

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Review of The Alternative Energy Rider Contained in The Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

)
CASE NO. 2013-2026
Appeal from the Public Utilities Commission of Ohio
Public Utilities Commission of Ohio
Case No. 11-5201-EL-RDR
)

THIRD MERIT BRIEF OF APPELLANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

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## I. INTRODUCTION

The error of the August 7, 2013 Order (the “Order”) of the Public Utilities Commission of Ohio (the “Commission”) to require Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”) to give back \$43.4 million in previously collected revenues is no better demonstrated than by the weakness of the arguments presented by those attempting to defend the Order. No one disputes that the Companies, being statutorily required to buy renewable energy credits (“RECs”) from facilities located in Ohio (“In-State RECs”), when the market for such products was nascent and highly constrained, endeavored successfully to do so. The Companies retained an independent, widely regarded expert in competitive procurements (*e.g.*, request for proposals (“RFPs”)), Navigant Consulting, Inc. (“Navigant”). Navigant designed and implemented a process that procured RECs through a competitive process that produced RECs for the Companies at market prices.

The renewable energy statute required electric distribution companies to purchase annually a certain number of In-State RECs. To satisfy these annual requirements, the Companies had to go into the market to purchase RECs. Consequently, except for the first compliance year (2009), Navigant and the Companies sought to spread out the purchases of RECs needed for a particular compliance year over more than one year. Pursuant to this strategy (called, “laddering”), RECs required for 2010 would be purchased in 2009 and 2010; RECs for 2011 would be purchased in 2009, 2010 and 2011.

In one part of the Order, the Commission approved this laddering strategy. For example, the Commission recognized that, for 2009 and 2010, the competitive process and/or the laddered procurements produced RECs at market-based (and therefore reasonable) prices. Similarly, the Commission approved the Companies’ purchases of 2011 In-State RECs in 2009.

Yet, when the Commission, in hindsight, saw that 2011 In-State REC prices dropped between 2010 to 2011, the Commission invented ad hoc rationales to achieve a desired outcome: *i.e.*, to disallow the cost of certain 2011 In-State RECs purchased in 2010. As shown in the Companies' First Merit Brief, requiring the Companies to give back revenues collected is prohibited as retroactive ratemaking under Ohio law. It is also unsupported in the record.

In response, the Commission makes two demonstrably wrong arguments on retroactive ratemaking. First, it contends that this Court, in *River Gas Co. v. Public Utilities Commission*, 69 Ohio St.2d 509 (1982), created an exception to the prohibition on retroactive ratemaking for adjustable rates. There are at least two things wrong with this. First, the rates at issue in *River Gas* were specifically authorized by statute to be placed into effect and collected prior to any Commission approval. The rates here, collected under the Companies' Alternate Energy Recovery Rider ("Rider AER"), were specifically subject to and collected following Commission approval. The facts in *River Gas* are inapposite. Retroactive ratemaking has always been applied to bar the refund of revenues recovered under approved rates. Second, this Court has applied the prohibition against retroactive ratemaking to adjustable riders, including a rider that recovered the very types of alternative energy costs recovered under Rider AER here. *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶13-16.

Next, the Commission asserts that, if the Companies prevail, the Commission could never approve adjustable rates because it could never meaningfully review such rates and adjust them for imprudently incurred costs. This claim cannot survive serious scrutiny. It overlooks that the Commission could have delayed the effective date of any rate under Rider AER if the Commission had questions about the rates. Instead, the Commission waited over one year after the disputed RECs were purchased even to open an investigation and then another two years to

issue its Order. The Commission's inaction that delayed addressing the Companies' collection of otherwise approved costs hardly justifies changing longstanding Ohio law.

The attempt by the Office of the Ohio Consumers' Counsel ("OCC") to avoid the Order's retroactive ratemaking fares no better. OCC claims that *River Gas* applies here because the Commission either never approved or only gave "ministerial" approval of the Rider AER rates. This is squarely contradicted by: (1) the very title of the filing that the Companies made every time that they sought to change the Rider AER rate, *i.e.*, "Request for Approval"; and (2) per the Commission-approved Rider AER tariff, these proposed rates would go into effect 30 days after the filing unless the Commission ordered otherwise. OCC thus suggests ignoring that a "Request for Approval" means what it says and that the 30-day review period must have some purpose.

The Commission's and OCC's attempts to defend the lack of support for the Commission's four factors that were the basis of the Order's denial of cost recovery meet a similar fate. For example, in its Order and Second Entry on Rehearing, the Commission relied upon an October 2009 Navigant Report to assert that: (1) the Companies knew that the constraints in the In-State REC market were easing as of the third RFP ("RFP 3") in July, 2010; and thus (2) the Companies should have waited to purchase 2011 RECs until 2011. Faced with the fact that, as shown in the Companies' First Merit Brief, the Navigant Report said nothing about the market in 2011, the Commission here goes even further with its unsupported hyperbole. The Commission now says that the Companies *knew* not merely that market constraints would ease, but that *REC prices were going to drop*. In doing so, the Commission points to the testimony of Company witness Dean Stathis, who had the responsibility for the REC procurements for the Companies. As shown below, however, Mr. Stathis said no such thing. In fact, he expressly said that the Companies did not know what prices would be in 2011.

Indeed, as the un rebutted record shows, such information was “unknowable.”

Similarly, although the Commission’s second factor cited to support the disallowance was the Companies’ alleged failure to advise the Commission of the In-State REC market constraints, the Companies’ filing with the Commission says otherwise. Thus, the Commission is left to argue weakly that the Companies’ statements weren’t “specific.” Notably, the Commission never contradicts, as the Companies’ First Merit Brief demonstrated, that the Commission was uniquely positioned to know about In-State REC prices via PJM’s website and about the In-State REC market via the requirement for Commission certification of all Ohio renewable energy facilities. Likewise, after the Companies pointed out that this second factor is irrelevant (because there is no evidence as to what difference it would have made to have advised the Commission), the Commission is left to contend, with no record citation or support, that “methods” could have been taken.

The Commission’s tepid defense continues with respect to its criticism of the record in supporting the reasonableness of the price paid for the disputed 2011 In-State RECs. The Commission never disputes that the prices determined by RFP 3 were market-based. Thus, the Commission never explains why below-market prices aren’t reasonable.

The best that the Commission can come up with is that the Companies should have waited until 2011 to purchase the 2011 In-State RECs. This is naked 20-20 hindsight. Nevertheless, this argument directly contradicts the Commission’s approval of the Companies’ laddered (*i.e.*, multi-year) procurement strategy. Thus, in response to the Companies’ argument – if the Companies’ purchase of 2010 and 2011 In-State RECs in 2009 was reasonable, why isn’t the Companies’ purchase of 2011 In-State RECs in 2010 reasonable? – the Commission feebly responds that the market in RFP 3 was “different.” This assertion is flatly

contradicted by the record, including the testimony of Staff's witness, that the market continued to be constrained through RFP 3. Further, the claim that the market had changed and thus the Companies' laddering strategy should have been abandoned simply misunderstands the point of laddering: to avoid attempting to "time" the market.

Nor is the defense of the rationale that the Companies should have sought force majeure relief on any stronger ground. The claim that force majeure relief from the statutory benchmarks could be based on high prices is: (1) not based on any express language in the statute relating to cost or prices; (2) contrary to the structure of the renewable energy statute which provided cost-based relief elsewhere (*i.e.*, not in the force majeure provision); and (3) contrary to the notion of force majeure generally. Moreover, contrary to the misuse of Commission case authority by the Commission and OCC here, there was no Commission precedent granting price-based force majeure relief as of the date of RFP 3. Thus, it would not have been reasonable for the Companies to have believed that price-based force majeure relief was available.

In its cross-appeal, OCC argues the academic point that the Commission's allocation of a rebuttable presumption and of the burden of proof generally was wrong. OCC's argument overlooks that: (1) the Commission has broad discretion to craft its own procedures; (2) this Court has previously approved the Commission's presumption and burden framework on prudence issues; and (3) regardless, the Companies carried their burden.

For their common cross-appeal point, OCC and the Environmental Law and Policy Center ("ELPC") argue that the Commission was wrong to grant trade secret protection for the identities of bidders and bid prices received during the RFPs. But trade secret determinations are issues of fact and the record supports that divulging the disputed information would have an adverse effect on future RFPs and the Ohio REC market. Thus, this cross-appeal founders.

**II. PROPOSITION OF LAW NO. 1: A COMMISSION ORDER IS UNLAWFUL WHERE IT MANDATES IMPERMISSIBLE RETROACTIVE RATEMAKING BY REQUIRING UTILITIES TO CREDIT TO CUSTOMERS MONIES ALREADY COLLECTED UNDER DULY AUTHORIZED RATES.**

The Order requires the Companies to adjust rates to give back \$43.4 million that the Companies have already collected pursuant to Commission-approved rates filed under Rider AER. Companies Br. at 18, citing Mikkelsen Rebuttal, p. 4; Supp. at 61. This Order violates this Court's long-standing prohibition against retroactive ratemaking. Companies Br. at 18-19.

The prohibition against retroactive ratemaking, recognized by this Court, in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (1957), arises from Ohio Revised Code Sections 4905.32, 4903.15 and 4903.16. Section 4905.32 prohibits utilities from charging any rates different than those established in its tariff. App. at 380. Sections 4903.15 and 4903.16 provide that a Commission order approving a rate is effective immediately and remains in effect unless stayed. *Id.* at 376-377. The doctrine thus balances the interests of both utilities and their customers. Utilities may not recover the costs they incur unless those costs are reflected in approved rates. Similarly, utilities are not required to give back funds collected under approved rates, even if those rates are later found to be improper. The doctrine recognizes that there may be periods of "regulatory lag" when the rates approved and charged may not match costs or other proper charges. *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶49; *Keco Industries, Inc.*, 166 Ohio St. at 259. Nevertheless, under long-standing precedents in Ohio and elsewhere, it is improper to claw back any funds collected (or to boost rates to recover past charges incurred) during or as a result of the regulatory lag. *Id.*; *In re Columbus Southern Power Co.*, 2011-Ohio-1788, ¶15. Simply put, as this Court recognized in *Keco*, the statutory scheme requiring that a utility charge only its approved rates cuts both ways. *Keco Industries, Inc.*, 166 Ohio St. at 259.

**A. Rider AER Is Subject To The Prohibition Against Retroactive Ratemaking.**

The Commission and OCC argue that this Court's opinion in *River Gas Co. v. Public Utilities Commission*, 69 Ohio St.2d 509 (1982), exempted any adjustable rate mechanism, including all variable riders, from the prohibition against retroactive ratemaking. Comm. Br. at 8-9; OCC Br. at 45. They reason that *River Gas* holds that any rate other than a "traditional" rate established in a base rate proceeding under Ohio Revised Code Section 4909.17 is exempted from the prohibition and subject to retroactive adjustments. *Id.*

These parties' view of *River Gas* is wrong. The *River Gas* Court did not create a broad exemption from the prohibition on retroactive ratemaking. This Court held that the retroactive ratemaking doctrine did not bar the Commission's order requiring that certain gas supplier refunds be reflected in rates established under the Uniform Gas Purchase Adjustment ("UPGA") statute, R.C. § 4905.302. *Id.* at 514. It explained that, pursuant to the UPGA statute, the utility's gas cost recovery tariff allowed the utility to pass fuel costs directly to customers *without the Commission's prior approval*. *Id.* at 513. The *River Gas* court explained that the gas cost recovery mechanism was different than the "usual and customary sense" of ratemaking that required prior approval. *Id.*

Rather than exempting all variable rates from retroactive ratemaking, the *River Gas* result merely arises from the statutory basis of the gas cost recovery tariff at issue there. The UPGA is a unique statutory scheme required to be incorporated into the tariffs of every natural gas company. The argument that all adjustable rates were addressed in *River Gas* incorrectly assumes that all adjustable rates are similar to those under the UPGA.

Rider AER is not analogous to the gas cost recovery tariff in *River Gas*. Unlike the gas tariff in *River Gas*, Rider AER was expressly subject to prior Commission review *and approval*. *See, e.g.,* Case No. 08-935-EL-SSO, Ohio Edison Company, P.U.C.O. No. 11, Sheet 84, 8th

Revised Sheet Page 1 of 1 (Effective Date: July 1, 2011); Supp. at 147. Under the Companies' tariffs, the Companies were required to file regularly a "Request for Approval" of a new Rider AER rate. That rate would be effective thirty days after the filing unless the Commission ordered otherwise. Thus, unlike UPGA rates, the Companies' Rider AER rates were expressly approved, per the language of the applicable tariff. *Id.*

Here, the Commission has ordered the Companies to "offset" their current Rider AER rates with monies the Companies previously collected under Rider AER.<sup>1</sup> The Commission's Order thus alters future rates based on previous events and does so because of its own delay in auditing Rider AER costs and revenues. As discussed further below, the Commission's Order was issued over three years after the disputed costs were incurred and began to be recovered in Rider AER. An attempt to adjust rates after the fact because of regulatory lag is retroactive ratemaking, pure and simple. *See* 2011-Ohio-1788, ¶11 (holding that a rate that makes up for regulatory lag is prohibited by *Keco*).

