

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

⁵ An August 22, 2012 Attorney Examiner Entry set the hearing date for November 27, 2012. FirstEnergy now seeks to continue the hearing until February 19, 2013.

especially considering the findings of the Financial Auditor that FirstEnergy is not complying with Commission Orders that determine how much money FirstEnergy's customers have to pay for FirstEnergy's procurement of renewable energy credits.⁶

The Financial Auditor in this case has determined that FirstEnergy is not complying with the Stipulation and Recommendation that was approved by the Commission (in PUCO Case No 08-935-EL-SSO) that mandates how Rider AER should be calculated.⁷ This is costing FirstEnergy's customers more money. And the Commission's review of the Financial Audit Report should not be delayed more than two months at FirstEnergy's request.

FirstEnergy is correct that the Commission should ensure that the parties have ample time to complete discovery.⁸ But parties can have ample time to complete discovery without granting FirstEnergy's request for an 11-week delay. First, the Commission should ensure that the parties in this case are immediately provided with an unredacted copy of the Exeter Audit Report. Second, because of FirstEnergy's refusal to provide the parties with an unredacted copy of the Exeter Audit Report, a continuance of a reasonable amount of time—two weeks—is warranted. Third, the Commission should require FirstEnergy to respond to all discovery requests within ten days of service.

As explained below, the 11-week delay that FirstEnergy seeks will only cause financial harm to FirstEnergy's customers. Accordingly, the Commission should deny FirstEnergy's request to continue the hearing until February 19, 2013.

⁶ Financial Report at 13-14.

⁷ Financial Report at 13.

⁸ Memorandum in Support at 3. *See also* R.C. 4903.082 provides that "[a]ll parties and intervenors shall be granted ample rights of discovery."

II. ARGUMENT

The Companies cite to a Commission rule for support of its request for an 11-week delay of the hearing. Specifically, FirstEnergy relies on Ohio Adm. Code 4901-1-13(A) which states that “continuances of public hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown.” However, the Companies have failed to meet the requirements of the rule because they have not shown good cause for delaying the hearing in this case for more than eleven weeks. The Companies’ only justification for an 11-week continuance of the proceeding is that more time is needed for the parties to conduct discovery and settlement discussions.⁹

In regards to FirstEnergy’s argument that more time (11 weeks) is needed for discovery, such an argument is unpersuasive because any potential delays in discovery are the result of the actions of the Companies. The confidentiality issues referenced by FirstEnergy are related to the Companies’ repeated refusals to provide the parties with an unredacted copy of the Exeter Report—even subject to a protective agreement.¹⁰

FirstEnergy also argues that an 11-week delay is warranted because more time is needed for settlement.¹¹ It has been over two months since the Exeter Audit Report was

⁹ FirstEnergy’s Memorandum in Support of Motion to Modify Procedural Schedule and Expedited Request, Case No. 11-5201-EL-RDR, at 1 (October 19, 2012).

¹⁰ See OCC’s Motion to Compel.

¹¹ Memorandum in Support at 1.

filed. FirstEnergy has never contacted OCC, Sierra Club or OEC about settlement of this case. If any delay is warranted now for purposes of settlement, two weeks is appropriate—not eleven weeks as FirstEnergy requests.

In its Motion, FirstEnergy indicates that its request for over an 11-week continuance will not unduly prejudice any party's interest.¹² FirstEnergy is wrong. After claiming that "The requested continuance will not unduly prejudice any party's interests,"¹³ FirstEnergy then acknowledges that the amount of carrying charges will continue to increase during the delay resulting from the continuance.¹⁴ And the Companies' claim that "[c]arrying costs *** as a result of the continuance would be de minimus ***"¹⁵ is no justification for imposing additional costs on consumers.

