BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF THE ENVIRONMENTAL LAW & POLICY CENTER, THE OHIO ENVIRONMENTAL COUNCIL, AND SIERRA CLUB

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INTRODUCTION

In this review of Rider AER and the renewable energy procurement practices of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively "FirstEnergy" or "Companies"), the Public Utilities Commission of Ohio ("Commission" or "PUCO") must decide whether FirstEnergy's costs were prudently incurred. On April 15, 2013, the parties filed initial post-hearing briefs, with the Environmental Law & Policy Center, the Ohio Environmental Council, and the Sierra Club ("Environmental Intervenors") and the Ohio Consumers' Counsel ("OCC") contending that the Commission should disallow certain costs and impose a penalty on FirstEnergy for its overpayment for renewable energy credits from [redacted]. Staff also agreed that FirstEnergy's "decision-making was . . . seriously flawed and should not be countenanced by the Commission."[1]

In its initial brief, FirstEnergy impermissibly attempts to shift the burden of proof to intervenors. In fact, FirstEnergy bears the burden of proving that its renewable energy credit ("REC")[2] purchases were reasonable, and it has failed to meet that burden in this case. For the reasons below, and as outlined in the Environmental Intervenors' Initial Brief, the Commission should conclude that FirstEnergy's actions with regard to its REC procurements were unreasonable and imprudent. The Environmental Intervenors agree with OCC and the Staff that the Commission should disallow the costs associated with certain REC purchases and impose a fine on FirstEnergy to discourage future imprudent and unreasonable conduct. Further, the Environmental Intervenors agree with OCC that the Commission should commence an

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[1] Staff Br. at 6-7.

[2] Unless otherwise stated, "REC" refers to In-State All-Renewable RECs.

investigation into the [redacted]

[redacted]

ARGUMENT

I. FirstEnergy bears the burden, not Staff or Intervenors, to prove that its REC purchases were prudent.

FirstEnergy argues that the Commission should apply a "presumption of prudence" to the Companies' REC purchases. FirstEnergy's attempts to muddle the standard of proof should be rejected out of hand. As Staff explained in its initial brief, the burden is squarely on the Companies to prove that its expenses in purchasing RECs were prudently incurred. The Commission and Ohio courts have consistently held that the "ultimate burden of persuading the Commission that [costs] were prudently incurred rests with" the utility.[3] This burden of proof rests with FirstEnergy throughout the entire proceeding.[4] In fact, because FirstEnergy bears this burden of proving it acted prudently, "if the evidence [is] inconclusive or questionable, the commission could justifiably reduce or disallow cost recovery."[5]

Although the Commission has suggested that there is a presumption of prudence initially applied to a utility's actions, this presumption is overcome by the production of some evidence supporting the conclusion that the Companies acted imprudently.[6] This evidence must be more than "conclusory statements."[7] Here, Staff and Intervenors have produced overwhelming evidence in support of the position that FirstEnergy acted unreasonably, including the 39-page

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[3] *In the Matter of the Investigation into the Perry Nuclear Power Station*, Case No. 85-521-EL-COI, January 12, 1988 Opinion and Order at 21.
[4] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, Case No. 86-12-GA-GCR, December 30, 1986 Opinion and Order at 22.
[5] *In re Duke Energy Ohio, Inc.*, 131 Ohio St. 3d 487, 488 (Ohio 2012).
[6] *Syracuse Home Utilities Company*, Case No. 86-12-GA-GCR, December 30, 1986 Opinion and Order at 22-23.
[7] *Id.*

Exeter Report, which thoroughly examined the Companies' REC purchases and management decisions and concluded that FirstEnergy "paid unreasonably high prices for In-State All Renewables RECs"; the testimony of Staff witness Estomin and OCC witness Gonzales regarding FirstEnergy's imprudent actions; and numerous documents and exhibits demonstrating the outrageous prices paid by FirstEnergy. Clearly, this evidence is much more than more than "essentially stat[ing] 'we disagree'" with FirstEnergy.[8]

This production of evidence overcomes any possible presumption of prudence that would be applied to FirstEnergy's actions. Therefore, the burden remains squarely on the Companies to produce evidence to prove that it acted prudently. FirstEnergy has not met this burden.

