

IN THE SUPREME COURT OF OHIO

In the Matter of the Review of The )  
Alternative Energy Rider Contained in The ) Case No. 13-2026  
Tariffs of Ohio Edison Company, The )  
Cleveland Electric Illuminating Company and ) Appeal from the Public Utilities  
The Toledo Edison Company. ) Commission of Ohio  
) )  
) Public Utilities Commission of Ohio Case  
) No. 11-5201-EL-RDR

MEMORANDUM CONTRA MOTION TO SEAL  
BY  
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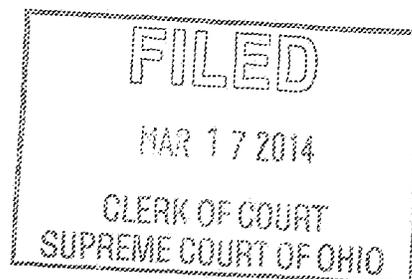
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**I. INTRODUCTION**

The Ohio customers of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively referred to as “FirstEnergy,” “the Company,” or “the Utility”) have paid a lot of money for the Utility’s imprudently purchased renewable energy credits (“RECs” or “renewables”). To make matters worse, FirstEnergy’s customers as well as all Ohio citizens have been deprived of any information regarding the price that FirstEnergy paid for the renewables. FirstEnergy claims that the identity of the renewables suppliers, and the prices paid for the renewables that were acquired in 2009, 2010 and 2011 are somehow trade secret information.

The Office of the Ohio Consumers’ Counsel (“OCC”) has consistently maintained that this information fails to meet the rigorous standards that would allow it to be hidden from Ohio residents and FirstEnergy customers as a bona fide trade secret. Rather, what FirstEnergy asks this Court to hide from public view is simply information that shows just how imprudent FirstEnergy’s purchases of In-State All Renewable Energy Credits

were. Having achieved some measure of relief from the Public Utilities Commission of Ohio (“Commission” or “PUCO”) in its original attempt, FirstEnergy seeks to enlist Ohio’s highest Court to ignore its own rulings and Rule of Superintendence to shield dated, in some cases nearly five years old, market data from the public.

This Court should deny FirstEnergy’s Motion to Seal because FirstEnergy fails to meet the “clear and convincing” burden of proving that the Court’s presumption of allowing public access to case information (set forth in Sup.R. 45(E)(2)) is outweighed by a higher interest. And FirstEnergy cannot meet that burden because the information (some of which is almost five years old) that it seeks to conceal from Ohio citizens does not meet the definition of trade secret information under R.C. 1333.61(D). If this Court does not deny FirstEnergy’s Motion to Seal based upon this Memoranda Contra, a hearing should be held on the Motion to Seal in an effort to sort out the confidentiality issues prior to any further briefing and oral argument in this case.

## **II. STATEMENT OF FACTS**

On September 20, 2011, the PUCO ordered an audit to review FirstEnergy’s “procurement of renewable energy credits.” *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*, Pub. Util. Comm. No. 11-5201-EL-RDR, 2013 Ohio PUC LEXIS 159, at \*3 (Aug. 7, 2013). Two separate audits were conducted a financial audit and a management/performance audit. Exeter Associates, Inc. (“Exeter”) conducted the management audit, and a Final Report was filed under seal with the Commission on August 15, 2012. *Id.* A public copy of the

Final Report, redacting supplier identities and most supplier pricing information was also filed with the PUCO.

Nevertheless, certain pricing information and a supplier's identity were disclosed in the publicly filed document. FirstEnergy allowed this information to remain publicly available for 49 days before the Utility eventually filed a Motion for Protective Order claiming that all supplier identities and pricing information was trade secret. *Id.* at 20.

