BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING BRIEF
OF
OHIO EDISON COMPANY AND
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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I. INTRODUCTION

The two fundamental issues in this proceeding are enforcing the terms of Commission-approved supplier tariffs and safeguarding the future integrity of the competitive retail electric market in Ohio. The genesis of this dispute concerns a mistake in reporting data to PJM Interconnection LLC ("PJM") made by Ohio Edison Company and The Cleveland Electric Illuminating Company (collectively, the "Companies"), which resulted in Direct Energy Business, LLC ("Direct") receiving a $5.6 million windfall. As a result of the error, another supplier paid $5.6 million for the power supplied to three of Direct's customers. Direct received all the retail revenue the customers paid for that power without incurring any of the costs. Direct has refused to relinquish this windfall in violation of the Companies' Commission-approved Supplier Tariffs.[1] The Commission cannot allow this injustice to stand.

The Companies' Supplier Tariffs enable coordination and cooperation between the Companies and competitive retail electric service ("CRES") providers so that competition in the provision of CRES can exist. 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,[2] which necessarily includes cooperating with the Companies whenever a billing correction must be made as the result of an error. The process of correcting meter, billing, or coordination errors is commonly known as "settlement" or "resettlement". Although Direct has cooperated with FirstEnergy electric distribution utilities ("FE EDUs") and consented to

[1] The Companies' Commission-approved Supplier Tariffs are attached as Exhibit EBS-1 to Companies Exhibit 12, Direct Testimony of Edward B. Stein.

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

resettlement in the past where it has been *overbilled* due to an error, here, Direct refused to cooperate in resettling $5.6 million it was *underbilled*.

Direct cannot effectively dispute it has retained a $5.6 million windfall, so it has attempted to argue about everything other than that windfall. Among other things, it has advanced unfounded theories that the Companies violated their corporate separation obligations under R.C. 4905.33, R.C. 4905.35 and R.C. 4928.17. But the record unmistakably shows that the Companies acted consistent with their corporate separation obligations under Ohio law, including their obligations under the Commission-approved Supplier Tariffs. The record also demonstrates that Direct has manufactured a demonstrably false narrative to retroactively justify its refusal to cooperate with the Companies' resettlement efforts. Instead of doing the right thing and honoring its commitments under the Supplier Tariffs, Direct has chosen to delay and obstruct the Companies' good faith efforts to restore parity to all impacted CRES providers. Indeed, Direct has taken positions in this case that are directly contrary to positions Direct has taken in other Commission proceedings and that support resettlement here.

Despite Direct's protestations in this case, the parties otherwise agree that the Commission has the authority to order Direct to cooperate in and consent to resettlement to ensure the competitive retail electric market functions properly.[3] Under the circumstances presented here, the law, the facts, and equity militate in favor of ordering Direct to consent to resettlement. Thus, consistent with its statutory authority and pursuant to the terms of the Companies' Supplier Tariffs, the Commission should order Direct to resettle with the Companies its $5.6 million windfall.

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[3] *See* Hearing Transcript ("Tr.") Vol. I, at 27-28 (Direct witness Teresa Ringenbach agreeing that the Commission can require CRES providers to resettle billing errors at PJM under a supplier tariff). *See also* Tr. Vol. I, at 57 (Direct witness Ringenbach agreeing that whether the Companies have authority under the Supplier Tariff to requirement resettlement is a legal question for the Commission to answer in this case).

II. BACKGROUND

A. The State of Ohio Restructured the Electric Market to Permit Customer Choice Concerning Retail Electric Generation Service.

Effective January 1, 2001, the state of Ohio restructured its electric market to give customers the ability to competitively shop retail electric generation service from CRES providers instead of purchasing it directly from their electric distribution utility ("EDU").[4] To implement customer choice programs, the EDUs and CRES providers were required to develop supplier tariffs and coordination agreements setting forth the basic requirements for interaction and coordination between the EDU and CRES providers necessary to ensure the delivery of CRES to customers.[5] In other words, supplier tariffs and coordination agreements were designed to ensure EDUs and CRES providers cooperated and coordinated to deliver electric service to shopping customers.[6] Cooperation and coordination between EDUs and CRES providers were essential to establish and maintain a vibrant and effective competitive electric market.[7] Accordingly, the Companies require CRES providers operating in their service territories to comply with and be contractually bound by the terms and conditions set forth in supplier tariffs and coordination agreements.[8]

B. The Companies and Direct Executed Coordination Agreements.

On or around December 5, 2000, Strategic Energy LLC (the predecessor-in-interest to Direct) and the Companies executed the Coordination Agreements, which bound the parties to the

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[4] Companies Ex. 12, at 3.

[5] *Id.*; *see also* O.A.C. 4901:1-10-29.

[6] *Id*.

[7] Companies Ex. 12, at 4.

[8] *Id*. at 3-4.

terms and conditions set forth in the Companies' Supplier Tariffs.[9] Direct, as the successor-in-interest to Strategic Energy LLC, is obligated to comply with the terms and conditions set forth in the Supplier Tariffs.[10] Among other things, the Supplier Tariffs require the Companies and Direct to cooperate with each other to ensure the delivery of CRES to customers in the Companies' service territories (specifically defined in the Supplier Tariffs as the "Duty of Cooperation").[11] In addition, the Supplier Tariffs obligate the Companies to aggregate individual customer usage data on a daily basis respective to each CRES provider and submit that data to PJM.[12] PJM then uses that aggregate retail customer usage data to bill CRES providers for energy, capacity, and other generation-based services used by their enrolled retail customers.[13]

C. Billing and Resettlement Processes Under the Supplier Tariffs.

Under the terms of the Supplier Tariffs, the Companies submit aggregated customer load information to PJM for billing on two separate occasions.[14] The first submittal, referred to as "Settlement A", occurs two days after the operating day and may sometimes include estimated load data for customers.[15] By way of example, for a customer's consumption of electricity on Monday, the Companies would submit that load information to PJM on Wednesday. The second submittal to PJM, referred to as "Settlement B", occurs two months (or 60 days) after the operating

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[9] *Id*. at 3-5. Like the Supplier Tariffs, the Coordination Agreements between Direct and the Companies are attached to Companies Ex. 12 as Ex. EBS-1.

[10] Companies Ex. 12, at 4.

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

[12] Companies Ex. 12, at 4-5.

[13] *Id*. at 5.

[14] *Id*. at 4-5.

[15] *Id*. at 5.

month.[16] Again, by way of example, the Companies would submit the load data for the entire month of January, which includes any true-ups to estimated data submitted in Settlement A, at the end of March.

Given that the Companies manage and submit millions of customers' data on a daily and monthly basis via the Settlement A and B processes described above, there may be meter errors, billing errors, coordination issues, incorrect customer setup information, and other errors that result when submitting this load data to PJM.[17] When an error is discovered, the Companies promptly work to remediate any fall out, which often depends on the type of error involved, the timing of the error's discovery, and the extent to which the error impacts other CRES providers. For instance, if the error is discovered and confined to the load data submitted during the Settlement A process, the system will self-correct through true-ups in the Settlement B process.[18] If any errors are discovered beyond 60 days (i.e., outside of Settlement B), the Companies (as well as other FirstEnergy electric distribution utilities, hereinafter "FE EDUs") and impacted CRES providers initiate resettlement using PJM's Billing Line Item 1980 titled "Miscellaneous Bilateral".[19] When using this bilateral agreement process to initiate resettlement outside 60 days (often informally described as "Settlement C"), the Companies must obtain approval of the CRES providers impacted by the error and submit final billing determinants to PJM to facilitate the exchange of

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[16] *Id*.

