

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

Direct Energy Business, LLC,)	
)	
Complainant,)	
)	Case No. 17-791-EL-CSS
v.)	(consolidated with 17-
)	1967-EL-CSS)
Ohio Edison Company and The Cleveland)	
Electric Illuminating Company,)	
)	
Respondents.)	
)	

**SUPPLEMENTAL BRIEF OF
OHIO EDISON COMPANY AND
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY**

I. INTRODUCTION

This supplemental brief addresses the November 19, 2020 Entry directing the parties to these consolidated proceedings to argue whether and, if so, how the Commission should consider the Supreme Court’s ruling in *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020 WL 5551074, 2020-Ohio-4429 (Sept. 17, 2020) (the “Duke Resettlement Decision”) for purposes of these proceedings. As explained below by Ohio Edison Company and The Cleveland Electric Illuminating Company (collectively, the “Companies”), the Duke Resettlement Decision requires the dismissal of only some of the claims asserted by the parties in these proceedings. Direct’s claims against the Companies based on alleged violations of R.C. 4905.22, 4905.26 and 4905.32 must be dismissed, but the Duke Resettlement Decision does not affect the Commission’s jurisdiction over competitive retail electric service (“CRES”) as governed by R.C. Chapter 4928.

II. ARGUMENT

A. Under the Duke Resettlement Decision, the Commission lacks jurisdiction to consider complaints against a public utility for violation of R.C. Chapter 4905 when the public utility is not acting as a public utility.

In the Commission proceeding that led to the Duke Resettlement Decision, Direct Energy Business, LLC (“Direct”) alleged that the provision by Duke Energy Ohio (“Duke”) of inaccurate meter data to PJM Interconnection LLC (“PJM”) caused Direct to overpay PJM by \$2 million, which allegedly constituted violations by Duke of R.C. 4905.22, 4905.30, and 4905.32.¹ The Commission’s findings were limited to a determination that Duke provided inadequate service to Direct in violation of R.C. 4905.22.² In the Duke Resettlement Decision, the Ohio Supreme Court reversed the Commission’s order for lack of subject matter jurisdiction after finding that Duke was not acting in its capacity as a public utility, as defined in R.C. 4905.02 and 4905.03, when it was providing meter-data-management service to Direct.³ The Court agreed with Duke that the duty of “adequate service” under R.C. 4905.22 applies only when a public utility is acting as a public utility, i.e., which it is “engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state.”⁴

B. Under the Duke Resettlement Decision, Direct’s Claims Against the Companies Should Be Dismissed, In Part.

In Case No. 17-791-EL-CSS, Direct has alleged that the Companies violated their Supplier Tariffs and Coordination Agreements⁵ by asking Direct to sign a bilateral agreement form to

¹ *Id.* at ¶ 10. See *In the Matter of the Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, Case No. 14-1277-EL-CSS, Opinion & Order, at ¶ 31 (Apr. 10, 2019) (“Duke Resettlement Order”).

² Duke Resettlement Decision at ¶ 10; Duke Resettlement Order at ¶ 31.

³ Duke Resettlement Decision at ¶ 25.

⁴ *Id.* at ¶¶ 11, 14-15 (citing the definition of electric light company in R.C. 4905.03(C)).

⁵ The Companies’ Supplier Tariffs are attached as Exhibit EBS-1 to Companies Exhibit 12, Direct Testimony of Edward B. Stein. Count II of Direct’s Complaint alleging a violating of the Coordination Agreements is redundant of Count I, which alleges a violation of the Supplier Tariffs, since the parties’ rights and obligations under the Coordination Agreements are entirely dependent upon the terms of the Supplier Tariffs. Thus, any further references in this brief to the Supplier Tariffs should be understood to include Direct’s claim that the Companies violated the Coordination Agreements.