Despite OCC's insistence that FirstEnergy did not meet the burden of establishing that the information merited trade secret status under R.C. 1333.61(D), during a hearing on November 20, 2012, the Attorney Examiner granted, in part, FirstEnergy's Motion for Protective Order. In doing so, the Attorney Examiner found that the redacted (unreleased) portions of the Final Report contained trade secret information and was eligible for a protective order under different standards than used by this Court. The parties then entered into a Protective Agreement whereby OCC was granted access to the pricing information and identifies of renewables suppliers but was not permitted to publicly disseminate that information. Later, the PUCO ordered that the aggregate amount that OCC seeks to disallow in this case, as calculated and explained by OCC witness Wilson Gonzalez, was to be kept from the public. *Id.* at \*\*24, 27.

In its Opinion and Order in this case, the PUCO "modif[ied] the attorney examiners' rulings to permit the generic disclosure of FES as a successful bidder in the competitive solicitations." *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, 2013 Ohio PUC LEXIS 159, at \*28. But "specific information related to bids by FES, such as the quantity and price of RECs contained in such bids and whether such bids were accepted by the Companies,

shall continue to be confidential and subject to protective order.” Id. Based solely upon the PUCO’s ruling below and without any additional stated justification, FirstEnergy has now moved this Court to seal certain portions of the Appendix and Supplement filed with its Merit Brief that contain facts underlying the basis of the PUCO’s decision.

### **III. LAW AND ARGUMENT**

This Court should deny FirstEnergy’s Motion to Seal because the Company, in relying exclusively on the PUCO’s decision, fails by clear and convincing evidence to overcome the necessary presumption that the information considered in the case below by a public agency (the PUCO) should be publicly available. Additionally, Sup.R. 45(A) spells out clearly that “Court records are presumed open to public access.” Before negating this strong presumption, Sup.R (E)(2) requires this Court to review three mandatory factors and make an affirmative finding by clear and convincing evidence that each factor outweighs the presumption of access. This Court should find that, after consideration of the three mandatory factors, the presumption of public access is not outweighed by FirstEnergy’s desire to keep secret the prices it paid for renewables and the identities of the suppliers of those renewables.

**A. This Court should deny FirstEnergy’s Motion to Seal and permit public access to all information in this case including the Identities of all Renewable Energy Credit Suppliers and Pricing Information.**

**1. FirstEnergy did not meet its burden of establishing that the information should be sealed pursuant to Sup.R. 45(E).**

By exclusively relying on the PUCO’s decision below, FirstEnergy failed to carry its burden of establishing the need for sealing the very information upon which the

decision was based: the identities of REC suppliers and the prices bid for In-State All Renewable energy credits. Much like the strong presumption in favor of disclosure created by the public records laws, R.C. 4901.12 and 4905.07, “[u]nder Sup.R. 45(A), ‘[c]ourt records are *presumed open to public access.*’” *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 488, 2012-Ohio-3328, 974 N.E.2d 89, ¶15. (Emphasis added.) A party can only overcome this presumption if a court makes a finding based upon “*clear and convincing evidence* that the presumption of allowing public access is outweighed by a higher interest after considering \*\*\*” three factors. Sup.R. 45(E)(2) (Emphasis added).

Specifically, Sup.R.45(E)(2) mandates that in determining whether public access to information should be restricted, a court must consider each of the following:

- (a) Whether public policy is served by restricting public access;
  - (b) Whether any state, federal, or common law exempts the document or information from public access;
  - (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.
- Sup.R.45(E)(2)(a)-(c).

FirstEnergy’s Motion to Seal does not meet this high burden, failing to address the Court’s rule on when it will restrict public access to information in a case document. See, Sup.R.45(E)(2). Additionally, FirstEnergy fails to address either prong of Ohio’s trade secret statute, R.C. 1333.61(D), or the 6-part test set forth in *State ex rel. Plain Dealer v. Ohio Dep’t of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

Instead, FirstEnergy relies exclusively on the PUCO's determination and expects this Court to bestow "routine" treatment to its Motion to Seal historic supplier identities and pricing information, thus further preventing FirstEnergy's customers from learning the price they paid for imprudently acquired renewables. (FirstEnergy Motion to Seal, at p. 6 (Mar. 6, 2014)). But this Court's decision to grant motions to seal utility trade secret information is anything but routine.

