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October 12, 2010

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VIA HAND DELIVERY

Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Re: Case No. 10-1398-EL-CSS

Dear Docketing Division:

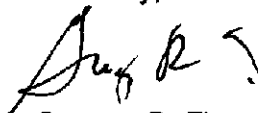
Enclosed please find for filing in the above-captioned case an original and eleven (11) copies of the following:

1. Motion of Respondent Duke Energy Ohio, Inc. to Dismiss the Complaint of Industrial Energy Users-Ohio; and
2. Motion of Respondent Duke Energy Ohio, Inc. to Stay Discovery Pending Resolution of Its Motion to Dismiss the Complaint.

Please return one time-stamped copy for our records.

Please do not hesitate to call me if you have any questions.

Sincerely,



Gregory R. Flax

Enclosures

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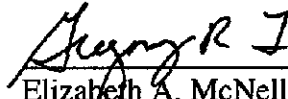
**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of:)	
)	
Industrial Energy Users-Ohio,)	Case No. 10-1398-EL-CSS
)	
Complainant,)	
)	
v.)	
)	
The Midwest Independent Transmission)	
System Operator, Inc., et al.,)	
)	
Respondents.)	

**MOTION OF RESPONDENT DUKE ENERGY OHIO, INC. TO DISMISS THE
COMPLAINT OF INDUSTRIAL ENERGY USERS-OHIO**

Pursuant to Section 4901-9-01(C) of the Ohio Administrative Code, Respondent Duke Energy Ohio, Inc. ("Duke Energy Ohio") respectfully requests that the Complaint of Industrial Energy Users-Ohio (the "Complainant" or "IEU-Ohio") be dismissed. The Commission lacks jurisdiction over the subject matter of IEU-Ohio's Complaint. Furthermore, IEU-Ohio fails to set forth reasonable grounds for complaint against Duke Energy Ohio. For these reasons, and as more fully set forth in the attached Memorandum in Support, IEU-Ohio's Complaint must be dismissed.

Respectfully submitted,



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In the Matter of the Complaint of:)	
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The Midwest Independent Transmission)	
System Operator, Inc., et al.,)	
)	
Respondents.)	

**MEMORANDUM IN SUPPORT OF RESPONDENT DUKE ENERGY OHIO, INC.'S
MOTION TO DISMISS THE COMPLAINT OF INDUSTRIAL ENERGY USERS-OHIO**

Complainant Industrial Energy Users-Ohio (the “Complainant” or “IEU-Ohio”) seeks a determination from this Commission that Respondent Midwest Independent Transmission System Operator, Inc. (“Midwest ISO”) has made “offers and commitments” that cause it not to be qualified as a regional transmission organization (“RTO”) and “that it is not in the interest of Ohio consumers for *any* owner of transmission facilities located in Ohio to participate in [Midwest ISO].” Compl. at 11 (emphasis added). IEU-Ohio’s Complaint should be dismissed because this Commission lacks jurisdiction over claims against RTOs, and Complainant cannot manufacture jurisdiction over such claims by simply naming Duke Energy Ohio, Inc. (“Duke Energy Ohio”) as a respondent. In addition, IEU-Ohio’s Complaint should be dismissed because it fails to state grounds for complaint against Duke Energy Ohio.

FACTUAL AND PROCEDURAL BACKGROUND

On June 25, 2010, Duke Energy Ohio and Duke Energy Kentucky, Inc. (“Duke Energy Kentucky”) tendered their Initial Filing to the Federal Energy Regulatory Commission (“FERC”) as the first step of their proposed realignment from Midwest ISO to PJM Interconnection, L.L.C.

(the “Realignment Proceeding,” FERC Docket No. ER10-1562-000). A number of entities, including Midwest ISO and this Commission – but not including IEU-Ohio – intervened and filed comments in the Realignment Proceeding. Duke Energy Ohio and DE-Kentucky filed an Answer and Motion for Leave to Answer in the Realignment Proceeding on August 10, 2010. That Answer apparently piqued the interest of IEU-Ohio. Instead of seeking leave from FERC to intervene in the pending Realignment Proceeding, however, IEU-Ohio initiated the above-captioned Complaint before this Commission in an ill-conceived attempt to fish for documents and information relating to the Realignment Proceeding.¹

IEU-Ohio’s September 20, 2010 Complaint against Midwest ISO and DE Ohio alleges that Midwest ISO made “offers and commitments” that “promised to confer undue advantages upon Duke as a particular market participant, and confer undue disadvantages on ultimate consumers in general.” Compl. at ¶ 4. The Complaint does not allege, however, that Duke Energy Ohio accepted any of the “offers and commitments.” Indeed, the exhibits to the Complaint make it abundantly clear that Duke Energy Ohio *rejected* the very “offers and commitments” that are the purported basis for IEU-Ohio’s Complaint (*see* Compl. Ex. 1-B (letter from Keith Trent to John Bear, May 14, 2010)) and elected, instead, to initiate the Realignment Proceeding. In addition, the Complaint:

