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 IN SUPPORT OF MOTION TO DISMISS

BY

DUKE ENERGY OHIO, INC.

I. INTRODUCTION

According to its own Complaint, Direct Energy Business, LLC, ("Direct Energy") has apparently "incur[red] millions of dollars of erroneous energy charges from PJM Interconnection, L.L.C. (PJM)," due to PJM's procedural requirements regarding resettlements. Direct Energy attempts to blame Duke Energy Ohio, Inc., (Duke Energy Ohio) for its loss, but there is no dispute that the PJM procedures are the direct cause of the problem faced by Direct Energy.

Perhaps Direct Energy could have found an appropriate forum to hear its concerns with those procedures, but it has not chosen to do so. Instead, Direct Energy has sought the

involvement of the Public Utilities Commission of Ohio (Commission) by shifting its focus to state laws and rules, as well as the Company's tariffs. Unfortunately for Direct Energy, such laws, rules, and tariffs are inapplicable. Direct Energy's memorandum contra the Company's motion to dismiss fails to refute the legal arguments for dismissal.

Direct Energy's Complaint should be dismissed.

II. LEGAL ARGUMENT

A. The Commission Has No Jurisdiction over PJM Resettlement Procedures.

Although dressed up as if based on state law, the Complaint by Direct Energy is one seeking a requirement that Duke Energy Ohio undertake a process that is squarely under the control of PJM. The issue here is one of wholesale billing. PJM bills the load serving entities, such as Direct Energy, for the services they provide. To the extent there are adjustments or reconciliations needed in that billing, PJM administers the process.

Direct Energy asks the Commission to order Duke Energy Ohio and other suppliers to participate in the PJM resettlement process. Even though such an order would be demanding that a jurisdictional utility take a certain action, it is nevertheless a wholesale, federally controlled matter that is under discussion. And the suppliers that Direct Energy hopes to control are not even parties to this case.

Direct Energy certainly understands that there is no valid basis on which to rely to compel participation in PJM's alternate resettlement process, leaving it to manufacture state regulatory claims. The proceeding should be dismissed as outside of the Commission's jurisdiction.

B. Direct Energy Erroneously Attempts to Hold Duke Energy Ohio to the Standard of Summary Judgment on its Motion to Dismiss.

Duke Energy Ohio's motion is one seeking dismissal of the Complaint. The Ohio General Assembly has carefully provided the outline for when a complaint to the Commission should proceed through litigation. A case is to be scheduled for hearing only "if it appears that reasonable grounds for complaint are stated . . ..[1] The Commission has confirmed that reasonable grounds for complaint must be evident before discovery may proceed. For example, in one case brought under R.C. 4905.26, the Commission stated that, when faced with a complaint, it "must decide whether 'reasonable grounds' have been stated before the case proceeds to hearing. Broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony."[2]

The Ohio Rules of Civil Procedure are comparable, allowing dismissal for "failure to state a claim upon which relief can be granted."[3] On the other hand, the civil rules allow for summary judgment when, based on the factual evidence in the case, reasonable minds can come to but one conclusion.[4]

In lieu of pointing out where in its Complaint it pled factual allegations in support of either of its claims, Direct Energy admits instead:

> Duke [Energy Ohio] has not yet provided a cogent explanation of the precise reason for its inability to provide hourly interval data, much less accurate interval data, from the Suncoke [*sic*] meters in a timely manner in early 2013. Discovery in this proceeding has not yet commenced. Discovery in this proceeding will likely lead to a better understanding of how Duke [Energy Ohio] mismanaged the metering of Direct's Suncoke [*sic*] load. Accordingly, any attack on Direct based

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[1] R.C. 4905.26.

[2] *Office of the Consumer's Counsel v. Dayton Power & Light Co.*, Case No. 88-1085-EL-CSS, pp. 10-11 (dismissing a complaint for falling short of " reasonable grounds for proceeding to discovery and hearing").

[3] Ohio Rules of Civ. Pro., Rule 12(B).

[4] *Id.* at Rule 56(C).

