**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Duke )

Energy Ohio, Inc., for the Establishment ) Case No. 12-2400-EL-UNC

of a Charge Pursuant to Revised Code )

Section 4909.18 )

In the Matter of the Application of Duke )

Energy Ohio, Inc., for Approval to ) Case No. 12-2401-EL-AAM

Change 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 )

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Motion for an Order permitting memorandum contra to Motion to Strike and Supporting memorandum and Memorandum of Industrial Energy Users-Ohio in Opposition of the Motion to Strike by Duke Energy Ohio, Inc.**

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**October 28, 2013 Attorneys for Industrial Energy Users-Ohio**

**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Duke )

Energy Ohio, Inc., for the Establishment ) Case No. 12-2400-EL-UNC

of a Charge Pursuant to Revised Code )

Section 4909.18 )

In the Matter of the Application of Duke )

Energy Ohio, Inc., for Approval to ) Case No. 12-2401-EL-AAM

Change 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 )

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Motion for an Order permitting memorandum contra to Motion to Strike**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 Industrial Energy Users-Ohio (“IEU-Ohio”) moves for an order permitting the filing of a memorandum contra the Motion to Strike by Duke Energy Ohio, Inc (“Duke”). Reasons supporting this motion are set out in the accompanying memorandum.

 Respectfully submitted,

 /s/ Frank P. Darr

 Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Duke )

Energy Ohio, Inc., for the Establishment ) Case No. 12-2400-EL-UNC

of a Charge Pursuant to Revised Code )

Section 4909.18 )

In the Matter of the Application of Duke )

Energy Ohio, Inc., for Approval to ) Case No. 12-2401-EL-AAM

Change 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 )

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Memorandum in Support of Motion**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 On October 21, 2013, Duke filed a motion to strike. Under the procedural rules of the Public Utilities Commission of Ohio (“Commission”), the time to file a memorandum in opposition to the motion is fifteen days. Rule 4901-1-16, Ohio Administrative Code (“OAC”). In this proceeding, the Attorney Examiner established a three day response date during a pretrial hearing on March 7, 2013. The shortened time period was in response to the impending hearing date.

 Since the hearing has concluded, it is not clear that the shortened time frame is still applicable. If it is, however, IEU-Ohio requests that the time to respond be lengthened and that the Commission accept for filing the attached Memorandum Contra. This filing is well within the time permitted by rule, causes no undue prejudice to Duke, and will have no effect on the deliberations of the Commission. Thus, if such a motion is necessary, IEU-Ohio has stated adequate grounds and the motion should be granted.

 Respectfully submitted,

 /s/ Frank P. Darr

 Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Duke )

Energy Ohio, Inc., for the Establishment ) Case No. 12-2400-EL-UNC

of a Charge Pursuant to Revised Code )

Section 4909.18 )

In the Matter of the Application of Duke )

Energy Ohio, Inc., for Approval to ) Case No. 12-2401-EL-AAM

Change 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 )

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Memorandum of Industrial Energy Users-Ohio in Opposition of the Motion to Strike by Duke Energy Ohio, Inc.**

# INTRODUCTION

After the completion of the briefing schedule in this case, federal district courts in New Jersey and Maryland concluded that state commissions were without authority to increase the compensation of generators for wholesale capacity and energy services. The federal district courts held that the Federal Power Act (“FPA”) preempted state action because Congress, through the Act, had placed exclusive jurisdiction with the Federal Energy Regulatory Commission (“FERC”) to regulate the price setting of wholesale capacity and energy services. Since these decisions were released following the briefing in this case, IEU-Ohio filed the additional authority indicating that the Commission is without jurisdiction to increase the compensation of Duke for the provision of wholesale capacity service.

In response, Duke filed a Motion to Strike. In its Motion, Duke argues that IEU-Ohio’s Notice of Additional Authority is in violation of Commission rules and the procedural schedule set in this case and that Duke is prejudiced.

The Commission should deny Duke’s motion because the Notice of Additional Authority identifies a jurisdictional subject matter bar on the Commission’s authority that can be raised at any time, the Notice does not violate a Commission rule, and Duke is not prejudiced by the Notice. Even if the Commission’s rules do not permit the filing of the Notice of Additional Authority, the proper solution is for the Commission to waive its rules and order a reopening of the briefing schedule in this case.

