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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)))))	Case No. 11-5201-EL-RDR

REPLY BRIEF OF NUCOR STEEL MARION, INC.

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Nucor Steel Marion, Inc. hereby submits its reply brief in the above-captioned proceeding addressing the review of the alternative energy rider ("Rider AER") contained in the tariffs of Ohio Edison Company ("Ohio Edison"), the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy").

I. INTRODUCTION

Nucor has focused in this proceeding on the proper application of the 3% cap on renewable energy costs, an issue that the Commission has recognized is a "case of first impression."[1] Nucor and the Ohio Energy Group ("OEG") were the only parties in the case to put forward a comprehensive, two-part cap proposal that will provide protection for customers against excessive renewable energy costs, thereby fulfilling the legislative purpose of the cap under Section 4928.64(C)(3), Ohio Revised Code, while at the same time providing certainty and protection for FirstEnergy. This cap mechanism, presented in the testimony of Nucor and OEG witness Dr. Dennis Goins, was unrebutted by FirstEnergy and unopposed by any other party,

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[1] *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-PDR, Entry at ¶ 4 (January 18, 2012).

and is strongly supported by the evidence in this case. Moreover, as discussed below, several parties affirmatively support the key elements of the OEG/Nucor cap recommendation in their initial briefs.

The cap mechanism proposal by the Mid-Atlantic Renewable Energy Coalition ("MAREC") is similar in some ways with the OEG/Nucor cap recommendation (although much less detailed). However, Nucor urges the Commission to exercise caution in considering MAREC's recommendation to include a "price suppression benefit" value in the calculation of the cap. While Nucor would not necessarily object to including a price suppression value in the cap calculation in theory, in practice such a feature would add a subjective element to what is otherwise a straightforward and purely objective calculation of the cap on renewable energy costs. Moreover, there is no evidence on the record in this case demonstrating the need for including a price suppression benefit value in the cap calculation.

Aside from the cap issue, the other major issue in this case is whether FirstEnergy was imprudent in purchasing certain In-State All-Renewable RECs over the course of the audit period under review in this case. Although Nucor has not taken a position on the imprudence issue, several parties argue that FirstEnergy was imprudent.[2] In its initial brief, FirstEnergy argues that, even if the Commission finds that FirstEnergy was imprudent in purchasing the high-priced in-state RECs, the imprudent costs could not be disallowed because providing for a disallowance through Rider AER would constitute retroactive ratemaking.[3] FirstEnergy's

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[2] *See* Initial Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio ("Staff Brief") at 3-7; Initial Brief by the Office of the Ohio Consumers' Counsel at 16-57; Initial Brief of the Environmental Law & Policy Center, The Ohio Environmental Council, and Sierra Club ("Environmental Intervenors Brief") at 8-23.

[3] Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy Brief") at 75-78.

retroactive ratemaking argument, if accepted by the Commission, would leave customers with no remedy if FirstEnergy's REC purchases are found to be imprudent. Further, Nucor is concerned about the potential far-reaching impact of FirstEnergy's retroactive ratemaking argument on the Commission's ability to review the reasonableness of a utility's costs recovered under variable, periodically-updated riders such as Rider AER. FirstEnergy's position on this issue is not supported by Ohio law, and if the Commission finds that FirstEnergy was imprudent, the imprudent costs can and should be disallowed and passed back to customers though the Rider AER credit mechanism proposed by Dr. Goins.

These issues are discussed below in more detail. Nucor's failure to address other arguments raised by FirstEnergy and the other parties in this case should not be construed as Nucor support for those arguments.

II. ARGUMENT

A. The Commission Should Adopt the Two-Part Cap Mechanism Proposed by Nucor and OEG

Under the two-part cap mechanism proposed by Nucor and OEG, FirstEnergy would apply a mandatory, 3% "hard cap" on renewable expenditures per compliance year. FirstEnergy would also apply a "soft cap" on Rider AER charges of 3% of the cost of generation recovered under Rider GEN. Both parts of this recommended cap mechanism are described in detail in Dr. Goins' testimony and Nucor's and OEG's initial briefs.[4] The OEG/Nucor two-part cap recommendation is supported by the evidence in this case and by strong public policy considerations, and should be adopted by the Commission.

