

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of Ohio</b>	)	
<b>Edison Company, The Cleveland Electric</b>	)	
<b>Illuminating Company, and The Toledo</b>	)	<b>Case No. 14-1297-EL-SSO</b>
<b>Edison Company for Authority to Provide for</b>	)	
<b>a Standard Service Offer Pursuant to R.C.</b>	)	
<b>4928.143 in the Form of An Electric Security</b>	)	
<b>Plan</b>	)	

---

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM  
CONTRA THE MOTION TO COMPEL OF THE ENVIRONMENTAL  
LAW & POLICY CENTER**

---

**I. INTRODUCTION**

In its Motion to Compel, the Environmental Law & Policy Center (“ELPC”) seeks to compel a response to an interrogatory, which is not only objectionable on numerous grounds, but also has been answered. Consequently, as further demonstrated below, ELPC’s motion should be denied.

**II. RELEVANT FACTS**

On December 8, 2014, ELPC served its second set of discovery requests on Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”). The interrogatory at issue here, EPLC Set 2-INT-5, stated:

Given the concerns articulated in the Moul Testimony from page 7, line 3 through page 8, line 21, explain why FirstEnergy filed an application to amend its portfolio plan to eliminate certain energy efficiency and peak demand reduction programs from its portfolio plan in Case No. 12-2190-EL-POR.

ELPC Mot. to Compel at Attachment B, p. 5. On December 29, 2014, the Companies provided their timely response. Because the “concerns” supposedly stated by Mr. Moul were undefined, and because the interrogatory improperly conflated generation resource diversity (the subject of

Mr. Moul's testimony on the pages and lines referenced) with the Companies' energy efficiency and peak demand reduction ("EE/PDR") portfolio plan, the Companies objected that ELPC Set 2-INT-5 was "argumentative, overbroad, unduly burdensome, vague and ambiguous and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Subsequently, the parties exchanged emails regarding the Companies' objections to several of ELPC's interrogatories, including ELPC Set 2-INT-5. *See* ELPC Mot. to Compel at Attachment C, p. 1. On January 12, 2015, counsel for the Companies explained that: (a) the statements made in Mr. Moul's direct testimony regarding resource diversity did not in any way relate to the Companies' portfolio plan application in Case No. 12-2190-EL-POR or the Companies' authority under Senate Bill 310 to amend that plan; (b) the generating assets at issue were not owned by the Companies; and (c) whether the Companies included (or did not include) certain provisions in their portfolio plan in another proceeding had nothing to do with the Companies' ESP application. *Id.* Thus, as counsel for the Companies explained, the Companies had properly objected to ELPC Set 2-INT-5.

On January 15, 2015, Mr. Moul was deposed by various intervenors, including ELPC. During that deposition, counsel for ELPC explored the issue ELPC attempted to raise with ELPC Set 2-INT-5:

Q. ...I believe before you said that you view peak demand reduction and energy efficiency measures as not an -- not being an aspect of resource diversity; is that correct?

A. I stated I don't consider them to be capacity.

Q. Okay. Do you think they are an important part of resource diversity?

A. I think they are important on the demand side as a dispatch transmission operator tool.

Q. So do you think that there should be as part of the portfolio of resources some amount of peak demand reduction and energy efficiency?

A. Not as capacity.

Q. Okay. I got -- *if we look at pages 7 through 8 of your testimony, you generally describe some purposes that resource diversity serves; is that correct?*

A. Yes.

Q. Do you think that energy efficiency and peak demand reduction measures can also address any of these purposes?

A. No, because demand reduction and energy efficiency don't produce a single megawatt.

Q. So I guess let's just go through these one by one. You're saying that energy efficiency and peak demand reduction play no role in mitigating price volatility?

A. I'm saying they don't generate a megawatt; so, therefore, they cannot be part of supply. They can help manage demand, but they don't provide supply.

Q. Okay. Does managing -- can managing demand help mitigate price volatility?

A. No.

Q. Okay. Can managing demand help avoid, I am just going to quote, 'potential catastrophic issues within a single class of generation'?