The argument by the Commission and OCC that adjustable rates are not subject to the prohibition against retroactive ratemaking also conflicts with Ohio law. The holding in *Keco* prohibiting retroactive ratemaking has not been overruled. And the General Assembly has not revoked Sections 4905.32, 4903.15 and 4903.16. Further, "[i]t is [presumed] that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment." *Clark v. Scarpelli*, 91 Ohio St.3d 271, 278 (2001). In 2008, when the General Assembly adopted S.B. 221 to include the electric security plan ("ESP") mechanism under which

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<sup>1</sup> Although the "offset" ordered by the Commission is a credit on current Rider AER tariffs, the Order reaches the same financial result as if the Commission ordered the Companies to refund the monies previously collected by the Companies under approved Rider AER tariffs. *See In re Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶10.

a utility may recover rates under adjustable riders, the General Assembly did not abrogate the longstanding prohibitions against retroactive ratemaking. Indeed, this Court has recognized this fact.

In 2011, this Court applied the retroactive rate doctrine to an order involving adjustable rates that were part of a utility's ESP plan. In *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, this Court found that the retroactive ratemaking doctrine prohibited the Commission from setting rates under the utility's ESP plan at a level that would recover twelve months of revenue over nine months. This Court applied the prohibition against retroactive ratemaking even though the rates involved included several adjustable riders designed to recover variable costs, such as the kinds of costs recovered under Rider AER. *Electric Security Plan*, Case No. 08-917-EL-SSO, Opinion and Order at 14-15, 49-50 (Mar. 18, 2009); *see also*, Case No. 08-917-EL-SSO, Entry on Rehearing at 9 (July 23, 2009); Supp. at 312-13, 347-48; 384. Specifically, the Fuel Adjustment Clause ("FAC") rider included in AEP Ohio's ESP provided that the utility could recover "prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations." Case No. 08-917-EL-SSO, Opinion and Order at 14; Supp. at 312. Like Rider AER here, the FAC rider was subject to quarterly adjustments as well as a prudence review. *Id.* at 15; Supp. at 313. If Rider FAC, which included improper costs in *Columbus Southern* could not be retroactively adjusted because costs were already collected, Rider AER cannot be adjusted here.

The Commission also wrongly argues that in *In re Application of Ohio Power Co.*, Slip Opinion, No. 2014-Ohio-4271, this Court recently reaffirmed an "important distinction" between reconcilable riders and traditional ratemaking statutes. Comm. Br. at 12. In that case, Ohio

Power had transmission costs that it had not recovered under its prior ESP. 2014-Ohio-4271, ¶1. Ohio Power sought to recover these transmission costs from all customers over an additional three-year period. *Id.* at ¶2, 10. The Commission allowed the recovery.<sup>2</sup> *Id.* at ¶2.

This Court held that the prohibition on retroactive ratemaking did not apply because the Commission had *specific statutory authority* which allowed the Commission to phase in the recovery of certain costs in rates. *Id.* at ¶ 41 (citing R.C. § 4928.144). Thus, this Court did not make a “distinction” between reconcilable riders and traditional ratemaking in that case.

**B. The Doctrine Of Retroactive Ratemaking Prohibits The Commission From Retroactively Changing Rates That The Commission Has Already Approved To Make Up For Regulatory Delay.**

The Commission also argues that if the Order constitutes retroactive ratemaking, then there can never be review of adjustable rates. Comm. Br. at 7. The Commission claims that if the retroactive ratemaking doctrine applies, then any Rider AER audit would be futile. *Id.*

But the Commission ignores the culprit of its complaint regarding its alleged inability to adjust rates timely: the Commission’s own regulatory delay. The Order was issued about:

- three years after the Companies purchased the In-State RECs and incurred the costs in RFP 3 that the Commission now orders should be credited to customers (August 2010) Stathis Test. at 33-34; Supp. at 46-47; *See* Order at 25; App. at 33;
- two years after the Commission opened a docket to audit Rider AER (September 20, 2011) (*See* Case No. 11-5201-EL-RDR, Docket (Sept. 20, 2011));
- a year and a half after the Commission approved external auditors to review the Companies’ Rider AER costs and revenues (February 23, 2012) (Case No. 11-5201-EL-RDR, Entry (Feb. 23, 2012); Supp. at 85; and
- one year after the external auditors filed their report regarding those costs. (*See* Case No. 11-5201-EL-RDR, Docket (Aug. 15, 2012)).

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<sup>2</sup> Ohio law provides that a utility may recover its transmission-related costs from its retail customers. *See* R.C. § 4928.05(A)(2); App. at 384.

The simple response to the Commission's argument about timely adjustments to Rider AER is that the Commission could have begun its Rider AER audit earlier. For example, it could have reviewed the costs during the Commission-approved 30-day review period provided for in the Rider AER tariff sheets. *See, e.g.,* Ohio Edison Company, P.U.C.O. No. 11, Original Sheet 84, 8th Revised Sheet Page 1 of 1 (May 29, 2009); Supp. at 146. Or the Commission could have initiated an audit proceeding at the end of each compliance year and then precluded recovery of any imprudently incurred costs.<sup>3</sup> The Commission also could have delayed the effective dates of Rider AER by postponing its approval of Rider AER tariffs, as the Commission even acknowledges. Comm. Br. at 10.

But the Commission didn't do any of these things. Instead, it did nothing until a third-party requested the Commission to look at the Companies' Rider AER costs. *See In the Matter of the Annual Alternative Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP, Finding and Order at 4 (August 3, 2011). Yet, even during the course of the audit, the Commission continued to approve Rider AER tariffs that were recovering the alternative energy compliance costs for 2009, 2010 and 2011.

The Commission's delay in initiating an audit defies explanation. In fact, the

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<sup>3</sup> There were delays in recovering costs from the beginning of the AER program. For example, the Companies incurred all of their 2009 compliance costs in the last quarter of that year. To ease the effect of the cost recovery on customers, the Companies spread the recovery of 2009 costs over 2010 and into 2011. Comm. Ordered Ex. 1 at 13; Supp. at 732. Similarly, as part of the Companies' third ESP, the Commission approved having the Companies spread cost recovery over the three-year term of the ESP. *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 706, Opinion and Order at \*76 (July 18, 2012); Supp. at 544. Thus, earlier annual audits could have prevented the recovery of any costs that the Commission might have found were imprudent.

Commission hardly tries. At most, in its Second Entry on Rehearing, the Commission contended that no meaningful review could be undertaken in the 30-day period between the filing of a proposed Rider AER rate and its effective date. But the Commission approved the 30-day review period as part of the Commission's approval of the Companies' first ESP proceeding. Case No. 08-935-EL-SSO. Further, the Commission never explains – either in its Second Entry on Rehearing or before this Court – why it couldn't delay the effective date of rates if the Commission had questions. Further, the Commission offers no explanation why it couldn't have started and completed its audit sooner than two years after the fact.<sup>4</sup>

For its part, OCC engages in linguistic gymnastics to argue that the Order is not retroactive ratemaking. It argues that each filing that preceded each adjustment to the Rider AER rate – a filing called, per the tariff, a “Request for Approval” – was not, in fact, a request for approval. OCC Br. at 10. *E.g.*, Case No. 08-935-EL-SSO, Ohio Edison Company, P.U.C.O. No. 11, Original Sheet 84, 8th Revised Sheet Page 1 of 1 (May 29, 2009); Supp. at 146. Further, OCC argues that, to the extent that the Commission approved the rates, it was only “ministerial approval.” OCC Br. at 47. This is nonsense. Rates are either approved by the Commission or they are not. As noted, the Rider AER rates proposed in each “request for approval” went into effect after 30 days, absent Commission action. Contrary to OCC's suggestion, that 30-day

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<sup>4</sup> The Commission's delay is all the more baffling given that the Commission and its Staff had the ability to monitor and review the prices of RECs purchased by the Companies via a website operated by PJM. Tr. Vol. II at 356; Supp. at 87. Pricing information was available for the 2009 RECs starting on March 31, 2010. Stathis Test. at 44; Supp. at 55. The Commission also certified the REC suppliers in Ohio and thus was aware of any shortage or backlog. *Id.* at 28; Supp. at 43. The Commission and its Staff thus had the unique ability to understand the In-State REC market and the opportunity to monitor the Companies' costs well before it opened this case. If the Commission had monitored these things and had any question about the REC prices that the Companies had paid on the market, it could have convened an audit earlier or had simply put the collection of questioned costs on hold.

period must have had some purpose. It is obvious that the purpose for the 30-day period was to allow the Commission to exercise its authority to review, accept, delay, question or reject the proposed rates as they were filed. With no action by the Commission, the rates were approved. Consequently, the prohibition against retroactive ratemaking applies to rates, like Rider AER, that are approved by the Commission. *Supra* Section II.A.

The Commission also suggests that the Companies are seeking a “blank check” for the costs incurred, thus avoiding any review of their purchase of RECs. Comm. Br. at 12. This is wrong. The fact is, as the Commission knew, once the Rider AER tariffs were approved by the Commission, the Companies had no option but to charge the rates on file with and approved by the Commission until the Commission ordered otherwise. *See* R.C. § 4905.32; App. at 380. That order did not come until August 2013. As noted, the Commission could have taken all manner of measures between the middle of 2010 (when the Companies purchased the disputed RECs) and August, 2013 (when the Order was issued). But the Commission eschewed all of these options, deciding instead to authorize the Companies to recover the costs in question. The Commission cannot now attempt to make up for its regulatory lag by retroactively modifying approved rates. *See In re Columbus Southern Power Co.*, 2011-Ohio-1788, ¶11 (“[P]resent rates may not make up for the dollars lost during the pendency of commission proceedings.”).

The Companies are not asking for a blank check; they’re asking this Court to apply Ohio law. The law required the Companies to comply with renewable energy benchmarks and charge Commission-approved Rider AER rates, which they did. The Commission also must follow the law. Retroactive ratemaking prohibits the Commission from ordering the Companies to pay back monies collected under approved Commission rates. The Order requires reversal.

### III. PROPOSITION OF LAW NO. 2: A COMMISSION ORDER IS UNLAWFUL WHEN IT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Although the Commission suggests that the Court should simply defer to the Commission's factual findings, the applicable standard of review requires more. Comm. Br. at 13-14. Instead, "this court should examine the record with a view of determining whether the findings of the commission on the facts are *reasonably supported by the evidence* adduced at the hearing." *St. Clairsville v. Pub. Util. Comm.*, 102 Ohio St. 574 (1921) (emphasis added); *accord Cincinnati Traction Co. v. Pub. Util. Comm.*, 112 Ohio St. 699, 700-701 (1925).

An administrative agency's finding is unsupported by the record when it is based on an unrealistic view or misinterpretation of the evidence. *See Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, ¶18 (reversing order where the record did not support the Commission's finding); *Superior Metal Products, Inc. v. Administrator, Ohio Bureau of Employment Servs.*, 41 Ohio St.2d 143 (1975) (affirming court of appeals reversal of agency's order because the order was the product of mistake and misinterpretation of the evidence); *see also Barsan v. Giles*, 8th Dist. Cuyahoga No. 44933, 1983 LEXIS 12767, at \*4 - \*5 (Feb. 17, 1983) (reversing order of agency as against the manifest weight of the evidence because the agency misinterpreted the testimony of appellant).

This Court also reverses the decisions of administrative agencies that contain internal inconsistencies. *See, e.g., Higbee Co. v. Cuyahoga County Bd. of Revision*, 107 Ohio St.3d 325, 2006-Ohio-2, ¶38 (reversing a Board of Tax Appeals ("BTA") decision in part because of an internal inconsistency); *Ridgeview Center, Inc. v. Lorain County Bd. of Revision*, 42 Ohio St.3d 30, 31 (1989) (reversing BTA decision because it was "internally inconsistent").

In the Order, the Commission cited four specific factors that the Commission believed rebutted any presumption or other evidence that the Companies' purchases of 2011 In-State

RECs were prudent. *See* Order at 25; App. at 33. First, the Commission concluded, based on an October 2009 report from Navigant, that the Companies “knew” that market “relief was imminent” and that market constraints “would be relieved by December 2010.” *Id.* at 26; App. at 34. Second, the Commission noted that the Companies had failed in 2010 to advise the Commission, in the Companies’ ten-year compliance plan reports, that there were any constraints in the In-State RECs market. *Id.* at 25; App. at 33. Third, the Commission pointed out that the price for the questioned RECs was a negotiated price. The Commission stated that there was no evidence that such price was reasonable. *Id.* at 27; App. at 35. Fourth, the Commission stated that the Companies could have sought force majeure relief. *Id.*

In their First Merit Brief, the Companies demonstrated that each of the four factors is either unsupported by the record or does not support a conclusion that the purchases were imprudent. Companies Br. at 26-43. The Commission and OCC point to no evidence to show otherwise. And they misread Ohio law to argue that the Companies should have sought a force majeure determination instead of purchasing the In-State RECs.

**A. There Is No Evidence That, When The Companies Purchased 2011 In-State RECS In RFP 3, The Companies Knew Market Conditions Were Projected To Be Relieved In The Near Future.**

**1. Misinterpreting evidence does not create support for the Commission’s finding.**

The Commission and OCC fail to show that the record supports a finding that the Companies knew market conditions were projected to improve in the near future. Instead, they ignore what Navigant actually said – and recommended – and they also mischaracterize and misinterpret Company witness Stathis’ testimony. For example, the Commission argues, without any citation to record evidence, that the Companies “knew prices were expected to drop significantly in the near future, but went ahead anyway and hastily secured 2011 vintage credits

during a period of short supply.” Comm. Br. at 15. This assertion is utterly unsupported.

