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

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING OF FIRSTENERGY AND OHIO POWER COMPANY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

PUBLIC VERSION

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. LAW AND ARGUMENT 3

A. The PUCO's Finding That Customers Should Not Have To Pay For FirstEnergy's Purchase Of 2011-Vintage In-State All Renewable Energy Credits (In August 2010) Is Lawful And Reasonable. 3

1. FirstEnergy's Claim That the PUCO Erred In Finding That Market Constraints Were Coming to An End in 2010 and That FirstEnergy Knew It, Should Be Rejected. The PUCO's Review of the Market Evidence, Toward Protecting Ohio Customers, Was Reasonable and FirstEnergy Failed to Produce Evidence Showing Otherwise. 4

2. FirstEnergy's Claim That the PUCO Erred In Finding that FirstEnergy Failed to Report Market Constraints When It Was Under a Regulatory Duty To Do So Should Be Rejected. FirstEnergy Failed To Advise The PUCO Of The Extent of Market Constraints or Their Impact on REC Prices That FirstEnergy Would Seek to Impose on Ohio Customers. 11

3. FirstEnergy's Argument That The PUCO Erred in Finding That the Negotiated Price in RFP3 Was Not Reasonable Because The Initial, Higher, Bid Price Was the Result of a "Competitive Procurement" Should Be Rejected. A "Competitive Procurement" Process Will Not Necessarily Produce a Competitive Outcome That is Needed to Protect Customers. 13

4. The PUCO Properly Protected Ohio Customers By Disallowing the Costs of RECs Purchased in RFP3 that Exceeded [redacted], Because FirstEnergy Could Have Filed for *Force Majeure* Relief to Excuse its 2011 Purchase Obligation. 16

a. PUCO precedent establishes that price is a component in determining whether RECs are "reasonably available." 17

b. The rules of statutory construction establish that price is a component in determining whether RECs are "reasonably available." 17

c. Ohio law provides customers with more protection against unreasonable prices than just the "Three-Percent Cost Cap" provision in R.C. 4928.64(C)(3). 20

5. FirstEnergy's Claim that the PUCO Erred by Reducing The Amount of The Disallowance (For FirstEnergy's Purchase of 2011-Vintage In-State All-Renewable Energy Credits in 2010) By The Amount Paid To A Second Bidder Should Be Rejected. 21

B. FirstEnergy's Assertion--That The PUCO's Order To Protect Customers From Paying Imprudent Costs Constitutes Unlawful Retroactive Ratemaking--Is Wrong. It Was Lawful For The PUCO To Protect Ohio Customers From Paying FirstEnergy For Its Imprudent Costs. 27

C. FirstEnergy Has Not Met The Requirements Under Ohio Law To Warrant A Stay Of The Crediting of $43 Million To Ohio Customers Per The PUCO's Order. 32

III. CONCLUSION 36

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I. INTRODUCTION

On August 7, 2013, the Public Utilities Commission of Ohio ("PUCO" or "Commission") decided that customers do not have to pay $43,362,796.50 (plus carrying costs) to FirstEnergy[1] for its imprudent purchase (in 2010) of 2011-vintage In-State All Renewable Energy Credits (RECs).[2] This decision is based on the PUCO finding that "the record demonstrates that the Companies have not met their burden of proving that, based upon the facts and circumstances which the Companies knew, or should have known, at the time of the decision to purchase, the purchase of 2011 vintage year RECs in August 2010 was prudent."[3] That PUCO finding is correct.

In an attempt to defend the prices it paid for the purchase of 2011-vintage In-State All-Renewable RECs (in 2010), FirstEnergy tries to shield itself under a presumption of prudence argument. But that attempt fails for two reasons. First, there is no presumption

[1] "FirstEnergy," "Utility" and "Company" mean the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

[2] Opinion and Order at 25.

[3] Opinion and Order at 28.

of prudence.[4] Second, assuming *arguendo* that the PUCO lawfully applied a presumption of prudence (which it did not); there is plenty of evidence in this case that rebuts such a presumption. That evidence also supports the PUCO's finding that FirstEnergy did not meet its burden of proving that its purchase of 2011 vintage RECs (in 2010) was prudent.[5]

Finally, the PUCO should be concerned about the arguments that FirstEnergy has made throughout this proceeding. In its effort to secure an 11-week delay in the hearing in this matter (in which FirstEnergy succeeded), FirstEnergy reassured the PUCO (in October 2012) that such a delay would "not unduly prejudice any party's interest."[6] At the same time, FirstEnergy acknowledged that its customers were still paying for the 2009-2011 RECs.[7]

But now, FirstEnergy maintains that "[b]ecause the Companies have shown that by July 31, 2013, the Companies would have likely recovered all but $4.9 million in costs for purchasing RECs in 2009 through 2011, the Commission cannot order the Companies not to collect more than $4.9 million of AER-related costs."[8] Assuming *arguendo* that FirstEnergy cannot lawfully be required to credit customers for money already collected (as FirstEnergy wrongfully alleges now), then FirstEnergy's customers were unduly

[4] Memorandum In Support at pages 3-11 (attached to the Application for Rehearing by the Office of the Ohio Consumers' Counsel (OCC)).

[5] Opinion and Order at 28.

[6] FirstEnergy's Memorandum in Support of Motion to Modify Procedural Schedule at 3 (October 19, 2012). OCC opposed FirstEnergy's request to postpone the hearing for 11 weeks. Under the circumstances of FirstEnergy's position that its charges to customers (including its charges during the case delay that FirstEnergy sought and was granted) cannot be credited back to customers once collected, the PUCO should consider appropriate ramifications for FirstEnergy's representation.

[7] FirstEnergy's Memorandum in Support of Motion to Modify Procedural Schedule at 3 (October 19, 2012).

[8] FirstEnergy Memorandum in Support of Application for Rehearing at 37.

prejudiced by the 11-week delay that FirstEnergy requested. FirstEnergy cannot have it both ways. Fortunately for consumers, the PUCO's disallowance of over $43 million in costs related to FirstEnergy's imprudent REC purchases is not retroactive ratemaking and is lawful.

II. LAW AND ARGUMENT

A. The PUCO's Finding That Customers Should Not Have To Pay For FirstEnergy's Purchase Of 2011-Vintage In-State All Renewable Energy Credits (In August 2010) Is Lawful And Reasonable.

The PUCO disallowed FirstEnergy's charges of $43.3 million to customers for 2011-vintage RECs purchased at a price of $[redacted] per REC. In doing so, the PUCO found that while the market was "constrained and illiquid," FirstEnergy knew that these constraints "would be relieved in the near future."[9] This was one prong of the PUCO's prudence evaluation.

But the PUCO also considered it significant that "the Companies failed to report to the Commission that the market was constrained and illiquid."[10] And that after FirstEnergy rejected a bid price of $[redacted] per REC in Request for Propose ("RFP")3, a price of $[redacted] per REC was negotiated in a bilateral negotiation with the rejected bidder.[11] The PUCO found that negotiated price to be "unsupported by any testimony in the record."[12] Indeed, the PUCO emphasized the inadequacy of the testimony of FirstEnergy's witness, "who described the process of rejecting the bid, did not participate

[9] Opinion and Order at 25.

[10] Opinion and Order at 25; *see also* Opinion and Order at 25-27.

[11] Opinion and Order at 27.

[12] Opinion and Order at 25, 27.

in the negotiations, had no personal knowledge regarding the agreed purchase price, and did not provide testimony in support of the agreed purchase price."[13]

As discussed below, the PUCO's finding of a lack of prudence in FirstEnergy's August 2010 purchase of 2011-vintage RECs is supported by the evidence of record and should stand. FirstEnergy's arguments to the contrary lack any sound foundation in the record.