## The Commission’s Lack of Subject Matter Jurisdiction to Increase Duke’s Compensation for Wholesale Capacity Service May be Raised at any Time

As the district courts in New Jersey and Maryland concluded, a state public utilities commission may not invade the field of price setting for wholesale capacity and energy services because Congress placed exclusive jurisdiction with the Federal Energy Regulatory Commission. *PPL Energyplus, LLC, et al., v. Douglas R. M. Nazarian*, *et al*., Civ. Action No. MJG-12-1286 (decided Sept. 30, 2013) (“*PPL I*”); *PPL Energyplus, LLC, et al., v. Robert M. Hanna, et al.*, Civ. Action No. 11-745 (decided Oct. 11, 2013) (“*PPL II*”) (copies attached to Notice of Additional Authority). Because price setting of wholesale capacity and energy service is governed by federal law, “states are ousted of all jurisdiction.” *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, 352, (1998). If the state lacks jurisdiction due to preemption, “a state court must decline to exercise jurisdiction when there is a danger of disparate remedies prescribed for conduct which is arguably prohibited under the Act.” *Builders Ass'n of Eastern Ohio and Western Pennsylvania, Inc. v. Commercial Piping Co., Inc*., 70 Ohio St.2d 9, 15, (1982). As the *PPL I and II* decisions demonstrate, the preemptive effect of the FPA extends to and preempts the actions of state commissions to increase the compensation of generators for wholesale capacity and energy services.

A challenge to the Commission’s subject matter jurisdiction can be made at any time because activities of the agency not within its subject matter jurisdiction are void. *International Lottery, Inc. v. Kerouac*, 102 Ohio App. 3d 660, 665 (1995); *Jenkins v. Keller*, 6 Ohio St.2d 122, 126 (1966) (“[W]here a court has no jurisdiction over the subject matter of an action, a challenge to jurisdiction on such ground may effectively be made for the first time on appeal in a reviewing court.”).

Accordingly, the Notice of Additional Authority is properly before the Commission. Under federal law, the Commission is preempted from acting on the application. In the application, Duke has sought to increase its total compensation for wholesale capacity service.[[1]](#footnote-1) The preemptive effect of the FPA, however, prevents the Commission from exercising subject matter jurisdiction over setting the price of wholesale capacity service. Therefore, the Commission lacks subject matter jurisdiction to grant the relief that Duke is seeking. Because a challenge to the subject matter of the jurisdiction in this action can be made at any time, the Notice of Additional Authority is timely, and Duke cannot legitimately complain that questioning the Commission’s jurisdiction is not properly before the Commission.

## Duke’s Complaints as to the Form of the Pleading Are Meritless

Because the issue can be raised at any time, Duke’s motion is limited to complaining that the Notice of Additional Authority does not comply with Commission rules and the procedural orders in this case. As discussed below, Duke’s motion does not allege grounds that justify striking IEU-Ohio’s Notice of Additional Authority.

Duke initially argues that the Notice of Additional Authority should be stricken because Commission rules and the procedural orders in this case do not permit the filing of additional authority. Duke’s reading of the rules, however, is unduly narrow and not supported by the authority the Commission retains to waive its rules when appropriate.

Initially, there is nothing that prevents a party from filing a Notice of Additional Authority. The rules do not contain a provision that states that no additional pleadings may be filed. Likewise, the Attorney Examiner’s order contains no such limitation on new information that would affect the outcome of this case. In fact, the Attorney Examiner has attempted to assure that the record is complete, seeking comments and refusing to act on motions to dismiss prior to an evidentiary hearing.

Further, the Commission’s Rules contain provisions that permit parties to assist the Commission to reach a lawful and reasonable decision. For example, the Commission may permit an amendment of a pleading at any time on its own motion. Rule 4901-1-06, Ohio Administrative Code (“OAC”). Further, the Commission may on its own motion waive any procedural rule for good cause shown. Rule 4901-1-38(B), OAC.[[2]](#footnote-2) Thus, the Commission retains authority to modify both the briefing requirements and schedule.

Based on Commission rules and the practice in this case, Duke has failed to show a violation that supports its Motion to Strike. There is no rule precluding the filing of a Notice of Additional Authority. Even if there were, the Commission may allow a waiver of its rules concerning pleadings. If a waiver is necessary in this instance, the Commission should grant it because the Notice of Additional Authority concern decisions addressing the Commission’s jurisdiction to render a decision in this matter which became available only after the pleading schedule in this matter had ended and which go to the Commission’s subject matter jurisdiction to decide Duke’ application.