A. No, because it doesn't generate.

Deposition of Donald Moul. Tr. at 150:17-152:9 (Jan. 15, 2015) (emphasis added) (attached as Ex. A).

Notwithstanding this unambiguous testimony, in a letter dated January 23, 2015, counsel for ELPC again sought a response to ELPC Set 2-INT-5. *See* ELPC Mot. to Compel at Attachment D. In that letter, counsel for ELPC mischaracterized ELPC Set 2 INT-5 as follows: "[The interrogatory] seeks information regarding FirstEnergy's filing 'of an application to amend

its portfolio plan to eliminate certain energy efficiency and peak demand reduction programs from its portfolio plan in Case No. 12-2190-EL-POR’.” *Id.*

On January 30, 2015, counsel for the Companies responded to ELPC’s letter. *See* ELPC Mot. to Compel at Attachment E. In that response, counsel for the Companies stated that ELPC’s characterization of ELPC Set 2-INT-5 was inaccurate and, in fact, posed a different interrogatory from the one served on the Companies: i.e., ELPC Set 2-INT-5 was “specifically contingent upon Mr. Moul’s testimony rather than a general question related” to any supposed amendment to the Companies’ portfolio plan in a separate proceeding. *Id.* Further, counsel for the Companies directed counsel for ELPC to the relevant portions of Mr. Moul’s deposition testimony (quoted above):

Mr. Moul specifically testified that he did not believe demand response addresses any of the purposes served by resource diversity. Mr. Moul did not consider his testimony related to resource diversity to have anything to do with energy efficiency or peak demand reduction. Given that ELPC Set 2-INT-5 is contingent on Mr. Moul’s testimony, and he has given further testimony on what he believes ‘resource diversity’ to mean, the Companies consider ELPC Set 2-INT-5 to be asked and answered on this topic.

*Id.* at p. 2. On February 24, 2015, ELPC filed its Motion to Compel.

### **III. LAW AND ARGUMENT**

#### **A. Applicable Law**

The Commission routinely denies motions to compel when a party has already responded to the movant’s request, when the movant seeks the production of irrelevant information, or when the discovery requested is vague, overly broad or otherwise objectionable. *See, e.g., In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, 2011 Ohio PUC LEXIS 415 at \*5-13 (April 4, 2011) (denying in part motion to compel where respondent had already provided responses to several discovery requests at issue and the requests otherwise sought irrelevant information); *In the Matter of the Application of Buckeye Wind LLC*

*for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, 2009 Ohio PUC LEXIS 931 at \*8-12 (Oct. 30, 2009) (denying in part motion to compel because several discovery requests were irrelevant, vague and overly broad); *In the matter of the Application of Middletown Coke Co.*, Case No. 08-281-EL-BGN, 2008 Ohio PUC LEXIS 821 at \*3-4 (Nov. 4, 2008) (denying motion to compel and holding that irrelevant material was not subject to discovery); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, 2003 Ohio PUC LEXIS 392 at \*34-35 (Sept. 2, 2003) (acknowledging the general rule that discovery is limited to materials “relevant to the subject matter of the proceeding” and denying motion to compel because “the information sought would not be relevant to the determination of [the present] matter”); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at \*2-19 (June 21, 2002) (denying motion to compel where discovery requested was vague, “not imperative to a final in a final determination of [the] matter,” overly broad, and because the respondent had already responded to several of the discovery requests at issue) *In the Matter of Bauman v. The Western Reserve Telephone Co.*, Case No. 90-1095-TP-PEX, 1991 Ohio PUC LEXIS 325 at \*7-9 (denying a motion to compel discovery because requested information was irrelevant to the proceeding).

