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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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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA  
AEP RETAIL ENERGY PARTNERS LLC'S  
MOTION TO COMPEL FURTHER RESPONSES TO DISCOVERY**

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ATTORNEYS FOR OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY

## I. INTRODUCTION

AEPR Energy Retail Partners LLC (“AEPR”) seeks to compel Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”) to provide further responses to AEPR’s Interrogatories 88, 146, and 147. Interrogatory 88 seeks the projected impact of the Companies’ proposed Electric Security Plan (“ESP 3”) on consumers’ bills. Interrogatories 146 and 147 ask the Companies to provide billing impacts based on the results of PJM Interconnection, Inc.’s (“PJM”) 2015/2016 Base Residual Auction (“BRA”), released May 18, 2012.

AEPR’s Motion to Compel is without merit for at least two reasons. First, the Companies cannot be compelled to produce information that they do not have. Second, AEPR’s complaints about the Companies’ projection and bill impact methodology treads old ground: AEPR belatedly seeks to challenge a methodology that the Companies presented in their previous ESP (“ESP 2”) case and that the Commission found was reasonable.<sup>1</sup>

As to the former, the projections AEPR seeks have not been—and should not be—performed. The SSO rates arising from ESP 3 will be based in large part on the competitive bidding process (“CBP”) to procure generation for the SSO load. Neither the Companies nor anyone else know what the results of the CBP under ESP 3 will be. Thus, the Companies have

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<sup>1</sup> AEPR’s motion should also be denied because AEPR has utterly failed to meet the requirements of Rule 4901-1-23 of the Ohio Administrative Code to file a motion to compel. That rule provides, “No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought.” To this end, a motion to compel must include “An affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought.” Such an affidavit is missing from AEPR’s motion. And for good reason since AEPR could not have come even close to showing that it could satisfy the Rule’s requirements about prefiling attempts to resolve this issue. AEPR’s “efforts” consisted of a single email, sent at about noon on May 29, 2012, demanding that the Companies’ counsel respond to their concerns by between 1 PM and 3 PM. Although the Companies’ counsel responded within 30 minutes that he was not available between those hours, AEPR did not attempt to determine whether there was any time when counsel could confer, but instead proceeded to file the instant motion by the end of the day. (See email correspondence between AEPR and the Companies, attached as Exhibit A.)

prudently based their billing impacts on the results of their last auction, reflected in tariff pricing as of April 1, 2012. Billing impacts based on prior auctions were submitted in ESP 2. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO. The Commission accepted the prior auction data in the ESP 2 case. In short, because the information AEPR seeks cannot be accurately ascertained and the Commission has already approved the use of prior auction data to predict billing impact, AEPR's Motion to Compel further responses to Interrogatories 88, 146, and 147 should be denied.

## **II. BACKGROUND**

On May 2, 2012, the Companies made a Supplemental Information Filing that provided data to address the requirements of Ohio Administrative Code Rule 4901:1-35-03(C) for which the Commission did not grant the Companies' requested waivers. (Supplemental Information Filing of Ohio Edison Company, the Cleveland Electric Illuminating Company and The Toledo Edison Company, May 2, 2012.) As required under Rule 4901:1-35-03(C)(3), Exhibit 3 of the Supplemental Information Filing includes ESP 3's rate impacts by customer class. For each class, Exhibit 3 provides a comparison of ESP 2 and ESP 3. The "Current Winter Bill" and "Proposed Winter Bill" are compared in Columns C and D. The dollar and percent increases are provided in Columns E and F.

Despite the detailed information the Companies supplied through Exhibit 3, AEPR propounded discovery requests regarding billing impact. Interrogatory 88 asks the Companies to specify the rate included in each line item of service that represents the Companies' Riders GEN, AER, and NDU rates. With respect to the "Current Winter Bill" column, the Companies indicated that the information provided in Exhibit 3 reflects seasonal pricing in effect as of April

1, 2012. (ESP 3, Companies' Response to AEPR's Interrogatory 88.3.) With respect to "Proposed Winter Bill," the Companies indicated that they had provided "estimated pricing pursuant to paragraph A.4 of the proposed ESP 3 Stipulation." (ESP 3, Companies' Response to AEPR's Interrogatory 88.6.) The data was based on the results of their last auction.

Apparently dissatisfied with the Companies' response to Interrogatory 88, AEPR propounded Interrogatories 146 and 147, asking the Companies to update Exhibit 3 and Interrogatory 88 to reflect PJM's 2015/2016 BRA prices released May 18, 2012. The Companies responded that "the estimated typical bill rate impacts for the period June 1, 2015 through May 31, 2016 are largely dependent on the results of competitive solicitations for SSO service, the results of which are not known." (ESP 3, Companies' Response to AEPR's Interrogatory 146.)<sup>2</sup> AEPR now seeks to compel further responses to all three Interrogatories.