- Fails to explain how IEU-Ohio, its members, or any person for that matter, has been harmed (or could possibly be harmed) by Duke Energy Ohio’s actions with respect to the “offers and commitments”; and

¹ IEU-Ohio conceded as much when it opposed Duke Energy Ohio’s Motion for an Extension of the Answer Date and Request for Expedited Ruling solely on the grounds that extension of the answer date might delay Duke Energy Ohio’s production of information in this proceeding. *See* Complainant’s Response, Sept. 30, 2010, at 2-3. The discovery requests that IEU-Ohio served on Duke Energy Ohio have little, if any, relevance to the allegations in IEU-Ohio’s Complaint but rather relate to the proposed realignment. Duke Energy Ohio is contemporaneously filing a motion requesting that the Commission stay discovery pending its resolution of this Motion to Dismiss.

- Fails to allege that Duke Energy Ohio has done anything contrary to its obligations under R.C. § 4928.12.

Simply put, IEU-Ohio fails to state any grounds for complaint against Duke Energy Ohio under R.C. § 4905.26. The absence of substantive allegations against Duke Energy Ohio and the absence of a request for meaningful relief from Duke Energy Ohio make it clear that Duke Energy Ohio was only named as a party in this Complaint because it may have access to documents that IEU-Ohio wants in discovery and because IEU-Ohio incorrectly determined that the Commission would have jurisdiction over this dispute if it named Duke Energy Ohio as a respondent.

IEU-Ohio's Complaint is meritless and Duke Energy Ohio respectfully requests that it be dismissed.

LAW AND ARGUMENT

I. JURISDICTIONAL ISSUES PRECLUDE THIS COMMISSION FROM GRANTING THE RELIEF REQUESTED BY COMPLAINANT.

A. The Commission lacks jurisdiction over claims against RTOs.

This Commission lacks jurisdiction to hear any claim against a regional transmission organization ("RTO") approved by FERC. "The commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute." *Time Warner AxS v. PUCO* (1996), 75 Ohio St. 3d 229, 234. The Commission is vested with "the power and jurisdiction to supervise and regulate public utilities" pursuant to R.C. § 4905.04(A). It also has the power to hear complaints concerning services rendered by public utilities as set forth in R.C. § 4905.26.

RTOs, however, are specifically excluded from the definition of "public utility" in R.C. §§ 4905.02 and 4905.03. Section 4905.03(A)(3) provides that a person or entity is an "electric light company" subject to the jurisdiction of the Commission "when engaged in the business of

supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, *but excluding a regional transmission organization approved by the federal energy regulatory commission.*" (emphasis added). Respondent Midwest ISO is indisputably a FERC-approved RTO. *See* 97 FERC 61,326, 2001 WL 34075789 (Dec. 20, 2001) (granting RTO status to Midwest ISO). Accordingly, this Commission lacks jurisdiction over any claim against Midwest ISO.

B. Complainant cannot manufacture jurisdiction over an RTO by simply naming Duke Energy Ohio as a respondent.

IEU-Ohio attempts an end-run around this Commission's lack of jurisdiction over Midwest ISO, by joining Duke Energy Ohio as a party in this proceeding even though Duke Energy Ohio is not alleged to have done anything that could form the basis of a justiciable claim. The mere inclusion of Duke Energy Ohio as a respondent in this action does not transform IEU-Ohio's complaint concerning the actions of Midwest ISO into an action that this Commission has jurisdiction to hear. When the General Assembly specifically excluded claims against RTOs from the subject-matter jurisdiction of this Commission, it could not have intended for litigants to bypass that exclusion by simply naming one of the RTO's members as a party to the proceeding.

Rather, the General Assembly excluded claims against RTOs from the jurisdiction of this Commission because it recognized that any attempts by this Commission to exercise meaningful supervision over RTOs would conflict with the exclusive and preemptive jurisdiction of the federal government. The Supreme Court of the United States explained, in *New York v. FERC* (2002), 535 U.S. 1, 18-19, "the text of the [Federal Power Act, 16 U.S.C. § 824, *et seq.*] gives FERC jurisdiction over the 'transmission of electric energy in interstate commerce and . . . the

sale of such energy at wholesale in interstate commerce.” See also *Wis. Pub. Power, Inc. v. FERC* (D.C. Cir. 2007), 493 F.3d 239, 246 (explaining that “Section 201(b) of the Federal Power Act (FPA) [16 U.S.C. § 824(b)] grants the Federal Energy Regulatory Commission exclusive jurisdiction over the transmission and wholesale sale of electricity in interstate commerce”); *Midwest ISO Transmission Owners v. FERC* (D.C. Cir. 2004), 373 F.3d 1361, 1372 (explaining that “[f]ederal preemption and the Supremacy Clause . . . operate to prevent the states from taking regulatory action in derogation of federal regulatory objectives”).

