

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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Direct Energy Business, :  
 LLC, :  
 :  
                   Complainant, :  
                   : :  
                   : :  
                   vs. : Case No. 17-791-EL-CSS  
                   : :  
                   : :  
 Ohio Edison and The :  
 Cleveland Electric :  
 Illuminating Company, :  
                   : :  
                   Respondents. :

- - -

Ohio Edison and The :  
 Cleveland Electric :  
 Illuminating Company, :  
                   : :  
                   Complainants, :  
                   : :  
                   vs. : Case No. 17-1967-EL-CSS  
                   : :  
                   : :  
 Direct Energy Business, :  
 LLC, :  
                   : :  
                   Respondent. :  
                   : :

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PREHEARING CONFERENCE

before Ms. Megan Addison, Attorney Examiner, at the  
 Public Utilities Commission of Ohio, 180 East Broad  
 Street, Room 11-D, Columbus, Ohio, called at 10:00  
 a.m. on Wednesday, April 11, 2018.

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ARMSTRONG & OKEY, INC.  
 222 East Town Street, Second Floor  
 Columbus, Ohio 43215-5201  
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APPEARANCES:

FirstEnergy Service Company  
By Ms. Carrie Dunn  
76 South Main Street  
Akron, Ohio 44308

On behalf of the FirstEnergy Company.

Calfee, Halter & Griswold, LLP  
By Mr. James F. Lang  
1400 KeyBank Center  
800 Superior Avenue East  
Cleveland, Ohio 44114

On behalf of the Respondents.

Whitt Sturtevant, LLP  
By Mr. Mark A. Whitt  
PNC Plaza, 20th Floor  
155 East Broad Street  
Columbus, Ohio 43215

On behalf of the Complainant.

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1 Wednesday Morning Session,  
2 April 11, 2018.

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4 THE ATTORNEY EXAMINER: The Public  
5 Utilities Commission of Ohio has called for  
6 prehearing conference at this time and place Case No.  
7 17-791-EL-CSS being In the Matter of the Complaint of  
8 Direct Energy Business, LLC, versus Ohio Edison  
9 Company and The Cleveland Electric Illuminating  
10 Company, and Case No. 17-1967-EL-CSS, being In the  
11 Matter of the Complaint of the Ohio Edison Company  
12 and the Cleveland Electric Illuminating Company  
13 versus Direct Energy Business, LLC.

14 My name is Megan Addison, the attorney  
15 examiner assigned by the Commission to oversee the  
16 prehearing conference.

17 Let's take appearances, beginning with  
18 Direct Energy.

19 MR. WHITT: Thank you, your Honor. On  
20 behalf of Direct Energy Business, LLC, the law firm  
21 of Whitt Sturtevant, LLP, Mark Whitt, 88 East Broad  
22 Street, Suite 1590, Columbus, Ohio, 43215.

23 THE ATTORNEY EXAMINER: Thank you.

24 MR. LANG: On behalf of the Ohio Edison  
25 Company and CEI, Jim Lang, Calfee, Halter & Griswold.

1 With me is Carrie Dunn with the FirstEnergy Service  
2 Company.

3 THE ATTORNEY EXAMINER: Thank you.

4 The purpose of the prehearing conference  
5 this morning is to discuss the pending motion to  
6 compel. As this is your motion, Mr. Lang, I will ask  
7 you to -- perhaps we could break up the arguments as  
8 to the three groupings I have identified in the  
9 motion and responses. We could go through the first  
10 groupings, the request for admission. Then I'll take  
11 Mr. Whitt's response, and then we can move on from  
12 there.

13 MR. LANG: That's good. I think the --  
14 I'd like to argue kind of the first group and second  
15 group together, the request for admissions and the  
16 interrogatories. Those are kind of trying to get to  
17 the same place.

18 THE ATTORNEY EXAMINER: Sure, sure, just  
19 as long as we are clear on the transcript.

20 MR. LANG: I think what the companies are  
21 trying to do is simplify the issues for hearing. I  
22 think, as I understand the complaint that Direct has  
23 filed, Ohio Edison and CEI, are, you know, not  
24 complying with the supplier tariff and trying to  
25 direct Direct to pay this amount of money, and, you

1 know, conversely for Ohio Edison and CEI, the  
2 argument is that under the supplier tariff, Direct  
3 should cooperate to pay this sum of money through  
4 resettlement.

