ORIGINAL

In The
SUPREME COURT OF OHIO

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,	:	Case No. 13-2026
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case No. 11-5201-EL-RDR, *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.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

David A. Kutik (0006418)
Counsel of Record
Lydia M. Floyd (0088476)
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114
216.586.3939 (telephone)
216.579.0212 (fax)
dakutik@jonesday.com
lmfloyd@jonesday.com

Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief

Thomas G. Lindgren (0039210)
Counsel of Record
Ryan P. O'Rourke (0082651)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
thomas.lindgren@puc.state.oh.us
ryan.orourke@puc.state.oh.us

Counsel for Appellee,
The Public Utilities Commission of Ohio

James W. Burk (0043808
Carrie M. Dunn (0076952)
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
330.384.5861 (telephone)
330.384.3875 (fax)
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

Counsel for Appellants,
Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company

Edmund Berger (0090307)
Counsel of Record
Michael Schuler (0082390)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614 466.1292 (telephone)
614.466-9475 (fax)
edmund.berger@occ.ohio.gov
michael.schuler@occ.ohio.gov

Counsel for Appellee/Cross-Appellant, The Office of the Ohio Consumers' Counsel

Mark R. Weaver (0065769)
Isaac, Wiles, Burkholder & Teetor
Two Miranova, 7th Floor
Columbus, Ohio 43215
614.221.2121 (telephone)
614.365.9516 (fax
MWeaver@IsaacWiles.com

Outside Counsel for Appellee/Cross-Appellant, The Office of the Ohio Consumers' Counsel

Bradley Klein (*pro hac vice*)
Environmental Law & Policy Center
135 East Wacker Drive, Suite 1600
Chicago, IL 60601
312.795.3746 (telephone)
312.795.3730 (fax)
bklein@elpc.org

**Counsel for Appellee/Cross-Appellant,
Environmental Law & Policy Center**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

Page(s)

Other Authorities

Rules

In The
SUPREME COURT OF OHIO

Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company,	:	Case No. 13-2026
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case No. 11-5201-EL-RDR, *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.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") approved an adjustable rate and it adjusted that rate to disallow excessive costs that Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company ("FirstEnergy" or "the Companies") attempted to collect from their customers. The rider is not an automatic pass-through of all costs, as FirstEnergy incorrectly posits; rather, cost recovery is subject to periodic, ongoing Commission review to ensure that the tab customers are asked to pay is just and reasonable.

Ohio electric utilities are required to provide a portion of their electricity through renewable energy resources such as solar or wind generation. The utilities may accomplish this through facilities they own or they may purchase credits from other entities. In either case, the costs are ultimately borne by ratepayers and must be reasonable.

The Commission has authorized FirstEnergy to recover its costs for renewable energy on an accelerated basis through a special rider that is subject to quarterly adjustments by the Commission to eliminate excess costs and to ensure reasonable customer rates. Here, after a thorough review of the record, the Commission disallowed a portion of FirstEnergy's expenses for which no evidentiary support was provided. The Court should affirm.

STATEMENT OF THE FACTS AND CASE

This case arises out of a Commission-ordered review into the prudency of the Companies' procurement of renewable energy credits ("RECs").[1] See *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR ("*In re FE Renewable Energy Credits*") (Opinion and Order at 2) (Aug. 7, 2013), FE App. at 10.[2] The Companies recover their REC-procurement costs through Rider AER, the terms of which were originally agreed to in the Companies'

---

1 Ohio Adm. Code 4901:1-10-01(V), App. at 17 defines a "renewable energy credit" as "the fully aggregated attributes associated with one megawatt hour of electricity generated by a renewable energy resource as defined in division (A)(35) of section 4928.01 of the Revised Code." R.C. 4928.01, App. at 1.

2 References to the attached appendix are denoted "App. at ___;" references to the appendix attached to appellant FirstEnergy's merit brief are denoted "FE App. at ___;" references to FirstEnergy's supplement are denoted "FE Supp. at ___."

first electric security plan. Under this plan, the Companies are permitted to recover only their prudently incurred REC-procurement costs. Filings are made quarterly and go into effect one month afterwards.

To assist with its review of the Companies' REC-procurement costs, the Commission selected a pair of respected outside auditors. Exeter Associates Inc. performed a management/performance audit (the Exeter Report) and Goldenberg Schneider, LPA performed a financial audit (the Goldenberg Report). *Id.* at 3, FE App. at 11. The results of these audits, coupled with the testimony and exhibits presented by numerous parties over the course of several days of hearing, together with the Commission's own independent analysis, resulted in an order disallowing over $43 million of imprudently-incurred costs from the Companies' Rider AER[3] recovery balance. *Id.* at 35, FE App. at 43.

The statutory backdrop for this appeal is R.C. 4928.64, which mandates, among other things, that an electric distribution utility ("EDU") provide its customers with specified percentages of electricity that are sourced from renewable energy resources. The statute establishes a series of annual benchmarks that the EDU must achieve or else face a compliance payment. R.C. 4928.64(C)(2), App. at 3. Compliance with an annual benchmark may be excused, however, if the EDU can demonstrate that its costs of meeting the benchmark "exceeds its reasonably expected cost of otherwise producing or

3 Rider AER permits the Companies to recover their "prudently incurred cost[s]" of complying with R.C. 4928.64's renewable energy resource requirements. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 10) (Dec. 18, 2013), FE App. at ___.

acquiring the requisite electricity by three per cent or more." R.C. 4928.64(C)(3), App. at 4. An EDU may also be excused from meeting its benchmark by making a *force majeure* request with the Commission. R.C. 4928.64(C)(4)(a)-(c), App. at 4. In deciding whether to grant *force majeure* relief, the Commission must assess whether renewable energy resources were reasonably available in the market and whether the EDU exercised good faith in attempting to meet the benchmark. *Id.*

The Commission scrutinized the prudency of the Companies' procurement of in-state all renewable RECs[4] for the 2009, 2010, and 2011 benchmark-compliance years. For each year, the Companies spread their REC procurements out over several requests for proposal (RFPs) through a process called laddering. This process occurred as follows:

- under RFP1 (issued August 2009) the Companies secured 35% of their RECs for benchmark-compliance year 2009 and 45% for 2010;
- under RFP2 (issued October 2009) the Companies secured 65% of their RECs for benchmark-compliance year 2009, 29% for 2010, and 15% for 2011; and
- under RFP3 (issued August 2010) the Companies secured 27% of their RECs for benchmark-compliance year 2010 and 85% for 2011.

Two of the dominant issues addressed in the Exeter Report concerned (1) the structure of the Companies' RFPs and (2) the Companies' solicitation results and procurement decisions. While the Exeter Report found that the RFPs were reasonably developed and

[4] The Companies' secured four categories of RECs: (1) in-state solar RECs; (2) all-state solar RECs; (3) in-state all renewables RECs; and (4) all-state all renewable RECs. Exeter Report at ii. The only disputed category is with the Companies' procurement of in-state all renewable RECs. *In re FE Renewable Energy Credits*") (Opinion and Order at 21) (Aug. 7, 2013), FE App. at 29. Unless otherwise noted, the term "RECs" denotes this disputed category.

did not appear to be anti-competitive, it also found that "the contingency planning in place for the first three RFPs was inadequate * * *." Regarding the solicitation results and procurement decisions, the Exeter Report found, among other things, that the Companies:

- Failed to establish a maximum (or limit) price that they were willing to pay for RECs before the issuance of the RFPs;
- Paid unreasonably high-prices to a certain bidder;[5]
- Paid REC prices that exceeded any reported price paid for non-solar RECs in the country between July 2008 and December 2011;
- Ignored any available alternative to the purchase of high-priced RECs;
- Should have been aware that the REC prices reflected significant economic rents and were excessive.

Based on these findings, the Exeter Report "recommend[ed] that the Commission examine the disallowance of excessive costs associated with purchasing RECs to meet the [Companies'] In-State All Renewable obligations."

Given this and other evidence, the Commission found that the Companies failed to show they acted prudently by paying excessive REC prices in August 2010 to meet their 2011 benchmark. The Commission grounded its decision in several factors. First, the Commission found the Companies acted imprudently by hastily securing 2011 RECs during an admittedly constrained market that it knew would soon ease. See *In re FE Renewable Energy Credits* (Opinion and Order at 25-26) (Aug. 7, 2013), FE App. at 33-34. The prudent course of action, the Commission found, was to forestall securement of

[5] The RECs in question were purchased from a seller that is identified only in the confidential portion of the record filed with the Court.

