ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY Appellants, v. THE PUBLIC UTILITIES COMMISSION OF OHIO Appellee.	))))))))))))	CASE NO. 13-2026 Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 11-5201-EL-RDR

MOTION FOR STAY OF APPELLANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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IN THE SUPREME COURT OF OHIO

OHIO EDISON COMPANY , THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY Appellants, v. THE PUBLIC UTILITIES COMMISSION OF OHIO Appellee.	)	CASE NO.________ Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 11-5201-EL-RDR

MOTION FOR STAY OF APPELLANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

Pursuant to Section 4903.16 of the Ohio Revised Code and Rule 4.01(A) of the Rules of Practice of the Supreme Court of Ohio, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "the Companies") respectfully request this Court to issue an order staying the Public Utilities Commission of Ohio's Opinion and Order dated August 7, 2013, and Second Entry on Rehearing dated December 18, 2013, in the proceeding below, PUCO Case No. 11-5201-EL-RDR. Without a stay, the Companies would be required to begin crediting customers' bills over $43,000,000 beginning February 17, 2014. The Companies request that the stay be made effective as of the date this Court grants it and that said stay remain in effect until this Court decides the Companies' appeal on the merits.

In accordance with Section 4903.16, the Companies will execute and post a bond payable to the State of Ohio "conditioned for the prompt payment by the [Companies] of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained." Likewise, as required by Rule 4.01(A)(2) of the Rules of Practice of the Supreme Court of Ohio, the Companies' Memorandum in Support "include[s] relevant information regarding bond."

In addition to the Memorandum in Support, the following documents are attached to this Motion:

- The Commission's Opinion and Order, dated August 7, 2013
- The Commission's Second Entry on Rehearing, dated December 18, 2013
- The letter providing three day's written notice filed with the Commission on December 18, 2013
- The Commission's Second Opinion and Order in PUCO Case No. 08-935-EL-SSO, dated March 25, 2009
- An interest calculation worksheet for the bond

As explained more fully in the attached Memorandum in Support, the Companies respectfully request that this Court issue an Order staying the Commission's Opinion and Order, dated August, 7, 2013, and Second Entry on Rehearing, dated December 18, 2013, pending the outcome of this appeal, and further respectfully request that this Court's Order staying the Commission's Opinion and Order be issued by February 16, 2014.

Dated: December 24, 2013

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

IN THE SUPREME COURT OF OHIO

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY Appellants, v. THE PUBLIC UTILITIES COMMISSION OF OHIO Appellee.	))))))))))))	CASE NO.________ Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 11-5201-EL-RDR

MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION FOR STAY

I. INTRODUCTION AND OVERVIEW

The case below concerns a Commission-initiated audit proceeding into certain purchases of Renewable Energy Credits ("RECs") by Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company and (collectively, "the Companies") from 2009 to 2011. This case addresses the Commission's order requiring the Companies to credit customers' bills by over $43,000,000. This amount represents the cost of certain RECs that the Commission found the Companies did not prove were prudently purchased.

Pursuant to Sections 4928.64 and 4928.65 of the Ohio Revised Code, electric distribution utilities ("EDUs") in Ohio, such as the Companies, are required to "generate a portion" of their "electricity supply to retail customers" from alternative energy resources. R.C. 4928.64(B). EDUs may purchase such resources from suppliers through the procurement of RECs. R.C. 4928.65. Importantly, Section 4928.64 mandates that to meet their REC compliance obligations EDUs must purchase at least one-half of their RECs from in-state suppliers ("in-state RECs").

On February 19, 2009, as part of their application in Case No. 08-935-EL-SSO, the Companies submitted a plan to procure the necessary RECs from in-state and out-of-state suppliers for the period January 1, 2009 through May 31, 2011, which the Commission subsequently approved. *See* Case No. 08-935-EL-SSO, Second Opinion and Order, p. 9 (Mar. 25, 2009). The Commission further approved the Companies' recovery of the costs associated with the REC procurement process by allowing for the establishment of an alternative energy cost-recovery rider, Rider AER. *Id.* The Companies then proceeded to issue requests for proposals, entertain and accept bids, and enter into binding, confidential contracts for the purchase of RECs with various suppliers to comply with the provisions of Section 4928.64.

On September 20, 2011, the Commission initiated the audit proceeding below by opening a docket to review Rider AER. The Commission directed its staff to secure the services of outside auditors to perform a management and performance audit and a financial audit. On August 15, 2012, these auditors filed their reports with the Commission. The authors of the management and performance audit were concerned that the Companies paid excessive prices for certain purchases of in-state RECs. Although the Companies strongly disagree with this conclusion, it is not necessary for the purposes of this Motion to delve into these issues now.

From February 19, 2013 to February 26, 2013, the Commission conducted a hearing on this matter. On August 7, 2013, the Commission issued an Order and Opinion in which it found that the majority of the REC purchases made by the Companies were prudent, including all out-of-state RECS and in-state RECs of 2009 and 2010 vintage. Opinion and Order, PUCO Case No. 11-5201-EL-RDR, 21-25 (Aug. 7, 2013). The Commission, however, held that the Companies had not proved that certain acquisitions of in-state RECs made during 2010 were prudent. *Id.* at 25. The Commission thus ordered that the Companies credit customers' bills in the amount of approximately $43 million dollars within 60 days of a final, appealable Commission order. *Id.*

On September 6, 2013, the Companies filed a timely application for rehearing. In their Application for Rehearing, the Companies set forth several errors made by the Commission in its Opinion and Order. These errors included the unreasonableness of the Commission's finding that any of the Companies' REC purchases were imprudent and that, contrary to the Commission's holding, any refund of monies already collected pursuant to Rider AER would run afoul of this Court's prohibition on retroactive ratemaking. *See Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). On December 18, 2013, the Commission issued its Second Entry on Rehearing denying in its entirety the Companies' Application for Rehearing and ordering the Companies to comply with its Order issued on August 7, 2013.[1] On December 24, 2013, the Companies filed their Notice of Appeal with this Court.

II. ARGUMENT

Pursuant to Ohio law, parties aggrieved by Commission orders have the right to seek a stay of such orders provided that they comply with the requirements of Section 4903.16 of the Ohio Revised Code. Section 4903.16 provides, in its entirety:

> A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the

[1] The Commission initially granted the Companies' application for rehearing for further consideration on September 18, 2013.

> order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

As demonstrated below, the Companies have complied with all of the requirements of Section 4903.16.

A. The Commission's Opinion And Order And Second Entry On Rehearing Affect A Substantial Right Of The Companies.

Section 4903.16 authorizes stays of "a final order" of the Commission, i.e., when "the order in question affects a substantial right" of a party. *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St. 3d 329, 331-332, 533 N.E.2d 353 (1988). *See also, East Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St. 3d 295, 297, 530 N.E.2d 875 (1988) (same); *Ohio Domestic Violence Network v. Pub. Util. Comm*, 65 Ohio St. 3d 438, 439-440, 605 N.E.2d 13 (1992) (same). In turn, a Commission order affects a "substantial right" of a party if that party has a "present interest" and an "immediate and pecuniary interest" in the proceedings subject to the order. *Ohio Domestic Violence Network*, 65 Ohio St. 3d at 439. *See also, East Ohio Gas*, 39 Ohio St. 3d at 298 (same, with adverse impact on future sales counting as an "immediate and pecuniary interest"); *Ohio Contract Carriers Assoc., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942) (same).

Here, the Commission's Second Entry on Rehearing does not "reverse, vacate, or modify" the disallowance amount of approximately $43 million previously ordered by the Commission in its Opinion and Order dated August 7, 2013. R.C. 4903.16. The Second Entry on Rehearing thereby "affects a substantial right" of the Companies, i.e., a right in which the Companies have an "immediate and pecuniary interest." The Companies have thus met this requirement of Section 4903.16.

B. The Companies Have Made A Proper Application To This Court.

Section 4903.16 requires that any party seeking a stay of a Commission order file a proper "application" to this Court. The Companies have met this requirement by filing this Motion and attached Memorandum in Support in compliance with all of this Court's applicable filing rules and procedures.

C. The Companies Have Provided Three Day's Notice To The Commission.

Section 4903.16 requires that any party seeking a stay of a Commission order provide the Commission with three day's notice of that party's intent to seek a stay. The Companies complied with this requirement on December 18, 2013 when they filed a letter with the Commission on the docket for PUCO Case No. 11-5201-EL-RDR indicating their intent to seek a stay in this Court on or after December 23, 2013. A copy of this letter is attached hereto as Exhibit C. The Commission issued its Second Entry on Rehearing on December 18, 2013. The Companies have provided the Commission with more than three day's notice of their intent to move for a stay and therefore meet the notice requirement of Section 4903.16.

D. The Companies Will Satisfy The Bond And Interest Requirements Of Section 4903.16.

Pursuant to the Section 4903.16, the Companies are in the process of executing "an undertaking" from a reputable third party at the proper rate of interest. The Companies will secure a bond for $50,096,550. This sum represents the disallowance ($43,362,796) ordered by the Commission in its Opinion and Order, dated August 7, 2013, and affirmed by the Second Entry on Rehearing, dated December 18, 2013, plus interest calculated at the Companies' carrying cost through April 2015.[2]

[2] The Companies' calculated carrying cost of $6,7330,730 using a rate of 0.7066 percent, the rate approved by the Commission for carrying costs in the Companies' last three Electric Security Plans, PUCO Case No. 08-935-

As required by Section 4903.16, the Companies will ensure that the bond is payable to the State of Ohio and properly deposited with the office of this Court's Clerk. Should this Court sustain the Commission's Order, such a bond will more than guarantee "prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of." R.C. 4903.16. Should this Court desire the Companies to execute a bond in an amount different from the sum above, the Companies are ready and willing to do so. The Companies have thus met the bond requirements of Section 4903.16 and Rule 4.01(A)(2) of the Rules of Practice of the Supreme Court of Ohio.

E. Additional Considerations That Favor Granting A Stay To The Companies.

Although Section 4903.16 does not require a movant to demonstrate its likelihood of prevailing on the merits or suffering irreparable harm if a stay is not granted, the Companies can do both. First, the Companies have a strong likelihood of prevailing on the merits. For example, the Commission's orders are unlawful on their face because they mandate a refund that violates Ohio's long-standing prohibition on retroactive ratemaking. This Court has long held that "any rates set for the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court." *Keco Industries,* 166 Ohio St. 254, 259. "[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.*, 166 at 257 (emphasis added); *see also Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St. 3d 344, 347, 42 N.E.2d 758 (1997)

(continued...)

EL-SSO, PUCO Case No. 10-388-EL-SSO, and PUCO Case No. 12-1230-EL-SSO. A worksheet of this calculation is attached hereto as Exhibit E.

(holding that "while a rate is in effect a public utility must charge its consumers in accordance with the commission-approved rate schedule" and citing Revised Code Section 4905.32). Further, Ohio law provides that even if the Commission determines "the rates charged by a utility are unjust or unreasonable," an order modifying those rates (such as the Commission orders complained of here) has "prospective effect only." *Lucas County*, 80 Ohio St. 3d at 347.

Yet, the Commission's Opinion and Order and Second Entry on Rehearing at issue here are retrospective in effect. These orders require the Companies to refund monies that the Companies have been collecting since October 1, 2009 pursuant to a Commission-approved tariff. This tariff, approved by the Commission in the Companies' first Electric Security Plan proceeding, PUCO Case No. 08-935-EL-SSO, authorized the Companies to recover under Rider AER the costs associated with complying with Section 4928.64. To order a refund of these monies now, several years after their lawful collection, constitutes impermissible retroactive ratemaking.

Second, allowing a refund to go into effect with the real possibility that the refund could be reversed would benefit no one. Indeed, in the absence of a stay of execution of the Commission's orders complained of here, the Companies will likely suffer irreparable harm. That is, "an injury for which there is no plain, adequate, and complete remedy at law, and for which monetary damages would be impossible, difficult or incomplete." *Ohio Hosp. Assoc. v. Ohio Bureau of Workers' Comp.*, Franklin App. No. 06AP-471, 2007-Ohio-1499, at ¶ 25.

Specifically, if the Companies were to issue a refund, and if this Court were to vacate or substantially reduce the refund amount, then it is unclear how the Companies would be able to re-collect such sums from their customers without themselves running afoul of the prohibition on retroactive ratemaking. If this Court grants the Companies' appeal, then restitution of monies refunded under the Commission's Opinion and Order and Second Entry on Rehearing would, at best, prove "difficult or incomplete" and, at worst, "impossible," because a reversal of the refund amount may well implicate retroactive ratemaking concerns. *See Keco Industries*, 166 Ohio St. at 259 ("the General Assembly . . . has completely abrogated the common law remedy of restitution in [retroactive ratemaking] cases").

Retroactive ratemaking arguments aside, allowing a refund at this early stage in the appellate process could also easily lead to customer confusion. In the absence of a stay, if the Companies were to issue a credit and then this Court were to reverse the Commission orders at issue, customer rates would decrease and subsequently increase. This result would likely only upset and confuse customers, thereby causing harm to them as well. These additional considerations thus provide further support for granting a stay of the Commission's orders at issue here.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request this Court to stay the Commission's Opinion and Order, dated August 7, 2013, and Second Entry on Rehearing, dated December 18, 2013, during the pendency of the Companies' appeal.

Dated: December 24, 2013

Respectfully submitted,

David Kutik (per authority 12/24/2013 TMO)

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ATTORNEYS FOR APPELLANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Stay of Appellants, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, was served by electronic mail on the 24th day of December, 2013, upon the following:

William Wright
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David Kutik (per authority 12/24/2013 TMD)
AN ATTORNEY FOR APPELLANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

EXHIBIT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

The Public Utilities Commission of Ohio, coming now to consider the above-entitled matter, having reviewed the exhibits introduced into evidence in this matter, and being otherwise fully advised, hereby issues its opinion and order in this case.

APPEARANCES:

James W. Burk and Carrie M. Dunn, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Jones Day, by David A. Kutik and Lydia A. Floyd, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Mike DeWine, Ohio Attorney General, by Thomas Lindgren and Ryan O'Rourke, Assistant Attorneys General, 180 East Broad Street, 6th Floor, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Bruce J. Weston, Ohio Consumers' Counsel, by Melissa R. Yost, Edmund Berger, and Michael J. Schuler, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Nicholas McDaniel, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212, on behalf of the Environmental Law and Policy Center.

Trent A. Dougherty, Cathryn N. Loucas, and Nolan Moser, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of Ohio Environmental Council.

Bricker & Eckler, LLP, by J. Thomas Siwo and Terrence O'Donnell, 100 South Third Street, Columbus, Ohio 43215-4291, on behalf of Mid-Atlantic Renewable Energy Coalition.

Bricker & Eckler, LLP, by Frank L. Merrill, 100 South Third Street, Columbus, Ohio, 43215-4291, on behalf of Ohio Manufacturers Association.

Brickfield, Burchette, Ritts & Stone, P.C., by Michael K. Lavanga, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007-5201, on behalf of Nucor Steel Marion, Inc.

Williams, Allwein & Moser, LLC, by Christopher J. Allwein, 1373 Grandview Avenue, Suite 212, Columbus, Ohio 43212, on behalf of the Sierra Club.

Boehm, Kurtz & Lowry, by Michael L. Kurtz and Jody Kyler Cohn, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Vorys, Sater, Seymour and Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Interstate Gas Supply.

Theodore S. Robinson, 2121 Murray Avenue, Pittsburgh, Pennsylvania, 15217, on behalf of Citizen Power, Inc.

OPINION:

I. HISTORY OF PROCEEDINGS:

On September 20, 2011, the Commission issued an entry on rehearing in *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP. In that entry on rehearing, the Commission stated that it had opened the above-captioned case for the purpose of reviewing Rider AER of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies). Additionally, the Commission noted that its review would include the Companies' procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code. The Commission further stated that it would determine the necessity and scope of an external auditor within the above-captioned case.

To assist the Commission with the audit, the Commission directed Staff to issue a request for proposal (RFP) for audit services. Thereafter, by entry issued February 23, 2012, the Commission selected Exeter Associates, Inc. (Exeter), to conduct the management/performance portion of the audit and Goldenberg Schneider, LPA (Goldenberg), to conduct the financial portion of the audit in accordance with the terms set forth in the RFP. On August 15, 2012, Exeter and Goldenberg filed final audit reports on the management/performance portion and financial portion of Rider AER, respectively. Thereafter, the attorney examiner set the matter for hearing regarding the content of the management/performance and financial audit reports. A prehearing conference was held on November 20, 2012, in order to resolve pending discovery issues.

Numerous parties filed motions to intervene in this proceeding including the Ohio Consumers' Counsel (OCC), the Sierra Club, Ohio Environmental Council (OEC), Ohio Energy Group (OEG), Nucor Steel Marion, Inc. (Nucor), Citizen Power, Mid-Atlantic Renewable Energy Coalition (MAREC), the Environmental Law and Policy Center (ELPC), Interstate Gas Supply, Inc. (IGS), and Ohio Power Company Corp. (AEP Ohio). By entry issued December 15, 2011, the attorney examiner granted intervention to OCC, OEC, OEG, and Nucor. Additionally, by entry issued December 15, 2011, the attorney examiner granted a motion for admission *pro hac vice* of Michael Lavanga. Thereafter, by entry issued December 13, 2012, the attorney examiner granted a motion for admission *pro hac vice* of Edmund Berger. Further, on December 31, 2012, the attorney examiner granted intervention to ELPC. The hearing commenced on February 19, 2013, and proceeded through February 25, 2013.

Post-hearing briefs were filed in this matter by FirstEnergy; the Commission's Staff (Staff); OCC; the Sierra Club, OEC, and ELPC, collectively; OEG; Nucor; MAREC; and IGS. Reply briefs were filed by FirstEnergy; Staff; OCC; the Sierra Club, OEC, and ELPC, collectively; OEG; Nucor; MAREC; and IGS.

II. APPLICABLE LAW

Section 4928.64, Revised Code, establishes benchmarks for electric distribution utilities to provide a portion of electricity for customers in Ohio from renewable energy resources. The statute requires that a portion of the electricity must come from alternative energy resources (overall or all-state renewable energy resources benchmark), half of which must be met with resources located within Ohio (in-state renewable energy resources benchmark), and including a percentage from solar energy resources (overall or all-state solar energy resources benchmark), half of which must be met with resources located within Ohio (in-state solar energy resources benchmark). The baseline for compliance is based upon the utility's or company's average load for the preceding three years, subject to adjustment by the Commission for new economic growth. Section 4928.64(B), Revised Code.

Section 4928.64, Revised Code, also requires the Commission to undertake an annual review of each electric distribution utility's or electric service company's compliance with the annual benchmark, including whether the failure to comply with an applicable benchmark is weather-related, is related to equipment or resource shortages, or is otherwise outside the utility's or company's control. Section 4928.64(C)(1), Revised Code. If the Commission determines, after notice and opportunity for hearing, that the utility or company failed to comply with an annual benchmark, the Commission shall impose a renewable energy compliance payment (compliance payment) on the utility or company. Compliance payments may not be passed through to consumers. Section 4928.64(C)(2), Revised Code.

An electric distribution utility or electric services company need not comply with the annual benchmarks to the extent its reasonably expected cost of compliance exceeds its reasonably expected cost of "otherwise procuring or acquiring" electricity by three percent or more. Section 4928.64(C)(3), Revised Code. In addition, an electric distribution utility or electric services company may request the Commission to make a *force majeure* determination regarding any annual benchmark. Section 4928.64(C)(4), Revised Code. In making a *force majeure* determination, the statute directs that the Commission shall determine if renewable energy resources are "reasonably available" in the marketplace in sufficient quantities for the utility or company to comply with the annual benchmark. Further, the statute provides that, in making this determination, the Commission shall consider whether the utility or company has made a good faith effort to acquire sufficient renewable energy resources or solar energy resources, including by banking, through long-term contracts or by seeking renewable energy credits. Section 4928.64(C)(4)(b), Revised Code.

III. SUMMARY OF THE AUDIT REPORTS

A. Goldenberg Report

In its final report on the financial audit of Rider AER (Commission-ordered Ex. 1 or Goldenberg Report), Goldenberg evaluated two primary areas: (1) the mathematical accuracy of the Companies' calculations involving Rider AER; and (2) the Companies' status relative to the three percent provision set forth in Section 4928.64(C)(3), Revised Code, for the period of July 2009 to December 2011 (Goldenberg Report at 3).

Regarding the mathematical accuracy of the Companies' calculations involving Rider AER, Goldenberg noted that it verified the mathematical accuracy and data provided by FirstEnergy and observed several minor issues that did not result in a large variance. Goldenberg recommended that the quarterly calculations should recover all appropriate costs during the following calendar year, and that recovered costs should include estimated REC expenditures, RFP costs, or other administrative and estimated carrying costs. Further, Goldenberg recommended that quarterly calculations be trued-up and any over- or under-recovery included in the calculation two quarters later. Goldenberg also recommended that each operating company charge the overall Rider AER rate calculated for the quarter to all rate classes rather than allocating the overall rate to rate classes based on loss factors. Finally, Goldenberg recommended that forecasted sales volumes for non-shopping customers to be included in Rider AER calculations should be reviewed each quarter and the best estimate at the time should be used for cost recovery to assure appropriate recovery. (Goldenberg Report at 6-7.)

Regarding the three percent provision set forth in Section 4928.64(C)(3), Revised Code, Goldenberg recommended that the Commission require each operating company to develop: (1) a projected calculation of the three percent provision for the next calendar year; (2) a projected calculation of the three percent provision for the balance of the current SSO period; and (3) a historical calculation of the three percent provision to determine the Companies' status with regard to the three percent provision. (Goldenberg Report at 7.)

B. Exeter Report

In its final report on the management/performance audit of Rider AER (Commission-ordered Ex. 2 or Exeter Report), Exeter examined two primary areas: (1) the Companies' general renewable energy credit (REC)/ solar REC (SREC) acquisition approach; and (2) the Companies' solicitation results and procurement decisions. (Exeter Report at 2.)

Regarding the Companies' general REC/SREC acquisition approach, Exeter found that the requests for proposals (RFPs) issued by FirstEnergy were reasonably developed, did not appear to be anti-competitive, and contained terms generally acceptable by the industry. Further, Exeter found that the processes in place to disseminate information to bidders and mechanisms in place to review and evaluate bids were generally adequate. Exeter also observed that market information for in-state SRECs and overall RECs was limited prior to the first and second RFPs conducted by the Companies. Finally, Exeter observed that the contingency planning in place by the Companies for the first three RFPs was inadequate and should have encompassed a set of fallback approaches or a mechanism to develop a modified approach. In light of its findings, Exeter recommended that FirstEnergy implement a more robust contingency planning process regarding procurement of RECs and SRECs in order to comply with Ohio's alternative energy portfolio standards (AEPS), subject to Commission review prior to implementation. Further, Exeter recommended that a thorough market analysis should precede issuance of any future RFPs issued by FirstEnergy for RECs and SRECs. Finally, Exeter recommended that FirstEnergy consider a mark-to-market approach to the security requirement for future procurements when the RECs and SRECs markets mature. (Exeter Report at 12-13.)

Regarding the Companies' solicitation results and procurement decisions, Exeter clarified that it reviewed the results of FirstEnergy's procurement decisions for 2009, 2010, and 2011. As a result of its review, Exeter found that the prices paid by FirstEnergy for all-state RECs were consistent with regional REC prices and that the decision to purchase the majority of the 2009, 2010, and 2011 requirements under the first RFP was not unreasonable. Exeter noted that the lower prices available for all-state SRECs in the 2011 timeframe could not have been reasonably foreseen by the Companies, and that the prices paid for all-state SRECs were consistent with regional SREC prices. Exeter further found that FirstEnergy failed to establish a maximum price it was willing to pay for in-state RECs prior to issuance of the RFPs, and that FirstEnergy paid unreasonably high prices for in-state RECs from a supplier, with prices exceeding reported prices for non-solar RECs anywhere in the country between July 2008 and December 2011. Exeter continued that FirstEnergy had several alternatives available to the purchase of the high-priced in-state RECs that the Companies did not consider, and that FirstEnergy should have been aware that the prices reflected significant economic rents and were excessive. Finally, Exeter found that the procurement of in-state SRECs by FirstEnergy was competitive and the prices were consistent with the prices for SRECs seen elsewhere. In light of these findings, Exeter recommended that the Commission examine the disallowance of excessive costs associated with FirstEnergy's purchase of RECs to meet its in-state renewable energy benchmarks. (Exeter Report at 14, 19, 23, 33, 37.)

IV. PROCEDURAL ISSUES

A. Pending Motions to Intervene, Motion for Admission *Pro Hac Vice*, and Motion to Reopen the Proceedings

Motions to intervene remain pending for Citizen Power, Sierra Club, MAREC, OMAEG, and IGS. The Commission finds that these motions to intervene are reasonable and should be granted. Additionally, Theodore Robinson filed a motion for admission *pro hac vice* on December 28, 2011. The Commission finds that the motion for admission *pro hac vice* is reasonable and should be granted.

Additionally, the Commission notes that AEP Ohio filed a motion to intervene and reopen the proceedings in this case on June 21, 2013. In its motion, AEP Ohio states that it has multiple real and substantial interests in this proceeding which may be prejudiced by the outcome of this case. AEP Ohio also states that extraordinary circumstances justify intervention and reopening of the proceedings. Further, AEP Ohio contends that it satisfies the intervention standard because the Commission's resolution of this case will impact the ability of AEP Ohio to comply with renewable standards.

On July 2, 2012, FirstEnergy filed a memorandum contra AEP Ohio's motion to intervene and reopen the proceedings. In its memorandum contra, FirstEnergy initially notes that AEP Ohio's motion to intervene is untimely, as it was filed 640 days after the docket in this case was opened, 220 days after the deadline to intervene established by the Commission, and 46 days after the final briefing deadline. Further, FirstEnergy argues that AEP Ohio fails to explain why it failed to timely intervene or what circumstances are so extraordinary as to justify the late intervention. FirstEnergy further contends that, not only has AEP Ohio failed to meet the requirements for late intervention under Rule 4901-1-11(F), Ohio Administrative Code (O.A.C.), but has also failed to meet the standards to reopen proceedings as set forth in Rule 4901-1-34, O.A.C. More specifically, FirstEnergy avers that AEP Ohio has failed to set forth facts showing why additional evidence could not have been presented earlier in this proceeding.

Thereafter, on July 9, 2013, OCC and the Environmental Advocates filed replies to FirstEnergy's memorandum contra. In its reply, OCC states that it supports AEP Ohio's motion to reopen the record, but states that the Commission should also minimize delay in issuing a ruling in this case. OCC further states that AEP Ohio can provide the Commission with unique information. In their reply, the Environmental Advocates also voice their support for AEP Ohio's motion to intervene and reopen the proceedings on the basis that AEP Ohio's utility perspective could assist the Commission in deciding the issues in this case, and that AEP Ohio is affected by the issues in this case.

The Commission finds that AEP Ohio's motion to intervene and reopen the proceedings should be denied. Rule 4901-1-11(F), O.A.C., provides that a "motion to intervene which is not timely will be granted only under extraordinary circumstances." Although AEP Ohio has asserted that it has an interest in this proceeding, which may be prejudiced by the results, the Commission cannot find that the circumstances articulated by AEP Ohio are extraordinary. Consequently, given that AEP Ohio's motion to intervene was filed 220 days after the deadline to intervene and presents no extraordinary circumstances, the Commission finds that the motion to intervene should be denied. Further, Rule 4901-1-23, O.A.C., provides that a motion to reopen a proceeding shall set forth facts showing why additional evidence "could not, with reasonable diligence, have been presented earlier in the proceeding." The Commission finds that AEP Ohio has failed to set forth why any additional evidence could not, with reasonable diligence, have been presented earlier in this proceeding. Therefore, the Commission finds that AEP Ohio's motion to reopen the proceedings should be denied.

B. Review of Rulings on Motions for Protective Orders

OCC seeks Commission review of protective orders granted by the attorney examiners in this proceeding. OCC requests that the Commission reverse the rulings which protect from public disclosure certain supplier information and prices paid by the Companies for RECs. More specifically, OCC argues that the attorney examiners erred in granting, in part, FirstEnergy's first and second motions for protective order. OCC claims that there is a strong presumption in favor of disclosure under which the party seeking a protective order must overcome the presumption by showing harm or that its competitors could use the information to its competitive disadvantage. *In re Ohio Bell Tel. Co. and Ameritech Mobile Servs., Inc.*, Case No. 89-365-RC-ART, Opinion and Order (Oct. 18, 1990) at 4. OCC contends that the supplier-identity and supplier-pricing information of alternative energy marketers does not constitute trade secret information as defined by Section 1333.61(D), Revised Code, and that FirstEnergy failed to meet the six-factor test for determining whether information is a trade secret set forth by the Ohio Supreme Court in *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

OCC claims that FirstEnergy failed to carry its burden of demonstrating that this information provides independent economic value from not being known pursuant to Section 1333.61(D), Revised Code. OCC argues that the Companies provided no evidence of any economic value within the redacted information and the Companies failed to identify any specific parties who would gain economic value from the disclosure of the information. OCC further alleges that the Commission's prior rulings do not support the attorney examiners' rulings. OCC notes that the Commission has held that financial data, including basic financial arrangements, do not contain proprietary information that should be protected as a trade secret. OCC also claims that the Commission has determined that contracts between a utility and its customers do not qualify for protection from disclosure.

Moreover, OCC argues that FirstEnergy has failed to show that the information is kept under circumstances that maintain its secrecy. OCC notes that certain information was disclosed to the media in the Exeter Report and that FirstEnergy did not take prompt action to protect this information, allowing publication of the information on a number of occasions. OCC disputes the value of confidentiality agreements between the Companies and third-party REC suppliers, contending that the Ohio Supreme Court has held that the mere existence of a confidentiality agreement cannot prevent disclosure of information that does not meet the definition of a trade secret. *Plain Dealer* at 527.

Finally, OCC argues that the public interest favors disclosure, particularly in light of the age of the information. OCC claims that FirstEnergy failed to provide any specific evidence that the utility or suppliers will be harmed in a way that outweighs the public's interest in disclosure.

OCC further argues that granting FirstEnergy's October 3, 2012, motion for a protective order was an error because the Companies' motion was not timely under the Commission's rules. OCC notes that the information that the Companies sought to protect was filed by Staff on August 15, 2012, but the Companies did not file the motion for protective order until October 3, 2012.

OCC also claims that the Commission should reverse the attorney examiners' ruling on the Companies' second motion for a protective order because information was improperly redacted. OCC claims that the specific amount of the disallowance recommended by the Exeter Report was already released in response to a public records request and that a discussion regarding that amount was held on the public transcript.

FirstEnergy responds that the Commission has properly protected confidential and proprietary supplier pricing and supplier identifying information from disclosure. FirstEnergy contends that the Companies have at all times safeguarded the REC procurement data. The Companies note that, as part of the audits, the auditors and Staff were provided with competitively sensitive and proprietary REC procurement data, including: the specific identities of REC suppliers who participated in the RFPs; the specific prices for the RECs bid by specific REC suppliers in response to each RFP; and detailed financial information regarding individual REC transactions between suppliers and the Companies. The Companies claim that this REC procurement data was provided to the auditors and Staff with the understanding they would keep this information confidential and not release it to the public. However, FirstEnergy contends that the public version of the Exeter Report filed in this proceeding was improperly redacted and the identity of a single REC supplier was inadvertently disclosed.

Further, the Companies argue that the attorney examiners correctly found that the REC procurement data constituted a trade secret under Ohio law. The Companies claim that, under Section 1333.61(D), Revised Code, the REC procurement data is a trade secret because the REC procurement data bears independent economic value and because the Companies have made reasonable efforts to ensure the secrecy of the REC procurement data. The Companies allege that OCC fails to understand that the age of proprietary data is neither a necessary nor a sufficient determinant in deciding whether information has independent economic value. The Companies also claim that the REC procurement data has not been disclosed to any third parties outside of this proceeding and has only been disclosed to third parties in this proceeding pursuant to a confidentiality agreement or to the Staff and the auditors with the understanding that the information would remain confidential.

The Companies also contend that the REC procurement data readily satisfies the six-factor test set forth in *Plain Dealer*, 80 Ohio St.3d at 524-525. FirstEnergy claims that the Companies have consistently protected the REC procurement data from disclosure and that the REC procurement data is not widely disseminated with the Companies. Further, the Companies argue that they have undertaken several precautions to safeguard the REC procurement data, including acquiring the data through contracts containing strict confidentiality provisions, taking steps to ensure the secrecy of the data at all times, and filing all pleadings containing the data under seal. In addition, FirstEnergy alleges that the REC procurement data has independent economic value because its dissemination would cause competitive harm to the Companies by undermining the integrity of the REC procurement process due to decreased supplier participation in future RFPs. Further, the Companies argue that they incurred significant expense in retaining their consultant and conducting the RFPs through which FirstEnergy acquired the REC procurement data. Finally, the Companies contend that another entity could not recreate the REC procurement data, regardless of the time and expense expended.

The Companies further argue that the Commission has regularly found that pricing and bidding information similar to the REC procurement data meets the six-factor test. They note that the Commission recently held that pricing and growth projections data met the six-factor test. *In re Duke Energy Ohio, Inc.*, Case No. 10-2326-GE-RDR, Entry (Jan. 25, 2012), at 3-5.

FirstEnergy rejects OCC's contention that the Companies abandoned the REC procurement data. The Companies allege that they requested an opportunity to review the final draft of the Exeter Report prior to its filing but were refused. The Companies claim that the exposure of the identity of a REC supplier in an improperly redacted version of the Exeter Report occurred without the Companies' knowledge, consent or control. Thus the Companies claim that the inadvertent and involuntary disclosure of some of the REC procurement data in the public version of one of the audit reports provides no basis to claim that abandonment somehow occurred.

The Companies also reject OCC's contention that the motion for protective order was not timely. The Companies note that Staff filed the Exeter Report, not the Companies, and that the REC procurement data was provided to Staff and the auditors in this proceeding with the understanding that it would remain confidential pursuant to Section 4901.16, Revised Code. Entry (Jan. 18, 2012) at 2-3. Further, the Companies urge the Commission to affirm the attorney examiners' ruling that the improperly redacted information should not be referenced in public filings. The Companies note that the parties can cite to this portion of the Exeter Report in their filings but must do so in a confidential version filed under seal.

Moreover, the Companies claim that the attorney examiners correctly determined, following an *in camera* review, that the REC procurement data contained in confidential drafts of the Exeter Report warranted trade secret protection. Entry (Feb. 14, 2013) at 5. The Companies note that the draft Exeter Report contains the identical supplier-identifying and pricing information as the filed Exeter Report and deserves the same protection. The Companies also argue that the proposed disallowance contained in the confidential version of OCC witness Gonzalez's testimony warrants protection. FirstEnergy notes that the proposed disallowance merely aggregates the confidential REC pricing information. The Companies posit that the proposed disallowance, and interest amounts, would enable anyone, with little effort, to arrive at the REC pricing data.

The Commission notes that Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

Similarly, Rule 4901-1-24, O.A.C., allows the Commission to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Ohio law defines a 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." Section 1333.61(D), Revised Code.

Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court in *Plain Dealer*, 80 Ohio St.3d at 524-525, the Commission finds that the REC procurement data contains trade secret information. Its release, therefore, is prohibited under state law. The Commission also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, we note that the filings and documents subject to the protective orders have been redacted to remove the confidential information, and that public versions of the pleadings and documents have been docketed in this proceeding. Accordingly, we will affirm the rulings of the attorney examiners granting protective orders in all but one respect.

However, the Commission notes that the public versions of the audit reports disclose the fact that the Companies' affiliate, FirstEnergy Solutions Corp. (FES), was a bidder for some number of the competitive solicitations. Although this information may have been inadvertently disclosed due to a failure of communication between Staff and the Companies, this fact has been placed in the public domain and has been widely disseminated. Further, the Commission's policy has been to disclose the identities of winning bidders in competitive auctions within a reasonable time after the auction results are released to the public. See *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 10-1284-EL-UNC, Finding and Order (Jan. 23, 2013); *In the Matter of the Procurement of Standard Service Offer Generation as Part of the Third Electric Security Plan for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 12-2742-EL-UNC, Finding and Order (Jan. 23, 2013).

Therefore, we will modify the attorney examiners' rulings to permit the generic disclosure of FES as a successful bidder in the competitive solicitations. However, specific information related to bids by FES, such as the quantity and price of RECs contained in such bids and whether such bids were accepted by the Companies, shall continue to be confidential and subject to the protective orders.

C. Pending Motions for Protective Orders

FirstEnergy filed a motion for a protective order on January 23, 2013, requesting a protective order for portions of the pre-filed direct testimony of FirstEnergy witnesses Stathis and Bradley on the basis that they include confidential supplier-identifying and price information. OCC filed a memorandum contra on February 7, 2013. Further, FirstEnergy filed a motion for protective order on February 7, 2013, contending that the Commission should grant a protective order to prevent public disclosure of portions of OCC witness Gonzalez's pre-filed direct testimony that contain REC procurement data. FirstEnergy filed its next motion for protective order on February 15, 2013, requesting a protective order for portions of the deposition testimony of OCC witness Gonzalez that contain supplier-identifying and pricing information. OCC filed a memorandum contra

FirstEnergy's motion for protective order on February 25, 2013, arguing that the figure representing the total dollar amount that OCC argues should not be charged to Ohio customers should be public because it does not identify specific prices paid or bidder identities. Next, FirstEnergy filed a motion for protective order on February 22, 2013, seeking a protective order for portions of the pre-filed rebuttal testimony of FirstEnergy witness Mikkelsen that contain references to REC procurement data, including pricing information. FirstEnergy filed another motion for protective order on April 15, 2013, requesting a protective order for portions of its post-hearing brief that contain REC procurement data and cite various portions of the confidential transcript. FirstEnergy filed its final motion for protective order on May 6, 2013, seeking a protective order for portions of its reply brief that contain REC procurement data and cite various portions of the confidential transcript.

OCC filed a motion for protective order on January 31, 2013, seeking a protective order for portions of the pre-filed direct testimony of OCC witness Gonzalez that are asserted to be confidential by FirstEnergy. Next, OCC filed a motion for protective order on February 15, 2013, requesting a protective order for portions of a revised attachment to the pre-filed direct testimony of OCC witness Gonzalez that contain information asserted to be confidential by FirstEnergy. OCC filed its next motion for protective order on April 15, 2013, seeking a protective order for portions of its post-hearing brief that contain information asserted to be confidential by FirstEnergy. OCC filed its final motion for protective order on May 6, 2013, requesting a protective order for portions of its reply brief that contain information asserted to be confidential by FirstEnergy. In all motions it filed for protective order, OCC notes that it does not concede that the information at issue is confidential.

ELPC, OEC, and the Sierra Club filed a motion for protective order on April 15, 2013, regarding portions of their collective post-hearing brief that contain information asserted to be confidential by FirstEnergy. ELPC, OEC, and the Sierra Club filed another motion for protective order on May 6, 2013, regarding portions of their collective reply brief that contain information asserted to be confidential by FirstEnergy. In both motions for protective order, ELPC, OEC, and the Sierra Club note that they do not concede that the information at issue is confidential.

Under the standards for protective orders specifically set forth in Section IV(B) of this Opinion and Order, the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Supreme Court of Ohio,[1] the Commission finds that the REC procurement data at issue in all

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[1] *See Plain Dealer*, 80 Ohio St.3d at 524-525.

pending motions for protective order in this case, including but not limited to the pending motions enumerated above, contains trade secret information. Its release is, therefore, prohibited under State law. The Commission also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, we note that the filings and documents subject to the protective orders have been redacted to remove confidential information, and that public versions of the pleadings and documents have been docketed in this proceeding. Accordingly, we find that the pending motions for protective orders are reasonable and should be granted, in all but one respect. Consistent with the Commission's discussion in Section IV(B) of this Opinion and Order, the Commission finds that generic disclosure of FES as a successful bidder in the competitive solicitations shall be permitted. However, as previously discussed, specific information related to bids by FES, such as the quantity and price of RECs contained in such bids and whether such bids were accepted by the Companies, shall continue to be confidential and subject to protective order.

Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this entry or until January 19, 2015. Until that time, the Docketing Division should maintain, under seal, the information filed confidentially. Further, Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If a party wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend the confidential treatment is filed, the Commission may release this information without prior notice.

V. DISCUSSION AND CONCLUSIONS

A. Prudency of Costs Incurred

In its brief, FirstEnergy claims that the Companies had a duty to meet the statutory renewable energy requirements contained in Section 4928.64, Revised Code and that they made prudent and reasonable decisions in purchasing RECs to meet their statutory benchmarks.

Initially, the Companies contend that their procurement process was developed and implemented in a competitive, transparent, and reasonable manner. More specifically, the Companies explain that they adopted a laddering strategy for the procurement of RECs necessary to meet the applicable renewable energy benchmarks. The Companies also explain that their consultant, Navigant, developed an effective procurement process. Further, the Companies contend that Navigant implemented the

RFPs in such a manner as to make them open, inclusive, competitive, and attractive to potential suppliers.

Next, the Companies contend that, given the nascent market, lack of market information available to the Companies, and uncertainty regarding future supply and prices, the Companies' decisions to purchase in-state RECs were reasonable and prudent. More specifically, the Companies point out that they were required to purchase in-state RECs during a time when Ohio's energy efficiency statute was in its infancy, and the market was nascent and highly constrained. Further, the Companies argue that, during the first, second, and third RFPs, no market price information was available to the Companies, causing uncertainty regarding supply and prices for in-state RECs. The Companies also note that, at all times, they purchased in-state RECs at prices at or below the prices recommended by Navigant. Consequently, the Companies argue that Exeter's suggestion that the Companies should have delayed purchase of in-state RECs is unsupported and unreasonable.

The Companies next argue that the prices they paid for in-state RECs reflected the market and were reasonable and that there is no evidence that the prices they paid were unreasonable. The Companies also contend that the statutory compliance payment amount does not indicate a market price or a fair comparison price. The Companies further argue that pricing information from other states is irrelevant, that data relied upon by Exeter and OCC provides no basis to conclude that the prices paid by the Companies were unreasonable, and that the development costs of renewable facilities do not indicate a market price. Finally, the Companies contend that there is no evidence that, had they contacted Staff prior to the procurement, discussions with Staff would or could have changed the Companies' procurement decisions.

In its brief, OCC argues that the prices the Companies paid for in-state RECs from 2009 through 2011 were grossly excessive and inappropriate. OCC contends that the Companies' management decisions to purchase in-state RECs at excessive prices were imprudent and should disqualify the Companies from collecting these costs from customers; that the Companies should have known that the prices paid for in-state RECs contained significant economic rents; that an RFP to procure RECs, even if competitively sourced, does not ensure a competitive result; and that the Companies' decision to pay excessive prices injured its customers.

OCC additionally argues that reasonable alternatives were available to FirstEnergy that would have protected customers, including consultation with the Commission prior to purchasing the excessively priced in-state RECs, application for a *force majeure* upon receiving bid proposals that were excessive, and a compliance payment in the event the Commission rejected a *force majeure* request. Next, OCC criticizes FirstEnergy's failure to implement a contingency plan and failure to establish a price limit to be paid for the purchase of in-state RECs.

OCC concludes that, for these reasons, the Commission should disallow FirstEnergy a portion of the amount it paid for in-state RECs for compliance periods 2009 through 2011 and should require FirstEnergy to refund to customers certain carrying costs associated with recovery of the disallowed costs. OCC continues that the Commission should credit the amount of the disallowance, plus carrying costs, to the balance of Rider AER, and that the Commission should impose a penalty on FirstEnergy in order to encourage future customer protection.

In its brief, Staff contends that FirstEnergy, as a utility seeking cost recovery, bears the burden of demonstrating that its costs were prudently incurred, citing *In re Application of Duke Energy, Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 8. In that case, Staff points to the Supreme Court of Ohio's holding that "[t]he commission did not have to find the negative: that the expenses were imprudent" and that "if the evidence was inconclusive or questionable, the commission could justifiably reduce or disallow cost recovery." *Id.* Staff argues that, in this case, FirstEnergy has failed to demonstrate that all of its costs for REC procurement were prudently incurred because the Companies made several purchases at extremely high prices and failed to employ alternatives that could have significantly reduced costs. Staff points out that evidence suggests that the Companies did not consider price at all in their purchasing decisions, pointing to the Exeter Report as well as the testimony of Company witness Stathis (Tr. II at 406). Staff emphasizes that the Companies did not establish a limit price prior to receiving bids or a price that would trigger a contingency plan. Staff also points out that multiple alternatives were available to FirstEnergy including making a compliance payment in lieu of procuring RECs, rejecting the high-priced bids and requesting a *force majeure* determination pursuant to Section 4928.64(C)(4)(a), Revised Code, or consulting with the Commission or Staff to obtain guidance on whether to accept the high-priced bids. Staff contends that FirstEnergy did not appear to consider any of these options, which indicates flawed decision-making. Consequently, Staff recommends that the Commission consider a disallowance of the excessive costs associated with the in-state REC acquisitions, as recommended in the Exeter Report.

In their collective brief, ELPC, OEC, and the Sierra Club (collectively, Environmental Advocates), contend that the Commission should find FirstEnergy's REC procurement practices were unreasonable and imprudent. More specifically, the Environmental Advocates argue that FirstEnergy failed to implement long-term contracts prior to the sixth RFP, utilized an unreasonable laddering approach in its procurements in light of the nascent Ohio market and high prices, and failed to negotiate for lower REC prices in the first and second RFPs, although admitting that negotiation was a good decision in the third RFP. Further, the Environmental Advocates argue that FirstEnergy acted unreasonably in failing to communicate with Staff regarding its difficulties in procuring reasonably priced RECs, and failing to utilize options other than purchasing RECs, such as making a compliance payment or requesting a *force majeure* determination.

In its brief, Nucor argues that, to the extent the Commission disallows FirstEnergy recovery of any costs associated with its REC purchases during the audit period, the costs, with interest, should be refunded back to current SSO customers through Rider AER utilizing the rider's current rate design. Similarly, OEG argues in its brief that any disallowance of REC costs should be refunded to rate classes through loss-adjusted energy charges under the current rate design of Rider AER.

In its brief, IGS disputes the proposition by other intervenors that the Companies could have made a compliance payment in lieu of acquiring RECs. IGS contends that the wording of Section 4928.64(C)(2) and (C)(5), Revised Code, indicates that utilities and CRES providers must actually acquire or realize energy derived from renewable energy resources, rather than merely making the compliance payment.

In its reply brief, FirstEnergy contends that other parties, including Staff, have misstated the appropriate standards for determining the Companies' prudency, and argue that the Companies' management decisions are presumed to be prudent. FirstEnergy argues that these parties cannot use the standards set forth in *In re Duke*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 8, because, in that case, Duke agreed in a stipulation that it would seek Commission approval for recovery of the storm-related costs and would bear the burden of proof. FirstEnergy argues that its situation is distinguishable from Duke's because FirstEnergy's costs have already been incurred and nearly recovered pursuant to a rider and cost-recovery mechanism previously approved by the Commission.

Further, FirstEnergy replies to other arguments by the intervenors, arguing that the intervenors' criticism of FirstEnergy's REC procurements amount to Monday morning quarterbacking. Specifically, FirstEnergy contends that the intervenors' arguments that the Companies should have known the prices bid for in-state RECs were too high are misguided because the Ohio in-state REC market is unique and includes geographic limitations, the Companies needed a substantial volume of RECs, and pricing information from other states was not comparable or informative and did not remove the Companies' statutory obligations. FirstEnergy also stresses that its procurement processes, which were reviewed by Staff, were designed to be competitive and were managed by an independent evaluator.

Next, FirstEnergy responds to intervenors' arguments that the Companies should have pursued alternatives to purchasing the high-priced in-state RECs, arguing that none of those alternatives were realistic, feasible, or legal. Initially, the Companies contend that making a compliance payment would have amounted to ignoring their statutory obligation to procure in-state RECs. Further, FirstEnergy contends that seeking a *force majeure* determination under the circumstances was not an option because in-state RECs were available and failing to purchase them would have been contrary to the statute. FirstEnergy also notes that several of the intervenors have previously opposed the Companies' *force majeure* applications even for SRECs, which were completely unavailable. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure*, Case No. 09-1922-EL-ACP; *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP. FirstEnergy next reiterates its argument that, although several intervenors argued that the Companies should have sought Staff guidance, nothing suggests that such a conference would have yielded a different result given the statutory obligations.

Finally, in its reply brief, FirstEnergy responds to several intervenors' conclusions that the Commission should disallow the costs incurred by the Companies to purchase in-state RECs. FirstEnergy argues that the intervenors could point to no alternative price that would have been prudent or reasonable. FirstEnergy additionally points out that the Companies have already recovered virtually all of the costs at issue through Commission-approved tariffs. Thus, FirstEnergy concludes that any disallowance at this point would be impermissible retroactive ratemaking.

In its reply brief, OCC initially argues that FirstEnergy's Rider AER was created by a stipulation that allowed the Companies to recover the "prudently incurred cost[s] of" renewable energy resource requirements. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO (*ESP I Case*), Stipulation and Recommendation (Feb. 19, 2009) at 10-11, Second Opinion and Order (Mar. 25, 2009) at 23. OCC argues that there was no presumption that expenditures for REC procurements were prudently incurred, and maintains that FirstEnergy bears the burden of proof. Additionally, OCC cites to *In re Duke*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 9, for the proposition that a utility must "prove a positive point: that its expenses had been prudently incurred * * * [and t]he commission did not have to find the negative: that the expenses were imprudent."

Next, OCC responds to FirstEnergy's argument that its REC procurement process was competitively designed. OCC argues that even a competitively designed RFP process does not necessarily achieve a competitive result where the bids are submitted by a single bidder holding market power. OCC argues that, in the REC procurements at issue, the presence of market power and high-priced bids resulted in in-state RECs not being "reasonably available." OCC argues that, consequently, contrary to FirstEnergy's assertions, the Companies could have filed an application for a *force majeure* determination. OCC argues that the language in Section 4928.64(C)(4)(b), Revised Code, regarding whether RECs are "reasonably available," should not be read as limited only to whether RECs are available or whether the procurement process was reasonable. Instead, OCC argues that significant market constraints and bid prices from a single supplier would demonstrate that certain REC products were not "reasonably available."

OCC continues that, as argued by the Environmental Advocates, the maximum price that should have been paid for RECs was the amount of the compliance payment. Further, OCC contends that, contrary to FirstEnergy's assertions, market price data from other markets was available and was an appropriate tool to gauge the reasonable level of market prices for in-state RECs. More specifically, OCC argues that the Spectrometer Report showed prices for in-state RECs and demonstrated that, at the time FirstEnergy was evaluating its bids for its third RFP, the market was easing and prices were decreasing. OCC contends that FirstEnergy had information available that the market was changing and should have responded accordingly. OCC continues that Ohio's nascent market period was no different from other nascent market periods and that there is no basis for FirstEnergy to conclude that Ohio's in-state renewables market would be very different from prices in other markets.

In its reply brief, Staff argues that FirstEnergy was not barred from seeking *force majeure* relief because Section 4928.64(C)(4), Revised Code, clearly provides that the Commission may modify the utility's compliance obligation if it determines that sufficient resources are not reasonably available. Staff contends that FirstEnergy's arguments equate "reasonably available" with "available," but that the word "reasonably" should not be ignored and that price is a factor that is logically considered in determining what is reasonable. Staff further supports this position by noting that it has previously granted a *force majeure* request in a proceeding with price as an issue, *In the Matter of the Application of Noble Americas Energy Solutions LLC for a Waiver*, Case No. 11-2384-EL-ACP, Finding and Order (Aug. 3, 2011).

Additionally, in reply, Staff reiterates its position that FirstEnergy has the burden of demonstrating that its expenses for REC procurement were reasonable. Staff again cites *In re Duke*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 8, for the proposition that a utility seeking cost recovery bears the burden of demonstrating that its expenses were prudently incurred and that, where evidence is inconclusive or questionable, the Commission may disallow recovery. Further, Staff responds to

FirstEnergy's assertion that, if the Commission orders a disallowance, it is engaging in retroactive ratemaking. Staff contends that, if this were so, FirstEnergy would have a *carte blanche* to pass whatever costs it wants onto ratepayers, no matter how exorbitant. Staff also notes that, in *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 512, 433 N.E.2d 568 (1982), the Supreme Court of Ohio distinguished rates arising out of customary base rate proceedings from variable rate schedules tied to fuel adjustment clauses, holding that the former implicate the retroactive ratemaking doctrine, while the latter do not. Staff argues that Rider AER is comparable to the variable rate schedules tied to fuel adjustment clauses, as Rider AER did not arise out of a base rate proceeding. Further, Staff points out that the Commission-approved stipulation creating Rider AER provides that only the Companies' "prudently incurred" costs are recoverable. *ESP I Case*, Stipulation and Recommendation (Feb. 19, 2009) at 10-11, Second Opinion and Order (Mar. 25, 2009) at 23.

Staff also contends in its reply brief that the Companies' exclusive focus on the solicitation process is misplaced. Staff argues that there is a significant difference between the solicitation process to obtain bids and the decision-making process associated with evaluation and selection of bids. Consequently, Staff criticizes FirstEnergy's assertion that no price was too high to pay for in-state RECs as long as the purchase resulted from a competitive process.

In their collective reply brief, the Environmental Advocates initially argue that FirstEnergy bears the burden of demonstrating that its REC purchases were prudent. Similar to OCC and Staff, the Environmental Advocates cite *In re Duke* at ¶ 8 to support their assertions. Further, the Environmental Advocates reply to FirstEnergy's arguments set forth in its brief, arguing that FirstEnergy failed to offer legitimate reasons for failing to negotiate lower REC prices in its first and second RFPs, and that FirstEnergy's admission that it did not seek to pay the compliance payment because the compliance payment is not recoverable from customers should not be condoned by the Commission.

The Commission notes that, in the Companies' first electric security plan case, we approved a stipulation (ESP Stipulation) that provided that FirstEnergy would use a separate RFP process to obtain RECs to meet the Companies' renewable energy resource requirements for January 1, 2009, through May 31, 2011. Further, the ESP Stipulation provided that the Companies would recover the prudently incurred costs of the RECs, including the cost of administering the RFP and carrying charges. *ESP I Case*, Second Opinion and Order (Mar. 25, 2009) at 9.

The Supreme Court of Ohio has held that a prudent decision by an electric distribution utility is a decision "which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made." *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999), citing *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826 (1993). Additionally, the Commission has previously found that "[p]rudence should be determined in a retrospective, factual inquiry." *In re Syracuse Home Utils. Co.*, Case No. 86-12-GA-GCR, Opinion and Order (Dec. 30, 1986), at 10. Therefore, the Commission will examine the conditions and circumstances which were known to the Companies at the time each decision to purchase RECs was made. Additionally, we find that, pursuant to the Commission-approved stipulation creating Rider AER, which, provides that only the Companies' "prudently incurred" costs are recoverable, the Companies bear the burden of proof in this proceeding. *See ESP I Case*, Stipulation and Recommendation (Feb. 19, 2009) at 10-11, Second Opinion and Order (Mar. 25, 2009) at 23. Our determination that the Companies bear the burden of proof in this proceeding is also consistent with the Supreme Court of Ohio's recent holding in *In re Duke*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 8. Further, we agree with FirstEnergy that, although the Companies ultimately bear the burden of proof in this proceeding, the Commission should presume that the Companies' management decisions were prudent. *Syracuse*, Opinion and Order (Dec. 30, 1986) at 10. We emphasize, however, that, as discussed in *Syracuse*, the presumption that a utility's decisions were prudent is rebuttable, and evidence produced by Staff or intervenors may overcome that presumption. *Id.* Here, we find 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 RECs.

The Commission also notes that recovery of the costs of the Companies' purchases of all-state SRECs, in-state SRECs, and all-state RECs are not disputed by either Exeter or the intervenors in this proceeding. Accordingly, because the Companies management decisions are presumed to be prudent, the recovery of the costs of those SRECs and RECs should not be disallowed, and the Commission will address in detail only the purchase of in-state all renewables RECs.

(1) August 2009 RFP (RFP1)

The Commission finds that recovery of the costs for the RECs obtained though the August 2009 RFP should not be disallowed. Am. Sub. S.B. 221, which codified Section 4928.64, Revised Code, had been enacted little more than a year before the RFPs, and 2009 was the first compliance year under the new statute. The evidence in the record demonstrates that the market was still nascent and that reliable, transparent information on market prices, future renewable energy projects that may have resulted in future RECs trading at lower prices, or other information that may have directly influenced the Companies' decision to purchase RECs was generally not available (Co. Ex. 1 at 22-25; Exeter Report at 29; Tr. III at 569-570, 572). Further, the record demonstrates that other states had experienced significantly higher REC prices in the first few years after enactment of a state renewable energy portfolio standard, and that the prices paid for the RECs were within the range predicted by the Companies' consultant (Co. Ex. 1 at 36-37, 51-52; Exeter Report at 31, footnote 17; Tr. I at 195-197). The Commission notes that Exeter found no evidence of technical violations of Section 4928.64, Revised Code (Exeter Report at 27, 28). Further, Exeter determined that the RFPs issued by the Companies were competitive and that the rules for the determination of winning bids were uniformly applied (Exeter Report at 28-29).

We note that the Companies claim to have embarked on a "laddering" strategy in these RFPs. Under the laddering strategy, the Companies would spread the purchase of RECs for any given compliance year over multiple RFPs (Co. Ex. 2 at 21). Testimony at hearing demonstrates that laddering is a common strategy for the procurement of renewable energy resources and other energy products (Tr. I at 150-151). In the August 2009 RFP, the Companies obtained 35 percent of their 2009 compliance obligation and 45 percent of their 2010 compliance obligation (Exeter Report at 25). There is no evidence in the record that these were unreasonable first steps in the Companies' laddering strategy or that the laddering strategy was inherently flawed.

In addition, the Commission finds that the alternatives proposed by Exeter and intervenors were not viable options, based upon what FirstEnergy knew, or should have known, at the time of the RFP. Exeter contends that the Companies should have set a reserve price for the RFP; however, the Commission is not persuaded that a reasonable reserve price could have been calculated given the absence of reliable, transparent market information (Co. Ex. 1 at 49-52; Co. Ex. 5 at 12; Tr. I at 128-130).

With respect to the option of making a compliance payment, the Commission finds that the Companies were not required to make a compliance payment as an alternative to obtaining RECs through a competitive process. Section 4928.64(C)(1), Revised Code, requires the Commission to identify any undercompliance or noncompliance by an electric distribution utility (EDU) which is weather-related, related to equipment or resource shortages or is otherwise outside the EDU's control. Section 4928.64(C)(2), Revised Code, then authorizes the Commission to impose a compliance payment in the event of an "avoidable undercompliance or noncompliance." Moreover, Section 4928.64(C)(2)(c), Revised Code, prohibits an electric distribution utility from recovering a compliance payment from customers. Therefore, the Commission finds that the General Assembly intended that the compliance payment be imposed only where the undercompliance or noncompliance was due to an act or omission by the EDU which was within the EDU's control. The Commission finds that, just as with a resource shortage, a serious market disequilibrium, as identified by Exeter, is not within an EDU's control; therefore, the Companies were not required to consider making a compliance payment in lieu of purchasing the RECs offered though a competitive auction.

Further, we disagree with intervenors' arguments that the statutory compliance payment amount should have been the maximum amount paid by the Companies. The record reflects that, in states where a compliance payment is recoverable from ratepayers and where the compliance payment can be used in lieu of procuring renewable energy resources, the level of the compliance payment will act as a cap on market prices of renewable energy resources (Tr. I at 83; Tr. II at 599-600). However, testimony in the record also reflects that, where the compliance payment is not recoverable from ratepayers, the compliance payment will not act as a cap on market prices (Tr. I at 85). Therefore, the record demonstrates that, since the compliance payment in Ohio is not recoverable from ratepayers, it will not act as a cap on market prices, and there is no evidence that payment of market prices resulting from a competitive process, above the statutory compliance payment level, is necessarily unreasonable.

In order to address factors beyond an EDU's control, Section 4928.64, Revised Code, provides an opportunity for the EDU to seek a *force majeure* determination. Exeter concluded that the Companies should have rejected the results of the RFP, based upon the prices contained in the bids and sought a *force majeure* determination. The Commission notes that the Companies obtained 35 percent of the 2009 compliance obligation in the August 2009 RFP. Section 4928.64(C)(4)(b), Revised Code, directs the Commission to issue a ruling on a *force majeure* determination within 90 days of the filing. However, if FirstEnergy had rejected the results of the August 2009 RFP and sought a *force majeure* determination, there was the potential that the Commission would deny the application during the 90-day timeframe and there would be little time for a further solicitation of RECs after such potential denial (Co. Ex. 1 at 37-38). Moreover, in the *force majeure* determination for AEP Ohio, the Commission issued our first decision in a series of *force majeure* determinations. *In re Columbus Southern Power Co. and Ohio Power Co.*, Case Nos. 09-987-EL-EEC, et al., Entry (Jan. 7, 2010) (*AEP Ohio Case*). In this decision, the Commission, by granting the *force majeure* determination requested by AEP Ohio, implicitly rejected arguments that the statutory provision, "reasonably available in the marketplace," did not include consideration of cost of the RECs. *AEP Ohio Case* at 4, 8-9. However, the August 2009 RFP took place before the Commission issued our decision in the *AEP Ohio Case*. Therefore, we find that the Companies' belief in August 2009, that a *force majeure* determination based solely on the market price of RECs was not an option, was not unreasonable.

The Commission notes that Exeter also concluded that the Companies should have consulted with the Commission or Staff regarding the results of the August 2009 RFP although Exeter acknowledges that the Companies were under no statutory obligation to do so (Exeter Report at 32; Tr. II at 422). The Commission believes that the Companies could have consulted with the Staff given the nascent market and the unavailability of reliable market information. However, this factor alone is not sufficient to overcome the presumption that the Companies' management decisions were prudent or to support a disallowance of the costs of the REC purchases.

(2) October 2009 RFP (RFP2)

The Commission finds that recovery of the costs for the RECs obtained though the October 2009 RFP should not be disallowed. In the October 2009 RFP, the Companies obtained, as part of their "laddering" strategy, 65 percent of their 2009 compliance obligation (the remaining balance for the 2009 compliance year), 29 percent of their 2010 compliance obligation and 15 percent of their 2011 compliance obligation (Exeter Report at 25). As discussed above, 2009 was the first compliance year for the new statutory renewable energy benchmarks, and the record demonstrates that the market was nascent and illiquid (Co. Ex. 1 at 22-23, 30-31; Co. Ex. 2 at 28). The Exeter Report also agreed that market information was limited prior to the issuance of this RFP (Exeter Report at 12). Further, Exeter determined that the RFPs issued by the Companies were competitive and that the rules for the determination of winning bids were uniformly applied (Exeter Report at 29).

Moreover, there is no evidence in the record of a significant change in the amount of market information available between August 2009 and October 2009 (Co. Ex. 1 at 30-31). Thus, based upon what FirstEnergy knew or should have known in October 2009, the alternatives proposed by Exeter and intervenors, such as establishing a reserve price, seeking a *force majeure* determination or making a compliance payment, were not viable options for the Companies. The Commission is concerned that the Companies chose to purchase vintage 2011 RECs in 2009 when the market was nascent and illiquid (Co. Ex. 2 at 28). However, the Companies claim that this was part of the laddering strategy, and the evidence indicates that the 2009 purchase of 2011 vintage RECs amounted to only 15 percent of the 2011 compliance requirement (Exeter Report at 25). The Commission also will reiterate that the Companies could have consulted with Staff, but that factor alone is insufficient to support a disallowance of the costs of the October 2009 RFP.

(3) August 2010 RFP (RFP3)

(a) 2010 Vintage RECs

The Commission finds that recovery of the costs for the 2010 Vintage RECs obtained though the August 2010 RFP should not be disallowed. In the August 2010 RFP, the Companies obtained 27 percent of their 2010 compliance obligation, which represented the remaining balance of the obligation. There is no evidence in the record that the market for renewables had significantly developed in 2010, that liquidity had increased, or that reliable, transparent market information was now available to the

Companies (Co. Ex. 1 at 37-38). Navigant's market assessment report dated October 18, 2009, state that the supply of Ohio RECs will continue to be very constrained through 2010 (Co. Ex. 1 at 34-35). Further Navigant indicated that supply conditions for in-state all renewable energy resources were marked by few willing and certified suppliers, that there were major uncertainties with respect to economic conditions that could support new renewable project development, and that credit conditions with respect to financing for new projects were a significant limiting factor (Co. Ex. 2 at 40).

The Commission notes that a *force majeure* determination was not a viable option for the vintage 2010 RECs obtained in the August 2010 RFP. If the Companies had rejected the results of the vintage 2010 RECs in the August 2010 RFP and sought a *force majeure* determination, there was the potential that the Commission would deny the application during the 90-day statutory timeframe, and there would be little time for a further solicitation of RECs after such potential denial. Moreover, we will reiterate that the Companies were not required to consider making a compliance payment in lieu of purchasing the RECs offered though a competitive auction.

(b) 2011 Vintage RECs

The Commission finds that recovery of $43,362,796.50 for 2011 vintage RECs purchased in August 2010 should be disallowed. Although the Companies' management decisions are presumed to be prudent, there was more than sufficient evidence produced at hearing to overcome this presumption. Specifically, the Commission will base our determination on the following factors. First, the Companies knew that the market was constrained and illiquid at the time of the RFP but that the market constraints were projected to be relieved in the near future. Second, the Companies failed to report to the Commission that the market for in-state RECs was constrained and illiquid. Third, the actual purchase price was not the result of a competitive bid but a negotiated purchase price. That negotiated purchase price was unsupported by any testimony in the record. Finally, the Companies could have requested a *force majeure* determination from the Commission instead of purchasing the vintage 2011 RECs through the August 2010 RFP.

The evidence in the record demonstrates that FirstEnergy knew that, although the market was constrained and illiquid at the time of the RFP, the market constraints were projected to be relieved in the near future (Co. Ex. 1 at 34-35). FirstEnergy witness Stathis testified that the Companies had received new information regarding the development of the in-state all renewables market, including the projection that market constraints were due to be relieved (Co. Ex. 2 at 35; Tr. II at 360[2]). FirstEnergy witness Stathis acknowledged that new market information was available to the Companies in August 2010. This information included a second bidder for the RECs, which was consistent

[2] We note that several portions of the transcript cited throughout this opinion and order are confidential.

with Navigant's projected expiration of the 12-month constrained supply timeframe. Moreover, the Companies had information that other Ohio utilities were meeting their in-state renewable benchmarks (Co. Ex. 2 at 35-36; Tr. II at 369-370). Further, the Companies knew that there was time for additional RFPs to purchase the vintage 2011 RECs because FirstEnergy had contingency plans for an additional RFP in October 2010 and two additional RFPs in 2011 (Co. Ex. 2 at 36). Moreover, in the August 2010 RFP, FirstEnergy did not execute its laddering strategy, which would have involved spreading the REC purchases for any given compliance year over the course of multiple RFPs. Here, however, FirstEnergy chose to purchase the entire remaining balance of its 2011 compliance obligation (85 percent of its 2011 compliance obligation) in this RFP and reserved no 2011 RECs to be purchased in 2011 (Exeter Report at 25; Tr. II at 414-415). The Commission finds that, based upon the Companies' knowledge of market conditions and market projections, the Companies' decision to purchase 2011 RECs in August 2010 was unreasonable, given that the market was constrained but relief was imminent.

Moreover, the Commission finds that the Companies failed to report the market constraints to the Commission when the Companies were under a regulatory duty to do so. Rule 4901:1-40-03, O.A.C. requires electric utilities to annually file a ten-year alternative energy resource plan. Rule 4901:1-40-03(C)(4), O.A.C., specifically requires such plans to discuss "any perceived impediments to achieving compliance with the required benchmarks, as well as suggestions for addressing any such impediments." On April 15, 2010, FirstEnergy filed its ten-year alternative energy resource plan for the period of 2010 through 2020 in Case No. 10-506-EL-ACP (2010 Plan). In the 2010 Plan, the Companies indicated that the "RFP REC Procurement Process is an efficient means of meeting the annual benchmarks" (2010 Plan at 5). In the 2010 Plan, the Companies noted the limited availability of in-state renewable energy resources. However, the Companies emphasized that this was true "particularly for solar renewable energy resources" where Navigant had identified only 1 MW of installed solar energy resources in Ohio in 2009 and for which the Companies had already been granted a *force majeure* determination (2010 Plan at 5; Tr. II at 427-428).

Moreover, the record reflects that, according to a market assessment report from Navigant dated October 18, 2009, Navigant stated that supply conditions for in-state all renewable energy resources were marked by few willing and certified suppliers, there were major uncertainties with respect to economic conditions that could support new renewable project development, and credit conditions concerning financing for new projects were a significant limiting factor (Co. Ex. 2 at 40; Tr. II at 426). FirstEnergy witness Stathis conceded that these factors were significant and that these factors were impediments to FirstEnergy's compliance with the benchmarks because these factors hindered market development and supply (Tr. II at 426-427). However, despite the fact that the Companies were in possession of this significant information at the time of the filing of the 2010 Plan, the Companies failed to identify any of these factors. The Companies also failed to report to the Commission that the market for in-state RECs was very constrained and would remain very constrained though 2010, as reported by Navigant (Co. Ex. 1 at 34). Further, the Companies failed to report to the Commission that the market constraints, while still present, were projected to be relieved within a year (Co. Ex. 1 at 34-35; Tr. II at 428).

In addition, the Commission notes that the actual purchase price was not the result of a competitive bid but was the result of a bilateral negotiation, the results of which are unsupported by the record in this case. As discussed above, FirstEnergy witness Stathis testified that new market information was available to the Companies in August 2010. This information included a second bidder for the RECs, the projected expiration of the 12-month constrained supply timeframe, and information that other Ohio utilities were meeting their in-state renewable benchmarks (Co. Ex. 2 at 35-36; Tr. II at 369-370). Based on this new market information, the Companies rejected one of two bids for 2011 vintage year RECs (Co. Ex. 1 at 41-42; Tr. II at 359-360, 373-374). The Commission finds that, based on the knowledge available to FirstEnergy at the time, the Companies properly rejected the bid for the RECs.

However, instead of deferring the purchase of the 2011 vintage RECs to one of the three planned future RFPs, FirstEnergy entered into a bilateral negotiation with the rejected bidder and reached an agreed purchase price (Co. Ex. 1 at 41-42; Co. Ex. 2 at 35-36; Tr. II at 364-365). FirstEnergy witness Stathis, who described the process of rejecting the bid, did not participate in the negotiations, had no personal knowledge regarding the agreed purchase price, and did not provide testimony in support of the agreed purchase price (Tr. II at 360-365, 370), and there is no other evidence in the record that the agreed purchase price was reasonable.

Further, the Commission finds that the Companies could have requested a *force majeure* determination from the Commission instead of purchasing the vintage 2011 RECs through the August 2010 RFP. At the time of the August 2010 RFP, the Commission had granted *force majeure* requests from a number of utilities and electric service companies. As discussed above, in the *force majeure* determination for AEP Ohio, the Ohio Environmental Council argued that relatively high prices for RECs does not equal an "act of God" or event beyond an electric utility's control. *AEP Ohio Case* at 4. However, by granting the force majeure determination, the Commission implicitly rejected arguments that "reasonably available in the marketplace" did not include consideration of cost of the RECs. *AEP-Ohio Case* at 8-9. FirstEnergy should have known that the Commission had issued this decision and that cost would be a relevant consideration in a *force majeure* determination. Moreover, even if the Commission had rejected a *force majeure* application by the Companies for 2011 vintage RECs, there would have been sufficient time for the two planned additional RFPs in 2011 in order to obtain the RECs necessary for the 2011 compliance obligation.

Accordingly, the Commission finds that there is evidence in the record to overcome the presumption that the Companies' management decisions were reasonable. Further, the Commission finds that the record demonstrates that the Companies have not met their burden of proving that, based upon the facts and circumstances which the Companies knew, or should have known, at the time of the decision to purchase, the purchase of 2011 vintage year RECs in August 2010 was prudent. Thus, we find that recovery of $43,362,796.50 for 2011 vintage RECs purchased in August 2010 should be disallowed. In determining the amount of the disallowance, the Commission notes that, for this transaction, the record reflects that the Companies purchased 145,269 RECs through the bilateral negotiation with the rejected bidder. The Companies also purchased 5,000 RECs at a significantly lower cost from a second bidder. The disallowance represents the purchase price agreed to by the Companies in the bilateral negotiation for 2011 Vintage RECs multiplied by 145,269 (the quantity of RECs purchased through the bilateral negotiation). In addition, the disallowance includes an offset which the Commission determined by calculating the lower price paid to the second, winning bidder multiplied by 145,269 (Exeter Report at 28).

Regarding FirstEnergy's argument that a Commission disallowance will constitute retroactive ratemaking in this case, the Commission notes that the Supreme Court of Ohio has held that rates arising out of customary base rate proceedings implicate the retroactive ratemaking doctrine, while rates arising from variable rate schedules tied to fuel adjustment clauses do not. *See River Gas Co.*, 69 Ohio St.2d at 512, 433 N.E.2d 568. The Commission agrees with Staff that Rider AER is akin to a variable rate schedule tied to a fuel adjustment clause for purposes of applying the retroactive ratemaking doctrine, as Rider AER did not arise out of a base rate proceeding and was created by a stipulation expressly providing that only prudently incurred costs would be recoverable. Consequently, the Commission finds that the disallowance does not constitute retroactive ratemaking.

Therefore, the Commission directs the Companies to credit Rider AER in the amount of $43,362,796.50, plus carrying costs, and to file tariff schedules within 60 days of the issuance of a final appealable order in this proceeding, adjusting Rider AER to reflect the refund and associated carrying costs. Further, the Commission directs the next financial auditor to review the credit and whether carrying costs were appropriately calculated.

(c) Other REC Purchases

The Commission notes that there were a number of other, smaller transactions, at various price points, involving in-state all renewables outlined in the Exeter Report (Exeter Report at 28). To the extent that these transactions have not been specifically discussed above, the Commission has reviewed such transactions and, balancing the factors discussed above, determined that the recovery of the costs of these RECs should not be disallowed.

B. Undue Preference

OCC requests that the Commission order an investigation into the Companies' compliance with the corporate separation provisions of Ohio law. OCC claims that the auditors conducted a limited investigation of this issue due to the auditors' understanding of their scope of work (Tr. I at 64-65).

FirstEnergy replies that there is no evidence that the Companies provided any preference to any bidder. The Companies note that OCC witness Gonzalez admitted that OCC had the opportunity to undertake discovery in this proceeding and that the witness was unaware of any facts to support such claims (Tr. Vol. III at 624-625 (Confidential)). The Companies contend that, because OCC had an opportunity for discovery and was unable to cite to a single fact to support its request, OCC lacks standing to claim that the Commission should order further investigations.

The Commission finds that there in no evidence in the record in this proceeding to support further investigation at this time. As noted above, the Companies' affiliate, FES, was the winning bidder for at least one RFP where RECs were obtained. However, the Exeter Report did not recommend any further investigation on this issue (Tr. I at 117-118). The Exeter Report contains no evidence of undue preference by the Companies in favor of FES or any other bidder or improper contacts or communication between FirstEnergy and FES or any other party (Exeter Report at 31; Tr. I at 114). In fact, the Exeter Report states that the auditors "found nothing to suggest that the FirstEnergy Ohio utilities operated in a manner other than to select the lowest cost bids received from a competitive solicitation" (Exeter Report at 29). Moreover, the Exeter Report states that the RFPs were reasonably developed and did not appear to incorporate any provisions or terms that were anticompetitive (Exeter Report at 12). Finally, the Commission finds that OCC had a full and fair opportunity to obtain discovery of any issue relevant to this proceeding but did not introduce any evidence to support its request for further investigations (Tr. III at 624-625). In the absence of concrete evidence of improper communications, anticompetitive behavior, or undue preference for FES in awarding bids, the Commission finds that the fact that FES was one of the winning bidders of the RFPs during the audit period is insufficient grounds for further investigation at this time.

C. Statutory Three Percent Provision

Staff argues that, although Section 4928.64(C)(3), Revised Code, refers to "reasonably expected" costs, suggesting a forward-looking consideration, the statute also requires the compliance obligation as a function of historical sales. Consequently, Staff recommends a six-step methodology that incorporates both historical and future components: (1) determine the sales baseline in megawatt hours (MWhs) for the applicable compliance year consisting of an average of each electric distribution utility's annual Ohio retail electric sales from the three preceding years; (2) calculate a "reasonably expected" dollar per MWh figure for the compliance year, consisting of a weighted average of the SSO supply for the delivery during the compliance year, net of distribution system losses; (3) Staff's annual calculation of a dollar per MWh suppression benefit (if any) and distribution of this suppression calculation to all affected companies; (4) calculate an adjusted dollar per MWh figure by adding the suppression benefits, if any, to the dollar per MWh figure from Step 2; (5) calculate the total cost by multiplying the Step 4 adjusted dollar per MWh figure by the baseline calculated in Step 1; and (6) multiply the total cost from Step 5 by three percent with the result representing the maximum funds available to be applied toward compliance resources for that compliance year. Further, Staff contends that the Companies perform this calculation early in each compliance year to identify their maximum available compliance funds for the year, and that, in the event an operating company reaches its maximum, it should not incur any additional compliance costs for that year, absent Commission direction.

MAREC contends that the mathematical calculation of the three percent cost cap consists of two basic steps: (1) add the electric utility's annual cost of generation to customers (the wholesale price average from the previous three years) with the price suppression benefits of the previous year, and multiply that figure by three percent to calculate the annual renewable spending cap for the utility; and (2) compare the utility's annual cost of renewable generation to its annual renewable spending cap to determine which is greater. Further, MAREC contends that the benefits of price suppression should be factored into the calculation in order to fully account for the costs and benefits of renewable energy displacing higher-cost generating resources.

OEG contends that the Commission should expressly find that Section 4928.64(C)(3), Revised Code, establishes a mandatory, non-discretionary annual cap limiting the Companies' recovery of prudent expenditures incurred pursuant to Section 4928.64, Revised Code, to no more than three percent of its cost of purchasing or acquiring substitute energy. Further, OEG contends that the three percent cost cap should be calculated as follows: (1) set the three percent cost cap each January following the SSO auction; (2) determine FirstEnergy's annual generation cost ($/MWh) using the weighted average of its January-May and June-December SSO generation prices; (3) calculate FirstEnergy's benchmark baseline non-shopping MWh sales by averaging non-shopping sales for the previous three years; (4) calculate FirstEnergy's cost to acquire requisite electricity by multiplying its benchmark baseline non-shopping MWh sales by its annual SSO generation cost adjusted for losses; and (5) set FirstEnergy's annual mandatory cost cap equal to three percent of its annual cost to acquire requisite energy. Further, OEG argues that the Commission should establish a cap on the Rider AER charge for each rate class at three percent of the applicable Rider GEN energy charge for that class. Nucor also contends that Section 4928.64(C)(3), Revised Code, establishes an explicit, mandatory cap that applies to all future Rider AER costs and charges. Further, Nucor argues that the Commission should adopt a two-part cap mechanism as recommended by OEG/Nucor witness Goins, that constitutes a hard cap on annual renewable expenditures by FirstEnergy of three percent, and a soft cap on Rider AER rates charged to customers of no more than three percent of the cost of generation under Rider GEN. (OEG/Nucor Ex. 1.)

The Environmental Advocates also recommend that the utilities set an annual cost of generation based on the average price of electricity purchased by the utility for its SSO load over the three preceding years, to be compared to the cost of acquiring renewable energy, less any and all carrying and administrative costs. Further, the Environmental Advocates argue that the Commission should investigate ways to quantify price suppression benefits and include them in the cost cap calculation.

In its reply brief, FirstEnergy notes that Section 4928.64(C)(3), Revised Code, provides that an electric utility "need not comply" if a company's cost of complying with statutory requirements exceeds three percent of its reasonably expected cost of obtaining the electricity. FirstEnergy argues that this language indicates that the three percent mechanism is discretionary, not mandatory. Further, FirstEnergy contends that the Commission should reject the recommendations of Nucor and OEG that the Commission apply a cap on Rider AER by rate class, arguing that there is no statutory support for that recommendation. Further, FirstEnergy disputes various intervenors' suggestions that the calculation should include a price suppression benefit, arguing that there is no evidence in the record to support inclusion or calculation of a price suppression benefit.

In its reply brief, OCC argues that the three percent cost cap is mandated by Ohio law and that FirstEnergy should utilize the six-step process recommended by Staff to determine whether the utility purchased RECs in excess of the cost cap. Additionally, OCC urges the Commission to require FirstEnergy to perform the test on or before April 15 of each compliance year in order to identify the maximum available compliance funds for the year.

In its reply brief, MAREC notes that no party opposed MAREC's calculation of the cost cap provision and that several parties' calculations mirrored MAREC's. Additionally, MAREC states that it opposes OEG's proposal to cap Rider AER for each rate class. MAREC argues that this methodology would stray from the specific language and intent of the applicable statute and rule, which do not provide that a three percent cap be applied to each rate class, but refer to the "total expected cost of generation." Rule 4901:1-40-07(C), O.A.C. MAREC contends that this language implies that the costs be applied across all customer classes.

In its reply brief, OEG opposes various intervenors' recommendations that the three percent cost cap calculation include price suppression benefits. OEG argues that this is an unworkable calculation that would increase costs customers pay, undermining the customer protection purpose of the cap, and that is contrary to the plain language of Section 4928.64(C), Revised Code. Further, OEG contends that the record in this case does not provide a detailed explanation of how price suppression benefits would be calculated and that the Goldenberg Report acknowledges that price suppression benefits are "difficult to calculate precisely" (Goldenberg Report at 29). Similarly, Nucor also warns against the use of price suppression benefits in the three percent cost cap calculation. Nucor states that the Commission would need to use extreme caution in including price suppression benefits, as their use would add a subjective element to an otherwise straightforward and objective calculation.

In their reply brief, the Environmental Advocates reiterate their position that the Commission should adopt Staff's recommended method of calculating the three percent cost cap. The Environmental Advocates further note that Staff volunteered to annually calculate a dollar per MWh suppression benefit (if any) to be distributed to all affected Companies. Consequently, the Environmental Advocates argue that stakeholders could be confident that the suppression benefits are properly and independently verified and calculated.

Initially, the Commission notes that it directed Goldenberg to evaluate the Companies' status relative to the three percent provision in Section 4928.64(C)(3), Revised Code. In its analysis of the three percent provision, Goldenberg noted that neither the Revised Code nor the Ohio Administrative Code provide a definition for the timeframe for the calculation, a definition of the term "reasonably expected cost of compliance," or a definition for the term "reasonably expected cost of otherwise producing or acquiring the requisite electricity." Nevertheless, Goldenberg concluded that the formula for the calculation set forth in Section 4928.64(C)(3), Revised Code, is relatively straightforward: determine the reasonably expected cost of compliance with the renewable energy resource benchmark and divide it by the reasonably expected cost of generation to customers. (Goldenberg Report at 24, 26-27.)

Goldenberg also noted that FirstEnergy provided its three percent provision calculations for 2009 through 2011, and replicated this information in the Goldenberg Report. For example, for FirstEnergy in 2010, the following chart represents the actual total cost of generation exclusive of compliance costs, and the actual percentage representing the cost of compliance as compared to the total cost of SSO generation. Further, the Commission has calculated the threshold that would need to have been spent on compliance with the renewable energy resources benchmarks in order to reach the three percent cap:

2010	
Actual cost of compliance with renewable energy resource benchmarks	$60,749,428
Actual total cost of generation, excluding compliance	$2,940,669,478
Actual percentage cost of compliance	2.07%
Three percent cost cap	$88,220,084

(Goldenberg Report at 30.)

The Commission notes that these calculations demonstrate that the cost of compliance with renewable energy resources benchmarks is a very small percentage of a Company's cost of SSO generation, even at prices argued by intervenors to be significantly high. The Commission notes that this percentage is small, notwithstanding prices for renewable energy credits, because the portion of their electricity supply electric distribution utilities and electric service companies are required to obtain from renewable energy resources began at only .25 percent in 2009 and increased to only 0.5 percent in 2010.

The Commission finds, based upon our reading of the plain language of the statute, that Staff's methodology to calculate the three percent cap is consistent with the intent of the General Assembly and should be adopted, with the exception of the portions of the methodology utilizing price suppression benefits. The Commission believes that this methodology strikes the appropriate balance to allow electric utilities to achieve compliance with the renewable energy resource benchmarks and to provide a limit to the costs passed along to ratepayers.

Regarding price suppression benefits, the Commission finds that inserting price suppression benefits into the calculation would add a subjective element to an objective calculation and that the record in this case does not provide a clear explanation of how price suppression benefits would be determined. Further, as stated in the Goldenberg Report, price suppression benefits are difficult to calculate (Goldenberg Report at 27, 29).

Additionally, the Commission notes that, in conjunction with its discussion of price suppression benefits, OEG argued in its brief that the Commission should follow the plain language of the statute and should decline to increase complexity and confusion associated with calculation of the three percent cap. Curiously, OEG went on to argue that the Commission should impose the three percent cost cap individually to each rate class to prevent industrial customers from bearing a disproportionate share of Rider AER charges. The Commission declines to read this requirement into the statute and finds that the clear wording of the statute does not provide for a three percent cap to be applied to each rate class but to the total expected cost of generation across all rate classes.

Consequently, the Commission finds that the following methodology is consistent with the intent of the General Assembly and should be used to calculate the three percent cost cap: (1) determine the sales baseline in MWhs for the applicable compliance year consisting of an average of each electric distribution utility's annual Ohio retail electric sales from the three preceding years; (2) calculate a "reasonably expected" dollar per MWh figure for the compliance year, consisting of a weighted average of the cost of SSO supply for the delivery during the compliance year, net of distribution system losses; (3) calculate the total cost by multiplying the Step 2 dollar per MWh figure by the baseline calculated in Step 1; and (4) multiply the total cost from Step 3 by three percent with the result representing the maximum funds available to be applied toward compliance resources for that compliance year. Further, as recommended by Staff, the Commission finds that the Companies should perform this calculation early in each compliance year to identify their maximum available compliance funds for the year, and that, in the event an operating company reaches its maximum, it should not incur any additional compliance costs for that year absent Commission direction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

(2) On September 20, 2011, the Commission opened this case for the purpose of reviewing the Companies' Rider AER.

(3) Motions to intervene in this case were granted to OCC, OEC, OEG, Nucor, ELPC, Citizen Power, Sierra Club, MAREC, OMAEG, and IGS.

(4) Motions for admission *pro hac vice* were granted to Michael Lavanga, Edmund Berger, and Theodore Robinson.

(5) The hearing in this matter commenced on February 19, 2013, and continued until February 25, 2013.

(6) Post-hearing briefs were filed in this matter by FirstEnergy; Staff; OCC; the Sierra Club, OEC, and ELPC, collectively; OEG; Nucor; MAREC; and IGS.

(7) Reply briefs were filed by FirstEnergy; Staff; OCC; the Sierra Club, OEC, and ELPC, collectively; OEG; Nucor; MAREC; and IGS.

(8) The Commission finds that FirstEnergy shall be disallowed recovery in the amount of $43,362,796.50.

(9) The Commission finds that the Companies shall calculate the three percent cap pursuant to Section 4928.64(C)(3), Revised Code, as set forth in this opinion and order.

It is, therefore,

ORDERED, That the motions to intervene filed by Citizen Power, Sierra Club, MAREC, OMAEG, and IGS are granted. It is, further,

ORDERED, That the motion for admission *pro hac vice* filed by Theodore Robinson is granted. It is, further,

ORDERED, That the motion to intervene and reopen the proceedings filed by AEP Ohio is denied. It is, further,

ORDERED, That the attorney examiners' rulings regarding protective orders are modified to permit the general disclosure of FES as a successful bidder in the competitive solicitations, but that specific information related to bids by FES shall continue to be confidential and subject to the protective orders. It is, further,

ORDERED, That the pending motions for protective orders filed by FirstEnergy, OCC, ELPC, OEC, and the Sierra Club are granted. It is, further,

ORDERED, That FirstEnergy be disallowed recovery in the amount of $43,362,796.50 as set forth in this opinion and order. It is, further, ORDERED, That FirstEnergy credit Rider AER in the amount of $43,362,796.50, plus carrying costs, and file tariff schedules within 60 days of the issuance of a final appealable order in this proceeding, adjusting Rider AER to reflect such credit and associated carrying costs. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

MWC/GAP/sc

Entered in the Journal

AUG 07 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

EXHIBIT B

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SECOND ENTRY ON REHEARING

The Commission finds:

(1) On September 20, 2011, the Commission issued an Entry on Rehearing in *In re the Annual Alternative Energy Status Report of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.,* Case No. 11-2479-EL-ACP. In that Entry on Rehearing, the Commission stated that it had opened the above-captioned case for the purpose of reviewing Rider AER of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies). Additionally, the Commission stated that its review would include the Companies' procurement of renewable energy credits for purposes of compliance with R.C. 4928.64.

(2) On August 7, 2013, following a hearing, the Commission issued an Opinion and Order (Order) finding that FirstEnergy should be disallowed recovery in the amount of $43,362,796.50.

(3) R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by filing an application within 30 days after the entry of the order upon the journal of the Commission. Under Ohio Adm.Code 4901-1-35(B), any party may file a memorandum contra within ten days after the filing of an application for rehearing.

(4) On August 30, 2013, an application for rehearing was filed by Interstate Gas Supply, Inc. (IGS Energy).

(5) On September 6, 2013, applications for rehearing were filed by Ohio Consumers' Counsel (OCC); FirstEnergy; and the Sierra Club, Environmental Law and Policy Center, and Ohio Environmental Council (collectively, Environmental Groups). Further, Ohio Power Company (AEP Ohio) filed an application for rehearing, or, in the alternative, a motion for leave to file an application for rehearing. Additionally, a motion for leave to file an application for rehearing and application for rehearing were filed by Direct Energy Services, LLC, and Direct Energy Business, LLC (jointly, Direct Energy).

(6) By entry issued September 18, 2013, the Commission granted the applications for rehearing filed by IGS Energy, OCC, FirstEnergy, the Environmental Groups, and AEP Ohio for further consideration of the matters specified in the applications for rehearing. The Commission denied the motion for leave to file an application for rehearing filed by Direct Energy.

Rulings on Motions for Protective Orders

(7) Regarding the Commission's rulings on motions for protective orders in this proceeding, OCC contends that the Commission erred because it prevented disclosure of information relating to FirstEnergy's purchase of in-state all renewables RECs. More specifically, OCC argues that the exclusion of trade secrets from the public domain is a very limited and narrow exception and that information including the identities of bidders and price and quantity of RECs bid by each specific bidder should not protected in this case because they are too old to have economic value as to the current REC market. Further, OCC argues that the information should not be protected because FirstEnergy failed to take sufficient safeguards to protect the identities of the bidders and pricing information because the information was made publicly available in the Exeter Report, and FirstEnergy failed to file a contemporaneous motion for protective order for the information—waiting until 49 days after its release. Consequently, OCC argues that the

Commission should make available publicly the complete unredacted copies of the Exeter Report and all pleadings filed in this proceeding. Finally, OCC argues that the Commission erred in affirming the attorney examiner's ruling on FirstEnergy's second motion for protective order, because public information was improperly redacted from the draft Exeter Report, and that the Commission erred in granting FirstEnergy's fourth motion for protective order because there is no evidence that anyone could derive REC pricing data using publicly available information from OCC's total recommended disallowance.

Similarly, the Environmental Groups contend that the Commission unlawfully found certain information to be confidential, including REC prices, seller identities, and recommended penalty amounts. More specifically, the Environmental Groups argue that outdated REC prices and seller identities do not qualify as trade secrets because this information is extremely outdated and holds no economic value. Further, the Environmental Groups argue that there are overwhelming public policy reasons why information related to the REC purchases must be disclosed, including the goal of a fully functioning REC market. Finally, the Environmental Groups contend that the Commission should further un-redact the Exeter Report given the ruling in the Order permitting the disclosure of FES as a successful bidder in the competitive solicitations.

In its memorandum contra OCC's and the Environmental Groups' applications for rehearing, FirstEnergy maintains that confidential and proprietary information belonging to participants in the RFP process should continue to be protected. FirstEnergy asserts that the Commission has properly determined that REC procurement data warrants trade secret protection, and that it has independent economic value, despite claims that it is "historic in nature." FirstEnergy draws comparisons to bidder identification and price information in post-auction market monitor reports that the Commission has protected, despite being over 24 months old. Further, FirstEnergy states that it has safeguarded this information by consistently moving to protect REC procurement data contained in any filings in this case. FirstEnergy next contends that the Companies moved in a timely fashion to protect the REC procurement data, and that OCC's argument about failure to file a motion for protective order contemporaneously with the Exeter Report is erroneous because the Companies did not file the Exeter Report, Staff did. FirstEnergy continues that releasing the proposed disallowance and interest amounts contained in the information would enable anyone to arrive at the confidential REC pricing data, given that the number of RECs is public. Further, FirstEnergy asserts that public dissemination of the REC procurement data could lead to the disclosure of proprietary bidding strategies employed by REC suppliers, which could undermine confidence in the market.

(8) In the Order, the Commission granted multiple pending motions for protective orders and reviewed and affirmed the attorney examiners' rulings on motions for protective orders regarding REC procurement data appearing in the draft Exeter Report, as well as various pleadings in this proceeding discussing the draft Exeter Report. This REC procurement data consisted of supplier-identifying information and pricing information. As stated in the Order, the Commission found that the REC procurement data is trade secret information and its release is prohibited under state law. None of the arguments advanced by OCC or the Environmental Groups persuades the Commission to reverse its finding at this time. Further, the Commission did modify the attorney examiners' rulings in one respect in order to permit the generic disclosure of FES as a successful bidder in the competitive solicitations, due to the wide dissemination of this piece of information after an inadvertent disclosure in the Exeter Report. The Commission emphasized in making this finding, however, that specific information related to bids by FES, such as the quantity and price of RECs contained in such bids and whether the bids were accepted by the Companies, would continue to be confidential. Consequently, the Commission declines to further un-redact the Exeter Report as urged by the Environmental Groups, as this would be inconsistent with the Commission's order. Order at 11-14. Finally, although the Environmental Groups contend that the REC

procurement data should be public because it furthers the goal of a fully functioning REC market, the Commission finds that the opposite is true—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.

Burden of Proof

(9) In conjunction with several of its assignments of error, OCC argues that the Commission erred in presuming that several of FirstEnergy's management decisions to purchase RECs were prudent. OCC contends that the Commission should not have relied on *In re Syracuse Home Utils. Co., Case No. 86-12-GA-GCR*, Opinion and Order (Dec. 30, 1986) (*Syracuse*) for the proposition that there is a presumption of prudence because, in *Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶2, the Supreme Court of Ohio held that a utility has to prove that its expenses have been prudently incurred. Further, OCC argues that there is no presumption of prudence when analyzing transactions between affiliated companies, citing Model State Protocols for Critical Infrastructure Protection Cost Recovery issued by the National Association of Regulatory Commissioners, as well as cases from other states. Additionally, OCC contends that, assuming arguendo that there is a presumption, the Commission failed to apply it properly. OCC explains that the Commission properly found that the Exeter Report was sufficient evidence to overcome the presumption that the Companies' decisions were prudent, but then improperly shifted the burden of persuasion to other parties instead of FirstEnergy.

Similarly, the Environmental Groups argue that the Commission unlawfully shifted the burden of proof to intervenors by applying a presumption of prudence to FirstEnergy's purchases. More specifically, the Environmental Groups argue that the Supreme Court of Ohio unequivocally determined in *Duke* that a utility bears the burden of proving that its expenses were reasonable, and that the Commission's finding that a presumption exists that the Companies' management decisions were prudent is erroneous in light of *Duke*. The Environmental Groups argue that the Commission's error led to erroneous decisions that certain evidence was insufficient to overcome the presumption.

In its memorandum contra, FirstEnergy responds that the Commission used the correct standard to determine the prudence of the Companies' purchases under *Syracuse*; that the presumption of prudence still applies to an affiliate transaction and OCC has not presented any controlling authority supporting otherwise; and that the Commission did not misapply the standards in *Syracuse*.

(10) In the Order, the Commission acknowledged FirstEnergy's argument that, although the Companies ultimately bore the burden of proof in this proceeding, the Commission would presume that the Companies' management decisions were prudent, citing *Syracuse*, Opinion and Order (Dec. 30, 1986) at 10. In *Syracuse*, the Commission found that "[t]here should exist a presumption that decisions of utilities are prudent." Further, the Commission explained that "[t]he effect of a presumption of prudency is to shift the 'burden of producing evidence' (or 'burden of production') to the opposing party. While the 'burden of persuasion' (or 'burden of proof') generally rests throughout a proceeding on the same party, the burden of producing evidence can shift back and forth." Although OCC and the Environmental Groups claim that the Commission should not have relied on *Syracuse* in light of the Supreme Court decision in *Duke*, the Commission does not find that the Commission order and Supreme Court decision are inconsistent. Notably, the Supreme Court discussed the utility bearing the burden of proof in *Duke* and did not discuss the burden of production. For the reasons set forth in *Syracuse*, the Commission finds that there is a clear distinction between the burden of proof and burden of production. Further, to the extent the burden of production was not discussed in the Commission proceedings or Supreme Court decision in *Duke*, the Commission notes that it is not the duty of the Commission or the Court to sua sponte raise issues that are not raised by any party to the proceeding. Consequently, the Commission declines to find that the Supreme Court decision in *Duke* implicitly overruled Commission precedent regarding the burden of proof as set forth in *Syracuse*.

Finally, although OCC contends that Model State Protocols and cases from other states have found that transactions with affiliates should not be afforded a presumption of prudence, the Commission emphasizes that this authority is not controlling on the Commission and the Commission declines to adopt this doctrine at this time. Consequently, the Commission denies OCC's application for rehearing on this issue.

<u>Prudency of Costs Incurred</u>

<u>RFP1, RFP2, RFP3 (2010 Vintage RECs)</u>

(11) In its application for rehearing, OCC asserts that the Commission erred in finding that the Companies should be allowed to recover costs related to the purchases of 2009, 2010, and 2011 in-state all renewables RECs acquired as part of the August 2009 and October 2009 RFPs, and 2010 in-state all renewables RECs acquired as part of the August 2010 RFP.

(12) Regarding the August 2009 RFP, OCC specifically asserts that the Commission should have disallowed costs related to the 2009 and 2010 in-state all renewables RECs purchased in that RFP because the prices were unreasonable based on market information on all renewables RECs from around the country; because FirstEnergy should have filed an application for a force majeure based on the prices of the RECs; and, because FirstEnergy would have had sufficient time to acquire the necessary RECs if the force majeure application was denied. Further, OCC asserts that the Commission erred because it did not make a specific determination of prudence to support its allowance of cost recovery, which OCC alleges is required under R.C. 4903.09.

OCC argues that the Commission erred in failing to find that the prices paid by FirstEnergy were unreasonable based on available market information from all renewables markets around the county. OCC supports its conclusion by pointing out that the auditor found the prices paid for 2009 in-state all renewables RECs exceeded the prices paid anywhere in the country, even in other states' nascent markets, and similar testimony was presented by OCC witness Gonzalez. OCC argues that there is no basis to conclude that Ohio's requirements would drive prices to levels unseen anywhere else in the country. OCC further argues that the Commission erred in relying on FirstEnergy's argument comparing prices utilities paid for solar RECs in other states with the prices it paid for all renewables RECs in Ohio because it is widely recognized that solar RECs had an initial price point far higher than all renewables RECs. Additionally, OCC argues that the Commission erred in relying on the auditor's conclusion that the RFPs conducted were competitive and the rules for determining winning bids were applied uniformly. OCC concludes that the Commission erred in finding that the record lacked evidence from which the Companies could have determined that the bids received for in-state all renewables RECs in the first RFP were excessive.

Further, OCC argues that the Commission erred in finding that FirstEnergy was not required to request a force majeure, because the RECs were exorbitantly priced and, therefore, were not "reasonably available," and in finding that FirstEnergy was excused from filing a force majeure request because the Companies would not have had time to acquire RECs if the request had been denied. OCC argues that the Commission overstated the time FirstEnergy had to rebid the RECs—arguing that the compliance period for the 2009 RECs was extended through the end of March 2010. OCC also contends that FirstEnergy had four months to file a force majeure application for the 2010 RECs. Finally, in this assignment of error, OCC argues that the Commission erred in failing to make a specific determination of prudence as required by R.C. 4903.09 to support the Commission's allowance of cost recovery from customers, but instead finding that the Companies' actions were "not unreasonable."

Regarding the October 2009 RFP, OCC specifically argues that the Commission should have disallowed costs for the same reasons argued above as to the August 2009 RFP, and, additionally, because additional RECs were bid in to the October 2009 RFP, which OCC contends indicated a quickly expanding REC market. OCC also contends that the Companies' purchase of 2011 in-state all renewables RECs at this time may have been part of a laddering strategy but was unreasonable because the Navigant Report predicted that the market would remain constrained through 2010.

Regarding the August 2010 RFP, OCC specifically argues that the Commission again should have disallowed costs for the reasons set forth as to the August 2009 and October 2009 RFPs. OCC additionally asserts that the Commission should not have relied on the Navigant Report concerning this purchase because that report was released ten months prior to this purchase and record evidence, including the Spectrometer Report and market prices around the county, indicated that the market was changing.

In its memorandum contra, FirstEnergy argues that the Companies met the applicable burden of proof, and the Commission's Order permitting FirstEnergy to recover costs related to these RFPs was correct. FirstEnergy points out that the Commission found the Companies' laddering strategy was reasonable; the purchases were prudent as information on market prices or future renewable energy was generally unavailable; force majeure relief was not a legal alternative; and there would have been little time for the Companies to solicit additional RECs if a force majeure application was rejected.

FirstEnergy contends that the Companies' purchases of in-state all renewables RECs in the second RFP were prudent. More specifically, FirstEnergy contends that overwhelming evidence suggests that the market for in-state all renewables RECs in 2009 was constrained; that the Companies had no knowledge that the market constraints would end at the close of 2010, since Navigant's memorandum did not discuss any period beyond 2010; and that there was uncertainty in 2009 and 2010 as to what the market would be like in 2011.

FirstEnergy proffers that the Companies' purchases of 2010 in-state all renewables RECs in the third RFP were prudent because the Companies had no data to suggest that the market was improving; the Spectrometer Report touted by OCC was merely broker data that did not reflect actual transactions or volumes of RECs; force majeure was not a legal option; and, there would have been no time to procure the necessary RECs prior to the end of the compliance year if a force majeure determination was denied.

(13) Initially, the Commission emphasizes that Rider AER was created by a stipulation that allowed the Companies to recover the "prudently incurred cost[s] of" renewable energy resource requirements. *See In the Matter of the Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Auth. to Establish a Std. Serv. Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 08-935-EL-SSO, Stipulation and Recommendation (Feb. 19, 2009) at 10-11, Second Opinion and Order (Mar. 25, 2009) at 23. Turning to OCC's application for rehearing, the Commission thoroughly addressed in the Order the issues raised by OCC in support of these assignments of error. Notwithstanding OCC's claims, the Commission thoroughly considered the facts and circumstances of each transaction, based upon the evidence in the record in this proceeding. Order at 21-24. OCC contends that the Commission failed to adequately set forth the reasons for the Commission determination that recovery of the costs of the RECs obtained through the August 2009 RFP (RFP1) and the October 2009 RFP (RFP2) should be allowed. However, the Commission clearly set forth in the Order our finding that the Companies met their burden of proof for recovery of these costs based upon the evidence in the record. We noted that 2009 was the first compliance year under the new alternative energy portfolio standard requirement. Order at 21, 24. The Commission determined that, with respect to both the August 2009 RFP and the October 2009 RFP, the evidence in the record demonstrated that the Ohio renewables market was still nascent and that reliable, transparent information regarding market conditions was not generally available (Co. Ex. 1 at 22-25; Co. Ex. 2 at 28; Exeter Report at 12, 29; Tr. III at 569-570, 572). Order at 21-22, 24. In fact, the auditor conceded that there was no reliable available data at the time of the 2009 and 2010 RFPs

on REC prices for in-state all renewable RECs (Tr. I at 80). In addition, OCC's claim that the Commission erred in finding that the RFPs were competitive and that the rules for determining that the rules for determining winning bids were applied uniformly elides the testimony of OCC's own witness Gonzalez, who agreed that the process was designed to obtain a competitive outcome, that the solicitations were, in fact, competitive, and that the process was designed to select the lowest price bid (Tr. III at 566-567). Moreover, the Commission determined that the Companies had embarked on a "laddering" strategy, under which the Companies would spread the purchase of RECs for any given compliance year over multiple RFPs (Co. Ex. 2 at 21), that a laddering strategy is a common strategy for the procurement of renewable energy resources and other energy products (Tr. I at 150-151) and that there was no evidence that the laddering strategy was flawed or implemented in an unreasonable manner for the August 2009 RFP or the October 2009 RFP. Order at 22, 24.

Further, the Commission rejected arguments that the REC prices paid by the Companies were unreasonable based upon market information from around the country, noting that the record demonstrated that other states had experienced significantly higher prices in the first few years after the enactment of a state renewable energy portfolio standard and that the prices paid for the RECs were within the range predicted by the Companies' consultant (Co. Ex. 1 at 36-37, 51-52; Exeter Report at 31, footnote 17; Tr. I at 195-197). Order at 21-22. FirstEnergy witness Bradley also testified that REC prices from one state are not directly comparable to another states because each state may define differently the types of resources eligible to create a REC and the location in which the REC may be generated (Co. Ex. 1 at 52). Differences in whether RECs may be generated in one state or in a number of states creates a wide disparity in prices for RECs (Co. Ex. 1 at 51). In addition, FirstEnergy witness Earle testified that, when there is scarcity of supply, prices can greatly exceed the cost of production and that scarcity of supply can often happen in nascent markets where there is a sudden increase in demand without matching supply becoming available, as happened in the

Ohio in-state all renewables market in 2009 and 2010 (Co. Ex. 3 at 11).

With respect to the arguments raised by OCC regarding FirstEnergy's obligation to file a force majeure application following the August 2009 RFP, OCC misrepresents the Order regarding the amount of time available for FirstEnergy to solicit 2009 vintage RECs in the event that the Commission denied an application for a force majeure filed after August 2009 RFP. OCC complains that the Order suggests that the Companies would only have until the end of 2009 to conduct another solicitation for RECs rather than the filing deadline for the 2009 compliance year of March 31, 2010. However, the Commission made no such statement. In any event, there is no evidence in the record that additional vintage 2009 RECs would have been available in appreciable quantities for a solicitation held in the first quarter of 2010. Otherwise, OCC has raised no new arguments in its application for rehearing, and the Commission fully addressed this issue in the Order. Order at 23.

In addition, OCC claims that the Commission should have disallowed recovery of the costs of vintage 2011 RECS procured through the October 2009 RFP (RFP2). However, in the Order, the Commission noted that this purchase was part of the Companies' laddering strategy and constituted only 15 percent of the Companies' 2011 compliance requirement (Exeter Report at 25). Order at 24. OCC argues that this laddering strategy was unreasonable based upon a comparison with the actual weighted cost of vintage 2011 RECs purchased through RFP6 in 2011 and based upon the prices of RECs in other states. However, prudence must be determined based upon information which the Companies knew or should have known at the time of the transaction; FirstEnergy had no way of knowing in October 2009 what the actual weighted cost of vintage 2011 RECs purchased through 2011 would be. Moreover, the Commission has already rejected arguments that REC prices paid by the Companies were unreasonable based upon market information from around the country, given the differences in types of resources eligible to create a REC and the location in which the REC may be generated (Co. Ex. 1 at 52).

OCC also asserts that the Commission should have disallowed recovery of the costs of vintage 2010 RECS procured through the August 2010 RFP (RFP3). In addition to reiterating arguments raised with respect to the August 2009 RFP and the October 2009 RFP, OCC contends that the Commission should ignore the market report prepared by Navigant Consulting following the October 2009 RFP (Navigant Report). OCC contends that the Commission erred in relying upon the Navigant Report because it was prepared ten months before the August 2010 RFP and because there was a Spectrometer Report published showing dramatically lower REC prices (OCC Ex. 15, Set 3-INT-2, Attachment 25; Tr. II at 493). However, the evidence in the record indicates that the Spectrometer Report is of limited value because the Spectrometer Report does not report actual transactions and does not contain the volumes available broker prices indicated in the report (Tr. II at 492).

Accordingly, the Commission finds that rehearing on these assignments of error should be denied.

RFP3 (2011 Vintage RECs)

(14) In its application for rehearing, FirstEnergy argues that the Order unreasonably found that the Companies failed to meet their burden of proof that purchases of 2011 in-state all renewables RECs in 2010 were prudent. FirstEnergy supports its assertion by claiming that the Commission erred in finding that Navigant's projection that the constrained market would be relieved by 2011, as well as the presence of more than one bidder, were reasons not to purchase 2011 in-state all renewables RECs in 2010. In contrast, FirstEnergy claims that there was still significant uncertainty in 2010 about the 2011 market conditions. FirstEnergy also claims that the Companies did advise the Commission that the markets for in-state all renewables RECs were constrained. Further, FirstEnergy claims that the Commission erred in finding that the negotiated price for certain 2011 in-state all renewables RECs purchased in 2010 were unsupported, because the bid resulted directly from

the competitive RFP process and then a lower price was garnered in order to save customers money. Finally, FirstEnergy contends that the Commission erred in finding that the Companies could have requested a force majeure determination in order to excuse their 2011 in-state all renewables RECs obligation on the basis that R.C. 4928.64(C)(4) does not permit a force majeure determination based on the cost of RECs.

In its memorandum contra FirstEnergy's application for rehearing, OCC contends that the Commission should reject FirstEnergy's claim that the Commission erred in finding that FirstEnergy knew that market constraints were coming to an end in 2010. OCC points out that the Commission's review of the market evidence was reasonable and FirstEnergy failed to produce evidence otherwise. OCC also contends that the Commission properly determined that FirstEnergy failed to advise the Commission as to the extent of market constraints and the impact on REC prices. OCC next argues that the Commission properly determined that the negotiated price in the third RFP was not reasonable, despite the initial bid price being the result of a competitive procurement, as a competitive procurement will not necessarily produce a competitive outcome. Next, OCC contends that the Commission properly disallowed costs of certain RECs purchased in the third RFP on the basis that FirstEnergy could have filed for a force majeure determination, as Commission precedent demonstrates price is a component in determining whether RECs are reasonably available, the rules of statutory construction establish that price is a component, and Ohio law provides more protection than just the three percent cost cap. Finally, OCC contends that FirstEnergy is wrong in arguing that the Commission erred in reducing the amount of the disallowance by the amount paid to a second bidder.

(15) The Commission finds that the record fully supports our determination in the Order that FirstEnergy failed to meet its burden of proof that the purchases of the 2011 vintage RECs through a bilateral negotiation following the August 2010 RFP were prudent. FirstEnergy claims that the Commission erred in finding that Navigant projected that the constraints

in the in-state all renewables market would be relieved by 2010. However, FirstEnergy's claims are not supported by the testimony of its own witnesses in this proceeding. FirstEnergy witness Stathis testified that, at the time of the August 2010 RFP, "new information" was available to the Companies "for the first time" (Tr. II at 368). According to the witness, this new information consisted of three facts: First, there was a second bidder in the auction. Second, Navigant had identified a period of one-year of constrained supply, and that period was close to ending at the time of the August 2010 RFP. Third, the Companies learned that the other Ohio electric utilities were meeting their in-state benchmarks, indicating that the market was possibly beginning to expand. (Co. Ex. 2 at 35; Tr. II at 360, 369-370). The witness further explained that these three facts were interrelated, testifying that "the new supplier observation was also consistent with the *upcoming expiration* of the 12 month constrained supply time frame that the October 2009 Navigant market report had identified almost a year earlier" (emphasis added) (Co. Ex. 2 at 35). Likewise, FirstEnergy witness Bradley claimed that time was on the side of the Companies if the bilateral negotiations failed to reach an agreed price (Tr. I at 205). Based upon this testimony, it is clear that the Companies should have known and, based on the record, actually knew, that the constraints in the in-state all renewables market would be relieved by late 2010. The Commission further notes that, although the Commission did find that the Companies' laddering strategy was reasonable, the Commission also determined that the failure to execute that strategy properly was unreasonable. Order at 26.

Further, the Commission finds that the evidence in this proceeding supports the Commission's determination that the negotiated price for the vintage 2011 RECs was unsupported by the record. Order at 27. FirstEnergy relies upon the fact that the result of the bilateral negotiation was a lower price than the amount originally bid in the August 2010 RFP, claiming that the RFP was competitive. However, the record demonstrates that the Companies properly rejected that bid based upon the new information regarding market conditions (Co. Ex. 2 at 35-36; Tr. I at 369-370).

Having properly rejected the bid, FirstEnergy cannot now claim that the bid price was reasonable and, therefore, any agreed price below the bid price was reasonable. The Companies bear the burden of proof in this proceeding, and FirstEnergy did not present any testimony demonstrating that the actual price agreed to for the RECs through the bilateral negotiation was reasonable.

With respect to FirstEnergy claim that the Commission erred in finding that the Companies failed to advise the Commission of market constraints in the Companies' alternative energy resource plan filed on April 15, 2010, in Case No. 10-506-EL-ACP, the Commission acknowledges that the Companies made vague references regarding the limited availability of renewable energy resources. However, the Companies qualified that statement by stating that this was true *"particularly for solar renewable energy resources"* (emphasis added). FirstEnergy followed these statements with detailed information regarding the amount of solar energy resources installed in Ohio. This detailed information regarding installed solar capacity was already known to the Commission because the Companies had presented the information to the Commission in support of their force majeure filing for their 2009 solar renewable energy resource obligation, which was granted by the Commission on March 10, 2010. *In re FirstEnergy*, Case No. 09-1922-EL-ACP, Finding and Order (Mar. 10, 2010) at 2-3. By contrast, the alternative energy resource plan omitted detailed information known to the Companies, including that supply conditions for in-state all renewable energy resources were marked by few willing and certified suppliers, that there were major uncertainties with respect to economic conditions that could support new renewable project development, and that credit conditions concerning financing for new projects were a significant limiting factor (Co. Ex. 2 at 40; Tr. II at 426). Further, First Energy witness Stathis conceded that these factors were significant and that these factors were impediments to the Companies' compliance with the renewable energy requirements (Tr. II at 426-427). Order at 26. Finally, the Companies failed to report that, although the markets were constrained, Navigant projected that the constraints would be relieved in late 2010 (Co. Ex. 2 at 35).

FirstEnergy further contends that there was no connection between the failure to report any market condition and the Companies' knowledge about market conditions or the decision to purchase 2011 in-state all renewable energy resources in 2010. However, the Commission notes that the auditor has claimed that the Companies should have consulted with the Commission regarding the bids received for in-state all renewable RECs although the Companies were under no statutory obligation (Exeter Report at 32). In this instance, the Commission determined that the Companies failed to report the market constraints when the Companies were under a regulatory duty to do so under Ohio Adm.Code 4901:1-40-03. Order at 36.

With respect to the filing of a force majeure application, the Companies contend that the Commission had already rejected the use of force majeure when prices are too high in the rulemaking implementing the renewable mandates contained on Am. Sub. Senate Bill 221. However, the Company misreads both the assignment of error raised by The Dayton Power and Light Company (DP&L) and the Commission's Entry on Rehearing rejecting the assignment of error. Notably, DP&L did not raise its assignment of error with respect to Ohio Adm.Code 4901:1-40-06, which governs force majeure determinations; instead DP&L raised its assignment of error regarding Ohio Adm.Code 4901:1-40-07, which implements the three percent statutory cost cap. Further, DP&L sought a third mechanism, the provision for a waiver in the cost cap rule of the renewable energy benchmarks, in addition to the force majeure determination and statutory cost cap. In rejecting this proposed third mechanism, the Commission correctly pointed out that R.C. 4928.64 provides two, and only two, provisions by which an electric utility or electric services company may be excused from meeting a required benchmark: a force majeure determination or reaching the statutory cost cap. *In re Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations*, Case No. 08-888-EL-ORD, Entry on Rehearing (June 17, 2009) at 21. The

Commission never said that price was not a factor in determining whether RECs were reasonably available in the market as part of a force majeure determination, and there is nothing inconsistent between the Entry on Rehearing and the discussions of force majeure determinations contained in the Order. Order at 23, 27-28. Otherwise, the Commission finds that the Companies have raised no new arguments in their application for rehearing with respect to their failure to seek a force majeure determination and that the Commission fully addressed those arguments in the Order. Order at 27-28.

Accordingly, the Commission finds that rehearing on this assignment of error should be denied.

(16) FirstEnergy further contends that the Order unlawfully requires the Companies to refund money collected under duly authorized rates. In support, FirstEnergy relies on the holding in *Keco Indust. v. Cincinnati & Suburban Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957), that Ohio law prohibits refunds of money collected through rates approved by the Commission. Further, FirstEnergy argues that the rates at issue are distinguished from the situation in *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568.

Similarly, in its application for rehearing, AEP Ohio argues that the Order is unreasonable and unlawful to the extent the Commission concluded that the prohibition against retroactive ratemaking only applies in traditional base rate proceedings. More specifically, AEP Ohio argues that the Commission overstates its authority to retroactively adjust rates in the Order to any case that does not involve a base rate proceeding. AEP Ohio states that it takes no position on how the bar against retroactive ratemaking applies to the facts in the current case, but requests rehearing on the legal conclusions relied upon by the Commission that AEP Ohio argues contradict established precedent under *Keco*.

In its memorandum contra FirstEnergy's application for rehearing, Nucor argues that crediting any disallowed costs to Rider AER does not constitute impermissible retroactive ratemaking. Nucor initially argues that, although

FirstEnergy argues this case is distinguished from *River Gas* because Rider AER rates were approved and were filed with the Commission at least 30 days in advance to taking effect, it would not have been possible to conduct a meaningful review or analysis of Rider AER costs in 30 days. Further, Nucor points out in response to FirstEnergy's argument that there was no statutory authority for the Commission to order a disallowance that the Commission has broad authority to approve an ESP with automatic increases or decreases in any component under R.C. 4928.143(B)(2)(e), as well as authority to establish an automatic REC recovery rider that may be adjusted to account for imprudently incurred costs under R.C. 4928.143(B)(2)(e). Nucor also notes that *Columbus S. Power Co. v. Pub. Util. Comm.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, can be distinguished from the case at issue because it was addressing an ESP rate plan that went through a full and extensive ratemaking process before the Commission, prior to approval of the rates. Finally, Nucor points out that variable pass-through riders such as Rider AER are common in recent utility SSO rate plans, many of which have true-up or reconciliation components to allow the utility to pass over-recoveries or under-recoveries from prior periods through to customers in subsequent rider adjustments. Nucor notes that, if FirstEnergy's argument in this case on retroactive ratemaking prevails, it is unclear whether any of these reconciliation riders may continue to be used in utility rate plans.

In its memorandum contra FirstEnergy's application for rehearing, OCC argues that the Commission's decision did not constitute retroactive ratemaking. More specifically, OCC argues that the process of quarterly filings and adjustments in prudence review and true-up proceedings is a standard mechanism used by the Commission to true up actual costs without delay in implementing new rates for subsequent periods. OCC points out that utilities benefit from this automatic adjustment mechanism by allowing new rates to go into effect without waiting for reconciliation—and that, if review of such variable rates was retroactive ratemaking, prudence review of such rates would be meaningless, while utilities would receive all the benefits.

OCC points out that, if FirstEnergy's argument prevails on this issue, the Commission must immediately undertake a review of its single-issue ratemaking regulations and limit or eliminate them, as they would cause utilities to be judgment proof to claims of imprudence. OCC also asserts that the Commission properly relied upon *River Gas* for the proposition that retroactive ratemaking doctrine does not apply to rates arising from variable rate schedules, and that the Stipulation in FirstEnergy's ESP expressly provided that only prudently incurred costs would be recoverable from customers. Further, OCC argues that AEP Ohio's requested clarification of the Order is misplaced and unnecessary in the context of this proceeding and the Commission should deny the request.

In the Order, the Commission found that Rider AER was akin to a variable rate schedule tied to a fuel adjustment clause and, consequently, under *River Gas,* did not implicate the retroactive ratemaking doctrine set forth in *Keco.* The Commission is not now persuaded that *Keco* applies by FirstEnergy's arguments; however, in light of FirstEnergy's arguments, the Commission will further explain its decision in the Order.

In *Keco,* the Supreme Court of Ohio addressed the issue of retroactive ratemaking and held that rates set by the Commission are the lawful rates until such time as they are set aside by the Supreme Court. Thereafter, in *River Gas,* the Court clarified that there may be situations involving utility rates where *Keco* does not apply; namely, where the Commission's actions do not constitute "ratemaking" as that term is customarily defined. One such situation, the Court held, would include variable rate schedules under the fuel cost adjustment procedure. The Court explained that these rates are distinguishable from traditional ratemaking because they are "varied without prior approval of the Commission and independently from the formal statutory ratemaking process." *River Gas,* 69 Ohio St.2d at 513, 433 N.E.2d 568. The Court held that this type of variable rate schedule does not constitute ratemaking in its usual and customary sense. *River Gas* at 513. The Court also noted that it made this finding notwithstanding the fact that the

Commission could refuse to permit a flow-through of gas cost under certain prescribed conditions. *River Gas* at 513.

The Court went on to hold in *River Gas* that, even if the Commission had engaged in ratemaking, the ratemaking was not retroactive. *River Gas* at 513-514. The Court explained that *Keco* involved a situation where a consumer sued for restitution for amounts collected under a Commission-approved tariff later found to be unreasonable; whereas, in *River Gas*, the Commission found that, in calculating costs that may be recovered prospectively from customers, it was appropriate for certain refunds to be deducted from the costs. *River Gas* at 513-514. The Court also pointed out that the purchased gas adjustment clause was still included in the utility's current tariffs. *River Gas* at 514.

Thereafter, the Supreme Court revisited *Keco* in *Lucas County Commissioners v. Pub. Util. Comm. of Ohio*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997). *Lucas County* involved a Commission-approved pilot program, which was alleged to be unjust and unreasonable. The Court found that there was no statutory authorization for ordering a rebate or credit and that *Keco* barred a refund in that situation. *Lucas County*, 80 Ohio St.3d at 347-348. The Court specified that, in *Lucas County*, no mechanism for rate adjustment of the pilot program had been incorporated into the initial rate stipulation approved by the Commission. *Lucas County*, 80 Ohio St.3d at 348. Further, the Court pointed out that the pilot program had been discontinued by the time the complaint was filed, and that "there was simply no revenue from the challenged program against which the utilities commission could balance alleged overpayments, or against which it could order a credit. Absent such revenue, were the commission to order either a refund or credit, the commission would be ordering [the utility] to balance a past rate with a different future rate, and would thereby be engaging in retroactive ratemaking[.]" *Lucas County*, 80 Ohio St.3d at 348-349.

More recently, in 2011, the Supreme Court of Ohio applied *Keco* in *Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788. In this case, the Commission, as part of a fully-litigated electric security plan application, set AEP-Ohio's rates at a level intended to permit the utility to recover 12 months of revenue over a 9-month period, in order to compensate for a 3-month regulatory lag. The Court held that this constituted retroactive ratemaking because the Commission was essentially compensating the utility for dollars lost during the pendency of Commission proceedings. *Columbus S. Power Co.* at ¶ 16.

Initially, the Commission notes that FirstEnergy has cited *Columbus S. Power Co.* to support its assertion that, as all but $4.9 million of the disallowed costs have already been fully recovered, a refund is prohibited because it would be retroactive ratemaking. As pointed out by OCC, this argument conflicts with FirstEnergy's argument made during the audit proceeding in which FirstEnergy sought an 11-week delay in the hearing, which was granted, and, in doing so, assured the Commission that delay would not prejudice any party's interest. See FirstEnergy Memorandum in Support of Motion to Modify Procedural Schedule (Oct. 19, 2012) at 3.

Further, the Commission maintains that, under *Keco* and its progeny, the retroactive ratemaking doctrine is not implicated in this case because it is neither ratemaking in a customary sense as defined by the Court, nor is it retroactive. As to the ratemaking basis, Rider AER did not arise out of a base rate proceeding but is a variable rate created by a stipulation that expressly provides that only prudently incurred costs are recoverable. Further, the periodic tariffs for Rider AER are due to be filed at such a time (one month prior to taking effect) that no meaningful opportunity is available for the Commission to review them prior to their collection from customers. While a one-month period could permit a cursory review of the amount of costs, it would not provide a reasonable opportunity for review of the prudence of the costs and Commission approval or denial of the costs. Thus, it was clearly never intended that the Commission would fully review each variable rate prior to it taking effect. Consequently, the Commission believes that Rider AER is clearly more akin to the variable rate at issue in *River Gas*, which the Supreme Court found was not ratemaking in its customary sense. Further, as discussed in

Lucas County, a mechanism for adjustment of the rate was incorporated into the rate stipulation approved by the Commission, in addition to the express provision that only prudently incurred costs would be recoverable.

As to retroactivity, the Commission stresses that rates continue to be collected under Rider AER, which remains part of FirstEnergy's current tariffs. Consequently, the situation is similar to that in *River Gas*, where the gas adjustment clause was still included in the utility's current tariffs, and the refunds were merely deducted in calculating prospective costs to be recovered. Further, Rider AER is precisely the situation discussed in *Lucas County* as not implicating the retroactive ratemaking doctrine—there continues to be revenue collected from Rider AER against which the Commission has ordered a credit for prior overpayments.

Finally, the Commission finds that the decision in *Columbus S. Power Co.* can be distinguished on several bases from this case. Initially, contrary to the arguments made by AEP Ohio and FirstEnergy, the Commission did not make the blanket assertion that any and all rates created outside of a base rate proceeding are not ratemaking. Instead, the fact that Rider AER was not created as part of a base rate case was one of multiple factors that the Commission took into consideration in determining that this situation did not constitute "ratemaking" in its traditional sense under Supreme Court precedent. Further, the rate in *Columbus S. Power Co.* addressed an ESP plan that went through a full and extensive ratemaking process prior to approval and the rates going into effect, which was much more akin to the formal ratemaking process than the situation in Rider AER, which involved a single, variable direct pass-through rider, which was subject to only 30 days possible review prior to automatically taking effect, and, further, which contained a prudency review contingency from its inception.

The Commission also notes that, as pointed out by OCC, the process of quarterly filings and adjustments in prudence review and true-up proceedings is a standard mechanism used by the Commission, which is often a benefit for the utilities because it allows for implementation of new rates without regulatory lag If this mechanism was retroactive ratemaking, the Commission would be forced to immediately eliminate this mechanism, which is widely used, including for numerous riders in FirstEnergy's ESP.

(17) FirstEnergy next argues that the Commission's disallowance of the costs of all but 5,000 2011 in-state all renewables RECs purchased as part of the third RFP was unreasonable because the Commission also determined that the Companies' laddering purchasing strategy was reasonable; and, because the Commission used an offset equivalent to the price of the lowest bid price for 2011 in-state all renewables RECs as part of the third RFP, even though it is undisputed that RECs were not available in a sufficient quantity at the lowest bid price.

(18) The Commission finds that FirstEnergy's arguments in support of this assignment of error should be rejected. Although the Commission did find that the Companies' laddering strategy was reasonable, the Commission also determined that the failure to execute that strategy properly was unreasonable. In the Order, the Commission states that:

> [I]n the August 2010 RFP, FirstEnergy did not execute its laddering strategy, which would have involved spreading the REC purchases for any given compliance year over the course of multiple RFPs. Here, however, FirstEnergy chose to purchase the entire remaining balance of its 2011 compliance obligation (85 percent of its 2011 compliance obligation) in this RFP and reserved no 2011 RECS to be purchased in 2011 (Exeter Report at 25; Tr. II at 414-415).

Order at 26.

The evidence in the record demonstrates that the FirstEnergy laddering strategy entailed purchasing some portion of its 2011 compliance obligation in the August 2011 RFP. FirstEnergy witness Stathis testified that:

> RCS [FirstEnergy's Regulated Commodity Sourcing group, which is responsible for

> procuring power and renewable products for the Companies] expected that it would hold 3 RFPs for all 4 renewable products – one per year. RCS believed that the 2009 RFP would seek 100% of 2009 compliance obligations, and some percentage of 2010 and 2011; the 2010 RFP would seek the remaining percentages needed for 2010 compliance and some additional percentage of 2011; and *the 2011 RFP would seek the residual percentages, per product needed for 2011 compliance.*

(Emphasis added) (Co. Ex. 2 at 21.)

Notwithstanding this laddering strategy, the Companies purchased their entire remaining 2011 compliance obligation, over 145,269 RECs, which represented 85 percent of their 2011 compliance obligation, in the August 2010 RFP. Thus, instead of the planned three-step ladder, the Companies completed the purchase of vintage 2011 RECs in only two steps. (Exeter Report at 25; Tr. II at 414-415.) The Commission further notes that, according to the record, there were three more RFPs in which the Companies could have purchased 2011 vintage RECS: March 2011 (RFP4), August 2011 (RFP5), and September 2011 (RFP6) (Exeter Report at 11; Tr. II at 205). In fact, FirstEnergy ultimately did purchase additional 2011 vintage in-state all renewables REC in the September 2011 RFP as required by the Stipulation in FirstEnergy's second ESP; these vintage 2011 RECS were in excess of its 2011 compliance obligation and were purchased at a significantly lower price than the RECs purchased in the August 2010 RFP (Exeter Report at 28).

With respect to FirstEnergy's arguments regarding the offset price, the Commission explicitly noted in the Order that the Companies had purchased vintage 2011 RECS at a significantly lower price from a second winning bidder in the August 2010 RFP. Further, the Order is clear that the 5,000 RECs actually purchased through the August 2010 RFP was substantially fewer than the 145,269 RECs imprudently purchased through the bilateral negotiation. However, we determined, based upon the lack of other options in the evidentiary record, that the actual price paid for comparable vintage RECs in the August 2010 RFP was the most appropriate offset price to be used in determining the disallowance. Order at 28. Nonetheless, the Commission notes that our conclusion that the decision to purchase the vintage 2011 RECs was imprudent and that recovery of the costs of the vintage 2011 RECs should be denied was not contingent upon the determination of an offset price. The determination of the offset price was relevant solely to determining the amount of the disallowance. In the event the Commission had not been able to determine an appropriate offset price based upon the record in this case, the Commission would have denied recovery of the full costs of the vintage 2011 RECs purchased through the bilateral negotiation after August 2010 RFP. Accordingly, rehearing on this assignment of error should be denied.

(19) Next, FirstEnergy contends that the Order unreasonably determined that the refund of the disallowance commence prior to the conclusion of any appeals to the Supreme Court of Ohio.

In its memorandum contra FirstEnergy's application for rehearing, OCC argues that FirstEnergy has failed to meet the requirements to warrant a stay of the credit to customers. In support, OCC points out that there is no strong likelihood of modifying the Order, and FirstEnergy has failed to make a sufficient argument on this point; that FirstEnergy has failed to demonstrate it will suffer irreparable harm absent a stay, but merely argues that it will likely suffer harm; that FirstEnergy has failed to demonstrate a stay will not result in substantial harm to other parties, and that customers' refunds would be delayed, which is particularly harmful because customers could leave FirstEnergy's SSO in the meantime and never receive a credit; and because there has been no showing that a delay in returning money will serve the public interest.

(20) The Commission finds that rehearing on this assignment of error should be denied. The Commission finds that the availability of a potential stay adequately protects the Companies' interests. Nothing in the Order precludes the opportunity for the Companies to seek a stay of the Order

from the Commission or from the Supreme Court of Ohio if the Companies can establish that a stay is warranted.

Undue Preference

(21) In its application for rehearing, OCC argues that the Commission erred in declining to order an investigation of whether FirstEnergy extended undue preference to FES. More specifically, OCC argues that the Commission was unreasonable in finding that there was no evidence in the record to support further investigation into FirstEnergy and FES' compliance with applicable corporate separation rules. OCC argues that, in fact, evidence in the record shows that the purchase of RECs from FES resulted from undue preference because FirstEnergy knew that FES was a bidder when it chose to purchase certain RECs.

Similarly, in its application for rehearing, the Environmental Groups argue that the Order was unreasonable because the Commission declined to initiate a corporate separation investigation into FirstEnergy's relationship with its affiliate company, FES, based on the Exeter Report. The Environmental Groups argue that the facts in this case and the Commission's obligation to foster competitive generation are sufficient for the Commission to use its initiative to commence a corporate separation investigation under R.C. 4928.18. More specifically, the Environmental Groups argue that the Commission erred in finding that an investigation was not warranted in part because the auditor did not recommend further investigation, on the basis that the scope of the auditors' work was designated by the Commission and did not include exploration of the issues of deliverables related to corporate separation. Further, the Environmental Groups argue that, if the Commission initiated an investigation into affiliate transactions, parties would be able to obtain discovery from FES, which the Environmental Groups argue could provide the information necessary to determine whether corporate separation violations occurred. The Environmental Groups conclude that the Commission has an obligation and responsibility under R.C. 4928.02 to launch a corporate separation investigation.

In its memorandum contra, FirstEnergy states that there is no basis or reason to conduct any further investigation of the Companies' procurements from 2009 through 2011. More specifically, FirstEnergy urges that OCC's request overlooks the fact that the Commission already ruled that the procurement of all RECs other than the 2011 in-state all renewables RECs purchased in the third RFP were reasonable. FirstEnergy contends that, if the Companies made prudent purchases, then any affiliate transaction is irrelevant; and, if the Companies made imprudent purchases that are disallowed, any affiliate transaction is irrelevant. Consequently, FirstEnergy argues that there is no purpose for further investigation. Further, FirstEnergy points out that, although OCC argues that there was evidence of inappropriate undue preference, the evidence clearly demonstrated that the process was unquestionably fairly run to produce a competitive result.

Additionally, in its memorandum contra, FirstEnergy argues that the Environmental Groups are incorrect that affiliate activities were not within the scope of the audit; to the contrary, FirstEnergy points out that the RFP authorized the auditor to identify other issues in need of investigation, and that Exeter did, in fact, look at affiliate issues as evidenced by data requests to FirstEnergy about its dealings with FES. Further, FirstEnergy contends that none of the parties ever sought discovery from FES, even though its identity as a bidder was something that these parties knew. FirstEnergy next agues that the Environmental Groups fail to understand that the RFPs were designed in such a way that qualified suppliers did not know how many other suppliers submitted bids, and that, consequently, FES would have had no knowledge that any of its bids would be the lowest bid. Finally, FirstEnergy contends that, contrary to the Environmental Groups' assertion, there is no basis for a Commission investigation as there is no evidence that the Companies provided preference to FES.

(22) The Commission finds that rehearing on these assignments of error should be denied. Neither OCC nor the Environmental Groups have raised any new arguments for the Commission's consideration, and the Commission

thoroughly addressed this issue in the Order. In the Order, we noted that the Exeter Report did not recommend any further investigation on this issue (Tr. I at 117-228). Further, the Exeter Report contains no evidence of an undue preference by the Companies in favor of FES, or any other bidder or evidence of improper contacts or communications between the Companies or FES or any other party (Exeter Report at 31; Tr. I at 114). Moreover, the Exeter Report specifically states that the auditors "found nothing to suggest that the FirstEnergy Ohio utilities operated in a manner other than to select the lowest cost bids received from a competitive solicitation" (Exeter Report at 29). Order at 29.

<u>Statutory Three Percent Provision</u>

(23) In its application for rehearing, FirstEnergy argues that the Order unlawfully and unreasonably held that the three percent test set forth in R.C. 4928.64(C)(3) is mandatory.

In its application for rehearing, the Environmental Groups also criticize the Order regarding the statutory three percent provision, arguing that the Commission unreasonably excluded price suppression effects from its proposed cost cap calculation. In support, the Environmental Groups cite the Commission's reliance on evidence that price suppression benefits were subjective and difficult to calculate. The Environmental Groups point out that, after the Order was issued, the Commission Staff issued a report that the Environmental Groups argue demonstrated that price suppression benefits are objective and quantifiable.

In its memorandum contra, Nucor contends that the Commission should affirm the methodology set forth in the Order concerning the three percent cost cap. More specifically, Nucor contends that the Commission properly ruled that the three percent cost cap is mandatory. Nucor contends that FirstEnergy's argument that the "need not comply" language is discretionary ignores the context in which those words were used—namely, that the statute itself refers to the three percent test as a "cap" and because the drafters of S.B. 221 and the Commission itself have made clear that the purpose of the three percent test is to protect customers from significant increases in their electric bills. Further, Nucor points out that, nowhere in the Commission's orders in *In re Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations*, Case No. 08-888-EL-ORD, does the Commission state that the cap is discretionary on part of the utility.

Further, Nucor contends that the Commission properly excluded price suppression effects from the cap calculation because neither the statute nor the Commission's rules contemplate the incorporation of such effects. Further, Nucor urges that it would be inappropriate to consider Staff's Report on the effects, given that it was issued well after the record in this case was closed, and given that the Staff Report does not address the Commission's key concerns set forth in the Order, including subjectivity and difficulty in calculation. Further, Nucor points out that nothing in the statute suggests the cap can be adjusted above three percent to account for price suppression benefits.

In its memorandum contra the Environmental Groups' application for rehearing, FirstEnergy claims that the Commission's formula for the three percent test is correct. More specifically, FirstEnergy argues that no testimony was heard at the hearing on how suppression benefits should be determined; the Goldenberg Report observed that price suppression benefits would be difficult to calculate; and, the study proffered by the Environmental Groups was released after the hearing in this case and parties have had no opportunity to review the study's methodology or assumptions. Further, FirstEnergy points out that neither the Companies nor any other intervenors have had a meaningful opportunity to respond to the study, making any adoption into the record and reliance by the Commission grossly unfair. Consequently, FirstEnergy argues that taking administrative notice would deny the Companies any opportunity to explain or rebut the information, as this case is in its final stage.

(24) As to the motion to take administrative notice, the Commission notes that the Supreme Court of Ohio has held that there is neither an absolute right for, nor a prohibition against, the Commission's taking administrative notice of

facts that are outside the record in this case. Instead, each case should be resolved on its facts. The Court further held that the Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction. See *In re FirstEnergy*, Case No. 12-1230-EL-SSO, Second Entry on Rehearing (Jan. 30, 2013) at 3-4, citing *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995), citing *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988). Here, with respect to the "Renewable Resources and Wholesale Price Suppression" study, the Commission finds that FirstEnergy and the other intervening parties in this case have not had an opportunity to prepare for, explain, or rebut this evidence for which the Environmental Groups seek administrative notice. Further, the record in this proceeding has closed and the Environmental Groups' requests for administrative notice were made after completion of the hearing and after the issuance of the order. Consequently, the Commission finds that other parties would be prejudiced by the introduction of the study and the Commission denies the motion to take administrative notice for that reason.

Finally, the Commission notes that, in the Order, it declined to interject price suppression benefits into the three percent cap calculation on the basis that evidence at the hearing indicated that price suppression benefits are subjective and difficult to calculate. Order at 3. The Commission finds that the Environmental Groups have presented no persuasive arguments otherwise; consequently, the Commission denies the Environmental Groups' application for rehearing on this issue.

<u>Draft Exeter Report</u>

(25) OCC contends that the Commission erred in failing to find that due process was violated when a recommendation in the draft Exeter Report did not appear in the final Exeter Report filed in the docket after FirstEnergy objected to the recommendation after viewing the draft report; by failing to file findings of fact and written opinions in accordance with R.C. 4903.09 because a recommendation in the draft Exeter

Report was not included in the final Exeter Report; and in failing to rule that, in future cases for review of FirstEnergy's Rider AER and other utilities' alternative energy purchases, any commentary on a draft audit by an electric utility must be shared with other parties and other parties must be provided with an opportunity to make substantive recommendations for the final audit report. More specifically, OCC complains that, before the Exeter Report was filed in the docket, FirstEnergy was provided with a draft and requested substantive modifications to the draft Exeter Report. OCC contends that it subsequently learned that the draft Exeter Report had recommended that the Commission disallow FirstEnergy recovery of RECs priced above $50, and that this recommendation did not appear in the final Exeter Report filed in the docket. OCC argues that this process was unfair to the other participants in this proceeding who were not permitted to review the draft and provide comments. Further, OCC argues that the Commission should have considered the recommendation set forth in the draft Exeter Report that was omitted from the final Exeter Report filed in the docket, and that the Commission should not permit a party to view a draft audit report in any future case involving an audit of a utility's alternative energy purchases.

In its memorandum contra OCC's application for rehearing, FirstEnergy contends that the audit process was proper and should not be modified. FirstEnergy asserts that OCC has no right to participate in a review of the draft Exeter Report, unlike the Companies' opportunity to review the draft report for accuracy and confidentiality, which was a process detailed in the Commission's RFP in this case and per the Commission's usual audit RFPs. Further, FirstEnergy points out that the draft report does not represent any conclusion, result, or recommendation, because it is a draft. FirstEnergy further notes that, once the report was final, OCC had all access to it and was able to interview and cross-examine the principal auditor. FirstEnergy next argues that OCC's argument that the Commission violated R.C. 4903.09 by not relying on information in the draft report is nonsense, as the statute does not require the Commission to rely on any certain evidence in its findings, and particularly not information contained in a draft that was not introduced into evidence.

(26) The Commission finds that, although OCC repeatedly complains that FirstEnergy was provided with a draft of the Exeter Report prior to the Exeter Report being filed, OCC acknowledges that the RFP explicitly provided that a draft would be provided to FirstEnergy for its review for confidentiality purposes. Indeed, the Commission notes that the RFP specified that "[t]he Companies shall diligently review the draft audit report(s) for the presence of information deemed to be confidential, and shall work with the auditor(s) to assure that such information is treated appropriately in the report(s)." Entry (Jan. 18, 2012), RFP at 5. Nevertheless, OCC claims that FirstEnergy's review of the draft Exeter Report went beyond the scope of the RFP because it requested substantive modifications and that the draft Exeter Report had recommended that the Commission disallow FirstEnergy recovery of RECs priced above \$50—a recommendation which did not appear in the final Exeter Report—and the Commission erred in failing to consider this recommendation. Initially, the Commission notes that, for whatever reason, the auditor chose not to make this recommendation in the final Exeter Report; consequently, the Commission does not consider this to be a conclusion or recommendation of the auditor. Further, the Commission notes that the RFP expressly provided that "[n]either the Commission nor its Staff shall be bound by the auditor's conclusions or recommendations." Entry (Jan. 18, 2012), RFP at 2. Thus, even if the recommendation in the draft Exeter Report appeared in the final Exeter Report, the Commission was not bound to accept the recommendation. Consequently, the Commission finds that OCC has demonstrated no error and the Commission denies the application for rehearing on these grounds.

Administration of Credit

(27) In its application for rehearing, IGS Energy seeks modification of the Order only with respect to the manner in which the credit, or refund, will be administered. IGS Energy argues that the Order is unreasonable and unlawful because, given the amount of the refund and

diminished number of standard service offer customers in FirstEnergy's territory, the refund may skew the price-to-compare, which could delay a consumer's interest in choosing a competitive supplier, adversely affecting the development of the competitive market. Further, IGS Energy contends that the Order is unreasonable and unlawful because the refund will be given through Rider AER, so that customers who received standard service in 2011, but are now shopping, will be excluded from the benefit of the refund. Consequently, IGS Energy requests that the Commission require that the refund be given to all distribution customers of FirstEnergy, or, in the alternative, that FirstEnergy identify which customers paid Rider AER when relevant and issue those customers a refund, regardless of whether they are now shopping.

In its memorandum contra IGS Energy's application for rehearing, FirstEnergy argues that the manner of refunding discussed by IGS Energy is moot because FirstEnergy proved that it was prudent in all REC purchases; however, FirstEnergy argues that, even if IGS Energy's argument was not moot, its argument about refunding is unlawful or unreasonable. Initially, FirstEnergy argues that IGS Energy's suggestion that all distribution customers receive a refund violates R.C. 4928.64(E), which provides that all cost incurred for compliance with R.C. 4928.64 shall be paid by nonshopping customers. Additionally, FirstEnergy points out that this method would dilute the amount of the refund received by any customer who paid Rider AER rates and remains nonshopping. Further, FirstEnergy argues that IGS Energy's concerns related to competition are premature because the Commission must first determine whether there should be a refund, and the Commission should not feel compelled to resolve refunding issues until a final amount of refund is established.

In its memorandum contra IGS Energy's application for rehearing, OCC contends that IGS Energy is incorrect that the ordered refund will affect the price-to-compare. OCC argues that, if the disallowance is credited back to customers using the rider's current rate design, the price-to-compare will be unaffected because the credit will appear as a separate entry on customers' bills, not as a discount to the price per kilowatt-hour (kWh). Further, although IGS Energy has proposed that the Commission identify customers that paid for the RECs and directly refund them, regardless of whether they are now shopping, OCC points out that it may be challenging to implement precisely this plan. Additionally, OCC points out that IGS Energy's alternate plan to refund the dollars to all customers would inappropriately extend the refund to a large class of customers, many of whom paid none of the disallowed costs. Finally, OCC contends that the Commission should disregard IGS Energy's assertion that customers should not have the option of a standard offer, because it is not an issue in this case.

In its memorandum contra IGS Energy's application for rehearing, OEG contends that the Commission should reject IGS Energy's recommendations because IGS Energy has not previously raised the issue of implementation of the refund; because IGS Energy's suggestion that the refund be distributed to all customers in FirstEnergy's territory, regardless of shopping status, would unjustly enrich shopping customers; and because identifying specific customers to determine who paid the REC costs to be refunded would be extremely onerous. Further, OEG argues that IGS Energy's concern regarding the impact on the price-to-compare fails to recognize that FirstEnergy's imprudent REC purchases previously distorted the price-to-compare in IGS Energy's favor. OEG argues that, if the Commission wishes to minimize the impact of the refund on the price-to-compare, it should order FirstEnergy to refund the money over a brief period of time, such as in one quarterly adjustment.

In its memorandum contra IGS Energy's application for rehearing, Nucor argues that the approaches for refunding proposed by IGS Energy are unsupported by evidence in the record. More specifically, Nucor contends that IGS Energy provided no testimony supporting any particular approach to distribution of any refund. Further, Nucor argues that, although IGS Energy argues that the refund could affect the price-to-compare, there is no evidence that even a relatively large disallowance spread over a relatively small number of non-shopping customers will influence customer behavior. Further, Nucor points out that a distorting affect on the price-to-compare occurred that was favorable to IGS Energy when Rider AER rates were high in 2010 and 2011. Nucor further argues that IGS Energy's proposed alternatives are unfair or unworkable.

(28) The Commission agrees with the arguments in the memoranda contra that IGS Energy's proposals for distribution of the credit would undercompensate current SSO customers or would be administratively burdensome and unworkable. As pointed out by Nucor, the reality of utility ratemaking is that customers often must pay for costs they did not cause themselves, as it is impossible to precisely match up costs with specific customers when customers routinely enter and leave the system. Consequently, the Commission declines to modify its order that the disallowances be credited to customers through an adjustment to Rider AER. Further, to the extent that administration of the credit was unclear under the Order, the Commission clarifies that the credit should be administered according to Rider AER's current rate design. As a result, the credit should appear as a single line-item credit to Rider AER over three monthly billing cycles, which appears as a separate entry on customers' bills, not as a discount to the price per kWh. Consequently, the Commission finds that distortion of the price-to-compare will not occur.

<u>AEP Ohio's Intervention</u>

(29) In its application for rehearing, AEP Ohio argues that the Commission erred in denying AEP Ohio's intervention in this proceeding. More specifically, AEP Ohio argues that it was delayed in filing for intervention due to extensive redactions for confidentiality and delayed filing of documents in the docket, and that the Environmental Groups and OCC support the intervention of AEP Ohio. Further, AEP Ohio repeats the argument in its motion for leave to intervene that it believes it can share with the Commission its own experience in seeking to comply with state mandates in order to assist the Commission in

determining the reasonableness of the parties' positions in this proceeding.

Additionally, AEP Ohio argues that the Order is unreasonable and unlawful because the Commission failed to reopen the proceedings to consider additional evidence that could have been provided by AEP Ohio. More specifically, AEP Ohio contends that there are "gaps in the record" and that AEP Ohio can fill these gaps by sharing its own experiences with the AEPS benchmarks, and that this information was not provided earlier as there was no indication that there were industry issues in question where the prudence of the expenditures would be an issue.

In its memorandum contra, FirstEnergy asserts that the Commission properly denied AEP Ohio's motion to intervene, pointing out that AEP Ohio has failed to meet the requirements of R.C. 4903.10, as it must because it is not a party to this case. Next, FirstEnergy asserts that AEP Ohio still has not met the standard for late intervention because it has given no reasonable excuse for its lack of timeliness, there are no extraordinary circumstances that justify late intervention, there is no real and substantial interest, and there is no justification for reopening proceedings at this late date.

(30) The Commission finds that AEP Ohio has presented no argument in support of its motion to intervene and reopen the proceedings that was not already raised and addressed in the Order. In the Order, the Commission found that AEP Ohio's motion to intervene should be denied because AEP Ohio's motion to intervene was filed 220 days after the deadline to intervene and presents no extraordinary circumstances. Further, the Commission found that the motion to reopen the proceedings should be denied because AEP Ohio failed to set forth why any additional evidence could not, with reasonable diligence, have been presented earlier in this proceeding. Order at 7-8. Accordingly, the Commission finds that AEP Ohio's motion for rehearing on these grounds should be denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by IGS Energy, OCC, FirstEnergy, the Environmental Groups, and AEP Ohio are denied. It is, further,

ORDERED, That copies of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

MWC/sc

Entered in the Journal
DEC 1 8 2013

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DISSENTING OPINION OF COMMISSIONER LYNN SLABY

Upon further consideration of this case, I would dissent from the majority. I am convinced that *Columbus S. Power Co. v. Pub. Util. Comm.*, 128 Ohio St.3d 512, 2011-Ohio-1788, precludes us from refunding money to customers as the majority has done here.

Lynn Slaby

Lynn Slaby, Commissioner

LS/sc

Entered in the Journal
DEC 18 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

EXHIBIT C

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December 18, 2013

Ms. Barcy F. McNeal
Director, Office of Administration
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

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

Dear Ms. McNeal:

On December 18, 2013, the Commission issued a Second Entry on Rehearing denying in its entirety the Application for Rehearing filed by Ohio Edison Company, The Toledo Edison Company, and The Cleveland Electric Illuminating Company (collectively "the Companies"). Section 4903.16 of the Ohio Revised Code provides that a final order may be stayed provided that, among other things, "three days notice" has been given to the Commission.

The Companies hereby notify the Commission of their intent to apply to the Supreme Court of Ohio for a stay of the orders pending appeal. The Companies intend to file a notice of appeal of the Commission's Opinion and Order dated August 7, 2013 and its Second Entry on Rehearing dated December 18, 2013 and a motion for stay with the Supreme Court of Ohio on or after December 23, 2013. The Commission should consider this letter to be the notice required by Section 4903.16.

Very truly yours,

David A. Kutik

cc: Parties to Case No. 11-5201-EL-RDR *via electronic mail*

EXHIBIT D

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority.	)	Case Nos. 09-21-EL-ATA 09-22-EL-AEM 09-23-EL-AAM

SECOND OPINION AND ORDER

The Commission, considering the evidence presented in the above-entitled applications, hereby issues its second opinion and order in these matters.

APPEARANCES:

James W. Burk, Arthur E. Korkosz, Mark A. Hayden, Ebony L. Miller, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, Jones Day, by David A. Kutik, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, and Calfee, Halter & Griswold, LLP, by James F. Lang and Laura C. McBride, 1400 KeyBank Center, 800 Superior Avenue, Cleveland, Ohio 44114, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright, Thomas W. McNamee, and John H. Jones, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Jacqueline Lake Roberts, Richard C. Reese, Gregory J. Poulos, and Terry Etter, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Chester, Willcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of The Kroger Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Lisa G. McAlister, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Brickfield, Burchette, Ritts & Stone, P.C., by Michael K. Lavanga and Garrett A. Stone, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of Nucor Steel Marion, Inc.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Gary A. Jefferies, Dominion Resources Services, Inc., 501 Martindale Street, Suite 400, Pittsburgh, Pennsylvania 15212-5817, on behalf of Dominion Retail, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Cynthia A. Fonner, Constellation Energy Group, Inc., 550 West Washington Street, Suite 3000, Chicago, Illinois 60661, on behalf of Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

Robert J. Triozzi, Director of Law, and Steven Beeler, Assistant Director of Law, City of Cleveland, and Schottenstein, Zox & Dunn Co., LPA, by Gregory H. Dunn, Christopher L. Miller, and Andre T. Porter, 250 West Street, Columbus, Ohio 43215, on behalf of the city of Cleveland.

Brickfield, Burchette, Ritts & Stone, P.C., by Damon E. Xenopoulos, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of OmniSource Corporation.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Nolan Moser and Trent A. Dougherty, Ohio Environmental Council, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of Ohio Environmental Council.

Richard L. Sites, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of Ohio Hospital Association.

The Legal Aid Society of Cleveland, by Joseph P. Meissner, 1223 West 6th Street, Cleveland, Ohio 44113, on behalf of The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates.

Leslie A. Kovacik, city of Toledo, 420 Madison Avenue, Suite 100, Toledo Ohio 43604-1219; Lance M. Keiffer, Lucas County, 711 Adams Street, 2nd Floor, Toledo, Ohio 43624-1680; Marsh & McAdams, by Sheilah H. McAdams, city of Maumee, 204 West Wayne Street, Maumee, Ohio 43537; Ballenger & Moore, by Brian J. Ballenger, city of Northwood, 3401 Woodville Road, Suite C, Toledo, Ohio 43619; Paul S. Goldberg and Phillip D. Wurster, city of Oregon, 5330 Seaman Road, Oregon, Ohio 43616; James E. Moan, city of Sylvania, 4930 Holland-Sylvania Road, Sylvania, Ohio 43560; Leatherman, Witzler, by Paul Skaff, city of Holland, 353 Elm Street, Perrysburg, Ohio 43551; and Thomas R. Hayes, Lake Township, 3315 Centennial Road, Suite A-2, Sylvania, Ohio 43560, on behalf of Northwest Ohio Aggregation Group.

Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Natural Resources Defense Council.

Craig G. Goodman, 3333 K. Street, N.W., Suite 110, Washington, D.C. 20007, on behalf of National Energy Marketers Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Bobby Singh, 300 West Wilson Bridge Road, Suite 350, Worthington, Ohio 43085, on behalf of Integrys Energy Services, Inc.

Sean W. Vollman and David A Muntean, 161 South High Street, Suite 202, Akron, Ohio 44308, on behalf of the city of Akron.

Bell & Royer Co., LPA, by Langdon D. Bell, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Kevin Schmidt, 33 North High Street, Columbus, Ohio 43215-3005, on behalf of Ohio Manufacturers' Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Direct Energy Services, LLC.

Bailey Cavalieri, LLC, by Dane Stinson, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215-3422, and F. Mitchell Dutton, FPL Energy Power Marketing, Inc., 700 Universe Boulevard, Juno Beach, Florida 33408, on behalf of NextEra Energy Resources, LLC, FPL Energy Power Marketing, Inc., and Gexa Energy Holdings, LLC, and Gexa Energy - Ohio, LLC.

Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Sierra Club, Ohio Chapter.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Northeast Ohio Public Energy Council.

Larry Gearhardt, 280 North High Street, P.O. Box 182383, Columbus, Ohio 43218-2383, on behalf of Ohio Farm Bureau Federation.

Bricker & Eckler, LLP, by Sally W. Bloomfield and Terrence O'Donnell, 100 South Third Street, Columbus, Ohio 43215, on behalf of American Wind Energy Association, Wind on the Wires, and Ohio Advanced Energy.

Theodore S. Robinson, 2121 Murray Avenue, Pittsburgh, Pennsylvania 15217, on behalf of Citizens Power, Inc.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California, 90067-3218, and Grace C. Wung, 600 Thirteenth Street, N.W., Washington, D.C. 20005, on behalf of Wal-Mart Stores East, LP, Sam's East, Inc., LP, Macy's, Inc., and BJ's Wholesale Club, Inc.

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Material Sciences Corporation.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Schools Council.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California 90067-3218, and Gregory K. Lawrence, 28 State Street, Boston, Massachusetts 02109, on behalf of Morgan Stanley Capital Group, Inc.

Tucker, Ellis & West, LLP, by Nicholas C. York and Eric D. Weldele, 1225 Huntington Center, 41 South High Street, Columbus, Ohio 43215-6197, and Steve Millard, 100 Public Square, Suite 201, Cleveland, Ohio 44113, on behalf of Council of Smaller Enterprises.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Ohio Association of School Business Officials, Ohio School Boards Association, and Buckeye Association of School Administrators.

Schottenstein, Zox & Dunn Co., LPA, by C. Todd Jones, Christopher L. Miller, Gregory H. Dunn, and Andre T. Porter, 250 West Street, Columbus, Ohio 43215, on behalf of Association of Independent Colleges and Universities of Ohio.

Morgan E. Parke and Michael R. Beiting, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, on behalf of FirstEnergy Solutions Corp.

Timothy G. Dobeck, 6611 Ridge Road, Parma, Ohio 44129, on behalf of the city of Parma.

OPINION:

I. HISTORY OF PROCEEDINGS

On July 31, 2008, Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) filed an application for a standard service offer (SSO), in the form of an electric security plan (ESP) in accordance with Section 4928.143, Revised Code, in Case No. 08-935-EL-SSO (*FirstEnergy ESP Case*). On December 19, 2008, the Commission issued an opinion and order that approved FirstEnergy's proposed ESP with certain modifications. Subsequently, FirstEnergy withdrew its application.

On January 9, 2009, FirstEnergy filed an application in Case No. 09-21-EL-ATA, et. al (*FirstEnergy Rider FUEL Case*), which, *inter alia*, requested approval of a fuel rider (Rider FUEL). As proposed by FirstEnergy, Rider FUEL would recover the costs for power purchased for customers receiving generation service for the time period of January 1, 2009, through March 31, 2009; and costs incurred after March 31, 2009, would be determined by the results of a future competitive bid process. On January 14, 2009, the Commission issued a finding and order in the *FirstEnergy Rider FUEL Case* which, *inter alia*, authorized FirstEnergy to implement Rider FUEL on a temporary basis until March 31, 2009. In addition, the Commission stated that it would conduct a prudency review of the costs included in Rider FUEL.

The following parties have been granted intervention in the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case*: Ohio Energy Group (OEG); the Office of the Ohio Consumers' Counsel (OCC); Kroger Company (Kroger); Ohio Environmental Council (OEC); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Partners for Affordable Energy (OPAE); Nucor Steel Marion, Inc. (Nucor); Northwest Ohio Aggregation Coalition (NOAC); Constellation NewEnergy and Constellation Energy Commodities Group, Inc. (Constellation); Dominion Retail, Inc. (Dominion); Ohio Hospital Association (OHA); Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates (Citizens' Coalition); Natural Resources Defense Council (NRDC); Sierra Club; National Energy Marketers Association (NEMA); Integrys Energy Service, Inc. (Integrys); Direct Energy Services, LLC (Direct Energy); city of Akron (Akron); Ohio Manufacturers' Association (OMA); NextEra Energy Resources, LLC, FPL Energy Power Marketing, LLC, Gexa Energy Holdings, LLC, and Gexa Energy – Ohio, LLC (NextEra); city of Cleveland (Cleveland); Northeast Ohio Public Energy Council (NOPEC); Ohio Farm Bureau Federation (OFBF); American Wind Energy Association, Wind on the Wires, and Ohio Advance Energy (AWEA/WOW/OAE); Citizen Power, Inc. (Citizen Power); Omnisource Corporation (Omnisource); Material Sciences Corporation (Material Sciences); Ohio Schools Council (OSC); Council of Smaller Enterprises (COSE); Morgan Stanley Capital Group (MSCG); Wal-Mart Stores East, LP, Sam's East, Inc., Macy's, Inc., and BJ's Wholesale Club, Inc. (Commercial Group); Ohio Association of School Business Officials, Ohio School Boards Association, and Buckeye Association of School Administrators (OASBO/OSBA/BASA); The Association of Independent Colleges and Universities of Ohio (AICUO); city of Parma (Parma); and FirstEnergy Solutions Corp. (FES).

On February 19, 2009, FirstEnergy filed an amended application in the *FirstEnergy ESP Case*, with an attached stipulation and recommendation (stipulation), which sets forth a Stipulated ESP. The stipulation was also filed in the *FirstEnergy Rider FUEL Case*. The stipulating parties recommended that the Commission act, by March 4, 2009, on the limited term ESP that is contained within the interim provisions set forth in the stipulation. These interim provisions are delineated in Section I of the stipulation and are effective prior to June 1, 2009 (namely, Sections A.1, A.2, A.3, A.4, and I, as well as Section A.12). Furthermore, the stipulating parties recommended that the Commission act, by March 25, 2009, on the remaining provisions of the stipulation.

By entry issued February 19, 2009, the attorney examiner, *inter alia*, agreed with the stipulating parties that the provisions set forth in Sections A.1, A.2, A.3 A.4, and I of the stipulation (hereinafter these provisions will be referred to as the interim provisions), which relate to FirstEnergy's interim procurement of power, as well as the prudency review mandated by the Commission's January 14, 2009, order in the *FirstEnergy Rider FUEL Case*, should be considered expeditiously. With regard to the Generation Service Uncollectible Rider proposal set forth in Section A.12 of the stipulation, as well as all remaining matters addressed in the amended application and stipulation, the attorney examiner found that the hearing on those matters should follow a subsequent procedural schedule. By this same entry, the attorney examiner directed FirstEnergy to publish notice of the two evidentiary hearings; FirstEnergy provided the requisite proofs of publication (Co. Ex. 100).

The evidentiary hearing addressing the interim provisions of the stipulation commenced on February 25, 2009. At the hearing, the attorney examiners determined that the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case* should be consolidated. Furthermore, at the hearing, the parties submitted a supplemental stipulation (Jt. Ex. 101). The supplemental stipulation was signed by CEI, TE, OE, Staff, OCC, IEU-Ohio, OEG, OHA, OPAE, Akron, OSC, Nucor, Cleveland, COSE, Material Sciences, OMA, Kroger, OEC, NOPEC, NOAC, Citizens' Coalition, Lucas County, FES, AICUO, NRDC, Sierra Club, city of Toledo, NextEra, MSCG, OASBO/OSBA/BASA, Commercial Group, Parma, AWEA/WOW/OAE, and Citizen Power. On March 3, 2009, Direct Energy and Integrys filed a letter stating that they will not oppose the supplemental stipulation. By its second finding and order issued March 4, 2009, in these cases, the Commission found that the limited term ESP contained in the interim provisions of the stipulation, as supplemented, were reasonable and should be adopted.[1]

The evidentiary hearing addressing the remaining provisions of the stipulation, as supplemented, was held on March 11, 2009. Since the interim provisions of the stipulation were approved in our March 4, 2009, order, the purpose of this second opinion and order is for the Commission to consider the remaining provisions agreed to by the signatory parties.

II. DISCUSSION

A. Applicable Law

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In considering these cases, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and is guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by SB 221.

1 The Commission notes that, in correspondence docketed on March 19, 2009, OEG and FirstEnergy agreed that nothing in the stipulation, including the provisions set forth on pages 36-37 of the stipulation is intended to affect the rights of the parties with respect to an application for rehearing or an appeal of the Commission's decisions in Case Nos. 07-1255-EL-CSS, 08-67-EL-CSS or 08-254-EL-CSS.

In addition, SB 221 amended Section 4928.14, Revised Code, which now provides that, beginning on January 1, 2009, electric utilities must provide customers with an SSO, consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default SSO. Section 4928.143, Revised Code, sets out the requirements for an ESP. Section 4928.143(C)(1), Revised Code, provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO.

B. Summary of the Stipulation

Pursuant to the supplemental stipulation, the parties agree to all of the terms and conditions of the stipulation filed on February 19, 2009, subject to and including certain specified additions, modifications, and clarifications to the February 19, 2009, stipulation. The stipulation is quite detailed; therefore, the following is a brief summary of the major provisions contained in the stipulation, as supplemented, and is not intended to supplant the actual language contained in the stipulation:

(1) The term of the Stipulated ESP is April 1, 2009, to May 31, 2011 (Jt. Ex. 100 at 44).

(2) For June 1, 2009, through May 31, 2011, retail generation rates will be determined by a descending-clock format competitive bid process (CBP). In the CBP, the Companies will seek to procure, on a slice of system basis, 100 percent of the aggregate wholesale "full requirements" SSO supply. The CBP will be conducted by an independent bid manager, CRA International (CRA). The bidding will occur for a single two-year product and there will not be a load cap for bidders. FES may participate without limitation. CRA will select the winning bidder(s), but the Commission may reject the results within 48 hours of the auction conclusion (*Id.* at 8-9).

(3) Commencing June 1, 2009, the Commission will have the option of phasing-in generation prices resulting from the CBP in an amount not to exceed, in the aggregate for all three companies, \$300 million in 2009, \$500 million in 2010, and \$200 million in 2011, provided the Companies have the ability to finance the additional funds. Purchased power costs equal to the amounts constituting the phase-in discount will be deferred and collected through a rider. Recovery of the accumulated phase-in deferrals, including carrying charges, will commence on June 1, 2011, through an unavoidable charge to all

customers (except to certain governmental aggregation customers consistent with Section 4928.20(I)), Revised Code, for the company(ies) for which the phase-in has been authorized. The charge will not exceed ten years and will be adjusted annually, or more frequently if necessary, to attain complete recovery (*Id.* at 9-10).

(4) There will be no minimum stay for residential and small commercial non-aggregation customers (*Id.* at 10).

(5) There will be no rate stabilization charges starting June 1, 2009 (*Id.*).

(6) Unless otherwise noted in the stipulation, all generation rates for the Stipulated ESP period are avoidable and there are no shopping credit caps (*Id.*).

(7) Renewable energy resource requirements for January 1, 2009, through May 31, 2011, will be met by using a separate request for proposal (RFP) process to obtain renewable energy credits (RECs). An avoidable generation rider will recover, on a quarterly basis, the prudently incurred costs of the credits pursuant to Section 4928.64, Revised Code, including the cost of administering the RFP and the carrying charges on any unrecovered balances, including accumulated deferred interest (*Id.* 10-11).

(8) The Companies will work with interested signatory parties to include a residential REC purchase program by June 30, 2009, that will be available during the ESP period. If a consumer inquires about the installation of renewable energy generation, the Companies will make information on net metering, interconnection, and the REC purchase program available to the consumer. The costs of the RECs will be recovered through the renewable energy rider (Jt. Ex. 101 at 9).

(9) Any waiver of the alternative energy resource requirements shall be limited to those waivers identified in Section 4928.64, Revised Code (Jt. Ex. 100 at 11).

(10) The rate design shall be as proposed by the Companies in their application for an MRO, Case No. 08-936-EL-SSO (*FirstEnergy MRO Case*), with the following modifications:

(a) The average rate increase for the period of 2008 to 2009 resulting from the CBP for customers on Rate GT, Private Outdoor Lighting, Traffic Lighting, and Street Lighting rates shall not exceed a percentage in excess of one and one-half times the system average increase (the cap) proposed in the Companies' ESP. In determining the increase that will be subject to the cap, the increase shall include the impact of Case No. 07-551-EL-AIR (*FirstEnergy Distribution Rate Case*), transmission rider changes, and the termination of special contracts.

(b) The Economic Load Response Program Rider (Rider ELR) and the Optional Load Response Program Rider (Rider OLR), as proposed in the Companies' ESP and as modified in attachment B to the stipulation, shall be approved.

(c) Generation rates from the CBP will be discounted for qualifying schools by 8.693 percent to match the discount process from the *FirstEnergy Distribution Rate Case*.

(d) Residential generation rates will be modified to reflect the first 500 kilowatt hour (kWh) blocking as proposed in the Companies' ESP.

(e) As a demand response program under Section 4928.66, Revised Code, any revenue shortfall resulting from the application of the $1.95 per kW interruptible credit in Rider ELR and Rider OLR will be recovered as part of an unavoidable Demand Side Management and Energy Efficiency Rider (Rider DSE).

(f) Any revenue shortfall resulting from the application of (a) through (d), above, shall be recovered from the General Service and General Primary customers on an unavoidable basis.

(g) Rider EDR will be reconciled quarterly and allocated on a per company per class basis.

(*Id.* at 11-13).

(11) A Generation Service Uncollectible Rider shall be established for the Companies to recover uncollectible costs through May 31, 2009, as well as uncollectible costs subsequent to May 31, 2009. Effective April 1, 2009, the rider will initially be set at the average rate of .0539 cents per kWh. If there is no phase-in of generation rates for SSO customers, or if no governmental aggregation program elects to phase-in generation pricing, then the rider shall only apply to generation and transmission uncollectible costs arising from SSO customers and the rider will be avoidable. If there is a phase-in of generation rates, the rider shall be unavoidable; however, it will not apply to Rate GT and Rate GSU customers that are not part of a governmental aggregation program during the period they receive electric generation service from a competitive retail electric service supplier (Jt. Ex. 101 at 5-6).

(12) An unavoidable Generation Cost Reconciliation True-up Rider shall be established to reconcile the seasonal generation cost recovery and to recover the difference in the amounts paid to suppliers and the amount billed to customers (Jt. Ex. 100 at 13).

(13) At least 60 days before the filing of another ESP that contains a CBP, or an MRO, the signatory parties will engage in a collaborative process (*Id.* at 14).

(14) The bid price for winning bidders will be incrementally adjusted to the extent the Midwest Independent Transmission System Operator, Inc. (MISO) rate for Network Integration Transmission Service, Seams Elimination Cost Adjustment, or other nonmarket-based charges approved by the Federal Energy Regulatory Commission (FERC) change, or are newly approved. Retail rates shall automatically be adjusted through Rider GEN (*Id.*).

(15) There will be a distribution rate freeze until December 31, 2011, subject to the significantly excessive earnings test (SEET), and certain other factors (*Id.*).

(16) A Delivery Service Improvement Rider (Rider DSI) should be approved for April 1, 2009, through December 31, 2011, for the purpose of improving the overall performance, including

reliability of the distribution systems. Rider DSI will, on average, be set at $.002 per kWh (*Id.* at 15).

(17) For January 1, 2009, through December 31, 2011, the Companies, in the aggregate, may defer line extension costs, including post-in-service carrying charges, in an amount representing the difference between: what customers would have paid for line extension projects under the Companies' proposed program in the *FirstEnergy Distribution Rate Case* and the amounts customers are required to pay for line extensions under the Commission's decision in the *FirstEnergy Distribution Rate Case*. Cost recovery for the line extension deferrals shall occur over three years beginning January 1, 2012 (*Id.* at 16-17).

(18) A rider shall be approved to recover reasonably incurred deferrals for distribution uncollectible expenses incurred after December 31, 2008, including uncollectible expenses for Regulatory Transition Charge (RTC) rates, in excess of those provided for in the *FirstEnergy Distribution Rate Case* (*Id.* at 17).

(19) The calculation of the return on equity for the significantly excessive earning test shall exclude: the write-off of regulatory assets due to the implementation of the Stipulated ESP, the revenues for Rider DSI, a reduction in equity from any write-off goodwill, and deferred carrying charges (*Id.*).

(20) Effective January 1, 2011, an unavoidable Deferred Distribution Cost Recovery Rider shall be established to recover the post-May 31, 2007, unrecovered actual balances of: distribution costs under the rate certainty plan (RCP) in Case No. 05-1125-EL-ATA, deferred transition taxes under the electric transition plan in Case No. 99-1212-EL-ETP, and line extension deferrals in Case No. 01-2708-EL-COI (*Id.* at 18).

(21) For June 1, 2009, through May 31, 2011, transmission, as proposed in the Companies' MRO, will be part of the product obtained through the CBP and, except for reconciliation, the transmission rider will be set at zero for this period (*Id.* at 19).

(22) An unavoidable Deferred Transmission Cost Recovery Rider should be approved to recover certain deferred incremental transmission and ancillary service-related charges, authorized in Case Nos. 04-1931-EL-AAM and 04-1932-EL-ATA, to be

recovered during the period of April 1, 2009, through December 31, 2010 (*Id.*).

(23) Fifty percent of CEI's extended RTC balance, approximately $215 million, as of May 31, 2009, shall be written off. Recovery of CEI's remaining RTC and extended RTC balances is modified from the process included in the RCP as set forth in the stipulation. After full recovery of CEI's RTC and extended RTC balances, any additional amounts collected through the RTC charge shall be applied to reduce the purchased power deferral that arose for CEI for the January 1, 2009, through May 31, 2009, period (*Id.* at 20).

(24) There will be no company-funded energy efficiency and advanced metering infrastructure (AMI) programs as part of the Stipulated ESP (*Id.*).

(25) An unavoidable Demand Side Management and Energy Efficiency rider, as proposed in the Companies' ESP (excluding smart grid), will recover costs incurred by the Companies associated with energy efficiency, peak load reduction, and demand-side management programs (*Id.* at 21).

(26) The Companies will develop a proposal to pursue federal funds available under the Economic Recovery Act that may be available for smart grid investment. The Companies will work with signatory parties to develop tariffs for customers that include critical peak, time-of-day and real-time pricing, and consideration of a load factor provision for Rate GSU and Rate GP. Recovery for smart grid investment shall be through an unavoidable rider. Any under or overrecovery of costs by the distribution company due to time-differentiated rate structures will be passed through via an unavoidable rider and allocated on a voltage differentiated basis. Any load factor pricing provisions shall be funded within the specific rate schedule by unavoidable demand charges and unavoidable energy credits (*Id.* at 21-22).

(27) An Energy Efficiency and Peak Demand (EEPD) Program shall be established for the period 2009 through 2011. On or before September 1, 2009, the Companies will conduct a market study to identify potential residential, small commercial, and industrial energy efficiency and peak demand reduction

opportunities. The Companies will then commence a collaborative process. Independent third-party administrators will implement the programs. The Companies will request Commission approval of the proposed programs. In addition, the Companies will propose an independent third-party administrator (M&V consultant) to establish measurements and verification protocol and ascertain whether the programs have achieved the desired impact and savings. The costs associated with the EEPD Program will be recovered through the Demand-Side Management and Energy Efficiency rider (Rider DSE), as proposed in the ESP. Customers that commit their demand-response or other customer-sited capabilities for integration into the Companies' program may be exempt, with Commission approval, from the Companies' cost recovery mechanism. Lost distribution revenues associated with the program shall be recovered from all customers for a period not to exceed the earlier of the effective date of the Companies' next base rate case or six years from the effective date of the Stipulated ESP.[2] Mercantile customers may receive their electric supply from the Companies or a competitive retail electric service (CRES) provider. Mercantile customers that commit some or all of the results from their self-directed demand-response, energy efficiency, or other customer-sited capabilities, whether existing or new, for use by the Companies to achieve the targets in SB 221, may seek approval from the Commission for exemption from Rider DSE (Jt. Ex. 100 at 23-30; Jt. Ex. 101 at 8-9).

(28) For the April 1, 2009, through December 31, 2011, period, the Companies will contribute, in aggregate, $25 million to support economic development and job retention including: $7.5 million for projects identified by OMA; $1 million for OPAE's community connections program or the fuel fund; Cleveland, Akron, and Toledo will each have available at least $500,000, and other municipalities will have available at least $200,000 for economic development and job development activities; and, to assist low-income customers in paying their electric bills, a fuel fund shall be created consisting of $2 million per year for 2009 through 2011 (Jt. Ex. 101 at 6-7).

2 NRDC does not support the collection of lost revenues for six years; however, for purposes of settlement, NRDC will not challenge this provision (Jt. Ex. 101 at 9).

(29) As proposed in the Companies' ESP, a Reasonable Arrangements rider and a Delta Revenue Recovery rider (Rider DRR) will be established for contracts approved by the Commission after January 1, 2009, on an unavoidable basis. Rider DRR will initially be set at zero and reconciled quarterly (Jt. Ex. 100 at 31-32).

(30) A separate unavoidable Rider DRR for existing CEI contracts that continue past December 31, 2008, will be established effective April 1, 2009, for 100 percent of the delta revenue associated with those contracts, and these charges will be recovered only from CEI customers (*Id.* at 32).

(31) The Companies may securitize and recover the generation-related and distribution-related deferrals and carrying charges, provided such securitization has lower future costs as compared to Section A.6 of the stipulation. The recovery would be unavoidable and may not exceed ten years (*Id.*).

(32) Recovery of the 2006 and 2007 deferred fuel expense and associated carrying charges is pending in Case No. 08-124-EL-ATA (*FirstEnergy Deferred Fuel Costs Case*). The Companies will establish an unavoidable rider to recover $10 million less than the December 31, 2008, balance of deferred fuel costs including carrying charges. Recovery through the rider will begin January 1, 2011, for a period of 25 years (*Id.* at 33).

(33) The Companies will continue to offer the Green Resource program for Type I renewable resources in accordance with Case No. 06-1112-EL-UNC (*Id.*).

(34) Effective April 1, 2009, an unavoidable percentage of income payment plan (PIPP) Uncollectible Rider shall be established. It will be initially set at zero and reconciled quarterly (*Id.* at 33-34).

(35) Purchased power is considered fuel for purposes of cost recovery (*Id.* at 34).[3]

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[3] Ohio Consumer and Environmental Advocates (OCEA) assert that the purchased power acquired through the RFP procurement process does not constitute fuel costs, as defined in Section 4928.143(C)(2)(b), Revised Code, for purposes of cost recovery; however, for purposes of settlement, OCEA agreed not to pursue this issue (Jt. Ex. 101 at 9).

(36) The parties agree that Stipulated ESP is more favorable in the aggregate as compared to an MRO alternative (*Id.*).

(37) If the Commission orders a phase-in of the Companies' generation prices and a government aggregation group elects to phase-in generation costs: each aggregation customer served by a governmental aggregation generation supplier (GAGS) shall receive a phase-in credit equal to the phase-in credit approved by the Commission for the Company's(ies') SSO customers; for every kWh of energy a GAGS delivers to a governmental aggregation customer, the GAGS will be granted, subject to certain provisions of the stipulation, the right to receive from the Company(ies) a receivable amount equal to the phase-in credit received by the aggregation customer, plus carrying charges; any uncollectible GAGS receivables shall be included in the calculation of the Generation Service Uncollectible Rider; and the Generation Service Uncollectible Rider shall remain in full force to allow the Companies throughout the phase-in period and recovery period to charge and collect the uncollectible amounts associated with the GAGS receivables (Jt. Ex. 101 at 2-4).

(38) The Stipulated ESP is conditioned upon FirstEnergy receiving all necessary FERC approvals (Jt. Ex. 100 at 45).

C. Consideration of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994), *citing Consumers' Counsel, supra*, at 126. The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

The Commission finds that the stipulation, as supplemented, in these cases appears to be the product of serious bargaining among capable, knowledgeable parties. The signatory parties represent diverse interests including the Companies, governmental aggregators, municipalities, competitive suppliers, industrial consumers, commercial consumers, residential consumers, environmental advocates, and Staff. Further, we note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters (Co. Ex. 105 at 4-5).

With respect to the second criterion, the evidence in the record indicates that, as a package, the stipulation, as supplemented, advances the public interest by resolving all the issues raised in these matters without resulting in extensive litigation and by providing for stable and predictable rates, established by a competitive procurement process, for customers during the ESP period (Co. Ex. 105 at 8, 10). As agreed to by the signatory parties, approval of Rider DSI is in recognition of the Companies' commitments to stabilize rates through December 31, 2011, write-off over $200 million of RTC recovery, and make a total aggregate investment of not less than $615 million for January 1, 2009, through December 31, 2011 (Jt. Ex. 100 at 15). The stipulation, as supplemented, provides for the creation of a collaborative before the filing of any future MRO or ESP which contains a CBP for establishing generation prices. In addition, the stipulation, as supplemented, provides for the withdrawal of complaints pending before the Commission related to interruptible tariff provisions (Co. Ex. 105 at 10). Finally, the ESP established by the stipulation, as supplemented, contains no minimum default service rider or standby charges, no rate stabilization charges commencing June 1, 2009, and no minimum stay for residential and small commercial customers; all generation rates under the ESP will be avoidable, and there will be no shopping credit caps (*Id.* at 9).

Moreover, testimony in the record indicates that there are significant additional benefits for customers in the stipulation, as supplemented. In the stipulation, as supplemented, the Companies have committed $25 million over three years for economic development. Further, the stipulation, as supplemented, provides the Commission the flexibility to order the phase-in generation prices if the Commission determines that a phase-in is necessary. Moreover, the stipulation, as supplemented, would freeze distribution rates through December 31, 2009, at the rates established in the *FirstEnergy Distribution Rate Case*, except for emergencies and increases in taxes. The stipulation, as supplemented, also provides additional benefits to interruptible industrial customers, schools, municipalities, and certain residential customers. Finally, the stipulation, as supplemented establishes an energy efficiency collaborative to develop energy efficiency and demand-side management programs and continues the existing green resource program which allows customers an opportunity to purchase RECs on a monthly basis (*Id.* at 8-9).

With respect to the third criterion testimony in the record of these proceedings indicates that the stipulation, as supplemented, does not violate any important regulatory principle or practice (Co. Ex. 105 at 7; Staff Ex. 103 at 2). However, the Commission believes that a number of clarifications to the stipulation, as supplemented, are necessary before the Commission can find that the stipulation meets the third criterion. First, the Commission notes that the stipulation provides that "[i]f this Stipulated ESP is inconsistent with the Commission's rules *in effect*, the Companies request waivers to the extent deemed necessary, and the Commission's approval of this Stipulated ESP shall constitute a waiver of any Commission rule that is inconsistent with or in conflict with the provisions of this Stipulated ESP" (Jt. Ex. 101 at 35) (emphasis added). The Commission clarifies that this waiver applies only to rules in effect on the date of this second opinion and order. Similarly, customers that seek exemption from Rider DSE must do so in a manner consistent with any rules adopted by the Commission pursuant to Section 4928.66, Revised Code.

Moreover, the stipulation, as supplemented, contains a number of exclusions from the calculation of the return on equity for the SEET (Jt. Ex. 101 at 17-18). Although the Commission will convene a workshop of interested parties to discuss the implementation of the SEET, with respect to FirstEnergy, this workshop will address those aspects of the SEET which are not specifically discussed in the stipulation, as supplemented.

In addition, the Commission notes that the EEPD program to be created under the stipulation, as supplemented, provides for the use of independent third-party administrators both to implement proposed programs and to review whether such programs achieved the desired impact and savings (Jt. Ex. 101 at 23-27). The Commission clarifies that the same third-party administrator shall not be used to both implement a proposed program and to review whether such program achieved the desired impact and savings.

Further, the Commission notes that the stipulation, as supplemented, provides that the Companies may elect to securitize any generation-related and distribution- related deferrals and carrying charges provided that such securitization has lower future costs for customers as compared to a deferral with carrying charges as provided in Section A.6. of the stipulation, as supplemented (Jt. Ex. 101 at 32). The Commission clarifies that the Companies will be required to provide a demonstration of such cost-savings *prior to* the implementation of the securitization option.

Finally, we wish to emphasize our desire that this competitive bidding process proceeds to a successful conclusion securing the Companies' POLR supply requirements. However, the Commission will review the results of the auction and, within 48 hours of the conclusion of the auction, excluding weekends and holidays, the Commission may reject the results if, following a report by the independent bid manager or the Commission's auction monitor, the Commission finds that the auction violated the competitive bidding process rules in such a manner as to invalidate the auction or that the results are inconsistent with the Commission's statutory obligations.

With these clarifications, the Commission finds that the stipulation, as supplemented, does not violate any important regulatory principles or practices.

However, the Commission must also consider the applicable statutory test for approval of an ESP as part of our review of whether the stipulation, as supplemented conforms with important regulatory principles. Section 4928.143(C)(1), Revised Code, provides that the Commission should approve, or modify and approve, an application for an ESP if it finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. The record of these proceedings demonstrates that the Stipulated ESP is, in fact, more favorable in the aggregate than the expected results under Section 4928.142, Revised Code.

Under the ESP contained in the stipulation, as supplemented, the rates to be charged customers will be established through a CBP; therefore, the rates in the ESP will be equivalent to the results which would be obtained by FirstEnergy under Section 4928.142, Revised Code (Co. Ex. 105 at 10, 11). However, FirstEnergy witness Blank and Staff witness Cahaan both testified that the additional benefits contained in the stipulation, as supplemented, makes the ESP more favorable in the aggregate than the expected results under Section 4928.142, Revised Code (Co. Ex. 105 at 11-13; Staff Ex. 103 at 2-6).

FirstEnergy witness Blank notes that an MRO would be strictly limited to a determination of the SSO prices and would not provide any additional benefits to consumers. On the other hand, the ESP contained in the stipulation, as supplemented contains additional quantitative advantages for consumers. Mr. Blank testified that his analysis shows these benefits to be nearly $100 million if no deferrals are authorized by the Commission and over $160 million if the Commission authorizes the maximum deferrals contained in the stipulation (Co. Ex. 105 at 11-12; Blank Attachment 1). In addition, Mr. Blank testified that the ESP preserves the ability of FirstEnergy to enter into a subsequent ESP in the future, which would not be permitted under Section 4928.143(F), Revised Code, if the Commission approved an MRO for the Companies (Co. Ex. 105 at 12-13).

Staff witness Cahaan testified that the ESP is superior to an MRO because the ESP provides a net benefit to customers of nearly $100 million (Staff Ex. 103 at 3-5). Further, Mr. Cahaan also notes that the ESP preserves the option of establishing an ESP in the future, which would not be an option under an MRO (*Id.* at 5-6).

Therefore, based upon the evidence in the record in these proceedings, the Commission finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Accordingly, we find that the stipulation, as supplemented, should be adopted.

Finally the Commission notes that the Commission is committed to making the upcoming CBP a success. We will need a large number of suppliers and a large quantity of power offered to achieve this. Therefore, it is of greatest importance that the procurement be designed in such a way as to attract as many bidders as possible. The CBP design has several features which we believe will be enticing to bidders.

(a) The CBP features a transparent product definition which allows bidders to accurately price their product. The full requirements service being sought in the CBP is familiar to bidders in that it is solicited in other jurisdictions such as New Jersey, Delaware, Maryland and Pennsylvania.

(b) The CBP features a fair and transparent process for submitting and evaluating bids. All bidders will be informed of a single price for the product and then have an opportunity to offer to serve a number of "tranches" at that price.

(c) Bids will be judged solely on the basis of price, with the suppliers offering the lowest-cost supply being declared the winners. There will be no subjective "non-price" evaluation.

(d) To enable the "price only" evaluation all bidders will sign the same supply contract with the same terms and conditions, including credit requirements.

(e) The total supply being sought is extremely large; approximately 11,500 Megawatts of Peak Load must be served.

(f) The process will be monitored for openness, fairness, transparency and competitiveness by the Commission's independent monitor, Boston Pacific Company, Inc., as well as by the auction manager, CRA International.

An additional protection for suppliers and ratepayers in this CBP are the association rules that each bidder must abide by. These rules will prevent collusion by forcing bidders to declare any bidding consortiums that they may form. In addition, we believe that the implementation of the CBP rules by the independent auction manager must prevent participants from circumventing these rules by selling the full requirements product to other participants for the express purpose of providing supply in this CBP.

In sum, the Commission is committed to having an open, fair, transparent and competitive solicitation which attracts a large number of qualified bidders and, therefore, assures the best deal possible for ratepayers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) The Companies are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On July 31, 2008, FirstEnergy filed an application for an SSO in accordance with Section 4928.141, Revised Code.

(3) On December 19, 2008, the Commission issued an opinion and order that approved FirstEnergy's proposed ESP with certain modifications. Subsequently, FirstEnergy withdrew its application.

(4) On January 9, 2009, FirstEnergy filed an application in the *FirstEnergy Rider FUEL Case* requesting approval of Rider FUEL for the time period of January 1, 2009, through March 31, 2009.

(5) On January 14, 2009, the Commission issued a finding and order in the *FirstEnergy Rider FUEL Case* authorizing FirstEnergy to implement Rider FUEL until March 31, 2009.

(6) The following parties have been granted intervention in the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case*: OEG; OCC; Kroger; OEC; IEU-Ohio; OPAE; Nucor; NOAC; Constellation; Dominion; OHA; Citizens' Coalition; NRDC; Sierra Club; NEMA; Integrys; Direct Energy; Akron; OMA; NextEra; Cleveland; NOPEC; OFBF; AWEA/WOW/OAE; Citizen Power; Omnisource; Material Sciences; OSC; COSE; MSCG; Commercial Group; OASBO/OSBA/BASA; AICUO; Parma; and FES.

(7) On February 19, 2009, FirstEnergy filed an amended application in the *FirstEnergy ESP Case*, with an attached Stipulated ESP. The stipulation was also filed in the *FirstEnergy Rider FUEL Case*.

(8) The hearing on the interim provisions of the stipulation commenced on February 25, 2009. At the hearing, the attorney examiner consolidated the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case*, and the parties submitted a supplemental stipulation.

(9) The supplemental stipulation was signed by CEI, TE, OE, Staff, OCC, IEU-Ohio, OEG, OHA, OPAE, Akron, OSC, Nucor, Cleveland, COSE, Material Sciences, OMA, Kroger, OEC, NOPEC, NOAC, Citizens' Coalition, Lucas County, FES, AICUO, NRDC, Sierra Club, city of Toledo, NextEra, MSCG, OASBO/OSBA/BASA, Commercial Group, Parma, AWEA/WOW/OAE, and Citizen Power. On March 3, 2009, Direct Energy and Integrys filed a letter stating that they will not oppose the stipulation, as supplemented.

(10) By its second finding and order issued March 4, 2009, in these cases, the Commission found that the limited term ESP contained in the interim provisions of the stipulation, as supplemented, is reasonable and should be adopted.

(11) The evidentiary hearing addressing the remaining provisions of the stipulation, as supplemented, was held on March 11, 2009.

(12) The Companies' application in the *FirstEnergy ESP Case* was filed pursuant to Section 4928.143, Revised Code, which authorizes the electric utilities to file an ESP as their SSO.

(13) The Commission finds that the stipulation, as supplemented, meets the three criteria for adoption of stipulations, is reasonable, and should, therefore, be adopted.

(14) The proposed Stipulated ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

ORDER:

It is, therefore,

ORDERED, That the stipulation, as supplemented, be adopted and approved. It is, further,

ORDERED, That the Companies be authorized to file in final form four complete, printed copies of tariffs consistent with this second opinion and order, and to cancel and withdraw their superseded tariffs. The Companies shall file one copy in this case docket and one copy in its TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy, and Water Division of the Commission's Utilities Department. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than April 1, 2009, or the date upon which four complete, printed copies of final tariffs are filed with the Commission, whichever date is later. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That the Companies shall notify their customers of the changes approved by this second opinion and order, as described herein. It is, further, ORDERED, That a copy of this second opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

CMTP/GAP/vrm

Entered in the Journal
MAR 2 5 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority.	)	Case Nos. 09-21-EL-ATA 09-22-EL-AEM 09-23-EL-AAM

CONCURRING OPINION OF CHAIRMAN ALAN R. SCHRIBER AND COMMISSIONER RONDA HARTMAN FERGUS

Having been presented with a Stipulation agreed to by (or at least not opposed by) virtually all parties in FirstEnergy's ESP case, the Commission is now confronted with the challenge of deciding a difficult issue. Having very little experience in the competitive bid process, we are nevertheless questioning the efficacy of the application of a cap on the amount a single supplier can bid upon and acquire. Does a load cap make sense as some would argue? Would the absence of a load cap skew the outcome of the auction? Having spent hour upon hour contemplating the issue, we can say unequivocally that we really have no idea.

The bottom line should be a process that brings the lowest prices to customers. It seems that such a price would be directly related to the number of participants that bid into the auction. On the one hand, it can be argued that a load cap sends a signal that the auction is serious about moving forward in a vigorous fashion. On the other hand, it might be argued that the bidders are sufficiently knowledgeable that an equal number will show up no matter the load cap. In other words, if there are a significant number of participants in the process, then the load cap really should not matter.

What we do know is that we have a stipulation in front of us that was signed by a significant number of entities. One would have to believe that the majority of these knowledgeable parties understood the provision that speaks to the lack of a limitation on the load that can be bid upon by any one bidder. It should be obvious that the signatories negotiated something of value for agreeing to settle this case, and clearly, what they received was more valuable to them than what they perceived to be the outcome of an auction with or without a load cap.

The overarching issue here is that each and every one of the signatories will be impacted by the competitive bid, yet each agreed to sign on with the understanding that, perhaps like me, it is exceptionally difficult to dissect this auction. Given this incontrovertible conclusion, there is virtually no one left to "protect" by modifying the Stipulation, because either individually or by counsel, all implicitly agreed to the auction terms as presented.

As a final matter, we believe that we now speak for all of our colleagues in expressing as ardently as possible our desire for a dynamic auction. This requires many qualified, serious bidders, and we will do all in our power to assure that if any party questions the sincerity of our intent, we stand prepared to address all concerns.

Alan R. Schriber

Ronda Hartman Fergus

Entered in the Journal
MAR 2 5 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO
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CONCURRING IN PART AND DISSENTING IN PART
OPINION OF COMMISSIONER CHERYL L. ROBERTO

All parties, including FirstEnergy, are to be applauded for working together to reach a stipulated agreement. It is clear that considerable time and effort has been invested by the signatory parties. The concept of blending a competitive bid process (CBP) into an electric security plan (ESP) standard service offer pursuant to Section 4928.143, Revised Code, is a creative solution to the seemingly intractable stalemate created when a public utility, operating fully within its statutory authority, may reject a unanimous decision of the regulatory Commission vested with the power and jurisdiction to supervise and regulate it. Section 4928.143(C)(2)(a), Revised Code.

While the Commission gives substantial weight to stipulations, it is well established that, "a stipulation entered by the parties...is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing." *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 592 N.E.2d 1370. When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion. *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571, 820 N.E.2d 921.

In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.

Pursuant to Chapter 4928, Revised Code, Competitive Retail Electric Service, it is the policy of this state to ensure the availability to consumers of reasonably priced retail electric service, encourage market access for cost-effective supply-side retail electric service, ensure diversity of electricity supplies and suppliers, ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service, and ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Sections 4928.02(A),(C),(D),(H), and (I), Revised Code. Revised Code Section 4928.06(A) imposes an affirmative obligation to carry out these policies, "... the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated." It is incumbent upon this Commission, within the limits of its authority, to ensure that any electric security plan is consistent with and advances the policies adopted in Revised Code Section 4928.02. For this reason, it is imperative that the Commission assess the reasonableness of any CBP in the context of these policies.

In this case, the Commission must consider whether there are essential features of a competitive procurement process that are needed to promote reasonable prices, encourage market access, ensure a diversity of suppliers, enhance competition, and protect against market power but that have not been adopted within the stipulation. I believe that a bid load cap is just such an essential feature. A load cap limits the number or percentage of tranches that any one bidder can bid on and win. FirstEnergy witnesses Bradley A. Miller and Dean W. Stathis both testified that a load cap facilitates diversity of suppliers (Co. Ex. 102 13; Co. Ex. 101 at 15). In the only two prior actions that this Commission has taken to approve a competitive bid process for the purchase of retail electric supply using a descending clock auction, the Commission has mandated a load cap. In so ruling, the

Commission found that a CBP should include at least two winning bidders because it serves to spread the risk and creates a more competitive post-auction market. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load,* Case No. 04-1371-EL-ATA (October 6, 2004, at finding 15) (*First Energy 04-1371*); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process for Retail Electric Load,* Case No. 05-936-EL-ATA (January 25, 2006, at finding 12) (*First Energy* 05-946).[1]

Additionally, the record in this matter establishes that New Jersey has a successful history of purchasing retail electric service using a descending clock auction. In fact witnesses could identify no jurisdiction, other than New Jersey, currently competitively procuring electricity using a descending clock auction. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service,* Case No. 08-936-EL-SSO (Tr. I at 27, 42-43, 72-73; Tr. IV at 22, 91). New Jersey implements bid load caps on both a statewide basis and for each electric distribution utility. *In the Matter of the Provision of Basic Generation Service For the Period Beginning June 1, 2009,* Energy, Decision and Order No. ER08050310, New Jersey Board of Public Utilities (January 20, 2009). In the past, this Commission has considered the New Jersey process in establishing competitive procurement standards for retail electric supply here in Ohio. *FirstEnergy* 04-1371 at finding 20.

No reason was offered in the record of this matter to support varying from past Commission practice in mandating a bid load cap. It is difficult to conceive of any legitimate reason for an electric distribution company, or for that matter any party to this case, to object to a bid load cap in the CBP. The uncontroverted evidence indicates that a load cap will support competition, facilitate diversity of suppliers, mitigate the risk from a supplier's failure to perform, and protect consumers from the exercise of market power. For all of these reasons, a bid load cap should be included in the CBP adopted within this order. Therefore, while I concur with the remainder of the stipulation and the majority opinion, in the absence of a load cap, I dissent from the majority finding that the stipulation is reasonable.

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1 FirstEnergy, on its own accord, also included a seventy-five percent bid load cap in the request for proposal procurement process that it used to purchase power in this matter for the term beginning January 4, 2009, and ending May 31, 2009. The results of that RFP, which are currently confidential, suggest that, had FirstEnergy used the process at issue in the stipulated CBP, the resulting purchase price would have been higher.

Having concluded that a bid load cap is necessary, I turn next to determining the appropriate bid cap level. The Commission has previously imposed a bid load cap of sixty-five percent in CBPs intended to test the value of a negotiated rate stabilization plan. *First Energy* 04-1371 at Finding 15; *First Energy* 05-946 at Finding 12. New Jersey imposes a bid load cap of approximately thirty-five percent statewide and fifty percent for each distribution company in its CBP to procure electricity. *Final BGS-FP Auction Rules* at http://www.bgs-auction.com/documents/Final_2009_BGS-FP_Auction_Rules_December_08_2008.pdfln; *Minimum and Maximum Starting Prices, Tranche Targets, and Statewide Load Cap for the BGS-CIEP Auction* at http://www.bgs-auction.com/bgs.press.annc.item.asp?anncId=232; *Minimum and Maximum Starting Prices, Tranche Targets, and Load Caps for the BGS-FP Auction* at http://www.bgs-auction.com/bgs.press.annc.item.asp?anncId=231. In this matter, the CBP is for the purchase of the retail loads for three distribution companies, which in combination serve a vast region of the State of Ohio. Based upon the record of this case, the laws we are entrusted to implement, and the experience both here in Ohio and in New Jersey, the CBP should have a bid load cap of fifty percent.

Even as I urge this result, however, I am mindful that such a modification would enable FirstEnergy to once again reject a modified ESP.

Cheryl L. Roberto

Cheryl L. Roberto

Entered in the Journal
MAR 25 2009

Reneé J. Jenkins

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.)	Case No. 08-935-EL-SSO
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority.)	Case Nos. 09-21-EL-ATA 09-22-EL-AEM 09-23-EL-AAM

CONCURRING OPINION OF
COMMISSIONERS PAUL A. CENTOLELLA AND VALERIE A. LEMMIE

In December, the FirstEnergy Companies withdrew a modified electric security plan (ESP) that provided a fair result for the Companies and consumers and had been unanimously approved by this Commission. The Companies' exercise of its statutory option to withdraw created uncertainty for consumers seeking to manage their energy costs and placed businesses at risk in an already difficult economic environment. This lack of alignment between the Companies' interests and the interests of the customers they serve has limited the available options for setting Standard Service Offer (SSO) prices.[1]

The use of a competitive bidding process (CBP) in an ESP under Section 4928.143, Revised Code, will create a period of rate stability and certainty to consumers, while providing an opportunity to resolve other key issues. All parties, including FirstEnergy, are to be applauded for working together to reach this agreement. The

1 In the event the Companies for any reason are not successful in obtaining POLR supplies through the competitive bidding process authorized in this case, the alternative may be for the Companies to rely heavily on Midwest ISO energy and ancillary service markets where there is active market monitoring and mitigation. The Commission has adequate mechanisms within Sections 4928.141, 4928.143, and 4928.144 of the Revised Code to manage any price volatility that might result from purchases of energy and ancillary services in the Midwest ISO markets and from short-term capacity purchases and to ensure the Companies an opportunity to earn reasonable returns.

Commission appreciates the time and effort that has been invested by the signatory parties.

While the Commission gives substantial weight to stipulations recommending what the parties believe to be an appropriate resolution, it is well established that, "a stipulation entered into by the parties ... is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing." *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 592 N.E.2d 1370 (citing: *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367, 379, 10 O.O.3d 493, 499, 384 N.E.2d 264, 273). The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise.[2]

The ability of an electric distribution utility to withdraw a Commission-modified and approved ESP and the Companies' prior withdrawal from an approved plan in this case need to be taken into account when considering the weight to be given to this stipulation. The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of the issues.

It is the policy of this state to ensure the availability to consumers of reasonably priced retail electric service, encourage market access for cost-effective supply-side retail electric service, ensure diversity of electricity supplies and suppliers, ensure effective competition in the provision of retail electric service, and ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Sections 4928.02(A), (C), (D), (H), and (I), Revised Code. Section 4928.06(A), Revised Code, imposes an affirmative obligation on the Commission to "...shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated." See also *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305. The Commission must ensure that the Companies' electric security plan effectuates the policies adopted in Section 4928.02, Revised Code.

In this case, the Commission had to consider whether there are essential features of a forward competitive procurement that are needed to achieve a reasonable price, encourage market access, ensure a diversity of suppliers, enhance competition, and protect against market power but that have not been adopted within the stipulation. In our view, a load cap is an essential feature of a forward competitive procurement for these companies, given that they have until recently been served by a single large

2 The Ohio Supreme Court "has consistently found it proper to defer to the commission's judgment in matters that require the commission to apply its specialized expertise and discretion." *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571, 820 N.E.2d 921.

incumbent supplier.[3] And, it would have been preferable to modify the stipulation to provide for a load cap.

A load cap limits the number or percentage of tranches that any one bidder can win. Effective competition depends upon having a diversity of suppliers independently competing to serve the POLR load. However, to the extent that potential suppliers perceive that an incumbent's structural advantages could prevent them from winning load, additional suppliers may be less likely to participate. A load cap ensures that there will be multiple winners and encourages additional participation and competition. FirstEnergy witnesses Bradley A. Miller and Dean W. Stathis both testified that a load cap facilitates diversity of suppliers (Co. Ex. 101 at 15; Co. Ex. 102 at 13). In the only two prior instances in which this Commission has approved a competitive bid process for the purchase of retail electric supply using a descending clock auction, the Commission imposed a load cap. In so ruling, the Commission found that a CBP should include at least two winning bidders because it serves to diversify risk and create a more competitive market. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load,* Case No. 04-1371-EL-ATA (October 6, 2004, at finding 15); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process for Retail Electric Load,* Case No. 05-936-EL-ATA (January 25, 2006, at finding 12).[4] The auction mechanism proposed in the Stipulation follows many of the features of the New Jersey descending clock auction. However, New Jersey has continued to use load caps on both a statewide basis and for each electric distribution utility. *In the Matter of the Provision of Basic Generation Service For the Period Beginning June 1, 2009,* Energy, Decision and Order No. ER08050310, New Jersey Board of Public Utilities (January 20, 2009). No compelling reason has been presented in this case to vary from the past Commission practice of using a load cap.

The relevant provisions of the stipulation are, "... the bidding process will not be subject to a load cap. The Companies' competitive affiliate, FirstEnergy Solutions Corp., may participate without limitation." (Jt. Ex. 100 at 8.) The conjunction of these

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[3] In the Companies' short-term procurement for January through March 2009, although 11 potential suppliers initially expressed interest, only 4 suppliers submitted qualifying offers, and the procurement was undersubscribed due to inadequate participation from alternative suppliers. While we anticipate greater participation in this auction, given the longer time available to suppliers to evaluate the procurement, prior limited participation underscores the need to encourage multiple suppliers to participate. The Commission also is aware that questions relating to the definition of the relevant wholesale market and whether FirstEnergy's generation affiliate can exercise market power to raise prices above competitive levels are currently pending before the Federal Energy Regulatory Commission in FERC Docket No. ER01-1403-000.

[4] FirstEnergy, on its own accord, included a seventy-five percent bid load cap in the request for proposal procurement process that it used to purchase power in this matter for the term beginning January 4, 2009, and ending May 31, 2009.

terms might be seen by potential suppliers as signaling a desire by the Companies to discourage the participation of non-affiliated suppliers. Any such signaling is anti-competitive and would be a violation of the electric utilities' obligation to not extend any undue preference or advantage to an affiliate. Section 4928.17(A)(3), Revised Code. The Commission today is sending the opposite signal to potential bidders. The Commission is committed to the success of this competitive bidding process and will need a large number of suppliers and a large quantity of power offered to achieve this objective. Therefore, it is of great importance that the procurement be designed as to attract as many bidders as possible.

The Commission has previously imposed a load cap of sixty-five percent. To clearly indicate to potential bidders that the Commission is seeking the broadest possible participation, we would have retained such a load cap for this auction.

The Commission is obligated to ensure the availability to consumers of reasonably priced retail electric service. Robust competition in this auction is essential to achieving that objective. There are pending questions regarding whether FirstEnergy's generation affiliate can exercise market power within the relevant market. The Commission expects the Auction Manager and the Commission's consultant to closely monitor bidding behavior of FirstEnergy Solutions Corporation. And, most importantly, we want to encourage the broadest possible participation in the auction such that no individual supplier can set prices above competitive levels.

Although we are concerned that the lack of a load cap could be misconstrued and might lead bidders to limit their participation, we concur in the result permitting the auction to proceed. The breadth and depth of participation, whether multiple suppliers are successful in the auction, and the bidding behavior of FirstEnergy Solutions will be relevant considerations in evaluating the auction results.

Paul A. Centolella

Valerie A. Lemmie

Entered in the Journal

MAR 2 5 2009

Reneé J. Jenkins
Secretary

EXHIBIT E

Calculation for Interest on Stay Bond

CEI				0.7066%		
Month	**Year**	**Beginning Balance**	**Expense Adjustment**	**Interest Calculation**	**Ending Balance**	**Cumulative Interest**
August	2013	$ -	$ (15,357,208)	$ (54,257)	$ (15,411,465)	(54,257)
September	2013	$ (15,411,465)	$ -	$ (108,897)	$ (15,520,362)	(163,154)
October	2013	$ (15,520,362)	$ -	$ (109,667)	$ (15,630,029)	(272,821)
November	2013	$ (15,630,029)	$ -	$ (110,442)	$ (15,740,471)	(383,263)
December	2013	$ (15,740,471)	$ -	$ (111,222)	$ (15,851,693)	(494,485)
January	2014	$ (15,851,693)	$ -	$ (112,008)	$ (15,963,701)	(606,493)
February	2014	$ (15,963,701)	$ -	$ (112,800)	$ (16,076,501)	(719,293)
March	2014	$ (16,076,501)	$ -	$ (113,597)	$ (16,190,097)	(832,889)
April	2014	$ (16,190,097)	$ -	$ (114,399)	$ (16,304,497)	(947,289)
May	2014	$ (16,304,497)	$ -	$ (115,208)	$ (16,419,704)	(1,062,496)
June	2014	$ (16,419,704)	$ -	$ (116,022)	$ (16,535,726)	(1,178,518)
July	2014	$ (16,535,726)	$ -	$ (116,841)	$ (16,652,567)	(1,295,359)
August	2014	$ (16,652,567)	$ -	$ (117,667)	$ (16,770,234)	(1,413,026)
September	2014	$ (16,770,234)	$ -	$ (118,498)	$ (16,888,733)	(1,531,525)
October	2014	$ (16,888,733)	$ -	$ (119,336)	$ (17,008,069)	(1,650,861)
November	2014	$ (17,008,069)	$ -	$ (120,179)	$ (17,128,248)	(1,771,040)
December	2014	$ (17,128,248)	$ -	$ (121,028)	$ (17,249,276)	(1,892,068)
January	2015	$ (17,249,276)	$ -	$ (121,883)	$ (17,371,159)	(2,013,951)
February	2015	$ (17,371,159)	$ -	$ (122,745)	$ (17,493,904)	(2,136,696)
March	2015	$ (17,493,904)	$ -	$ (123,612)	$ (17,617,516)	(2,260,308)
April	2015	$ (17,617,516)	$ -	$ (124,485)	$ (17,742,001)	(2,384,793)

OE				0.7066%		
Month	**Year**	**Beginning Balance**	**Expense Adjustment**	**Interest Calculation**	**Ending Balance**	**Cumulative Interest**
August	2013	$ -	$ (19,903,145)	$ (70,318)	$ (19,973,462)	(70,318)
September	2013	$ (19,973,462)	$ -	$ (141,132)	$ (20,114,595)	(211,450)
October	2013	$ (20,114,595)	$ -	$ (142,130)	$ (20,256,725)	(353,580)
November	2013	$ (20,256,725)	$ -	$ (143,134)	$ (20,399,859)	(496,714)
December	2013	$ (20,399,859)	$ -	$ (144,145)	$ (20,544,004)	(640,859)
January	2014	$ (20,544,004)	$ -	$ (145,164)	$ (20,689,168)	(786,023)
February	2014	$ (20,689,168)	$ -	$ (146,190)	$ (20,835,358)	(932,213)
March	2014	$ (20,835,358)	$ -	$ (147,223)	$ (20,982,580)	(1,079,436)
April	2014	$ (20,982,580)	$ -	$ (148,263)	$ (21,130,843)	(1,227,699)
May	2014	$ (21,130,843)	$ -	$ (149,311)	$ (21,280,154)	(1,377,009)
June	2014	$ (21,280,154)	$ -	$ (150,366)	$ (21,430,519)	(1,527,375)
July	2014	$ (21,430,519)	$ -	$ (151,428)	$ (21,581,947)	(1,678,803)
August	2014	$ (21,581,947)	$ -	$ (152,498)	$ (21,734,445)	(1,831,301)
September	2014	$ (21,734,445)	$ -	$ (153,576)	$ (21,888,021)	(1,984,876)
October	2014	$ (21,888,021)	$ -	$ (154,661)	$ (22,042,682)	(2,139,537)
November	2014	$ (22,042,682)	$ -	$ (155,754)	$ (22,198,435)	(2,295,291)
December	2014	$ (22,198,435)	$ -	$ (156,854)	$ (22,355,289)	(2,452,145)
January	2015	$ (22,355,289)	$ -	$ (157,962)	$ (22,513,252)	(2,610,107)
February	2015	$ (22,513,252)	$ -	$ (159,079)	$ (22,672,331)	(2,769,186)
March	2015	$ (22,672,331)	$ -	$ (160,203)	$ (22,832,533)	(2,929,389)
April	2015	$ (22,832,533)	$ -	$ (161,335)	$ (22,993,868)	(3,090,723)

TE				0.7066%		
Month	**Year**	**Beginning Balance**	**Expense Adjustment**	**Interest Calculation**	**Ending Balance**	**Cumulative Interest**
August	2013	$ -	$ (8,102,444)	$ (28,626)	$ (8,131,070)	(28,626)
September	2013	$ (8,131,070)	$ -	$ (57,454)	$ (8,188,524)	(86,080)
October	2013	$ (8,188,524)	$ -	$ (57,860)	$ (8,246,384)	(143,940)
November	2013	$ (8,246,384)	$ -	$ (58,269)	$ (8,304,653)	(202,209)
December	2013	$ (8,304,653)	$ -	$ (58,681)	$ (8,363,334)	(260,890)
January	2014	$ (8,363,334)	$ -	$ (59,095)	$ (8,422,429)	(319,985)
February	2014	$ (8,422,429)	$ -	$ (59,513)	$ (8,481,942)	(379,498)
March	2014	$ (8,481,942)	$ -	$ (59,933)	$ (8,541,875)	(439,431)
April	2014	$ (8,541,875)	$ -	$ (60,357)	$ (8,602,232)	(499,788)
May	2014	$ (8,602,232)	$ -	$ (60,783)	$ (8,663,016)	(560,572)
June	2014	$ (8,663,016)	$ -	$ (61,213)	$ (8,724,228)	(621,785)
July	2014	$ (8,724,228)	$ -	$ (61,645)	$ (8,785,874)	(683,430)
August	2014	$ (8,785,874)	$ -	$ (62,081)	$ (8,847,955)	(745,511)
September	2014	$ (8,847,955)	$ -	$ (62,520)	$ (8,910,474)	(808,031)
October	2014	$ (8,910,474)	$ -	$ (62,961)	$ (8,973,436)	(870,992)
November	2014	$ (8,973,436)	$ -	$ (63,406)	$ (9,036,842)	(934,398)
December	2014	$ (9,036,842)	$ -	$ (63,854)	$ (9,100,697)	(998,253)
January	2015	$ (9,100,697)	$ -	$ (64,306)	$ (9,165,002)	(1,062,558)
February	2015	$ (9,165,002)	$ -	$ (64,760)	$ (9,229,762)	(1,127,318)
March	2015	$ (9,229,762)	$ -	$ (65,217)	$ (9,294,979)	(1,192,536)
April	2015	$ (9,294,979)	$ -	$ (65,678)	$ (9,360,658)	(1,258,214)

Total for Ohio Companies August 2013 through April 2015	(6,733,730)