IN THE SUPREME COURT 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. 13-2026 Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 11-5201-EL-RDR

*** * * * UNREDACTED VERSION* * ***

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I. INTRODUCTION

This case is about two things: secrecy and exorbitant charges to customers. First, it concerns the Public Utilities Commission of Ohio's ("the PUCO" or "Commission") withholding from the public essential information regarding high-priced purchases of renewable energy by a utility – Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "FirstEnergy," "FE," or "Utility"). The PUCO did not allow the public to know the identity of FirstEnergy's supplier of high-priced renewable energy, the prices paid to that supplier, and the total amount of those purchases that was recommended to be disallowed by the Office of the Ohio Consumers' Counsel ("OCC") witness Wilson Gonzalez. The PUCO's decisions to withhold this information – on purchases that were made 4 and 5 years ago – were unreasonable and unlawful because the information did not amount to a trade secret under R.C. 1333.61.

Second, this case is about FirstEnergy's repeated imprudent purchases from its affiliate of renewable energy at exorbitant prices. The PUCO properly disallowed $43.4 million that the Utility charged customers after finding the purchases imprudent. The PUCO concluded that, in lieu of purchasing the high-priced In-State Non-Solar renewables, FirstEnergy could have sought force majeure relief (that R.C. 4928.64 law permits). That would have excused FirstEnergy from purchasing the In-State Non-Solar[1] renewables. But FirstEnergy didn't do this. Additionally, the PUCO properly found that adjusting the Utility's rates to remove the imprudently incurred

[1] As explained below, although there are a number of renewable products with annual benchmark requirements under Ohio law, this case only concerns renewables required to be generated in Ohio ("In-state") and that are *not required* to be solar ("Non-Solar"). OCC notes that OCC's use of the term "Non-Solar" is intended to distinguish it from the renewables that *must* be generated from solar energy. However, OCC recognizes that "Non-Solar" requirements may also be met from solar energy under the law. FirstEnergy has referred to these renewables as "All-Renewables."

costs was not impermissible retroactive ratemaking. FirstEnergy is appealing that decision of the PUCO. The Court should affirm that portion of the PUCO's decision.

But the PUCO also unlawfully allowed FirstEnergy to charge its customers over $110 million for other In-State Non-Solar renewables purchases from 2009 – 2011 that OCC had recommended be disallowed. The $110 million wrongfully allowed by the PUCO, was for purchases of In-State Non-Solar renewables from 2009 – 2011. Those purchases were made through the issuance of three Requests for Proposals ("RFPs") to potential sellers, in August 2009 (RFP1), October 2009 (RFP2), and August 2010 (RFP3).

The PUCO's decision to allow FirstEnergy to overcharge its customers by $110 million was unlawful and unreasonable. In allowing FirstEnergy to pass these charges on to customers, the PUCO unlawfully and unreasonably applied a presumption of prudence to the utility purchases. But, as borne out by the evidence produced, the charges to customers were exorbitant considering all the options available to the Utility at that time. And to make matters worse, the high-priced RECs were purchased from FE's affiliate, FirstEnergy Solutions. The PUCO's presumption of prudence for the Utility's purchases of renewable energy, especially from an unregulated affiliate, was contrary to the law pertaining to burden of proof. OCC asks the Court to remand this matter to the PUCO with instructions that the PUCO must place the burden of proof where it belongs -- on the Utility.

II. STATEMENT OF FACTS

FirstEnergy's Statement of Facts presents a biased portrayal of the facts, discussing only the evidence that favors FirstEnergy's position. (FE Merit Brief at 3-17). Certain key facts are omitted by FirstEnergy and others are not fully or accurately stated. OCC does not agree with

the statement of facts presented by FirstEnergy. Accordingly, consistent with S.Ct.Prac.R. 16.03(B)(2), Appellee/Cross-Appellant provides its own statement of facts.

A. Public Records Issues

The PUCO ordered an audit of FirstEnergy's Alternative Energy Rider ("Rider AER") – the rider for collecting charges in relation to the alternative energy costs incurred pursuant to R.C. 4928.64. (FE Appx. at 104-107). A redacted copy of the PUCO-ordered Exeter Audit Report was filed with the PUCO and was made available for public inspection on August 15, 2012. (R. 18 at 1-39, FE Supp. at 1-39). That Exeter Audit Report found that FirstEnergy overcharged customers and that certain disallowances should be made. (R. 18 at iv, 33, FE Supp. at 105, 139). At FirstEnergy's behest, however, the Audit Report omitted information containing specific pricing of alternative energy credit bids and the identities of the bidders. (R. 18 at i-39, FE Supp. at 1-39). This was done despite the fact that FirstEnergy did not file a Motion for Protective Order at that time to protect information alleged to be trade secret. However, as publicly filed, there were portions of the Audit Report that divulged the name of one of the bidders and the amounts that FirstEnergy paid to secure its renewable purchases from 2009 - 2011.

After numerous unsuccessful attempts (beginning August 16, 2012) to informally acquire an unredacted (complete) version of the Exeter Audit Report, OCC served a discovery request on FirstEnergy seeking the unredacted Report. In response, FirstEnergy filed a Motion for Protective Order ("October 3 Motion for Protective Order") with the PUCO on October 3, 2012, seeking to block "public disclosure of the redacted supplier information contained in the Exeter Report." (R. 24 at 1, OCC Supp. at 212). After conducting a hearing on FirstEnergy's October 3 Motion for Protective Order, the Attorney Examiner held that the redacted portions of the Report

contained "trade secret information" that should be protected, not publicly disclosed. (Tr. of 11/20/2012 (filed 12/4/2012) at 17, OCC Appx. at 102).

OCC later learned that FirstEnergy was afforded a private opportunity to review and propose changes to a draft of the Audit Report ("Draft Audit Report") before the final Exeter Audit Report was filed with the PUCO. (Tr. Vol. III (pub.) at 512, OCC Supp. at 127). While the Auditor did not accept all of the changes proposed by FirstEnergy, it did delete its recommendation (in the draft Report) that the PUCO disallow FirstEnergy's payment for In-State Non-Solar renewables in excess of a specific dollar amount. (R. 80 at Ex. C & D, OCC Supp. at 136-202).

OCC then submitted a public records request to the PUCO seeking "any and all records that reflect edits or comments on draft version of the Audit Report by employees, outside consultants, and/or counsel of [FirstEnergy]." (R. 47 at Exhibit A, OCC Supp. at 240). FirstEnergy then filed a second Motion for Protective Order ("December 31 Motion for Protective Order") with the PUCO. (R. 47, OCC Supp. at 222-245). In its December 31 Motion for Protection, FE asked the PUCO to deny OCC's public record request. (R. 47 at 1, OCC Supp. at 222). The Attorney Examiner once again ruled that the supplier-pricing and supplier-identifying information that appears in the Draft Audit Report is "trade secret" information. (R. 65 at 5, OCC Appx. at 120). The Attorney Examiner further held that the Draft Audit Report would be released in redacted form (meaning some information would not be shown in the public version). (R. 65 at 5-6, OCC Appx. at 120-121).

FirstEnergy also filed another Motion for Protective Order ("February 7 Motion for Protective Order") with the PUCO to prevent OCC from disclosing specific renewable purchaser pricing and bidder identities in the testimony of OCC's witness, Wilson Gonzalez. (R. 61, OCC

Supp. at 246-281). The February 7 Motion for Protective Order also sought to preclude OCC from publicly disclosing Mr. Gonzalez's recommended disallowance. (R. 61 at 3, OCC Supp. at 248). FirstEnergy filed the February 7 Motion for Protective Order after OCC informed the Utility of its intent "to publicly release [through Mr. Gonzalez's testimony] the total dollar amount of FirstEnergy's renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers plus interest." (R. 61 at 4, OCC Supp. at 249) Notably, Mr. Gonzalez's recommended disallowance was an aggregate number that did not disclose the specific pricing information that FirstEnergy's prior Motions for Protection addressed. (R. 56 (conf.) at 34, 36, OCC Supp. (conf.) at 82, 84; R. 71 (conf.); OCC Supp. (conf.) at 118). The February 7 Motion for Protective Order was not ruled upon until the PUCO's Opinion and Order ("Order") was issued on August 7, 2013. (R. 109 at 11, FE Appx. at 19).

In its Opinion and Order, the PUCO "affirm[ed] the rulings of the attorney examiners granting protective orders in all but one respect." (R. 109 at 11, FE Appx. at 19). The PUCO "modif[ied] the attorney examiners' rulings to permit the generic disclosure of FES as a successful bidder in the competitive solicitations." (R. 109 at 12, FE Appx. at 20). However, the PUCO made it clear that "specific information related to bids by FES, such as the quantity and price of renewable energy credits ("renewables" or "RECs")[2] contained in such bids and whether such bids were accepted by the Companies, shall continue to be confidential and subject to the protective orders." (Id.) The PUCO also granted FirstEnergy's remaining Motions for Protective

[2] RECs or Renewable Energy Credits are a tradable form of renewable energy. For purposes of this proceeding, one unit of Renewable Energy Credit can be understood as "equal [to] one megawatt hour of electricity derived from renewable energy resources . . ." R.C. 4928.65; (OCC Appx. at 304).

Order, with the caveat of allowing for "generic disclosure of FES as a successful bidder." (Id. at 14, FE Appx. at 22).

B. Prudence Issues

Renewable energy purchase requirements were established by Senate Bill 221 to commence in the year 2009, with increasing annual benchmarks thereafter. R.C. 4928.64(B)(2); (FE Appx. at 106). The law requires that a small percentage of renewable purchases be met from "solar energy resources," which is a subset of "renewable energy resources." Id. The balance may come from any of the "renewable energy resources" defined by R.C. 4928.01. (OCC Appx. at 288-294). The market has, as a result, developed distinct products for Solar and Non-Solar renewables. In addition, 50% of the renewable purchases (both Solar and Non-Solar) must be "met through facilities located" in Ohio, with the balance to be "met with resources that can be shown to be deliverable into this state." R.C. 4928.64(B)(3); (FE Appx. at 106). Renewables are not only separated as Solar and Non-Solar products, but also as "In-State" and "All-States." In total, there were four renewable energy products marketed in Ohio during the applicable period: [1] All-States Solar, [2] All-States Non-Solar, [3] In-State Solar, and [4] In-State Non-Solar.

The dispute in this case concerns only one of those products – In-State Non-Solar renewable purchases. The $43.4 million disallowed by the PUCO was the purchase, in August 2010 (RFP 3), of 145,269 high-priced 2011-vintage In-State Non-Solar renewables.