## **B. Application To The Instant Matter**

ELPC Set 2-INT-5 is objectionable on several grounds. To begin, the Companies are under no obligation to respond to discovery to which they have already provided a response. At his deposition, Mr. Moul stated that there was no connection between his testimony regarding the need for generation resource diversity, and the reasons as to why the Companies chose to amend their EE/PDR programs in a completely unrelated proceeding. When asked whether EE/PDR

programs could “address any of [the] purposes” of resource diversity as outlined in his direct testimony, Mr. Moul unequivocally responded: “No, because demand reduction and energy efficiency don’t produce a single megawatt.” *Id.* at 151:17-18. As he further observed, nor do EE/PDR programs mitigate price volatility or avoid overreliance on a “single class of generation” because, again, such programs “don’t generate a megawatt.” *Id.* at 151:20-152:9.<sup>1</sup> As such, Mr. Moul provided definitive responses to any subject matter addressed by ELPC Set 2-INT-5. The Commission’s Rules do not require an additional response to what amounts to a duplicative discovery request, such as the one here. ELPC’s Motion to Compel should be denied for this reason alone. *See Fitzgerald*, 2011 Ohio PUC LEXIS 415 at \*5-8; *Wellman*, 2002 Ohio PUC LEXIS 554 at \*2-8.

Further, in light of Mr. Moul’s deposition testimony regarding the complete disconnect between resource diversity and the Companies’ EE/PDR programs, the information sought by ELPC Set 2-INT-5 is irrelevant and not likely to lead to the discovery of admissible evidence. Nonetheless, ELPC claims that the interrogatory “seeks to discover relevant information regarding whether FirstEnergy has acted consistently with its apparent concern about the sources of electricity *supply* in Ohio in its approach to managing electricity *demand* through its EE and PDR programs.” ELPC Mot. to Compel at 6 (original emphasis). This claim falls flat.

Mr. Moul’s direct and deposition testimony make clear that the need for “resource diversity” addressed in this proceeding is unrelated to any EE/PDR programs that are the subject of a separate Commission proceeding and not under consideration here. In his direct testimony, Mr. Moul explains that “resource diversity includes fuel and asset diversity.” Direct Testimony

---

<sup>1</sup> The transcript indicates that counsel for ELPC intended to “go through [the other ways in which the Plants promote resource diversity] one by one,” but counsel apparently abandoned this tack in light of Mr. Moul’s definitive responses regarding volatility and overreliance. Moul Dep. Tr. at 151:19-20.

of Donald Moul at 6 (Aug. 4, 2014). “Fuel diversity” entails having different sources of generation, e.g., coal, nuclear, gas, wind, etc., comprise the “generation fuel mix.” *Id.* “Asset diversity” involves the proper “mix of assets” of different generating classes, e.g., baseload, intermediate and peaking. *Id.* As Mr. Moul elaborates, the Plants contribute to resource diversity by, among other things: (a) mitigating price volatility; (b) avoiding overreliance on a “single class of generation”; (c) protecting against interruptions in fuel supply; (d) providing on-site fuel supply; (e) providing certain essential ancillary services; and (f) for Davis-Besse, being a zero-carbon facility. *See id.* at 7-8. Notably, in his direct testimony, Mr. Moul does not anywhere discuss -- let alone reference -- any connection between EE/PDR programs and generation resource diversity. The reason for this omission is obvious. As noted, Mr. Moul’s deposition testimony makes clear there simply is no connection or relationship between the two.<sup>2</sup>

Indeed, generation resource diversity as related to the Companies’ ESP application and the amendment of the Companies’ EE/PDR programs in a separate, unrelated proceeding could not be so connected.<sup>3</sup> ELPC Set 2-INT-5 seeks irrelevant information that is not likely to lead to the discovery of admissible evidence. Moreover, for similar reasons, ELPC Set 2-INT-5 is also overly broad. Its scope goes well beyond the purview of the instant matter and extends to the subject matter of another, unrelated proceeding that was initiated over two years ago, well before the Companies filed their ESP application. The Commission should deny ELPC’s motion accordingly. *See Buckeye Wind*, 2009 Ohio PUC LEXIS 931 at \*8-12; *Middletown Coke*, 2008

---

<sup>2</sup> At most, EE/PDR programs are “important on the demand side as a dispatch transmission operator tool.” Moul Dep. Tr. at 151:3-4.

<sup>3</sup> The fact that the Stipulation, entered into by Companies and various intervenors and filed on December 22, 2014, may contain provisions regarding “certain demand response programs” is of no moment. ELPC Mot. to Compel at 8. Any such programs are more or less continuations of similar programs approved by the Commission in the Companies’ third ESP proceeding, Case No. 12-1230-EL-SSO. Their inclusion in the proposed Stipulation is in no way related to the need to promote resource diversity or any amendments to the Companies’ EE/PDR programs in Case No. 12-2190-EL-POR.

