BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

DIRECT ENERGY BUSINESS, LLC, Complainant, v. OHIO EDISON COMPANY AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, Respondents.	)	Case No. 17-791-EL-CSS
OHIO EDISON COMPANY AND THE CLEVELAND ELECTRIC ILLUMINGATING COMPANY, Complainants, v. DIRECT ENERGY BUSINESS, LLC Respondent.	)	Case No. 17-1967-EL-CSS

INITIAL POST-HEARING BRIEF OF DIRECT ENERGY BUSINESS, LLC

Mark A. Whitt
Andrew J. Campbell
Rebekah J. Glover
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215

Counsel for Direct Energy Business, LLC

TABLE OF CONTENTS

I. INTRODUCTION

The Companies' Supplier Tariff states that the financial settlement of wholesale transactions undertaken by suppliers to serve retail load "will be provided under the rates, terms, and conditions of" PJM's Open-Access Transmission Tariff (OATT).[1] PJM's tariff allows transactions to be "resettled" for up to 60 days. Transactions cannot be resettled after 60 days unless "both Market Participants are willing."[2] Both PJM and the Commission recognize that a "willing" participant is one who affirmatively chooses to resettle.[3] This is an imminently sensible interpretation. PJM resettles transactions through bilateral agreements; by definition, a "bilateral agreement" means both parties consent to the transaction.[4] Thus, when the Companies started making demands in 2017 for Direct to resettle wholesale transactions that occurred in 2014 and 2015, Direct had every right to refuse. Every effort the Companies have made since then to try to force resettlement violates the Supplier Tariff.

The Companies' unlawful demands are not the only tariff violations at issue. The events that prompted resettlement discussion were the result of an earlier violation; namely, the violation of provisions requiring the Companies to keep track of which competitive retail suppliers serve which customers, and to advise PJM accordingly. Between 2013 and 2015, the Companies led PJM to believe that their affiliate, FirstEnergy Solutions Corp. (FES), was serving certain customers that were actually served by Direct and other suppliers. As a result,

---

[1] Ohio Edison Co., P.U.C.O. No. S-2 (Supplier Tariff), Section XV.A. All FirstEnergy Ohio EDUs operate under the same supplier tariff.

[2] OATT Attachment K, Appx. (PJM Tariff), Sec. 3.6.2.

[3] Direct Ex. 3 at 6:8-14; *Duke Energy Ohio*, Case No. 14-841-EL-SSO, Order (Apr. 2, 2015) at 91.

[4] *See Kostelnik v. Helper*, 2002-Ohio-2985, ¶ 16, 96 Ohio St. 3d 1, 3–4 ("A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract.").

FES paid $25 million for wholesale energy and capacity used by other suppliers' retail customers. Had the Companies done what the Supplier Tariff required of them, FES would not have been "disadvantaged" nor any other suppliers "advantaged." And to be clear, the Companies were not parties to *any* transaction that allegedly benefitted or harmed *any* supplier. The transactions involved PJM and each individual supplier, and the Supplier Tariff expressly forbids the Companies from meddling in these transactions.

The Companies dug a deeper hole for themselves by deciding to address the mess they created by not only piling on more tariff violations, but by also violating their corporate code of conduct. From their initial contact with Direct in December 2015 to the present, everything the Companies have done to try to recoup the "windfall" from suppliers has been done for the benefit of their affiliate. The Companies and FES entered a "settlement" in which the Companies have stepped into FES's shoes.[5] Any money the Companies recover is to be handed over to FES. This inside deal gives the Companies and FES the best of both worlds: FES pays nothing for the collection service provided by the Companies, and the Companies are able to compensate their affiliate with CRES suppliers' money instead of their own.

The Companies do not dispute the plain language of the Supplier Tariff. They ask the Commission to ignore the applicable provisions, because to apply them would inhibit the Companies' ability to "right a wrong" or avoid an "unjust and inequitable outcome."[6] This is a completely different tune than the Companies sang when recently arguing that the absence of refund language in their Rider AER tariff prohibited the Commission from ordering them to refund $43 million in imprudent REC purchases (RECs purchased from FES, no less). The

[5] Direct Exs. 14-C ¶ 4, 15-C ¶ 4.

[6] Companies Ex. 12 at 16:16; 21:2.

Companies argued, and the Court agreed, that a refund was not allowed because the applicable tariff did not authorize refunds. *In re Ohio Edison Co*., 2018-Ohio-229, ¶ 12, __ Ohio St.3d ___, *reconsideration denied sub nom.*, 2018-Ohio-1600, ¶ 12, 152 Ohio St. 3d 1449. The underlying principle of the filed-rate doctrine is that utilities are duty-bound to follow their tariffs, and this doctrine works both ways. Direct cannot be forced to resettle transactions to reverse its alleged "windfall" for the same reason the Commission cannot force the Companies to relinquish their $43 million windfall: the plain language of the applicable tariff "requires this result [.]" *Id*. at ¶ 54.

