

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**FOURTH MERIT BRIEF  
OF APPELLEE/CROSS-APPELLANT  
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## **I. INTRODUCTION**

In this Reply, the Office of the Ohio Consumers' Counsel ("OCC") addresses its two issues on cross-appeal: (1) the Public Utilities Commission of Ohio ("PUCO") erred when it prevented public disclosure of certain renewable energy credit ("renewables" or "RECs") bidding information, and (2) the PUCO erred in misapplying the burden of proof. Specifically, the PUCO kept secret the identity of the supplier of the high-priced renewable energy credits ("RECs" or "renewables") that Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively "FirstEnergy" or "the Utility") purchased, the prices FirstEnergy paid to that supplier, and the total amount of REC purchases that OCC recommended be disallowed by the PUCO. The PUCO's decision to prevent this information from being publicly disclosed was unlawful and unreasonable. That information was not trade secret information as defined by R.C. 1333.61.

The PUCO also erred by applying a presumption to the Utility's REC purchases. But even if such a presumption was appropriate, the PUCO impermissibly shifted the burden of proof from FirstEnergy to the Staff of the PUCO ("Staff") and other Intervenors, including OCC. OCC respectfully requests that this Court find that the PUCO acted unlawfully and unreasonably when it presumed that FirstEnergy's expenditures were prudent. Further, OCC asks this Court to rule that in all utility rate matters such as the Audit Proceeding presently under review, the burden of proof does not shift from a utility to an intervening party at any point in the proceeding.

## II. STATEMENT OF THE FACTS AND CASE

A complete statement of the facts and case, including the pertinent procedural history, is included in the Merit Brief of the Appellee/Cross-Appellant, the Office of the Ohio Consumers' Counsel ("OCC 2<sup>nd</sup> Br."), filed in this proceeding on October 23, 2014.

## III. ARGUMENT

### **PROPOSITION OF LAW NO. 1: The PUCO's Decision to Prevent Public Disclosure of Information that Does Not Constitute a Trade Secret under R.C. 1333.61 and R.C. 149.43 is Against the Manifest Weight of the Evidence (responding to PUCO Proposition of Law No. I and FirstEnergy Proposition of Law No. 4).**

FirstEnergy and the PUCO contend that the PUCO's decision to prevent disclosure of portions of the Exeter Audit Report was supported by the manifest weight of the evidence. (*See*, FirstEnergy Third Merit Brief at 40-43 (December 4, 2014) ("FE 3<sup>rd</sup> Br."); PUCO's Third Merit Brief at 6-8 (December 3, 2014) ("PUCO 3<sup>rd</sup> Br.")). Despite their contentions, the evidence demonstrates that the information over which the PUCO granted confidential treatment does not constitute trade secret information under Ohio statutes, regulations, or common law. (*See*, FE 3<sup>rd</sup> Br. at 40-41). Accordingly, the PUCO's decision was not supported by competent, credible evidence. The information that FirstEnergy claims as trade secret does not satisfy the two prongs set forth in R.C. 1333.61(D). This information is generally known and readily ascertainable, thereby losing any purported independent economic value. And FirstEnergy did not make reasonable efforts to maintain its secrecy. Additionally, the information fails to satisfy the six-factor test adopted by this Court to examine whether information should be classified as a trade secret in *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-25, 687 N.E.2d 661. Accordingly, the information is not trade secret by the very definition set forth in the statute.

Contrary to the PUCO and FirstEnergy's characterizations, when applying the facts of the case to the *Plain Dealer* criteria, it is apparent that the information does not merit trade secret protection. First, while FirstEnergy asserts that the REC bidding information was not widely known inside the business or outside of the business (FE 3<sup>rd</sup> Br. at 44), FirstEnergy ignores that the renewables bidding information was widely publicly disseminated. As set forth in OCC's Second Merit Brief in this matter, specific supplier pricing and identities were described in the public Exeter Audit Report and reported in a number of news media outlets, including *The Plain Dealer*. (R. 74 at Ex. 2 & Ex. 3, OCC Supp. at 291-93). The public reporting of facts specific to this case in newspapers of general circulation supports the argument that the information is widely known outside of the business. Since the information is widely known outside of the business, logic also dictates that it is widely known inside of the business.