Ohio PUC LEXIS 821 at \*3-4; *Dayton Power and Light*, 2003 Ohio PUC LEXIS 392 at \*34-35; *Wellman*, 2002 Ohio PUC LEXIS 554 at \*8; *Bauman*, 1991 Ohio PUC LEXIS 325 at \*7-9.

ELPC Set 2-INT-5 is also objectionable because it is argumentative. ELPC claims that Mr. Moul's "deposition testimony is not sufficient to answer Interrogatory 5...[because] there is no indication that Mr. Moul had any role in FirstEnergy's amendment of its EE and PDR portfolio plan." ELPC Mot. to Compel at 6. And further: "[I]t may be that Mr. Moul's testimony regarding the role of EE and PDR in addressing 'resource diversity' issues is not consistent or not relevant to FirstEnergy's rationale for the elimination of most of its EE and PDR programs." *Id.* at 9-10.

ELPC Set 2-INT-5 thus assumes some sort of inconsistency between Mr. Moul's statements regarding the need for resource diversity in a generation fleet and the Companies' actions in following Senate Bill 310 regarding the amendment of EE/PDR programs. The fact that Mr. Moul denied any connection between generation resource diversity and EE/PDR programs is dismissed out of hand. ELPC erroneously assumes, without any factual basis, that there *must be* an inconsistency between Mr. Moul's testimony in this proceeding and the Companies' supposed motivations to amend their EE/PDR programs in wholly unrelated proceeding. On the one hand, such an assumption demonstrates the argumentative character of ELPC Set 2-INT-5. On the other, if ELPC is simply seeking commentary on EE and PDR policy from the Companies, such commentary is best left to briefing and has no place in discovery.

Moreover, ELPC's motion indicates that ELPC is still seeking a response to a different interrogatory than the one that was originally served on the Companies. As noted, in her letter dated January 23, 2015, counsel for ELPC mischaracterized ELPC Set 2-INT-5 as simply seeking "information regarding FirstEnergy's filing 'of an application to amend its portfolio plan



to eliminate certain energy efficiency and peak demand reduction programs from its portfolio plan in Case No. 12-2190-EL-POR’.” ELPC Mot. to Compel at Attachment D. Here, ELPC similarly claims that “there are a number of potential answers to ELPC’s Interrogatory 5 that might be relevant to determining how FirstEnergy’s views regarding resource diversity as expressed here relate its concurrent decision to cut back on its EE and PDR programs.” ELPC Mot. to Compel at 8. Once again, ELPC has divorced ELPC Set 2-INT-5 from the direct testimony of Mr. Moul, upon which the interrogatory is explicitly contingent. The Companies are under no obligation to respond to an interrogatory different from the one which was originally posed.

Given that ELPC now apparently doesn’t care what Mr. Moul thinks (even though his testimony is expressly referred to), ELPC Set 2-INT-5 is also plagued by vagueness. As noted, the interrogatory begins by referencing “the *concerns* articulated in the Moul Testimony....” ELPC never defines this term in its discovery, or subsequently. In the portion of his direct testimony cited in ELPC Set 2-INT-5, Mr. Moul provides several salient reasons as to why generation resource diversity is important. Thus, given that ELPC Set 2-INT-5 specifically referred to Mr. Moul’s testimony, to the extent that Mr. Moul’s deposition testimony on the very subject in his direct testimony cited in ELPC’s interrogatory is not a sufficient response, the Companies simply cannot respond to ELPC Set 2-INT-5 in an intelligible fashion. The Commission denies motions to compel where, as here, the discovery requested contains vague terms that preclude the ability to proffer a rational response. *See Wellman*, 2002 Ohio PUC LEXIS 554 at \*11-12.