[17] Companies Ex. 12. at 6.

[18] *Id*.

[19] *Id*. For a sample of a Miscellaneous Bilateral used by the Companies to remediate the impact of the Computer Error (defined below), see Direct Exhibits 12c and 13c.

payment between the CRES providers harmed by the error and the CRES providers enriched by the error.[20]

Importantly, in any situation involving resettlement, the Companies' assignment of load obligations for customers' generation service is a zero-sum game, meaning that when one CRES provider is assigned a load obligation, another CRES provider (or multiple CRES providers) were not assigned that load obligation.[21] Accordingly, resettlements and bilateral agreements are designed to remediate any adverse financial consequences to any impacted CRES providers and, most importantly, to restore equity to all parties impacted by the error.[22]

For resettlements more than sixty days after an error, the impacted CRES providers must sign bilateral agreements with the Companies so that PJM can process the transfer of funds from the "Advantaged Supplier" who received the windfall through the Companies as intermediary to the "Disadvantaged Supplier" who was overcharged.[23] Without resettlement, the Advantaged Supplier will have received revenues but incurred no costs, while the Disadvantaged Supplier will have incurred costs but received no revenues.[24] In this case, the Disadvantaged Supplier purchased all the power for Direct's customers, while Direct received all the revenue from those customers.[25] The inequity of this outcome is obvious. Fortunately, in the Companies' experience, most CRES providers do not obstruct or otherwise refuse to cooperate in the resettlement process.[26]

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[20] *Id*.

[21] *Id*.

[22] Companies Ex. 12, at 6.

[23] *Id*. at 6-7.

[24] *Id*. at 6-7, 10.

[25] *Id.* at 10.

[26] *Id*. at 6-7.

If the Advantaged Supplier (i.e., Direct) refuses to cooperate in resettlement, the Disadvantaged Supplier may insist that the Companies reimburse it for any shortfall incurred from the error.[27] Under such circumstances, the Companies will work with the Disadvantaged Supplier to provide it a remedy as the Companies did here.[28]

D. The Companies Discovered an Error in the Reporting of Data to PJM and Promptly Worked to Fix It.

The error that gave rise to this dispute involved the enrollment of three customers who switched to Direct as their new CRES provider.[29] Specifically, on or around December 1, 2013, Direct became the CRES provider to a new customer ("Customer 1") pursuant to a CRES agreement in The Cleveland Electric Illuminating Company's ("CEI") service territory.[30] On or around May 22, 2014, Direct became the CRES provider to a new customer ("Customer 2") pursuant to a CRES agreement in Ohio Edison Company's ("OE") territory. Then, on or around June 5, 2014, Direct became the CRES provider to another customer ("Customer 3") pursuant to a CRES agreement in CEI's service territory.[31] Customers 1, 2, and 3 are collectively referred to herein as the "Affected Customers."

During this time, an internal computer error in the Companies' system inadvertently failed to report to PJM the Affected Customers' enrollment switches to Direct, their new CRES provider ("Computer Error").[32] Instead, the Affected Customers' load obligations remained assigned to

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[27] *Id*.

[28] *Id.* at 7-8.

[29] *Id*. at 8.

[30] *Id*.

[31] *Id.* at 8.

[32] *Id*. at 9.

their previous CRES provider; therefore, the cost of energy and capacity for the Affected Customers, which should have been charged to and paid by Direct (i.e., the new CRES provider) through PJM, was inadvertently charged to and continued to be paid by the Affected Customers' previous CRES provider, which in this case was FirstEnergy Solutions Corp. ("FES").[33] In other words, the load obligations at PJM did not switch to Direct as they should have, which resulted in FES paying for the energy and capacity of its former customers and Direct collecting revenues from the Affected Customers with no corresponding market costs.[34] In total, as a result of the Computer Error, Direct retained $5,602,981.39 that it should have paid for the cost and energy of its Affected Customers.[35]

Direct, FES, and the Affected Customers were not the only parties impacted by the Computer Error. The Computer Error also failed to report to PJM several other customers' switches to new CRES providers during this time, which caused similar problems with other CRES providers in Ohio, New Jersey, and Pennsylvania.[36] In total, the Computer Error affected thirteen suppliers and twenty retail customer accounts in Ohio, New Jersey, and Pennsylvania.[37] The total financial impact of the Computer Error in all three states was approximately $25 million.[38]

The Companies first discovered the Computer Error on November 3, 2015, after an Advantaged Supplier in Ohio (not Direct or FES) notified the Companies that the load of its largest

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[33] *Id*.

[34] *Id*. *See* Tr. Vol. I, at 28 (Direct was paid by Affected Customers for retail electric generation service).

[35] More specifically, Direct should have paid $5,323,309.59 for Customer 1 from December 1, 2013 to June 30, 2015, $205,248.90 for Customer 2 from May 22, 2014 to November 30, 2014, and $74,422.90 from June 5, 2014 to November 30, 2015. *Id*. at 9-10. *See also* Direct Ex. 2C, at Ex. 1.4.

[36] Companies Ex. 12, at 11.

[37] *Id*.

[38] *Id*.

customer was missing from the total load obligations that the Companies reported to PJM.[39] The Companies and their affiliate FE EDUs immediately conducted a comprehensive, diligent review of all customer accounts to identify the extent and impact of the Computer Error.[40] The Companies contacted Direct and all other Advantaged Suppliers, as well as all Disadvantaged Suppliers.[41]

Most of the Advantaged Suppliers cooperated with Companies' resettlement efforts under the Supplier Tariffs to make whole the Disadvantaged Suppliers.[42] Specifically, ten Advantaged Suppliers cooperated and worked with the Companies and their affiliate FE EDUs to reach a prompt, equitable resolution for all impacted parties.[43] In fact, nine of the Advantaged Suppliers executed bilateral agreements the month after being notified of the Computer Error.[44] Direct refused to cooperate in resettlement and refused to return its $5.6 million windfall.[45]

E. Direct Refused to Relinquish Its Windfall and Participate in the Companies' Resettlement Efforts.

1. The Companies notified Direct of the Computer Error and provided detailed information to Direct concerning the nature, scope, and impact of the Computer Error.

On December 18, 2015, the Companies notified Direct via email about the Computer Error and provided detailed billing and financial information about the Affected Customers.[46] Specifically, the Companies identified the customer names, account numbers, and precise dates in

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[39] *Id.* at 11-12.

[40] *Id.*

[41] *Id.* at 13.

[42] Companies Ex. 12, at 11.

[43] *Id.* at 13.

[44] *Id.*

[45] *Id.* at 11.