II. FirstEnergy paid unreasonably high prices for RECs because its REC procurement practices were seriously flawed.

As explained in the Environmental Intervenors' initial brief, FirstEnergy acted imprudently and unreasonably in its REC procurements because it failed to implement long-term contracts, utilized an unreasonable laddering approach, and did not negotiate for lower REC prices in RFPs 1 and 2. FirstEnergy has failed to meet its burden to show that the costs associated with its REC purchases were prudently incurred.

A. FirstEnergy has failed to demonstrate that its laddering strategy was reasonable.

FirstEnergy attempts to defend its overpayment for RECs by arguing that its laddering strategy was reasonable. It claims that laddering procurements over a number of years is a well-recognized strategy and an appropriate way to hedge against future price uncertainty.

Essentially, FirstEnergy's argument boils down to the claim that a heavy reliance on a laddering strategy is always prudent and reasonable. The Commission should reject this unsupported claim. While laddering may generally be a reasonable hedging strategy for utility

[8] *Id.* at 23.

procurements, in this case a number of factors, known to the Companies at the time, demonstrated that laddering was imprudent and distinguish FirstEnergy's REC purchases from other utility procurements. First, as FirstEnergy repeatedly explains, the REC market in Ohio was nascent in 2009, which, FirstEnergy claims, led to the outrageously high prices it paid for RECs. The fact that Ohio was a nascent market in 2009 means that the REC market was in its beginning stages and would continue to develop over time. In fact, Navigant's own study had advised FirstEnergy that it could expect the market to develop past the point of constraint by October 2010.[9] The Companies also knew that the REC supply would increase over time as the market developed. FirstEnergy witness Earle's testimony explains how an increase in supply serves to lower market prices for RECs.[10] Despite the developing market and increasing supply, however, FirstEnergy remained stubbornly and unreasonably committed to a laddering strategy by which it paid exorbitant prices for 2010 and 2011 RECs in advance of those years.

In addition to its awareness of Ohio's developing market and increasing supply, FirstEnergy also should have known that its laddering strategy was imprudent because the prices it received through its RFPs were unreasonably high by any measure. At the time FirstEnergy was paying upwards of $[redacted]/REC for future-year RECs, "none of the RECs prices elsewhere in the country were trading at prices more than $45 per REC . . . and many were selling for prices considerably lower."[11] FirstEnergy witness Bradley testified that he had reviewed REC pricing information in Pennsylvania for over six years, and he had never seen the price of non-solar RECs in Pennsylvania rise above $100.[12] Faced with these extremely high prices for future-year RECs, FirstEnergy should have reconsidered its laddering approach. The evidence in this case,

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[9] *See* FirstEnergy Ex. 1, Bradley Testimony at 34.
[10] FirstEnergy Ex. 3, Earle Testimony at 11, lines 3-8.
[11] Exeter Report at 30.
[12] Tr. at 176, lines 3-6.

including the testimony of Staff witness Estomin and OCC witness Gonzales, supports the conclusion that FirstEnergy acted unreasonably and imprudently by declining to reject overpriced 2010 and 2011 RECs in RFPs 1-3 instead of locking in those excessive prices.

FirstEnergy makes much of the fact that it never purchased additional or more expensive RECs than recommended by Navigant during the RFP process. The problem with this argument is that the RFP framework within which Navigant had to work was critically flawed. That framework included the unreasonable laddering strategy, the failure to utilize long-term contracts, a complete lack of consideration regarding the ACP and force majeure provisions as potential options, and a very late start by the Companies in trying to procure RECs to comply with Section 4928.64. Moreover, as FirstEnergy explains, its decision to purchase fewer RECs than those recommended by Navigant was based on the fact that a lower non-shopping load reduced FirstEnergy's compliance obligations,[13] not that FirstEnergy made a management decision to decline to purchase overpriced future-year RECs. Therefore, the fact that FirstEnergy purchased fewer RECs than recommended by Navigant is irrelevant to the inquiry into whether FirstEnergy's purchases were prudent.

B. FirstEnergy has failed to offer any legitimate reasons for failing to attempt a negotiation for lower REC prices in RFPs 1 and 2.

Even accepting the Companies' unreasonable laddering strategy and failure to utilize long-term contracts, at the very least FirstEnergy could have negotiated with the single bidder in RFPs 1 and 2 for a considerably lower price, as it did in RFP 3. FirstEnergy claims in its initial brief that it only sought a lower price in RFP 3 because for the first time there was a second qualified bidder, the constrained supply time frame identified by Navigant was coming to an end,

[13] *See* FirstEnergy Br. at 44, footnote 213.

and the Companies had information that other Ohio utilities were meeting benchmarks. These factors "suggested [to FirstEnergy] that the market may be possibly improving."[14]

The Companies' proffered reasons for the impetus of the negotiation in RFP 3 do not hold water. Instead, even if accepted, they are reasons to expect a lower overall market price, not reasons to conduct or not conduct a negotiation.