FirstEnergy purchased the renewable energy that is the subject of this proceeding through the issuance of three RFPs – in August 2009 (RFP 1), October 2009 (RFP 2) and August 2010 (RFP 3). Through this process, FirstEnergy's consultant, Navigant, identified potential bidders for the renewable products and provided potential bidders with information regarding how to submit a bid. (R. 52 at 8-11, OCC Supp. at 297-300). A deadline for each bid was established.

(R. 52 at 10, OCC Supp. at 299). Once bids were received, the information was reviewed to determine whether bidders met the qualification requirements. (R. 52 at 12, FE Supp. at 13). The identity of qualifying bidders was provided by Navigant to FirstEnergy before the bid selection process commenced. (Id.) Qualifying bidders' bids were then ranked by price and the bids were selected (lowest price to highest price) until the requested quantity was fulfilled or there were no more RECs bid. (R. 52 at 13-14, OCC Supp. at 301-302). "If fewer RECs were bid than were sought in a category, all RECs in that category were recommended for selection." (R. 52 at 13; OCC Supp. at 302).

But FirstEnergy's RFP process for In-State Non-Solar renewables resulted in only one bidder – FirstEnergy's affiliate – in both RFP 1 and RFP 2 and two bidders in RFP 3, of which one was FirstEnergy's affiliate. (R. 18 (conf.) at 31, OCC Supp. (conf.) at 38; R. 56 (conf.) at 18-19, OCC Supp. at 66-67; Tr. Vol. II (conf.) at OCC Ex. 9, OCC Supp. (conf.) at 125-189). And the prices bid by that bidder – and paid by FirstEnergy to its affiliate - were exorbitant, prices unseen for Non-Solar products in any state around the country. (R. 18 (conf.) at 28, OCC Supp. (conf.) at 35). Those exorbitant prices – a critical piece of information -- were omitted by FirstEnergy in its Brief. In August 2009, FirstEnergy paid up to $700/REC; in October 2009, FirstEnergy paid up to $700/REC, and in October 2010, FirstEnergy paid up to $500/REC. And FirstEnergy also omits that it paid these amounts to its affiliate. (R. 18 (conf.) at 28, 31, OCC Supp. (conf.) at 35, 38; Tr. Vol. II (conf.) at OCC Ex. 9, OCC Supp. (conf.) at 125-189).

FirstEnergy's Brief also disregards the evidence of the prevailing rates paid for In-State Non-Solar renewables in other states across the country at the same time FirstEnergy was purchasing RECs from its affiliate. At that time, non-solar RECs were selling for less than $50/REC in 11 states and the District of Columbia, as shown in the U.S. Department of Energy's

(DOE) documentation included in the PUCO-ordered Audit Report. (R. 18 at 26, FE Supp. at 132). For instance, in Pennsylvania, non-solar REC prices for 2011 had a high price of $50.00/REC, a low price of $0.14/REC, and a weighted average price of $3.94 per Tier I non-solar REC. (R. Tr. Vol. I (pub.), OCC Ex. 2, OCC Supp. at 119). In contrast, FirstEnergy paid its affiliate $325/REC. (R. 18 (conf.) at 28, OCC Supp. (conf.) at 35). And FirstEnergy produced no evidence of any other utility paying prices greater than $50/REC during the time frame associated with RFP3.

FirstEnergy also emphasizes the confidentiality of the procurement process where "bidders would not know who else was participating or how many other bidders were participating." (FE Merit Brief at 6). FirstEnergy claims that this structure would have resulted in "getting the best price that each bidder was willing to bid." (FE Merit Brief at 6). FirstEnergy ignores a number of important facts. After the bids were submitted, but before any bid was accepted, FirstEnergy was informed of the identities of the bidders. (R. 52 at 12, FE Supp. at 13; Tr. Vol. II (pub.) at. 314-316, OCC Supp. at 121-123). Knowing that one of the bidders was FirstEnergy's generation affiliate certainly could have influenced the Utility's decision to accept the high-priced bids rather than considering two alternatives available under the law: either a force majeure filing under R.C. 4928.64(C)(4) or making an alternative compliance payment under R.C. 4928.64(C)(1). (FE Appx. at 106-107).

FirstEnergy emphasizes that it relied on the recommendations of Navigant Consulting, in making its purchases. (FE Merit Brief at 9-12). However, FirstEnergy did not contract with Navigant to evaluate or make recommendations regarding *alternatives to the purchase of RECs*. (Tr. Vol. I (pub.) at 169, OCC Supp. at 114). Navigant's recommendations, therefore, did not consider the available alternatives to purchasing the RECS – making a force majeure request to

the PUCO, or making alternative compliance payments. (Tr. Vol. I (pub.), at 169, 184-185, OCC Supp. at 114, 117-118). Nor did Navigant's recommendations take into account consultation with PUCO Staff. (Id.) Despite not having reviewed these options, Navigant provided a recommendation to FirstEnergy with respect to the qualifying bids. (Id.) Navigant witness Daniel Bradley testified that the spreadsheet showing the qualifying bids ranked by price "constituted Navigant's recommendations" to FirstEnergy. (R.52 at 13-14; OCC Supp. at 301-302).

OCC also disagrees with FirstEnergy's characterization of its options. (FirstEnergy Merit Brief at 4). FirstEnergy states that, in lieu of purchasing the RECs (at $325/REC), it had only two options: [1] force majeure under R.C. 4928.64(C)(4) and [2] the 3% cost cap under R.C. 4928.64(C)(3). (FE Merit Brief at 4; FE Appx. at 107). In fact, another option was to make the alternative compliance payment of approximately $45/REC under R.C. 4928.64(C)(1). (R. 56 at 23, 25-31, OCC Supp. at 25, 27-33; FE Appx. at 106). If FirstEnergy had made the alternative compliance payment at $45/REC, it would have saved Ohio consumers "millions of dollars." (R. 56 (conf.) at 23, OCC Supp. (conf.) at 71). The Commission has the discretion to accept compliance payments and/or make force majeure determinations if RECs are not reasonably available in the market. R.C. 4928.64(C)(2) and (4); (FE Appx. at 106-107); *see also, In Re Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Pub. Util. Comm. No. 10-2986-EL-ACP, 2011 Ohio PUC LEXIS 268, Finding and Order (Mar. 2, 2011); *In Re Application of Noble Americas Energy Solutions LLC for a Waiver from 2010 Ohio Sited Solar Energy Resource Benchmarks*, Pub. Util. Comm. No. 11-2384-EL-ACP, 2011 Ohio PUC LEXIS 944, Finding and Order (Aug. 3, 2011); *In Re Application of Columbus Southern Power Co. and Ohio Power Co. for Amendment of the 2009 Solar Energy Resource Benchmark Pursuant to*

Section 4928.64(C)(4), Ohio Revised Code, Pub. Util. Comm. Nos. 09-987-EL-EEC, et al., 2010 Ohio PUC LEXIS 6, Entry (Jan. 7, 2010). And contrary to FirstEnergy's claim otherwise, RECs at the prices paid by FirstEnergy were not "reasonably available," in light of the PUCO's determination that the term "reasonably available" includes consideration of price.[3]

Despite its knowledge of a nascent market, FirstEnergy chose to pay high-prices for advanced purchases of renewables. When FirstEnergy purchased In-State Non-Solar renewables in August 2009 (RFP1), it paid as much as $700/REC, not just for 2009-vintage RECs but for 2010-vintage RECs. When it purchased In-State Non-Solar renewables in October 2009 (RFP2), it paid as much as $600/REC for 2010 RECs and $500/REC for 2011 RECs, as well as $700/REC for 2009 RECs. (R. 18 (conf.) at 28, OCC Supp. (conf.) at 35). And in August 2010, FirstEnergy paid $500/REC for 2010 RECs but received a bid and paid $26.50/REC for some 2011 RECs. (Id.) It then negotiated a price of $325/REC for the 2011-vintage RECs that were bid by its affiliate, which are the subject of FirstEnergy's appeal. (R. 52 (conf.) at 42, FE Supp. (conf.) at 577). With over a year left before the deadline to acquire the requisite RECs, FirstEnergy chose to purchase its remaining RECs rather than wait for further market development. (R. 18 at 25, FE Supp. at 131). Nor did FirstEnergy seek PUCO approval of force majeure which would have relieved the Utility from its obligations to purchase such exorbitantly priced renewables.

OCC also disagrees with FirstEnergy's assertion that its quarterly Alternative Energy Rider filings (the tool used to charge customers for its REC purchases) constituted a "request for approval" of the prudently-incurred costs included in such filings. (FE Brief at 12-14.) In these filings, FirstEnergy presents proposed tariffs for PUCO approval. Although the single tariff

[3] *See, infra* at 40.

page states that FirstEnergy is to file a "request for approval of the Rider charges" on a quarterly basis, FirstEnergy submitted nothing at the time of such filings other than a single tariff page, as revised to show new proposed rates. *Ohio Edison Company*, Case No. 08-935-EL-SSO, P.U.C.O. No. 11, Filing of June 1, 2011, OCC Supp. at 203-211).[4] The filings do not request approval from the PUCO of proposed costs. (Id.) Nor do they seek a PUCO ruling on the prudence of such costs. (Id.) In fact, such filings do not identify Rider AER costs at all; rather, they only include the updated rates to be charged by customer class without any calculations or accounting of revenues derived from Rider AER. (Id.) Thus, neither the Commission nor any party would have had any basis upon which to conduct a review of the calculation of the quarterly rate, let alone a prudence review. (Id.)

Finally, no statement is made in these quarterly filings that a prudence review is conducted by the PUCO. (Id.) Certainly, the AER Annual Status Reports referenced by FirstEnergy do not constitute a prudence review. (FE Merit Brief at 14). They are solely for the purpose of determining the extent of compliance with the benchmarks, as required by 4928.64(C)(1) and Ohio Adm. Code 4901:1-40-05. (FE Appx. at 106; OCC Appx. at 310) Similarly, the ten-year compliance plans required by Ohio Adm. Code 4901:1-40-03 (OCC Appx. at 307-309) do not address the prudence of past REC purchases; rather, they address how the utility plans to meet its requirements in the future. The Commission's clear intent was to leave prudence review to audit proceedings as it has historically and consistently done since the PUCO's Order implementing Rider AER provided that recovery would be limited to FirstEnergy's "prudently incurred costs" FirstEnergy incurred. *In Re Application of Ohio Edison*

[4] Administrative notice was taken of all of FirstEnergy's Rider AER Filings made from 2009-2011. (Tr. Vol. III at 505-506, OCC Supp. at 125-126).

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, 2009 Ohio PUC LEXIS 279, Second Opinion and Order at **17, 40 (Mar. 25, 2009).

