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October 27, 2010

VIA HAND DELIVERY

Gregory R. Flax
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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 / cc

Gregory R. Flax
Enclosures

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

FILE

**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
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**

A stay of discovery is warranted in this case because Complainant Industrial Energy Users-Ohio ("IEU-Ohio") initiated the above-captioned proceeding in an improper attempt to obtain documents and information from Duke Energy Ohio concerning matters that are unrelated to the allegations in the Complaint. Respondents should not bear the burden and expense of responding to discovery that will be unnecessary once IEU-Ohio's Complaint is dismissed for lack of jurisdiction and/or for failure to state any grounds for complaint.

Duke Energy Ohio filed a motion with this Commission, on October 12, 2010, requesting that discovery in this matter be stayed, pursuant to OAC 4901-1-24, pending resolution of Duke Energy Ohio's Motion to Dismiss the Complaint of Industrial Energy Users-Ohio ("IEU-Ohio")

or “Complainant”).¹ Respondent Midwest Independent Transmission System Operator, Inc. (“Midwest ISO”) filed a similar motion to stay discovery in this proceeding on October 15, 2010.

IEU-Ohio filed a Memorandum Contra Duke Energy Ohio’s Motion for Stay, on October 20, 2010. On the very next day, IEU-Ohio filed a Motion to Compel Discovery that reiterated the arguments in its Memorandum Contra.² None of the arguments in either of IEU-Ohio’s briefs refute the central premises in Duke Energy Ohio’s Motion to Stay Discovery: (1) IEU-Ohio filed its meritless Complaint, in the above-captioned matter, as a subterfuge for obtaining documents and information in discovery that would otherwise be unavailable; and (2) this Commission has discretion to limit or stay discovery in order to prevent an abuse of the discovery process. Duke Energy Ohio respectfully requests that its Motion to Stay Discovery be granted and that IEU-Ohio’s Motion to Compel Discovery be denied.

LAW AND ARGUMENT

IEU-Ohio’s Complaint fails to allege any real, imminent, and justiciable controversy to be resolved by the Commission; any concrete injury in fact on the part of IEU-Ohio or its members to be redressed by this Commission; or any claims against Duke Energy Ohio or Midwest ISO that are within the subject matter of this Commission. Not surprisingly, IEU-Ohio is vigorously opposed to staying discovery until the Commission has resolved the motions to dismiss the Complaint. Indeed, IEU-Ohio argues that allowing Duke Energy Ohio and Midwest ISO to stay discovery in this case would be “effectively the same as blocking IEU-Ohio’s Complaint.” IEU-Ohio’s Mem. Contra Mot. Stay at 14; IEU-Ohio’s Mot. Compel at 16. But IEU-Ohio’s protests only reinforce the conclusion that IEU-Ohio’s primary purpose in initiating

¹ The arguments in Duke Energy Ohio’s Motion to Stay Discovery and its Motion to Dismiss the Complaint and are incorporated herein by reference.

² In the interest of efficiency, Duke Energy Ohio has elected to file a single response to IEU-Ohio’s redundant Memorandum Contra and Motion to Compel Discovery.

this proceeding was to fish for documents and information; not to obtain relief from either Duke Energy Ohio or Midwest ISO.

IEU-Ohio argues that since the Commission's procedural rules provide that discovery may commence immediately after the filing of a Complaint, this Commission lacks discretion to stay discovery pending the resolution of a motion to dismiss. See Mot. Compel at 8. Complainant's conclusion is incorrect, though, as this Commission can exercise, and has exercised, its considerable discretion over the discovery process by staying discovery of matters pending resolution of dispositive motions, under appropriate circumstances. See OAC 4901-1-24(A); *Wilkes v. Ohio Edison Co.*, Case No. 09-682-EL-CSS (Entry, Dec. 16, 2009), at ¶ 4 (finding that "staying discovery is in the interest of both parties should the Commission ultimately decide to grant Ohio Edison's motion to dismiss"). Courts and commentators have explained that a stay of discovery may be warranted, in cases like this one, where the complaint lacks merit and there are pending challenges with respect to jurisdiction. See, e.g., *Wenger v. Monroe* (9th Cir. 2002), 282 F.3d 1068, 1077 (explaining that "[a] district court may . . . stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief"); Wright, 8A Federal Practice & Procedure § 2040 (stating that "a court may decide that in a particular case it would be wise to stay discovery on the merits until challenges to jurisdiction have been resolved").