There are two main reasons for FirstEnergy to have conducted a negotiation for a lower REC price, and both were present during RFPs 1 and 2 as well as RFP 3. The first reason is simply time, and the Companies had plenty of it. RFPs 1 and 2 were conducted well over a year prior to the March 31, 2011 deadline for 2010 RECs and over two years prior to the 2011 REC deadline. There was no rush or "tight timeframe" for FirstEnergy to purchase 2010 and 2011 RECs,[15] and therefore FirstEnergy had ample time to attempt a negotiation. The second reason to conduct a negotiation was also present in RFPs 1 and 2: Because there was only one bidder, FirstEnergy did not have to be concerned about fairness to other parties and could have negotiated consistent with RFP bid rules, as Navigant concluded in 2010.

The Commission has made clear that "[a] failure to mitigate costs where the opportunity to do so presented itself would, on its face, be imprudent."[16] Here, FirstEnergy had a clear opportunity in RFPs 1 and 2 to mitigate costs by seeking a lower purchase price for its RECs. The Commission should conclude that this failure to negotiate and mitigate costs resulted in imprudent and unreasonable purchases.

C. REC prices from other states can serve as useful points of comparison for prices in Ohio.

[14] FirstEnergy Br. at 47.
[15] *See* Tr. at 238, lines 5-6.
[16] *Perry Nuclear Power Station*, Case No. 85-521-EL-COI, January 12, 1988 Opinion and Order at 26.

The Commission should reject FirstEnergy's illogical claim that pricing information from other states is irrelevant to the inquiry into whether FirstEnergy paid unreasonably high prices for its RECs. FirstEnergy's argument seems to be that if any state market has a single difference from Ohio, then that state's market cannot be examined as a point of comparison. This contention is absurd. The fact that two state markets may differ in some way simply means that those differences must be factored into the comparison being made. Different markets will always have some similarities and some differences, and the experts from Exeter and OCC factored in those differences when comparing FirstEnergy's purchases to other states' REC prices. Both Exeter and OCC witness Gonzales concluded that, even factoring in the market differences cited by FirstEnergy, the Companies' purchase prices were unreasonable. The relatively minor differences between the REC market in Ohio and other states do not support Ohio prices that were fifteen times those seen in any other state.

1. The Alternative Compliance Payment is not recoverable from customers in other jurisdictions in which FirstEnergy operates.

One of FirstEnergy's main contentions as two why Ohio's REC market differs from other markets is that the alternative compliance payment ("ACP") in Ohio does not function the same as ACPs in other states. Contrary to this claim, however, the ACP is not recoverable in other jurisdictions, including states in which FirstEnergy does business. In Pennsylvania, for example, this issue was decided eight years ago.[17] A FirstEnergy Company was a participant in that case, and the Pennsylvania Commission received similar arguments to those cited by FirstEnergy in its brief here.[18] However, the Pennsylvania Commission decided that compliance issues were best

[17] See, Pennsylvania Public Utility Commission: *Implementation of the Alternative Energy Portfolio Standards Act of 2004*; Docket No. M-00051865, IMPLEMENTATION ORDER II (July 18, 2005).
[18] *Id.* at 11-14.

decided in a force majeure determination and continued to deny utilities cost recovery for ACP payments.[19] The Pennsylvania Commission found that a force majeure provision "will serve to provide adequate financial protection to EDCs and that alternative compliance payments are therefore not recoverable from ratepayers."[20]

The ACP is treated in a similar way and plays a similar role in Ohio and other jurisdictions. "The size of the ACP limits the market price of the RECs since RECs would not be purchased at prices higher than the ACP if energy providers can pay the ACP in lieu of paying for higher priced RECs."[21] FirstEnergy is aware of the ACP process and the function of the ACP in these other jurisdictions. The fact that the ACP is not recoverable is neither unusual nor unprecedented. FirstEnergy's implication that Ohio's rules and laws are somehow more difficult to maneuver or in some way limited because the ACP is not recoverable from customers, and that this somehow results in the Ohio market being vastly different, should be rejected by the Commission.