effectuate resettlement of a \$5.6 million windfall that Direct received after the Companies reported incorrect data to PJM.⁶ Direct also has alleged that the Companies' demand for resettlement of this windfall violated R.C. 4905.22, 4905.26, 4905.32 and R.C. 4928.17.⁷ For the first time in Direct's post-hearing brief, Direct also claimed that the Companies violated the Supplier Tariffs by failing to report accurate meter data to PJM.⁸

1. Direct's R.C. Chapter 4905 claims

Direct's claims based on R.C. 4905.22, 4905.26 and 4905.32 must suffer the same fate as Direct's equivalent claims against Duke in Case No. 14-1277-EL-CSS. As the Court found in the Duke Resettlement Decision, these statutes apply to electric utilities only when "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state."⁹ The Court found no evidence that Duke was engaged in the business of supplying electricity to Direct as a "consumer" when acting as a meter-data-management agent providing meter data to PJM.¹⁰ Similarly, when the Companies are acting as resettlement agent for participants in the PJM market and requesting that a wholesale market participant sign a bilateral agreement to resettle a windfall (or be compensated for an over-charge), the Companies are not supplying electricity to that market participant as a "consumer" as referenced in R.C. 4905.03(C). As such, the Companies were not acting as a "public utility" for purposes of R.C. Chapter 4905 when taking any of the actions alleged to have violated R.C. 4905.22, 4905.26 and 4905.32. Thus, as in the Duke Resettlement Decision, the Commission lacks jurisdiction over those claims.

⁶ See Case No. 17-791-EL-CSS, Direct Complaint at pp. 5-6 (Mar. 20, 2017).

⁷ *Id.* at pp. 6-7.

⁸ Direct Initial Post-Hearing Brief, at 10-12.

⁹ Duke Resettlement Decision, ¶¶ 12-15.

¹⁰ *Id.* ¶¶ 15, 17.

2. Direct's Supplier Tariff claim

Conversely, Direct's claims based on the Supplier Tariffs that relate to the Companies' resettlement practices do not fail for lack of Commission jurisdiction under the Duke Resettlement Decision. Although Direct's claims fail legally and factually, they nonetheless rely on the Commission's jurisdiction over the provision of CRES as defined in R.C. Chapter 4928. When the General Assembly restructured retail electric service in 2009, it enacted several new provisions defining and expanding the Commission's jurisdiction over this more complex blend of competitive and non-competitive retail electric services.¹¹ The General Assembly redefined the Commission's jurisdiction over competitive and non-competitive retail electric services in R.C. 4928.03, 4928.05, 4928.06, 4928.11, and 4928.16, among others. What traditionally had been a two-way relationship between public utility and consumer (as regulated under R.C. Chapter 4905), had expanded into a three-way relationship between public utility, CRES provider and consumer. The General Assembly gave the Commission new authority in Chapter 4928 to regulate that new three-way relationship.

Most notably, S.B. 3 gave customers the ability to competitively shop for retail electric generation service from CRES providers instead of purchasing it directly from their electric distribution utility ("EDU"),¹² and S.B. 3 directed the Commission to adopt rules necessary to ensure that effective competition developed in Ohio.¹³ To address the cooperation required between EDUs and CRES providers to implement customer choice programs, the Commission adopted a rule – O.A.C. 4901:1-10-29 – requiring EDUs "to coordinate with CRES providers to

¹¹ See Companies Ex. 12, at 3. See, generally, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 22; *Maumee v. Pub. Util. Comm.*, 101 Ohio St.3d 54, 2004-Ohio-7, 800 N.E.2d 1154, ¶¶ 6, 13-14 (describing enactment of R.C. Chapter 4928 as part of S.B. 6, governmental aggregation rules adopted under R.C. 4928.06, and "statutory regime that provides a variety of means for consumers to meet their electricity needs, including the creation of entirely new classes of third-party entities in electricity markets.").

¹² Companies Ex. 12, at 3.