With respect to the third factor, rather than admit failure to adequately safeguard the secrecy of the REC pricing information, FirstEnergy instead blames the PUCO for publicly releasing the Exeter Audit Report with information that the Utilities considered to be trade secret information. Although portions of the Exeter Audit Report, filed in the PUCO's docket on August 15, 2012, were redacted, the report publicly divulged the identity of suppliers and included a key finding relaying pricing information. (R. 18 at iv, 28, FE Supp. at 105, 134). Despite the fact that this alleged trade secret information was included in the report, FirstEnergy did not take "active steps' necessary to maintain the secrecy of their information." (FE 3<sup>rd</sup> Brief at 44-45; PUCO 3<sup>rd</sup> Br. at 7-8). FirstEnergy is a sophisticated participant in PUCO proceedings and is charged with knowing the applicable rules and regulations. (FE 3<sup>rd</sup> Brief at 1-5). Yet, FirstEnergy did not contemporaneously file a motion for a protective order, as prescribed by O.A.C. 4901-1-24 (OCC Appx. 306) when the Exeter Audit report was filed on August 15, 2012.

Instead, FirstEnergy waited to file a motion for protective order with the PUCO until October 3, 2012. (R. 24, OCC Supp. at 212-21). Certainly FirstEnergy was aware that the Exeter Audit Report was publicly filed. But rather than reviewing the document to adequately safeguard the information it claims to be trade secret, FirstEnergy filed a Motion for Protective Order 49 days after it first appeared on the PUCO's Docketing Information System.

FirstEnergy's failure to file a motion for protection for almost two months after the report was initially filed should be construed by this Court as a disavowal of the alleged proprietary nature of any information, and a waiver of its ability to seek such treatment. The information also fails to satisfy the spirit of the rule, including the Commission's own directive to "minimize the amount of information protected from public disclosure." (OCC Appx. 306). Accordingly, any statement that "[t]he Companies went to great lengths to keep the information confidential during and after the RFPs" is without merit. (FE 3<sup>rd</sup> Br. at 44). The purportedly confidential information was subsequently filed with a public agency and disseminated by the media while FirstEnergy took no action to protect it for 49 days.

To satisfy the fourth prong of the *Plain Dealer* test, FirstEnergy relies on a non-specific letter from a consultant asserting that disclosure of bidders and their bids will have an effect on market participation. Contrary to the PUCO assertions otherwise, however, this letter is not actual record evidence, the type of which the Court will defer to the PUCO. (PUCO 3<sup>rd</sup> Br. at 8). And without more information, without specific details as to type of data and time frames of disclosure that will negatively affect the market, and without subjecting the letter to cross examination, Mr. Bradley's letter fails to satisfy the *Plain Dealer* criteria. In fact, the record is void of any evidence that demonstrates that the REC bidding information for 2009 and 2010 purchases derives economic value today.

Moreover, even though the 2009 and 2010 bidder identity and pricing information is not FirstEnergy's information, no other entity objected to the release of the information. Specifically, the entities that are the subject of the nondisclosure request (i.e., the identity of the third-party bidders or suppliers who offered the bids and REC pricing) have not objected to the release of said information. (OCC Appx. at 96-99). Neither FirstEnergy nor the suppliers have explained or offered any evidence as to the economic value of the 2009 and 2010 bidding information. Nor have they explained the value of not having their 4-5 year old pricing and bidding information known to their competitors, the amount of money expended in obtaining and developing the bidding information (which is distinguishable from hiring a consultant to conduct an RFP as suggested by FirstEnergy), or the amount of time and expense it would take for others to acquire and duplicate the information as required by *Plain Dealer*. (See, FE 3<sup>rd</sup> Br. at 43-44 (FirstEnergy admits that it cannot quantify the amount of time or expense expended)). To the contrary, the REC pricing information that FirstEnergy seeks to protect is stale due to the amount of time that has transpired since the procurement process occurred.

