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Via E-File

September 16, 2013

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 11-5201-EL-RDR

Dear Sir/Madam:

Please find attached the MEMORANDUM CONTRA APPLICATIONS FOR REHEARING AND MOTION TO TAKE ADMINISTRATIVE NOTICE BY THE OHIO ENERGY GROUP for e-filing in the above-referenced matter.

Copies have been served on all parties listed on the Certificate of Service. Please place this document of file.

Respectfully yours,

David F. Boehm, Esq.
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Jody Kyler Cohn, Esq.
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MLKkew
Encl.
Cc: Certificate of Service

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 Nos. 11-5201-EL-RDR**

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING AND MOTION TO TAKE ADMINISTRATIVE NOTICE BY THE OHIO ENERGY GROUP

The Ohio Energy Group ("OEG") submits this response to Applications for Rehearing filed by intervenors on September 6, 2013 in the above-captioned proceeding. OEG also responds to the Motion to Take Administrative Notice or in the Alternative to Supplement the Record ("Motion") filed by Sierra Club, Environmental Law & Policy Center, and the Ohio Environmental Council ("Environmental Intervenors") on the same day. OEG's decision not to respond to other arguments raised in this proceeding should not be construed as implicit agreement with those arguments.

I. The Commission Should Reject Direct Energy's Untimely Recommendation to Alter the Manner By Which FirstEnergy's Refund Will Be Distributed And Should Maintain the Current Allocation of Rider AER.

Direct Energy Services LLC and Direct Energy Business LLC ("Direct Energy") never attempted to participate in this case during the testimony, hearing, or briefing phases of the proceeding. Nevertheless, it now belatedly urges that the Commission significantly modify its August 7, 2013 Opinion & Order in this case. Direct Energy's untimely and unsupported recommendation to alter the refund methodology chosen by the Commission should be rejected. The Commission should maintain the current allocation of Rider AER.

A. Issuing FirstEnergy's Refund to All Distribution Customers Would Unjustly Enrich Shopping Customers Who Were Never Overcharged at the Expense of Non-Shopping Customers Who Did In Fact Pay The Imprudent REC Costs.

Direct Energy urges that the Commission require the FirstEnergy operating companies to implement the approximately $43 million refund ordered by the Commission by distributing it to all customers (shopping and non-shopping) in FirstEnergy's service territory.[1] It is too late for Direct Energy to raise such an argument. A very real possibility of a refund by FirstEnergy has existed since the Exeter management/performance audit was filed in this case on August 15, 2012. Yet Direct Energy did not seek to intervene in this case in the months after the audit report was filed. Indeed, Direct Energy did not seek to intervene even after OEG, Nucor, and OCC all filed testimony with specific recommendations as to how any refund should be distributed. Now, over a year after the Exeter audit was filed and after the Commission's Order has already been issued in this case, Direct Energy seeks to significantly modify the Commission's finding regarding the distribution of the $43 million refund. It is inappropriate and unreasonable for Direct Energy to make such a request at this late juncture, particularly since Direct Energy never provided any testimony/evidence in support of its recommendation.

Moreover, Direct Energy's recommendation regarding how FirstEnergy's refund should be distributed is flawed since it would unjustly enrich shopping customers at the expense of non-shopping customers. Rider AER is bypassable. Consequently, customers who were shopping when the imprudent REC costs were collected by FirstEnergy through Rider AER were never required to pay those costs. And as the shopping statistics cited by Direct Energy reflect, a majority of sales within FirstEnergy's territory since 2010 were sales by CRES providers to shopping customers. It would therefore be unreasonable to issue the refund to the numerous shopping customers who never paid the imprudent REC costs collected by FirstEnergy.

[1] Direct Energy Application for Rehearing at 5.

Direct Energy's principle concern is that issuing the $43 million refund through FirstEnergy's Rider AER "artificially distorts the price to compare downward and will inhibit customer shopping."[2] But this concern fails to recognize that FirstEnergy's imprudent REC costs previously "distorted" the price to compare in the opposite direction in Direct Energy's favor. While FirstEnergy's pending $43 million refund may lower the price to compare for a brief period in the future, the imprudent REC costs collected by FirstEnergy acted to artificially raise the price to compare in the past.