¹³ R.C. 4928.06(A).

promote nondiscriminatory access to electric services, to ensure timely enrollment with CRES providers to maintain a customer's electric service, and to timely and correctly switch the customer's electric service between CRES providers.”¹⁴ The same rule also obligated each EDU to adopt a supplier tariff and to enter into agreements with CRES providers to operate under the terms of the supplier tariff.¹⁵ Consistent with the purposes of R.C. Chapter 4928, these rules recognize the Commission must regulate the EDU/CRES provider relationship in order to ensure the assignment and delivery of CRES-sourced energy to their respective customers.¹⁶ The Commission's power to require cooperation and coordination between EDUs and CRES providers is essential to establish and maintain a vibrant and effective competitive electric market.¹⁷ If the Commission lacked jurisdiction over EDUs' supplier tariffs and coordination agreements, the complex, competitive markets Ohio has today would suffer.

Although the Companies disagree that Direct has stated a claim for violation of the Supplier Tariffs, R.C. 4928.16 gives the Commission authority to review any complaint filed against the Companies alleging that the Companies have violated or failed to comply with any rule adopted under R.C. 4928.01 to 4928.15, which would include an alleged violation of the Supplier Tariffs adopted pursuant to R.C. 4928.06 and O.A.C. 4901:1-10-29, as well as any complaint against a CRES provider alleging that the CRES provider has violated the Duty of Cooperation in the Supplier Tariffs, as detailed below. Thus, it is the Companies' position that the Commission has

¹⁴ O.A.C. 4901:1-10-29(A). *See In re Amendments to the Electric Service and Safety Standards*, Case No. 99-1613-EL-ORD, Finding and Order (April 7, 2000). *See also* Rule Summary and Fiscal Analysis for O.A.C. 4901:1-10-29 (filed Oct. 30, 2014), available here: [http://www.registerofohio.state.oh.us/pdfs/4901/1/10/4901\\$1-10-29_RV_A_RS_20141030_1536.pdf](http://www.registerofohio.state.oh.us/pdfs/4901/1/10/4901$1-10-29_RV_A_RS_20141030_1536.pdf) (stating that the statutes authorizing adoption of this rule are R.C. 4928.06, 4928.11 and 4928.53); Rule Summary and Fiscal Analysis for O.A.C. 4901:1-10-20 (filed Nov. 18, 2003), available here: [http://www.registerofohio.state.oh.us/pdfs/4901/1/10/4901\\$1-10-29_RF_A_RS_20031118_1535.pdf](http://www.registerofohio.state.oh.us/pdfs/4901/1/10/4901$1-10-29_RF_A_RS_20031118_1535.pdf) (stating that the statutes authorizing adoption of this rule are R.C. 4928.06 and R.C. 4928.53).

¹⁵ O.A.C. 4901:1-10-29(B), (C).

¹⁶ *See* Companies Ex. 12, at 3. *See also* O.A.C. 4901:1-10-29.

¹⁷ *See* Companies Ex. 12, at 4.

jurisdiction to consider Direct's claims against the Companies for alleged violation of the Supplier Tariffs.

3. Direct's R.C. 4928.17 claim

Direct's Complaint alleges that the Companies have violated R.C. 4928.17 by demanding payment of the windfall Direct received as a result of the Companies' computer error.¹⁸ R.C. 4928.18 states that the Commission "has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person . . . , to determine whether an electric utility . . . has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section."¹⁹ Thus, while Direct's claim alleging a violation of R.C. 4928.17 is legally and factually deficient, it is not impacted by the Duke Resettlement Decision.

C. The Commission Has Jurisdiction to Hear the Companies' Claims.

In Case No. 17-1967-EL-CSS, the Companies primarily have alleged that Direct violated the Duty of Cooperation in the Supplier Tariffs,²⁰ which necessarily includes cooperating with the Companies whenever a billing correction must be made as the result of an error.²¹ The Companies also have alleged that Direct's failure to resettle the \$5.6 million windfall violates R.C. 4928.03 and R.C. 4905.35(A). The Commission has jurisdiction to hear each of these claims.