Other than the conclusory assertions made by Mr. Bradley, there is no evidence in the record to demonstrate that information about pricing and bidder identities from 2009 through 2010 is competitively sensitive and will have an effect on future procurement processes. Contrary to the assertions of FirstEnergy (FE 3<sup>rd</sup> Br. at 41-42), bid prices do not reveal bidding strategies. Nor is there any evidence indicating that the competitive bids of 2013 and 2014 were harmed in any way when REC pricing information was publicly disseminated. In fact, there is no evidence in the record that even correlates information about bid pricing or offers made into the REC market, how many RECs were acquired, the terms and conditions of contracts, or any profits made by those suppliers/bidders. To the contrary, the record indicates that the renewables

market, which was once nascent, is remarkably different; thus, rendering the REC bidding information from four to five years ago antiquated and irrelevant.

FirstEnergy cites to the PUCO's decisions in *In re Alternative Energy Portfolio Status Report for 2011 of Ohio Power Co.*, Case No. 12-1212-EL-ACP, Finding and Order at 2 (July 30, 2014), *In the Matter of DPL Energy Resources, Inc.'s Annual Alternative Energy Portfolio Status Report*, Case No. 12-1205-EL-ACP, 2013 Ohio PUC LEXIS 265, at \*6-8 (Nov. 13, 2013), and *In the Matter of the Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Case No. 12-1223-EL-ACP, 2013 Ohio PUC LEXIS 251, at \*6-9 (Nov. 13, 2013) in support of its argument that the PUCO has granted trade secret protection to REC procurement information, even when it is several years old. (FE 3<sup>rd</sup> Br. at 44-45). FirstEnergy also cites the following cases loosely in support of its contention that the Commission may grant continued trade secret protection to information that is several years old: *Synergetics, Inc., v. Hurst*, 477 F.3d 949, 958 (8th Cir. 2007); *Encyclopedia Brown Prods. v. Home Box Office*, 26 F. Supp. 2d 606, 614 (S.D.N.Y.1998); and *Joint Stock Soc'y v. UDV N. Am., Inc.*, 104 F. Supp. 2d 390, 409 (D. Del. 2000). (Id.) Unlike the circumstances in the case *sub judice*, however, the information alleged to be trade secret in *Ohio Power*, *Dayton Power and Light*, *Dominion Retail*, *Synergetics*, *Encyclopedia Brown Prods.*, and *Joint Stock Soc'y* had not been disclosed through numerous public reports.

Moreover, the facts of these cases were much different and the information in each case still had significant economic value. In *Synergetics*, 477 F.3d at 958, 961, the 8<sup>th</sup> Circuit granted an injunction for two years following that company's 4-year development of a product. In *Encyclopedia Brown Prods.*, 26 F. Supp. at 614, that federal court in New York prohibited disclosure of detailed HBO business practices that were still in use. And in *Joint Stock Soc'y*,

104 F.Supp.2d at 409, the federal district court in Delaware found that flavored Vodka formulas are the “newest trend in the Vodka market” and “releasing the old recipes from seal would confer a windfall upon the defendants' competitors.” As the 8<sup>th</sup> Circuit stated in *Synergetics*, 477 F.3d at 958, “[d]etermination of when trade secret information becomes stale cannot be made by reference to a bright line rule and necessarily requires fact specific consideration.” Thus, these cases are distinguishable.

FirstEnergy also cites to *Public Citizen Health Research Group v. FDA*, 953 F. Supp. 400 (D.D.C. 1996) for the proposition that when protecting trade secret information, there is a distinction between voluntary disclosure - *i.e.*, “the escape of the information into the public domain ...[that] was due to a conscious choice by the party seeking to have the information’s dissemination halted” - and involuntary disclosure, “where the government inadvertently inserted.... information into the public domain.” (FE 3<sup>rd</sup> Br. at 49). As explained at length earlier, however, FirstEnergy was fully aware that the Audit Report, in some form, would be publicly filed. In fact, FirstEnergy reviewed the report prior to it being filed. (OCC 2<sup>nd</sup> Br. at 4). Yet, FirstEnergy chose not to file a motion for protective treatment immediately, instead waiting 49 days. And that was after the redacted information was sought in discovery. FirstEnergy is a sophisticated participant in PUCO proceedings and is well aware that protection of information claimed to be trade secret is necessarily accompanied by a motion for protective order at the PUCO. The fact that FirstEnergy chose not to file a motion for protective order immediately once the Exeter Audit Report was filed should be seen as an affirmative decision because the Utility could have moved quickly to correct any claimed “involuntary disclosure” by the PUCO. Thus, *Public Citizen Health Research Group* is not dispositive.