2011 RECs and await market relief which would have relaxed REC prices. *Id.* Second, the Companies failed to comply with Ohio Adm. Code 4901:1-40-03, App. at 14-17 by failing to report known market constraints to the Commission. *Id.* at 26, FE App. at 34. Third, the Companies secured the 2011 RECs through a bilateral negotiation rather than a competitive bidding process. *Id.* Finally, the Commission found the Companies acted imprudently by failing to request available *force majeure* relief during known constraints in the REC market. *Id.* at 27, FE App. at 35. Even assuming unlikely denial of *force majeure* relief by the Commission, this still would have afforded the Companies extra time to secure RECs during a period of time that market constraints were expected to ease. *Id.* at 27-28, FE App. at 35-36.

The Commission found that these factors, in the aggregate, were more than sufficient to establish imprudent purchasing practices and that a disallowance was necessary. *Id.* Therefore, the Commission directed the "Companies to credit Rider AER in the amount of $43,362,796.50, plus carrying costs, and to file tariff schedules within 60 days * * * ." *Id.* at 28, FE App. at 36.

On rehearing, the Commission rejected various arguments in their entirety, while it amplified its prior discussion as to why the disallowance did not violate the prohibition against retroactive ratemaking. Drawing on this Court's guidance from *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982), the Commission found that the Companies' Rider AER was akin to a variable rate schedule and, thus, was not subject to the retroactive ratemaking doctrine. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 18-24) (Dec. 18, 2013), FE App. at 63-69.

ARGUMENT

Proposition of Law No. I:

As part of its broad ratemaking authority, the Commission can approve an adjustable rate mechanism subject to ongoing review.

FirstEnergy asserts that the Commission acted unlawfully when it adjusted the rider rate to disallow costs for which FirstEnergy provided no evidentiary support. According to FirstEnergy, this adjustment, or credit, violates the prohibition on retroactive ratemaking. FirstEnergy misunderstands the retroactive ratemaking doctrine.

FirstEnergy raises the specter of retroactive ratemaking to avoid any inquiry into the propriety of its renewable energy purchases. If the Commission's examination, and partial disallowance, of FirstEnergy's use of *ratepayer* funds for renewable energy purchases constitutes retroactive ratemaking, then the entire proceeding at the Commission was little more than an exercise in futility and a tremendous waste of time and money by all parties. Moreover, if the Commission is forbidden from disallowing imprudently-incurred costs, then FirstEnergy (and other public utilities with similar riders) necessarily enjoy *carte blanche* authority to pass unlimited costs on to ratepayers. Fortunately for customers, this is not the state of Ohio law. The retroactive ratemaking doctrine, while important when properly applied, is not so rigid and blind to common sense as FirstEnergy suggests.

FirstEnergy agreed to the terms of the applicable rider (Rider AER) and it was approved by the Commission in FirstEnergy's first electric security plan case. The rider approved by the Commission presents FirstEnergy with an opportunity to recover its *prudently*-incurred costs, on an accelerated basis, to procure the renewable energy needed to satisfy its statutory obligations under R.C. 4928.64. Filings are made quarterly and become effective one month later. FirstEnergy has benefited considerably from this rider by being able to recover its costs without the delay occasioned by a traditional rate case. In turn, FirstEnergy's customers can and should expect the Commission to periodically review these expenses (again as the rider provides) and determine whether they were indeed prudently incurred.

Now that the Commission has found that FirstEnergy failed to justify some of its expenses, the Company claims that it is insulated from any meaningful oversight because it has already collected the money. FirstEnergy's argument, however, is contrary to how the rider recovery process works and, importantly, precedent of this Court that permits adjustment, after collection, of variable rates such as Rider AER. The Commission order is firmly supported by the Court's decision in *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St. 2d 509, 433 N.E. 2d 568 (1982) that controls here and refutes FirstEnergy's argument. There, the Court held that the retroactive ratemaking doctrine did not bar the Commission from ordering a utility to deduct supplier-issued refunds from the cost of gas that it charged to customers under a *variable* rate schedule. *Id.* at 512-514. In reaching this conclusion the Court distinguished variable rate schedules from more traditionally-established rates, observing that the former may be varied without prior Commission approval whereas the latter, which typically arise out of base rate proceedings, may not. *Id.* at 512-513. The Court then held that even if the Commission engaged in ratemaking, it did not do so retroactively because the deduction of supplier-issued refunds was done prospectively to the utility's existing tariff. *Id.* at 513-514.

Importantly, the *River Gas* circumstances are distinguishable from those facing the Court in *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). In *Keco*, a customer sought restitution from a utility of funds that were collected under rates approved by the Commission, but which were later found to be unreasonable by the Court. *Id.* at 255. The *Keco* Court held that restitution was unavailable as a remedy because, given the statutory design, the utility was required to collect the Commission-approved rates. *Id.* at 257. The *River Gas* Court correctly found *Keco* inapplicable. What was being sought in *River Gas* was not restitution, but rather an offset of supplier-issued refunds against the utility's existing tariff. *River Gas*, 69 Ohio St.2d at 513-514.

The reasoning from *River Gas*, not *Keco*, applies here and defeats FirstEnergy's retroactive ratemaking argument. First, there is no ratemaking (in the traditional sense) here. As the Commission found, Rider AER operates much like the variable cost-recovery mechanism considered in *River Gas*. Rider AER is a variable rate that was established to recover, on a quarterly basis, the costs of FirstEnergy's prudently incurred REC purchases. Counterbalancing FirstEnergy's accelerated cost recovery is the Commission's ability to review and disallow excessive costs at periodic intervals. Moreover, *Keco* is inapposite because the Commission did not order restitution in the form of a refund to ratepayers' bills. Rather, just as in *River Gas*, the Commission ordered an offset against FirstEnergy's existing tariff, *i.e.* Rider AER.

In an attempt to evade this review, FirstEnergy asserts that the Commission had to complete its review of the costs within the thirty-day period between the updating of the rider and the effective date for the new charges. FE Merit Brief at 22. FirstEnergy's rationale is that the tariff uses the label "request for approval" for the quarterly filings. After the thirty days has expired, FirstEnergy asserts, it is simply too late for the Commission to review its expenses, even though only a cursory review, at best, could be performed within thirty days.

Nothing in the Commission order approving the rider, or Ohio law, binds the Commission to the thirty-day review period that FirstEnergy advocates. Indeed, it was "never intended that [it] would fully review each variable rate prior to its taking effect." *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 22) (Dec. 18, 2013), FE App. at 67. The Commission *could* have blocked the adjustment from going into effect during the thirty-day period, thereby negating the purpose of quarterly adjustments, but that does not mean that the Commission was precluded from performing its review at a later time. Having the new rate go into effect after thirty days was a benefit to FirstEnergy. The Court must not permit FirstEnergy to now use that benefit as a shield to insulate the Companies' procurement practices from review. It was not a shield in *River Gas*, nor should it be here. Had the Commission suspended the new tariff and ordered an audit, as FirstEnergy suggests it should have, the Companies could have waited many months before having the new rates adjusted (about which the Companies would have surely complained).

Moreover, the Commission has taken no retroactive action. Rider AER, like the schedule in *River Gas*, still exists in the Companies' current tariffs. It expressly contemplates cost-recovery review, and adjustments, at specified intervals. Thus, the Companies can deduct the imprudently incurred REC costs from their recovery balance on a prospective basis. This distinguishes the present case from *Lucas County Commissioners v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997), where the Court held the Commission violated the retroactive ratemaking doctrine by ordering a utility to issue refunds to consumers under an *expired* rate program. Nor has the Commission ordered a refund of money to customers as was the case in *Keco*. There will simply be an offset made to current rates on a going-forward basis, to effect the disallowance.