[4] Initial Brief by Nucor Steel Marion, Inc. ("Nucor Brief") at 7-25; Initial Brief of the Ohio Energy Group ("OEG Brief") at 2-7; Direct Testimony of Dennis W. Goins, PH.D. on Behalf of the Ohio Energy Group and Nucor Steel Marion, OEG/Nucor Ex. 1 at 6-14.

1. Most parties support, or do not oppose, the key features of the OEG/Nucor cap proposal

The initial briefs demonstrate that there is strong support for a consistently-applied 3% renewable energy expenditure cap.[5] For example, Staff's recommendation for how to apply the cap includes the following features:

- Determine the sales baseline in megawatt-hours for the applicable compliance year consisting of an average of the Company's annual Ohio retail electric sales from the preceding three years. This calculation should be performed individually for each FirstEnergy electric distribution company.

- Calculate a "reasonably expected" $/MWH figure for the compliance year, based on the weighted average of the SSO supply for delivery during the compliance year, net of distribution system losses.

- Annually calculate a $/MWH price suppression benefit and distribute the suppression calculation to all affected FirstEnergy EDUs. Then calculate an adjusted "reasonably expected" $/MWH figure by adding the price suppression benefit to the "reasonably expected" figure calculated in the previous step.

- Calculate a Total Cost by multiplying the adjusted "reasonably expected" $/MWH figure by the three-year baseline.

- Multiply the Total Cost by 3%, with the result representing the maximum funds available to be applied to compliance resources for that compliance year.

- Each FirstEnergy EDU should perform this calculation early in the compliance year to identify their maximum available compliance funds for the year, and if any EDU reaches its maximum available compliance funds, it should not incur any additional compliance cost for that compliance year absent specific Commission direction.[6]

Although, as discussed in more detail below, we oppose the inclusion of a price suppression benefit variable in the cap calculation, all of the other elements of Staff's cap

[5] *See* Staff Brief at 7-11; Environmental Intervenors Brief at 32-33; Post Hearing Brief of the Mid-Atlantic Renewable Energy Coalition ("MAREC Brief") at 2-3; OEG Brief at 2-7; Nucor Brief at 7-25.

[6] Staff Brief at 9-10.

recommendation are consistent with the OEG/Nucor expenditure cap recommendation. Perhaps of greatest significance is Staff's recommendation that the 3% cap establish *the maximum available compliance funds for a FirstEnergy EDU for the compliance year*, and that the utility *should not incur additional compliance costs for that compliance year* absent specific Commission direction. We interpret this as agreement with our recommendation that the cap be mandatory – not discretionary – on the part of the utility.

Staff qualifies its recommendation that the utility may not exceed the expenditure cap with the caveat "absent specific Commission direction." Although we think an absolute hard cap on expenditures is more consistent with the purpose of the 3% cap in the statute, if the Commission is inclined to retain discretion to allow FirstEnergy to exceed the cap, we would urge the Commission to adopt as a default position that no more expenditures may be made once the cap has been hit, and that the Commission would not direct FirstEnergy to exceed the cap except in extraordinary circumstances. But in no case should it be up to FirstEnergy to decide whether it may exceed the expenditure cap.

Along with the support for an expenditure cap along the lines of the OEG/Nucor expenditure cap recommendation, no party opposed the second part of the OEG/Nucor cap mechanism, the 3% Rider AER cap. For the reasons discussed in Nucor's and OEG's initial briefs, this second part of the cap mechanism is critical to ensuring that customers are protected against high and volatile renewable energy costs.[7] The Rider AER cap would also allow for future recovery of costs that FirstEnergy prudently incurs, but which are in excess of the 3%

[7] Nucor Brief at 20-25; OEG Brief at 5-7.

Rider AER cap.[8] There is no evidence on the record opposing this recommendation and, in fact, FirstEnergy's recently-approved ESP III proposal specifically changed the Rider AER cost recovery mechanism to allow FirstEnergy to spread recovery of prudent renewable energy costs over several years.[9] Accordingly, the Commission should also approve this second part of the OEG/Nucor cap recommendation.