If the Commission wishes to minimize the impact of the $43 million refund on the price to compare, it could adopt Direct Energy's alternative recommendation – issuing the entire refund through Rider AER in one quarterly adjustment.[3] This is a sensible approach that the Commission can adopt to address the concerns of Direct Energy (and IGS) while still distributing the refund in a reasonable manner. The Commission should not offset the $43 million refund by FirstEnergy's under-collected costs, however, as proposed by Direct Energy. The total amount of under-collected costs that remain since the audit report was filed and whether any of those costs were imprudent REC costs is not clear in the record of this proceeding.

B. If the Commission Adopts Additional Recommendations of the Financial Auditor, It Should Not Modify The Current Rider AER Allocation.

Direct Energy asks that the Commission adopt the recommendations of the financial auditor, including those that FirstEnergy specifically objected to implementing.[4] OEG notes, however, that Direct Energy expressly takes no position regarding the financial auditor's recommendation to modify the current allocation of Rider AER, which is allocated to rate schedules based on loss factors.[5] Accordingly, even if the Commission adopts additional recommendations of the financial auditor, it should not modify the current Rider AER allocation.

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[2] Direct Energy Application for Rehearing at 5.
[3] Direct Energy Application for Rehearing at 5.
[4] Direct Energy Application for Rehearing at 7-8.
[5] Direct Energy Application for Rehearing at 8, fn. 12.

II. The Commission Should Deny Environmental Intervenors' Motion and Reject Their Proposal to Insert a Vague "Price Suppression Benefit" Into the 3% Cost Cap Calculation, Which Would Be Unduly Complex and Contrary to the Language and Purpose of R.C. 4928.64(C)(3).

Environmental Intervenors propose that the Commission modify its Order and insert a vague "price suppression benefit" element into the 3% cost cap calculation set forth in R.C. 4928.64(C)(3).[6] In an attempt to bolster this argument, Environmental Intervenors ask that the Commission either take administrative notice of or supplement the record to include a PUCO report from August 2013 related to the impact of renewable resources on wholesale LMPs.[7]

The Commission should deny Environmental Intervenors' Motion. Though the Report comes from a credible source, consideration of that Report for purposes of this record would be a violation of the due process rights of other intervenors to this proceeding. Intervenors were never given a chance to cross-examine the PUCO Staff responsible for the Report. It would therefore be unreasonable for the Commission to allow the Report to prejudice those intervenors at this late stage of the proceeding.

Even if the Commission admits the Report into the record, it should still reject the recommendation of Environmental Intervenors to insert a vague "price suppression benefit" element into the statutory 3% cost cap. The addition of the Report into the record would not warrant reversing the Commission's finding in this proceeding. The Commission has already heard evidence reflecting that renewable resources may act to lower wholesale LMPs in this proceeding through the testimony of MAREC witness Bruce Burcat.[8] And the Commission has already found that evidence insufficient to outweigh the multitude of other reasons for rejecting the insertion of a vague "price suppression benefit" into the 3% cost cap calculation.

There is no compelling reason for the Commission to undertake complex modeling in order to insert a vague "price suppression benefit" into what could otherwise be simple and transparent 3% cost

[6] Environmental Intervenors Motion.
[7] *Renewable Resources and Wholesale Price Suppression* (August 2013)("Report")
[8] *See* Direct Testimony of Bruce Burcat, Exhibit 2.

cap calculation. As OEG already explained, inserting such an element into the statutory calculation would only unnecessarily increase the uncertainty, subjectivity, and confusion associated with the 3% cost cap calculation for both utilities and retail customers.[9] A host of issues, including how to isolate the effects of only those renewable resources used in furtherance of Ohio's alternative energy benchmarks, make the price suppression argument even more unreliable. And nowhere in the record of this proceeding is there a detailed explanation of how all of those issues would be addressed and/or how a precise "price suppression benefit" would be calculated for each FirstEnergy operating company.

Insertion of a "price suppression benefit" element into the 3% cost cap calculation is also contrary to the plain language of R.C. 4928.64(C)(3). Nowhere in the statute did the General Assembly instruct the Commission to account for vague "price suppression benefits" in conducting the calculation. Such an instruction is also absent from the Commission's rules addressing the 3% cost cap.[10] Rather, the 3% cost cap calculation involves a comparison of FirstEnergy's "reasonably expected cost of that compliance" to its "reasonably expected cost of otherwise producing or acquiring the requisite electricity." As the Commission is a creature of statute,[11] it should apply 3% cost cap calculation consistent with the plain language of §4928.64(C)(3) and should reject appeals to insert a vague "price suppression benefit" element into the statutory calculation.