The Court's recent decision in *In re Application of Columbus Southern Power Co.*, 2014-Ohio-462, is likewise readily distinguishable. The provider-of-last-resort charges at issue in that case had been approved up-front by the Commission in an order that was then reversed by the Court. *In re Columbus S. Power Co.,* 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E. 2d 655. The Court noted in the earlier case that "[t]he commission approved the recovery of roughly $500 million in provider-of-last-resort ("POLR") charges over the three years of the plan." *Id.* at ¶ 22. In the present case, in contrast, the Commission did not approve the amount of the renewable energy costs. The Commission simply approved the *creation of a rider,* merely a recovery mechanism, to permit the recovery of costs, subject to prudence review at a later time. This procedure has become common in recent years, with an assortment of riders being created through the rate plans of all electric utilities, including FirstEnergy. Acceptance of FirstEnergy's argument would call into question the operation of all of these riders.

Just recently, the Court reaffirmed the important distinction that exists between statutes authorizing reconcilable riders (such as Rider AER) and traditional ratemaking statutes that authorize prospective rates. *See in re Application of Ohio Power Co.*, Slip Opinion No. 2014-Ohio-4271. There the appellant argued that the Commission engaged in unlawful retroactive ratemaking when it authorized recovery, through a rider, of underrecovered costs of providing transmission service from shopping customers that no longer paid the utility for this service. *Id.* at ¶ 47. The Court rejected the assertion that the Commission's order constituted unlawful retroactive ratemaking. The Court emphasized the statute's "retrospective approach to cost recovery" which authorized a reconciliation rider to true-up any over or under recovery from the previous period. Unlike in other cases where the Court invalidated the Commission's attempts to alter present rates to make up for regulatory lag, the Court explained that this element was missing from the Commission's order. Therefore, there was no retroactive ratemaking. *Id.* This reasoning applies equally well to the present case.

The Commission has a duty to ensure that all expenses charged to FirstEnergy's customers are reasonable. This is fundamental to Ohio ratemaking law. There is no blank check that evades meaningful regulatory review and leaves customers with no recourse. The Court should recognize the Commission's authority to examine a utility's expenses, and when it finds some to be unreasonable, to order an offset to current rates.

Proposition of Law No. II:

> **The Court does not reweigh the evidence nor substitute its judgment for that of the Commission on factual matters. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 39. The Commission's factual findings should be upheld if supported by sufficient record evidence. *Consumers' Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 289, 2008-Ohio-860, ¶ 10.**

The Commission's decision to disallow recovery of over $43 million spent imprudently by FirstEnergy is firmly supported by the record and should be affirmed. The evidence shows that FirstEnergy paid excessive prices for these credits and, in so doing, ignored all feasible strategies to address the market disequilibrium existing at the time. FirstEnergy *ignored information from its own consultant* which, if heeded, would have curbed the price paid for the RECs. It failed to establish a limit price, which meant that no price was too high to pay for RECs. And it failed to file, let alone even consider filing, a request for *force majeure* relief—a statutory safe harbor and a potent tool that can guard against adverse market conditions. When coupled together, these and other factors discussed below demonstrate that the Commission was fully justified in imposing the disallowance.

FirstEnergy's factual challenges lack evidentiary support and are insufficient to carry its "heavy burden" of showing that the Commission's findings are against the manifest weight of the evidence. *Consumers' Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 289, 2008-Ohio-860, ¶ 10. FirstEnergy's "burden is difficult to sustain, since the Court has consistently deferred to the commission's judgment in matters like setting rates where the Commission applies its special expertise and discretion to factual matters."

Constellation NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004-Ohio-6767, ¶ 50. FirstEnergy's challenge is little more than a request for the Court to substitute its judgment and reweigh the Commission's factual findings. The Court should decline the request. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 39.

A. The Commission's factual findings are grounded in "what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made." *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 711 N.E.2d 670 (1999).

The standard the Commission used to gauge the prudency of FirstEnergy is taken from this Court's decision in *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 711 N.E.2d 670 (1999). In that case, the Court found that a prudent decision "reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made." *Id.* at 58. The Commission correctly applied this precedent, noting that it would "examine the conditions and circumstances which were known to [FirstEnergy] at the time each decision to purchase RECs was made." *In re FE Renewable Energy Credits* (Opinion and Order at 21) (Aug. 7, 2013), FE App. at 29. Having engaged in a studied review of these then-existing conditions and circumstances, the Commission made factual findings, grouped under four factors that showed FirstEnergy acted imprudently when it paid excessive prices for 2011 vintage credits. *Id.* at 25, FE App. at 33.

While each individual factor standing alone shows FirstEnergy's imprudence, together they make a compelling case. We now review these four factors.

B. It was imprudent for FirstEnergy to purchase energy credits in a constrained, high-priced market, when it knew that market conditions were projected to improve in the very near term.

FirstEnergy knew prices were expected to drop significantly in the near future, but went ahead anyway and hastily secured 2011 vintage credits during a period of short supply. *In re FE Renewable Energy Credits* (Opinion and Order at 25) (Aug. 7, 2013), FE App. at 33. FirstEnergy's own witness (Stathis) noted an imminent expiration of the 12-month constrained supply time frame that had been forecast in a market report issued almost a year earlier. *Id.*; FirstEnergy Ex. 2 at 35, FE Supp. I at 48. He also testified that other Ohio utilities were meeting their in-state benchmarks, which signaled potential market expansion, and that a second bidder for RECs had entered the market. *In re FE Renewable Energy Credits* (Opinion and Order at 25-26) (Aug. 7, 2013), FE App. at 33-34; FirstEnergy Ex. 2 at 35, FE Supp. I at 48. In other words, the facts on the ground known to FirstEnergy at the time showed that market constraints were starting to ease.

Despite signals that pointed to near-term price declines, FirstEnergy hastily and prematurely procured all the credits it needed for 2011 in August 2010 through RFP3. This was sixteen months before the credits were needed. This was imprudent, as the Commission found. *In re FE Renewable Energy Credits* (Opinion and Order at 26) (Aug. 7, 2013), FE App. at 34. There was no sound reason to procure the remaining credit balance then because FirstEnergy "knew that there was time for additional RFPs to purchase the vintage 2011 credits because [it] had contingency plans for an additional RFP in October 2010 and two additional FRPs in 2011." *Id.* Had FirstEnergy followed its own laddering strategy,[6] it reasonably could have spread its procurements over the course of future RFPs, and secured much more favorable pricing. Instead, FirstEnergy jettisoned its laddering strategy in favor of securing excessively-priced credits during a tight market.

FirstEnergy asks the Court to reweigh the evidence and substitute its judgment for that of the Commission on factual matters. This is not the Court's function on appeal. *Elyria Foundry Co.*, 2007-Ohio-4164, ¶ 39. So long as the Commission's factual findings are supported by sufficient record evidence they will be upheld. *Consumers' Counsel*, 2008-Ohio-860, ¶ 10. Here, FirstEnergy's own witness' testimony provides sufficient record evidence to support the Commission's factual findings and therefore its orders should be upheld.

C. FirstEnergy's failure to provide mandatory notices to the Commission regarding market constraints was imprudent.

FirstEnergy failed to comply with the reporting requirements of Ohio Administrative Code Section 4901:1-40-03. This rule requires FirstEnergy to annually file a "plan for compliance with future annual and renewable-energy benchmarks, including

---

6 "Laddering" is a strategy used by FirstEnergy that "spread[s] the purchase of RECs for any given compliance year over multiple RFPs. Testimony at hearing demonstrates that laddering is a common strategy for the procurement of renewable energy resources and other energy products." *In re FE Renewable Energy Credits* (Opinion and Order at 22) (Aug. 7, 2013), FE App. at 30 (internal citations omitted).

solar" which, of particular importance here, discusses "any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments." Ohio Adm. Code 4901:1-40-03(C)(4), App. at 17.

FirstEnergy filed its plan on April 15, 2010, but failed to specifically address known constraints in the market for in-state all renewable credits. *In re FE Renewable Energy Credits* (Opinion and Order at 26) (Aug. 7, 2013), FE App. at 34. This omission is striking because, according to FirstEnergy witness Stathis' testimony, an October 18, 2009 report from its consultant, Navigant, showed that (1) "market supply conditions for the In-State All Renewable product were marked by few willing and certified suppliers," (2) that "there were major uncertainties with respect to economic conditions that could support new renewable project development," and (3) that credit conditions were "significantly limiting" the financing of new projects. *Id.*; FirstEnergy Ex. 2 at 40, FE Supp. at 52. He further testified that these circumstances posed significant impediments to compliance because they hindered market development and supply. *In re FE Renewable Energy Credits* (Opinion and Order at 26) (Aug. 7, 2013), FE App. at 34. He also conceded that FirstEnergy's plan did not disclose that the market for in-state all renewable RECs was constrained. *Id.* FirstEnergy knew that market constraints were expected to ease in the near future, yet omitted this fact from the plan document. *In re FE Renewable Energy Credits* (Opinion and Order at 27) (Aug. 7, 2013), FE App. at 35.

