**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY TO FIRSTENERGY’S MEMORANDUM CONTRA**

**OHIO Power’S MOTIONS TO Intervene and REOPEN PROCEEDINGS**

**by**

**the OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Public Utilities Commission of Ohio (“PUCO”) has been asked in this case to credit customers for overcharges by FirstEnergy[[1]](#footnote-2) in its purchases of renewable energy credits (“RECs”) from 2009 to 2011. The parties are awaiting the PUCO’s decision. Then, on June 21, 2013, Ohio Power Company Corp. (“AEP Ohio”) filed a Motion to Intervene and Reopen Proceedings (“Motion to Reopen”). AEP Ohio has raised more concerns about FirstEnergy’s charges to consumers for renewable energy.

AEP Ohio stated its intention to provide information regarding the operation of the renewable energy market that bears significantly upon the issues in this case.[[2]](#footnote-3) On July 2, 2013, FirstEnergy filed a Memorandum Contra to AEP Ohio’s Motion to Reopen. FirstEnergy contends that AEP Ohio has not met the standard for reopening the record as set forth in Ohio Adm. Code 4901-1-34 or for intervention in the case.[[3]](#footnote-4) OCC, however, supports AEP Ohio’s Motion to Reopen the record in this proceeding so that this Commission has the opportunity to review all available and relevant information in this case involving an extraordinary large amount of customer money. Any reopening should be done in a way that minimizes delay in a ruling that has been awaited in this case.

AEP Ohio is one of only four electric distribution utilities (“EDUs”) in this state that is subject to the same alternative energy benchmarks as FirstEnergy. AEP Ohio is uniquely positioned to provide the PUCO with information regarding the REC market during the applicable time-period as well as the options that were available to EDUs in a nascent market. AEP Ohio’s willingness to provide relevant evidence regarding the pricing and availability of the RECs during the applicable time-period is likely to be extremely beneficial to the PUCO and to Ohio consumers who paid the excessive costs to FirstEnergy. Since AEP Ohio has demonstrated good cause,[[4]](#footnote-5) the PUCO should reopen this proceeding and permit the presentation of additional evidence.

In its Memorandum Contra, FirstEnergy argues that AEP Ohio does not adequately describe the nature and purpose of the additional evidence.[[5]](#footnote-6) But AEP Ohio explained in detail the information it plans to share with the PUCO. Specifically, AEP Ohio intends to share how it “did consider lower cost RECs from other states to comply with Ohio standards,”[[6]](#footnote-7) which is directly in response to FirstEnergy’s criticism of the Auditor’s reliance on other states’ REC markets. Throughout this case, FirstEnergy has

maintained the position that it could not consider the REC prices in other states because of the lack of comparability of the markets and lack of transparency of market information.[[7]](#footnote-8) AEP Ohio also indicates that it specifically could provide evidence showing that it “relied on the broker and bilateral markets as a contingency to obtain renewable energy certificates when faced with high cost certificates held by a few bidders.”[[8]](#footnote-9) This contrasts FirstEnergy’s litigation position that it was not required to explore, nor were RECs available in broker and bilateral markets at the time FirstEnergy was faced with the exceedingly high-priced RECs bids.[[9]](#footnote-10)

Additionally, in its Motion to Reopen, AEP Ohio questions why the identity of the REC suppliers would be protected from public disclosure.[[10]](#footnote-11) AEP Ohio asks a good question. And AEP Ohio “questions FirstEnergy's motives for its repeated attempts to shroud the market-related issues in this case under a veil of secrecy.”[[11]](#footnote-12) That is another good question from AEP Ohio.

In response to AEP Ohio’s concerns about FirstEnergy’s motives behind protecting information in this case, FirstEnergy misleadingly claims that “none of the actual parties to this case, having seen the Companies redactions, have claimed that the

Companies’ redactions were improper.”[[12]](#footnote-13) OCC[[13]](#footnote-14) (and other parties)[[14]](#footnote-15) have consistently argued that the supplier-pricing and supplier-identifying information is not trade secret and therefore should *not* be concealed from the public (redacted).

Perhaps the worst of FirstEnergy’s secrecy is that OCC has been denied permission to publicly state the dollar amount that OCC is recommending FirstEnergy be required to return to Ohio customers, to resolve FirstEnergy’s overcharges. OCC’s recommendation appears under seal (not in the PUCO’s public docket), for example, in the testimony of Mr. Gonzalez and in OCC’s Initial Brief. OCC’s recommendation is based on aggregated information. As OCC has noted in its appeal, in its April 15, 2013 Initial Brief to the full Commission on this issue, the PUCO’s precedent is that aggregated information can be publicly used even where some information that forms the aggregate is protected.[[15]](#footnote-16) OCC requests that, when the PUCO rules upon AEP Ohio’s Motion to Reopen, the PUCO should grant OCC’s appeal and deny FirstEnergy’s confidentiality request that otherwise will continue to prevent the public from knowing critical information about this case including the recommendation of the state’s advocate for utility consumers.