To support its argument, FirstEnergy cites to two cases where this Court granted motions to seal - *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853 and *In re Application of Am. Transmission Sys., Inc.*, 122 Ohio St.3d 1451, 2009-Ohio-3161, 908 N.E.2d 943. Both of those decisions, however, were decided before the effective date of Sup.R. 45 rendering them inapposite. Moreover, in *Ohio Consumers' Counsel*, the Court independently analyzed whether it was reasonable for the PUCO to grant confidentiality on the basis of trade secret. *Id.* at 367-370. And the information at issue in *In re Application of Am. Transmission Sys* was sensitive in nature and that sensitivity did not lapse because of the passage of time, as it has in this case. *In re Application of Am. Transmission Sys., Inc.*, 122 Ohio St.3d 1451, 2009-Ohio-3161, 908 N.E.2d 943. In that case, this Court denied a motion to unseal and granted a motion to seal trade secret information pertaining to the high voltage transmission system that Cleveland Electric Illuminating Company and American Transmission Systems, Inc. sought to build in Geauga County. *In re Am. Transmission Sys.* Unlike the now dated pricing information at issue in this case, the information sealed in *In re Am. Transmission Sys.* included "raw data on the design, structure and condition of the transmission system owned and operated by ATSI." *In re Application of*

*Am. Transmission Sys., Inc.*, Case No. 2009-0781, Motion of appellant Citizens Advocating Responsible Energy to Unseal Appellate Record, at 2 (May 4, 2009). The documents also contained “critical energy infrastructure information” that could present a “risk of terrorism” if publicly disclosed. *Id.* at 4. Public safety was placed at risk by the disclosure of such information and that data’s relevancy was undiminished by the passage of time.

Here, FirstEnergy has not overcome the presumption that court records should be publicly available. Because FirstEnergy did not meet the high burden – clear and convincing evidence -- established in the Rules of Superintendence for the Courts of Ohio, the Motion to Seal should be denied.

Moreover, the Court’s decision on this matter could substantially impact the procedure of this case, essentially inadvertently making a substantive ruling while granting an ostensibly procedural motion. Part of OCC’s cross-appeal addresses the PUCO’s granting of FirstEnergy’s request to protect the specific identities of REC suppliers and the prices paid for RECs. And the sole issue raised on appeal by the Environmental Law and Policy Center (“ELPC”) is the PUCO’s finding that REC prices, seller identities and penalty amounts was confidential.<sup>1</sup>

If the Court grants FirstEnergy’s Motion to Seal, such a decision would, in essence, decide the merits of OCC’s and ELPC’s appeal of the PUCO granting FirstEnergy’s requests to restrict public access to information that fails to qualify as trade secret under Ohio law. A denial of FirstEnergy’s Motion would eliminate the need for a confidential record and allow the parties to publicly file and reference during oral

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<sup>1</sup> Notice of Appeal of Appellant, Environmental Law and Policy Center (Feb. 18, 2014) at 1.

argument all information that refers to the specific identities of REC suppliers and the prices paid for In-State All Renewable RECs. That information is integral to the Court's evaluation of the prudence issues in this proceeding. Accordingly, all briefing should be stayed until this Court has denied FirstEnergy's Motion to Seal or the hearing on the Motion is concluded.

2. **FirstEnergy's desire to keep the identities of suppliers and prices that it paid for In-State All Renewable Energy Credits is not a "higher interest" under Sup.R. 45 that can outweigh the presumption that court records are open to the public.**
  - a. **Public policy is not served by restricting public access to information underlying the basis of the PUCO's decision that FirstEnergy charged customers for imprudent purchases of renewables.**

The first of the three factors that must be considered under Sup.R.45(E)(2) is the Court determining whether public policy is served by restricting public access to information in a case. *See* Sup.R.(E)(2)(a). When making such a decision, this Court should be cognizant of its own rulings that have allowed some records to be hidden from Ohio citizens and other records to be released.

In *State ex rel. Patterson v Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508 (1960) this Court held that "[t]he rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same." While *Patterson* was decided prior to the current version of the Public Records Act and prior to the

promulgation of Sup.R. 45, the clarion rule it puts forth has been upheld and underscored repeatedly by this Court.