FirstEnergy denies this but its plan merely contains a generic reference to the limited availability of renewable energy resources. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 16) (Dec. 18, 2013), FE App. at 61. The only specifics it discusses are impediments to achieving compliance with respect to *solar* renewable obligations, not in-state all renewables which is the focal point here. But this information was already known to the Commission by virtue of the *force majeure* filing FirstEnergy made on March 10, 2010 with respect to their 2009 solar renewable resource obligations. *Id.*

FirstEnergy's claims that the Commission and its Staff could have done internet research or reviewed docketed filings to stay abreast of the shortage is misplaced because it ignores that O.A.C. Section 4901:1-40-03(C)(4) logically requires market participants (*i.e.* FirstEnergy) to report problems in achieving compliance. This is sensible because they are the ones who have the information and they must act on it.

Finally, this rule violation shows imprudence. Notifying the Commission and its Staff of the market shortage was vital so that methods could be developed to cope with the situation. FirstEnergy had the information, failed to act on it itself, and failed to notify the Commission so that the Commission could take action. This shows imprudence.

D. The negotiated price that FirstEnergy paid for 2011 vintage credits lacks record support.

FirstEnergy imprudently chose to secure 145,269 RECs through a bilateral negotiation rather than a competitive bid. *In re FE Renewable Energy Credits* (Opinion and Order at 27) (Aug. 7, 2013), FE App. at 35. There are two problems with FirstEnergy's approach. First, the results of the negotiation lack any record support. Second, the negotiation transpired during a highly constrained market period. With time still remaining to procure these credits through three future RFPs, FirstEnergy could and should have deferred procurement to a time when lower prices were expected.

FirstEnergy's witness Stathis admitted that he "did not participate in the negotiations, had no personal knowledge regarding the agreed purchase price, and did not provide testimony in support of the agreed purchase price * * * ." *In re FE Renewable Energy Credits* (Opinion and Order at 27) (Aug. 7, 2013), FE App. at 35. There was "no other evidence" to support the reasonableness of the purchase price that arose out of the negotiation. *Id.* Given the total lack of evidence to substantiate the prudence of the negotiated purchase price, FirstEnergy manifestly failed to carry its evidentiary burden.

FirstEnergy claims that the negotiated price was reasonable. To justify this claim, it strings together a two-step syllogism. First, that the original bid price was reasonable. Second, if the original bid price was reasonable, then the negotiated price must therefore also be reasonable because it was less than the bid price. Neither is true.

FirstEnergy's sole justification to support the notion that the bid price was reasonable is that it was designed to obtain competitive prices, but this only tells half of the story. To be sure, the Exeter Report noted that "the procurement methods employed by [FirstEnergy] are assessed to have been competitive." Exeter Report at 29-30, FE Supp. at 135-136. A competitive procurement *method*, however, does not necessarily equate to a competitive *result*. FirstEnergy mistakenly conflates the two. Indeed, as the Exeter Report further explained, a competitive procurement method "does not mean, however, that the *market* in which the Companies were operating was competitive. The bids received by [FirstEnergy] should have been interpreted by [them] as indicative of serious market disequilibrium." Exeter Report at 29-30, FE Supp. at 135-136.

Given the then-poor market conditions for the certificates it sought, FirstEnergy's reasoning necessarily falls apart. That is, the fact that the negotiated price was less than the bid price does not substantiate the claim that the negotiated price was reasonable. Because the bid price was made during a period of supply shortage, any discount off the bid price that was achieved by the negotiation still reflected the influence of poor market conditions and was necessarily inflated.[7] It was FirstEnergy's burden to show that the negotiated price was reasonable but, as explained above, it failed to carry its burden.

The Commission found that the prudent course of action would have been for FirstEnergy to "defer[] purchase of the 2011 vintage RECs to one of the three planned future RFPs * * *." *In re FE Renewable Energy Credits* (Opinion and Order at 27) (Aug. 7, 2013), FE App. at 35. Recall that signs were pointing towards near-term market relief: Navigant was projecting expiration of the 12 month constrained time frame and other Ohio utilities were meeting their in-state benchmarks. *Id.* at 25, FE App. at 33; FirstEnergy Ex. 2 at 35, FE Supp. I at 48. Armed with this knowledge at the time of RFP3, it was imprudent for FirstEnergy to ignore this important factor and, instead, to hastily secure these credits through a negotiation when market conditions were about to improve.

---

7 The point can be illustrated with a simple example. Assume constraints in the market for wheat drove the price of bread up to \$50/loaf, a sure sign of market disequilibrium. Even by negotiating 35% off the purchase price with your local grocer (as FirstEnergy claims to have done here with bidder 2), the price of bread would still be \$32.50/loaf, a plainly unreasonable price even with the discount.

E. FirstEnergy's failure to invoke the statutory safe harbor of *force majeure* relief was imprudent.

FirstEnergy failed to even consider filing for statutorily-available *force majeure* relief. By statute, an electric distribution utility may file a request with the Commission to make a *force majeure* determination with respect to the utility's compliance obligations. R.C. 4928.64(C)(4)(a), App. at 4. Essentially this is a means for the Commission to postpone a utility's REC obligation into the future. The Commission must then determine whether credits "are *reasonably* available in the marketplace in sufficient quantities for the utility" to meet its compliance obligations. R.C. 4928.64(C)(4)(b), App. at 4. In making this determination, the Commission must consider whether the utility made a good-faith effort to comply with its obligations as well as the availability of both in-state and out-of-state credits. *Id.* If the Commission finds that credits are not reasonably available, it shall modify the utility's compliance obligations as it determines appropriate. R.C. 4928.64(C)(4)(c), App. at 4.

The option of *force majeure* relief serves as a powerful and practical tool to guard against the vagaries of the market, to protect both the utility and its ratepayers from excessive prices. For the utility, it also protects against the possibility of incurring a compliance payment under R.C. 4928.64(C)(2) for failing to comply with the renewable energy benchmarks. For ratepayers, it can diminish the chance that they'll bear the brunt of paying for excessively-priced credits through the utility's cost-recovery mechanism (*i.e.*, FirstEnergy's Rider AER). As shown by FirstEnergy's excessive REC purchases, this case poignantly illustrates the harm that can flow from a utility's imprudent disregard of the *force majeure* option.

Given the market disequilibrium that persisted at the time of RFP3, which in turn fueled excessively-priced vintage 2011 credits, FirstEnergy should have at the very least considered filing a *force majeure* application with the Commission. FirstEnergy knew the option existed at the time of RFP3. Indeed, it had sought and received *force majeure* relief in the past.[8] Moreover, other utilities had successfully sought and received *force majeure* relief based on price considerations.[9] *In re FE Renewable Energy Credits* (Opinion and Order at 27) (Aug. 7, 2013), FE App. at 35. And even if such an application were rejected, there still "would have been sufficient time for the two planned additional RFPs in 2011 in order to obtain the RECs necessary for the 2011 compliance obligation." *Id.* at 28, FE App. at 36. In other words, FirstEnergy (and derivatively, ratepayers) had nothing to lose by filing a *force majeure* application and everything to gain.

FirstEnergy's response is that *force majeure* relief was not necessary because RECs were available for purchase in the marketplace, irrespective of price. In arriving at this conclusion, FirstEnergy mangles the meaning of the phrase "reasonably available" used in R.C. 4928.64(C)(4)(b). In the administrative law context, this Court has held that

---

8 See *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of The 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code*, Case No. 09-1922-EL-ACP (Finding and Order at 4) (Mar. 10, 2010) (granting force majeure relief with respect to FirstEnergy's 2009 solar REC obligations), App. at 10.

9 *See, e.g., In re Columbus Southern Power Co.*, Case No. 09-987-EL-EEC (Entry) (January 7, 2010).