To begin, as the Companies demonstrated in their First Merit Brief, there was no projection about 2011 In-State REC prices beyond December 2010. Companies Br. at 31. Navigant analyzed the In-State REC market for the fifteen-month period from October 2009 through only December 2010 and found:

The assessment of the Ohio-REC market concludes that it is a nascent, highly constrained market, consisting of a small number of renewable facilities. *Looking forward, the primary conclusion is that supply of Ohio RECs will continue to be very constrained through 2010. . . .* Given the time requirements for permitting and constructing new facilities, there does not appear to be any major new supply entrants to the Ohio-REC market over the next 12 months.

OCC Ex. 9 (Oct. 18, 2009 Navigant Memorandum at 1(emphasis added)) (Comp. Sens. Conf.); Supp. at 608. Navigant said nothing about when the market conditions were projected to improve. Navigant also said nothing about what would happen at any time after December 2010.

Attempting to avoid the fact that Navigant never made the projection that the Commission said it did, Order at 25; App. at 33, the Commission and OCC point to Company witness Stathis’ testimony addressing the Companies’ consideration of the possibility of pursuing a counteroffer with the higher-priced bidder. *See* Comm. Br. at 15 citing Company Ex. 2 at 35; OCC Br. at 33 citing Tr. Vol. II at 360 (Conf.); Supp. at 586; and Tr. Vol. II at 370 (Conf.); Supp. at 588. Specifically, they cite Mr. Stathis’ testimony identifying the three pieces of “new information” that the Companies believed supported their decision to pursue a counteroffer in an attempt to receive a lower price. The record cited by the Commission and OCC says this:

- Q. Did the FEOUs [*i.e.*, the Companies] have a concern about the [higher price] supply offer for the quantity of 145,269 2011 In-State All Renewable RECs [in RFP 3]. . . ? If so, was a contingency event deployed?

A. Yes. With the results of RFP 3, the FEOUs now had more information about the development of the In-State All Renewable RECs market. For the first time, a second bidder submitted an offer to supply RECs. This 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. Moreover, the FEOUs had information that other Ohio utilities were meeting their in-state benchmarks – an indication that the market was quite possibly beginning to expand.

[Stathis Testimony at 35-36; Supp. at 48-49.]

- [D]iscussion centered on the fact that there are differences in this RFP versus the prior two held in 2009, those differences being, number one, for the first time there's a second bidder; number two, as you recall, the October, 2009, Navigant study said there'd be a period of about year of constraint -- potentially a year of constrained activity in the Ohio in-state markets, and now that year period was close to ending; and, third, we've learned from compliance filings from other utilities that they're starting to meet their in-state renewable categories. So, at that point, it was felt that possibly some other contingency could be invoked, and that contingency ended up being potential examination for a counteroffer.

[Tr. Vol. II at 360 (Conf.); Supp. at 586.]

- “The second piece is . . . the market study that Navigant – . . . identified the potential of a one-year constrained period, and now that one year was ending.”

[Tr. Vol. II at 369-70 (Conf.); Supp. at 587-88.]

None of this testimony states (or even could be reasonably construed to mean) that the Companies “knew that prices were expected to drop” or even that the market was markedly less constrained. At most, it indicates that the Companies believed the market may be changing.

The assertions by the Commission and OCC that the Companies had knowledge that the market would *improve* in the near future also is flatly contradicted by the only testimony that Mr. Stathis offered regarding the Companies' knowledge during RFP 3 of the future market

conditions. Mr. Stathis testified:

I think the counteroffer was made because *those three new pieces of information indicated the market was potentially changing. We didn't know how much.* Maybe that was small movement. Maybe it was the beginning of some real change in the marketplace. The internal review team decided to leverage that opportunity to try to get a better price, knowing that if they lost that opportunity and that bidder walked away, there was still time to go back out into the market.

Tr. Vol. II (Conf.) at 373-74 (emphasis added); Supp. at 590-91. Notably, Mr. Stathis did not testify that the Companies believed (much less knew) that market conditions would be relieved in the near future.

The Commission's arguments also overlook the testimony of Company witness Bradley, who headed the Navigant team and served as the independent project manager for RFP 3. As Mr. Bradley explained, Navigant recommended that the Companies purchase all of the 2011 In-State RECs bid in RFP 3 at the prices that were bid. Bradley Test. at 41; Supp. at 26. It would make little sense for Navigant to have recommended that the Companies purchase these RECs if Navigant had projected the market to improve in the near future. In fact, Company witness Bradley testified to just the opposite:

At the time that the decisions that Navigant was making with respect to RECs recommended to the FEOUs for purchase, we had limited reasonable availability of information that we could rely upon to forecast going forward to determine whether the prices of RECs would go up or down.

Tr. Vol. I at 151; Supp. at 77.

The Commission's suggestion that the Companies knew prices would drop in the near future (Comm. Br. at 15) is also contradicted by the undisputed record that just the opposite was true: how prices would fare in the future was "unknowable." Earle Test. at 15; Supp. at 58. Indeed, the unrebutted evidence demonstrated that trying to predict future prices of RECs during

RFP 3 (or any RFP) was a fool's errand. Company witness economist Dr. Robert Earle testified:

[A]t the time of the RFPs in question, the exact amount and timing of future investment in renewables in Ohio was *unknowable*. It is not reasonable to suggest that the FirstEnergy Ohio utilities could have known that prices in In-State All Renewables RECs would have declined in time to meet their requirements at a lower cost and therefore the FirstEnergy Ohio utilities should have necessarily delayed some of its purchases of In-State All Renewables RECs. [*Id.* (emphasis added).]

The Commission's auditor, Exeter Associates ("Exeter"), also found:

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.

Comm. Ordered Ex. 2A at 29; Supp. at 135. Exeter concluded, "we believe that there was significant uncertainty associated with assessing changes in future RECs [sic] prices and the potential availability of future RECs." *Id.*

Staff witness Steven Estomin, the principal author of the Exeter Report, testified similarly: "there was *significant uncertainty* associated with assessing changes in future REC prices and the potential availability of RECs during the time of RFP 1, 2, and 3." Tr. Vol. I at 81 (emphasis added); Supp. at 66. Indeed, he acknowledged the difficulty in predicting the development of REC markets. In December 2011, Dr. Estomin wrote, with regard to the Maryland market (another market that was more mature than the Ohio REC market), "attempting to model REC prices is likely to produce results that entail a high degree of uncertainty." Tr. Vol. I at 108-109; Supp. at 72-73.

In short, it is simply untrue that Mr. Stathis or any other Company witness testified that the Companies knew or were aware of any information that predicted the market conditions

would improve in the near future. Nor is there any other record support for this view. At most, Mr. Stathis' testimony shows that the Companies were aware that the market might be changing and that uncertainty could potentially be used to leverage a better In-State REC price from one of the bidders in RFP 3. But the Commission's conclusion that the Companies "knew" the market would develop or how that development would affect prices grossly misinterprets Mr. Stathis' testimony. The Commission's first factor supporting the disallowance of the cost of some 2011 In-State RECs is without record support.

**2. The Commission and OCC incorrectly rely on hindsight to support the Commission's finding.**

The Commission recognizes that a prudent decision reflects "what a reasonable person would have done in light of the conditions and circumstances which were known or should have been known at the time the decision was made." Comm. Br. at 14, quoting *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53 (1999). What happened after the decision is made is irrelevant. *In the Matter of the Regulation of the 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 (Dec. 30, 1986); Supp. at 447. Notably here, hindsight is prohibited. *Id.*

Yet, the Commission and OCC give only lip service to this admonition. These parties contend that the Companies should have waited for the prices to drop. Comm. Br. at 15-16; OCC Br. at 10. The Commission asserts the Companies could have "secured much more favorable pricing." Comm. Br. at 16. But this argument can only be made given the hindsight that the market actually improved in mid-2011.

In fact, what the Commission and OCC suggest with 20/20 hindsight – that the Companies could have "timed" the In-State REC market – is exactly the opposite of what the

record shows a prudent REC procurement practice would entail. A laddered procurement strategy makes purchases over different times to lessen the effect of the market and the volatility of market prices. Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 706, Opinion and Order at \*71-72; Supp. at 543. Laddered procurements thus reject the notion that a purchaser should change course based on speculation of changes in market conditions. Tr. Vol. II at 399-400; Supp. at 88-89. Once a purchaser commits to ladder, then the purchaser should continue to ladder regardless of whether the market changes or remains static. *See id.* As Company witness Stathis explained regarding the Companies' laddering strategy:

You don't want to speculate as to, hey, we think the market is going to be illiquid for this amount of time, therefore, I won't ladder. That's the whole point of laddering, to take the guesswork out, the speculation out, and buy over time, and that's been consistently used in New Jersey, Pennsylvania, and Ohio on the power side and the renewable side.

Tr. Vol. II at 399-400; Supp. at 88-89. Given the Commission's finding that a laddered procurement strategy was prudent, the argument that the Companies should have timed the market and waited can be seen for what is: a hindsight-driven argument used to justify the Commission's decision to disallow certain 2011 In-State REC costs.<sup>5</sup>

**B. The Commission Erred In Concluding That The Companies Failed To Advise The Commission Of Market Constraints And Then Further Erred By Using That Wrong Conclusion As A Basis That The Companies Failed To Meet Their Burden Of Proof.**

The second factor cited by the Commission in support of a disallowance was the

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<sup>5</sup> The Commission also is wrong to suggest that the Companies "jettisoned" their laddering strategy. Comm. Br. at 16. The Companies followed their strategy to purchase 2011 In-State All Renewable RECS in each year from 2009 through 2011. Stathis Test. at 21; Supp. at 38. There is no dispute that the Companies, in fact, purchased 2011 In-State RECs during each of those years. *Id.* at 25, 26, 37; Supp. at 41-42, 50. Indeed, the Exeter Report concluded that the Companies properly pursued a laddering strategy for all of the RECs that they were required to buy from 2009 through 2011. Comm. Ordered Ex. 2A at i-iii; Supp. at 102-104.

Companies' alleged failure to report market constraints for In-State RECs. Order at 26; App. at 34. As the Companies pointed out in their First Merit Brief, this is untrue. Companies Br. at 35.

In their April 15, 2010 Ten Year Compliance Plan, the Companies advised the Commission regarding the constrained market: "the most significant impediment to achieving compliance (particularly for solar renewable energy resources) is the limited availability of renewable energy resources." Alternative Energy Resource Plan 2010 through 2020, Case No. 10-506-EL-ACP (Apr. 15, 2010) at 5; Supp. at 435. The report continued, "Such limited availability is exacerbated by the legislative requirement that fifty percent of the renewable energy resource requirement originate from facilities located within Ohio, and the regulatory requirement that renewable energy resource facilities be certified by the Public Utilities Commission of Ohio . . . ." *Id.* The report noted the need for a lead time of twelve to eighteen months for the construction of new facilities: "there is little opportunity for new facilities to come online and produce sufficient RECs for some time." *Id.*

In its Second Entry on Rehearing, the Commission conceded that the Companies had reported the limited availability of renewable resources. Second Entry on Rehearing at 16; App. at 61. Nonetheless, the Commission now argues that the Companies failed to comply with their reporting requirements because the Companies "failed to specifically address known constraints in the market for in-state all renewable credits." Comm. Br. at 17. This is nonsense. The Companies' report addressed market conditions of all types of In-State RECs. The Companies did not say that these conditions were limited "only" or "exclusively" to solar RECs. The Commission further incorrectly asserts that Company witness Stathis conceded that the Companies' plan did not disclose that the market for In-State All Renewables was constrained. *Id.* This assertion is false. Mr. Stathis made no such concession. Rather, Mr. Stathis testified in

response to a question regarding whether specific information contained in the October 2009 Navigant report was related in the Companies' plan: "While those specific references aren't identified, they are encapsulated in the first sentence on page 6, which references a 'tight market.'" Tr. Vol. II at 426-27; Supp. at 665-66.

Importantly, the Commission never says how an alleged failure to report any market condition to the Commission would have affected either: (1) the Companies' knowledge about the markets; or (2) the prudence of the Companies' decision to purchase 2011 In-State RECs in 2010. Companies Br. at 36. The reason for the omission is obvious: there is no connection.

The Commission suggests that if the Companies had disclosed market constraints, "methods" could have been developed to address the situation. Comm. Br. at 18. This is nothing more than unsupported conjecture. Indeed, as OCC acknowledges, it's "unclear what actions the PUC could or would have taken." OCC Br. at 34. The second factor relied upon by the Commission to disallow the Companies 2011 In-State REC costs is thus wholly unsupported.

**C. The Commission Erred In Concluding That The Negotiated Price For Certain 2011 In-State RECs Purchased In 2010 Was Not Reasonable Or Supported In The Record.**

In their First Merit Brief, the Companies demonstrated that the Commission's conclusion that there is "no evidence" that the negotiated price is reasonable is belied by the record, to wit:

- the original bid price for the disputed 2011 In-State RECs was a competitive, market price (Tr. Vol. I at 78-79, 153; Comm. Ordered Ex. 2A at 3; Tr. Vol. III at 562-566; Bradley Test. at 2-3; Supp. at 63-64, 79; 109; 91-95; 10-11);
- Navigant recommended that the Companies purchase the RECs at the original bid price because the RFP process was competitive and produced a market-based, fair and reasonable price (Bradley Test. at 41 (Comp. Sens. Conf.); OCC Ex. 9 (Aug. 13, 2010 Navigant Report, at 14-15; Nov. 10, 2009 Navigant Report, at 12-13; Aug. 21, 2009 Navigant Report, at 11-12) (Comp. Sens. Conf.); Supp. at 576; 647-48; 630-31; 604-05);
- the negotiated price was 35% below the bid price and resulted in approximately \$25 million in savings to customers (OCC Ex. 9 (Aug. 13, 2010) (Navigant

Report at 7 (Comp. Sens. Conf.); Supp. at 640; Stathis Test. at 36; Bradley Test. at 42; Supp. at 49; 27); and

- Navigant recommended that the Companies purchase the 2011 In-State RECs at the negotiated price (OCC Ex. 9 (Aug. 13, 2010 Navigant Report at 7 (Comp. Sens. Conf.)); Tr. Vol. I at 207 (Conf.); Supp. at 640; 583).

