's management of its docket. Thus, at

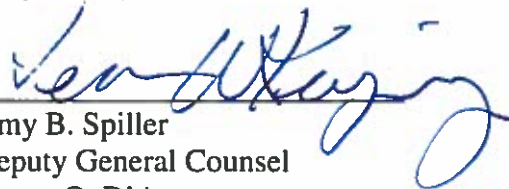
some point, the opportunity to provide legal justification for a position must be cut off. Here, that point must be the deadline ordered by the Attorney Examiner.<sup>4</sup>

Furthermore, the irrelevance of the extra-jurisdictional cases cited by IEU cannot be overstated. IEU proposes that the Commission rely on determinations made by federal district courts, not even in Ohio. As the Commission is well aware, these courts have no appellate authority over the Commission's decisions. Only the Ohio Supreme Court can review Commission orders.<sup>5</sup>

### **Conclusion**

For the reasons stated herein, Duke Energy Ohio respectfully requests that the Commission strike the entirety of the Notice filed by IEU.

Respectfully submitted,



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<sup>4</sup> See, e.g., *In the Matter of the Complaint of the Office of the Consumers' Counsel on behalf of Jim and Helen Heaton, et al., and Certain Other Unnamed Individuals v. Columbus and Southern Ohio Electric Company, Relative to alleged unjust, unreasonable, and unlawful policies and practices with regard to establishing new service for residential customers in rural areas of its service area*, Case No. 83-1279-EL-CSS, Opinion and Order (April 16, 1985), at pp. 12-13 (Commission struck filing of additional authority as support for exceptions to attorney examiner's report).

<sup>5</sup> R.C. 4903.12.

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 21st day of October 2013, to the parties listed below.

  
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