Furthermore, contrary to the PUCO's assertion, pricing and bidder information is not akin to the Coca-Cola formula; the reference is inapposite. (PUCO 3<sup>rd</sup> Br. at 7). Bidder identities, prices of commodities traded in a competitive market, and when and how much those bidders trade or sell RECs for in a competitive market are significantly affected by the passage of time and market conditions. This is clearly not analogous to a formula/recipe that remains constant and is not directly related to the changing conditions in the marketplace. (Id.). Just because a particular offer on a particular day to a particular buyer may not necessarily be publicly disclosed instantaneously, it is not a trade secret.

FirstEnergy did not adequately demonstrate the confidential nature of certain information it alleges to be trade secret information, for which the PUCO granted confidential treatment. The PUCO's decision to protect this information as trade secret information was against the manifest weight of the evidence. Similarly, FirstEnergy has not adequately demonstrated that public disclosure of the prices it paid for RECs half a decade ago would harm its future competitive bid processes, thereby causing that information to have some independent economic value. As stated previously, OCC acknowledges the need for confidentiality during the early stages of the REC procurement process, including the issuance of the RFP and receipt and acceptance of bids. However, there is no corresponding need to prevent disclosure of price and bidder identity long after the process is completed and the winning bidder has been selected and awarded the bid.

The PUCO also erroneously prevented public disclosure certain information contained in the testimony and exhibits of OCC witness Wilson Gonzalez. Specifically, the PUCO prevented disclosure of Mr. Gonzalez's recommendation that the PUCO disallow [REDACTED] of FirstEnergy's costs, including the \$43.3 million associated with 2011 vintage RECs that the PUCO disallowed. (R. 56 (conf.) at 34, OCC Supp. (conf.) at 82). FirstEnergy sought authority

from the PUCO to collect from its customers the costs associated with, inter alia, REC purchases. Common sense and notions of fairness dictate that consumers should be fully apprised of the costs that a utility intends to charge them. Hand-in-hand with this notion of fair play and disclosure, consumers should be fully apprised of any costs that interested parties, including those representing their interests, recommend that the Commission disallow. Thus, the total dollar amount that OCC witness Gonzales testified that FirstEnergy's customers should not have to pay should have been publicly disclosed.

The PUCO's decision to treat the identities of REC suppliers and the prices FirstEnergy paid for those renewables and passed on to customers as confidential was not supported by the manifest weight of the evidence. Nor did the evidence support its decision to exclude from the public domain OCC witness Gonzalez's recommended disallowance. OCC respectfully requests that this Court reverse the PUCO's decision on public disclosure of these items and instruct the Commission to order the information to be disclosed in the public record.

**PROPOSITION OF LAW NOS. 2 and 3: It is Unreasonable for the PUCO to Apply a Presumption of Prudence to a Utility's Payments to ██████████, and to Inappropriately Place the Burden of Proof for Demonstrating the Prudence of Utility Purchases on Staff and Intervenors (responding to PUCO Proposition of Law No. II and FirstEnergy Proposition of Law No. 3).**

Notwithstanding the fact that the costs at issue represented payments made by FirstEnergy to ██████████ for RECs at a price ██████████ than other market prices, the PUCO applied a presumption of prudence to FirstEnergy's REC expenditures. This practice is inappropriate, against the public interest, and violates Ohio law. The PUCO then compounded the problem by effectively shifting the burden of proof onto Staff and Intervenors even after the PUCO acknowledged that the presumption had been rebutted. OCC respectfully requests that this Court clarify that there is no presumption that a utility's costs are prudently incurred. Or, at a minimum, the Court should rule that such a presumption is inappropriate and constitutes

reversible error where the transactions involve dealings between a utility and [REDACTED]. In the alternative, OCC requests that the Court hold that the PUCO erroneously shifted the burden of proving that FirstEnergy's REC expenditures were prudent to Staff and Intervenors, and remand the matter for PUCO proceedings consistent with the Court's determination.