Nonetheless, the Commission and OCC argue that the Court should dismiss this evidence because, in their view, a competitive process does not create a competitive price in a constrained market. Comm. Br. at 19; OCC Br. at 25. Their argument is contradicted by the evidence and the Commission's approval of other REC purchases in the same constrained market.

The logic of the Commission and OCC here breaks down because it is undisputed that the competitive RFP process used by the Companies was designed to attract the lowest price a bidder was willing to offer. The Commission's auditor, Exeter, approved of the design of the RFP process. Comm. Ordered Ex. 2A at ii; Supp. at 102. Exeter found that the Companies, through Navigant, employed a common sealed-bid protocol for the RFPs to attract competitive prices that reflected market conditions. *Id.* at 3; Supp. at 109. Exeter explained: "The sealed-bid pricing requirement of the RFPs . . . is assessed to be competitive . . . Because bidders recognize that there may be only one opportunity to secure a buyer, bidders tend to provide competitive prices reflective of market conditions." Comm. Ordered Ex. 2A at 3; Supp. at 109; *accord* Bradley Test. at 15-17; Supp. at 14-16. The Staff's and OCC's witnesses further agreed that the RFP processes were designed to be competitive and *resulted in bid prices that reflected the market*. Tr. Vol. I at 79; Supp. at 64; Tr. Vol. III at 567; Supp. at 668.

The real complaint that these parties have is with the fact that the market wasn't sufficiently developed to produce lower prices in the time frame mandated by law to meet the statutory benchmarks. But their unhappiness about the pace of market development does not make the prices, which reflected the market, unreasonable. There is no question that the In-State

REC market was nascent and constrained in 2010. *See e.g.* Order at 24; App. at 32; Comm. Ordered Ex. 2A at 29; Supp. at 135. This was an unremarkable (*i.e.*, expected) result of the renewable energy mandate statute which had as its goal the creation and development of a renewable energy market in Ohio. Bradley Test. at 45, n. 14 (citing the October 1, 2008 letter from Speaker Jon Husted of the Ohio House of Representatives to PUCO Chair Alan Schriber); Supp. at 29. Given the statutory requirements and given the constrained market, it should have surprised no one that In-State RECs market prices would be higher in the first few years of the newly-developing market as compared to prices in a more mature market. Nevertheless, the Commission's dissatisfaction with the pricing resulting from the market is no reason to penalize the Companies and disallow their prudently incurred costs.

At bottom, the Commission and OCC offer no explanation for why a market price is unreasonable. In addition, OCC and the Commission overlook that the negotiated prices paid by the Companies were below the market price bid into RFP 3. *See* OCC Ex. 9 (Aug. 13, 2010 Navigant Report at 7 (Comp. Sens. Conf.); Supp. at 640; Stathis Test. at 36; Bradley Test. at 42; Supp. at 49; 27. They further offer no explanation for how a price that is lower than a market price can be unreasonable.

Regarding their specific complaint – *i.e.*, RFP 3 did not produce a competitive result – this is flatly contradicted by the Commission's approval of the Companies' purchases of In-State RECs in RFP 1 and RFP 2. The Commission found that the RFPs issued by the Companies were competitive processes that produced market prices even though the Commission also found that the market was nascent and illiquid. Order at 21-24; App. at 29-32. There is no dispute that: (1) the Companies used the same process in all three RFPs; and (2) the In-State REC market continued to be constrained and illiquid throughout all three RFPs. Order at 24-25; App. at 32-

33. If the RFP processes produced competitive and reasonable prices in 2009, then the same RFP process produced competitive and reasonable prices in 2010.<sup>6</sup>

In addition, OCC argues that REC prices in other states show that the prices the Companies paid were unreasonable. The Commission, however, rejected this argument based on a well-supported record. In its Second Entry on Rehearing, the Commission “rejected arguments that the REC prices paid by the Companies were unreasonable based upon market information from around the country.” Second Entry at 11-12; App. at 56-57, citing Co. Ex. 3 at 11.

The Commission’s contention that the Companies should have set a limit price (*i.e.*, a price above which the Companies would not accept bids) and therefore paid prices that were too high, Comm. Br. at 13, is irrelevant and is contradicted by the Order. Indeed, the Commission found that the Companies could not have set a limit price: “the Commission is not persuaded that a reasonable reserve price could have been calculated given the absence of reliable, transparent market information.” Order at 22, citing Co. Ex. 1 at 49-52, Co. Ex. 5 at 12; Tr. Vol. I at 128-130; App. Indeed, Staff witness Estomin acknowledged that he knew of no utility that had a limit price in a similar procurement process. Tr. Vol. I at 105; Supp. at 70. Thus, the absence of a limit price says nothing about the 2010 decision to purchase 2011 In-State RECs.

**D. The Commission Erred In Finding That The Companies Could Have Filed For Force Majeure Relief For Their 2011 In-State REC Benchmarks.**

The fourth factor the Commission relied on to support its Order that the Companies failed to meet their burden of proof is that the Companies should have pursued force majeure relief

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<sup>6</sup> The logic used by the Commission and OCC here similarly fails because the Commission approved the Companies’ purchases of 2010 In-State RECs and the 5000 2011 In-State RECs at the prices bid into RFP 3. *Id.* at 24-25, 28; App. at 32-33, 36. The Commission approved these purchases even though the market during RFP 3 continued to be constrained and illiquid. *Id.* at 24-25; App. at 32-33.

under Ohio Revised Code Section 4928.64(C), rather than purchasing the 2011 In-State RECs in RFP 3 that were reasonably available. In their First Merit Brief, the Companies demonstrated that the Commission's interpretation was unreasonable. Companies Br. at 41-42.

The Commission here contends that this Court should simply defer to the Commission's interpretation of the force majeure statute. This is wrong. Contrary to its suggestion, the Commission does not have a blank check to misinterpret a statute.<sup>7</sup> Instead, this Court must give effect to the unambiguous language of the statute. *Lang v. Dir., Ohio Dep't of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, ¶12. If this Court deems that the statute is silent or ambiguous, then this Court must look at whether an agency's interpretation is based on a "permissible construction of the statute." *Id.* If the agency's interpretation is based on an impermissible construction, then this Court does not provide any deference to the agency's interpretation. *State ex rel. Celebrezze v. Nat'l Lime & Stone Co.*, 68 Ohio St.3d 377, 382 (1994); *see also Columbus S. Power Co. v. Public Utils. Comm.*, 67 Ohio St.3d 535, 540 (1993).

**1. The Commission's force majeure statutory interpretation is unreasonable.**

The Commission's interpretation of the force majeure statute is not entitled to any

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<sup>7</sup> None of the cases or statutes cited by the Commission shows otherwise. Comm. Br. at 23. The Commission cited the *dissenting* opinion in *Celebrezze v. Nat'l Lime & Stone Co.* In that case, this Court did not defer to the agency because the agency's interpretation was unreasonable. 68 Ohio St.3d at 382. In *Weiss v. Public Utils. Comm'n.*, 90 Ohio St.3d 15, 734 N.E.2d 775 (2000), the statute allowed for a rate classification to be based on "any reasonable interpretation." This Court agreed with the Commission's "long-standing" interpretation about rate classification. The Commission also cites *State ex rel. Beck v. Casey*, 51 Ohio St.3d 79, 554 N.E.2d 1284 (1990), a case that is inapposite because the Court rejected the agency's interpretation as unsupported by the relevant statutes. The Commission's citation to Ohio Revised Code Section 1.49(F) is also unavailing. That statute provides: "If a statute is *ambiguous*, the court, in determining the intention of the legislature, may consider among other matters: The administrative construction of the statute." R.C. § 1.49(F) (emphasis added); App. at 362. The Commission never claims, however, that the force majeure statute is ambiguous.

deference because, among other reasons, the statute is neither silent nor ambiguous. Section 4928.64(C) dictates the Commission's review of and considerations for granting force majeure. The Commission is charged with making a determination of whether "renewable energy resources are *reasonably available in the marketplace in sufficient quantities* for the utility or company to comply with the subject minimum benchmark during the review period." R.C. § 4928.64(C)(4)(b) (emphasis added); App. at 107. The statute then requires the Commission to consider, in light of whether renewable energy resources are "reasonably available," if the utility seeking force majeure made a "*good faith effort to acquire sufficient renewable energy . . . resources . . . to so comply.*" *Id.* Thus, the statute with regard to the force majeure provision directs the Commission to review a utility's efforts to obtain a supply of RECs, rather than review the price at which RECs were reasonably available.

The Commission's interpretation that the price or cost of RECs can be a basis for the Commission granting force majeure relief is unreasonable. *See* Order at 27-28; App. at 35-36. For starters, the words "price" or "cost" are conspicuously absent from this provision of the statute. Had the General Assembly intended the Commission to consider the cost or price as part of its force majeure determination, it would have said so. *See Celebrezze*, 68 Ohio St.3d at 381 (the inclusion of express terms show that alternative terms were intentionally excluded).

The Commission's interpretation suggests that the level of prices can transform an available REC into an unavailable REC. This interpretation conflicts with the statute's analysis of whether a company has made a "*good faith effort to acquire sufficient renewable energy . . . resources . . . to so comply [with the statutory benchmarks].*" *See* R.C. § 4928.64(C)(4)(b); App. at 107. It also conflicts with the plain meaning of "available": "present or ready for immediate use" or "accessible or obtainable." *See Webster's Ninth College Dictionary* at 119; Supp. at 573.

The Commission contends that it would be “striking” if the force majeure provision did not include price or cost considerations because there would be no REC price too high for a utility’s compliance obligation. Comm. Br. at 24. The Commission argues that the force majeure provision is needed to protect customers from excessive prices. *Id.* at 21. The Commission’s arguments ignore the fact that Section 4928.64(C)(3) provides protection to customers against unreasonably high costs. In that section, the General Assembly determined the threshold for excessive cost, stating that a utility need not comply for that year if “its reasonably expected cost of that compliance exceeds its expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more.” R.C. §4928.64(C)(3); App. at 107.

Indeed, a statute providing force majeure relief based on high prices or cost would be “striking.” Force majeure provisions generally excuse performance based on unforeseeable events, not high prices. *See e.g., Stand Energy Corp. v. Cinergy Servs.*, 144 Ohio App.3d 410, 415 (5th Dist. 2001) (affirming finding that force majeure provision did not excuse performance based on high market prices); *United Arab Shipping Co. v. PB Express, Inc.*, 2011-Ohio-4416, ¶¶22-23 (8th Dist.) (distinguishing between high gas prices, which would not be a ground for force majeure and a strike that the court found was a ground for force majeure). “The inability to purchase a commodity at an advantageous price is not a contingency beyond a party’s control.” *Stand Energy*, 144 Ohio App.3d at 416. Thus, the General Assembly, understanding the market-forcing renewable energy mandate, envisioned that RECs might be unavailable with reasonable effort and that such reasonable unavailability could give rise to force majeure relief.

In addition, again considering the market-forcing nature of the mandate, the possibility that a utility may incur high costs to comply with the renewable energy benchmarks during relatively short supply of RECs in the market development period was anticipated by the General

Assembly. The three percent provision under Section 4928.64(C)(3) excuses a company from compliance if its cost to comply exceeds the threshold set by the General Assembly.

Accordingly, the Commission's interpretation that force majeure excuses compliance based on prices or costs that fall under the three percent provision is unreasonable.

**2. During RFP 3, the Companies did not have a reasonable basis to believe that force majeure relief would have been available.**

The Commission's finding regarding the availability of force majeure relief also wrongly assumes that the Companies should have known that the cost could be a consideration for granting that relief. Order at 27; App. at 35. This overlooks that the Commission had clearly spoken on this issue earlier. Indeed, almost a year prior to RFP 3, the Commission had issued a decision that indicated that high prices were not an exception to the mandatory compliance rules. In *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources*, Case No. 08-888-EL-ORD, 2009 Ohio PUC LEXIS 429, Entry on Rehearing, at \*35-37 (June 17, 2009); Supp. at 760-61, the Commission rejected a proposed amendment to its renewable energy rules that would expressly provide a cost-based waiver for annual benchmark compliance. The Commission explained that there was "no additional statutory direction" for such relief and that "[u]nless a cost cap was triggered or an event of force majeure can be proven, the Commission would expect" compliance. *Id.*

To support the Commission's finding, the Commission and OCC rely on *In re Columbus Southern Power Co.*, Case No. 09-987-EL-EEC ("*AEP Ohio*"), that the Commission referenced in its order.<sup>8</sup> Order at 23; App. at 31; Comm. Br. at 22; OCC Br. at 9. *See also* Order at 27;

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<sup>8</sup> OCC also cites five additional Commission orders granting force majeure. (OCC Br. at 43.) Only one, however, was issued before RFP 3. In that case, however, *In the Matter of the 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-

App. at 35. According to the Order, “by granting the force majeure determination [in *AEP Ohio*], the Commission implicitly rejected arguments that ‘reasonably available in the marketplace’ did not include consideration of cost of the RECs.” *Id.* at 27; App. at 35. But this misreads what occurred in *AEP Ohio*. In that case, AEP Ohio sought force majeure relief regarding its obligation to purchase 2009 solar RECs (“SRECs”). Notably, the company did not seek that relief on the basis of price, stating: “AEPSC believes that *there is an insufficient supply in the solar REC market to achieve compliance.*” Case No. 09-987-EL-EEC, Application, at 4 (Oct. 26, 2009) (emphasis added); Supp. at 686.