Unambiguous tariff provisions are to be applied, not interpreted—regardless of whether the outcome is "perceived as unfair" or "result[s] in a windfall." *Id*. In any event, a federal judge has *already decided* that the Companies have no equitable claim to Direct's alleged "windfall"—on their own behalf or anyone else's.[7]

The Companies' fallback argument is that a provision in the Supplier Tariff having nothing whatsoever to do with wholesale settlements imposes a general "duty to cooperate" that trumps every specific duty mentioned in the tariff. But this provision gets the Companies nowhere. The duty to "cooperate" requires both parties to address wholesale settlement issues "as provided" in the Supplier Tariff and PJM tariff.[8] The Companies, not Direct, are the parties who have failed to "cooperate" in performing the duties required under these tariffs.

The Commission must apply the version of the Supplier Tariff in effect—not a version the Companies wish they had proposed, or a version they might propose in the future. If the

[7] *Ohio Edison Co., et al, v. Direct Energy Business, LLC*, N.D.Ohio No. 5:17 CV 746, 2017 WL 3174347 (Jul. 26, 2017).

[8] *Id*. at 4; *see also* Supplier Tariff, Section III.C.

Companies do not like PJM's settlement process or the result it produces, they can do what Duke and AEP did: revise their tariff to require a different process that mandates a different result.[9]

Direct has met its burden of proof. The preponderance of the evidence unmistakably shows that the Companies committed each violation alleged in each of the three counts of the Complaint.

II. FACTS

The Companies have admitted most of the facts alleged in the Complaint.[10]

The dispute in this case involves approximately $5.6 million in wholesale energy and capacity charges associated with three customers who switched from FES to Direct in 2013. Direct followed all necessary enrollment procedures for these customers.[11] Throughout the relevant time period, the Companies provided monthly meter data that Direct used to issue bills (the Companies continued to bill distribution charges separately).[12] There were no issues with these customers' retail charges or service.[13] Moreover, Direct had no reason to question whether the invoices it was receiving from PJM accurately reflected Direct's load obligation.[14] Direct relied on the Companies to perform their obligations under the Supplier Tariff, and assumed that the information it was receiving for retail billing purposes matched the information PJM was receiving from the Companies for wholesale settlement purposes.[15]

---

[9] *See Ohio Power Co*., Case No. 16-1852-EL-SSO, Compliance Filing (May 4, 2018) at Attachments C and D; *Duke Energy Ohio*, Case No. 14-841-EL-SSO, Second Entry on Reh'g (Mar. 21, 2018) at ¶ 125.

[10] Case No. 17-791-EL-CSS, Answer ¶¶ 6-10, 11-13 (in part), 15-16 (in part), 17, 19-20, 22.

[11] Direct Ex. 1.0 at 5:19-22; Tr. at 156:16-20.

[12] Direct Ex. 1.0 at 6:1-3.

[13] Companies Ex. 12. at 11:9.

[14] Tr. 156:21-157:2.

[15] Direct Ex. 1.0 at 8:7-16.

In the Fall of 2015, a CRES provider notified the Companies of an apparent load discrepancy with the supplier's largest customer, which had just switched from FES the previous month.[16] The Companies discovered that the supplier who had contacted them was not showing up in the Companies' system as the supplier to the customer in question; FES was still listed as the supplier.[17] The Companies dug further and learned that the same phenomenon had occurred across multiple suppliers in multiple states.[18] The Companies attribute the phenomenon to a "computer error," and the error resulted in losses of $25 million to FES.[19]

PJM has a resettlement process to address situations like this, but the process has strict deadlines. PJM's tariff requires market participants to resettle transactions for a period of up to 60 days after an error is discovered.[20] Errors discovered after 60 days, but before two years, *may* be resettled "if both Market Participants are willing."[21] Errors discovered after two years *may not* be resettled.[22]

The Companies and Direct were aware of PJM's resettlement deadlines well before the "computer error" was discovered. In fact, just a few months earlier, Direct spearheaded a proposal at PJM to liberalize these deadlines.[23] Under Direct's proposal, suppliers would have been required to resettle transactions involving errors discovered within two years.[24] But the

[16] Companies Ex. 12 at 11:19-23; 12:1.

[17] *Id*. at 12:8-11.

[18] *Id*. at 11:3-7.

[19] *Id*. at 11:10; *see also* Tr. at 155:13-22; 162:7-163:25 (describing computer error and financial impact).

[20] Direct Ex. 3 at 4:21-23; 5:1-4.

[21] *Id*. at 5:4; *see also* PJM Tariff Sec. 3.6.2.

[22] Direct Ex. 3 at 5:5-9; *see also* PJM Tariff Sec. 3.6.6.

[23] *See* Companies Exs. 10, 11.

[24] Companies Ex. 11 at 3.

stakeholder group—which included the Companies and FES—rejected this proposal, opting instead to maintain the status quo.[25] The stakeholder group disbanded in the Spring of 2016.[26]

Ironically, Direct was advised of the "computer error" at the very same time its proposal was working its way through the PJM stakeholder group. The Companies sent an email to Direct on December 18, 2015 to advise that "the load for three customers was not accounted for in Direct Energy Business's load obligation submitted to PJM" because "these customers' load obligation remained assigned to their previous supplier."[27] The mis-assigned load covered the period December 1, 2013 to September 30, 2015.[28] "These errors are beyond PJM's 60-day window so we will need to remediate this with out of market bilateral settlements through PJM," according to the email.[29] Subsequent email traffic through early January 2016 reflects Direct's attempt to not only understand what happened, but to address the issue directly with the previous supplier.[30] The Companies declined to identify the other supplier, and there was no further follow-up.[31]

About a year later, unbeknownst to Direct at the time, the Companies and FES executed settlement agreements. The settlements included bilateral transactions to "move money between

[25] See Tr. at 172:11-176:7.