Moreover, IEU-Ohio seeks documents and information in discovery from Duke Energy Ohio that have little, or nothing, to do with the allegations in the Complaint. Duke pointed out the irrelevance and overbreadth of IEU-Ohio's discovery requests in its Motion to Stay Discovery and listed some of IEU-Ohio's requests to illustrate the extent to which IEU-Ohio's discovery requests exceed the scope of permissible discovery. See Mot. Stay at 5 (explaining

that “IEU-Ohio’s Discovery Requests have little, or no, relation to the allegations in its Complaint”).³ Many of those requests call for the production of Duke Energy Ohio’s internal studies and analysis concerning the financial impact that Duke Energy Ohio’s decision to realign from Midwest ISO to PJM Interconnection, L.L.C. (“PJM”) may have on Duke Energy Ohio, its affiliates, the members of Midwest ISO, and the members of PJM. IEU-Ohio is simply incorrect in its contention that Duke Energy Ohio has not alleged the IEU-Ohio’s discovery is outside the scope permitted by OAC 4901-1-16(B). See IEU-Ohio’s Mot. Compel at 4; Duke’s Mot. Stay at 5.

IEU-Ohio is similarly incorrect in its contentions that Duke Energy Ohio has improperly sought to delay these proceedings or that it has failed to exhaust reasonable means of resolving this matter. Counsel for Duke Energy Ohio spoke to counsel for IEU-Ohio on September 29, 2010 – nearly two weeks before discovery responses were due – and advised counsel for IEU-Ohio that Duke Energy Ohio would be moving to dismiss the complaint and requesting that its obligation to respond to IEU-Ohio’s overbroad and irrelevant discovery requests be stayed pending the Commission’s resolution of the motion to dismiss. IEU-Ohio’s counsel made it clear during that conversation, and in the brief that IEU-Ohio filed with the Commission on September 30, 2010, that IEU-Ohio would not agree to defer discovery until after the Commission’s decision on Duke Energy Ohio’s dispositive motion. The Commission considered IEU-Ohio’s concerns about discovery delays and responded: “With respect to IEU-Ohio’s concerns regarding potential delays in responses to discovery requests, any discovery disputes should be addressed pursuant to Rules 4901-1-23 and 4901-1-24, Ohio Administrative Code.” Entry, October 7, 2010, at ¶ 4. IEU-Ohio cannot act surprised that on October 12, 2010, Duke

³ In addition, Duke expressly reserved the right to raise lack of relevance, and other appropriate objections to IEU-Ohio’s discovery requests, when or if it is required to respond to those discovery requests. See Mot. Stay at note 2.

Energy Ohio moved this Commission for a stay of discovery, pursuant to OAC 4901-1-24, rather than serving responses and objections to IEU-Ohio's discovery requests.

IEU-Ohio's Complaint fails to state any grounds for relief against Duke Energy Ohio or to assert any claim that this Commission has jurisdiction to consider. It would be a waste of Respondents' time and resources to respond to IEU-Ohio's overbroad and irrelevant discovery requests in a case that will never reach a hearing. The Commission has considerable discretion to limit or delay discovery in order to prevent an abuse of the discovery process and it should exercise that discretion in this case. Duke Energy Ohio respectfully requests that its Motion to Stay Discovery be granted and that IEU-Ohio's Motion to Compel Discovery be denied.

Respectfully submitted,


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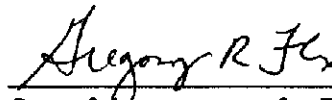
Attorneys for Duke Energy Ohio, Inc

CERTIFICATE OF SERVICE

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

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One of the attorneys for Duke Energy Ohio, Inc.