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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Industrial Energy Users-Ohio ("IEU-Ohio"),)
)
Complainant,)
)
v.)
)
The Midwest Independent Transmission System)
Operator, Inc. ("Midwest ISO"),)
)
and)
)
Duke Energy Ohio, Inc. ("DEO"))
)
Respondents.)
)
)
)

Case No. 10-1398-EL-CSS

**MIDWEST ISO's MOTION TO DISMISS THE COMPLAINT
AND MOTION TO STAY DISCOVERY**

Pursuant to Rules 4901-1-12 and 4901-9-01, Ohio Administrative Code ("O.A.C."), The Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") respectfully requests issuance of an Order dismissing the Complaint of Industrial Energy Users-Ohio ("IEU-Ohio"). As discussed in the attached Memorandum in Support, the Commission does not have subject matter jurisdiction to hear a complaint against Midwest ISO because Midwest ISO is not a "public utility" under Ohio law. In the absence of subject matter jurisdiction, there are no reasonable grounds for IEU-Ohio's Complaint against Midwest ISO, and thus it must be dismissed. The Commission also should stay discovery during the pendency of this Motion.

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Technician 2 Date Processed OCT 15 2010

Dated: October 15, 2010

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Industrial Energy Users-Ohio ("IEU-Ohio"),

Complainant,

v.

The Midwest Independent Transmission System
Operator, Inc. ("Midwest ISO"),

and

Duke Energy Ohio, Inc. ("DEO")

Respondents.

**MIDWEST ISO'S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS THE COMPLAINT AND MOTION TO STAY DISCOVERY**

The Complaint of Industrial Energy Users-Ohio ("IEU-Ohio") wrongly infers through very dubious accusations that the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") was trying to "confer undue advantages upon" Duke Energy Ohio, Inc. ("Duke") that would allegedly "increase capacity prices in the MISO region and specifically within Ohio." (Complaint, ¶¶ 4 & 5.) These spurious allegations are completely belied by the very open and transparent stakeholder and mandatory Federal Energy Regulatory Commission ("FERC") review and tariff processes to which the Midwest ISO is bound. These are the same stakeholder and FERC review processes that are referenced in the very letter that IEU-Ohio attempts to use as a basis for its unfounded Complaint. Even if everything IEU-Ohio alleges about "offers and commitments" could be excised from these mandatory Midwest ISO open

review processes (and they certainly cannot be), and were taken as true (which they are not), the Commission does not need to read beyond the second paragraph of the Complaint to recognize that it lacks subject matter jurisdiction to even consider IEU-Ohio's allegations.

R.C. 4905.26 establishes the Commission's jurisdiction to hear complaints against "public utilities." The first sentence of Paragraph 2 states, "The Midwest Independent Transmission System Operator, Inc. ("MISO") is a regional transmission organization approved by the Federal Energy Regulatory Commission ("FERC")." (Complaint, ¶ 2.) R.C. 4905.03(A) expressly excludes regional transmission organizations ("RTO") from the definition of a "public utility." It is on this basis that the Commission previously dismissed a complaint against Midwest ISO for lack of subject matter jurisdiction. S.G. Foods, Inc. et al. v. FirstEnergy Corp. et al., Case No. 04-28-EL-CSS et al. (Entry of March 7, 2006, p. 26).

Shortly after filing the Complaint, IEU-Ohio also served discovery. Given that the Commission so plainly lacks jurisdiction over the allegations against Midwest ISO, the Commission should stay discovery pending a ruling on the Motion to Dismiss. There is no basis to order Midwest ISO to respond to discovery in a case in which the Commission plainly lacks subject matter jurisdiction. The alacrity of the discovery service the very same day as the Complaint is filed is telling as well. This is a good old fashion fishing expedition in a fishless, dry hole.

