

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Filing by Ohio Edison)	
Company, The Cleveland Electric Illuminating)	
Company, and The Toledo Edison Company of)	Case No. 16-481-EL-UNC
a Grid Modernization Business Plan.)	

In the Matter of the Filing by Ohio Edison)	
Company, The Cleveland Electric Illuminating)	
Company, and The Toledo Edison Company)	Case No. 17-2436-EL-UNC
Application for Approval of a Distribution)	
Platform Modernization Plan.)	

In the Matter of the Application of Ohio Edison)	
Company, The Cleveland Electric Illuminating)	
Company, and The Toledo Edison Company to)	Case No. 18-1604-EL-UNC
Implement Matters Relating to the Tax Cuts and)	
Jobs Act of 2017.)	

In the Matter of the Application of Ohio Edison)	
Company, The Cleveland Electric Illuminating)	
Company, and The Toledo Edison Company for)	Case No. 18-1656-EL-ATA
Approval of a Tariff Change.)	

MEMORANDUM CONTRA MOTION TO COMPEL

I. INTRODUCTION

On January 25, 2019, the Environmental Law and Policy Center (ELPC) filed a motion against Interstate Gas Supply, Inc. (IGS) to compel responses to two interrogatories that are, among other things, not relevant to the Commission's determination in this proceeding. Specifically, ELPC seeks the number of customers enrolled in all products IGS offers to residential customers in any utility territory that use demand side management solutions to better shape a customer's load; and the number of Ohio residential customers that IGS has provided with a smart thermostat in each year since 2013, including how many of those were offset by a utility rebate. While IGS sympathizes with ELPC's desire to empower customers with tools that complement a

more advanced distribution grid, it will not be harassed by another party about its business dealings in other states and other service territories in order for them to advance an irrelevant argument. Therefore, the Commission should deny the motion to compel.

II. ARGUMENT

The scope of discovery in Commission proceedings is limited to “any matter, not privileged, which is relevant to the subject matter of the proceeding.”¹ “Therefore, in determining whether or not to grant a motion to compel discovery, the Commission, or the attorney examiner, must determine that the information sought to be discovered is neither privileged nor irrelevant.”² The information sought must be relevant to the Commission’s determination in the case.³ Courts in this state have held that the purpose of discovery is not to permit an unbridled fishing expedition.⁴

The Commission’s precedent holds that CRES provider products and prices in other utility service territories are simply not relevant. For example, The Cincinnati Gas & Electric Company (CG&E) sought an order compelling CRES providers to provide every offer the provider made to each potential customer located in Ohio and the number of customers that accepted such offers. CG&E argued the information was relevant to the Commission’s determination of whether the

¹ Ohio Adm.Code 4901-1-16(B).

² *In re The Dayton Power and Light Company*, Case Nos. 02-2779-EL-ATA, et al., Opinion and Order (Sept. 2, 2003) at 12.

³ *In re Cincinnati Gas & Electric Co.*, Case No. 99-1658-EL-ETP, Entry (May 19, 2000) at 3 (denying a motion to compel because the information sought “will not affect the Commission’s determination of the reasonableness of the stipulation and CG&E’s transition plan”); *In re The Dayton Power and Light Co.*, Case No. 02-2779-EL-ATA (Sept. 2, 2013) at 12 (“the information sought would not be relevant to the determination of this matter”).