AEP Ohio filed its Motion to Reopen after the close of the briefing period and before the PUCO’s ruling in the case. That makes AEP Ohio’s Motion to Reopen timely under the PUCO’s rules, which provide for a proceeding to be reopened “at any time prior to the issuance of a final order.”[[16]](#footnote-17) Also, AEP Ohio can provide this Commission with unique information, which serves as good cause upon which to reopen this proceeding.

Accordingly, the PUCO should grant AEP Ohio’s Motion to Reopen so that the PUCO may render a decision based upon all relevant information and a complete record.[[17]](#footnote-18) The specific factual information that AEP Ohio intends to present will certainly help the Commission to determine whether FirstEnergy fairly assessed the market prior to making purchases of excessively priced RECs. Finally, the PUCO should adopt a procedural schedule that minimizes any delay in issuing a decision in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of the *Reply* was served on the persons listed below, via electronic service, this 9th day of July 2013.

*/s/ Melissa R. Yost*

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1. “FirstEnergy” is the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. [↑](#footnote-ref-2)
2. Memorandum in Support of AEP Ohio Motion to Reopen, at 2. [↑](#footnote-ref-3)
3. FirstEnergy Memo Contra at 3-13. [↑](#footnote-ref-4)
4. *See* Ohio Adm. Code 4901-1-34(A). [↑](#footnote-ref-5)
5. FirstEnergy Memo Contra at 3. [↑](#footnote-ref-6)
6. Memorandum in Support of AEP Ohio Motion to Reopen at 2. [↑](#footnote-ref-7)
7. Initial Brief of FirstEnergy at 37-39, 51-54; Reply Brief of FirstEnergy at 27-32. [↑](#footnote-ref-8)
8. Memorandum in Support of AEP Ohio Motion to Reopen at 4. [↑](#footnote-ref-9)
9. Post-Hearing Initial Brief of FirstEnergy at 59-63. [↑](#footnote-ref-10)
10. Memorandum in Support of AEP Ohio Motion to Reopen, footnote 2, page 5. (“[I]t is unclear to AEP Ohio why the identity of the provided would be protected from disclosure.”) [↑](#footnote-ref-11)
11. Memorandum in Support of AEP Ohio Motion to Reopen, footnote 1, page 4. [↑](#footnote-ref-12)
12. FirstEnergy Memo Contra at 5. [↑](#footnote-ref-13)
13. OCC’s Reply Brief at 48-49 (Stating the information should be publicly disclosed.). OCC’s Initial Brief at 58-62, 65, 67, 73, 79, 83-84, 86-87 (Stating the information does not qualify as a trade secret and it should be publicly disclosed.). OCC’s Reply to FirstEnergy’s Memorandum Contra the OCC’s Motion to Compel filed on December 14, 2012, at 2-3, 6, 8, 14-15 (Stating that the information is not a trade secret and should not be made public.). OCC’s Memorandum Contra FirstEnergy’s Motion for a Protective Order filed on October 18, 2012, at 6, 21, 24, 29, 35 (Stating that the information is not a trade secret and should be made public.). [↑](#footnote-ref-14)
14. Initial Brief of the Environmental Law and Policy Center, the Ohio Environmental Council, and Sierra Club at 1, 25-29. (Stating the information is not a trade secret and should be available in the public domain.). [↑](#footnote-ref-15)
15. OCC Memorandum Contra, at 4-5 (Feb. 25, 2013); *In the Matter of the Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio v. Ameritech Ohio and Verizon North Incorporated*, Case No. 02-1752-TP-TXP, 2002 Ohio PUC LEXIS 889, Entry at 1-2 (Sept. 30, 2002); *See also, In the Matter of the Petition of Dean Thomas and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Telephone Company of Ohio dba Sprint*, Case No. 02-880-TP-TXP, 2002 Ohio PUC LEXIS 679, Entry at 3 (Jul. 31, 2002); *In the Matter of the Commission’s Promulgation of Rules for Market Monitoring Pursuant to Chapter 4928, Revised Code*, Case No. 99-1612-EL-ORD, 2000 Ohio PUC LEXIS 445, Finding and Order at 6 (Mar. 30, 2000) (stating “The fact that the information is confidential, however, does not preclude the Commission or Commission Staff from publishing [] data in an aggregated form”). [↑](#footnote-ref-16)
16. Ohio Adm. Code 4901-1-34(A). [↑](#footnote-ref-17)
17. *In* *the Matter of the Complaint of Lisa and Clayton Giuffre*, Pub. Util. Comm. No/ 88-1707-EL-CSS, 1989 Ohio PUC LEXIS 280, at \*1 (April 4, 1989) (acknowledging that a complete record is an essential goal of the Commission). [↑](#footnote-ref-18)