[46] *Id.* at 13.

question.[47] Not only that, the Companies provided Direct with additional background information concerning the nature, scope, and impact of the Computer Error, and attached detailed financial calculations in Excel spreadsheets indicating the precise energy and capacity costs (down to the exact dollar and cent) which Direct should have been charged and paid but for the Computer Error.[48] As part of the same email, the Companies asked Direct to schedule a conference call to discuss any potential concerns or questions that Direct had with respect to the Computer Error.[49] Approximately ten minutes later, the same employee for the Companies sent a second email to Direct concerning a separate resettlement involving Direct and the Companies' affiliate in New Jersey – Jersey Central Power & Light Co. ("JCP&L").[50] In the JCP&L resettlement, Direct was a Disadvantaged Supplier.[51]

On December 28, 2015, having received no response from Direct, the Companies contacted Direct to confirm receipt of the financial and energy calculations and other information the Companies supplied ten days earlier, and to again offer assistance with any questions or concerns about the Computer Error.[52] Direct responded later that day to confirm receipt of some information

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[47] *Id.*

[48] Companies Ex. 12, at 13-14; Companies Exhibit 7c, Excel Spreadsheet Containing Detailed Financial/Energy Data for Affected Customers; Direct Exhibit 1, Direct Testimony of Teresa Ringenbach, at Ex. 1.3, p. 1-2.

[49] Direct Ex. 1, at Ex. 1.3 at 1-2.

[50] Companies Exhibit 4, Dec. 18, 2015 email at 1:02 p.m.

[51] *See* Companies Ex. 4. This is not the only instance where Direct has been a Disadvantaged Supplier. In the past year, Direct cooperated in and consented to two market resettlements involving JCP&L where it received $60,613.70 and Pennsylvania Electric Company (an FE EDU in Pennsylvania) where it received $14,208.04, as a Disadvantaged Supplier. *See* Companies Ex. 12, at 19. On both occasions, Direct executed bilateral agreements without any delay or objection. *Id*. at 19-20. More recently, Direct received a bilateral agreement from JCP&L on April 23, 2018 to effect a resettlement in which Direct was a Disadvantaged Supplier. Tr. Vol. I, at 42-43. Direct witness Ringenbach was not aware of Direct ever refusing to enter into a bilateral agreement involving a credit to Direct. *Id.* at 43.

[52] Companies Ex. 12, at 14; Direct Ex. 1, at Ex. 1.3, p. 1.

but advising that it was missing other information.[53] Less than an hour later, the Companies sent Direct detailed financial calculations for the energy costs of the Affected Customers.[54] The Companies also again sent Direct detailed financial calculations for the capacity costs of the Affected Customers.[55] The Companies again contacted Direct on December 31, 2015 to follow up about their request to initiate resettlement to make whole the Disadvantaged Supplier who paid for the power supplied to the Affected Customers.[56]

2. Direct delayed and ultimately rebuffed the Companies' good faith efforts to coordinate resettlement and restore parity to impacted parties.

On January 4, 2016, an employee for the Companies contacted Direct "to discuss the status of the account error [Computer Error]" and to request "an estimate of when [Direct's] review will be complete and what additional information I can provide to assist with resolving this issue."[57] The following day, on January 5, 2016, in-house counsel for Direct contacted the Companies to explain that Direct was "currently conducting a review of this situation", but "hop[ed] to have the review complete by next week at the earliest."[58] That same day, on January 5, 2016, the Companies and Direct communicated several times by phone and email, with the Companies again offering to provide any "further information . . . to help reach [a] conclusion", including offering to provide "proof – like a receipt of sorts – from [the Companies'] settlement system to show

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[53] *Id*.

[54] Companies Exhibit 5, December 28, 2015 email at 2:22 p.m.; Companies Ex. 7c; Tr. Vol. I, at 37, 39, 47-48, 50-52.

[55] Companies Exhibit 6, December 28, 2015 email at 3:26 p.m.

[56] Direct Ex. 1, Ex. 1.3 at 3-4.

[57] *Id*. at 3.

[58] *Id*. at 10.

Direct did not have this customer's load during the time frame under review."[59] The following day on January 6, 2016, the Companies followed up with Direct again to offer any additional information about the Affected Customers' financial/energy data.[60]

On January 11, 2016, Direct eventually responded by assuring the Companies that Direct "was still working on [its] due diligence."[61] However, in the same email, Direct requested, for the first time, the identity of the Disadvantaged Supplier (i.e., FES), so that Direct could "work through this directly with them."[62] The Companies were perplexed by Direct's insistence that it work directly with the Disadvantaged Supplier, instead of using the Companies as an intermediary, as was the normal course of business in any resettlement process, including other resettlement efforts involving Direct and the FirstEnergy utilities.[63] No other CRES provider made similar demands, which is understandable given that the Companies were best positioned to resolve the matter (i.e., the Companies held all the confidential and proprietary data necessary to make whole all impacted CRES providers) and given that the terms of the Supplier Tariffs required the Companies to keep this information confidential.[64]

Direct witness Teresa Ringenbach confirmed at hearing that Direct's request to work directly with the Disadvantaged Supplier was abnormal. Ms. Ringenbach not only admitted she was unaware of any other prior instance in resettlement where Direct insisted on the disclosure of

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[59] *Id*. at 9-10.

[60] *Id*. at 8.

[61] Direct Ex. 1, at Ex. 1.3, p. 8.

[62] *Id*.

[63] *Id*. at 6; Tr. Vol. I, at 166.

[64] Companies Ex. 12, at 19 and Ex. EBS-1, Original Sheet 1, Section XVIII, Page 33 of 49.

the identity of the other impacted supplier, she also admitted that knowing the identity of the other supplier was entirely unnecessary to complete resettlement.[65]

The Companies were "bound to confidentiality regarding such information" per the terms of the Supplier Tariffs.[66] Nevertheless, in the spirit of cooperation and good faith, the Companies advised Direct that they would contact the Disadvantaged Supplier to see if it would authorize the Companies to disclose this confidential information per Direct's request.[67] On January 15, 2016, the Companies notified Direct that the Disadvantaged Supplier preferred to work through the Companies, as was/is customary in any resettlement process, to resolve the issue.[68] Nevertheless, the Companies reassured Direct that they were "always available to talk" and would "pass along any information you would like to exchange with the other party if needed as well."[69]

Importantly, despite the Companies' numerous good faith offers to supply Direct with any additional information it needed to research and/or verify the financial/energy data from the Computer Error, Direct **never** asked the Companies for any additional information, nor did Direct ever dispute the accuracy of the financial/energy data supplied to it.[70] Direct's witness, Ms. Ringenbach, confirmed at hearing that Direct never responded to the Companies' numerous offers

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[65] Tr. Vol. I, at 32, 34-35. As explained in more detail *infra*, the Companies later discovered that some of Direct's personnel involved in the Companies' resettlement requests harbored deep distrust and suspicion of the FirstEnergy EDUs (including the Companies), as well as FES, stemming from matters entirely unrelated to the subject matter of this proceeding. *Id*. at 32-34.

[66] Direct Ex. 1, at Ex. 1.3, p. 7-8; *see also* Tr. Vol. I, at 166; Companies Ex. 12, at Ex. EBS-1, Original Sheet 1, Section XVIII, Page 33 of 49.