"where the legislature 'has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 386-387, 627 N.E.2d 538 (1994) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). *See also Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18, 734 N.E.2d 775 (2000) ("Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility."). Likewise, under R.C. 1.49(F), the Court is empowered to consider "the administrative construction of the statute" in discerning the General Assembly's intent. *State ex rel. Beck v. Casey*, 51 Ohio St.3d 79, 81, 554 N.E.2d 1284 (1990) (explaining that R.C. 1.49(F) entitled the agency's interpretation to "more weight" than its opponent's). The upshot of all this is that the Commission's interpretation, if reasonable, must be upheld over any competing interpretation offered by FirstEnergy.

Here, the Commission logically found that in determining whether RECs were "reasonably available" in the context of a *force majeure* application, REC prices had to be considered. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 17-18) (Dec. 18, 2013), FE App. at 62-63; *In re FE Renewable Energy Credits* (Opinion and Order at 27) (Aug. 7, 2013), FE App. at 35. This was a permissible construction of the statute and it should be sustained by this Court. A prudent person considers the price of a commodity before deciding to buy it, whether it be a car, a house, or a cell phone. There is no reason why this logic should not apply to REC procurements, especially by a utility conducting business in a pervasively regulated industry where the concept of prudence takes center stage. *See Cincinnati Gas & Elec. Co.*, 86 Ohio St.3d 53 (disallowing cost recovery because the utility acted imprudently).

Indeed, it would be striking in this context if the phrase "reasonably available" did not embody the concept of price. If this were true, then there would be no REC price too high when it came time for a utility to meet its compliance obligation. And, like here, these excessive compliance costs would ultimately get passed down to ratepayers through the utility's cost-recovery mechanism. Yet, as extravagant as this sounds, this is precisely the interpretation that FirstEnergy asks this Court to accept. The Court should decline the invitation.

FirstEnergy claims that the word "available" denotes accessible or obtainable. In other words, if RECs were accessible or obtainable, then they were available and FirstEnergy had no discretion but to purchase them no matter how exorbitant the price. This out-of-context, formalistic interpretation is misguided. As this Court has instructed, words must be read in light of their context. *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997) ("In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body."). *See also In re Application of Columbus S. Power Co.*, 2014-Ohio-462, ¶ 27-28 ("the question is what [the statute] means when read as a whole").

Any doubt about this is resolved by the General Assembly's decision to place the word "reasonably" in front of "available." With this modifier, it should be plainly understood that not only must price be taken into account when purchasing RECs, but the price must be informed by an understanding of what is reasonable under the circumstances. In other words, there are limits on what a utility can justifiably pay to secure RECs; there is no blank check.

F. The Commission reasonably calculated the disallowance amount.

The Commission's decision to not force FirstEnergy's customers to pay over $43 million in imprudently-incurred 2011 vintage credit costs was reasonable and supported by the record. To arrive at the disallowance, the Commission took the number of 2011 vintage credits secured through the negotiation (*i.e.*, 145,269) and multiplied that number by the agreed purchase price. *In re FE Renewable Energy Credits* (Opinion and Order at 28) (Aug. 7, 2013), FE App. at 36. It then subtracted from this amount, as an offset, the same number of credits multiplied by the purchase price that was bid-in to secure the 5,000 credits from the other bidder in RFP3.[10] *Id.*

FirstEnergy claims that by disallowing procurement costs that were incurred through RFP3 but not through RFP 1 and RFP2 the Commission acted inconsistently. But this is wrong, the market conditions present during RFP1 and RFP 2 were markedly different from RFP3.

---

10 The purchase prices paid to secure the 145,269 RECs and the 5,000 RECs are omitted by virtue of their confidential status.

At the time of RFP1 (August 2009), the Commission found:

> that the market was still nascent and that reliable, transparent information on market prices, future renewable energy projects that may have resulted in future RECs trading at lower prices, or other information that may have directly influenced [FirstEnergy's] decision to purchase RECs was generally not available. Further, the record demonstrates that other states had experienced significantly higher REC prices in the first few years after enactment of a state renewable energy portfolio standard, and that the prices paid for the RECs were within the range predicted by [FirstEnergy's] consultant.

In re FE Renewable Energy Credits (Opinion and Order at 21) (Aug. 7, 2013) (internal citations omitted), FE App. at 29. The market conditions persisting at the time of RFP1 carried over to RFP2 (October 2009). Remarking on this similarity, the Commission noted "there is no evidence in the record of a significant change in the amount of market information available between August 2009 and October 2009." *Id.* at 24, FE App. at 32.

The market information that was known to FirstEnergy during the time of RFP1 and RFP2 starkly contrasts with what was known to it during RFP3 (August 2010). Unlike in RFP1 and RFP2, the market during RFP3 was showing signs of relief. As noted before, FirstEnergy's consultant, Navigant, was projecting expiration of the 12 month constrained time frame and other Ohio utilities were meeting their in-state benchmarks. *Id.* at 25, FE App. at 33; FirstEnergy Ex. 2 at 35, FE Supp. I at 48. Given the disparity in market conditions between RFP1 and RFP2 versus RFP3, it is therefore inaccurate to suggest that the Commission acted inconsistently by disallowing 2011 vintage RECs that were secured in August 2010 but not in disallowing others.

FirstEnergy argues that, if it was reasonable in 2009 to ladder-in credits for 2011 then it was reasonable in 2010 to ladder-in credits for 2011 too. But this argument only works if market conditions remain static. As just noted, market conditions were expected to change, that is, improve in the near term.

However, FirstEnergy failed to follow its own laddering strategy when it decided to secure the balance (85%) of its 2011 compliance obligation in August of 2010. The imprudence of this decision is thrown into sharp relief given the existence of three future RFPs that FirstEnergy could have used to spread out its purchases during a time when market constraints were expected to ease.

FirstEnergy next faults the methodology used by the Commission in making the offset calculation to the disallowance. Tellingly, FirstEnergy points to no authority requiring the Commission to have performed the calculation differently, but it nonetheless claims the math is wrong. It cannot cite any authority because the Commission has not been given specific guidance on how to perform the calculation.[11] This absence of authority highlights the heavy burden that FirstEnergy must carry to show error. "When a statute does not prescribe a particular formula, the PUCO is vested with broad discretion." *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 25. *See also In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 68 ("Any lack of statutory guidance on that point should be read as a grant of discretion."). The

[11] Under the terms of the stipulation, FirstEnergy is authorized to recover only its prudently incurred costs. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 22) (Dec. 18, 2013), FE App. at 67. This necessarily means that the Commission is authorized to disallow FirstEnergy's imprudently incurred costs. The stipulation does not expound further on what constitutes imprudence in the REC-procurement setting.

Court defers to the Commission on discretionary decisions. *In re Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, ¶ 27.

In FirstEnergy's view, the Commission's methodology is wrong because the offset price is not a fair measure of what could have been purchased at the time to secure the 145,269 credits for 2011-compliance purposes. The only price available to secure the 145,269 credits, according to FirstEnergy, was the negotiated price. Thus, it was unreasonable to use the price associated with the purchase of the lesser-priced 5,000 credits as an offset. Properly understood, this argument is really just a thinly-veiled way of saying that because of the difficulties involved in coming up with an offset price, there should be no offset at all. In reality, however, the Commission would have been justified in allowing *no* recovery for these RECs because it was imprudent for FirstEnergy to purchase when it did, knowing what it did.

But just because the Commission could not travel back in time to re-bid the RECs to determine a prudent price does not mean that the offset should be set aside entirely as FirstEnergy advocates. Given the lack of other viable options or statutory criteria to decide the appropriate level of the offset, the Commission reasonably exercised its discretion and used, as a logical measuring stick, the price paid to secure the 5,000 credits through RFP3. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 25-26) (Dec. 18, 2013), FE App. at 70-71. In doing so, the Commission recognized that there was *some* level of prudency embodied in the negotiated price to secure the 145,269 credits. But because this level could not be precisely identified, the Commission relied on the best measure it had available, the price of a contemporaneous credit purchase which was prudent. *Id.* at 26, FE App. at 71.

In sum, by tying the offset price to the price paid for the 5,000 credits the Commission stayed within the bounds of its discretion, and properly balanced competing interests. This discretionary decision deserves deference from this Court. *In re Columbus S. Power Co.*, 2011-Ohio-2383, ¶ 27.