5           The issue with the request for  
6 admissions, the Request for Admissions 7, 14, 21 and  
7 the Interrogatories 11, 12 and 13 are going to what  
8 we understood as kind of a basic fact in the case,  
9 which is simply the basic fact that created the  
10 dispute regarding the supplier tariff, which is what  
11 the obligations are in the supplier tariff, is simply  
12 that Direct did not pay for the energy and capacity  
13 used by the three specific customers that were  
14 involved in this issue during the specific time  
15 period.

16           And the goal with the Request for  
17 Admissions 7, 14 and 21, if you look at the request  
18 for admissions, there were several different ways we  
19 are trying to get to the same point, which is admit,  
20 you know, what we thought was an undisputed fact, but  
21 admit that Direct did not pay for the energy and  
22 capacity used by the specific customers during that  
23 specific time period.

24           And the interrogatories came at it in a  
25 little different way, the same customers, same time

1 period, asking Direct what amount did it pay, so it  
2 is admit that you didn't pay, or tell us what you  
3 paid, and tell us what you paid might be zero, in  
4 which case they can admit they didn't pay it and  
5 admit they paid zero.

6 The response from Direct was they get an  
7 aggregate bill from PJM and they paid that bill, and  
8 that was the response both to the request for  
9 admissions and that was the response to the  
10 interrogatories. And the reason we filed the motion  
11 to compel is that doesn't answer the question, both  
12 for the request for admissions and for the  
13 interrogatories.

14 The question is because, you know, the  
15 dispute in this case with regard to the load, the  
16 energy, and capacity of these customers that were  
17 Direct customers -- that's undisputed, they did  
18 admit, you know, that these three customers were  
19 Direct customers during those time periods -- to say  
20 those three customers during those time periods, did  
21 Direct pay for the energy and load for those  
22 customers for those time periods, it should be a very  
23 simple factual issue. It's yes, we did pay, and  
24 here's the amount, or no, we didn't pay, so we paid  
25 zero.

1           We don't view that as a legal issue. You  
2 know, the legal issue we believe in the case -- you  
3 know, accepting that getting to the point to simplify  
4 kind of the goal of this discovery is to get to the  
5 point where we can simplify for the hearing, yes,  
6 that happened, Direct has those customers, they did  
7 not pay for the energy and capacity during that time  
8 period -- really the issue for hearing, we believe,  
9 should be what are the obligations of the companies  
10 and Direct under the supplier tariff now that that  
11 has happened.

12           But for some reason we're in this fight  
13 where we can't even get to an agreement through  
14 simple discovery requests that that has happened,  
15 that they didn't pay for the load of the customers.  
16 And having a response that says, you know, well, we  
17 got an aggregate bill and we paid that, that's nice  
18 that they get an aggregate bill and they paid that,  
19 but the question is, you know, What about these  
20 customers?

21           And because that's really what  
22 precipitates the issue that's before the Commission  
23 with regard to obligation under the supplier tariff,  
24 that's why we move to compel. And so we do know from  
25 discovery that once this issue arose, Direct said it

1 was conducting due diligence for months. It was  
2 reviewing the issue. It was doing something. The  
3 question in these discovery requests is now that  
4 Direct has done all that, will Direct agree that it  
5 paid nothing for those customers, or does Direct  
6 believe that it paid for customers? Either way, we  
7 would like discovery responses that tell -- that  
8 provide us Direct's position as to what the fact is.  
9 That's why we moved to compel on those requests.

10 THE ATTORNEY EXAMINER: Thank you,  
11 Mr. Lang.

12 Mr. Whitt.

13 MR. WHITT: Yes, your Honor. I don't  
14 think there's any dispute that mistakes were made in  
15 the meter assignments for how load was to be tracked  
16 and what was reported to PJM and so forth. Let me, I  
17 guess, start at the end. As apparent, I think, from  
18 the request for admissions, we did, in fact, respond  
19 to the request, and the response was denied, and then  
20 we explained why we were denying the request.

21 Request for Admission No. 1-2, for  
22 example, says that -- asks if Direct was obligated to  
23 pay PJM for the load of the customer on or about  
24 May 22, 2014.

25 Again, our response was that we denied

1 it, and then we go on to explain what we believe our  
2 obligation to be, and that's the word used in the  
3 request, admit that Direct was obligated to pay PJM  
4 under some supplier tariff and under the PJM tariff  
5 Direct is obligated to pay what it is billed by PJM.