1. FirstEnergy's Claim That the PUCO Erred In Finding That Market Constraints Were Coming to An End in 2010 and That FirstEnergy Knew It, Should Be Rejected. The PUCO's Review of the Market Evidence, Toward Protecting Ohio Customers, Was Reasonable and FirstEnergy Failed to Produce Evidence Showing Otherwise.

FirstEnergy takes issue with the PUCO's finding that the Utility knew relief from market constraints was "imminent" at the time it purchased 145,269 2011-vintage RECs from [redacted] at a price of $[redacted] per REC (after "negotiating" that price down from $[redacted] per REC).[14] To support its Application for Rehearing, FirstEnergy contends that the PUCO overstated three specific facts: (1) that Navigant projected relief from market constraints by the end of 2010, (2) that the market improved between RFPs 1 and 2 in 2009 and RFP3 in 2010, as indicated by the presence of a second bidder for In-State All-Renewable RECs in RFP3, and (3) that FirstEnergy knew other utilities were able to meet their In-State All-Renewable requirements.[15] FirstEnergy then relies on the PUCO's

[13] Opinion and Order at 27, *citing* Tr. II at 360-365, 370).

[14] FirstEnergy Memorandum in Support of Application for Rehearing at 8-15, citing PUCO Order of August 7, 2013 at 26.

[15] FirstEnergy Memorandum in Support of Application for Rehearing at 8.

finding concerning FirstEnergy's laddering strategy for purchases of 2011-vintage RECs in RFP1 and RFP2 to support FirstEnergy's purchases of 2011-vintage RECs in RFP3.[16]

As discussed below, the PUCO properly represented these facts, based on FirstEnergy's witness's own statements. Moreover, the PUCO accurately assessed the available market information presented in the record to conclude that the market was becoming less constrained and that, under the circumstances, FirstEnergy had reasonable alternatives to accepting [redacted] bid in RFP3 or negotiating a price better than what was still more than [redacted] what the other bidders bid. FirstEnergy must prove that it acted prudently and reasonably under the circumstances given what was known about the All-Renewables RECs market. While FirstEnergy points to record statements of the Exeter Auditor, Mr. Estomin, Mr. Estomin's assessment does not support FirstEnergy's position.[17]

The Exeter Auditor's final report (filed with the PUCO) recommended the examination of a disallowance.[18] The Exeter Auditor also repeatedly states that (1) FirstEnergy paid unreasonably high prices for In-State All-Renewable RECS, (2) FirstEnergy should have established a maximum or limit price on these purchases, but did not, and (3) FirstEnergy had alternatives that likely would have saved customers a significant amount of money.[19] But FirstEnergy ignored these alternatives.[20]

[16] FirstEnergy Memorandum in Support of Application for Rehearing at 14.

[17] FirstEnergy Memorandum in Support of Application for Rehearing at 10-12.

[18] Exeter Audit at 33. The Auditor's draft report recommended a specific disallowance. PUCO Staff Ex. 2A (Public) and 2B (Confidential).

[19] Exeter Audit at iii-iv, 28-33.

[20] Exeter Audit at iii-iv.

The PUCO's assessment, like the Auditor's assessment, was sound, notwithstanding FirstEnergy's efforts to point out limitations in available market information at the time the decision to proceed with RFP3 was made. FirstEnergy also, conveniently, ignores key market information that was available, such as the Spectrometer report indicating [redacted].[21]

While FirstEnergy emphasizes that the PUCO acknowledged that Navigant's projection, that "the Ohio RECs market will continue to be very constrained through 2010," was only a "projection" and not a fact,[22] the limitations on any and all projections are obvious. They are never facts – they are always predictions. The question, for the PUCO's purposes, is not whether they are predictions or not, but whether they were reasonable ones.

The PUCO clearly considered Navigant's projection, that the market would be constrained through 2010, to be a reasonable one – and one of which FirstEnergy was well aware. And, therefore, the PUCO pointed to this reasonable projection in reaching its decision that market relief was imminent and that this was known to FirstEnergy. Historic All-Renewables market prices in other states, as emphasized by the Exeter Auditor and OCC witness Gonzalez was another strong indicator that FirstEnergy's purchase price was an unreasonable one.[23] The PUCO could have relied on that historic information as the basis for its Opinion. The record provided ample basis for finding that market prices should have been much lower than the prices paid by FirstEnergy in RFP3

[21] OCC Exhibit 15, Set 3-INT-2, Attachment 25 (Confidential); *see also*, Transcript Volume II-confidential, page 493.

[22] FirstEnergy Memorandum in Support of Application for Rehearing at 9.

[23] Exeter Audit at 28, 30; Direct Testimony of Wilson Gonzalez at 8-9, 12-13.

to Bidder 1. The PUCO states that the "new market information" upon which it relied "included" (1) the second-bidder, (2) Navigant's projected 12-month constraint, and (3) the fact that other utilities were able to meet their In-State All-Renewable benchmarks.[24] While the PUCO's assessment "included" these facts, it was not necessarily limited to it.

FirstEnergy also criticizes the PUCO for interpreting Navigant's statement to mean that the significant constraints Navigant saw "through 2010" would come to an end after 2010.[25] But the PUCO's interpretation of Navigant's statement was a reasonable one. It was consistent with the testimony of FirstEnergy witness Dean Stathis cited by the PUCO,[26] and FirstEnergy failed to produce evidence that the market constraints Navigant identified "through 2010" continued beyond early 2011. FirstEnergy's effort to shift the burden of proof to the PUCO -- or other parties -- should be rejected.

FirstEnergy also challenges the emphasis the PUCO placed on the second bidder in RFP3 and FirstEnergy's knowledge that other utilities were able to comply with the AER mandates.[27] FirstEnergy argues that these facts "at most" "show the beginning of some development of the market" but do not show "imminent relief" from constrained market conditions.[28]

Certainly, in light of the facts identified in its Opinion and Order, it was reasonable for the PUCO to recognize, in August 2010, a significant change in the market. Moreover, the constrained market conditions and differences in the Ohio In-State All-Renewables RECs market from other states' All-Renewable RECs markets do

[24] Opinion and Order at 26-27.

[25] FirstEnergy Memorandum in Support of Application for Rehearing at 9-10.

[26] Opinion and Order at 26, *citing* to Direct Testimony of Dean Stathis at 35, Tr. II at 360.

[27] FirstEnergy Memorandum in Support of Application for Rehearing at 10.

[28] FirstEnergy Memorandum in Support of Application for Rehearing at 10.

not explain or justify the prices bid and accepted by FirstEnergy in either RFP1, RFP2, or RFP3, as the Exeter Auditor emphasized.[29] Even though the absence of market information made Ohio's market more difficult to evaluate and understand, the Exeter Auditor explained that the differences in different states' RECs market could not explain the magnitude of price difference bid by FirstEnergy:

> As noted previously in this report, none of the RECs prices elsewhere in the country were trading at prices more than $45 per REC during the relevant period, and many were selling for prices considerably lower. While this information does not translate to what RECs prices in Ohio should be, ***the underlying economic factors are the same***, that is, the price of RECs should be adequate to cover the higher costs of generation using renewable technologies, subject to the economic impacts of the differences in state legislation. **There is no basis for concluding that the cost of renewable energy development in Ohio differs so markedly from the cost of renewable development elsewhere in the country so as to warrant RECs prices of $[redacted] or more in Ohio compared to the RECs prices seen elsewhere.**[30]

This fundamental conclusion by the Exeter Auditor was unequivocal. Exeter stated that there is ***no basis*** to conclude that prices in Ohio would be so markedly different from All-Renewable RECs prices elsewhere simply because of Ohio's In-State requirement.[31] The Exeter Auditor further concluded that market power was being exercised in Ohio's nascent renewables market "given offered prices well above the cost of production."[32] The Exeter Auditor concluded that the prices offered, "were composed largely of economic rents."[33] Although the PUCO's Opinion did not emphasize the Auditor's conclusion on this point, there is ample evidence for the PUCO to conclude

[29] Exeter Audit Report at 30.