[67] Direct Ex. 1, at Ex. 1.3, p. 7.

[68] *Id*. at 6; Tr. Vol. I, at 35. Direct's demand to work directly with the Disadvantaged Supplier is even more befuddling given Direct's prior experience working directly with other Ohio EDUs (e.g., Duke) in facilitating the exchange of payment in resettlement processes beyond 60 days. Tr. Vol. I, at 71-72.

[69] Direct Ex. 1, at Ex. 1.3, p. 6.

[70] Tr. Vol. I, at 53-55, 207.

to provide additional information or financial/energy-related data, nor did Direct ever represent at the time that it was missing any data or other information it purportedly needed to participate in resettlement.[71]

3. Direct changed its narrative to retroactively justify its refusal to cooperate in resettlement.

Ms. Ringenbach's prefiled testimony tells a completely different story – one that plainly contradicts the facts and record evidence, including Ms. Ringenbach's own testimony at hearing. For instance, Ms. Ringenbach's prefiled testimony falsely claims that the Companies' emails were "not specific" and that "[i]t would have been completely irresponsible for Direct to have agreed to resettle with the Companies or FES ***based on the scant information provided by them*** . . . ."[72] Further, Ms. Ringenbach bemoans that Direct never received information concerning "the amounts Direct was owed a credit", nor did Direct receive information concerning "the underlying data and methodology" used by the Companies to calculate the total impact of the Computer Error on the Affected Customers.[73] Also, Ms. Ringenbach's prefiled testimony maintains that Direct had "no idea what facts or data were relied on to prepare this calculation."[74] As Ms. Ringenbach admitted at hearing, none of these allegations is true.[75]

First, even a cursory review of the incomplete compilation of emails exchanged between the Companies and Direct – which are attached to Ms. Ringenbach's prefiled testimony as Exhibit

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[71] Tr. Vol. I, at 53-55.

[72] Direct Ex. 1, at 9, 19 (emphasis added).

[73] *Id*. at 9-11.

[74] *Id*. at 11.

[75] Tr. Vol. I, at 35-41, 47-48, 51-52, 69.

1.3 – reveals that the Companies provided ample information and afforded Direct a multitude of opportunities to request any additional information Direct needed to engage in resettlement.[76]

Second, Ms. Ringenbach admitted at hearing that she had not reviewed all the emails exchanged between the Companies and Direct until after her deposition, some of which contained the very information Ms. Ringenbach claimed was missing.[77] Ms. Ringenbach confessed that she never spoke to the employee who oversees the Settlements Group at Direct and to whom the Companies repeatedly sent this so-called "missing" information.[78] In other words, Ms. Ringenbach failed to check with the head of the Settlements Group at Direct to determine if the Companies supplied the Settlements Group with the information she was testifying the Settlements Group did not receive.

Third, although Ms. Ringenbach criticized the Companies for not disclosing "the underlying data and methodology for the calculations,"[79] she admitted that, prior to her deposition, she had not seen any of the detailed financial data the Companies provided to Direct in Excel spreadsheets that Direct reviewed in late 2015 and early 2016.[80] Prior to her deposition, she had not seen the e-mails the Companies sent to Direct the afternoon of December 28, 2015, despite Direct producing one of those e-mails to the Companies in discovery.[81] Prompted by questioning at her deposition, Ms. Ringenbach later reviewed for the first time one of the spreadsheets the

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[76] *See, e.g.*, Direct Ex. 1, at Ex. 1.3; Companies Ex. 7c.

[77] Tr. Vol. I, at 35-41.

[78] Tr. Vol. I, at 39.

[79] Direct Ex. 1, at 10.

[80] Tr. Vol. I, at 37-39.

[81] Tr. Vol. I, at 47-48.

Companies sent to Direct and confirmed that, in direct contradiction to her pre-filed testimony, the Companies sent Direct detailed hour-by-hour energy charges for the Affected Customers.[82]

In short, Ms. Ringenbach's testimony at hearing undermines and contradicts her prefiled testimony that the Companies failed to send Direct information it needed to evaluate the resettlement request. Ms. Ringenbach's testimony drew only from e-mails that had been forwarded to her and retained in her personal in-box, and ignored all other communications between the Companies and Direct.[83] Thus, Ms. Ringenbach's testimony followed the following course: (1) she pre-filed testimony in this case without undertaking reasonable efforts to determine whether it was truthful; (2) discovered during her deposition that her pre-filed testimony was misleading and incorrect; (3) confirmed after her deposition but before the hearing that her pre-filed testimony was misleading and incorrect; then (4) swore under oath at hearing to the truthfulness of her pre-filed testimony. Obviously, her pre-filed testimony has no probative value and should be disregarded by the Commission.

F. Notwithstanding Direct's Refusal to Cooperate, the Companies Continued to Work in Good Faith to Remediate the Impact of the Computer Error.

While Direct dragged its feet and ignored the Companies' requests to cooperate, the Companies continued to work with other Advantaged and Disadvantaged Suppliers impacted by the Computer Error. Because Direct and a few other Advantaged Suppliers were refusing to return their windfalls, the Disadvantaged Suppliers who wrongfully paid for the power used by those Advantaged Suppliers' customers were left uncompensated and demanding to be cured.[84] Thus,

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[82] Tr. Vol. I, at 37-39, 51-52, 69.

[83] Tr. Vol. I, at 36-37, 69; Tr. Vol. I, at 38 ("Q. And your testimony concerning the lack of underlying data and methodology is not based on a review of all the financial data the Companies provided to Direct in late 2015, correct? A. Yes.").

[84] Companies Ex. 12, at 15; Tr. Vol. I, at 203-04, 209-10.

the Companies and their affiliated FE EDU in Pennsylvania entered into settlement, release, and assignment agreements ("Assignment Agreements") with two Disadvantaged Suppliers to ensure they were reasonably compensated.[85] Under these Assignment Agreements, the Companies and their affiliate FE EDU in Pennsylvania committed, among other things, to refund the money owed to the Disadvantaged Suppliers; in exchange, the Disadvantaged Suppliers agreed to release any claims they might have against the FE EDUs, and the Disadvantaged Suppliers assigned to the FE EDUs all claims related to or arising out of the Computer Error.[86] Pertinent here, OE and CEI each executed an Assignment Agreement with FES (the Disadvantaged Supplier and previous CRES provider of the Affected Customers), whereby FES agreed, among other things, to assign to the Companies all right and interest in recovering the $5.6 million Direct refused to relinquish as an Advantaged Supplier.[87]

In February of 2017, shortly after executing the Assignment Agreements with FES, the Companies tried once more to work with Direct to resettle the $5.6 million.[88] The Companies again explained to Direct that it had "enjoyed the benefits of over $5.6 million retail revenue (based on the wholesale expense determination) with no actual expense associated/coordinated with delivery of wholesale market products/services – an outcome to which it was never entitled in the first place under state tariffs and agreements."[89] Further, Direct and the Companies spoke over the phone to discuss the Companies' resettlement request.[90] During February of 2017, Direct

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[85] Companies Ex. 12, at 15-16.

[86] *Id*.

[87] *Id*.