> on an inability to precisely identify the root cause of Duke [Energy Ohio]'s meter data mismanagement in its complaint is wholly inappropriate.[5]

By claiming to await a "cogent explanation" from Duke Energy Ohio, Direct Energy displays a fundamental misunderstanding of its own pleading burden. It is up to a complainant, not a respondent, to allege adequate facts to support a Complaint in response to a motion to dismiss. It is not for Duke Energy Ohio to disprove Direct Energy's ambiguous assertions or to demonstrate that there is no genuine issue of material fact. Rather, Direct Energy must direct the Commission to specific paragraphs in its poorly pled Complaint to demonstrate where it has stated a sufficient factual premise for either of its two claims. Nor can Direct Energy rely on discovery to validate its Complaint when a basic principle of Ohio law is that the purpose of discovery "is not to permit one party to conduct a 'fishing expedition' for evidence to support his or her claim."[6]

By seeking discovery, Direct Energy hopes to survive dismissal by manufacturing factual questions on matters that it did not raise anywhere in its Complaint. Although that tactic might be appropriate to defeat a motion for summary judgment in a court of general jurisdiction, it is not the proper standard to apply on a motion to dismiss.[7]

C. There Is No Legal Basis for Direct Energy's Complaint.

As discussed in the Company's Motion to Dismiss, the Complaint offers legal theories that do not reflect any legal basis for a complaint against Duke Energy Ohio.

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[5] Memorandum Contra at pp. 4-5.

[6] *Beard v. N.Y. Life Ins. & Annuity Corp.*, 10th Dist. No. 12AP-977, 2013-Ohio-3700, ¶ 28 (stating the generally applicable rule in Ohio courts); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (similarly, the federal rule on point "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions . . .. [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss").

[7] *In the Matter of AK Steel Corp.*, Case No. 02-989-EL-CSS, p. 8 (Oct. 2, 2002) (granting motion to dismiss based on issues raised therein, and not on matters beyond the Complaint).

1. Direct Energy Has No Standing to Assert Claims Against Duke Energy for Metering Inaccuracy under Tariffs.

Although ignored by Direct Energy, one fact is critical: Direct Energy is not the customer. The customer here is SunCoke, and Direct Energy is in no position to assert claims on behalf of that customer.

As will be discussed in the following section, the Commission's mandates regarding metering accuracy apply to the relationship between a customer and a utility. Similarly, only the Company's retail tariff includes commitments regarding meter accuracy.[8] The supplier tariff that applies to the relationship with Direct Energy does not. And Direct Energy, not being a retail customer, has no standing to complain about service under that tariff.

Direct Energy attempts to use language from the supplier tariff to manufacture responsibilities that do not exist. It cites to section 9.2 of the supplier section, which states that the "Company will own, furnish, install, program, calibrate, test, and maintain all meters and all associated equipment used for retail billing and settlement purposes in the Company's service area." Direct Energy explains, in its memorandum contra, that this language requires Duke Energy Ohio to maintain the meters and associated equipment in accordance with good utility practice. But it added that language to the actual language of the tariff. The tariff says nothing about how the equipment will be maintained. It merely explains that maintenance responsibilities remain with the utility.

The supplier tariff, unlike Direct Energy, does not demand 100 percent perfection in metering. Quite the reverse, the tariff actually indicates that the Company will provide meter data to PJM, based on estimates when necessary, and that it is to be held harmless with regard to such service. The process is spelled out in the tariff, complete with an explanation of the timing.

[8] P.U.C.O. Electric No. 19, Sheet 24.

And the suppliers are put on notice that they are expected to understand the process. But Direct Energy demurs, arguing that the hold-harmless language is unenforceably vague. In a final salvo, Direct Energy complains that because it has no bargaining power, such a provision must be narrowly interpreted.

But Direct Energy does have bargaining power in respect of the terms set forth in the supplier tariff. That tariff was last approved in the Company's standard service offer proceeding, in which parties entered into a stipulation addressing all issues in the case. Direct Energy was a participant in that proceeding and a signatory of the stipulation. And certainly if the language had been vague at the time of that proceeding, Direct Energy would have brought that to the Company's attention. No narrow interpretation of this language is necessary or appropriate.

