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PUCO

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric ) Case No. 10-0176-EL-ATA  
Illuminating Company and The Toledo )  
Edison Company for Approval of a )  
New Rider and Revision of an Existing )  
Rider )

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MEMORANDUM OF SUE STEIGERWALD; CITIZENS FOR KEEPING THE ALL-  
ELECTRIC PROMISE (CKAP); JOAN HEGINBOTHAM AND; ~~BOB SCHMITT~~  
HOMES, INC. CONTRA FIRSTENERGY'S MOTION TO COMPEL

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**I. INTRODUCTION**

This matter was reopened due to large and in some cases, obscene increases in electric bills by All-Electric customers. The existence of the All-Electric customer and their unique energy requirements and usage were not disclosed to the PUCO or OCC when the initial matter was discussed. Due to the All-Electric customers lack of representation earlier, on May 27, 2010, a Motion to Intervene was filed by Sue Steigerwald, Citizens for Keeping the All-Electric Promise (CKAP), Joan Heginbotham and Bob Schmitt Homes, Inc. ("CKAP Parties"). On November 17, 2010, the Attorney Examiner granted intervention. In addition, FE's marketing practices are under scrutiny in this matter. FE has filed three sets of Interrogatories and Requests for Production of Documents. The CKAP Parties have responded to each of those sets of discovery and provided supplemental responses to FE's first set since FE's Motion To Compel. FE's Motion to Compel should be denied.

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## **II. ARGUMENT**

### **CKAP PARTIES HAVE PROVIDED COMPLETE RESPONSES TO FE'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION**

FE argues that CKAP Parties' responses are deficient since they have not specifically identified documents that have been submitted at Public Hearings or to the PUCO Docket. CKAP Parties have responded to those requests with their objections and have provided documents rendering FE's Motion to Compel moot.

FE's discovery requests essentially ask for either all documents CKAP Parties have or will use in this matter. The CKAP Parties objected to the breadth of the requests, objected on the basis that the information was exempt from discovery under the trial preparation or attorney-work product doctrine and attorney-client privilege and pointed to the PUCO Docket and the transcripts of the Public Hearings. FE complained that those responses were insufficient, as the documents were not specifically identified. FE is seeking a ruling that is neither required by the PUCO's discovery rules and which there is no precedent to require such an effort. In fact, Ohio case law has held that if the demanding party has equal access to the documents then they are not entitled to demand discovery.

FE also complains about other documents that may be available. CKAP Parties have noted their objections above. While FE may have obtained a document that is exempt from discovery, it does not mean that all other documentation that is exempt is suddenly discoverable. The focus of this matter must remain on the marketing of the all-electric rate by FE and the plight of the All-Electric customer should the discount be

taken away. The attempt to obtain documents exempt from discovery is an attempt to shift that focus.

In addition, FE's demand asks for documents that are not in the possession, custody or control of CKAP Parties. Implicit in the wording of Ohio Adm. Code 4901-1-20(A) is the requirement that the requested documents are in the possession, custody or control of the party upon whom the request is served. CKAP Parties' counsel has made it clear that the requested documents are not in their possession, custody or control. (See Ex. GWG-2). There is no duty under the discovery rules to force CKAP Parties to compile or possess the requested documents.

FE has had equal access to the documents submitted at the Public Hearings and those submitted to the Docket. FE's counsel attended each Public Hearing and witnessed the documents submitted at those hearings and the transcripts of those hearings have been docketed. In addition, the PUCO Docket is publicly available to all. FE has equal access to those documents and cannot demand more. Furthermore, FE is not entitled to documents exempt from discovery or those that are not in the possession, custody or control of CKAP Parties. FE's motion to compel should be denied.

FE has also requested all documents reflecting, based upon or related to the September 24, 2010 Staff Report or any analysis thereof. CKAP Parties have objected to that request citing trial preparation and attorney-client privilege. These privileges have a long history of being upheld and derive from the Federal Rules of Civil Procedure, Ohio Rules of Civil Procedure and Ohio Administrative Code. (See OCC's Memorandum Contra FirstEnergy's Motion to Compel Pages 7-14). FE's Motion to Compel on this basis must be denied.

### III. CONCLUSION

CKAP Parties have responded to FE's discovery requests with documents and objections. FE is not entitled to a Motion to Compel. FE has equal access to the PUCO Public Hearing transcripts and the Docket. FE cannot compel production of documents not in the possession, custody or control of CKAP Parties. FE cannot compel production of documents that are protected by privilege. CKAP Parties have submitted their responses to all of FE's discovery requests. For these reasons, CKAP Parties respectfully request that the Commission reject FE's arguments and deny FE's Motion to Compel.

Respectfully submitted,

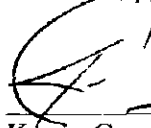
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# CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties of record this 30<sup>th</sup> day of December 2010 via first class US mail, postage prepaid.



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