2. The Commission should reject MAREC's proposal to incorporate a price suppression value in the cap calculation or, at a minimum, establish a separate proceeding to evaluate price suppression benefit without delaying implementation of the cap

MAREC recommends that the calculation of the 3% cap mechanism be "simple and transparent."[10] We agree with MAREC on this point, but are concerned that MAREC's proposal to incorporate a price suppression benefit into the cap calculation is at odds with the goal of keeping the cap calculation simple and transparent. There is also a lack of evidence on the record in this case justifying the need for such a price suppression benefit.

While Nucor would not necessarily oppose the incorporation of a price suppression benefit in theory, in practice including this in the cap calculation would add a subjective element to what is otherwise a purely objective calculation. Under the OEG/Nucor proposed expenditure cap calculation, all of the key variables in the calculation (*i.e.*, the utility's non-shopping load for the previous three years, the cost of generation for the compliance year, and the 3% multiplier) are fixed and easily knowable. Calculating a price suppression benefit, however, likely would require detailed analysis and conflicting judgments and opinions among

[8] Nucor Brief at 23.

[9] Goins Testimony, OEG/Nucor Ex. 1 at 13.

[10] MAREC Brief at 3.

various parties about how to value what price suppression effect, if any, renewable energy has on energy prices. While robust debate among parties on the economic impact of particular energy policies or utility proposals is of course commonplace in Commission proceedings, in the case of the 3% cap, injecting a subjective element such as a price suppression benefit would unnecessarily complicate the cap calculation, and would undermine the basic purpose of the cap to provide a reasonable degree of protection for utility customers against excessive renewable energy costs. Also, incorporating a price suppression benefit is intended to increase the level of the cap,[11] thereby eroding the cost protection for customers under Section 4928.64(C)(3).

Section 4928.64(C)(3) does not require, or even contemplate, the incorporation of price suppression benefit in the cap calculation. Nor do the Commission's regulations. There is also a lack of evidence in this case supporting the need for including a price suppression value in the cap calculation. MAREC did not propose a methodology for calculating the price suppression benefit,[12] and MAREC also did not provide evidence that renewable energy is, in fact, currently having a suppression benefit on energy prices in PJM and that any such benefit will continue going forward. MAREC's witness Mr. Burcat cited several third-party studies purporting to describe the benefits of price suppression by renewables, but the only one addressing prices in PJM was from 2009.[13]

[11] Tr. Vol. IV at 678-79.

[12] *Id.* at 678, 683.

[13] Direct Testimony of Bruce Burcat on Behalf of the Mid-Atlantic Renewable Energy Coalition, MAREC Ex. 101 at Exhibit 2.

For these reasons, the Commission should not incorporate a price suppression benefit variable into the 3% cap calculation. If, however, the Commission determines that price suppression should be explored further, we urge the Commission to adopt the recommendation of the Environmental Intervenors to set up a separate docket to address this issue.[14] The new case should evaluate: (i) whether there is actually a price suppression benefit from renewables in PJM, and (ii) if so, how to calculate the suppression benefit and reflect it in the cap calculation. However, the implementation of the cost cap should not be delayed until after the conclusion of the price suppression proceeding. In other words, the Commission should approve the cap mechanism without the price suppression benefit and have it take effect immediately. Then, when and if the price suppression proceeding produces a reasonable cost suppression benefit value that may be incorporated into the cap mechanism, that value can be reflected in the cost cap calculation for the next compliance year.

B. The Commission Can and Should Order a Disallowance if it Determines that Any of FirstEnergy's REC Purchases Were Imprudent

FirstEnergy argues that, even if it was imprudent in purchasing the very expensive In-State All-Renewable RECs at issue in this case, the Commission cannot order a disallowance because it would constitute retroactive ratemaking.[15] FirstEnergy's position would leave customers with no remedy if FirstEnergy is found to have been imprudent in its purchases of In-State All-Renewable RECs over the course of the audit period, and would also have potentially far-reaching implications for the use of variable riders in utility rate plans. FirstEnergy's position also is not supported by the case law it cites. The Commission should reject

[14] Environmental Intervenors Brief at 38.

[15] FirstEnergy Brief at 75-78.

