

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	:	Case No. 12-1230-EL-SSO
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	:	

AEP RETAIL ENERGY PARTNERS LLC'S
REPLY
TO THE FIRSTENERGY COMPANIES'
MEMO CONTRA AEP RETAIL ENERGY PARTNERS, LLC'S
MOTION TO CONTINUE HEARING DATE,
AND TO THE FIRSTENERGY COMPANIES' MEMO CONTRA
ITS' MOTION TO COMPEL

The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (together, "FirstEnergy") oppose AEP Retail Energy Partners LLC's ("AEP Retail's"), Motion to Continue the June 4, 2012, evidentiary hearing in this case on the grounds that "there is little new" in its proposed ESP-3, that AEP Retail is using its motion to argue the merits of the case, and finally, by complaining that AEP Retail is trying to "mislead" this Commission through unfair criticism of FirstEnergy.¹ It opposes AEP Retail's Motion to Compel by suggesting that the evidence AEP Retail seeks has no significance to this case, and it even attempts to argue that it should not be compelled to produce such evidence on the basis that it does not possess the evidence. FirstEnergy also complains that undersigned counsel did not attach an affidavit averring that he had exhausted all measures to resolve the discovery dispute prior to filing the motion to compel.²

¹ FirstEnergy's Memo Contra, pg. 1.

² AEP Retail's efforts to resolve the discovery dispute prior to filing its motion to compel did *not* consist of a single email to counsel for FirstEnergy as claimed by FirstEnergy. The email attached to FirstEnergy's Memo Contra accurately reflects the first and second communications regarding the subject on May 29, 2012. Undersigned

II. ARGUMENT

FirstEnergy's opposition to both the Motion to Continue and the Motion to Compel underscore the strategy FirstEnergy is pursuing in this matter. It first demanded that it be heard with unwarranted speed. It then insists that the manufactured need for speed is paramount to the consideration – and even the disclosure – of relevant information that it would likely find troublesome.

FirstEnergy initiated this case on April 13, 2012 – some unknown period of time *after* it negotiated a partial stipulation with *some* of the parties to its prior ESP case. Regarding its application, it asserted that "time is of the essence" and that ". . . the Commission must act quickly on the Application (by May 2, 2012) as such expedited approval is required in order to have the Companies to [sic] bid **demand response resource and energy efficiency resource** into the PJM 2015/2016 BRA on May 7, 2012, but in no event later than June 20, 2012³" – a date FirstEnergy represented "should still permit time to implement changes to the competitive bid process for a three year bid period *to take advantage of historically low market prices for wholesale electric generation*."⁴

At this point, it is worth noting several *facts*: First, FirstEnergy was fully prepared to bid the Energy Efficiency Resources that it deemed available into the PJM BRA with or without

counsel responded to that email with the email attached as Exhibit 3 to undersigned counsel's affidavit (attached hereto as Exhibit A), in which counsel indicated the parties should discuss the issues later that same day, as suggested by counsel for FirstEnergy. Ultimately, hearing nothing from FirstEnergy, undersigned counsel called counsel for FirstEnergy at approximately 5:00 p.m. Upon receiving a voice mail greeting, counsel left a message explaining that he felt compelled to proceed with the motion to compel due to the nearness of the hearing date. Against this timeline, and in light of the exigency of the circumstances due to the approaching hearing date, counsel acknowledges he had no time to prepare and to attach his affidavit, which would have set forth the foregoing attempts through the time of filing to resolve the discovery dispute. However, in good faith, undersigned counsel then followed up the next day with the email attached as Exhibit 4, suggesting the parties attempt to resolve the discovery issues between themselves despite the fact that the motion to compel was pending.

³ April 13, 2012 Motion for Waiver of Rules, Request for Expedited Treatment, and Memorandum in support, pg. 1 (Emphasis supplied.)

⁴ Id. (Emphasis supplied.)

waiting for this Commission's approval. Second, as it later conceded during its April 26, 2012, technical conference, it deemed only the Demand Response Resources it was prepared to offer into PJM to be dependent upon this Commission's approval by May 2, 2012.⁵ Third, as it also conceded at its April 26, 2012 technical conference, it fully understood on April 19, 2012 – the date the first procedural schedule was entered in this matter – that it had delayed too long before seeking approval from this Commission and, therefore, those Demand Response Resources would not be bid into the May, 2012 PJM BRA.