6 Now, to the extent the companies did not  
7 report information to PJM correctly and the amount  
8 that PJM billed to Direct reflects some inaccurate  
9 information because of what the company reported,  
10 that doesn't really affect Direct's obligation,  
11 again, because the obligation is to pay the PJM  
12 invoice that reflects all of Direct Energy's load  
13 share over a particular period, and that is the  
14 aggregate data. That is what the company is  
15 obligated to pay.

16 If information had been reported  
17 correctly to PJM in the period on the PJM invoice,  
18 Direct would have been obligated to pay those  
19 amounts, but because the information wasn't reported,  
20 there wasn't the obligation.

21 Now that then gets us into what's the  
22 remedy for that. The PJM tariff has resettlement  
23 provisions and so forth. I know that's beyond the  
24 scope of this discovery request, but in terms of the  
25 basic question or the basic fact that Direct is being

1 asked to admit, we disagree with the very premise  
2 that there's any obligation to pay for load that PJM  
3 had not invoiced.

4 THE ATTORNEY EXAMINER: Thank you. Can  
5 you speak a little bit more about the interrogatories  
6 and if your answer would be somewhat different to  
7 those versus the request for admissions?

8 MR. WHITT: Well, again, your Honor,  
9 there would be no -- there would not be any place to  
10 look on the PJM invoice to see what share of that  
11 load was paid for any particular customer. Now, I  
12 would indicate that with these discovery requests we  
13 did produce documents, and some of the documents we  
14 produced included Direct's review of what we believed  
15 the impact of these misassigned meters was and gave  
16 that information to the company.

17 I think our particular numbers are  
18 somewhat different than the companies' numbers, and I  
19 can -- just so counsel knows what I'm talking about,  
20 this is the summary sheet. If you don't have that,  
21 let me know, but I believe that was produced. It  
22 would give some indication based on our information  
23 of what the impact of these errors were, which,  
24 again, recognizing that is a slightly different  
25 question, the answer that they're looking for is

1 zero.

2 MR. LANG: And, your Honor, if I may.

3 THE ATTORNEY EXAMINER: You may.

4 MR. LANG: On the request for admissions,  
5 Mr. Whitt took us back to the Request for Admission  
6 1-2, which is admit that Direct was obligated to pay  
7 PJM, and I understand that the denial for that one,  
8 that they're denying they are obligated.

9 What we moved to compel on 1-7, 1-14, and  
10 1-21 are simply taking the obligation out of the  
11 question. What did you pay? And the request for  
12 admission that you paid nothing for the energy and  
13 capacity for that customer during that time period.

14 Now, if they believe they paid something,  
15 then it would be fair to deny that, if they believed  
16 they paid something, in which case in the  
17 interrogatories they should be telling us what they  
18 paid. So that's how the request to admit and the  
19 interrogatories fit together, is if you believe you  
20 paid for the energy and capacity of these customers,  
21 then you can deny the request to admit and you can  
22 tell us in the interrogatories what you paid.

23 If you believe you paid nothing, then you  
24 can admit the request for admission and put it in the  
25 interrogatory. But it's a simple fact that doesn't

1 have anything to do with, you know, Direct's legal  
2 position as to what they are obligated to do. It's a  
3 simple fact of what they paid, and that's all we're  
4 trying to find out, what their position is on that  
5 simple fact.

6 THE ATTORNEY EXAMINER: Thank you,  
7 Mr. Lang.

8 Mr. Whitt, response?

9 MR. WHITT: Well, Your Honor, it's  
10 ultimately the company that is responsible for these  
11 meter assignments and knowing exactly which load is  
12 being attributed to which customers. That's the  
13 companies' responsibility and not Direct's. The only  
14 thing Direct knows is that it gets a bill from PJM  
15 with a total load obligation that Direct then has to  
16 pay, and Direct doesn't necessarily know what or how  
17 that load obligation was calculated, other than what  
18 the companies had provided to PJM.

19 And it's ultimately, you know, to the  
20 extent the companies maintain that Direct hasn't paid  
21 what it should have paid, that is a fact in dispute  
22 for which the companies bear the burden of proof.  
23 There isn't any claim in Direct's complaint about  
24 these errors or so forth. The complaint simply goes  
25 to the actions of the companies and the manner in

1 which they pursued Direct for these funds.