III. STANDARD OF REVIEW

Under R.C. 4903.13, the Court may reverse, modify or vacate a PUCO order if that order is "unlawful or unreasonable." (FE Appx. at 91). The standard of review applicable to a PUCO order will turn on whether the issue presented is a question of law or one of fact. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 118, 388 N.E.2d 1370 (1979).

Where the issue before the Court presents a question of law, the Court will review the issue de novo, giving the Court "complete, independent power of review." *Id.* Under a de novo review, the Court will pursue a "more intensive examination" of the legal issues than it would in a review of factual issues. *Id.* Such determinations include whether a presumption ought to have been applied, *see*, *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 95, 2014-Ohio-1588, 9 N.E.2d 1004, ¶¶ 10-11, and a determination of the burden of proof. *See*, *Acuity, Inc. v. Trimat Constr.*, 4th Dist. Gallia No. 05CA2, 2005-Ohio-6128, ¶ 17. Thus, this Court should apply a de novo standard of review with respect to Proposition of Law 2 and Proposition of Law 3. Those Propositions of Law explain that the PUCO should not have applied a presumption of prudence and that the PUCO misstated (and consequently misapplied) the burden of proof. Proposition of Law 5, establishing that the PUCO's disallowance cost was not retroactive ratemaking, is also subject to a de novo review.

With respect to factual considerations, this Court has stated that it will not reverse or modify a PUCO order on questions of fact when the record contains sufficient probative

evidence to show that the PUCO's decision was not manifestly against the weight of the evidence or was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. In making this evaluation, this Court looks to any probative evidence in the record, not just the evidence cited to by the PUCO. Thus, Proposition of Law 4, FirstEnergy's appeal of the PUCO's disallowance of imprudence, is subject to a reversal only if the decision was issued against the manifest weight of the evidence.

Similarly, the "issue of whether particular information is a trade secret is a factual determination." *Water Mgt., Inc. v. Stayanchi*, 15 Ohio St.3d 83, 86, 472 N.E.2d 715 (1984) (citing *Pyromatics, Inc.* v. *Petruziello*, 7 Ohio App.3d 131, 137, 454 N.E.2d 588 (8th Dist. 1983)). A trier of fact's "determination that the requested information does, in fact, constitute trade secrets will be upheld if supported by some competent, credible evidence." *State ex rel. Fisher v. PRC Pub. Sector*, 99 Ohio App.3d 387, 393, 650 N.E.2d 945 (10th Dist. 1994), citing *Kinney v. Mathias*, 10 Ohio St.3d 72, 73, 461 N.E.2d 901 (1984); *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). Therefore, Proposition of Law 1, explaining that the PUCO unlawfully and unreasonably withheld public information, should be reviewed accordingly.

IV. ARGUMENT

PROPOSITION OF LAW 1: The Public Utilities Commission acts unlawfully and unreasonably when it prevents public disclosure of information that does not amount to a trade secret under R.C. 1333.61 and R.C. 149.43.

FirstEnergy spent nearly $158 million on excessively-priced renewable energy that was purchased from its affiliate; yet, OCC and other interested parties were prevented from explaining to the public how these exorbitant costs impacted the Utility's customers. At the

Utility's request, the PUCO permitted FirstEnergy to treat the identities of renewable energy suppliers and the prices paid for those renewables (and charged to customers) as confidential under R.C. 149.43(a)(1)(q). (R. 109 at 12, 14, FE Appx. at 20, 22; R. 143 at 4-5, FE Appx. at 49-50). The PUCO also prevented the parties from publicly disclosing the specific amount of disallowance recommended in the Draft Report of the Exeter Auditor. (Id.) Finally, the PUCO prevented the public disclosure of OCC witness Wilson Gonzalez's testimony, which referenced not only the specific bidding prices but OCC's total recommended disallowance based upon aggregated information. (Id.). But it was unreasonable and unlawful for the PUCO to hold that "specific bidding information" (prices bid and paid) and the identities of suppliers who bid in 2009 and 2010 are trade secret information subject to protection.

Under Ohio law, "[e]xcept as provided in section 149.43 of the Revised Code . . . all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." R.C. 4905.07; (OCC Appx. at 281). Similarly, "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records." R.C. 4901.12; (OCC Appx. at 279). The Ohio Public Records Laws are supported by a strong presumption in favor of disclosure and are "intended to be liberally construed to ensure that governmental records be open and made available to the public * * * subject only to a very few limited exceptions." *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549, 597 N.E.2d 147 (1992). Accordingly, Ohio Adm. Code 4901-1-24(D)(1) limits redactions for confidentiality to only that information that is "essential to prevent disclosure of the allegedly confidential

information." (OCC Appx. at 306). But, the PUCO unreasonably and unlawfully granted FirstEnergy's request to protect renewables bidding information as confidential trade secret information, which was inconsistent with Ohio law.

R.C. 1333.61(D) defines trade secret information as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(OCC Appx. at 278). In determining whether certain information meets this standard, this Court has adopted the following 6 factors to assist in analysis:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.,* by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. Plain Dealer v. Ohio Dep't of Ins., 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

The PUCO's decision that the information amounted to a trade secret (R. 109 at 12-14, FE Appx. at 20-22), was not supported by competent and credible evidence as discussed below. While the PUCO allowed "generic disclosure of FES as a successful bidder," (R.109 at 12, 14, FE Appx. at 20, 22; R. 143 at 4-5, FE Appx. at 49-50) it was against the manifest weight of the evidence to hold that specific renewables pricing by the specific bidders is confidential trade

secret information. The record indicates, as discussed below, that the 2009 and 2010 renewables bidding information is not economically valuable (and hasn't been for years) and that FirstEnergy did not sufficiently safeguard the secrecy of the information, allowing it to be publicly disseminated on multiple occasions. Because no trade secret exists, no protection is warranted. To that extent, the PUCO also erred by prohibiting public disclosure of the disallowance recommendation in the Draft Audit Report and the total amount of disallowance calculation recommended by OCC witness Gonzalez. (R. 109 at 14, FE Appx. at 22). As a result, this Court should overturn the PUCO's ruling and permit public disclosure of all specific bidding, including the Draft Audit Report and related testimony.

A. The PUCO Erred When It Found That The Identities Of Suppliers And The Prices Paid For RECs Was "Economically Valuable Information."

The PUCO's decision to grant confidentiality over certain REC bidding information was unreasonable and unlawful. This is because FirstEnergy failed to demonstrate how the prices it paid for renewables approximately four and five years ago, would harm future competitive bid processes and thus render that information economically valuable. There is no competent and credible evidence in the record to support such a finding that FirstEnergy carried its burden of proof. (R. 109 at 21, FE Appx. at 29; R. 143 at 5, FE Appx. at 50). While OCC understands the need for confidentiality during the RFP process to ensure competitive bidding, a valid concern does not remain after the process is completed and the bidder has been selected and awarded the bid, especially several years later.

A number of United States District Courts have held that historic information, specifically with respect to business practices, can be outdated and not subject to trade secret protection when such information does not reveal anything about the contemporary operations of the party resisting disclosure. *United States v. International Business Mach. Corp.*, 67 F.R.D. 40

(S.D.N.Y. 1975) (business information as little as three years old not entitled to trade secret protection); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251-252 (D.D.C. 1981) (five-year old business practices, strategies, and accounting were outdated and not entitled to trade secret protection).

Similarly, the high-priced renewables supplier identity and pricing information that the PUCO allowed FirstEnergy to seal is historic in nature. The passage of time and the rapid changes in the marketplace eliminate any economic value that this information may have once held. Indeed, it has been years since this information had any economic value. It is uncontested, and the record is replete with evidence, that Ohio's In-State Non-Solar renewables market has changed dramatically since the initial period after Senate Bill 221 went into effect. (R. 109 at 15, 17, 19, 21, 24-25, FE Appx. at 25, 27, 29, 32-33; Tr. Vol. II (conf) at OCC Ex. 15, OCC Supp. (conf.) at 190-195; Tr. Vol. I, at 154, FE Supp. at 80; Tr. Vol. III, at 602-603, OCC Supp. at 130-131). The bidding information at issue refers only to one-time transactions in a unique market situation that ceased to exist after 2010. Thus, the PUCO's Order and Second Entry on Rehearing were issued in error because the REC bidding information is historic in nature, eliminating any economic value in the current renewables market.

B. The PUCO Erred When It Found That FirstEnergy Took Sufficient Safeguards To Protect The Alleged Trade Secret Information.

The PUCO also erred in granting confidentiality over specific renewables bidding information because FirstEnergy failed to carry its burden of presenting credible evidence that it took sufficient precautions to safeguard the secrecy of specific renewable supplier identities and specific renewable pricing information. This Court has held that "a record is entitled to trade secret status 'only if the information is not generally known or readily ascertainable to the public.'" (Citation omitted). *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 732

N.E.2d 373 (2000). In the case below, the PUCO acknowledged that certain information was "*widely disseminated in the public domain.*" (R. 109 at 12, 14, FE Appx. at 20, 22; R. 143 at 4-5, FE Appx. at 49-50 (emphasis added)). But the PUCO unlawfully and unreasonably only allowed "generic disclosure of FES as a successful bidder." (Id.).

The public version of the Exeter Audit Report was filed in the PUCO's docket on August 15, 2012. Although portions of that Exeter Audit Report were redacted, it publicly divulged the identity of suppliers when it stated "[t]he FirstEnergy Ohio utilities should have been aware that the prices bid by *FirstEnergy Solutions* reflected significant economic rents and were excessive by any reasonable measure." (R. 18 at iv, FE Supp. at 105) (emphasis added). Similarly, the Exeter Audit Report stated "we believe that the management decisions made by the FirstEnergy Ohio utilities to purchase non-solar RECs at prices in some cases *more than 15 times the price of the applicable forty-five dollar Alternative Energy Compliance Payment* to have been seriously flawed." (R. 18 at 28, FE Supp. at 134 (emphasis added)). Thus, both the identity of FirstEnergy's affiliate as a bidder and the general level of the prices paid by FirstEnergy were disclosed in the publicly filed Exeter Audit Report. Nevertheless, FirstEnergy did not file a Motion for a Protective Order with the PUCO to keep the unredacted version of the Exeter Audit Report from public disclosure until October 3, 2012 – 49 days after it was published on the PUCO's public docket. (R. 24, OCC Supp. at 212-221).

In the meantime, specific supplier pricing and identification was disseminated in a number of news media outlets, ensuring that much of the information is already widely known outside of the business. News media outlets such as The Plain Dealer have published that FirstEnergy "paid up to 15 times more for credits than the three local companies would have spent had they just paid the fines." (R. 74 at Ex. 2 & Ex. 3, OCC Supp. at 291-293). The

newspaper articles further indicated that FirstEnergy "relied on FirstEnergy Solutions, an unregulated affiliate, to buy credits from people and organizations that generate renewable energy." (R. 74 at Ex. 2, OCC Supp. at 291-292).

