

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)	

**REPLY OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS,
LLC TO THE MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY THE MOTION TO COMPEL OF DIRECT ENERGY SERVICES, LLC AND
DIRECT ENERGY BUSINESS LLC**

I. INTRODUCTION

On May 9, 2012, Direct Energy Services, LLC and Direct Energy Business, LLC (collectively “Direct Energy”) filed a Motion to Compel in this docket requesting that the Public Utilities Commission of Ohio (“Commission”) compel 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. On May 14, 2012, FirstEnergy filed a Memorandum Contra to the Motion to Compel, making several arguments that the Commission should reject. Direct Energy respectfully files this Reply to the Memorandum Contra explaining why the Commission should reject FirstEnergy’s arguments.

Time is of the essence with this issue, as Direct Energy's testimony in this proceeding is due by 3:00 p.m. EST on Monday, May 21, 2012, and the discovery responses sought by Direct Energy are critical to Direct Energy's testimony. As such, Direct Energy respectfully requests that the Commission require FirstEnergy to electronically serve responses to the discovery requests by 5:30 p.m. EST on Friday, May 18, 2012, so they may be incorporated into testimony filed by Direct Energy.

II. DISCOVERY REQUESTS AND FIRSTENERGY RESPONSES

As explained in its Motion to Compel, Direct Energy requests that the Commission compel FirstEnergy to respond to three discovery requests – one interrogatory and two requests for production of documents. 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.

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 9th billing cycle. Specifically, please produce copies of bills for the 8th, 9th, 10th and 11th billing cycles where the CRES amount remains unpaid after the 9th 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.

III. ARGUMENT

A. Interrogatory No. 19

Interrogatory No. 19 asks FirstEnergy to provide an anonymous breakdown (by percentage) of the CRES load served by CRES providers in the respective Companies’ service territories, and to include government aggregation customers in the breakdown. Consistent with its discovery response, FirstEnergy argues in its Memorandum Contra that this information is irrelevant, beyond the scope of this proceeding, and cannot be disclosed due to confidentiality considerations.

As to FirstEnergy’s relevancy/beyond the scope arguments, Direct Energy intends to file testimony showing 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 information requested by Direct Energy in Interrogatory No. 19 will provide Direct Energy and the Commission with a snapshot of the competitiveness of the current marketplace and provide a macro-level view of supplier market share and effective competition in the FirstEnergy service territories, all of which is very relevant to this ESP.

The Commission's rules require (and the Commission denied a FirstEnergy Motion for Waivers of these rules) information regarding how an ESP affects the retail competitive marketplace,¹ and the Commission is further required to monitor the state of retail competition under its rules, Section 4928.06, Revised Code. Respectfully, and based upon the broad scope of discovery that the rules of this Commission and Ohio law provides for, Direct Energy asks that the Commission discard FirstEnergy's assertion that the information requested is irrelevant and not within the scope. The information requested by Direct Energy *is* relevant (has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence) and is well within the scope of this proceeding.

FirstEnergy also objects on the grounds that the information is confidential and cannot be disclosed under Rule 4901:1-37-04(D)(4), Ohio Administrative Code ("O.A.C."), as well as under its own tariffs. Again, these arguments should be rejected. Direct Energy disputes FirstEnergy's notion that aggregated, anonymous information about the marketplace in the Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison territories violates any confidentiality duties carried by FirstEnergy.

The rule that FirstEnergy relies upon is part of Chapter 4901:1-37, O.A.C., which governs the relationships between electric distribution companies and their affiliates. The specific rule cited, Rule 4901:1-37-04, O.A.C., contains subsections pertinent to structural

¹ See, for example, Rules 4901:1-35-03(C)(6), (C)(7), (C)(8), and (C)(9).

safeguards, separate accounting, financial arrangements, a code of conduct, and emergency situations. Rule 4901:1-37-04(D)(4), O.A.C., is specifically targeted to a code of conduct ensuring that an electric distribution company does not favor its own affiliates. However, code of conduct and affiliate relationship matters are not at issue in this discovery dispute. The Commission should reject this argument inasmuch as the rule cited by FirstEnergy is inapplicable to this discovery dispute.

As to the tariff, the language in the tariff (Companies Supplier Tariffs, Section XVIII, p. 33) permits the disclosure of confidential information if ordered by a regulatory agency or court of law. As stated above, Direct Energy disputes that anonymous, aggregated information about market share is confidential inasmuch as it will not directly reveal the identity or information about any CRES and is not intended to reveal such information. However, even if the Commission finds this information is confidential, the Commission should (as permitted by tariff) issue an order from an administrative agency requiring disclosure as requested by Direct Energy.

It is telling that no CRES filed a Memorandum Contra or a Motion for Protective Order to combat Direct Energy's Motion to Compel. If in fact FirstEnergy is protecting the interests of other CRES, one would logically conclude that these CRES would also seek to maintain the supposed confidentiality of the information requested from FirstEnergy. No such filing was made by any CRES.