Direct Energy also asserts that the hold-harmless provision fails to identify the party that is expected to hold the Company harmless. It cites, for this astonishing proposition, a case in which the commission upheld an indemnity provisions. But the Ohio Supreme Court, in that case, specifically explained that it is not appropriate to require strict construction where the two parties are on relatively equal footing.[9] As Direct Energy had a straight-forward way to negotiate this language in the context of a proceeding that was important to Duke Energy Ohio, and where both parties were represented by competent counsel, no uneven bargaining power should be presumed.

2. Direct Energy Has No Cause of Action Against Duke Energy under the Customer-Directed Metering Rule.

First, Direct Energy asserts that Duke Energy Ohio has violated the Commission's retail metering rules in the course of providing metering services to Direct Energy. And the next paragraph of the rule follows up with the requirement that a "customer's electric usage shall be

[9] *Glaspell v. Ohio Edison Co.*, 29 Ohio St.3d 44, 47, 505 N.E.2d 264 (1987).

metered by commercially acceptable measuring devices that comply with . . . ANSI . . . standards." Paragraph (F) then lays out the procedures for testing meters to "verify . . . compliance with the ANSI C 12.1 standards." These are all requirements applicable to a consumer of electricity – the end-use customer. Direct Energy is not such an entity and thus cannot rely on the rule in question.

Direct Energy attempts, in its memorandum contra, to avoid the inapplicability of O.A.C. 4901:1-10-05 to the services it receives by pointing to one line in paragraph (F) thereof where there is no specific reference to the customer or consumer. However, it fails to recognize the applicability of the entire chapter. The chapter, as a whole, is directed at service to the customer and is inapplicable to wholesale service. O.A.C. Rule 4901:1-10-05, as a part of O.A.C. Chapter 4901:1-10, is "intended to promote safe and reliable service to consumers and the public . . . ."[10] And if that is not clear enough, Paragraph (A) of the metering rule starts the entire rule out with a statement that "energy delivered to the customer shall be metered . . . ."[11] The rule that Direct Energy attempts to rely on simply does not govern the services provided by Duke Energy Ohio to Direct Energy.

Direct Energy sums up its position on this issue with an assertion that its interest in accurate meter data is obvious and "therefore provides the requisite standing." But this is false. Just because it may need such data does not mean that every rule relating to metering applies to its relationship with Duke Energy Ohio. Direct Energy has no standing to complain under O.A.C. 4901:1-10-5. This count of the Complaint must therefore be dismissed.

[10] O.A.C. 4901:1-10-02(A)(2).
[11] O.A.C. 4901:1-10-05(A) (emphasis added).

3. Direct Energy Has no Cause of Action Against Duke Energy Ohio under Inapplicable Statutes.

The second count of the Complaint is based on an alleged violation of R.C. 4905.32 and 4928.35(C). The first of these cited sections is one, unchanged since 1953, that prohibits a utility from charging any amount for a service other than is set forth in its approved tariffs, and other than as charged to other customers for a like service. Direct Energy, in its Complaint, misreads this statute to require utilities "to provide services in accordance with their tariffs . . . and in a uniform manner." But the law does not relate to the provision of services; it relates to charges. And this case is not about the amount that Duke Energy Ohio has charged for its services to Direct Energy.

R.C. 4928.35(C) is likewise unhelpful to Direct Energy's cause. It is important to recognize, first, that this particular provision is part of the portion of Chapter 28 that addressed the transition from fully regulated, vertically integrated electric utilities to the system we have now. Conveniently omitted from Direct Energy's pleadings on this topic is the introductory language in division (C), as well as the explanatory referenced material from division (A). The full text of these sections follows. Note, importantly, that division (A) describes schedules that were to be filed upon approval of a transition plan and that were to remain in effect for the entirety of the market development plan. Note likewise that non-discrimination requirements in division (C) apply only to the schedules mandated by division (A). Duke Energy Ohio filed such schedules long ago, and those schedules remained in effect until the termination of the market development plan at the end of 2005.

> (A) Upon approval of its transition plan under sections 4928.31 to 4928.40 of the Revised Code, an electric utility shall file in accordance with section 4905.30 of the Revised Code schedules containing the unbundled rate components set in the approved plan in accordance with section 4928.34 of the Revised Code. The schedules shall be in effect for the duration of the utility's market development

period, shall be subject to the cap specified in division (A)(6) of section 4928.34 of the Revised Code, and shall not be adjusted during that period by the public utilities commission except as otherwise authorized by division (B) of this section or as otherwise authorized by federal law or except to reflect any change in tax law or tax regulation that has a material effect on the electric utility.