[26] *See* Direct Ex. 8.

[27] Direct Ex. 1.3 at 1-2.

[28] *Id*. at 2.

[29] *Id*.

[30] *See generally* Direct Ex. 1.3.

[31] *Id*. at 5-8.

Ohio Edison and FES," via PJM, to compensate FES.[32] Under the settlement agreements, the Companies now stand in the shoes of FES.[33]

Soon after the Companies executed these settlements with FES, they re-engaged Direct.[34] Direct again asked to deal with the previous supplier and was again told "no."[35] The Companies eventually issued an ultimatum that they would consider Direct in breach of its "duty to cooperate" under the Supplier Tariff if Direct did not pay approximately $5.6 million—which, again, would be handed over to FES under the settlement agreements.[36] Direct filed its Complaint to stop the Companies from making good on their threat.

Direct's Complaint did not stop the Companies from pursuing collection through other means. On the same day the Companies filed their Answer to the Complaint, they also filed a complaint in U.S. District Court, alleging that Direct had been "unjustly enriched" by the Companies' error.[37] The District Court dismissed the Complaint because Ohio law does not recognize claims for unjust enrichment between parties who did not deal with each other in an economic transaction.[38] The Companies then filed a complaint with the Commission, which was subsequently consolidated with this case.

At no point did the "computer error" or the Companies' efforts to force resettlement ever affect retail customers.[39] Nor did any of the transactions the Companies are trying to force Direct

[32] Tr. at 178:9-11; Direct Ex. 12-C.

[33] Direct Exs. 14-C, 15-C.

[34] Direct Ex. 1 at 13:13-14.

[35] *Id*. at 13:16-18.

[36] *Id*. at 15:4-5.

[37] *Ohio Edison v. Direct*, Compl. ¶ 22.

[38] *Ohio Edison v. Direct* at 7-8.

[39] Companies Ex. 12. at 11:9; Tr. at 151:1-10.

to resettle involve the Companies or FES. The transactions involved Direct and PJM only. In fact, it is not technically accurate to say that the Companies are trying to force Direct to "resettle" its prior transactions with PJM. The Companies want Direct to enter into an entirely new bilateral agreement with them, submit the agreement to PJM, and have PJM debit Direct's PJM account $5.6 million and credit the Companies' account by the same amount.[40] The Companies plan to simultaneously enter into a different bilateral agreement with FES to debit the Companies' PJM account by $5.6 million and credit FES's.[41] In the context of this case, what the Companies characterize as "resettlement" is actually just a polite way to describe something not far removed (if at all) from money laundering. The economic substance of the Companies' proposal would simply move money from Direct to FES, with the Companies acting as the conduit.

III. ARGUMENT

Direct's Complaint alleges three counts. Counts 1 and 2 allege violations of the Supplier Tariff and Coordination Agreements, respectively. The duties under the Coordination Agreements and Supplier Tariff are the same, so meeting the burden of proof for Count 1 also satisfies Direct's burden under Count 2. The Companies' tariff violations also prove the violations of R.C. 4905.30 and R.C. 4905.32 alleged in Count 3. Count 3 also alleges a violation of the corporate separation/code of conduct requirements in R.C. 4928.17.

As discussed below, the unrefuted evidence of record proves each of the violations alleged.

[40] *See* Tr. at 178:5-179:11 and Direct Exs 12-C, 13-C.

[41] *See* Direct Exs. 12-C, 13-C.

A. The Supplier Tariff defines the parties' rights and obligations regarding wholesale settlements.

R.C. 4905.30(A) requires the Companies' filed tariffs to disclose "service of every kind furnished," and "all rules and regulations affecting" these services. The Supplier Tariff applies to and addresses wholesale settlement issues, so the parties' claims and defenses must be judged by the conduct required of them under the tariff. "[O]nce approved, a tariff has the same binding effect as a law." *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 41, 134 Ohio St. 3d 29, 38. The Commission has no statutory authority to imply new terms and conditions into the Supplier Tariff, nor ignore or reform any existing provisions. "The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly." *Tongren v. Pub. Util. Comm.*, 1999-Ohio-206, 85 Ohio St. 3d 87, 88.

In interpreting the Supplier Tariff, "[t]he meaning and effect of particular provisions are to be ascertained from the words employed and the connection in which they are used, the subject matter, and the evident purpose of such provisions." *Saalfield Pub. Co. v. Public Util. Comm.*, 149 Ohio St. 113, 118 (1948*); see also Myers v. Public Util. Comm.*, 1992-Ohio-135, 64 Ohio St. 3d 299, 301 (applying *Saalfield*). Ambiguous tariff provisions are construed against the drafting party. *Saalfield,* 149 Ohio St. at 118. *See also Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, ¶13 ("[W]here the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party.").

