**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 )

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**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.**

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

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

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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,

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**Memorandum in Support of Motion**

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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,

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**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,

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**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.

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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)