With the date of May 2, 2012 no longer a consideration, FirstEnergy's demand for a decision by June 20, 2012, can itself be examined in isolation, as FirstEnergy insistence on expedited treatment now depends solely upon its assertion that the date of June 20, 2012, is critical because that date still allows it to implement changes to the competitive bid process so that it may *"take advantage of historically low market prices for wholesale electric generation."*

Again, several *facts* are worthy of note regarding this position: First, the auction to which FirstEnergy refers when it states it hopes to take advantage of historically low market prices is scheduled for October, 2012 – four months after the ‘deadline’ set by FirstEnergy. Second, FirstEnergy itself designed that auction, and nothing about its design would preclude it from providing notice to potential bidders – in advance of this Commission's decision – that it may, subject to approval by this Commission, seek a three year product in that auction. Bidders would certainly be able to prepare to bid for any product that FirstEnergy might then eventually seek. Third, FirstEnergy could simply have requested Commission authority to change its auction date by a few weeks, rather than demand that this Commission and others accomodate its

⁵ See the CONFIDENTIAL response to Sierra Club's RPD No. 1, filed by FirstEnergy under seal, for the quantity of Demand Response Resource FirstEnergy hoped to have the opportunity to bid into PJM.

demands for expedited treatment. Finally, FirstEnergy has another CBP auction scheduled for January, 2013, a mere three months after the October 2012 auction date. FirstEnergy offers no explanation why it could not simply seek a three year product at that time, particularly since any "new" power it obtains in the auction will not begin to flow until summer, 2014⁶ in any event.

FirstEnergy's insistence upon the need for a decision by June 20, 2012, does not withstand scrutiny, and its insistence that its hearing begin June 4, 2012, accomplishes little except to disadvantage those who wish to thoroughly and critically examine its proposal.

Such a disadvantage is particularly heavy in this particular case. FirstEnergy's application, it should be recalled, contained virtually none of the information required by the rules of this Commission. Instead, FirstEnergy asked for the wholesale waiver of rules that compel the filing of such information. FirstEnergy then conducted its technical conference on April 26, 2012, in the absence of any such information. As this Commission directed, FirstEnergy supplemented the information in its application on May 2, 2012, discovery then began in earnest as the parties attempted to prepare for hearings set to begin 21 business days after FirstEnergy's supplement was filed.

First Energy's supplement consisted of approximately 176 pages, approximately 12 of which are balance, income and expense projections, and 154 pages of which are represented to be FirstEnergy's compliance with Rule 4901:1-35-03(C)(3). That rule, of course requires the applicant to submit:

Projected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.

Rule 4901:1-35-03(C)(3)(Emphasis supplied.)

⁶ FirstEnergy would already have been seeking a one year product for the year 2013/2014, in any event.

FirstEnergy's typical bill analysis, however, remains woefully inadequate. It is based solely upon historic prices as determined by past auctions. It ignores available information relevant to the market period for which bids will be sought. Thus, it fails to *project* anything, because it relies upon information that FirstEnergy understood to be inaccurate at the time of filing, and which it declines to correct based upon available information.⁷

FirstEnergy, of course, insists that it *is* reasonable to rely upon the results of prior auctions, claiming the future may not be known with any certainty. Certainty, of course, is not required. A semblance of good judgment, however, should be. Financial tools and market information exist through which a sophisticated entity such as FirstEnergy is well able to make informed judgments regarding future prices. For example, FirstEnergy itself acknowledged the existence of such information in response to OCC Interrogatory no. 43(d), which asks it to provide “any available evidence that the forward curve for wholesale generation will be lower in October 012 and January 2013 than it will be a year or two later.” After objecting that the request is overly broad and unduly burdensome, FirstEnergy responded as follows, referring OCC to its response to Interrogatory No. 43(c):

. . . generally wholesale generation prices over the last several months are at the lowest price they have been for at least nine years. **The forward market in PJM is very transparent and there are numerous places to observe the data through both subscription and public sources, and reports reflecting such data have been posted publicly.** See OCC Set 3-INT 43 Attachment 1 for examples of such publicly available information.

