

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) On September 20, 2010, Industrial Energy Users-Ohio (IEU-Ohio) filed a complaint against The Midwest Independent Transmission System Operator, Inc., (Midwest ISO) and Duke Energy Ohio, Inc., (Duke). In its complaint, IEU-Ohio alleges that, as evidenced by a filing made by Duke in a proceeding before the Federal Energy Regulatory Commission (FERC), the Midwest ISO violated its obligation to independently discharge its regional transmission operator (RTO) duties, as required under Section 4928.12, Revised Code. IEU-Ohio explains that the filing describes offers the Midwest ISO made to Duke for the purpose of influencing wholesale electricity market design and, thus, wholesale market prices. IEU-Ohio alleges that the Midwest ISO promised to confer undue advantages upon Duke, as a particular market participant, even though the Midwest ISO's offers to Duke would result in increased capacity costs in the Midwest ISO region and specifically in Ohio, thus increasing the cost of electricity for ultimate consumers. IEU-Ohio contends that the Midwest ISO's actions demonstrate that it is not in the interests of Ohio consumers for any owner of transmission facilities located in Ohio to participate in the

Midwest ISO and, accordingly, that Duke violated Section 4928.12, Revised Code, by placing its transmission facilities under the Midwest ISO's operational control.

- (2) On September 20, 2010, and October 8, 2010, IEU-Ohio and the Midwest ISO filed motions for admission *pro hac vice* of Robert A. Weishaar, Jr. and Keith L. Beall, respectively. The Commission finds that the motions for admission *pro hac vice* are reasonable and should be granted.
- (3) On May 11, 2011, IEU-Ohio and Duke filed a joint motion to dismiss the complaint, as it pertains to all claims against Duke. In support of their request, IEU-Ohio and Duke explain that they have resolved all issues between them in this case and have reached a settlement that is satisfactory to both parties. Accordingly, IEU-Ohio and Duke request that the complaint be dismissed as it pertains to Duke.
- (4) The Commission finds that the request to dismiss the complaint, given that IEU-Ohio and Duke have reached an agreement which resolves the issues raised in the complaint as they pertain to Duke, is reasonable. Accordingly, the request to dismiss the complaint, as it relates to Duke, should be granted.
- (5) Under consideration in this entry are the motions to dismiss and to stay discovery filed by the Midwest ISO on October 15, 2010. IEU-Ohio filed a memorandum contra on October 28, 2010, and the Midwest ISO filed a reply on November 4, 2010.
- (6) In its motion to dismiss, the Midwest ISO argues that the Commission lacks jurisdiction over claims against an RTO. The Midwest ISO states that the Commission can only exercise the jurisdiction conferred to it by statute and that the General Assembly has vested the Commission with jurisdiction to regulate and hear complaints against "public utilities." *Lucas Cty. Commr's v. Public Util. Comm.* (1997), 80 Ohio St.3d 344, 347; Sections 4905.04, 4905.05, and 4905.06, Revised Code. Moreover, the Midwest ISO points out that Section 4905.03(A), Revised Code, expressly excludes RTOs from the definition of a "public utility," and further notes that the Commission has previously dismissed a complaint against the Midwest ISO on this very ground, citing *S.G. Foods, Inc. et al. v. FirstEnergy Corp. et al.*, Case No. 04-28-EL-CSS (March 7, 2006 Entry at 26).

In addition, the Midwest ISO contends that IEU-Ohio's argument that Sections 4928.09 and 4928.12, Revised Code, confer jurisdiction on the Commission to hear IEU-Ohio's complaint against the Midwest ISO is incorrect. Section 4928.09(A)(1), Revised Code, requires any FERC-approved RTO to consent to jurisdiction of Ohio courts before commencing operations within Ohio. The Midwest ISO asserts that this statute at most requires an RTO to submit to the personal jurisdiction of Ohio courts but does not confer subject matter jurisdiction on the Commission to hear complaints against RTOs. Likewise, the Midwest ISO argues that Section 4928.12, Revised Code, also does not confer the Commission with jurisdiction over RTOs. Instead, the Midwest ISO contends that this statute does not purport to regulate RTOs in any way but simply requires transmission-owning entities in Ohio to join an RTO. In sum, the Midwest ISO concludes that IEU-Ohio's complaint amounts to a claim that the Midwest ISO violated its FERC-approved tariff and contends that FERC has exclusive jurisdiction over RTO tariff issues.

- (7) IEU-Ohio initially responds by arguing that the Midwest ISO's motion to dismiss is facially defective as it fails to apply the standard of proof for considering motions to dismiss. For purposes of ruling on the motion to dismiss, IEU-Ohio asserts that all allegations in the complaint must be accepted as true by the Commission and the Commission can only dismiss the complaint if it finds that IEU-Ohio can prove no set of facts that would permit the Commission to provide the requested relief. *Cleveland Electric Illuminating Co. v. Public Util. Comm.* (1996), 76 Ohio St.3d 521, 524.

