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October 27, 2010

VIA HAND DELIVERY

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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. Reply of Respondent Duke Energy Ohio, Inc. to Complainant IEU-Ohio's Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Dismiss the Complaint; and
2. Reply of Respondent Duke Energy Ohio, Inc. to Complainant Industrial Energy Users-Ohio's Memorandum Contra Duke Energy Ohio's Motion to Stay Discovery and Memorandum Contra of Respondent Duke Energy Ohio, Inc. to Complainant Industrial Energy Users-Ohio's Motion to Compel Discovery.

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

Gregory R. Flax
Enclosures

cc: Samuel C. Randazzo, Esq.
Mark A. Whitt, Esq.

Cincinnati Cleveland Columbus Costa Mesa Denver Houston Los Angeles New York Orlando Washington, DC

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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.)	

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**REPLY OF RESPONDENT DUKE ENERGY OHIO, INC. TO
COMPLAINANT IEU-OHIO'S MEMORANDUM CONTRA
DUKE ENERGY OHIO, INC.'S MOTION TO DISMISS THE COMPLAINT**

The Complaint of Industrial Energy Users-Ohio ("Complainant" or "IEU-Ohio") should be dismissed because it fails to state a justiciable case or controversy and because this Commission lacks jurisdiction over the subject matter of the Complaint. In its Memorandum Contra Duke Energy Ohio's Motion to Dismiss, IEU-Ohio contends that the Commission can exercise jurisdiction over IEU-Ohio's claim against Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") – in spite of the Commission's clear lack of subject-matter jurisdiction over claims against regional transmission organizations ("RTOs") – because IEU-Ohio bootstrapped its claim against Midwest ISO to a purported claim against Duke Energy Ohio. Notwithstanding the circular illogic of IEU-Ohio's argument, the Commission need not decide whether it can assert subject-matter jurisdiction over a claim against an RTO. IEU-Ohio has failed to state a real, immediate, and justiciable controversy concerning an electric utility. Neither IEU-Ohio's Complaint nor its Memorandum Contra allege any actionable conduct by Duke Energy Ohio nor any harm to IEU-Ohio that was allegedly caused by Duke Energy Ohio.

IEU-Ohio has failed to set forth reasonable grounds for its Complaint against Duke Energy Ohio and its Complaint should be dismissed.

LAW AND ARGUMENT

A. IEU-Ohio's Complaint does not allege any actionable conduct by Duke Energy Ohio or any harm to IEU-Ohio or its members.

“[J]udicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems that are abstract or hypothetical or remote.” *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1988), 82 Ohio St.3d 88, 89. IEU-Ohio's Complaint requests that the Commission determine that, because of certain “offers and commitments” Midwest ISO allegedly made to Duke Energy Ohio, “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 fails to allege, however, that any of the “offers and commitments” were implemented by Midwest ISO or accepted by Duke Energy Ohio; that there was any actionable conduct by Duke Energy Ohio with respect to the “offers or commitments”; or that IEU-Ohio or any of its members were harmed by the unconsummated “offers and commitments.” Accordingly, IEU-Ohio's Complaint fails to present a real and immediate controversy that can be resolved by the Commission and it should, therefore, be dismissed.

Complaints that fail to present real, present, and imminent controversies cannot be resolved by this Commission. See, e.g., *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 (explaining 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”).

IEU-Ohio makes foreboding predictions, in its Memorandum Contra, that Midwest ISO “is on a course to do harm to Ohio’s citizen’s and economy” (Mem. Contra at 22) and that Midwest ISO is “plotting to hurt . . . Ohio electric consumers in the future” (*id.* at 18). But IEU-Ohio does not allege, nor could it allege, that any of Midwest ISO’s alleged plots, schemes, offers, or commitments have caused any injury to IEU-Ohio or its members. IEU-Ohio is simply speculating that Midwest ISO may take actions in the future that will be contrary to the interests of IEU-Ohio’s members.¹

Moreover, while IEU-Ohio’s allegations concerning Midwest ISO’s alleged “offers and commitments” are remote and speculative, its allegations concerning any alleged misconduct by Duke Energy Ohio are completely nonexistent. IEU-Ohio concedes, in its Memorandum Contra, that Duke Energy Ohio was not an “active participant in [Midwest ISO’s] [alleged] efforts to hurt Ohio customers.” Mem. Contra at 17. Duke Energy Ohio is not alleged to have done anything contrary to its obligations under R.C. § 4928.12 – aside from being a member of Midwest ISO. Notably, IEU-Ohio still has not identified any injury that was caused by Duke Energy Ohio and still has not identified what relief it is seeking against Duke Energy Ohio.²

