

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.)

I. INTRODUCTION

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Motion for Protective Order seeking to prevent the disclosure of the OCC's total request for disallowance.

II. STATEMENT OF FACTS

On September 20, 2011, the Public Utilities Commission of Ohio ("Commission" or "PUCO") ordered an audit to review FirstEnergy's "procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code." Exeter Associates, Inc. ("Exeter") conducted the audit, and a Final Report was filed under seal with the Commission on August 15, 2012. A public (redacted) copy of the Final Report, with information not shown regarding the pricing and identities of alternative energy credit bids, was also filed with the Commission.

OCC immediately sought production of an unredacted version of the Final Report,¹ but FirstEnergy eventually filed a Motion for Protective Order ("First Motion for Protective Order").² During a hearing on November 20, 2012, the Attorney Examiner granted, in part, FirstEnergy's First Motion for Protective Order, finding that the redacted (unreleased) portions of the Final Report were trade secrets subject to protective order – meaning the information would not be available to the public. The parties then entered

¹ OCC first contacted FirstEnergy on August 16, 2012, the day after the Exeter Report was filed and again on August 21, 2012, seeking an unredacted copy of the Exeter Report. OCC then attempted to acquire the unredacted Exeter Report through discovery, which was propounded upon FirstEnergy on August 24, 2012.

² FirstEnergy's "Second Motion for Protective Order" was filed in response to a public records request that OCC issued to the PUCO. After learning that FirstEnergy provided edits to the Exeter audit before the Final Report was filed with the Commission, OCC submitted a public records request with 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]." In a February 14, 2013 Entry, the Attorney Examiner ruled that the supplier pricing and supplier-identifying information that appears in the draft document is trade secret information in accordance with the November 20, 2012 ruling and is therefore prohibited from release under the Public Records Act. FirstEnergy's "Third Motion for Protective Order" was filed on January 31, 2013, and sought protection of those portions of direct testimony of the Companies' witnesses Dean W. Stathis and Daniel R. Bradley, which contain "supplier-identifying and price information." That motion is also still pending before the Commission.

into a Protective Agreement whereby OCC was granted access to the pricing information and identity of REC suppliers.

Despite disagreeing with the ruling that certain information should be held secret, OCC has honored the Protective Agreement and has diligently safeguarded this information. OCC now seeks the PUCO's ruling to allow the public filing of certain information that FirstEnergy claims is trade secret. In this regard, OCC has recommended the disallowance of certain FirstEnergy charges as calculated and explained by OCC witness Wilson Gonzalez.

In accordance with paragraph 9 of the Protective Agreement, on February 1, 2013, OCC sent notice to FirstEnergy 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."³ In response, FirstEnergy filed its Fourth Motion for Protective Order to prevent disclosure of this particular dollar value, despite the fact that it does not contain specific pricing information and most certainly does not divulge the names of any of the bidders.

III. LAW AND ARGUMENT

The Commission's approach to resolving motions for protective orders recognizes that there is a "strong presumption in favor of disclosure"⁴ created by the public record statutes applicable to this Commission.⁵ The Commission further recognizes that

³ See Feb. 1, 2013 Letter, Attached as Exhibit 1.

⁴ *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-122-GA-COI, Entry on Rehearings at 4 (Feb. 1, 2012)

⁵ R.C. 4901.12; R.C. 4905.07.

confidential treatment should only be given in “extraordinary circumstances.”⁶ Based upon these principles, and the arguments explained more fully below, this Commission should deny FirstEnergy’s Fourth Motion for Protective Order.

A. The Total Disallowance, as Contained in Wilson Gonzalez’s Testimony, is not Subject to Protection Under the Attorney Examiner’s November 20, 2012 Ruling.

In its Fourth Motion for Protective Order, FirstEnergy relies exclusively on the November 20, 2012 ruling by the Attorney Examiner, as indicated by the argument that “[g]iven that the Attorney Examiner previously ruled that the REC Procurement Data is proprietary in nature and warrants trade secret protection, the Commission should make the same finding here and grant a protective order prohibiting the disclosure of the Confidential Gonzalez Testimony.”⁷ In that ruling, however, the Attorney Examiner limited his decision to the redacted portions of the Exeter Audit Report, which contained “bidder-specific information including prices, quantities, and the identity of bidders.”⁸ The total amount of disallowance, as determined by OCC witness Gonzalez, does not reveal such specific prices or identities of In-State Non-Renewable bidders.