. . . .

(C) 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 also shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.[12]

Direct Energy deems it a mere "semantic argument" that Duke Energy Ohio demonstrates this statute to be inapplicable to the current situation. But the words of the statute are inescapable. The second cause of action has no basis in law and must be dismissed.

D. There Is No Factual Basis for Direct Energy's Complaint.

1. Far from Being Able to Plausibly Plead a Violation of the Ohio Administrative Code, Direct Energy Hopes That Discovery Will Reveal a Claim Against Duke Energy.

Direct Energy admits that it has no adequate factual predicate for Count I of the Complaint when it boldly states "only Duke [Energy Ohio]will know" how Duke Energy Ohio is allegedly violating Ohio Admin. Code 4901:1-10-05(B).[13] And while a *res ipsa loquitur* theory may be appropriate in a tort setting, it is wholly inappropriate for Direct Energy to claim a

[12] R.C. 4928.35 (emphasis added).
[13] Memorandum Contra at p. 5.

statutory or rule violation without alleging how Duke Energy Ohio failed to comply with the law.[14]

Direct Energy's legal basis for Count I is also flawed. It conveniently reads O.A.C. 4901:1-10-05(B) to require meters that are both (1) "commercially acceptably measuring devices" and (2) in compliance with ANSI standards,[15] without pointing any legal authority for support. Yet the plain reading of the statute is that a device is deemed commercially acceptable by being compliant with ANSI standards.[16]

Even if Direct Energy's interpretation of the statute were correct, Direct Energy never alleges in its Complaint that Duke Energy Ohio's metering devices were not commercially acceptable, or that "commercially acceptable" means that the devices must be infallible. Clearly, the Commission, in adopting such a rule, did not intend to impose statutory liability on a utility every time a device malfunctioned. It is a much more reasonable approach to impose liability when those devices fail to meet ANSI standards, which standards allow for a margin of error.

Direct Energy next faults Duke Energy Ohio for limiting its view of the statute to "meters" instead of including all "measuring devices." Had Direct Energy's Complaint been properly pled, Duke Energy Ohio would not have to guess about the identity of the offending equipment. Yet neither in its Complaint, nor in its memorandum contra, does Direct Energy identify what measuring devices it claims to be defective. Direct Energy's complaint must give

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[14] *See generally In the Matter of the Time Cable*, Case No. 90-189-AU-CSS, p. 6 ("The examiner agrees with respondents that the Commission cannot consider, at this stage of the proceeding, possible issues which may arise as a result of discovery. The Commission is limited to considering only those facts before it, and cannot proceed on hypotheticals or possibilities concerning pertinent issues which may develop during the course of discovery.").

[15] Memorandum Contra at p. 5.

[16] *See generally In the Matter of WorldCom, Inc.*, Case No. 02-3207-AU-PWC, p. 23 (May 14, 2003) (stating the principle that language in statutes should be given their "ordinary, everyday meaning.").

Duke Energy Ohio sufficient notice of its claims, yet it fails to do so when it does not even specify which of Duke Energy Ohio's "measuring devices" it believes violated the statute.[17]

Finally, Direct Energy's allegations of discriminatory treatment are entirely conclusory. Direct Energy alleges how it has been treated, but it does not aver how others are treated or that Direct Energy was singled out for any discriminatory treatment. Simply put, even assuming Duke Energy Ohio made a mistake and such error led to overbilling, Direct Energy has not alleged that such mistake was intentional or designed to put Direct Energy at a disadvantage with respect to its competitors. For these reasons, Count I of the Complaint must be dismissed for failure to state a claim.

