BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Authority to Provide For a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of An Electric Security Plan	)))))))	Case No. 12-1230-EL-SSO

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC'S MOTION TO COMPEL RESPONSES TO DISCOVERY

James W. Burk (0043808)
Counsel of Record
Arthur E. Korkosz (0010587)
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
korkosza@firstenergycorp. com

James F. Lang (0059668)
Laura C. McBride (0080059)
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
E-mail: jlang@calfee.com
lmcbride@calfee.com

David A. Kutik (0006418)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190

Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

On April 13, 2012, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "the Companies" or "FirstEnergy") initiated this case by filing their Application for Authority to Provide for a Standard Service Offer ("SSO") Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan ("ESP"). The Companies also filed a Stipulation and Recommendation in an effort to resolve the issues involved in this proceeding. Direct Energy Services, LLC and Direct Energy Business, LLC (collectively, "Direct Energy") did not sign the Stipulation and Recommendation.

On April 23, 2012, Direct Energy served discovery requests on the Companies. Interrogatory No. 19 asks the Companies to provide a breakdown of the load served by competitive retail electric service ("CRES") suppliers in the Companies' territories. Requests for Production Nos. 2 and 3 ask the Companies to provide numerous copies of actual bills reflecting specified billing parameters that Direct Energy purportedly intends to use to advocate for a purchase of receivables ("POR") program. The Companies objected to providing substantive responses to those requests, except as to Interrogatory No. 19 wherein Direct Energy was directed to the Commission's website for publicly available information related to shopping and governmental aggregation levels. The Companies' objections were proper. Interrogatory No. 19 seeks information restricted from disclosure under Rule 4901:1-37-04(D)(4), Ohio Administrative Code, and the Companies' Supplier Tariffs. Requests for Production Nos. 2 and 3 ask for information that is irrelevant because it is wholly outside the scope of the Stipulation and Recommendation filed by the Companies as part of their ESP. Request No. 2 is also unduly burdensome. Direct Energy's Motion to Compel should be denied.

II. ARGUMENT

Direct Energy's Motion to Compel seeks additional responses to the following discovery requests:

- **Interrogatory No. 19:** Without identifying any CRES by name, please provide an anonymous breakdown (by percentage) of the CRES load served by CRES providers in the respective Companies' service territories. Please also provide government aggregation customers in the breakdown.

- **Request for Production No. 2:** Please produce copies of a FirstEnergy customer's bills (personal information redacted if necessary) that was receiving CRES service and returned to SSO service with a CRES arrearage remaining unpaid after the 9th billing cycle. Specifically, please produce copies of bills for the 8th, 9th, 10th, and 11th billing cycles where the CRES amount remains unpaid after the 9th billing cycle.

- **Request for Production No. 3:** Please produce copies of a FirstEnergy customer's bills (personal information redacted if necessary) on both a "One-six" [sic] and "One Ninth" deferred payment plan as those plans are described under O.A.C. 4901:1-18-05(B). Specifically, please produce copies of bills for the four (4) billing cycles from initial payment on the deferred payment plan for a FirstEnergy customer making payments under a deferred payment plan.

All three Requests are improper, so Direct Energy's Motion to Compel should be denied.

A. Direct Energy's Interrogatory No. 19 Seeks Confidential Information That Cannot Be Released Under Commission Rules Or The Companies' Tariffs.

Interrogatory No. 19 improperly seeks information that is confidential and cannot be disclosed under Rule 4901:1-37-04(D)(4), which provides:

> An electric utility shall treat as confidential information obtained from a competitive retail electric service provider, both affiliated and nonaffiliated, and shall not release such information, unless a competitive retail electric service provider provides authorization to do so or unless the information was or thereafter becomes available to the public other than as a result of disclosure by the electric utility.[1]

[1] "Electric utility" means "an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state." Rule 4901:1-37-01(E), citing O.R.C. § 4928.01(A)(11).

The Companies' Supplier Tariffs confirm this obligation, providing that confidential or proprietary information made available to the Companies by CRES suppliers may not be disclosed without the CRES suppliers' consent absent a court or agency order. *See* the Companies' Supplier Tariffs, § XVIII, p. 33. Information regarding the total load served by an individual CRES provider in the Companies' territories is obtained from the CRES provider, is not publicly available, and is required to be provided to the Commission on a confidential basis under Rule 4901:1-25-02(A), Ohio Administrative Code. All of the CRES providers have not authorized—and surely would not authorize—the disclosure of such data. After all, the release of such data could cause the CRES providers to suffer competitive harm at the hands of other market participants seeking to best the other players in the Companies' territories. Accordingly, the Companies are not permitted under Rule 4901:1-37-04(D)(4) to release CRES information.