II. ARGUMENT

A. The Commission Lacks Jurisdiction Over Claims Against Midwest ISO.

"The Commission may exercise only that jurisdiction conferred by statute." Lucas Cty. Commr's v. Public Util. Comm'n (1997), 80 Ohio St. 3d 344, 347. Where the General Assembly has decided to confer jurisdiction to the Commission, it has done so clearly and unambiguously through Title 49 of the Revised Code.

The General Assembly has vested the Commission with jurisdiction to regulate and hear complaints against "public utilities." Under R.C. 4905.04, "The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities" See also R.C. 4905.05 ("The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad"); R.C. 4905.06 ("The public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code").

R.C. 4905.26 vests the Commission with jurisdiction to adjudicate complaints "against any public utility," provided the complainant states "reasonable grounds for complaint." Title 49 defines a "public utility" as any entity that meets one or more of the definitions listed in R.C. 4905.03(A), and includes an "electric light company." An entity is subject to regulation as an "electric light company" 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.)

Thus, the Ohio legislature has specifically and explicitly excluded RTOs from the definition of "public utility." Furthermore, an RTO does not meet the definition of "electric

utility," "electric services company," "electric supplier" or "electric utility" as defined in the various subparts of R.C. 4928.01(A). Nor do the activities of an RTO fall within the scope of Commission jurisdiction as defined in R.C. 4928.16.

The Commission has previously confirmed that it does not have and refuses to exercise jurisdiction to hear complaints against RTOs. In S.G. Foods, et al. v. FirstEnergy Corp., et al., Case No. 04-28-EL-CSS et al., certain complainants in consolidated cases brought claims against the FirstEnergy distribution utilities arising from the August 2003 blackout. Midwest ISO and PJM Interconnection, Inc. were named as respondents in some of the consolidated cases, as were the FirstEnergy and AEP holding companies. The Commission determined that the RTOs and holding companies should be dismissed for lack of jurisdiction:

Among the various respondents in the consolidated cases are holding companies and regional transmission organizations. As discussed above, the Commission has jurisdiction to hear complaints against public utilities in the state of Ohio, as such term is defined in Section 4905.02, Revised Code. Regional Transmission organizations such as PJM and MISO are specifically excluded from the definition, under Section 4905.03(A)(4), Revised Code. Holding companies such as FE and AEP are not engaged in the business of supplying electricity to consumers and, thus, are not subject to our jurisdiction for purposes of service-quality complaints. Companies that are in the business of providing power in states other than Ohio are also not within the definition of a "public utility" and are, also, outside of our jurisdiction. Therefore, each of these respondents should be dismissed. (March 7, 2006 Entry, ¶ 57.)

IEU-Ohio attempts to hang its jurisdictional hat on R.C. 4928.09 and 4928.12. (See Complaint, ¶ 3.) Neither of these statutes confers subject matter jurisdiction on the Commission to hear complaints against an RTO. R.C. 4928.09 provides in relevant part:

(A)(1) No person shall operate in this state as an electric utility, an electric services company, a billing and collection agent, or a regional transmission organization approved by the federal energy regulatory commission and having the responsibility for maintaining reliability in all or part of this state on and after the starting date of competitive retail electric service unless that person first does both of the following:

(a) Consents irrevocably to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with division (A)(4) of this section;

(b) Designates an agent authorized to receive that service of process in this state, by filing with the commission a document designating that agent.

At most, R.C. 4928.09 requires an RTO to submit to the personal jurisdiction of the Ohio courts under procedures and rules that have yet-to-be adopted by the Commission. And, the Commission is an administrative agency, not a court. But even if R.C. 4928.09 were interpreted as conferring personal jurisdiction on the Commission, the statute does not purport to confer subject matter jurisdiction to hear complaints against RTOs. See, e.g., Toledo Premium Yogurt, Inc., dba Freshens Yogurt v. Toledo Edison Co., Case No. 91-1528-EL-CSS, 1992 Ohio PUC LEXIS 984, at *6 (Nov. 5, 1992) ("Freshens' arguments confuse this Commission's subject matter jurisdiction with our personal jurisdiction. Although the Commission has been given broad statutory authority to regulate public utilities and their relationships with their customers, it is well settled that this Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute."). Had the legislature intended for R.C. 4928.09 to confer either personal or subject matter jurisdiction to the Commission, the legislature would have said so expressly, as it did elsewhere in Title 49 in establishing the scope of the Commission's jurisdiction and the entities subject to Commission regulation.