Section XV.A. of the Supplier Tariff, titled "RTO Settlements," states: "[S]settlements will be provided under the rates, terms and conditions of the Transmission Provider OATT and the applicable business practice manuals." There is no dispute that PJM is the "Transmission Provider" referenced in this section. The Companies' Code of Conduct requires them to "*strictly*

follow all tariff provisions." (Emphasis added.)[42] Nowhere does the Supplier Tariff state that the Companies may take any action they deem necessary to "restor[e] equity" or "right [a] wrong."[43] No provision states that the tariff will be suspended when deemed necessary by the Companies to avoid an "unjust and inequitable outcome."[44]

R.C. 4905.30 and .32 foreclose any claim that the Companies may address resettlement issues in a manner other than specified in the tariff. The Supplier Tariff is clear, unambiguous, and must be strictly applied. *See Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 2011-Ohio-4189, ¶ 24, 129 Ohio St. 3d 485, 490 (final order reversed because "the commission should have determined the intent of the parties to the special contracts from the four corners of the document.").

B. The Companies violated the Supplier Tariff.

Applying the plain language of the Supplier Tariff to the undisputed facts reveals at least four separate and distinct violations. Direct will address each of them in the order committed.

1. The Companies failed to report accurate meter data to PJM.

The Supplier Tariff is clear. "The Company shall upload required, aggregated customer meter data information on behalf of Certified Suppliers to the Transmission Provider including but not limited to real time hourly energy kWh data, capacity daily load share data and transmission daily load share data for use with financial settlement purposes as required by the Transmission Provider under the Transmission Provider's OATT."[45] Likewise, "[o]n a calendar

[42] *Ohio Edison Co. et al.,* Case No. 09-462-EL-UNC, Application (June 1, 2009), Corporate Separation Plan, Sec. VII (Code of Conduct) at ¶ 10.d.

[43] Companies Ex. 12 at 16:7, 19.

[44] *Id*. at 21:2.

[45] Supplier Tariff, Sec. XV.F.1.

month basis, monthly metered Customers' actual usage and hourly metered Customers' actual usage shall be aggregated by the Company to arrive at the total hourly aggregated load for each Certified Supplier and submitted to the Transmission Provider in accordance with the Transmission Provider OATT and applicable business practice manuals."[46]

The "evident purpose" of these provisions is to place the responsibility for reporting customer usage data to PJM where it belongs: with the Companies. The Companies are the only parties permitted to install, maintain and read meters.[47] PJM relies on this data to settle load share responsibility among suppliers.[48] The Companies sent aggregated monthly and hourly customer usage data to PJM, but they attributed this data to the wrong suppliers. As a consequence, PJM issued invoices to suppliers that did not reflect the suppliers' actual load share responsibility.[49] When asked point-blank, "Ohio Edison did not correctly assign FES's load obligation, correct?", the Companies responded: "Correct."[50]

The Companies cannot claim that the "computer error" excuses them from performing their duty to provide accurate meter data to PJM. The plain language of the tariff makes this duty absolute, as it must. The Companies are the only parties able to provide the necessary meter data to PJM because the Companies have sole access to, and control of, both customer meters and the computer system that is supposed to keep track of which suppliers are associated with which meters. Whether the Companies violated their tariff negligently or intentionally is irrelevant.

---

[46] *Id*. at Sec. XV.D.

[47] *See id*. at Sec. VII.B., E., F., G.; Sec. IX.C.; Sec. X.B., C.

[48] Direct Ex. 1 at 7:1-17.

[49] Tr. 155:13-18.

[50] Tr. 179:24-180:1.

The blame for the events that resulted in "advantaged" and "disadvantaged" suppliers falls squarely on the Companies. The Companies are responsible for causing FES's losses in the first place.

2. The Companies assumed responsibility for billing issues between suppliers and PJM.

Section XII.C. of the Supplier Tariff states: "The Company will assume no responsibility for billing between a Certified Supplier and the Transmission Provider or any party other than the Company."[51] The Companies' violation of this section is clear.

The *Companies* sustained no loss from the "computer error." PJM's invoices reflect the *supplier's* purchases and sales on the wholesale market. That is why the Companies approached Direct "on behalf of" FES—the Companies were not "disadvantaged," FES was. The Supplier Tariff expressly forbids the Companies from "assuming responsibility" for billing issues involving a supplier and PJM. There is no exception to "right a wrong" or to address "extraordinary circumstances."[52]

Obviously, a utility may need to provide information to a supplier so the supplier can pursue its billing issues with PJM or others. But the Companies have done far more than this for FES. The Companies have literally and legally assumed responsibility for FES's PJM billing issue by standing in FES's shoes. Any claims FES had were assigned to the Companies (the federal court found that FES had no claims to assign, but that is beside the point for present purposes). The settlement agreements reflect the Companies' commitment to pursue ongoing litigation on FES's behalf. The federal court lawsuit filed against Direct sought a remedy that

[51] Supplier Tariff, Sec. XII.C.