IEU-Ohio next points out that its complaint never claims that the Midwest ISO is a public utility subject to the ratemaking jurisdiction of the Commission and argues that the Midwest ISO's eligibility to qualify as a "transmission entity" under the terms of Section 4928.12, Revised Code, has nothing to do with and is not dependent upon the Midwest ISO being a "public utility" that is subject to the Commission's ratemaking jurisdiction. IEU-Ohio argues that its complaint is focused on the Commission's obligation to advance the policy objectives expressed in Section 4928.02, Revised Code, and the state's policies are imperiled if the Midwest ISO fails to perform its duty to act independently. IEU-Ohio maintains that failure by the Commission to exercise jurisdiction in this matter would eliminate any basis for the Commission to enforce Section 4928.12, Revised Code. IEU-Ohio further asserts

that the FERC order approving Duke's request for authorization to transfer operational control of its Ohio and Kentucky transmission facilities out of the Midwest ISO does not prevent the Commission from addressing IEU-Ohio's complaint. IEU-Ohio states that the FERC order makes clear that FERC's approval of Duke's application does not affect state regulatory proceedings.

IEU-Ohio further argues that, pursuant to Section 4928.09, Revised Code, the Midwest ISO must consent to Ohio's jurisdiction in order to be eligible as a transmission entity that may exercise control over transmission assets within this state. IEU-Ohio also contends that its joinder of the Midwest ISO in the complaint is proper under the Ohio Rules of Civil Procedure. In addition, IEU-Ohio asserts that misjoinder of parties is not grounds for dismissing the complaint. Finally, IEU-Ohio argues that the factual statements made by the Midwest ISO in its motion to dismiss should not be relied upon when adjudicating the motion to dismiss, as the Commission must assume all allegations and factual assertions made in IEU-Ohio's complaint are true for purposes of ruling on the Midwest ISO's motion to dismiss.

- (8) The Midwest ISO replies that IEU-Ohio's claims about the standard of review for a dismissal are misplaced, as IEU-Ohio applies the standard for dismissal for failure to state a claim. In contrast, the Midwest ISO's motion to dismiss is centered on the Commission's lack of subject matter jurisdiction, and review of a motion to dismiss based on that ground focuses on whether the complaint raises any cause of action cognizable by the forum. *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. Since the Commission lacks the statutory authority to adjudicate a claim against an RTO, the Midwest ISO argues that IEU-Ohio's complaint fails to raise a cause of action cognizable by the Commission. Instead, the Midwest ISO contends that whether the Commission believes that the Midwest ISO qualifies as a "transmission entity" under Ohio law does not establish that the Commission has jurisdiction over the Midwest ISO.

In response to IEU-Ohio's contention that the Commission should assert jurisdiction over the Midwest ISO in order to advance the policy objectives expressed in Section 4928.02, Revised Code, the Midwest ISO points out that the Commission can only exercise such jurisdiction as it is given to it by the General Assembly and contends that RTOs have been specifically excluded from

Commission regulation. The Midwest ISO contends that the FERC order is irrelevant to consideration of whether the Commission has jurisdiction over an RTO under state law and maintains that the FERC order simply confirms FERC's exclusive jurisdiction over issues pertaining to interstate transmission and RTO activities. Moreover, the Midwest ISO argues that the Ohio rules of civil procedure are irrelevant in determining whether the Commission has subject matter jurisdiction.

- (9) The Commission notes that, pursuant to Section 4905.26, Revised Code, we have jurisdiction to hear complaints against "public utilities" in the state of Ohio, as such term is defined in Section 4905.02, Revised Code. RTOs such as the Midwest ISO are specifically excluded from that definition, under Section 4905.03(A)(4), Revised Code. In addition, the Commission finds that under Section 4928.09, Revised Code, does not supply the Commission with jurisdiction over a complaint case against an RTO. The Commission finds that IEU-Ohio's concern that the Commission will neither be able to fulfill its obligation to advance the policy objectives expressed in Section 4928.02, Revised Code, nor be able to enforce Section 4928.12, Revised Code, unless we exercise jurisdiction over the Midwest ISO in this proceeding is misplaced. The Commission will be able to fully implement the goals established by the General Assembly in each of those statutes without extending to the Midwest ISO our authority to hear complaints against public utilities Section 4905.26, Revised Code. Accordingly, the Commission finds that the Midwest ISO's motion to dismiss should be granted.
- (10) Since the motion to dismiss filed by the Midwest ISO has been granted, the Commission finds that the motion to stay discovery filed by the Midwest ISO is moot.

It is, therefore,

ORDERED, That the request to dismiss the complaint filed by IEU-Ohio and Duke be granted. It is, further,

ORDERED, That motions for admission *pro hac vice* of Robert A. Weishaar, Jr. and Keith L. Beall, filed by IEU-Ohio and the Midwest ISO, respectively, be granted. It is, further,

ORDERED, That the motion to dismiss filed by the Midwest ISO be granted. It is, further,

ORDERED, That the motion to stay discovery filed by the Midwest ISO is moot. It is, further,

ORDERED, That Case No. 10-1398-EL-CSS be dismissed. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Todd A. Snitchler, Chairman




Paul A. Centolella



Steven D. Lesser



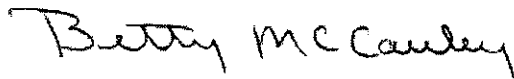
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