1. The Companies' Supplier Tariff claim

For the reasons discussed above regarding Direct's claims against the Companies under the Supplier Tariffs, the Commission has jurisdiction under R.C. 4928.16 to hear the Companies' claims against Direct for violating the Duty of Cooperation in the Supplier Tariffs. The Companies' Supplier Tariffs enable coordination and cooperation between the Companies and

¹⁸ Direct Complaint, ¶ 36.

¹⁹ R.C. 4928.18(B).

²⁰ See Companies Ex. 12, at Ex. EBS-1, Original Sheet 1, Section III(C), Page 9 of 49.

²¹ Companies' Complaint, ¶¶ 44-47.

CRES providers so that competition in the provision of CRES can exist as mandated by R.C. 4928.06.²² The Supplier Tariffs include a Duty of Cooperation that obligates Direct and other CRES providers to cooperate with the Companies in the delivery of CRES to customers.²³ The Duty to Cooperate is imposed under O.A.C. 4901:1-10-29, which was adopted by the Commission under R.C. 4928.06 to effectuate robust competition. Thus, the Companies' complaint against Direct for failing to cooperate in the resettlement process as required by the Supplier Tariffs falls under the Commission's jurisdiction under R.C. 4928.16 to hear complaints against electric service companies for violating or failing to comply with R.C. 4928.06 and O.A.C. 4901:1-10-29.

Notably, Direct's Complaint against Duke that led to the Duke Resettlement Decision was limited to alleged violations of R.C. 4905.22, 4905.30, and 4905.32, and the Commission's findings were limited to R.C. 4905.22 and R.C. 4905.26.²⁴ Further, there was no claim involving the Duty of Cooperation because Duke's supplier tariff lacked the requisite language imposing such a duty. No party on appeal to the Ohio Supreme Court asserted R.C. Chapter 4928 as a basis for the Commission's jurisdiction over the parties' dispute.²⁵ By not citing R.C. 4928.16 as a separate, independent jurisdictional basis for its claims against Duke, Direct forfeited its ability to rely on any provisions in R.C. Chapter 4928. Thus, the Ohio Supreme Court necessarily decided the jurisdictional question based on a review only of sections in R.C. Chapter 4905. Indeed, the Court's analysis suggests that the Duke Resettlement Decision is limited to "the purpose of R.C. Chapter 4905" and "the PUCO's regulatory authority as it relates to R.C. Chapter 4905."²⁶ While an R.C. 4905.22 claim under the circumstances presented therein is now jurisdictionally barred,

²² Companies Ex. 12, at 3-4.

²³ *Id.* at 4.

²⁴ *In the Matter of the Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, Case No. 14-1277-EL-CSS, Opinion & Order, at ¶ 31 (Apr. 10, 2019).

²⁵ Direct did not raise R.C. Chapter 4928 until after the Duke Resettlement Decision when it filed a motion for reconsideration.

²⁶ Duke Resettlement Decision at ¶¶ 14, 24.

the Duke Resettlement Decision did not limit the Commission's jurisdiction under R.C. Chapter 4928 to ensure effective competition in the provision of CRES to customers.

Additionally, the Companies' claim for violation of the Supplier Tariffs relates to the switching of retail customers from one CRES provider to another, a matter well within the Commission's jurisdiction under R.C. 4928.06, 4928.11 and 4928.16. Thus, Direct's failure to comply relates to a competitive retail electric service for which Direct is subject to certification.²⁷ The Companies' claim is not based on the provision of meter data to PJM, as in the Duke Resettlement Decision. Instead, the question posed by the Companies' Complaint is whether the explicit terms and conditions of the Supplier Tariffs and Ohio law support a Commission order requiring Direct to cooperate in resettlement because, as the result of a computer error that occurred when customers were switched to Direct, Direct received all the retail revenue from those customers without incurring any of the costs to serve. As Companies witness Stein testified, cooperation between the EDUs and CRES providers in resettlement is "the essential glue that holds the entire competitive retail electric market together."²⁸ The applicable resettlement process here requires only Direct's signature on a form to effectuate resettlement. Whether the Duty of Cooperation in the Supplier Tariffs obligates Direct to sign that form is properly before this Commission for determination.