## Duke Has Failed to Demonstrate Prejudice

In addition to failing to show a violation of Commission rules or procedure to support its Motion to Strike, Duke also has failed to establish any prejudice that would justify granting its motion. As shown above, the Commission lacks jurisdiction to act on Duke’s application. As a result, there is no legal prejudice to Duke since the Commission cannot act on the application other than by determining that it lacks subject matter jurisdiction and then dismissing the application. *Kennedy v. Ohio Dept. of Public Safety*, 2006 WL 2627562 ¶¶12-13 (10th Dist. Ct. App. 2006).

Further, Duke cannot demonstrate prejudice because IEU-Ohio informed the Commission that courts have ruled against state commissions seeking to authorize an increase in a generator’s compensation for wholesale capacity service. The alternative suggested by Duke’s motion is that relevant legal authority going to the Commission’s jurisdiction should be ignored.

If there is some prejudice to Duke, the Commission should instruct Duke to respond to the issue presented by the Notice of Additional Authority if it chooses to. Ohio Supreme Court practice supports this approach. Under Supreme Court rules, parties may file additional authority before and after oral argument. See Sup.Ct.R.Prac. 17.08 & 17.09. When a notice of additional authority raises a new issue, the Court has permitted the opposing party to respond to the additional authority. *State v. Sapp*, 103 Ohio St.3d 1487 (2004). Thus, to the extent there is any prejudice, the Commission can address that concern by permitting Duke to respond to the additional authority; the remedy is not an order striking the Notice of Additional Authority.

# Conclusion

In summary, Duke has not provided the Commission a justification to strike the Notice of Additional Authority filed by IEU-Ohio. The additional authority raises a subject matter jurisdictional issue that may be raised at any time. Commission rules either allow the filing of additional authority or allow the Commission to waive any applicable rule or ruling that prevents the filing of the pleading. Finally, Duke cannot be prejudiced if the Commission lacks subject matter jurisdiction. In any case, the proper remedy for the Motion to Strike would be for the Commission to provide Duke an opportunity to respond to the additional authority. Therefore, Duke’s Motion to Strike should be denied.

 Respectfully submitted,

 /s/ Frank P. Darr

 Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

 **Attorneys for Industrial Energy Users-Ohio**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Motion for an Order Permitting Memorandum Contra to Motion to Strike and Supporting Memorandum and Memorandum of Industrial Energy Users-Ohio in Opposition of the Motion to Strike by Duke Energy Ohio, Inc.* was served upon the following parties of record this 28th day of October, 2013, via hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

 /s/ Frank P. Darr

 Frank P. Darr

Amy B. Spiller

Rocco D’Ascenzo

Jeanne Kingery

Elizabeth Watts

Duke Energy Business Services LLC

139 East Fourth Street

1303 Main

Cincinnati, Ohio 45202

amy.spiller@duke-energy.com

rocco.dascenzo@duke-energy.com

jeanne.kingery@duke-energy.com

elizabeth.watts@duke-energy.com

**On Behalf of Duke Energy Ohio, Inc.**

Bruce J. Weston

Consumers’ Counsel

Maureen R. Grady (Counsel of Record)

Kyle L. Kern

Office of the Ohio Consumers’ Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215

grady@occ.state.oh.us

kern@occ.state.oh.us

**On Behalf of the Office of the Ohio Consumers’ Counsel**

David F. Boehm

Michael L. Kurtz

Jody M. Kyler

Boehm, Kurtz & Lowry

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

dboehm@bkllawfirm.com

mkurtz@bkllawfirm.com

jkyler@bkllawfirm.com

**On Behalf of the Ohio Energy Group**

Colleen L. Mooney

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, Ohio 45839-1793

Cmooney2@columbus.rr.com

**On Behalf of Ohio Partners for Affordable Energy**

Douglas E. Hart

411 Vine Street, Suite 4192

Cincinnati, Ohio 45202

dhart@douglasehart.com

**On Behalf of The Greater Cincinnati Health Council and Cincinnati Bell Inc.**

Kimberly W. Bojko (Counsel of Record)