Proposition of Law No. III:

> **"Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant."** ***Ohio Contract Carriers Ass'n v. Pub. Util. Comm.,*** **140 Ohio St. 160, 42 N.E. 2d 758 (1942).**

In its final argument, FirstEnergy contends that the Commission improperly concluded that the three percent provision in R.C. 4928.64(c)(3) is a mandatory limit. The Commission actually did no such thing. The Commission simply stated that, if a company reached that level, "it should not incur any additional compliance costs for that year *absent Commission direction.*" *In re FE Renewable Energy Credits* (Opinion and Order at 34) (Aug. 7, 2013), FE App. at 42 (emphasis added). Thus, the Commission has not yet decided whether a company can exceed the three percent level. This issue is not ripe for review by the Court.

Moreover, FirstEnergy has not shown that it would be harmed by the three-percent test, even if the Commission determined it was mandatory. The three-percent calculation had no bearing on the Commission's partial disallowance of costs in this case. Therefore, FirstEnergy can not demonstrate harm from this part of the Commission order.

It is well-settled that this Court will not reverse an order of the Commission on the basis of an error that did not prejudice the party seeking reversal. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St. 2d 335, 335, 402 N.E.2d 1175 (1980) Indeed, this Court "will not reverse an order of the commission . . . without a showing of concomitant harm or prejudice." *Ohio Commt. Of Cent. Station Elec. Protection Assn. v. Pub. Util. Comm.*, 50 Ohio St. 2d 169, 174, 364 N.E.2d 3 (1977); *see also Worthington Hills Civic Assn. v. Pub. Util. Comm.*, 45 Ohio St.2d 11, 12-13, 340 N.E.2d 411 (1976). To pursue an appeal the appellant must demonstrate a present, immediate, pecuniary interest and the appellant here has none. *See E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 295, 530 N.E.2d 875 (1988).

FirstEnergy asks the Court to decide an issue that the Commission has not yet addressed and which has not yet had any impact upon FirstEnergy. This Court does not indulge itself in advisory opinions, *Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982), and it should decline the invitation to do so here.

CONCLUSION

The Commission approved an adjustable rate and it adjusted that rate to disallow excessive costs that FirstEnergy attempted to foist upon its customers. The rider is not an automatic pass-through of all costs, as FirstEnergy incorrectly posits; rather, cost recovery is subject to periodic, ongoing Commission review to ensure that the tab customers are asked to pay is just and reasonable.

The Commission's order is lawful, supported by the evidence, and should be affirmed.

Respectfully submitted,

Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief

Thomas G. Lindgren

Thomas G. Lindgren (0039210)
Counsel of Record
Ryan P. O'Rourke (0082651)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
thomas.lindgren@puc.state.oh.us
ryan.orourke@puc.state.oh.us

Counsel for Appellee,
The Public Utilities Commission of Ohio

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 22nd day of October, 2014.

Thomas G. Lindgren
Assistant Attorney General

Parties of Record:

David A. Kutik
Lydia M. Floyd
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114

Edmund Berger
Michael Schuler
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

Bradley Klein
Environmental Law & Policy Center
135 East Wacker Drive, Suite 1600
Chicago, IL 60601

James W. Burk
Carrie M. Dunn
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

Mark R. Weaver
Isaac, Wiles, Burkholder & Teetor
Two Miranova, 7th Floor
Columbus, Ohio 43215

APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

4928.01 [Effective Until 9/12/2014] Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

4928.64 [Effective Until 9/12/2014] Electric distribution utility to provide electricity from alternative energy resources.

(A)

(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; a renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or a mercantile customer-sited advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division (A)(2)(c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(a) A resource that has the effect of improving the relationship between real and reactive power;

(b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;

(e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)

(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)

(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing all of the following:

(a) The compliance of electric distribution utilities and electric services companies with division (B) of this section ;

(b) The average annual cost of renewable energy credits purchased by utilities and companies for the year covered in the report;

(c) Any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts.

The commission shall begin providing the information described in division (D)(1)(b) of this section in each report submitted after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

1.49 Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of The 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code.	)	Case No. 09-1922-EL-ACP

FINDING AND ORDER

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) Section 4928.64(B), Revised Code, establishes benchmarks for electric utilities to acquire a portion of the electric utility's standard service offer from renewable energy resources. Specifically, the statute provides that, for 2009, a portion of the electric utility's electricity supply for its standard service offer must come from alternative energy sources, including 0.004 percent from solar energy resources (SER); this requirement increases to 0.010 percent for 2010.

(3) On December 8, 2010, as corrected on March 9, 2010, FirstEnergy filed an application, requesting that the Commission make a force majeure determination regarding its 2009 SER benchmark and reduce the three electric utilities' aggregate SER benchmark to the level of solar renewable energy credits (SRECs) actually obtained by FirstEnergy.

(4) Motions to intervene in this proceeding have been filed by the Ohio Environmental Council (OEC), the Environmental Law and Policy Center (ELPC), Industrial Energy Users-Ohio (IEU-Ohio),

efforts to reduce the owners' existing carbon footprints. Further, FirstEnergy claims that there is less than 5 MW of solar generation presently available in contiguous states.

Finally, FirstEnergy represents that it considered the potential of long-term contracts as a compliance option. However, NCI determined that there were no long-term contracts available to meet the 2009 SER benchmark.

(7) On March 9, 2010, OCC, OEC, ELPC, Citizen Power, The Vote Solar Initiative, and The Solar Alliance filed comments in opposition to FirstEnergy's application.

(8) Upon review of the application and the other filings in this proceeding and recognizing the limited time available for the development of new solar energy resources to meet the statutory standard in its first year, the Commission finds that FirstEnergy's application is reasonable and should be granted. Section 4928.64(C)(4), Revised Code, authorizes the Commission to determine whether an insufficient quantity of renewable energy resources was reasonably available in the market to facilitate an electric utility's compliance with the statutory benchmarks. The statute further provides that the Commission shall consider the electric utility's good faith effort to acquire sufficient renewable energy resources to comply with the benchmark and the availability of renewable energy resources in Ohio or other jurisdictions within PJM Interconnection, L.L.C., or the Midwest Independent Transmission System Operator.

The Commission notes that FirstEnergy conducted two RFPs through a third-party RFP manager and did not obtain sufficient SRECs to meets its 2009 benchmark. FirstEnergy also established a residential REC purchase program to encourage residential customers to install renewable energy resources, including solar power. Under this program, FirstEnergy will purchase RECs generated from a customer's approved renewable energy project over a 15-year contract term. However because the program was not effective until late 2009, it has not generated SRECs with a 2009 vintage. FirstEnergy further explored long term contracts and determined that no long term contracts were available to meet the 2009 SER benchmark. Moreover, FirstEnergy represents that there were insufficient solar resources installed in Ohio to meet its 2009 SER benchmark.

ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

GAP/dah

Entered in the Journal

MAR 1 0 2010

Reneé J. Jenkins
Secretary

(O) "Electric services company" shall have the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.

(P) "Electric utility" as used in this chapter shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(Q) "Electric utility call center" means an office or department or any third party contractor of an electric utility designated to receive customer calls.

(R) "Fraudulent act" means an intentional misrepresentation or concealment by the customer or consumer of a material fact that the electric utility relies on to its detriment. Fraudulent act does not include tampering.

(S) "Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years.

(T) "Major event" encompasses any calendar day when an electric utility's system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 3.5 of standard 1366-2012 adopted by the institute of electrical and electronics engineers (IEEE) in "IEEE Guide for Electric Power Distribution Reliability Indices." The threshold will be calculated by determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility's daily SAIDI performance during the most recent five-year period. The computation for a major event requires the exclusion of transmission outages. For purposes of this definition, the SAIDI shall be determined in accordance with paragraph (C)(3)(e)(iii) of rule 4901:1-10-11 of the Administrative Code.

(U) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(V) "Momentary interruption" means an interruption of electric service with a duration of five minutes or less.

(W) "Outage coordinator" means the commission's service monitoring and enforcement department director or the director's designee.

(X) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(Y) "Postmark" means a mark, including a date, stamped or imprinted on a piece of mail which services to record the date of its mailing, which in no event shall be earlier than the date on which the item is actually deposited in the mail. For electronic mail, postmark means the date the electronic mail was transmitted.

