BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

DIRECT ENERGY BUSINESS, LLC, Complainant, v. OHIO EDISON COMPANY, and CLEVELAND ELECTRIC ILLUMINATING COMPANY, Respondents.	)	Case No. 17-791-EL-CSS

COMPLAINANT'S REPLY MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL DISCOVERY

Respondents give three excuses for refusing to answer a single interrogatory or identify a single document:

1. The discovery references Respondents' federal court lawsuit;
2. The discovery constitutes a "fishing expedition"; and
3. The discovery is part of a "smokescreen" and "smear campaign."

None of these excuses justify Respondents' refusal to comply with their discovery obligations. Direct Energy Business, LLC's (Direct) motion to compel should be granted.

A. Direct is not seeking "Federal Court Case Discovery."

Respondents ask the Attorney Examiner to "preclude Direct from improperly seeking discovery in this case on matters directly relating to or that expressly reference defined terms or other issues in the Federal Court Case." (Mem. Contra at 4.) This is absurd. Both Direct's Complaint and Respondents' federal complaint arise from a common set of facts. Both cases

involve the same conduct, among the same parties, during the same general period of time. The legal significance of these facts may have different implications in each case, but the underlying *facts* are the same. Consequently, virtually *any* fact discovery in this case will necessarily "relate" to the federal court case—and vice versa.

One need look no further than Respondents' pleadings to confirm that both cases share common facts. Both cases stem from Respondents' furnishing of incorrect information to PJM. Respondents' Answer refers to this series of incidents as "the data reporting issue." (Answer, Affirmative Defense ¶ 1.) In their federal court complaint, Respondents describe this very same series of incidents with a defined term; the "Supplier Mismatch Issue." (*See* Mem. Contra at 2.) Likewise, Respondents' PUCO Answer refers to the entity affected by this mistake with three different terms; the "previous supplier," the "prior supplier" and the "Harmed Supplier." (Answer ¶¶ 11, 13; Affirm. Defenses ¶6.) Respondents' federal court complaint uses the defined term "Harmed Supplier" to refer to the same entity. (*See* Mem. Contra at 3.)

Direct's discovery adopted Respondents' defined terms for no other reason than to make the subject matter of the discovery perfectly clear. Respondents' claim that the use of these defined terms renders the discovery improper is baseless and petty.

Respondents' discussion of federal versus Commission jurisdiction, alleged differences in the scope of federal versus state discovery, and who is seeking what relief, where—all of this is beside the point. Respondents' retaliatory lawsuit in federal court does not allow them to avoid discovery served *in this case* related to claims and defenses asserted *in this case.*

B. Discovery served to address Respondents' defenses is not a "fishing expedition."

Respondents' pleadings *in this case* contain assertions and representations about the "Harmed Supplier" and "some eleven suppliers," as well as Respondents' version of events

surrounding the "data reporting issue." (Answer, Affirm. Defenses ¶¶1, 6.) Given that *Respondents* raised these issues, it is silly for them to characterize Direct's discovery as a "fishing expedition." (Mem. Contra at 5.)

The closest Respondents come to an actual legal argument is that the discovery is irrelevant because the subject matter is "undisputed." Direct does not need discovery about other suppliers, Respondents say, because "Direct has not and cannot dispute that it received a $5.6 million windfall." (*Id*. at 6.) Discovery concerning Respondents' settlement and assignment with the Harmed Supplier is unnecessary, argue Respondents, because "Direct has made no effort to contest the accuracy of the $5.6 million settlement amount." (*Id*.) And discovery about the "Supplier Mismatch Issue/data reporting issue" is supposedly out-of-bounds because Respondents "admit their mistake." (*Id*. at 8.)

Respondents' misguided claim that certain facts or issues are "undisputed" basically makes Direct's point. Direct cannot fully and adequately dispute the factual bases of Respondents' defenses without more information. Perhaps the "data reporting issue" resulted in other errors that offset or eliminated Direct's alleged "windfall." Perhaps the error affected more than eleven suppliers. Perhaps there is a history of Respondents seeking to "resettle" with PJM when their affiliated supplier would benefit, but avoiding resettlement when it would not. Or perhaps the "mistake" is a systemic, ongoing issue that Respondents have failed to fix. None of these scenarios can be dismissed out-of-hand. Direct must be entitled to explore these issues in discovery.

C. Respondents' accusations of "slander" are all the more reason to compel discovery.

Direct's motion to compel spells out exactly why there is reason to believe that Respondents have violated their Code of Conduct. Respondents dismiss this observation as a

"smear campaign" and "slander." (Mem. Contra at 10-11.) This leaves two possibilities: either Respondents *have* violated their Code of Conduct, or Direct is just making things up for a "smear campaign." The only way to get to the bottom of this is to compel responses to Direct's discovery.

Respondents are simply wrong to say that their corporate separation policies "have *nothing* to do with the subject matter of this proceeding." (Mem. Contra 11, emphasis in original.) The Complaint does not "solely address" Respondents' Supplier Tariff. (*Id*. at 10.) Count III alleges statutory violations, including violation of R.C. 4928.17—titled "Corporate Separation Plans." (Complaint ¶ 36.) The requested discovery is directly relevant to this allegation. And it is the relevance of the subject matter of the discovery that counts—not Direct's alleged motive in propounding it.

Respondents could easily clear up any "misdirection and hyperbole" by coming clean with the identity of the Harmed Supplier. (*See* Mem. Contra at 10.) That they have not done so is telling.

The Attorney Examiner should grant Direct's motion to compel and order Respondents to serve responses to the requested discovery within 10 calendar days.

Dated: June 19, 2017

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt
Andrew J. Campbell
Rebekah J. Glover
WHITT STURTEVANT LLP
88 E. Broad St., Suite 1590
Columbus, Ohio 43215
Telephone: (614) 224-3946
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

(All counsel are willing to accept service by email)

ATTORNEYS FOR DIRECT ENERGY BUSINESS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complainant's Reply Memorandum in Support of Motion to Compel Discovery was served to the following by e-mail this 19th day of June 2017:

James F. Lang
Mark T. Keaney
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
jlang@calfee.com
mkeaney@calfee.com

/s/ Rebekah J. Glover
One of the Attorneys for Direct Energy Business, LLC

Summary: Reply Memorandum in Support of Motion to Compel Discovery electronically filed by Ms. Rebekah J. Glover on behalf of Direct Energy Business, LLC