Thus, FirstEnergy is seeking protection of information that falls outside of the scope of the Attorney Examiner’s ruling. OCC merely seeks to make public the total disallowance contained in Mr. Gonzalez’s testimony as an aggregate number, which this Commission has held is not subject to confidential treatment. Specifically, in 2002, Verizon sought a protective order requesting confidentiality of the number of access lines

⁶ *In the matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, Entry at 2-3 (Sept. 6, 1995)

⁷ FirstEnergy’s Fourth Motion for Protective Order at 8.

⁸ *Id.*

in the Montrose Exchange as of May 2002.”⁹ The attorney examiner noted that “the aggregate figure does not reveal the access line count provided by any particular carrier.”¹⁰ For these reasons, the Commission should deny FirstEnergy’s Fourth Motion for Protective Order.

B. OCC Incorporates by Reference, the Arguments Asserted in the Joint Memorandum Contra to FirstEnergy’s First Motion for Protective Order.

As previously mentioned, FirstEnergy exclusively argues that this Fourth Motion for Protective Order should be granted because “the same trade secret information is at stake here,”¹¹ as was at issue in its First Motion for Protective Order. Given FirstEnergy’s claim, in addition to the arguments asserted above, OCC renews and incorporates by reference the arguments set forth in its (and others) Joint Memorandum Contra to FirstEnergy’s First Motion for Protective Order (“Joint Memorandum Contra”), which was filed on October 18, 2012. For the reasons more fully explained in OCC’s Joint Memorandum Contra, the Commission should deny FirstEnergy’s Fourth Motion for Protective Order.

In addition to the arguments asserted in the Joint Memorandum Contra, the prior ruling on FirstEnergy’s First Motion for Protective Order should be reversed, with respect to the REC pricing information, because it is already publicly available.

⁹ *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 (Sept. 30, 2002).

¹⁰ *Id.* at 1-2; *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”).

¹¹ FirstEnergy’s Fourth Motion for Protective Order at 8.

Specifically, the unredacted version of the Exeter Report makes a number of references to the price of In-State All-Renewable RECs that were “in some cases more than 15 times the price of the applicable forty-five-dollar Alternative Compliance Payment.”¹² The Exeter Report also indicated the prices by explaining “[p]rices for In-State All Renewable RECs . . . exceeded the reported prices paid for non-solar compliance RECs anywhere in the country.”¹³ Moreover, a number of media outlets, including *The Plain Dealer*, have further publicized this price point by stating that FirstEnergy “paid up to 15 times more for credits than the three local companies would have spent had they just paid the fines, a management audit by Exeter Associates of Columbia, Md., found.”¹⁴ For these reasons, this Commission should deny FirstEnergy’s Fourth Motion for Protective Order.

IV. CONCLUSION

FirstEnergy’s Fourth Motion for Protective Order, seeking a protective order prohibiting the public release of OCC’s request that the PUCO disallow certain FirstEnergy charges to customers, in the aggregate, should be denied because is not protected by the Attorney Examiner’s ruling. Accordingly, FirstEnergy fails to carry its burden of establishing the need for a Protective Order. And OCC’s recommended disallowance of FirstEnergy’s charges (in the aggregate) should be publicly available for the practical reason that the PUCO must be able to publish its findings into a public order under R.C. 4903.09. Additionally, FirstEnergy’s Fourth Motion for Protective Order

¹² Exeter Report, at 28.

¹³ Exeter Report, at iv.

¹⁴ John Funk, “Audit finds FirstEnergy overpaid for renewable energy credits, passed on expenses to customers,” available at http://www.cleveland.com/business/index.ssf/2012/08/audit_finds_firstenergy_overpa.html (last accessed February 13, 2013), Attached as Exhibit 2; Gina-Marie Cheeseman, “FirstEnergy Paid Way Too Much to Comply With Ohio’s Renewable Mandate,” available at <http://www.triplepundit.com/2012/08/firstenergy-ohio-renewable-mandate> (last accessed February 13, 2013), Attached as Exhibit 3.

should be denied because the REC pricing information is not trade secret, and OCC's use of aggregated information is even farther removed from what could be trade secret information.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Michael J. Schuler

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Memorandum Contra* was served on the persons listed below via electronic mail this 25th day of February, 2013.