FirstEnergy contends that the presumption of prudence is part of the PUCO's "broad discretion in the conduct of its hearings." (FE 3<sup>rd</sup> Br. at 36; *see also*, PUCO 3<sup>rd</sup> Br. at 11). OCC recognizes that the PUCO has discretion in the conduct of its hearings. However, the PUCO does not have discretion to reassign the evidentiary burden among parties participating in a proceeding as it sees fit. Whereas the application of certain presumptions may merely procedurally or ministerially affect the conduct of a proceeding, application of a presumption of prudence in the instant matter represents a burden of proof issue, the propriety of which must be determined by the General Assembly or by this Court. The application of such a presumption of prudence by an administrative agency improperly shifts the evidentiary burden, which in this case, is ultimately supposed to reside with FirstEnergy. The application of a presumption of prudence is decidedly not, as FirstEnergy contends, "academic." (FE 3<sup>rd</sup> Br. at 37). It was error for the PUCO to apply a presumption of prudence to FirstEnergy's REC purchases. The PUCO's decision should be reversed accordingly.

To the extent this Court finds that a presumption of prudence applies to arms-length transactions, this Court should not permit the PUCO to adopt a presumption of prudent spending when the transactions represent dealings between a utility and [REDACTED]. The costs in the matter *sub judice* were the result of a transaction between FirstEnergy and [REDACTED]. FirstEnergy knew it was transacting with [REDACTED] and that undue preference existed or could potentially exist. (R. 52 at 12, FE

Supp. at 13; Tr. Vol. II (pub.) at 314-316, OCC Supp. at 121-123). But the PUCO improperly applied a presumption of prudence to FirstEnergy's decision to purchase high-priced RECs from

██████████.

The PUCO contends that the presumption of prudence is rooted in the understanding that the Commission should not micromanage a utility's day-to-day business judgments. (See, PUCO 3<sup>rd</sup> Br. at 11, citing *W. Ohio Gas Co. v Pub. Util. Comm.*, 128 Ohio St. 301, 318, 191 N.E. 105 (1934) (rev'd on other grounds, 294 U.S. 63 (1935))). But *W. Ohio Gas* did not establish a presumption of prudence and, in fact, found that the PUCO's disallowance of prohibitive charges for gas in a service area without competition was reasonable under the circumstances. *W. Ohio Gas*, 128 Ohio St. at 320, 191 N.E. at 113.

The PUCO also cites to its decision in *In re Syracuse Home Util. Co.*, Case No. 86-12-GA-GCR, 1986 Ohio PUC Lexis 1, \*21-22 (December 30, 1986) in support of its decision to apply a presumption of prudence in the instant matter. (PUCO 3<sup>rd</sup> Br. at 11-13). In *In Re Syracuse*, the PUCO noted that it believed "that assessments of the prudence of a utility's decision should be made in accordance with the \* \* \* *guidelines* suggested by the National Regulatory Research Institute (NRRI)." *Id.* at \*21 (Emphasis added). Although the guidelines suggest that "[t]here should exist a presumption that decisions of utilities are prudent[,]" the guidelines also state that the "standard of reasonableness under the circumstances should be used" when assessing the prudence of a utility's decisions. *Id.* Given the dubious circumstances under which the transactions took place, the Commission erroneously relied upon the NRRI guideline advanced in *In Re Syracuse*. In fact, another guideline (NARUC) strongly suggested that the presumption should not be applied. (See, OCC 2<sup>nd</sup> Brief at 24). Moreover, unlike the factual setting in *In Re Syracuse*, the transaction in question does not represent a run-of-the-mill

regulated utility transaction which should be insulated from scrutiny. Despite FirstEnergy's contention that OCC's argument is a "red herring," (FE 3<sup>rd</sup> Br. at 37) this very issue was decided by the Supreme Court of Missouri. Missouri's highest court found that no presumption of prudence should be applied to affiliate transactions. *Office of the Pub. Counsel v. Missouri Pub. Serv. Comm.*, 409 S.W.3d 371, 372 (Mo. 2013).