Environmental Intervenors not only fail to address the plain language of R.C. 4928.64(C)(3), they likewise fail to address the fact that inserting a vague "price suppression benefit" element into the 3% cost cap calculation would significantly undermine the level of protection from unreasonably high alternative energy compliance costs that R.C. 4928.64(C)(3) provides for customers. MAREC witness Burcat conceded that his recommendation would increase the level of the statutory cost cap.[12] This means that, if the Commission adopted his recommendation, customers would end up paying more for

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[9] OEG Reply Brief.
[10] Ohio Adm. Code 4901:1-40-07.
[11] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88 (1999).
[12] Tr. Vol. IV. at 678:25-679:4.

alternative energy compliance than the statute dictates. There is no reason for the Commission to increase the amount of alternative energy compliance costs that customers are exposed to beyond the bounds of statute. Instead, the Commission should reinforce the level of customer protection provided for under R.C. 4928.64(C)(3) by rejecting the recommendation that a vague "price suppression benefit" element be inserted into the 3% cost cap calculation.

III. The Commission Should Uphold Its Decision That R.C. 4828.64(C)(3) Establishes a Mandatory Cost Cap.

FirstEnergy argues that the Commission's finding that R.C. 4928(C)(3) establishes a mandatory cap for alternative energy expenses, subject to additional Commission approval, conflicts with the plain language of that statute and is inconsistent with Commission precedent.[13] But the Commission's finding is based upon a reasonable interpretation of R.C. 4928.64(C)(3), which recognizes that once a utility's benchmark compliance obligation is legally satisfied, it is not reasonable for that utility to incur additional *over*-compliance costs and subsequently seek to recover those costs from customers.

The Commission's interpretation is also consistent with its other regulations and its precedent. The Commission's regulations expressly refer to the 3 percent provision as a "*cost cap.*"[14] A *cost cap* implies a limit or ceiling on payments for a product or service in a specified time period.[15] Accordingly, the 3 percent provision should serve as a limit or ceiling on the amount that customers must pay annually through the Rider AER charge. Further, in the same case that FirstEnergy cites as inconsistent precedent, the Commission expressly declared that "*the function of the [3 percent] cost cap is to protect consumers from significant increases in their electric bills.*"[16] It is therefore reasonable for the

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[13] FirstEnergy Application for Rehearing at 45-46.

[14] R.C. 4928.64(C)(2); Ohio Adm. Code 4901:1-40-07 and 4901:1-40-08.

[15] Direct Testimony of Dennis W. Goins (January 31, 2013)("Goins Testimony") at 7:10-11.

[16] Case No. 08-888-EL-ORD, *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulation, and Review of Chapter 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221,* Opinion and Order at 37 (April 15, 2009).

Commission to find in this case that R.C. 4928.64(C)(3) will be interpreted as establishing a mandatory cap on the level of annual alternative energy compliance costs that FirstEnergy can incur and recover from customers through Rider AER.

The Commission's finding benefits both customers and FirstEnergy. Customers benefit through protection from paying unreasonably high alternative energy costs. If the 3 percent provision was merely *discretionary* for utilities, customers would continually be exposed to the risk of paying unreasonably high alternative energy costs in addition to the costs associated with ever-increasing alternative energy benchmarks.[17] This would severely undermine the customer protection provided for under R.C. 4928.64(C)(3).[18] FirstEnergy benefits by gaining greater pricing leverage in negotiating future REC procurements and by reducing the potential for disputes between FirstEnergy and its customers regarding possible disallowances of any excessive, imprudent REC costs.[19]

Respectfully submitted,

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September 16, 2013

COUNSEL FOR THE OHIO ENERGY GROUP

[17] Goins Testimony at 8:10-15.

[18] Goins Testimony at 8:9-10.

[19] Goins Testimony at 8:3-6.

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 16th day of September, 2013 to those parties listed below:

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Summary: Memorandum Ohio Energy Group's (OEG) Memorandum Contra Applications for Rehearing and Motion to Take Administrative Notice electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group