[30] Exeter Audit Report at 30.

[31] Exeter Audit Report at 30.

[32] Exeter Audit Report at 31.

[33] Exeter Audit Report at 31.

that the prices paid were not reasonable despite the limited market information that was available. As the Spectrometer report shows, however, in August 2010, [redacted].[34]

OCC disputes FirstEnergy's statement that "there was no market price information on In-State All-Renewables."[35] The Spectrometer report definitively shows that there was [redacted].

FirstEnergy also argues that looking to other REC markets provides little guidance since other markets do not move in lockstep.[36] But neither the Exeter Auditor nor OCC have argued that these markets move in lockstep or that some variation is not to be expected. The fact that there are and will continue to be variations in REC markets, including market supply and prices, across states is discussed by the Exeter Auditor.[37] And the PUCO, in its Opinion and Order, never addressed the comparability of Ohio's REC market to other states' REC markets.

It is one thing, however, to say REC markets do not move in lockstep and another to say, as FirstEnergy has argued, that prices in one REC market are completely different from those in other REC markets for a similar product. FirstEnergy's suggestion, that the factors driving solar REC prices can be compared to All-Renewables REC prices,[38] is mistaken. It is well recognized that higher development costs for solar facilities have

[34] OCC Exhibit 15, Set 3-INT-2, Attachment 25 (Confidential); *see also*, Transcript Volume II-confidential, page 493.

[35] FirstEnergy Memorandum in Support of Application for Rehearing at 11.

[36] FirstEnergy Memorandum in Support of Application for Rehearing at 12.

[37] Exeter Audit Report at 30.

[38] FirstEnergy Memorandum in Support of Application for Rehearing at 11-12 (discussing New Jersey solar REC prices).

resulted in very different supply curves for these products throughout the country, and higher prices for solar RECs.[39]

Finally, FirstEnergy argues that its laddering strategy was designed to address the uncertainty associated with the timing of availability of additional supply and the level of future prices.[40] FirstEnergy emphasizes that its laddering approach was supported by Navigant, was utilized for all other categories of RECs without complaint from the Exeter Auditor, and was not criticized by the PUCO with respect to the 2009 purchases of 2011 In-State All-Renewable RECs.[41] Although OCC disagrees with the PUCO's determination allowing laddering of 2009 purchases of 2010- and 2011-vintage In-State All Renewables RECs and has filed an Application for Rehearing regarding the imprudence of those purchases, a laddering strategy at the prices paid in 2010 for 2011-vintage RECs was simply unreasonable.[42]

Given the moderate prices in the All-Renewables market throughout the country and the expectation that supply would become increasingly available (lowering prices), buying high-priced RECs in the early years of Ohio's nascent market for In-State All-Renewables RECs market made little sense. As the Exeter Auditor stated:

> While the Companies could not know with certainty that prices would be declining over time or that the required number of In-State All Renewables RECs would be available at any price in sufficient time to meet the compliance requirements, the experience in other states suggests that price would be declining and that RECs would be increasingly available as markets respond to the newly created demand for RECs.[43]

[39] Direct Testimony of Wilson Gonzalez at 13-14.

[40] Opinion and Order at 12-15.

[41] Opinion and Order at 12-15.

[42] See Transcript Vol. I at 112-113, 121 (Estomin-confidential); Direct Testimony of Wilson Gonzalez at 17.

[43] Exeter Auditor Report at 33.

As the PUCO recognized, the uncertainties of additional availability of supply and declining prices, were different in 2010 than in 2009. Continuation of a laddering strategy, while it made sense for REC products where prices were within the range of reasonableness in other REC markets around the county, did not make sense in Ohio where the prices were incongruent with All-Renewables RECs market prices around the country. Use of a laddering approach is simply inappropriate where prices far exceed those previously seen in related markets.

2. FirstEnergy's Claim That the PUCO Erred In Finding that FirstEnergy Failed to Report Market Constraints When It Was Under a Regulatory Duty To Do So Should Be Rejected. FirstEnergy Failed To Advise The PUCO Of The Extent of Market Constraints or Their Impact on REC Prices That FirstEnergy Would Seek to Impose on Ohio Customers.

As emphasized by the PUCO, FirstEnergy was obligated, pursuant to Ohio Adm. Code. 4901:1-40-03, to report any purported market constraints.[44] FirstEnergy incorrectly argues, however, that it fulfilled this obligation, by explaining, in its Ten Year Compliance Plan, that there was a "limited availability of renewable energy resources" due to a "significant impediment to achieving compliance (particularly for solar renewable energy resources)."[45] FirstEnergy's Ten Year Compliance Plan fell short of the statutory requirement of reporting market constraints that were driving prices to unseen levels.

Pointing to the magnitude of the REC costs, the Exeter Auditor clearly explained that FirstEnergy should have consulted with the PUCO Staff to discuss reasonable

[44] Opinion and Order at 26

[45] FirstEnergy Memorandum in Support of Application for Rehearing at 17.

alternatives before moving forward with the purchases.[46] Furthermore, in arguing that REC pricing information was available to the PUCO Staff through the PJM GATS website,[47] FirstEnergy attempts to shift its burden of managing the reasonableness of its procurement decisions onto the PUCO Staff. But such a position is disingenuous, seeing as FirstEnergy never even consulted with the PUCO Staff prior to purchasing the high-priced RECs. While the PUCO Staff may provide regulatory guidance when approached, it is not the PUCO Staff's responsibility to oversee day-to-day utility management decisions, including REC purchasing decisions.[48]

While no one can say for sure whether the PUCO Staff would have provided FirstEnergy with money-saving guidance prior to FirstEnergy incurring over [redacted][49] in REC costs that were passed on to customers, FirstEnergy's failure to inform the PUCO of the market disequilibrium was unquestionably imprudent. FirstEnergy's failure to take reasonable steps that might have averted this financial catastrophe was imprudent. And FirstEnergy's customers should not have to pay for FirstEnergy's failures.

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[46] Exeter Audit Report at 32.

[47] FirstEnergy Memorandum in Support of Application for Rehearing at 18.

[48] *In the Matter of the Application of Ohio Edison Company for Certification of the West Lorain Combustion Turbine Project in Lorain County, Ohio*, Case No. 99-540-EL-BGN, 2000 Ohio PUC LEXIS 416 (PUC Ohio April 17, 2000) at 43-44 ("As we move towards a competitive electric industry, the Board must be mindful to allow the market to dictate certain aspects of electric service and not to micromanage electric companies. We believe that it is clearly the company's responsibility to determine whether to curtail supply to or load of any customer or curtail or shut down the West Lorain project based on operational constraints. These are operational considerations best left to the company."); *see also In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, 2000 Ohio PUC LEXIS 678 (PUC Ohio July 20, 2000) at 44 ("This Commission is not required to micromanage Ameritech's record keeping. If Ameritech is not able to understand the meaning of "case-by-case documentation," then we may have a far more serious problem with Ameritech's record keeping than we realize.")

[49] Direct Testimony of Wilson Gonzalez-Confidential at 34 & Exh. WG-3-Confidential.

3. FirstEnergy's Argument That The PUCO Erred in Finding That the Negotiated Price in RFP3 Was Not Reasonable Because The Initial, Higher, Bid Price Was the Result of a "Competitive Procurement" Should Be Rejected. A "Competitive Procurement" Process Will Not Necessarily Produce a Competitive Outcome That is Needed to Protect Customers.

