

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio	)	
Edison Company, The Cleveland Electric	)	
Illuminating Company and The Toledo	)	Case No. 12-1230-EL-SSO
Edison Company for Authority to Provide	)	
for a Standard Service Offer Pursuant to	)	
R.C. § 4928.143 in the Form of an Electric	)	
Security Plan	)	

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**DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC'S  
MOTION TO COMPEL**

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Direct Energy Services, LLC and Direct Energy Business, LLC (collectively “Direct Energy”), pursuant to Rule 4901-1-23 of the Ohio Administrative Code (“O.A.C.”), respectfully move the Commission for an order compelling Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively “FirstEnergy” or “Companies”) to respond to certain interrogatory requests and produce certain documents requested by Direct Energy in its First Set of Interrogatories and Request for Production of Documents, served upon FirstEnergy on April 23, 2012. As will be set forth in the attached Memorandum in Support, FirstEnergy has failed to respond to certain interrogatory requests and produce documents that Direct Energy is entitled to under the rules of this Commission and applicable Ohio law, and the parties have been unsuccessful in trying to resolve this discovery dispute prior to the filing of this Motion.<sup>1</sup>

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<sup>1</sup> An Affidavit explaining the efforts made by Direct Energy’s Counsel to resolve this discovery dispute is attached hereto as Exhibit A.

Respectfully Submitted,

/s/ Joseph M. Clark

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and Direct Energy Business, LLC*

## **MEMORANDUM IN SUPPORT**

### **I. Introduction**

FirstEnergy has attempted to hasten this proceeding since its initial filing a mere three and a half weeks ago. The Commission correctly placed a brief pause on FirstEnergy's hastiness, and created a procedural schedule that attempts to allow non-signatory parties to FirstEnergy's Stipulation to obtain necessary information through a discovery process, and provide a meaningful opportunity to prepare for the hearing in this case. This discovery process is governed by Ohio law, and is crafted to allow for parties to obtain non-privileged information necessary to make informed decisions regarding, in this case, an Electric Security Plan ("ESP"). Non-signatory parties to FirstEnergy's Stipulation have been forced to accommodate, at least in part, FirstEnergy's desired hastiness in this proceeding. Through this Motion, Direct Energy simply requests that it be provided with necessary documentation to continue in its analysis of FirstEnergy's Stipulation/ESP in the short period of time that it has been allotted.

### **II. Law and Argument**

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

Commission rules and applicable Ohio law allow for broad discovery rights in Commission proceedings. Ohio Revised Code ("O.R.C.") § 4903.082 provides that all parties shall be granted "ample rights" of discovery. These "ample rights" include a party's right to receive complete responses to discovery requests so that the party may prepare for hearing, particularly when the case is on an expedited schedule. *See In re Investigation into the pErry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 10 (Mar. 17, 1987) (stating that "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly...").

Further, O.A.C. 4901-1-16(B) provides that “any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.” This rule is similar to Ohio Civ. R. 26(B)(1), which governs the scope of discovery in civil cases. The Supreme Court of Ohio has held, in comparing the Commission’s O.A.C. Rule with Ohio Civ. R. 26, that the rule should be construed liberally to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Ohio Consumers’ Council v. PUCO* (2006), 111 Ohio St.3d 300 at 320, *citing Moskowitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638.

**B. Direct Energy’s Requests and FirstEnergy’s Responses**

FirstEnergy failed to respond to Direct Energy’s Interrogatory Set 1-INT 19 and to produce documents in response to Direct Energy’s document Requests No. 1-002 and No.1-003, and should now be compelled to do so.<sup>2</sup> These Requests, and FirstEnergy’s responses to those requests read as follows:

**Set 1-INT 1-19**

Without identifying any CRES by name, please provide an anonymous breakdown (by percentage) of the CRES load served by CRES providers in the respective Companies’ service territories. Please also include government aggregation customers in the breakdown.

**Response:** Objection. The information sought is irrelevant, beyond the scope of this proceeding, and is subject to confidentiality provisions. Subject to and without waiving the objections, information related to shopping customers, shopping sales, and governmental aggregation shopping is publicly available on the Commission’s website.

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<sup>2</sup> FirstEnergy’s responses to DirectEnergy’s INT No. 19, RPD No. 1-002 and 1-003 within Direct Energy’s First Set of Interrogatories and Requests for Production of Documents are attached hereto at Exhibit B.

**RPD No. 1 – 002**

Please produce copies of a FirstEnergy customer's bills (personal information redacted if necessary) that was receiving CRES service and returned to SSO service with a CRES arrearage remaining unpaid after the 9<sup>th</sup> billing cycle. Specifically, please produce copies of bills for the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> billing cycles where the CRES amount remains unpaid after the 9<sup>th</sup> billing cycle.