#### **IV. CONCLUSION**

ELPC assumes that there is some sort of relationship between Mr. Moul’s comments on resource diversity and the Companies’ EE/PDR portfolio plan. Mr. Moul’s deposition testimony

debunked that view. To the extent that ELPC asks for the Companies to repeat Mr. Moul's deposition testimony, the interrogatory at issue has been answered. To the extent that ELPC disagrees with Mr. Moul's testimony, the interrogatory at issue is improperly argumentative. To the extent that ELPC wants the Companies to answer a new, different question, the interrogatory is hopelessly vague. In any event, for all of these reasons, ELPC's Motion to Compel should be denied.

Date: March 10, 2015

Respectfully submitted,

/s/ David A. Kutik

---

James W. Burk (0043808)  
Counsel of Record  
Carrie M. Dunn (0076952)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
Telephone: (330) 384-5861  
Fax: (330) 384-8375  
Email: burkj@firstenergycorp.com  
Email: dunn@firstenergycorp.com

David A. Kutik (0006418)  
JONES DAY  
901 Lakeside Avenue  
Cleveland, OH 44114  
Telephone: (216) 586-3939  
Fax: (216) 579-0212  
Email: dakutik@jonesday.com

James F. Lang (0059668)  
N. Trevor Alexander (0080713)  
CALFEE, HALTER & GRISWOLD LLP  
The Calfee Building  
1405 East Sixth Street  
Cleveland, OH 44114  
Telephone: (216) 622-8200  
Fax: (216) 241-0816  
Email: jlang@calfee.com  
Email: talexander@calfee.com

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

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on March 10, 2015.

/s/ David A. Kutik

David A. Kutik

cmooney@ohiopartners.org  
drinebolt@ohiopartners.org  
tdougherty@theoec.org  
joseph.clark@directenergy.com  
ghull@eckertseamans.com  
sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
mkurtz@BKLawfirm.com  
kboehm@BLKlawfirm.com  
jkylercohn@BKLawfirm.com  
larry.sauer@occ.ohio.gov  
Michael.schuler@occ.ohio.gov  
joliker@igsenergy.com  
mswhite@igsenergy.com  
myurick@taftlaw.com  
Schmidt@sppgrp.com  
ricks@ohanet.org  
tobrien@bricker.com  
stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com  
callwein@wamenergylaw.com  
jfinnigan@edf.org  
wtppmlc@aol.com  
mkl@bbrslaw.com  
gas@bbrslaw.com  
ojk@bbrslaw.com  
lhawrot@spilmanlaw.com  
dwilliamson@spilmanlaw.com  
meissnerjoseph@yahoo.com  
trhayslaw@gmail.com  
lesliekovacic@toledo.oh.gov  
Cynthia.brady@exeloncorp.com  
David.fein@exeloncorp.com

Christopher.miller@icemiller.com  
Gregory.dunn@icemiller.com  
Jeremy.grayem@icemiller.com  
athompson@taftlaw.com  
Marilyn@wflawfirm.com  
Blanghenry@city.cleveland.oh.us  
hmadorsky@city.cleveland.oh.us  
kryan@city.cleveland.oh.us  
glpetrucci@vorys.com  
ccunningham@akronohio.gov  
bojko@carpenterlipps.com  
Allison@carpenterlipps.com  
hussey@carpenterlipps.com  
gkrassen@bricker.com  
dborchers@bricker.com  
asonderman@keglerbrown.com  
mfleisher@elpc.org  
jscheaf@mcdonaldhopkins.com  
mitch.dutton@fpl.com  
matt@matthewcoxlaw.com  
todonnell@dickinson-wright.com  
dwolff@crowell.com  
rlehfeldt@crowell.com  
Jeffrey.mayes@monitoringanalytics.com  
toddm@wamenergylaw.com  
sechler@carpenterlipps.com  
gpoulos@enernoc.com  
mhpetricoff@vorys.com  
Thomas.mcnamee@puc.state.oh.us  
Ryan.orourke@puc.state.oh.us  
sfisk@earthjustice.org  
msoules@earthjustice.org  
tony.mendoza@sierraclub.org  
Lael.campbell@exeloncorp.com  
dstinson@bricker.com

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**3/10/2015 4:21:51 PM**

**in**

**Case No(s). 14-1297-EL-SSO**

Summary: Memorandum Contra the Environmental Law & Policy Center's Motion to Compel electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company