FirstEnergy also dismisses the fact that Dominion East Ohio ("DEO") provides similar information (an anonymous pie chart of competitive retail natural gas supplier ("CRNGS") market share) to what Direct Energy requests as part of this proceeding. As demonstrated above, Rule 4901:1-37-04(D)(4), O.A.C., is inapplicable in this instance. Further, Rule 4901:1-25-

02(A), O.A.C. contains no provisions related to the confidentiality of the market monitoring reports submitted to the Commission or its staff. The release of this information by DEO, which also has a “thriving” market with the largest amount of switching of any natural gas company in Ohio, has not harmed the competitive marketplace or overtly harmed or allowed for identification of any of the CRNGS participating in that marketplace. The same reasons that such aggregated, anonymous information for DEO is important and relevant to the ongoing monitoring of the marketplace by the Commission are equally applicable in this instance as well.

FirstEnergy is aware that this information is discoverable, hence its plea for an in-camera inspection. Should the Attorney Examiner grant FirstEnergy’s request for an in-camera inspection, Direct Energy respectfully requests that the Attorney Examiner ensure that such a request is not a delay tactic aimed at preventing Direct Energy from including this information in its testimony due on Monday, May 21st. If an in-camera inspection is indeed conducted and the Motion to Compel is granted, Direct Energy should not be prejudiced by the in-camera inspection, which could be accomplished by (amongst other alternatives) explicitly permitting Direct Energy to file a late-filed exhibit to its testimony or *sua sponte* granting an extension of the testimony deadline for the purpose of including this information in its testimony.

B. RPD No. 1-002 and 1-003

Additionally, as to both of Direct Energy’s document requests, FirstEnergy’s Memo Contra asserts that the requested documentation is not relevant, beyond the scope of the proceeding, and production of RPD No. 1-002 would be overly burdensome for FirstEnergy.²

As explained in the Motion to Compel, these simple document requests are highly relevant inasmuch as they would show, both factually as well as in a pictorial/bill statement

² Memo Contra at 7-10.

format, an explanation of how 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 proposed Stipulation that would require FirstEnergy to offer a purchase of receivables (“POR”) program to enhance the competitive market in the FirstEnergy service territories. These discovery responses are needed to provide information to the Commission as to how the payment priority system in the FirstEnergy territories is working in reality, how it hinders CRES participation in the FirstEnergy marketplace, and how a POR program could remedy these issues.

The bill statements requested will show what FirstEnergy customers actually see as they proceed through the bill payment cycle, including what happens when a CRES drops a customer back to utility service for non-payment, and how confusion about this process caused in part by what customers see on their bills hinders the competitive marketplace. Enhancements to the competitive marketplace are highly relevant to this proceeding, and FirstEnergy’s position that competition itself is not relevant to its own ESP proceeding is a position that should not be supported.

FirstEnergy’s reliance on the Stipulation and Recommendation (“02-1944 Stipulation”) in Case No. 02-1944-EL-CSS is misguided. First, the very terms of the Stipulation prohibit FirstEnergy from relying on the 02-1944 Stipulation in this proceeding or any other proceeding and therefore cannot be used as a reason to deny Direct Energy’s Motion to Compel.³ Further, the 02-1944 Stipulation approved by the Commission is almost ten (10) years old and the practical effects of the payment priority currently employed by FirstEnergy, as will be

³ *WPS Energy Services, Inc. and Green Mountain Energy Co v. FirstEnergy Corp. The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company*, PUCO Case No. 02-1944-EL-CSS, Stipulation and Recommendation at 15 (April 24, 2003).

demonstrated by Direct Energy if given the appropriate discovery as requested, hinders development of the competitive market in the FirstEnergy service territories.

As to its overly burdensome claim, FirstEnergy asserts that the request should be denied because FirstEnergy approximates it would take at least 32 employee hours to develop this information, and this amount of time is unreasonable.

First, Direct Energy's respective RPD requests ask for representative samples of customer bills for a single customer for the two different scenarios. Direct Energy is not asking for samples for multiple customers of the same effect – just one respective sample of customer bills as described in the respective discovery requests. Further, had this case gone through the ordinary process, without the expedited timeframe that FirstEnergy asked be imposed on the non-signatory parties to the Stipulation, then perhaps Direct Energy could have worked with FirstEnergy to gather this information without having to go through litigation channels to find it.

It is not unreasonable or an undue burden to expect efforts (including those described by FirstEnergy) to respond to discovery. FirstEnergy is required by law to make such efforts. Further, it is not unreasonable to expect some effort when the ordinary procedural schedule is as rushed as it is in this case, especially when that accelerated timeframe is at FirstEnergy's request.

Again, in an effort to provide information to the Commission on how the competitive marketplace in the FirstEnergy territories could be enhanced, the documents requested are directly relevant and will aide Direct Energy in its efforts to provide testimony demonstrating how the payment priority system in the FirstEnergy territories is working in reality, how it hinders CRES participation in the FirstEnergy marketplace, and how a POR program could remedy these issues.

III. Conclusion

Direct Energy respectfully requests that the Commission grant Direct Energy's Motion to Compel and **respectfully requests the Commission require FirstEnergy to electronically serve responses to the discovery requests by 5:30 p.m. EST on Friday, May 18, 2012 so they may be incorporated into testimony filed by Direct Energy that is due by 3:00 p.m. EST on Monday, May 21, 2012.**

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Reply of Direct Energy Services, LLC and Direct Energy Business, LLC to The Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company The Motion To Compel Of Direct Energy Services, LLC and Direct Energy Business LLC* was served upon the parties of record listed below this 16th day of May, 2012 via electronic mail.

/s/ Joseph M. Clark

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