Since some of the most relevant specific renewables bidding information has long appeared in some of the largest news outlets in Ohio, the PUCO erred in finding that any portion of the renewables bidding information was not generally known nor readily ascertainable to the public. Further, the disclosure of such information and FirstEnergy's actions, which allowed it to remain public for 49 days, also undercuts any finding that the renewables bidding information meets the element of the *Plain Dealer* test requiring the holder of the purported trade secret to guard the secrecy of the information. It would be inappropriate to give trade secret protection to such a poorly guarded secret. Therefore, the PUCO erred in granting protection over specific renewables bidding information because FirstEnergy failed to carry its burden of demonstrating that it made adequate efforts to protect the secrecy of this historic information.

C. The PUCO Erred Under R.C. 1333.61 And 149.43, When It Affirmed The Attorney Examiner's Ruling That Granted FirstEnergy's December 31 Motion For Protective Order, Which Concealed Public Information In The Draft Audit Report.

The PUCO erred by affirming the Attorney Examiner's ruling granting FirstEnergy's December 31 Motion for Protective Order, resulting in the redaction of public information from the Draft Audit Report. (R. 109 at 12, FE Appx. at 20; R.65 at 5-6, OCC Appx. at 120-121). As the record reflects, a draft of the Exeter Audit Report was provided to FirstEnergy prior to the August 15, 2012 filing of the final Exeter Audit Report. (Tr. Vol. III (pub.) at 512, OCC Supp. at 127). FirstEnergy provided comments upon the Draft Audit Report in two primary forms: [1] a line-edited draft of the Exeter Audit Report ("Draft Report Line Edits") and [2] a supplemental document labeled "The Companies' Major Comments Regarding the Executive Summary Draft

Management/Performance Audit Report" ("Draft Report Supplement"). (R. 80 at Ex. C & Ex. D, OCC Supp. at 136-202; *See also*, Tr. Vol. II (conf.) at 391, OCC Supp. (conf.) 123); Tr. Vol. III(conf.) at 648-665, OCC Supp. at 197-214; Tr. Vol. III (pub.) at 512-514, OCC Supp. at 127-129). Based upon FirstEnergy's comments in those documents, the Exeter Auditor deleted any reference to its original recommendation to disallow the collection of certain costs from customers that was contained in the Draft Audit Report. (R. 80 at Ex. C & Ex. D, OCC Supp. at 136-202).

After OCC submitted a public records request seeking a copy of the Draft Audit Report, FirstEnergy filed its December 31 Motion for Protective Order. (R. 47, OCC Supp. at 222-245). The PUCO affirmed the Attorney Examiner ruling that the document would be released with the caveat that any portion of the Draft Report Line Edits that identified the specific dollar amount that the Auditor recommended for disallowance would be redacted. (R. 109 at 11-12, FE Appx. at 19-20; R. 65 at 5-6, OCC Appx. at 120-121).

Under R.C. 1333.61(D)(1), the disallowance, as recommended in the Draft Audit Report, should still be publicly available because it does not divulge any specific information that would be economically valuable, and it has been publicly disclosed through the Draft Report Supplement. The disallowance contained in the Draft Audit Report does not indicate the specific prices paid for RECs, nor does it tie any of the bids to specific suppliers. Likewise, when permitting public disclosure of the Draft Audit Report with a redaction of the recommended disallowance, the PUCO did not redact the recommended disallowance from the Draft Report Supplement. (R. 80 at Ex. C & Ex. D, OCC Supp. at 136-202). Moreover, a discussion of the amount of the Auditor's recommended disallowance is part of the public record in this proceeding. (Tr. Vol. III (pub.) at 512, OCC Supp. at 127). Therefore, the PUCO erred by

affirming the Attorney Examiner's decision because FirstEnergy failed to carry its burden of establishing that the Auditor's recommended disallowance is economically valuable or sufficiently safeguarded from public dissemination. This Court should reverse and remand the PUCO's public records decision by directing the Commission to comply with the strong presumption in favor of disclosing public records.

D. The PUCO Erred Under R.C. 1333.61 And R.C. 149.43, When It Granted FirstEnergy's February 7 Motion For Protective Order, Which Prevented OCC From Publicly Disclosing Its Recommendation To The PUCO Regarding The Amount Of Imprudent Charges That FirstEnergy Should Credit Back To Its Customers.

OCC filed testimony and exhibits of OCC witness Wilson Gonzalez recommending a disallowance of $157.7 million, which included a recommendation to disallow the $43.4 million ultimately disallowed by the PUCO. (R. 56 (conf.) at 34, OCC Supp. (conf.) at 82). The PUCO erred when it prevented public disclosure of the total dollar amount that OCC maintains that FirstEnergy's customers should not have to pay.

In accordance with paragraph 9 of the Protective Agreement, to which OCC and FirstEnergy agreed on February 1, 2013, OCC sent notice of its intent "to publicly release the total dollar amount of FirstEnergy's renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers plus interest." (R. 61 at Ex. B; OCC Supp. at 263-271). In response, FirstEnergy filed a Motion for Protective Order ("February 7 Motion for Protective Order") to prevent public disclosure of this particular dollar value despite the fact that it does not contain specific pricing information or the names of any of the bidders. The PUCO summarily granted FirstEnergy's February 7 Motion for Protective Order by unlawfully applying R.C. 1333.61(D) in the absence of credible supporting evidence. (R. 109 at 11, FE Appx. at 19; R. 143 at 4-5; FE Appx. at 49-50).

For the same reasons explained above, it logically follows that OCC should have the ability to publicly disclose this aggregate number. OCC's recommended disallowance, as set forth in the expert testimony of Wilson Gonzalez, is based on aggregated information. That aggregate recommendation does not reveal specific prices of In-State Non-Solar renewables or the bidders of those renewables. Therefore, it should be subject to public dissemination regardless of whether bidder-specific pricing and identity information is deemed to be confidential.

The PUCO has consistently held that aggregated information can be publicly used even where some information that forms the aggregate is protected. *In Re Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio v. Ameritech Ohio and Verizon North Inc.*, Pub. Util. Comm. No. 02-1752-TP-TXP, 2002 Ohio PUC LEXIS 889, Entry at **6-7 (Sept. 30, 2002); *In Re Petition of Dean Thomas and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Tel. Co. of Ohio*, Pub. Util. Comm. No. 02-880-TP-TXP, 2002 Ohio PUC LEXIS 679, Entry at **5-6 (Jul. 31, 2002). But the ruling in the case below is inconsistent with the PUCO's prior holdings.

While this Court recognizes the PUCO's authority to change its position, this Court has also found that the PUCO "should also respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law." *Office of Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50, 461 N.E.2d 303 (1984). Thus, the PUCO erred when it changed its position on this issue without appropriate consideration or supporting evidence. It was unlawful and unreasonable for the PUCO to grant FirstEnergy's February 7 Motion for Protective Order when FirstEnergy failed to carry its burden of proof to establish that the information contained in Mr. Gonzalez's testimony warranted protection.

Therefore, this Court should reverse and remand the PUCO's decision in accordance with the presumption in favor of disclosing the renewable bidding information and the aggregate amount of disallowance ($157.7 million) contained in Wilson Gonzalez's testimony.

PROPOSITION OF LAW 2: The Public Utilities Commission acts unlawfully and unreasonably when it presumes a utility's expenditures are prudent.

The PUCO ruled that customers should not pay for a portion ($43 million) of the amount FirstEnergy paid for 2011 vintage In-State Non-Solar renewables. (R. 109 at 28, FE Appx. at 36). Nonetheless, it applied a "presumption of prudence" to FirstEnergy's renewable purchases. (R. 109 at 21, 24, FE Appx. at 29, 32). In doing so, the PUCO unreasonably and unlawfully allowed FirstEnergy to overcharge its customers by $110.48 million for high-priced In-State Non-Solar renewables imprudently purchased from its affiliate.

The burden of proof "encompasses two different aspects of proof: the burden of going forward with evidence (or burden of production) and the burden of persuasion." *Chari v. Vore*, 91 Ohio St.3d 323, 326, 744 N.E.2d 763 (2001), citing *Commonwealth v. Walker*, 370 Mass. 548, 578, 350 N.E.2d 678 (1976). Generally, both of these duties are initially borne by the same party that brings the action. The burden of production does not shift to the opposing party until a prima facie case has been established. *See*, *Chari* at 326; *see also*, *Williams v. City of Akron*, 107 Ohio St.3d 203, 206, 2005-Ohio-6268, 837 N.E.2d 1169. However, the burden of production is "frequently [] influenced by presumptions," *State v. Robinson*, 47 Ohio St.2d 103, 107, 351 N.E.2d 88 (1979), whereby the presumption "serves to establish a prima facie case" in favor of the claimant. *Shephard v. Midland Mut. Life Ins. Co.*, 152 Ohio St. 6, 15, 87 N.E.2d 156 (1949). After a party demonstrates a prima facie case (or it is presumed), the burden of producing

evidence shifts to the opposing party. *Williams* at 206. Then, once the burden of production has been met, "the presumption created by the prima facie case drops from the case." *Id*.

The burden of persuasion, on the other hand, requires the party upon whom it rests to convince the trier of fact by some quantum of evidence. *Chari* at 326. Unlike the burden of production, the burden of persuasion "never leaves the party on whom it is originally cast." *State ex rel. Hardin v. Clermont Cty. Bd. Of Elections*, 134 Ohio St.3d 1451, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 23 (citing 29 Am. Jur. 2d Evidence, §171 (2012)). In this case, the PUCO erred by applying a presumption that FirstEnergy's purchases of renewables were prudent. A presumption of prudence cannot apply to a utility's request to collect charges from customers, certainly not when those charges stem from affiliate transactions.

A. It Is Unreasonable For The PUCO To Apply A Presumption Of Prudence To FirstEnergy's Renewables Purchases.

It was unreasonable for the PUCO to presume that FirstEnergy's decisions related to In-State Non-Solar renewables purchases were prudent. Because the PUCO adopted this presumption, it did not require FirstEnergy to submit any evidence to establish a prima facie case. Instead, the PUCO simply presumed, without any modicum of support, that the Utility's renewable purchases were reasonable and prudent. (R. 109 at 24, FE Appx. at 32). This enabled FirstEnergy to overcharge customers $110.48 million for high cost renewables.

