# IN RE REVIEW OF THE ALTERNATIVE ENERGY RIDER CONTAINED IN THE TARIFFS OF OHIO EDISON COMPANY, CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND TOLEDO EDISON COMPANY; OHIO EDISON COMPANY ET AL., APPELLANTS AND CROSS-APPELLEES; OFFICE OF OHIO CONSUMERS' COUNSEL, APPELLEE AND CROSS-APPELLANT; ENVIRONMENTAL LAW AND POLICY CENTER, CROSS-APPELLANT; PUBLIC UTILITIES COMMISSION, APPELLEE AND CROSS-APPELLEE.

**[Cite as *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229.]**

*Public utilities—R.C. 4928.64—Recovery by utility of costs to procure renewable-energy resources—R.C. 4905.32—Rule against retroactive ratemaking—Public Utilities Commission's disallowance of utility's recovery of certain renewable-energy costs reversed—R.C. 1333.61(D)—Trade secrets—Public Utilities Commission violated R.C. 4903.09 by failing to sufficiently explain basis for its finding that information regarding utility's purchase of renewable-energy resources derived independent economic value from not being generally known—Public Utilities Commission's order affirmed in part and reversed in part and cause remanded.*

(No. 2013-2026—Submitted June 21, 2017—Decided January 16, 2018.)

APPEAL and CROSS-APPEALS from the Public Utilities Commission, No. 11-5201-EL-RDR.

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**O'NEILL, J.**

## I. SUMMARY

**{¶ 1}** In the case on appeal, the Public Utilities Commission ordered an audit to review renewable-energy-credit ("REC") purchases made by the

FirstEnergy companies (Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company [collectively, "FirstEnergy"]) under FirstEnergy's first electric-security plan ("ESP"). After the audit hearing, the commission found that certain purchases had not been prudent, and it ordered FirstEnergy to refund more than $43 million to ratepayers.

**{¶ 2}** The commission also granted several motions for protective orders, granting trade-secret protection to certain information related to FirstEnergy's purchase of RECs.

**{¶ 3}** FirstEnergy filed an appeal in this court challenging the commission's adoption of the part of the audit findings regarding the more than $43 million disallowance. The Environmental Law and Policy Center ("ELPC") filed a cross-appeal challenging the protective orders. The Office of the Ohio Consumers' Counsel ("OCC") also cross-appealed, challenging the protective orders and the part of the commission's decision approving the remainder of FirstEnergy's renewable-energy costs.

**{¶ 4}** After review, we find that the parties have demonstrated two commission errors, one on appeal and one on cross-appeal. Therefore, we affirm the commission's order in part, reverse it in part, and remand the cause for further consideration.

## II. FACTS AND PROCEDURAL BACKGROUND

**{¶ 5}** R.C. 4928.64 requires electric-distribution utilities to generate a portion of the electricity supplied to retail customers from renewable-energy resources, such as solar and wind power. Under an earlier version of the statute, electric utilities were required to purchase at least half of their renewable energy from in-state suppliers.[1] *See* former R.C. 4928.64(B)(3), 2012 Am.Sub.S.B. No. 315. The law imposes annual goals or benchmarks that increase over time. R.C.

[1] This requirement was eliminated in 2014 Am.Sub.S.B. No. 310, effective September 12, 2014.

4928.64(B)(2). If an electric utility does not meet its benchmarks, the commission must impose a compliance payment on the utility. R.C. 4928.64(C)(2).

**{¶ 6}** Electric utilities may purchase such resources from suppliers through the procurement of RECs. *See* R.C. 4928.645. A REC is created for each megawatt hour of electricity generated by a renewable-energy resource. Ohio Adm.Code 4901:1-10-01(Z). Once electricity generated from a renewable-energy resource is delivered to the power grid, it becomes indistinguishable from electricity generated from traditional resources, such as coal or natural gas. A REC (an acronym also used for "renewable energy certificate") is a nontangible, tradable commodity that serves as a mechanism for utilities and regulators to track renewable-energy purchases. *See* United States Environmental Protection Agency, Green Power Partnership, *Renewable Energy Certificates*, https://www.epa.gov/greenpower/renewable-energy-certificates-recs (accessed Jan. 11, 2018).

**{¶ 7}** In 2009, the commission approved the first ESP for FirstEnergy. As part of that ESP, the commission approved FirstEnergy's plan to procure the necessary RECs from in-state and out-of-state suppliers for the period January 1, 2009, through May 31, 2011. The commission also approved a mechanism—an "Alternative Energy Resource Rider" ("Rider AER")—for FirstEnergy to recover the costs associated with the REC-procurement plan. *See In re Application of Ohio Edison Co.*, Pub. Util. Comm. Nos. 08-935-EL-SSO, 09-21-EL-ATA, 09-22-EL-AEM, and 09-23-EL-AAM, 2009 Ohio PUC LEXIS 279, *17-18 (Mar. 25, 2009). FirstEnergy then proceeded to request proposals, entertain and accept bids, and contract with various suppliers for the purchase of RECs in order to comply with R.C. 4928.64.

**{¶ 8}** Utilities are generally entitled to recover from retail customers the costs for buying renewable energy to comply with statutory benchmarks. *See*

R.C. 4928.64(E). In the order approving FirstEnergy's first ESP, the commission approved a stipulation whereby FirstEnergy agreed that it would be able to recover "the prudently incurred costs" of its REC purchases under Rider AER. *See* 2009 Ohio PUC LEXIS 279 at *17.

**{¶ 9}** The commission initiated the underlying case to review the prudence of FirstEnergy's REC purchases from 2009 through 2011. *See* Pub. Util. Comm. No. 11-5201-EL-RDR, 2013 Ohio PUC LEXIS 159, *3, 11 (Aug. 7, 2013). The commission selected Exeter Associates, Inc. ("Exeter"), to conduct the management and performance portions of the audit. Exeter filed its final audit report on Rider AER on August 15, 2012.

**{¶ 10}** Following the audit hearing, the commission found that most of FirstEnergy's purchases had been prudent, but the commission found that FirstEnergy failed to act prudently in purchasing certain in-state, nonsolar RECs in August 2010 to meet FirstEnergy's renewable-energy benchmarks for 2011. *Id*. at *61-69. As a result, the commission ordered FirstEnergy to credit customers' bills in the amount of $43,362,796.50. This amount was payable, with carrying costs, within 60 days of the commission's final order. *Id*. at *70, 86-87.