Indeed, this Court has found that the purpose of providing public access to government documents and records “is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, quoting the U.S. Supreme Court in *Natl. Labor Relations Bd. v. Robbins Tire & Rubber Co.* (1978), 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159. These holdings make it clear that Ohio citizens in general (and FirstEnergy customers more specifically) look to this Court to provide transparency in those records in its possession. Transparency and openness in the judicial process is as important as transparency and openness in the other two branches of government - perhaps even more. After all, the branch that citizens count on to deliver justice is hindered when a party—in this case, FirstEnergy—requests that the public be denied access to information central to its decision making process. Full acceptance of judicial decisions and process hinges on compliance with general notions of public access to the documents upon which those decisions are made.

- b. There are no factors that support restriction of public access to dated information about FirstEnergy’s purchase of renewables because that information is not trade secret information under Ohio law.**

The other two factors that the Court must consider when deciding whether information filed with the Court should be kept secret is whether state or federal law prohibits public access and whether factors that support restriction of public access,

including whether the information is proprietary business information exist. Sup.R. 45(E)(2)(b) and (c). FirstEnergy claims that information in regard to the identities of renewable suppliers and the prices bid for the renewables should be kept from the public because it is trade secret information under Ohio law. (FirstEnergy Motion to Seal at p. 6). However, this Court should not allow this information to remain shielded from the public's eyes any longer because such information is not entitled to trade secret protection under Ohio's laws and this Court's interpretation of those laws.

R.C. 1331.61(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.

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).

While OCC understands the need for confidentiality during the RFP process to ensure competitive bidding, no such concern exists after the process is completed and the bidder has been selected and awarded the bid – let alone years later. There is no evidence in the record to support FirstEnergy's claim that the disclosure of supplier identities and supplier-pricing information would harm future competitive bid processes rendering it economically valuable. To the contrary, not only is the bidding process complete, but the renewables at issue were purchased in the summer and fall of 2009 and 2010 – nearly four to five years ago, respectively. 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 information that FirstEnergy seeks to seal is historic in nature, and the REC marketplace has changed dramatically during the course of those nearly four to five years. The passage of time and the rapid changes in this marketplace essentially eliminates any economic value of this information in the market of 2014.

Ohio's In-State All Renewables REC market was a new and emerging market during the initial period after Senate Bill 221 went into effect. *In re Ohio Edison*

*Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, 2013 Ohio PUC LEXIS 159, at \*\*34, 39, 46, 52. As the PUCO recognized, however, as supply constraints in the market began to ease and prices decreased, market fundamentals changed dramatically. *Id.* at \*45. In fact, the PUCO disallowed over \$43 million from RFP3 because it found that such changes in the market meant that FirstEnergy could no longer justify the exorbitant prices paid for 2011-vintage In-State All-Renewable RECs in RFP1 and RFP2. *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, 2013 Ohio PUC LEXIS 159, at \*\*61-62. The contracts at issue are simply one-time transactions in a unique market situation that no longer exists. Thus, contrary to the PUCO's Opinion in Order in this case, the supplier-identity and supplier-pricing information FirstEnergy seeks to seal has no independent economic value because it is historic in nature and has no impact on the current REC market.

FirstEnergy also failed to take sufficient precautions to safeguard the secrecy of supplier identities and pricing information. The public version of the Exeter Audit Report was filed in the PUCO's public docket on August 15, 2012. Although portions of that Audit Report were redacted, it still disclosed certain supplier identities and pricing information. Specifically, the Exeter Audit Report 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." (Exeter Audit Report, at p. iv) (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.” (Id., at p. 28) (Emphasis added). While it is true that FirstEnergy filed a motion for a protective order with the PUCO to keep the unredacted version of the Exeter Audit Report from public disclosure (FirstEnergy, Motion to Seal, at p. 3), this was not done until October 3, 2012 – 49 days after it was published on the PUCO’s public docket. Similarly, FirstEnergy did enter into confidentiality agreements with the intervenors in this case (id.), but not until November 29, 2012.