In doing so, the PUCO relied upon its 1986 decision in *In Re Syracuse*, which found that the "effect of a presumption of prudency is to shift the 'burden of producing evidence' (or 'burden of production') to the opposing party." *See*, *In Re Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, Pub. Util. Comm. No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1,

Opinion and Order at *22 (Dec. 30, 1986). However, the determination of whether a presumption should apply under the circumstances of a case is a purely legal issue. *Akron City School Dist.*, 139 Ohio St.3d 92, 95 2014-Ohio-1588, 9 N.E.3d 1004. And previous PUCO rulings have no precedential value on questions of law. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶¶ 42-45. Additionally, this Court has never recognized that utilities enjoy a presumption of prudence upon filing a request to charge customers for costs incurred. Nor should this Court allow the PUCO to apply a presumption of prudence to utility decisions in this case.

Utility applications filed with the PUCO are unique and demand more rigorous scrutiny than the types of cases where presumptions have been applied (e.g., life insurance). "Public utilities being legal monopolies by their very nature . . . operate in a designated area and are not ordinarily subject to competition therein." *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St.2d 34, 37, 218 N.E.2d 446 (1966). "'The public interest increases with a monopoly, for, as such, its actions are not regulated by the strictures of the market place.'" *Office of Consumers' Counsel v. Pub. Util. Comm.*, 32 Ohio St.3d 263, 273, 513 N.E.2d 243 (1987), quoting *Central State Univ. v. Pub. Util. Comm.*, 50 Ohio St.2d 175, 180, 364 N.E. 2d 6, 9 (1977) (Locher, J., dissenting).

As an investor-owned utility, FirstEnergy's primary concern is the fiduciary duty owed to its shareholders to generate earnings. Moreover, utility applications involve a certain level of complexity that demands intense scrutiny by highly specialized experts. This Court should not recognize a presumption of prudent spending when the petitioning party is a monopoly driven by the goal to maximize profits for its shareholders. Instead, this Court should find, upon a de novo review, that it was error for the PUCO to apply a presumption of prudence and should require the

Utility, on remand, to produce evidence sufficient to support its request to collect millions of dollars from customers.

B. It Is Unreasonable And Unlawful For The Public Utilities Commission To Presume First Energy's Purchases Of Renewable Energy Credits Were Prudent When The Renewables Were Purchased From FirstEnergy's Affiliate.

This Court should decline to recognize any presumption of prudence where the transaction involves a public utility and its unregulated affiliate. Ohio law asserts that it "is the policy of this state" to "avoid[] anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service . . . and vice versa." R.C. 4928.02(H) (OCC Appx. at 295). Affiliate transactions present too many opportunities for self-dealing and potentially fraudulent or inflated contracts at the customers' expense. Due to the elevated concern of impropriety in transactions between affiliated companies, "a presumption of prudence should not be applied to affiliate transactions." *Office of the Pub. Counsel v. Missouri Pub. Serv. Comm.*, 409 S.W.3d 371, 372 (Mo. 2013). Therefore, the PUCO erred in applying a presumption of prudence to FirstEnergy's purchases of renewables from its competitive affiliate and should be reversed accordingly.

Other jurisdictions have also found that affiliate transactions are not entitled to a presumption of prudence. *See, infra*. Moreover, the National Association of Regulatory Utility Commissioners ("NARUC"), of which the PUCO is a member, declares its policy is that "[t]here is no presumption of prudence for affiliate transactions, whether they are for expenditures or investments."[5] *See*, Model State Protocols for Critical Infrastructure Protection Cost Recovery, NARUC, Version 1 (July 2004).

[5] NARUC is a non-profit organization for utility commissioners whose mission, in part, is to ensure that its members provide rates that are fair and reasonable for all consumers.

In the Missouri case referenced above, a gas utility purchased gas from its affiliate that submitted the lowest bids in response to two requests for proposal. *Missouri Pub. Serv. Comm.*, at 373-374. In reviewing the purchases made by the utility, the Missouri Public Service Commission ("Missouri PSC") applied a presumption of prudence because Missouri recognizes a presumption of prudence in arm's-length transactions. *Id.* at 375-376. The Supreme Court of Missouri overturned the Missouri PSC's decision, holding that any presumption of prudence was improper when applied to transactions between affiliates because of the greater risk of self-dealing. *Id.* The Missouri Supreme Court determined that "the rationale for permitting a presumption of prudence in arms-length transactions simply has no application to affiliate transactions." *Id.* at 377. The Missouri Supreme Court also held that a presumption of prudence is inconsistent with the Missouri PSC's obligation to prevent regulated utilities from subsidizing their non-regulated operations, *id.* at 378 – the same protection contained in R.C. 4928.02(H). (OCC Appx. at 295).

Several other states have also made similar rulings emphasizing that affiliate transactions are subject to higher scrutiny and not entitled to a presumption of prudence. *See*, *Boise Water Corp. v. Idaho Pub. Util. Comm.*, 97 Idaho 832, 838, 555 P.2d 163 (1976) (the Court "refuse[d] to make an exception to the rule placing upon the utility the burden of proving reasonableness of its operating expenses paid to an affiliate," because the "distinction between affiliate and non-affiliate expenditures appears to be that the probability of unwarranted expenditures corresponds to the probability of collusion"); *Michigan Gas Util. v. Michigan Pub. Serv. Comm.*, Mich. App. No. 206234, 1999 Mich. App. LEXIS 1954, at *9 (Feb. 8, 1999) ("the utility has the burden of demonstrating that transactions with its affiliate are reasonable"); *Turpen v. Oklahoma Corp. Comm.*, 1988 Okla.126, 769 P.2d 1309, 1320-1321 (1988) ("it is generally held that, while the

regulatory agency bears the burden of proving that expenses incurred in transactions with non-affiliates are unreasonable, the utility bears the burden of proving that expenses incurred in transactions with affiliates are reasonable); *US West Communications, Inc. v. Pub. Serv. Comm.*, 901 P.2d 270, 274 (Utah 1995) ("[w]hile the pressures of the competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction").

United State Supreme Court Justice Scalia noted the need to conduct an inquiry into the prudence of affiliate transactions among regulated entities, stating "it is entirely reasonable to think that the fairness of rates and contracts relating to joint ventures among affiliated companies cannot be separated from an inquiry into the prudence of each affiliate's participation." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 382, 108 S.Ct. 2428, 101 L. Ed. 2d 322 (1988) (Scalia, J., concurring). Thus, both Ohio law and similar rulings outside of Ohio support that no presumption of prudence should be applied.

PROPOSITION OF LAW 3: The PUCO acted unreasonably and unlawfully by leaving the burden of producing evidence on the intervenors after it found that the presumption of prudence was rebutted.

Assuming *arguendo* that a presumption of prudence could be applied to FirstEnergy's management decisions, the PUCO erred when it failed to properly determine the burden of proof. The presumption of prudence only affects whether the Utility must initially produce evidence of prudence (initial burden of production). A rebuttable presumption shifts the burden of production to the opposing party – in this case the PUCO Staff and intervening parties. *See generally*, *Williams*, 107 Ohio St.3d 203, 206, 2005-Ohio-6268, 837 N.E.2d 1169. The PUCO applies a low threshold for rebutting the presumption of prudence, holding that challengers do not have to prove that the utility's decisions were imprudent. *In Re Regulation of the Electric*

Fuel Component Contained within the Rate Schedules of The Toledo Edison Company and Related Matters, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, Supplemental Opinion and Order at *65 (Jul. 16, 1987). Rather, challengers only need to provide "*some* concrete evidence," *In Re Investigation into the Perry Nuclear Power Station*, PUCO Case No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, Opinion and Order at * 21 (Jan. 12, 1988) (emphasis added), evidencing a "*potential* imprudence to rebut the presumption." *In Re Regulation of the Electric Fuel Component*, 1987 Ohio PUC LEXIS 69, at * 65 (emphasis added).

At no point, however, does a presumption of prudence change the fact that the utility bears the burden of proof in all utility rate matters. (R.C. 4909.18, OCC Appx. at 284-285; R.C. 4909.19, OCC Appx. at 286-287; R.C. 4928.142(D)(4), OCC Appx. at 299; R.C. 4928.143(E) - (F), OCC Appx. at 302-303); *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶ 8. To the contrary, this Court has held that "a presumption is not to have the effect of shifting the burden of proof onto the opposite party, but merely imposes a 'burden of going forward with the evidence to rebut or meet the presumption.'" *Evans v. Nat. Life & Acci. Ins. Co.*, 22 Ohio St.3d 87, 90, 488 N.E.2d 1247 (1986), citing Evid. R. 301. Thus, once the presumption is rebutted by some concrete evidence, the Utility must meet its burden of proof to establish that its costs for procurement of renewables were prudently incurred.

In this case, the PUCO found that "the Exeter Report was sufficient evidence to overcome the presumption that the Companies' management decisions were prudent as to the procurement of in-state all renewables [sic] RECs." (R. 109 at 21, FE Appx. at 29). Once the PUCO found that the Exeter Audit Report rebutted the presumption of prudence, the presumption is gone, *Williams*, 107 Ohio St.3d 203, 206, 2005-Ohio-6268, 837 N.E.2d 1169, and

FirstEnergy should have been forced to carry its burden of establishing that its purchasing decisions were prudent. However, instead of requiring FirstEnergy to meet its burden of proof, the PUCO turned it around. The PUCO looked instead to the intervening parties (and PUCO Staff) and held that they did not produce evidence "sufficient to overcome the presumption that the Companies' decisions were prudent to support a disallowance of the costs of the REC purchases." (R. 109 at 23, FE Appx. at 31).

Not only was the PUCO's ruling internally inconsistent, it unlawfully and unreasonably shifted the burden of proof by requiring the intervening parties to prove a negative – that the Utility did not act prudently. This Court recently explained that it is the utility that has to "prove a positive point: that its expenses had been prudently incurred * * * [t]he commission did not have to find the negative: that the expenses were imprudent." *In Re Duke Energy* at ¶ 8. A utility is not "given a blank check, but an opportunity to prove to the commission that it had reasonably and prudently incurred the costs it sought to recover." *Id.* at ¶ 6. But, nowhere in the PUCO's Order does the Commission find that FirstEnergy's decisions to purchase In-State Non-Solar renewables were prudent and reasonable. Rather, the PUCO found that FirstEnergy's decisions were not unreasonable. (R. 109 at 22-23, FE Appx. at 30-31). FirstEnergy failed to meet its burden and the PUCO, by improperly applying the presumption of prudence, failed to hold the Utility to its legal burden. Instead, the PUCO unreasonably and unlawfully misapplied the burden of proof by placing a burden on the intervenors to prove a negative. Therefore, upon a de novo review, this Court should reverse and remand the PUCO's decision that allowed FirstEnergy to overcharge customers by $110 million.