**{¶ 11}** Several parties filed applications for rehearing, and the commission ultimately issued an entry declining to rehear any aspect of its order. Commissioner Lynn Slaby dissented from that entry, stating: "Upon further consideration of this case, I would dissent from the majority. I am convinced that [*In re Application of*] *Columbus S. Power Co*. * * *, 128 Ohio St.3d 512, 2011-Ohio-1788 [947 N.E.2d 655], precludes us from refunding money to customers as the majority has done here." Pub. Util. Comm. No. 11-5201-EL-RDR at 39 (Dec. 18, 2013) (Slaby, Commr., dissenting).

**{¶ 12}** FirstEnergy filed this appeal raising a number of challenges to the commission's decision to disallow the more than $43 million in REC costs. OCC and ELPC filed cross-appeals challenging the commission's decisions to grant

trade-secret status to certain information related to FirstEnergy's REC purchases. OCC also challenges the commission's finding that the majority of FirstEnergy's purchases were prudent.

**{¶ 13}** On February 10, 2014, we granted FirstEnergy's motion to stay the commission's refund order. 138 Ohio St.3d 1405, 2014-Ohio-429, 3 N.E.3d 207.

## III. STANDARD OF REVIEW

**{¶ 14}** Under R.C. 4903.13, this court will reverse, vacate, or modify an order of the commission only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50. This court has "complete and independent power of review as to all questions of law" in appeals from the commission. *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997). We will not reverse or modify a commission decision as to questions of fact when the record contains sufficient probative evidence to show that the decision is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. The appellant bears the burden of demonstrating that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.*

## IV. DISCUSSION

### A. FirstEnergy's Appeal

#### *1. FirstEnergy's Proposition of Law No. 1*: Whether the commission engaged in unlawful retroactive ratemaking

**{¶ 15}** FirstEnergy argues under its first proposition of law that the commission engaged in unlawful retroactive ratemaking when it ordered FirstEnergy to refund more than $43 million in REC costs. FirstEnergy's

argument centers on the filed-rate doctrine, which provides that a utility may charge only the rates fixed by its current, commission-approved tariff, *see* R.C. 4905.32; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). And though the commission has the power to invalidate a rate schedule and fix new rates, it may exercise this power prospectively only. *See Ohio Util. Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 157-158, 389 N.E.2d 483 (1979). The rule against retroactive ratemaking thus bars the commission from ordering a refund or otherwise adjusting current rates to make up for overcharges under previously recovered rates. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 15-16. Put most simply, "[t]he rule against retroactive rates * * * also prohibits refunds." *Id.* at ¶ 15.

**{¶ 16}** The commission determined that under this court's decision in *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982), disallowing REC costs under Rider AER does not constitute retroactive ratemaking. 2013 Ohio PUC LEXIS 159 at *69-70. In disputing that conclusion, FirstEnergy maintains that because the commission had approved the rates charged under FirstEnergy's Rider AER tariff, this case is distinguishable from *River Gas* and the rule against retroactive ratemaking bars any refund or disallowance of REC costs already collected under these commission-approved rates.

**{¶ 17}** *River Gas* involved the commission's audit of a utility's charges under a Uniform Purchased Gas Adjustment Clause ("UPGA"), which was adopted under R.C. 4905.302. The UPGA contained a provision requiring that supplier refunds be taken into account in determining gas rates charged to customers. After an audit, the commission ordered the utility to refund to ratepayers a supplier refund that related to rates charged before the UPGA went into effect but that the utility did not receive until after the UPGA became

effective. *River Gas* at 509-511. This court affirmed, concluding that the commission's order did not violate the rule against retroactive ratemaking. *Id*. at 512-514. We held that because the variable rates charged under the UPGA were authorized by a " 'statutory plan which authorizes a utility to pass variable fuel costs directly to consumers,' " *id.* at 513, quoting *Consumers' Counsel v. Pub. Util. Comm.*, 57 Ohio St.2d 78, 82-83, 386 N.E.2d 1343 (1979), the commission's approval of the refund occurred pursuant to a process that did not constitute "ratemaking in its usual and customary sense," *id*. We agree with FirstEnergy that *River Gas* does not support the commission's determination in this case.

**{¶ 18}** In this case, the tariff language of Rider AER required FirstEnergy to request quarterly approval from the commission of the charges collected through the rider. As indicated by the tariff sheets here, the requested rates were to go into effect one month after the stated filing dates "unless otherwise ordered by" the commission. The record reflects that during the time period under review, FirstEnergy made these quarterly filings on behalf of its operating companies without objection from the commission and charged consumers pursuant to the filed tariff sheets. Under R.C. 4905.32, a public utility must charge its consumers consistently with the rate set forth in the schedule "*filed* with the public utilities commission which is in effect at the time." (Emphasis added.) Because FirstEnergy recovered REC costs under a "filed" rate schedule, the commission was prohibited from later ordering a disallowance or refund of those costs. R.C. 4905.32; *Keco Industries*, 166 Ohio St. at 257, 141 N.E.2d 465. Notwithstanding that FirstEnergy was entitled to recover only "prudently incurred costs," there can be no remedy in this case because the costs were already recovered. We have recognized that application of the no-refund rule has been perceived as unfair and has even sometimes resulted in a windfall for a utility company. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 15-17; *In re Application of Columbus Southern Power Co.*,

138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 56. But we have also recognized that it is the statutory scheme that requires this result and therefore, it is a matter for the General Assembly to remedy, not this court. *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 17.

**{¶ 19}** FirstEnergy also asserts that the plain language of R.C. 4905.32 bars any refund in this case because Rider AER did not specify a refund process. We agree. R.C. 4905.32 provides that "[n]o public utility shall refund or remit directly or indirectly, any rate * * * or charge * * * except such as are specified in [its filed] schedule * * *."

**{¶ 20}** For the foregoing reasons, we find that the commission engaged in unlawful retroactive ratemaking when it ordered FirstEnergy to refund more than $43 million in previously recovered REC costs to ratepayers.

### *2. FirstEnergy's Proposition of Law No. 2*: Whether the commission's order is against the manifest weight of the evidence

**{¶ 21}** Under its second proposition of law, FirstEnergy challenges the commission's finding that FirstEnergy's management acted imprudently when it decided to purchase certain of the 2011 RECs under the August 2010 request for proposals ("RFP"), as opposed to reserving some RECs to be purchased in 2011. FirstEnergy alternatively argues that even if the commission's finding of imprudence is upheld, the amount of the disallowance—more than $43 million—is unreasonable.

**{¶ 22}** Our decision sustaining FirstEnergy's retroactive-ratemaking arguments makes it unnecessary to decide these arguments. Accordingly, we dismiss FirstEnergy's second proposition of law as moot. *See In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, at ¶ 39 (this court does not issue advisory opinions).