2 But, again, when we're dealing with the  
3 request for admission, there is sort of a remedy  
4 built into the rules, which is to the extent the  
5 companies believe that the denial is unjustified and  
6 that they have been put upon to prove something in  
7 the case that they shouldn't have to prove, then they  
8 certainly can elicit that at hearing and petition the  
9 Commission to sanction us.

10 But what they're really asking for is  
11 it's not a motion to compel a response, it's a motion  
12 to compel Direct to change a response, and that  
13 really just isn't appropriate under the rules,  
14 especially for request for admissions.

15 THE ATTORNEY EXAMINER: Mr. Whitt,  
16 doesn't PJM provide certain tools available to all  
17 suppliers to verify the calculations contained on the  
18 bill issued?

19 MR. WHITT: I'm not sure. I'm really  
20 not. I'm sure that there is some sort of process or  
21 somebody to talk to if somebody at Direct receives a  
22 bill and doesn't know what to do about it.

23 THE ATTORNEY EXAMINER: To your  
24 knowledge, Direct didn't undergo that process to  
25 verify the bills in question?

1 MR. WHITT: Not at the time. But my  
2 understanding once this issue was brought to their  
3 attention and the parties were moving towards  
4 litigation and some information had been provided by  
5 the companies, that enabled Direct to go back and  
6 look at the records and try to approximate what the  
7 impact was, and a spreadsheet was combined of that  
8 information and turned over to the companies.

9 So, again, there's certainly going to be  
10 a basis for the companies to question folks about the  
11 information we've turned over and how did you do  
12 that? There won't be any mysteries, I don't think,  
13 on what Direct's position is going to be.

14 But, again, the issue is, you know, I  
15 think the companies are forced to buy into certain  
16 characterizations and case theories, but really  
17 there's fundamental disagreement, and I think we've  
18 explained ourselves, and it's disputed. That's why  
19 we are in litigation, and it's something that  
20 ultimately is going to have to be resolved, but I  
21 don't think in the context of a discovery motion.

22 THE ATTORNEY EXAMINER: Thank you.

23 Mr. Lang, last word.

24 MR. LANG: Yes, your Honor. I think  
25 where there may be a dispute, based on the

1 spreadsheet Mr. Whitt has, is based on the mistake in  
2 the billing parameters that were submitted, that as  
3 to what the impact was, the total impact for the  
4 customers in that case in terms of what the total  
5 amount is that Direct should have paid but did not.

6 And so, you know, here's a spreadsheet  
7 they should have paid X amount and our spreadsheet  
8 says 5.6 million down to the penny. But given that's  
9 not the issue that we're going to with these requests  
10 to admit and the interrogatories, it's not a question  
11 of what's the -- we're not asking them to confirm the  
12 total amount that they should have paid. We're  
13 asking them just to, as a very baseline question,  
14 agree with us or tell us differently, that in the  
15 first instance, as a result of the mistake, they did  
16 not make payments for these customers, or if they  
17 did, what did they pay.

18 It's one or the other, and they should  
19 have that data or -- but, I think, sticking to this  
20 concept of, well, this is a legal issue and we  
21 weren't obligated to pay, that's not what we're  
22 asking for. We're just asking for a very basic  
23 starting fact so that, again, we can simplify this  
24 for hearing, not have to -- I appreciate the offer  
25 that we can go forward at hearing and prove it and

1 then move for sanctions. I'd rather just simplify  
2 the issue for hearing. Moving for sanctions is one  
3 remedy. Filing a motion to compel we think is an  
4 easier and simpler remedy to get this done before  
5 hearing, so that's what we ask the Commission to do.

6 THE ATTORNEY EXAMINER: Thank you.

7 Moving on to the motion to compel dealing  
8 with Interrogatories 1-23, 24, and 25, Mr. Lang.

9 MR. LANG: Yes, your Honor. I think  
10 23 and 24, both ask about proceedings in which  
11 Direct has been a party in the last eight years.  
12 23 is a proceeding relating to a supplier claim of  
13 underpayment or overpayment. 24 is a proceeding  
14 relating to resettlement under a supplier tariff.

15 Then 25 is about proceedings in the last  
16 eight years Direct has basically taken a position  
17 that CRES providers should return any overpayments.  
18 We know of Case No. 14-1277-EL-CSS, which is a case  
19 in which Direct was a party relating to a supplier  
20 that came in that case of underpayment. That's the  
21 case where Direct is on the opposite side of where  
22 they are here and where they were overbilled.