In essence, FirstEnergy argues that the negotiated price that it paid to [redacted] in RFP3 after rejecting the initial RFP bid price was reasonable because the initial bid price was the result of a competitive procurement.[50] In so arguing, it is FirstEnergy's position that any price below the initial bid price is necessarily a competitive price. FirstEnergy even claims $25 million in savings resulting from its negotiating effort.[51] Interestingly, FirstEnergy publicly claims $25 million in savings for customers while vehemently arguing that the prices paid for those RECs are confidential.

Contrary to FirstEnergy's assertions, the Exeter Auditor found that a competitive procurement process does not ensure a competitive result:

> We have noted above that procurement methods employed by the Companies are assessed to have been competitive. ***That does not mean, however, that the market in which the Companies were operating was competitive.*** The bids received by the FirstEnergy Ohio utilities should have been interpreted by the Companies as indicative of serious market disequilibrium.[52]

Similarly, OCC witness Gonzalez testified that a competitive outcome is not necessarily the result of a competitive procurement process.[53]

> Q. Thank you. Mr. Gonzalez, you were asked questions about the design of the competitive process. My question to you is, a process that is designed to obtain a competitive

[50] FirstEnergy Memorandum in Support of Application for Rehearing at 19-22.

[51] FirstEnergy Memorandum in Support of Application for Rehearing at 21.

[52] Exeter Audit Report at 29-30. (Emphasis added.)

[53] Transcript Volume III-public, page 639

outcome, does it always actually result in competitive results?

A. No, it doesn't. It depends on what the nature of the market is. You -- you could have a -- you could have a competitive -- a competitive process, but if the market has conditions, for example, where there is a large supply that's controlled by an individual supplier, that may not lead to a competitive outcome.[54]

Indeed, the evidence shows that a significant portion of the market was controlled [redacted][55] [redacted][56] [redacted][57] [redacted][58] Therefore, FirstEnergy's contention that the negotiated price was reasonable because the initial bid price was competitive simply lacks merit. Thus, the PUCO properly held that FirstEnergy failed to carry its burden of proof establishing that the negotiated price was prudent under the existing market conditions.[59]

FirstEnergy's emphasis on the fact that the bids were "sealed" and that the potential bidders did not know the identities or number of the other bidders does not

[54] Transcript Volume III-public, page 639.

[55] OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-confidential, at p. 4 of 10.

[56] Direct Testimony of Daniel R. Bradley at 28-30, 33-35; Direct Testimony of Wilson Gonzalez (confidential) at 19.

[57] Direct Testimony of Daniel R. Bradley at 40-41; Exeter Audit Report at 4, 23-25.

[58] OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-confidential, at p. 4 of 10. Navigant also goes on to say that [redacted]

[59] Opinion and Order at 27.

necessarily create a competitive outcome.[60] The bidders' ignorance to other bids and prices is only one component of many in determining whether there was an effective competitive bidding process that will produce reasonable prices for consumers.

FirstEnergy's knowledge [redacted], when it decided whether to purchase the RECs, was an even more determinative factor, indicating the lack of a competitive bidding process.[61] One can hardly think of anything that would have jeopardized the independence and neutrality of FirstEnergy's decision-making process more than the Utility knowing that [redacted] for the excessively-priced RECs. FirstEnergy knowingly allowed [redacted] to reap incredible financial rewards. Indeed, for this reason, at least one other Ohio utility (AEP-Ohio) included a provision in its RFP that prohibited [redacted].[62] FirstEnergy, however, did not provide its customers with any such protection.[63]

Moreover, the Exeter Auditor was not aware that FirstEnergy knew [redacted] was the high-priced bidder prior to FirstEnergy's determination to purchase the high-priced RECs.[64] Had FirstEnergy disclosed this fact to the Exeter Auditor, it may have impacted the Auditor's findings.

Contrary to FirstEnergy's argument that "[t]he number of bidders thus did not affect whether the outcome would be competitive,"[65] the lack of bidders created a

[60] FirstEnergy Memorandum in Support of Application for Rehearing at 19-20.

[61] Transcript Volume I-confidential, pages 314-316.

[62] Transcript Volume III-public, page 565.

[63] *See* Exeter Audit Report at iv.

[64] Transcript Volume I-confidential, page 67.

[65] FirstEnergy Initial Brief at 32.

position of market power for the [redacted] bidder in RFP1 and RFP2 and the high-priced bidder in RFP3.[66] The record is clear that FirstEnergy's RFPs did not yield competitive prices because the RFP instrument had no controls on market power and no checks on [redacted] transactions. The [redacted] difference between the prices offered by Bidder 1 and Bidder 2 (including the negotiated price) in RFP3 is a clear indication that [redacted] had market power. Through its market power, [redacted] affected the total quantity and/or price for In-State All Renewable RECs for the period at issue.[67] For these reasons, the PUCO properly found that 145,269 RECs purchased in RFP3 were not competitively procured and should be disallowed.

4. The PUCO Properly Protected Ohio Customers By Disallowing the Costs of RECs Purchased in RFP3 that Exceeded [redacted], Because FirstEnergy Could Have Filed for *Force Majeure* Relief to Excuse its 2011 Purchase Obligation.

FirstEnergy also takes issue with the PUCO's finding that, in August 2010, when FirstEnergy determined to purchase the excessively-priced RECs in RFP3, FirstEnergy should have known, based upon the PUCO's decision in an *AEP Ohio* case in January 2010, that *force majeure* could be lawfully granted because of excessive prices.[68] FirstEnergy acknowledges that it had time to apply for *force majeure* but argues that the PUCO misreads *AEP Ohio* and that the PUCO's view is wrong as a matter of law.[69] But

[66] Initial Brief of OCC at 23-26. *See also* the Exeter Auditor's conclusion that "RECs prices of that magnitude indicate that some degree of **market power** is being exercised by a segment of the market given offered prices well above the cost of production." Exeter Audit Report at 31. (Emphasis added.)

[67] *See* OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-confidential, at p. 4 of 10.

[68] FirstEnergy Memorandum in Support of Application for Rehearing at 22-29, *citing In re Columbus Southern Power Co and Ohio Power Co. ("AEP Ohio"),* Case o. 09-987-EL-EEC, Entry (PUC Ohio January 7, 2010).

[69] FirstEnergy Memorandum in Support of Application for Rehearing at 22-23.

the Commission properly applied its own precedent and considered price as a factor in determining whether it was prudent to file for *force majeure*.

a. PUCO precedent establishes that price is a component in determining whether RECs are "reasonably available."

In particular, FirstEnergy argues that AEP Ohio's basis for relief was not price but availability of solar RECs and that this is consistent with FirstEnergy's position in this case.[70] FirstEnergy also argues that the PUCO's reading of its decision in *AEP Ohio* is at odds with the statute and prior Commission precedent in a rulemaking proceeding.[71]

While the PUCO's implicit rejection of the Ohio Environmental Council's position in *AEP Ohio* may lack an express ruling that is determinative of the PUCO's interpretation of the law, the law's use of the term "reasonably available" defines the application of the *force majeure* provision. And the PUCO has explicitly ruled that "reasonably available" pertains to price in other cases since *AEP Ohio.*[72]

b. The rules of statutory construction establish that price is a component in determining whether RECs are "reasonably available."

Ohio law provides that words are to be construed according to their common usage and that the entire statute is intended to be effective.[73] Unless the terms used in the

[70] FirstEnergy Memorandum in Support of Application for Rehearing at 23-24.