⁴ See *Keenan v. Adecco Emp. Servs., Inc.*, 2006 Ohio 3633 (Ohio App., 2006) at ¶ 15 (“[T]he purpose of discovery is not to permit one party to conduct a “fishing expedition” for evidence to support their claim.”); and *Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App. 3d 663, 668 (Ct. App. 1990) (finding the trial court was “not under any obligation to permit [a party] to conduct a fishing expedition for incriminating documents.”)

generation rates it had proposed in its application were just and reasonable. The attorney examiner found that information regarding offers and actual contracts, as well as the information relating to parts of Ohio outside CG&E's service territory "go beyond what is relevant to this matter or reasonably calculated to lead to the discovery of admissible evidence," and denied the motion regarding data from any territory other than CG&E.⁵

Here, ELPC seeks information about the number of customers enrolled in IGS' offers and the number of thermostats provided by IGS outside of the FirstEnergy territory. ELPC alleges the information would speak to whether the cost-benefit analysis conducted by FirstEnergy is reasonable. IGS urges the Commission to find, like in the CG&E Case, that customer enrollment counts and other data related to IGS' operations outside of FirstEnergy's territory are not relevant to the Commission's consideration of the Stipulation in this case. Indeed, the application and Stipulation is specifically tailored to the deployment of *distribution infrastructure*; therefore, there is no clear nexus between ELPC's requested discovery and the matters to be addressed in this case.

Specifically, IGS' offers and the number of customers participating in IGS' offers in other states, like Texas and Illinois, are not relevant to the Commission's determination in this case for several reasons. First, there are significant differences between the markets in other states. Texas, for example, in addition to different market constructs, regulatory and statutory schemes, climates, and competitors, has no capacity market, belongs to different RTO/ISO, and is far more advanced with customer data access than Ohio. While Illinois is further along in its AMI roll out than Ohio, Illinois *still* does not reconcile CRES provider PJM wholesale energy statements based upon actual customer energy usage in each hour. The Stipulation in this case, however, proposes a path to reconciling CRES provider settlement statements based upon actual energy usage.

⁵ *In re Cincinnati Gas & Electric Co.*, Case No. 03-93-EL-ATA, Entry (May 14, 2004). See also *In re AEP Ohio*, Case No. 10-2929-EL-UNC, Transcript Vol. III at 730-731 (granting the motion to compel only with respect to the CRES provider's contracts in AEP Ohio's territory rather than the entire state).

Given the differences between these diverse markets, the structure or popularity of IGS' offerings in other states has no bearing on the popularity of the offerings IGS may provide in the future in the FirstEnergy territory. Second, ELPC's motion is predicated on the flawed assumption that a product offered today or in the past in one market reflects the same product that will be offered in the future in another market with different rules. That is simply not the case.

Third, IGS is just one actor in those markets, just as IGS is one of many CRES providers in the FirstEnergy service territory. Taking IGS' offerings in a vacuum would provide a potentially misleading and confusing reference point, which would be contrary to Ohio Rule of Evidence 403. Fourth, ELPC is active in other states served by IGS and are readily aware of the products and services available in those markets. Indeed, ELPC's headquarters is based in Chicago—it is well aware of the time varying products available in Illinois. Its request for IGS' specific information cannot be viewed as anything other than a fishing expedition to ascertain IGS' proprietary information.⁶

Further, ELPC's attempts to shoehorn IGS' competitive operations into relevancy fail. For example, ELPC wants information about customer enrollment levels in other jurisdictions "in order to determine whether IGS has a basis to claim that, if such products were offered in Ohio, significant numbers of customers would enroll in and benefit from them." Contrary to ELPC's claim, IGS has not made specific claims regarding the amount of customers that may enroll in demand side management solutions to better shape a customer's load. Because IGS has not made these claims, FirstEnergy could not have relied on them when developing its assumptions for its cost-benefits analysis. ELPC argues there is no requirement that customer enrollment levels on its own definitively answer whether customers will benefit from the Stipulation, merely

⁶ And the Commission has ruled that discovery "cannot be used as a fishing expedition." *In re FirstEnergy*, Case No. 80-376-EL-AIR, Entry (Nov. 4, 1980) at 1. See also *Drawl v. Cleveland Orthopedic Ctr.*, 107 Ohio App. 3d 272, 277-78 (Ct. App., 11th App. Dist. 1995) ("[T]rial courts may limit discovery to prevent 'fishing expeditions' where the requested discovery is broad and the party requesting the discovery fails to demonstrate a likelihood that relevant evidence will be obtained.").

that it be relevant. However, current customer enrollment levels of one entity's demand side management programs offered in Texas simply provide *no* answer to whether customers in FirstEnergy's territory will benefit from the savings resulting from the Tax Cuts and Jobs Act of 2017 and the first phase of FirstEnergy's grid modernization plan.