### *3. FirstEnergy's Proposition of Law No. 3*: Whether the commission unlawfully interpreted Ohio law

**{¶ 23}** FirstEnergy argues under its third proposition of law that the commission incorrectly construed the 3 percent cost-cap provision in R.C. 4928.64(C)(3) as mandatory. FirstEnergy maintains that the plain language of the statute gives electric utilities discretion whether to invoke the cap. But contrary to FirstEnergy's argument, the commission made no such holding. This proposition of law is therefore without merit.

## B. The Cross-Appeals of OCC and ELPC

### *1. OCC's Proposition of Law No. 1; ELPC's Proposition of Law Nos. 1 and 2*: Whether the commission erred in granting the motions for protective orders

**{¶ 24}** On cross-appeal, OCC and ELPC both challenge the commission's decision to grant trade-secret status to certain information related to FirstEnergy's in-state REC purchases. The information protected included REC-supplier information originally submitted during the competitive-bid auctions and the outcomes of those auctions, which was later included in Exeter's audit report. As will be discussed below, we find that the commission's trade-secret determination lacks record support.

#### *a. Background on the commission's trade-secret rulings*

**{¶ 25}** On August 15, 2012, the commission staff filed under seal a confidential version of Exeter's audit report. FirstEnergy had entered into confidentiality agreements with REC suppliers to prevent the disclosure of certain supplier and pricing information submitted during the competitive-bid REC auctions. The confidential version of the audit report protected this information from public disclosure. A public version that redacted this information was filed the same day.

**{¶ 26}** Seven weeks later, on October 3, 2012, FirstEnergy filed its first motion for a protective order. In this motion, FirstEnergy sought an order to

continue to protect from public disclosure the information designated as confidential during the competitive-bid process, specifically the identity of REC suppliers that participated in the auctions and their specific bid prices. FirstEnergy argued that this REC-procurement data was trade-secret information that if disclosed would harm FirstEnergy's ability to conduct future auctions and compromise its ability to obtain competitive pricing in the REC market.

**{¶ 27}** During a November 20, 2012 prehearing conference, an attorney examiner granted FirstEnergy's motion, finding that the information sought to be protected qualified as trade secrets. Specifically, the attorney examiner exempted from public disclosure (1) the identity of renewable-energy suppliers that bid during the REC auctions, (2) the number of RECs bid, and (3) each supplier's bid prices. The attorney examiner, however, did not issue a follow-up entry memorializing the decision made during the prehearing conference.

**{¶ 28}** On December 31, 2012, FirstEnergy filed a second motion for a protective order. In this motion, FirstEnergy sought to protect from public disclosure certain "Confidential Draft Documents," which consisted of FirstEnergy's "unpublicized and confidential" comments to the prefiled draft of Exeter's report. According to FirstEnergy, these documents contained the same trade secrets as the unredacted, confidential version of Exeter's report filed on August 15, 2012.

**{¶ 29}** On February 14, 2013, a different attorney examiner issued an entry granting the second motion for protective order. The attorney examiner found that the information was the same trade-secret information that was protected at the November 20, 2012 prehearing conference.

**{¶ 30}** The commission affirmed the rulings of the attorney examiners on the motions with one exception.[2] 2013 Ohio PUC LEXIS 159 at *26-27. The

[2] The commission also granted several other pending motions for protective orders. These motions sought to protect the same supplier information that was already protected, and the

commission found that the attorney examiners' rulings wrongly protected the identity of FirstEnergy Solutions Corporation—an affiliate of FirstEnergy—as a successful bidder in the competitive auctions. According to the commission, the public version of Exeter's report disclosed the fact that FirstEnergy Solutions had bid to sell RECs to FirstEnergy and this information had been widely disseminated to the public. The commission also noted that its policy is to disclose the identities of winning bidders in competitive auctions within a reasonable time after auction results are announced to the public. *Id*. at *27. The commission, however, refused to disclose any specific information related to the bids of FirstEnergy Solutions, such as the quantity and price of its REC bids and whether specific bids were accepted by FirstEnergy. *Id*. at *28.

*b. Whether the commission's trade-secret findings are supported by the record*

**{¶ 31}** OCC and ELPC argue that the commission erred when it found that certain REC-procurement information was entitled to trade-secret protection. R.C. 1333.61(D) defines "trade secret" as information that satisfies both of the following:

> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

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commission granted these motions solely on the authority of its prior determination that the information qualified as trade secrets. 2013 Ohio PUC LEXIS 159 at *28-32. Review of these rulings is not necessary to resolve the issues on appeal.

**{¶ 32}** Applying the trade-secret test set forth in R.C. 1333.61(D), the commission found "that the REC procurement data contains trade secret information." 2013 Ohio PUC LEXIS 159 at *26.

**{¶ 33}** In their first propositions of law, OCC and ELPC both contend that the record does not support the commission's finding on the first prong of the test. OCC also challenges the commission's finding on the second prong as against the manifest weight of the evidence. For the reasons that follow, we find merit to cross-appellants' challenge regarding the economic-value prong, R.C. 1333.61(D)(1). However, we reject OCC's challenge regarding the reasonable-efforts prong, R.C. 1333.61(D)(2).

i. The commission cited no evidence and offered no explanation to support its finding that the information derived independent economic value from not being generally known

**{¶ 34}** OCC and ELPC both argue that the commission failed to cite evidence or offer an explanation in its order regarding how the sealed information—given its age and the changes in market conditions that have occurred over time—has retained its economic value in today's market.

**{¶ 35}** Whether information constitutes a trade secret is a question of fact. *See State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 401, 732 N.E.2d 373 (2000). FirstEnergy had claimed that the REC-procurement data had independent economic value because its release would cause competitive harm to FirstEnergy and REC suppliers by revealing bidding strategies and valuations, thereby discouraging bidders from participating in future auctions. Yet notably absent from the commission's order is mention of any evidence supporting that FirstEnergy or the REC suppliers would be competitively harmed by the release of this information. The attorney examiners' rulings granting trade-secret protection are likewise devoid of any mention of this type of evidence.

**{¶ 36}** Further, even if the order had mentioned supporting evidence, the commission (and the attorney examiners) failed to explain how this supplier information, if disclosed, would have affected future REC auctions. The commission's order reflected that market conditions had undergone significant changes and development since the REC-procurement data was submitted during the competitive auctions. Yet the commission never explained how this specific information retained independent economic value—particularly in relation to future auctions—in light of those changes in market conditions. *See Besser* at 401.