[71] FirstEnergy Memorandum in Support of Application for Rehearing at 25-29, *citing* 4928.64(C)(4) and *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221,* Case No. 08-888-EL-ORD, Opinion and Order at *61-62 (April 15, 2009)

[72] *In the Matter of the Application by Noble Americas Energy Solutions LLC for a Waiver from 2010 Ohio Sited Solar Energy Resource Benchmarks*, Case No. 11-2384-EL-ACP, 2011 Ohio PUC LEXIS 944, PUCO Finding & Order (Aug. 3, 2011); *In the Matter of the Application by Noble Americas Energy Solutions LLC for a Waiver from 2010 Ohio Sited Solar Energy Resource Benchmarks*, Case No. 11-2384-EL-ACP, 2011 Ohio PUC LEXIS 944, PUCO Finding & Order (Aug. 3, 2011).

[73] R.C. 1.42 and R.C. 1.47(B).

statute are otherwise defined or are ambiguous, their common meaning should be applied.[74] The term "reasonable" is a common modifier in legal provisions and has a common and well-established meaning.[75] Neither the term "reasonable" or the phrase "reasonably available" is defined in R.C. 4928.64. Consequently, as discussed by OCC in its Application for Rehearing, the plain language "reasonably available" means that the REC purchase requirement should be excused if RECs cannot not be acquired under reasonable circumstances.[76]

FirstEnergy construes the term "reasonably" in a manner inconsistent with common usage, arguing that it "directs the Commission to look at the reasonableness of the efforts by the utility to obtain those RECs."[77] But R.C. 4928.64(C)(4)(b) does not define "reasonably available" in terms of the "efforts" of the utility to obtain RECs. Although the statute directs the PUCO to consider, as part of its *force majeure* determination, whether the utility has made a "good faith effort" to acquire the RECs, FirstEnergy would have the PUCO improperly construe the statute to exclude price as a factor in determining whether the RECs are "reasonably available." But the common usage of the term "reasonable" and the phrase "reasonably available" provides otherwise. Accordingly, the PUCO has explicitly ruled that price is a factor to be considered.

Moreover, the use of the term "reasonably available" reflects the General Assembly's recognition that the application of the *force majeure* provisions of the law should be driven by factual circumstances, under each situation. For instance, in a case

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[74] *Id.*

[75] *See, e.g. Chester v. Custom Countertop & Kitchen,* 1999 Ohio App. LEXIS 6138 (1999).

[76] R.C. 4928.64(C)(4)(b); OCC Memorandum in Support of Application for Rehearing at 26.

[77] FirstEnergy Memorandum in Support of Application for Rehearing at 25.

involving DPL Energy Resources, the Commission stated that "recognizing the limited time available for the development of new SERs [Solar Energy Resources] to meet the statutory standard in its first year, the Commission finds that DPLER's request for a *force majeure* determination is reasonable and should be granted."[78] Similarly, in connection with an application filed by FirstEnergy Solutions, the Commission recognized "that its certification process for SRECs was in its infancy in 2009, and, as such, a limited number of SRECs were available."[79]

Thus, the PUCO has consistently construed the phrase "reasonably available" within the context of each individual case. These considerations include the length of time the market had to develop, the period during which necessary rules of implementation were in effect, the status of the certification process, and, of course, the price at which RECs or SRECs were available.

The PUCO's ruling that FirstEnergy was obligated to pursue *force majeure* as an available alternative is consistent with these rulings. It was unreasonable for FirstEnergy, in addressing its statutory obligations, to narrowly construe the *force majeure* provision so as to exclude price in such determination, especially in the absence of any clear

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[78] *In the Matter of the Application of DPL Energy Resources Inc. for an Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code*, Case No. 09-2006-EL-ACP, 2011 Ohio PUC LEXIS 371, PUCO Finding & Order (Mar. 23, 2011) (emphasis in original).

[79] *In the Matter of the Application of FirstEnergy Solutions Corp. for Approval of its Alternative Energy Annual Status Report and for an Amendment of its 2009 Solar Energy Resources Benchmark Pursuant to Section 4928.64(C)(4)(a), Revised Code*, Case No. 10-467-EL-ACP, 2011 Ohio PUC LEXIS 238, PUCO Finding & Order (Feb. 23, 2011); *see also, In the Matter of Duke Energy Retail Sales, LLC's Annual Alternative Energy Portfolio Status Report & In the Matter of Duke Energy Retail Sales, LLC's Request for Force Majeure Determination*, Case No. 10-508-EL-ACP & Case No. 10-509-EL-ACP, 2011 Ohio PUC LEXIS 255, PUCO Finding & Order (Feb. 23, 2011) (reaching similar conclusions regarding the infant state of the Commission's certification process and state of the market); *In the Matter of the Application of the Retail Electric Supply Association for an Amendment to the 2009 Solar Energy Resource Benchmark Pursuant to Section 4928.64(C)(4), Revised Code*, Case No. 10-428-EL-ACP, 2010 Ohio PUC LEXIS 455, PUCO Finding & Order (Apr. 28, 2010) (recognizing that the Commission's rules did not become effective until December 10, 2009 and that the certification process for S-RECs was in its infancy).

precedent on the subject. For these reasons, the PUCO properly held that it was imprudent for FirstEnergy not to seek a *force majeure* determination before purchasing the high-price RECs bid in RFP3.

c. Ohio law provides customers with more protection against unreasonable prices than just the "Three-Percent Cost Cap" provision in R.C. 4928.64(C)(3).

FirstEnergy attempts to further gut the *force majeure* provision contained in R.C. 4928.46 (C)(4)(b). FirstEnergy argues that R.C. 4928.64(C)(3), allowing a utility to limit its expenditures on RECs to 3% of its cost of "otherwise producing or acquiring the requisite electricity," is the only price-related limitation under the law.[80] But there is nothing in the law to suggest that the 3% overall cost cap was intended as the only dollar-related check on REC purchases.

Moreover, FirstEnergy argues that the three-percent cost cap is within the Utility's discretion.[81] However, if that is the only price-related limitation, then that leaves very little protection for the customers paying for the REC purchases. Certainly, the General Assembly did not intend that utilities could expend an unlimited sum of money for RECs and still be able to recover the cost from Ohio customers. Therefore, it stands to reason, that the phrase "reasonably available" as it appears in R.C. 4928.64(C)(4)(b), necessarily includes a price component.

With respect to FirstEnergy's reliance on the PUCO's rules review,[82] the PUCO did not address the interpretation of "reasonably available" as it is used in R.C. 4928.64(C)(4)(b). Rather, in that case, the PUCO addressed whether there was any way

[80] FirstEnergy Memorandum in Support of Application for Rehearing at 26-27.

[81] FirstEnergy Memorandum in Support of Application for Rehearing at 44-46.

[82] FirstEnergy Memorandum in Support of Application for Rehearing at 27-28.

for the utility to avoid having to make a compliance payment ("statutory out") if *force majeure* was not granted and the three-percent cap was not exceeded.[83] Contrary to FirstEnergy's discussion, the PUCO, in its rules review, addressed whether compliance payments would be applied, not whether *force majeure* would apply where the price of RECs was prohibitive. Moreover, as discussed above, the PUCO has subsequently ruled that price is a consideration in *force majeure* determinations – despite FirstEnergy's disagreement with that position. In this case, FirstEnergy's decision to forego a *force majeure* determination was grossly imprudent under any measurable standard. The PUCO should reject FirstEnergy's interpretation of the law and prior PUCO rulings.

5. FirstEnergy's Claim that the PUCO Erred by Reducing The Amount of The Disallowance (For FirstEnergy's Purchase of 2011-Vintage In-State All-Renewable Energy Credits in 2010) By The Amount Paid To A Second Bidder Should Be Rejected.

In arriving at its $43.3 million disallowance, the PUCO took the negotiated price paid by FirstEnergy to [redacted] of $[redacted] per REC and reduced that amount by the level of the Second Bidder's bid price ($[redacted] per REC), resulting in a net disallowance of $298.50 per REC ($43,362,796.50/145,269) for 145,269 RECs, or $43,362,796.[84] Per the terms of the Stipulation in FirstEnergy's ESP proceeding and consistent with Ohio law as discussed below, the PUCO did not have to apply an offset for FirstEnergy's imprudent REC purchases. FirstEnergy nonetheless challenges the amount of that credit.[85]

[83] *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 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. 22,* Case No. 08-888-EL-ORD, Entry on Rehearing, pp. 35-37 (June 17, 2009).