Finally, allowing ELPC to compel IGS to disclose aspects of IGS' competitive operations in other states and territories in this proceeding would set a dangerous precedent and have a chilling effect on intervenor participation.

Similar arguments apply to ELPC's second request. Contrary to ELPC's claim, IGS did not specifically identify smart thermostats as a technology it may rely on in providing demand side management solutions.⁷ IGS also did not file testimony "asserting specific benefits from smart thermostats."⁸ IGS filed testimony in support of the Stipulation provisions that provide wholesale market settlements and data access enhancements. Regarding smart thermostats, IGS' testimony states that these wholesale market settlements and data access enhancements will enable CRES providers to offer innovative products to help customers manage their usage through market-based price signals; one category of these innovative products are demand side management solutions that better shape a customer's load; one example of a demand side management solution that better shapes a customer's load is an internet connected device that controls load; and finally, one example of an internet connected device that can control load is, among others provided, a smart thermostat.

Moreover, ELPC appears to be confusing smart *meters* with smart *thermostats*. Mr. Childers' testimony covers benefits of smart meters – measuring and transmitting granular customer energy usage data – which will be deployed as part of this Stipulation. ELPC Witness

⁷ ELPC Motion at 5.

⁸ ELPC Motion at 5.

Volkman's testimony actually provides the benefits of smart thermostats⁹ – occupancy sensors that automatically adjust temperatures when residents are away, “learning” capabilities to optimize comfort and energy consumption, and the ability to be controllable remotely from many devices making them easier and more convenient to program and adjust – which are referenced once in the Stipulation as an example of an enabling device. Smart meters are capital improvements that modernize a utility's distribution infrastructure and support the functionality needed by IGS to offer innovative products in FirstEnergy's territory, while a smart thermostat is a product available in the market.

Additionally, the number of smart thermostats IGS has provided to residential customers does not provide or lead to relevant evidence. As IGS has been unable to offer innovative products utilizing market-based price signals to residential customers in Ohio, the customers that received these smart thermostats did so without any consideration of the benefits that may accrue from this Stipulation. In other words, the number of smart thermostats IGS has provided over the last five years has no bearing on customer adoption or engagement with the new products it will offer once the meters and data access systems are in place. The use of this number would also be an improper representation of the smart thermostat market and IGS' FirstEnergy customers during the years included in the cost-benefit analysis provided by FirstEnergy.

III. CONCLUSION

For the foregoing reasons, the Commission should deny ELPC's Motion to Compel. However, should the Commission compel IGS to provide any information, IGS reserves its right to provide that information under a confidentiality agreement. The customer enrollment levels of IGS' offerings and the quantity of thermostats IGS has provided its customers is highly proprietary information that should not be publicly disclosed.

⁹ Test. of Volkman at 22, fn. 35.

Respectfully submitted,

/s/ Bethany Allen

Bethany Allen (0093732)

Counsel of Record

bethany.allen@igs.com

Joseph Olikar (0086088)

joe.oliker@igs.com

Michael Nugent (0090408)

michael.nugent@igs.com

IGS Energy

6100 Emerald Parkway

Dublin, Ohio 43016

Telephone: (614) 659-5000

Facsimile: (614) 659-5073

Attorneys for IGS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Contra submitted on behalf of IGS was served by electronic mail upon all parties of record on January 31, 2019.

/s/ Bethany Allen
Bethany Allen

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Summary: Memorandum Memorandum Contra Motion to Compel of IGS electronically filed by Bethany Allen on behalf of Interstate Gas Supply, Inc.