One intervenor in *AEP Ohio*, referencing the high price that the company paid, argued, “the thrust of AEP Ohio’s argument appears to be that high REC prices have made compliance more difficult or expensive, which is not a basis for a *force majeure* determination.” Case No. 09-987-EL-EEC, OEC Comments at 3; Supp. at 691. But, as noted, this misreads AEP Ohio’s application.

Further, the Commission’s Entry approving the application there never mentioned high prices at all, other than to restate the intervenor’s argument incorrectly. Case No. 09-987-EL-EEC, Entry, at 4 (Jan. 7, 2010); Supp. at 699. More to the point, the Commission never characterized any grounds for relief as price-related. Thus, the Companies could not have read *AEP Ohio* to discuss (or to consider implicitly) price as a reason to seek force majeure relief.

The Commission also wrongly suggests here that the Companies failed to consider whether force majeure relief was available. Comm. Br. at 21. Company witness Stathis

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(continued...)

428-EL-ACP, April 28, 2010, the Commission granted an application for force majeure *based on an inability to obtain solar RECs*, not price. 2010 Ohio PUC LEXIS 455, at \*1.

explained that if the Companies were unable to procure RECs to meet their compliance obligations by the end of the compliance period, then the Company would have considered filing for force majeure. Tr. Vol. II at 322-23; Supp. at 663-64. In fact, the Companies *did* seek force majeure relief for their SREC compliance obligations for compliance years 2009 and 2010 when insufficient SRECs were available. *In re the Matter of the Application of Ohio Edison Co., et al.*, Case No. 09-1922-EL-ACP, Finding and Order, p. 4 (Mar. 10, 2010); *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Co., et al.*, Case No. 11-2479-EL-ACP, Finding and Order, pp. 13-14 (Aug. 3, 2011). (Notably, even when there were no SRECs to be found, certain parties, including OCC, opposed the Companies' force majeure application. They contended that the Companies didn't try hard enough to find SRECs.)<sup>9</sup>

Further, testimony cited to by OCC to the effect that Navigant wasn't consulted about whether to file force majeure, OCC Br. at 8-9, misses the point. Although Navigant's role was not to make the determination regarding whether to file force majeure, Navigant's job was to help the Companies make the determination as to whether RECs were reasonably available in the market place, *i.e.*, whether the statutory test for force majeure was met. Tr. Vol. I at 250-51; Supp. at 660-61. Moreover, Company witness Bradley explained that Navigant would have provided support for any force majeure application. *Id.* at 251; Supp. at 661.

In addition, the Commission's suggestion that the Companies had time to seek force majeure and then secure RECs if force majeure was denied is wrong. Comm. Br. at 6. Similarly, the Commission's suggestion that the Companies should have filed force majeure because they "had nothing to lose . . . and everything to gain" proves nothing except its improper reliance on hindsight. Comm. Br. at 22.

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<sup>9</sup> Case No. 11-2479-EL-ACP, Finding and Order, at 6-8 (Aug. 3, 2011).

Simply put, in light of all of the circumstances that existed during RFP 3, the Companies could not have reasonably assumed that force majeure was available under the law related to REC prices, and even if available, would have been granted if they filed an application. As of RFP 3, the facts faced by the Companies were as follows: (1) the Companies had market-priced (or below market-priced) 2011 In-State RECs in hand; (2) Navigant, the independent procurement expert, recommended – twice – that the Companies purchase all such RECs bid into the RFP; (3) as Navigant noted, there was uncertainty about whether additional 2011 In-State RECs would be available later given the continued uncertainty about constraints in the market; (4) there was no statutory language that supported getting force majeure relief based on price; (5) there was no Commission authority granting such relief (indeed, to the extent that the Commission addressed the issue at all, it stated that relief on that grounds would *not* be available); and (6) when the Companies actually tried and were unable to obtain SRECs earlier, the Companies had been criticized – wrongly – for not trying hard enough to acquire SRECs. Under the facts known at the time, the Companies’ decision not to seek force majeure relief was reasonable. The Commission’s contention otherwise is mere after-the-fact conjecture and is wholly unsupported.

**E. The Commission’s Recommended Disallowance Amount Was Against The Manifest Weight of the Evidence.**

In their First Merit Brief, the Companies demonstrated that the Commission’s calculation of the disallowance was against the manifest weight of the evidence in two ways: the calculation was internally inconsistent and unsupported by the evidence. Companies Br. at 43-48.

**1. The Commission’s Order is internally inconsistent because the disallowance amount calculation conflicts with its approval of a laddered procurement strategy.**

The Companies have previously demonstrated that the Commission’s calculation is

unreasonable because its approval of the recovery of the cost of only 5000 2011 In-State RECs purchased during RFP 3 is inconsistent with the Commission's approval of a laddered procurement strategy. Under this strategy, the Companies obtained 2010 and 2011 In-State RECs in 2009 as part of RFP 1 and RFP 2. Order at 21-22, 24; App. at 29-30, 32. The costs of all of those procurements were allowed by the Commission. *Id.* Simply put, if it was reasonable to purchase 2010 and 2011 In-State RECs in 2009 as part of a laddering strategy, then it was reasonable to purchase more 2011 In-State RECs in 2010 as part of that same strategy. This internal inconsistency is grounds for reversing the Commission's Order. *See, e.g., Higbee Co. v. Cuyahoga County Bd. of Revision*, 107 Ohio St.3d 325, 2006-Ohio-2, ¶39; *Ridgeview Center, Inc. v. Lorain County Bd. of Revision*, 42 Ohio St.3d 30, 31 (1989).

The Commission and OCC argue that a change in market conditions between RFPs 1 and 2 and RFP 3 excuses the Commission's inconsistent application of laddering. Comm. Br. at 26; OCC Br. at 43. This is doubly flawed. First, as the Order observed, "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." Order at 24; App. at 32. Indeed, Staff witness Estomin testified that there was "significant uncertainty associated with assessing changes in future REC prices and the potential availability of RECs during the time of *RFP 1, 2, and 3.*" Tr. Vol. I at 81 (emphasis added); Supp. at 66.

Second, the Commission incorrectly suggests that laddering in RFP 3 would only be reasonable if "market conditions remain static." Comm. Br. at 27. This misunderstands the concept of laddering. As noted, "the whole point of laddering" is "to take the guesswork out, the speculation out and buy over time." Tr. Vol. II at 399-400; Supp. at 88-89. Therefore, a laddered REC procurement strategy would call for buying RECs over time regardless of market

conditions, not just when the Companies guessed that the market might be favorable.

Neither the Commission nor OCC offer any meaningful response to the fact that, even under the Commission's flawed reasoning, the Commission should have disallowed only the amount of RECs above what it found to be a "proper" laddering strategy. As part of a three year procurement strategy to buy 176,156 2011 In-State RECs, the Companies would have reasonably purchased more than 5000 2011 In-State RECs in 2010. *See* Companies Br. at 46.<sup>10</sup>

**2. The Commission erred by using an offset price for the disallowed 2011 In-State RECs for 2011 In-State RECs that was unavailable in the market.**

Although the record supports the Commission's finding that the Companies should receive credit for the purchases of 2011 In-State RECs, there is no support for the offset price that the Commission used. Indeed, the Commission has no authority that supports its calculation. Comm. Br. at 27. The Commission argues this Court should simply defer to the Commission's calculation. *Id.* But the Commission's calculation of the offset price, like all of the Commission's factual determinations, must be based on evidence. The Commission effectively admits that there is no evidence regarding a price for 2011 In-State RECs that were reasonably available other than what the Companies paid. Comm. Br. at 27. The Commission and OCC try to excuse the lack of support for its offset price by suggesting that the Commission could have disallowed the entire amount of the purchases. But this suggestion contradicts the Commission's finding that provided a credit for the RECs purchased by offsetting this amount from the disallowance. Order at 28; App. at 36. That finding, in turn, recognized that the

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<sup>10</sup> OCC relies on Ohio Revised Code Section 4909.154 as "authority" that the Commission could have disallowed the entire amount of the purchases. OCC Br. at 41. But OCC's "authority" is misdirected. Section 4909.154 does not apply to rates set under S.B. 221. Section 4909.154 applies to proceedings involving a utility's base distribution rates. App. at 381.

Companies in fact purchased the disputed RECs which were used by the Companies, on behalf of the Companies' customers, to satisfy the Companies' renewable energy compliance obligation. Disallowing all of the cost of the disputed RECs would "assum[e], contrary to fact, that the RECs were never purchased and that the Companies wholly failed to comply with their statutory mandates – all of which simply isn't true." Mikkelsen Rebuttal at 3; Supp. at 658. It would allow customers to get the benefit of those RECs for "free."

**IV. PROPOSITION OF LAW NO. 3: THE COMMISSION HAS BROAD DISCRETION REGARDING THE CONDUCT OF ITS HEARINGS, INCLUDING THE USE OF EVIDENTIARY PRESUMPTIONS (responding to OCC Propositions of Law 2 and 3).**

In the Order, the Commission explicitly followed its prior decision, *In re Syracuse Home Util. Co.*, Case No. No. 86-12-GA-GCR (Dec. 30, 1986), in affording the Companies a presumption of prudence regarding their REC purchases. *See* Order at 21; App. at 29. For its second proposition of law, OCC essentially states that a utility is not entitled to such a presumption during the course of Commission audit or investigatory proceedings. OCC claims that "the PUCO erred by applying a presumption that FirstEnergy's purchases of renewables were prudent" and that this error was compounded by the fact that some of these purchases were from an "affiliate." OCC Br. at 24. OCC is wrong on both counts.

To begin, "[t]he commission has broad discretion in the conduct of its hearings." *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19 (2000); *see also Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982). Further, this Court has previously adopted the definition of a prudent utility management decision as set forth in *Syracuse Home Util. Co.* In *City of Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 527-28 (1993), this Court stated:

We adopt the commission's definition of a prudent decision, which is in accord with that used in other jurisdictions, as "one which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the

decision was made.”...The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decisionmaking process of the utility’s management. *See In Re Syracuse* [and other Commission decisions following *Syracuse*].

Given the above, OCC’s unfounded criticism of the Commission’s reliance on *In re Syracuse* falls particularly flat, especially when OCC argues in another section of its brief that the Commission “should...respect its own precedents.” OCC Br. at 22.

Moreover, OCC’s argument makes much ado about nothing. Any discussion about the burden of proof and rebuttable presumptions is academic: even without the benefit of the presumption, there is ample record evidence to support that the Companies at all times acted prudently and met their burden of proof. As demonstrated above and in the Companies’ First Merit Brief, the nascent and constrained In-State REC market, the limited information regarding that market, the Companies’ reliance on a respected, independent RFP manager, an undisputedly competitive RFP process, and the Companies’ use of laddering, all show that the Companies more than met their burden. *See, e.g.*, Bradley Test. at 2-3, 23, 34; Comm. Ordered Ex. 2A at 3-4, 29; Tr. Vol. I at 79-80; Supp. at 10-11, 19, 21; 109-10, 135; 64-65.

OCC’s misguided claim regarding presumptions of prudence in the case of affiliate transactions is nothing more than a red herring. *See* OCC Br. at 26-28. Almost all of the cases that OCC relies on have to do with affiliate transactions that occurred within the context of a rate proceeding amid fears of excessive rate increases. That was not a basis for the proceeding below. Only one case, *Office of the Public Counsel v. Missouri Pub. Serv. Comm.*, 490 S.W.3d 371 (Mo. 2013), considered the presumption of prudence in the context of competitive solicitations involving utilities and their affiliates. But Missouri has enacted a statute prohibiting presumptions of prudence under such circumstances. *Id.* at 372. That case is thus inapposite because Ohio lacks a similar statute or administrative rule regarding affiliate transactions. Nor is

there any reason to adopt such a rule in a case, such as this one, where the record overwhelmingly supports the prudence of the purchases at issue.

**V. PROPOSITION OF LAW NO. 4: COMMISSION FINDINGS REGARDING TRADE SECRETS CAN ONLY BE REVERSED, VACATED OR MODIFIED IF THOSE FINDINGS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE (responding to OCC Proposition of Law 1 and ELPC Propositions of Law 1 and 2).**

**A. Overview Of Relevant Facts and Procedural History**

In the Companies' first ESP case, the Commission approved the Companies' plan to obtain RECs through an RFP process. Case No. 08-935-EL-SSO, Second Opinion and Order at 9 (Mar. 25, 2009); Supp. at 214. In September 2009, the Companies held the first of a number of RFPs to secure the requisite number of RECs to meet their renewable procurement obligations. Importantly, these RFPs generated certain proprietary information related to REC suppliers' bidding strategies including: (a) the identities of specific REC suppliers who participated in the RFP process; and (b) the specific prices for the RECs bid by those suppliers in response to each RFP (collectively, the "REC Procurement Data"). See Case No. 11-5201-EL-RDR, Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, Stathis Affidavit at ¶4 (Oct. 25, 2012) ("Stathis Aff."); Supp. at 676.