2. The Companies' R.C. 4928.03 claim

The Companies' Complaint alleges that Direct has violated R.C. 4928.03 by refusing to cooperate with the Companies, thereby preventing CRES providers from having comparable and

²⁷ See R.C. 4928.16(B).

²⁸ Companies Ex. 12, at 8. Mr. Stein explained, "Direct's refusal to cooperate in this case and essentially allowing it to retain the windfall, would send a signal to CRES providers who may decide that participating in Ohio's retail choice market is inadvisable. With fewer participating CRES providers, retail customers have fewer options, which, in turn, could lead to reduced participation in customer choice programs." *Id.*

nondiscriminatory access to the Companies' supplier services.²⁹ R.C. 4928.03 provides in relevant part: "each consumer in this state **and the suppliers to a consumer** shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code."³⁰ If Direct is permitted to retain its windfall, other CRES providers will be deprived of comparable and nondiscriminatory access to the Companies' coordination and resettlement services. As with the Companies' claim for violation of the Supplier Tariffs, the Commission expressly has jurisdiction over this R.C. 4928.03 claim pursuant to R.C. 4928.16.

3. The Companies' R.C. 4905.35(A) claim

The Duke Resettlement Decision does not require the dismissal of the Companies' R.C. 4905.35(A) claim because Direct and the Companies are situated differently than Direct and Duke were in that case. Direct is not accused by the Companies of being an inadequate meter-data-management agent when providing data to PJM. Instead, Direct's fault is its refusal to relinquish a windfall it received while operating as a Commission-certified CRES provider. The Commission has jurisdiction to determine whether Direct's refusal constitutes a violation of R.C. 4905.35.

R.C. 4905.35 prohibits any "public utility" as defined in R.C. 4905.03 from "subject[ing] any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage." Direct meets the definition of a public utility as defined in R.C. 4905.03(C) because it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this

²⁹ Companies' Complaint, ¶ 50.

³⁰ R.C. 4928.03 (emphasis added).

state.”³¹ When Direct refuses to resettle with the Companies, Direct also is acting as a “public utility” as required by the Duke Resettlement Decision. Direct has been certified as CRES provider under R.C. 4928.08, and one requirement of being in the business of providing retail electric generation service to consumers in Ohio is compliance with the minimum service requirements in R.C. 4928.10 and the Commission’s rules. Among other things, R.C. 4928.10 requires “coordination between suppliers for the purpose of maintaining service.”³² Thus, when Direct refuses to coordinate with the Companies in the resettlement of its windfall, Direct is acting as a public utility and in violation of R.C. 4905.35(A).

Further, CRES providers are subject to Commission supervision and regulation under “sections 4905.10 and 4905.31, division (B) of section 4905.33, **and sections 4905.35** and 4933.81 to 4933.90.”³³ R.C. 4928.05(A)(1) provides that the Commission may enforce those excepted provisions via a complaint filed under R.C. 4905.26, among other options. Further, the Commission has authority under R.C. 4928.08(D) and O.A.C. 4901:1-21-15(A)(2) to suspend a CRES provider’s certificate if it has “engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state,” and the Companies’ Complaint requested this specific remedy.³⁴ Thus, the Commission has jurisdiction to hear the Companies’ R.C. 4905.35(A) claim against Direct.

III. CONCLUSION

For the foregoing reasons, the Commission should exercise jurisdiction over the Companies’ claims against Direct and order Direct to resettle its \$5.6 million windfall with the Companies.

³¹ R.C. 4905.03(C).

³² R.C. 4928.10(D)(1).

³³ R.C. 4928.05(A)(1) (emphasis added).

³⁴ Companies’ Complaint, p. 11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 21st day of December, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ James F. Lang

One of the Attorneys for Ohio Edison
Company and The Cleveland Electric
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Summary: Brief Supplemental Brief re Jurisdiction electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company