[88] Direct Ex. 1, at Ex. 1.3, pp. 11-12.

[89] *Id*. at 11.

[90] *Id*. at 11, 12.

claims the Companies issued a "threat" and an "ultimatum" that if Direct did not return the $5.6 million to the Companies, the Companies would "consider Direct in breach of the Supplier Tariff" and draw on the letter of credit Direct was required to post per the terms of the Supplier Tariffs.[91]

In response, Direct filed a complaint in Case No. 17-791-EL-CSS to prevent the Companies from "follow[ing] through with th[eir] threat", which Direct dramatically and falsely contended would have put Direct out of business in the Companies' service territories.[92] Yet the Companies never issued a "threat" or "ultimatum" as Direct contends. Instead, the Companies merely explained to Direct that its refusal to cooperate and participate in resettlement constituted a breach of its obligations under the Supplier Tariffs – a breach which gave the Companies the option under the Supplier Tariffs of drawing on Direct's letter of credit if did not resettle its $5.6 million windfall.[93] The Companies never threatened or even insinuated that they would put Direct out of business in their service territories if Direct did not return the $5.6 million. After all, suspending the credit of a CRES provider under the Supplier Tariffs is completely different than drawing on a letter of credit, which Direct witness Teresa Ringenbach conceded at hearing.[94] To state otherwise is simply not true.

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[91] Direct Ex. 1, at 15; Tr. Vol. 1, at 57. Direct incorrectly claims that the Companies had "changed their position" during this time in February 2017 by describing the issue as a breach of the Supplier Tariffs instead of it being "a PJM issue." Direct Ex. 1, at 14. Direct is wrong. Whenever the Companies had to coordinate with CRES providers to initiate resettlement, all parties involved knew that they were operating pursuant to and consistent with the terms of the Supplier Tariffs, which, as explained before, provided the basic framework and rules for delivering CRES to customers, including rules governing how resettlement should be conducted. Tr. Vol. I, at 168. The fact that the Companies did not explicitly cite to the Supplier Tariffs in prior emails is making much ado about nothing, and merely betrays yet another example of Direct trying to retroactively justify its refusal to cooperate in resettlement as an Advantaged Supplier.

[92] Direct Ex. 1, at 15.

[93] Direct Ex. 1, at Ex. 1.3, p. 11; Tr. Vol. 1, at 57; Companies Ex. 12, at Ex. EBS-1, Original Sheet 1, at Page 25 of 49.

[94] Tr. Vol. I, at 57.

III. ARGUMENT

A. Direct Breached the Supplier Tariffs by Refusing to Cooperate in the Resettlement Process.

Despite the Companies' best efforts to restore equity to all CRES providers impacted by the Computer Error, Direct has refused to cooperate in resettlement in violation of the Companies' Supplier Tariffs. There is no dispute that Direct is holding $5.6 million for which it incurred no costs, and that FES incurred equivalent costs for which it received no revenues. Direct has refused resettlement because it distrusted the Companies and apparently did not see any benefit in paying $5.6 million to one of its competitors, FES, which it knew was close to bankruptcy.[95] Not only is this appalling and unfair, but it violates the Duty of Cooperation found in the Supplier Tariffs and threatens the efficient functioning of Ohio's retail electric service market. The Commission should order Direct to resettle with the Companies the amounts at issue.

Supplier tariffs serve a critical role in Ohio's electric utility industry. Supplier tariffs outline the basic requirements for how the Companies and CRES providers interact and coordinate with each other to ensure the delivery of CRES to customers.[96] Without supplier tariffs, there would be no obligation to cooperate or coordinate between EDUs and CRES providers to ensure customers received the benefits of a competitive retail electric market.[97] In fact, the entire retail electric market in Ohio hinges on CRES providers and EDUs working cooperatively together to coordinate the delivery of CRES to customers pursuant to the mutually agreed-upon terms in

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[95] Tr. Vol. I, at 32-33, 67-68.

[96] Companies Ex. 12, at 3 and at Ex. EBS-1.

[97] Companies Ex. 12, at 3-5.

Commission-approved supplier tariffs.[98] Without cooperation under the supplier tariffs, customers in Ohio would be deprived of a vibrant, effective competitive electric market.[99]

The Commission's rules require EDUs to adopt supplier tariffs to ensure EDUs and CRES providers coordinate and cooperate with each other. For instance, O.A.C. 4901:1-10-29 – titled "Coordination with competitive retail electric service (CRES) providers" – requires EDUs and CRES providers to coordinate with each other in delivering CRES to customers pursuant to supplier tariffs. Along the same lines, the Commission requires CRES providers to "make good faith efforts to resolve disputes, **and cooperate with the resolution of any joint issues with the electric utility**."[100] In developing these rules, the Commission understood that supplier tariffs and cooperation were not only mandatory but essential to ensure that CRES is delivered effectively and efficiently to retail customers.

The Companies' Supplier Tariffs impose a Duty of Cooperation on the parties (unlike some other Ohio EDUs' supplier tariffs), which necessarily includes the duty to cooperate in any resettlement process like the one at issue here.[101] When Direct refused to participate or otherwise cooperate in the Companies' request for resettlement, Direct was in breach of its coordination and cooperation obligations under the terms of the Supplier Tariffs.[102] As explained next, the remedy for that breach is a Commission order compelling Direct to cooperate and consent to resettlement of its $5.6 million windfall.

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[98] *Id.*

[99] *Id.*

[100] O.A.C. 4901:1-21-08(B)(6) (emphasis added).

[101] Companies Ex. 12, at 11, 13, and at EBS-1, Section III(C), at Page 9 of 49.

[102] *Id.*

B. The Commission Should Compel Direct to Cooperate in and Consent to Resettlement.

1. The Companies and Direct agree that the Commission has the authority to compel CRES providers to consent to resettlement.

The Commission has the authority to compel Direct to cooperate in and consent to resettlement consistent with Direct's obligations under the Supplier Tariffs and Ohio law. Importantly, the parties do not dispute that the Commission has the authority to compel CRES providers to cooperate in resettlement.

In a separate case pending before the Commission, *Direct Energy Business, LLC v. Duke Energy Ohio, Inc*., Case No. 14-1277-EL-CSS (hereinafter, the "*Duke Case*"), Direct repeatedly emphasized the authority of the Commission to compel EDUs and CRES providers to cooperate in resettlement. In the *Duke Case*, Duke allegedly misread the meter of a Direct customer, resulting in Duke reporting inaccurate load data to PJM, which, in turn, harmed Direct as a Disadvantaged Supplier.[103] Given that the discovery of Duke's error occurred beyond the 60-day time window of Settlement B (like in this case), Direct sought to compel the Advantaged Suppliers to consent to resettlement so that Direct would be compensated for being overbilled as a result of Duke's error.[104] Unfortunately for Direct, of the fifty-five CRES providers impacted by Duke's error, only four cooperated and consented to resettlement.[105] Without the consent of all impacted

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[103] Tr. Vol. I, at 13-16, 22; Companies Exhibit 2, Direct Application for Rehearing in Case No. 14-841-EL-SSO *et al*., at 3-4.

[104] *Id*.

[105] *Id*.