**Response:** Objection. Irrelevant, overly burdensome.

**RPD No. 1 – 003**

Please produce copies of a First Energy customer's bills (personal information redacted if necessary) on both a "One Six" and "One Ninth" deferred payment plan as those plans are described under O.A.C. 4901:1-18-05(B). Specifically, please produce copies of bills for the four (4) billing cycles from initial payment on the deferred payment plan for a FirstEnergy customer making payments under a deferred payment plan.

**Response:** Objection. Irrelevant, overly burdensome.

**C. Argument**

As to FirstEnergy's objection to Interrogatory No. 19, the information sought by Direct Energy is very relevant to this case. Direct Energy intends to present evidence about the state of the competitive market and how the Commission, by modifying the Stipulation, can enhance the retail competitive marketplace in the FirstEnergy territories for all CRES. The Commission is required by Section 4928.06, Revised Code, to monitor the state of retail competition and the data requested by Direct Energy will aid the Commission as it considers FirstEnergy's proposed ESP. *See also* Section 4928.06(D), Revised Code. The relevance of this information is further

established by the fact that the Commission's rules require (and the Commission denied a FirstEnergy Motion for Waivers) information regarding how an ESP affects the retail competitive marketplace. *See, for example*, Rules 4901:1-35-03(C)(6), (C)(7), (C)(8), and (C)(9). The information requested by Direct Energy is both relevant as well as within the scope of this proceeding.

Direct Energy wants to be clear that its intent is not to ask FirstEnergy to reveal the identities of any particular company. This is why Direct Energy asked for the information anonymously and for its entire market. Responding to Direct Energy's request would not require FirstEnergy to break any confidentiality agreement. The only purpose of the information is to give the Commission an accurate snapshot of the current state of competition in the FirstEnergy service territory, which is highly relevant to the ESP. FirstEnergy will likely argue in its memorandum contra to this Motion that it is prohibited by the Commission's rules from turning over this information, and that alternatively, turning over the information could give a party an opportunity to derive who the particular CRES are through combined review of this information and other public documents. This claim is erroneous. There are too many other unknown dots to connect that would provide for specific CRES identification. Finally, for a comparable example, during its auction preparations each year Dominion East Ohio provides an anonymous pie chart of competitive retail natural gas supplier ("CRNGS") market share.<sup>3</sup>

Additionally, as to both of Direct Energy's document requests, FirstEnergy responded that the documentation is not relevant, and production would be overly burdensome for FirstEnergy. These responses are inadequate for the reasons stated below and the Commission should require FirstEnergy to produce these documents.

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<sup>3</sup> For example, see slide 10 of this link – <http://www.dom.com/dominion-east-ohio/customer-service/for-businesses/pdf/2011-auction/attachment-15.pdf>. (last accessed on May 9, 2012).

These simple information requests from Direct Energy would provide some explanation of how, under a few scenarios, FirstEnergy customers are informed (or not informed) about CRES services under FirstEnergy utility payment arrangements. Direct Energy intends to present evidence in this case supporting a modification to the Stipulation that would require FirstEnergy to offer a purchase of receivables (“POR”) program to enhance the competitive market in the FirstEnergy service territories. Enhancements to the competitive marketplace are highly relevant to this proceeding, and for the same relevance arguments set forth above, FirstEnergy’s objection should be rejected.

As to FirstEnergy’s contention that the documentation is overly burdensome to produce, it is difficult to fathom how obtaining customer bills that fit this criteria (with personal information redacted), could be so burdensome to a company the size of FirstEnergy that this objection could somehow be upheld, especially considering the broad discovery standards established by Commission rules and applicable Ohio law. Again, in an effort to provide information to the Commission on how the competitive marketplace in the FirstEnergy territory could be enhanced, Direct Energy intends to provide testimony demonstrating how the payment priority system in the FirstEnergy territory is working in reality, how it hinders CRES participation in the FirstEnergy marketplace, and how a POR program could remedy these issues. FirstEnergy is capable of producing this documentation without any overly burdensome effort and should be required to do so. After the Commission denied its Motion for Waivers, FirstEnergy managed to produce a 181 page document in one week, including 154 pages of bill impact information. It is hard to imagine that it would be overly burdensome for FirstEnergy to produce the documentation requested by Direct Energy based upon FirstEnergy’s already proven ability to produce a much more taxing request in a shorter period of time.