Direct Energy asserts that Interrogatory No. 19 would not require the Companies to violate Rule 4901:1-37-04(D)(4) or their Supplier Tariffs. Direct Energy explains that "its intent is not to ask FirstEnergy to reveal the identities of any particular company. That is why Direct Energy asked for the information anonymously and for its entire market." (Mot. p. 6.) Direct Energy also claims that other parties and the public cannot derive the identities of the particular CRES providers. It further argues that "there are too many other unknown dots to connect that would provide for specific CRES identification." (Mot. p. 6.)

Direct Energy fails to specify which, if any, "unknown dots" would actually prevent market participants from identifying the CRES providers in the Companies' territories. In any event, Direct Energy is wrong. The requested information, when combined with public documents, could allow market participants to reverse engineer which CRES providers hold the largest shares in the Companies' territories. That is precisely why CRES information is filed on

a confidential basis under Rule 4901:1-25-02(A). Granting Direct Energy's request would significantly impair both the spirit and direct purpose of the Rule. Through Interrogatory No. 19, Direct Energy's seeks to force the Companies to disclose information indirectly that cannot be disclosed directly under Rule 4901:1-37-04(D)(4) or the Companies' Supplier Tariffs. That cannot be permitted.[2]

Direct Energy cites a pie chart that Dominion East Ohio ("DEO") posted to its website in connection with its SSO and SCO Auctions Information Meeting held on November 30, 2010. (Mot. p. 6.) The chart, titled "Energy Choice Market Shares," shows the top five competitive retail *natural gas* suppliers, the shares held by the other twenty suppliers, and the percentage of the market that is attributed to governmental aggregation in DEO's territory. Direct Energy suggests that the Companies should provide these types of charts. But CRES market share pie charts may not be disclosed under Rule 4901:1-37-04(D)(4), the corporate separation rules for electric utilities, or Rule 4901:1-25-02(A), the market monitoring rules for electric utilities, simply because DEO chose to release a similar chart. Natural gas companies are not subject to Rule 4901:1-37-04(D)(4) or Rule 4901:1-25-02(A). Such a disclosure would not be proper here. Providing the load served by individual market participants, directly or indirectly, would violate Rule 4901:1-37-04(D)(4) and the Companies' Supplier Tariffs. It would also undermine the

[2] Although, as demonstrated herein, Direct Energy's Motion to Compel a response to Interrogatory No. 19 should be denied, to the extent that there is any doubt on the issue of the propriety of this request, the Commission should allow the Companies to demonstrate, in camera, that the identities of key market participants in their territories are readily discernable when the information Direct Energy seeks is combined with publicly available documents. An in camera demonstration would be appropriate so that the Companies would not be required to publicly disseminate confidential information or the method by which this information could be competitively used. *See State ex rel. Allright Parking of Cleveland Inc. v. Cleveland*, 63 Ohio St.3d 772, 711 (Ohio 1992) (an in camera inspection remains the best procedure for determining whether records are excepted from public disclosure). *See also In the Matter of the Application of Border Energy, Inc. for Certification as a Competitive Retail Natural Gas Supplier*, No. 07-26-GA-CRS, Entry dated Feb. 23, 2009 (find that in camera review was proper to determine whether documents claimed to be confidential and trade secret were entitled to protection from disclosure).

intent and purpose of Rule 4901:1-25-02(A). Accordingly, the Commission should deny Direct Energy's Motion to compel charts revealing CRES load data in the Companies' territories.

Furthermore, Direct Energy provides little or no explanation why the information is needed at all to permit the Commission to rule on the Companies' ESP Stipulation, other than a vague, ill-defined reference to making the market better.[3] But the Companies are already experiencing significant shopping in their service territories—by far the highest in the state. While competition may not be working for Direct Energy, the law protects competition, not competitors, and other competitors should not be placed at a disadvantage because Direct Energy is unable to compete under the existing rules where competition is thriving.

B. Direct Energy's Requests For Production Nos. 2 and 3 Seek Information That Is Irrelevant And Beyond The Scope Of The Proceeding.