CRES providers, Duke could not initiate resettlement and Direct could not be made whole.[106] Frustrated by the inequities, Direct filed a complaint against Duke at the Commission.[107]

As part of the *Duke Case*, Direct witness Teresa Ringenbach submitted prefiled testimony, articulating Direct's position in the case. According to her, an informal process known as Resettlement C was available at PJM to achieve resettlement, and the Commission need only order the recalcitrant Advantaged Suppliers to consent to resettlement:

> **Q15. What are you recommending the Commission order in this case to make the Resettlement C process work this time?**
>
> A15. The Commission should require Duke to undertake the Resettlement C process, including any steps that PJM may require of Duke, given that the Resettlement C process is an informal process. Further, to ensure completion of the process, the Commission should mandate that each supplier (CRES provider or their designated Transmission Scheduling Agent or "TSA") affected by the resettlement that is regulated by the Commission affirmatively consent in writing to the resettlement or risk consequences in its licensing docket before the Commission. The Commission should also instruct Duke to provide Staff a list of the affected suppliers or their successors and for Staff to work with docketing to send a paper copy of the order to the regulatory contact of every affected CRES provider or its successor identified by Duke.[108]

Ms. Ringenbach further explained during her deposition in the *Duke Case* that every CRES supplier has the responsibility to ensure the market is functioning properly, which includes the obligation to engage in resettlement:

> Q. And on what authority can the PUCO mandate that competitive suppliers engage in resettlement?

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[106] *Id.*

[107] *Id.*

[108] Companies Exhibit 1, Direct Prepared Testimony of Teresa L. Ringenbach on Behalf of Direct Energy Business, LLC in Case No. 14-1277-EL-CSS (Apr. 14, 2015), at 8-9.

> A. So Direct's position is if you are a competitive retail electric supplier in this market, **then everyone has responsibility to make sure that the market's functioning properly** which also means if there's a situation in the market where one supplier may be disadvantaged because there needs to be some sort of resettlement, then everyone should come together and work through that whether it's Direct or another supplier.
>
> Q. And is that participation and ensuring properly functioning market, are those activities that can be enabled at the state level?
>
> A. Yes.[109]

Not only did Direct seek an order from the Commission compelling Duke and impacted CRES providers to consent in writing to resettlement, Direct went so far as to express its belief that the Commission could do so by threatening non-compliant CRES providers with potential suspension or revocation of their CRES certification.

> Q. Ms. Ringenbach, on what authority can the PUCO revoke a CRES provider's license for failing to participate in a process administered through PJM?
>
> A. So as part of your CRES license you have to fulfill certain obligations which include your FERC power marketer's license, you have to show your participation in the PJM, and in addition to that the utility tariffs require specific items.
>
> So you have to make sure that you're basically a good acting company and you fulfill all the requirements to deliver that power and ensure that the market functions properly. **So based on that we think that the licensing process is broad enough to allow the Commission to say as part of a supplier in this market you have to basically make sure -- you have responsibility to make sure that the market is properly functioning too, which means if something gets messed up and everyone has to agree to fix it, everybody has to agree to fix it**.

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[109] Companies Exhibit 3, Deposition Transcript of Teresa Ringenbach in Case No. 14-1277-EL-CSS (Apr. 21, 2015), at 58 (emphasis added). In stark contrast, as the Advantaged Supplier in this case, Direct refuses to acknowledge any "responsibility to make sure that the market is properly functioning." In fact, Direct claims in this case that it has no responsibility to ensure the competitive retail market functions properly. Direct Ex. 1, at 7.

> Q. And do you think the Ohio Commission can do that on a retroactive basis?
>
> . . .
>
> A. So can they retroactively tell CRES providers you need to agree to this?
>
> Q. Uh-huh.
>
> A. Yes, I believe that they can.
>
> Q. On what basis do you -- have you formed that belief?
>
> A. I think the Commission has pretty wide authority under their licensing requirements of CRES providers.[110]

Importantly, when asked at hearing in this case if Direct had since changed its mind and no longer believed the Commission could order market participants to cooperate in resettlement as it did in the *Duke Case*, Ms. Ringenbach denied that Direct's position in the *Duke Case* was any different than it is today.[111] She also agreed that the Commission has the authority to order CRES providers to consent to resettlement.[112] Therefore, there is no dispute among the parties that the Commission can, in fact, compel CRES providers to cooperate in resettlement, and, according to Direct, it may even do so under threat of revoking or suspending an uncooperative supplier's CRES certification.

2. Direct has argued, and the Commission has agreed, that it is reasonable and lawful for CRES providers to consent to resettlement.

The *Duke Case* is not the only Commission proceeding where Direct has adopted a position wholly inconsistent with the one advanced in this proceeding. In Case No. 14-841-EL-SSO, titled

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[110] Companies Ex. 3, at 59-61 (emphasis added).

[111] Tr. Vol. I, at 24.

[112] Tr. Vol. I, at 18-19.

In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer in the Form of an Electric Security Plan ("*Duke ESP III*"), Direct urged the Commission to support an amendment to Duke's supplier tariff to require that all CRES providers cooperate in resettlement to prevent the kind of inequitable situation Direct found itself in the *Duke Case* (and which FES found itself in this case).[113] In its application for rehearing ("AFR") in *Duke ESP III*, Direct explained that CRES providers should have no objection to resettlements so that market participants are treated fairly:

> The Commission should grant rehearing on this matter and approve Duke's request. **Duke should have no incentive (financial or otherwise) to ask for resettlements or billing adjustments except to make corrections due to errors or reconciliations – in other words to do the right thing**. **Affected CRES providers should have no objections inasmuch as Duke would simply be correcting an error or making a reconciliation**. Further, because PJM will not run a resettlement without affirmative consent of the other affected LSEs, **the proposed tariff is important step in filling in a gap to ensure market participants are treated fairly in a well-functioning market**.[114]

Based on its experience as a Disadvantaged Supplier in the *Duke Case*, Direct represented to the Commission in *Duke ESP III* that it believed CRES providers impacted by an EDU error do not have any credible basis for objecting to resettlement since the resettlement process is designed to correct an error and to "do the right thing."[115]

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[113] Companies Exhibit 4, Direct Application for Rehearing in *Duke ESP III* (May 1, 2015); Tr. Vol. I, at 25.

[114] Companies Ex. 4, at 4 (emphasis added).

[115] *Id*.

The Commission granted Direct's AFR in the Second Entry on Rehearing in *Duke ESP III*.[116] The Commission agreed that impacted CRES providers need to cooperate and not unreasonably withhold consent when an EDU initiates resettlement to fix an error. But Duke's supplier tariff lacked "Duty of Cooperation" language. Thus, the Commission approved a supplier tariff amendment requiring CRES providers to consent to any billing adjustments or resettlements.[117] As the Commission explained, "Duke would have no motivation to seek resettlement except to correct an error. . . . [and] CRES providers should have no objection to Duke ensuring proper billing."[118]

3. The Commission should find that the Companies' Supplier Tariffs require Direct to resettle its $5.6 million windfall.

In this case, Direct is asking the Commission to overlook the glaring inequities of Direct keeping a $5.6 million windfall that does not belong to it. In other words, Direct supports doing "the right thing" and ensuring CRES providers are "treated fairly in a well-functioning market" – but only where doing so benefits Direct. The Commission should find here, as it did in *Duke ESP III* and as Direct argued in the *Duke Case*, that Direct should have no objection to the Companies ensuring proper billing by engaging impacted CRES providers to cooperate in and consent to resettlement.