In the meantime, supplier pricing and identity information was disseminated in a number of news media outlets, ensuring that much of the information is already widely known outside of the business. Like the Exeter Audit Report, 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.” John Funk, *Audit Finds FirstEnergy Overpaid for Renewable Energy Credits, Passed on Expenses to Customers*, [http://www.cleveland.com/business/index.ssf/2012/08/audit\\_finds\\_firstenergy\\_overpa.html](http://www.cleveland.com/business/index.ssf/2012/08/audit_finds_firstenergy_overpa.html) (last accessed March 17, 2014), Attachment A; Gina-Marie Cheeseman, “FirstEnergy Paid Way Too Much to Comply With Ohio’s Renewable Mandate,” <http://www.triplepundit.com/2012/08/firstenergy-ohio-renewable-mandate> (last accessed March 17, 2014), Attachment B. 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.” John Funk, *Audit Finds FirstEnergy Overpaid for Renewable Energy Credits, Passed on Expenses to Customers*,

[http://www.cleveland.com/business/index.ssf/2012/08/audit\\_finds\\_firstenergy\\_overpa.html](http://www.cleveland.com/business/index.ssf/2012/08/audit_finds_firstenergy_overpa.html) (last accessed March 17, 2014). Cleveland's NBC 3 television station then published an Internet article citing "[t]he (Cleveland) Plain Dealer report[] that audits found 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." The Associated Press, *Audits: FirstEnergy Overpaid for Credits*, <http://www.wkyt.com/news/article/256501/3/Audits-FirstEnergy-overpaid-for-credits> (last accessed March 17, 2014). In fact, the Commission overruled the Attorney Examiner rulings, in part, thereby allowing "generic disclosure of FES as a successful bidder in the competitive solicitations" because "the fact that the Companies' affiliate, FirstEnergy Solutions Corp. (FES), was a bidder for some number of the competitive solicitations \*\*\* has been *widely disseminated*." *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, 2013 Ohio PUC LEXIS 159, at \*28 (Emphasis added).

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.' " *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 732 N.E.2d 373 (2000) (internal citations omitted). Since some of the most relevant material FirstEnergy seeks to hide has already appeared in some of the largest news outlets in Ohio, an argument that is not generally known or readily ascertainable to the public lacks any merit whatsoever.

Further, the disclosure of such information and allowing it to remain public for 49 days also undercuts any argument under the ability of FirstEnergy to claim that it can meet the this element of the *Plain Dealer* test which requires the holder of the purported

trade secret to guard the secrecy of the information. Indeed, the *Besser* holding continued with support for this position “An entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy.” *Besser* at 400.

This Court has already held that “Voluntary disclosure can preclude later claims that records are exempt from release as public records.” *State ex re. Zuern v. Leis*, 56 Ohio St.3d 20, 22, 564 N.E.2d 81, 84 (1990). Even if FirstEnergy were to claim that its filing information with the PUCO that it claims to be a trade secret was inadvertent or accidental, waiting 49 days before seeking to shield the information can only be described as “voluntary disclosure” under *Zuern*.

FirstEnergy failed to make adequate efforts to protect the secrecy of this historic information that is publicly available and not economically valuable. For these reasons, this Court should deny the Utility’s Motion to Seal.

**B. In the Alternative, This Court Should Hold a Hearing on the Motion To Seal and Stay the Briefing Schedule.**

While OCC points out that FirstEnergy failed to carry its burden to warrant sealing information in this case, if this Court does not summarily deny FirstEnergy’s Motion to Seal, a hearing on the Motion should be held. In order to overcome the presumption that a court document should be open to public access, it must be upon motion to the court, and “the court may schedule a hearing on the motion.” Sup.R. 45(E)(1). It is in the public interest for this Court to allow a decision about hiding

information from the public to be discussed publicly prior to such a decision to take effect.