The Commission’s assertion of jurisdiction in this case (aside from being an unwarranted expansion of the jurisdiction conferred on the Commission by Ohio law) would conflict with FERC’s exclusive jurisdiction over the regulation and supervision of RTOs. See FERC Order No. 888 (Apr. 24, 1996), 75 FERC 61,080 (discussing the scope of FERC’s jurisdiction with respect to interstate transmission and setting forth principles for ISO governance and independence); *New York v. FERC* (2002), 535 U.S. 1 (holding that FERC properly construed its statutory authority when it issued Order No. 888).

C. **The statutory requirement that electric utilities join a qualified transmission entity does not confer jurisdiction to this Commission over claims against RTOs.**

Although Complainant liberally cites to R.C. § 4928.12 as establishing the jurisdictional predicate for this action, that statute simply requires that electric companies join qualified RTOs; it does not give this Commission jurisdiction to hear claims against the RTOs. This Commission previously considered the independent transmission plan submitted by Duke Energy Ohio’s predecessor, and its election to participate in Midwest ISO. See *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan*, Case No. 99-1658-EL-ETP, 2000 Ohio PUC LEXIS 814, at *117-27. The question presented in IEU-Ohio’s Complaint is not whether Duke Energy Ohio has complied with R.C. § 4928.12, but

whether Midwest ISO is qualified as an RTO. That issue is simply beyond the jurisdiction of the Commission.

IEU-Ohio does not allege that Duke Energy Ohio's compliance with R.C. § 4928.12 has been called into question by Duke Energy Ohio's initiation of the Realignment Proceeding before FERC. But even if Complainant had included such an allegation, this proceeding would not be the proper vehicle for engaging in a general inquiry concerning Duke Energy Ohio's business decision to change RTOs. At a minimum, jurisdictional conflicts will prevent the Commission from performing a meaningful review of Duke Energy Ohio's decision and its implications – at least while Duke Energy Ohio's request to withdraw from Midwest ISO is pending with FERC. See *In the Matter of the Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan*, PUCO Case No. 02-3310-EL-ETP, 2003 WL 21205932 (staying the proceedings and explaining that “there are too many unresolved issues beyond the Commission's jurisdiction for the Commission to have a meaningful review of the Utilities' ITP at this time”).²

This Commission lacks jurisdiction to consider IEU-Ohio's claim that Midwest ISO is not a qualified RTO and for that reason IEU-Ohio's Complaint must be dismissed.

² The Pennsylvania Public Utilities Commission considered whether it had jurisdiction over matters involving RTO membership in *Petition of Reliant Energy, Inc. for a Declaratory Order Regarding the Pennsylvania Public Utility Commission's Jurisdiction over Duquesne Light Company's Withdrawal from PJM Interconnection, L.L.C.*, Penn. PUC Case No. P-00072338. The ALJ's Initial Decision, dated December 17, 2007 (available at <http://www.puc.state.pa.us/PCDOCS/1011106.doc>), explained that FERC has “exclusive and preemptive jurisdiction over matters involving RTO membership” and concluded that “the Pennsylvania Public Utility Commission does not possess the requisite jurisdiction to direct Duquesne Light Company to either retain or withdraw its membership in PJM Interconnection, L.L.C.” The Initial Decision further explained that it was premature for the commission to institute an “[i]nvestigation into the effects of the withdrawal . . . on customers, rates, competitive retail electric markets and adequacy of service” while Duquesne's application to withdraw was pending with FERC. The Pennsylvania Public Utilities Commission subsequently modified the ALJ's initial order; “declin[ing] to find, as a matter of law, that this Commission is forever barred from ruling on RTO membership issues[.]” See Order dated June 24, 2008 (available at <http://www.puc.state.pa.us/PCDOCS/1014781.doc>).

II. IEU-OHIO FAILS TO STATE ANY GROUNDS FOR ITS COMPLAINT AGAINST DUKE ENERGY OHIO.

IEU-Ohio's Complaint should be dismissed because it does not present a real and immediate controversy that can be resolved by the Commission. In order to invoke the processes of the courts – or of this Commission – the Complainant:

must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife (1992), 504 U.S. 555, 560-561 (internal citations omitted). See also *XO Ohio, Inc. v. City of Upper Arlington*, PUCO Case No. 03-870-AU-PWC (Entry, May 14, 2003), at ¶ 23(f) (explaining that "[n]o legal action can be brought where there is not real controversy").