[52] Companies Ex. 12 at 16:16; 7:19.

could only benefit FES. When that lawsuit failed, the Companies filed their complaint with the Commission. The Companies are simply the alter ego of FES.

The arrangement between the Companies and FES raises obvious red flags concerning corporate separation, and those issues will be addressed later. The Supplier Tariff does not permit the Companies to insert themselves into PJM billing issues involving *any* supplier.

3. The Companies attempted to force resettlement beyond PJM's 60-day deadline.

The Supplier Tariff devotes and entire section to "RTO Settlements."[53] Within that section, the very first provision states that "settlements *will be provided* under the rates, terms and conditions" of the PJM tariff.[54] The PJM tariff states that resettlement may occur after 60 days but before the expiration of two years "if both parties are willing." "Willing" means "accepted by choice or without reluctance."[55] Direct chose not to engage in resettlement. The Companies have no right to compel a different choice.

The evident purpose of Section XV.A. is apparent from its language. Settlements are to be conducted and managed in accordance with PJM requirements. PJM's requirements are equally apparent. If a metering error is discovered during a billing month, it can be addressed at the end of the month under Resettlement A.[56] If an error is discovered after the end of the billing month, it can be addressed by the end of the following month under Resettlement B.[57] When the Companies first contacted Direct about the meter data issues, they recognized the transactions

[53] Supplier Tariff Sec. XV.

[54] *Id*. at XV.A.

[55] Merriam-Webster.com/dictionary/willing (updated June 12, 2018).

[56] *See* Direct Ex. 3 at 4:11-5:4.

[57] *Id*. at 5:4.

were "beyond PJM's 60-day window" and thus could not be addressed through the Resettlement B process.[58]

This left Resettlement C as the only viable option. Resettlement C is permitted only "if both Market Participants are willing" and "such adjustment does not affect other parties."[59] Neither condition existed here. The Companies had made clear that the "computer error" affected numerous other suppliers, and that multiple "bilateral settlements" would be needed to unwind these transactions.[60] Direct was unwilling to enter a bilateral settlement with an unknown, unidentified third-party, either directly or through the Companies.[61] More importantly, Direct was not required to enter into any such settlement *even if* the identity of the other supplier had been known from the beginning. The Companies' own witness acknowledges that transactions under Resettlement C "require the FE EDUs to seek approval of all parties involved."[62] And the Commission itself has recognized that with regard to PJM resettlement, "we find it is not reasonable to force a CRES provider's consent where it may not exist."[63]

Notwithstanding PJM's clear directive that Resettlement C is only permitted "if both Market Participants are willing," the Companies claim that Direct should be *required* to agree to whatever transactions the Companies deem necessary to "right a wrong."[64] The Supplier Tariff

---

[58] Direct Ex. 1.3 at 2.

[59] Direct Ex. 3 at 5:6-9; *see also* PJM Tariff Sec. 3.6.2.

[60] *See* Companies Ex. 12 at 11:1-18.

[61] See Direct Ex. 1 at 13:4-16:13.

[62] Companies Ex. 12 at 6:11-14. *See also* Tr. at 152:17-153:22 and Direct Ex. 10 (discussing FirstEnergy procedures manual referencing Resettlement C and procedure for addressing errors "as agreed upon by the Company and the Supplier").

[63] *Duke Energy Ohio*, Case No. 14-841-EL-SSO, Order (Apr. 2, 2015) at 91.

[64] Companies Ex. 12 at 16:16-20.

says nothing of the sort: "The Company and Certified Supplier will cooperate in order to ensure delivery of Competitive Retail Electric Services to Customers as provided for by this Tariff, the Electric Service Regulations, and the Transmission Provider OATT."[65] Thus, contrary to imposing a general "duty to cooperate" that trumps every other specific obligation in the tariff, the tariff requires cooperation "as provided for" by the Supplier Tariff and PJM tariff. The duty to "cooperate" simply means that *both* parties are required to fulfill the obligations spelled-out in the governing tariffs.[66] PJM settlements are expressly governed by Section XV, and Section III.C. requires the Companies to "cooperate" in carrying out those provisions.

The very point of the Supplier Tariff—or any tariff—is to firmly establish rights and obligations. Tariffs are intended to *limit* a utility's exercise of discretion in matters concerning the tariff, not expand the utility's discretion. *See In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 45, 134 Ohio St. 3d 29, 39–40 ("[U]tility rates and charges are fixed by the commission and set down in tariff schedules, to which the utility is bound to adhere."). By mandating that certain situations be handled a certain way—for everyone, no exceptions—tariffs promote certainty, predictability, and fairness. Parties bound by the PJM tariff expect those provisions to be honored. Interpreting the Supplier Tariff as imposing a broad and general "duty to cooperate" that authorizes a utility to compel action that conflicts with express provisions of the PJM tariff undermines the very purpose of *both* tariffs.

No supplier would have been "advantaged" or "disadvantaged" if the Companies had done what they were required to do—report accurate meter data to PJM. PJM does not expect perfection (that is why there is a process for resettlement), but it does expect diligence; diligence

[65] Supplier Tariff, III.C.