In the proceeding below, the Companies sought eight protective orders to safeguard the REC Procurement Data from disclosure. As a result, on each occasion, the Commission found that the REC Procurement Data qualified as a trade secret under Ohio law. On November 20, 2012, during a hearing, the Attorney Examiner granted the Companies' first motion for a protective order regarding the REC Procurement Data contained in the Exeter Report. At that hearing, and subsequent to an *in camera* review, the Attorney Examiner found that "redacted portions of the auditor reports have independent economic value and the information was subject to reasonable efforts to maintain its secrecy. Further, the Examiner finds the redacted portions of

the auditor's reports meet the six factor test specified by the Supreme Court." Tr. at 17-18 (Nov. 20, 2012); Supp. at 678-79. On February 14, 2013, the Attorney Examiner, again subsequent to an *in camera* review, found likewise regarding a draft copy of the Exeter Report that contained confidential commentary by the Companies related to the REC Procurement Data. Entry at 5 (Feb. 14, 2013); App. at 353.

Similarly, in the Order, the Commission granted numerous pending protective orders related to the REC Procurement Data and again held that this proprietary information met the requirements for a trade secret pursuant to Ohio Revised Code Section 1333.61 and *State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*, 80 Ohio St.3d 513, 524-25, 687 N.E.2d 661 (1997). Order at 11-12; App. at 19-20. The only modification to the previous orders was that the Commission permitted the "generic disclosure" of one of the Companies' REC suppliers as a successful bidder.<sup>11</sup> *Id.* Likewise, in its Second Entry on Rehearing, the Commission affirmed the trade secret status of the REC Procurement Data. Second Entry at 4; App. at 49. The Commission emphasized the continued need to protect the REC Procurement Data because: "if this trade secret information was public, it could discourage REC suppliers' confidence in the market and impede the function of the REC market." *Id.* at 5; App. at 50. In an entry dated May 6, 2014, subsequent to an *in camera* review, the Attorney Examiner again held that the REC Procurement Data constituted a trade secret under Ohio law. *See* Case No. 11-5201-EL-RDR, Entry at 4 (May 6, 2014); App. at 359. Pursuant to that Entry, trade secret protection lasts until February 13, 2015, potentially subject to renewal. *Id.* at 5.

Whether information qualifies as a trade secret is a question of fact. *See Valco*

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<sup>11</sup> As discussed below, this disclosure was the result of an improper redaction by Staff to the confidential version of the Exeter Report, a disclosure which the Companies had no control over and which inadvertently disclosed the identity of one REC bidder.

*Cincinnati, Inc. v. N & D Machining Service, Inc.*, 24 Ohio St.3d 41, 47 (1986). The burden is thus on ELPC and OCC to demonstrate here that the Commission’s trade secret findings regarding the REC Procurement Data were “against the manifest weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *Green Cove Resort I Owners’ Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, ¶30. Case law cited by OCC and ELPC regarding the need to “liberally construe” Section 149.431 is inapposite here: “[R.C. 149.43] must be liberally construed to provide access unless access is clearly not provided by statute.” *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 41 (2000) (emphasis added). Indeed, there is “long-standing precedent exempting trade secrets from disclosure under R.C. 149.43” because “records the release of which is prohibited by state or federal law.” *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 539-40 (2000). This exemption reflects the equally important policy goal of protecting trade secrets. Thus, given its fundamental role in developing Ohio’s REC market, the Commission’s decisions to protect the REC Procurement Data should come as no surprise.

**B. The Commission’s Findings Met The Standard Under Ohio Revised Code Section 1333.61(D) And This Court’s Precedent.**

**1. The REC Procurement Data qualifies for trade secret protection under Section 1333.61(D).**

The REC Procurement Data satisfies the two-prong test in Section 1333.61 because: (1) the data “bears independent economic value . . . from not being generally known”; and (2) has been “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

Daniel Bradley, Navigant’s independent RFP manager and procurement expert, discussed independent economic value of the REC Procurement Data. He stated, “[B]idders in general do not want their bidding data disclosed, as that could reveal their bidding strategies and valuations, and discourage them from participating in future procurements.” Case No. 11-5201-EL-RDR,

Affidavit of Daniel R. Bradley at ¶4, Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For a Protective Order, Ex. D (Feb. 7, 2013) (“Bradley Aff.”); Supp. at 670; *See also*, Letter from Daniel R. Bradley, p. 2 (Oct. 26, 2012) (“Navigant Letter”); Supp. at 674. He further observed, “Since bidders have become extremely sophisticated, disclosing details of bids could also allow bidders to discern bidding strategies of other bidders which can lead to gaming of future bidding processes, resulting in less than competitive outcomes.” Bradley Aff. at ¶4; Supp. at 670. Per Mr. Bradley, “Most bidders consider their bid prices to be highly sensitive and competitive information,” and “believe disclosure of . . . information [such as the REC Procurement Data] puts them at a competitive disadvantage in the marketplace compared to their competitors.” *Id.* Thus, continued protection of this information is necessary to preserve bidder participation in future RFPs and thus the competitive integrity of Ohio’s REC market. *See* Second Entry at 5-6; App. at 50-51.

Contrary to ELPC’s suggestion, the REC Procurement Data, and the bidding strategies its disclosure would reveal, are not reflective of a “single, ephemeral event.” ELPC Br. at 9 (quoting *Plain Dealer* at 526). Here, the concern is not just a single event, but a series of RFPs – each of which was predicated upon the confidentiality of the bid pricing and the names of the bidders involved. Under the Companies’ sealed-bid protocol, “bidders tend to provide competitive prices reflective of market conditions.” Comm. Ordered Ex. 2A at 3; Supp. at 109. This was so because “the sealed-bid pricing requirement of the RFPs . . . [tended] . . . to minimize the potential for bidder collusion and ‘gaming’ of the process.” *Id.* Knowing a bidder’s strategy in a prior RFP could provide other bidders with information that could be improperly used to give a competitive advantage in subsequent RFPs.

The fact that Ohio’s REC market was both nascent and constrained during the RFPs in

question does not change this analysis. As Mr. Bradley noted, bidders expected, and continue to expect, that their proprietary bidding information, such as the REC Procurement Data, will remain confidential. *See* Bradley Aff. at ¶4; Supp. at 670. This is true regardless of market conditions. Thus, ELPC simply misses the point here. The ability to tie prices to specific bidders provides an improper window into bidders' proprietary pricing methodologies. *See id*; Navigant Letter at 2; Supp. at 674. To disclose these methodologies to competitors would thus place bidders at a competitive disadvantage. *Id.*

Regarding secrecy (the second requirement for trade secret protection under Section 1333.61(D)), the Companies have consistently exercised reasonable efforts to preserve the secrecy of the REC Procurement Data. Within the Companies, the REC Procurement Data was segregated and only provided to persons on a need-to-know basis. Stathis Aff. at ¶3; Supp. at 676. The Companies have consistently protected the REC Procurement Data from disclosure outside of the Companies or Navigant. Pursuant to Ohio Revised Code Section 4901.16, the Companies provided the REC Procurement Data to Staff and the external auditors with the understanding that the auditors would at all times keep this information strictly confidential.<sup>12</sup> *See id.* at ¶4. The Companies also entered into protective agreements with the intervenors in the proceeding below to prevent public dissemination of the REC Procurement Data. As noted, the Companies filed multiple motions for protective orders to protect the REC Procurement Data contained in various materials, such as the Exeter Report, direct and deposition testimony, and

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<sup>12</sup> Section 4901.16 requires, in pertinent part, that “no employee or agent [of the Commission] shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent.” R.C. 4901.16; App. at 374. This Court has held: “[Section] 4901.16 imposes a duty of confidentiality on PUCO employees and agents.” *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.* (2007), 113 Ohio St.3d 180, 2007-Ohio-1386, ¶52.

draft audit reports. Because the Companies have taken “active steps to maintain [the] secrecy” of the REC Procurement Data, they have satisfied the second prong of Section 1331.61(D). *State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 2009-Ohio-4762, ¶25. Hence, the Commission’s decisions were not against the manifest weight of the evidence.

**2. The REC Procurement Data met the test for trade secret protection in Plain Dealer.**

Contrary to the claims of OCC and ELPC, the Commission was correct in its repeated findings that REC Procurement Data satisfied the six-factor test set forth in *State ex rel. The Plain Dealer*, 80 Ohio St.3d at 524-25. These factors are:

(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.

With regard to the first factor (the extent to which information is known outside the business), as noted, the Companies have consistently protected the REC Procurement Data and any inadvertent disclosure occurred without the Companies’ knowledge or consent. *Stathis Aff.* at ¶3; *Supp.* at 676. Concerning the second factor (the extent to which the information is known inside the business), the vast majority of the REC Procurement Data is not known outside of the confines of the Companies and Navigant. *Id.* In the case of the third factor (precautions taken to protect secrecy), as detailed above, the Companies have taken a host of precautions to safeguard the REC Procurement Data. *See id.* at ¶¶2-4; *Supp.* at 675-76. With regard to the fourth factor (the competitive value of the information), as also demonstrated above, the REC Procurement Data bears independent economic value. *See, e.g., Bradley Aff.* at ¶¶2, 4; *Supp.* at 669, 670.

Concerning the fifth factor (the money and effort to develop the information), as

discussed in the Exeter Report, the Companies incurred significant expense in retaining Navigant and conducting a series of REC RFPs, and thus acquiring the REC Procurement Data. Comm. Ordered Ex. 2A at 3-6; Supp. at 109-112. The Companies went to great lengths to keep the information confidential during and after the RFPs. *See* Stathis Aff. at ¶¶2-4; Supp. at 675-76. Regarding the sixth factor (the amount of time and expense it would take to acquire the information), it is unclear how another entity could acquire the REC Procurement Data, aside from its public dissemination, regardless of the time and expense expended. Accordingly, the Commission's repeated findings that the REC Procurement Data satisfied the *Plain Dealer* six-factor test are well supported by the record evidence.

**C. The Age Of The REC Procurement Data Is Of No Moment.**

ELPC and OCC appear to assume, erroneously, that the age of proprietary information is the sole determining factor regarding continued trade secret protection. *See* OCC Br. at 16-17; ELPC Br. at 8-11. Age is but one factor, among many, that are to be considered when making trade secret determinations. Indeed, the determination of trade secret status is a fact-specific, case-by-case inquiry. Notably, "a reviewing court should not substitute its judgment for that of the trial court on these factual issues." *Valco*, 24 Ohio St.3d at 47.

The Commission has regularly granted trade secret protection to REC procurement information, even when it is several years old. In *In re Alternative Energy Portfolio Status Report for 2011 of Ohio Power Co.*, Case No. 12-1212-EL-ACP, Finding and Order at 2 (July 30, 2014); Supp. at 707, the Commission afforded trade secret status to REC data dating to three years prior, 2011. Following an *in camera* review, the Commission found that the REC data met the requirements of Section 1333.61 and ordered it protected until July 23, 2016, when the information was five years old. *Id.* at 4-6; Supp. at 709-11. The Commission also stated that the

utility could move to extend trade secret protection in 2016. *Id.* at 5; Supp. at 710. *See also, In the Matter of DPL Energy Resources, Inc.'s Annual Alternative Energy Portfolio Status Report*, Case No. 12-1205-EL-ACP, 2013 Ohio PUC LEXIS 265, at \*6-8 (Nov. 13, 2013) (finding that 2011 REC data, including identity and source of RECs, warranted trade secret protection pursuant to Section 1333.61 until 2015 at which time the protective order may be renewed); Supp. at 713-14; *In the Matter of the Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Case No. 12-1223-EL-ACP, 2013 Ohio PUC LEXIS 251, at \*6-9 (Nov. 13, 2013) (same); Supp. at 716-17. The Commission's actions in these cases, as well as in the matter below, should come as no surprise given Ohio's still developing REC market. This market has only been in existence for approximately five years.

The REC Procurement Data cannot be treated as if in a vacuum with age the only relevant consideration. As the Bradley Affidavit and Navigant Letter demonstrate, the release of the REC Procurement Data could have a "chilling effect" on participation in Ohio's REC market because bidders expect this information to remain confidential. *See* Bradley Aff. at ¶4; Navigant Letter at 2; Supp. at 674. And, as the Commission found, "if this trade secret information was public, it could discourage REC suppliers' confidence in the market and impede the function of the REC market." Second Entry at 5; App. at 50.

Courts concur that age is not the sole determinant for trade secret status. For example, one court held, "Determination of when trade secret information becomes stale cannot be made by reference to a bright line rule and necessarily requires fact specific consideration." *Synergetics, Inc. v. Hurst*, 477 F.3d 949, 958 (8th Cir. 2007). Another court noted, "Confidential business information dating back even a decade or more may provide valuable insights into a company's current business practices that a competitor would seek to exploit." *Encyclopedia*

*Brown Prods. v. Home Box Office*, 26 F. Supp. 2d 606, 614 (S.D.N.Y.1998) (protecting seven year old business information). Still another court observed “trade-secret status may continue indefinitely [if] there is no public disclosure” and the information retains some measure of value. *Joint Stock Soc’y v. UDV N. Am., Inc.*, 104 F. Supp. 2d 390, 409 (D. Del. 2000).<sup>13</sup>

The cases cited by OCC and ELPC are easily distinguished. OCC Br. at 16. In *U.S. v. International Bus. Mach. Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975), the relative age of information was only one issue. The court also noted that, unlike here, there was no demonstration of “secrecy.” *Id.* at 49. Likewise, in *U.S. v. Exxon Corp.*, 94 F.R.D. 250 (D.D.C 1981), much of the information for which protection was sought related to “complying with governmental programs which [were] no longer even in existence.” *Id.* at 251.