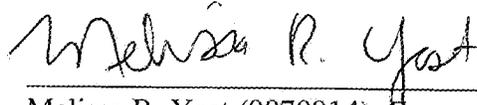
FirstEnergy has charged its customers a lot of money for its imprudent purchase of RECs. Despite the fact that OCC seeks disallowance of all REC purchases that exceed the Alternative Compliance Payment set forth in R.C. 4928.64(C)(2)(b), the PUCO disallowed just a fraction of those costs in the amount of \$43,362,796.50. Given the amount of money at stake, the public interest weighs heavily in favor of at least conducting a hearing to determine if Ohio citizens should be restricted from access to this information, or if the public, including affected customers, should know the cost of the RECs for which they paid and from whom they were purchased. Therefore, if the Court does not deny FirstEnergy's Motion to Seal after consideration of the Memorandum Contra, a hearing should be held on this very important issue that is the subject of OCC's appeal. The need for a hearing warrants a stay of all briefing until this Court has made a determination whether the public will be denied access to the identities of REC suppliers and the amounts FirstEnergy paid for In-State All Renewable RECs referenced in briefs and at oral argument.

#### **IV. CONCLUSION**

For the reasons more fully explained above, this Court should deny FirstEnergy's Motion to Seal, which would permit public access to the identities of suppliers and prices that FirstEnergy paid for In-State All Renewable Energy Credits, including the aggregate amount of disallowance sought by OCC. Alternatively, this Court should hold a hearing on this matter on the Motion to Seal and stay the briefing schedule.

Respectfully submitted,

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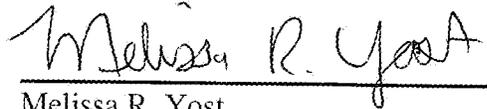
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Memorandum Contra Motion to Seal* was served on the persons listed below, via electronic service, this 17<sup>th</sup> day of March 2014.



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

John Funk, The Plain Dealer By John Funk, The Plain Dealer

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on August 17, 2012 at 6:00 AM, updated August 17, 2012 at 11:35 AM

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.

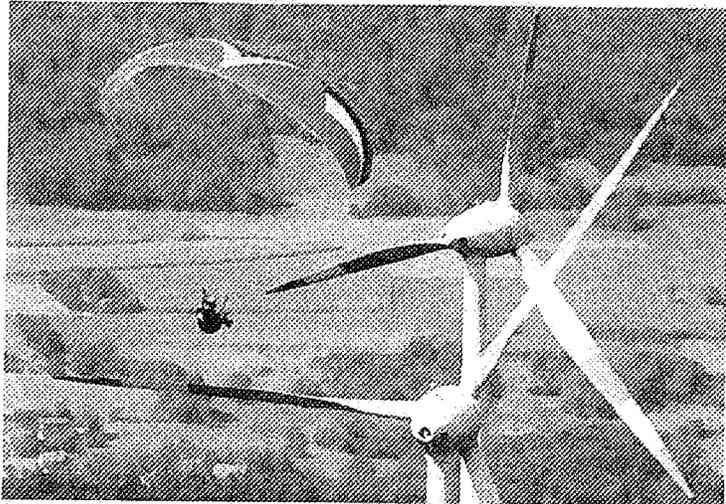
The law requires that a percentage of the power every electric company sells to be generated with renewable technologies such as wind and solar. Companies can buy "renewable energy credits" -- or RECS -- instead of the power itself or pay the state a fine, called an "alternative compliance payment."

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.



View full sizeAssociated Press file photoFirstEnergy's efforts to meet state renewable energy mandates may make some customers feel as if they are hang-gliding when they examine their monthly bills.

"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.

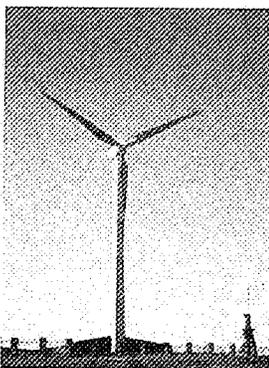
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## FirstEnergy Paid Way Too Much to Comply With Ohio's Renewable Mandate

 Gina-Marie Cheeseman | Thursday 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 194,000 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 \$126 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.

Photo: Flickr user, mcdltx

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