Through Requests for Production Nos. 2 and 3, Direct Energy seeks detailed information relating to the Companies' handling of accounts receivable as those amounts are reflected on actual Company customer bills. Direct Energy suggests that it intends to present evidence that would require the Companies to implement a POR program. (Mot. p. 7.) The information Direct Energy seeks, however, is irrelevant because the Companies' handling of accounts receivable is not at issue in this proceeding. In fact, the Companies previously established a procedure for distributing funds obtained on accounts that are in arrears through a Stipulation, which remains in effect today, entered in *WPS Energy Services, Inc. and Green Mountain Energy Co. v. FirstEnergy Corp., The Cleveland Elec. Illuminating Co., The Toledo Edison Co., and Ohio Edison Co.*, No. 02-1944-EL-CSS, Stipulation dated April 24, 2003, and Order dated August 6, 2003. In that case, the parties agreed that:

[3] Direct Energy's argument that a response to Interrogatory No. 19 is needed to help the Commission monitor the retail competitive marketplace in the Companies' territories rings false. The Commission already has confidential access to market information that CRES providers must file pursuant to Rule 4901:1-25-02(A).

> In lieu of purchasing CRES provider accounts receivable, FirstEnergy shall modify its current partial payment posting priority. The current partial payment posting priority in accordance with Commission rule is: EDU past due, EDU current, CRES past due, and CRES current. Pursuant to this Stipulation, FirstEnergy shall change this partial payment posting priority to CRES past due, EDU past due, EDU current, and CRES current ("modified partial payment posting priority"). If the customer pays the full amount billed, then the CRES provider and FirstEnergy will receive 100% of their invoiced amounts. If a customer pays less than the full amount billed, the CRES past due shall be satisfied in full before payments are applied to EDU past due. EDU past due shall then be satisfied in full before payments are applied to EDU current. EDU current shall then be satisfied before CRES current.

WPS Energy Services, Inc. and Green Mountain Energy Co., No. 02-1944-EL-CSS, Stipulation dated April 24, 2003, ¶ 1. The terms of the Stipulation remain in force and "apply equally to all CRES providers that utilize consolidated billing of FirstEnergy." *Id.* at ¶ 18. The Companies' handling of CRES accounts receivable has already been addressed. Payments made by customers in arrears are applied to CRES past due, electric distribution utility ("EDU") past due, EDU current, and then to CRES current. *Id.* at ¶ 1. In short, because the Companies' priority of payment has already been resolved by Stipulation and determined to be reasonable, it is not a proper subject of inquiry in this proceeding.[4] As a result, Direct Energy's Motion to Compel responses to Requests for Production Nos. 2 and 3 should be denied. *See In re App. of Buckeye Wind LLC for a Certificate to Construct Wind-Powered Elec. Generation Facilities in Champaign Cty., Ohio*, No. 08-666-EL-BGN, Entry dated Oct. 30, 2009, ¶ 11 (denying a motion to compel discovery regarding wind turbines not at issue in proceeding); *Metricom, Inc. v. Ohio Edison Co.*, No. 01-431-EL-CSS, Entry dated May 30, 2001, ¶¶ 4-5 (denying a motion to compel discovery of pricing information deemed "not relevant" to case); *In re App. of Cincinnati Bell Tele. Co. for Approval of an Alternative Form of Regulation and for a Threshold Increase in*

[4] Indeed, to revisit these issues would deprive both the Companies and the other parties to the Stipulation the benefit of the bargain obtained almost ten years ago.

Rates, No. 96-899-TP-ALT, Entry dated Dec. 5, 1997, ¶¶ 2-4 (denying a motion to compel cost studies that would not "provide a basis for developing relevant evidence in [the] proceeding").

C. Direct Energy's Request for Production No. 2 Is Also Unduly Burdensome.

Direct Energy's Request for Production No. 2 is further improper because it is unduly burdensome. Direct Energy boldly claims that "FirstEnergy is capable of producing this documentation without any overly burdensome effort." (Mot. p. 7.) Direct Energy has no way of knowing this. Its representation is pure speculation on its part and is, in fact, not true. The Companies do not currently isolate bills for customers receiving CRES service that returned to SSO service with a CRES arrearage remaining unpaid after the ninth billing cycle—the type of detailed billing information sought by Direct Energy. To obtain the bills, the Companies' information technology department would have to build a new system query, then test and validate the data resulting from the new query. Once validated, the Companies' revenue operations personnel would run the query, review individual accounts, and then print the applicable bills. The Companies estimate that at least 32 employee hours would be needed to complete these tasks—more if any unanticipated difficulties are encountered at any point during the process. That is an unreasonable amount of time for a request that does not relate to any aspect of the Companies' proposed Stipulation in this proceeding. Direct Energy's Motion to Compel a response to Request for Production No. 2 should be denied not only because it is irrelevant and beyond the scope of this proceeding, but also because it would unduly burden the Companies. *See In re App. of Buckeye Wind LLC,* No. 08-666-EL-BGN, Entry dated Oct. 30, 2009, ¶ 12 (denying a motion to compel evidence because "one would not reasonably expect [it] to be in the possession of Buckeye"); *In re App. of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Retail Transition Cost Recovery of Nonbypassable Generation Transition Charges and Regulatory Transition Charges,* No. 03-