D. The Commission should disallow the imprudent and unreasonable costs incurred by FirstEnergy in purchasing outrageously-priced RECs.

As explained in our initial brief, The Environmental Intervenors agree with Exeter and OCC that the Commission should disallow certain costs from Rider AER.[22] Staff similarly argues that FirstEnergy's "excessive costs" and "seriously flawed [decision-making] should not be countenanced by the Commission."[23]

FirstEnergy misleadingly states in its initial brief that, although Exeter recommended that the Commission "examine" a disallowance, it "did not recommend that any such disallowance be

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[19] *Id.* at 14.
[20] *Id.*
[21] Exeter Report at 30.
[22] Exeter Report at iv; OCC Ex. 16 at 5, lines 13-19, and 6, lines 1-2; OCC Br. at 49-51.
[23] Staff Br. at 6-7.

ordered or provide any specific amount that should be considered for disallowance."[24] What FirstEnergy fails to mention is that the Draft Exeter Report originally recommended that all costs incurred in purchasing RECs above $50/REC be excluded from recovery.[25] This recommendation was only removed from the final report after *FirstEnergy* (the company being audited) was able to review the draft report and "rais[ed] questions with respect to [its] inclusion."[26] Therefore, although the final Exeter Report did not include a specific amount that should be considered for disallowance, the auditors clearly believed that a disallowance would be warranted.

There can be no question as to the conclusion of the Exeter Report: FirstEnergy "paid unreasonably high prices for In-State All Renewables RECs purchased from" [redacted],[27] and its management decisions to make those purchases were "seriously flawed."[28] The Commission should disallow the imprudent and excessive costs incurred by FirstEnergy in its REC procurement practices.

III. FirstEnergy's admission that it preferred to saddle customers with the cost of overpriced RECs rather than pay the Alternative Compliance Payment should not be condoned by the Commission.

The Environmental Intervenors agree with Exeter that the Companies had at least two alternatives for rejecting overpriced bids for In-State, All-Renewables: (1) it could have sought

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[24] FirstEnergy Br. at 8.
[25] Tr. at 512-513.
[26] Tr. at 513, lines 16-21 (testimony of FirstEnergy witness Eileen Mikkelsen, explaining how the Companies' review of the draft report led to the exclusion of Exeter's specific disallowance recommendation).
[27] Exeter Report at iv.
[28] *Id.* at 28.

force majeure relief, and (2) it could have paid an ACP.[29] FirstEnergy states that "Under Ohio law, the Companies could not obtain relief based on force majeure."[30] As noted in initial briefs, a force majeure determination is based on several factors.[31] The first factor is whether or not renewable energy resources are "reasonably available."[32] FirstEnergy attempts to employ a narrow definition of this phrase to justify the outrageous financial burden it placed upon its customers in order to avoid a much smaller burden that may have possibly been placed upon its shareholders by a Commission decision.

FirstEnergy admits the real reason it did not seek a force majeure: The Companies did not want to take the chance that the Commission would require the ACP to be paid and thus cost FirstEnergy shareholders money. In its initial brief, FirstEnergy explains its reasoning, stating that "[the ACP] is not recoverable from customers."[33] This admission is stunning. Instead of seeking a force majeure and taking a chance that an ACP would be assessed against its shareholders, the Companies instead purchased excessively-priced RECs, the prices of which

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[29] Exeter Report at 32. Of course, as explained above, FirstEnergy also the option of rejecting bids for future-year RECs and simply acquiring them at a later time when the Ohio market developed more fully.

[30] FirstEnergy Br. at 19.

[31] Ohio Rev. Code § 4928.64(C)(4)(b) states: "Within ninety days after the filing of a request by an electric distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor."

[32] Ohio Rev. Code § 4928.64(C)(4)(b).

[33] FirstEnergy Br. at 25.

were 15 times higher than the price of the ACP and at least fifteen times higher than RECs were selling for anywhere else in the country.