(Emphasis supplied.) Furthermore, unless one is to believe that entities affiliated with the FirstEnergy EDUs simply bid yesterday's price in all their own trading operations, those

⁷ In fairness, AEP Retail readily acknowledges that the typical bill analysis FirstEnergy presents in its Supplemental Information is not entirely worthless. Its analysis does permit a reviewer to determine – all else equal – the impact that the extension of FirstEnergy's various deferrals represent on a per bill basis to ratepayers during the ESP period.

affiliates rely daily in their own trading operations upon precisely the same sort of information regarding the future that FirstEnergy now asserts is too speculative to be considered.

In short, FirstEnergy is aware of the significance of the results of the PJM BRA. It knows that those results indicate that 2015/2016 capacity purchased today is significantly more expensive than capacity purchased in prior auctions for the 2011/2012 period. It nonetheless insists it should not be required to account for the bill impacts of that increase, even though it predicates its application upon the capture of low prices for the benefit of consumers. Thus, the fundamental question raised by FirstEnergy's application is whether this Commission should permit FirstEnergy to compel bidders to bid, now, into the locational constraints in the ATSI zone, or whether the wiser course is to tell FirstEnergy to wait and seek such bids during a later period, when market responses to the predicted constraints are better known, or whether a different auction structure or product would produce better benefits overall for customers.

Even if it was unaware of those constraints until the PJM auction – and FirstEnergy's own response to AEP Retail's Motion for Continuance suggests it was completely aware of those constraints at the time it filed its application⁸ -- the PJM BRA results are significant enough that FirstEnergy should be required to supplement its filing to address those results. When it became apparent that FirstEnergy had no intention of doing so, AEP Retail reasonably asked FirstEnergy to supply information regarding the impact on customer bills of high capacity prices in the ATSI zone in its Interrogatories 88, 146, and 147.⁹

⁸ Memo Contra Motion for Continuance, pg. 3 and Exhibit A.

⁹ Undersigned counsel for AEP Retail wishes to acknowledge receipt of FirstEnergy's Supplement to Interrogatory No. 11.7 on May 29, 2012 at 1:34 p.m. In the midst of preparing the two motions that were filed that date, undersigned counsel failed to note the arrival of the email. However, that information, which is also based on historical competitive auction results, is not germane to the motion to compel as it neither satisfies the motion nor provides an actual projection of market prices. Counsel's failure to recognize receipt of a supplement to an interrogatory response that he is citing within a motion is merely indicative of the mistakes that inevitably must be expected as a result of the undue haste imposed by FirstEnergy's demand for a decision by June 20, 2012.

The information AEP Retail seeks is plainly relevant to any decision by this Commission. Further, FirstEnergy alone controls the software that permits it to calculate typical bills for its customers, in their numerous permutations. As a result, it is the only source capable of providing the requested information with accuracy. Nor is FirstEnergy being asked for information that is unduly burdensome to produce, as it suggests. AEP Retail is of course aware that pending before this Commission at this same point in time is its own EDU affiliates' ESP case. Those entities have provided forecasted competitive bid prices for use in its MRO test, including typical bill analysis based upon forecast bid prices.

AEP Retail is not suggesting that this is an undertaking without its complexities, and acknowledges that the complexity of PJM in particular requires thorough analysis and verification. As an example, although it is only indirectly germane to the pending motions, AEPR acknowledges that it can no longer verify that ATSI zone capacity prices are likely to approach or exceed \$400 per MW-day. The price appears to require adjustment due to the availability of a credit of approximately \$48 that recognizes the limited amounts of capacity from outside of ATSI available to supplement the generation resources in that zone, which resources are projected to be depleted by the generation retirements of FirstEnergy Solutions and others. At the same time, AEP Retail does not concur with FirstEnergy's statement that the ultimate zone price will be \$329.00 per day, because AEP Retail believes that calculation also contains analytic errors, which errors are difficult to further analyze because no supporting workpapers are provided by the Companies. However, the fact that two entities such as FirstEnergy and AEP Retail are still calculating the results of the PJM BRA is indicative of the further time needed by all parties to understand the impact of the PJM's recent PJM base residual auction on this case.