### **III. ARGUMENT**

The Companies have responded to Interrogatory 88. The projections that AEPR seeks through Interrogatories 146 and 147 have not been prepared by the Companies and the Companies should not be compelled to create them. Because the Companies do not know what the results of the auctions will be, any impacts that would be forecast would not be informative; any number would, at this point, be an uninformed guess. Instead, the Companies have provided a comparison of ESP 2 and ESP 3 by submitting billing impacts based on the results of their last auction, reflected in tariff pricing as of April 1, 2012.

The Companies' reliance on prior auction data is reasonable and appropriate. In connection with ESP 2, the Commission found that "based upon the comments received during the local public hearings held in this proceeding, the Commission believes that additional

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<sup>2</sup>The Companies did supplement AEPR 1-11.7 with an attachment that shows the impact of blending the 15/16 capacity auction results with the 1/24/12 SSO auction results.

information regarding the impact of the proposed ESP on customers' bills is necessary before we can consider the [amended] stipulation.” (ESP 2, Entry on Rehearing dated May 13, 2010.) As a result, the Commission directed Staff to present a detailed analysis of ESP 2's billing impact. (*Id.*) Staff presented its analysis through supplemental testimony from Robert Fortney. Fortney attached a chart to his supplemental testimony that is essentially identical in form to Exhibit 3 submitted in this case. He acknowledged that the computation of future charges was based on the most recent auction results. (ESP 2, Supplemental Testimony of Robert Fortney, June 10, 2010, p.3.) The Commission accepted Fortney's data and approved the Stipulation (as amended) entered in ESP 2. (ESP 2, Opinion and Order dated Aug. 25, 2010, p. 46–47.)

AEPR contends that the Companies have “not made the effort to perform the modeling that would be necessary to actually ‘project’ rate class impacts as required by Rule 4901:1-35-03(C)(3).” (AEPR's Motion to Compel p. 5.) But that assertion is incorrect. Rule 4901:1-35-03(C)(3) provides that companies submitting an SSO application must provide “[p]rojected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.” The Companies have complied with Rule 4901:1-35-03(C)(3) by providing projected rate impacts for the term of ESP 3 by utilizing prior auction data.

AEPR also contends that the Companies have failed to provide “meaningful information” about ESP 3's impact on consumers' bills. (AEPR's Motion to Compel 5.) But the projections the Companies have provided are meaningful—more meaningful than the projections AEPR seeks based on uncertain future auction outcomes. Indeed, the projections AEPR seeks may be far less accurate than projections based on auctions already held under ESP 2. Contrary to AEPR's assertion, the Companies do not “pretend that the market in 2014/2015 and 2015/2016 will be absolutely no different than the market in 2012.” (AEPR Motion to Compel 6.) Instead,

the Companies have based their projections on the most reliable currently available data—prior auctions.

Finally, AEPR claims that its Motion to Compel is its only recourse. That is not true. AEPR could have had a witness submit alternate projections. It failed to do so. And, at hearing, AEPR may cross examine the Companies' witnesses about the customer billing impact projections. In short, granting AEPR's Motion to Compel is not necessary. It is also not proper, given that the Companies complied with Rule 4901:1-35-03(C)(3).

#### **IV. CONCLUSION**

For the above reasons, the Companies respectfully request that the Commission deny AEPR's Motion to Compel Further Responses to Interrogatories 88, 146, and 147.

Dated: May 31, 2012

Respectfully submitted,

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ATTORNEYS FOR OHIO EDISON  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra AEP Retail Energy Partners LLC's Motion to Compel Discovery Responses was sent to the following by e-mail this 31st day of May, 2012:

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# **EXHIBIT A**

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Mike,

I am not available today between 1 and 3, but could possibly talk more toward the end of the day today or tomorrow morning.

In the future, you don't need to copy "elmiller@firstenergycorp.com" <elmiller@firstenergycorp.com>, "haydenm@firstenergycorp.com" <haydenm@firstenergycorp.com>, and "mparke@firstenergycorp.com" <mparke@firstenergycorp.com> on emails related to the FirstEnergy Utilities. But please add dakutik@jonesday.com to your distribution list. Thanks.

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▼ Michael Dortch ---05/29/2012 12:05:19 PM---Gentlemen and Ms. Miller: AEP Retail is dissatisfied with the companies' response to discovery quest

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Gentlemen and Ms. Miller:

AEP Retail is dissatisfied with the companies' response to discovery questions it asked about the typical bills comparison analysis in FirstEnergy's supplemental filing. Accordingly, it will pursue a motion to compel responses unless we are able

to resolve our dispute regarding this discovery. In particular, I would like to discuss FirstEnergy's responses to AEPR Int. no. 88, 146 and 147. I am available between 1:00 and 3:00 today for this purpose.