PROPOSITION OF LAW 4: The Public Utilities Commission's denial of prudent utility expenses was not against the manifest weight of the evidence.

A. There Was Sufficient Probative Evidence To Support The PUCO's Conclusion That FirstEnergy's Purchase Of $43 Million Of 2011 Vintage RECs Was Imprudent.

FirstEnergy procured its renewables through a bidding process where third parties submitted bids in response to requests for proposals. It was through this process that FirstEnergy undertook efforts to meet its renewable purchase requirements under R.C. 4928.64. (FE Appx. at 104-107). Ultimately, FirstEnergy spent $158,147,130 to acquire 365,808 In-State Non-Solar renewables to satisfy this statutory duty. (R. 71 (conf.) at Ex. WG-3, OCC Supp. (conf.) at 118). Of this amount, $157,693,925 or 99.7% was paid to FirstEnergy's affiliate at an average price of $467.45/REC. (Id.). The remaining RECs from these RFPs were purchased at an average price of $15.77/REC. (Id.). The PUCO properly found that it was imprudent for FirstEnergy to purchase 145,269 2011-vintage RECs in RFP3 from its affiliate, FirstEnergy Solutions, at a price of $325/REC. (R. 109 at 28, FE Appx. at 36). As a result, the PUCO disallowed approximately $43 million of FirstEnergy's costs. (Id.). This $43 million disallowance amounts to $298.50/REC for 145,269 RECs.[6]

The PUCO decision in this matter was based on four factors. First, the PUCO found that in August 2010 although "the market was constrained and illiquid at the time of the RFP," "the market constraints were projected to be relieved in the near future." (R. 109 at 25; FE Appx. at 33). Second, the PUCO found that FirstEnergy "failed to report to the Commission that the market for in-state RECs was constrained and illiquid." (Id.) Third, the PUCO pointed to the fact that the actual purchase price was not the result of a competitive bid but a negotiated

[6] $43,362,796.50 ($298.50/REC for 145,269 RECs) plus carrying costs. (R. 109 at 25, FE Appx. at 33).

purchase price and that the price was not supported by testimony in the record. (Id.) Fourth, the PUCO found that FirstEnergy "could have requested a *force majeure* determination from the Commission instead of purchasing the vintage 2011 RECs through the August 2010 RFP." (Id.)

FirstEnergy never asserts that the PUCO's determination is so clearly unsupported as to show misapprehension, mistake, or willful disregard of duty. Moreover, the testimony and exhibits presented in this proceeding describing the market for renewable energy in 2010 demonstrate that the PUCO's decision to disallow $43.36 million for this renewable energy was not against the manifest weight of the evidence, nor was it so clearly unsupported as to "show misapprehension, mistake, or willful disregard of duty." To the contrary, sufficient probative evidence existed for the PUCO to conclude that FirstEnergy imprudently purchased these renewables.

1. The PUCO's decision to disallow costs associated with the purchase of 2011 RECs was supported by the evidence in the case below.

a. PUCO Factor 1: Evidence supports the PUCO's conclusion that FirstEnergy should have known or actually knew that constraints in the In-State Non-Solar renewable market would be relieved by late 2010 at the time they purchased high-priced 2011 RECs in August 2010.

As part of its rationale supporting the disallowance of costs associated with FirstEnergy's renewable purchases,[7] the PUCO found that FirstEnergy should have known, and in fact knew that the constraints in the In-State Non-Solar market would be relieved by late 2010. (R. 109 at 25; FE Appx. at 33). FirstEnergy takes issue with this conclusion, arguing that the actual language in Navigant's October 18, 2009 memorandum to FirstEnergy explains that the "supply of Ohio RECs will continue to be very constrained through 2010," but never said that the

[7] RFP 3.

constraints would *end* in December 2010. (FE Merit Brief at 30-34). FirstEnergy also points to the Auditor's statements regarding the availability of price information and the resulting uncertainty in the markets, and to similar testimony by its own witnesses, Dr. Earle and Mr. Bradley. (FE Merit Brief at 32). But FirstEnergy's arguments are at odds with the testimony of its other witness, Dean Stathis.

Mr. Stathis' testimony was relied upon by the PUCO in finding that FirstEnergy had knowledge that market constraints were coming to an end in Ohio's In-State Non-Solar renewables market. (R. 109 at 26-27, FE Appx. at 34, 35). Mr. Stathis testified that FirstEnergy's internal review team negotiated a lower price from the high-price bidder in RFP3. Mr. Stathis explained that the reasons for negotiating a lower price included the fact that:

> there are differences in this RFP versus the prior two held in 2009, those differences being, number one, for the first time there's a second bidder; number two, as you recall, the October, 2009, Navigant study said there'd be a period of about a year of constraint – potentially a year of constrained activity in the Ohio in-state markets, and now that year period was close to *ending*; and third, we've learned from compliance filings from other utilities that they're starting to meet their in-state renewable categories.

(Tr. Vol. II (conf.) at 360; FE Supp. at 586 (emphasis added)). Later, Mr. Stathis testified again that Navigant "identified the potential of a one-year constrained period, and now that one year was *ending*." (Tr. Vol. II (conf.) at 370; FE Supp. at 588 (emphasis added)).

FirstEnergy argues that these statements cannot "impute" knowledge to the Utility because Mr. Stathis further testified that "[w]e didn't know how much" the market was potentially changing. (FE Merit Brief at 33, citing Tr. Vol. II (conf.) at 373-374, FE Supp. at 590-91). Nevertheless, the PUCO had ample evidence to support its decision based upon Mr. Stathis' testimony, which indicated that FirstEnergy believed the constrained period was *ending* in 2010. Moreover, Mr. Stathis' testimony indicates that FirstEnergy had this belief at the time it was making decisions about RFP3. Clearly, the PUCO's view that FirstEnergy should have

known, or knew, that the period of constraint was ending at the end of 2010 was based on record evidence. It was a reasonable interpretation of Mr. Stathis' testimony – and its conclusion in this respect was not against the manifest weight of the evidence.

b. PUCO Factor 2: Evidence supports the PUCO conclusion that FirstEnergy failed to advise the PUCO that the In-State Non-Solar renewables market was constrained and that FirstEnergy was under a regulatory duty to advise the Commission.

The PUCO based its decision in part on FirstEnergy's failure to advise the PUCO of constraints in the In-State Non-Solar renewables market when it submitted its ten year compliance plan. Despite FirstEnergy's arguments to the contrary (FE Merit Brief at 34-37), the record reflects that FirstEnergy's Ten Year Compliance Plan, while reporting in particular on limitations in the In-State Solar renewables market, effectively disregarded the In-State Non-Solar renewables market. (Tr. Vol. II (pub.) at 427; FE Supp. at 435-436.) The PUCO appropriately emphasized its reliance on this report to explain its understanding of the impediments facing FirstEnergy in meeting the compliance mandates. The PUCO was correct to rely on such information for purposes of providing regulatory oversight. It is unclear what actions the PUCO could or would have taken had it been advised by FirstEnergy of the constraints in the In-State Non-Solar renewables market. However, the PUCO's later discussion of the force majeure option, and its findings of force majeure for other entities to waive compliance, indicates that other alternatives such as force majeure might have been recommended by the PUCO had FirstEnergy informed the PUCO of the situation with the high-priced renewables.

c. PUCO Factor 3: Evidence supports the PUCO's conclusion that the negotiated price for In-State Non-Solar Renewables in RFP3 was not reasonable or supported in the record.

Further supporting its reasoning for disallowing the 2011-vintage In-State Non-Solar renewables purchased through RFP3, the PUCO found that FirstEnergy failed to carry its burden of proof that the purchase price was reasonable. (R. 109 at 27; FE Appx. at 35). The PUCO explained that there was "no evidence" that the negotiated price for the 2011 RECs was reasonable because FirstEnergy failed to provide a witness who participated in the negotiation of the purchase price. (Id.) The PUCO also recognized that there "is no other evidence in the record that the agreed purchase price was reasonable." (Id.).

FirstEnergy takes issue with the PUCO's conclusions in this respect, stating that the original bid price itself was "reasonable" because it was obtained through a "well-designed, well-run RFP." (FE Merit Brief at 38). FirstEnergy, however, consistently relies upon the incorrect theory that a competitive bid process always produces a competitive outcome. (FirstEnergy Merit Brief at 2, 3, 10, 27, 38, 41). The evidentiary record, however, tells a different story – a story of FirstEnergy paying exorbitant prices to its affiliate that were not consistent with what was paid for similar products in other states, and what experts recognized as reasonable.

A significant part of the Auditor's assessment in this proceeding was U.S. Department of Energy ("DOE") data, which reported renewable energy prices throughout the U.S. (R. 18 at 26; FE Supp. at 132). In its Final Report, the Auditor presented a table showing "Compliance market (primary tier) REC prices, January 2008 to December 2011," for 11 states and the District of Columbia. (Id.). The Exeter auditor explained that:

> Between mid-2008 and December 2011, none of the non-solar REC prices reported by DOE was above $45 and in almost all cases significantly below that

> level. * * * Additionally, the overall trend in REC prices has been declining during that period from January 2008 through mid-2011. Beginning in mid-2011, there have been marked increases in the prices of RECs for some of the states included in the DOE reporting due to certain state changes to renewable eligibility and also increasing percentage requirements for renewables.

(Id.) In fact, the DOE did not report any renewable energy prices higher than $52/mWh since January 2008. (R. 56 at 9, OCC Supp. at 11). This pricing information was available at the time FirstEnergy made its purchases in this case. (R. 18 at n.14, FE Supp. at 132).

Some states, such as Pennsylvania, also gather market price data for government publications, further indicating a reasonable price of In-State Non-Solar renewables far lower than what FirstEnergy paid its affiliate.[8] Pennsylvania's 2009 annual report of renewable prices reflected a weighted average price of $3.65 per Tier 1[9] non-solar REC (prices ranged from a high of $23/REC to a low of $0.50/REC). (Tr. Vol. I (pub.) at 174-175, OCC Supp. at 115-116; Tr. Vol. I (pub.) at OCC Ex. 2, OCC Supp. at 119). The 2010 Tier 1 non-solar RECs sold at a similar weighted average price of $4.77/REC, with a high price of $24.15/REC and a low price of $0.50/REC. (Id.). Pennsylvania prices for 2011 non-solar RECs – the year (vintage) of the disallowed purchases – had a weighted average price of $3.94/REC, which ranged from $0.14/REC to $50.00/REC. (Id.) Even in 2008, one year after Pennsylvania's compliance mandates took effect and nearly two years before FirstEnergy's RFP3 purchases, the weighted average price of Tier I renewables was $4.48/REC (high price of $20.50/REC; low price of $1.00/REC). (Id.). Not only was this information available to FirstEnergy at the time of RFP3,

[8] The Exeter Auditor testified that New Jersey has a similar publication for solar renewable purchases and that other states have similar publications that have a lag so that the data may not be so useful [to inform purchasing decisions in the near-term]. (Tr. Vol. I (conf.) at 142, OCC Supp. (conf.) at 120).