1445-EL-ATA, Entry dated August 3, 2005, ¶ 8 (denying a motion to compel a discovery request that could require identification of every expenditure related to the Companies' distribution systems); *In re Complaint of Nat'l Elec. Contractors Assoc., Ohio Conference, et al. v. Ohio Edison Co., The Toledo Edison Co., Cleveland Elec. Illuminating Co., and FirstEnergy Corp.*, No. 98-1400, Entry dated April 30, 1999, ¶ 6 (denying a motion to compel a response to a discovery request that would require respondents to identify all individuals with information about the allegations in the complaint but that may not have had any direct responsibility for the conduct complained of).

The Companies cannot reasonably be placed in the role of consultant for every thought or idea an intervenor may wish to pursue. Certainly, nothing prevents Direct Energy from filing any testimony it seeks to file or from making any argument on brief it seeks to make, but the Companies should not be forced, through the discovery process, to serve as Direct Energy's consultant at no cost related to an issue that is far afield of anything proposed in the Stipulation filed in this proceeding. Further, much like with Interrogatory No. 19, Direct Energy offers little or no basis explaining the need for the information in this proceeding or how it relates to the Stipulation that was filed other than a vague reference to wanting to propose a POR program for the Companies' service territories, presumably to permit Direct Energy to gain a competitive advantage. Again, the law protects competition, not competitors, and competition is thriving in the Companies' territories. Direct Energy's motion to compel should be denied.

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission deny Direct Energy's Motion to Compel Responses to Interrogatory No. 19 and Requests for Production Nos. 2 and 3.

Dated: May 14, 2012

Respectfully submitted,

David A. Kutik / per authority BEH

James W. Burk (0043808)
Counsel of Record
Arthur E. Korkosz (0010587)
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
Telephone: (330) 761-7735
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
korkosza@firstenergycorp. com

James F. Lang (0059668)
Laura C. McBride (0080059)
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
E-mail: jlang@calfee.com
lmcbride@calfee.com

David A. Kutik (0006418)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Direct Energy Services, LLC and Direct Energy Business, LLC's Motion to Compel Discovery Responses was sent to the following by e-mail this 14th day of May, 2012:

"Amy.Spiller@Duke-Energy.com" <Amy.Spiller@Duke-Energy.com>, "cynthia.brady@constellation.com" <cynthia.brady@constellation.com>, "dakutik@JonesDay.com" <dakutik@JonesDay.com>, "dane.stinson@baileycavalieri.com" <dane.stinson@baileycavalieri.com>, "david.fein@constellation.com" <david.fein@constellation.com>, "DBoehm@bkllawfirm.com" <DBoehm@bkllawfirm.com>, "drinebolt@ohiopartners.org" <drinebolt@ohiopartners.org>, "dryan@mwncmh.com" <dryan@mwncmh.com>, "ehess@mwncmh.com" <ehess@mwncmh.com>, "Garrett.Stone@bbrslaw.com" <Garrett.Stone@bbrslaw.com>, "gregory.dunn@icemiller.com" <gregory.dunn@icemiller.com>, "GKrassen@Bricker.com" <GKrassen@Bricker.com>, "jbowser@mwncmh.com" <jbowser@mwncmh.com>, "Lang, Jim" <JLang@Calfee.com>, "korkosza@firstenergycorp.com" <korkosza@firstenergycorp.com>, "mhpetricoff@vorys.com" <mhpetricoff@vorys.com>, "Mike.Lavanga@bbrslaw.com" <Mike.Lavanga@bbrslaw.com>, "MKurtz@bkllawfirm.com" <MKurtz@bkllawfirm.com>, "mparke@firstenergycorp.com" <mparke@firstenergycorp.com>, "murraykm@mwncmh.com" <murraykm@mwncmh.com>, "MWarnock@Bricker.com" <MWarnock@Bricker.com>, "Ray.Strom@puc.state.oh.us" <Ray.Strom@puc.state.oh.us>, "ricks@ohanet.org" <ricks@ohanet.org>, "TOBrien@Bricker.com" <TOBrien@Bricker.com>, "trent@theOEC.org" <trent@theOEC.org>, "VLeach-Payne@mwncmh.com" <VLeach-Payne@mwncmh.com>, "burkj@firstenergycorp.com" <burkj@firstenergycorp.com>, "jpmeissn@lasclev.org" <jpmeissn@lasclev.org>, "robert.fortney@puc.state.oh.us" <robert.fortney@puc.state.oh.us>, "McBride, Laura" <LMcBride@Calfee.com>, "doris.mccarter@puc.state.oh.us" <doris.mccarter@puc.state.oh.us>, "Ccunningham@Akronohio.Gov" <Ccunningham@Akronohio.Gov>, "rkelter@elpc.org" <rkelter@elpc.org>, "joliker@mwncmh.com" <joliker@mwncmh.com>, "dsullivan@nrdc.org" <dsullivan@nrdc.org>, "callwein@wamenergylaw.com" <callwein@wamenergylaw.com>, "lmcalister@bricker.com" <lmcalister@bricker.com>, "matt@matthewcoxlaw.com" <matt@matthewcoxlaw.com>, "greg.lawrence@cwt.com" <greg.lawrence@cwt.com>, "cathy@theoec.org" <cathy@theoec.org>, "Tammy.Turkenton@puc.state.oh.us" <Tammy.Turkenton@puc.state.oh.us>, "teresa.ringenbach@directenergy.com" <teresa.ringenbach@directenergy.com>, "ray.strom@puc.state.oh.us" <ray.strom@puc.state.oh.us>, "robinson@citizenpower.com" <robinson@citizenpower.com>, "ricks@ohanet.org" <ricks@ohanet.org>, "myurick@taftlaw.com" <myurick@taftlaw.com>, "nolan@theOEC.org" <nolan@theOEC.org>, "sam@mwncmh.com" <sam@mwncmh.com>, "smhoward@vorys.com" <smhoward@vorys.com>, "steven.huhman@morganstanley.com" <steven.huhman@morganstanley.com>, "Thomas.McNamee@puc.state.oh.us" <Thomas.McNamee@puc.state.oh.us>, "jmclark@vectren.com" <jmclark@vectren.com>, "gpoulos@enernoc.com" <gpoulos@enernoc.com>, "cmooney2@columbus.rr.com" <cmooney2@columbus.rr.com>, "RHorvath@city.cleveland.oh.us" <RHorvath@city.cleveland.oh.us>, "christopher.miller@icemiller.com"

<christopher.miller@icemiller.com>, "asim.haque@icemiller.com" <asim.haque@icemiller.com>, "vparisi@igsenergy.com" <vparisi@igsenergy.com>, "sauer@occ.state.oh.us" <sauer@occ.state.oh.us>, "etter@occ.state.oh.us" <etter@occ.state.oh.us>, "yost@occ.state.oh.us" <yost@occ.state.oh.us>, "leslie.kovacik@toledo.oh.gov" <leslie.kovacik@toledo.oh.gov>, "trhayslaw@gmail.com" <trhayslaw@gmail.com>, "Judi.sobecki@dplinc.com" <Judi.sobecki@dplinc.com>, "Randall.Griffin@dplinc.com" <Randall.Griffin@dplinc.com>, "Jkyler@bkllawfirm.com" <Jkyler@bkllawfirm.com>, "tsiwo@bricker.com" <tswio@bricker.com>, "jeanne.kingery@duke-energy.com" <jeanne.kingery@duke-energy.com>, "dorothy.corbett@duke-energy.com" <dorothy.corbett@duke-energy.com>, "jejadwin@aep.com" <jejadwin@aep.com>, "mdortch@kravitzllc.com" <mdortch@kravitzllc.com>, "mjsatterwhite@aep.com" <mjsatterwhite@aep.com>, "stnourse@aep.com" <stnourse@aep.com>, "sandy.grace@exeloncorp.com" <sandy.grace@exeloncorp.com>, "stephen.bennett@exeloncorp.com" <stephen.bennett@exeloncorp.com>, "lkalepsclark@vorys.com" <lkalepsclark@vorys.com>, "wttpmlc@aol.com" <wttpmlc@aol.com>, BarthRoyer@aol.com

David A. Kutik / per authority BEH

An Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company