FirstEnergy's argument on this issue and should require FirstEnergy to credit any disallowance in this case to Rider AER going forward, as recommended by Dr. Goins.

Ohio law distinguishes variable pass-through rates such as Rider AER from more formal types of ratemaking for purposes of applying the rule against retroactive ratemaking. In *River Gas Co. v. Public Utilities Commission of Ohio*,[16] the Ohio Supreme Court explained:

> It is axiomatic that before there can be retroactive ratemaking, there must, at the very least, be ratemaking. We are not convinced that the commission's actions at issue herein constitute ratemaking as that term is customarily defined. In considering a case arising under the fuel adjustment clause of an electric light company, pursuant to R.C. 4905.301, we stated, "(a)t the outset, a distinction must be recognized between the statutory rate-making process involved in establishing fixed rate schedules, and the statutory procedure governing variable rate schedules under the fuel cost adjustment procedure. In the normal instance, a utility desiring to establish a rate, or change an existing one, must file a written application with the commission pursuant to R.C. 4909.18. The function of the commission is to determine the justness and reasonableness of the proposed rates before they become effective, and to fix lawful rates in accordance with the statutory rate plan. . . . .Once computed, a schedule of rates approved by the commission must be filed with the commission under R.C. 4905.30. The utility is admonished, by the provisions of R.C. 4905.32, that it may not charge rates which differ from those previously approved and filed with the commission.
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> In contrast, the fuel cost adjustment provisions of R.C. 4905 and 4909 represent a statutory plan which authorizes a utility to pass variable fuel costs directly to consumers. Rates are thereby varied without prior approval of the commission, and independently from the formal rate-making process incorporated in R.C. 4909.18 and 4909.19. . . . Notwithstanding the fact that the commission may refuse to permit a flow-through of gas costs under certain prescribed conditions, it does not appear that application of the [Uniform Purchased Gas Adjustment Clause] constitutes ratemaking in its usual and customary sense.[17]

Although the Commission has not ruled on retroactive ratemaking in the context of renewable energy cost recovery under S.B. 221, the situation in this case is analogous to the

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[16] 69 Ohio St.2d. 509 (1982) ("River Gas").

[17] *Id.* at 571 (citing *Office of Consumers Counsel v. Public Utilities Commission*, 57 Ohio St. 2d 78 (1979)).

situation addressed in *River Gas*. There, the Court determined that the rule against retroactive ratemaking did not preclude the Commission from passing refunds to customers through the fuel clause.[18] The refund at issue in *River Gas* was the result of the utility not accounting for "supplier refunds" correctly under the gas adjustment clause. Similarly, if FirstEnergy is found to have incurred imprudent renewable energy costs in this case, FirstEnergy will have erroneously applied Rider AER, which only allows FirstEnergy to recover "the prudently incurred" cost of RECs.[19] Further, in this case, the renewable energy costs recovered through Rider AER are direct pass-through costs recovered through a variable quarterly rider – in other words, Rider AER is not the type of "fixed rate schedule" to which the rule against retroactive ratemaking traditionally applies.

As FirstEnergy notes, FirstEnergy filed its rider updates on a quarterly basis.[20] However, the Commission never issued an order approving the updated rider charges, meaning that it would not be accurate to claim that the Commission was engaged in formal ratemaking when the new charges took effect automatically 30 days after the rider filings. Conducting a full investigation of FirstEnergy's Rider AER rates within a 30 day period would have been impossible. Clearly, by electing instead to open a new proceeding with an audit process to examine FirstEnergy's renewable energy costs, the Commission did not intend to leave

[18] *See also, In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No. 09-872-EL-FAC, Opinion and Order (January 23, 2012) ("Columbus Southern"). In *Columbus Southern*, the Commission addressed a situation where the utility incurred excessive coal costs and passed those costs through to the ratepayers. The Commission ordered the utility to reallocate some of its revenues to a deferral balance to establish a future rate based on the real cost of the coal used by the utility, and determined that this type of prospective relief was not barred by the rule against retroactive ratemaking.

[19] Case No. 08-935-EL-SSO, Stipulation and Recommendation at 10-11 (February 19, 2009).