RC 4928.12 also does not confer jurisdiction over RTOs. The relevant part of the statute provides:

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no entity shall own or control transmission facilities as defined under federal law and located in this state on or after the starting date of competitive retail electric service unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities, as described in division (B) of this section, that are operational.

(B) An entity that owns or controls transmission facilities located in this state complies with division (A) of this section if each transmission entity of which it is a member meets all of the following specifications:

R.C. 4928.12(B) goes on to list eight specifications. Nothing in the statute purports to confer jurisdiction to the Commission to regulate RTOs for continuing compliance with these specifications. R.C. 4928.12, in fact, does not purport to regulate RTOs in any way. The statute simply requires transmission-owning entities to join an RTO.¹ RTOs themselves are subject to FERC's exclusive jurisdiction, as Duke explains in its motion to dismiss (pp. 6-7) and as recognized by the Supreme Court of Ohio. See Office of Consumers' Counsel v. Public Util. Comm'n (2006), 111 Ohio St. 3d 384, ¶¶ 36-38 (FERC is "the independent federal agency that

¹ Although the Commission need not address the issue at this time, any suggestion that R.C. 4928.12 authorizes the Commission to prevent a transmission-owning utility from joining a FERC-approved RTO based on findings that the RTO does not meet one or more characteristics listed in subsections (B)(2) through (9) is highly dubious. It is undisputed that FERC has jurisdiction over "transmission of electric energy in interstate commerce," and that this jurisdiction is exclusive. New York v. FERC (2002), 535 U.S. 1, 18-19, quoting 16 U.S.C. § 824(b); see also Wisconsin Pub. Power, Inc. v. FERC (D.C. Cir. 2007), 493 F.3d 239, 246. By definition, transmission performed by an RTO is transmission in interstate commerce. Moreover, FERC's Order 2000 contains the functions and characteristics required of RTOs. See 18 C.F.R. § 35.34. State requirements for RTOs that conflict with federal requirements violate the Commerce Clause and Supremacy Clause of the U.S. Constitution. See Public Util. Comm'n of Rhode Island v. Attelboro Steam & Elec. Co. (1927), 273 U.S. 83, 89-90 (state may not regulate wholesale rates charged by a Rhode Island utility selling to a Massachusetts utility because it imposed a "direct burden on interstate commerce"); Schneidewind v. ANR Pipeline Co. (1988), 485 U.S. 293, 300 (preemption will be inferred where, among other things, a "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.")

Congress vested with primary responsibility of carrying out the provisions of the Federal Power Act, 16 U.S.C. §§ 791a-825r.") (Internal quotation omitted.)

That MISO "controls" transmission facilities does not subject it to regulation under R.C. 4918.12. Midwest ISO "controls" transmission facilities in its capacity as an RTO, not as a transmission owner. To interpret R.C. 4918.12 otherwise would mean that Midwest ISO also must join an RTO which, of course, is absurd since Midwest ISO is an RTO.

Notably, R.C. 4928.09 and 4928.12 were enacted in 1999 as part of Senate Bill 3. These statutes notwithstanding, in S.G. Foods the Commission held that Midwest ISO is not subject to Commission jurisdiction. The further restructuring of the retail electric market that occurred in 2008 with the enactment of Senate Bill 221 does not alter the Commission's conclusion in S.G. Foods in any way.