Mallory M. Mohler

Carpenter Lipps & Leland LLP

280 North High Street

Suite 1300

Columbus, Ohio 43215

bojko@carpenterlipps.com

mohler@carpenterlipps.com

**On Behalf of Kroger Co.**

Jay E. Jadwin

Yazen Alami

Madelon Kuchera

Jon Casadont

American Electric Power Service Corporation

155 Nationwide Avenue

Columbus, Ohio 43215

jejadwin@aep.com

yalami@aep.com

mkuchera@aepenergy.com

jcasadont@aepenergy.com

**On Behalf of AEP Energy**

Robert A. Brundrett

The Ohio Manufacturer’s Association

33 N. High Street

Columbus, Ohio 43215

rbrundrett@ohiomfg.com

**On Behalf of the Ohio Manufacturers’ Association**

Thomas J. O’Brien

J. Thomas Siwo

Matthew W. Warnock

Bricker & Eckler, LLP

100 South Third Street

Columbus, Ohio 43215

tobrien@bricker.com

tsiwo@bricker.com

mwarnock@bricker.com

**On Behalf of the City of Cincinnati**

Mark A. Hayden

FirstEnergy Service Company

76 South Main Street

Akron, Ohio 44308

haydenm@firstenergycorp.com

James F. Lang

Laura C. McBride

N. Trevor Alexander

Calfee, Halter & Griswold LLP

1405 East Sixth Street

Cleveland, Ohio 44114

jlang@calfee.com

lmcbride@calfee.com

talexander@calfee.com

David A. Kutik

Lydia M. Floyd

Jones Day

North Point, 901 Lakeside Avenue

Cleveland, OH 44114-1190

dakutik@jonesday.com

lfloyd@jonesday.com

**On Behalf of FirstEnergy Solutions Corp.**

M. Howard Petricoff

Stephen M. Howard

Gretchen L. Petrucci

Lija Kaleps-Clark

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street, P.O. Box 1008

Columbus, Ohio 43216-1008

mhpetricoff@vorys.com

smhoward@vorys.com

glpetrucci@vorys.com

lkalepsclark@vorys.com

**On Behalf of Constellation NewEnergy, Inc., Exelon Generation Company, LLC, Interstate Gas Supply, Inc., Retail Energy Supply Association, Miami University and the University of Cincinnati**

Steven T. Nourse

Matthew J. Satterwhite

American Electric Power Service Corp.

1 Riverside Plaza 29th Floor

Columbus, Ohio 43215

stnourse@aep.com

mjsatterwhite@aep.com

**On Behalf of Ohio Power Company**

Joseph G. Strines

DPL Energy Resources Inc.

1065 Woodman Drive

Dayton, Ohio 45432

Jospeh.strines@DPLINC.com

Andrew J. Sonderman

Margeaux Kimbrough

Kegler, Brown, Hill & Ritter Co. LPA

Capitol Square, Suite 1800

65 East State Street

Columbus, Ohio 43215

asonderman@keglerbrown.com

mkimbrough@keglerbrown.com

**On Behalf of DPL Energy Resources Inc.**

Judi L. Sobecki

Randall V. Griffin

The Dayton Power and Light Company

1065 Woodman Drive

Dayton, Ohio 45432

judi.sobecki@DPLINC.com

randall.griffin@DPLINC.com

Jeffrey S. Sharkey

James W. Pauley

Faruki Ireland & Cox PLL

500 Courthouse Plaza, S.W.

10 North Ludlow Street

Dayton, Ohio 45402

jsharkey@ficlaw.com

**On Behalf of The Dayton Power and Light Company**

Kevin J. Osterkamp

Roetzel & Andress LPA

PNC Plaza

Twelfth Floor

155 East Broad Street

Columbus, Ohio 43215

kosterkamp@ralaw.com

Rick D. Chamberlain

Behrens, Wheeler & Chamberlain

6 N.E. 63rd Street, Suite 400

Oklahoma City, Oklahoma 73105

Rdc\_law@swbell.net

**On Behalf of Wal-Mart Stores East, LP, and Sam’s East, Inc.**

Barth E. Royer

Bell & Royer Co., LPA

33 South Grant Ave.

Columbus, Ohio 43215

barthroyer@aol.com

Gary A. Jeffries

Dominion Resources Services, Inc.

501 Martindale Street, Suite 400

Pittsburgh, Pennsylvania 15212-5817

Gary.a.jeffries@dom.com

**On Behalf of Dominion Retail, Inc.**

Steven Beeler

John Jones

Assistant Attorneys General

Public Utilities Section

180 East Broad Street

Columbus, Ohio 43215

steven.beeler@puc.state.oh.us

john.jones@puc.state.oh.us

**On Behalf of the Staff of the Public Utilities Commission of Ohio**

Christine Pirik

Katie Stenman

Attorney Examiners

Public Utilities Commission of Ohio

180 East Broad Street

Columbus, Ohio 43215

Christine.pirik@puc.state.oh.us

Katie.stenman@puc.state.oh.us

**Attorney Examiners**

1. Application at 3-4. [↑](#footnote-ref-1)
2. In adopting Rule 4901-1-38(B), OAC, the Commission stated that it may waive any rule so long as waiver would not conflict with a statute. *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at 57 (Dec. 6, 2006). [↑](#footnote-ref-2)