[84] Opinion and Order at 28.

[85] FirstEnergy Memorandum in Support of Application for Rehearing at 42-44.

Indeed, FirstEnergy argues that there is "no evidence" to support as an offset any price other than the full price paid by FirstEnergy for the disallowed RECs.[86] In other words, FirstEnergy's argument against the PUCO's offset is just another argument to say that the PUCO's disallowance should be reversed in its entirety. In support of its position, FirstEnergy argues there is no evidence, beyond those RECs acquired from the Second Bidder, that there were any RECs available to purchase at the Second Bidder's price.[87]

Given the state of the market for In-State All-Renewables RECs in August 2010, the PUCO found that it was imprudent for FirstEnergy to purchase from the First Bidder such RECs at the negotiated price (i.e., $298.50 plus the amount paid to the Second Bidder). The PUCO, therefore, disallowed this sum -- $[redacted] per REC. The PUCO found, however, that an offset to the disallowance of the amount paid to the First Bidder was warranted at the rate paid to the Second Bidder.[88] The PUCO did not explain why it determined that an offset was appropriate or why the amount paid to the Second Bidder was considered the appropriate offset amount. Presumably, the actual availability of RECs to be purchased at this price convinced the PUCO that this was a reasonable offset.

FirstEnergy argues "[t]here is no evidence that there were any other In-State All Renewables that were or could be offered" at the price paid by the Second Bidder.[89] FirstEnergy contends that [redacted] and that the Second Bidder's price understates the reasonable market price for

[86] FirstEnergy Memorandum in Support of Application for Rehearing at 44.

[87] FirstEnergy Memorandum in Support of Application for Rehearing at 42.

[88] Opinion and Order at 28.

[89] FirstEnergy Memorandum in Support of Application for Rehearing at 43.

the higher volume of RECs bid by the First Bidder.[90] FirstEnergy points to the Exeter Auditor's testimony to argue that the PUCO should consider basing its disallowance on [redacted] "[redacted]"[91] Using this higher "basis for disallowance" offered by the Auditor, as compared to the Second Bidder price utilized by the PUCO, FirstEnergy argues that the PUCO's offset price is "well below even the range recommended by the principal author of the Exeter Report."[92] But the Auditor's recommendation is not satisfactory to FirstEnergy either, since it argues that the PUCO Auditor's "standard is too low" because of the "unique nature of the In-State All Renewables market."[93] And, instead of putting forth any argument for a higher offset, FirstEnergy simply returns to its position that "there is no evidence that a price, other than the price received by the Companies, was available to support a calculation for a disallowance."[94] Thus, even though it would appear that FirstEnergy is arguing for a different offset, instead it is arguing that the difficulty of assigning a price for a disallowance offset makes the entire disallowance unreasonable.[95] FirstEnergy's position makes little sense.

The Stipulation and law support disallowance of imprudent purchases in their entirety.[96] Indeed, a significant objective of regulatory disallowances is to discourage utilities from making imprudent purchases, especially imprudent purchases from

[90] FirstEnergy Memorandum in Support of Application for Rehearing at 43.

[91] FirstEnergy Memorandum in Support of Application for Rehearing at 43, *quoting* Transcript Vol. I at 133 (Confidential).

[92] FirstEnergy Memorandum in Support of Application for Rehearing at 44.

[93] FirstEnergy Memorandum in Support of Application for Rehearing at 43.

[94] FirstEnergy Memorandum in Support of Application for Rehearing at 44.

[95] FirstEnergy Memorandum in Support of Application for Rehearing at 44.

[96] OCC did not, in its Application for Rehearing, take issue with the PUCO's offset to the disallowance.

companies. Disallowing the entire amount of the imprudent purchases acts as a deterrent. To the extent the entire amount is not disallowed, then the deterrent benefit is lessened. Thus, it is the intent of the law and the history of application of that law that imprudently incurred expenses should be disallowed in their entirety.

R.C. 4909.154 provides that the public utilities commission "shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent." R.C. 4909.154 leaves no room for offsets. Rather, it is intended to ensure that customers do not pay the entirety of expenses that are found to be imprudent.

In *In the Matter of the Investigation into the Perry Nuclear Power Station; In the Matter of the Investigation into the Beaver Valley Nuclear Power Station*, 85-521-EL-COI, (Phase II); 87-1777-EL-COI, 1989 Ohio PUC LEXIS 196 (Opinion and Order of March 7, 1989) at 90, the PUCO found that disallowance of $237 million invested "with no offset for the sale and leaseback transaction" was appropriate. Although Ohio Edison stipulated to this disallowance, without offset, the principle is essential to public utility regulation. It simply does not make sense to approve a portion of the costs associated with a transaction – or construction of facilities – if the transaction itself is imprudent. If the transaction itself is imprudent, then so are the expenditures or capital investments associated with it.

Moreover, the Stipulation in FirstEnergy's Electric Security Plan proceeding specifically provided for recovery of only the prudently incurred cost of Renewable

Energy Credits.[97] Since the PUCO has determined that the Renewable Energy Credits at issue were not prudently purchased, no portion of those costs should be permitted to be collected from customers.

In its decision in this case, the PUCO lessened the deterrent effect of its disallowance by giving FirstEnergy an offset based upon what it viewed as the reasonable price that was actually available for RECs at the time. Since it is not possible to go back in time to re-bid the RECs or solicit REC brokers to determine reasonable prices to be paid,[98] the PUCO did the next best thing. It used an actual price paid to FirstEnergy for the same category of RECs at the same time. The PUCO moderated the impact of its order on FirstEnergy by requiring customers to pay what it viewed as the reasonable market price of the RECs. Furthermore, the PUCO did not impose any specific penalty on FirstEnergy for making such aberrant purchases from [redacted].

FirstEnergy's argument in its Application for Rehearing – that there was no price other than the full amount of the purchase price that would represent a reasonable offset – is indicative of FirstEnergy's unwillingness to accept any responsibility for its imprudent purchasing practices. To FirstEnergy, it was simply a victim of market forces. The fact that FirstEnergy paid [redacted] of Ohio's Alternative Compliance Payment and [redacted] of prices seen throughout All-Renewables RECs markets around the country, in FirstEnergy's view, should have no bearing on the PUCO's assessment of FirstEnergy's REC purchases.

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[97] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority*, Case No. 09-21-EL-ATA, Case No. 09-22-EL-AEM, and Case No. 09-23-EL-AAM, Stipulation (Filed February 19, 2009).

[98] Transcript Vol. I-public at 130-131 (Estomin).

FirstEnergy is inconsistent in comparing the Exeter Auditor's recommendation of a reasonable "basis for disallowance" with the offset determined by the PUCO, and then saying that neither amount represents a reasonable offset. In reality, the PUCO has made an offset that is generous to FirstEnergy compared to the legally supported approach of providing no offset. Moreover, the PUCO's assessment should reasonably be construed as an assessment of the reasonable proxy price for Ohio In-State All-Renewable RECs. It is not possible, nor is it required, for the PUCO to go back to see whether a bidder could have been obtained for the volume of RECs at the Second Bidder price.

Moreover, it should be emphasized that the PUCO did not find that these RECs could have been purchased at the time at the offset price. Its decision was that they should not have been purchased at the indicated price, that FirstEnergy had time to re-bid these RECs (in both 2010 and 2011), and that FirstEnergy could have applied for *force majeure* if the RECs were not reasonably available by the time that they had to be acquired (first part of 2012).