(2) At least half of the electricity supplied from alternative energy resources shall be generated from renewable energy resources, including solar energy resources, in accordance with the following annual benchmarks:

Annual benchmarks for alternative energy resources generated from renewable and solar energy resources

By end of year:	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.01%
2011	1.0%	0.03%
2012	1.5%	0.06%
2013	2.0%	0.09%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.30%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each year thereafter	12.5%	0.50%

(a) At least half of the annual renewable energy resources, including solar energy resources, shall be met through electricity generated by facilities located in this state. Facilities located in the state shall include a hydroelectric generating facility that is located on a river that is within or bordering this state, and wind turbines located in the state's territorial waters of Lake Erie.

(1) Baseline for the current and future calendar years.

(2) Supply portfolio projection, including both generation fleet and power purchases.

(3) A description of the methodology used by the company to evaluate its compliance options.

(4) A discussion of any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments.

4928.01 [Effective Until 9/12/2014] Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

4928.64 [Effective Until 9/12/2014] Electric distribution utility to provide electricity from alternative energy resources.

(A)

(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; a renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or a mercantile customer-sited advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division (A)(2)(c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(a) A resource that has the effect of improving the relationship between real and reactive power;

(b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;

(e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such an advanced energy resource or a renewable energy resource.

(B) By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract. That portion shall equal twenty-five per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the commission may reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in this state.

Of the alternative energy resources implemented by the subject utility or company by 2025 and thereafter:

(1) Half may be generated from advanced energy resources;

(2) At least half shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

By end of year	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.010%
2011	1%	0.030%
2012	1.5%	0.060%
2013	2%	0.090%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.3%
2020	8.5%	0.34%

2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)

(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more. The cost of compliance shall be calculated as though any exemption from taxes and assessments had not been granted under section 5727.75 of the Revised Code.

(4)

(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) 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.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The

commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)

(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing all of the following:

(a) The compliance of electric distribution utilities and electric services companies with division (B) of this section ;

(b) The average annual cost of renewable energy credits purchased by utilities and companies for the year covered in the report;

(c) Any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts.

The commission shall begin providing the information described in division (D)(1)(b) of this section in each report submitted after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

1.49 Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of The 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code.	)	Case No. 09-1922-EL-ACP

FINDING AND ORDER

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) Section 4928.64(B), Revised Code, establishes benchmarks for electric utilities to acquire a portion of the electric utility's standard service offer from renewable energy resources. Specifically, the statute provides that, for 2009, a portion of the electric utility's electricity supply for its standard service offer must come from alternative energy sources, including 0.004 percent from solar energy resources (SER); this requirement increases to 0.010 percent for 2010.

(3) On December 8, 2010, as corrected on March 9, 2010, FirstEnergy filed an application, requesting that the Commission make a force majeure determination regarding its 2009 SER benchmark and reduce the three electric utilities' aggregate SER benchmark to the level of solar renewable energy credits (SRECs) actually obtained by FirstEnergy.

(4) Motions to intervene in this proceeding have been filed by the Ohio Environmental Council (OEC), the Environmental Law and Policy Center (ELPC), Industrial Energy Users-Ohio (IEU-Ohio),

Ohio Energy Group (OEG) and the Office of the Ohio Consumers' Counsel (OCC), Citizen Power, Inc. (Citizen Power), The Vote Solar Initiative, and The Solar Alliance.

No party opposed the motions to intervene. The Commission finds that the motions to intervene are reasonable and should be granted.

(5) On February 26, 2010, a motion for admission *pro hac vice* was filed on behalf of Theodore S. Robinson. The Commission finds that this motion is reasonable and should be granted.

(6) In its application, FirstEnergy claims that, in the stipulation approved by the Commission in its electric security plan (ESP) proceeding, the signatory parties agreed that, as authorized by Section 4928.65, Revised Code the Companies' renewable energy resource requirements for the period of January 1, 2009, through May 31, 2011, would be met using an RFP process to obtain renewable energy credits (RECs). *In re FirstEnergy*, Case Nos. 08-935-EL-SSO, et al., Second Opinion and Order (March 25, 2009) at 9. FirstEnergy claims that it requires an aggregate 1,885 SRECs to meet its 2009 SER benchmark. Each SREC is equivalent to 1 MWh of electricity derived from solar energy resources.

FirstEnergy represents that it sponsored two separate RFPs for SRECs. These RFPs were managed by Navigant Consulting, Inc., (NCI). FirstEnergy states that NCI solicited SRECs from both facilities within Ohio and resources in states contiguous to Ohio. Banked SRECs were eligible for the solicitations provided they were produced after July 31, 2008. NCI conducted the first RFP in July 2009 and received no bids for SRECs. NCI conducted the second RFP in September 2009 and received bids for 49 SRECs, all from resources in states contiguous to Ohio. No bids for SRECs were received from facilities located in Ohio. FirstEnergy agreed to purchase all SRECs offered; however, this resulted in a per company deficit of SRECs needed to satisfy the 2009 SER benchmark of 814 for OE, 669 for CEI and 353 for TE.

FirstEnergy argues that the limited number of SREC bidders is consistent with the market availability of SRECs in Ohio and contiguous states. According to FirstEnergy, as of July 2009, there was less than 1 MW of solar generation capacity installed in Ohio, some of which was already committed to long-term contracts or efforts to reduce the owners' existing carbon footprints. Further, FirstEnergy claims that there is less than 5 MW of solar generation presently available in contiguous states.

Finally, FirstEnergy represents that it considered the potential of long-term contracts as a compliance option. However, NCI determined that there were no long-term contracts available to meet the 2009 SER benchmark.

(7) On March 9, 2010, OCC, OEC, ELPC, Citizen Power, The Vote Solar Initiative, and The Solar Alliance filed comments in opposition to FirstEnergy's application.

(8) Upon review of the application and the other filings in this proceeding and recognizing the limited time available for the development of new solar energy resources to meet the statutory standard in its first year, the Commission finds that FirstEnergy's application is reasonable and should be granted. Section 4928.64(C)(4), Revised Code, authorizes the Commission to determine whether an insufficient quantity of renewable energy resources was reasonably available in the market to facilitate an electric utility's compliance with the statutory benchmarks. The statute further provides that the Commission shall consider the electric utility's good faith effort to acquire sufficient renewable energy resources to comply with the benchmark and the availability of renewable energy resources in Ohio or other jurisdictions within PJM Interconnection, L.L.C., or the Midwest Independent Transmission System Operator.

The Commission notes that FirstEnergy conducted two RFPs through a third-party RFP manager and did not obtain sufficient SRECs to meets its 2009 benchmark. FirstEnergy also established a residential REC purchase program to encourage residential customers to install renewable energy resources, including solar power. Under this program, FirstEnergy will purchase RECs generated from a customer's approved renewable energy project over a 15-year contract term. However because the program was not effective until late 2009, it has not generated SRECs with a 2009 vintage. FirstEnergy further explored long term contracts and determined that no long term contracts were available to meet the 2009 SER benchmark. Moreover, FirstEnergy represents that there were insufficient solar resources installed in Ohio to meet its 2009 SER benchmark.

Therefore, we find that there was an insufficient quantity of solar energy resources reasonably available in the market and that FirstEnergy has presented sufficient grounds for the Commission to reduce the three electric utilities' aggregate 2009 SER benchmark to the level of SRECs acquired through FirstEnergy's 2009 RFP process. The Commission also notes that, although the stipulation in the ESP proceeding envisions that FirstEnergy's renewable energy resource requirements will be met using an RFP process to obtain RECs, FirstEnergy is responsible for meeting the statutory SER benchmarks through all means available, if the RFP proves not to be a viable means to meet the statutory requirement. Further, pursuant to Section 4928.64(C)(4)(c), Revised Code, our approval of FirstEnergy's application is contingent upon FirstEnergy meeting revised 2010 SER benchmarks, which shall be increased to include the shortfall for the 2009 SER benchmarks.

(9) Furthermore, pursuant to the entry issued on November 12, 2009, in Case No. 08-888-EL-ORD, the Commission finds that this case, which was originally docketed as Case No. 09-1922-EL-EEC, is more appropriately docketed with the ACP purpose code, as it specifically addresses alternative energy portfolio compliance. Accordingly, Case No. 09-1922-EL-EEC should be designated as Case No. 09-1922-EL-ACP.