A person only has standing to initiate a complaint proceeding “if he or she can

¹ Many of the allegations in IEU-Ohio’s Memorandum Contra concerning Midwest ISO have little, if anything, to do with the allegations in IEU-Ohio’s Complaint, which focused exclusively on Midwest ISO’s alleged “offers and commitments” to Duke Energy. For example, IEU-Ohio takes issue, in its Memorandum Contra, with Midwest ISO’s alleged proposal for allocating the cost of “very large and very expensive transmission projects located outside of Ohio” and with Midwest ISO’s alleged failure to initiate an independent investigation at the request of certain “larger electric customers located in the Midwest.” Mem. Contra at 20-21. The actions that IEU-Ohio complains of in its Memorandum Contra are as remote and speculative as the actions complained of in its Complaint – and they have nothing to do with Duke Energy Ohio. In deciding this Motion to Dismiss, the Commission should ignore factual allegations that IEU-Ohio failed to include in its Complaint. See *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 207 (explaining that a court may not rely on allegations outside of the complaint in considering a motion to dismiss).

² In its Memorandum Contra, IEU-Ohio alleges that Duke Energy Ohio has documents in its possession that are necessary for establishing claims that IEU-Ohio would like to pursue against Midwest ISO. The alleged possession of documents, however, does not state a claim against Duke Energy Ohio, nor does IEU-Ohio’s assertion that those documents *might* result in IEU-Ohio uncovering facts that could *possibly* be used to amend its complaint overcome the Motion to Dismiss.

demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a specific, judicially redressible injury as a result of the challenged action.” *Thompson v. Argent Mortg. Co., LLC*, 8th Dist. No. 94613, 2010-Ohio-4499, at ¶ 6. See also *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”). IEU-Ohio fails to allege, in its Complaint, that it has suffered or will suffer any injury as a result of actions Midwest ISO’s is allegedly contemplating. It simply alleges that Midwest ISO’s “offers and commitments” “promise[] to confer undue advantages upon . . . ultimate consumers in general.” Compl. at ¶ 4. IEU-Ohio’s standing in this case cannot be premised on speculation about the possibility of future injuries to “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).

IEU-Ohio has failed to allege a real or present and imminent controversy in the case. Moreover, no such controversy based on Duke’s participation in Midwest ISO will *ever* arise from the facts alleged. The Federal Energy Regulatory Commission, on October 21, 2010, subject to certain conditions, has approved Duke Energy Ohio’s withdrawal from Midwest ISO. 133 FERC 61,058 (Oct. 21, 2010). IEU-Ohio has failed to set forth a justiciable claim against IEU-Ohio and, accordingly, its Complaint should be dismissed. *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”).

B. The Commission lacks jurisdiction over claims against RTOs.

In addition, IEU-Ohio's Complaint should be dismissed because the Commission lacks jurisdiction over the subject matter of the Complaint. This Commission only has jurisdiction to consider complaints against "public utilities." See R.C. §§ 4905.04(A); 4905.26. IEU-Ohio does not dispute that Midwest ISO is an RTO or that RTOs are specifically excluded from the definition of "public utility" in R.C. §§ 4905.02 and 4905.03. See Mem. Contra at 10. See also *S.G. Foods v. FirstEnergy Corp.*, Case No. 04-28-EL-CSS, et al., March 7, 2006, Entry at ¶ 57 (explaining that the Commission lacks subject-matter jurisdiction over MISO because, as an RTO, it is excluded from the definition of "public utility"). Yet, IEU-Ohio has set forth an elaborate theory of jurisdiction in its Memorandum Contra, that it contends will allow this Commission to exercise jurisdiction over Midwest ISO in spite of the Commission's clear lack of subject-matter jurisdiction over claims against RTOs.

The Commission must reject IEU-Ohio's invitation to circumvent the statutorily-prescribed limits of its jurisdiction. As explained above, IEU-Ohio's alleged claim against Duke Energy Ohio is premised entirely on IEU-Ohio's allegations against Midwest ISO. IEU-Ohio nonetheless asserts that it can manufacture jurisdiction over its claim against Midwest ISO by bootstrapping it to the claim against Duke Energy Ohio – which is in turn bootstrapped to the claim against Midwest ISO. See Mem. Contra at 11-12. IEU-Ohio's "double-bootstrapping" theory is entirely circular. If the Commission accepted IEU-Ohio's reasoning, any complaint against an RTO with a member in this state would be subject to the jurisdiction of this Commission. According to IEU-Ohio's theory, the complaining party simply needs to: (1) allege that the RTO's objectionable conduct disqualifies it under R.C. § 4928.12; (2) assert a related claim against any one of the RTO's members in Ohio, alleging that the member is in violation of R.C. § 4928.12 as a result of its membership in an unqualified RTO; and (3) allege

that the exercise of jurisdiction over the RTO is necessary to resolve the claim against the RTO's member. See Mem. Contra at 11-12. IEU-Ohio's novel theory is contrary to the plain language, and legislative intent, of R.C. §§ 4905.02 and 4905.03, which expressly exclude claims against RTOs from the subject-matter jurisdiction of this Commission.