[66] Tr. at 151:22-152:7 (Companies' witness agreeing that Section III.C. requires both parties to "cooperate").

is a precondition for certainty and finality, which are just as important to market participants as "equity" and "fairness." Transactions cannot remain subject to resettlement indefinitely. PJM has determined that 60 days should be sufficient to identify errors. If errors are identified within this period, transactions can be resettled as a matter of course, whether affected parties consent or not. Prohibiting resettlement after 60 days unless all parties consent gives all market participants an incentive to minimize the need for resettlement. If utilities could force parties to resettle after 60 days, there would be no incentive for them to ensure the accuracy of load data sent to PJM.

The ends do not justify the means. The Supplier Tariff requires the Companies and suppliers to observe the PJM settlement process. That process simply does not allow the Companies to force "cooperation" from suppliers to resettle transactions after 60 days, as the Commission has previously found.[67] The Commission must "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law." *Cleveland Elec. Illum. Co. v. Public Util. Comm.*, 42 Ohio St.2d 403, 431 (1975). Commission precedent firmly supports a finding that the Companies violated the Supplier Tariff by attempting to force resettlement.

4. The Companies took adverse action against Direct without cause.

Section XXI of the Supplier Tariff defines an "Event of Breach" and the parties rights and liabilities in the event of such breach. Direct did not breach the Supplier Tariff but was treated as if it did—and threatened accordingly.

An Event of Breach includes "failure to perform any material obligation under this tariff," failure to maintain CRES certification, failure to pay Coordination Services Charges, and

[67] *Duke Energy Ohio*, Case No. 14-841-EL-SSO, Order (Apr. 2, 2015) at 90-91.

bankruptcy.[68] If the Companies believe a supplier is in breach, the Companies must provide written notice of default and an opportunity to cure.[69] If the default is not cured, the Companies may file with the Commission a request to terminate the supplier's Coordination Agreement. "Terminations or suspensions shall require authorization from the Commission."[70]

Direct engaged in no conduct defined as an Event of Breach. Even if it had, the Supplier Tariff expressly forbids the very kind of self-help the Companies exercised here. The Companies breached Section XXI be threatening to make a claim against Direct's letter of credit without prior Commission authorization.[71] And, suffice it so say, the Commission had rendered no findings against Direct when the Companies sued in federal court.

The Companies have violated the Supplier Tariff every step of the way, starting with their initial failure to report accurate load information to PJM. (If one wishes to get technical, the violations actually began earlier, when the Companies programmed their unruly computer system in a way that made it susceptible to the "error" that resulted in load being attributed to the wrong suppliers.) The Companies compounded these violations by inserting themselves between suppliers and PJM, demanding that Direct resettle transactions from *years* earlier, and not only threatening action against Direct if it did not agree, but taking action in the form of a federal lawsuit and Commission complaint. Direct has easily met its burden of proof for Counts 1 and 2.

C. The Companies violated R.C. 4928.17.

The Supplier Tariff does not allow the Companies to meddle in billing issues involving PJM and *any* supplier. That the Companies did so on behalf of their affiliate, FES, is not only a

[68] Supplier Tariff, Sec. XXI.A.1-5.

[69] *Id*. at D.2.

[70] *Id*.

[71] Direct Ex. 1 at 15:1-8.

tariff violation, but a violation of corporate separation statutes as well. Direct has met its burden of proof for this claim as alleged in Count 3.

R.C. 4928.17(A)(2) requires the Companies to implement and follow a corporate separation plan that, among other things, "satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power." R.C. 4928.18(B) authorizes complaints to address violations of a corporate separation plan. The Companies filed a corporate separation plan in Case No. 09-462-EL-UNC, and it was approved in Case No. 10-388-EL-SSO.[72] The plan includes a code of conduct "that all employees of the Companies and the Companies' affiliates must follow."[73] The code of conduct was not followed here.

Most notably, under the code of conduct, "[t]he Companies are required to strictly follow all tariff provisions."[74] The Companies have not followed the Supplier Tariff at all, let alone "strictly." Their entire case is built around the fiction that they do *not* have to follow the Supplier Tariff when to do so would produce a result that the Companies—and the Companies' alone—deem "unjust and inequitable."[75]

Again, it is important to remember that the Companies do not argue that anything "unjust and inequitable" happened to *them* because of Direct's refusal to resettle. If Direct's refusal to resettle harmed anyone, it could only have harmed FES. FES was the "disadvantaged supplier," not the Companies. If there were other disadvantaged suppliers, the record is clear that the Companies are not representing *their* interests in these proceedings. The Companies are

[72] Case No. 09-462-EL-UNC, Application (June 1, 2009); Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010).

[73] Code of Conduct, Sec. VII (opening paragraph).

[74] *Id*. at ¶ 10.d.

[75] Companies Ex. 12 at 21:2.

representing their affiliate's interests, as they have since the very beginning. And the *only* reason the Companies are pursing resettlement on behalf of their affiliate is because the Companies have a Supplier Tariff, which gives them leverage over other suppliers that FES itself does not have. If FES was *not* affiliated with the Companies, its only recourse for the Companies' failure to provide accurate meter data would have been to file a complaint with the Commission—just as Direct had to do when it was similarly-situated with Duke.[76]

The code of conduct also represents that "[t]he Companies will ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa."[77] Serving as FES's collection agent is an anticompetitive subsidy that confers an advantage to FES that no other similarly-situated supplier has.