23 And we also know of the Duke ESP case,  
24 which we put in our reply, Case 14-841, which would  
25 qualify as a proceeding in the last eight years, in

1 which Direct was a party relating to settlement under  
2 a supplier tariff, and there was litigation in that  
3 case concerning the resettlement obligation under the  
4 supplier tariff, which the Commission resolved under  
5 hearing in that case, and we are aware of those cases  
6 and believe they are relevant to this case because we  
7 see Direct taking positions in those cases and Direct  
8 arguing that it's the right thing to do for the  
9 supplier that's been benefited by a mistake to  
10 resettle, you know, to pay back the windfall.

11           What we're asking for in these  
12 interrogatories, in addition to those cases we  
13 already know about because of Direct, among other  
14 things as a business in places other than Ohio, we  
15 would like them to identify other proceedings in  
16 which they've taken positions with regard to, for  
17 example, whether CRES providers should voluntarily  
18 return overpayments.

19           And we believe that goes to the  
20 credibility of Direct's witnesses that would testify  
21 at hearing. We believe that the positions that  
22 they're taking in those other cases are admissions  
23 against interest that we have a right to use in this  
24 case.

25           But Direct, obviously, is in a much

1 better position than we are to identify for us any of  
2 the other cases in which they've argued that CRES  
3 providers should voluntarily return overpayments; in  
4 other words, made some argument directly or  
5 indirectly made in this case, which say they have an  
6 obligation to return the overpayment.

7 That's why we've served those  
8 interrogatories. We had, you know, a basis for  
9 believing there were other cases because we have seen  
10 other cases. We just don't know if they were the sum  
11 total of cases, and that's why we moved on Direct and  
12 that's why we moved to compel those interrogatories.

13 THE ATTORNEY EXAMINER: Thank you.

14 Mr. Whitt.

15 MR. WHITT: Yes, your Honor. When we  
16 were here about a year ago on a discovery issue, one  
17 of the things that Direct sought to discover at that  
18 time was the circumstances surrounding the companies'  
19 resettlement with 11 other suppliers that they've  
20 notified about the pleadings in the case that were  
21 also affected by this error, and the argument was  
22 made and prevailed that whatever was happening  
23 simultaneously with these other suppliers was really  
24 just irrelevant to the case, and we weren't allowed  
25 to inquire into that.

1           And it strikes me that if other issues  
2 arising from the same facts that give rise to the  
3 dispute there, that interactions with other suppliers  
4 aren't relevant, then I'm not sure how Direct's  
5 interactions with other companies that have nothing  
6 to do with this case could be in any way relevant.

7           This case arises from the companies'  
8 supplier tariffs and their obligations thereunder.  
9 To the extent there were previous complaints about  
10 the companies and their supplier tariff, I could  
11 understand the relevance and the desire to find that  
12 information.

13           This interrogatory asks very broadly  
14 about supplier disputes anywhere else over the past  
15 eight years. I'm not even sure what would  
16 necessarily constitute a dispute, and I don't know  
17 whether there are any other proceedings that would  
18 even be responsive.

19           The reason I objected as a lawyer was my  
20 belief that the company should not, I believe, incur  
21 the time and expense of going down this rabbit hole  
22 to identify any other instance that arguably  
23 constitutes a dispute over supplier rebilling issues.

24           People have come and gone from Direct,  
25 just like any other company. There was an individual

1 that was Jeffrey Whitehead that was kind of right in  
2 the middle of this situation initially, and he's  
3 moved on out of Direct. I don't even know where the  
4 fellow is. You know, I don't know the full extent of  
5 what institutional knowledge Direct could even rely  
6 on to give a comprehensive answer, and, ultimately,  
7 somebody would have to do what the companies are also  
8 capable of doing, which is do some research.

9           It's not a mystery where Direct operates.  
10 Where is Google and Lexis, and all these other tools  
11 available to research these things? In his line of  
12 inquiry that they believe is relevant to the case, if  
13 they would like to do that on their own dime, there's  
14 nothing I can do to stop that, but I don't think it's  
15 reasonable to ask Direct to go essentially down the  
16 same sort of research project, again, given the very  
17 tangential relevance, if any, to the issues in this  
18 case.