And the evidence bears that out. Taking the simple average of the indicative prices for Ohio 2011 vintage In-State All Renewables found in OCC witness Gonzalez's attachments yields a REC price of $[redacted] per REC.[99] This price is consistent with the Ohio In-State data exhibited in the REC Pricing Graph that is found in FirstEnergy witness Bradley's Testimony.[100] And the price paid by FirstEnergy for 20,000 2011-vintage In-State All-Renewable RECs in RFP6, was only $[redacted] per REC.[101] Therefore, contrary to First Energy's claims, there is ample evidence in the record to support the

[99] Direct Testimony of Wilson Gonzalez, Attachment 2.

[100] Direct Testimony of Daniel Bradley, Attachment DRB-2.

[101] Exeter Audit Report at 24 – 25 and Table 4 (p. 25).

offset price utilized by the PUCO, or even a lower offset price – if indeed, an offset price is justified. The PUCO should reject FirstEnergy's arguments that the only appropriate offset is the full amount of the disallowance.

B. FirstEnergy's Assertion--That The PUCO's Order To Protect Customers From Paying Imprudent Costs Constitutes Unlawful Retroactive Ratemaking--Is Wrong. It Was Lawful For The PUCO To Protect Ohio Customers From Paying FirstEnergy For Its Imprudent Costs.

In the Commission's Opinion and Order issued on August 7, 2013, the PUCO directed FirstEnergy to credit Rider AER in the amount of $43,362,796.50, plus carrying costs.[102] The disallowed amount will flow through to customers prospectively through a credit to be established in subsequent AER filings.

The process of quarterly filings and adjustments in prudence review and true-up proceedings is a standard mechanism used by regulated utilities and the PUCO to true-up actual costs that are reasonable, prudent, and ultimately authorized to be collected from customers without delay in implementing new rates for subsequent periods. Utility companies benefit from this automatic adjustment mechanism by allowing new, and often, increased rates to go into effect without waiting for the reconciliation process or prudence review to conclude (and, to the benefit of utilities, without having to file a general rate case).

Thus, it is oxymoronic that a utility (FirstEnergy) is contesting this adjustment process that exists to provide a benefit to utilities and their investors. If retroactive ratemaking were found to apply to the review of variable rates, it would render a

[102] Opinion and Order at 28.

prudence review of such rates meaningless, while providing the utilities all of the benefits such rates offer.[103]

If FirstEnergy succeeds in converting the single-issue ratemaking process to a mere rubber-stamp of its rate proposals, then the PUCO should protect Ohio utility customers by undertaking an immediate review of its single-issue ratemaking regulations. The objective of the PUCO review should be to limit or eliminate single-issue ratemaking if utilities, using FirstEnergy's approach, are permitted to make themselves judgment-proof to claims of imprudence and other bases for disallowances for protecting customers.

In reliance upon *River Gas Co. v. Public Utilities Commission of Ohio* (1982), 69 Ohio St.2d 509, the PUCO correctly explained that a disallowance or credit to Rider AER is not retroactive ratemaking as argued by FirstEnergy. In *River Gas*, the Court held that "rates arising out of customary base rate proceedings implicate the retroactive ratemaking doctrine, while rates arising from variable rate schedules tied to fuel adjustment clauses do not."[104] In this case, the PUCO found that Rider AER is similar "to a variable rate schedule tied to a fuel adjustment clause for purposes of applying the retroactive ratemaking doctrine, as Rider AER did not arise out of a base rate proceeding."[105] Accordingly, the PUCO determined that a credit to an adjustable, variable rate collected through Rider AER does not constitute retroactive ratemaking.[106]

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[103] Ohio Power also appears to recognize the illogic in FirstEnergy's arguments in its Application for Rehearing. Ohio Power Application for Rehearing at 10.

[104] *River Gas Co. v. Public Utilities Commission of Ohio* (1982), 69 Ohio St.2d 509, 512.

[105] Opinion and Order at 28.

[106] Opinion and Order at 28.

FirstEnergy continues to argue on rehearing that any disallowance and credit to the customers for imprudent purchases by FirstEnergy constitutes retroactive ratemaking. FirstEnergy states that "[b]y requiring the Companies to adjust rates to disallow $43.4 million, the Commission's Order requires the Companies to unlawfully refund monies."[107] And as it did in its Briefs, FirstEnergy again cites to *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone* Co., 166 Ohio St. 254 (1957), and *Lucas County Commissioners v. Public Utilities Commission*, 80 Ohio St.3d 344 (1997), to assert that a credit to a variable, adjustable rider that is trued-up periodically is barred by retroactive ratemaking.[108] FirstEnergy also argues that any such refund would be contrary to precedent.[109] Although FirstEnergy recognizes *River Gas* as an exception to the *Keco* precedent, FirstEnergy asserts that the Commission's reliance on that decision is misplaced.[110]

The Court in *River Gas* clearly held that the retroactive ratemaking doctrine does not apply to rates arising from variable rate schedules. The Court specifically stated that "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."[111] The Court further stated that, "[n]otwithstanding the fact that the commission may refuse to permit flow-through of gas costs under certain prescribed conditions, it does not appear that application of the [gas adjustment clause] constitutes

[107] FirstEnergy Memorandum in Support of Application for Rehearing at 30.

[108] *Id.* at 30-32.

[109] *Id.* at 32. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009), 121 Ohio St.3d 362; *In re Columbus Southern Power Co.* (2011), 128 Ohio St.3d 512.

[110] FirstEnergy Memorandum in Support of Application for Rehearing at 33.

[111] *River Gas Co. v. Pub. Util. Comm. of Ohio* (1982), 69 Ohio St.2d 509 (quoting *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 57 Ohio St.2d 78, 82).

ratemaking in its usual and customary sense."[112] FirstEnergy's argument contradicts this precedent.

FirstEnergy claims that because its rates were filed subject to review, but went into effect automatically prior to review, the rates were somehow established pursuant to a customary ratemaking process. FirstEnergy is wrong.

The Commission has an obligation to determine whether rates are just and reasonable.[113] Where a regulated electric utility is authorized to pass on to its customers its reasonable costs incurred for compliance with the renewable energy resource benchmark (including any reasonable costs incurred in purchasing RECs), the rates are variable and not part of the establishment of fixed, base rates, which the Court referred to as the "customary ratemaking process." Accordingly, FirstEnergy's argument with respect to the Commission's reliance on *River Gas* is without merit, and should be rejected.

Further, Rider AER and all rates set therein were established as a result of a negotiated stipulation. This not only establishes that the rates in Rider AER were not set through the customary ratemaking process, but it also makes the facts of this case distinguishable from those in *Columbus Southern Power*.[114]

As the Commission noted, the Stipulation in FirstEnergy's Electric Security Plan case expressly provided that only prudently incurred costs would be recoverable from customers. FirstEnergy and the other signatory parties established a review process where the Commission would review the costs and disallow collecting costs from

[112] *Id.*

[113] *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 57 Ohio St.2d 78, 82.

[114] *In re Columbus Southern Power Co.* (2011), 128 Ohio St.3d 512.

customers through Rider AER that are found to be imprudently incurred. FirstEnergy and the Signatory Parties specifically negotiated for this provision in the Stipulation. That Stipulation provision was a significant protection for customers. Therefore, FirstEnergy cannot now claim that the Commission is engaging in retroactive ratemaking by disallowing the imprudently incurred costs through the agreed-upon review process.

Finally, as noted in OCC's Initial Brief, regardless of whether the Rider AER rates were set through the customary ratemaking process, the application of a prospective credit to Rider AER to protect customers is lawful and does not constitute retroactive ratemaking.[115] The Commission has previously held that *Keco* does not apply when the Commission is ordering a credit to customers to adjust for costs from a previous period as that is establishing a future rate.[116] The Commission has further found that *Lucas County* does not apply when the Commission issues a credit against a rider outside of an experimental rate program as that credit also acts as a new prospective rate.[117] The PUCO has made it clear that the application of a credit to a rider (that customers pay) establishes a future rate and does not constitute retroactive ratemaking.