The Companies knew that FES could not seek resettlement through PJM because the deadline had long since expired. FES found itself in the same situation Direct faces in its pending case against Duke; like Direct, FES sustained wholesale losses as a result of the distribution utility's mistake, but the PJM resettlement process offers no relief for these losses. But unlike Direct, FES is affiliated with the distribution utilities that made the mistake and caused the losses. Direct has no quarrel with FES taking action to protect its interests. But FES cannot collude with its regulated affiliate to leverage the Supplier Tariff for FES's benefit.

Also under the code of conduct, "[t]he Companies are required to apply all tariff provisions in the same manner to the same or similarly situated entities, regardless of any

[76] *See* Companies Ex. 1.

[77] Code of Conduct at 8 ¶ 6.

affiliation or nonaffiliation."[78] Similarly, "[t]he Companies may not, through a tariff provision, a contract, or otherwise, give their affiliates or customers of affiliates preferential treatment or advantages over nonaffiliated competitors of retail electric service or their customers in matters relating to any product and/or service."[79] The Companies stand in the shoes of FES *because* of the parties' affiliation, not in spite of it. To expect the Commission to believe that the Companies would take such extraordinary actions on behalf of a non-affiliate is to expect it to believe anything. Indeed, the Companies have not invoked their New Jersey affiliate's tariffs to remedy Direct's status in that state as a "disadvantaged" supplier.[80]

Furthermore, "[s]hared representatives or shared employees of the Companies and affiliated electric services company will clearly disclose upon whose behalf their public representations are being made when such representations concern the entity's provision of electric services."[81] The individuals who dealt with Direct are shared employees.[82] They steadfastly refused to "clearly disclose" FES as the "disadvantaged supplier." And to this day, the Companies waffle back and forth on whom these shared employees actually represent. They insist that they only represent the FirstEnergy distribution utilities in activities at PJM,[83] yet PJM meeting minutes disclose that these individuals also represent FES.[84] The shared employees initially approached Direct "on behalf of" FES, but when they did not receive the level of

[78] Code of Conduct at 9 ¶ 10.b.

[79] *Id*. at ¶ 10.c.

[80] *See* Direct Ex. 1 at 17:8-12; Direct Ex. 1.3 at 2.

[81] Code of Conduct at ¶ 11.

[82] Tr. at 174:1-3 (Mr. Stein and Ms. Teamann employed by FirstEnergy Service Company).

[83] "Q. Your group does not have responsibility for interacting with PJM on behalf of FirstEnergy Solutions, correct? A. That is correct." Tr. at 145:1-4.

[84] Tr. at 114-122, 144; Direct Exs. 4, 5, 8, 11 (PJM Meeting Minutes reflecting the appearance of Anna Caruthers, Cynthia Teaman and others as representatives of FES).

cooperation they believed they deserved, they quickly put on their utility hat as enforcers of the Supplier Tariff. And the settlement agreement reached in early 2017 requires the Companies to take action not for themselves, but for the benefit of FES.

The record in this case shows a coordinated effort by the Companies and FES to join forces in pursuit of a common interest. From the very beginning, the Companies' set out to recoup money from "advantaged" suppliers and then transfer that money to their "disadvantaged" affiliate supplier so the Companies could pay for their mistake with suppliers' money, not their own. The settlement agreement limits the Companies' liability to FES to whatever amount the Companies are able to collect from "advantaged" suppliers. The Company is merely a straw-man in the PJM transactions.

D. The Companies violated R.C. Chapter 4905.

The Companies also violated statutes prohibiting them from attempting to collect unauthorized charges, as alleged in Count 3. Under R.C. 4905.30(A), a "public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of *every kind* furnished by it, and all rules and regulations affecting them." Additionally, "[n]o public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the [Commission] which is in effect at the time." R.C. 4905.32.

The Companies admit that Direct is and was current on payment of all Coordination Services Charges.[85] The tariff does not authorize the Companies to condition their continued provision of coordination services on Direct's agreement to enter into transactions with the

[85] Case No. 17-791-EL-CSS, Answer ¶ 17.

Companies so that the payment of services provided by *PJM* can be reallocated between Direct and FES. The "demand" that Direct pay such a "charge" violates R.C. 4905.30 and .32.

Additionally, under the second paragraph of R.C. 4905.32, "No public utility shall . . . extend to any person . . . any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service." As explained in the discussion of the Companies' code of conduct violations, the Companies went far beyond the call of duty for FES, not just by demanding resettlement from other suppliers on FES's behalf, but in becoming the alter ego of FES under the settlement agreements. Direct sustained "undue or unreasonable prejudice or disadvantage" as a result, meaning R.C. 4905.35 has been violated as well. *See Consumers' Counsel v. Public Util. Comm.,* 61 Ohio St. 3d 396, 402 (1991) ("Pursuant to R.C. 4905.26, the Commission may find a rate or tariff provision unlawful, unjust, unreasonable or discriminatory, whether that issue is raised by the complaint or *sua sponte* by the Commission."). Additionally, the Companies' tariff violations also violate the duty to render just and adequate service under R.C. 4905.22.