**{¶ 37}** The commission added little to its analysis in its entry denying the parties' applications for rehearing. In relevant part, the commission stated that "if this trade secret information was public, it could discourage REC suppliers' confidence in the market and impede the function of the REC market." Pub. Util. Comm. No. 11-5201-EL-RDR at 5 (Dec. 18, 2013). But once again, the commission cited no evidence to support its finding.

**{¶ 38}** The commission's failure to cite evidence and offer a reasoned explanation for its findings violated R.C. 4903.09, which requires the commission to file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Cross-appellants did all they needed to do to compel the commission to comply with this statute. They argued that the attorney examiners' protective orders lacked any mention of supporting evidence and explanation of economic value, particularly in light of the age of the information being protected. *See* 2013 Ohio PUC LEXIS 159 at *16-19. And after the commission had summarily responded to those arguments in its initial order, OCC and ELPC complained in their applications for rehearing about the lack of any discussion of supporting evidence and the lack of an explanation of economic value. The commission essentially repeated what it had

said in its initial order and again offered no evidence in support or explanation of its trade-secret finding.

**{¶ 39}** In sum, the commission's violation of R.C. 4903.09 is clear. While trade secrets may continue to be protected if the information retains some measure of value, the commission failed to show that to be the case here. Therefore, we reverse the commission's decision to grant trade-secret protection. On remand, the commission must either cite evidence and explain its order or publicly disclose the information that has been protected.

ii. The commission did not err in finding that FirstEnergy took reasonable efforts to maintain the secrecy of the REC-procurement data

**{¶ 40}** OCC also argues that the commission erred when it found that FirstEnergy took sufficient safeguards to protect the secrecy of REC-supplier identities and bid information. We find that FirstEnergy took reasonable steps to maintain the secrecy of the REC-procurement data, as required by R.C. 1333.61(D)(2).

**{¶ 41}** Before the commission issued its initial opinion and order deciding the merits of this case, FirstEnergy filed eight different motions for protective orders. FirstEnergy also had entered into protective agreements with REC suppliers and parties to the case. And the publicly filed documents subject to protective orders were, with one exception, redacted to remove confidential information. The exception was that the public version of Exeter's audit report failed to redact FirstEnergy Solutions—an affiliate of FirstEnergy—as one of the suppliers that submitted bids. As a result, the commission found that the identity of FirstEnergy Solutions as a winning bidder was no longer entitled to trade-secret protection. *See* 2013 Ohio PUC LEXIS 159 at *27-28.

**{¶ 42}** OCC argues that FirstEnergy's inaction following the naming of FirstEnergy Solutions in Exeter's report and the resulting dissemination of the identity of FirstEnergy Solutions to the public proves that FirstEnergy did not

carry its burden under R.C. 1333.61(D)(2). Information is entitled to trade-secret status "only if the information is not generally known or readily ascertainable to the public." *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 529, 687 N.E.2d 661 (1997). According to OCC, the fact that this information remained public for 49 days before FirstEnergy filed a motion for protective order undercuts any finding that FirstEnergy adequately guarded the secrecy of the REC-procurement data. We disagree.

**{¶ 43}** A partial disclosure of confidential information does not foreclose the possibility of a trade secret. *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d 1049, ¶ 29; *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 174, 724 N.E.2d 411 (2000). There is nothing before us to suggest that the release of the identity of FirstEnergy Solutions opened the door to access other protected REC-procurement data. Knowing that FirstEnergy Solutions was a winning bidder provided no insight into the identity of other bidders, their bid prices, or whether their bids were accepted by FirstEnergy. Nor did the disclosure reveal other protected bid information specific to FirstEnergy Solutions, such as the price and quantity of REC bids and whether any were accepted. In short, despite FirstEnergy's delay in moving to protect certain information in the filed report, the commission did not err in finding that FirstEnergy complied with R.C. 1333.61(D)(2). Therefore, contrary to OCC's assertion, we find that FirstEnergy's delay in seeking to protect the identity of a single REC bidder does not prove that FirstEnergy failed to safeguard its claimed trade secrets.

iii. OCC's remaining attacks on the commission's "reasonable efforts" finding lack merit

**{¶ 44}** OCC points to two other instances in which FirstEnergy purportedly failed to protect trade-secret information as further evidence that FirstEnergy did not comply with R.C. 1333.61(D)(2). According to OCC, the

first instance involves FirstEnergy's failure to protect from public disclosure unredacted information in Exeter's audit report stating that FirstEnergy had purchased some RECs at prices that were "more than 15 times the price of the applicable forty-five dollar Alternative Compliance Payment." The second instance concerns certain information contained in the prefiled, draft version of Exeter's audit report. According to OCC, the commission had sealed a recommendation contained in the auditor's draft report regarding the amount of REC costs that should be disallowed. OCC maintains that FirstEnergy stood idle while the protected disallowed amount was publicly disclosed during the commission proceedings.

**{¶ 45}** Contrary to OCC's assertion, the record does not reflect that the commission granted trade-secret protection to either piece of information. It follows that FirstEnergy cannot be faulted for failing to protect information that was never protected to begin with.

**{¶ 46}** In the end, the commission correctly found that FirstEnergy had consistently sought confidential treatment of the REC-procurement data. Therefore, we reject OCC's challenge under R.C. 1333.61(D)(2). *See Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 29.

*c. Whether the commission gave proper consideration to policies of open government*

**{¶ 47}** In its second proposition of law, ELPC argues that the commission failed to give proper consideration to R.C. 149.43, Ohio's Public Records Act. According to ELPC, the public's interest in knowing how FirstEnergy made REC purchases "far outweighs any speculative interest in keeping that information secret." Given our decision to reverse the commission's determination regarding the trade-secret issue and to remand this case to the commission for further

consideration of that issue, we find it unnecessary to determine whether the commission gave proper consideration to R.C. 149.43.

### *2. OCC's Proposition of Law Nos. 2 and 3*: Whether the commission erred when it presumed that FirstEnergy's expenditures were prudent and whether the commission misapplied the burden of proof

**{¶ 48}** Our decision sustaining FirstEnergy's retroactive-ratemaking arguments makes it unnecessary to consider OCC's second and third propositions of law. *See In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, at ¶ 39 (this court does not issue advisory opinions).

## V. CONCLUSION

**{¶ 49}** For the foregoing reasons, the commission's order is affirmed in part and reversed in part and this cause is remanded for further consideration.

Order affirmed in part
and reversed in part,
and cause remanded.

O'CONNOR, C.J., and FISCHER, J., concur.

KENNEDY, J., concurs, with an opinion joined by O'DONNELL and DEWINE, JJ.

FRENCH, J., concurs in part and dissents in part, with an opinion.

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**KENNEDY, J., concurring.**

**{¶ 50}** I agree with the lead opinion's resolution of the trade-secret issues and concur in reversing the order of the Public Utilities Commission and remanding the cause for further proceedings, consistent with the lead opinion, regarding those issues. I also agree with the lead opinion that the commission engaged in unlawful retroactive ratemaking when it ordered the FirstEnergy companies (Ohio Edison Company, Cleveland Electric Illuminating Company,

and Toledo Edison Company [(collectively, "FirstEnergy")]) to refund previously recovered renewable-energy-credit ("REC") costs to ratepayers and that the commission's order should be reversed on that issue. I write separately, however, because we need look no further than the language of the relevant statutes to determine that the commission engaged in unlawful retroactive ratemaking.

**{¶ 51}** This case originates from the first electric security plan ("ESP") FirstEnergy filed with the commission after the General Assembly enacted 2008 Am.Sub.S.B. No. 221 ("S.B. 221").[3] In addition to establishing the framework for FirstEnergy's ESP, S.B. 221 also required FirstEnergy to provide "a portion of the electricity supply required for its standard service offer" from "renewable energy resources." R.C. 4928.64(B)(1). Among other measures, in order to comply with the renewable-energy provisions, an electric-distribution utility could purchase RECs. *See* former R.C. 4928.65, as enacted in S.B. 221, now renumbered R.C. 4928.645 and modified.

**{¶ 52}** Without citing a statute that gives the commission authority to issue a refund when that refund order is not contained in the tariff, the opinion concurring in part and dissenting in part nevertheless concludes that the commission did not engage in retroactive ratemaking in this case. I disagree.

**{¶ 53}** While the General Assembly in S.B. 221 enacted some new provisions regarding the ratemaking process for certain purposes, *compare* R.C. 4928.143(B)(2)(a), (C), (E), and (F) *with* R.C. 4909.15, 4909.17, 4909.18, and 4909.19, the General Assembly nevertheless specified that ESP distribution rates were subject to the traditional ratemaking requirements of an application before the commission, preapproval by the commission, and the filing of rates with the

[3] For a concise history of electricity deregulation and the statutory scheme enacted in S.B. 221, *see In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 2-6.

commission prior to collection. And the General Assembly in S.B. 221 left untouched the filed-rate doctrine codified at R.C. 4905.32, which provides:

> No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate * * * or charge * * * except such as are specified in such schedule * * *.

**{¶ 54}** In matters of statutory construction, "[w]here the language of a statute is plain and unambiguous * * * there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. The language of R.C. 4905.32 is plain and unambiguous.

**{¶ 55}** In the past we have stated that "rates approved by and filed with the commission are the lawful rates," *In re Complaint of Pilkington N. Am., Inc.*, 145 Ohio St.3d 125, 2015-Ohio-4797, 47 N.E.3d 786, ¶ 31, and that "the commission may not engage in retroactive rate-making," *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). Therefore, a utility has "no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected." *Id.* Moreover, while the commission has the authority to oversee rates, "the commission has the power to invalidate a rate schedule and fix new rates, [but] this ratemaking power is prospective only." *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764, 18 N.E.3d 1157, ¶ 28, citing *Ohio Util. Co. v. Pub. Util. Comm.*, 58 Ohio

St.2d 153, 157-158, 389 N.E.2d 483 (1979); *see also Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

**{¶ 56}** FirstEnergy filed an application for a standard service offer ("SSO"), in the form of an ESP in accordance with R.C. 4928.143. *In re Application of Ohio Edison Co.*, Pub. Util. Comm. Nos. 08-935-EL-SSO, 09-21-EL-ATA, 09-22-EL-AEM, and 09-23-EL-AAM, 2009 Ohio PUC LEXIS 279, *8-9 (Mar. 25, 2009). The commission issued an opinion and order that approved FirstEnergy's proposed ESP with certain modifications. *Id.* at *9. Subsequently, FirstEnergy withdrew its application. *Id.*

**{¶ 57}** FirstEnergy then filed an amended application with an ESP that was stipulated to by both FirstEnergy and the commission. *Id.* at *11. The renewable-energy rider at issue here was approved by the commission as part of that stipulated ESP. *Id.* at *17-18.

**{¶ 58}** While I agree that under the terms of the stipulated ESP, FirstEnergy was permitted to recover only prudently incurred costs of purchasing RECs, the stipulated ESP, as finalized and approved by the commission, did not include a provision that REC costs that were not "prudently incurred" were refundable to ratepayers.

**{¶ 59}** The concurring and dissenting opinion concludes that FirstEnergy forfeited any argument that the refund is prohibited by R.C. 4905.32. However, I categorically reject that conclusion.

**{¶ 60}** When an appellant raises grounds for rehearing before the commission, this court has required the appellant to use a "rifle"—not a "shotgun"—in order to preserve an issue for appeal to this court. *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949). Here, in its application for rehearing before the commission, FirstEnergy argued that the commission "unlawfully required the companies to refund monies collected under

duly authorized rates and thus the order mandates impermissible retroactive ratemaking."

**{¶ 61}** In support of its argument, FirstEnergy quoted R.C. 4905.32, italicizing for emphasis the statutory language prohibiting refunds unless they are "*specified in such schedule*." This citation of R.C. 4905.32 as part of FirstEnergy's retroactive-ratemaking argument complies with the statutory requirement of R.C. 4903.10(B) that appellants are to specifically raise issues in applications for rehearing. In accord with our holding in *Cincinnati*, FirstEnergy argued that the language of R.C. 4905.32 prohibits the commission from ordering a refund when refund language is not contained in the tariff, and FirstEnergy used a "rifle"—not a "shotgun"—in properly preserving this issue for appeal to this court.

**{¶ 62}** In denying FirstEnergy's request for a rehearing, the commission ignored FirstEnergy's R.C. 4905.32 argument and chose instead to continue to rely on the reasoning expressed in its initial order that it did not engage in unlawful retroactive ratemaking based on our decision in *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982). However, the commission's reliance on *River Gas* is misplaced for two reasons.

**{¶ 63}** The first reason the commission's reliance on *River Gas* is mistaken is that *River Gas* did not involve ratemaking. *Id*. at 512-513. The fuel-cost-adjustment provisions enacted by the General Assembly in R.C. 4905.302 in the form of the Uniform Purchased Gas Adjustment ("UPGA") clause authorized natural-gas companies to pass variable fuel costs directly to consumers without application or preapproval by the commission. *River Gas* at 513. Because the rates varied without an application before, or prior approval of, the commission, the UPGA rates were a statutorily authorized departure from the commission's ratemaking and preapproval authority. *Id.* at 512-513. Therefore, we concluded that the UPGA rates did not constitute "ratemaking in its usual and customary

sense." *Id*. at 513. "It is axiomatic that before there can be retroactive ratemaking, there must, at the very least, be *ratemaking*." (Emphasis sic.) *Id*. at 512.

**{¶ 64}** The second reason the commission's reliance on *River Gas* is misplaced is that R.C. 4905.302 mandated that the UPGA clause be included in every tariff of all natural-gas companies. *Id*. at 509-511. In promulgating the UPGA rule under the authority given by the legislature, the commission included a Gas Cost Recovery ("GCR") rate. *Id.* at 510. One of the several factors in determining the GCR rate was the amount of refunds natural-gas companies received from suppliers. *Id*. The tariff at issue in *River Gas* contained the UPGA clause as required by law. *Id*. at 511.

**{¶ 65}** Contrary to the UPGA rates at issue in *River Gas*, the renewable-energy rates at issue here were ratemaking in the traditional sense. In *River Gas*, we stated that traditional ratemaking includes three steps: an application before the commission, preapproval by the commission, and the filing of the rate with the commission prior to the collection of the rate. *Id*. at 512-513.

**{¶ 66}** FirstEnergy's stipulated ESP application was filed with the commission, and it included the renewable-energy rates as required by law. *See* R.C. 4928.143(A); R.C. 4928.64(B)(1). The ESP required preapproval by the commission. *See* R.C. 4928.143(C). And prior to the rates being charged to customers, they were filed with the commission. *See* R.C. 4905.32; *see also, e.g.*, Rider AER tariff sheet No. 84, filed by Ohio Edison Company in Pub. Util. Comm. case Nos. 08-935-EL-SSO, 09-21-EL-ATA, 09-22-EL-AEM, 09-23-EL-AAM, and 89-6006-EL-TRF on June 1, 2011 (effective July 1, 2011), available at http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=1772a830-ed7e-4c0c-b28f-538392e9b82b. If the commission intended to order a refund of any part of the rates, then the legislature gave the commission the discretionary authority to

do so. All the commission had to do was require a refund clause to be part of the tariff pursuant to R.C. 4905.32.

**{¶ 67}** As a creature of statute, the commission " 'has no authority to act beyond its statutory powers.' " *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 32, quoting *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51. Because the tariff at issue here did not specify a refund, the commission's order of a refund of REC costs was unlawful retroactive ratemaking.

**{¶ 68}** The "statutory and case law concerning retroactive ratemaking spans nearly 50 years." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 13. In matters of statutory construction, we presume that the legislature "knows the existing condition of the law, whether common law * * * or statute law." *Wachendorf v. Shaver*, 149 Ohio St. 231, 248, 78 N.E.2d 370 (1948), citing *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 90 N.E. 146 (1909), *Norris v. State*, 25 Ohio St. 217 (1874), *Johnson v. Johnson*, 31 Ohio St. 131 (1876), and *S. Sur. Co. v. Std. Slag Co.*, 117 Ohio St. 512, 159 N.E. 559 (1927). Therefore, if the General Assembly intended the REC rates to operate like the UPGA rates at issue in *River Gas* when it enacted S.B. 221, it could have written the law that way, but it did not.

**{¶ 69}** While I am sympathetic to the problem identified by the concurring and dissenting opinion that the holding of a majority of the court "reduces the entire audit review of FirstEnergy's REC purchases to an exercise in futility," *id.* at ¶ 87, absent the commission's compliance with the language of the controlling statutory provision, R.C. 4905.32, the commission as a creature of statute has no authority to act, *see In re Application of Ohio Power Co.* at ¶ 32. Under the plain language of the statute, once a rate has been approved and filed with the commission, no refund is possible unless the refund language is in the commission's order establishing the rate. *See* R.C. 4905.32.

**{¶ 70}** It is within the sole province and sound discretion of the General Assembly to balance the needs of the commission, the utilities, and consumers.

> "In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation."

*Keco Industries*, 166 Ohio St. at 259, 141 N.E.2d 465, quoting the trial court's opinion in that case. Because we are required neither to be assigned nor allowed "tasks that are more properly accomplished by [other] branches," *Morrison v. Olson*, 487 U.S. 654, 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), we must "apply the statute as written," *State v. J.M.*, 148 Ohio St.3d 113, 2016-Ohio-2803, 69 N.E.3d 642, ¶ 12, citing *Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 12.

**{¶ 71}** Because the language of R.C. 4905.32 is plain and unambiguous, the commission engaged in unlawful retroactive ratemaking. Therefore, based on that ground alone, I would reverse the order of the commission on the retroactive-ratemaking issue. I concur in reversing the order of the commission and

remanding the cause for further proceedings, consistent with the lead opinion, on the trade-secret issues.

O'DONNELL and DEWINE, JJ., concur in the foregoing opinion.

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**FRENCH, J., concurring in part and dissenting in part.**

**{¶ 72}** I agree with the conclusion of a majority of this court that the Public Utilities Commission's trade-secret determination regarding the information discussed in the lead opinion lacks record support. I disagree, however, with the determination reached in both the lead and concurring opinions that the commission engaged in unlawful retroactive ratemaking when it disallowed more than $43 million in renewable-energy-credit ("REC") costs that appellants and cross-appellees, the FirstEnergy companies (Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company [(collectively, "FirstEnergy")]), had collected from customers. Therefore, I concur in part and dissent in part.

**ANALYSIS**

**{¶ 73}** A majority of the court holds that FirstEnergy as a matter of law is not required to return to ratepayers over $43 million in REC costs, even though FirstEnergy was authorized to recover only prudently incurred REC costs and the commission determined that those costs were imprudently incurred. According to both the lead opinion and the concurring opinion, FirstEnergy may keep these incurred costs because ordering FirstEnergy to return this money to customers is unlawful retroactive ratemaking. The lead opinion offers two grounds for this conclusion: (1) the commission's lack of objection to the rates charged under an "Alternative Energy Resource Rider" ("Rider AER") barred a refund in this case and (2) R.C. 4905.32 bars any refund in this case because the commission-approved tariff for Rider AER did not specify a refund. Because neither ground justifies the result reached by a majority of this court, I dissent.

***The commission's quarterly review and approval of Rider AER did not result in a fixed rate***

**{¶ 74}** FirstEnergy argues that the REC costs were charged and collected through Rider AER under a commission-approved tariff and that therefore, the rule against retroactive ratemaking bars any refund or disallowance of money already collected by its companies.

**{¶ 75}** FirstEnergy is referring to the tariff language of Rider AER, which required the FirstEnergy companies to request approval of the rider charges from the commission each quarter and provided that the requested rates would go into effect one month later "unless otherwise ordered by" the commission. According to FirstEnergy, this process gave the commission "numerous opportunities to review and object to the rates in Rider AER or to the process by which the Companies incurred costs recovered under that Rider." And because the commission took no action to delay or disapprove of the charges proposed in the quarterly filings before they became effective, FirstEnergy asserts that the Rider AER rates became fixed and, consequently, were not subject to refund.

**{¶ 76}** The lead opinion agrees, finding that the commission's failure to object to the rates proposed in the quarterly filings somehow turned those proposed rates into fixed ones. According to the lead opinion, "[b]ecause FirstEnergy recovered REC costs under a 'filed' rate schedule, the commission was prohibited from later ordering a disallowance or refund of those costs." *Id.* at ¶ 18. The lead opinion is wrong to rely on this quarterly review process to reverse the commission's disallowance of REC costs.

**{¶ 77}** First, the lead opinion acknowledges in its statement of facts that FirstEnergy was allowed to recover only its "prudently incurred costs" of purchasing RECs, *id.* at ¶ 8, but it then ignores that fact in resolving this issue. In FirstEnergy's first electric-security-plan ("ESP") case, FirstEnergy entered into a stipulation with the other parties that resolved all issues in the ESP case. *See In re*

*Application of Ohio Edison Co.*, Pub. Util. Comm. Nos. 08-935-EL-SSO, 09-21-EL-ATA, 09-22-EL-AEM, and 09-23-EL-AAM, Stipulation and Recommendation (Feb. 19, 2009). Under the stipulation, the parties proposed Rider AER as the mechanism to recover the costs that FirstEnergy planned to incur in meeting its alternative-energy-resource requirements under R.C. 4928.64. *Id*. at 10-11, stipulation No. 9. In March 2009, the commission issued an order adopting the stipulation, thereby approving FirstEnergy's ESP, including Rider AER. *In re Application of Ohio Edison Co.*, Pub. Util. Comm. Nos. 08-935-EL-SSO, 09-21-EL-ATA, 09-22-EL-AEM, and 09-23-EL-AAM, 2009 Ohio PUC LEXIS 279, *17 (Mar. 25, 2009).

**{¶ 78}** Under the ESP order, FirstEnergy was allowed to implement Rider AER to "recover, on a quarterly basis, the *prudently* incurred costs of" obtaining RECs. (Emphasis added.) *Id*. That is, the commission allowed FirstEnergy to automatically recover its REC costs, on the condition that a later review would be conducted to determine whether those costs were prudently incurred.

**{¶ 79}** So while it is true that we have prohibited refunds of money collected under final commission-approved rates, it is not true that the rates charged under Rider AER were final, approved rates. To conclude that they were, we must disregard the clear terms of the ESP order, which expressly limited FirstEnergy's recovery to only those REC costs that were prudently incurred. Nothing before us supports the lead opinion's finding that the rates charged under Rider AER were fixed and thus not subject to refund.

**{¶ 80}** The commission relied on *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982), to support disallowing these particular REC costs. The lead opinion distinguishes *River Gas* solely on the ground that FirstEnergy had already collected its incurred REC costs under the commission-approved tariff for Rider AER. But because the commission's quarterly approval

of the Rider AER tariffs did not result in a fixed rate, the attempt to distinguish *River Gas* falls short.

**{¶ 81}** Second, the lead opinion is wrong to accept FirstEnergy's argument, asserted in its brief, that the quarterly review process gave the commission "numerous opportunities to review and object to the rates in Rider AER or to the process by which the Companies incurred costs recovered under that Rider." The lead opinion overlooks the commission's finding that the quarterly review process was never intended to be used to audit FirstEnergy's REC purchases for prudence.

**{¶ 82}** In fact, it was impossible for these quarterly reports to be used for that purpose. Under the tariff language, FirstEnergy submitted its proposed rates for Rider AER each quarter, and charges went into effect one month later unless the commission ordered otherwise. On rehearing below, the commission expressly found that there had been no meaningful opportunity to review the REC costs for prudence during this one-month period. Pub. Util. Comm. No. 11-5201-EL-RDR at 22 (Dec. 18, 2013).

**{¶ 83}** The lead opinion cites no evidence that the commission could have determined the prudence of FirstEnergy's REC purchases solely by looking at these quarterly tariff filings. FirstEnergy in its brief claims that it "made 27 timely quarterly * * * filings, each updating the Rider AER rate during 2009, 2010, and 2011." And FirstEnergy later refers us to one of those filings, which had an effective date of July 1, 2011.

**{¶ 84}** But this proposed tariff sheet contains no information that the commission could have reviewed to determine the prudence of FirstEnergy's REC purchases. This tariff sheet includes only the proposed Rider AER rates to be charged to each customer class for the next quarter. It contains no information related to FirstEnergy's REC purchases, such as the number of renewable-energy suppliers in the market, the number of suppliers who bid during FirstEnergy's

REC auctions, the quantity of RECs bid or each supplier's bid prices. Contrary to the lead opinion's view, the commission could not have reviewed FirstEnergy's REC purchases for prudence by looking at these quarterly filings.

**{¶ 85}** Although we have complete and independent power to review all questions of law in appeals from the commission, *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997), we can, and should, consider the expertise of a state agency in interpreting a law when, as here, "highly specialized issues" are involved and when the commission's expertise would "be of assistance in discerning the presumed intent of our General Assembly," *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979). Here, the commission explained on rehearing that the process of quarterly filings employed in this case is a standard mechanism "in prudence review and true-up proceedings" (the process of reconciling the rates recovered as revenue by the utility with the costs incurred by the utility). Pub. Util. Comm. No. 11-5201-EL-RDR at 23 (Dec. 18, 2013). Utilities often benefit from this process, as it allows them to implement new rates without regulatory lag, *id*. at 23-24, and the commission observed that if the process used in this case is found to be retroactive ratemaking, then that process, which has been used in numerous other situations, will no longer be available, *id.* at 24. Disregarding the commission's expertise on this issue, a majority of the court renders the prudence-review process in this case—a review that FirstEnergy agreed to undergo in its ESP case—meaningless.

**{¶ 86}** The commission initiated its audit review of FirstEnergy's REC purchases in September 2011. Numerous parties intervened. The commission appointed an independent consultant, Exeter Associates, Inc., to review FirstEnergy's REC purchases for prudence. Exeter filed its audit report in August 2012. Thereafter, the parties engaged in extensive discovery, and attorney examiners issued several entries on motions for protective orders. The parties

filed depositions and direct testimony. The commission held five days of audit hearings in February 2013. The parties then filed two rounds of posthearing briefs. The commission issued its order on August 7, 2013, and its final rehearing entry on December 18, 2013, over two years after the case began.

**{¶ 87}** By the time the commission issued its final order, FirstEnergy had collected nearly all the incurred REC costs from ratepayers. A majority of the court holds that the commission cannot order FirstEnergy to refund any REC costs that were recovered before the commission issued its audit order, even if the costs were imprudently incurred. That holding reduces the entire audit review of FirstEnergy's REC purchases to an exercise in futility. In effect, the commission and the parties needlessly went through more than two years of litigation at the commission when everyone involved should somehow have realized from the outset that FirstEnergy would be entitled to keep virtually all its REC costs, whether prudently incurred or not.

***The court is wrong to rely on the refund language of R.C. 4905.32***

**{¶ 88}** The lead and concurring opinions also accept FirstEnergy's assertion that the plain language of R.C. 4905.32 bars any refund in this case because Rider AER did not specify a refund process. R.C. 4905.32 provides that "[n]o public utility shall refund or remit directly or indirectly, any rate * * * or charge * * * except such as are specified in [its] schedule * * *." Because no refunds or disallowances are specified in the commission-approved tariffs for Rider AER, FirstEnergy maintains that R.C. 4905.32 precludes the commission from ordering a refund of previously recovered REC costs in this case. In my view, reliance on this provision is erroneous.

**{¶ 89}** First, we lack jurisdiction over this issue. We have jurisdiction only over arguments raised in a party's application for rehearing at the commission. R.C. 4903.10; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 40. FirstEnergy did quote

the refund language of R.C. 4905.32 in its application for rehearing before the commission. But FirstEnergy never made the specific argument on rehearing that it makes on appeal—that R.C. 4905.32 bars any refund in this case because Rider AER did not specify a refund process. And we have strictly construed the specificity requirement in R.C. 4903.10. *See* R.C. 4903.10(B) (application for rehearing "shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful"); *see also Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59. So FirstEnergy has forfeited any argument based on the refund provision of R.C. 4905.32.

**{¶ 90}** Second, even if FirstEnergy had preserved this argument, it should not be relied on in this case. Under the filed-rate doctrine, the rates approved by and filed with the commission are the lawful rates, unless and until a litigant proves otherwise. *See* R.C. 4905.32; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257-259, 141 N.E.2d 465 (1957); *see also Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347, 686 N.E.2d 501 (1997) ("while a rate is in effect, a public utility must charge its consumers in accordance with the commission-approved rate schedule"). And although the commission has the power to invalidate a rate schedule and fix new rates, this authority is prospective only. *See Ohio Util. Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 158, 389 N.E.2d 483 (1979). The rule against retroactive ratemaking thus bars the commission from ordering a refund or otherwise adjusting current rates to make up for overcharges under previously approved rates. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 15-16.

**{¶ 91}** But the commission's approval of Rider AER did not result in a final, approved rate, so the commission did not engage in retroactive ratemaking when it disallowed over $43 million in REC costs. Because FirstEnergy could

recover only prudently incurred REC costs under the ESP order, the Rider AER costs were subject to retrospective adjustment dependent on the outcome of the commission's prudence review. *See, e.g., Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 527-528, 620 N.E.2d 826 (1993) (explaining that a review of a utility's decision to determine whether it was prudent contemplates a retrospective, factual inquiry, without the use of hindsight, into the decision-making process of the utility's management). Stated differently, the commission did not order a refund of a final, approved rate here because the rates charged in the Rider AER tariffs were never fixed. Rather, those rates were subject to postrecovery adjustment if the commission later determined that FirstEnergy had not made prudent REC purchases. In short, because the commission did not order a refund of lawfully recovered REC costs, any reliance on the refund provision of R.C. 4905.32 is misplaced.

**{¶ 92}** The lead and concurring opinions also err in treating this issue as settled law, when it clearly is not. They both construe the following language in R.C. 4905.32 to authorize a refund, so long as the refund is "specified" in the utility's schedules and evenly applied:

> No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified [in its schedule filed with the Public Utilities Commission], or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

The lead and concurring opinions adopt FirstEnergy's interpretation of the statute and conclude that R.C. 4905.32 precludes the commission from ordering FirstEnergy to refund previously recovered REC costs in this case because the tariff for the Rider AER does not specify a refund.

**{¶ 93}** But both opinions fail to recognize that this sentence can be read more than one way. The sentence contains two prohibitions. No public utility shall (1) "refund or remit * * * any rate, rental, toll, or charge" *or* (2) "extend to any person, firm, or corporation, any rule, regulation, privilege, or facility." An exception directly follows the second prohibition: "except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances." There is no question that the exception, because of its placement, applies to the second prohibition—that is, no utility may extend a rule, regulation or privilege to any person "except such as are specified in such schedule and regularly and uniformly extended to all persons." The lead opinion and the concurring opinion construe the exception to also apply to the first prohibition—that is, a refund may occur only if "specified" in the schedule. To my knowledge, the court has never expressly considered whether the exception applies to both prohibitions. Despite the fact that this appears to be an issue of first impression, a majority of the court simply accepts FirstEnergy's interpretation.

**{¶ 94}** But even if this interpretation of R.C. 4905.32 is correct, FirstEnergy should not be able to benefit from the fact that there was no refund language in Rider AER. Under the ESP order, the commission charged FirstEnergy with filing tariffs consistent with that order. 2009 Ohio PUC LEXIS 279 at *45; *see* R.C. 4905.30 (every public utility must apply for commission approval of tariff schedules that detail the rates, charges, and classifications of service). So FirstEnergy should not be able to rely on the absence of refund

language in the Rider AER tariff to avoid having to repay REC costs if those costs were imprudently incurred.

## CONCLUSION

**{¶ 95}** For all these reasons, I would conclude that the commission did not engage in unlawful retroactive ratemaking. Having reached that conclusion, I would proceed to address FirstEnergy's second proposition of law, which challenges the commission's findings that the specified REC purchases made in 2010 were imprudent, and I would also address the additional propositions of law raised in the cross-appeal in this case that a majority of the court does not consider. Because a majority of this court has determined otherwise, I respectfully dissent.

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