Similarly, in *Hydrofarm, Inc. v. Orendorff*, 180 Ohio App.3d 339, 2008-Ohio-6819 (10th Dist.), a case cited by the ELPC, the court addressed a customer list recreated annually that was directly analogous to a “single, ephemeral event.” In *Jacono v. Invacare Corp.*, 8th Dist. No. 86605, 2006-Ohio-1596, ¶¶22-23, most of the information at issue had been made public or was known to competitors via “reverse engineering.” Likewise, in *Brentlinger Entrs. v. Curran*, 141 Ohio App.3d 640 (10th Dist. 2001), most of the information at issue “was readily available to the

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<sup>13</sup> See also, *Pincheira v. Allstate Ins. Co.*, 144 N.M. 601, 614 (N.M. 2008) (“[A]ge alone can never destroy a trade secret....Even if the information no longer reflects current thinking, a competitor could, for example, use old business data to extrapolate a business’s current strategy.”); *MicroStrategy, Inc. v. Business Objects, S.A.*, 369 F. Supp. 2d 725, 734 (E.D. Va. 2005) (finding that certain strategic business information could remain a trade secret because there was “no evidence, beyond argument based on the age of the documents, that [the] documents [had] lost economic value.”); *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 16 (D.D.C. 2000) (“Information does not become stale merely because it is old.”); *Enter. Leasing Co. v. Ehmke*, 3 P.3d 1064, 1070 (Ariz. Ct. App. 1999) (“[T]rade-secret status may continue indefinitely so long as there is no public disclosure.”); *Burke Energy Corp. v. Dept. of Energy*, 583 F. Supp. 507, 514 (D. Kan. 1984) (finding that information ranging from three- to nine-years old was not stale).

public.” In *Al Minor & Assocs. v. Martin*, 10th Dist. No. 06AP-217, 2006-Ohio-5948, ¶¶9-11, the court held that the information at issue, a customer list developed over 20 years, was correctly afforded secret status. Unlike these cases, the REC Procurement Data was not generated during the course of a “single, ephemeral event,” was never made “readily available to the public,” was not subject to reverse engineering, and is still of value to competitors.

ELPC also seeks to rely on comments filed by the Companies and various intervenors related to auction results in Case Nos. 04-1371-EL-ATA and 08-935-EL-SSO. *See* ELPC Br. at 12; 18; 20 (quoting “NERA Comments” from Case No. 04-1371-EL-ATA; “FirstEnergy Comments” and “Comments of Exelon Generation Company, LLC Regarding AEP’s Release of Data” from Case No. 08-935-EL-SSO). This material is not part of the record in this proceeding and should be ignored by this Court. *See Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 67, 2010-Ohio-134, ¶55 (citing R.C. 4903.13 and noting that certain documents were “not part of the record in this appeal and are not proper for our consideration”). Further, even if this material was part of the record, which it is not, it fails to show that the Commission’s decisions were against the manifest weight of the evidence.<sup>14</sup> The Bradley Affidavit, Navigant Letter, and Stathis Affidavit clearly establish that the REC Procurement Data bore independent value and was the subject of reasonable efforts at secrecy. ELPC’s improper reliance on materials outside of the record is thus of no moment.

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<sup>14</sup> For example, Case No. 04-1371-EL-ATA involved a single auction before the advent of S.B. 221 and auctions now held to serve a utility’s nonshopping load. A wholesale auction in 2004 was not thought to provide information in 2006 when such auctions were not being contemplated as a regular occurrence as auctions under ESPs are today. Thus, this was information about a one-off auction, not a successive series of auctions or RFPs. Moreover, the protective order in that case was set to expire within two months of the date of the proposed early disclosure. *See* Case No. 04-1371-EL-ATA, Entry at 2 (April 6, 2006); Supp. at 681.

**D. The Inadvertent Disclosure Of One Portion Of The REC Procurement Data Does Not Defeat Trade Secret Status.**

OCC contends that the Companies failed to maintain the secrecy of the REC Procurement Data because a portion was inadvertently disclosed due to improper redactions by Staff of the public version of the Exeter Report. *See* OCC Br. at 18-19. Further, OCC argues, the Companies waived any protection by waiting 49 days to address the Staff's disclosure. These improper redactions disclosed the identity of a single REC supplier and occurred without the Companies' knowledge, consent or control.<sup>15</sup> If the Companies had been given an opportunity to review the final Exeter Report, this disclosure would not have happened.

Importantly, the disclosure here was involuntary and thus does not provide a basis for ordering that other confidential information be disclosed. In *Public Citizen Health Research Group v. FDA*, 953 F. Supp. 400 (D.D.C. 1996), a government agency inadvertently disclosed several corporations' trade secrets. The corporations filed their motion approximately three months after learning of the inadvertent disclosure. A party opposing the motion argued that the

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<sup>15</sup> Staff agreed that the Companies would have a chance to conduct a final, pre-filing review of the report. Order at 9-10; Tr. Vol. III at 650 (Conf.); Supp. at 795. On or about August 13, 2012, the Companies requested the opportunity to review a final draft of the Exeter Report. Order at 10; Tr. Vol. III. at 651 (Conf.); Supp. at 796. Staff refused this request. *Id.* The public version of the Exeter Report was not properly redacted and the identity of an REC supplier was inadvertently disclosed. When the Companies realized that Staff had improperly redacted the Exeter Report, the Companies promptly asked Staff to remedy the issue. Tr. Vol. III at 653-54 (Conf.); Supp. at 797-98; *see also* Order at 10-12. Even though Staff was under a continuing duty to keep the REC Procurement Data confidential, pursuant to Section 4909.16, Staff told the Companies to take the issue up with the Attorney Examiner. *Id.* Staff thereby placed the Companies in a "no win" position: file a motion which publicly pointed out the material that should have been protected or do nothing and be accused later of waiving the trade secret status of this information. As they explained at the start of the evidentiary hearing, the Companies decided to wait for an opportunity to address the issue in a way that would: (a) allow the Companies to address the disclosure in a confidential fashion; and (b) permit all parties to participate. *See* Tr. Vol. I at 19 (Conf.); Supp. at 793. That opportunity came on the first day of the evidentiary hearing. Thus, the improper redactions occurred without the Companies' knowledge, consent or control.

three month delay waived trade secret status. *Id.* at 402. Rejecting that argument, the court drew a sharp distinction between voluntary disclosure – *i.e.*, “the escape of the information into the public domain . . . [that] was due to a conscious choice by the party seeking to have the information’s dissemination halted” – and involuntary disclosure, “where the government inadvertently inserted . . . information into the public domain.” *Id.* at 404. The court held that, with involuntary disclosures, there was no “waiver of any confidentiality interests,” even if there was a two to three month delay in seeking protection. *Id.* at 405. Thus, the involuntary, inadvertent disclosure of a portion of the REC Procurement Data – and the 49 day gap following that disclosure – does not defeat its trade secret status.

**E. OCC’s Proposed Disallowance Amount Would Have Led To The Disclosure Of The REC Procurement Data.**

OCC claims that the Commission erred when it held that a proposed disallowance amount (including interest) proffered by its witness warranted trade secret protection. *See* OCC Br. at 21-23. These disallowance and interest amounts, however, are aggregates of the confidential REC pricing information discussed above and thus warrant protection. With little effort, anyone could arrive at the confidential REC pricing. Specifically, given that the number of RECs is public, releasing the total amount paid for those RECs would allow the price paid for the RECs to become public. *See* Order at 11-12; App. at 19-20.

The cases OCC relies on actually support the Commission’s decision. The Commission’s holding in *In re the Petition of Deborah Davis*, Case No. 02-1752-TP-PEX, 2002 Ohio PUC LEXIS 889 (Sept. 30, 2002), teaches that if the disclosure of an aggregate number could be “useful in revealing confidential information” or “permit[s] the discernment” or in any way “compromise[s] the confidentiality” of any of its constituent components, then that aggregate figure warrants trade secret protection. *Id.* at \*6-7. That was precisely the case below. The

Commission thus appropriately protected OCC's proposed disallowance amount.<sup>16</sup>

## VI. CONCLUSION

For the foregoing reasons, this Court should reverse the Commission's Order and Second Entry on Rehearing because they are unreasonable and unlawful with regard to ordering the Companies to refund \$43.4 million in monies collected through Commission approved rates. This Court should affirm the Commission's Order and Second Entry on Rehearing regarding the rebuttable presumption of prudence and the protection of the REC Procurement Data.

Dated: December 4, 2014

Respectfully submitted,

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<sup>16</sup> OCC also cites to a related case, *In re Petition of Dean Thomas*, Case No. 02-880-TP-PEX, 2002 Ohio PUC LEXIS 679 (July 31, 2002), which is almost identical to *Deborah Davis*.

**APPENDIX TO THIRD MERIT BRIEF**

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,<sup>1</sup> 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

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<sup>1</sup> 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

APP. 0354

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/14/2013 9:58:57 AM

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.

APP. 0355

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. )

ENTRY

The attorney examiner finds:

- (1) On September 20, 2011, the Commission issued an Entry on Rehearing in *In re Annual Alternative Energy Status Report of Ohio Edison Co., The Cleveland Elec. Illum. 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 the alternative energy rider (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 (RECs) for purposes of compliance with R.C. 4928.64.
- (2) On August 7, 2013, following a hearing, the Commission issued an Opinion and Order in this case. As part of that decision, the Commission granted motions for protective order regarding REC procurement data, including specific information related to bids by FirstEnergy Solutions Corp. (FES), quantity and price of RECs contained in bids, and whether such bids were accepted by the Companies. Additionally, the Commission upheld attorney examiner rulings made orally on November 20, 2012, and by entry issued February 14, 2013, granting motions for protective order regarding the same information, with the exception that the attorney examiner rulings were modified to allow generic disclosure of FES as a successful bidder in the competitive solicitations.

- (3) Thereafter, multiple parties filed applications for rehearing. In conjunction with applications for rehearing and memoranda contra, motions for protective order were filed on September 6, 2013, by the Environmental Law and Policy Center (ELPC), Ohio Environmental Council, and the Sierra Club (collectively, Environmental Advocates), and the Office of the Ohio Consumers' Counsel (OCC), and on September 16, 2013, by OCC, the Environmental Advocates, and FirstEnergy. The Commission issued a Second Entry on Rehearing denying the applications for rehearing on December 18, 2013.
- (4) Subsequently, the Companies, ELPC, and OCC appealed from the Commission's decision to the Supreme Court of Ohio.
- (5) On April 4, 2014, the Companies filed a motion for renewal of the Commission's protective order of the REC procurement data. FirstEnergy asserts that dissemination of this information would reveal proprietary bidding strategies, which could lead potential REC suppliers to engage in collusive behavior and harm consumers. Additionally, FirstEnergy asserts that it provided the REC procurement data to Staff and the auditors with the expectation of strict confidentiality. Consequently, FirstEnergy asserts that the Commission should renew its protective order covering the REC procurement data, which FirstEnergy states is due to expire on May 20, 2014.
- (6) On April 16, 2014, OCC filed a motion for extension of time to file a memorandum contra FirstEnergy's motion for renewal of the protective order. By Entry issued April 18, 2014, the attorney examiner granted OCC's motion for extension, finding that memoranda contra should be filed by April 28, 2014.
- (7) On April 24, 2014, a telephone status conference was held at the request of several parties, during which participating parties sought clarification of the term of the protective orders issued in this proceeding.

- (8) Thereafter, on April 25, 2014, OCC filed another motion for extension of time to file a memorandum contra FirstEnergy's motion for renewal of the protective order. In its motion, OCC noted the telephone status conference and requested an extension until May 6, 2014. By Entry issued April 28, 2014, the attorney examiner granted OCC's motion for extension, finding that memoranda contra should be filed by May 6, 2014.
- (9) The attorney examiner notes that, during the April 24, 2014 telephone status conference, several parties expressed that the August 7, 2013 Opinion and Order was ambiguous as to the time frame of motions for protective order. More specifically, parties noted that, although the Commission granted multiple pending motions for protective order, it was unclear whether the Commission was also extending the time period of the protective orders issued by the attorney examiners on November 20, 2012, and February 14, 2013. Additionally, parties noted that the protective orders granted by the Commission on August 7, 2013, are set to expire on January 19, 2015, while the protective order granted by the attorney examiner on February 14, 2013, is set to expire on February 13, 2015.
- (10) The attorney examiner acknowledges the ambiguity pointed out by the parties and finds that it is appropriate to clarify that all motions for protective order granted by the attorney examiners or the Commission in this proceeding will remain in effect until February 13, 2015, unless otherwise ordered by the Commission.
- (11) Turning to the pending motions for protective order filed on September 6, 2013, and September 16, 2013, the attorney examiner notes that R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 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).

- (12) Similarly, Ohio Adm.Code 4901-1-24 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."
- (13) 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." R.C. 1333.61(D).
- (14) The attorney examiner has reviewed the information included in the motions for protective order, as well as the assertions set forth in the supportive memorandums. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Supreme Court of Ohio, the attorney examiner finds that, consistent with the ruling at the November 20, 2012 prehearing conference, the February 14, 2013 Entry, and the Commission's Opinion and Order on August 7, 2013, confidential supplier pricing and supplier-identifying information contains trade secret information. *See State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). Its release is, therefore, prohibited under state law. The attorney examiner finds that the motions for protective order filed on September 6, 2013, and September 16, 2013, are reasonable and should be granted. Additionally, the attorney examiner finds that, for the ease of the Commission as well as the parties, the information shall be protected until February 13, 2015, to maintain the same timeline as the protective orders previously granted.