FirstEnergy charged customers for the cost of RECs that it purchased at unreasonably high prices by charging customers the AER Rider. The Commission correctly determined that the cost for the RECs FirstEnergy purchased at unreasonable prices should be disallowed and a credit should be applied to the AER Rider, which will have the effect of adjusting the customers' AER Rider rates in subsequent quarters.

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[115] OCC Initial Brief at 51-53.

[116] *In the Matter of Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, Opinion and Order at 13 (January 23, 2013), reh'g denied, Entry on Rehearing at 6-7 (April 11, 2012), *appeal pending*, S.Ct. Case No. 2012-1484.

[117] *Id.* at 14.

FirstEnergy's proposal would leave customers that it charged for imprudent costs without recourse for its imprudent practices. The PUCO appropriately determined that such an outcome was not viable.

FirstEnergy has raised no new issues or arguments that have not already been considered and addressed by the PUCO. The PUCO acted lawfully in ordering FirstEnergy to provide a credit to the prospective rates established by Rider AER for the imprudently incurred costs to purchase RECs. Accordingly, the Commission should fulfill its duties to protect Ohioans and deny FirstEnergy's request for rehearing on this issue.

The Ohio Power Company (Ohio Power) also requested leave to file an Application for Rehearing on this issue, seeking clarification of the Commission's decision. Although Ohio Power states that it is not taking a position on the applicability of the Commission's Order to the facts of this case, Ohio Power asks the Commission to clarify its ruling regarding retroactive ratemaking.[118] Ohio Power's requested clarification of the PUCO's Order is misplaced and unnecessary in the context of this proceeding. As such, the Commission should deny Ohio Power's request for rehearing on this issue.

C. FirstEnergy Has Not Met The Requirements Under Ohio Law To Warrant A Stay Of The Crediting of $43 Million To Ohio Customers Per The PUCO's Order.

In its September 6, 2013 Application for Rehearing, FirstEnergy argues that the "Commission unreasonably determined that the refund commence prior to the conclusion

[118] Ohio Power Application for Rehearing at 9 and 11.

of any appeals to the Ohio Supreme Court."[119] In effect, FirstEnergy is attempting to circumvent the process created by the General Assembly that provides for stays of PUCO orders pending an appeal to the Supreme Court of Ohio.

The Supreme Court of Ohio has held that: "R.C. 4903.16 provides for the procedure that must be followed when seeking a stay of a final order of the Commission."[120] The Supreme Court has specifically found that "[p]atently, Section 4903.16, Revised Code, was designed primarily to apply to a public utility which is dissatisfied with the rates or charges as ordered by the Public Utilities Commission."[121] Commenting that R.C. 4903.17 through 4903.19 provided no further guidance on this issue, the Court cited precedent for the proposition that "*there is no automatic stay* of any order, but * * * it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond."[122]

Ohio law does not provide for the automatic stay of the PUCO's order that FirstEnergy seeks in its Application for Rehearing. And even if FirstEnergy were to take affirmative action and post a bond, FirstEnergy has failed to show that a stay should be granted.

FirstEnergy cites to four factors which it states the PUCO has relied upon in the past to determine whether or not to grant a stay of execution, which include the following: "(1) whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits, (2) whether the party seeking the stay has shown it would

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[119] FirstEnergy Memorandum in Support of Application for Rehearing at 47.

[120] *Office of Consumers' Counsel v. Public Utilities Commission of Ohio* (1991), 61 Ohio St. 3d 396, 403.

[121] *City of Columbus v. Public Utilities Commission of Ohio*, 170 Ohio St. 105, 109 (1959).

[122] *Id.* (quoting *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.* (1957), 166 Ohio St. 254, 258) (emphasis in *Keco Industries*).

suffer irreparable harm absent the stay, (3) whether the stay would cause substantial harm to other parties (especially customers), and (4) where lies the public interest."[123] FirstEnergy then attempts to address these factors in its Application for Rehearing but fails to adequately do so.

First, FirstEnergy claims that it has "a strong likelihood of modifying the August 7 Order. As set forth above, there are multiple errors with the Commission's order for a refund."[124] That is the extent of FirstEnergy's argument that it has a strong likelihood of prevailing on the merits. However, the Commission does not accept conclusory statements as justifications and proof. Therefore, FirstEnergy has failed to satisfy the first factor of the test.

Next, FirstEnergy claims that it will suffer irreparable harm without a stay.[125] FirstEnergy makes a confusing claim that if it were to "issue a refund, and if the refund amount was vacated or substantially reduced subsequent to the final resolution of an appeal, then it is unclear [to FirstEnergy] how the Companies would be able to re-collect such sums from their customers without themselves [FirstEnergy] running afoul of the prohibition on retroactive ratemaking."[126] But this factor requires the party seeking a stay to show that it **will** suffer irreparable harm absent a stay.[127] FirstEnergy merely maintains that it "will likely" suffer irreparable harm.[128] FirstEnergy does not even argue

[123] *Id.*

[124] FirstEnergy Memorandum in Support of Application for Rehearing at 47.

[125] *Id.*

[126] *Id.* at 48.

[127] *MCI Telecommunications v. Pub. Util. Comm. of Ohio*, 31 Ohio St.3d 604, Douglass Dissent, 510 N.E.2d 806, (1987). (Emphasis Added).

[128] FirstEnergy Memorandum in Support of Application for Rehearing at 47.

that it will suffer irreparable harm absent a stay. Accordingly, FirstEnergy fails to satisfy the requirement to show irreparable harm.

FirstEnergy attempts to satisfy the third factor by claiming that a stay will not result in substantial harm to other parties, especially customers, because the refunds would only be delayed.[129] But if the delayed receipt of money owed to an individual is not harmful, then carrying charges on any utility recovery would never be necessary. Furthermore, as time passes, customers who pay Rider AER may leave FirstEnergy's standard service offer or move from FirstEnergy's service territory. Those customers will suffer harm because they will not receive the credit to the unlawful rate they paid FirstEnergy under Rider AER. FirstEnergy has failed to provide any support for its conclusory statement that its customers will not be substantially harmed from a delay.

For the final factor, FirstEnergy claims that the delay will serve the public interest by promoting rate stability and predictability.[130] However, this argument is unconvincing. The public interest would be best served by FirstEnergy's customers receiving their Rider AER credit as quickly as possible. FirstEnergy has already wrongfully taken this money from its customers. Now, FirstEnergy is seeking to hold onto its customers' money even longer and further deprive them of its benefits. FirstEnergy has failed to show how a delay in returning money back to its customers is in the public interest.

FirstEnergy has failed to satisfy any of the factors that it claims govern the PUCO's decision as to whether or not to grant a stay of execution. Accordingly, the credit to customers should be implemented consistent with the PUCO's Order.

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[129] *Id*. at 48.

[130] *Id.*

III. CONCLUSION

For the reasons set forth in this Memorandum Contra Applications for Rehearing, the PUCO should affirm its Opinion and Order, subject to the issues raised in OCC's Application for Rehearing. Doing so would assure that the consumers who paid for imprudent costs through Rider AER will get the credit they deserve.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Memorandum Contra* (PUBLIC Version) was served on the persons listed below via electronic mail this 16th day of September 2013.

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Summary: Memorandum Memorandum Contra Applications for Rehearing of FirstEnergy and Ohio Power Company by the Office of the Ohio Consumers' Counsel (PUBLIC Version) electronically filed by Patti Mallarnee on behalf of Yost, Melissa Ms.