/s/ Michael J. Schuler

Michael J. Schuler
Assistant Consumers' Counsel

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Office of the Ohio Consumers' Counsel

Your Residential Utility Consumer Advocate

February 1, 2013

Mr. James W. Burk
FirstEnergy Corporation
76 South Main Street
Akron, OH 44308

Via E-Mail

Re: Information that Should be in the Public Domain Regarding FirstEnergy's Rates

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,
PUCO Case No. 011-5201-EL-RDR

Dear Mr. Burk:

Thank you for your prompt response yesterday in regard to my inquiry about certain information that The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy") claim to be confidential and not public information. Specifically, I called you yesterday to inquire whether FirstEnergy would agree that the Office of the Ohio Consumers' Counsel (OCC) may publicly file the total dollar amount (in the aggregate) of FirstEnergy's renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers. You indicated that FirstEnergy would not agree that OCC is permitted to release the aggregated information (described above) at that time. Accordingly, OCC filed its testimony yesterday with that dollar amount under seal and not in the public domain.

Please note that this correspondence shall serve as OCC's Notice to FirstEnergy, pursuant to paragraph nine of the Protective Agreement (entered into between the OCC and FirstEnergy in this proceeding on November 29, 2012) that OCC seeks to include, utilize, or refer to Protected Materials in a manner that might require disclosure of such material. Specifically, the OCC seeks 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. Those figures can be seen on the Confidential Exhibit WG-3 attached to the Testimony of Wilson Gonzalez (Confidential Version) (and elsewhere in the confidential testimony) filed yesterday in the proceeding referenced above.

Should you have any questions with regard to this matter, please feel free to contact me.

Sincerely,

Melissa R. Yost
Deputy Consumers' Counsel



Audit finds FirstEnergy overpaid for renewable energy credits, passed on expenses to customers

Published: Friday, August 17, 2012, 6:00 AM Updated: Friday, August 17, 2012, 11:35 AM



By John Funk, The Plain Dealer

FirstEnergy Corp. has spent millions of dollars more than it should have since late 2009 to comply with state renewable-energy mandates, two independent audits have found.

And the Public Utilities Commission of Ohio has allowed the Akron-based company to pass those costs on to customers -- with a 7 percent interest charge -- over the next three years. The charge will amount to about \$5 a month for the average customer.

The law requires that a percentage of the power every electric company sells to be generated with renewable technologies such as wind and solar. Companies can buy "renewable energy credits" -- or RECS -- instead of the power itself or pay the state a fine, called an "alternative compliance payment."

The audits found that the Illuminating Co., Ohio Edison and Toledo Edison relied on FirstEnergy Solutions, an unregulated affiliate, to buy credits from people and organizations that generate renewable energy.

And FES paid up to 15 times more for credits than the three local companies would have spent had they just paid the fines, a management audit by Exeter Associates of Columbia, Md., found. In fact, the cost of the credits was higher than credits anywhere in the country, before or since, the audit found.

The auditors called FirstEnergy's decisions "seriously flawed." They recommended that the PUCO consider not allowing the companies to pass on the "excessive costs," a move the company said it would challenge.

The company said it had no choice but to buy the credits.

"We bought the credits to comply with the law," FirstEnergy spokesman Todd Schneider said. "If the credits are available, you have to buy them. The alternative compliance payments are available only if there is a shortfall, if you can't buy the credits."

Fines cannot be passed onto rate payers. Expenses for credits can. And have been.

Schneider said the company decided to spread out the costs over three years to lessen the effect on customers' bills. And he added that comparing Ohio's renewable energy credit costs in the first years of the state program with the cost of RECs in other states makes no sense. "RECs were new to Ohio," he said.

The cost of the credits is already showing up on customers' bills - in half-cent-per-kilowatt-hour increases that will add up over time. The average residential customer uses between 750 and 1,000 kilowatt-hours of electricity per month.