Aware of the ACP price and other prices being paid around the country, FirstEnergy made a decision to saddle its customers with a bill for outrageously priced RECs and avoid *the chance* that the Commission might assess an ACP, to be borne by FirstEnergy's shareholders. Further, they chose not to discuss this issue with Commission Staff. Now the Companies brazenly request that the Commission condone its disregard for its customers and approve its conduct. As a public utility, FirstEnergy has an obligation to consider the impact of its decision on customers. State policy requires that electric service be "reasonably priced,"[34] and the Commission must ensure the interests of FirstEnergy's utility customers are protected and that state policy is followed. Ohio's force majeure and ACP provisions provide for procedures that FirstEnergy should have considered and pursued to protect its customers. They chose instead to protect their shareholders [redacted]

IV. The Commission has the authority to issue a credit to customers in the amount of any potential disallowance.

A. The Companies violated the terms of Commission ruling by failing to prudently incur costs for compliance efforts associated with Rider AER; only recovery of prudently incurred costs has been authorized by the Commission.

FirstEnergy has failed to meet its burden to establish that its costs to comply with Ohio's renewable energy standards were prudently incurred. This failure to demonstrate the "prudent" nature of these costs is important, as the Commission has authorized only the recovery of "prudently incurred" costs associated with renewable energy standard compliance. Accordingly, FirstEnergy's recovery of these costs is not part of its Commission approved rate structure.

[34] R.C. 4928.02(A)

FirstEnergy's failure to follow this Commission order precludes FirstEnergy from any argument that retroactive ratemaking prohibitions may be implicated by a disallowance. A Commission ruling which appropriately disallows incurred costs associated with Rider AER along the lines proposed by Wilson Gonzalez of the OCC does not violate any part of the retroactive rulemaking decisions which FirstEnergy attempts to stand behind.

FirstEnergy is only authorized by the Commission to recover costs from customers that are "prudently incurred;" authorization to collect imprudent or excessive costs has not been given by the Commission. FirstEnergy's ability to collect funds from customers for the purposes of actions and contracts to satisfy compliance with Ohio's renewable energy standards emerged through the Commission approved stipulation in Case No. 08-0935-EL-SSO, which is binding upon FirstEnergy. In relevant part the stipulation reads:

> "Renewable energy resource requirements for the period January 1, 2009 through May 31, 2011 will be met using a separate RFP process to obtain Renewable Energy Credits. A generation rider will be established to recover, on a quarterly basis, the ***prudently incurred*** cost of such credits pursuant to R.C. sec. 4928.64 including the cost of administering the RFP and carrying charges on any unrecovered balances including accumulated deferred interest. The aforementioned generation rider shall be reconciled quarterly and will be bypassable to a shopping customer consistent with R.C. sec. 4928.64€, and the supplier of such shopping customer shall accrue at a rate of 0.7066 percent per month and without reduction for accumulated deferred income taxes." [35]

This language was approved by the Commission unaltered,[36] and through this approval the Commission incorporated the stipulation into its order. Accordingly, FirstEnergy only has Commission approval to recover prudently incurred costs. The recovery of imprudently incurred costs is not part of FirstEnergy's approved rate structure in Case No. 08-0935-EL-SSO. Clearly,

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[35] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. sec. 4928.143 in the Form of an Electric Security Plan* , Case No. 08-935-EL-SSO; Stipulation and Recommendation filed on February 19th 2009, p.10-11 (emphasis added).
[36] See Case No, 08-935-EL-SSO March 25th 2009 Opinion and Order at 23.

the Commission has authority to make prospective adjustments to Rider AER based on a determination that certain costs were not prudently incurred.

B. Retroactive ratemaking prohibitions apply only to properly collected and administered rates and rate structures approved by the Commission.

FirstEnergy claims in its initial brief that the Commission does not have authority to issue a disallowance for FirstEnergy's imprudent costs because such disallowance would violate the rule against retroactive rulemaking.[37] FirstEnergy cites *Keco Industries, Inc. v. Cincinnati Suburban Tel. Co.*[38] and *Lucas Cnty. Comm's v. Pub. Utils. Comm.*[39] in support of this position.