FirstEnergy inappropriately attempts to distinguish the Missouri case, by arguing that Ohio lacks a statute similar to the Missouri "statute prohibiting presumptions of prudence under such circumstances." (FE 3<sup>rd</sup> Br. at 37). To the contrary, Ohio has robust protections against the abuse of affiliate transactions. More importantly, however, the Missouri law (4 CSR 240-40.015 and 40.016) to which FirstEnergy refers "does not address the burden of proof at all." *Office of the Pub. Counsel v. Missouri Pub. Serv. Comm.*, 409 S.W.3d 371, 378 (Mo. 2013). To the contrary, the Missouri laws expressly do "not modify existing legal standards regarding which party has the burden of proof in commission proceeding." 4 CSR 240-40.015(6)(C); 4 CSR 240-40.016(6)(C). Moreover, FirstEnergy's attempt to diminish the importance of the *Missouri* case actually reveals the need for this Court to rule on the propriety of a presumption of prudence in utility proceedings and specifically those involving affiliate transactions. Further, the *Missouri* decision is well-reasoned and directly applicable to the facts under consideration in this case. It is strong persuasive authority upon which this Court may rely in this important matter of first instance.

Given the significant potential for impropriety inherent in affiliate transactions, this Court should follow the Missouri Supreme Court. Accordingly, this Court should decline to recognize any presumption of prudence where the transaction involves a public utility and its unregulated affiliate. These are the exact type of self-dealing transactions that the court in *Missouri* was

trying to prevent when it determined that a presumption of prudence should not be applied to affiliate transactions.

Even assuming that the PUCO acted appropriately when it initially presumed that FirstEnergy's decision to purchase RECs from ██████████ at elevated costs was prudent, the PUCO committed reversible error when it failed to shift the burden of production back to FirstEnergy after Staff and Intervenors successfully rebutted its prudence presumption. This caused the burden of proof to shift to the PUCO Staff and Intervenors even though the burden of proof "never leaves the party on whom it is originally cast." *State ex rel. Hardin v. Clermont Cty. Bd. Of Elections*, 134 Ohio St.3d 1451, 2012-Ohio-2569, 972 N.E.2d. 115, ¶ 23, citing 29 Am. Jur. 2d Evidence, §171 (2012). The PUCO contends that "following this Court's guidance and consistent with the terms that created Rider AER, the Commission placed the burden squarely on FirstEnergy to show that its REC-procurement costs were prudently incurred." (PUCO 3<sup>rd</sup> Br. at 9). The PUCO further contends that "[a]ll it did was shift the burden of going forward with evidence to Staff and the Intervenors." (Id.). But the language of the PUCO's decision tells a different story.

Notably, the PUCO found that "the Exeter Report was sufficient evidence to overcome the presumption that the Companies' management decisions were prudent as to the procurement of in-state all renewables [sic] RECs." (R. 109 at 21, FE Appx. at 29). With this finding, the burden of production should have dropped from the case. *Shephard v. Midland Mut. Life Ins. Co.*, 152 Ohio St.6, 15, 87 N.E.2d 156 (1949). Under this Court's precedent, the Utility was still charged with the burden of proving the prudence of all of FirstEnergy's In-State Non-Solar purchases (RFP1, RFP2, and RFP3), which were questioned by the auditor. But the PUCO unreasonably fixed the burden of proof on Staff and the Intervenors, ultimately finding that they

did not produce evidence “sufficient to overcome the presumption that the Companies’ decisions were prudent to support a disallowance of the costs of the REC purchases.”(R. 109 at 23, FE Appx. at 31). This language demonstrates, in no uncertain terms, that the Commission did not, contrary to the PUCO’s contention, apply the burden of proof to the proper party in this proceeding. (*See*, PUCO 3<sup>rd</sup> Br. at 15).

The PUCO’s failure to shift the burden back to the Companies once Staff and Intervenors had successfully rebutted the presumption of prudence amounted to reversible error. It is incumbent upon the utility to “prove a positive point: that its expenses ha[ve] been prudently incurred[.]” *In re Duke Energy Ohio*, 131 Ohio St.3d 487, 2012-Ohio-1509 at ¶8. Here, the PUCO improperly shifted the burden of proof to parties not responsible for demonstrating the prudence of the expenditures. Further, FirstEnergy did not present the requisite proof to the PUCO.