[9] Pennsylvania has two tiers of non-solar renewables. The Tier I Non-Solar RECs reported here are significantly more expensive than the Tier II RECs based on the reported data.

but it reflected prices for a similar product in a similarly nascent market. The Pennsylvania market, even in its infancy, did not garner prices anywhere close to the $325/REC that FirstEnergy paid to its affiliate, indicating the unreasonableness of FirstEnergy's decision.

FirstEnergy fails to establish that the PUCO's disallowance was against the manifest weight of the evidence by arguing that the In-State requirement distinguishes the reasonable level of price paid for Ohio non-solar renewables from prices paid in other states for non-solar renewables. (FE Merit Brief at 33-34 & n.19). It is true that "there are significant differences among the RPS [Renewable Portfolio Standards] programs in the various states with respect to eligible resources (technologies and locations), the percentage renewable requirements, and set-asides for particular technologies." (R. 18 at n. 15, FE Appx. at 132). During the relevant period, Ohio's legislation required that at least 50% of all renewable energy purchased to meet Ohio's compliance requirements, "be met through facilities located" in Ohio with the balance to be met with resources "deliverable" into Ohio. Former R.C. 4928.64((B)(3). Other states only require development within a particular region of the country. (R. 51 at Ex. Att. RE-12; OCC Supp. at 132-133). Despite this difference among state practices, however, PUCO Staff witness Dr. Estomin and OCC Witness Mr. Gonzalez both found that the effect of Ohio's in-state requirement is significantly smaller than what FirstEnergy suggests.

Dr. Estomin explained that while he would expect to see "different values of RECs in different states" because of a number of factors, he would not have expected to see such a vast price differential between the amounts paid by FirstEnergy and the amounts paid for the same product in other states. (R. 18 at 30, FE Appx. at 136). In particular, the Exeter Audit Report states:

> 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 $300 or more in Ohio compared to the RECs prices seen elsewhere.
>
> RECs prices of that magnitude clearly 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. Consequently, the prices offered for the high-priced RECs, and accepted by the Companies, were composed largely of economic rents.

(Id.). Similarly, OCC witness Gonzalez testified that "[a]lthough other REC market data may not have been readily available for the nascent market in Ohio, to assume that Ohio was such an outlier from every other state is mind-boggling." (R. 56 at 18; OCC Supp. at 20). Mr. Gonzalez also pointed out that "New England states had a similar restriction masked as a stringent delivery into the state requirement * * * but did not experience the economic rents paid by FirstEnergy." (R. 56 at 14-15; OCC Supp. at 16-17).

Moreover, Spectrometer, a broker that reports market price data, published a report in August 2010 (the same month that FirstEnergy conducted RFP3), indicating that Ohio In-State Non-Solar renewables were being sold for $32.00 - $36.00 per REC. (Tr. Vol. II (conf.) at OCC Ex. 15, OCC Supp. at 190-195; *see also* Tr. Vol. II (conf.) at 493, OCC Supp. (conf.) at 124). While Spectrometer did not report the volume of trades in the market, it is still probative evidence indicating what In-State Non-Solar renewables were selling for in Ohio. This information was available at the time FirstEnergy made its imprudent purchases. Broker reports are particularly probative information that has been relied upon by the Department of Energy in performing its market assessments. (Tr. Vol. I (pub.) at 49, OCC Supp. at 112).

The record in this case indicates that it was not against the manifest weight of the evidence for the PUCO to disallow the costs associated with the 2011 vintage RECs that FirstEnergy purchased for $325.

d. PUCO Factor 4: The PUCO properly concluded that FirstEnergy could have filed for force majeure relief.

FirstEnergy's imprudence not only stemmed from its unrealistic evaluation of the market, but its failure to consider alternatives available under Ohio law. Under Ohio law, FirstEnergy was able to make a $45/REC alternative compliance payments ("ACP") in lieu of purchasing renewables, R.C. 4928.64(C)(2), or apply for force majeure. R.C. 4928.64(C)(4)(a); *see also*, (FE Appx. at 106-107). The PUCO never specifically reached the ACP issue after finding that it was imprudent to purchase RECs at $325. The PUCO did, however, conclude that FirstEnergy "could have requested a *force majeure* determination from the Commission instead of purchasing the vintage 2011 RECs through the August 2010 RFP." (R. 109 at 27-28, FE Appx. at 35-36). The PUCO relied upon its decision earlier that year in an AEP Ohio case. *In Re Columbus Southern Power Company*, 2010 Ohio PUC LEXIS 6, Entry (Jan. 7, 2010).

Disputing the PUCO's reliance on the availability of force majeure relief (but not disputing that there was time to seek such relief), FirstEnergy argues that the term "reasonably available" only refers to whether there were In-State Non-Solar renewables that *could* be purchased and did not include consideration of the price of the renewables. (FE Merit Brief at 40-43). Neither the term "reasonable" nor the phrase "reasonably available" is defined in R.C. 4928.64. But the term "reasonable" is a common modifier in legal provisions and has a common and well-established meaning. *Chester v. Custom Countertop & Kitchen,* 11th Dist. No. 98-T-0193, 1999 Ohio App. LEXIS 6138 (Dec. 17, 1999). The plain language "reasonably available" means that the renewable purchase requirement should be excused if renewables cannot be

acquired under reasonable circumstances. It was unreasonable for FirstEnergy to narrowly construe the force majeure provision of the law to exclude consideration of price as a basis for relief. The PUCO appropriately found that considerations relating to force majeure 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 price*.[10]

FirstEnergy also attempts to equate the words "reasonably available" with other language used in R.C. 4928.64(C)(4), which directs the PUCO to consider whether the utility "has made a good faith effort" to acquire the renewables. (FE Merit Brief at 40). While "efforts" are to be considered in this assessment, the determination of whether renewables are "reasonably available" does not turn on "efforts" alone. The PUCO appropriately considered market conditions, including price, as the primary determinant of whether In-State Non-Solar renewables were "reasonably available."

Additionally, FirstEnergy's assertion that the "3 percent cost cap" on expenditures for renewables was intended as the only dollar-related check on renewable purchases is not

[10] *In Re 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,* Pub. Util. Comm. No. 09-2006-EL-ACP, 2011 Ohio PUC LEXIS 371, Finding & Order (Mar. 23, 2011) (emphasis in original). *In Re 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,* Pub. Util. Comm. No. 10-467-EL-ACP, 2011 Ohio PUC LEXIS 238, Finding & Order (Feb. 23, 2011); *In Re Duke Energy Retail Sales, LLC's Annual Alternative Energy Portfolio Status Report,* Pub. Util. Comm. Nos. 10-508-EL-ACP, et al., 2011 Ohio PUC LEXIS 255, Finding & Order (Feb. 23, 2011) (reaching similar conclusions regarding the infant state of the Commission's certification process and state of the market); *In Re 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, 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); *In Re Noble Americas Energy Solutions*, 2011 Ohio PUC LEXIS 944, Finding & Order (Aug. 3, 2011).

supported by Ohio law and precedent. (FE Merit Brief at 42-43). The law's 3 percent cost cap provision states that a utility "need not comply" with a renewables benchmark "to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more." R.C. 4928.64(C)(3) (FE Appx. at 107). FirstEnergy's argument is peculiar because the Utility later argues that the 3 percent cost cap is within the utility's discretion. (FE Merit Brief at 49-50). But a completely discretionary cost cap would leave customers with no protection from excessive expenditures. There is also no basis for FirstEnergy's argument that two different forms of protection for customers from paying excessive prices would be "redundant." An overall cost cap and a provision providing relief from market conditions, including conditions that produce excessive prices, serve different purposes and are not redundant.

2. The PUCO's calculation of the amount of disallowance was appropriate.

The PUCO properly found that certain In-State Non-Solar renewables should not have been purchased. R.C. 4909.154 provides that the PUCO "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." (OCC Appx. at 282). Under this authority, the PUCO could have disallowed the entire amount of the purchases, providing a strong deterrent to imprudent purchases. Instead, the PUCO chose to soften the effect of the deterrent by reducing the disallowance by the amount of the low bidder's price – $26.50/REC. (R. 109 at 28, FE Appx. at 36). Nevertheless, FirstEnergy argues that the PUCO's disallowance calculation, was "internally inconsistent" and against the manifest weight of the evidence. (FE Merit Brief at 43, 47-49).

FirstEnergy argues that it is inconsistent for the PUCO to use the other bidder's price as an offset because it was not a bid for the same amount of renewables. (FE Merit Brief at 43). It also argues that it was inconsistent for the PUCO to have allowed laddering – purchasing energy for future periods as well as for the current period – in some of the bids, but not for RFP3. (Id.). But the PUCO's finding that these specific purchases were imprudent and that laddering under the circumstances was not prudent was based on changes in the marketplace from 2009 to 2010. (R. 109 at 25-26; FE Appx. at 33-34). FirstEnergy ignores the PUCO's conclusion that these renewables should never have been purchased at the price paid. The offset represented what the PUCO believed was a reasonable price for In-State Non-Solar renewables at the time. For a variety of reasons, the PUCO found that it was not prudent to continue laddering purchases made in 2010 for 2011. The PUCO stated:

> The evidence in the record demonstrates that FirstEnergy knew that, although the market was constrained and illiquid at the time of the RFP, the market constraints were projected to be relieved in the near future (Co. Ex. 1 at 34-35). FirstEnergy witness Stathis testified that the Companies had received new information regarding the development of the in-state all renewables market, including the projection that market constraints were due to be relieved (Co. Ex. 2 at 35; Tr. II at 3602). FirstEnergy witness Stathis acknowledged that new market information was available to the Companies in August 2010. This information included a second bidder for the RECs, which was consistent with Navigant's projected expiration of the 12-month constrained supply timeframe. Moreover, the Companies had information that other Ohio utilities were meeting their in-state renewable benchmarks (Co. Ex. 2 at 35-36; Tr. II at 369-370). Further, the Companies knew that there was time for additional RFPs to purchase the vintage 2011 RECs because FirstEnergy had contingency plans for an additional RFP in October 2010 and two additional RFPs in 2011 (Co. Ex. 2 at 36). Moreover, in the August 2010 RFP, FirstEnergy did not execute its laddering strategy, which would have involved spreading the REC purchases for any given compliance year over the course of multiple RFPs. Here, however, FirstEnergy chose to purchase the entire remaining balance of its 2011 compliance obligation (85 percent of its 2011 compliance obligation) in this RFP and reserved no 2011 RECs to be purchased in 2011 (Exeter Report at 25; Tr. II at 414-415).
>
> The Commission finds that, based upon the Companies' knowledge of market conditions and market projections, the Companies' decision to purchase 2011

> RECs in August 2010 was unreasonable, given that the market was constrained but relief was imminent.