In contrast to the supplier tariff at issue in *Duke ESP III*, the Companies' Supplier Tariffs include a Duty of Cooperation.[119] Indeed, the Supplier Tariffs in their entirety describe the

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[116] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer in the Form of an Electric Security Plan et al*. ("Duke ESP III"), Case No. 14-841-EL-SSO *et al*., Second Entry on Rehearing (Mar. 21, 2018), at ¶¶ 123-125.

[117] *Id.* at ¶ 125.

[118] *Id.*

[119] Companies Ex. 12, at 4 and at EBS-1, Section III(C), at Page 9 of 49.

coordination required between the Companies and Direct.[120] After the Companies discovered the Computer Error, they corrected billings for the most-recent sixty-day period under the Settlement B process and corrected the error going forward without any objection from Direct.[121] Corrections beyond that sixty-day period require Direct's signature on a bilateral agreement, which the Companies requested on multiple occasions in late 2015, early 2016 and early 2017. But Direct refused to execute a bilateral agreement because it distrusts the Companies and may have hoped to harm FES.[122] However, for the markets to work effectively and for the Duty of Cooperation in the Supplier Tariffs to have any meaning, Direct cannot be permitted to cooperate only with EDUs that it trusts. The Commission should order Direct to resettle with the Companies as required by the Companies' Supplier Tariffs.

C. The Commission Should Compel Direct to Cooperate in Resettlement to Safeguard the Competitive Retail Electric Service Market in Ohio.

The Companies share Direct's belief that CRES providers should be required to cooperate in and consent to resettlement so that "market participants are treated fairly in a well-functioning market."[123] When Ohio moved to a deregulated market and allowed CRES providers to market electricity to customers in the early 2000s, EDUs and CRES providers were (and still are) required to cooperate and work together to ensure customers received CRES.[124] At the heart of any successful, thriving competitive retail electric market is cooperation between the EDUs and CRES

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[120] Tr. Vol. I, at 151-52.

[121] Tr. Vol. I, at 150.

[122] Tr. Vol. I, at 32-33, 67-68.

[123] Companies Ex. 2, at 4.

[124] Companies Ex. 12, at 20.

providers.[125] Without it, the retail market cannot function, which is why supplier tariffs and coordination agreements compel cooperation between EDUs and CRES providers.[126] While Direct may view its unjust retention of $5.6 million as advantageous in the short-term, Direct could find itself on the opposite end of a future billing adjustment as a Disadvantaged Supplier (as it did in the *Duke Case*).[127] And when it finds itself in that position, Direct undoubtedly will demand the very cooperation it has withheld here.[128]

When a CRES provider like Direct refuses to cooperate and unduly enriches itself at the expense of others, it corrodes the essential glue that holds the entire competitive retail market together – i.e., cooperation between the EDUs and CRES providers.[129] If the Commission permits an uncooperative CRES provider like Direct to obstruct good faith resettlement efforts notwithstanding its Duty of Cooperation in the Supplier Tariffs, it would send a signal to CRES providers that participating in Ohio's retail electric market is unwise and unprofitable.[130] Such a message would threaten the robust, vibrant competitive marketplace in Ohio, and it would directly contravene state policy favoring effective competition.[131]

Moreover, if CRES providers are permitted to withhold cooperation under similar circumstances as in this case, smaller CRES providers serving large customers impacted by an error could be driven out of business by uncooperative CRES providers like Direct, thereby further

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[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] Companies Ex. 12, at 8.

[130] *Id*. at 8.

[131] *Id*. at 20; *see* R.C. 4928.02.

limiting and undermining the customer choice programs in Ohio.[132] To avoid such an unjust and inequitable outcome and to safeguard the integrity of the competitive electric retail market in Ohio, Direct should be ordered to cooperate with the Companies, as the Supplier Tariffs require and as ten other Advantaged Suppliers already have done, to return the $5.6 million windfall.[133]

Direct understands that its refusal to cooperate with the Companies in resettlement is harmful to the long-term viability of the competitive retail electric market. In fact, Direct prepared and gave a PowerPoint presentation that underscored the critical importance of completing resettlements to "ensure that [market participants] wholesale costs align with revenues billed through the retail market."[134] Thus, there is no dispute concerning the importance of cooperating in resettlements to ensure the competitive retail electric market functions properly. As such, the Commission should enter an order compelling Direct to resettle with the Companies to safeguard the proper functioning of the retail electric market in Ohio.

D. The Companies' Response to the Computer Error and Attempts to Initiate Resettlement with Impacted CRES Providers Did Not Violate Any Corporate Affiliate Separation Obligations under Ohio Law.

1. Direct is using the Companies' refusal to disclose the identity of the Disadvantaged Supplier as a mere pretext to justify its decision not to cooperate in resettlement and relinquish its $5.6 million windfall.

Direct contends that it refused to cooperate in the resettlement of the Computer Error, in part, because the Companies refused to identify the Disadvantaged Supplier of the Affected Customers.[135] At the same time, however, Direct witness Ringenbach unequivocally conceded at

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[132] Companies Ex. 12, at 20-21.

[133] *Id.*

[134] Companies Exhibit 10, MSS Settlement C Package Proposal by Direct Energy and PHI.

[135] Direct Ex. 1, at 19.

hearing that knowing the name of the other impacted CRES provider(s) is unnecessary to cooperate in and consent to resettlement:

> Q. And to accomplish resettlement through PJM, it is not necessary to know the name of the other impacted suppliers, right?
>
> A. Yes.[136]

In fact, when asked to identify any other prior instance where Direct insisted on the disclosure of the other impacted CRES providers in resettlement, Ms. Ringenbach was unaware of any:

> Q. However, you do not know of any other settlement situation where Direct asked for the name of the supplier on the other side of the error, correct?
>
> A. I'm not aware of one.[137]

Nevertheless, Direct somehow declares that "[i]t would have been completely irresponsible for Direct to have agreed with the Companies or FES based on the scant information provided by them and refusal to identify the 'harmed supplier'."[138] This begs the obvious question: if it would be "completely irresponsible" for Direct to resettle with the Companies without knowing the name of the other CRES provider, why did Direct resettle in the past without knowing the identity of the other impacted supplier(s)?

Direct is using the Companies' refusal to disclose the name of the Disadvantaged Supplier (i.e., FES) as a mere pretext to justify its refusal to cooperate in resettlement so that it can keep $5.6 million that does not belong to it. Direct witness Ringenbach provided a more candid answer at hearing when asked why Direct refused to cooperate in the Computer Error resettlement with the Companies:

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[136] Tr. Vol. I, at 35.

[137] Tr. Vol. I, at 34.

[138] Direct Ex. 1, at 19.