In furtherance of its argument that its requested delay of over 11 weeks will not unduly prejudice any party's interest, FirstEnergy states that "[t]he Companies have recovered most of the expenses incurred for the purchase of alternative energy related to this period."¹⁶ This is problematic considering that the Exeter Audit Report recommends "that the Commission examine the disallowance of excessive costs associated with purchasing RECs to meet the FirstEnergy Ohio utilities' In-State All Renewable obligations."¹⁷ This recommendation is based, in part, on the Exeter Auditor's finding

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Final Report (REDACTED) Management/Performance Audit of the Alternative Energy Resource Rider (RIDER AER) of the FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011, prepared by Exeter Associates, Inc., filed on August 15, 2012 in PUCO Case No. 11-5201-EL-RDR (Exeter Audit Report) at page 33.

that the Companies have already made “seriously flawed” decisions regarding the unreasonable costs it has incurred.¹⁸ Specifically, at times, FirstEnergy paid more than \$675 for non-solar RECs.¹⁹ Exeter found that based on the U.S. Department of Energy (DOE) reports on non-solar REC prices paid throughout the U.S. between mid-2008 and December 2011, none of the non-solar REC prices reported by DOE were above \$45.²⁰ And in almost all cases, non-solar REC prices were significantly below \$45.²¹ And in regards to FirstEnergy’s affiliate—FirstEnergy Solutions—the Exeter Audit Report found that FirstEnergy should have known that “the prices bid by FirstEnergy Solutions reflected significant economic rents and were excessive by any reasonable measure.”²²

Furthermore, FirstEnergy’s characterization of the increase in carrying charges as “de minimus” and its willingness for customers to incur them are contrary to the recommendations made in the Financial Audit which seek to reduce the amount of carrying costs customers would have to pay.²³ The Stipulation and Recommendation that the Commission approved in Case No. 08-935-EL-SSO requires Rider AER to be calculated and recovered on a quarterly basis.²⁴ However, the Financial Auditor found that FirstEnergy is not complying with the Commission’s Order. The Financial Audit

¹⁸ *Id.* at page 28.

¹⁹ *See id.* (Stating the Companies at times paid more than 15 times the price of the applicable forty-five-dollar Alternative Compliance Payment) (15 x \$45 = \$675.)

²⁰ *Id.* at 26.

²¹ *Id.*

²² *Id.* at page iv.

²³ Financial Audit at 16.

²⁴ *Id.* at 13.

Report indicates that “FirstEnergy has decided that the rider should be calculated to recover costs over periods longer than a quarter.”²⁵

The Companies also chose to disregard another Commission Order from Case No. 08-935-EL-SSO, which requires Rider AER to be reconciled quarterly.²⁶ The Financial Audit Report states that “FirstEnergy has not shown that it attempted to reconcile the rider for any period to date” and that “costs from 2009 remain in the Rider AER calculation for periods in 2011.”²⁷

Decisions by FirstEnergy to disregard the Commission’s Orders were deemed by the Financial Auditor to be “substantial issues” related to the calculation of Rider AER”²⁸ and those decisions, in part, resulted in an under-recovery of \$50,440,151 as of December 31, 2011, instead of what would have been an under-recovery of \$23,431,795 using the Commission approved processes for the same time period.²⁹ FirstEnergy’s decisions to violate Commission Orders have contributed to FirstEnergy’s large under-recovery of money from its customers. Because of the carrying charges on the under-recovered amounts, FirstEnergy’s customers will have to pay more money. And FirstEnergy’s customers will have to pay even more if FirstEnergy is successful in delaying this proceeding for over 11-weeks, without good cause shown.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.* at 16.

III. CONCLUSION

FirstEnergy's attempt to delay this proceeding for over 11 weeks should be rejected by the Commission. The Companies' request for an 11-week extension is unreasonable, especially considering the poor decisions they have already made that have increased the costs for its customers. The OCC, Sierra Club and OEC maintain that a two-week extension is appropriate. Furthermore, the Commission should ensure that the parties in this case are immediately provided with an unredacted copy of the Exeter Audit Report and require FirstEnergy to respond to all discovery requests within ten days of service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memo Contra* was served on the persons listed below, via electronic service, this 26th day of October 2012.

/s/ Melissa R. Yost

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Summary: Memorandum Memorandum Contra to FirstEnergy's Motion to Modify the Procedural Schedule and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel, Sierra Club, and the Ohio Environmental Council electronically filed by Patti Mallarnee on behalf of Yost, Melissa Ms.