(R. 109 at 25-26, FE Appx. at 33-34).

There is no internal inconsistency with respect to the PUCO's acceptance of laddering in one period and its rejection of laddering for another period. This is an issue that turns on the specific facts at that point in time and the facts changed. Although laddering is an often used purchasing tool, the PUCO appropriately recognized that the use of that tool is not appropriate in all markets, for all quantities, or at all times. The PUCO found, for good reasons, that laddering purchases of 2011 vintage In-State Non-Solar renewables in August 2010 was not reasonable.

FirstEnergy also makes a desperate argument that "some amount of the Companies' purchases" above that paid to the second bidder was prudent, suggesting that the Commission should have approved 73% of such purchases because that was the amount allowed to be laddered in 2009 for 2010. (FE Merit Brief at 46, n.24). Again, FirstEnergy misses the crux of the PUCO's decision – the market was different in 2009 v. 2010. As a result, the PUCO concluded that FirstEnergy's laddering approach for the quantity of RECs purchased was inappropriate. Prudent decision making is not the implementation of the same action regardless of the circumstances. FirstEnergy's argument is without merit and should be rejected.

Similarly, FirstEnergy's claim that it saved customers $25.4 million is baseless. (FE Merit Brief at 40). The PUCO correctly recognized that $25.4 million was a reduction from an excessive price, but it was still significantly higher than what could be justified given the first bidder's bid and the other circumstances relied upon by the PUCO.

FirstEnergy's request for a lower disallowance based upon a higher offset price – more than the price paid to the first bidder -- should also be rejected. (FE Merit Brief at 47-49). Effectively, the PUCO concluded that it was not appropriate to purchase the renewables at a

price exceeding that offered by the first bidder. In its Second Entry on Rehearing, the PUCO stated that the first bidder's price was "the most appropriate offset price." (R. 143 at 25-26, FE Appx. at 70-71). Although the PUCO was not required to credit such an offset to FirstEnergy's imprudent purchases, given the findings discussed above, the first bidder price was a reasonable offset to apply. Furthermore, FirstEnergy's argument that the only appropriate offset was "the price initially offered to or actually paid by the Companies" (FE Merit Brief at 48) would invalidate the PUCO's finding of imprudence and should be rejected as baseless.

PROPOSITION OF LAW 5: The Public Utilities Commission does not engage in unlawful retroactive ratemaking when it disallows expenses collected through a utility's adjustable rates.

This Court should uphold the PUCO's decision lowering the expenses to be collected from customers by $43.4 million to exclude imprudent costs. Such an adjustment to include in rates only actual, prudent costs incurred does not constitute retroactive ratemaking. Accordingly, FirstEnergy's contention that this Court's 1957 decision in *Keco Industries v. Cincinnati & Suburban Bel Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d (1957) (*"Keco"*) prevents the PUCO from adjusting Rider AER in this manner is wrong. (FE Merit Brief at 18-26).

Although FirstEnergy recognizes that the case of *River Gas Co. v. Publ. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E. 2d 568 (1982) ("*River Gas"*) established an exception to *Keco's* retroactive ratemaking doctrine for rate mechanisms that "are adjusted as gas prices fluctuate," FirstEnergy incorrectly attempts to distinguish *River Gas* from this case. (FE Merit Brief at 22-26.) FirstEnergy contends that *River Gas* does not stand for the proposition that "traditional base rate proceedings implicate the retroactive ratemaking doctrine, while rates arising from variable rate schedules do not." (Id. at 23.) Instead of this fairly straightforward distinction between *Keco* and *River Gas*, FirstEnergy argues that the natural gas price adjustments in *River Gas* were

"automatic," whereas the rates in *Keco* were "approved" rates. (Id.). FirstEnergy then argues that the Rider AER rates at issue in this case, although adjusted every quarter like the rates in *River Gas*, were "approved" rates. But FirstEnergy's arguments misconstrue the holding in *River Gas* to suggest its desired result.

The *River Gas* exception does not turn on whether the rate has been approved – all rates have to be approved in a ministerial[11] sense before being charged to customers. Indeed, the Ohio Revised Code mandates that:

> No rate . . . , no change in any rate . . . , and no regulation or practice affecting any rate . . . of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18, 4909.19, and 4909.191 of the Revised Code.

R.C. 4909.17 (OCC Appx. at 283). The applicable distinction upon which the *River Gas* exception is based is not in whether the rates are approved in a ministerial sense, but in whether the particular rates are set subject to adjustment. As this Court explained:

> the fuel cost adjustment provisions of *R.C. Chapters 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*. * * *."

River Gas, 69 Ohio St. 2d at 513,433 N.E. 2d 568, citing *Consumers' Counsel v. Pub. Util. Comm.*, 57 Ohio St.2d 78, 82-83, 384 N.E.2d 245 (1979); *See, also, Ford Motor Co. v. Pub. Util. Comm*., 52 Ohio St. 2d 142, 151, 370 N.E.2d 468 (1977).

[11] The Administrative Procedures Act, although not specifically applicable to adjudications of the Public Utilities Commission, excludes from the definition of "Adjudication," "the issuance of a license in response to an application with respect to which no question is raised nor any other acts of a ministerial nature." R.C. 119.01; (OCC Appx. at 265-266). FirstEnergy's quarterly filings, submitted thirty days before their effective date, and showing no cost or other information from which the rate could be determined, were nothing more than such a ministerial act with no judgment or discretion to be exercised by the Commission.

While the ministerial act of approval must still take place for variable rates, until the actual costs are known and a prudence review of those costs is conducted such as occurred in this proceeding, the Supreme Court recognized that the justness and reasonableness of the rate would necessarily remain subject to review and final determination by the PUCO. The prospect of PUCO review results in variable rates, which do not "constitute[] ratemaking in its usual and customary sense." *Id.*

The process of reviewing variable rates is well-established in Ohio. These rates are initially projected based on estimates of the costs that may be incurred in providing the service. Then, after the actual costs are incurred, the costs incurred are subjected to a prudence review through an audit. In this case, the PUCO retained both a financial auditor and a management performance auditor to review the financial calculations of Rider AER as well as prudence. The Commission's first audit of FirstEnergy's Rider AER, which went into effect on July 1, 2009, was the one conducted in this case. After the PUCO determines the prudent costs allowed for the time frame in question, the rates going forward are then adjusted to reflect either an under- or over-collection of the charges during the historic time frame. The PUCO's order in the FirstEnergy case establishing Rider AER only allowed FirstEnergy to charge for "prudently incurred costs." *In Re Ohio Edison Company,* 2009 Ohio PUC LEXIS 279, Second Opinion and Order at **17, 40. Until that audit for the period being reviewed is completed, the rates at issue are not "Commission-made rates" and are subject to adjustment. This process has long been utilized in natural gas and electric fuel audit proceedings. Rider AER is nothing more than a fuel adjustment clause to which these same rules of review apply.

FirstEnergy's reliance on two *Columbus Southern Power Company* cases is misplaced. (FE Merit Brief at 20, 21, citing *In Re Columbus Southern Power Co.*, 128 Ohio St. 3d 512,

2011-Ohio 1788, 947 N.E.2d 655 and *In Re Application of Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.2d. 863). In each of those cases, this Court was addressing Provider of Last Resort ("POLR") charges that were not subject to adjustment based on actual costs incurred.

Specifically, in *In Re Columbus Southern Power Co.*, the 128 Ohio St. 3d 512, 2011-Ohio 1788, 947 N.E.2d 655, the PUCO permitted 12 months of revenue to be collected from customers over a nine-month period. Although the Court found that the utility had unlawfully collected $63 million, it also found that it would be improper to refund the improper revenue because it had already been collected from customers pursuant to a PUCO order. *Id.* at 514. That case, however, did not involve a claim that the POLR charges constituted variable rates subject to adjustment for actual, prudent costs incurred.

Furthermore, the Court found later in the related remand proceeding that the argument that the amount of the deferred fuel costs could be adjusted to compensate for the improperly collected POLR charges had not been preserved below. As a result, while the argument might have merit, it could not be raised on appeal. *In Re Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio 1788, 947 N.E.2d 655 and *In Re Application of Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.2d. 863.

The Supreme Court never reached the *River Gas* issue – whether projected amounts could be reconciled with actual, prudent charges incurred – in either of the *Columbus Southern* decisions upon which FirstEnergy relies. In the current case, audits and adjustments for actual costs incurred were part of the ongoing approval of Rider AER. This was made clear by the Commission's approval of the Stipulation establishing Rider AER, providing for quarterly rate adjustments to recover the "prudently incurred costs" for renewables. *In Re Ohio Edison*

Company, 2009 Ohio PUC LEXIS 279, Second Opinion and Order at **17, 40. The fact that the approved tariff provided for ministerial approval of quarterly adjustments to Rider AER within thirty days of submission of a tariff did not change the fact that Rider AER is a rate that is subject to ongoing adjustment and audit just like the natural gas price adjustments in *River Gas*. Certainly, neither FirstEnergy nor the PUCO ever contemplated that anything other than a ministerial review would, or could, be conducted within thirty days. Such a time frame would hardly allow parties sufficient time to review the filing, let alone conduct discovery and a PUCO hearing. FirstEnergy's arguments that review of Rider AER did not fall squarely under the *River Gas* doctrine lack any merit and should be rejected.

IV. CONCLUSION

The PUCO's $43.36 million disallowance of FirstEnergy's excessively priced In-State Non-Solar renewables purchases from its affiliate in RFP3 for 2011-vintage RECs should be affirmed. The Supreme Court should remand the PUCO's decisions permitting the Utility to charge customers $110 million for exorbitantly priced renewables with instructions that the PUCO correct the errors found. This will require the PUCO to place the burden of proof on FirstEnergy. FirstEnergy would have to prove that its renewables purchases were prudent. Otherwise, the PUCO must order a return to customers of an additional $110 million in unjust and unreasonable charges. Additionally, the Court should reject FirstEnergy's arguments that 2009 and 2010 bid information should continue to be protected as trade secret information. The PUCO should be reversed on its decision that hides information from the public that is not trade secret.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *CONFIDENTIAL Merit Brief and CONFIDENTIAL Appendix of Appellee/Cross-Appellant* was served on the persons listed below, via electronic service, this 3rd day of October 2014.

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