Retroactive ratemaking prohibitions are designed to protect utilities from after the fact disallowance of Commission approved and ordered rates; these prohibitions protect utilities from Commission reaction to negative pressure from customers as utilities are bound by Commission decisions, even where those decisions result in poorly designed rate structures that negatively impact customers. The current case presents no such situation. As OCC explained in its initial brief, a disallowance in this case would not run afoul of the rule against retroactive rulemaking.[40] Rather than a refund for past rates, a disallowance for FirstEnergy's imprudent costs would instead be establishing a future rate that simply factors in the overpayment by FirstEnergy for RECs. The future rate would be "based upon the reasonable price that should have been paid for RECs purchased by FirstEnergy during 2009, 2010, and 2011."[41]

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[37] *See* FirstEnergy Br. at 75.
[38] 166 Ohio St. 254 (Ohio 1957).
[39] 80 Ohio St. 3d 344 (1997).
[40] *See* OCC Br. at 53.
[41] *Id.*

The Commission has distinguished *Keco* and *Lucas Cnty.* in an analogous rider case involving fuel adjustment clauses.[42] As in that case, the Commission here "is not considering modifying a previous rate established by a Commission order through the ratemaking process."[43] Instead, by crediting a disallowance for imprudently incurred costs against Rider AER, the Commission "is establishing a future rate based upon" the reasonable price FirstEnergy should have paid for RECs.[44]

The Commission should reject FirstEnergy's argument that it does not have authority to issue a disallowance in this case. A credit to customers based on a disallowance would be a prospective adjustment to Rider AER that would be consistent with FirstEnergy's approved rate structure and would not violate the rule against retroactive rulemaking.

V. The Commission should adopt Staff's recommended method of calculating the three percent cost cap.

In our initial brief, Environmental Intervenors recommended our preferred calculation of the 3% cost cap. Going forward, we suggested that the utilities set an annual cost of generation based on the average price of electricity purchased by the utility for its SSO load over the preceding three years. This would be compared to the cost of acquiring the renewable energy, less any and all carrying costs and administrative costs. This recommendation is clear, transparent, and consistent with the recommendations from Goldenberg Report, and intervenor witnesses Goins and Burcat.

In its initial brief, Staff too has proposed a 3% cost cap calculation consistent with the methodology supported by Goldenberg's recommendations, Environmental Intervenors, and

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[42] *See In the Matter of Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, January 23, 2012 Opinion and Order.
[43] *Id.* at 34.
[44] *See id.*

Nucor/OEG witness Goins and MAREC witness Burcat.[45] Staff's recommended calculation is in accord with those calculations supported by all parties and provides the adequate amount of detail required to calculate a cost of generation. Therefore, the Commission should adopt Staff's six-step calculation as the proper methodology moving forward. Specifically, Staff recommends a six-step calculation as follows:

> Step 1: Determine the sales baseline in megawatt – hours (MWHs) for the applicable compliance year consisting of an average of the Company's annual Ohio retail electric sales from the three preceding years. Such calculation should be performed individually for each FirstEnergy electric distribution utility.
>
> Step 2: Calculate a "reasonably expected" \$/MWH figure for the compliance year. This \$/MWH figure should be a weighted average of the SSO supply for delivery during the compliance year, net of distribution system losses.
>
> Step 3: Staff should annually calculate a \$/MWH suppression benefit (if any) and distribute this suppression calculation to all affected Companies. Such calculation and distribution should occur early in the compliance year so that the Companies timely can compute their 3% fund, as detailed below in Step 6.
>
> Step 4: Calculate an adjusted \$/MWH figure by adding the Suppression Benefits, if any, to the \$/MWH figure from Step 2.
>
> Step 5: Calculate the Total Cost by multiplying the Step 4 adjusted \$/MWH figure by the baseline calculated in Step 1.
>
> Step 6: Multiply the Total Cost from Step 5 by 3%, with the result representing the maximum funds available to be applied towards compliance resources for that compliance year.

The most significant feature of Staff's proposal is its recognition and full incorporation of price suppression benefits to the 3% calculation. Environmental Intervenors, in our initial brief, requested that the Commission develop a separate docket to allow for interested party and Commission Staff analysis of price suppression benefits, the proper calculation of those benefits, and the incorporation of these benefits into the methodology approved in this case. However, because Commission Staff strongly recommends that a simple dollar per MWH calculation of price suppression be added to the "reasonably expected" dollar per MWH price for the

[45] *See* Staff Br. at 7-11.

compliance year, we urge the Commission to adopt this process and account for price suppression benefits.

Further, Staff has not only included the addition of price suppression in the cost calculation, but will take it upon itself to "annually calculate a $/MWH suppression benefit (if any) and distribute this suppression calculation to all affected Companies."[46] With the Staff responsible for determining an annual price suppression benefit, EDUs, customers, and stakeholders can be confident that the suppression benefits are properly and independently verified and calculated.