2. Direct Energy Has Not Identified How Duke Energy Ohio Violated Its Supplier Tariff.

Similarly, Count II of Direct Energy's Complaint must fail, as even Direct Energy cannot identify where in its pleading it cites any provision of Duke Energy Ohio's Supplier Tariff. Indeed, the section of Direct Energy's memorandum contra devoted to a discussion of Duke Energy Ohio's Supplier Tariff is wholly void of any reference to the Complaint. Instead, Direct Energy uses its memorandum contra to suggest, for the first time, that Duke Energy Ohio violated its Supplier Tariff by not maintaining its equipment "in accordance with good utility practice."[18] Again, even if such a vague allegation had been made in the Complaint, it is hardly actionable when Direct Energy does not identify what constitutes "good utility practice" or any legal authority for what constitutes a violation of such an ambiguous standard. Rather, Direct

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[17] *See, e.g., Helwig v. The East Ohio Gas Co.*, No. 87-1927-GA-CSS, p. 22 (May 10, 1988) (dismissing complaint when it failed to state specifically what property or incidents were the subject of the complaint because it did not give either the respondent or the Commission notice of its claims).

[18] Memorandum Contra at p. 3.

Energy relies on the conclusory assertion that Duke Energy Ohio's supposed failure to make hourly interval data available to Direct Energy for a period of five months violates its Tariff.[19]

Such an allegation, found nowhere in the Complaint, is fundamentally flawed for two reasons. First, Direct Energy points to no authority, or to any provision within the Supplier Tariff, that obligates Duke Energy Ohio to provide hourly interval data. Second, such an assertion is factually inaccurate and at odds with the Complaint itself. Direct Energy admits that Duke Energy Ohio provided data for all but two months, and that the sole basis for its Complaint are the two months that remain outstanding.[20] Thus, it is a gross overstatement for Direct Energy to now suggest that Duke Energy Ohio failed to make hourly interval data available for a period of five months. Thus, Count II is entirely baseless as pled in the Complaint and should be dismissed out-of-hand.

E. The Commission Cannot Grant The Monetary Relief Direct Energy Requests.

Direct Energy fails to allege facts that would support an award of damages by the Commission. Pointing to R.C. 4928.16, Direct Energy attempts to fall under one of those provisions that would allow remedies under R.C. 4928.16(B)(1), the only section within Title XLIX of the Revised Code that gives such authority to the Commission.

The only way to get "restitution" under that division is to have filed a complaint under division (A)(1) or (A)(2) of R.C. 4928.16. Division (A)(1) relates to complaints regarding a utility's provision of services "for which it is subject to certification." Duke Energy Ohio provides no such services. Division (A)(2) references utility violations of sections 4928.01 through 4928.15 (which are not alleged) and utility violations of R.C. 4928.35. Although Direct Energy did include an allegation under the latter section, as discussed previously it is entirely

[19] *Id.* at p. 5.
[20] *See* Complaint at ¶¶ 10-12.

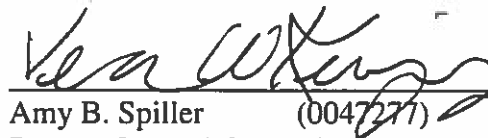
inapplicable. The allegation under R.C. 4928.35 is thus revealed to be a vain effort to fall within the types of actions under which the Commission can award restitution. However, the allegation of a violation under a statute that does not apply does not suffice to give the Commission the authority that Direct Energy hopes for.

III. CONCLUSION

For all of the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission grant its motion to dismiss.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



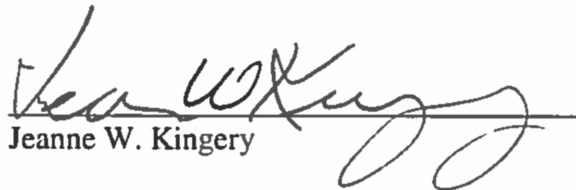
Amy B. Spiller (0047277)
Deputy General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel
139 East Fourth Street, 1303-Main
P.O. Box 960
Cincinnati, Ohio 45202-0960
Tel: (513) 287-4359
Fax: (513) 287-4385
Amy.Spiller@duke-energy.com
Jeanne.Kingery@duke-energy.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 21st day of November, 2014, by electronic transmission or U.S. mail, postage prepaid, upon the persons listed below.

Gerit F. Hull
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW, 12th Floor
Washington, DC 20006
ghull@eckertseamans.com

Joseph M. Clark
Direct Energy
21 East State Street, 19th Floor
Columbus, OH 43215
joseph.clark@directenergy.com



Jeanne W. Kingery