The Companies do not have a right to do as they please. The governing statutes require them to conform their conduct to the Supplier Tariff. They did not do so here, and the reason they did not was to benefit FES at Direct's expense.

E. The Companies' complaint fails as a matter of law.

The Companies are not merely denying and defending their actions. In filing a complaint of their own, the Companies seek the Commission's aid in helping them recover money for FES—and, for good measure, issue an order putting Direct out of business.[86]

[86] Case No. 17-1967-EL-CSS, Compl. at 11, Request for Relief (h).

Count I of the Companies' complaint alleges Direct violated the Supplier Tariff, and Count II alleges violations of R.C. 4905.35(A), R.C. 4928.03 and R.C 4905.26. Both counts fail. Direct has already refuted Count I by showing that the Companies violated their tariff, not Direct. Count II fails because R.C. 4905.35(A) does not apply to Direct, and the other two statutes apply only to the Commission.[87]

R.C. 4905.35(A) prohibits any "public utility" from subjecting any person to undue preference or advantage. The controlling definition of "public utility" under R.C. 4905.35 is provided in R.C. 4905.02; that definition in turn encompasses an "electric light company" as defined in R.C. 4905.03(C); *i.e.,* companies engaged in the business of "supplying electricity . . . to consumers in this state [.]" R.C. 4905.03(C). *Id*. The Companies assume that a different definition of "electric light company" found in R.C. Chapter 4928 also applies to Chapter 4905 (thereby making Direct a "public utility" subject to R.C. 4905.35), but they are mistaken.

When Chapter 4905 was enacted in the 1950s, the only Commission-regulated entities engaged in the "supply" of electricity were vertically-integrated electric utilities. S.B. 3 introduced additional definitions in a new chapter of the Revised Code to describe new business models engaged in various aspects of the "supply" of electricity. For example, the term "electric services company" was introduced to describe CRES suppliers. *See* R.C. 4928.01(A)(9). Chapter 4928 has its own definition of "electric light company," and that definition encompasses an "electric services company" such as Direct. *See* R.C. 4928.01(A). But these definitions apply only in "this chapter," *i.e.,* Chapter 4928. The General Assembly did not amend the Chapter

[87] R.C. 4928.03 is a statement of legislative policy; R.C. 4905.26 is a procedural statute. Neither statute imposes duties on public utilities, CRES suppliers, or any entity except the Commission. *See Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 64 Ohio St. 3d 145, 148 (1992) (describing "the procedural requirements of R.C. 4905.26.")

4905 definition of "electric light company." For purposes of Chapter 4905, an electric light company/public utility encompasses the same entities after deregulation as it did before. These entities do not include Direct or other "electric service compan[ies.]"

CRES suppliers did not even exist when Chapter 4905 was enacted and are not covered by this chapter now. Chapter 4928 establishes standards of conduct for an "electric service company" such as Direct precisely because the standards proscribed in Chapter 4905 apply only to "public utilities" such as the Companies. *See, e.g.,* R.C. 4928.05 (supervision and regulation of competitive and noncompetitive services); R.C. 4928.06 (rulemaking authority for competitive services); R.C. 4928.08 (supplier certification requirements); R.C. 4928.10 (minimum service standards for competitive services).

The Companies have not stated reasonable grounds for complaint. They are entitled to nothing from Direct and their Complaint must be dismissed.

IV. CONCLUSION

This case does not require the Commission to interpret a new or novel issue in favor of one party and against the other. The General Assembly decided that utilities must follow their tariffs regardless of "equitable" considerations, and the Companies decided they would agree to interpret their tariffs "strictly." The Companies also decided to seek and obtain approval of a Supplier Tariff that requires settlements to occur in the manner directed by PJM. The Commission, in turn has already decided that it "is not reasonable to force a CRES provider's consent" under existing PJM rules without an explicit tariff change.[88] When Direct approached PJM stakeholders with a proposal for more flexible resettlement rules, the Companies decided

[88] *Duke Energy Ohio*, Case No. 14-841-EL-SSO, Order (Apr. 2, 2015) at 91.

that they liked the rules just as they are. If the Companies have changed their mind, they can revise the Supplier Tariff to implement different rules.

Direct is entitled to a final order in its favor on all counts of the Complaint.

Dated: June 14, 2018

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt (0067996)
Andrew J. Campbell (0081485)
Rebekah J. Glover (0088798)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3946
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
(All counsel are willing to accept service by email)

ATTORNEYS FOR DIRECT ENERGY BUSINESS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief was served to the following by e-mail this 14th day of June 2018:

James F. Lang
Mark T. Keaney
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
jlang@calfee.com
mkeaney@calfee.com

/s/ Rebekah J. Glover
One of the Attorneys for Direct Energy Business, LLC

Summary: Text Initial Post-Hearing Brief electronically filed by Ms. Rebekah J. Glover on behalf of Direct Energy Business, LLC