19           I would also note that the testimony that  
20 has been cited in the Duke case that's allegedly  
21 inconsistent with the position also taken here, you  
22 know, if that's an argument that the companies wish  
23 to make, then they can make it, but there's a  
24 difference between a nonlawyer's opinion about  
25 something and legal obligations. And, ultimately, in

1 the Duke case, we have submitted a brief and made  
2 legal arguments in that case which control the issues  
3 there, not a lay person about something they would  
4 like to see happen.

5 But, in any event, again, I'm not  
6 certainly one to tell the companies what issues they  
7 can or should raise or how they should do it. If  
8 it's something they wish to pursue, that's fine, but  
9 we should not be co-opting into that exercise.

10 THE ATTORNEY EXAMINER: Mr. Lang.

11 MR. LANG: Yes, your Honor. I would note  
12 the only objection made in response to these  
13 interrogatories is a relevance objection, plus in  
14 4901-1-16(G) we pointed out limited application would  
15 apply here, so sounds like Mr. Whitt was trying to  
16 say that some of the requests might be a little  
17 vague, ambiguous. No objection was stated on those  
18 grounds.

19 The question is Direct's position, the  
20 position that Direct has taken as a company with  
21 regard to the obligation to resettle under supplier  
22 tariffs. So we've asked for proceedings in which  
23 that issue would come up because there was  
24 underpayment or overpayment for the retail load.  
25 We've asked for proceedings specifically related to

1 resettlement of supplier tariff, and we've asked  
2 where Direct itself has specifically taken the  
3 position that CRES providers who are kind of in the  
4 benefited position should resettle for that benefit  
5 that they received, the windfall that they received.

6 With regard to whether employees have  
7 left the company in that time period, that happens in  
8 all companies. That's not a ground to refuse to  
9 respond to an interrogatory. The requirement in the  
10 rules is to make a reasonable effort based on the  
11 information that you have and that you have access to  
12 respond to the interrogatory.

13 So Mr. Whitehead, who is no longer there,  
14 he's free, I guess, but the employees who are at  
15 Direct can use the knowledge that they have and the  
16 documents that they have in their files to respond to  
17 the interrogatory, and, in fact, this is Direct's  
18 information that we're asking for, where Direct has  
19 taken specific positions where it has been parties in  
20 proceedings where these specific issues have come up  
21 in the past.

22 That's information that Direct has, not  
23 information that we have, and the fact that we might  
24 be able to happen upon one or two other proceedings  
25 by using Google is not an acceptable objection under

1 any discovery rule in any court, because the question  
2 and the purpose of interrogatories is to establish  
3 what the party knows who is responding to the  
4 interrogatory. The purpose of the interrogatory is  
5 not to prove what we can discover using Google.

6 And the Commission's rules are  
7 interesting because they do have a specific provision  
8 in Rule 16. If it's public information in a  
9 Commission case, that's a reasonable objection. What  
10 we're talking about here, I believe, are other cases  
11 that Rule 16(G) does not apply to, so it's not  
12 something we can easily identify.

13 There are many states that I've been  
14 somewhat surprised to find out when looking at  
15 documents in other states, they don't have the  
16 wonderful commission website that this state has  
17 where it's actually much easier in this state to find  
18 documents than a lot of other states I've been  
19 looking at.

20 THE ATTORNEY EXAMINER: Thank you.

21 MR. LANG: Actually, it's a great  
22 website. So, I think the issue is for information  
23 that Direct has. We believe it's relevant to the  
24 case. You know, I think at base Mr. Whitt's  
25 objection is we don't really have an obligation to

1 help them make their case, and that's just plain  
2 wrong.

3 That's the whole purpose of discovery, is  
4 we exchange discovery. We come to, you know -- not  
5 come to an agreement on the facts. We narrow the  
6 issues with regard to the facts. We find out what  
7 the opposing party's positions are so we can address  
8 them at hearing, but if one party is saying, our  
9 position is we're not going to help you out in  
10 discovery, that's just bad policy when it comes to  
11 this Commission having discovery in the first place.

12 The point is, let's narrow the issues.  
13 Let's find out what Direct Energy has done, and if  
14 they want to argue over maybe the supplier tariff in  
15 a different case has a little bit different language,  
16 we can certainly argue over that, but let's identify  
17 those cases first to see what the universe is of  
18 cases where Direct has taken these positions, and  
19 then we can go forward from there and figure out --  
20 you know, Direct certainly has the opportunity then  
21 to take the position, well, we don't think that case  
22 is directly applicable because that supplier tariff  
23 was a little bit different. That's fine, but let's  
24 find out what the cases are first.