The Staff further suggests that "in the event an operating company reaches its maximum available compliance funds, it should not incur any additional compliance costs for that compliance year absent specific Commission direction."[47] This recommendation suggests that the operating company still should obtain those RECs at costs below the cost cap, but for those purchases that would meet or exceed that cap, only then will the cap be triggered. This provides that the RECs under the cap for that year are purchased and can apply to that year's requirements.

The Staff adds in its recommendation that when the cap is triggered for purchases in one year, it does not preclude a company from "pursuing reasonable transactions for compliance resources applicable to future years."[48] This would allow companies to continue to obtain the best price on RECs in future years, even though the company will not incur further RECs in a current year. For the above reasons, Environmental Intervenors urge the Commission to adopt Staff's recommended calculation.

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[46] Staff Br. at 10.
[47] *Id.* at 10.
[48] *Id.*

However, one clarification is needed to any cost cap calculation adopted by the Commission. In those situations where an EDU employs Ohio Revised Code § 4928.143(B)(2)(c) and decides to develop its own renewable project rather than just buy RECs, the total cost for the construction of the renewable energy facility must be characterized as a generation cost not a compliance cost. The RECs themselves that are generated from the project should be the only compliance cost to count toward the 3% provision. With this minor clarification, the Environmental Advocates support Staff's recommended calculation and urge the Commission to adopt it going forward.

VI. The Commission must stress the other consumer protection provisions in the law.

As the Commission looks to clarify the 3% cost cap issue in this case, it is important for all parties to remember that there are other consumer protection mechanisms already imbedded within the Code, including the ACP and the requirement that costs of compliance be prudently incurred.

In its brief, Nucor points out a number of authorities supporting the notion that the 3% provision in 4928.64(C)(3) is meant as a customer protection mechanism.[49] While we agree that in enacting SB 221, "the Legislature recognized the need to have a mechanism in place to protect customers . . ." we must disagree with any suggestion that the three percent cap is the only mechanism. The cost cap is merely one of the protections afforded customers.

The ACP is clearly a consumer protection mechanism created by the statute. The ACP consists of a determination of under compliance,[50] followed by a calculation and assessment of an ACP as presented in Ohio Revised Code § 4928.64(C)(2)(a) and (b). This is simply the

[49] Nucor Br. at 8-9 (citing legislative history of SB 221).
[50] Ohio Rev. Code § 4928.64(C)(2).

amount of under compliance multiplied by the amount of the ACP, as presented in the statute.[51] As the Exeter Report explains, the ACP acts as a soft cap on REC market prices and can therefore protect consumers from inflated compliance costs: "The size of the ACP limits the market price of the RECs since RECs would not be purchased at prices higher than the ACP if energy providers can pay the ACP in lieu of paying for higher priced RECs."[52]

Perhaps the most significant customer protection mechanism is the prudence requirement in incurring costs to be ultimately borne by customers. This prudence requirement is arguably more significant than the 3% cost cap as it relates to proactive customer protection. If costs associated with REC purchases are not prudently incurred, those costs are not recoverable by the utility.[53] This is a significant incentive for utilities to perform due diligence and obtain the best possible price in carrying out compliance activities. It incents a utility to: negotiate with an RFP bidder to obtain the best price; engage in cost saving long-term contracts for renewable energy; if bids are less than satisfactory, employ (or at the least investigate) the statutory safety nets of filing for a force majeure or paying the ACP; and inquire with the Commission or its Staff for advice or guidance when presented with the results of the bid FirstEnergy, however, chose not to employ any of these actions with regard to the RFPs at issue. Therefore, the Commission should protect consumers by disallowing the imprudent costs incurred by FirstEnergy in this case.

VII. The Environmental Intervenors agree with OCC that the Commission should commence an investigation.

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[51] *Id.*
[52] Exeter Report at 30.
[53] *See In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan,* PUCO Case No. 08-935-EL-SSO, Stipulation and Recommendation, at 10-11 (February 19, 2009).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

CONCLUSION

For the reasons explained above and in the Environmental Intervenors' initial brief, the Environmental Intervenors agree with Staff and OCC that FirstEnergy has not met its burden to prove that the costs associated with its REC procurements were prudently incurred. The Commission should conclude that FirstEnergy's REC procurement practices were imprudent and impose a disallowance and penalty on FirstEnergy for its overpayment for RECs, as well as initiate an investigation into the transactions between FirstEnergy and [redacted].

[redacted]

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CERTIFICATE OF SERVICE

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