Finally, FirstEnergy suggests that it should not be compelled to produce the information because this Commission approved the use of historic information rather than forecast information in its ESP-2, Case No. 10-388-EL-SSO. This is not accurate. While it is true that FirstEnergy relied upon similarly limited information in that case, the Commission's Order of August 25, 2010, approves a modified stipulation. It did not consider, let alone "approve" or even suggest that the Commission was endorsing any particular approach for typical bill calculations. Even if the Commission intended to "approve" FirstEnergy's uses of historic information, however, the issue before the Commission at this time is not the credibility of the information before it, but an issue of the right to discovery, alone. FirstEnergy may continue to contend that its preferred approach is the more credible. It should not be permitted to deny others information that is completely relevant and arguably more credible than that relied upon to date by FirstEnergy.

Respectfully submitted,

s/s Michael D. Dortch
Michael D. Dortch (0043897)
KRAVITZ, BROWN & DORTCH, LLC
65 East State Street
Suite 200
Columbus, OH 43215
(614)464-2000
(614)464-2002 (fax)
mdortch@kravitzllc.com

Attorneys for
AEP RETAIL ENERGY PARTNERS LLC

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing were served upon the following parties to this proceeding this June 1, 2012, via electronic mail if available or by depositing the same in the United States Mail, postage prepaid, addressed as follows:

James W. Burk
Arthur E. Korkosz
Mark A. Hayden
Ebony L. Miller
FirstEnergy Service Company
76 S. Main Street
Akron OH 44308

James F. Lang
Laura C. McBride
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland OH 44114

David A. Kutick
Jones Day
901 Lakeside Avenue
Cleveland OH 44114

Attorneys for Applicants, Ohio Edison
Company, The Cleveland Electric
Illuminating Company, and The Toledo
Edison Company

Thomas McNamee
Attorney General's Office
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus OH 43215

Asim Z. Haque
Christopher L. Miller
Gregory H. Dunn
Alan G. Starkoff
Ice Miller LLP
240 West Street
Columbus OH 43215

Attorneys for Direct Energy Services, LLC
And Direct Energy Business LLC

Vincent Parisi
Matthew White
Interstate Gas Supply, Inc
6100 Emerald Parkway
Dublin OH 43016

Attorneys for Interstate Gas Supply, Inc.

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus OH 43216-1008

Attorneys for Exelon Generation Company,
LLC and Constellation NewEnergy, Inc.

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay OH 45839-1793

Attorney for Ohio Partners for Affordable
Energy

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton OH 45432

Attorneys for The Dayton Power and Light
Company

Joseph M. Clark
6641 North High Street, Suite 200
Worthington OH 43085

Attorney for Direct Energy Services, LLC
and Direct Energy Business LLC

Glenn Krassen
Bricker & Eckler LLP
1001 Lakeside Avenue
Cleveland OH 44114

Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus OH 43215

Attorneys for the Northeast Ohio Public
Energy Council

Leslie A. Kovacik
City of Toledo
420 Madison Ave., Suite 100
Toledo OH 43604-1219

Counsel on behalf of the Northwest Ohio
Aggregation Coalition

Cynthia Fonner Brady
David I. Fein
550 W. Washington Street, Suite 300
Chicago IL 60661

Attorneys for Constellation Energy
Resources, LLC

Robert Kelter
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago IL 60601

Environmental Law & Policy Center

Christopher J. Allwein
Williams Allwein & Moser, L.L.C.
1373 Grandview Ave., Suite 212
Columbus OH 43212

Natural Resources Defense Council
Thomas R. Hays
John Borell
Lucas County Prosecutors Office
700 Adams Street Suite 251
Toledo OH 43604

Counsel on behalf of the Northwest Ohio
Aggregation Coalition

Larry S. Sauer, Counsel of Record
Terry L. Etter
Melissa Yost
Assistant Consumers' Counsel
Ohio of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus OH 43215

Sandy I-ru Grace
Exelon Business Services Company
101 Constitution Avenue NW, Suite 400
East
Washington DC 20001

Stephen Bennett
Exelon Generation Company LLC
300 Exelon Way
Kennett Square PA 19348

s// Michael D. Dortch
Michael D. Dortch

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Summary: Reply to FirstEnergy's Memo Contra Motion to Compel and Memo Contra Motion to Continue electronically filed by Mr. Michael D. Dortch on behalf of AEP Retail Energy Partners, LLC