Although the PUCO has already approved the costs in its recent acceptance of a new FirstEnergy rate case, the audit report is sure to come up in appeals to that rate case decision due Friday.

"Renewable energy is a cost-competitive option, and yet FirstEnergy chose to over-charge their customers," said Daniel Sawmiller, an analyst with the Sierra Club.

"The Sierra Club will be looking to the PUCO to ensure that these excessive payments make their way back into customers' wallets and that FirstEnergy's other companies, like FirstEnergy Solutions, are no longer able to benefit at the public's expense."

A companion financial audit conducted by Goldenberg Schneider LPA of Cincinnati examined the amount of money the companies spent - nearly \$126 million between the last quarter of 2009 and Dec. 31, 2011.

That cost has been added to all customers' bills, in the form of a "rider" on the rate every customer pays per kilowatt-hour used.

In the last three months of 2011, the most recent quarter the audit examined, Illuminating Co. customers were paying an extra 0.4699 cents per kilowatt-hour, the highest in the state. That's a few dollars on a customer's bill but millions of dollars for the companies.

The auditors compared that charge to the charges levied by other Ohio utilities to pay for renewable energy credits. FirstEnergy's three companies were the highest.

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2012/08/firstenergy-ohio-renewable-mandate/



FirstEnergy Paid Too Much ...



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FirstEnergy Paid Way Too Much to Comply With Ohio's Renewable Mandate

By Gina-Marie Cheeseman | August 30th, 2012 | 0 Comments



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When states enact renewable energy mandates, it's good for the renewable energy sector. However, allowing energy companies to purchase renewable energy certificates (RECs) can create problems, as a recent expose of an Ohio-based energy company by the Cleveland, Ohio newspaper, The Plain Dealer, showed. The newspaper reported that two independent audits found that FirstEnergy Corp. spent "billions of dollars more than it should have" since 2009 in order to comply with Ohio's renewable energy mandate.

The Ohio law requires a percentage of an electric company's power be generated by renewable energy, but allows companies to purchase RECs instead, or pay an "alternative compliance payment." The Public Utilities Commission of Ohio (PUCO) allowed FirstEnergy to pass on the costs of compliance to its customers via a seven percent interest fee, or about \$5 a month, from 2009 to this year.

Three companies owned by FirstEnergy (Illuminating Co., Ohio Edison and Toledo Edison) used FirstEnergy Solutions (FES), which is not regulated, to purchase RECs, the audits found. FES paid up to 15 times more for RECs than it would have cost the companies to pay the alternative compliance payments. Exeter Associates of Columbia, Maryland found in its audit. The audit also found that the cost of the RECs were the highest anywhere in the U.S.

FirstEnergy is an energy company based in Akron, Ohio, operating in six states, and includes one of the largest investor-owned electric systems in the U.S. It has a generating fleet with a total capacity of almost 23,000 megawatts (MW). Serving six million customers in the Midwest and Mid-Atlantic regions, it has 184,000 miles of distribution lines.

The Plain Dealer reported that the auditors called FirstEnergy's decisions "seriously flawed" and recommended that PUCO not allow companies to pass on the "excessive costs" of complying with the state law to customers. An audit by Goldenberg Schneider LPA of Cincinnati found that the companies spent almost \$128 million on RECs between 2009 and 2011.

"We bought the credits to comply with the law," FirstEnergy spokesman Todd Schneider said. "If the credits are available, you have to buy them. The alternative compliance payments are available only if there is a shortfall, if you can't buy the credits."

An analyst with the Sierra Club, Daniel Sawmiller, criticized FirstEnergy for passing on the costs of the RECs to its customers. "Renewable energy is a cost-competitive option, and yet FirstEnergy chose to over-charge their customers," said Sawmiller.

"The Sierra Club will be looking to the PUCO to ensure that these excessive payments make their way back into customers' wallets and that FirstEnergy's other companies, like FirstEnergy Solutions, are no longer able to benefit at the public's expense," Sawmiller added.

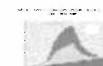
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Summary: Memorandum Memorandum Contra FirstEnergy's Motion for Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Mr. Michael Schuler