It is, therefore,

ORDERED, That FirstEnergy's application, as corrected, be granted. It is, further,

ORDERED, That FirstEnergy's 2010 SER benchmarks be increased as set forth in Finding (8). It is, further,

ORDERED, That the motions to intervene filed by OEC, ELPC, IEU-Ohio, OEG, OCC, Citizen Power, The Vote Solar Initiative, and The Solar Alliance be granted. It is, further,

ORDERED, That the motion for admission *pro hac vice* submitted on behalf of Theodore S. Robinson be granted. It is, further, ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

GAP/dah

Entered in the Journal

MAR 1 0 2010

Reneé J. Jenkins
Secretary

4901:1-10-01 Definitions.

As used in this chapter:

(A) "Advanced meter" means any electric meter that meets the pertinent engineering standards using digital technology and is capable of providing two-way communications with the electric utility to provide usage and/or other technical data.

(B) "Advanced meter opt-out service" means a service provided by an electric utility under the terms and conditions of a commission-approved tariff, which allows a customer to take electric distribution service using a traditional meter.

(C) "Applicant" means a person who requests or makes application for service.

(D) "Commission" means the public utilities commission of Ohio.

(E) "Competitive retail electric service provider" or "CRES" means a provider of competitive retail electric service, subject to certification under section 4928.08 of the Revised Code.

(F) "Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period for services from both an electric utility and a competitive retail electric service provider.

(G) "Consumer" means any person who receives service from an electric utility or a competitive retail electric service provider.

(H) "Critical customer" means any customer or consumer on a medical or life-support system who has provided appropriate documentation to the electric utility that an interruption of service would be immediately life-threatening.

(I) "Customer" means any person who has an agreement, by contract and/or tariff with an electric utility or by contract with a competitive retail electric service provider, to receive service.

(J) "Customer energy usage data" means data collected from a customer's meter, which is identifiable to a retail customer.

(K) "Customer premises" means the residence(s), building(s), or office(s) of a customer.

(L) "Director of the service monitoring and enforcement department" means the director of the service monitoring and enforcement department of the commission or the director's designee.

(M) "Electric distribution utility" or "EDU" shall have the meaning set forth in division (A)(6) of section 4928.01 of the Revised Code.

(N) "Electric light company" shall have the meaning set forth in division (A)(4) of section 4905.03 of the Revised Code.

(O) "Electric services company" shall have the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.

(P) "Electric utility" as used in this chapter shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(Q) "Electric utility call center" means an office or department or any third party contractor of an electric utility designated to receive customer calls.

(R) "Fraudulent act" means an intentional misrepresentation or concealment by the customer or consumer of a material fact that the electric utility relies on to its detriment. Fraudulent act does not include tampering.

(S) "Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years.

(T) "Major event" encompasses any calendar day when an electric utility's system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 3.5 of standard 1366-2012 adopted by the institute of electrical and electronics engineers (IEEE) in "IEEE Guide for Electric Power Distribution Reliability Indices." The threshold will be calculated by determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility's daily SAIDI performance during the most recent five-year period. The computation for a major event requires the exclusion of transmission outages. For purposes of this definition, the SAIDI shall be determined in accordance with paragraph (C)(3)(e)(iii) of rule 4901:1-10-11 of the Administrative Code.

(U) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(V) "Momentary interruption" means an interruption of electric service with a duration of five minutes or less.

(W) "Outage coordinator" means the commission's service monitoring and enforcement department director or the director's designee.

(X) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(Y) "Postmark" means a mark, including a date, stamped or imprinted on a piece of mail which services to record the date of its mailing, which in no event shall be earlier than the date on which the item is actually deposited in the mail. For electronic mail, postmark means the date the electronic mail was transmitted.

(Z) "Renewable energy credit" means the fully aggregated attributes associated with one megawatt hour of electricity generated by a renewable energy resource as defined in division (A)(35) of section 4928.01 of the Revised Code.

(AA) "Slamming" means the transfer of or requesting the transfer of a customer's competitive electric service to another provider without obtaining the customer's consent.

(BB) "Staff" means the commission staff or its authorized representative.

(CC) "Sustained outage" means the interruption of service to a customer for more than five minutes.

(DD) "Tampering" means to interfere with, damage, or by-pass a utility meter, conduit, or attachment with the intent to impede the correct registration of a meter or the proper functions of a conduit or attachment so far as to reduce the amount of utility service that is registered on or reported by the meter. Tampering includes the unauthorized reconnection of a utility meter, conduit, or attachment that has been disconnected by the utility.

(EE) "Time differentiated rates" means rates that vary from one time period to another, such as hourly, daily, or seasonally.

(FF) "Traditional meter" means any meter with an analog or digital display that does not have the capability to communicate with the utility using two-way communications.

(GG) "Transmission outage" means an outage involving facilities that would be included in rate setting by the federal energy regulation commission.

(HH) "Universal service fund" means a fund established pursuant to section 4928.51 of the Revised Code, for the purpose of providing funding for low-income customer assistance programs, including the percentage of income payment plan program, customer education, and associated administrative costs.

(II) "Voltage excursions" are those voltage conditions that occur outside of the voltage limits as defined in the electric utility's tariffs and are beyond the control of the electric utility.

4901:1-40-03 Requirements.

(A) All electric utilities and affected electric services companies shall ensure that, by the end of the year 2024 and each year thereafter, electricity from alternative energy resources equals at least twenty-five per cent of their retail electric sales in the state.

(1) Up to half of the electricity supplied from alternative energy resources may be generated from advanced energy resources.

(2) At least half of the electricity supplied from alternative energy resources shall be generated from renewable energy resources, including solar energy resources, in accordance with the following annual benchmarks:

Annual benchmarks for alternative energy resources generated from renewable and solar energy resources

By end of year:	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.01%
2011	1.0%	0.03%
2012	1.5%	0.06%
2013	2.0%	0.09%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.30%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each year thereafter	12.5%	0.50%

(a) At least half of the annual renewable energy resources, including solar energy resources, shall be met through electricity generated by facilities located in this state. Facilities located in the state shall include a hydroelectric generating facility that is located on a river that is within or bordering this state, and wind turbines located in the state's territorial waters of Lake Erie.

(b) To qualify towards a benchmark, any electricity from renewable energy resources, including solar energy resources, that originates from outside of the state must be shown to be deliverable into this state.

(3) All costs incurred by an electric utility in complying with the requirements of section 4928.64 of the Revised Code, shall be avoidable by any consumer that has exercised choice of electricity supplier, during such time that a customer is served by an electric services company.

(B) The baseline for compliance with the alternative energy resource requirements shall be determined using the following methodologies:

(1) For electric utilities, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold under its standard service offer to any and all retail electric customers whose electric load centers are served by that electric utility and are located within the electric utility's certified territory. The calculation of the baseline shall be based upon the average, annual, kilowatt-hour sales reported in that electric utility's three most recent forecast reports or reporting forms.

(2) For electric services companies, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold to any and all retail electric consumers served by the company in the state, based upon the kilowatt-hour sales in the electric services company's most recent quarterly market-monitoring reports or reporting forms.

(a) If an electric services company has not been continuously supplying Ohio retail electric customers during the preceding three calendar years, the baseline shall be computed as an average of annual sales data for all calendar years during the preceding three years in which the electric services company was serving retail customers.

(b) For an electric services company with no retail electric sales in the state during the preceding three calendar years, its initial baseline shall consist of a reasonable projection of its retail electric sales in the state for a full calendar year. Subsequent baselines shall consist of actual sales data, computed in a manner consistent with paragraph (B)(2)(a) of this rule.

(3) An electric utility or electric services company may file an application requesting a reduced baseline to reflect new economic growth in its service territory or service area. Any such application shall include a justification indicating why timely compliance based on the unadjusted baseline is not feasible, a schedule for achieving compliance based on its unadjusted baseline, quantification of a new change in the rate of economic growth, and a methodology for measuring economic activity, including objective measurement parameters and quantification methodologies.

(C) Beginning in the year 2010, each electric utility and electric services company annually shall file a plan for compliance with future annual advanced- and renewable-energy benchmarks, including solar, utilizing at least a ten-year planning horizon. This plan, to be filed by April fifteenth of each year, shall include at least the following items:

(1) Baseline for the current and future calendar years.

(2) Supply portfolio projection, including both generation fleet and power purchases.

(3) A description of the methodology used by the company to evaluate its compliance options.

(4) A discussion of any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments.