

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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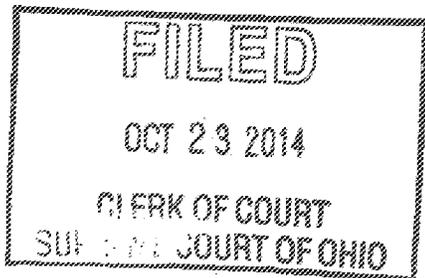
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I. INTRODUCTION

This case is about two things: secrecy and exorbitant charges to customers. First, it concerns the Public Utilities Commission of Ohio's ("the PUCO" or "Commission") withholding from the public essential information regarding high-priced purchases of renewable energy by a utility – Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "FirstEnergy," "FE," or "Utility"). The PUCO did not allow the public to know the identity of FirstEnergy's supplier of high-priced renewable energy, the prices paid to that supplier, and the total amount of those purchases that was recommended to be disallowed by the Office of the Ohio Consumers' Counsel ("OCC") witness Wilson Gonzalez. The PUCO's decisions to withhold this information – on purchases that were made 4 and 5 years ago – were unreasonable and unlawful because the information did not amount to a trade secret under R.C. 1333.61.

Second, this case is about FirstEnergy's repeated imprudent purchases from ██████████ of renewable energy at exorbitant prices. The PUCO properly disallowed \$43.4 million that the Utility charged customers after finding the purchases imprudent. The PUCO concluded that, in lieu of purchasing the high-priced In-State Non-Solar renewables, FirstEnergy could have sought force majeure relief (that R.C. 4928.64 law permits). That would have excused FirstEnergy from purchasing the In-State Non-Solar¹ renewables. But FirstEnergy didn't do this. Additionally, the PUCO properly found that adjusting the Utility's rates to remove the imprudently incurred

¹ As explained below, although there are a number of renewable products with annual benchmark requirements under Ohio law, this case only concerns renewables required to be generated in Ohio ("In-state") and that are *not required* to be solar ("Non-Solar"). OCC notes that OCC's use of the term "Non-Solar" is intended to distinguish it from the renewables that *must* be generated from solar energy. However, OCC recognizes that "Non-Solar" requirements may also be met from solar energy under the law. FirstEnergy has referred to these renewables as "All-Renewables."

costs was not impermissible retroactive ratemaking. FirstEnergy is appealing that decision of the PUCO. The Court should affirm that portion of the PUCO's decision.

But the PUCO also unlawfully allowed FirstEnergy to charge its customers over ██████████ ██████████ for other In-State Non-Solar renewables purchases from 2009 – 2011 that OCC had recommended be disallowed. The \$ ██████████ wrongfully allowed by the PUCO, was for purchases of In-State Non-Solar renewables from 2009 – 2011. Those purchases were made through the issuance of three Requests for Proposals ("RFPs") to potential sellers, in August 2009 (RFP1), October 2009 (RFP2), and August 2010 (RFP3).

The PUCO's decision to allow FirstEnergy to overcharge its customers by ██████████ was unlawful and unreasonable. In allowing FirstEnergy to pass these charges on to customers, the PUCO unlawfully and unreasonably applied a presumption of prudence to the utility purchases. But, as borne out by the evidence produced, the charges to customers were exorbitant considering all the options available to the Utility at that time. And to make matters worse, the high-priced RECs were purchased from ██████████ ██████████. The PUCO's presumption of prudence for the Utility's purchases of renewable energy, especially from ██████████ was contrary to the law pertaining to burden of proof. OCC asks the Court to remand this matter to the PUCO with instructions that the PUCO must place the burden of proof where it belongs -- on the Utility.

II. STATEMENT OF FACTS

FirstEnergy's Statement of Facts presents a biased portrayal of the facts, discussing only the evidence that favors FirstEnergy's position. (FE Merit Brief at 3-17). Certain key facts are omitted by FirstEnergy and others are not fully or accurately stated. OCC does not agree with the statement of facts presented by FirstEnergy. Accordingly, consistent with S.Ct.Prac.R. 16.03(B)(2), Appellee/Cross-Appellant provides its own statement of facts.

A. Public Records Issues

The PUCO ordered an audit of FirstEnergy's Alternative Energy Rider ("Rider AER") – the rider for collecting charges in relation to the alternative energy costs incurred pursuant to R.C. 4928.64. (FE Appx. at 104-107). A redacted copy of the PUCO-ordered Exeter Audit Report was filed with the PUCO and was made available for public inspection on August 15, 2012. (R. 18 at 1-39, FE Supp. at 1-39). That Exeter Audit Report found that FirstEnergy overcharged customers and that certain disallowances should be made. (R. 18 at iv, 33, FE Supp. at 105, 139). At FirstEnergy's behest, however, the Audit Report omitted information containing specific pricing of alternative energy credit bids and the identities of the bidders. (R. 18 at i-39, FE Supp. at 1-39). This was done despite the fact that FirstEnergy did not file a Motion for Protective Order at that time to protect information alleged to be trade secret. However, as publicly filed, there were portions of the Audit Report that divulged the name of one of the bidders and the amounts that FirstEnergy paid to secure its renewable purchases from 2009 - 2011.

After numerous unsuccessful attempts (beginning August 16, 2012) to informally acquire an unredacted (complete) version of the Exeter Audit Report, OCC served a discovery request on FirstEnergy seeking the unredacted Report. In response, FirstEnergy filed a Motion for Protective Order ("October 3 Motion for Protective Order") with the PUCO on October 3, 2012, seeking to block "public disclosure of the redacted supplier information contained in the Exeter Report." (R. 24 at 1, OCC Supp. at 212). After conducting a hearing on FirstEnergy's October 3 Motion for Protective Order, the Attorney Examiner held that the redacted portions of the Report contained "trade secret information" that should be protected, not publicly disclosed. (Tr. of 11/20/2012 (filed 12/4/2012) at 17, OCC Appx. at 102).

OCC later learned that FirstEnergy was afforded a private opportunity to review and propose changes to a draft of the Audit Report (“Draft Audit Report”) before the final Exeter Audit Report was filed with the PUCO. (Tr. Vol. III (pub.) at 512, OCC Supp. at 127). While the Auditor did not accept all of the changes proposed by FirstEnergy, it did delete its recommendation (in the draft Report) that the PUCO disallow FirstEnergy’s payment for In-State Non-Solar renewables in excess of a specific dollar amount. (R. 80 at Ex. C & D, OCC Supp. at 136-202).

OCC then submitted a public records request to the PUCO seeking “any and all records that reflect edits or comments on draft version of the Audit Report by employees, outside consultants, and/or counsel of [FirstEnergy].” (R. 47 at Exhibit A, OCC Supp. at 240). FirstEnergy then filed a second Motion for Protective Order (“December 31 Motion for Protective Order”) with the PUCO. (R. 47, OCC Supp. at 222-245). In its December 31 Motion for Protection, FE asked the PUCO to deny OCC’s public record request. (R. 47 at 1, OCC Supp. at 222). The Attorney Examiner once again ruled that the supplier-pricing and supplier-identifying information that appears in the Draft Audit Report is “trade secret” information. (R. 65 at 5, OCC Appx. at 120). The Attorney Examiner further held that the Draft Audit Report would be released in redacted form (meaning some information would not be shown in the public version). (R. 65 at 5-6, OCC Appx. at 120-121).

FirstEnergy also filed another Motion for Protective Order (“February 7 Motion for Protective Order”) with the PUCO to prevent OCC from disclosing specific renewable purchaser pricing and bidder identities in the testimony of OCC’s witness, Wilson Gonzalez. (R. 61, OCC Supp. at 246-281). The February 7 Motion for Protective Order also sought to preclude OCC from publicly disclosing Mr. Gonzalez’s recommended disallowance. (R. 61 at 3, OCC Supp. at

248). FirstEnergy filed the February 7 Motion for Protective Order after OCC informed the Utility of its intent “to publicly release [through Mr. Gonzalez’s testimony] the total dollar amount of FirstEnergy’s renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers plus interest.” (R. 61 at 4, OCC Supp. at 249) Notably, Mr. Gonzalez’s recommended disallowance was an aggregate number that did not disclose the specific pricing information that FirstEnergy’s prior Motions for Protection addressed. (R. 56 (conf.) at 34, 36, OCC Supp. (conf.) at 82, 84; R. 71 (conf.); OCC Supp. (conf.) at 118). The February 7 Motion for Protective Order was not ruled upon until the PUCO’s Opinion and Order (“Order”) was issued on August 7, 2013. (R. 109 at 11, FE Appx. at 19).

In its Opinion and Order, the PUCO “affirm[ed] the rulings of the attorney examiners granting protective orders in all but one respect.” (R. 109 at 11, FE Appx. at 19). The PUCO “modif[ied] the attorney examiners’ rulings to permit the generic disclosure of FES as a successful bidder in the competitive solicitations.” (R. 109 at 12, FE Appx. at 20). However, the PUCO made it clear that “specific information related to bids by FES, such as the quantity and price of renewable energy credits (“renewables” or “RECs”)² contained in such bids and whether such bids were accepted by the Companies, shall continue to be confidential and subject to the protective orders.” (Id.) The PUCO also granted FirstEnergy’s remaining Motions for Protective Order, with the caveat of allowing for “generic disclosure of FES as a successful bidder.” (Id. at 14, FE Appx. at 22).

² RECs or Renewable Energy Credits are a tradable form of renewable energy. For purposes of this proceeding, one unit of Renewable Energy Credit can be understood as “equal [to] one megawatt hour of electricity derived from renewable energy resources . . .” R.C. 4928.65; (OCC Appx. at 304).

B. Prudence Issues

Renewable energy purchase requirements were established by Senate Bill 221 to commence in the year 2009, with increasing annual benchmarks thereafter. R.C. 4928.64(B)(2); (FE Appx. at 106). The law requires that a small percentage of renewable purchases be met from “solar energy resources,” which is a subset of “renewable energy resources.” *Id.* The balance may come from any of the “renewable energy resources” defined by R.C. 4928.01. (OCC Appx. at 288-294). The market has, as a result, developed distinct products for Solar and Non-Solar renewables. In addition, 50% of the renewable purchases (both Solar and Non-Solar) must be “met through facilities located” in Ohio, with the balance to be “met with resources that can be shown to be deliverable into this state.” R.C. 4928.64(B)(3); (FE Appx. at 106). Renewables are not only separated as Solar and Non-Solar products, but also as “In-State” and “All-States.” In total, there were four renewable energy products marketed in Ohio during the applicable period: [1] All-States Solar, [2] All-States Non-Solar, [3] In-State Solar, and [4] In-State Non-Solar.

The dispute in this case concerns only one of those products – In-State Non-Solar renewable purchases. The \$43.4 million disallowed by the PUCO was the purchase, in August 2010 (RFP 3), of 145,269 high-priced 2011-vintage In-State Non-Solar renewables.

FirstEnergy purchased the renewable energy that is the subject of this proceeding through the issuance of three RFPs – in August 2009 (RFP 1), October 2009 (RFP 2) and August 2010 (RFP 3). Through this process, FirstEnergy’s consultant, Navigant, identified potential bidders for the renewable products and provided potential bidders with information regarding how to submit a bid. (R. 52 at 8-11, OCC Supp. at 297-300). A deadline for each bid was established. (R. 52 at 10, OCC Supp. at 299). Once bids were received, the information was reviewed to determine whether bidders met the qualification requirements. (R. 52 at 12, FE Supp. at 13). The identity of qualifying bidders was provided by Navigant to FirstEnergy before the bid

selection process commenced. (Id.) Qualifying bidders' bids were then ranked by price and the bids were selected (lowest price to highest price) until the requested quantity was fulfilled or there were no more RECs bid. (R. 52 at 13-14, OCC Supp. at 301-302). "If fewer RECs were bid than were sought in a category, all RECs in that category were recommended for selection." (R. 52 at 13; OCC Supp. at 302).

But FirstEnergy's RFP process for In-State Non-Solar renewables resulted in only one bidder – [REDACTED] – in both RFP 1 and RFP 2 and two bidders in RFP 3, of which one was [REDACTED]. (R. 18 (conf.) at 31, OCC Supp. (conf.) at 38; R. 56 (conf.) at 18-19, OCC Supp. at 66-67; Tr. Vol. II (conf.) at OCC Ex. 9, OCC Supp. (conf.) at 125-189). And the prices bid by that bidder – and paid by FirstEnergy to [REDACTED] – were exorbitant, prices unseen for Non-Solar products in any state around the country. (R. 18 (conf.) at 28, OCC Supp. (conf.) at 35). Those exorbitant prices – a critical piece of information -- were omitted by FirstEnergy in its Brief. In August 2009, FirstEnergy paid up to \$[REDACTED]/REC; in October 2009, FirstEnergy paid up to \$[REDACTED]/REC, and in October 2010, FirstEnergy paid up to \$[REDACTED]/REC. And FirstEnergy also omits that it paid these amounts to [REDACTED]. (R. 18 (conf.) at 28, 31, OCC Supp. (conf.) at 35, 38; Tr. Vol. II (conf.) at OCC Ex. 9, OCC Supp. (conf.) at 125-189).

FirstEnergy's Brief also disregards the evidence of the prevailing rates paid for In-State Non-Solar renewables in other states across the country at the same time FirstEnergy was purchasing RECs from [REDACTED]. At that time, non-solar RECs were selling for less than \$50/REC in 11 states and the District of Columbia, as shown in the U.S. Department of Energy's (DOE) documentation included in the PUCO-ordered Audit Report. (R. 18 at 26, FE Supp. at 132). For instance, in Pennsylvania, non-solar REC prices for 2011 had a high price of \$50.00/REC, a low price of \$0.14/REC, and a weighted average price of \$3.94 per Tier I non-

solar REC. (R. Tr. Vol. I (pub.), OCC Ex. 2, OCC Supp. at 119). In contrast, FirstEnergy paid [REDACTED] /REC. (R. 18 (conf.) at 28, OCC Supp. (conf.) at 35). And FirstEnergy produced no evidence of any other utility paying prices greater than \$50/REC during the time frame associated with RFP3.

FirstEnergy also emphasizes the confidentiality of the procurement process where “bidders would not know who else was participating or how many other bidders were participating.” (FE Merit Brief at 6). FirstEnergy claims that this structure would have resulted in “getting the best price that each bidder was willing to bid.” (FE Merit Brief at 6). FirstEnergy ignores a number of important facts. After the bids were submitted, but before any bid was accepted, FirstEnergy was informed of the identities of the bidders. (R. 52 at 12, FE Supp. at 13; Tr. Vol. II (pub.) at 314-316, OCC Supp. at 121-123). Knowing that one of the bidders was [REDACTED] certainly could have influenced the Utility’s decision to accept the high-priced bids rather than considering two alternatives available under the law: either a force majeure filing under R.C. 4928.64(C)(4) or making an alternative compliance payment under R.C. 4928.64(C)(1). (FE Appx. at 106-107).

FirstEnergy emphasizes that it relied on the recommendations of Navigant Consulting, in making its purchases. (FE Merit Brief at 9-12). However, FirstEnergy did not contract with Navigant to evaluate or make recommendations regarding *alternatives to the purchase of RECs*. (Tr. Vol. I (pub.) at 169, OCC Supp. at 114). Navigant’s recommendations, therefore, did not consider the available alternatives to purchasing the RECS – making a force majeure request to the PUCO, or making alternative compliance payments. (Tr. Vol. I (pub.), at 169, 184-185, OCC Supp. at 114, 117-118). Nor did Navigant’s recommendations take into account consultation with PUCO Staff. (Id.) Despite not having reviewed these options, Navigant

provided a recommendation to FirstEnergy with respect to the qualifying bids. (Id.) Navigant witness Daniel Bradley testified that the spreadsheet showing the qualifying bids ranked by price “constituted Navigant’s recommendations” to FirstEnergy. (R.52 at 13-14; OCC Supp. at 301-302).

OCC also disagrees with FirstEnergy’s characterization of its options. (FirstEnergy Merit Brief at 4). FirstEnergy states that, in lieu of purchasing the RECs (at \$[REDACTED]/REC), it had only two options: [1] force majeure under R.C. 4928.64(C)(4) and [2] the 3% cost cap under R.C. 4928.64(C)(3). (FE Merit Brief at 4; FE Appx. at 107). In fact, another option was to make the alternative compliance payment of approximately \$45/REC under R.C. 4928.64(C)(1). (R. 56 at 23, 25-31, OCC Supp. at 25, 27-33; FE Appx. at 106). If FirstEnergy had made the alternative compliance payment at \$45/REC, it would have saved Ohio consumers “[REDACTED]” (R. 56 (conf.) at 23, OCC Supp. (conf.) at 71). The Commission has the discretion to accept compliance payments and/or make force majeure determinations if RECs are not reasonably available in the market. R.C. 4928.64(C)(2) and (4); (FE Appx. at 106-107); *see also, In Re Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Pub. Util. Comm. No. 10-2986-EL-ACP, 2011 Ohio PUC LEXIS 268, Finding and Order (Mar. 2, 2011); *In Re Application of Noble Americas Energy Solutions LLC for a Waiver from 2010 Ohio Sited Solar Energy Resource Benchmarks*, Pub. Util. Comm. No. 11-2384-EL-ACP, 2011 Ohio PUC LEXIS 944, Finding and Order (Aug. 3, 2011); *In Re Application of Columbus Southern Power Co. and Ohio Power Co. for Amendment of the 2009 Solar Energy Resource Benchmark Pursuant to Section 4928.64(C)(4), Ohio Revised Code*, Pub. Util. Comm. Nos. 09-987-EL-EEC, et al., 2010 Ohio PUC LEXIS 6, Entry (Jan. 7, 2010). And contrary to FirstEnergy’s claim otherwise, RECs

at the prices paid by FirstEnergy were not “reasonably available,” in light of the PUCO’s determination that the term “reasonably available” includes consideration of price.³

Despite its knowledge of a nascent market, FirstEnergy chose to pay high-prices for advanced purchases of renewables. When FirstEnergy purchased In-State Non-Solar renewables in August 2009 (RFP1), it paid as much as \$[REDACTED]/REC, not just for 2009-vintage RECs but for 2010-vintage RECs. When it purchased In-State Non-Solar renewables in October 2009 (RFP2), it paid as much as \$[REDACTED]/REC for 2010 RECs and \$[REDACTED]/REC for 2011 RECs, as well as \$[REDACTED]/REC for 2009 RECs. (R. 18 (conf.) at 28, OCC Supp. (conf.) at 35). And in August 2010, FirstEnergy paid \$[REDACTED]/REC for 2010 RECs but received a bid and paid \$[REDACTED]/REC for some 2011 RECs. (Id.) It then negotiated a price of \$[REDACTED]/REC for the 2011-vintage RECs that were bid by [REDACTED], which are the subject of FirstEnergy’s appeal. (R. 52 (conf.) at 42, FE Supp. (conf.) at 577). With over a year left before the deadline to acquire the requisite RECs, FirstEnergy chose to purchase its remaining RECs rather than wait for further market development. (R. 18 at 25, FE Supp. at 131). Nor did FirstEnergy seek PUCO approval of force majeure which would have relieved the Utility from its obligations to purchase such exorbitantly priced renewables.

OCC also disagrees with FirstEnergy’s assertion that its quarterly Alternative Energy Rider filings (the tool used to charge customers for its REC purchases) constituted a “request for approval” of the prudently-incurred costs included in such filings. (FE Brief at 12-14.) In these filings, FirstEnergy presents proposed tariffs for PUCO approval. Although the single tariff page states that FirstEnergy is to file a “request for approval of the Rider charges” on a quarterly basis, FirstEnergy submitted nothing at the time of such filings other than a single tariff page, as

³ See, *infra* at 40.

revised to show new proposed rates. *Ohio Edison Company*, Case No. 08-935-EL-SSO, P.U.C.O. No. 11, Filing of June 1, 2011, OCC Supp. at 203-211).⁴ The filings do not request approval from the PUCO of proposed costs. (Id.) Nor do they seek a PUCO ruling on the prudence of such costs. (Id.) In fact, such filings do not identify Rider AER costs at all; rather, they only include the updated rates to be charged by customer class without any calculations or accounting of revenues derived from Rider AER. (Id.) Thus, neither the Commission nor any party would have had any basis upon which to conduct a review of the calculation of the quarterly rate, let alone a prudence review. (Id.)

Finally, no statement is made in these quarterly filings that a prudence review is conducted by the PUCO. (Id.) Certainly, the AER Annual Status Reports referenced by FirstEnergy do not constitute a prudence review. (FE Merit Brief at 14). They are solely for the purpose of determining the extent of compliance with the benchmarks, as required by 4928.64(C)(1) and Ohio Adm. Code 4901:1-40-05. (FE Appx. at 106; OCC Appx. at 310) Similarly, the ten-year compliance plans required by Ohio Adm. Code 4901:1-40-03 (OCC Appx. at 307-309) do not address the prudence of past REC purchases; rather, they address how the utility plans to meet its requirements in the future. The Commission's clear intent was to leave prudence review to audit proceedings as it has historically and consistently done since the PUCO's Order implementing Rider AER provided that recovery would be limited to FirstEnergy's "prudently incurred costs" FirstEnergy incurred. *In Re 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*

⁴ Administrative notice was taken of all of FirstEnergy's Rider AER Filings made from 2009-2011. (Tr. Vol. III at 505-506, OCC Supp. at 125-126).

Electric Security Plan, Case No. 08-935-EL-SSO, 2009 Ohio PUC LEXIS 279, Second Opinion and Order at **17, 40 (Mar. 25, 2009).

III. STANDARD OF REVIEW

Under R.C. 4903.13, the Court may reverse, modify or vacate a PUCO order if that order is “unlawful or unreasonable.” (FE Appx. at 91). The standard of review applicable to a PUCO order will turn on whether the issue presented is a question of law or one of fact. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 118, 388 N.E.2d 1370 (1979).

Where the issue before the Court presents a question of law, the Court will review the issue de novo, giving the Court “complete, independent power of review.” *Id.* Under a de novo review, the Court will pursue a “more intensive examination” of the legal issues than it would in a review of factual issues. *Id.* Such determinations include whether a presumption ought to have been applied, *see, Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 95, 2014-Ohio-1588, 9 N.E.2d 1004, ¶¶ 10-11, and a determination of the burden of proof. *See, Acuity, Inc. v. Trimat Constr.*, 4th Dist. Gallia No. 05CA2, 2005-Ohio-6128, ¶ 17. Thus, this Court should apply a de novo standard of review with respect to Proposition of Law 2 and Proposition of Law 3. Those Propositions of Law explain that the PUCO should not have applied a presumption of prudence and that the PUCO misstated (and consequently misapplied) the burden of proof. Proposition of Law 5, establishing that the PUCO’s disallowance cost was not retroactive ratemaking, is also subject to a de novo review.

With respect to factual considerations, this Court has stated that it will not reverse or modify a PUCO order on questions of fact when the record contains sufficient probative evidence to show that the PUCO’s decision was not manifestly against the weight of the evidence or was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571,

2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. In making this evaluation, this Court looks to any probative evidence in the record, not just the evidence cited to by the PUCO. Thus, Proposition of Law 4, FirstEnergy's appeal of the PUCO's disallowance of imprudence, is subject to a reversal only if the decision was issued against the manifest weight of the evidence.

Similarly, the "issue of whether particular information is a trade secret is a factual determination." *Water Mgt., Inc. v. Stayanchi*, 15 Ohio St.3d 83, 86, 472 N.E.2d 715 (1984) (citing *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 137, 454 N.E.2d 588 (8th Dist. 1983)). A trier of fact's "determination that the requested information does, in fact, constitute trade secrets will be upheld if supported by some competent, credible evidence." *State ex rel. Fisher v. PRC Pub. Sector*, 99 Ohio App.3d 387, 393, 650 N.E.2d 945 (10th Dist. 1994), citing *Kinney v. Mathias*, 10 Ohio St.3d 72, 73, 461 N.E.2d 901 (1984); *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). Therefore, Proposition of Law 1, explaining that the PUCO unlawfully and unreasonably withheld public information, should be reviewed accordingly.

IV. ARGUMENT

PROPOSITION OF LAW 1: The Public Utilities Commission acts unlawfully and unreasonably when it prevents public disclosure of information that does not amount to a trade secret under R.C. 1333.61 and R.C. 149.43.

FirstEnergy spent nearly [REDACTED] on excessively-priced renewable energy that was purchased from [REDACTED]; yet, OCC and other interested parties were prevented from explaining to the public how these exorbitant costs impacted the Utility's customers. At the Utility's request, the PUCO permitted FirstEnergy to treat the identities of renewable energy suppliers and the prices paid for those renewables (and charged to customers) as confidential under R.C. 149.43(a)(1)(q). (R. 109 at 12, 14, FE Appx. at 20, 22; R. 143 at 4-5, FE Appx. at

49-50). The PUCO also prevented the parties from publicly disclosing the specific amount of disallowance recommended in the Draft Report of the Exeter Auditor. (Id.) Finally, the PUCO prevented the public disclosure of OCC witness Wilson Gonzalez's testimony, which referenced not only the specific bidding prices but OCC's total recommended disallowance based upon aggregated information. (Id.). But it was unreasonable and unlawful for the PUCO to hold that "specific bidding information" (prices bid and paid) and the identities of suppliers who bid in 2009 and 2010 are trade secret information subject to protection.

Under Ohio law, "[e]xcept as provided in section 149.43 of the Revised Code . . . all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." R.C. 4905.07; (OCC Appx. at 281). Similarly, "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records." R.C. 4901.12; (OCC Appx. at 279). The Ohio Public Records Laws are supported by a strong presumption in favor of disclosure and are "intended to be liberally construed to ensure that governmental records be open and made available to the public * * * subject only to a very few limited exceptions." *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549, 597 N.E.2d 147 (1992). Accordingly, Ohio Adm. Code 4901-1-24(D)(1) limits redactions for confidentiality to only that information that is "essential to prevent disclosure of the allegedly confidential information." (OCC Appx. at 306). But, the PUCO unreasonably and unlawfully granted FirstEnergy's request to protect renewables bidding information as confidential trade secret information, which was inconsistent with Ohio law.

R.C. 1333.61(D) defines trade secret information as:

information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(OCC Appx. at 278). In determining whether certain information meets this standard, this Court has adopted the following 6 factors to assist in analysis:

(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. Plain Dealer v. Ohio Dep't of Ins., 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

The PUCO's decision that the information amounted to a trade secret (R. 109 at 12-14, FE Appx. at 20-22), was not supported by competent and credible evidence as discussed below. While the PUCO allowed "generic disclosure of FES as a successful bidder," (R.109 at 12, 14, FE Appx. at 20, 22; R. 143 at 4-5, FE Appx. at 49-50) it was against the manifest weight of the evidence to hold that specific renewables pricing by the specific bidders is confidential trade secret information. The record indicates, as discussed below, that the 2009 and 2010 renewables bidding information is not economically valuable (and hasn't been for years) and that FirstEnergy did not sufficiently safeguard the secrecy of the information, allowing it to be

publicly disseminated on multiple occasions. Because no trade secret exists, no protection is warranted. To that extent, the PUCO also erred by prohibiting public disclosure of the disallowance recommendation in the Draft Audit Report and the total amount of disallowance calculation recommended by OCC witness Gonzalez. (R. 109 at 14, FE Appx. at 22). As a result, this Court should overturn the PUCO's ruling and permit public disclosure of all specific bidding, including the Draft Audit Report and related testimony.

A. The PUCO Erred When It Found That The Identities Of Suppliers And The Prices Paid For RECs Was "Economically Valuable Information."

The PUCO's decision to grant confidentiality over certain REC bidding information was unreasonable and unlawful. This is because FirstEnergy failed to demonstrate how the prices it paid for renewables approximately four and five years ago, would harm future competitive bid processes and thus render that information economically valuable. There is no competent and credible evidence in the record to support such a finding that FirstEnergy carried its burden of proof. (R. 109 at 21, FE Appx. at 29; R. 143 at 5, FE Appx. at 50). While OCC understands the need for confidentiality during the RFP process to ensure competitive bidding, a valid concern does not remain after the process is completed and the bidder has been selected and awarded the bid, especially several years later.

A number of United States District Courts have held that historic information, specifically with respect to business practices, can be outdated and not subject to trade secret protection when such information does not reveal anything about the contemporary operations of the party resisting disclosure. *United States v. International Business Mach. Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975) (business information as little as three years old not entitled to trade secret protection); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251-252 (D.D.C. 1981) (five-year old

business practices, strategies, and accounting were outdated and not entitled to trade secret protection).

Similarly, the high-priced renewables supplier identity and pricing information that the PUCO allowed FirstEnergy to seal is historic in nature. The passage of time and the rapid changes in the marketplace eliminate any economic value that this information may have once held. Indeed, it has been years since this information had any economic value. It is uncontested, and the record is replete with evidence, that Ohio's In-State Non-Solar renewables market has changed dramatically since the initial period after Senate Bill 221 went into effect. (R. 109 at 15, 17, 19, 21, 24-25, FE Appx. at 25, 27, 29, 32-33; Tr. Vol. II (conf) at OCC Ex. 15, OCC Supp. (conf.) at 190-195; Tr. Vol. I, at 154, FE Supp. at 80; Tr. Vol. III, at 602-603, OCC Supp. at 130-131). The bidding information at issue refers only to one-time transactions in a unique market situation that ceased to exist after 2010. Thus, the PUCO's Order and Second Entry on Rehearing were issued in error because the REC bidding information is historic in nature, eliminating any economic value in the current renewables market.

B. The PUCO Erred When It Found That FirstEnergy Took Sufficient Safeguards To Protect The Alleged Trade Secret Information.

The PUCO also erred in granting confidentiality over specific renewables bidding information because FirstEnergy failed to carry its burden of presenting credible evidence that it took sufficient precautions to safeguard the secrecy of specific renewable supplier identities and specific renewable pricing information. This Court has held that "a record is entitled to trade secret status 'only if the information is not generally known or readily ascertainable to the public.'" (Citation omitted). *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 732 N.E.2d 373 (2000). In the case below, the PUCO acknowledged that certain information was "*widely disseminated in the public domain.*" (R. 109 at 12, 14, FE Appx. at 20, 22; R. 143 at 4-5,

██████████ to buy credits from people and organizations that generate renewable energy.” (R. 74 at Ex. 2, OCC Supp. at 291-292).

Since some of the most relevant specific renewables bidding information has long appeared in some of the largest news outlets in Ohio, the PUCO erred in finding that any portion of the renewables bidding information was not generally known nor readily ascertainable to the public. Further, the disclosure of such information and FirstEnergy’s actions, which allowed it to remain public for 49 days, also undercuts any finding that the renewables bidding information meets the element of the *Plain Dealer* test requiring the holder of the purported trade secret to guard the secrecy of the information. It would be inappropriate to give trade secret protection to such a poorly guarded secret. Therefore, the PUCO erred in granting protection over specific renewables bidding information because FirstEnergy failed to carry its burden of demonstrating that it made adequate efforts to protect the secrecy of this historic information.

C. The PUCO Erred Under R.C. 1333.61 And 149.43, When It Affirmed The Attorney Examiner’s Ruling That Granted FirstEnergy’s December 31 Motion For Protective Order, Which Concealed Public Information In The Draft Audit Report.

The PUCO erred by affirming the Attorney Examiner’s ruling granting FirstEnergy’s December 31 Motion for Protective Order, resulting in the redaction of public information from the Draft Audit Report. (R. 109 at 12, FE Appx. at 20; R.65 at 5-6, OCC Appx. at 120-121). As the record reflects, a draft of the Exeter Audit Report was provided to FirstEnergy prior to the August 15, 2012 filing of the final Exeter Audit Report. (Tr. Vol. III (pub.) at 512, OCC Supp. at 127). FirstEnergy provided comments upon the Draft Audit Report in two primary forms: [1] a line-edited draft of the Exeter Audit Report (“Draft Report Line Edits”) and [2] a supplemental document labeled “The Companies’ Major Comments Regarding the Executive Summary Draft Management/Performance Audit Report” (“Draft Report Supplement”). (R. 80 at Ex. C & Ex.

D, OCC Supp. at 136-202; *See also*, Tr. Vol. II (conf.) at 391, OCC Supp. (conf.) 123); Tr. Vol. III(conf.) at 648-665, OCC Supp. at 197-214; Tr. Vol. III (pub.) at 512-514, OCC Supp. at 127-129). Based upon FirstEnergy's comments in those documents, the Exeter Auditor deleted any reference to its original recommendation to disallow the collection of certain costs from customers that was contained in the Draft Audit Report. (R. 80 at Ex. C & Ex. D, OCC Supp. at 136-202).

After OCC submitted a public records request seeking a copy of the Draft Audit Report, FirstEnergy filed its December 31 Motion for Protective Order. (R. 47, OCC Supp. at 222-245). The PUCO affirmed the Attorney Examiner ruling that the document would be released with the caveat that any portion of the Draft Report Line Edits that identified the specific dollar amount that the Auditor recommended for disallowance would be redacted. (R. 109 at 11-12, FE Appx. at 19-20; R. 65 at 5-6, OCC Appx. at 120-121).

Under R.C. 1333.61(D)(1), the disallowance, as recommended in the Draft Audit Report, should still be publicly available because it does not divulge any specific information that would be economically valuable, and it has been publicly disclosed through the Draft Report Supplement. The disallowance contained in the Draft Audit Report does not indicate the specific prices paid for RECs, nor does it tie any of the bids to specific suppliers. Likewise, when permitting public disclosure of the Draft Audit Report with a redaction of the recommended disallowance, the PUCO did not redact the recommended disallowance from the Draft Report Supplement. (R. 80 at Ex. C & Ex. D, OCC Supp. at 136-202). Moreover, a discussion of the amount of the Auditor's recommended disallowance is part of the public record in this proceeding. (Tr. Vol. III (pub.) at 512, OCC Supp. at 127). Therefore, the PUCO erred by affirming the Attorney Examiner's decision because FirstEnergy failed to carry its burden of

establishing that the Auditor's recommended disallowance is economically valuable or sufficiently safeguarded from public dissemination. This Court should reverse and remand the PUCO's public records decision by directing the Commission to comply with the strong presumption in favor of disclosing public records.

D. The PUCO Erred Under R.C. 1333.61 And R.C. 149.43, When It Granted FirstEnergy's February 7 Motion For Protective Order, Which Prevented OCC From Publicly Disclosing Its Recommendation To The PUCO Regarding The Amount Of Imprudent Charges That FirstEnergy Should Credit Back To Its Customers.

OCC filed testimony and exhibits of OCC witness Wilson Gonzalez recommending a disallowance of [REDACTED], which included a recommendation to disallow the \$43.4 million ultimately disallowed by the PUCO. (R. 56 (conf.) at 34, OCC Supp. (conf.) at 82). The PUCO erred when it prevented public disclosure of the total dollar amount that OCC maintains that FirstEnergy's customers should not have to pay.

In accordance with paragraph 9 of the Protective Agreement, to which OCC and FirstEnergy agreed on February 1, 2013, OCC sent notice of its intent "to publicly release the total dollar amount of FirstEnergy's renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers plus interest." (R. 61 at Ex. B; OCC Supp. at 263-271). In response, FirstEnergy filed a Motion for Protective Order ("February 7 Motion for Protective Order") to prevent public disclosure of this particular dollar value despite the fact that it does not contain specific pricing information or the names of any of the bidders. The PUCO summarily granted FirstEnergy's February 7 Motion for Protective Order by unlawfully applying R.C. 1333.61(D) in the absence of credible supporting evidence. (R. 109 at 11, FE Appx. at 19; R. 143 at 4-5; FE Appx. at 49-50).

For the same reasons explained above, it logically follows that OCC should have the ability to publicly disclose this aggregate number. OCC's recommended disallowance, as set

forth in the expert testimony of Wilson Gonzalez, is based on aggregated information. That aggregate recommendation does not reveal specific prices of In-State Non-Solar renewables or the bidders of those renewables. Therefore, it should be subject to public dissemination regardless of whether bidder-specific pricing and identity information is deemed to be confidential.

The PUCO has consistently held that aggregated information can be publicly used even where some information that forms the aggregate is protected. *In Re Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio v. Ameritech Ohio and Verizon North Inc.*, Pub. Util. Comm. No. 02-1752-TP-TXP, 2002 Ohio PUC LEXIS 889, Entry at **6-7 (Sept. 30, 2002); *In Re Petition of Dean Thomas and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Tel. Co. of Ohio*, Pub. Util. Comm. No. 02-880-TP-TXP, 2002 Ohio PUC LEXIS 679, Entry at **5-6 (Jul. 31, 2002). But the ruling in the case below is inconsistent with the PUCO's prior holdings.

While this Court recognizes the PUCO's authority to change its position, this Court has also found that the PUCO "should also respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law." *Office of Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50, 461 N.E.2d 303 (1984). Thus, the PUCO erred when it changed its position on this issue without appropriate consideration or supporting evidence. It was unlawful and unreasonable for the PUCO to grant FirstEnergy's February 7 Motion for Protective Order when FirstEnergy failed to carry its burden of proof to establish that the information contained in Mr. Gonzalez's testimony warranted protection. Therefore, this Court should reverse and remand the PUCO's decision in accordance with the

presumption in favor of disclosing the renewable bidding information and the aggregate amount of disallowance [REDACTED] contained in Wilson Gonzalez's testimony.

PROPOSITION OF LAW 2: The Public Utilities Commission acts unlawfully and unreasonably when it presumes a utility's expenditures are prudent.

The PUCO ruled that customers should not pay for a portion (\$43 million) of the amount FirstEnergy paid for 2011 vintage In-State Non-Solar renewables. (R. 109 at 28, FE Appx. at 36). Nonetheless, it applied a "presumption of prudence" to FirstEnergy's renewable purchases. (R. 109 at 21, 24, FE Appx. at 29, 32). In doing so, the PUCO unreasonably and unlawfully allowed FirstEnergy to overcharge its customers by [REDACTED] for high-priced In-State Non-Solar renewables imprudently purchased from [REDACTED].

The burden of proof "encompasses two different aspects of proof: the burden of going forward with evidence (or burden of production) and the burden of persuasion." *Chari v. Vore*, 91 Ohio St.3d 323, 326, 744 N.E.2d 763 (2001), citing *Commonwealth v. Walker*, 370 Mass. 548, 578, 350 N.E.2d 678 (1976). Generally, both of these duties are initially borne by the same party that brings the action. The burden of production does not shift to the opposing party until a prima facie case has been established. *See, Chari* at 326; *see also, Williams v. City of Akron*, 107 Ohio St.3d 203, 206, 2005-Ohio-6268, 837 N.E.2d 1169. However, the burden of production is "frequently [] influenced by presumptions," *State v. Robinson*, 47 Ohio St.2d 103, 107, 351 N.E.2d 88 (1979), whereby the presumption "serves to establish a prima facie case" in favor of the claimant. *Shephard v. Midland Mut. Life Ins. Co.*, 152 Ohio St. 6, 15, 87 N.E.2d 156 (1949). After a party demonstrates a prima facie case (or it is presumed), the burden of producing evidence shifts to the opposing party. *Williams* at 206. Then, once the burden of production has been met, "the presumption created by the prima facie case drops from the case." *Id.*

The burden of persuasion, on the other hand, requires the party upon whom it rests to convince the trier of fact by some quantum of evidence. *Chari* at 326. Unlike the burden of production, the burden of persuasion “never leaves the party on whom it is originally cast.” *State ex rel. Hardin v. Clermont Cty. Bd. Of Elections*, 134 Ohio St.3d 1451, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 23 (citing 29 Am. Jur. 2d Evidence, §171 (2012)). In this case, the PUCO erred by applying a presumption that FirstEnergy’s purchases of renewables were prudent. A presumption of prudence cannot apply to a utility’s request to collect charges from customers, certainly not when those charges stem from affiliate transactions.

A. It Is Unreasonable For The PUCO To Apply A Presumption Of Prudence To FirstEnergy’s Renewables Purchases.

It was unreasonable for the PUCO to presume that FirstEnergy’s decisions related to In-State Non-Solar renewables purchases were prudent. Because the PUCO adopted this presumption, it did not require FirstEnergy to submit any evidence to establish a prima facie case. Instead, the PUCO simply presumed, without any modicum of support, that the Utility’s renewable purchases were reasonable and prudent. (R. 109 at 24, FE Appx. at 32). This enabled FirstEnergy to overcharge customers ██████████ for high cost renewables.

In doing so, the PUCO relied upon its 1986 decision in *In Re Syracuse*, which found that the “effect of a presumption of prudence is to shift the ‘burden of producing evidence’ (or ‘burden of production’) to the opposing party.” *See, In Re Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, Pub. Util. Comm. No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, Opinion and Order at *22 (Dec. 30, 1986). However, the determination of whether a presumption should apply under the circumstances of a case is a purely legal issue. *Akron City School Dist.*, 139 Ohio St.3d 92, 95 2014-Ohio-1588, 9 N.E.3d 1004. And previous PUCO

rulings have no precedential value on questions of law. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶¶ 42-45. Additionally, this Court has never recognized that utilities enjoy a presumption of prudence upon filing a request to charge customers for costs incurred. Nor should this Court allow the PUCO to apply a presumption of prudence to utility decisions in this case.

Utility applications filed with the PUCO are unique and demand more rigorous scrutiny than the types of cases where presumptions have been applied (e.g., life insurance). “Public utilities being legal monopolies by their very nature . . . operate in a designated area and are not ordinarily subject to competition therein.” *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St.2d 34, 37, 218 N.E.2d 446 (1966). “The public interest increases with a monopoly, for, as such, its actions are not regulated by the strictures of the market place.” *Office of Consumers' Counsel v. Pub. Util. Comm.*, 32 Ohio St.3d 263, 273, 513 N.E.2d 243 (1987), quoting *Central State Univ. v. Pub. Util. Comm.*, 50 Ohio St.2d 175, 180, 364 N.E. 2d 6, 9 (1977) (Locher, J., dissenting).

As an investor-owned utility, FirstEnergy's primary concern is the fiduciary duty owed to its shareholders to generate earnings. Moreover, utility applications involve a certain level of complexity that demands intense scrutiny by highly specialized experts. This Court should not recognize a presumption of prudent spending when the petitioning party is a monopoly driven by the goal to maximize profits for its shareholders. Instead, this Court should find, upon a de novo review, that it was error for the PUCO to apply a presumption of prudence and should require the Utility, on remand, to produce evidence sufficient to support its request to collect [REDACTED] [REDACTED] from customers.

B. It Is Unreasonable And Unlawful For The Public Utilities Commission To Presume First Energy's Purchases Of Renewable Energy Credits Were Prudent When The Renewables Were Purchased From [REDACTED].

This Court should decline to recognize any presumption of prudence where the transaction involves a public utility and [REDACTED]. Ohio law asserts that it “is the policy of this state” to “avoid[] anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service . . . and vice versa.” R.C. 4928.02(H) (OCC Appx. at 295). Affiliate transactions present too many opportunities for self-dealing and potentially fraudulent or inflated contracts at the customers’ expense. Due to the elevated concern of impropriety in transactions between affiliated companies, “a presumption of prudence should not be applied to affiliate transactions.” *Office of the Pub. Counsel v. Missouri Pub. Serv. Comm.*, 409 S.W.3d 371, 372 (Mo. 2013). Therefore, the PUCO erred in applying a presumption of prudence to FirstEnergy’s purchases of renewables from [REDACTED] and should be reversed accordingly.

Other jurisdictions have also found that affiliate transactions are not entitled to a presumption of prudence. *See, infra*. Moreover, the National Association of Regulatory Utility Commissioners (“NARUC”), of which the PUCO is a member, declares its policy is that “[t]here is no presumption of prudence for affiliate transactions, whether they are for expenditures or investments.”⁵ *See, Model State Protocols for Critical Infrastructure Protection Cost Recovery, NARUC, Version 1 (July 2004)*.

In the Missouri case referenced above, a gas utility purchased gas from its affiliate that submitted the lowest bids in response to two requests for proposal. *Missouri Pub. Serv. Comm.*,

⁵ NARUC is a non-profit organization for utility commissioners whose mission, in part, is to ensure that its members provide rates that are fair and reasonable for all consumers.

at 373-374. In reviewing the purchases made by the utility, the Missouri Public Service Commission (“Missouri PSC”) applied a presumption of prudence because Missouri recognizes a presumption of prudence in arm’s-length transactions. *Id.* at 375-376. The Supreme Court of Missouri overturned the Missouri PSC’s decision, holding that any presumption of prudence was improper when applied to transactions between affiliates because of the greater risk of self-dealing. *Id.* The Missouri Supreme Court determined that “the rationale for permitting a presumption of prudence in arms-length transactions simply has no application to affiliate transactions.” *Id.* at 377. The Missouri Supreme Court also held that a presumption of prudence is inconsistent with the Missouri PSC’s obligation to prevent regulated utilities from subsidizing their non-regulated operations, *id.* at 378 – the same protection contained in R.C. 4928.02(H). (OCC Appx. at 295).

Several other states have also made similar rulings emphasizing that affiliate transactions are subject to higher scrutiny and not entitled to a presumption of prudence. *See, Boise Water Corp. v. Idaho Pub. Util. Comm.*, 97 Idaho 832, 838, 555 P.2d 163 (1976) (the Court “refuse[d] to make an exception to the rule placing upon the utility the burden of proving reasonableness of its operating expenses paid to an affiliate,” because the “distinction between affiliate and non-affiliate expenditures appears to be that the probability of unwarranted expenditures corresponds to the probability of collusion”); *Michigan Gas Util. v. Michigan Pub. Serv. Comm.*, Mich. App. No. 206234, 1999 Mich. App. LEXIS 1954, at *9 (Feb. 8, 1999) (“the utility has the burden of demonstrating that transactions with its affiliate are reasonable”); *Turpen v. Oklahoma Corp. Comm.*, 1988 Okla.126, 769 P.2d 1309, 1320-1321 (1988) (“it is generally held that, while the regulatory agency bears the burden of proving that expenses incurred in transactions with non-affiliates are unreasonable, the utility bears the burden of proving that expenses incurred in

transactions with affiliates are reasonable); *US West Communications, Inc. v. Pub. Serv. Comm.*, 901 P.2d 270, 274 (Utah 1995) (“[w]hile the pressures of the competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm’s length transaction”).

United State Supreme Court Justice Scalia noted the need to conduct an inquiry into the prudence of affiliate transactions among regulated entities, stating “it is entirely reasonable to think that the fairness of rates and contracts relating to joint ventures among affiliated companies cannot be separated from an inquiry into the prudence of each affiliate’s participation.”

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 382, 108 S.Ct. 2428, 101 L. Ed. 2d 322 (1988) (Scalia, J., concurring). Thus, both Ohio law and similar rulings outside of Ohio support that no presumption of prudence should be applied.

PROPOSITION OF LAW 3: The PUCO acted unreasonably and unlawfully by leaving the burden of producing evidence on the intervenors after it found that the presumption of prudence was rebutted.

Assuming *arguendo* that a presumption of prudence could be applied to FirstEnergy’s management decisions, the PUCO erred when it failed to properly determine the burden of proof. The presumption of prudence only affects whether the Utility must initially produce evidence of prudence (initial burden of production). A rebuttable presumption shifts the burden of production to the opposing party – in this case the PUCO Staff and intervening parties. *See generally, Williams*, 107 Ohio St.3d 203, 206, 2005-Ohio-6268, 837 N.E.2d 1169. The PUCO applies a low threshold for rebutting the presumption of prudence, holding that challengers do not have to prove that the utility’s decisions were imprudent. *In Re Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Toledo Edison Company and Related Matters*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, Supplemental Opinion and Order at *65 (Jul. 16, 1987). Rather, challengers only need to

provide “some concrete evidence,” *In Re Investigation into the Perry Nuclear Power Station*, PUCO Case No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, Opinion and Order at * 21 (Jan. 12, 1988) (emphasis added), evidencing a “potential imprudence to rebut the presumption.” *In Re Regulation of the Electric Fuel Component*, 1987 Ohio PUC LEXIS 69, at * 65 (emphasis added).

At no point, however, does a presumption of prudence change the fact that the utility bears the burden of proof in all utility rate matters. (R.C. 4909.18, OCC Appx. at 284-285; R.C. 4909.19, OCC Appx. at 286-287; R.C. 4928.142(D)(4), OCC Appx. at 299; R.C. 4928.143(E) - (F), OCC Appx. at 302-303); *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶ 8. To the contrary, this Court has held that “a presumption is not to have the effect of shifting the burden of proof onto the opposite party, but merely imposes a ‘burden of going forward with the evidence to rebut or meet the presumption.’” *Evans v. Nat. Life & Acci. Ins. Co.*, 22 Ohio St.3d 87, 90, 488 N.E.2d 1247 (1986), citing Evid. R. 301. Thus, once the presumption is rebutted by some concrete evidence, the Utility must meet its burden of proof to establish that its costs for procurement of renewables were prudently incurred.

In this case, the PUCO found that “the Exeter Report was sufficient evidence to overcome the presumption that the Companies’ management decisions were prudent as to the procurement of in-state all renewables [sic] RECs.” (R. 109 at 21, FE Appx. at 29). Once the PUCO found that the Exeter Audit Report rebutted the presumption of prudence, the presumption is gone, *Williams*, 107 Ohio St.3d 203, 206, 2005-Ohio-6268, 837 N.E.2d 1169, and FirstEnergy should have been forced to carry its burden of establishing that its purchasing decisions were prudent. However, instead of requiring FirstEnergy to meet its burden of proof, the PUCO turned it around. The PUCO looked instead to the intervening parties (and PUCO

Staff) and held that they did not produce evidence “sufficient to overcome the presumption that the Companies’ decisions were prudent to support a disallowance of the costs of the REC purchases.” (R. 109 at 23, FE Appx. at 31).

Not only was the PUCO’s ruling internally inconsistent, it unlawfully and unreasonably shifted the burden of proof by requiring the intervening parties to prove a negative – that the Utility did not act prudently. This Court recently explained that it is the utility that has to “prove a positive point: that its expenses had been prudently incurred * * * [t]he commission did not have to find the negative: that the expenses were imprudent.” *In Re Duke Energy* at ¶ 8. A utility is not “given a blank check, but an opportunity to prove to the commission that it had reasonably and prudently incurred the costs it sought to recover.” *Id.* at ¶ 6. But, nowhere in the PUCO’s Order does the Commission find that FirstEnergy’s decisions to purchase In-State Non-Solar renewables were prudent and reasonable. Rather, the PUCO found that FirstEnergy’s decisions were not unreasonable. (R. 109 at 22-23, FE Appx. at 30-31). FirstEnergy failed to meet its burden and the PUCO, by improperly applying the presumption of prudence, failed to hold the Utility to its legal burden. Instead, the PUCO unreasonably and unlawfully misapplied the burden of proof by placing a burden on the intervenors to prove a negative. Therefore, upon a de novo review, this Court should reverse and remand the PUCO’s decision that allowed FirstEnergy to overcharge customers by ██████████.

PROPOSITION OF LAW 4: The Public Utilities Commission’s denial of prudent utility expenses was not against the manifest weight of the evidence.

A. There Was Sufficient Probative Evidence To Support The PUCO’s Conclusion That FirstEnergy’s Purchase Of \$43 Million Of 2011 Vintage RECs Was Imprudent.

FirstEnergy procured its renewables through a bidding process where third parties submitted bids in response to requests for proposals. It was through this process that FirstEnergy

undertook efforts to meet its renewable purchase requirements under R.C. 4928.64. (FE Appx. at 104-107). Ultimately, FirstEnergy spent ██████████ to acquire 365,808 In-State Non-Solar renewables to satisfy this statutory duty. (R. 71 (conf.) at Ex. WG-3, OCC Supp. (conf.) at 118). Of this amount, \$ ██████████ or 99.7% was paid to ██████████ at an average price of ██████████/REC. (Id.). The remaining RECs from these RFPs were purchased at an average price of ██████████/REC. (Id.). The PUCO properly found that it was imprudent for FirstEnergy to purchase 145,269 2011-vintage RECs in RFP3 from ██████████ at a price of ██████████/REC. (R. 109 at 28, FE Appx. at 36). As a result, the PUCO disallowed approximately \$43 million of FirstEnergy's costs. (Id.). This \$43 million disallowance amounts to \$298.50/REC for 145,269 RECs.⁶

The PUCO decision in this matter was based on four factors. First, the PUCO found that in August 2010 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.” (R. 109 at 25; FE Appx. at 33). Second, the PUCO found that FirstEnergy “failed to report to the Commission that the market for in-state RECs was constrained and illiquid.” (Id.) Third, the PUCO pointed to the fact that the actual purchase price was not the result of a competitive bid but a negotiated purchase price and that the price was not supported by testimony in the record. (Id.) Fourth, the PUCO found that FirstEnergy “could have requested a *force majeure* determination from the Commission instead of purchasing the vintage 2011 RECs through the August 2010 RFP.” (Id.)

FirstEnergy never asserts that the PUCO's determination is so clearly unsupported as to show misapprehension, mistake, or willful disregard of duty. Moreover, the testimony and exhibits presented in this proceeding describing the market for renewable energy in 2010

⁶ \$43,362,796.50 (\$298.50/REC for 145,269 RECs) plus carrying costs. (R. 109 at 25, FE Appx. at 33).

demonstrate that the PUCO's decision to disallow \$43.36 million for this renewable energy was not against the manifest weight of the evidence, nor was it so clearly unsupported as to "show misapprehension, mistake, or willful disregard of duty." To the contrary, sufficient probative evidence existed for the PUCO to conclude that FirstEnergy imprudently purchased these renewables.

1. **The PUCO's decision to disallow costs associated with the purchase of 2011 RECs was supported by the evidence in the case below.**
 - a. **PUCO Factor 1: Evidence supports the PUCO's conclusion that FirstEnergy should have known or actually knew that constraints in the In-State Non-Solar renewable market would be relieved by late 2010 at the time they purchased high-priced 2011 RECs in August 2010.**

As part of its rationale supporting the disallowance of costs associated with FirstEnergy's renewable purchases,⁷ the PUCO found that FirstEnergy should have known, and in fact knew that the constraints in the In-State Non-Solar market would be relieved by late 2010. (R. 109 at 25; FE Appx. at 33). FirstEnergy takes issue with this conclusion, arguing that the actual language in Navigant's October 18, 2009 memorandum to FirstEnergy explains that the "supply of Ohio RECs will continue to be very constrained through 2010," but never said that the constraints would *end* in December 2010. (FE Merit Brief at 30-34). FirstEnergy also points to the Auditor's statements regarding the availability of price information and the resulting uncertainty in the markets, and to similar testimony by its own witnesses, Dr. Earle and Mr. Bradley. (FE Merit Brief at 32). But FirstEnergy's arguments are at odds with the testimony of its other witness, Dean Stathis.

Mr. Stathis' testimony was relied upon by the PUCO in finding that FirstEnergy had knowledge that market constraints were coming to an end in Ohio's In-State Non-Solar

⁷ RFP 3.

renewables market. (R. 109 at 26-27, FE Appx. at 34, 35). Mr. Stathis testified that FirstEnergy's internal review team negotiated a lower price from the high-price bidder in RFP3. Mr. Stathis explained that the reasons for negotiating a lower price included the fact that:

[REDACTED] aid there'd be a period of about a year of constraint -- potentially a year of constrained activity in the Ohio in-state markets, and now that year period was close to [REDACTED]

(Tr. Vol. II (conf.) at 360; FE Supp. at 586 (emphasis added)). Later, Mr. Stathis testified again that Navigant [REDACTED] [REDACTED] (Tr. Vol. II (conf.) at 370; FE Supp. at 588 (emphasis added)).

FirstEnergy argues that these statements cannot "impute" knowledge to the Utility because Mr. Stathis further testified that "[w]e didn't know how much" the market was potentially changing. (FE Merit Brief at 33, citing Tr. Vol. II (conf.) at 373-374, FE Supp. at 590-91). Nevertheless, the PUCO had ample evidence to support its decision based upon Mr. Stathis' testimony, which indicated that FirstEnergy believed the constrained period was *ending* in 2010. Moreover, Mr. Stathis' testimony indicates that FirstEnergy had this belief at the time it was making decisions about RFP3. Clearly, the PUCO's view that FirstEnergy should have known, or knew, that the period of constraint was ending at the end of 2010 was based on record evidence. It was a reasonable interpretation of Mr. Stathis' testimony – and its conclusion in this respect was not against the manifest weight of the evidence.

b. PUCO Factor 2: Evidence supports the PUCO conclusion that FirstEnergy failed to advise the PUCO that the In-State Non-Solar renewables market was constrained and that FirstEnergy was under a regulatory duty to advise the Commission.

The PUCO based its decision in part on FirstEnergy's failure to advise the PUCO of constraints in the In-State Non-Solar renewables market when it submitted its ten year compliance plan. Despite FirstEnergy's arguments to the contrary (FE Merit Brief at 34-37), the record reflects that FirstEnergy's Ten Year Compliance Plan, while reporting in particular on limitations in the In-State Solar renewables market, effectively disregarded the In-State Non-Solar renewables market. (Tr. Vol. II (pub.) at 427; FE Supp. at 435-436.) The PUCO appropriately emphasized its reliance on this report to explain its understanding of the impediments facing FirstEnergy in meeting the compliance mandates. The PUCO was correct to rely on such information for purposes of providing regulatory oversight. It is unclear what actions the PUCO could or would have taken had it been advised by FirstEnergy of the constraints in the In-State Non-Solar renewables market. However, the PUCO's later discussion of the force majeure option, and its findings of force majeure for other entities to waive compliance, indicates that other alternatives such as force majeure might have been recommended by the PUCO had FirstEnergy informed the PUCO of the situation with the high-priced renewables.

c. PUCO Factor 3: Evidence supports the PUCO's conclusion that the negotiated price for In-State Non-Solar Renewables in RFP3 was not reasonable or supported in the record.

Further supporting its reasoning for disallowing the 2011-vintage In-State Non-Solar renewables purchased through RFP3, the PUCO found that FirstEnergy failed to carry its burden of proof that the purchase price was reasonable. (R. 109 at 27; FE Appx. at 35). The PUCO explained that there was "no evidence" that the negotiated price for

the 2011 RECs was reasonable because FirstEnergy failed to provide a witness who participated in the negotiation of the purchase price. (Id.) The PUCO also recognized that there “is no other evidence in the record that the agreed purchase price was reasonable.” (Id.).

FirstEnergy takes issue with the PUCO’s conclusions in this respect, stating that the original bid price itself was “reasonable” because it was obtained through a “well-designed, well-run RFP.” (FE Merit Brief at 38). FirstEnergy, however, consistently relies upon the incorrect theory that a competitive bid process always produces a competitive outcome. (FirstEnergy Merit Brief at 2, 3, 10, 27, 38, 41). The evidentiary record, however, tells a different story – a story of FirstEnergy paying exorbitant prices to ██████████ that were not consistent with what was paid for similar products in other states, and what experts recognized as reasonable.

A significant part of the Auditor’s assessment in this proceeding was U.S. Department of Energy (“DOE”) data, which reported renewable energy prices throughout the U.S. (R. 18 at 26; FE Supp. at 132). In its Final Report, the Auditor presented a table showing “Compliance market (primary tier) REC prices, January 2008 to December 2011,” for 11 states and the District of Columbia. (Id.). The Exeter auditor explained that:

Between mid-2008 and December 2011, none of the non-solar REC prices reported by DOE was above \$45 and in almost all cases significantly below that level. * * * Additionally, the overall trend in REC prices has been declining during that period from January 2008 through mid-2011. Beginning in mid-2011, there have been marked increases in the prices of RECs for some of the states included in the DOE reporting due to certain state changes to renewable eligibility and also increasing percentage requirements for renewables.

(Id.) In fact, the DOE did not report any renewable energy prices higher than \$52/mWh since January 2008. (R. 56 at 9, OCC Supp. at 11). This pricing information was available at the time FirstEnergy made its purchases in this case. (R. 18 at n.14, FE Supp. at 132).

Some states, such as Pennsylvania, also gather market price data for government publications, further indicating a reasonable price of In-State Non-Solar renewables far lower than what FirstEnergy paid [REDACTED].⁸ Pennsylvania's 2009 annual report of renewable prices reflected a weighted average price of \$3.65 per Tier 1⁹ non-solar REC (prices ranged from a high of \$23/REC to a low of \$0.50/REC). (Tr. Vol. I (pub.) at 174-175, OCC Supp. at 115-116; Tr. Vol. I (pub.) at OCC Ex. 2, OCC Supp. at 119). The 2010 Tier 1 non-solar RECs sold at a similar weighted average price of \$4.77/REC, with a high price of \$24.15/REC and a low price of \$0.50/REC. (Id.). Pennsylvania prices for 2011 non-solar RECs – the year (vintage) of the disallowed purchases – had a weighted average price of \$3.94/REC, which ranged from \$0.14/REC to \$50.00/REC. (Id.) Even in 2008, one year after Pennsylvania's compliance mandates took effect and nearly two years before FirstEnergy's RFP3 purchases, the weighted average price of Tier I renewables was \$4.48/REC (high price of \$20.50/REC; low price of \$1.00/REC). (Id.). Not only was this information available to FirstEnergy at the time of RFP3, but it reflected prices for a similar product in a similarly nascent market. The Pennsylvania market, even in its infancy, did not garner prices anywhere close to the \$ [REDACTED] /REC that FirstEnergy paid to [REDACTED], indicating the unreasonableness of FirstEnergy's decision.

FirstEnergy fails to establish that the PUCO's disallowance was against the manifest weight of the evidence by arguing that the In-State requirement distinguishes the reasonable level of price paid for Ohio non-solar renewables from prices paid in other states for non-solar renewables. (FE Merit Brief at 33-34 & n.19). It is true that "there are significant differences

⁸ [REDACTED] (Tr. Vol. I (conf.) at 142, OCC Supp. (conf.) at 120).

⁹ Pennsylvania has two tiers of non-solar renewables. The Tier I Non-Solar RECs reported here are significantly more expensive than the Tier II RECs based on the reported data.

among the RPS [Renewable Portfolio Standards] programs in the various states with respect to eligible resources (technologies and locations), the percentage renewable requirements, and set-asides for particular technologies.” (R. 18 at n. 15, FE Appx. at 132). During the relevant period, Ohio’s legislation required that at least 50% of all renewable energy purchased to meet Ohio’s compliance requirements, “be met through facilities located” in Ohio with the balance to be met with resources “deliverable” into Ohio. Former R.C. 4928.64((B)(3)). Other states only require development within a particular region of the country. (R. 51 at Ex. Att. RE-12; OCC Supp. at 132-133). Despite this difference among state practices, however, PUCO Staff witness Dr. Estomin and OCC Witness Mr. Gonzalez both found that the effect of Ohio’s in-state requirement is significantly smaller than what FirstEnergy suggests.

Dr. Estomin explained that while he would expect to see “different values of RECs in different states” because of a number of factors, he would not have expected to see such a vast price differential between the amounts paid by FirstEnergy and the amounts paid for the same product in other states. (R. 18 at 30, FE Appx. at 136). In particular, the Exeter Audit Report states:

As noted previously in this report, none of the RECs prices elsewhere in the country were trading at prices more than \$45 per REC during the relevant period, and many were selling for prices considerably lower. While this information does not translate to what RECs prices in Ohio should be, the underlying economic factors are the same, that is, the price of RECs should be adequate to cover the higher costs of generation using renewable technologies, subject to the economic impacts of the differences in state legislation. There is no basis for concluding that the cost of renewable energy development in Ohio differs so markedly from the cost of renewable development elsewhere in the country so as to warrant RECs prices of \$■■■■ or more in Ohio compared to the RECs prices seen elsewhere.

RECs prices of that magnitude clearly indicate that some degree of market power is being exercised by a segment of the market given offered prices well above the cost of production. Consequently, the prices offered for the high-priced RECs, and accepted by the Companies, were composed largely of economic rents.

(Id.). Similarly, OCC witness Gonzalez testified that “[a]lthough other REC market data may not have been readily available for the nascent market in Ohio, to assume that Ohio was such an outlier from every other state is mind-boggling.” (R. 56 at 18; OCC Supp. at 20). Mr. Gonzalez also pointed out that “New England states had a similar restriction masked as a stringent delivery into the state requirement * * * but did not experience the economic rents paid by FirstEnergy.” (R. 56 at 14-15; OCC Supp. at 16-17).

Moreover, Spectrometer, a broker that reports market price data, published a report in August 2010 (the same month that FirstEnergy conducted RFP3), indicating that Ohio In-State Non-Solar renewables were being sold for ██████ - ██████ per REC. (Tr. Vol. II (conf.) at OCC Ex. 15, OCC Supp. at 190-195; *see also* Tr. Vol. II (conf.) at 493, OCC Supp. (conf.) at 124). While Spectrometer did not report the volume of trades in the market, it is still probative evidence indicating what In-State Non-Solar renewables were selling for in Ohio. This information was available at the time FirstEnergy made its imprudent purchases. Broker reports are particularly probative information that has been relied upon by the Department of Energy in performing its market assessments. (Tr. Vol. I (pub.) at 49, OCC Supp. at 112).

The record in this case indicates that it was not against the manifest weight of the evidence for the PUCO to disallow the costs associated with the 2011 vintage RECs that FirstEnergy purchased for ██████.

d. PUCO Factor 4: The PUCO properly concluded that FirstEnergy could have filed for force majeure relief.

FirstEnergy’s imprudence not only stemmed from its unrealistic evaluation of the market, but its failure to consider alternatives available under Ohio law. Under Ohio law, FirstEnergy was able to make a \$45/REC alternative compliance payments (“ACP”) in lieu of purchasing renewables, R.C. 4928.64(C)(2), or apply for force majeure. R.C. 4928.64(C)(4)(a); *see also*,

(FE Appx. at 106-107). The PUCO never specifically reached the ACP issue after finding that it was imprudent to purchase RECs at [REDACTED]. The PUCO did, however, conclude that FirstEnergy “could have requested a *force majeure* determination from the Commission instead of purchasing the vintage 2011 RECs through the August 2010 RFP.” (R. 109 at 27-28, FE Appx. at 35-36). The PUCO relied upon its decision earlier that year in an AEP Ohio case. *In Re Columbus Southern Power Company*, 2010 Ohio PUC LEXIS 6, Entry (Jan. 7, 2010).

Disputing the PUCO’s reliance on the availability of force majeure relief (but not disputing that there was time to seek such relief), FirstEnergy argues that the term “reasonably available” only refers to whether there were In-State Non-Solar renewables that *could* be purchased and did not include consideration of the price of the renewables. (FE Merit Brief at 40-43). Neither the term “reasonable” nor the phrase “reasonably available” is defined in R.C. 4928.64. But the term “reasonable” is a common modifier in legal provisions and has a common and well-established meaning. *Chester v. Custom Countertop & Kitchen*, 11th Dist. No. 98-T-0193, 1999 Ohio App. LEXIS 6138 (Dec. 17, 1999). The plain language “reasonably available” means that the renewable purchase requirement should be excused if renewables cannot be acquired under reasonable circumstances. It was unreasonable for FirstEnergy to narrowly construe the force majeure provision of the law to exclude consideration of price as a basis for relief. The PUCO appropriately found that considerations relating to force majeure include the length of time the market had to develop, the period during which necessary rules of implementation were in effect, the status of the certification process, and price.¹⁰

¹⁰ *In Re Application of DPL Energy Resources Inc. for an Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code*, Pub. Util. Comm. No. 09-2006-EL-ACP, 2011 Ohio PUC LEXIS 371, Finding & Order (Mar. 23, 2011) (emphasis in original). *In Re Application of FirstEnergy Solutions Corp. for Approval of its Alternative Energy Annual Status Report and for an Amendment of its 2009 Solar Energy Resources Benchmark Pursuant to Section 4928.64(C)(4)(a), Revised Code*, Pub. Util. Comm. No. 10-467-

FirstEnergy also attempts to equate the words “reasonably available” with other language used in R.C. 4928.64(C)(4), which directs the PUCO to consider whether the utility “has made a good faith effort” to acquire the renewables. (FE Merit Brief at 40). While “efforts” are to be considered in this assessment, the determination of whether renewables are “reasonably available” does not turn on “efforts” alone. The PUCO appropriately considered market conditions, including price, as the primary determinant of whether In-State Non-Solar renewables were “reasonably available.”

Additionally, FirstEnergy’s assertion that the “3 percent cost cap” on expenditures for renewables was intended as the only dollar-related check on renewable purchases is not supported by Ohio law and precedent. (FE Merit Brief at 42-43). The law’s 3 percent cost cap provision states that a utility “need not comply” with a renewables benchmark “to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more.” R.C. 4928.64(C)(3) (FE Appx. at 107). FirstEnergy’s argument is peculiar because the Utility later argues that the 3 percent cost cap is within the utility’s discretion. (FE Merit Brief at 49-50). But a completely discretionary cost cap would leave customers with no protection from excessive expenditures. There is also no basis for FirstEnergy’s argument that two different forms of protection for customers from paying excessive prices would be “redundant.” An overall cost cap and a

EL-ACP, 2011 Ohio PUC LEXIS 238, Finding & Order (Feb. 23, 2011); *In Re Duke Energy Retail Sales, LLC’s Annual Alternative Energy Portfolio Status Report*, Pub. Util. Comm. Nos. 10-508-EL-ACP, et al., 2011 Ohio PUC LEXIS 255, Finding & Order (Feb. 23, 2011) (reaching similar conclusions regarding the infant state of the Commission’s certification process and state of the market); *In Re Application of the Retail Electric Supply Association for an Amendment to the 2009 Solar Energy Resource Benchmark Pursuant to Section 4928.64(C)(4), Revised Code*, Case No. 10-428-EL-ACP, 2010 Ohio PUC LEXIS 455, Finding & Order (Apr. 28, 2010) (recognizing that the Commission’s rules did not become effective until December 10, 2009 and that the certification process for S-RECs was in its infancy); *In Re Noble Americas Energy Solutions*, 2011 Ohio PUC LEXIS 944, Finding & Order (Aug. 3, 2011).

provision providing relief from market conditions, including conditions that produce excessive prices, serve different purposes and are not redundant.

2. The PUCO's calculation of the amount of disallowance was appropriate.

The PUCO properly found that certain In-State Non-Solar renewables should not have been purchased. R.C. 4909.154 provides that the PUCO “shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.” (OCC Appx. at 282). Under this authority, the PUCO could have disallowed the entire amount of the purchases, providing a strong deterrent to imprudent purchases. Instead, the PUCO chose to soften the effect of the deterrent by reducing the disallowance by the amount of the low bidder’s price – [REDACTED]/REC. (R. 109 at 28, FE Appx. at 36). Nevertheless, FirstEnergy argues that the PUCO’s disallowance calculation, was “internally inconsistent” and against the manifest weight of the evidence. (FE Merit Brief at 43, 47-49).

FirstEnergy argues that it is inconsistent for the PUCO to use the other bidder’s price as an offset because it was not a bid for the same amount of renewables. (FE Merit Brief at 43). It also argues that it was inconsistent for the PUCO to have allowed laddering – purchasing energy for future periods as well as for the current period – in some of the bids, but not for RFP3. (Id.). But the PUCO’s finding that these specific purchases were imprudent and that laddering under the circumstances was not prudent was based on changes in the marketplace from 2009 to 2010. (R. 109 at 25-26; FE Appx. at 33-34). FirstEnergy ignores the PUCO’s conclusion that these renewables should never have been purchased at the price paid. The offset represented what the PUCO believed was a reasonable price for In-State Non-Solar renewables at the time. For a

variety of reasons, the PUCO found that it was not prudent to continue laddering purchases made in 2010 for 2011. The PUCO stated:

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 3602). 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 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.

(R. 109 at 25-26, FE Appx. at 33-34).

There is no internal inconsistency with respect to the PUCO's acceptance of laddering in one period and its rejection of laddering for another period. This is an issue that turns on the specific facts at that point in time and the facts changed. Although laddering is an often used purchasing tool, the PUCO appropriately recognized that the use of that tool is not appropriate in all markets, for all quantities, or at all times. The PUCO found, for good reasons, that laddering purchases of 2011 vintage In-State Non-Solar renewables in August 2010 was not reasonable.

FirstEnergy also makes a desperate argument that “some amount of the Companies’ purchases” above that paid to the second bidder was prudent, suggesting that the Commission should have approved 73% of such purchases because that was the amount allowed to be laddered in 2009 for 2010. (FE Merit Brief at 46, n.24). Again, FirstEnergy misses the crux of the PUCO’s decision – the market was different in 2009 v. 2010. As a result, the PUCO concluded that FirstEnergy’s laddering approach for the quantity of RECs purchased was inappropriate. Prudent decision making is not the implementation of the same action regardless of the circumstances. FirstEnergy’s argument is without merit and should be rejected.

Similarly, FirstEnergy’s claim that it saved customers \$25.4 million is baseless. (FE Merit Brief at 40). The PUCO correctly recognized that \$25.4 million was a reduction from an excessive price, but it was still significantly higher than what could be justified given the first bidder’s bid and the other circumstances relied upon by the PUCO.

FirstEnergy’s request for a lower disallowance based upon a higher offset price -- more than the price paid to the first bidder -- should also be rejected. (FE Merit Brief at 47-49). Effectively, the PUCO concluded that it was not appropriate to purchase the renewables at a price exceeding that offered by the first bidder. In its Second Entry on Rehearing, the PUCO stated that the first bidder’s price was “the most appropriate offset price.” (R. 143 at 25-26, FE Appx. at 70-71). Although the PUCO was not required to credit such an offset to FirstEnergy’s imprudent purchases, given the findings discussed above, the first bidder price was a reasonable offset to apply. Furthermore, FirstEnergy’s argument that the only appropriate offset was “the price initially offered to or actually paid by the Companies” (FE Merit Brief at 48) would invalidate the PUCO’s finding of imprudence and should be rejected as baseless.

PROPOSITION OF LAW 5: The Public Utilities Commission does not engage in unlawful retroactive ratemaking when it disallows expenses collected through a utility's adjustable rates.

This Court should uphold the PUCO's decision lowering the expenses to be collected from customers by \$43.4 million to exclude imprudent costs. Such an adjustment to include in rates only actual, prudent costs incurred does not constitute retroactive ratemaking. Accordingly, FirstEnergy's contention that this Court's 1957 decision in *Keco Industries v. Cincinnati & Suburban Bel Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d (1957) ("*Keco*") prevents the PUCO from adjusting Rider AER in this manner is wrong. (FE Merit Brief at 18-26).

Although FirstEnergy recognizes that the case of *River Gas Co. v. Publ. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E. 2d 568 (1982) ("*River Gas*") established an exception to *Keco's* retroactive ratemaking doctrine for rate mechanisms that "are adjusted as gas prices fluctuate," FirstEnergy incorrectly attempts to distinguish *River Gas* from this case. (FE Merit Brief at 22-26.) FirstEnergy contends that *River Gas* does not stand for the proposition that "traditional base rate proceedings implicate the retroactive ratemaking doctrine, while rates arising from variable rate schedules do not." (Id. at 23.) Instead of this fairly straightforward distinction between *Keco* and *River Gas*, FirstEnergy argues that the natural gas price adjustments in *River Gas* were "automatic," whereas the rates in *Keco* were "approved" rates. (Id.). FirstEnergy then argues that the Rider AER rates at issue in this case, although adjusted every quarter like the rates in *River Gas*, were "approved" rates. But FirstEnergy's arguments misconstrue the holding in *River Gas* to suggest its desired result.

The *River Gas* exception does not turn on whether the rate has been approved – all rates have to be approved in a ministerial¹¹ sense before being charged to customers. Indeed, the Ohio Revised Code mandates that:

No rate . . . , no change in any rate . . . , and no regulation or practice affecting any rate . . . of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18, 4909.19, and 4909.191 of the Revised Code.

R.C. 4909.17 (OCC Appx. at 283). The applicable distinction upon which the *River Gas* exception is based is not in whether the rates are approved in a ministerial sense, but in whether the particular rates are set subject to adjustment. As this Court explained:

the fuel cost adjustment provisions of *R.C. Chapters 4905 and 4909* represent a statutory plan which authorizes a utility to pass variable fuel costs directly to consumers. Rates are thereby varied without prior approval of the commission, and independently from the formal rate-making process incorporated in *R.C. 4909.18 and 4909.19. * * **

River Gas, 69 Ohio St. 2d at 513,433 N.E. 2d 568, citing *Consumers' Counsel v. Pub. Util.*

Comm., 57 Ohio St.2d 78, 82-83, 384 N.E.2d 245 (1979); *See, also, Ford Motor Co. v. Pub. Util.*

Comm., 52 Ohio St. 2d 142, 151, 370 N.E.2d 468 (1977).

While the ministerial act of approval must still take place for variable rates, until the actual costs are known and a prudence review of those costs is conducted such as occurred in this proceeding, the Supreme Court recognized that the justness and reasonableness of the rate would necessarily remain subject to review and final determination by the PUCO. The prospect of

¹¹ The Administrative Procedures Act, although not specifically applicable to adjudications of the Public Utilities Commission, excludes from the definition of “Adjudication,” “the issuance of a license in response to an application with respect to which no question is raised nor any other acts of a ministerial nature.” R.C. 119.01; (OCC Appx. at 265-266). FirstEnergy’s quarterly filings, submitted thirty days before their effective date, and showing no cost or other information from which the rate could be determined, were nothing more than such a ministerial act with no judgment or discretion to be exercised by the Commission.

PUCO review results in variable rates, which do not “constitute[] ratemaking in its usual and customary sense.” *Id.*

The process of reviewing variable rates is well-established in Ohio. These rates are initially projected based on estimates of the costs that may be incurred in providing the service. Then, after the actual costs are incurred, the costs incurred are subjected to a prudence review through an audit. In this case, the PUCO retained both a financial auditor and a management performance auditor to review the financial calculations of Rider AER as well as prudence. The Commission’s first audit of FirstEnergy’s Rider AER, which went into effect on July 1, 2009, was the one conducted in this case. After the PUCO determines the prudent costs allowed for the time frame in question, the rates going forward are then adjusted to reflect either an under- or over-collection of the charges during the historic time frame. The PUCO’s order in the FirstEnergy case establishing Rider AER only allowed FirstEnergy to charge for “prudently incurred costs.” *In Re Ohio Edison Company*, 2009 Ohio PUC LEXIS 279, Second Opinion and Order at **17, 40. Until that audit for the period being reviewed is completed, the rates at issue are not “Commission-made rates” and are subject to adjustment. This process has long been utilized in natural gas and electric fuel audit proceedings. Rider AER is nothing more than a fuel adjustment clause to which these same rules of review apply.

FirstEnergy’s reliance on two *Columbus Southern Power Company* cases is misplaced. (FE Merit Brief at 20, 21, citing *In Re Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio 1788, 947 N.E.2d 655 and *In Re Application of Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.2d. 863). In each of those cases, this Court was addressing Provider of Last Resort (“POLR”) charges that were not subject to adjustment based on actual costs incurred.

Specifically, in *In Re Columbus Southern Power Co.*, the 128 Ohio St. 3d 512, 2011-Ohio 1788, 947 N.E.2d 655, the PUCO permitted 12 months of revenue to be collected from customers over a nine-month period. Although the Court found that the utility had unlawfully collected \$63 million, it also found that it would be improper to refund the improper revenue because it had already been collected from customers pursuant to a PUCO order. *Id.* at 514. That case, however, did not involve a claim that the POLR charges constituted variable rates subject to adjustment for actual, prudent costs incurred.

Furthermore, the Court found later in the related remand proceeding that the argument that the amount of the deferred fuel costs could be adjusted to compensate for the improperly collected POLR charges had not been preserved below. As a result, while the argument might have merit, it could not be raised on appeal. *In Re Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio 1788, 947 N.E.2d 655 and *In Re Application of Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.2d. 863.

The Supreme Court never reached the *River Gas* issue – whether projected amounts could be reconciled with actual, prudent charges incurred – in either of the *Columbus Southern* decisions upon which FirstEnergy relies. In the current case, audits and adjustments for actual costs incurred were part of the ongoing approval of Rider AER. This was made clear by the Commission’s approval of the Stipulation establishing Rider AER, providing for quarterly rate adjustments to recover the “prudently incurred costs” for renewables. *In Re Ohio Edison Company*, 2009 Ohio PUC LEXIS 279, Second Opinion and Order at **17, 40. The fact that the approved tariff provided for ministerial approval of quarterly adjustments to Rider AER within thirty days of submission of a tariff did not change the fact that Rider AER is a rate that is subject to ongoing adjustment and audit just like the natural gas price adjustments in *River Gas*.

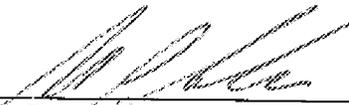
Certainly, neither FirstEnergy nor the PUCO ever contemplated that anything other than a ministerial review would, or could, be conducted within thirty days. Such a time frame would hardly allow parties sufficient time to review the filing, let alone conduct discovery and a PUCO hearing. FirstEnergy's arguments that review of Rider AER did not fall squarely under the *River Gas* doctrine lack any merit and should be rejected.

IV. CONCLUSION

The PUCO's \$43.36 million disallowance of FirstEnergy's excessively priced In-State Non-Solar renewables purchases from ██████████ in RFP3 for 2011-vintage RECs should be affirmed. The Supreme Court should remand the PUCO's decisions permitting the Utility to charge customers ██████████ for exorbitantly priced renewables with instructions that the PUCO correct the errors found. This will require the PUCO to place the burden of proof on FirstEnergy. FirstEnergy would have to prove that its renewables purchases were prudent. Otherwise, the PUCO must order a return to customers of an additional ██████████ in unjust and unreasonable charges. Additionally, the Court should reject FirstEnergy's arguments that 2009 and 2010 bid information should continue to be protected as trade secret information. The PUCO should be reversed on its decision that hides information from the public that is not trade secret.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

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

**PUBLIC APPENDIX
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ORIGINAL

IN THE SUPREME COURT OF OHIO

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The Toledo Edison Company.)
) Public Utilities Commission of Ohio Case
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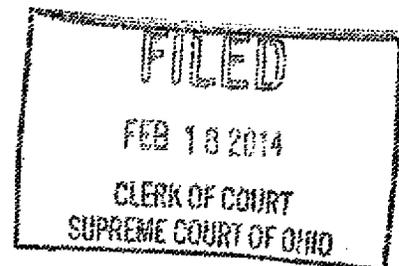
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NOTICE OF APPEAL

Intervening Appellee, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(A)(2), 3.11(C)(2), and 10.02, hereby gives notice to this Court and to the Public Utilities Commission of Ohio ("Commission" or "PUCO") of this cross-appeal from PUCO decisions issued in Case No. 11-5201-EL-RDR. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on August 7, 2013, and the PUCO's Second Entry on Rehearing entered in its Journal on December 18, 2013.¹

On August 7, 2013, the PUCO decided that customers do not have to pay \$43,362,796.50 (plus carrying costs) to FirstEnergy² for its imprudent purchase (in 2010) of 2011-vintage In-State All Renewable Energy Credits ("RECs"). *See In the Matter of the Review of The Alternative Energy Rider Contained in The Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 11-5201-EL-RDR (Opinion and Order at 25) (Aug. 7, 2013). The PUCO found 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." *Id.* at 28. That PUCO finding is correct. But the PUCO unlawfully permitted FirstEnergy to keep a lot more of its customers' money for other imprudent REC purchases. And the PUCO allowed FirstEnergy to conceal from the

¹ Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

² "FirstEnergy," "Utilities" and "Companies" mean the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

public the amounts that it paid and the identity of the suppliers who it bought REC's from as far back as 2009.

The OCC is the statutory representative, as established under R.C. Chapter 4911, of the residential customers of FirstEnergy. OCC was a party of record in the above-referenced PUCO case.

On September 6, 2013, OCC filed a timely Application for Rehearing from the August 7, 2013 Opinion and Order, in accordance with R.C. 4903.10. The PUCO issued an Entry on Rehearing dated September 18, 2013, in part, to further consider the matters specified in numerous parties' applications, including OCC's Application for Rehearing. OCC's Application for Rehearing was denied by a Second Entry on Rehearing on December 18, 2013.

OCC was granted intervention as an Appellee in this proceeding on January 23, 2014. OCC files this Notice of Cross-Appeal complaining of errors in the PUCO's August 7, 2013 Opinion and Order and its Second Entry on Rehearing. OCC alleges that the PUCO's Order and Entry are unlawful and unreasonable in the following respects, all of which were raised in OCC's Application for Rehearing:

- A. **The PUCO's Decision That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase In-State All Renewable Energy Credits (Procured Through The August 2009 RFP, October 2009 RFP, And August 2010 RFP – 2010 Vintage) Was Unlawful and Unreasonable Because FirstEnergy Did Not Meet Its Burden Of Proof That Those Costs Were Prudently Incurred.**
 1. The PUCO acted unlawfully and unreasonably when it decided that customers should have to pay for FirstEnergy's decisions to purchase in-state all renewable energy credits (procured through the August 2009 RFP, October 2009 RFP, and August 2010 RFP – 2010 vintage) without finding that FirstEnergy met its burden of proof that those costs were prudently incurred.

2. The PUCO acted unlawfully and unreasonably when it presumed that FirstEnergy's management decisions to purchase renewable energy credits were prudent.
 3. The PUCO acted unlawfully and unreasonably when it presumed that FirstEnergy's management decisions to purchase renewable energy credits were prudent, because there is no presumption of prudence when analyzing transactions between affiliated companies.
 4. Even if the PUCO did not err when it presumed that FirstEnergy's management decisions were prudent, the PUCO acted unlawfully and unreasonably because it failed to properly apply such presumption.
- B. The PUCO Acted Unlawfully and Unreasonably When It Allowed FirstEnergy To Collect Costs from Customers Without A Finding of Prudence, Contrary to R.C. 4903.09.
- C. The PUCO Acted Unlawfully and Unreasonably When It Prevented The Public Disclosure Of Information Relating To FirstEnergy's Imprudent Purchases Of In-State All Renewable Energy Credits.
- D. By Improperly Applying R.C. 1331.61(D) and Violating R.C. 4901.13, R.C. 4905.07 and Ohio Adm. Code 4901-1-24(D)(1), the PUCO Unlawfully Granted FirstEnergy's Motions for Protective Orders, Preventing Disclosure Of Public Information Relating To the Identity of Bidders from which FirstEnergy Purchased In-State All Renewable Energy Credits and the Prices Paid for Those Renewable Energy Credits.
1. The PUCO acted unlawfully and unreasonably when it found that the identities of suppliers and the specific prices that FirstEnergy paid for renewable energy credits was economically valuable information.
 2. The PUCO acted unlawfully and unreasonably when it granted FirstEnergy's Motions for Protective Orders which concealed from the public information that FirstEnergy failed to sufficiently protect.
 3. The PUCO acted unlawfully and unreasonably when it failed to find that FirstEnergy's Motion for Protection of Supplier Identities and Pricing Information was untimely.

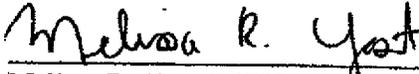
4. It was unlawful and unreasonable for the PUCO to affirm the Attorney Examiner's ruling that granted FirstEnergy's second Motion for Protective Order, which concealed public information in the draft Exeter Audit Report.
5. It was unlawful and unreasonable for the PUCO to grant FirstEnergy's fourth Motion for Protective Order, which prevented OCC from publicly disclosing its recommendation to the PUCO regarding the total dollar amount that FirstEnergy should have to credit back to its customers for overcharges.

Finally, OCC respectfully requests this Honorable Court designate OCC as an Appellee/Cross-Appellant for purposes of this proceeding. Such designation is appropriate and coincides with the intent of OCC's Notice of Cross-Appeal.

WHEREFORE, OCC respectfully submits that the PUCO's Opinion and Order and Second Entry on Rehearing are unreasonable and unlawful in regard to the errors discussed above, and should be reversed or modified with instructions to the PUCO to correct the errors complained of herein.

Respectfully submitted,

Bruce J. Weston (0016973)
OHIO CONSUMERS' COUNSEL

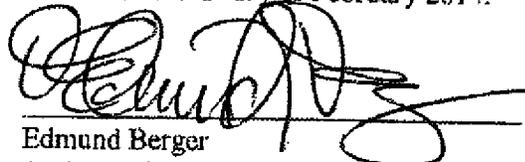


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Cross-Appeal by the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 18th day of February 2014.


Edmund Berger
Assistant Consumers' Counsel

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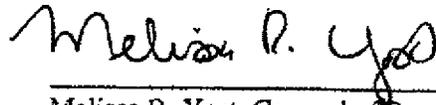
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CERTIFICATE OF FILING

I hereby certify that a Notice of Cross-Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.



Melissa R. Yost, Counsel of Record
Counsel for Appellee/Cross-Appellant
Office of the Ohio Consumers' Counsel

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,) Case No. 11-5201-EL-RDR
The Cleveland Electric Illuminating)
Company, and The Toledo Edison)
Company.)

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.

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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.

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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

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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

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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 true-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

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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

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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

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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.

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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

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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

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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

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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 RBCs 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 RBC 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

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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

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

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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

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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

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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

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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' prudence, 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.

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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

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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

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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

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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 REC 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 through 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

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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 through a competitive auction.

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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-EBC, 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

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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 through 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 through 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

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Companies (Co. Ex. 1 at 37-38). Navigant's market assessment report dated October 18, 2009, state that the supply of Ohio REC's 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 REC's obtained in the August 2010 RFP. If the Companies had rejected the results of the vintage 2010 REC's 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 REC's 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 REC's offered through a competitive auction.

(b) 2011 Vintage REC's

The Commission finds that recovery of \$43,362,796.50 for 2011 vintage REC's 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 REC's 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 REC's 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 360²). FirstEnergy witness Stathis acknowledged that new market information was available to the Companies in August 2010. This information included a second bidder for the REC's, which was consistent

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

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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

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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 through 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

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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.

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(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 is 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.

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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

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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.

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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).

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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.

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- (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,

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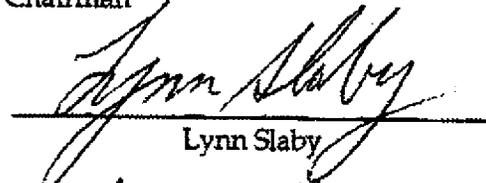
ORDERED, That FirstEnergy credit Rider AER in the amount of \$43,362,796.50, plus carrying costs, and file tariff schedules within 60 days of the issuance of a final appealable order in this proceeding, adjusting Rider AER to reflect such credit and associated carrying costs. It is, further,

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

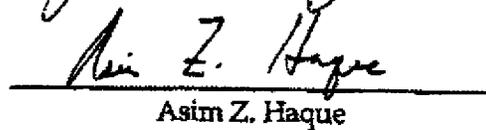
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Smithler, Chairman


Steven D. Lesser


Lynn Slaby

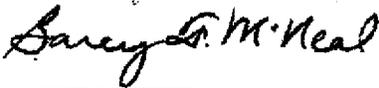

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~~AUG 07 2009~~



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,) Case No. 11-5201-EL-RDR
The Cleveland Electric Illuminating)
Company, and The Toledo Edison)
Company.)

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.

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- (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 be 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

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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

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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

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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

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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 prudence 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

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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.

Prudency of Costs Incurred

RFP1, RFP2, RFP3 (2010 Vintage RECs)

- (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

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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,

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additionally, because additional REC's 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 REC's 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 REC's if a force majeure application was rejected.

FirstEnergy contends that the Companies' purchases of in-state all renewables REC's in the second RFP were prudent. More specifically, FirstEnergy contends that overwhelming evidence suggests that the market for in-state all renewables REC's 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 REC's in the third RFP were prudent

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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

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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

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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

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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

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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 REC's obligation on the basis that R.C. 4928.64(C)(4) does not permit a force majeure determination based on the cost of REC's.

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 REC's 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 REC's 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 REC's 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

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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).

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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,

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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

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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

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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.

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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 BSP 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

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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

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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

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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 prudence 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

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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

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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

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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

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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.

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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 argues 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

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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.

Statutory Three Percent Provision

- (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

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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

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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.

Draft Exeter Report

- (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

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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

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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

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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

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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

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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.

AEP Ohio's Intervention

- (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

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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 AEP's 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.

11-5201-EL-RDR

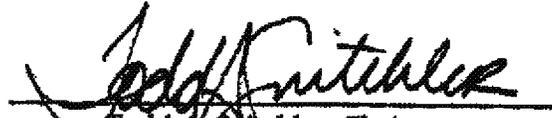
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It is, therefore,

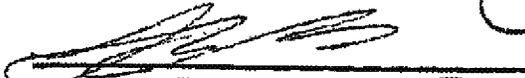
ORDERED, That the applications for rehearing filed by IGS Energy, OCC, FirstEnergy, the Environmental Groups, and AEP Ohio are denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

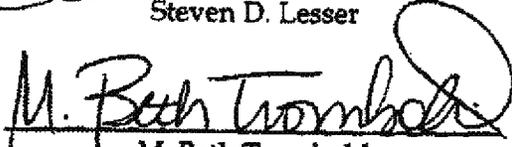


Todd A. Stritchler, Chairman

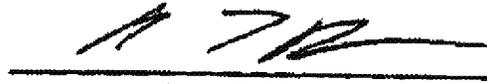


Steven D. Lesser

Lynn Slaby



M. Beth Trombold

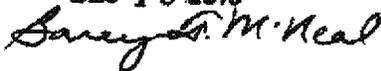


Asim Z. Haque

MWC/sc

Entered in the Journal

~~DEC 18 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,) Case No. 11-5201-EL-RDR
The Cleveland Electric Illuminating)
Company, and The Toledo Edison)
Company.)

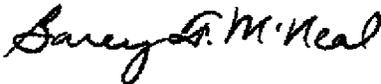
DISSENTING OPINION OF COMMISSIONER LYNN SLABY

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, Commissioner

LS/sc

Entered in the Journal
DEC 18 2013



Barry F. McNeal
Secretary

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

PROCEEDINGS

before Mr. Gregory Price, Hearing Examiner, at the
Public Utilities Commission of Ohio, 180 East Broad
Street, Room 11-C, Columbus, Ohio, called at 10:00
a.m. on Tuesday, November 20, 2012.

ARMSTRONG & OKEY, INC.
222 East Town Street, 2nd Floor
Columbus, Ohio 43215
(614) 224-9481 - (800) 223-9481
Fax - (614) 224-5724

(2)

1 APPEARANCES:

2 FirstEnergy
3 By Mr. James W. Burk
4 And Ms. Carrie M. Dunn
5 76 South Main Street
6 Akron, Ohio 44308

7 Jones Day
8 By Mr. David A. Kutik
9 901 Lakeside Avenue
10 Cleveland, Ohio 44114

11 On behalf of the Company.

12 Vorys, Sater, Seymour and Pease
13 By Mr. M. Howard Petricoff
14 And Mr. Stephen M. Howard
15 52 East Gay Street
16 Columbus, Ohio 43216

17 On behalf of the IGS Energy.

18 Bruce J. Weston, Ohio Consumers' Counsel
19 By Ms. Melissa R. Yost
20 Assistant Consumers' Counsel
21 10 West Broad Street, 18th Floor
22 Columbus, Ohio 43215

23 On behalf of OCC.

24 Williams, Allwein & Moser, LLC
25 By Mr. Christopher J. Allwein
1373 Grandview Avenue, Suite 212
Columbus, Ohio 43212

On behalf of the Sierra Club.

Ohio Environmental Council
By Mr. Trent A. Dougherty
and Ms. Catherine N. Lucas
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43215

On behalf of the OEC.

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APPEARANCES (Continued):

Bricker & Eckler
By Mr. Matthew W. Warnock
100 South Third Street
Columbus, Ohio 43215

On behalf of OMA.

Bricker & Eckler
By Mr. J. Thomas Siwo
and Terrence O'Donnell
100 South Third Street
Columbus, Ohio 43215

On behalf of the Mid-Atlantic Renewable
Energy Coalition.

Mike DeWine, Ohio Attorney General
By Thomas G. Lindgren
Assistant Attorney General
180 East Broad Street, 6th Floor
Columbus, Ohio, 43215

On behalf of the Staff.

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(4)

1 Tuesday Morning Session,
2 November 20, 2012.

3 - - -

4 EXAMINER PRICE: Let's go on the record
5 please.

6 Good morning. The Public Utilities
7 Commission has set for this time and this place a
8 prehearing conference in Case No. 11-5201-EL-RDR,
9 being In the Matter of the Review of the Alternative
10 Energy Rider Contained in the Tariffs of Ohio Edison,
11 Company, The Cleveland Electric Illuminating Company,
12 and The Toledo Edison Company.

13 My name is Gregory Price, I'm the
14 Attorney Examiner assigned to preside over today's
15 prehearing conference.

16 Let's begin by taking appearances
17 starting with the company.

18 MR. BURK: On behalf of the companies,
19 James W. Burk and Carrie M. Dunn, 76 South Main
20 Street, Akron, Ohio, and also on behalf of the
21 companies David Kutik, the Jones-Day law firm, North
22 Point, 901 Lakeside Avenue, Cleveland, Ohio.

23 EXAMINER PRICE: Mr. Lindgren?

24 MR. LINDGREN: On behalf of the staff of
25 the Commission, Ohio Attorney General Mike DeWine, by

(5)

1 Thomas G. Lindgren, Assistant Attorney General, 180
 2 East Broad Street, 6th Floor, Columbus, Ohio, 43215.

3 EXAMINER PRICE: Thank you.

4 MR. HOWARD: Your Honor, on behalf of the
 5 Interstate Gas Supply, Inc., d/b/a IGS Energy, please
 6 have the record reflect the appearance of the law
 7 firm of Vorys Sater, Seymour and Pease, 52 East Gay
 8 Street, Columbus, Ohio, 43216, by M. Howard Petricoff
 9 and Stephen M. Howard. Thank you.

10 EXAMINER PRICE: Thank you.

11 MS. YOST: Good morning. On behalf of
 12 the Ohio Consumers' Counsel, Bruce J. Weston,
 13 Consumers' Counsel, Melissa Yost, 10 West Broad
 14 Street, Suite 1800, Columbus, Ohio, 43215.

15 EXAMINER PRICE: Thank you.

16 MR. DOUGHERTY: Your Honor, on behalf of
 17 the Ohio Environmental Council, Trent Dougherty and
 18 Catherine N. Lucas, 1207 Grandview Avenue, Suite 201,
 19 Columbus, Ohio, 43212.

20 EXAMINER PRICE: From the OMA?

21 MR. WARNOCK: On behalf of the OMA Energy
 22 Group, Matt Warnock from the law firm of Bricker &
 23 Eckler, 100 South Third Street, Columbus, Ohio.

24 MR. ALLWEIN: Good morning, your Honor,
 25 On behalf of the Sierra Club, Christopher J. Allwein,

(6)

1 1373 Grandview Avenue, Suite 212, Columbus, Ohio,
2 43212.

3 EXAMINER PRICE: Thank you.

4 The purpose of today's prehearing
5 conference is to --

6 MR. SIWO: Your Honor, on behalf of the
7 Mid-Atlantic Renewable Energy Coalition, J. Thomas
8 Siwo, Terrence O'Donnell, Bricker & Eckler, 100 South
9 Third Street, Columbus, Ohio, 43215.

10 EXAMINER PRICE: Thank you.

11 Once again, the purpose of today's
12 prehearing conference is to take up the two motions
13 we have regarding discovery issues. We have pending
14 before us a motion for protective order filed by
15 FirstEnergy and a motion to dismiss filed by the
16 Consumers' Counsel.

17 We've reviewed the pleading -- motion for
18 protection and to compel discovery filed by
19 Consumers' Counsel. I've reviewed the pleadings
20 filed by the parties but I thought we'd start by
21 allowing the parties to briefly summarize and
22 supplement any arguments that they made in the
23 pleadings, and we'll start with the company.

24 MR. KUTIK: Thank you, your Honor. Good
25 morning.

(7)

1 Your Honor, the only thing that really is
2 at issue here is whether the parties and the Public
3 Utilities Commission get to see the names of the
4 suppliers that are in the Exeter Report. Although
5 the Exeter Report also contains and the public
6 version has redacted pricing information, we have
7 offered to the parties, particularly OCC, the
8 opportunity to see that information under a
9 protective agreement.

10 With respect to the identity of the
11 suppliers, your Honor, we believe that that is trade
12 secret, and in very similar circumstances this
13 Commission has determined and has held that type of
14 information to be protected from the public.

15 And in our briefs, as you know, your
16 Honor, we cited the competitive bidding process cases
17 in the companies' and other's ESPs where the
18 company -- where information as to specific bidders
19 being tied to specific bids was kept confidential and
20 remained from public view.

21 We believe that that information again is
22 information that the Commission in this instance
23 should keep from the public as well.

24 As indicated by Navigant which ran the
25 competitive processes here, that information would be

(8)

1 deleterious if it was disclosed to the future
2 viability of RFPs and competitive bidding processes.

3 Parties that have participated in the
4 process, parties that are anticipating participating
5 in the process need to understand the rules. The
6 rules were understood to be that information with
7 respect to their specific bids and their identities
8 with respect to specific bids would remain
9 confidential even if that information was given to
10 the Commission.

11 We were obligated under our contracts to,
12 if the information was provided to the Commission or
13 to their auditors, keep that information confidential
14 and take steps to do so.

15 We had agreements with the staff and with
16 the auditors that that information that they were
17 given that were in the published report would remain
18 confidential and that was the reason why the staff
19 did file the document under seal and file the
20 redacted document.

21 We believe that the process that was
22 filed by the staff was in large part appropriate and
23 we believe that the confidentiality of the
24 information should be maintained.

25 EXAMINER PRICE: Mr. Kutik, I have one

1 question for you. It's my understanding that the
2 companies object to releasing the identities of the
3 bidders to the other parties even under a protective
4 agreement.

5 MR. KUTIK: Correct.

6 EXAMINER PRICE: Can you explain why you
7 believe that that information should not be disclosed
8 to the parties under protective agreement which would
9 shield it from the public?

10 MR. KUTIK: Well, your Honor, again, that
11 information with respect to suppliers, one, we
12 believe that there hasn't been any demonstration of
13 relevance. The OCC, for example, has had four
14 occasions, four briefs to demonstrate relevance and
15 they haven't done so.

16 But with respect to the confidentiality,
17 your Honor, we believe that given that there is no
18 need for that information, given that the specifics
19 of the supplier information is one of the I think key
20 pieces of proprietary information, we believe that
21 there has to be an extra special showing for them to
22 see that information beyond what they would get with
23 redaction.

24 EXAMINER PRICE: But, Mr. Kutik, they
25 don't need to show relevance, they need to show that

1 this is something that's reasonably calculated to
2 lead to discoverable materials.

3 MR. KUTIK: That's true, your Honor, and
4 they haven't done that either.

5 EXAMINER PRICE: Thank you.

6 Consumers' Counsel?

7 MS. YOST: Thank you, your Honor.

8 First, I'd like to point to the
9 Commission's entry regarding this process here.
10 Specifically, the Commission has held in two separate
11 entries, the first being January 18, 2012, paragraph
12 7, the second being February 23, 2012, paragraph 9,
13 that any conclusions, results, or recommendations
14 formulated by the auditor may be examined by any
15 participant to this proceeding.

16 OCC is requesting the information that
17 the Commission mandated would be available to any
18 party in this proceeding for its review.

19 What I'd like to really focus on is the
20 fact of the matter is the arguments that FirstEnergy
21 raised are meritless. The information, the Exeter
22 audit report was filed on August 15, 2012. At that
23 time there was no motion for protection filed with
24 that report.

25 That's contrary to the Commission's

(11)

1 rules, specifically 4901-1-02(E), that holds that any
2 document will be treated as public unless a motion
3 for protection is filed at the same time.

4 Second, or the next issue is the
5 information that FirstEnergy seeks to protect is not
6 their information. In their initial motion for
7 protection they acknowledged that, that they say this
8 information is third-party information.

9 In regard to any alleged contracts all --
10 EXAMINER PRICE: But that's not
11 unprecedented, Ms. Yost. We have proceedings all the
12 time where utilities holding third party confidential
13 information will file for protective orders in order
14 to protect the information. That's not unprecedented
15 at all, is it?

16 MS. YOST: No, especially where there's a
17 duty to protect it, but here is where we lack the
18 duty.

19 With their motion for protection they
20 filed two exhibits, Exhibit 1, Exhibit 2. They cite
21 to three different articles of those exhibits to
22 bestow upon them this duty to protect the
23 information.

24 One of the articles they cite to in
25 regards to one of the articles clearly is

1 inapplicable. It's about the buyer's obligation --
2 excuse me, the seller's obligation.

3 In regards to Exhibit 2, that agreement
4 specifically puts upon -- the duty to protect the
5 information upon the suppliers. It speaks to audits
6 by the Commission and has language that imposes any
7 obligation to protect that information upon the
8 suppliers.

9 Here we are months into this proceeding
10 and no supplier has motioned the Commission to
11 protect their information.

12 In regards to the other exhibit, any duty
13 to protect that information expired one year after
14 the term of the contract. In regards to the vintages
15 of 2009-2010, that term of the contract has already
16 expired so any obligations that there was has
17 expired, and the third term of that contract expires
18 at the end of this year, December 31, 2012.

19 But that obligation to keep information
20 confidential was only imposed upon FirstEnergy if
21 there was an actual request. And there's been no
22 evidence that any of the suppliers requested that
23 information being protected.

24 EXAMINER PRICE: But a supplier under
25 your theory would have to disclose their identity

1 that they were a bidder in order to protect the
2 information, wouldn't they?

3 They're going to have to come before the
4 Commission and say I'm a supplier and I would like my
5 information to be protected.

6 MS. YOST: Sure. To the extent that they
7 were a winning bidder, and I believe everybody's a
8 winning bidder, yes. And I don't think that's
9 something that they would shy away from. I think
10 they want to be in the business of selling recs and
11 would want people out there to know that's what they
12 do. But that's a fair assessment.

13 That being said, even for the company to
14 put forth any statements of fact or affidavits that
15 XYZ bidder asked them to do that, and we've seen none
16 of that. The information that they're seeking to
17 protect beyond not being theirs is historical; most
18 of it is over three years old.

19 I look to the most recent Commission
20 precedent hot off the press November 16 regarding the
21 most recent auction in the Duke case, and I cite to
22 paragraph 10 of the November 16, 2012, Commission
23 entry which in essence after 21 days will be
24 releasing the names of the bidders who won tranches
25 in the competitive bid auction.

1 The number of tranches won by each
2 bidder, the first round of ratio tranche is supplied
3 compared to the tranches needed, and other
4 information.

5 So the names of the suppliers are
6 information that the Commission generally always
7 releases. The cases that they cite to they
8 misinterpret and do not support their position and in
9 fact, would support OCC.

10 So my final thoughts are the information,
11 if it were trade secret information, we do not
12 dispute trade secret information should be protected.
13 The problem with FirstEnergy's argument is it's not
14 trade secret information and therefore OCC would like
15 to see the entire report.

16 Why this identity of the suppliers is
17 relevant: The identity of the suppliers is relevant
18 because we need to know if it's affiliate
19 transactions or non-affiliate transactions.

20 EXAMINER PRICE: You know there's some
21 affiliate transactions.

22 MS. YOST: Yes, but I think it would help
23 a person in this position if -- I do know there's
24 some affiliate transactions which --

25 EXAMINER PRICE: So what more do you need

1 if you know some of the transactions are affiliate
2 transactions? That's public. What more do you need
3 to know to put on your case?

4 There's no evidence in the audit report
5 that there were improper controls on the affiliate
6 transactions.

7 MS. YOST: Well, they say it didn't
8 violate the statute, but the corporate separation law
9 always speaks to the Commission's obligation or
10 authority to amend corporate separation.

11 So to the extent that if there were other
12 transactions where such as the auditor found that
13 there were excessively high prices paid and it was a
14 non-affiliate, that would kind of mitigate our
15 concerns that it's just about corporate separation.

16 So to the extent that ABC Wind Farm
17 receives \$675 for recs, that would be helpful to us
18 to say hey, you know what, this may be an issue
19 that's just not about corporate separation and we
20 could rule that out, but if it's only the affiliate
21 companies, which it seems like all signs are showing
22 received what amounts that are over \$675 for recs
23 that were \$45 that the auditor found to be a
24 seriously flawed business decision, that's why it's
25 important.

1 So with that, thank you.

2 EXAMINER PRICE: Thank you.

3 Any other party care to speak to this?

4 Mr. Kutik, response?

5 MR. KUTIK: Yes, your Honor, briefly.

6 With respect to the relevance, I'm not
7 sure I understand what the relevance case is.
8 There's nothing that prevents them if they think that
9 the proper protections were not accorded here in
10 terms of keeping corporate separation. There's
11 nothing that can prevent them from doing whatever
12 discovery they want to do with respect to the
13 process.

14 There's nothing in the report that they
15 can talk about or cite to which helps them in terms
16 of their case on that particular issue.

17 So they haven't made their case for
18 relevance, as you pointed out, to show that this is
19 likely to lead to discovery of admissible evidence.

20 The bottom line here is that it is in all
21 parties' interests, particularly customers'
22 interests, for the process to be a competitive one,
23 that the process be one that suppliers want to
24 participate in, and to protect the process to get a
25 competitive process that will lead to the best prices

1 and hopefully the lowest price that can be obtained
2 in the market.

3 If we change rules that allow information
4 that suppliers reasonably believe would be protected
5 from public disclosure or disclosure at all to be
6 disclosed after the fact, there will be some concerns
7 that suppliers have and that will question -- pose
8 questions about the integrity of the process and will
9 retard the development of a rec market and
10 particularly the effectiveness of the RFP process by
11 the companies.

12 EXAMINER PRICE: Thank you.

13 At this time the motion for protective
14 order and the motion to dismiss will be granted in
15 part and denied in part. The Commission has
16 generally ruled that bidder-specific information
17 including prices, quantities, and the identity of
18 bidders to be trade secret information.

19 The Examiner finds that the redacted
20 portions of the auditor reports have independent
21 economic value and the information was subject to
22 reasonable efforts to maintain its secrecy.

23 Further, the Examiner finds the redacted
24 portions of the auditor's reports meet the six-factor
25 test specified by the Supreme Court.

1 Therefore, the Examiner finds that the
2 redacted portions of the auditor's reports are trade
3 secrets and a protective order should be granted
4 pursuant to Rule 4901-1-24 of the Ohio Administrative
5 Code.

6 However, FirstEnergy will disclose
7 unredacted copies of the auditor's reports to Ohio
8 Consumers' Counsel. No bid-specific information will
9 be withheld, no bidder identities will be withheld.

10 This disclosure will be contingent upon
11 the agreement of a mutual acceptable protective
12 agreement between FirstEnergy and Consumers' Counsel.

13 The Examiner expects the protective order
14 will be consistent with the agreements entered into
15 between the parties in prior Commission proceedings.
16 To the extent that no mutual acceptable protective
17 agreement can be reached, the parties should raise
18 this issue with the Examiners.

19 All parties -- I'd like to emphasize that
20 all parties will maintain the confidentiality of the
21 confidential information contained in the unredacted
22 audit reports.

23 No information may be -- none of that
24 information may be publicly disclosed, and any
25 information containing documents filed with this

1 Commission will be filed under seal, and at the
2 hearing we'll take appropriate measures to protect
3 the confidentiality of that information.

4 Further, the Examiner would like to
5 emphasize that no ruling has been made with respect
6 to any evidence contained in the auditor's reports at
7 this time.

8 MS. YOST: Your Honor, you said "motion
9 to dismiss."

10 EXAMINER PRICE: I said it again. You
11 know, I wrote it down that way wrong too.

12 The proper ruling is the motion for
13 protective order and the motion to compel will be
14 granted in part and denied in part.

15 Thank you, Ms. Yost.

16 MS. YOST: I have another separate matter
17 in regard to the report, if this is the time to bring
18 it up.

19 EXAMINER PRICE: Yes.

20 MS. YOST: Again, speaking to the
21 redacted report that was filed on August 15, your
22 Honor, do you have a copy of it in front of you?

23 EXAMINER PRICE: I do.

24 MS. YOST: I only have the redacted copy
25 but if I could point the Bench's attention to what is

1 page Roman Numeral iv, specifically the sentence that
2 is numbered 8 at the top that reads "The FirstEnergy
3 Ohio Utility should have been aware that the prices
4 bid by FirstEnergy Solutions reflected significant
5 economic grants and were excessive by any reasonable
6 measure."

7 If you could turn now to page 33 of the
8 same document, specifically paragraph 5.

9 EXAMINER PRICE: Yes.

10 MS. YGST: Again I have only the redacted
11 copy, that's all I've been provided, but to the
12 extent that the redacted portion of sentence 5 says
13 "FirstEnergy Solutions," which it appears to be the
14 identical sentence, OCC would move to have that
15 sentence 5 unredacted because it's already been
16 publicly released on page iv, paragraph 8. If it is
17 the identical sentence. I don't know, it appears to
18 be.

19 EXAMINER PRICE: I suspect it is but I
20 don't have the unredacted copy with me either.

21 Mr. Kutik?

22 MR. KUTIK: Well, your Honor, frankly,
23 the unredacted portion of No. 8 should have been
24 redacted. And without agreeing or admitting anything
25 with respect to No. 5 on page 33, even assuming that

(21)

1 it was the same, we would argue that since 8 was
2 improper, then 5 should remain redacted.

3 EXAMINER PRICE: We're going to deal with
4 it this way: You're going to give them at some point
5 in the near future the unredacted copy and they can
6 raise this issue on hearing to the extent they need
7 to.

8 If it's identical, I don't know what it
9 would add to the record, and if it's not identical,
10 then it will be a different issue that we'll have to
11 deal with at that time.

12 MS. YOST: Your Honor, I only raise that
13 to the extent we are able to negotiate a protective
14 agreement that is given to us and we don't want it to
15 be confusing whether we are releasing information
16 that is already publicly there.

17 EXAMINER PRICE: If you quote page I-4,
18 you will be just fine.

19 MS. YOST: Thank you, your Honor.

20 EXAMINER PRICE: Mr. Allwein.

21 MR. ALLWEIN: You mentioned this
22 unredacted report would be released to OCC upon the
23 execution of a protective agreement. Is that
24 available to all parties?

25 EXAMINER PRICE: Available to all parties

1 who are willing to sign a protective agreement that
2 is substantially consistent with protective
3 agreements filed in other Commission proceedings.

4 MR. ALLWEIN: Thank you, your Honor.

5 EXAMINER PRICE: Any other issues for the
6 Bench?

7 MR. KUTIK: Yes, your Honor.

8 EXAMINER PRICE: Yes, sir.

9 MR. KUTIK: We have two issues, both
10 relate to staff. The scheduling order, as far as I
11 understand it, your Honor, does not specify a date
12 for staff to file its testimony if any. And we would
13 ask that the Bench set such a date.

14 EXAMINER PRICE: Mr. Lindgren?

15 MR. LINDGREN: The Commission customarily
16 allows the staff until a day prior to the start of
17 the hearing to file its testimony.

18 EXAMINER PRICE: I don't know about the
19 Commission but that certainly is my custom, and I
20 expect the staff will be reasonable and will file it
21 not the day before the hearing date but at some point
22 prior to the hearing.

23 MR. LINDGREN: Yes, it will be filed
24 prior to the hearing.

25 MR. KUTIK: Well, your Honor, that raises

1 another point, and that relates to our ability to
2 adequately prepare our case. We expect that most of
3 the case will be a dialogue in essence between our
4 witness' position and the witnesses of the staff
5 consultants, technically the auditor.

6 We would like obviously an opportunity
7 before the hearing begins to be able to understand
8 what staff's consultant's testimony is. So we would
9 ask that we would be given at least a week before the
10 hearing to get their testimony.

11 EXAMINER PRICE: I don't know that
12 there's -- I guess let me step back.

13 I suspect that the auditor's testimony is
14 not going to be anything other than what's currently
15 in the audit reports. That the auditor's testimony
16 is simply going to be these are our reports and
17 everything in there is truthful and accurate.

18 Is there any reason to believe that's not
19 correct, Mr. Lindgren?

20 MR. LINDGREN: It's possible they would
21 have a correction to make, but otherwise their
22 testimony is --

23 EXAMINER PRICE: Not going to be any
24 supplemental or additional issues beyond what's in
25 the audit report.

1 MR. LINDGREN: That's my understanding.

2 MR. KUTIK: So, for example, your Honor,
3 if I could inquire, there wouldn't be any specific,
4 for lack of a better term, rebuttal or response to
5 things that are explained or pointed out by the
6 companies.

7 I would expect that the staff would want
8 that opportunity and would do so in terms of their
9 consultant.

10 EXAMINER PRICE: If the staff is going to
11 put on rebuttal evidence, they would have to ask for
12 permission to put on rebuttal evidence at the
13 conclusion of this case in chief.

14 MR. KUTIK: "Rebuttal" is probably the
15 wrong word. The better word is "response." Because,
16 frankly, I think it's the company that has probably
17 the opportunity for rebuttal since we file our
18 testimony first.

19 EXAMINER PRICE: I said "ask."

20 MR. KUTIK: Correct, I would have the
21 opportunity I think I said.

22 So that if they were going to put things
23 in their testimony as staff consultants that would be
24 responding to specific points that the company's
25 witnesses would make, points that would be beyond

(25)

1 things that were pointed out in the report, that's a
2 scenario where we would like to have more than a day
3 to respond before the hearing.

4 EXAMINER PRICE: And again, I guess what
5 I'm trying to say is to the extent that staff is
6 going to rebut or respond or address any issues in
7 testimony that your witnesses raise, I would expect
8 they'll do it in the rebuttal phase and will have to
9 ask the Bench's indulgence to file such testimony.
10 At that point we'll work out an appropriate schedule.

11 MR. KUTIK: May I have one minute, your
12 Honor?

13 EXAMINER PRICE: Yes.

14 MR. KUTIK: The other thing, your Honor,
15 is --

16 EXAMINER PRICE: Let me, before we move
17 off topic.

18 Mr. Lindgren, is the staff going to put
19 on anybody other than the auditors?

20 MR. LINDGREN: May I have a moment to
21 consult my clients?

22 EXAMINER PRICE: You may.

23 MR. LINDGREN: Your Honor, at this time
24 the staff does not plan to put on any additional
25 witnesses.

1 EXAMINER PRICE: Thank you.

2 Thank you, Mr. Kutik

3 MR. KUTIK: Your Honor, in regard to the
4 witnesses that are going to be the consultants, we
5 would like to have the opportunity to take the
6 depositions of those witnesses.

7 And the reason I bring it up now, not
8 having filed a motion, not having notice, I didn't
9 want to be down the line where we are at the eve of
10 hearing and leave this unresolved. That's why I'm
11 bringing it up now.

12 If it would be more appropriate to do it
13 later, I'm certainly glad to do that.

14 EXAMINER PRICE: Mr. Lindgren, do you
15 care to respond?

16 MR. LINDGREN: If he's suggesting that he
17 wants to take the deposition of the auditors, the
18 Commission has ruled in previous cases that the
19 auditors who were retained pursuant to the Commission
20 order are treated the same as the staff and
21 depositions are not permitted of them.

22 EXAMINER PRICE: Mr. Kutik?

23 MR. KUTIK: Your Honor, the rule that the
24 Commission has excepts out for discovery depositions
25 members of the staff. And it particularly uses the

(27)

1 word "members" of the staff. It does not use the
2 word "consultant," it does not use the word
3 "contractor," uses the word "member." So that under
4 the language of the Rule, the clear language of the
5 Rule, we believe we should have an opportunity to
6 take a deposition of a witness even if they had a
7 contract with the staff.

8 EXAMINER PRICE: Understood. Let's go
9 off the record.

10 (Off the record.)

11 EXAMINER PRICE: Let's go back on the
12 record.

13 At this time the Bench will defer ruling
14 on FirstEnergy's request for a deposition of the
15 auditors. We do have usual practices and procedures
16 around here and I would like the parties to see if
17 they can informally resolve this without necessity of
18 a ruling from the Bench.

19 Anything else?

20 Seeing none, we are adjourned for the
21 day. Thank you, all.

22 (Hearing adjourned at 10:33 a.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, November 20, 2012, and carefully compared with my original stenographic notes.

Julieanna Hennebert, Registered Professional Reporter and RMR and Notary Public in and for the State of Ohio.

My commission expires February 19, 2013.

(JUL-1928)

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in

Case No(s). 11-5201-EL-RDR

Summary: Transcript of Ohio Edison Company, Cleveland Electric Illuminating Company and Toledo Edison Company hearing held on 11/20/12 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Hennebert, Julieanna Mrs.

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,) Case No. 11-5201-EL-RDR
The Cleveland Electric Illuminating)
Company, and The Toledo Edison)
Company.)

ENTRY

The attorney examiner finds:

- (1) 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 the 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 Section 4928.64, Revised Code.
- (2) By entry issued on 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.
- (3) On August 15, 2012, Exeter and Goldenberg filed final audit reports on the management/performance portion and financial portion of Rider AER, respectively.
- (4) On September 26, 2012, Ohio Consumers' Counsel (OCC) filed a motion for a prehearing conference in order to obtain a non-redacted copy of the management/performance portion of the audit report,

which the attorney examiner denied by entry issued on October 11, 2012, finding that OCC's motion was premature.

- (5) On October 3, 2012, FirstEnergy filed a motion for protective order to protect from public disclosure confidential supplier pricing and supplier-identifying information that appears in the unredacted version of the final report of the management/performance audit of Rider AER.
- (6) Thereafter, on October 23, 2012, OCC filed a motion to compel FirstEnergy to provide a completely unredacted copy of the final report of the management/performance portion of the audit.
- (7) On October 29, 2012, Daniel Bradley, Director of Navigant Consulting, filed correspondence with the Commission recommending against the release of the unredacted final report of the management/performance portion of the audit.
- (8) FirstEnergy filed a memorandum contra OCC's motion to compel on November 7, 2012.
- (9) On November 20, 2012, a prehearing was held in this proceeding pursuant to the procedural schedule. At the prehearing conference, the presiding attorney examiner addressed FirstEnergy's pending motion for protective order and OCC's pending motion to compel, granting them, in part, and denying them, in part. More specifically, the presiding attorney examiner found that the redacted portions of the auditor report have independent economic value, are subject to reasonable efforts to maintain its secrecy, and meet the six-factor test specified by the Supreme Court of Ohio. Nevertheless, the presiding attorney examiner found that FirstEnergy should disclose unredacted copies of the audit report to OCC, contingent upon a mutually acceptable protective agreement between FirstEnergy and OCC.
- (10) Thereafter, on December 31, 2012, FirstEnergy filed a second motion for protective order, requesting a protective order regarding a public records request made by OCC on

December 21, 2012. According to FirstEnergy, OCC's public records request at issue requested documents reflecting the Companies' comments on a confidential draft of the final report of the management/performance audit of Rider AER for October 2009 through December 31, 2011 (draft documents). FirstEnergy argues that the Commission should grant a protective order as to the confidential draft documents because they contain information on renewable energy credit supplier pricing and identities, which was already held to be confidential trade secret information subject to a protective order preventing public disclosure and limiting disclosure to OCC subject to a protective agreement at the November 20, 2012, prehearing. FirstEnergy asserts that, as a result, the confidential draft documents are not subject to disclosure under a public records request. Secondly, FirstEnergy contends that the confidential draft documents are not subject to disclosure under a public records request pursuant to Section 4901.16, Revised Code, because they were provided to Staff as confidential materials pursuant to Staff's audit of Rider AER. FirstEnergy argues that OCC's public records request is an inappropriate attempt to sidestep the Commission's discovery process.

- (11) On January 15, 2013, OCC filed a memorandum contra FirstEnergy's motion for protective order. In its memorandum contra, OCC argues that the Commission should deny FirstEnergy's motion for protective order because none of the information contained in the draft documents qualifies as trade secret information under Ohio law; because FirstEnergy failed to meet the burden associated with specifically identifying the need for protection from disclosure; because the draft documents must be produced in a redacted form; because Section 4901.16, Revised Code, does not prevent public disclosure of the draft documents pursuant to a public records request; and, because public policy supports denial of FirstEnergy's motion for protective order. In its memorandum contra, OCC also states that a draft copy of the audit report was filed with the Commission.
- (12) On January 22, 2013, FirstEnergy filed a reply to OCC's memorandum contra the Companies' motion for protective

order. In its reply, FirstEnergy initially points out that OCC incorrectly contends in its memorandum contra that the confidential draft documents were filed with the Commission. FirstEnergy notes that the draft documents were not filed with the Commission, but were provided to Staff as part of the audit process as contemplated by the RFP with the understanding that the documents would be kept confidential. Consequently, FirstEnergy reemphasizes its argument that the confidential draft documents fall within the ambit of Section 4901.16, Revised Code, and are not subject to disclosure under a public records request. Further, FirstEnergy argues that, even if the documents were not protected by Section 4901.16, Revised Code, the plain language of Section 149.43(v), Revised Code, excludes from the definition of public records those that are prohibited from disclosure by state or federal law.

- (13) The attorney examiner has conducted an *in camera* review of the document subject to the public records request to determine whether the document contains trade secrets or confidential information and whether any such information can be redacted from the document.
- (14) 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 Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).
- (15) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows an attorney examiner to issue an order 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."

- (16) 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.
- (17) The attorney examiner has reviewed the information included in FirstEnergy's motion for protective order, as well as the assertions set forth in the supportive memorandum. 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,¹ the attorney examiner finds that, consistent with the ruling at the November 20, 2012, prehearing conference, confidential supplier pricing and supplier-identifying information that appears in the draft document contains trade secret information. Its release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that FirstEnergy's motion for protective order is reasonable with regard to the confidential supplier pricing and supplier-identifying information that appears in the draft document and should be granted to the extent discussed herein.
- (18) Having determined that the supplier pricing and supplier-identifying information contains trade secret information, the attorney examiner now must evaluate whether the document can be reasonably redacted to remove the confidential information contained therein without rendering the remaining document incomprehensible or of little meaning. The attorney examiner does find that it is

¹ See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

possible to redact the document and release a redacted version of the document. Therefore, the document will be released in redacted form in seven days unless otherwise ordered. Finally, the parties to the proceeding may review *in camera* at the offices of the Commission the redacted document prior to its scheduled release.

- (19) 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. However, in this case, the attorney examiner finds that confidential treatment shall be afforded for a period ending 24 months from the date of this entry or until February 13, 2015.
- (20) 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 FirstEnergy 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 confidential treatment is filed, the Commission may release this information without prior notice to FirstEnergy.

It is, therefore,

ORDERED, That the motion for protective order filed by FirstEnergy is granted as set forth in Finding (17). It is, further,

ORDERED, That, unless otherwise ordered by the Commission, the redacted document be released in seven days in accordance with Finding (18). It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy Willey Chiles

By: Mandy Willey Chiles
Attorney Examiner

GAP/sc

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in

Case No(s). 11-5201-EL-RDR

Summary: Attorney Examiner Entry granting motion for protective order and ordering release of redacted version of document in seven days. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio

**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) Case No. 11-5201-EL-RDR
Cleveland Electric Illuminating Company)
and The Toledo Edison Company.)

PUBLIC VERSION

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

**BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL**

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September 6, 2013

**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) Case No. 11-5201-EL-RDR
Cleveland Electric Illuminating Company)
and The Toledo Edison Company.)

PUBLIC VERSION

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the August 7, 2013, Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). This case involves grossly excessive prices¹ paid by FirstEnergy² for In-State All Renewable Energy Credits ("RECs") and charged to its customers.

Through this filing, OCC seeks rehearing of the Commission's Order pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The August 7, 2013 Order was unjust, unreasonable, and unlawful because:

- A. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase In-State All Renewable Energy Credits (Procured Through The August 2009 RFP, October 2009 RFP, And August 2010 RFP – 2010 Vintage) Because The PUCO Did Not Find

¹ Exeter Audit Report at 28.

² The word "FirstEnergy" means the FirstEnergy Ohio electric distribution utilities and is also referred to as "Utility" or "Company."

That FirstEnergy Met Its Burden Of Proof That Those Costs Were Prudently Incurred.

- 1. The PUCO Erred When It Presumed that FirstEnergy's Management Decisions to Purchase Renewable Energy Credits were Prudent.**
- 2. The PUCO Erred Because There is No Presumption of Prudence When Analyzing Transactions Between Affiliated Companies.**
- 3. Even If the PUCO Did Not Err when it Presumed that FirstEnergy's Management Decisions Were Prudent, the PUCO Erred Because it Failed to Properly Apply Such Presumption.**

B. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision to Pay [REDACTED] \$ [REDACTED] - [REDACTED] (Per Renewable Credit) For 70,000 2009 and 2010 Vintage In-State All Renewable Credits.

- 1. The PUCO Erred In Failing to Find That Prices Above \$ [REDACTED] per REC Paid by FirstEnergy Were Unreasonable Based on Available Market Information From All-Renewables Markets Around the Country.**
- 2. The PUCO Erred in Finding that FirstEnergy Was Excused from Filing a Force Majeure Request (Until January 7, 2010) Because FirstEnergy did not Believe that Such a Request Could be Granted Based Solely on the Price of Renewable Energy Credits.**

3. The PUCO Erred in Finding that FirstEnergy was Excused from Filing a Force Majeure Request Because FirstEnergy Would Not Have Had Time to Acquire RECs if the Force Majeure Request was Denied.
 4. The PUCO Erred in Failing to Make a Specific Determination of Prudence As Required by R.C. 4903.09 To Support The PUCO's Allowance of Cost Recovery from Customers.
- C. The PUCO Erred When It Decided that Customers Should Pay The Costs Of FirstEnergy's Decision To Pay ██████████ \$ ██████████ (Per Renewable Credit) In RFP 2 For 95,489 2009, 2010, And 2011 Vintage In-State All Renewable Credits.
- D. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision To Pay ██████████ \$ ██████████ (Per Renewable Credit) For 29,676 2010 Vintage In-State All Renewable Credits.
- E. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase High-Priced In-State All Renewable Energy Credits In 2009 For Compliance Years 2010 And 2011, Given That FirstEnergy's Purchases Were Imprudent And Otherwise Unreasonable.
- F. The PUCO Erred By Failing To Order An Investigation Of Whether FirstEnergy Extended Undue Preference to FirstEnergy Solutions Given, Among Other Things, The Exeter Auditor Finding That "The Prices Bid

By FirstEnergy Solutions Reflected Significant Economic Rents And Were Excessive By Any Reasonable Measure.”³

- G. The PUCO Erred By Failing To Find That Its Entries and Due Process Were Violated When A Key Recommendation In The Draft Exeter Report -- that the PUCO should not allow FirstEnergy to collect from customers any procurement of In-State All Renewable Credits above \$50 per REC -- Did Not Appear In The Filed Exeter Report After FirstEnergy Objected To The Recommendation In A Private Process Where FirstEnergy, And Not Other Parties, Was Provided The Draft Report And Proposed Changes To The Report.
- H. The PUCO Erred By Not Filing “Findings Of Fact And Written Opinions,” In Violation Of R.C. 4903.09, To Use The Evidence That The Exeter Auditor’s Draft Report Contained A Recommendation For The PUCO To Credit Customers For FirstEnergy’s Renewable-Credit Purchases Above \$50. This Most Key Auditor Recommendation For Customer Protection Was Not Included In The Final Exeter Audit Report After FirstEnergy Objected To The Draft Recommendation In A Private Process Where It Was Provided A Copy Of The Auditor’s Draft.
- I. Consistent with R.C. 4901.13 (rules for regulating “the mode and manner of ... audits ... and hearings...”), the PUCO Erred By Not Ruling That, In Future Cases For Reviews Of FirstEnergy’s Alternative Energy Rider And In Cases For Review of Any Electric Utility’s Alternative Energy Purchases, Any Commentary On The Draft Audit Report By An Electric

³ Exeter Audit Report at iv.

Utility Must Be Shared Contemporaneously With Other Parties Who Will Be Given The Same Opportunity As The Utility To Make Substantive Recommendations For The Final Audit Report That Will Be Filed In Such Cases.

- J. The PUCO Erred By Preventing The Disclosure Of Public Information Relating To FirstEnergy's Imprudent Purchases Of In State All-Renewable Energy Credits For Which FirstEnergy's Customers Should Not Have To Pay.**
- 1. The PUCO Erred By Improperly Applying R.C. 1331.61(D) and by Violating R.C. 4901.13, R.C. 4905.07, Ohio Adm. Code 4901-1-24(D)(1) and the Strong Presumption in Favor of Public Disclosure Under Ohio Law by Preventing Public Disclosure of Bid-Specific Information, Including the Identities of the Bidders as well as the Price and Quantity of Renewable Energy Credits Bid by Each Specific Bidder.**
- a. The Identities of Suppliers and the Specific Prices that FirstEnergy Paid for Renewable Energy Credits is not Economically Valuable Information Nor can it be Duplicated to Undermine Future Renewable Energy Credit Procurement Processes.**
- b. FirstEnergy Failed to Take Sufficient Safeguards to Protect the Identities of Renewable Energy Credit Suppliers and**

Their Pricing Information, Allowing Individuals Outside of the Company to Discover the Information.

- c. The PUCO Failed to Address the Fact that FirstEnergy's Motion for Protection of Supplier Identities and Pricing Information was Untimely, Which should have Resulted in Denial.**
- 2. The PUCO should make Publicly Available the Complete (Unredacted) Copies of the Exeter Audit Report and All Prior Pleadings (Including Briefs, Motions and Testimony) in this Proceeding.**
- 3. The PUCO 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 Audit Report.**
- 4. The PUCO Erred by Granting FirstEnergy's Fourth Motion for Protective Order, Thereby Preventing FirstEnergy's Customers and the Public Generally from Knowing OCC's Recommendation to the PUCO on the Total Dollar Amount that FirstEnergy Should Have to Credit Back to Its Customers for Overcharges.**

An explanation of the basis for this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its Order.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Melissa R. Yost

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PUBLIC VERSION

7

OCC Appx. 000130

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

MEMORANDUM IN SUPPORT

I INTRODUCTION

OCC seeks rehearing of the August 7, 2013 Opinion and Order (“Order”) of the Public Utilities Commission of Ohio (“Commission” or “PUCO”) that fails to adequately protect FirstEnergy’s 1.9 million customers from all of the unreasonable and imprudent costs incurred when FirstEnergy decided to buy excessively priced In-State All Renewable Energy Credits (RECs) from [REDACTED]. The PUCO correctly decided that customers should not pay FirstEnergy over \$43 million dollars for 2011 vintage RECs purchased in August 2010. That is a lot of customer money. But there is a lot more at stake.

The imprudent purchases disallowed by the PUCO are only a portion of the imprudent costs associated with three deals with [REDACTED] for RECs purchased in 2009-2011. The additional amount of dollars that FirstEnergy should not be permitted to be collected from customers is \$ [REDACTED] (plus interest).

FirstEnergy failed to meet its burden of proof to show that its purchases were prudent. The PUCO presumed that FirstEnergy’s management decisions were prudent. But such a presumption is unlawful.

Additionally, the Order prevents public disclosure of supplier price and bid information from 2009 – 2011 that cannot reasonably be argued to constitute trade secret information. In this regard, the PUCO will not allow OCC to publicly reveal its own recommendations for protecting customers from FirstEnergy’s imprudent purchases of In-State All Renewable Energy Credits. Certainly, if the PUCO can publicly disclose the amount of money that it found FirstEnergy should not be permitted to collect from its customers (\$43,362,796.50 plus carrying costs) under Ohio’s law regarding trade secret information, then the amount OCC argued should be disallowed should likewise be disclosed ([REDACTED])

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the Commission, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.”⁴ Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”⁵

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.”⁶

Furthermore, if the Commission grants a rehearing and determines that “the original

⁴ R.C. 4903.10.

⁵ R.C. 4903.10(B).

⁶ *Id.*

order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *.”⁷

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the Commission’s rule on applications for rehearing.⁸ Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

III. LAW AND ARGUMENT

A. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy’s Decisions To Purchase In-State All Renewable Energy Credits (Procured Through The August 2009 RFP, October 2009 RFP, And August 2010 RFP – 2010 Vintage) Because The PUCO Did Not Find That FirstEnergy Met Its Burden Of Proof That Those Costs Were Prudently Incurred.

1. The PUCO Erred When It Presumed that FirstEnergy’s Management Decisions to Purchase Renewable Energy Credits were Prudent.

According to the Stipulation that established Rider AER, FirstEnergy could only collect from its customers the “prudently incurred cost[s] of” renewable energy resource requirements “pursuant to R.C. § 4928.64.”⁹ That Stipulation, however, granted no presumption that FirstEnergy’s management decisions to purchase RECs were prudent.

To the contrary, FirstEnergy bears the burden of demonstrating that its costs for procurement of Renewable Energy Credits were prudently incurred.¹⁰ FirstEnergy

⁷ *Id.*

⁸ See Ohio Adm. Code 4901-1-35.

⁹ *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, Stipulation and Recommendation, at 10-11 (Feb. 19, 2009).

¹⁰ See *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9; See also, R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

acknowledges this requirement,¹¹ and so does the PUCO.¹² But then the PUCO states that “the Commission should presume that the Companies’ management decisions were prudent.”¹³ This PUCO finding is wrong – the PUCO has no authority to change the burden of proof set out in relevant statutes.¹⁴ The PUCO’s “presumption of prudence” is not created by statute or by PUCO regulation. Instead, as explained below, it was created out of whole cloth by the PUCO through its case decisions.

The PUCO’s uncodified application of a presumption of prudence is based on the Commission’s ruling in a 1986 purchased gas adjustment clause case involving Syracuse Home Utilities Company, Inc.¹⁵ In that case (“*Syracuse*”), the PUCO adopted the guidelines reported in the National Regulatory Research Institute (“NRRI”) paper, “The Prudent Investment Test of the 1980s.”¹⁶ The first of these guidelines called for utility decisions to be viewed with a presumption of prudence.¹⁷

In the *Syracuse* case, the PUCO distinguished the burden of proof from the burden of producing evidence.¹⁸ However, the burden of proof requires that the utility produce evidence to support its position. Regardless of how the Commission worded the burden, it remains with the utility. By requiring the PUCO Staff or another party to produce evidence rebutting any alleged presumption of prudence, the Commission is

¹¹ Initial Brief of FirstEnergy at 69.

¹² Order at 21.

¹³ Order at 21.

¹⁴ R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

¹⁵ *In the Matter of the Regulation of Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, Case No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, at 21-23 (Dec. 30, 1986) (“*Syracuse*”).

¹⁶ *Id.* [Citing to “The Prudent Investment Test in the 1980s,” NRRI-85-16, (April, 1985)].

¹⁷ *Id.* at *22.

¹⁸ *Syracuse* at *22.

asking the challenger to prove a negative. This approach was rejected by the Supreme Court of Ohio.¹⁹

In the Supreme Court's decision in *Duke Energy*, Duke sought reimbursement for approximately \$30.7 million in costs associated with damages caused by Hurricane Ike.²⁰ Duke argued that "other parties did not conclusively prove that the claimed expenses were unreasonable or imprudent."²¹ But, as the Supreme Court held, "that [argument] is irrelevant because those parties did not bear the burden of proof."²² The Court explained that it is the Utility that has to "prove a positive point: that its expenses had been prudently incurred * * * [t]he commission did not have to find the negative: that the expenses were imprudent."²³ As a result, the Supreme Court upheld the Commission's decision to disallow much of the \$30 million that Duke sought to recover from customers for storm damage, flatly rejecting any presumption of prudence. The Supreme Court also noted, "Duke has not been given a blank check, but an opportunity to prove to the commission that it had reasonably and prudently incurred the costs it sought to recover."²⁴

Likewise, in this case, according to the Ohio Revised Code, the ESP Stipulation, and the Supreme Court of Ohio's *Duke Energy* decision, FirstEnergy must prove that its expenses were reasonable and prudent. It is not up to the other parties to first prove otherwise. Any shifting of the "burden of producing evidence" takes the burden off of

¹⁹ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012 Ohio LEXIS 849, 967 N.E.2d 201, ¶8.

²⁰ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶2.

²¹ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

²² *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

²³ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶8.

²⁴ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

the Utility and is contrary to Ohio law, Supreme Court of Ohio precedent, and the controlling Stipulation in this matter. Because the Utilities bear the burden of proof, it is axiomatic that there can be no presumption of prudence.

The Supreme Court of Ohio's ruling is consistent with other states as well. For instance, in a Supreme Court of Missouri case, the Missouri Public Service Commission ("PSC") decision to review affiliate transactions with the presumption of prudence was challenged.²⁵ The Supreme Court of Missouri found that while the burden of proof fell to the utility, the PSC had a practice, though not codified, of applying a presumption of prudence to utility expenditures.²⁶ The Supreme Court of Missouri noted that "The PSC has no authority to adopt rules changing the burden of proof set out in relevant statutes

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Finally, the test upon which the PUCO relied in finding a presumption of prudence for utility decisions was created for a completely different situation. The paper (that the PUCO relied upon in its *Syracuse* decision) is entitled "The Prudent Investment Test of the 1980's." It was designed to be applied to utility investment decisions, namely, investments in large power plants.²⁸

The ESP Stipulation that OCC, FirstEnergy and others signed does not provide for a presumption favoring FirstEnergy. The PUCO should enforce Ohio law and the ESP Stipulation and not allow customers to be harmed by a presumption that undermines

²⁵ *Office of the Public Counsel v. Missouri Public Service Commission*, 2013 Mo. LEXIS 45. at *1 (Missouri 2013).

²⁶ *Id.* at *12.

²⁷ *Id.* at *20.

²⁸ "The Prudent Investment Test in the 1980s," NRRI-85-16, at 62 (April, 1985).

the well-established burden of proof standard. The PUCO erred by misapplying controlling Supreme Court of Ohio precedent, when it created such a presumption.²⁹

2. The PUCO Erred Because There is No Presumption of Prudence When Analyzing Transactions Between Affiliated Companies.

There is no presumption of prudence when analyzing transactions between affiliated companies. This principle is recognized by the National Association of Regulatory Utility Commissioners (“NARUC”).³⁰ NARUC states that there are “four widely accepted guidelines to determine whether an investment or expenditure is prudent.”³¹ It then lists the guidelines, which are the exact same guidelines the Commission used in the *Syracuse* case from the NRRI paper, “The Prudent Investment Test of the 1980s.”³² But NARUC added “[t]here is no presumption of prudence for affiliate transactions, whether they are for expenditures or investments” (to the end of the first guideline which is the presumption of prudence.)³³ Additionally, there is a long line of precedent (from other jurisdictions) demonstrating that there is no presumption of prudence in affiliate transactions.

In a Supreme Court of Missouri case (discussed above), the Missouri Public Service Commission (“PSC”) decision to review affiliate transactions with the presumption of prudence was challenged.³⁴ The Supreme Court of Missouri found that

²⁹ See *supra*, Order at 21.

³⁰ Model State Protocols for Critical Infrastructure Protection Cost Recovery, NARUC, July 2004- Version 1, at pg. 21.

³¹ *Id.*

³² *Id.* fn. 17.

³³ *Id.* (Emphasis in the original.)

³⁴ *Office of the Public Counsel v. Missouri Public Service Commission*, 2013 Mo. LEXIS 45, at *1 (Missouri 2013).

while the burden of proof fell to the utility, the PSC had a practice, though not codified, of applying a presumption of prudence to utility expenditures.³⁵

The Court, however, held that any presumption of prudence was improper when applied to transactions between affiliates because of the greater risk of self-dealing.³⁶ The Court cited to a report of a Congressional Staff Investigation into Enron, which it characterized as particularly egregious.³⁷ The report stated:

[W]henver a company conducts transactions among its own affiliates there are inherent issues about the fairness and motivations of such transactions. ... One concern is that where one affiliate in a transaction has captive customers, a one-sided deal between affiliates can saddle those customers with additional financial burdens. Another concern is that one affiliate will treat another with favoritism at the expense of other companies or in ways detrimental to the market as a whole.³⁸

The Supreme Court of Missouri noted that affiliate transactions are not arm's length transactions and there is simply no place for a presumption of prudence.³⁹ As discussed above, the Court held that since the presumption of prudence was not codified, the PSC had no authority to change the burden of proof set out in the relevant statutes.⁴⁰ The Supreme Court of Missouri also held that a presumption of prudence is inconsistent with the PSC's obligation to prevent regulated utilities from subsidizing their non-

³⁵ *Id.* at *12.

³⁶ *Id.* at *14.

³⁷ *Id.*

³⁸ *Id.* [Citing Staff of Senate Comm. on Gov't Affairs, 107th Cong. *Committee Staff Investigation of the Federal Energy Regulatory Commission's Oversight of Enron 26*, n.75 (Nov. 12, 2002)].

³⁹ *Id.* at *15-16.

⁴⁰ *Id.* at *20.

regulated operations.⁴¹ Finally, the Court held that by changing the burden of proof, the PSC required Staff to prove a negative, but that was wrong as the burden of proof is on the company and it would have the records that would allow it to meet its burden.⁴²

The Supreme Court of Missouri's decision is in line with many other courts that have intensely scrutinized affiliate transactions. According to the Supreme Court of Idaho, "[t]he reason for this distinction between affiliate and non-affiliate expenditures appears to be that the probability of unwarranted expenditures corresponds to the probability of collusion."⁴³ The Superior Court of Pennsylvania similarly stated:

Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care [citations omitted] and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the commission allowances is properly refused. ***

It therefore follows that the commission should scrutinize carefully charges by affiliates, as inflated charges to [an] operating company may be a means to improperly increase the allowable revenue and raise the cost to consumers of utility service as well as the unwarranted source of profit to the ultimate holding company.⁴⁴

The Court of Appeals of Michigan found that, "the utility has the burden of demonstrating that transactions with its affiliate are reasonable."⁴⁵ The Supreme Court of Oklahoma has stated, "It is generally held that, while the regulatory agency bears the

⁴¹ *Id.* at *19.

⁴² *Id.* at *25.

⁴³ *Boise Water Corp. v. Idaho Pub. Util. Comm.*, 97 Idaho 832, 838, 1976 Ida. LEXIS 368, 555 P.2d 163 (Idaho 1976).

⁴⁴ *Solar Electric Co. v. Pennsylvania Public Utility Com.*, 137 Pa. Super. 325, 374, 1939 Pa. Super. LEXIS 47, 9 A.2d 447 (November 15, 1939).

⁴⁵ *Mich. Gas Utilites v. Mich. Pub. Serv. Comm.*, No. 206234, 199 Mich. App. LEXIS 1954, *6 (February 8, 1999).

burden of proving that expenses incurred in transactions with non-affiliates are unreasonable, the utility bears the burden of proving that expenses incurred in transactions with affiliates are reasonable.”⁴⁶

The Supreme Court of Utah also rejected a presumption of prudence in affiliate transactions by stating, “[w]hile the pressures of the competitive market might allow us to assume, in the absence of a showing to the contrary, that non-affiliated expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm’s length transaction.”⁴⁷ Finally, in his concurring opinion, Justice Scalia of the Supreme Court of the United States, stated, “it is entirely reasonable to think that the fairness of rates and contracts relating to joint ventures among affiliated companies cannot be separated from an inquiry into the prudence of each affiliate’s participation.”⁴⁸

Precedent clearly demonstrates that transactions between affiliates should never be subject to a presumption of prudence. Affiliate transactions present too many opportunities for self-dealing and potentially fraudulent or inflated contracts. Consistent with the long line of precedent from other jurisdictions, presumptions of prudence in affiliated transactions are inconsistent with the PUCO’s duty to prevent regulated entities from subsidizing their unregulated affiliates. The Commission cannot just shift the burden of proof when Ohio law explicitly places that burden on the utility. And even if the PUCO attempted to adopt such a prudence standard, it is not applicable to affiliate

⁴⁶ *Turpen v. Ok. Corp. Comm.*, 1988 OK 126, 769 P.2d 1309, 1320-21 (Okla. 1988).

⁴⁷ *US West Communications, Inc. v. Pub. Serv. Comm.*, 901 P.2d 270, 274, 1995 Utah LEXIS 46, 268 Utah Adv. Rep. 27 (Utah 1995).

⁴⁸ *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 382, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988) (Scalia, J., concurring).

transaction according to the very organization that oversees the research institute that published the test—NARUC.

FirstEnergy failed to prove that its decision to purchase In-State All Renewable Energy Credits at prices that exceeded \$ [REDACTED] was prudent. Indeed, the evidence introduced by the other parties indicated that RECs should not have been purchased at prices anywhere near the prices that FirstEnergy paid to [REDACTED]. For these reasons, the PUCO erred and should disallow FirstEnergy from overcharging its customers for its unreasonable REC purchases.

3. Even If the PUCO Did Not Err when it Presumed that FirstEnergy's Management Decisions Were Prudent, the PUCO Erred Because it Failed to Properly Apply Such Presumption.

Assuming *arguendo* that the PUCO's decision to presume that FirstEnergy's management decisions were prudent and lawful, the PUCO's application of that presumption was not. Specifically, the PUCO failed to correctly apply its holding in *Syracuse* in regard to such presumption of prudence in deciding that costs for the procurement of In-State All Renewable Energy Credits should be paid by FirstEnergy's customers.

In the 1986 *Syracuse* case, the Commission established guidelines for assessing the prudence of utility decisions.⁴⁹ The Commission established a rebuttable presumption of prudence.⁵⁰ Black's Law Dictionary defines a presumption as "A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts" and it defines a rebuttable presumption as "An inference drawn from

⁴⁹ *In re Syracuse Home Utils. Co.*, Pub. Util. Comm. No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, at *21 (Dec. 30, 1986). (Hereinafter *Syracuse*).

⁵⁰ *Syracuse* at *21-23.

certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”^{51,52} A rebuttable presumption shifts the burden of producing evidence to the party against whom the presumption operates - a challenger.⁵³

Therefore, according to the holding in *Syracuse*, the burden of proof or persuasion that the expenses incurred or decisions made were reasonable or prudent remains with the Company. The “presumption of prudence or reasonableness shifts to the challenger the duty of producing evidence to rebut the presumption.”⁵⁴ In other words, once a party rebuts the presumption established in *Syracuse*, the Company must meet its burden of proof.⁵⁵ The PUCO must first find that evidence rebuts the presumption of prudence, and then find that the Company sufficiently sustained its burden of persuasion.

According to PUCO case law, challengers must produce evidence to rebut the presumption. In *Syracuse*, the Commission decided that a party must do more than disagree to rebut the presumption that utility decisions are prudent.⁵⁶ Conclusory statements and unsubstantiated inferences were not enough to shift the burden of producing evidence back to the Company.⁵⁷ Yet, precedent does not require a high standard of proof to invalidate the prudence presumption. Challengers do not have to

⁵¹ *Black's Law Dictionary* 1304 & 1306 (9th Ed. 2009).

⁵² *Syracuse* at *22.

⁵³ *Id.*

⁵⁴ *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI. 1987 Ohio PUC LEXIS 716, at *3 (March 17, 1987).

⁵⁵ *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI. 1988 Ohio PUC LEXIS 1269, at *22 (January 12, 1988). In my opinion the language in another case she cites to better matches this point. I would use this cite: *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

⁵⁶ *Syracuse* at *22-23.

⁵⁷ *Id.*

prove that the Company's decisions were imprudent.⁵⁸ PUCO precedent only requires challengers to "go forward with *some* concrete evidence supporting their position."⁵⁹ Parties merely have "to provide enough evidence of *potential* imprudence to rebut the presumption."⁶⁰ These cases establish a low standard of proof to rebut the presumption.

Requiring a low standard to rebut the presumption is consistent with the Commission's stated purpose in instituting the prudence presumption. The presumption was established to promote fairness and efficiency in proceedings.⁶¹ The presumption was to act in such a way as to focus the issues in a proceeding to matters disputed by the parties.⁶² It promoted manageable hearings.

A low standard of proof to rebut prudence presumptions provides the Company and the PUCO with information about each party's concerns with the case. The parties must rebut the presumption by providing some evidence, and the Company can then provide proof as to why its decisions as to those particular issues were reasonable.⁶³ In this way, the proceedings can be narrowly focused on those particular issues raised by the parties, and the hearing process remains manageable.⁶⁴ Yet, by setting a high standard to rebut a presumption, the Commission not only focuses on particular issues, but goes

⁵⁸ *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

⁵⁹ *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at *21 (January 12, 1988). (Emphasis added).

⁶⁰ *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987). (Emphasis added).

⁶¹ *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at *22 (January 12, 1988).

⁶² *Id.*

⁶³ *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

⁶⁴ *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at *22 (January 12, 1988).

beyond its purpose in establishing the presumption. A high standard of proof to rebut the presumption excessively burdens other parties.

In this case, the PUCO applied the *Syracuse* precedent.⁶⁵ The Commission presumed that FirstEnergy's management decisions to procure RECs were prudent. Because of this presumption and because the prudence of these costs was not disputed in the proceeding, the Commission allowed FirstEnergy to collect from its customers the costs of its purchases of All-State SRECs, In-State SRECs, and All-State RECs. The PUCO also presumed that the decisions to purchase In-State All Renewable Energy Credits were prudent. However, the PUCO found that this presumption of prudence was rebutted.⁶⁶ The Commission explicitly stated:

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.⁶⁷

This finding is consistent with PUCO precedent. The duty of the parties to produce rebuttable evidence is not high. The Exeter Report along with other factors such as the Commission's finding that the Company should have consulted with the PUCO given the unavailability of reliable market information,⁶⁸ the various potential, alternative options presented by parties, and the costly, adverse outcome of FirstEnergy's decisions are evidence that rebuts the prudence presumption.

⁶⁵ Order at 21.

⁶⁶ Order at 21.

⁶⁷ Order at 21.

⁶⁸ Order at 23, 24.

A rebutted presumption of prudence creates a duty on the Company to produce evidence proving that the costs were reasonable and recoverable.⁶⁹ It then becomes the function of the PUCO to disallow the costs for which the Company fails to meet its burden, i.e. were imprudently incurred.⁷⁰ Having determined that the Exeter Report rebutted the presumption of prudence,⁷¹ the PUCO must require FirstEnergy to meet its burden of proof. Instead, the PUCO placed the burden of persuasion on other parties.⁷² The PUCO expected other parties to establish that the Company's actions were unreasonable or imprudent. This is inconsistent with Ohio law, Supreme Court of Ohio precedent and PUCO precedent, because it unlawfully shifts the burden of proof away from FirstEnergy and onto other parties.

The Commission found that the alternatives proposed by other parties were not viable options. First, the PUCO was "not persuaded" that a reasonable reserve price could have been calculated.⁷³ Second, the PUCO found that "the Companies were not required to consider making compliance payments in lieu of purchasing RECs offered through a competitive auction."⁷⁴ The PUCO also found that there was "no evidence that payment of market prices resulting from a competitive process, above the statutory compliance payment level, is necessarily unreasonable."⁷⁵

⁶⁹ *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

⁷⁰ *Id.* at *137.

⁷¹ Order at 21.

⁷² Order at 23-24.

⁷³ Order at 22.

⁷⁴ *Id.* The Commission did not find that FirstEnergy could not have made compliance payments.

⁷⁵ Opinion and Order at 23.

Yet, these findings do not hold FirstEnergy to its burden of proof. Nowhere in the PUCO's Opinion and Order does the Commission find that FirstEnergy's decisions to purchase In-State All Renewable Energy Credits were prudent. The law requires FirstEnergy to prove that its decisions were prudent and reasonable. The law does not require other parties to prove the unreasonableness or imprudence of FirstEnergy's actions.⁷⁶ The law does not require these parties to convince the PUCO that these alternative options were necessarily the better option. Again, the burden is on the Company to prove its decisions were reasonable.⁷⁷ Assuming, *arguendo*, that there was a burden, the challengers met their burden, but the Commission did not require the Company to meet its burden of proof.

Finally, the PUCO's Opinion and Order is contradictory in its finding regarding the presumption of prudence. The PUCO expressly stated that the Exeter Report was sufficient evidence to rebut the presumption of prudence as to the procurement of In-State All Renewable RECS.⁷⁸ The Commission then concluded that the costs to procure August 2009 RFP, October 2009 RFP, and August 2010 RFP – 2010 Vintage RECs should be paid by FirstEnergy's customers. To reach these conclusions, the PUCO did not weigh the Company's evidence regarding the reasonableness of its managers' decisions. Instead, the Commission reasoned that the Company's neglect in consulting with PUCO Staff was "not sufficient to overcome the presumption that the Companies'

⁷⁶*In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9; R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

⁷⁷*In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *64-65 (July 16, 1987).

⁷⁸ Order at 21.

management decisions were prudent.”⁷⁹ The PUCO then states that this factor also does not “support the disallowance of the costs of the REC purchases.”⁸⁰ This statement contradicts the former one. Earlier in its Opinion, the Commission expressed its finding that the presumption regarding In-State All Renewables RECs was rebutted by the Exeter Report.⁸¹

Because the PUCO determined that the Exeter Report rebutted the presumption of prudence, FirstEnergy had the burden to produce evidence proving the prudence of its decisions. The PUCO did not hold FirstEnergy to its burden. Instead, the PUCO’s Order lets FirstEnergy keep [REDACTED] (plus interest) wrongfully collected from its customers. The PUCO should approve this Application for Rehearing and find that FirstEnergy failed to prove that its decisions to purchase August 2009 RFP, October 2009 RFP, and August 2010 RFP – 2010 Vintage RECs were prudent.

B. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy’s Decision to Pay [REDACTED] [REDACTED] - [REDACTED] (Per Renewable Credit) For 70,000 2009 and 2010 Vintage In-State All Renewable Credits.

In its Opinion and Order, the PUCO found that customers would have to pay for 20,000 2009 In-State All-Renewable RECs FirstEnergy purchased for [REDACTED] per REC on August 20, 2009, in response to RFP1 issued the month before.⁸² In reaching its decision, the PUCO identified three reasons why it believed that FirstEnergy’s decision to purchase these 2009 In-State All-Renewable RECs at [REDACTED] per REC should not be

⁷⁹ Order at 23-24.

⁸⁰ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9; R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

⁸¹ Order at 24.

⁸² Order at 21-24.

disallowed.⁸³ First, the PUCO found that, “the market was still nascent and that reliable, transparent information on market prices, future renewable energy projects that may have resulted in future RECs trading at lower prices, or other information that may have directly influenced the Companies’ decision to purchase RECs was generally not available.”⁸⁴

Second, the PUCO found that when FirstEnergy decided to purchase these RECs in August 2009, FirstEnergy did not know that the PUCO would find that the excessiveness of price was an appropriate basis for a *force majeure* request.⁸⁵ The PUCO points out that it did not issue a ruling indicating its position on this issue until it issued its January 7, 2010 Opinion and Order in regard to an AEP *force majeure* application.⁸⁶ Thus, the PUCO found that it was reasonable for FirstEnergy to believe that *force majeure* was not an option.⁸⁷ Third, the PUCO found that there was insufficient time from August 2009 until the end of the compliance period for FirstEnergy to go back into the market if its *force majeure* request was rejected.⁸⁸

1. The PUCO Erred In Failing to Find That Prices Above █████ per REC Paid by FirstEnergy Were Unreasonable Based on Available Market Information From All-Renewables Markets Around the Country.

While the PUCO found that reliable, transparent market information related to Ohio’s In-State, All-Renewable nascent REC market was “generally not available” in

⁸³ Order at 21-24.

⁸⁴ Opinion and Order of August 7, 2013 at 21.

⁸⁵ Opinion and Order of August 7, 2013 at 23.

⁸⁶ Opinion and order of August 7, 2013 at 23, citing *In re Columbus Southern Power Co. and Ohio Power Co.*, Case Nos. 09-987-EL-EED, Entry (PUCO January 7, 2010) (*AEP Ohio Case*).

⁸⁷ Opinion and Order of August 7, 2013 at 23.

⁸⁸ Opinion and Order of August 7, 2013 at 23.

August 2009 – it was still not prudent for FirstEnergy to purchase All-Renewable RECs from: [REDACTED], at a price of [REDACTED] per REC. As both the Exeter Auditor and OCC witness Gonzalez testified, such prices had never been reported for any All-Renewables product in any state.⁸⁹

According to Exeter, the prices that FirstEnergy paid for 2009 RECs in RFP1 exceeded the prices paid anywhere in the country by [REDACTED] per REC.⁹⁰ Prices paid in compliance markets for non-solar RECs, between January 2008 and October 2011, were never more than \$52 per REC and, in most years, were below 40 dollars per REC.⁹¹ Even in other states' nascent markets, prices like those paid by FirstEnergy had not been seen.⁹² While Ohio's In-State requirement differed from other states' requirements, there was no basis to conclude that Ohio's REC requirements would drive prices to levels unseen anywhere else in the country.⁹³

The Commission also erred to the extent it relied on FirstEnergy's attempt to compare prices that utilities paid for solar RECs in other states with the prices that it paid for non-solar RECs in Ohio.⁹⁴ The Ohio General Assembly understood the difference between the market price of these two distinct products when it established an alternative compliance payment of \$450 per REC for solar RECs and \$45 per REC for All Renewable RECs (irrespective of whether they were In-State or All-State). Thus, the General Assembly did not find a reasonable market basis to support a price differential

⁸⁹ Exeter Audit Report at 26, 33; Direct Testimony of Wilson Gonzalez at 8-9.

⁹⁰ Exeter Audit Report at 33.

⁹¹ Direct Testimony of Wilson Gonzalez at 9.

⁹² Direct Testimony of Wilson Gonzalez at 12-13.

⁹³ Direct Testimony of Wilson Gonzalez at 12-13.

⁹⁴ Direct Testimony of Wilson Gonzalez at 13.

between In-State and All-States All Renewable RECs.⁹⁵ For these reasons, it was unreasonable and imprudent for FirstEnergy to purchase All-Renewable RECs, whether In-State or All-States, at prices above [REDACTED] REC [REDACTED] [REDACTED].

In rejecting Exeter's overall evaluation that FirstEnergy paid excessive prices for In-State All Renewable RECs, the PUCO relied on Exeter's conclusion that "the RFPs issued by the Companies were competitive and that the rules for the determination of winning bids were uniformly applied."⁹⁶ As emphasized by OCC witness Gonzalez, while a competitively-sourced REC RFP may be a necessary condition towards attaining a competitive result, it is not a sufficient condition to secure a competitive bid in and of itself.⁹⁷ Competitive outcomes are unlikely to exist where only a few suppliers (or a single supplier) control available supply.⁹⁸

In requiring at least 4 bidders for SSO auctions, the Ohio General Assembly acknowledged the need to protect consumers from market power.⁹⁹ Exeter's conclusion that the RFPs were conducted in an appropriate manner does lead, on the surface, to the conclusion that FirstEnergy's purchasing decisions were appropriate. But it was unreasonable for the PUCO to equate the two. The PUCO should consider the entirety of Exeter's evaluation, not simply its evaluation of the manner in which the RFP was conducted. The competitiveness of a single bidder's bid in a nascent market where there

⁹⁵ Direct Testimony of Wilson Gonzalez at 14; see R.C. 4928.64(C)(2)(a) – R.C. 4928.64(C)(2)(b)

⁹⁶ Order at 22.

⁹⁷ Initial Brief of OCC at 26-28, citing Transcript Volume III-public, p. 639.

⁹⁸ Initial Brief of OCC at 26-28, citing Transcript Volume III-public, p. 639.

⁹⁹ R.C. 4928.142(C)(2); Direct Testimony of Wilson Gonzalez at 19.

is a constrained supply should be carefully assessed and all reasonable alternatives should be considered.

FirstEnergy failed to exercise an appropriate level of care and caution before accepting the bid from [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 100

Furthermore, the simple act of bidding does not mean it reflects a competitive market price, much less that accepting the offer would be a prudent decision. This is why the Exeter Auditor explained that an absence of market information should not have led to a conclusion that prices for In-State All Renewable RECs in the Ohio market would have differed “so markedly from the cost of renewable development elsewhere in the country,” where “underlying economic factors *** are the same.”¹⁰¹ The price indicatives for In-State All Renewables reflected a market price of less than \$45.¹⁰²

Because the prices bid were so high¹⁰³ and FirstEnergy knew, prior to making the decision to purchase In-State All Renewable RECs, that they were bid by [REDACTED]

¹⁰⁰ OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-confidential, at p. 4 of 10. Navigant also goes on to say that [REDACTED]

¹⁰¹ Exeter Audit Report at 30.

¹⁰² Direct Testimony of Wilson Gonzalez at Attachment 2; Direct Testimony of Daniel R. Bradley at Attachment DRB-2; *see infra*, Section F.

¹⁰³ *See* Exeter Audit Report at 25-26.

██████████¹⁰⁴ with market power,¹⁰⁵ it was incumbent upon the Utility to recognize the absence of a competitive market.¹⁰⁶ At a minimum, prudence demanded an additional level of review, if for no other reason than to explore other options (e.g. ACP and/or *force majeure*) prior to purchasing grossly over-priced REC's from ██████████. Had alternatives been implemented, FirstEnergy would not have collected ██████████ dollars in imprudent costs from its customers through Rider AER.

The PUCO found that "other states had experienced significantly higher REC prices in the first few years after enactment of a state renewable energy portfolio standard." And the PUCO found that, as the prices paid for the REC's were within the range predicted by the Companies' consultant." But, in making these statements, the PUCO inappropriately mixes the history of solar REC prices with the history of All-Renewables REC's prices. This mixing of apples and oranges is just what FirstEnergy – and Navigant – did in trying to justify the purchase of these All-Renewable REC's. As noted above, Navigant explained that such prices had been seen before, but proceeded to cite to prices for solar REC's in New Jersey in 2009. However, it is widely recognized that solar REC's had an initial price point that was far higher because of the initial development costs associated with solar REC's.¹⁰⁷

¹⁰⁴ Transcript Volume II-public, p. 316.

¹⁰⁵ See OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-confidential, at p. 4 of 10. Navigant also goes on to say that ██████████

██████████ See also the Exeter Auditor's conclusion that "REC's prices of that magnitude indicate that some degree of market power is being exercised by a segment of the market given offered prices well above the cost of production." Exeter Audit Report at 31. (Emphasis added.)

¹⁰⁶ See Direct Testimony of Wilson Gonzalez at 18-19.

¹⁰⁷ Direct Testimony of Wilson Gonzalez at 13.

And the purchase prices that Navigant recommended to FirstEnergy, as indicated in Navigant's July 30, 2009 memo that FirstEnergy relied upon, were much lower than the prices that FirstEnergy actually paid. That same memorandum informed FirstEnergy that it [REDACTED] [REDACTED] [REDACTED] that statement suggests virtually no limit on what FirstEnergy could pay for RECs and should be given little value.¹⁰⁹ In fact, Mr. Bradley testified that it may have been reasonable, and that he may have even recommended that FirstEnergy pay up to \$ [REDACTED] per SREC.¹¹⁰ And it was apparent that Navigant would have recommended upwards of \$1,000 per REC, which was Navigant's calculation of the three percent cost cap set forth in R.C. 4928.64(C)(3).¹¹¹ Other than the three percent cost cap, price was not a component in Navigant's assessment of whether RECs were reasonably available.

Rather than relying upon Navigant's recommendations, the PUCO should look at the price ranges for All-Renewable RECs actually reflected in Navigant's report. The highest prices reflected in that report are for Connecticut and Massachusetts, which were between \$ [REDACTED] - \$ [REDACTED] per REC.¹¹² Navigant even states that these prices [REDACTED] [REDACTED] because of state RPS regulations, which require [REDACTED]

¹⁰⁸ OCC Exh. 5 at 2-3.

¹⁰⁹ OCC Exh. 5 at 3.

¹¹⁰ Transcript Volume I-confidential, page 197.

¹¹¹ Transcript Volume I-public, page 188.

¹¹² OCC Exh. 5 (Confidential), pp. 1-2.

[REDACTED]

[REDACTED]¹¹³ To pay more than this was folly and imprudent.

Moreover, Texas, which also has an In-State All Renewables REC market, did not see price-outliers such as the prices that FirstEnergy paid.¹¹⁴ Although FirstEnergy contrasted the Texas In-State All Renewable market with the Ohio In-State All Renewable market, suggesting that prices in the Ohio In-State All Renewable market would necessarily be grossly higher,¹¹⁵ there was no merit to this suggestion. While the Texas market was far more developed at the time of Ohio's market opening,¹¹⁶ there is no data indicating that Texas In-State All Renewables prices during Texas's nascent compliance period grossly exceeded prices in All-States Renewables markets during the initial compliance period.

Indeed, the Table on page 13 of Mr. Gonzalez's testimony, taken from the 2007 Annual Wind Power report and in Exeter Auditor's Figure 3, show that prices in Texas's infant All Renewable REC market, between 2002 through October 2011, consistently remain below \$20 per REC.¹¹⁷ To suggest that Ohio's In-State All Renewable REC market could reasonably see prices between [REDACTED] and [REDACTED] the highest prices reported in Texas's All Renewables market simply makes no sense.

It was FirstEnergy that inscrutably failed to reasonably assess the prices bid by [REDACTED] in light of the available information from across the country. That failure

¹¹³ OCC Exh. 5 (Confidential), pp. 1-2.

¹¹⁴ Exeter Audit Report at 26; Direct Testimony of Wilson Gonzalez at 13.

¹¹⁵ Initial Brief of FirstEnergy at 55-56.

¹¹⁶ Direct Testimony of Robert Earle, Attachment RE-13, page 2.

¹¹⁷ Direct Testimony of Wilson Gonzalez at 13 & OCC Exhibit 17; Exeter Audit Report at 26.

prevented it from establishing a reasonable maximum price that it would pay.

FirstEnergy also failed to consider that the prices bid by a single bidder reflected that bidder's market power. As a result, FirstEnergy accepted bids "well above the cost of production," which were "composed largely of economic rents."¹¹⁸ The PUCO erred in finding that the record lacked evidence from which FirstEnergy could have determined that the bids it received for In-State All-Renewables RECs in RFP 1 were grossly excessive.

2. The PUCO Erred in Finding that FirstEnergy Was Excused from Filing a *Force Majeure* Request (Until January 7, 2010) Because FirstEnergy did not Believe that Such a Request Could be Granted Based Solely on the Price of Renewable Energy Credits.

The PUCO found that FirstEnergy could not have known that the PUCO would find that excessively-priced RECs were not "reasonably available" in regard to a force majeure determination. That ruling is in error and should be abrogated.¹¹⁹

It was imprudent for FirstEnergy not to request *force majeure* by seeking a PUCO determination that such exorbitantly-price RECs were not "reasonably available."¹²⁰ The plain language "reasonably available" meant that the REC purchase requirement would be excused if RECs could not be acquired under reasonable circumstances.¹²¹ AEP Ohio knew this as indicated by its filing for *force majeure*, which was approved by the PUCO

¹¹⁸ Exeter Audit Report at 31. FirstEnergy witness Earle acknowledged that the "price of RECs in the market is determined by many factors. One of the factors is certainly the cost of development." Transcript Volume II-public at 440.

¹¹⁹ Opinion and Order of August 7, 2013 at 23.

¹²⁰ R.C. 4928.64(C)(4)(b).

¹²¹ R.C. 4928.64(C)(4)(b).

on January 7, 2010.¹²² It was unreasonable for the PUCO to find that FirstEnergy's purchases were not unreasonable simply because the AEP Ohio decision had not been rendered at the time that FirstEnergy conducted its first and second RFPs.¹²³ If AEP Ohio was able to make the determination to file an application for *force majeure* prior to the existence of precedent, it would logically follow that it would have been prudent for FirstEnergy to do the same, irrespective of Commission precedent.

For FirstEnergy to conclude that consideration of price did not figure into the determination of whether RECs were "reasonably available," was contrary to the plain language of the law. And the PUCO had no difficulty in recognizing, in the context an AEP Ohio *force majeure* request, that the law provided for *force majeure* where prices in Ohio's nascent market were so far out of line with prices seen in other states for comparable products.

It was also an unsound basis on which FirstEnergy should have proceeded to purchase RECs priced at between \$████ and \$████ per REC. Ohio law clearly provides that words are to be construed according to their common usage and that the entire statute is intended to be effective.¹²⁴ The term "reasonable" is a common modifier in legal provisions and has a common and well-established meaning.¹²⁵ FirstEnergy's construction of the *force majeure* provision construed this provision as excluding the term "reasonable" and, therefore, was inconsistent with Ohio laws on statutory construction.

¹²² *In the Matter of the Application of the Columbus Southern Power Company of Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928(C)(4), Ohio Revised Code*, Case No. 09-987-EL-EEC, Entry (Jan. 7, 2010).

¹²³ Order at 23.

¹²⁴ R.C. 1.42 and R.C. 1.47(B).

¹²⁵ *See, e.g. Chester v. Custom Countertop & Kitchen*, 1999 Ohio App. LEXIS 6138 (1999).

3. The PUCO Erred in Finding that FirstEnergy was Excused from Filing a *Force Majeure* Request Because FirstEnergy Would Not Have Had Time to Acquire RECs if the *Force Majeure* Request was Denied.

The PUCO's third basis for its decision – that FirstEnergy would not have had time to acquire the RECs if the PUCO rejected FirstEnergy's *force majeure* request, overstates the time that would have been required to rebid these RECs under the circumstances. And FirstEnergy never asserted this position or produced evidence to support it on the record of this proceeding. Furthermore, it ignores that 50,000 of the RECs acquired through the August 2009 RFP (RFP 1) were purchased to meet the 2010 compliance requirement that did not have to be met until March 31, 2011--more than a year later. And, even for the 2009 vintage RECs, the PUCO's decision mistakenly suggests that these RECs had to be acquired by the end of 2009 when the compliance period actually extended through the end of March, 2010.¹²⁶

Although the renewable energy associated with RECs of a particular vintage – whether 2009 or any other year – must be retired/produced in the vintage year, the RECs may be acquired after the vintage year. Thus, 2009 RECs would only have had to be purchased by the time of the filing of FirstEnergy's annual compliance report – March 31, 2010. As the PUCO knows, it is not uncommon for RECs to be acquired to meet compliance obligations after the calendar year in which they are retired. FirstEnergy still had significant time in which to acquire these RECs. Thus, FirstEnergy could have acquired these RECs long after the PUCO would have had to render a decision on an application for *force majeure*.

¹²⁶ *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, PUCO Opinion and Order at 14 (August 3, 2011).

Navigant tabulated the results of the RFP1 bids on August 12, 2009. FirstEnergy could have filed a *force majeure* application soon thereafter. Even if an application were not filed until the end of August 2009, the PUCO would have had to issue a decision by the end of November, 2009.¹²⁷ If the PUCO rejected its *force majeure* request, FirstEnergy still had options. FirstEnergy could have: 1) purchased the RECs from [REDACTED] or 2) issued another RFP. Based on this timetable, there was adequate time to file a *force majeure* application in regard to RFP1 2009 vintage RECs. There was more than enough time (4 months) to file a *force majeure* application in regard to RFP1 2010 vintage RECS. Thus, the PUCO's reasoning that FirstEnergy's failure to make a *force majeure* request was not unreasonable because of the consequences if such a request were to be rejected does not jibe with the facts regarding the time available to rebid.

4. The PUCO Erred in Failing to Make a Specific Determination of Prudence As Required by R.C. 4903.09 To Support The PUCO's Allowance of Cost Recovery from Customers.

In reaching its decision, the PUCO stated only that FirstEnergy's In-State All-Renewable REC purchases in RFP 1 should not be disallowed.¹²⁹ But the PUCO did not make findings that FirstEnergy's decisions were prudent. And, as discussed above, the PUCO wrongly applied an erroneous presumption of prudence. Thus, FirstEnergy did not carry its burden of proof in its claim for collection of these costs from its customers. And the PUCO did not adequately set forth the reasons supporting its determination to

¹²⁷ Given that price was a consideration in the AEP order according to the PUCO, there was a high probability that a *force majeure* based on the exorbitant REC prices would have been granted.

¹²⁸ It is reasonable to expect that [REDACTED] excessively-priced RECs would likely still have been available given the absence of evidence that RECs have been purchased at such prices by any entity other than FirstEnergy in these [REDACTED] transactions.

¹²⁹ Order at 21.

allow these costs under R.C. 4909.154.¹³⁰ Instead, the PUCO takes issue with the evidence offered by other parties challenging FirstEnergy's claims.

As discussed above, the burden of proof in this case rests with FirstEnergy and the PUCO must find that FirstEnergy showed that its costs were prudently incurred. This is required by the terms of the Stipulation in the ESP proceeding as well as by the Revised Code.¹³¹ Merely saying that the Utility's actions were "not unreasonable," that the claim should not be disallowed, or that the evidence produced by opposing parties does not overcome the so-called "presumption" of prudence is not sufficient. The PUCO erred in allowing FirstEnergy to collect money from customers for the excessively-priced 2009 and 2010-vintage In-State All Renewable REC costs in RFP 1 in the absence of a specific finding of prudence.

C. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision To Pay [REDACTED] - [REDACTED] (Per Renewable Credit) In RFP 2 For 95,489 2009, 2010, And 2011 Vintage In-State All Renewable Credits.

The PUCO also found that FirstEnergy's decision in October 2009 to purchase, in response to the October 2009 RFP (RFP 2), 95,489 In-State All-Renewable RECs at prices between \$ [REDACTED] and \$ [REDACTED] per REC should not be disallowed.¹³² However, these REC acquisitions were also imprudent for reasons similar to those set forth above with respect to RFP1.

Although Ohio's nascent market may not have been perfectly transparent in 2009, experience across the country, as previously discussed, indicated that prices above \$52

¹³⁰ R.C. 4903.09.

¹³¹ *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, Stipulation and Recommendation at 10-11 (Feb. 19, 2009); R.C. 4909.154.*

¹³² Order at 24.

per REC for an All-Renewables product was simply unheard-of.¹³³ It was unreasonable for FirstEnergy to pay ██████████ for 2009-vintage RECs, let alone for 2010 and 2011 vintage RECs. It was also unreasonable for FirstEnergy to ignore the *force majeure* provisions of the law, and the facially compelling conclusion that RECs at these prices were not “reasonably available.”

Moreover, the fact that significant additional RECs were bid in RFP 2, just two months after RFP 1, indicated a quickly expanding REC market even if the bidder was still attempting to exact significant economic rents. Yet the PUCO found that what FirstEnergy “knew or should have known” in October 2009 was still insufficient to justify FirstEnergy pursuing *force majeure* or other alternatives.

With respect to 2011 RECs purchased in RFP2, while the PUCO “is concerned that the Companies chose to purchase vintage 2011 RECs in 2009 when the market was nascent and illiquid,” the PUCO accepted “the Companies claim that this was part of the laddering strategy” and amounted to “only 15 percent of the 2011 compliance requirement.”¹³⁴ But 15% of the 2011 compliance requirement is not so insignificant as the PUCO suggests. Fifteen percent is 26,084 In-State All-Renewable RECs and when the price is \$█████████ per REC, the total cost to customers is \$█████████. That is a huge cost for a small number of RECs.

Had those RECs been purchased at the weighted average price of RECs purchased through RFP 6 in 2011, the price would have been \$█████████, not the ██████████ of dollars that FirstEnergy paid. Even at prices seen in the higher-priced Connecticut and Massachusetts markets as reported by Navigant in 2009, FirstEnergy would have saved

¹³³ Direct Testimony of Wilson Gonzalez at 9; Exeter Audit Report at 33.

¹³⁴ Order at 24.

customers huge sums of money had it recognized – as it should have – that other states' prices provided reasonable guidance for REC purchasing.

The PUCO, in disallowing 2011-vintage RECs purchased in RFP3 in August 2010,¹³⁵ discusses Navigant's market assessment report dated October 18, 2009 that "the supply of Ohio RECs will continue to be very constrained through 2010."¹³⁶ But the purchase of 2011-vintage RECs in 2009 made even less sense because FirstEnergy was already in possession of the October 2009 Navigant report, which indicated that the market would probably remain constrained through 2010.

The PUCO's reliance on this report to deny 2011-vintage RECs purchased in 2010 compels the same conclusion for 2011-vintage RECs purchased in 2009. It means that the PUCO should place the same significance on this information in evaluating both the RFP2 and RFP3 purchases of vintage 2011 In-State All Renewable RECs. Accordingly, purchases of vintage 2011 In-State All-Renewable Credits in both RFP2 and RFP3 should be disallowed because both were based on Navigant's conclusion that market constraints would end in 2010.

Finally, the PUCO again failed to find that FirstEnergy's actions were reasonable and prudent and that the Utility carried its burden of proof. Merely stating that the costs should not be disallowed and that the record evidence does not show "a significant change in the amount of market information available between August 2009 and October 2009" does not indicate a determination that FirstEnergy carried its burden of proof. The PUCO erred in making customers pay for the excessively-priced 2010-vintage In-State

¹³⁵ Order at 25-28.

¹³⁶ Order at 25-26.

All Renewable REC costs in RFP 3 in the absence of a specific finding that they were prudent.

D. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision To Pay [REDACTED] (Per Renewable Credit) For 29,676 2010 Vintage In-State All Renewable Credits.

The PUCO allowed recovery of [REDACTED] for 29,676 2010 Vintage In-State All Renewable RECs purchased, as part of RFP3, in August 2010 at a price of \$ [REDACTED] per REC.¹³⁷ That ruling was unreasonable. In allowing these costs, the PUCO stated that “[t]here 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.”¹³⁸ The PUCO refers to Navigant’s market assessment report of October 18, 2009, stating that “the supply of Ohio RECs will continue to be very constrained through 2010.”¹³⁹

In reaching these conclusions, FirstEnergy and the PUCO relied, in error, on a market report released on October 18, 2009--10 months before the decision was made to purchase the RECs. But record evidence showed a changing market. During the very month that FirstEnergy purchased 29,676 In-State All Renewable RECs at \$ [REDACTED] per REC, the Spectrometer report was published in Ohio showing Ohio In-State All Renewable RECs were priced between \$ [REDACTED] per REC to \$ [REDACTED] per REC.¹⁴⁰ Certainly, rather than paying \$ [REDACTED] per REC for 2010 Vintage RECs, FirstEnergy should have

¹³⁷ Order at 24-25.

¹³⁸ Order 24-25, *citing* FirstEnergy Exh. 1 (Bradley Testimony) at 37-38.

¹³⁹ Order at 25, *citing* FirstEnergy Exh. 1 (Bradley Testimony) at 34-35.

¹⁴⁰ OCC Initial Brief at 26; OCC Exhibit 15, Set 3-INT-2, Attachment 25 (Confidential); *see also*, Transcript Volume II-confidential, page 493.

recognized that the market was easing and prices were decreasing. FirstEnergy knew the market was changing and prudence demanded that it should have responded accordingly.

In addition to the Spectrometer report, the evidence shows that the All-Renewables market around the country was continuing to see relatively low prices. 2010 non-solar REC prices in Pennsylvania saw a high price of \$24.15 per Tier I non-solar REC and a weighted average price of \$4.77 per Tier I non-solar REC.¹⁴¹ FirstEnergy failed to produce evidence that prices anywhere in the country or elsewhere in Ohio that approached those accepted by FirstEnergy for an All-Renewables product, whether In-State or All-States. It was unreasonable for the PUCO to find it acceptable that FirstEnergy only relied on Navigant's dated report instead of looking into other price sources, including brokers, in determining the reasonableness of the pricing offered by 1 supplier for 2010 Vintage RECs.

Moreover, little weight can be given to the PUCO's rationale that requesting *force majeure* was not a viable option because the Company didn't have time to go back into the market if its *force majeure* request were rejected.¹⁴² It cannot be disputed that FirstEnergy could have issued its RFP 3 earlier, giving it plenty of time to make an appropriate *force majeure* request and save customers many, many dollars. But further indicating FirstEnergy's imprudent decision-making, it failed to timely issue RFP 3. And, as discussed above, FirstEnergy had until March 31 of the following year (2011) to obtain 2010 vintage RECs. Indeed, given the magnitude of RFP3 prices, FirstEnergy could have waited until October or November and issued another RFP for 2010 RECs if a request for *force majeure* was denied.

¹⁴¹ Transcript Volume I-public, pp. 174-75.

¹⁴² Order at 25.

The PUCO erred by failing to disallow FirstEnergy's purchase of 29,676 2010 Vintage In-State All Renewable RECs in RFP3. In addition, the PUCO failed to find that FirstEnergy's actions were reasonable and prudent and that the Utility carried its burden of proof. Merely stating that the costs should not be disallowed is insufficient to support a determination that FirstEnergy carried its burden of proof. The PUCO erred in finding that customers should pay the excessively-priced 2010-vintage In-State All Renewable REC costs in RFP 3 in the absence of a specific finding that they were prudent.

E. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase High-Priced In-State All Renewable Energy Credits In 2009 For Compliance Years 2010 And 2011, Given That FirstEnergy's Purchases Were Imprudent And Otherwise Unreasonable.

Instead of waiting for Ohio's renewables market to develop, FirstEnergy significantly compounded its imprudent decision to purchase high-priced non-solar RECs for compliance year 2009 by purchasing high-priced non-solar RECs for compliance years 2010 and 2011. Those purchases were made long before the purchases were required to meet 2010 and 2011 compliance obligations.¹⁴³ This decision was made by FirstEnergy—not Navigant. The [REDACTED] benefitted from this imprudent business decision was [REDACTED].

In its Order, the PUCO found that "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."¹⁴⁴ But, as the Supreme Court held in *Duke Energy*, "that [argument] is irrelevant because those parties did not bear the burden of proof."¹⁴⁵ The

¹⁴³ Direct Testimony of Wilson Gonzalez at 17.

¹⁴⁴ Order at 22.

¹⁴⁵ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

Court explained that it is the Utility that has to “prove a positive point: that its expenses had been prudently incurred * * * [t]he commission did not have to find the negative: that the expenses were imprudent.”¹⁴⁶

But FirstEnergy’s laddering strategy was inherently flawed. And there is plenty of evidence in the record as to why it was flawed.

The Exeter Auditor and OCC witness Gonzalez both acknowledge that FirstEnergy compounded the financial harm to its customers by locking in the grossly excessive REC prices in the 2009 compliance year to meet the renewable requirements for 2010 and 2011.¹⁴⁷ This is especially the case since (as previously discussed) applying for a *force majeure* was an option for FirstEnergy.

FirstEnergy’s apparent self-serving reason for paying grossly excessive prices for In-State All Renewable Energy Credits beyond 2009 was for the purposes of price risk mitigation.¹⁴⁸ In the abstract, a laddering concept has some merit in reducing customer price risk. At times, OCC has been supportive of Ohio utilities incorporating laddering in their SSO auctions. However, in real life, no one using sound judgment executes laddering when the prices bid are the highest ever seen, including more than 15 times greater than the ACP,¹⁴⁹ in a market that is constrained and exhibits the exercise of market power.

A more measured and prudent management approach would have been to exercise an alternative available to FirstEnergy while the Ohio In-State All Renewables market

¹⁴⁶ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶8.

¹⁴⁷ Direct Testimony of Wilson Gonzalez at 16; Exeter Audit Report (Redacted), at 32.

¹⁴⁸ Transcript Volume II-public, page 320.

¹⁴⁹ Exeter Audit Report (Redacted) at page 28.

matured and more projects came on line and were certified by the Commission. As stated in OCC witness Gonzalez' testimony, "When FirstEnergy 'doubled down' (locked in excessive prices in 2009 to meet the renewable requirements for 2010 and 2011 for In-State All Renewable RECs), it resulted in an even larger losing bet for consumers, especially given the increased volumes of RECs purchased in later years."¹⁵⁰

Mr. Gonzalez further testified that these decisions to purchase In-State All Renewable RECs at grossly excessive prices beyond the initial period were "particularly imprudent," "especially given the increased volumes of RECs purchased in later years."¹⁵¹ As he testified, "[i]f FirstEnergy believed that the In-State All Renewables RECs were going to be permanently short and constrained, it should have made a 'force majeure' filing as permitted by law ***."¹⁵² Thus, FirstEnergy's imprudent decision-making was compounded by its purchasing of In-State All Renewable RECs in 2009 for 2010 and 2011 and its purchase of In-State All Renewable RECs in 2010 for 2011.¹⁵³ Such imprudent decisions must be remedied by this Commission, for customers.

Additionally, the Order states that "The Commission is concerned that the Companies chose to purchase vintage 2011 RECs in 2009 when the market was nascent and illiquid."¹⁵⁴ That PUCO finding alone is fatal to FirstEnergy's burden to show that its purchase of vintage 2011 RECs in 2009 was prudent. Accordingly, customers should not have to pay the costs resulting from FirstEnergy's imprudent laddering strategy.

¹⁵⁰ Direct Testimony of Wilson Gonzalez at 17.

¹⁵¹ *Id.* at 17.

¹⁵² *Id.*

¹⁵³ *Id.* at 16-17.

¹⁵⁴ Order at 24.

F. The PUCO Erred By Failing To Order An Investigation Of Whether FirstEnergy Extended Undue Preference to FirstEnergy Solutions Given, Among Other Things, The Exeter Auditor Finding That “The Prices Bid By FirstEnergy Solutions Reflected Significant Economic Rents And Were Excessive By Any Reasonable Measure.”¹⁵⁵

The PUCO erred when it failed to order an investigation into FirstEnergy’s and FES’ compliance with the corporate separation rules contained in R.C 4928.17 and Ohio Adm. Code 4901:1-20-16. The PUCO unreasonably held that “there is no evidence in the record in this proceeding to support further investigation at this time.”¹⁵⁶ To the contrary, evidence in the record raises serious concerns about the possibility that the purchase of the [REDACTED] RECs resulted from inappropriate undue preference. In light of the limited scope of Exeter’s audit, an audit of whether there were improper communications that contributed to FirstEnergy’s decision to purchase In-State All Renewable Energy Credits at prices as high as [REDACTED] per REC from [REDACTED] warrants further investigation.

In declining to order an investigation into whether there was a violation of the corporate separation rules, the PUCO cites primarily to the Exeter Auditor Report. Although the Exeter Auditor did not recommend further investigation because it did not find [REDACTED], Exeter did not investigate these issues.¹⁵⁷ The PUCO’s RFP does not require or request the Auditor to look into inappropriate communications and/or corporate separation violations.¹⁵⁸

¹⁵⁵ Exeter Audit Report at iv.

¹⁵⁶ Order at 29.

¹⁵⁷ Order at 29; Exeter Audit Report at 31.

¹⁵⁸ Entry, Request for Proposal, Attachment 1 (Jan. 18, 2012).

And the primary auditor for Exeter, Dr. Steven Estomin, testified that [REDACTED]

[REDACTED]
[REDACTED] ¹⁵⁹ However, the PUCO failed to acknowledge that Exeter [REDACTED]

[REDACTED]
[REDACTED] It is unreasonable to expect the Auditor to find evidence of something that it was not even investigating.

Although the Auditor, in the absence of conducting an actual inquiry, did not see any obvious evidence of undue preference, evidence on the record does warrant further investigation of whether there was undue preference. Specifically, Exeter found that “the prices bid by FirstEnergy Solutions reflected significant economic rents and were excessive by any reasonable measure.”¹⁶⁰ That Auditor finding was not made about any other bidder.

Additionally, FirstEnergy knew that FirstEnergy Solutions was a bidder at the time it chose to purchase [REDACTED] RECs from its affiliate.¹⁶¹ Company witness Dean Stathis was Director of FirstEnergy Service Company’s Regulated Commodity Sourcing (“RCS”), which was responsible for developing and implementing renewable energy procurement processes.¹⁶² RCS developed a process that hired an independent evaluator (“Navigant”),¹⁶³ which ultimately made a recommendation to an internal review team.¹⁶⁴

¹⁵⁹ Transcript Volume I-confidential, p. 64-65.

¹⁶⁰ Exeter Audit Report at iv.

¹⁶¹ Transcript Volume II-public, pp. 316.

¹⁶² Stathis Direct Testimony at 4.

¹⁶³ Stathis Direct Testimony at 13-14.

¹⁶⁴ Stathis Direct Testimony at 14-15.

The internal review team then decided whether to accept Navigant's recommendations regarding the procurement of renewable energy credits.¹⁶⁵

While it was unnecessary for the internal review team to know the identities of the bidders,¹⁶⁶ Mr. Stathis testified that Navigant provided the internal review team with the names of the bidders along with its recommendation.¹⁶⁷ Knowing that its corporate affiliate was [REDACTED], and bid [REDACTED], the internal review team still knowingly elected to purchase [REDACTED] RECs from its corporate affiliate for as much as [REDACTED] per REC.

The fact that FirstEnergy knew that its affiliate was a bidder raises important questions regarding undue preference when other Ohio EDUs do not even permit corporately affiliated companies to bid RECs.¹⁶⁸ It is also telling that FirstEnergy did not inform Exeter that it knew [REDACTED] RECs at the time it was determining whether to purchase the RECs.¹⁶⁹ With all the access and input that FirstEnergy is now known to have had regarding the draft Audit Report, it is inappropriate that FirstEnergy failed to [REDACTED]

In declining to further investigate whether there was undue preference, the PUCO unreasonably relied on FirstEnergy's argument that the intervening parties had ample

¹⁶⁵ Stathis Direct Testimony at 15; Transcript Volume II-public, pp. 306-308.

¹⁶⁶ Transcript Volume II-public, pp. 314-315.

¹⁶⁷ Transcript Volume II-public, pp. 316.

¹⁶⁸ Transcript Volume III-public, pp. 565, 640 (As explained by OCC witness Wilson Gonzalez, AEP Ohio's 2008 RFP for renewable energy credits contained a provision that prohibited affiliate participation).

¹⁶⁹ Transcript Volume I-confidential p.67.

time to conduct discovery to further develop the record.¹⁷⁰ The discovery process, however, cannot be used as a substitute for a Commission-ordered investigation. An investigation carries the full-weight and authority of the PUCO. And, unlike the strict rules that govern the discovery process, the PUCO can bestow an investigator (whether its own staff or a retained investigator) with greater abilities, like requiring the Utility to have discussions with the investigator.

The management and performance audit was an investigation of whether the costs to purchase RECs were prudently incurred.¹⁷¹ It was not until after the audit was completed that facts came to light, through discovery and the development of the record in this case, which necessitates a further review of whether there FirstEnergy extended undue preference to its affiliate FirstEnergy Solutions resulting in purchase of the [REDACTED] RECs in violation of the corporate separation rules. For these reasons, the Commission should reconsider and grant the Application for Rehearing by ordering such an investigation.

¹⁷⁰ Order at 29.

¹⁷¹ Entry, Request for Proposal at 4 (Jan. 18, 2012).

- G. The PUCO Erred By Failing To Find That Its Entries and Due Process Were Violated When A Key Recommendation In The Draft Exeter Report – that the PUCO should not allow FirstEnergy to collect from customers any procurement of In-State All Renewable Credits above \$50 per REC – Did Not Appear In The Filed Exeter Report After FirstEnergy Objected To The Recommendation In A Private Process Where FirstEnergy, And Not Other Parties, Was Provided The Draft Report And Proposed Changes To The Report.**

AND

- H. The PUCO Erred By Not Filing “Findings Of Fact And Written Opinions,” In Violation Of R.C. 4903.09, To Use The Evidence That The Exeter Auditor’s Draft Report Contained A Recommendation For The PUCO To Credit Customers For FirstEnergy’s Renewable-Credit Purchases Above \$50. This Most Key Auditor Recommendation For Customer Protection Was Not Included In The Final Exeter Audit Report After FirstEnergy Objected To The Draft Recommendation In A Private Process Where It Was Provided A Copy Of The Auditor’s Draft.**

AND

- I. Consistent with R.C. 4901.13 (rules for regulating “the mode and manner of ... audits ... and hearings...”), the PUCO Erred By Not Ruling That, In Future Cases For Reviews Of FirstEnergy’s Alternative Energy Rider And In Cases For Review of Any Electric Utility’s Alternative Energy Purchases, Any Commentary On The Draft Audit Report By An Electric Utility Must Be Shared Contemporaneously With Other Parties Who Will Be Given The Same Opportunity As The Utility To Make Substantive Recommendations For The Final Audit Report That Will Be Filed In Such Cases.**

Throughout this case, the PUCO has emphasized that “Any conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding.”¹⁷² But that did not happen.

Before the filing of the Exeter Report, FirstEnergy was provided with a draft of

¹⁷² January 18, 2012 Entry at 2; see also Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 2; February 23, 2012 Entry at 3.

the Exeter Report (“Draft Exeter Report”). The Request for Proposal (attached to the January 18, 2012 Entry) did provide that a copy of the final draft of the Exeter Report was to be provided to FirstEnergy and the PUCO Staff at least ten days prior to the due date of the report.¹⁷³ Per the terms of the Request for Proposal, the draft final report was provided to FirstEnergy because FirstEnergy was required to “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).”¹⁷⁴

But FirstEnergy did more than that. FirstEnergy went far beyond the scope of what was permitted under the terms of the PUCO’s RFP. Specifically, FirstEnergy requested substantive modifications to the Draft Exeter Report, and did so in part by marking up an electronic draft of the Auditor’s Report.¹⁷⁵

Through a public records request¹⁷⁶ the parties learned that, in a pre-filing draft of the Exeter Report that parties other than FirstEnergy had not seen, the Exeter Auditor had originally drafted a recommendation for the PUCO to not allow FirstEnergy to collect from customers any procurement of In-State All Renewable Credits above \$50/REC.¹⁷⁷ And it was learned that, after FirstEnergy provided comments to the PUCO Staff and the Exeter Auditor regarding the Auditor’s draft recommendation,¹⁷⁸ the Auditor’s specific

¹⁷³ Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 6. Transcript Volume III-public, page 512, lines 16-23.

¹⁷⁴ Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 5.

¹⁷⁵ See Exhibit A and B (attached).

¹⁷⁶ February 14, 2013 Entry at paragraph 10.

¹⁷⁷ Transcript Volume III-public, page 512, line 24 through page 513, line 4.

¹⁷⁸ Transcript Volume III-public, page 512, lines 16-23.

recommendation to protect customers was removed from the final Audit Report that was filed in this case.¹⁷⁹

FirstEnergy engaged in a private process, a process lacking due process for other parties, where it was given the Exeter Auditor's report in draft form before the report's public issuance.¹⁸⁰ Instead of merely assisting the Exeter Auditor in the identification of any alleged confidential information, FirstEnergy took this opportunity to dispute the findings and conclusions in the Draft Exeter Audit Report.¹⁸¹ FirstEnergy's objections to the draft Audit Report included its disputing of what would have been a key Auditor recommendation — for the PUCO to protect customers from paying for all costs for In-State All Renewable Credits that FirstEnergy purchased above \$50/REC. But that auditor recommendation, that appeared in the draft report, was eliminated when the final report was filed at the PUCO.¹⁸²

This private process was not fair to the other participants to the proceeding who did not receive the same opportunities (as FirstEnergy received) to review a draft version of the Audit Report and advocate for what should or should not appear in the final version that was filed. And the private process was not fair to the Commission that benefits from participation by all parties on the issues for purposes of its decision-making under R.C. 4903.09. The unfairness of the process (and lack of due process) was especially highlighted by FirstEnergy's private advocacy to prevent the filing of a

¹⁷⁹ See Exeter Audit Report.

¹⁸⁰ Transcript Volume III-public, page 512, line 24 through page 513, line 4.; see also Initial Brief of OCC at 49-50; Exhibits A and B (attached.)

¹⁸¹ See Exhibits A and B (attached.).

¹⁸² Initial Brief of OCC at 49-50.

recommendation in the draft Audit Report that was favorable to customers.¹⁸³ The PUCO should find that its Entries that limited the scope of FirstEnergy's review of the draft audit report and due process were violated.

Further, the PUCO had before it the evidence of the recommendation that appeared in the draft Audit Report. That evidence should have been used in the Order in favor of protecting customers from paying for FirstEnergy's purchase of renewable credits above \$50. That evidence should now be used on rehearing to rule favorably on all of OCC's above claims of error to obtain further credits on customers' bills.

Finally, the private process – that allowed FirstEnergy the unilateral opportunity to make recommendations regarding the draft audit report – should not be repeated in any future cases involving audits of FirstEnergy's alternative energy purchases. And it should not be allowed in any future cases involving audits of an electric utility's alternative energy purchases. What occurred was not contemplated by the PUCO's Entries in this case. Therefore, any further steps needed to prevent recurrence of such a process should be taken, including that a copy of an electric utility's (including FirstEnergy's) commentary on a draft audit report should be contemporaneously provided to all other parties for their input.

J. The PUCO Erred By Preventing The Disclosure Of Public Information Relating To FirstEnergy's Imprudent Purchases Of In State All-Renewable Energy Credits For Which FirstEnergy's Customers Should Not Have To Pay.

The PUCO erred when it granted FirstEnergy's Motions for Protection despite the Utility's failure to meet its burden of establishing that REC procurement data, and OCC's

¹⁸³ January 18, 2012 Entry at 2; see also Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 2; February 23, 2012 Entry at 3.

aggregated disallowance, is “trade secret” information. As the PUCO properly noted, information is “trade secret” and exempt from the public records laws if 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.”¹⁸⁴

To assist in determining whether a trade secret claim meets the statutory definition as codified in R.C. 1333.61(D), the Ohio Supreme Court has adopted, and this Commission has recognized,¹⁸⁵ a six-factor test:

- (1) the extent to which the information is known outside the business;
- (2) the extent to which it is known to those inside the business, *i.e.*, by the employees;
- (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;
- (4) the savings effected and the value to the holder in having the information as against competitors;
- (5) the amount of effort or money expended in obtaining and developing the information; and
- (6) the amount of time and expense it would take for others to acquire and duplicate the information.¹⁸⁶

But this Commission has held that the trade secret exception is a **very limited and narrow exception**.¹⁸⁷ Therefore, the burden is on the moving party, in this case FirstEnergy, to prove that the information has “independent economic value” and was kept under circumstances that maintain its secrecy under the six-prong test.

¹⁸⁴ R.C. 1331.61(D).

¹⁸⁵ See *In the Matter of the Application of Constellation NewEnergy, Inc. for Renewal of its Certification as a Retail Electric Service Provider*, Case No. 09-870-EL-AGG, Entry at 2 (November 21, 2011); *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 8-9 (Nov. 25, 2003) (citations omitted).

¹⁸⁶ *State ex rel. Plain Dealer v. Department of Insurance*, 80 Ohio St. 3d 513, 524-524 (1998)(citations omitted); see also *The State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 414 (2009).

¹⁸⁷ See *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 7 (Nov. 25, 2003) (citations omitted) (emphasis added).

In its Opinion and Order, the PUCO failed to properly apply this burden. And to the extent that the PUCO relied upon the arguments set forth by the Utility, FirstEnergy failed to provide ample evidence to support its argument that it met the six-prong test.

While the General Assembly has allowed for the PUCO to protect trade secrets, the General Assembly has emphasized in the law that the public has a right to know the considerations in PUCO cases that affect their bills for vital utility services. For example, R.C. 4901.13 provides that “all hearings shall be open to the public.” That requirement is not satisfied in this case that had various closures of hearings for FirstEnergy’s assertions of trade secret information.

Similarly, R.C. balances the allowance of information to be protected with the expectation that “all facts and information in the possession of the public utilities commission shall be public....”¹⁸⁸ And Ohio Adm. Code 4901-1-24(D)(1) limits redactions for confidentiality to only that information that is “essential to prevent disclosure of the allegedly confidential information.” As OCC sets forth in this application for rehearing, FirstEnergy has succeeded in preventing public disclosure of information that goes far beyond what is essential to protect any confidentiality.

- 1. The PUCO Erred By Improperly Applying R.C. 1331.61(D) and by Violating R.C. 4901.13, R.C. 4905.07, Ohio Adm. Code 4901-1-24(D)(1) and the Strong Presumption in Favor of Public Disclosure Under Ohio Law by Preventing Public Disclosure of Bid-Specific Information, Including the Identities of the Bidders as well as the Price and Quantity of Renewable Energy Credits Bid by Each Specific Bidder.**

While the PUCO allowed “the generic disclosure of FES as a successful bidder in the competitive solicitations,”¹⁸⁹ it was unreasonable and not in accordance with law to

¹⁸⁸ R.C. 4905.07

¹⁸⁹ Order at 12, 14.

grant FirstEnergy's Motions for Protection thereby preventing public disclosure of "specific [REC procurement] information related to bids by FES"¹⁹⁰ and other competitive bidders. Specifically, historic procurement data that is anywhere from two to four years old, including pricing associated with supplier identities, does not have any economic value that may be duplicated in today's market. Nor did FirstEnergy take necessary precautions to protect the information from public disclosure.

Moreover, FirstEnergy's attempt to protect the procurement information was untimely under Ohio Admin. Code 4901-1-02(E). Thus, while FirstEnergy claims to seek protection of REC procurement information because it is competitively-sensitive "trade secret," the evidence suggests that FirstEnergy really seeks to prevent the public disclosure of specific supplier identity and pricing information because it is embarrassing. But embarrassing information is not "trade secret" and the PUCO erred by finding that such information was of the nature to meet the strict standard set forth in R.C.

1331.61(D) and the Supreme Court's *Plain Dealer* decision.

- a. **The Identities of Suppliers and the Specific Prices that FirstEnergy Paid for Renewable Energy Credits is not Economically Valuable Information Nor can it be Duplicated to Undermine Future Renewable Energy Credit Procurement Processes.**

The PUCO erred when it found that FirstEnergy presented sufficient evidence to meet its burden of establishing that the identity of the REC suppliers and the prices that they bid was trade secret information that has independent economic value. The PUCO provided little reasoning to support its decision for presumably finding that this historic procurement information has economic value. Rather, the PUCO simply acknowledged

¹⁹⁰ Order at 12, 14.

FirstEnergy's conclusory argument that "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."¹⁹¹ Without supporting evidence, which does not exist in the record,¹⁹² such a conclusory statement is not sufficient to meet the high burden required for establishing that the information falls under the very limited exception for "trade secret" information.

Contrary to the PUCO's holding, the supplier-identity and pricing information does not have independent economic value because it is historic in nature and has no impact on the current REC market. It is uncontested, and the record is replete with evidence, that the In-State All Renewables REC market was nascent during the first two years during which FirstEnergy purchased the RECs that are contested in this matter.¹⁹³ Since then, however, the market has changed because it has been continually easing and relieving.¹⁹⁴ In fact, the PUCO disallowed over \$43 million because there was evidence that the market constraints were to be relieved not long after the August 2010 RFP.¹⁹⁵ There is no economic value or competitive advantage to be gained in the current competitive market from such historic information identifying the bidders that provided RECs to FirstEnergy and how much the Utility paid for those RECs more than 3 years ago (in some cases).

¹⁹¹ Order at 10; FirstEnergy Reply Brief at 90 (citing Navigant Consulting, Inc. Comments Letter, p. 2 (Oct. 26, 2012)).

¹⁹² FirstEnergy Reply Brief at 88, 91, 100 (citing to a "Navigant Consulting, Inc. Comments Letter" that was allegedly produced on October 26, 2012). This document, however, was not admitted into evidence.

¹⁹³ Order at 15, 17, 19, 21, 24.

¹⁹⁴ Order at 19; OCC Exhibit 15, Spectrometer Report: Transcript I, p. 154, Daniel Bradley (the market "has some of the characterization of a more liquid and transparent market, I would still characterize it as relatively nascent"); *See also*, Transcript III, p. 602-603.

¹⁹⁵ Order at 25 (citing Transcript II, p. 360); Opinion and Order at 27 (citing Transcript II, pp. 369-370).

Moreover, the PUCO has recognized that historical information is not sufficient to establish the trade secret exception¹⁹⁶ – an argument raised in OCC’s Initial Brief¹⁹⁷ that was not even acknowledged in the PUCO’s Opinion and Order. The PUCO did, however, cite to *In re Duke Energy Ohio, Inc.*, Case No. 10-2326-GE-RDR,¹⁹⁸ which is distinguishable from the current matter. Unlike the historic information at issue in this case, Duke sought to protect spreadsheets that contained future projections of “growth rates as applied to the price of electricity and gas, as well as the amount of energy consumed and the number of installed meters.”¹⁹⁹ In that case, the PUCO did not protect historic information that was as little as two years old.

And to the extent that the PUCO relied upon Case No. 08-935-EL-SSO and Case No. 11-6000-EL-UNC as cited by FirstEnergy (although not cited in its Opinion and Order) in those cases the PUCO denied the motions for protection, in part, to allow public dissemination of winning bids and the identities of those bidders.²⁰⁰ It was only the unsuccessful bidders’ identities that were to be kept confidential under the trade secret doctrine.²⁰¹ And while FirstEnergy argues that the PUCO has yet to lift the seal in the

¹⁹⁶ *In the Matter of the Application of CAT Communications International, Inc.*, Pub. Util. Comm. Case No. 02-496-TP-ACE, Ohio PUC LEXIS 405, at *4, (Apr. 25, 2002). (Commission denying a protective order over information that failed to be established as a trade secret and was three years old.)

¹⁹⁷ OCC Initial Brief at 69.

¹⁹⁸ Order at 10.

¹⁹⁹ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-LM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Entry at 2 (Jan. 25, 2012).

²⁰⁰ *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*, 08-935-EL-SSO, Finding and Order, at 3 (May 14, 2009) (“FirstEnergy SSO”); *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, 11-6000-EL-UNC, Finding and Order at 3 (May 23, 2012) (“Duke SSO”).

²⁰¹ *FirstEnergy SSO* at 3; *Duke SSO* at 3.

Duke SSO case, the original Protective Order was only granted for 18 months and will expire on November 23, 2013.²⁰² Moreover, there is no indication that the SSO auction market has changed like the REC market. Thus, unlike the auction bidding information at issue in the *Duke SSO* case, release of the REC procurement data would not chill future REC bidding because is not relevant to current market conditions.

Instead, the PUCO should find direction from another case where it granted an 18-month protection over auction reports that contained the identities of all bidders, the actual bids, exit prices, and the indicative bids, which were only four months old at the time.²⁰³ In that case, the PUCO rescinded the protective order just over a year later when FERC requested the unredacted reports for *In Re First Energy Solutions Inc.*, which was pending before them at the time.²⁰⁴ The PUCO also stated that because of changes in the market, the one-and-a-half year old reports would not be of much present value.²⁰⁵ In fact, it was FirstEnergy that recommended the release of the full unredacted reports just over a year after requesting the initial protective order.²⁰⁶ Likewise, the bid information in this case is now between 3-4 years old and the bids relate to REC purchases that were finalized in 2011 (at the latest). There is no reason to protect this information anymore, even if there may have been some reason to do so during the period that the RECs were purchased.

²⁰² FirstEnergy Reply Brief at 87; *Duke SSO*, at 3.

²⁰³ *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 ("Ohio Edison Co.")*, Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, at *8, (Apr. 6, 2005).

²⁰⁴ *Id.* at ¶2 & ¶5, (April 19, 2006).

²⁰⁵ *Id.* at ¶5.

²⁰⁶ *Id.* at ¶4.

Moreover, there is no concern that others could duplicate the information because (1) the bids are from 2009-2011, which have long been completed and (2) the market is not as constrained as it was during that time. FirstEnergy failed to provide any evidence to the contrary, instead, relying on conclusory arguments that fall woefully short of the high burden for meeting the trade secret exception. The information that the PUCO has allowed FirstEnergy to protect is no longer current and certainly would not undermine the integrity of the REC process that has fundamentally changed since the bidding of those RECs (*Plain Dealer* prong 6). Therefore, it is of no economic value, necessitating a ruling by the PUCO denying FirstEnergy's Motions for Protection.

b. FirstEnergy Failed to Take Sufficient Safeguards to Protect the Identities of Renewable Energy Credit Suppliers and Their Pricing Information, Allowing Individuals Outside of the Company to Discover the Information.

The PUCO also erred by finding that FirstEnergy took precautions to safeguard the supplier identities and pricing information (*Plain Dealer* prong 3) such that it was not known by those outside of the Company (*Plain Dealer* prong 1). It is difficult to understand the PUCO's ruling in this case. While the PUCO failed to provide a detailed rationale of its decision to protect specific supplier identity and pricing information, it appears as though it relied, in part, upon FirstEnergy's argument that procurement data was not disclosed to third parties.²⁰⁷ Yet, the Commission acknowledged that this information was made publicly available in the Exeter Audit Report.²⁰⁸

²⁰⁷ Order at 9; FirstEnergy Reply Brief at 97.

²⁰⁸ Order at 12, 14.

The record also reflects that specific bidder identities and pricing information is publicly available in a number of media articles.²⁰⁹ In fact, the PUCO even modified the Attorney Examiner's ruling to permit "generic disclosure of FES as a successful bidder in the competitive solicitations," because "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."²¹⁰ The Commission went so far as to find that "this fact has been placed in the public domain and has been widely disseminated."²¹¹ However, the PUCO inexplicably stopped short of addressing the fact that the Exeter Audit Report also publicly explained that FirstEnergy paid "in some cases more than 15 times the price of the applicable forty-five-dollar Alternative Compliance Payment."²¹²

In limiting the scope of its decision, the PUCO appeared to rely on FirstEnergy's argument that repeatedly blames the PUCO Staff for "inadvertent and involuntary disclosure of some of the REC procurement data in the public version of one of the audit reports."²¹³ Yet, the Commission failed to give sufficient weight to the fact that FirstEnergy waited forty-nine (49) days before filing its first Motion for Protection of the REC procurement data.²¹⁴

²⁰⁹ John Funk, "Audit finds FirstEnergy overpaid for renewable energy credits, passed on expenses to customers," available at http://www.cleveland.com/business/index.ssf/2012/08/audit_finds_firstenergy_overpa.html (last accessed April 2, 2013); Gina-Marie Cheeseman, "FirstEnergy Paid Way Too Much to Comply With Ohio's Renewable Mandate," available at <http://www.triplepundit.com/2012/08/firstenergy-ohio-renewable-mandate> (last accessed February 13, 2013).

²¹⁰ Order at 12, 14.

²¹¹ Order at 12.

²¹² Exeter Audit Report at 28.

²¹³ Order at 10; FirstEnergy Reply Brief at 76, 90, 94-96, 98-99.

²¹⁴ Order at 9; OCC Initial Brief at 85.

The Exeter Audit Report was publicly filed on August 15, 2012, and the evidence in the record indicates that FirstEnergy was well aware of the [REDACTED]

[REDACTED]²¹⁵ But FirstEnergy chose not to file its first Motion for Protection until October 3, 2012.²¹⁶ And FirstEnergy's reliance on case law that applies the Freedom of Information Act²¹⁷ and petitions for writs of mandamus²¹⁸ is inapposite and misplaced.

In an attempt to establish that it properly safeguarded the procurement information, FirstEnergy provided evidence of confidentiality provisions in its third party contracts with the REC suppliers.²¹⁹ But, to the extent the PUCO relied on this argument,²²⁰ it was in error because the Supreme Court of Ohio has held that the mere existence of confidentiality provisions alone will not protect information from public disclosure.²²¹

Moreover, the precedent to which FirstEnergy cited involved the third party suppliers exercising their rights to confidentiality, not the procurer seeking protection of that information.²²² In this case, however, the docket reflects that no third-party REC

²¹⁵ Transcript Volume III-confidential, page 653-54; FirstEnergy Reply Brief at 94.

²¹⁶ FirstEnergy Reply Brief at 94.

²¹⁷ FirstEnergy Reply Brief at 95-95 (citing *Pub. Citizen Health Research Group v. FDA*, 953 F. Supp. 400 (D.C. 1996)).

²¹⁸ FirstEnergy Reply Brief at 95-95 (citing *State ex rel. Perrea v. Cincinnati Public Schools*, 123 Ohio St.3d 410 (2009)).

²¹⁹ FirstEnergy Reply Brief at 89-90.

²²⁰ Order at 10.

²²¹ *State ex. Rel. Plain Dealer v. Ohio Dept. of Insurance*, 80 Ohio St.3d 513, 527, 687 N.E.2d 661 (1997).

²²² See, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5)*, Ohio Administrative Code, Case No. 11-4570-EL-RDR, 2011 Ohio PUC LEXIS 1107, Finding and Order at *2 (October 12, 2011); *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power Company*, Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181 at *18, (Apr. 6, 2005).

supplier ever filed a Motion for Protection to exercise the confidentiality clause of those contracts or sought protection of the procurement information in anyway. And many of those protective orders that were granted in the cases, to which FirstEnergy cites, have subsequently expired.²²³ Based upon this precedent, and the evidence in the record, the PUCO erred by finding that FirstEnergy carried its burden of meeting the six-prong test set forth in the *Plain Dealer* decision.

c. The PUCO Failed to Address the Fact that FirstEnergy's Motion for Protection of Supplier Identities and Pricing Information was Untimely, Which should have Resulted in Denial.

The PUCO erred when it failed to substantively address the fact that FirstEnergy's Motion for Protection should be denied because it was untimely and not filed in accordance with the PUCO's rules. Ohio Adm. Code 4901-1-02(E) provides that "[u]nless a request for a protective order is made concurrently with or prior to the reception by the commission's docketing division of any document that is case-related, the document will be considered a public record." But FirstEnergy waited to seek protection until its filing on October 3, 2012, long after the information claimed to be confidential was filed on August 15, 2012. Despite FirstEnergy's Argument on Reply, that the document was filed under seal and therefore, it was assumed that the information

²²³ *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 ("Ohio Edison Co.")*, Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, at *8, (Apr. 6, 2005) (protective order granted for 18 months but dissolved in an April 19, 2006 Entry); *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power Company ("Monongahela Power Co.")*, Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181 at *18, (Apr. 6, 2005) (granting 18 month protective order, which expired on October 6, 2007); *In the Matter of the Commission's Investigation Into Continuation of the Ohio Tel. Relay Service ("Ohio Tel. Relay Serv.")*, Case No. 01-2945-TP-COL, 2002 Ohio PUC LEXIS 378, Entry at *1, (May 2, 2002) (holding that bidding information would remain protected until the Commission selected a successful bidder, and, in an April 27, 2005 Finding and Order, the Commission denied a subsequent request to extend the Protective Order after a successful bidder was selected).

would be kept confidential by the Commission and its Staff,²²⁴ -- Ohio Admin. Code 4901-1-02(E) is very strict in its wording.

To the extent the PUCO relied on the cases to which FirstEnergy cited to support its argument that it timely filed its Motion for Protection, it did so in error. The parties in those cases filed their motions on or before the day the trade secret information was filed with the Commission.²²⁵ FirstEnergy, on the other hand, waited forty-nine (49) days, despite its knowledge that the information was filed on the PUCO's public docket. Again, opting instead to blame the PUCO Staff without taking any accountability for failing to timely file a Motion for Protection.²²⁶ For these reasons, which were not substantively addressed in the Opinion and Order, the PUCO erred by granting FirstEnergy's Motions for Protection, thus, protecting supplier identifying and pricing information from public disclosure.

2. The PUCO should make Publicly Available the Complete (Unredacted) Copies of the Exeter Audit Report and All Prior Pleadings (Including Briefs, Motions and Testimony) in this Proceeding.

Because the PUCO erred by finding that procurement information is "trade secret," for the reasons explained in Assignment of Error (J)(1), which are hereby adopted and incorporated by reference, the PUCO should make unredacted copies of the Exeter Audit Report and all previously filed pleadings in this case publicly available.

²²⁴ FirstEnergy Reply Brief at 78.

²²⁵ 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 Competitive Bid process to Bid Out Their Retail Electric Load*, Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, at *8, (Apr. 6, 2005); *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power*, Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181 at *18, (Apr. 6, 2005).

²²⁶ FirstEnergy Reply Brief, at 98-99.

3. The PUCO 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 Audit Report.

While it did not provide any specific reasoning for its denial, the PUCO erred by affirming the Attorney Examiner's ruling granting FirstEnergy's Second Motion for Protection filed on December 31, 2012, which redacted public information from the draft Exeter Audit Report.²²⁷ OCC later learned that in advance of filing the Final Exeter Audit Report, a draft of the Exeter Audit Report had been provided to FirstEnergy.²²⁸ OCC also learned that FirstEnergy provided comments upon the Draft Exeter Audit Report.²²⁹ Consequently, OCC submitted a public records request to the PUCO seeking "any and all records that reflect edits or comments on draft version of the Audit Report by employees, outside consultants, and/or counsel of [FirstEnergy]," to which FirstEnergy filed a second Motion for Protective Order. In a February 14, 2013 Entry, the Attorney Examiner ruled that the supplier-pricing and supplier-identifying information that appears in the Draft Exeter Audit Report is trade secret information in accordance with the November 20, 2012 ruling.²³⁰ The Attorney Examiner further held that the document would be released in redacted form.²³¹

²²⁷ See Exhibit A (attached.)

²²⁸ Transcript Volume III-public, page 512, lines 16-23. It is noted that Exeter did not accept all of the changes proposed by FirstEnergy, but it did make changes in several critical respects after receiving FirstEnergy's commentary. Primary among the changes made was to recommend that the Commission merely "examine" a disallowance. The original draft recommendation, to quantify the specific amount of a proposed disallowance to protect customers, was deleted. See Draft Exeter Audit Report at IV (attached as Exhibit C; see also Exhibit D); Exeter Audit Report at iv.

²²⁹ Transcript Volume III-public, page 512, lines 16-23.

²³⁰ *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*, Entry at 5 (Feb. 14, 2013) (attached as Exhibit B).

²³¹ *Id.* at 6-7.

The Draft Exeter Audit Report consisted of two primary pieces: [1] a line-edited draft of the Exeter Audit Report (hereinafter referred to as "Draft Report Line Edits"),²³² and [2] a supplemental document labeled "The Companies' Major Comments Regarding the Executive Summary Draft Management/Performance Audit Report" (hereinafter referred to as "Draft Report Supplement").²³³ The Draft Report Line Edits that were initially released in response to the OCC's public records request identified that the Exeter Auditor, in its draft report, recommended that the Commission, at a minimum, disallow FirstEnergy's recovery from customers of all In-State All Renewable RECs cost incurred by FirstEnergy in excess of ██████ per REC. The release of that disallowance recommendation was subsequently modified by the Attorney Examiner.²³⁴ In doing so, the Attorney Examiner protected any portion of the Draft Report Line Edits that identified the dollar amount that was recommended for disallowance.

The Attorney Examiner did not, however, redact that same information from the Draft Report Supplement.²³⁵ And a discussion of the amount of the recommended disallowance is part of the public record in this proceeding.²³⁶ Therefore, the PUCO erred by affirming) the Attorney Examiner's decision because this information is already publicly available.

²³² Attached as Exhibit A.

²³³ Attached as Exhibit B.

²³⁴ See Draft Report Line Edits at page IV (attached to OCC's Initial Brief.)

²³⁵ Exhibit B at page 1 of 3 (attached.)

²³⁶ Transcript Volume III-public, page 512.

4. The PUCO Erred by Granting FirstEnergy's Fourth Motion for Protective Order, Thereby Preventing FirstEnergy's Customers and the Public Generally from Knowing OCC's Recommendation to the PUCO on the Total Dollar Amount that FirstEnergy Should Have to Credit Back to Its Customers for Overcharges.

The PUCO erred when it prevented public disclosure of the total dollar amount that OCC maintains that FirstEnergy's customers should not have to pay. In accordance with paragraph 9 of the Protective Agreement, to which OCC and FirstEnergy agreed on February 1, 2013, OCC sent notice to FirstEnergy of its intent "to publicly release the total dollar amount of FirstEnergy's renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers plus interest."²³⁷ In response, FirstEnergy filed its Fourth Motion for Protective Order, on February 7, 2013, to prevent disclosure of this particular dollar value, despite the fact that it does not contain specific pricing information or the names of any of the bidders. In its Opinion and Order in this case, the PUCO summarily granted FirstEnergy's Fourth Motion for Protective Order by unlawfully applying R.C. 1331.61(D).

Presumably, the PUCO was persuaded by FirstEnergy's argument, in its Fourth Motion for Protection, that if the aggregated number were disclosed, "REC pricing data could be derived using publicly available information."²³⁸ However, there is no evidence indicating that someone would be able to "reverse engineer"²³⁹ the number to arrive at the

²³⁷ See Feb. 1, 2013 Letter, attached as Exhibit 1 to Memorandum, *Contra FirstEnergy's Motion for Protective Order by The Office of the Ohio Consumers' Counsel* (Feb. 25, 2013).

²³⁸ Order at 11; *see also*, Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for a Protective Order Regarding Trade Secret Information Contained in the Direct Testimony to be Offered by The Office of the Ohio Consumers' Counsel, at 3 (Feb. 7, 2013). FirstEnergy continues to argue out of both sides of its mouth – at certain times the Utility complains about the "inadvertent" public release of procurement information, but then attempts to use it to its advantage to prohibit the disclosure of an aggregate number.

²³⁹ FirstEnergy Reply Brief at 103.

specific bidding prices. To the contrary, even though the number of RECs that were purchased is public information, releasing the total amount of disallowance would not provide ample information to calculate specific REC prices. At most, it would only create an ability to calculate an average price per REC. Moreover, the PUCO made the amount of disallowance associated with RFP3, an amount of \$43,362,796.50, publicly available.²⁴⁰ It is no easier to discern the prices paid from that number than from the total disallowance contained in OCC witness Wilson Gonzalez's testimony.

Nevertheless, as discussed in Assignment of Error 6a, *supra*, the prices that FirstEnergy paid to purchase renewable energy credits (RECs), which have already been provided to the public, does not constitute trade secret. It logically follows, therefore, that the aggregate number derived from information that is public (and not subject to "trade secret" protection) should likewise be publicly produced.

But even if the PUCO were to continue to find that supplier pricing and identifying information should be protected "under a veil of secrecy"²⁴¹ characterized as "trade secret," the total amount of disallowance, as determined by OCC witness Gonzalez, should still be made publicly available. The total disallowance contained in Mr. Gonzalez's testimony is based on aggregated information, which does not reveal such specific prices or identities of In-State All-Renewables bidders.

Moreover, this PUCO has held that aggregated information is not subject to confidential treatment. In 2002, Verizon sought a protective order requesting confidentiality of the number of access lines in the Montrose Exchange as of May

²⁴⁰ Order at 25.

²⁴¹ Ohio Power Company's Motion to Intervene and Reopen Proceedings at 4 (June 21, 2013).

2002.”²⁴² The attorney examiner noted that “the aggregate figure does not reveal the access line count provided by any particular carrier.”²⁴³ Although FirstEnergy attempts to distort the holding in that decision,²⁴⁴ the PUCO further held that aggregated information can be publicly used even where some information that forms the aggregate is protected.²⁴⁵ For these many reasons, the Commission erred by not, at a minimum, denying FirstEnergy’s February 7, 2013 Motion for Protection. The public should be allowed to know the dollar amount that OCC has asked the PUCO to order FirstEnergy to credit to customers’ bills to protect customers from paying for FirstEnergy’s overcharges.

IV. CONCLUSION

For all the reasons discussed above, the PUCO should grant rehearing on OCC’s claims of error and modify or abrogate its August 7, 2013 Opinion and Order consistent with Ohio law and reason.

²⁴² *In the Matter of the Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio v. Ameritech Ohio and Verizon North Incorporated*, Case No. 02-1752-TP-TXP, 2002 Ohio PUC LEXIS 889, Entry at 1 (Sept. 30, 2002).

²⁴³ *Id.* at 1-2; *See also*, *In the Matter of the Petition of Dean Thomas and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Telephone Company of Ohio dba Sprint*, Case No. 02-880-TP-TXP, 2002 Ohio PUC LEXIS 679, Entry at 3 (Jul. 31, 2002); *In the Matter of the Commission’s Promulgation of Rules for Market Monitoring Pursuant to Chapter 4928, Revised Code*, Case No. 99-1612-EL-ORD, 2000 Ohio PUC LEXIS 445, Finding and Order at 6 (Mar. 30, 2000) (stating “The fact that the information is confidential, however, does not preclude the Commission or Commission Staff from publishing [] data in an aggregated form”).

²⁴⁴ FirstEnergy Reply Brief at 102-103.

²⁴⁵ OCC Memorandum Contra. at 4-5 (Feb. 25, 2013); *In the Matter of the Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio v. Ameritech Ohio and Verizon North Incorporated*, Case No. 02-1752-TP-TXP, 2002 Ohio PUC LEXIS 889, Entry at 1-2 (Sept. 30, 2002); *See also*, *In the Matter of the Petition of Dean Thomas and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Telephone Company of Ohio dba Sprint*, Case No. 02-880-TP-TXP, 2002 Ohio PUC LEXIS 679, Entry at 3 (Jul. 31, 2002); *In the Matter of the Commission’s Promulgation of Rules for Market Monitoring Pursuant to Chapter 4928, Revised Code*, Case No. 99-1612-EL-ORD, 2000 Ohio PUC LEXIS 445, Finding and Order at 6 (Mar. 30, 2000) (stating “The fact that the information is confidential, however, does not preclude the Commission or Commission Staff from publishing [] data in an aggregated form”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Application for Rehearing (PUBLIC VERSION), was served via electronic mail to the persons listed below this 6th day of August, 2013.

/s/ Melissa R. Yost

Melissa R. Yost
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Confidential Pursuant to O.R.C. 4901.16

**CONFIDENTIAL DRAFT
MANAGEMENT/PERFORMANCE AUDIT
OF THE ALTERNATIVE ENERGY RESOURCE RIDER (RIDER AER)
OF THE FIRSTENERGY OHIO UTILITY COMPANIES
FOR OCTOBER 2009 THROUGH DECEMBER 31, 2011**

CASE NO. 11-5201-EL-RDR

**PREPARED FOR:
PUBLIC UTILITIES COMMISSION OF OHIO
180 EAST BROAD STREET
COLUMBUS, OHIO 43215-3793**

JUNE 1, 2012

PREPARED BY

EXETER

**ASSOCIATES, INC.
10480 Little Patuxent Parkway
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Confidential Pursuant to O.R.C. 4901.16**Executive Summary**

On September 20, 2011, the Public Utilities Commission of Ohio ("PUCO") issued an entry on rehearing 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 PUCO stated that it had opened Case No. 11-5201-EL-RDR for the purposes of reviewing the Alternative Energy Resource Rider ("Rider AER") of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy Ohio utilities" or "Companies"). Additionally, the PUCO indicated that its review would include the Companies' procurement of renewable energy credits for purposes of compliance with Ohio's Alternative Energy Portfolio Standard ("AEPS"). The PUCO further noted that it would determine the necessity and scope of an external auditor for this matter.

The PUCO subsequently decided that an external auditor would be necessary for the review, and on January 18, 2012 directed Staff to issue a request for proposals ("RFP") for audit services. After consideration of the proposals received, the PUCO 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.

This report presents the findings of Exeter's management/performance audit of the Rider AER of the FirstEnergy Ohio utility companies for the time period ~~October-June 2009~~ through December 31, 2011. Dr. Steven L. Estomin and Mr. Thomas S. Caitlin acted as the primary investigators for this audit.

The principal information on which this management/performance audit is based is from a variety of sources, including:

- Responses of the FirstEnergy Ohio utilities to requests for information prepared by Exeter Associates, Inc.
- Independent research conducted by Exeter Associates, Inc. related to the availability and market prices of SRECs and RECs in Ohio and elsewhere.
- Orders issued by the Public Utilities Commission of Ohio related to Ohio's AEPS and the FirstEnergy Ohio utilities Rider AER.
- Interview of personnel from the FirstEnergy Ohio utilities and Navigant Consulting, Inc., consultant to the Companies.

General SREC/REC Acquisition Approach

The FirstEnergy Ohio utilities employed Requests for Proposals ("RFPs"), with responses provided in sealed bids, to secure all four categories of Renewable Energy Credits ("RECs") – In-State Solar RECs; All-State Solar RECs; In-State All Renewables RECs; and All-State All Renewables RECs. In total, six RFPs were issued.

Exeter examined the FirstEnergy Ohio utilities' procurement process to see if it met the following important characteristics: (1) competitiveness; (2) transparency; (3) cost; and (4)

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ability to obtain adequate industry response. Each of these considerations appears to have been met by the REC acquisition approach employed by the Companies.

Exeter also considered the key elements of the RFPs issued as well as the processes associated with advance market research, issuance, dissemination of information to potential bidders, evaluation of bids, and handling of feedback obtained from bidders. The RFPs were assessed for the following key elements: (1) clarity; (2) financial/security requirements; (3) time between bid receipt and award; and (4) bidder feedback. Also examined was the RFP planning process with which was assessed for: (1) preparation and mechanics; (2) market research; and (3) contingency planning.

Exeter's analysis led to the following findings and recommendations on the RFPs and RFP processes:

Findings.

1. The RFPs issued by the FirstEnergy Ohio utilities are reasonably developed and do not appear to incorporate any provisions or terms that could be assessed to be anti-competitive.

~~1.2.~~ The basic terms and conditions contained in the RFP were generally acceptable by the industry and to the extent that individual bidders were unwilling to provide bids in response to the solicitations, those decisions were based on specific elements contained in the RFPs that were at odds with the individual business models. Such conditions include the duration of the contract periods and the firmness of the supply requirements.

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~~1.3.~~ The security requirements contained in the RFPs are assessed to strike a reasonable balance between safeguarding the FirstEnergy Ohio utilities and making the RFP attractive to potential bidders.

~~1.4.~~ The processes in place to disseminate information to potential bidders and to address issues and questions that arose during the time that potential bidders were deciding whether to proffer a bid and the offer due dates was adequate.

~~1.5.~~ The mechanisms in place to review and evaluate the bids were adequate, although a shorter period of time between the bid due date and the award in the first RFP would have been an improvement. The approximately three-week review period established by the FirstEnergy Ohio utilities was generally deemed excessive by industry participants and this was rectified in subsequent RFPs.

Comment [MCM1]: Did this provision have any impact on the outcome of or participation in the bidding process?

~~1.6.~~ The mechanisms in place to solicit industry feedback, through both the nature of the questions and comments raised by potential bidders and the conduct of a survey by NCI, are seen as an acceptable approach to inform the FirstEnergy Ohio utilities about the strengths and weaknesses of the issued RFPs. Further, the information obtained through the process was effectively used and served as a basis for modifications in RFPs subsequent to the conduct of the survey.

~~1.7.~~ The market research conducted by the FirstEnergy Ohio utilities prior to the first two-three RFPs was satisfactory in light of the limited information available and failed to provide the FirstEnergy Ohio utilities with sufficient information by which to fully assess and evaluate the responses to the first and second RFPs.

Comment [MCM2]: Inadequate by what standard?

Comment [MCM3]: Refer to point 1 on The Companies' Major Comments Regarding the Executive Summary document.

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4.8. The contingency planning in place for the first three RFPs was inadequate satisfactory and reflected the Companies' risk management policies from a supply-side perspective ~~should have encompassed a specific set of fall-back approaches, or in the alternative, specified a mechanism by which to distill the information gained from the solicitations to develop an modified approach.~~

4. Recommendations.

1. The FirstEnergy Ohio utilities should implement a more robust contingency planning process as it relates to the procurement of RECs and SRECs in compliance with Ohio's AEPS. We also recommend that the contingency plan be subject to review by the PUCO Staff prior to its implementation.
2. A thorough market analysis should precede the issuance of any RFPs by the FirstEnergy Ohio utilities for RECs and SRECs in compliance with Ohio's AEPS.
3. The FirstEnergy Ohio utilities should consider a mark-to-market approach to the security requirement for future procurements.

Solicitation Results and Procurement Decisions

As part of the management/performance audit, Exeter Associates, Inc. reviewed the results of the FirstEnergy Ohio utilities' procurement of SRECs and RECs to meet the Ohio AEPS requirements for 2009, 2010, and 2011. In particular, Exeter reviewed the quantities of SRECs and RECs bid, the prices associated with those bids, and the decisions of the FirstEnergy Ohio utilities regarding the bids (quantity and price) received. Exeter's analysis resulted in the following findings and recommendations.

Findings:

- The prices paid by the Companies for All-States All Renewables RECs were reasonably consistent with other regional RECs prices.
- While lower prices would have been available to the Companies, there were more fewer RECs purchased under RFP 1 and more RECs purchased under RFP 3, the Companies' decisions to purchase the bulk of the 2009, 2010, and 2011 requirements under RFP 1 were not unreasonable and were consistent with the recommendations of the independent RFP manager.
- The lower prices available for All-States SRECs in the 2011 timeframe could not have been reasonably foreseen by the Companies. The prices paid by the Companies for All-States SRECs are consistent with SRECs price regionally.
- The FirstEnergy Ohio utilities paid unreasonably-high prices for In-State All Renewables RECs purchased from a particular supplier but under the circumstances the prices resulted from a competitive bid under nascent conditions and were consistent with the recommendations of the independent RFP manager. ~~from [REDACTED]~~

Comment [MCM4]: Refer to point 2 on The Companies' Major Comments Regarding the Executive Summary document

Comment [MCM5]: Refer to point 3 on The Companies' Major Comments Regarding the Executive Summary document

Comment [MCM6]: Refer to point 4 on The Companies' Major Comments Regarding the Executive Summary document

Comment [MCM7]: Will all utilities and CRES be expected to adopt this approach? If not, why not?

Comment [MCM8]: Refer to point 5 on The Companies' Major Comments Regarding the Executive Summary document

Comment [MCM9]: This is a post RFP analysis and was not within the Companies' knowledge at the time of the RFPs.

Comment [MCM10]: Refer to point 6 on The Companies' Major Comments Regarding the Executive Summary document

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- Prices for In-State All Renewable RECs in the range of [REDACTED] to [REDACTED] exceeded the prices paid for non-solar compliance RECs anywhere in the country by at least \$ [REDACTED] to \$ [REDACTED] but cannot be determined to be out of line with the Ohio in-state market at that time.
- The FirstEnergy Ohio utilities had several alternatives available to the purchase of high-priced In-State All Renewables RECs, none of which were considered or voted upon but not adopted. Results were competitively determined and fully subscribed.
- The FirstEnergy Ohio utilities should have been aware that the prices bid by one Supplier [REDACTED] reflected significant economic rents and were high as compared with the national market excessive by any reasonable measure.
- The procurement of In-State Solar RECs by the FirstEnergy Ohio utilities was competitive and, when Ohio SRECs became reasonably available, the prices paid for those SRECs by the Companies were consistent with prices for SRECs seen elsewhere. This is the same approach and process followed for Ohio All Renewable RECs.

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Comment [MCM11]: Refer to point on The Companies' Major Comments Regarding the Executive Summary document

Comment [MCM12]: Refer to point on The Companies' Major Comments Regarding the Executive Summary document

Recommendations:

Based on the findings presented above, we recommend that the Commission, at a minimum, establish a review process of future procurements similar to power procurement. Since this was a nascent market and FE had the obligation to comply with a new law, it would not be appropriate to disallow recovery of costs paid and credits that have been used to assure compliance. The Commission should consider establishing a more structured procurement process in the future, including Staff oversight of the process and submittal of the process to the Commission for acceptance or rejection within 2-3 business days, in order that the Commission is more fully apprised and engaged in future solicitations. Staff should be apprised of the results of the RFP. The independent RFP manager should issue a report of market conditions and the RFP, and Staff should monitor the RFP and raise any concern prior to the Companies' acceptance of the bids. If the Commission rejects the results of the RFP, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year, disallow recovery of all In-State All Renewable RECs costs incurred by the FirstEnergy Ohio utilities in excess of [REDACTED] per REC.

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Miscellaneous Issues

During the course of conducting the management/performance audit of the FirstEnergy Ohio utilities, several issues emerged that warrant brief discussion, though these issues are not directly related to the FirstEnergy Ohio utilities and affect all of the regulated utilities in Ohio with respect to compliance with Ohio's AEPS legislation. Specifically, there are three aspects of either the legislation or the method by which the legislation is implemented that may warrant some reconsideration by the appropriate bodies. These issues are addressed below.

Comment [MCM13]: Why isn't the baseline methodology addressed in this section?

Recovery of ACP Charges

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Ohio's AEPS legislation does not permit the Ohio utilities to recover the costs associated with Alternative Compliance Payments. The fundamental purpose of the ACP is to set a limit on the exposure of retail customers for the costs of RPS (or AEPS) compliance. Not allowing recovery of the ACP provides a significant deterrent to regulated firms from employing the ACP in lieu of the procurement of RECs, even at prices well in excess of the ACP.

Commission Approval of RECs Purchases

A second modification that merits consideration is a requirement that the Commission approve the process whereby the Companies purchase of RECs for the retail suppliers of associated with SSO service before the RECs contracts are signed. That requirement would eliminate the types of issues that have arisen in the context of this management/performance audit. If the Commission rejects purchase of RECs, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year. Further, this recommendation is subject to the limits of the Commission's jurisdiction.

Comment [MCM14]: What is the basis for this conclusion?

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Application of the Three-Percent Rule

The legislation does not clearly lay out how the "three-percent rule" is to be applied. The apparent intent of the rule is to limit the degree to which retail customers are exposed to excessive costs related to the satisfaction of the renewable energy requirements. The rule, however, is based on "expected" impacts. An algorithm based on expected sales volumes that account for customer migration and projections of market pricing for power is recommended as a better approach.

Comment [MCM15]: What is the basis for the determination of the "apparent intent" of legislation?

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Exhibit A

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CONFIDENTIAL DRAFT
MANAGEMENT/PERFORMANCE AUDIT
OF THE ALTERNATIVE ENERGY RESOURCE RIDER (RIDER AER)
OF THE FIRSTENERGY OHIO UTILITY COMPANIES
FOR OCTOBER 2009 THROUGH DECEMBER 31, 2011

I. INTRODUCTION

On September 20, 2011, the Public Utilities Commission of Ohio ("PUCO") issued an entry on rehearing *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 PUCO stated that it had opened Case No. 11-5201-EL-RDR for the purposes of reviewing the Alternative Energy Resource Rider ("Rider AER") of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy Ohio utilities" or "Companies"). Additionally, the PUCO indicated that its review would include the Companies' procurement of renewable energy credits for purposes of compliance with Ohio's Alternative Energy Portfolio Standard ("AEPS"). The PUCO further noted that it would determine the necessity and scope of an external auditor for this matter.

The PUCO subsequently decided that an external auditor would be necessary for the review, and on January 18, 2012 directed Staff to issue a request for proposals ("RFP") for audit services. After consideration of the proposals received, the PUCO 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.

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This report presents the findings of Exeter's management/performance audit of the Rider AER of the FirstEnergy Ohio utility companies for the time period ~~October June 2009~~ through December 31, 2011. Dr. Steven L. Estomin and Mr. Thomas S. Caitlin acted as the primary investigators for this audit.

The principal information on which this management/performance audit is based is from a variety of sources, including:

- Responses of the First Energy Ohio utilities to requests for information prepared by Exeter Associates, Inc.
- Independent research conducted by Exeter Associates, Inc. related to the availability and market prices of SRECs and RECs in Ohio and elsewhere.
- Orders issued by the Public Utilities Commission of Ohio related to Ohio's AEPS and the FirstEnergy Ohio utilities Rider AER.
- Interview of personnel from the FirstEnergy Ohio utilities and Navigant Consulting, Inc., consultant to the Companies.

The remainder of this management/performance report is organized into three sections. The following section, Section 2, addresses the approach used by the Companies to procure Solar and Non-solar Renewable Energy Credits. This section includes assessment of the general approach, the structure of the request for Proposals, the Companies' treatment of industry feedback on the solicitation document, market research, and contingency planning.

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Comment [CBH16]: The first RFP was issued in July 2009, with execution in August 2009. As the report clearly references RFP1, this time is incorrect

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Section 3 of the report addresses the results of the acquisition process, including the effectiveness of the solicitations and the prices ultimately paid for Solar and Non-solar Renewable Energy credits, both in-State and out-of-State.

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Section 4 of the report addresses certain miscellaneous issues that emerged during the conduct of the management/performance audit.

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Findings and recommendations are presented throughout the document following the discussion of the relevant issues.

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II. GENERAL SREC/REC ACQUISITION APPROACH

The FirstEnergy Ohio utilities employed Requests for Proposals ("RFPs"), with responses provided in sealed bids, to secure all four categories of Renewable Energy Credits ("RECs") - In-State Solar RECs; All-States Solar RECs; In-State All Renewables RECs; and All-States All Renewables RECs. Because the competitive RFP approach did not fully satisfy all of the Companies' FE's requirements for in-State solar and non-solar for 2010 and 2011, the Companies also pursued broker transactions and bilateral arrangements following the issuance of the third RFP (October 2010). In addition, a limited number of Solar RECs ("SRECs") were available to the Companies internally from the operation of programs to promote renewable energy development within the Companies' FE service areas. In total, six RFP's were issued. The specifics of the RFP approach employed by the Companies is addressed below followed by an assessment of the alternative approaches employed to supplement the bids received through the RFP process.

A. RFP Approach Overview

The appropriateness of any particular acquisition approach needs to be judged on basis of several important characteristics. Most important among the characteristics are: (1) competitiveness; (2) transparency; (3) cost; and (4) the ability to obtain adequate industry response. Each of these considerations appears to have been met by the approach employed by the Companies.

The sealed bid RFP protocol used by the FirstEnergy Ohio utilities entailed a two-part submission, which is a common practice used in the electric utility industry for the purchase of

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~~not only RECs but also for electric power supplies.~~ Potential bidders are required to submit documents verifying credit-worthiness and the financial capability of meeting the requirements of the RFP. Once the credit/financial qualifications have been reviewed and a set of qualified bidders identified, the Phase 2 price/quantity bids submitted in response to the RFP are then evaluated purely on the basis of least cost, that is, lowest price. Offers are accepted from lowest price to highest until the specified requirement is filled. Typically, the seller conditions the RFP to permit rejection of bids even if the full requirement is not met. This allows the buyer to avoid paying for supplies assessed to be above market or to adjust the amount purchased due to circumstances that have developed since the issuance of the RFP.

Competitiveness. The sealed-bid pricing requirement of the RFPs for SRECs/RECs issued by the FirstEnergy Ohio utilities is assessed to be competitive and to minimize the potential for bidder collusion and "gaming" of the process. Because bidders recognize that there may be only one opportunity to secure a buyer, bidders tend to provide competitive prices reflective of market conditions.

Winning bidders are paid their own individual bid prices, in contrast to certain other competitive procurement methods (for example, descending clock auctions) where all selected bidders are paid the marginal bid, that is, the highest price bid selected that fulfills the established requirement. Paying the individual bid prices eliminates incentives on the part of bidders to potentially influence the clearing price, for example by bidding some supplies at low prices and other supplies at higher prices. Because all bids are paid the bid price, no bidder can influence the price paid to bidders below the marginal price – the price of the last accepted bid.

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Comment [P40427]: Explain "need to" - when wouldn't bidders

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Transparency. – The sealed-bid RFP process is transparent due to its simplicity and tractability. A paper trail exists for the bids and the awards, and the approach is straightforward and one with which industry participants are familiar and comfortable.

RFP Cost. – The sealed bid RFP method is relatively low-cost in comparison to alternative approaches that rely on a live auction platform. Using an RFP does not require monitoring of the bid process to attempt to identify collusive bidding practices. Bid evaluation is straightforward. Because the FirstEnergy Ohio utilities issued multiple RFPs, the same set of documents with only minor modifications were able to be relied upon, which eliminated the incurrance of duplicative costs.

Adequate Industry Response. The RFPs issued by the FirstEnergy Ohio utilities generally succeeded in obtaining bids from a variety of potential suppliers and were structured so as not to preclude bids from small entities wishing to bid only a small number of SRECs/RECs. The table below (Table 1, ~~Table 1~~, ~~Table 1~~) shows the number of successful bids and the number of successful bidders responding to each of the six RFPs. To place the number of responses in context, the type of RECs solicited in each RFP and the quantity of RECs solicited are also shown.

Table 11 FirstEnergy Ohio REC RFPs 2009 – 2011

	<u>In-State Solar</u>		<u>In-State All Renewables</u>		<u>All-States Solar</u>		<u>All-States All Renewables</u>	
	<u>Number of Successful Bidders</u>	<u>Number of Successful Bids</u>	<u>Number of Successful Bidders</u>	<u>Number of Successful Bids</u>	<u>Number of Successful Bidders</u>	<u>Number of Successful Bids</u>	<u>Number of Successful Bidders</u>	<u>Number of Successful Bids</u>
RFP1	---	---	1	6	---	---	2	89
RFP2	2	7	1	29	2	5	---	---
RFP3	9	475	52	64	1	89	62	327
RFP4	2	2	---	---	---	---	---	---
RFP5	1211	1411	---	---	113	367	---	---

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Comment [CM18]: Industry response needs to be considered in light of when SB 221 established requirements for in-state RECs - that seems to be missing from this analysis

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Comment [CM19]: This is not correct.

Comment [CM20]: This table contains inconsistencies in the definition of a "Successful Bidder." In some instances, the numbers in this table reflect the selected bids/bidders, in some instances the numbers in this table reflect the total number of bids/bidders, and in some instances the numbers are just incorrect. The numbers represented here are the number of selected bidders/bids for each RFP, hence "Successful" means selected by FE.

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Comment [CM21]: This error was due to double counting of tranches that were broken up based on price. The tranche is counted twice even though there was only 1 bid

RFPs	438	4910	82	102	---	---	---	---
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B. RFP Elements

This section addresses the key elements of the RFPs issued by the FirstEnergy Ohio utilities, as well as the processes associated with advance market research, issuance, dissemination of information to potential bidders, evaluation of bids, and handling of feedback obtained from bidders.

Clarity. - All six RFPs issued by the FirstEnergy Ohio utilities were assessed for clarity with respect to the submissions required; the deadlines for submission; the type, quantities, and vintage of RECs sought to be procured; and the means by which potential bidders could obtain additional information and have questions addressed. All RFPs were found to be adequate with respect to clarity.

Financial/Security Requirements. - All RFPs contained financial and security documentation requirements to ensure that the bidders had the financial capabilities of satisfying the contract terms and conditions based on the number of RECs bid in aggregate by the bidder. Additionally, posting of security following award was required. The security requirements serve to protect FirstEnergy the Companies in the event that the supplier defaults on the contract and FirstEnergy the Companies must then go back to the market to obtain the necessary RECs. This circumstance could emerge, for example, in the case of a winning bidder filing for bankruptcy protection before fulfillment of the contract. If market prices for RECs increased during the contract period, the contract could be voided by a bankruptcy judge and FirstEnergy the Companies could be required to replace the undelivered RECs with RECs obtained at market

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prices higher than those contained in the contract. Security requirements often serve as an impediment to bidders, especially smaller companies.

The first five RFPs contained financial/security terms that exempted bidders offering less than \$100,000 of RECs from having to obtain security guarantees. This arrangement facilitated participation by smaller entities offering a relatively small number of RECs. For those bidders offering RECs with an aggregate value (the product of price and the number of RECs) greater than \$100,000, security of ten percent of the value of the bid was required. The requirement was placed on the aggregate value to avoid suppliers attempting to circumvent the security requirement by offering multiple smaller bids. Since the potential existed that the bidder would be awarded all the bids proffered, the aggregate bid requirement utilized by the FirstEnergy Ohio utilities was appropriate.

The sixth RFP, which was to obtain in-State SRECs for a term up to 10 years, raised the threshold for security from \$100,000 to \$250,000. Given the longer term of the resulting contracts, the \$100,000 threshold, if left intact, would serve only to exempt bidders offering only a very small number of SRECs and may have served to effectively preclude the submission of bids from potentially viable sources. The higher threshold did not serve to put the Companies, or the Companies' customers, at a significant additional risk relative to the lower security threshold contained in the prior RFPs since any risk exposure was spread out over a ten-year period rather than concentrated in just one or two years.

RFPs are sometimes issued with a requirement that security be posted not later than the time of the bid, that is, the bidder must provide a security commitment (for example, a letter of credit, a parent-company guarantee, or cash) on or before the submission of the price/quantity

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bid. If the bidder is not selected, the security commitment can then be cancelled. The RFPs issued by the FirstEnergy Ohio utilities did not require the posting of security until the contract was awarded. The approach employed by the FirstEnergy Ohio utilities reduces the cost associated with bid preparation and is conducive to enhancing ~~to the~~ pool of potential bidders without imposing added risks on the Companies or the Companies' electric customers.

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An alternative approach to the one used by the Companies is to adjust the security periodically on a mark-to-market ("MtM") basis. Under this alternative approach, the winning bidders are required to increase the amount of security in accordance with the differential between the market price and the bid price. If market prices rise above the bid (award) price such that the initial security requirement is insufficient to cover the differential in the event of default, the seller is required to post additional security to provide protection to the buyer. When market prices decline below the bid (award) price, the level of security can be reduced since the buyer would not require price protection in the event of default, that is, the relevant commodity can be purchased in the market by the buyer at a price below the bid (award) price. The contracts awarded by the FirstEnergy Ohio utilities do not contain an MtM security adjustment mechanism. The absence of an MtM adjustment clause in the contracts is appropriate given the nature of the market for Ohio RECs. Determining the market price in any meaningful way, particularly for In-State Solar and In-State All Renewables RECs, would have proven difficult given the lack of maturity in those markets at the time that the RFPs were issued. Consequently, any MtM adjustment would have been subject to significant uncertainty given the lack of liquidity in the markets. [As the markets mature, however, and market price data become more transparent and more readily available, the Companies should give consideration to reliance on an MtM security mechanism, particularly for longer term contracts where the potential for

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differential between the market prices and the bid prices can become more pronounced over time.

Comment [MCM22]: FE takes exception as there is no known market price for RECs and REC prices are volatile

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Time Between Bid Receipt and Award. – The amount of time between the receipt of bids by the buyer and the award of contracts affects the risk to which the bidders are exposed. The longer the time interval, the greater the degree of risk since market conditions could change and adversely affect the financial position of the sellers. To compensate for increased risk related to an extended time between bid and award, bidders will sometimes increase the bid price over what it would be were the interval shorter. While the interval between bid receipt and award is much more important in the context of electric power supply procurement than it is for the procurement of RECs, bidders have a strong preference for shorter intervals (e.g., a few days) than for longer intervals (e.g., two or more weeks). However, the recommended Commission approval will add 2-3 days, but is recommended to prevent further instances of uncertainty and costs for the utility and the Commission. If the Commission rejects the results of the RFP, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year

The first RFP issued by the FirstEnergy Ohio utilities for the procurement of both SRECs and RECs, both in-State and out-of-State, contained a time interval of 17 days. This was shortened in subsequent RFPs to less than a week in response to feedback obtained from bidders. This bid/award interval, as modified following the issuance of the first RFP, is reasonable and

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appropriate, affords the Companies adequate time to evaluate the bids and select a suite of awards, and does not expose the bidders to unwanted and unnecessary risk.

Bidder Feedback. – Obtaining the perspective of potential bidders is critically important to structuring an RFP that is capable of eliciting broad industry participation. The FirstEnergy Ohio utilities held bidder conferences to address questions and also received questions from bidders outside of the bidder conferences. Questions and responses were posted and available to all potential bidders so as not to provide any bidding advantage to any one entity.

In addition to compiling and addressing the comments of potential bidders on each of the RFP issuances, the FirstEnergy Ohio utilities also directed Navigant Consulting, Inc. (“NCI”) to conduct a survey of supplier views on the 2009 RFPs.¹ Various types of suppliers were contacted (e.g., regional developers, national developers, marketers, generators) to allow NCI to obtain a range of views on the RFPs based on the alternative perspectives of various survey participants. Several of the modifications suggested by the various survey respondents were implemented by the FirstEnergy Ohio utilities, including: (1) shortening the time between bid and award notification,² (2) allowing for unit-contingent bids, and (3) extending the length of the contract period.

C. RFP Planning

Planning for the issuance of the RFP can be divided into three elements:

¹ Navigant Consulting, *Market Research Report Regarding Supplier Views on REC RFPs*, June 3, 2010. Prepared for FirstEnergy. Provided in response to Exeter Associates, Inc.’s first information request, interrogatory 3.

² The modification was implemented in the second RFP issued by the FirstEnergy Ohio utilities, prior to the compilation of the survey by NCI.

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- Preparation of the relevant documents and the putting in place of the mechanisms to effectuate the execution of the issuance of the RFP and the evaluation of results;
- Market research prior to issuance of the RFP; and
- Contingency planning.

Each of these elements is addressed below.

Preparation and Mechanics. The FirstEnergy Ohio utilities appear to have exercised reasonable care in preparation of the documents for the solicitations and arranged the appropriate mechanisms for the evaluation of the bids received to allow award to be made within the timeframes specified in the solicitations. The Companies also put in place adequate mechanisms to address issues and questions raised by potential bidders and to resolve those issues within a reasonable amount of time.

Market Research. The REC markets within which the FirstEnergy Ohio utilities operate currently, and during the period addressed by this management and performance audit, are extremely complex. The markets contain geographic and product definition dimensions which need to be recognized and information available as to the quantity of applicable RECs generated (or that will likely be generated during the contract performance period) is difficult to assemble and verify. This is largely the result of the nascent nature of the markets, particularly in 2009 and 2010 and also, although to a lesser extent, in 2011.

In essence, the FirstEnergy Ohio utilities were operating in four separate, but overlapping, markets the All-States All Renewables market; the All-States Solar market; the Ohio All Renewables market; and the Ohio Solar market. In the case of the All-States All Renewables market, the RECs available to the FirstEnergy Ohio utilities are also (largely)

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eligible to satisfy the Renewable Portfolio Standards ("RPS") in other states located in the mid-Atlantic area. For example, wind power generated in West Virginia, the REC's for which would be eligible to be used for compliance with the Ohio requirement, can also be used to satisfy RPS requirements for Pennsylvania; Maryland; Delaware; Washington, D. C., New Jersey, and other states. In assessing the market, the quantity of such REC's that would be available to the FirstEnergy Ohio utilities cannot be viewed in isolation, but must also consider the requirements of the other states for which those REC's are eligible. Confounding that analysis is that the various states have different definitions of what types of fuels and technologies can be used for RPS compliance. For example, Pennsylvania's list of eligible resources includes facilities that produce electricity from waste coal; and Maryland's list of eligible resources includes facilities generating electric power from black liquor (a waste by-product of paper production). Consequently, West Virginia wind power competes against these eligible resources in those states, which affects the availability of the West Virginia resources to meet the Ohio AEPS requirements. These considerations extend to the Ohio All Renewables market, recognizing that REC's generated in Ohio can be used to not only satisfy the Ohio requirements but also the requirements in other states for which those resources are eligible.

The market research conducted by the FirstEnergy Ohio utilities prior to the issuance of the first and second RFPs consisted principally of review of the prices for REC's being traded in nearby states. This avenue of research is limited with respect to what information might be able to be gleaned as it would relate to the initial two RFPs.

While information on market prices that the FirstEnergy Ohio utilities could expect to pay for All-States All Renewables and All-States Solar REC's would be reasonably obtainable from these sources, the amount of available (or potentially available) REC's and SREC's meeting

Comment [MCM23]: Note that each STATE RPS sets forth its own requirements

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the Ohio in-State criterion would not be available in any meaningful way. In the context of prices for In-State All Renewables RECs and In-State Solar RECs, those markets were nascent at the time of the first two RFPs and market data were not generally reported and available to potential market participants. The information from the PJM queue would also be of little help, since most of the projects in the queue at any particular time, and at the time of the first two RFPs in particular given the nation's economic condition, do not ultimately get developed.

Following the issuance of the second RFP, and prior to the issuance of the third RFP, the FirstEnergy Ohio utilities directed NCI to conduct a market analysis. That study was completed in July 2010. A previous study focusing on In-State Solar and All Renewables RECs was conducted by Navigant in October 2009. By the time these studies were completed, the FirstEnergy Ohio utilities had already purchased virtually all of the All Renewables RECs required (both In-State and All-States) to meet the utilities' requirements for years 2009, 2010, and 2011.

Contingency Planning. The FirstEnergy Ohio utilities indicated that it relied on the "FirstEnergy Corp FE Utilities Commodity Portfolio Risk Management Policy"³ to provide guidance on contingency planning for the purchase of RECs and SRECs to satisfy the Ohio AEPS requirements for 2009, 2010, and 2011. The document (2009, 2010, and 2011 versions) was reviewed and there is no requirement for contingency planning contained therein.

Based on the actions undertaken by the FirstEnergy Ohio utilities following the issuance of the first RFP, the general approach was to re-issue RFPs with relatively minor modifications in hopes of attracting a larger pool of bidders than the previous RFP for particular categories of

³ Provided in response to Exeter Associates' request for information, set 5, item 1.

Comment [MCM24]: Not available in 2009 et al.

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Comment [MCM25]: Contract for 3rd RFP was not awarded until August, 2010. Therefore this statement is not correct.

Comment [MCM26]: If the market was nascent and complex, and if market information about Ohio RECs was generally unavailable, what meaningful information would have been learned by doing a market study earlier? What basis does Exeter have to support its view that any meaningful information would have been learned?

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RECs. No formal contingency plan was in place to guide the follow-up actions of the FirstEnergy Ohio utilities in the event insufficient bids were received or if bid prices were excessive based on pre-established criteria.

Figure 1

Figure 1 shows the dates of RFP issuance and the RECs solicited under each of the six RFPs along with other key dates related to SREC/REC procurement activities.

Comment [MCM27]: What would an acceptable contingency plan have included? Would it have included one or more of the three options that Exeter suggests that FE should have considered (i.e., pay ACP, consult the Commission, or seek force majeure)? If not, what would a plan have looked like? Do other utilities have plans that include those suggestions?

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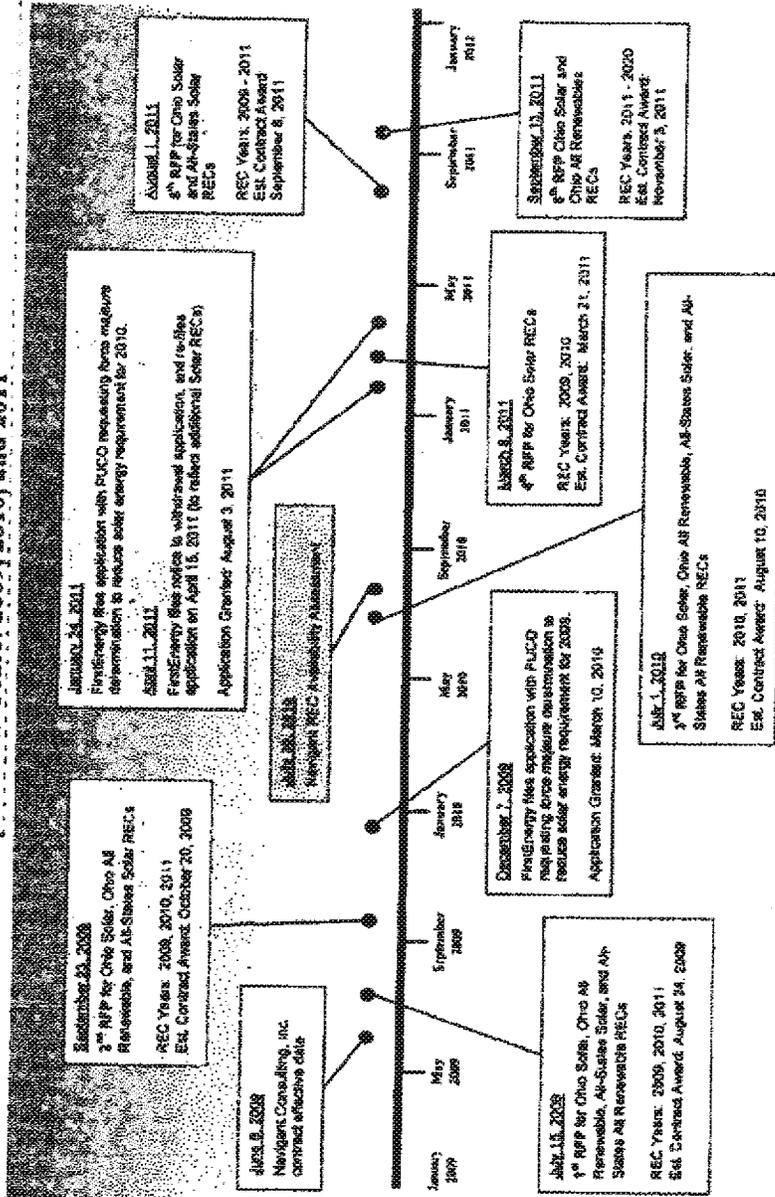
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Figure 144 Timeline of RFPs for RECs by FirstEnergy Ohio Utilities
Calendar Years: 2009, 2010, and 2011



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Findings and Recommendations on RFPs and RFP Processes

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D.

Based on the foregoing discussion and analysis, the following findings and recommendations are provided:

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Findings

Comment [CMB228]: Please see changes to executive summary above.

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1. The RFPs issued by the FirstEnergy Ohio utilities are reasonably developed and do not appear to incorporate any provisions or terms that could be assessed to be anti-competitive.

1.2. The basic terms and conditions contained in the RFP were generally acceptable by the industry and to the extent that individual bidders were unwilling to provide bids in response to the solicitations, those decisions were based on specific elements contained in the RFPs that were at odds with the individual business models. Such conditions include the duration of the contract periods and the firmness of the supply requirements.

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1.3. The security requirements contained in the RFPs are assessed to strike a reasonable balance between safeguarding the FirstEnergy Ohio utilities and making the RFP attractive to potential bidders.

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1.4. The processes in place to disseminate information to potential bidders and to address issues and questions that arose during the time that potential bidders were deciding whether to proffer a bid and the offer due dates was adequate.

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1.5. The mechanisms in place to review and evaluate the bids were adequate, although a shorter period of time between the bid due date and the award in the first RFP would have been an improvement. The approximately three-week review period established by

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the FirstEnergy Ohio utilities was generally deemed excessive by industry participants and this was rectified in subsequent RFPs.

4.6. The mechanisms in place to solicit industry feedback, through both the nature of the questions and comments raised by potential bidders and the conduct of a survey by NCI, are seen as an acceptable approach to inform the FirstEnergy Ohio utilities about the strengths and weaknesses of the issued RFPs. Further, the information obtained through the process was effectively used and served as a basis for modifications in RFPs subsequent to the conduct of the survey.

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4.7. Market information for In-State Solar and All Renewables RECs was limited prior to the issuance of the first and second RFPs.

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4.8. The contingency planning in place for the first three RFPs was inadequate and should have encompassed a specific set of fail-back approaches, or in the alternative, specified a mechanism by which to distill the information gained from the solicitations to develop an modified approach.

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Recommendations.

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1. The FirstEnergy Ohio utilities should implement a more robust contingency planning process as it relates to the procurement of RECs and SRECs in compliance with Ohio's AEPS. We also recommend that the contingency plan be subject to review by the PUCO Staff prior to its implementation.
2. A thorough market analysis should precede the issuance of any future RFPs by the FirstEnergy Ohio utilities for RECs and SRECs in compliance with Ohio's AEPS. While market information was relatively modest prior to the issuance of the first two RFPs,

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greater market information regarding In-State Solar and All Renewables is currently available.

2.3. The FirstEnergy Ohio utilities should consider a mark-to-market approach to the security requirement for future procurements.

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III. SOLICITATION RESULTS AND PROCUREMENT DECISIONS

As part of the management/performance audit, Exeter Associates, Inc. reviewed the results of the FirstEnergy Ohio utilities' procurement of SRECs and RECs to meet the Ohio AEPS requirements for 2009, 2010, and 2011. In particular, Exeter reviewed the quantities of SRECs and RECs bid, the prices associated with those bids, and the decisions of the FirstEnergy Ohio utilities regarding the bids (quantity and price) received. In the broadest terms, the procurement results can be characterized as follows:

- All-States All Renewables
 - All required RECs were secured at reasonable prices, though additional temporal diversity in establishing the REC portfolio would be desirable.
- All-States Solar
 - Based on information available at the time the bids were received, the Companies' purchasing decisions are found to be generally reasonable.
- In-State All Renewables
- The Companies purchased significant quantities of RECs for 2009, 2010, and 2011 compliance years at prices assessed to be unreasonable high on their face and also in comparison to prices paid elsewhere throughout the country.
- In-State Solar
 - The unavailability of Ohio SRECs in 2009 and 2010 led the Companies to request *force majeure* determinations from the Commission, which were granted. The procurements of Ohio SRECs made by the Companies when such SRECs became available were made at prices comparable to SRECs traded elsewhere.

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Comment [MCM29]: Is this true in light of statutory requirement?

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While the principal concerns of the procurements center on the costs of the Ohio All Renewables
RECs, each of the categories of SREC and REC purchases are discussed below.

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A. All-States All Renewables RECs

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Table 2 provides a summary of the bids received for All-States All
Renewables RECs by the FirstEnergy Ohio utilities by compliance year and by RFP issued.
Where SRECs and/or RECs were acquired through bilateral transactions or supplied by the
FirstEnergy Ohio utilities directly, that is so indicated.

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The bulk of All-States All Renewables RECs required to meet the 2009, 2010, and 2011
AEPS requirements were procured through the first RFP. Under that RFP, all of the 2009
requirement, 93 percent of the 2010 requirement (based on kWh sales data available in 2009),
and 60 percent of the 2011 requirement (based on kWh sales data available in 2009) were
procured. Prices ranged between \$ and \$ for the 2009 requirement, \$ and \$
for the 2010 requirement, and \$ and \$ for the 2011 requirement.

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Additional RECs for 2010 were acquired through a transfer of excess 2009 RECs from
2009. This level of RECs purchases more than fulfilled the 2010 RECs requirement.

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Table 222 FirstEnergy Ohio – All-States All Renewables RECs

	2009	2010	2011			
REC Requirement ⁽¹⁾⁽²⁾⁽³⁾	57,965	111,477	176,156			
RECs Acquired ⁽⁴⁾	2009	2010	2011			
RFP1	87,360	104,000	105,084			
RFP2	(a)	(a)	(a)			
RFP3	(a)	(a)	49,351			
RFP4	(a)	(a)	(a)			
RFP5	(a)	(a)	(a)			
RFP6	(a)	(a)	(a)			
Bilateral Transactions	(b)	(b)	(b)			
Adjustment/Transfer	(29,396)	29,396 (21,920)	21,920			
TOTAL	87,360	133,396	176,355			
Percent of Total	2009	2010	2011			
RFP1	151%	93%	60%			
RFP2	(a)	(a)	(a)			
RFP3	(a)	(a)	28%			
RFP4	(a)	(a)	(a)			
RFP5	(a)	(a)	(a)			
RFP6	(a)	(a)	(a)			
Bilateral Transactions	(b)	(b)	(b)			
Adjustment/Transfer	(51%)	26% (20%)	12%			
TOTAL	100%	100%	100%			
Price Range (\$/REC) ⁽⁴⁾	2009	2010	2011			
	MIN	MAX	MIN	MAX	MIN	MAX
RFP1	(a)	(a)	(a)	(a)	(a)	(a)
RFP2	(a)	(a)	(a)	(a)	(a)	(a)
RFP3	(a)	(a)	(a)	(a)	(a)	(a)
RFP4	(a)	(a)	(a)	(a)	(a)	(a)
RFP5	(a)	(a)	(a)	(a)	(a)	(a)
RFP6	(a)	(a)	(a)	(a)	(a)	(a)
Bilateral Transactions	(b)	(b)	(b)	(b)	(b)	(b)
Adjustment/Transfer			0.00	0.00	(a)	(a)
Weighted Average Price (\$/REC) ⁽⁴⁾	2009	2010	2011			
RFP1	(a)	(a)	(a)			
RFP2	(a)	(a)	(a)			
RFP3	(a)	(a)	2.17			
RFP4	(a)	(a)	(a)			
RFP5	(a)	(a)	(a)			
RFP6	(a)	(a)	(a)			
Bilateral Transactions	(b)	(b)	(b)			
Adjustment/Transfer		0.00	(a)			

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Table 2 FirstEnergy Ohio – All-States All Renewables RECs (Continued)

Notes:
 (a) This RFP did not solicit the indicated type of REC for the given energy year
 (b) No RECs were procured through bilateral transactions for the given energy year.

Sources:
 (1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
 (2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
 (3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
 (4) Calculated based on EA Set 1-INT-5 Attachment 1.

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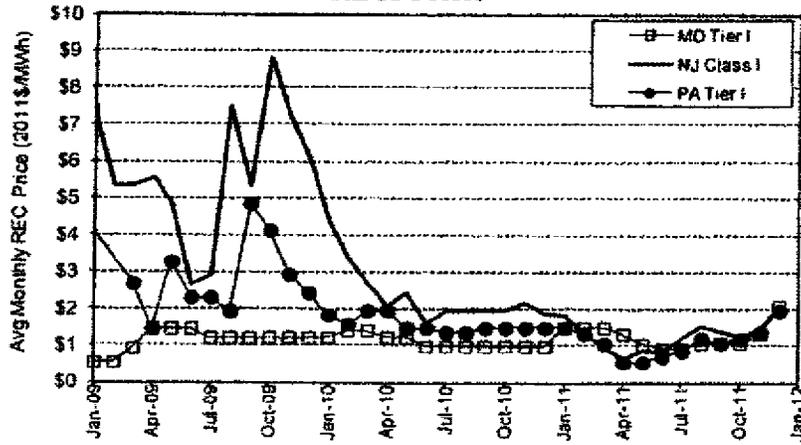
For 2011, an additional 49,351 All-States All Renewable RECs were procured through the third RFP issued in August-July 2010 and 21,920 All-States All Renewable RECs, which fulfilled the 2011 requirement, were obtained through a transfer of excess 2010 RECs. The 2011 All-States All Renewable RECs were bid at prices between \$[REDACTED] and \$[REDACTED]. The transferred RECs were purchased at a price of \$[REDACTED] per REC.

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Figure 2 (Figure 2, Figure 3) shows non-solar REC prices in Pennsylvania, Maryland, and New Jersey over the 2009 through 2011 period. As is shown in Figure 2 (Figure 2, Figure 2), RECs prices in New Jersey tended to be above the prices paid by the FirstEnergy Ohio utilities in 2009 for 2009 Vintage RECs and the Pennsylvania RECs are shown to entail prices below the RECs purchased by the FirstEnergy Ohio utilities. The pattern of prices evident in New Jersey and Pennsylvania is not atypical of RECs price trends elsewhere, that is, in the first years of enactment of a state portfolio standard, prices tend to be higher than in following years as the market adjusts and more projects become built and certified.

Comment (MCM30): RFP issued in July 2010, contracts awarded in August 2010.
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Figure 222 Historical Maryland, New Jersey, and Pennsylvania Compliance RECs Prices



Sources: Evolution Markets (through 2007) and Spectron (2008 onward). Plotted values are the last trade (if available) or the mid-point of Bid and Offer prices, for the earliest compliance year traded in each month.
Note: Figure provided to Exeter by personnel from the National Renewable Energy Laboratory (NREL), May 2012

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As seen with the FirstEnergy Ohio utilities' experience, substantially higher prices were paid in 2009 (for 2009, 2010, and 2011 vintage RECs) than were experienced in 2011 for 2011 vintage RECs. These price relationships indicate that lower-cost compliance would have been achieved for the All-States All Renewables component of the AEPS requirement had the FirstEnergy Ohio utilities procured a greater proportion of 2011 RECs in 2011 and, perhaps, a portion of 2010 RECs in 2010. This conclusion is clear from *ex post* analysis. However, we find that the FirstEnergy Ohio utilities' decisions to purchase the All-States All Renewables RECs reasonable.

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With respect to whether an alternative strategy for procurement of these RECs should have been pursued by the FirstEnergy Ohio utilities based on *ex ante* information is less clear. The Companies indicated during the Exeter interview conducted on April 20, 2012, that there

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was concern on the part of the Companies that the needed RECs might not be available in the timeframe required for compliance were the Companies to defer the purchase of 2010 and 2011 RECs in 2009. Notwithstanding this concern, a preferred method of risk management would have been to temporally diversify the purchases to avoid exposure to prevailing prices at one point in time. This method to help manage risk would have been beneficially employed by the FirstEnergy Ohio utilities with respect to REC purchases, that is, purchases of RECs should have been spread out over time.⁴

Related to the issue of risk mitigation is the pattern of REC prices that has tended to emerge following the initial implementation of renewable energy portfolio standards in other states. The general downward trend, fueled by increases in the availability of RECs that has come from industry response, should have informed the FirstEnergy Ohio utilities' decision to purchase almost all RECs needed to meet the 2009 through 2011 All-States All Renewables requirement in 2009.

While we believe that an alternative approach should have been relied upon by the FirstEnergy Ohio utilities, there are considerations that may have reasonably influenced the Companies' decision to maximize purchases in 2009 to fulfill the 2009 through 2011 AEPS requirements for All-States All Renewables RECs. One such consideration, as noted above, was the potential unavailability of the necessary RECs in later months. Given the annual increases in the percentage renewable requirements over time, not only in Ohio but in other states from which the FirstEnergy Ohio utilities could expect to draw RECs, this perspective is not without some basis. A related concern would emerge in the context of pricing, which could increase in the

⁴ We note that this approach is not employed for purposes of cost minimization but rather for purposes of risk mitigation.

Comment [MCM31]: Preferred by who? And with the benefit of hindsight
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face of tightening market conditions. Even with growth in the amount of REC's available, the increases in REC's offered on the market would need to be greater than the increase in renewable requirements to induce downward pressure on prices and ensure availability.

A final factor simply relates to the structure of incentives faced by the FirstEnergy Ohio utilities. The Companies were required to secure the necessary REC's for the 2009 through 2011 period. Absent the availability of REC's post 2009, the Companies would be faced with either obtaining a *force majeure* ruling from the Commission, for which a risk would be incurred (i.e., the Commission could deny the request) or, in the event that the required number of REC's were unavailable, the Company could pay the alternative compliance payment ("ACP") of \$45 per REC. The Companies, however, could not recover the ACP expense from customers pursuant to the legislation. As a consequence, the Companies had every incentive to secure the required number of REC's and avoid the incurrence of any risk that the REC's would be unavailable in the future. In that way, the Companies would avoid any potential of incurring a non-recoverable ACP expense.

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Findings

1. The prices paid by the Companies for All-States All Renewables REC's were reasonably consistent with other regional REC's prices.

2. While lower prices would have been available to the Companies were more fewer REC's purchased under RFP 1 and more REC's purchased under RFP 3, the Companies' decisions to purchase the bulk of the 2009, 2010, and 2011 requirements under RFP 1 were not unreasonable.

Comment (MCM32): Paying ACP doesn't equate to purchasing REC's to comply, the shortfall can be added to the following years larger requirements and if supply isn't available, the Companies are now deeper in a hole.

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Table 333 FirstEnergy Ohio – All-States Solar REC's

	2009	2010	2011			
SREC Requirement ^{(1) (2) (3)}	48	3,169	5,447			
SRECs Acquired ⁽⁴⁾	2009	2010	2011			
RFP1	0	0	0			
RFP2	498	208	4			
RFP3	(a)	5504	3,331			
RFP4	(a)	(a)	(a)			
RFP5	0	0	2,200			
RFP6	(a)	(a)	(a)			
Bilateral Transactions	(b)	2,454	37			
TOTAL	48	3,213	5,572			
Percent of Total	2009	2010	2011			
RFP1	0%	0%	0%			
RFP2	100%	7%	0%			
RFP3	(a)	17%	61%			
RFP4	(a)	(a)	(a)			
RFP5	0%	0%	40%			
RFP6	(a)	(a)	(a)			
Bilateral Transactions	(b)	77%	1%			
TOTAL	100%	101%	102%			
Price Range (\$/SREC) ⁽⁴⁾	2009	2010	2011			
	MIN	MAX	MIN	MAX	MIN	MAX
RFP1	N/A	N/A	N/A	N/A	N/A	N/A
RFP2	████	████	████	████	████	████
RFP3	(a)	(a)	████	████	████	████
RFP4	(a)	(a)	(a)	(a)	(a)	(a)
RFP5	N/A	N/A	N/A	N/A	████	████
RFP6	(a)	(a)	(a)	(a)	(a)	(a)
Bilateral Transactions	(b)	(b)	████	████	████	████
Weighted Average Price (\$/SREC) ⁽⁴⁾	2009	2010	2011			
RFP1	N/A	N/A	N/A			
RFP2	████	████	████			
RFP3	(a)	████	████			
RFP4	(a)	(a)	(a)			
RFP5	N/A	N/A	80.34			
RFP6	(a)	(a)	(a)			
Bilateral Transactions	(b)	████	████			
Notes:						
(a) This RFP did not solicit the indicated type of REC for the given energy year.						
(b) No RECs were procured through bilateral transactions for the given energy year.						
Sources:						
(1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.						
(2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.						
(3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.						
(4) Calculated based on EA, Set 1-INT-5 Attachment 1						

Comment [CBH33]: This table contains some inconsistencies with the RFP results.

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For the 2011 compliance year, the Companies procured 3,331 All-States Solar RECs through the 2010 RFP at a price range of \$[REDACTED] to \$[REDACTED]. The Companies also procured 37 vintage 2011 All-States Solar RECs through an internal bilateral trade executed in 2011 at a price of \$[REDACTED] per SREC. The remaining portion of the 2011 All-States Solar RECs requirement was procured through an RFP held in mid-2011. The price range for the 2,200 All-States Solar RECs purchased through this RFP was \$[REDACTED] to \$[REDACTED] significantly lower than the prices paid for the vintage 2011 All-States Solar RECs procured in the 2009 and 2010 RFPs and through the bilateral internal trade.

As with the All-States All Renewables RECs, an *ex post* analysis indicates that FirstEnergy Ohio utilities would have paid significantly less for 2011 All-States Solar RECs if they had waited until 2011 to purchase these SRECs. As discussed in the section on All-States All Renewables RECs, the Companies expressed concerns that the needed SRECs might not be available in the timeframe required to meet for compliance.

As discussed previously in this audit report, the appropriateness and reasonableness of any particular RECs transaction cannot be assessed on the basis of information that would not have been available at the time of the transaction, such as RECs prices that would have been knowable only after the fact. The prices paid by the FirstEnergy Ohio utilities for All-States Solar RECs were roughly consistent with prices paid in other nearby states with a solar set-aside. SREC prices in Pennsylvania in 2009 averaged about \$275 and in 2010 rose to approximately \$325 per SREC.⁵ New Jersey SRECs (which must all be generated in-State) were generally priced between \$600 and \$700 in 2009, 2010, and the first half of 2011.⁶ By the end of 2011,

⁵ www.srectrade.com/blog/SREC/SREC-markets/Pennsylvania/page/3 (and page/4).
⁶ <http://markets.fletsexchang.com/new-jersey-SREC>

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New Jersey SREC prices declined to between 150 and 250.⁷ In Maryland, which also requires that SRECs be generated in-State, prices in 2010 were between \$350 and \$400; between \$100 and \$350 in 2011; and declined to about \$200 in 2012.⁸

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While neither New Jersey nor Maryland SRECs can be used in Ohio to satisfy the All-States Solar requirement, both New Jersey and Maryland SRECs can be used in Pennsylvania. Pennsylvania SRECs can be used for the Ohio All-States Solar requirement. Therefore, while the pricing dynamics are complicated, there are relationships among the SREC prices in New Jersey, Maryland, Pennsylvania, and Ohio.

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As a general proposition, temporal diversity in purchasing to help manage risk is a prudent practice, the number of All-States SRECs that the FirstEnergy Ohio utilities were purchasing in the 2009 and 2010 timeframe were relatively small, and through the circumstances that evolved over the procurement history, a degree of temporal diversity was achieved. In aggregate, the 2009 and 2010 requirement was approximately 3,200 RECs, which were purchased through two RFPs and a set of bilateral transactions.

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2011 All-States Solar RECs were almost entirely purchased through two RFPs (RFP 3 and RFP 5). Average prices of Solar RECs under the RFP 3 procurement were approximately

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██████. The RFP 5 Solar RECs prices averaged ██████ and some Solar RECs under that procurement were purchased for less than ██████. This pattern of Solar RECs prices over the 2009 through 2011 time period is consistent with the pricing observed in other nearby states as the supply of available Solar RECs generally exceeded the Solar RECs compliance requirements in the

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⁷ Ibid.

⁸ <http://markets.fletsexchange.com/maryland-SREC>

regional market. The excess supply of All-States Solar RECs evident in 2011 is not a circumstance that the FirstEnergy Ohio utilities could have been reasonably expected to foresee.

Findings

1. The lower prices available for All-States SRECs in the 2011 timeframe could not have been reasonably foreseen by the Companies. The prices paid by the Companies for All-States SRECs are consistent with SRECs prices regionally.

C. In-State All Renewables RECs

Fifty percent of the All Renewables requirement under the Ohio AEPS legislation is set aside for qualifying renewable energy generated in Ohio. In 2009, the supply of Ohio-generated RECs appears to have approximated (or was slightly below) the State-wide compliance requirement.⁹ The FirstEnergy Ohio utilities were able to successfully procure the required number of 2009, 2010, and 2011 In-State All Renewables RECs through bids offered in four RFPs. RFP 1 provided 2009 and 2010 RECs; RFP 2 provided RECs for all three compliance years; RFP 3 provided RECs for 2010 and 2011; and RFP 6 secured additional 2011 vintage RECs.

The fundamental issue associated with the FirstEnergy Ohio utilities' procurement of In-State All Renewables RECs for compliance with the 2009, 2010, and 2011 requirements centers on the prices paid for the RECs. Significant numbers of RECs were purchased at prices as high as \$ per REC. Table 4 Table 4 Table 4 summarizes the procurement history of the In-State All Renewables RECs for the 2009, 2010, and 2011 compliance years. As seen on Table 4 Table

⁹ Ed Holt and Associates, Inc. and Exeter Associates, Inc., *Alternative Energy Resource Market Assessment*, prepared for the Public Utility Commission of Ohio and the National Association of Regulatory Utility Commissioners, September 30, 2011, p.6.

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Table 444 FirstEnergy Ohio – In-State All Renewables RECs

REC Requirement ^{(1) (2) (3)}	2009	2010	2011			
REC Requirement ^{(1) (2) (3)}	57,965	111,477	176,155			
RECs Acquired ⁽⁴⁾	2009	2010	2011			
RFP1	20,000	50,000	0			
RFP2	37,965	31,800	26,084			
RFP3	(a)	29,676	150,269			
RFP4	(a)	(a)	(a)			
RFP5	(a)	(a)	(a)			
RFP6	(a)	(a)	20,000			
Bilateral Transactions	(b)	1	(b)			
TOTAL	57,965	111,477	196,353			
Percent of Total	2009	2010	2011			
RFP1	35%	45%	0%			
RFP2	65%	29%	15%			
RFP3	(a)	27%	85%			
RFP4	(a)	(a)	(a)			
RFP5	(a)	(a)	(a)			
RFP6	(a)	(a)	11%			
Bilateral Transactions	(b)	0%	(b)			
TOTAL	100%	100%	111%			
Price Range (\$/REC) ⁽⁴⁾	2009	2010	2011			
	MIN	MAX	MIN	MAX	MIN	MAX
RFP1	(a)	(a)	(a)	(a)	N/A	N/A
RFP2	(a)	(a)	(a)	(a)	(a)	(a)
RFP3	(a)	(a)	(a)	(a)	(a)	(a)
RFP4	(a)	(a)	(a)	(a)	(a)	(a)
RFP5	(a)	(a)	(a)	(a)	(a)	(a)
RFP6	(a)	(a)	(a)	(a)	(a)	(a)
Bilateral Transactions	(b)	(b)	(b)	(b)	(b)	(b)
Weighted Average Price (\$/REC) ⁽⁴⁾	2009	2010	2011			
RFP1	(a)	(a)	N/A			
RFP2	(a)	(a)	(a)			
RFP3	(a)	(a)	(a)			
RFP4	(a)	(a)	(a)			
RFP5	(a)	(a)	(a)			
RFP6	(a)	(a)	(a)			
Bilateral Transactions	(b)	(b)	(b)			

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Notes:
 (a) This RFP did not solicit the indicated type of REC for the given energy year.
 (b) No RECs were procured through bilateral transactions for the given energy year.
Sources:
 (1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
 (2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
 (3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
 (4) Calculated based on EA Set 1-INF-5 Attachment 1.

The U.S. Department of Energy ("DOE") reports on solar and non-solar REC prices throughout the U.S. Between mid-2008 and December 2011, none of the non-solar REC prices reported by DOE was above \$45 and in almost all cases significantly below that level.¹⁰ The states covered include Connecticut, the District of Columbia, Delaware, Illinois (wind RECs), Massachusetts, Maryland, Maine, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Texas (See ~~Figure 3~~ ~~Figure 3~~ ~~Figure 3~~). Additionally, the overall trend in REC prices has been declining during the period from January 2008 through mid-2011. Beginning in mid-2011, there have been marked increases in the prices of RECs for some of the states included in the DOE reporting due to certain state changes to renewable eligibility and also increasing percentage requirements for renewables.

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Comment [MCM34]: None of which were from Ohio

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Comment [MCM35]: REC prices are in many states not public, and "prices" can mean quotes which aren't actual prices paid

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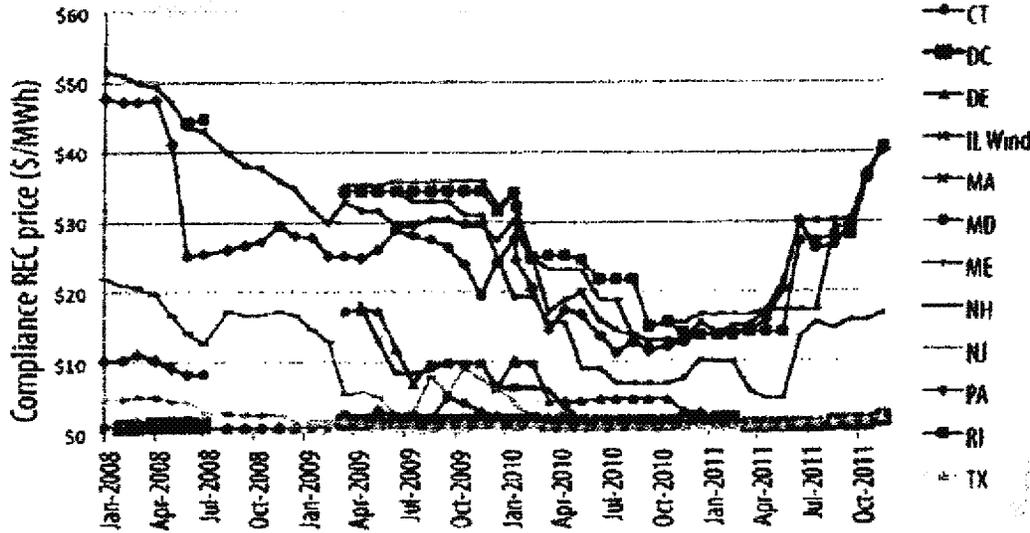
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Comment [MCM36]: Based on state RPS program design, not all state designs are equal

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¹⁰ <http://apps3.eere.energy.gov/greenpower/markets/certificates.shtml?page=5>

Figure 333 Compliance Markets for RECs



Compliance market (primary tier) REC prices, January 2008 to December 2011
Source: apps3.eere.energy.gov/greenpower/markets/certificates.shtml?page=5

Note: Plotted values are the last trade (if available) or the mid-point of bid and offer prices for the current or nearest compliance year for various state compliance RECs.

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Comment [MCM37]: This is a false comparison - these are spot market quotations from the Spectron Group (a broker) and may represent levels of pricing in which there were no actual transactions - Spectron has no access to many of the bilateral pricing - without contesting the relative direction or magnitude, it has to be pointed out that this chart is not based on some data trove of actual historical transacted prices

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Two qualifications, however, should be noted. First, the price decreases over time were not monotonic over the time period considered. While the average annual prices declined over time, there were interim months in which prices increased compared to prior months. Second, the specifics of the Renewable Portfolio Standard legislation in place in the various states differ from the Ohio AEPS legislation. These differences include the types of renewable resources eligible to meet the requirements and the geographic areas from which the RECs may originate. Particularly with respect to the second factor, the Ohio AEPS legislation is more restrictive than the legislation in other states, including the New Jersey, Maryland, and the Pennsylvania legislation, which, other factors equal, could result in higher REC prices in Ohio than elsewhere.

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Consequently, the non-Ohio REC prices discussed above cannot serve as a proxy for Ohio In-State All Renewables RECs prices. Rather, they provide a broad reference to what RECs have been trading for elsewhere over the relevant period under a wide range of RPS specifics and market conditions.

Comment [MCM38]: if Ohio market not developed at same level of other states and the products differ then how can this be used as a broad reference -- what is the reasonable adder to apply to prices from other states to then be able to compare to Ohio for reasonableness?

Table 5 shows the details of the purchases of In-State All Renewables RECs by the FirstEnergy Ohio utilities, including the dates of the purchases, the vintage year of the purchases, the quantity purchased, and the price paid. Total RECs purchased and costs incurred are also shown. The issue that is addressed below, which draws heavily on the information contained in Table 5, is the reasonableness of the prices paid by the FirstEnergy Ohio utilities for In-State All Renewables RECs for the compliance years 2009, 2010, and 2011. In addressing the reasonableness of these purchases, we avoid assessment based on *ex post* analysis and restrict the assessment to what would be considered reasonable at the time the transactions were entered into.

Table 5 In-State All Renewables RECs Prices Paid by FirstEnergy Ohio Utilities

2009 Vintage	Purchase Date	Quantity	Price/REC	Total
	August 2009	20,000	\$ [REDACTED]	\$ [REDACTED]
	October 2009	960	[REDACTED]	[REDACTED]
		37,005	[REDACTED]	[REDACTED]
	February 2010	13	[REDACTED]	[REDACTED]
	SUBTOTAL	57,978		\$ [REDACTED]
2010 Vintage	August 2009	10,000	\$ [REDACTED]	\$ [REDACTED]
		10,000	[REDACTED]	[REDACTED]
		10,000	[REDACTED]	[REDACTED]
		10,000	[REDACTED]	[REDACTED]
		10,000	[REDACTED]	[REDACTED]
	October 2009	30,400	[REDACTED]	[REDACTED]
		1,400	[REDACTED]	[REDACTED]
	August 2010	29,676	[REDACTED]	[REDACTED]
	April 2011	1	[REDACTED]	[REDACTED]
	SUBTOTAL	111,477		\$ [REDACTED]
2011 Vintage	October 2009	1,084	\$ [REDACTED]	\$ [REDACTED]
		25,000	[REDACTED]	[REDACTED]
	August 2010	143,269	[REDACTED]	[REDACTED]
		5,000	[REDACTED]	[REDACTED]
	November 2011	5,000	[REDACTED]	[REDACTED]
		15,000	[REDACTED]	[REDACTED]
	SUBTOTAL	196,353		\$ [REDACTED]
	TOTAL	365,808		\$ [REDACTED]

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Based on our review of the legislation, the responses of the FirstEnergy Ohio utilities to our requests for information, and various Commission filings, and our interview with FirstEnergy Ohio utility personnel and personnel from Navigant Consulting, there do not appear to be any technical violations of the Ohio's AEPS statute and the FirstEnergy Ohio utilities appear not to have violated the letter of the legislation. That said, we believe that the management decisions made by the FirstEnergy Ohio utilities to purchase non-solar RECs at prices in some cases more than 15 times the price of the applicable forty-five-dollar Alternative

Comment (MCM440): The Companies also complied with the spirit of the legislation, which was to comply
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Compliance Payment to have been ~~seriously flawed~~ concerning. The prices paid by the FirstEnergy Ohio utilities for these RECs were well above the prices customarily seen in any of the other RECs markets throughout the country contemporaneous with (as well as preceding and subsequent to) the purchasing decisions made by the FirstEnergy Ohio utilities.

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The mechanism employed by the FirstEnergy Ohio utilities for purchasing RECs through the RFP process was to stack the conforming bids received from eligible bidders from lowest price to highest price and to purchase the number of RECs needed to comply with the In-State All Renewables requirement regardless of the price bid. No limit price was established by the Companies prior to the receipt of bids, that is, the Companies indicated that prior to the receipt of bids, the Companies did not establish a maximum price that they would be willing to pay for RECs, or a price that would trigger embarking on a contingency plan. Reliance on this approach resulted in the purchase of more than 337,000 In-State All Renewables RECs at prices between \$ and \$ dollars.

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There are several issues that were considered in our assessment of the reasonableness of the high-priced RECs transactions entered into by the FirstEnergy Ohio utilities. Each is discussed in turn below.

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Statutory Violations – While this audit is not a legal review and the following opinion is not based on a legal review, we found no indication that the FirstEnergy Ohio utilities operated outside of the legal requirements established by the Ohio AEPS legislation. There is nothing in the legislation that limits the price that the Companies could pay for RECs, other than the requirement that on an expected (forward looking) basis, the cost of compliance should not

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exceed three percent of the Companies charges for the provision of power supply. This limitation appears not to have been violated based on a reasonable application of the rule.

The solicitations issued by the Companies, as discussed earlier in this report, were competitive and the rules for the determination of winning bids appear to have been applied uniformly. We 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 to satisfy the annual In-State All Renewables requirement established by the legislation.

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Market Information - At the time the solicitations resulting in the procurement of the high-cost RECs were conducted, the market for In-State All Renewables in Ohio was still nascent; 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 the high-priced RECs was generally not available. While information on planned renewable energy projects can be gleaned from the PJM interconnection queues, that information is highly unreliable. Some projects are entered multiple times (with variations on project specifics such as location or size) and most projects appearing in the queues do not come to fruition. The unreliability of the PJM queue information was further exacerbated by the economic recession and the difficulties faced by renewable energy developers in obtaining project financing. Consequently, we believe that there was significant uncertainty associated with assessing changes in future RECs prices and the potential availability of future RECs.

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Market Competition - We have noted above that the procurement methods employed by the Companies are assessed to have been competitive. That does not mean, however, that the

Comment [MCM41]: To be more clear that Exeter is commenting on the policy and structural design of the State Legislation SB221 and not anything that FEOU conceived

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market in which the Companies were operating was competitive. The bids received by the FirstEnergy Ohio utilities should have been interpreted by the Companies as indicative of serious market disequilibrium. The fundamental concept behind the creation of renewable energy portfolio standards, regardless of the state implementing the standard, is that to promote the development of renewable energy resources, an additional stream of revenue is required to be provided to the project owners to overcome the higher cost of renewable energy relative to energy generated from conventional sources. Absent the additional revenue stream associated with the marketability of the environmental attributes of renewable energy, i.e., the renewable energy credits, renewable technologies would not be able to effectively compete in the power markets. The market value of the RECs, therefore, should approximate the additional revenue required by project owners to facilitate the development of eligible renewable projects. We would expect, and in fact see, different values of RECs in different states based on a multitude of factors, most importantly including:

- The geographical area from which eligible RECs can be drawn; generally, the larger the geographical area from which the RECs can originate, the lower the price of the RECs;
- The types of resources that qualify as "renewable"; those states allowing relatively low-cost resources to qualify as renewable, such as black liquor or waste coal, tend to exhibit lower prices for RECs;
- The level of prevailing energy prices; the higher the price of energy, the lower the price of RECs, other factors equal;

Comment [MCM42]: Request support for the price that would in their determination be sufficient to facilitate development in their determinations given all of the issues they note with respect to development (or lack thereof)

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- * The size of the renewable requirement; the larger the percentage of the power supply that is required to be supplied from renewable resources, the higher is the price of the RECs, other factors equal;
- The size of the alternative compliance payment (ACP); the size of the ACP limits the market price of the RECs since RECs would not be purchased at prices higher than the ACP if energy providers can pay the ACP in lieu of paying for higher-priced RECs.

As noted previously in this report, none of the RECs prices elsewhere in the country were trading at prices more than \$45 per REC during the relevant period, and many were selling for prices considerably lower. While this information does not translate to what RECs prices in Ohio should be, the underlying economic factors are the same, that is, the price of RECs should be adequate to cover the higher costs of generation using renewable technologies, subject to the economic impacts of the differences in state legislation. There is no basis for concluding that the cost of renewable energy development in Ohio differs so markedly from the cost of renewable development elsewhere in the country so as to warrant RECs prices of \$45 or more in Ohio compared to the RECs prices seen elsewhere.

RECs prices of that magnitude clearly indicate that some degree of market power is being exercised by a segment of the market given offered prices well above the cost of production. Consequently, the prices offered for the high-priced RECs, and accepted by the Companies, were composed largely of economic rents.¹¹ As regulated entities, those costs were in turn passed on to Standard Service Offer ("SSO") customers.

¹¹ We note that the economic rents received may not necessarily accrue to the party selling the RECs to the FirstEnergy Ohio utilities. For example, if the seller purchased the RECs from a third party at high prices, the rents

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Comment [MCM43]: Request support for what price based on their analysis would meet their defined requirement of "adequate to cover the higher costs of generation using renewable technologies"

Comment [MCM44]: Regardless of cost, if the market was nascent and the Companies had to meet the standards, what evidence is there that the price paid for the RECs at issue wasn't the market price?

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Comment [MCN45]: By who?

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Comment [MCN46]: Information
contained in footnote should be included
in the body of the report

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Comment [MCN47]: No
prohibition in statute

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may have accrued to the third party. Economic rents can be defined as the return to the investment in excess of the
minimum required to induce the investment.

[REDACTED]

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Comment [MCM44]: It is one thing to say it "could effect" Commission decisions governing future REC transactions but it is entirely different to use it to recommend historical disallowances

Available Alternatives – The FirstEnergy Ohio utilities' decisions related to acceptance of the bids for In-State All Renewables RECs at prices ranging from [REDACTED] to [REDACTED] needs to be assessed in the context of alternatives that were available to the Companies. If the Companies had no option other than to purchase these RECs at the prices offered, the decision would be evaluated differently than if alternatives existed. We believe that at least three alternatives were available to the Companies, and each of these is discussed below.

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- Alternative Compliance Payment – One of the options available to the Companies was payment of the ACP in lieu of the procurement of RECs. The Companies indicated that they did not view the ACP as an alternative to the procurement of RECs and that payment of the ACP did not relieve them of the requirement to actually purchase RECs.¹³ Under

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¹³ The issue of reliance on the ACP as an alternative to the procurement of the high-priced RECs was raised during the April 20, 2012 interview with FirstEnergy Ohio utilities and Navigant Consulting personnel. During the interview, the personnel from the Companies expressed the perspective that the Alternative Compliance Payment is not an alternative to procuring RECs. In a separate request for information, the Companies' were unwilling to provide a legal opinion on this issue, but noted that there is no language in the legislation to suggest that the

the assumption that the Companies' interpretation of the legislation is incorrect, that is, that the ACP could have been used as an alternative to the procurement of RECs, that option was available to the Companies. The legislation, however, precludes the Companies from recovery of any costs related to Alternative Compliance Payments.¹⁴ This provision of the legislation provides a serious deterrent to the State's utility companies from reliance on the ACP and payment of the ACP rather than procuring RECs, even at prices higher than the \$45 ACP. Personnel from the Companies indicated during the April 20, 2012 interview that they did not consider use of the ACP as a mechanism to avoid the cost of the high-priced RECs.

- Consultation with the Commission - FirstEnergy Ohio utilities' personnel were asked whether they considered informing the Commission of the status of the bids received to obtain Commission input regarding a decision to purchase. The Companies indicated during the April 20, 2012 interview that approaching the Commission and explaining the circumstances of the solicitation results was not considered but was not pursued due to the prompt decisions that were needed to be made on the submitted bids. While the Companies were under no statutory obligation to obtain approval by the Commission for RECs purchases, the prices for the In-State All Renewables RECs that were received through the solicitation process were so far above customary prices outside of Ohio that consultation with the Commission should certainly have been more thoroughly

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Comment [MCM49]: Exeter is suggesting that the Companies should have incurred an unrecoverable cost of compliance instead of following through with a purchase of RECs, established through a competitively neutral RFP and corroborated by an independent consultant.

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Alternative Compliance Payment is an alternative to compliance through the procurement of RECs. (FirstEnergy Ohio utilities' response to Exeter Associates' request for information, set 5, item 3.)

¹⁴ Competitive suppliers are also precluded from explicit recovery of these costs, that is, a competitive supplier cannot include a line item on its invoices separately identifying ACP costs as part of its billing. Competitive suppliers, however, can incorporate the ACP into their overall energy price to recover their costs. That option, however, is not available to regulated utilities supplying SSD energy.

considered, despite the timing constraint, at least considered by the Companies prior to transacting.

- Rejection of High-Priced Bids - As part of the solicitation process, the Companies retained the right to reject any and all bids. In the face of the high prices received from the Supplier for the provision of In-State All Renewables RECs, the Company had the option of simply rejecting the bids. That would likely have necessitated the Companies filing a *force majeure* determination request with the Commission on the basis that In-State All Renewables RECs were not "reasonably" available (which appears to be accommodated in the legislation).¹⁵

A second alternative would have been to procure the high-priced RECs for compliance with the 2009 requirements, but reject those bids for the 2010 and 2011 requirements. That decision would be based on an assessment that In-State All Renewables RECs would become more available over time and could be secured at lower prices in the future. The risk of that approach, expressed by FirstEnergy Ohio utilities personnel, was that In-State All Renewables RECs would not increase in availability and would be in shorter supply in the coming years. That circumstance would expose the Companies to being unable to procure the requisite RECs for compliance years 2010 and 2011. Based on information available from other states, a decision to delay the purchases of RECs would have been preferred. For example, the Companies were able to procure 20,000 2011-vintage RECs in 2011 at an average price of \$ [redacted] compared to the average prices of \$ [redacted] (RFP 2) and \$ [redacted] (RFP 3). While the Companies could not know with certainty that prices would be declining over time or that the required number of In-State All

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Comment [MCM50]: What would Exeter have thought would have resulted if the Companies had consulted with the Commission? What evidence is there that the Commission would have come to any different conclusion?

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Comment [MCM51]: How is this different from the situation with all state RECs, where Exeter concluded that ex post information about price decreases was not a proper consideration, especially in light of the Companies' concern about meeting the legislative requirements?

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¹⁵ Note that this is not a legal opinion and is based on a lay reading and interpretation of the statute.

Renewables RECs would be available at any price in sufficient time to meet the compliance requirements, the experience in other states suggested that prices would be declining and that RECs would be increasingly available as markets responded to the newly created demand for RECs. If circumstances emerged such that In-State All Renewables RECs were not available in later years, the Companies would have had a basis for requesting a *force majeure* determination by the Commission.

Comment [MCMS2]: But elsewhere in the report, Exeter says that Ohio isn't like other states. So why is the experience of other states instructive? What specific information was available to the Commission that prices were expected to decline?

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Findings

Based on the foregoing discussion, our findings related to the FirstEnergy Ohio utilities procurement of In-State All Renewables RECs for compliance years 2009, 2010, and 2011 are:

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1. The FirstEnergy Ohio utilities paid unreasonably high prices for In-State All Renewables RECs purchased from [redacted] one supplier [redacted].

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2. Prices for In-State All Renewable RECs in the range of \$[redacted] to \$[redacted] exceeded the prices paid for non-solar compliance RECs anywhere in the country by at least \$[redacted] to \$[redacted].

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3. The FirstEnergy Ohio utilities had several alternatives available to the purchase of high-priced In-State All Renewables RECs, none of which were considered but not adopted or acted upon.

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Comment [MCMS3]: Excluding price equilibrium at the supply and demand curve intersection.

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4. The FirstEnergy Ohio utilities should have been aware that the prices bid by [redacted] the Supplier reflected significant economic rents and were excessive-high by any reasonable measure.

Recommendations

Based on the findings presented above, we recommend that the Commission, at a minimum, establish a process of review for REC's similar to power procurement. Staff should be apprised of the results of the RFP following the auction. The independent RFP manager should issue a report assessing the RFP, and Staff may monitor the RFP and raise any concerns prior to FE acceptance of the bids. The Commission should review the process of the RFP based on the the report submitted by the independent RFP manager and render a written opinion within 2-3 days after the results on whether the process was followed. If the Commission rejects purchase of REC's, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of REC's which would have been procured absent the Commission's rejection, for that compliance year. disallow recovery of all In-State All Renewables REC's costs incurred by the FirstEnergy Ohio utilities in excess of:

[REDACTED]

In-State Solar REC's

Table 6 ~~Table 6~~ ~~Table 6~~ shows a summary of the RFP results (and bilateral arrangements) related to the procurement of In-State Solar REC's by the FirstEnergy Ohio utilities. As shown on Table 6 ~~Table 6~~ ~~Table 6~~, the Companies were unable to secure adequate solar REC's from in-State sources to meet the 2009 requirement, which necessitated a request for a *force majeure* ruling from the Commission. The Commission determined that the adequate solar REC's were not available to the Companies and granted the *force majeure* request, moving the 2009 In State

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requirement to 2010. A similar *force majeure* request was made in 2010 for 2010 vintage In-State Solar RECs, and again was granted by the Commission. The unfulfilled obligation for 2010 was extended to 2011.

Table 666 FirstEnergy Ohio – In-State Solar RECs

	2009	2010	2011
SREC Requirement ⁽¹⁾⁽²⁾⁽³⁾	13	1,629	7,026
SRECs Acquired ⁽⁴⁾			
RFP1	0	0	0
RFP2	0	6	1,347,345
RFP3	(a)	482,175	946
RFP4	0	11	(a)
RFP5	0	0	4,653,522.4
RFP6	(a)	(a)	5,000
Bilateral Transactions	13	1,569	1,057
TOTAL	13	1,768	13,003
Percent of Total			
RFP1	0%	0%	0%
RFP2	0%	0%	19%
RFP3	(a)	11%	13%
RFP4	0%	1%	(a)
RFP5	0%	0%	66%
RFP6	(a)	(a)	71%
Bilateral Transactions	100%	96%	15%
TOTAL	100%	109%	185%
Price Range (\$/SREC) ⁽⁴⁾			
	<u>MIN</u> <u>MAX</u>	<u>MIN</u> <u>MAX</u>	<u>MIN</u> <u>MAX</u>
RFP1	N/A N/A	N/A N/A	N/A N/A
RFP2	N/A N/A	█ █	█ █
RFP3	(a) (a)	█ █	█ █
RFP4	N/A N/A	█ █	(a) (a)
RFP5	N/A N/A	N/A N/A	█ █
RFP6	(a) (a)	(a) (a)	█ █
Bilateral Transactions	█ █	█ █	█ █
Weighted Average Price (\$/SREC) ⁽⁴⁾			
RFP1	N/A	N/A	N/A
RFP2	N/A	█ █	█ █
RFP3	(a)	█ █	█ █
RFP4	N/A	█ █	(a)
RFP5	N/A	N/A	█ █
RFP6	(a)	(a)	█ █
Bilateral Transactions	█ █	█ █	█ █
Notes:			
(a) This RFP did not solicit the indicated type of REC for the given energy year			
Sources:			
(1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.			
(2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.			
(3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.			
(4) Calculated based on EA Set 1-INT-5 Attachments 1.			

Comment (CBM54): This table contains some inconsistencies with the RFP results.
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With respect to the 2009 and 2010 procurements for In-State Solar RECs, our assessment comports with the Commission rulings. The Companies exercised reasonable efforts to secure the subject Solar RECs and market conditions were such that the RECs were not available in the quantities needed. Given the Commission's review and decisions, no further examination of the Companies' efforts to secure 2009 and 2010 In-State Solar RECs was conducted pursuant to this management/performance audit.

For 2011, the Companies were able to obtain the required number of In-State Solar RECs through a combination of bilateral contracts and the issuance of the sixth RFP, which provided additional flexibility to bidders relative to previous RFPs. In particular, bidders were provided the option of bidding unit-contingent Solar RECs rather than having to bid firm quantities. The arrangement (also included in the fourth and fifth RFPs) eliminated an important source of risk for the In-State Solar RECs bidders. A second and more substantial change to the RFP structure was that the time period covered by the solicitation was extended to ten years. The longer duration of the contracts was an issue raised by the regional developers surveyed by NCI on behalf of the Companies and also was raised as an issue in the context of questions submitted to the Companies by certain potential bidders in the earlier RFP rounds. Finally, the security requirements were modified to accommodate protection under the longer contract period, while at the same time not being so onerous as to discourage bidders.

The prices paid for In-State Solar RECs for 2011 generally comport with prices seen in other nearby markets (e.g., Pennsylvania, New Jersey). As is the case for non-solar RECs, Solar RECs prices in any particular state reflect the market parameters contained in the governing legislation. New Jersey, for example, only allows for Solar RECs generated in-State to be used to meet the solar requirement. The same is true for Maryland. Maryland, however, has a fixed

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Solar ACP specified in the legislation whereas New Jersey's Solar ACP is established by the Board of Public Utilities. Pennsylvania allows out-of-State Solar RECs to be used to meet the Pennsylvania solar energy requirement and the Commission determines the ACP based on a multiple prevailing market prices. The In-State Solar RECs market in Ohio is influenced by the markets in other nearby states. Ohio In-State Solar RECs can be used to satisfy the Pennsylvania RPS requirement, as can Maryland, Delaware, and New Jersey Solar RECs. Consequently, there are complex interrelationships among these various markets.

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Irrespective of the differences in the levels of the Solar RECs carve-outs contained in the legislation of the various states, the level of prevailing energy prices, and the nature/levels of the ACPs, the prices paid by the FirstEnergy Ohio utilities for In-State Solar RECs (2011 vintage) were comparable to the prices for Solar RECs in other states. ~~Table 7~~ ~~Table 7~~ ~~Table 7~~ shows the Solar RECs prices for 2011 RECs in several nearby jurisdictions compared with the prices paid by the FirstEnergy Ohio utilities. Based on the information presented in ~~Table 7~~ ~~Table 7~~ ~~Table 7~~, the competitive solicitations (as modified over time to elicit greater market response) issued by the FirstEnergy Ohio utilities appear to have successfully secured In-State Solar RECs at reasonable prices.

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Table 777. Weighted Average Monthly SREC Prices (\$/SREC)

2011	Delaware	Maryland	New Jersey	Pennsylvania
Jan	229.49	332.72	573.62	293.97
Feb	275.92	335.07	614.88	274.03
Mar	210.34	275.34	632.14	233.13
Apr	197.19	304.94	618.17	227.17
May	259.04	298.08	632.17	239.82
Jun	158.08	271.79	610.38	172.25
Jul	205.34	285.38	588.92	223.01
Aug	259.51	276.52	541.27	222.24
Sep	210.40	274.39	558.45	135.41
Oct	197.56	288.67	553.47	182.85
Nov	119.00	257.17	448.74	143.18
Dec	192.29	256.86	405.89	212.38

Source: PJM GATS

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Findings

- The procurement of In-State Solar RECs by the FirstEnergy Ohio utilities was competitive and, when Ohio SRECs became reasonably available, the prices paid for those SRECs by the Companies were consistent with prices for SRECs seen elsewhere.

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IV. MISCELLANEOUS ISSUES

During the course of conducting the management/performance audit of the FirstEnergy Ohio utilities, several issues emerged that warrant brief discussion, though these issues are not directly related to the FirstEnergy Ohio utilities and affect all of the regulated utilities in Ohio with respect to compliance with Ohio's AEPS legislation. Specifically, there are three aspects of either the legislation or the method by which the legislation is implemented that may warrant some reconsideration by the appropriate bodies. These issues are addressed below.

A. Recovery of ACP Charges

Ohio's AEPS legislation does not permit the Ohio utilities to recover the costs associated with Alternative Compliance Payments. The ACP is currently set at \$45, which is comparable to the ACPs in other states. [The fundamental purpose of the ACP] is to set a limit on the exposure of retail customers for the costs of RPS (or AEPS) compliance. While the legislation is applicable to both regulated and competitive companies, the workings of the market are such that the legislation only affects the regulated utilities. Not allowing recovery of the ACP provides a significant deterrent to regulated firms from employing the ACP in lieu of the procurement of RECs, even at prices well in excess of the ACP. Consequently, the ACP does not accomplish what it is designed to accomplish for customers purchasing power from the regulated utilities.

One of the presumed goals of the legislation is to provide a strong inducement to the power suppliers to satisfy the renewable energy requirements using RECs rather than ACPs. One method to effectively ensure this result would be to require a regulated utility to seek Commission approval to use the ACP rather than RECs and to make a showing that RECs were

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not available at prices at or below the ACP. Such a modification would serve three related purposes. First, it would protect retail customers from high compliance costs. Second, it would discipline the market, that is, sellers of RECs would not be inclined to offer RECs at prices above the ACP. Third, it would limit (though not eliminate) the economic rents to sellers of RECs.¹⁶

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B. Commission Approval of RECs Purchases

~~A second modification that merits consideration is a requirement that the Commission approve the purchase of RECs for the retail suppliers of SSO before the RECs contracts are signed. That requirement would eliminate the types of issues that have arisen in the context of this management/performance audit. While the review and authorization requirement would add time to the procurement process, that is, the time between when the bid is made and when a purchase commitment can be made, the review and authorization activities can be structured so as not to add more than a day or two. This additional time should not adversely affect the price of the bids to any significant degree. This approach is successfully employed in other States, including Pennsylvania and Maryland.~~

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Comment [CMD57]: See Companies' alternative approach outlined above.

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C. Application of the Three-Percent Rule

The legislation does not clearly lay out how the "three-percent rule" is to be applied. The language in the legislation related to the three-percent rule is:

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~~Calculations involving a three percent cost cap shall consist of comparing the total expected cost of generation to customers of an electric utility or electric services~~

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¹⁶ The ACP needs to be set at a level that would generate a reasonable level of economic rent as a mechanism to induce market entry. The current ACP of \$45 accomplishes that goal since the costs of renewable energy production are below the level of the ACP when added to the market prices of energy.

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company, while satisfying an alternative energy portfolio standard requirement, to the total expected cost of generation to customers of the electric utility or electric services company without satisfying that alternative energy portfolio standard requirement.¹⁷

The apparent intent of the rule is to facilitate the limitation of the degree to which retail customers are exposed to excessive costs related to the satisfaction of the renewable energy requirements. The rule, however, is based on "expected" impacts, and it is not unreasonable for the utilities to base the calculations related to the rule on the same algorithm used to compute the quantity of RECs required for compliance in any particular compliance year, that is, the average level of MWh sales in prior three years. This approach, at least temporarily, has an upward bias since over time we would expect that the number of shopping customers (the number of customers taking competitive electric service) to increase. An algorithm based on expected sales volumes that account for customer migration and projections of market pricing for power is recommended in order to eliminate this bias.

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¹⁷ Ohio Code; Chapter 4901:1-40 [Alternative Energy Portfolio Standard], Section 4901:1-40-07 Cost Cap. (C).

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The Companies are initially concerned about the ultimate recommendation of the auditor that all amounts above \$50/REC be disallowed for all In-State All Renewable RECs purchased by the Companies in the 2009-2011 timeframe. The report does not contain a reasonable basis for the \$50 amount, particularly in light of the lack of market information relevant to Ohio in the 2009-2010 timeframe. Further, the disallowance recommendation appears inconsistent with the majority of conclusions reflected throughout the remainder of the report.

General SREC/REC Acquisition Approach

- 1) The Companies disagree with the conclusion in Finding 7 regarding the adequacy of the market research conducted prior to the first two RFPs. The underlying reality was that there was no market data available, particularly in 2009 since at that time the Commission had not yet qualified any resources. As the Companies indicated in the phone interview with Exeter, the Companies did conduct informal market research in 2009 and 2010, by reaching out to brokers (primarily SPECTRON) to get a sense of what was being offered across all four products. For both in-state Ohio categories (Solar and All Renewables), the Companies' broker intelligence revealed little to no supply for these categories. This market research, together with market supply information from Navigant, provided the Companies with a fairly accurate picture of the contemporaneous supply situation for the products being sought in the market. In Ohio, there are no reporting or transparency requirements for REC transactions, thus no information on market prices. It is important to note that there was hardly any change in price transparency between the time when the first two RFPs were conducted and the point in which RFP 3 was held, other than the knowledge that was gained through the first two RFPs. At that time, the market was nascent and complex, and if market information about Ohio RECs was generally unavailable, what meaningful information would have been learned by doing a market study earlier? What basis does Exeter have to support its view that any meaningful information would have been learned?
- 2) The Companies disagree with the conclusion in Finding 8 that the contingency planning for the first three RFPs was inadequate in that it should have included a specific set of "fall-back" approaches or a mechanism to develop a modified approach. The Companies' contingency plans focus on insufficient bidder interest and/or supplier default. If the solicitations are competitive and fully subscribed, they represent the outcome of what supply and demand conditions exist at that point in time. This report seems to suggest that the contingency definition be expanded to include a price threshold examination, which the Companies would view as a speculative feature to an already well-functioning contingency process. To add a price evaluation contingency planning element may be viewed by the market as speculative and may dampen bidder participation. What would an acceptable contingency plan include? Would it have included one or more of the three options that Exeter suggests that the Companies should have considered (i.e., pay ACP, consult the Commission, or seek force majeure)? If not, what would a plan have

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looked like? Do other utilities have plans that include those suggestions? It should be noted that paying the ACP doesn't equate to purchasing RECs to comply, the shortfall can be added to the following years larger requirement and if supply isn't available, even a greater number of RECs may have to be purchased.

- 3) The Companies agree with Recommendation 2 and already undertake a market analysis before RFPs are issued.
- 4) The Companies disagree with Recommendation 3, and do not think a mark-to-market approach to the security requirement for future procurements is appropriate at this time. Such an approach would be extremely complex and difficult to explain to small renewable owners. Further, the 'market price' to which this is proposing to 'mark to' doesn't exist as REC and SREC transaction prices are not publically disclosed. In addition, incorporating such an approach may discourage particularly smaller bidders such as residential customers from participating in the RFPs. Should transparent pricing become available in the future to support such an approach and mark to market is identified as the preferred approach by the Commission, the Companies will modify their credit requirements at that time.

Solicitation Results and Procurement Decisions

- 5) The Companies disagree with Finding 4 that they paid "unreasonably" high prices for In-State All Renewable RECs. The basis for the finding, at least in part, is based on information from outside the State (different product definitions) at points in time that are different from the Companies' procurement dates, and therefore results in an unreliable comparison. The basis for the conclusion of unreasonably high prices is unclear and generally unsupported in the report, particularly given the Companies' obligation to comply with SB 221 mandates and the lack of availability of both applicable market pricing information and lower cost REC's offered as part of the RFPs.
- 6) The Companies disagree with Finding 6 and do not believe other alternatives existed that would have resulted in the Companies complying with the requirements of SB 221. The REC purchases were competitively determined and fully subscribed. Alternatives were evaluated and rejected as it risked the Companies ability to comply with the SB 221 benchmarks.
- 7) 
- 8) The Companies disagree with Finding 7 that the prices bid were "excessive by any reasonable measure." The Companies were in the position where, having conducted multiple RFPs, these were the only in-State RECs available for purchase in order to

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- comply with statutory benchmarks. The suggestion that the Companies had insight into the bidders' cost structure (and therefore the profit margin) is unsupported and not accurate. The Companies are not in a position to investigate individual bidders' cost structures as part of any procurement process. The Companies purpose was to meet the regulatory requirements through arms-length, competitively derived, fully subscribed procurements that conform to our bid rules and credit requirements.
- 9) The Companies believe that one avenue to address the auditor's concerns would be to have the Commission approve the process whereby the Companies purchase RECs associated with SSO service before the RECs contracts are signed. Such an approach may eliminate the types of issues that have arisen in the context of this management/performance audit. If the Commission rejects purchase of RECs, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year. Further, this recommendation is subject to the limits of the Commission's jurisdiction.

Confidentiality Concerns

- 10) In the draft report, the Companies have highlighted in yellow (or underlined where highlight was not available due to comments), all information that must be held in confidence and redacted from the public version of the report that is filed with the Commission. Information related to an individual bidder/supplier and all pricing information related to what the Companies paid for RECs should be redacted or removed from the public version of the report. The Companies have an obligation to protect individual supplier names or contract information. Further, it would be inappropriate to disclose the REC pricing for the Companies, when similar information has not been disclosed for the other EDUs in Ohio.

CONFIDENTIAL Exhibit E – Omitted from filing in OCC’s Public Brief

This foregoing document was electronically filed with the Public Utilities

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in

Case No(s). 11-5201-EL-RDR

Summary: Application Application for Rehearing (Public Version) by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Yost, Melissa Ms.

119.01 Administrative procedure definitions.

As used in sections 119.01 to 119.13 of the Revised Code:

(A)

(1) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the civil service commission, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

Sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission. Sections 119.01 to 119.13 of the Revised Code do not apply to the utility radiological safety board; to the controlling board; to actions of the superintendent of financial institutions and the superintendent of insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, savings and loan associations, savings banks, credit unions, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies; to any action taken by the division of securities under section 1707.201 of the Revised Code; or to any action that may be taken by the superintendent of financial institutions under section 1113.03, 1121.06, 1121.10, 1125.09, 1125.12, 1125.18, 1157.09, 1157.12, 1157.18, 1165.09, 1165.12, 1165.18, 1349.33, 1733.35, 1733.361, 1733.37, or 1761.03 of the Revised Code.

Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the industrial commission or the bureau of workers' compensation under sections 4123.01 to 4123.94 of the Revised Code with respect to all matters of adjudication, or to the actions of the industrial commission, bureau of workers' compensation board of directors, and bureau of workers' compensation under division (D) of section 4121.32, sections 4123.29, 4123.34, 4123.341, 4123.342, 4123.40, 4123.411, 4123.44, 4123.442, 4127.07, divisions (B), (C), and (E) of section 4131.04, and divisions (B), (C), and (E) of section 4131.14 of the Revised Code with respect to all matters concerning the establishment of premium, contribution, and assessment rates.

(2) "Agency" also means any official or work unit having authority to promulgate rules or make adjudications in the department of job and family services, but only with respect to both of the following:

(a) The adoption, amendment, or rescission of rules that section 5101.09 of the Revised Code requires be adopted in accordance with this chapter;

(b) The issuance, suspension, revocation, or cancellation of licenses.

(B) "License" means any license, permit, certificate, commission, or charter issued by any agency. "License" does not include any arrangement whereby a person or government entity furnishes medicaid services under a provider agreement with the department of medicaid.

(C) "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and

includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code.

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

(E) "Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.

(F) "Person" means a person, firm, corporation, association, or partnership.

(G) "Party" means the person whose interests are the subject of an adjudication by an agency.

(H) "Appeal" means the procedure by which a person, aggrieved by a finding, decision, order, or adjudication of any agency, invokes the jurisdiction of a court.

(I)

"Internal management rule" means any rule, regulation, or standard governing the day-to-day staff procedures and operations within an agency.

Amended by 130th General Assembly File No. TBD, SB 3, §1, eff. 9/17/2014.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 128th General Assembly File No. 45, HB 292, §1, eff. 9/13/2010.

Effective Date: 06-18-2002; 04-14-2006; 2007 HB100 09-10-2007

149.43 [Effective Until 3/20/2015] Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x)

Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(y) Records listed in section 5101.29 of the Revised Code;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;

(bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)

(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is

exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of

the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)

(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee,

firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)

(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C) (1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requestor files a mandamus action to recover statutory damages, up to a maximum of one thousand

dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)

(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B)

of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)

(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)

(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General Assembly File No. 129, SB 314, §1, eff. 9/28/2012.

Amended by 129th General Assembly File No. 127, HB 487, §101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 43, HB 64, §1, eff. 10/17/2011.

Amended by 129th General Assembly File No. 28, HB 153, §101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 02-12-2004; 04-27-2005; 07-01-2005; 10-29-2005; 03-30-2007; 2006 HB 9 09-29-2007; 2008 HB 214 05-14-2008; 2008 SB 248 04-07-2009

Related Legislative Provision: See 129th General Assembly File No. 131, SB 337, §4

Note: This section is set out twice. See also § 149.43, as amended by 130th General Assembly File No. 56, SB 23, §1, eff. 3/20/2015.

1333.61 Uniform trade secrets act definitions.

As used in sections 1333.61 to 1333.69 of the Revised Code, unless the context requires otherwise:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(C) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and includes governmental entities.

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Effective Date: 07-20-1994; 2008 HB562 (Vetoed) 06-24-2008

4901.12 All proceedings public records.

Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records.

Effective Date: 09-17-1996

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

4905.07 Information and records to be public.

Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.

Effective Date: 09-17-1996

4909.154 Consideration of management policies, practices, and organization of public utility.

In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall consider the management policies, practices, and organization of the public utility. The commission shall require such public utility to supply information regarding its management policies, practices, and organization. If the commission finds after a hearing that the management policies, practices, or organization of the public utility are inadequate, inefficient, or improper, the commission may recommend management policies, management practices, or an organizational structure to the public utility. In any event, the public utilities commission shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.

Effective Date: 01-11-1983

4909.17 Approval required for change in rate.

No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18 , 4909.19 , and 4909.191 of the Revised Code. Such sections do not apply to any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of railroads, street and electric railways, for-hire motor carriers, and pipe line companies.

Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 6/11/2012.

Amended by 129th General Assembly File No.20, HB 95, §1, eff. 9/9/2011.

Amended by 128th General Assembly File No.43, SB 162, §1, eff. 9/13/2010.

Effective Date: 10-01-1953

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) Such other information as the commission may require in its discretion.

Amended by 129th General Assembly File No.199, HB 379, §1, eff. 3/27/2013.

Amended by 129th General Assembly File No.20, HB 95, §1, eff. 9/9/2011.

Effective Date: 01-11-1983

4909.19 Publication of notice ~ investigation.

(A) Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish notice of such application, in a form approved by the public utilities commission, once a week for two consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and directly affected by the matters referred to in said application . The notice shall include instructions for direct electronic access to the application or other documents on file with the public utilities commission. The first publication of the notice shall be made in its entirety and may be made in a preprinted insert in the newspaper. The second publication may be abbreviated if all of the following apply:

- (1) The abbreviated notice is at least one-fourth of the size of the notice in the first publication.
- (2) At the same time the abbreviated notice is published, the notice in the first publication is posted in its entirety on the newspaper's web site, if the newspaper has a web site, and the commission's web site.
- (3) The abbreviated notice contains a statement of the web site posting or postings, as applicable, and instructions for accessing the posting or postings.

(B) The commission shall determine a format for the content of all notices required under this section, and shall consider costs and technological efficiencies in making that determination. Defects in the publication of said notice shall not affect the legality or sufficiency of notices published under this section provided that the commission has substantially complied with this section, as described in section 4905.09 of the Revised Code.

(C) The commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The

commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

Amended by 129th General Assembly File No.20, HB 95, §1, eff. 9/9/2011.

Effective Date: 01-11-1983

4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

- (1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.
- (2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.
- (3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.
- (4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.
- (5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.
- (6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.
- (7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.
- (8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.
- (9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.
- (10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.
- (11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

- (12) "Firm electric service" means electric service other than nonfirm electric service.
- (13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.
- (14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.
- (15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.
- (16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.
- (17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.
- (18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.
- (19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.
- (20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.
- (21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.
- (22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.
- (23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.
- (24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

- (a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;
- (b) Is located on a customer-generator's premises;
- (c) Operates in parallel with the electric utility's transmission and distribution facilities;
- (d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM);

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

"Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy;

(ii) Wind energy;

(iii) Power produced by a hydroelectric facility;

(iv) Power produced by a run-of-the-river hydroelectric facility placed in service on or after January 1, 1980, that is located within this state, relies upon the Ohio river, and operates, or is rated to operate, at an aggregate capacity of forty or more megawatts;

(v) Geothermal energy;

(vi) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion;

(vii) Biomass energy;

(viii) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census;

(ix) Biologically derived methane gas;

(x) Heat captured from a generator of electricity, boiler, or heat exchanger fueled by biologically derived methane gas;

(xi) Energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors.

"Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, September 10, 2012, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the better utilization of a renewable energy resource; or distributed generation system used by a customer to generate electricity from any such energy.

"Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(38) "Waste energy recovery system" means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) "Smart grid" means capital improvements to an electric distribution utility's distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) "Combined heat and power system" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

Amended by 130th General Assembly File No. TBD, SB 310, §1, eff. 9/12/2014.

Amended by 129th General Assembly File No. 125, SB 315, §101.01, eff. 9/10/2012.

Amended by 128th General Assembly File No. 47, SB 181, §1, eff. 9/13/2010.

Amended by 128th General Assembly File No. 48, SB 232, §1, eff. 6/17/2010.

Amended by 128th General Assembly File No. 9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 10-05-1999; 01-04-2007; 2008 SB221 07-31-2008

4928.02 State policy.

It is the policy of this state to do the following throughout this state:

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;
- (F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) 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 or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;
- (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;
- (L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Amended by 129th General Assembly File No. 125, SB 315, §101.01, eff. 9/10/2012.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.142 Standard generation service offer price - competitive bidding.

(A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following:

(a) Open, fair, and transparent competitive solicitation;

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

(d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall

determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

(1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;

(2) Its prudently incurred purchased power costs;

(3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

(F) An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.

Effective Date: 2008 SB221 07-31-2008; 2008 HB562 09-22-2008

4928.143 Application for approval of electric security plan testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20 , division (E) of section 4928.64 , and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan

approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve

an application filed under division (A) of this section if it finds that the electric security plan so approved, 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 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141 , division (B) of section 4928.64 , or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating

that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

Amended by 129th General Assembly File No. 61, HB 364, §1, eff. 3/22/2012.

Effective Date: 2008 SB221 07-31-2008

4928.65 Adoption of rules governing disclosure of costs to customers of the renewable energy resource, energy efficiency savings, and peak demand reduction requirements.

(A) Not later than January 1, 2015, the public utilities commission shall adopt rules governing the disclosure of the costs to customers of the renewable energy resource, energy efficiency savings, and peak demand reduction requirements of sections 4928.64 and 4928.66 of the Revised Code. The rules shall include both of the following requirements:

(1) That every electric distribution utility list, on all customer bills sent by the utility, including utility consolidated bills that include both electric distribution utility and electric services company charges, the individual customer cost of the utility's compliance with all of the following for the applicable billing period:

(a) The renewable energy resource requirements under section 4928.64 of the Revised Code, subject to division (B) of this section;

(b) The energy efficiency savings requirements under section 4928.66 of the Revised Code;

(c) The peak demand reduction requirements under section 4928.66 of the Revised Code.

(2) That every electric services company list, on all customer bills sent by the company, the individual customer cost, subject to division (B) of this section, of the company's compliance with the renewable energy resource requirements under section 4928.64 of the Revised Code for the applicable billing period.

(B)

(1) For purposes of division (A)(1)(a) of this section, the cost of compliance with the renewable energy resource requirements shall be calculated by multiplying the individual customer's monthly usage by the combined weighted average of renewable-energy-credit costs, including solar-renewable-energy-credit costs, paid by all electric distribution utilities, as listed in the commission's most recently available alternative energy portfolio standard report.

(2) For purposes of division (A)(2) of this section, the cost of compliance with the renewable energy resource requirements shall be calculated by multiplying the individual customer's monthly usage by the combined weighted average of renewable-energy-credit costs, including solar-renewable-energy-credit costs, paid by all electric services companies, as listed in the commission's most recently available alternative energy portfolio standard report.

(C) The costs required to be listed under division (A)(1) of this section shall be listed on each customer's monthly bill as three distinct line items. The cost required to be listed under division (A)(2) of this section shall be listed on each customer's monthly bill as a distinct line item.

Added by 130th General Assembly File No. TBD, SB 310, §1, eff. 9/12/2014.

4901-1-24 Motions for protective orders.

(A) Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

- (1) Discovery not be had.
- (2) Discovery may be had only on specified terms and conditions.
- (3) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.
- (4) Certain matters not be inquired into.
- (5) The scope of discovery be limited to certain matters.
- (6) Discovery be conducted with no one present except persons designated by the commission, the legal director, the deputy legal director, or the attorney examiner.
- (7) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.
- (8) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

(B) No motion for a protective order shall be filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order filed pursuant to paragraph (A) of this rule shall be accompanied by:

- (1) A memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon.
- (2) Copies of any specific discovery requests that are the subject of the request for a protective order.
- (3) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts that have been made to resolve any differences with the party seeking discovery.

(C) If a motion for a protective order filed pursuant to paragraph (A) of this rule is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may require that the party or person seeking the order provide or permit discovery, on such terms and conditions as are just.

(D) Upon motion of any party or person with regard to the filing of a document with the commission's docketing division relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under

Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph:

(1) All documents submitted pursuant to paragraph (D) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(2) Two unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the secretary of the commission, the chief of the docketing division, or the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "confidential," "proprietary," or "trade secret."

(3) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

(E) Pending a ruling on a motion filed in accordance with paragraph (D) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered. The commission and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "confidential," "proprietary," or "trade secret," or with any other such marking will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph (D) of this rule.

(F) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire twenty-four months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond twenty-four months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure. Nothing precludes the commission from reexamining the need for protection issue de novo during the twenty-four month period if there is an application for rehearing on confidentiality or a public records request for the redacted information.

(G) The requirements of this rule do not apply to information submitted to the commission staff. However, information submitted directly to the legal director, the deputy legal director, or the attorney examiner that is not filed in accordance with the requirements of paragraph (D) of this rule may be filed with the docketing division as part of the public record. No document received via fax or e-filing will be given confidential treatment by the commission.

Effective: 06/15/2014

R.C. 119.032 review dates: 03/26/2014 and 03/26/2019

Promulgated Under: 111.15

Statutory Authority: 4901.13

Rule Amplifies: 4901.13 , 4901.18

Prior Effective Dates: 3/1/81, 6/1/83, 12/25/87, 4/4/96, 7/7/97, 5/07/07

4901:1-40-03 Requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Effective: 12/10/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4905.04 , 4905.06 , 4928.02 , 4928.64

Rule Amplifies: 4928.64

4901:1-40-05 Annual status reports and compliance reviews.

(A) Unless otherwise ordered by the commission, each electric utility and electric services company shall file by April fifteenth of each year, on such forms as may be published by the commission, an annual alternative energy portfolio status report analyzing all activities undertaken in the previous calendar year to demonstrate how the applicable alternative energy portfolio benchmarks and planning requirements have or will be met. Staff shall conduct annual compliance reviews with regard to the benchmarks under the alternative energy portfolio standard.

(1) Beginning in the year 2010, the annual review will include compliance with the most recent applicable renewable- and solar-energy resource benchmark.

(2) Beginning in the year 2025, the annual review will include compliance with the most recent applicable advanced energy resource benchmark.

(3) The annual compliance reviews shall consider any under-compliance an electric utility or electric services company asserts is outside its control, including but not limited to, the following:

(a) Weather-related causes.

(b) Equipment shortages for renewable or advanced energy resources.

(c) Resource shortages for renewable or advanced energy resources.

(B) Any person may file comments regarding the electric utility's or electric services company's alternative energy portfolio status report within thirty days of the filing of such report.

(C) Staff shall review each electric utility's or electric services company's alternative energy portfolio status report and any timely filed comments, and file its findings and recommendations and any proposed modifications thereto.

(D) The commission may schedule a hearing on the alternative energy portfolio status report.

Effective: 12/10/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4901.13 , 4905.04 , 4905.06 , 4928.02 , 4928.64 , 4928.65

Rule Amplifies: 4928.64 , 4928.65

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Public Appendix* was served on the persons listed below, via electronic service, this 23rd day of October 2014.

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