In this case, IEU-Ohio has failed to allege any concrete actions by Midwest ISO, that even if taken as true, would impair its ability to independently discharge its RTO responsibilities or that harm IEU-Ohio. IEU-Ohio merely alleges that Midwest ISO made certain "offers and commitments" to Duke Energy Ohio in order to induce Duke Energy Ohio to retain its membership in Midwest ISO. Apparent on the face of the Complaint, however, is the fact that Duke Energy Ohio *rejected* the very "offers and commitments" that are the basis for IEU-Ohio's Complaint (*see* Compl. Ex. 1-B (letter from Keith Trent to John Bear, May 14, 2010)) and elected to pursue withdrawal from Midwest ISO in FERC Docket No. ER10-1562-000.

This Commission explained, in *In the Matter of the Complaint of the Ohio Manufacturers' Association et al. Concerning the Failure of the East Ohio Gas Company to Provide Adequate Self-Help Gas Service*, PUCO Case No. 85-1010-GA-CSS, 1986 Ohio PUC

LEXIS 194, that a complaint is not justiciable if “the Complainants’ allegations are so abstract that it is unclear to the Commission that the threat Complainants perceive . . . is real.” See also *In re Application of Duke Energy Ohio, Inc.*, 125 Ohio St.3d 1434, 2010-Ohio-2212 (dismissing cause for failure to present a justiciable case or controversy); *In the Matter of the Complaint of Ohio Consumer Alliance for Responsible Electrical Systems v. FirstEnergy Corporation*, PUCO Case No. 98-1616-EL-CSS, 1999 Ohio PUC LEXIS 53, at ¶ 7 (holding that there were no reasonable grounds for complaint and explaining that the complaint was simply a request for the Commission to conduct an investigation and did “not allege that a customer or group of customers has/have been provided inadequate service as a result of particular actions/inactions on the part of a public utility”). The Commission cannot afford any relief to Complainant in this case, since there is no allegation that any of the “offers and commitments” were ever implemented by Midwest ISO or accepted by Duke Energy Ohio, and there is no allegation of *any* misconduct by Duke Energy Ohio. There is simply no factual basis for the Commission to grant the abstract and ill-defined relief requested in IEU-Ohio’s Complaint – *i.e.* a finding “that it is not in the interest of Ohio consumers for *any* owner of transmission facilities located in Ohio to participate in [Midwest ISO].” See Compl. at 11 (emphasis added)

Moreover, it is not alleged that IEU-Ohio or any of its members have suffered injury-in-fact as a result of the “offers and commitments.” See *City of Olmsted Falls v. Jones* (Franklin App. 2003), 152 Ohio App. 3d 282, 2003-Ohio-1512, at ¶ 20 (explaining that to confer standing, “the alleged injury must be concrete, rather than abstract or suspected . . . and [also must be] likely to be redressed if the court invalidates the action or inaction”). Complainant contends that the “offers and commitments *promised* to confer undue advantages upon Duke as a particular

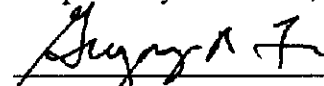
market participant, and confer undue disadvantages on ultimate consumers in general.”³ Compl. at ¶ 4 (emphasis added). The remote and abstract harm *promised* by the “offers and commitments” never came to fruition because the “offers and commitments” never left the drawing board. Accordingly, IEU-Ohio does not allege that it, or any of its members, have suffered or will suffer any concrete or particular injury-in-fact as a result of the “offers and commitments.”

IEU-Ohio fails to allege a justiciable controversy and, accordingly, it fails to state any grounds for complaint against Duke Energy Ohio under R.C. § 4905.26. Duke Energy Ohio respectfully requests that the Complaint be dismissed.

CONCLUSION

For each of the foregoing reasons, IEU-Ohio’s Complaint against Duke Energy Ohio should be dismissed.

Respectfully submitted,



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³ Notably, IEU-fails to allege that any of its members will be injured. The Complaint fails to even assert that there are any IEU-Ohio members within Duke Energy Ohio’s service territory. IEU-Ohio lacks standing to pursue relief for a conjectural and hypothetical injury to its unidentified members. It also lacks standing to assert a claim on behalf of “consumers in general.” See *Utility Service Partners, Inc v. PUCO*, 124 Ohio St. 3d 284, 2009-Ohio-6764, at ¶ 49 (“To have standing, the general rule is that ‘a litigant must assert its own rights, not the claims of third parties.’ Third-party standing is ‘not looked favorably upon’”) (internal citation omitted).

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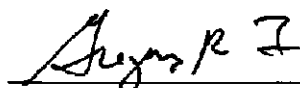
Attorneys for Duke Energy Ohio, Inc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was served on the following, by first class U.S. Mail, postage prepaid, this 12th day of October, 2010:

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