### III. Conclusion

Direct Energy, for the reasons set forth herein, respectfully request that the Commission order FirstEnergy to supplement its response to Direct Energy's Interrogatory No. 19, and produce documentation responsive to Direct Energy's document Requests No. 1-002 and No.1-003. Direct Energy and all non-signatory parties to this proceeding are working diligently to maintain pace with FirstEnergy's desired rapidity, and Direct Energy should be given every opportunity to evaluate FirstEnergy's Stipulation/ESP based upon its interests in this proceeding.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Direct Energy Services, LLC and Direct Energy Business, LLC's Motion to Compel* was served upon the parties of record listed below this 9<sup>th</sup> day of May, 2012 via electronic mail.

/s/ Joseph M. Clark

Joseph M. Clark

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## **EXHIBIT A**

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio	)	
Edison Company, The Cleveland Electric	)	
Illuminating Company and The Toledo	)	Case No. 12-1230-EL-SSO
Edison Company for Authority to Provide	)	
for a Standard Service Offer Pursuant to	)	
R.C. § 4928.143 in the Form of an Electric	)	
Security Plan	)	

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**AFFIDAVIT OF COUNSEL**

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STATE OF OHIO                    )  
  ) ss:  
COUNTY OF FRANKLIN        )

Asim Z. Haque, being first duly sworn, states as follows:

1. I am more than eighteen (18) years of age and I am competent to testify to the matters set forth herein from my personal knowledge.

2. I serve as legal counsel for Direct Energy Services, LLC and Direct Energy Business, LLC (collectively "Direct Energy").

3. On April 23, 2012, Direct Energy's First Set of Interrogatories, and Requests for Production of Documents to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company were served by e-mail on counsel for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively "FirstEnergy"). True and accurate copies of the discovery di of FirstEnergy's responses to those discovery requests are attached to Direct Energy's Motion to Compel as

Exhibit B. Direct Energy received FirstEnergy's responses on May 3, 2012, which Direct Energy contends to be incomplete.

4. On May 8, 2012, beginning at 9:00AM EST, counsel for Direct Energy and FirstEnergy partook in a conference call to try and resolve their discovery dispute. It was determined by both Direct Energy and FirstEnergy that their discovery dispute would not be resolved, and Direct Energy advised FirstEnergy that it would be filing a Motion to Compel.

FURTHER AFFIANT SAYETH NAUGHT.




Asim Z. Haque

Sworn and subscribed to me this 9<sup>th</sup> day of May, 2012.



KASANDRA S. CHILDERS  
NOTARY PUBLIC  
STATE OF OHIO  
MY COMMISSION EXPIRES  
JULY 8, 2012

  
Notary Public



## **EXHIBIT B**

**DE Set 1**

Case No. 12-1230-EL-SSO

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan

**RESPONSES TO REQUEST**

**DE Set 1 –  
INT-19**

Without identifying any CRES by name, please provide an anonymous breakdown (by percentage) of the CRES load served by CRES providers in the respective Companies' service territories. Please also include government aggregation customers in the breakdown.

**Response:** Objection. The information sought is irrelevant, beyond the scope of this proceeding, and is subject to confidentiality provisions. Subject to and without waiving the objections, information related to shopping customers, shopping sales, and governmental aggregation shopping is publicly available on the Commission's website.

**DE Set 1**

Case No. 12-1230-EL-SSO  
Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan

REQUEST FOR PRODUCTION

**DE Set 1 –**

**RPD-2**

Please produce copies of a FirstEnergy customer's bills (personal information redacted if necessary) that was receiving CRES service and returned to SSO service with a CRES arrearage remaining unpaid after the 9<sup>th</sup> billing cycle. Specifically, please produce copies of bills for the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> billing cycles where the CRES amount remains unpaid after the 9<sup>th</sup> billing cycle.

**Response:** Objection. Irrelevant , overly burdensome.

**DE Set 1**

Case No. 12-1230-EL-SSO

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan

**REQUEST FOR PRODUCTION**

**DE Set 1 –  
RPD-3**

Please produce copies of a First Energy customer's bills (personal information redacted if necessary) on both a "One Six" and "One Ninth" deferred payment plan as those plans are described under O.A.C. 4901:1-18-05(B). Specifically, please produce copies of bills for the four (4) billing cycles from initial payment on the deferred payment plan for a FirstEnergy customer making payments under a deferred payment plan.

**Response:** Objection. Irrelevant , overly burdensome

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

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**in**

**Case No(s). 12-1230-EL-SSO**

Summary: Motion to Compel electronically filed by Mr. Asim Z. Haque on behalf of Direct Energy Services, LLC and Direct Energy Business, LLC