At its core, IEU-Ohio's Complaint boils down to a spurious and unsubstantiated claim that Midwest ISO has allegedly violated its FERC-approved tariff. IEU-Ohio concedes that "[t]o satisfy the criteria set forth in Section 4928.12, Revised Code, MISO must function as an independent operator of transmission facilities and independent administrator of its FERC-approved tariff, including the MISO markets." (Complaint, ¶ 8.) This is another way of attempting to create a bootstrapped argument that by allegedly violating its FERC approved tariff, Midwest ISO also allegedly violated R.C. 4928.12. There is no argument but that RTO tariff issues are within the exclusive jurisdiction of the FERC. Thus, the Midwest ISO is not and cannot be subject to R.C. 4928.12, or any other statute that could conceivably be read to confer

subject matter jurisdiction for the Commission to adjudicate IEU-Ohio's complaint. The allegations in the Complaint are manifestly beyond the Commission's jurisdiction.²

B. The Commission Must Stay Discovery.

Concurrent with the filing of its Complaint, IEU-Ohio also served its first set of discovery and a few days later it filed a second round. Rule 4901-1-17, O.A.C. provides, "Unless otherwise ordered and for good cause shown, discovery must be completed prior to the commencement of the hearing." Good cause exists to stay discovery during the pendency of Midwest ISO's Motion to Dismiss. As explained above, Midwest ISO is not subject to the Commission's complaint jurisdiction. Because Midwest ISO is not subject to the Commission's jurisdiction, this case cannot proceed to hearing. And because this case cannot proceed to hearing, there is no basis to allow discovery.

The Commission routinely grants stays of discovery pending a ruling on a motion to dismiss. For example, in Wilkes v. Ohio Edison Co., Case No. 09-682-EL-CSS (Entry of Dec. 16, 2009), Ohio Edison filed a motion to dismiss based on lack of subject matter jurisdiction. The Complainant then served discovery, which Ohio Edison sought to stay. The Attorney Examiner granted the motion, finding that "staying discovery is in the interest of both parties should the Commission ultimately decide to grant Ohio Edison's motion to dismiss." (Entry, p. 2.) See also Office of Consumers' Counsel v. Dayton Power & Light Co., Case No. 88-1085-EL-CSS (Entry of Sept. 27, 1988) ("When the Commission is faced with a complaint under Section

² That Midwest ISO filed comments with the Commission in Case No. 09-90-EL-COI does not subject it to the Commission's complaint jurisdiction. The Commission issued an Entry in 09-90-EL-COI inviting "any interested party" to submit comments to address certain questions concerning the continued value of the participation of Ohio electric distribution utilities' in RTOs. This entry was issued under the Commission's authority and responsibility, pursuant to R.C. 4928.24, to designate a federal energy advocate to monitor the activities of FERC. (Entry of March 4, 2009, ¶ 3.) Filing comments in a Commission case does not subject a party to the Commission's complaint jurisdiction. Entities such as IEU-Ohio, Office of Ohio Consumers' Counsel ("OCC") and other stakeholder groups routinely participate in Commission proceedings, but participating in a Commission proceeding does not transform an entity into a "public utility" that is subject to the Commission's general complaint jurisdiction. Thus, Midwest ISO is no more subject to the Commission's complaint jurisdiction than is IEU-Ohio.

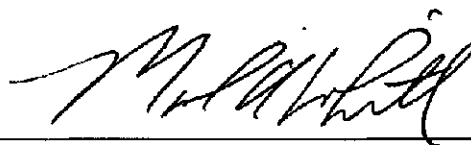
4905.26, Revised Code, it must decide whether 'reasonable grounds' have been stated before the case proceeds to hearing. Broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony.").

III. CONCLUSION

The IEU-Ohio Complaint does not meet the minimal, threshold standard of stating "reasonable grounds for complaint" against a "public utility." The Commission must dismiss the Complaint for lack of jurisdiction and, in the interim, grant the requested stay of discovery.

Dated: October 15, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Midwest ISO's Motion to Dismiss The Complaint and Motion to Stay Discovery, and Memorandum in Support, was served upon the following by U.S. first class mail this 15th day of October, 2010.

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