IEU-Ohio's theory is also premised on a misunderstanding of Rules 19 and 20 of the Ohio Rules of Civil Procedure, which do not allow for the joinder of parties over which the Commission lacks subject-matter jurisdiction. In *Dalton v. BCI* (1987), 39 Ohio App.3d 123, the 10th District Court of Appeals considered whether the Portage County Court of Common Pleas was subject to the jurisdiction of the Court of Claims. The Court of Appeals found that the Court of Claims lacked subject-matter jurisdiction over an action against the Court of Common Pleas *and that the Court of Common Pleas also could not "be joined in an action against BCI in the Court of Claims under Civ. R. 20(A)"* merely because BCI was subject to the jurisdiction of the Court of Claims. *Id.* at 125 (emphasis added). Consistent with the Court of Appeals' reasoning in *Dalton*, because Midwest ISO is not within the definition of a "public utility" and is not subject to the jurisdiction of the Commission, the Civil Rules of joinder do not create a basis to keep Midwest ISO in this proceeding simply because Duke Energy Ohio as a public utility is subject to such jurisdiction.

As a practical matter, since IEU-Ohio's purported claim against Duke Energy Ohio is entirely premised on its being a member of Midwest ISO, nothing remains for the Commission to resolve if Midwest ISO is not a party to this proceeding. In addition, any attempt by the Commission to resolve IEU-Ohio's nonjusticiable claim against Duke Ohio Energy, even in the absence of Midwest ISO, would conflict with FERC's exclusive jurisdiction over the regulation and supervision of RTOs. See Duke Energy Ohio's Mot. Dismiss at 5-8. IEU-Ohio points out,

in its Memorandum Contra, that this Commission has previously declined to find that jurisdictional conflicts preclude it from considering claims against electric utilities under R.C. § 4928.12. See *Ohio Consumers' Counsel v. Columbus Southern Power*, Case Nos. 02-1586-EL-CSS, et al., April 17, 2003, Entry on Rehearing at ¶ 6. The complaint presented in *Columbus Southern Power*, unlike IEU-Ohio's Complaint in this case, did not necessitate a finding by the Commission that an RTO was qualified or unqualified under R.C. § 4928.12 – the Commission could have determined that the utilities violated the requirement to timely join a FERC-approved RTO, without reaching the issue of whether any RTO was qualified under R.C. § 4928.12. But the Commission nonetheless recognized the possibility of jurisdictional conflicts and elected to avoid them by staying “all further activity, including discovery, in the above-captioned cases . . . until more clarity is achieved regarding matters pending at FERC and elsewhere. . . . There are too many unresolved issues beyond the Commission[']s jurisdiction for the Commission to have a meaningful review of the Utilities' [independent transmission plans] at this time.” *Ohio Consumers' Counsel v. Columbus Southern Power*, Case Nos. 02-1586-EL-CSS, et al., February 20, 2003, Entry at ¶ 9.

Since IEU-Ohio's Complaint fails to set forth a real, imminent, and justiciable controversy, the Commission need not decide whether it has jurisdiction to determine if Midwest ISO is qualified under R.C. § 4928.12. The Commission also need not determine whether it has jurisdiction to assess the appropriateness of Duke Energy Ohio's decision to realign from Midwest ISO to PJM, since IEU-Ohio's Complaint is not predicated on Duke Energy Ohio's realignment decision. In its recent order addressing Duke Energy Ohio's RTO realignment proposal, FERC concluded that it was premature to decide whether “a state commission should have the authority to determine the prudence of RTO Realignment decisions[.]” 133 FERC

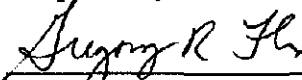
61,058, at ¶¶ 130, 134. Since the issue is not before the Commission on IEU-Ohio's Complaint, the Commission can defer to another day any determination as to whether it can or should exercise jurisdiction relative to Duke Energy Ohio's realignment decision.

Neither IEU-Ohio's Complaint nor its Memorandum Contra allege any claim against Duke Energy Ohio nor any harm to IEU-Ohio. IEU-Ohio has failed to set forth reasonable grounds for its Complaint against Duke Energy Ohio and its Complaint should 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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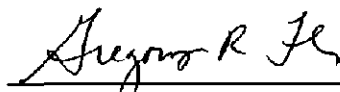
Attorneys for Duke Energy Ohio, Inc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served on the following, by first class U.S. Mail, postage prepaid, this 27th day of October, 2010:

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