- (15) Finally, Ohio Adm.Code 4901-1-24(F) 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 any 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 confidential treatment is filed, the Commission may release this information without prior notice to the parties.

It is, therefore,

ORDERED, That, in accordance with Finding (10), all motions for protective order granted by the attorney examiners or the Commission in this proceeding are in effect until February 13, 2015. It is, further,

ORDERED, That, as set forth in Finding (14), the pending motions for protective order filed on September 6, 2013, and September 16, 2013, are granted. 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 W. Chiles

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By: Mandy Willey Chiles  
Attorney Examiner

JRJ/sc

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/6/2014 3:08:32 PM

in

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

Summary: Attorney Examiner Entry granting pending motions for protective order and clarifying prior protective orders. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio

APP. 0361

ORC Ann. 1.49

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > OHIO REVISED CODE GENERAL PROVISIONS > CHAPTER I. DEFINITIONS; RULES OF CONSTRUCTION > CONSTRUCTION

**§ 1.49. Ambiguous statutes**

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

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

**History**

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134 v H 607, Eff 1-3-72.

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## ORC Ann. 1333.61

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 13. COMMERCIAL TRANSACTIONS -- OTHER COMMERCIAL TRANSACTIONS > CHAPTER 1333. TRADE PRACTICES > UNIFORM TRADE SECRETS ACT

### § 1333.61. Definitions

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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.

### History

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145 v H 320, Eff 7-20-94.

### Annotations

### Notes

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### Section Notes

The amendment of RC § 1333.61 by 152 v H 562 was disapproved by the Governor.

## ORC Ann. 149.43

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE I. STATE GOVERNMENT > CHAPTER 149. DOCUMENTS, REPORTS, AND RECORDS > RECORDS COMMISSIONS

### Notice

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This section has more than one version with varying effective dates. To view a complete list of the versions of this section see Table of Contents.

### **§ 149.43. Availability of public records [Effective until March 20, 2015]**

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(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 requester 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.

## History

130 v 155 (Eff 9-27-63); 138 v S 62 (Eff 1-18-80); 140 v H 84 (Eff 3-19-85); 141 v H 238 (Eff 7-1-85); 141 v H 319 (Eff 3-24-86); 142 v S 275 (Eff 10-15-87); 145 v H 152 (Eff 7-1-93); 146 v H 5 (Eff 8-30-95); 146 v S 269 (Eff 7-1-96); 146 v H 353 (Eff 9-17-96); 146 v H 419 (Eff 9-18-96); 146 v S 277, § 1 (Eff 3-31-97); 146 v H 438, § 3 (Eff 7-1-97); 146 v S 277, § 6 (Eff 7-1-97); 147 v H 352 (Eff 1-1-98); 147 v H 421 (Eff 5-6-98); 148 v S 55 (Eff 10-26-99); 148 v S 78 (Eff 12-16-99); 148 v H 471 (Eff 7-1-2000); 148 v H 539 (Eff 6-21-2000); 148 v H 640 (Eff 9-14-2000); 148 v H 448 (Eff 10-5-2000); 148 v S 180 (Eff 3-22-2001); 149 v H 196 (Eff 11-20-2001); 149 v S 180 (Eff 4-9-2003); 149 v S 258, Eff 4-9-2003; 149 v H 490, § 1, eff. 1-1-04; 150 v H 6, § 1, eff. 2-12-04; 150 v H 431, § 1, eff. 7-1-05; 150 v H 303, § 1, eff. 10-29-05; 151 v H 141, § eff. 3-30-07; 151 v H 9, § 1, eff. 9-29-07; 152 v H 214, § 1, eff. 5-14-08; 152 v S 248, § 1, eff. 4-7-09; 153 v H 1, § 101.01, eff. 10-16-09; 2011 HB 153, § 101.01, eff. Sept. 29, 2011; 2011 HB 64, § 1, eff. Oct. 17, 2011; 2012 HB 487, § 101.01, eff. Sept. 10, 2012; 2012 SB 314, § 1,

ORC Ann. 149.43

eff. Sept. 28, 2012; 2013 HB 59, § 101.01, eff. Sept. 29, 2013.

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## ORC Ann. 4901.16

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49. PUBLIC UTILITIES > CHAPTER 4901. PUBLIC UTILITIES COMMISSION -- ORGANIZATION

### **§ 4901.16. Penalty for divulging information**

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Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission.

### **History**

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GC § 614-11; 102 v 549, § 13; Bureau of Code Revision. Eff 10-1-53.

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ORC Ann. 4903.13

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49, PUBLIC UTILITIES > CHAPTER 4903, PUBLIC UTILITIES COMMISSION -- HEARINGS

**§ 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.

**History**

GC §§ 544, 545; 103 v 804(815), §§ 33, 34; 116 v 104 (120), § 2; Bureau of Code Revision, Eff 10-1-53.

## ORC Ann. 4903.15

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49. PUBLIC UTILITIES > CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

### § 4903.15. Order effective immediately; notice

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

### History

125 v 274 (Eff 10-2-53); 129 v 1061. Eff 10-25-61.

## ORC Ann. 4903.16

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49. PUBLIC UTILITIES > CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

### **§ 4903.16. Stay of execution**

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A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

### **History**

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GC § 548; 103 v. 803(815), § 37; 116 v. 104(121), § 2; Bureau of Code Revision, Eff. 10-1-53.

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## ORC Ann. 4905.302

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49. PUBLIC UTILITIES > CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

### § 4905.302. Purchased gas adjustment clause; rule

- (A) (1) For the purpose of this section, the term "purchased gas adjustment clause" means:
- (a) A provision in a schedule of a gas company or natural gas company that requires or allows the company to, without adherence to section 4909.18 or 4909.19 of the Revised Code, adjust the rates that it charges to its customers in accordance with any fluctuation in the cost to the company of obtaining the gas that it sells, that has occurred since the time any order has been issued by the public utilities commission establishing rates for the company pertaining to those customers;
  - (b) A provision in an ordinance adopted pursuant to section 743.26 or 4909.34 of the Revised Code or Section 4 of Article XVIII, Ohio Constitution, with respect to which a gas company or natural gas company is required or allowed to adjust the rates it charges under such an ordinance in accordance with any fluctuation in the cost to the company of obtaining the gas that it sells, that has occurred since the time of the adoption of the ordinance.
- (2) For the purpose of this section, the term "special purchase" means any purchase of interstate natural gas, any purchase of liquefied natural gas, and any purchase of synthetic natural gas from any source developed after the effective date of this section, April 27, 1976, provided that this purchase be of less than one hundred twenty days duration and the price for this purchase is not regulated by the federal power commission. For the purpose of this division, the expansion or enlargement of a synthetic natural gas plant existing at such date shall be considered a source so developed.
- (3) For the purpose of this section, the term "residential customer" means urban, suburban, and rural patrons of gas companies and natural gas companies insofar as their needs for gas are limited to their residence. Such term includes those patrons whose rates have been set under an ordinance adopted pursuant to sections 743.26 and 4909.34 of the Revised Code or Section 4 of Article XVIII, Ohio Constitution.
- (B) A purchased gas adjustment clause may not allow, and no such clause may be interpreted to allow, a gas company or natural gas company that has obtained an order from the public utilities commission permitting the company to curtail the service of any customer or class of customers other than residential customers, such order being based on the company's inability to secure a sufficient quantity of natural gas, to distribute the cost of any special purchase made subsequent to the effective date of such order, to the extent that such purchase decreases the level of curtailment of any such customer or class of customers, to any class of customers of the company that was not curtailed, to any class of residential customers of the company, or to any class of customers of the company whose level of curtailment was not decreased and whose consumption increased as a result of, or in connection with, the special purchase.
- (C)
- (1) The commission shall promulgate a purchased gas adjustment rule, consistent with this section, that establishes a uniform purchased gas adjustment clause to be included in the schedule of gas companies and natural gas companies subject to the jurisdiction of the public utilities commission and that establishes investigative procedures and proceedings including, but not limited to, periodic reports, audits, and hearings.
  - (2) The commission shall not require that a management or performance audit pertaining to the purchased gas adjustment clause of a gas or natural gas company, or a hearing related to such an audit, be conducted more frequently than once every three years. Any such management or performance audit and any such hearing shall be strictly limited to the gas or natural gas company's gas or natural gas production and purchasing policies. No such management or performance audit and no such hearing shall extend in scope beyond matters that are necessary to determine the following:

- (a) That the gas or natural gas company's purchasing policies are designed to meet the company's service requirements;
  - (b) That the gas or natural gas company's procurement planning is sufficient to reasonably ensure reliable service at optimal prices and consistent with the company's long-term strategic supply plan;
  - (c) That the gas or natural gas company has reviewed existing and potential supply sources;
- (3) Unless otherwise ordered by the commission for good cause shown and except as provided in division (D) of this section:
- (a) The commission's staff shall conduct any audit or other investigation of a natural gas company having fifteen thousand or fewer customers in this state that may be required under the purchased gas adjustment rule.
  - (b) Except as provided in section 4905.10 of the Revised Code, the commission shall not impose upon such company any fee, expense, or cost of such audit or other investigation or any related hearing under this section.
- (4) Unless otherwise ordered by the commission for good cause shown either by an interested party or by the commission on its own motion, no natural gas company having fifteen thousand or fewer customers in this state shall be subject under the purchased gas adjustment rule to any audit or other investigation or any related hearing, other than a financial audit or, as necessary, any hearing related to a financial audit.
- (5) In issuing an order under division (C)(3) or (4) of this section, the commission shall file a written opinion setting forth the reasons showing good cause under such division and the specific matters to be audited, investigated, or subjected to hearing. Nothing in division (C)(3) or (4) of this section relieves such a natural gas company from the duty to file such information as the commission may require under the rule for the purpose of showing that a company has charged its customers accurately for the cost of gas obtained.
- (D) A natural gas company that does not sell natural gas under a purchased gas adjustment clause shall not be subject to this section.
- (E) Nothing in this section or any other provision of law shall be construed to mean that the commission, in the event of any cost distribution allowed under this section, may issue an order pursuant to which the prudent and reasonable cost of gas to a gas company or natural gas company of any special purchase may not be recovered by the company. For the purpose of this division, such cost of gas neither includes any applicable franchise taxes nor the ordinary losses of gas experienced by the company in the process of transmission and distribution.
- (F) The commission shall not at any time prevent or restrain such costs as are distributable under this section from being so distributed, unless the commission has reason to believe that an arithmetic or accounting inaccuracy exists with respect to such a distribution or that the company has not accurately represented the amount of the cost of a special purchase, or has followed imprudent or unreasonable procurement policies and practices, has made errors in the estimation of cubic feet sold, or has employed such other practices, policies, or factors as the commission considers inappropriate.
- (G) The cost of natural gas under this section shall not include any cost recovered by a natural gas company pursuant to section 4929.25 of the Revised Code.

## History

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136 v H 1213 (Eff 4-27-76); 137 v H 1 (Eff 8-26-77); 146 v H 476 (Eff 9-17-96); 149 v H 9, Eff 6-26-2001; 2011 HB 95, § 1, eff. Sept. 9, 2011.

## ORC Ann. 4905.32

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

*Page's Ohio Revised Code Annotated* > TITLE 49. PUBLIC UTILITIES > CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

### **§ 4905.32. Schedule rate collected**

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

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

### **History**

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GC § 614-18; 102 v 549, § 20; Bureau of Code Revision. Eff 10-1-53.

### **Annotations**

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**ORC Ann. 4909.154**

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

*Page's Ohio Revised Code Annotated* > **TITLE 49. PUBLIC UTILITIES** > **CHAPTER 4909. PUBLIC UTILITIES COMMISSION -- FIXATION OF RATES**

**§ 4909.154. Management policies, practices and organization of utility to be considered**

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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.

**History**

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136 v S 94 (Eff 9-1-76); 139 v S 378, Eff 1-11-83.

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## ORC Ann. 4909.17

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49. PUBLIC UTILITIES > CHAPTER 4909. PUBLIC UTILITIES COMMISSION -- FIXATION OF RATES

### § 4909.17. Approval required for change in rate

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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.

### History

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GC § 614-20; 102 v 549, § 22; 108 v PtII, 1094; 110 v 366; 113 v 16; 119 v 275; Bureau of Code Revision, Eff 10-1-53; 153 v S 162, § 1, eff. 9-13-10; 2011 HB 95, § 1, eff. Sept. 9, 2011; 2012 HB 487, § 101.01, eff. June 11, 2012.

ORC Ann. 4928.144

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49, PUBLIC UTILITIES > CHAPTER 4928, COMPETITIVE RETAIL ELECTRIC SERVICE > STANDARD SERVICE OFFER

**§ 4928.144. Rate or price phase-ins; nonbypassable surcharge**

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The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

**History**

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152 v.S.221, § 1, eff. 7-31-08.

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## ORC Ann. 4928.05

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 49. PUBLIC UTILITIES > CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE

### **§ 4928.05. Extent of exemption from municipal and state supervision and regulation**

(A) (1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated.

On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX [49] of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

### **History**

148 v. S. 3, Eff. 10-5-99; 152 v. S. 221, § 1, eff. 7-31-08.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Third Merit Brief and Appendix of Appellants, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, was served by delivery service on the 4th day of December 2014 upon the following:

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