[20] FirstEnergy Brief at 77.

customers without any remedy if the evidence in the case demonstrated that any of FirstEnergy's renewable energy costs were imprudently incurred.

FirstEnergy's theory of retroactive ratemaking as applied to Rider AER would also have potentially far-reaching practical implications for the use of other types of variable, pass-through riders, which are common today in all utility ESP rate plans. If the Commission accepts FirstEnergy's argument, then costs incurred and charged under variable riders would never be reviewable for reasonableness in a Commission proceeding unless those riders were filed many months in advance of the requested effective date (otherwise, there would be insufficient time prior to the rider taking effect to thoroughly investigate and examine the utility's rates). It would also preclude a utility from engaging in the common practice of reconciling or "truing-up" variable costs (*i.e.*, passing over-recoveries or under-recoveries from prior periods through to customers) in subsequent rider adjustments.[21]

Finally, the cases FirstEnergy cites to support its retroactive ratemaking argument are inapposite. FirstEnergy draws an analogy between *Lucas County Commissioners v. Public Utilities Commission of Ohio*[22] and the present case by arguing that in both cases there is a Commission-approved rate schedule in effect.[23] However, the "Commission-approved rate" in *Lucas County* was actually a *discontinued* experimental program. The fact that the program was discontinued is critical to the Court's decision, which stated "there simply was no revenue from the challenged program against which the utilities commission could balance alleged

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[21] Rider AER, like other similar variable cost riders, is specifically designed to perform this reconciliation function. *See* Case No. 08-935-EL-SSO, Stipulation and Recommendation at 10-11 (February 19, 2009) (stating that the generation rider intended to recover renewable energy resource requirements "shall be reconciled quarterly").

[22] 80 Ohio St. 3d 344 (1997) ("Lucas County").

[23] FirstEnergy Brief at 77.

overpayments, or against which it could order a credit."[24] The Court notes that without such revenue, any refund or credit that the Commission could order would require the balancing of a past rate with a different future rate, and held that the Commission is not authorized to order a refund for charges previously collected by a utility where those charges were collected pursuant to an experimental program that has expired under its own terms.[25] This is simply not analogous to the present situation. Rider AER is not an experimental rate and has not expired. FirstEnergy will continue to collect Rider AER revenue in the future (at least through the end of FirstEnergy's ESP III rate plan in 2016), and any credit ordered by the Commission in this case would not amount to balancing a past, expired rate with a new and different future rate.

FirstEnergy also relies on the Ohio Supreme Court's decision in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*[26] for the proposition that any refund would constitute prohibited retroactive ratemaking.[27] However, *Keco* is not on point with the present case. In *Keco*, the customer brought a common law action against the utility for restitution seeking a refund for amounts collected under a Commission-approved tariff which was later determined to be unlawful. In this case, there has been no claim of restitution or allegation of unjust enrichment leveled against FirstEnergy. Instead, customers are seeking that, in calculating the renewable energy costs that may be recovered through Rider AER prospectively, it is appropriate to recognize a credit for the imprudently-incurred costs against the legitimate renewable energy compliance costs FirstEnergy continues to recover through Rider AER.

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[24] 80 Ohio St. 3d at 348.

[25] *Id.* at 348-49.

[26] 166 Ohio St. 254, 255-6 (1957) ("Keco").

[27] FirstEnergy Brief at 75.

In summary, Rider AER is not the form of customary ratemaking to which the rule against retroactive ratemaking applies. Further, parties in this case do not seek a retroactive remedy, but a prospective remedy to ensure that FirstEnergy recovers only the actual, prudent, and legitimate costs FirstEnergy incurs to meet its renewable energy benchmarks under Section 4928.64 of the Ohio Revised Code. If the Commission finds that some portion of the costs recovered by FirstEnergy over the audit period were imprudently incurred, the Commission should not allow FirstEnergy to continue to account for these funds as recovered compliance costs. Rather, the Commission should require FirstEnergy to credit those disallowed costs back to customers through Rider AER going forward, as recommended by Dr. Goins.

III. CONCLUSION

Nucor respectfully requests that the Commission adopt Nucor's recommendations as set forth in this brief and in Nucor's initial brief.

Respectfully submitted,

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