> Q. Okay. And your belief is that Direct asked for the name of the harmed supplier because it was a large amount of money and Direct was suspicious about how the Companies were asking for resettlement; is that right?
>
> A. Yes.
>
> Q. However, you do not know of any other settlement situation where Direct asked for the name of the supplier on the other side of the error, correct?
>
> A. I'm not aware of one.
>
> Q. And your belief is that Direct is generally suspicious of the FirstEnergy utilities, correct?
>
> A. Yes.
>
> Q. And in fact, if the harmed supplier in this case had been Constellation as an example, you don't know whether we would be here now, correct?
>
> A. I don't.[139]

Stunningly, Ms. Ringenbach revealed that Direct refused to cooperate, at least in part, because of a preexisting suspicion and distrust of the FirstEnergy utilities. Ms. Ringenbach even suggested that Direct may have cooperated in resettlement if the Disadvantaged Supplier had been anybody but FES. Ms. Ringenbach's revealing, yet frank admission also provides additional context that explains why Direct never took any actual steps to verify/dispute the accuracy of the PJM invoices in the months after being notified by the Companies of the Computer Error.[140] Instead of acting in good faith and cooperating as required by the Supplier Tariffs, Direct simply decided it would not engage in any resettlement, as a Disadvantaged Supplier, with utilities against whom it had harbored preexisting prejudice and suspicion. Because this is the opposite of how an

[139] Tr. Vol. I, at 34-35.

[140] Tr. Vol. I, at 39-42.

effective and efficient market works, the Commission should compel Direct to resettle with the Companies.

2. The Companies did not confer an undue benefit, preference or advantage on FES by executing assignment agreements with FES.

Direct has alleged that the Companies have violated various corporate separation obligations under Ohio law (namely, R.C. 4905.33, 4905.35, and 4928.17) by conferring an undue benefit, preference, or advantage on FES, as evidenced by the Assignment Agreements between the Companies and FES.[141] Direct is wrong for several reasons. First, FES is not the only supplier that signed an Assignment Agreement to remedy the financial losses incurred as a result of the Computer Error.[142] Another Disadvantaged Supplier (i.e., **not** FES) who was situated opposite of a non-cooperating Advantaged Supplier in Pennsylvania executed an Assignment Agreement to promptly remedy its financial losses from the Computer Error.[143] Importantly, that agreement was similar in its terms.[144] By entering into Assignment Agreements, the Companies and their affiliate FE EDU in Pennsylvania were merely offering and agreeing to resolve the dispute on similar terms and conditions as other similarly situated suppliers.[145] Accordingly, there is no factual basis to support Direct's allegations, which are entirely rooted in prejudice and abject speculation, that the Companies contravened corporate separation obligations under Ohio law by entering into Assignment Agreements with FES or by otherwise conferring an undue benefit, preference, or advantage on FES during the Companies' good faith attempts to initiate resettlement.

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[141] *See* Direct Counterclaim (Oct. 2, 2017) in Case No. 17-1967-EL-CSS, at ¶¶ 42-44.

[142] Companies Ex. 12, at 18.

[143] *Id.*

[144] *Id.*; *see also* Direct Ex. 14c and 15c.

[145] *Id.*

3. The Companies did not violate corporate separation obligations or the Supplier Tariffs by contacting Direct on behalf of FES as the Disadvantaged Supplier.

To advance its theory that the Companies were illegally conferring benefits and undue preferences on FES to the detriment of Direct and other CRES providers in Ohio, Direct claims that the Companies began to act "aggressive" in early 2017 when seeking Direct's cooperation in resettlement.[146] However, Ms. Ringenbach conceded at hearing that the Companies' resettlement efforts were **not** "aggressive" in late 2015 or early 2016.[147] It was only after Direct refused to cooperate with the Companies for well over a year, and the Companies were thereby compelled to settle with FES, that the Companies returned to Direct to again request resettlement. And by then the Companies were acting primarily in their own interest as a result of the Assignment Agreement with FES. Regardless, the Companies asking Direct to comply with the Supplier Tariffs cannot amount to a corporate separation violation.

Direct also claims that Section XII.C. of the Supplier Tariffs prohibits the Companies' from contacting Direct on behalf of another CRES provider.[148] Direct is wrong. Section XII.C of the Suppler Tariff provides: "The Company will assume no responsibility for billing between a Certified Supplier and the Transmission Provider or any party other than the Company."[149] Section XII.C. of the Supplier Tariffs merely ensures that the Companies provide PJM (i.e., the Transmission Provider) with each CRES provider's billing determinants, so that PJM can invoice CRES providers for market costs to be distributed among various market participants.[150] Here,

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[146] Tr. Vol. I, at 33.

[147] Tr. Vol. I, at 33.

[148] Direct Ex. 1, at 12.

[149] Companies Ex. 12, at Ex. EBS-1, Original Sheet 1, Section XII.C, at Page 25 of 49.

[150] Companies Ex. 12, at 16.

however, the Companies have never sought to replace or substitute PJM as the party responsible for invoicing or collecting payments from CRES providers or other third-parties.[151] The Companies' goal, as required by the Supplier Tariffs, has always been to facilitate coordination between CRES providers and PJM to ensure proper loads are assigned to the proper entities.[152] The Companies are merely trying to right a wrong by seeking cooperation from Direct and other impacted CRES providers, as the Supplier Tariffs require, to resettle incorrect billings via PJM's available processes.[153] There is nothing in the Supplier Tariffs (or Coordination Agreements) that prevents the Companies from doing so, and it is incumbent on the Companies to right the wrong.[154] And, per the terms of the Supplier Tariffs, CRES providers are expected to cooperate in that endeavor.[155]

In sum, Direct has failed to produce any evidence that the Companies violated corporate separation obligations or the Supplier Tariffs by attempting to resettle Direct's $5.6 million windfall.

IV. CONCLUSION

The Companies have acted in good faith, consistent with their obligations under the Supplier Tariffs, as they have unsuccessfully sought cooperation from Direct to resettle its $5.6 million windfall. Unfortunately, Direct has refused to cooperate and has gone so far as to file false testimony in this proceeding. Direct has alleged corporate separation violations as a smokescreen to deflect and distract the Commission from the inequity and hypocrisy of Direct's positions. The

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[151] *Id.*

[152] Tr. Vol, I, at 191.

[153] Companies Ex. 12, at 16.

[154] *Id.*

[155] *Id.*

record, however, is clear that the Companies have treated all parties fairly while requesting resettlement for the sole purpose of restoring equity to all CRES providers impacted by the Computer Error.

Accordingly, the Commission should order Direct to cooperate in resettlement and immediately return the $5.6 million windfall. In doing so, the Commission will not only enforce the terms of Commission-approved Supplier Tariffs, but perhaps more importantly, the Commission will protect the future integrity of the competitive retail electric market in Ohio.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Initial Post-Hearing Brief of Ohio Edison Company and The Cleveland Electric Illuminating Company was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 14th day of June, 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ *Mark T. Keaney*
One of the Attorneys for Ohio Edison Company and The Cleveland Electric Illuminating Company

Summary: Brief Initial Post Hearing Brief of Ohio Edison Company and The Cleveland Electric Illuminating Company electronically filed by Mr. Mark T Keaney on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company