The PUCO claims that OCC is “indirectly attacking” the PUCO’s factual findings by arguing that it erred in setting out the applicable burden of proof. (PUCO 3<sup>rd</sup> Br. at 9). The PUCO’s decision to require Staff and the Intervenors to prove that FirstEnergy’s decision to purchase RECs from ██████████ at elevated rates was imprudent impermissibly lifted FirstEnergy’s lawful burden of proving that such expenditures were prudently incurred. The PUCO also contends that OCC’s reliance on the fact that the PUCO did not expressly declare that FirstEnergy’s REC procurements were “prudent and reasonable” is misplaced, because this “Court does not insist on the recitation of magic words to convey a particular point—it focuses on substance.” (PUCO 3<sup>rd</sup> Br. at 16). The PUCO’s determination that FirstEnergy’s decisions were not unreasonable, however, demonstrates that it did not place the burden of proof on the appropriate party during the proceeding. (*See*, R. 109 at 22-23, FE Appx. at 30-31).

The PUCO cites *Evans v. Natl. Life and Acc. Ins. Co.*, 220 Ohio St.2d 87, 90, 88 N.E.2d 1247 (1986) to support its argument that utilizing a presumption of prudence regarding FirstEnergy's management decisions does not shift the burden of proof away from the Utility. (PUCO 3<sup>rd</sup> Br. at 10). The circumstances arising from the shift of the burden of production in the case below, however, are distinguishable from those in *Evans*. This is because once the PUCO Staff and the Intervenors rebutted the presumption of prudence regarding the Utility's expenditures, the PUCO failed to properly apply the burden to FirstEnergy to affirmatively prove that the Utility's expenditures were prudent.

Additionally, contrary to the PUCO's claim, (PUCO 3<sup>rd</sup> Br. at 14), OCC demonstrated harm by the exorbitant costs that customers were required to pay, resulting from transactions between FirstEnergy and ██████████ that were not done at arm's length. The PUCO agreed with OCC that, at least in one instance, customers overpaid for the RECs that FirstEnergy purchased, and customers were awarded a disallowance (refund) for that transaction. (PUCO 3<sup>rd</sup> Br. at 15-17). In light of the potential for non-arm's length transactions between affiliates, a presumption of prudence of a utility's expenditures related to an affiliate transaction should not exist. The burden of proof for demonstrating the prudence of expenditures should not shift away from the regulated utility. In view of these circumstances, this Court should reverse and remand the PUCO's decision.

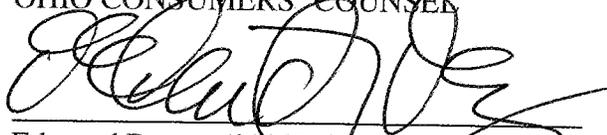
#### **IV. CONCLUSION**

As demonstrated above, the PUCO improperly withheld from the public certain information pertaining to the identity of FirstEnergy's REC suppliers, the costs of RECs procured, and testimony recommending that the PUCO disallow certain portions of the costs incurred by FirstEnergy. Further, the PUCO improperly applied a presumption of prudence to

FirstEnergy's management decisions, allowing FirstEnergy to engage in non-arm's length [REDACTED] transactions. These transactions resulted in REC purchases that were significantly above market prices. Moreover, assuming that the PUCO reasonably applied a presumption of prudence to FirstEnergy's [REDACTED] transactions, the PUCO still failed to properly assign the burden of proof to FirstEnergy to demonstrate prudence after Staff and Intervenors rebutted the presumption. Accordingly, OCC respectfully requests that this Court reverse the PUCO. The Court should find that certain information for which FirstEnergy sought protection is not trade secret information. It should rule that the PUCO's application of a presumption of prudence to FirstEnergy's [REDACTED] transactions was reversible error.

Respectfully submitted,

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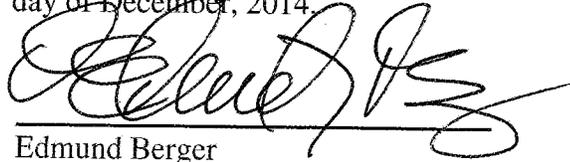
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Fourth Merit Brief* was served on the persons listed below, via electronic service, this 24<sup>th</sup> day of December, 2014.



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