25 THE ATTORNEY EXAMINER: Thank you. I

1 think --

2 MR. WHITT: May I briefly add one thing?

3 THE ATTORNEY EXAMINER: Briefly.

4 MR. WHITT: I would bring attention to  
5 the general objections that are contained in Direct's  
6 discovery responses. We raised general objections  
7 about undue burden and other things that would also  
8 apply to our answer. Although I've talked to you  
9 about we don't believe the information is relevant to  
10 begin with, we have preserved our objections based on  
11 undue burden and the other issues I talked about.

12 THE ATTORNEY EXAMINER: Thank you,  
13 Mr. Whitt.

14 I believe it would be beneficial for me  
15 to take a few minutes to go over the arguments and  
16 requests for admissions and interrogatories, and I  
17 will be back in about 10, 15 minutes to provide my  
18 ruling.

19 MR. WHITT: Thank you, your Honor.

20 MR. LANG: That's great. Thanks.

21 (Recess taken.)

22 THE ATTORNEY EXAMINER: Let's go back on  
23 the record. Thank you all for your patience.

24 I am ready to provide my ruling. At the  
25 time I will be granting in part and denying in part

1 the motion to compel.

2 I will be denying it as to the Request  
3 for Admission 1.7, 1.14, and 1.21. I believe that  
4 this goes to the very nature of the argument at hand.  
5 This is something that can be flushed out during the  
6 hearing. I don't think that's necessary to compel  
7 Direct to provide an admission apart from what they  
8 have already provided as a response to those requests  
9 for admission.

10 However, I will be granting the motion to  
11 compel, in part, first as to Interrogatories 1-23,  
12 24, and 25. I will note that the information subject  
13 to discovery should only be appearing reasonably  
14 calculated to lead to admissible evidence. That is a  
15 very low bar. I believe this information could be  
16 relevant to the proceedings, and its relevance is an  
17 entirely separate issue that we can address at the  
18 hearing; however, it is proper for discovery  
19 purposes.

20 As to Interrogatories 1-11, 1-12, and  
21 1-13, I will note although Direct did object to the  
22 questions as phrased to state the amount paid to PJM  
23 for the loads of customers between specified periods,  
24 I agree that the form of the question may be at  
25 issue; however, under the rules of the Commission, as

1 attorney examiners, we are afforded significant  
2 latitude when dealing with motions to compel, and I  
3 would at this time find it appropriate to restate the  
4 interrogatory to, perhaps, get to the merits of the  
5 question at hand here and basically rephrase.

6 I'll start with Interrogatory No. 1-11  
7 for Direct to state the amount, as estimated, paid to  
8 PJM per PJM's invoice attributable to the load of  
9 Customer 1 between May 22, 2014, and November 30,  
10 2015. And that is merely just to show an allocation  
11 of the charges actually paid by Direct that they  
12 associate with Customer 1.

13 Likewise, for Interrogatory No. 1-12, I  
14 will have Direct state the amount you paid as  
15 estimated. I understand that the numbers and  
16 associated data, that there may be some discrepancy  
17 as to actual amount. State the amount you paid, as  
18 estimated, to PJM attributable to the load of  
19 Customer 2 between June 5, 2014, and November 30,  
20 2015.

21 And, likewise, for Interrogatory  
22 No. 1-13, state the amount you paid, as estimated, to  
23 PJM attributable to the load of Customer 3 between  
24 December 1, 2013, and June 30, 2015.

25 Again, I just note that a discovery issue

1 is a very low threshold to meet, and I do believe  
2 that by providing this information we will be able to  
3 get to the hearing in a much more expedited fashion,  
4 knowing that disputes may come up as to the actual  
5 amounts, and I think that has been already noted on  
6 the record.

7 MR. LANG: Is there a timing that could  
8 be offered for responding to the questions where you  
9 did grant the motion?

10 THE ATTORNEY EXAMINER: I believe the  
11 typical -- we did not expedite the discovery period,  
12 correct?

13 MR. LANG: That's correct.

14 THE ATTORNEY EXAMINER: That would  
15 provide enough time before testimony is due; is that  
16 correct?

17 MR. WHITT: Not to get ahead of  
18 ourselves, but Mr. Lang and I started discussion  
19 yesterday on some procedural issues. I think what  
20 we've agreed to is we would prefile all witness  
21 testimony, whether it's a fact or an expert, all  
22 witness testimony would be prefiled, although  
23 ordinarily required to do so within seven days of the  
24 hearing, we've agreed among ourselves to prefile  
25 simultaneously on April 24. We don't feel that

1 there's a need to reissue a procedural entry to  
2 reflect that agreement. Obviously the Bench is  
3 entitled to do so if it wishes.

4 THE ATTORNEY EXAMINER: I'm fine with  
5 April 24.

6 MR. WHITT: So we would file our  
7 testimony on the 24th. Each party would have the  
8 opportunity to depose the other party's witnesses who  
9 prefiled, as well as any other discovery depositions,  
10 and even the discovery depositions don't necessarily  
11 need to wait until the 24th.

12 There's been some issuances of notices.  
13 We've talked about that, anticipated making people  
14 available by agreement. I would endeavor -- well,  
15 not endeavor. I would make a commitment to respond  
16 to these interrogatories for which the motion has  
17 been granted, we will do that before the testimony is  
18 due. If you give me a week, frankly, I don't think  
19 it will take even that long. That would be -- well,  
20 whatever a week is from today, we will have the  
21 revised answer.

22 THE ATTORNEY EXAMINER: Thank you. I  
23 appreciate that, Mr. Whitt.

24 Is that agreeable to the company?

25 MR. LANG: Mark, for 11, 12, 13, is it

1 possible to get those by the 19th or 20th?

2 MR. WHITT: Yes. I was indicating I  
3 would -- anything for which your motion was granted,  
4 I would respond within a week of today.

5 MR. LANG: That would be great.

6 MR. WHITT: Which would be the 18th.

7 MR. LANG: Okay.

8 MR. WHITT: I will give you my copy of  
9 it. I may end up just referring to this document.

10 MR. LANG: Okay.

11 MR. WHITT: But, yes, anything in here  
12 we'll respond to by then.

13 MR. LANG: That sounds good.

14 THE ATTORNEY EXAMINER: Thank you. Is  
15 there anything else we need to address?

16 MR. WHITT: I think that is all.

17 MR. LANG: I think we're on track.

18 MR. WHITT: You're going to love this.  
19 We have even talked about potentially even sponsoring  
20 joint exhibits, not necessarily all of the exhibits,  
21 but certainly materials, for example, the supplier  
22 tariff, the agreements between the parties, if we can  
23 sponsor those as joint exhibits.

24 MR. LANG: Just move them.

25 MR. WHITT: And move them in and

1 eliminate a lot of rigmarole with witnesses. We hope  
2 to do that. And this is really not going to be a  
3 highly document-intensive case, I don't think.

4 MR. LANG: Right, I don't think.

5 THE ATTORNEY EXAMINER: You're saying  
6 that now.

7 MR. WHITT: And for hearing, I don't have  
8 a great estimate of how long I think we'll need. It  
9 depends on the number of witnesses, I suppose.

10 THE ATTORNEY EXAMINER: Let's go off the  
11 record.

12 (Discussion off record.)

13 THE ATTORNEY EXAMINER: We will adjourn  
14 for today. Thank you all for coming.

15 (The hearing adjourned at 11:06 a.m.)

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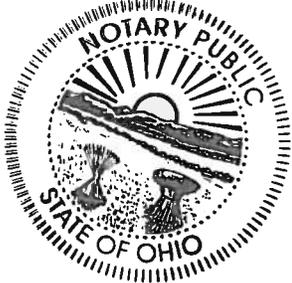
CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, April 11, 2018, and carefully compared with my original stenographic notes.

Rosemary Foster Anderson  
Rosemary Foster Anderson,  
Professional Reporter and Notary  
Public in and for the State of  
Ohio.

My commission expires April 5, 2019.  
(rfa-86616)

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Summary: Transcript Prehearing Conference - Direct Energy Business, LLC vs. Ohio Edison and Cleveland Electric Illuminating Company and Ohio Edison and The Cleveland Electric Illuminating Company vs. Direct Energy Business, LLC, hearing held on April 11, 2018. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Anderson, Rosemary Foster Mrs.