

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

- - -

PROCEEDINGS

before Mr. Gregory Price and Ms. Mandy Chiles,
Attorney Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 10:00 a.m. on Wednesday,
February 20, 2013.

- - -

VOLUME II

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481
FAX - (614) 224-5724

- - -

1 APPEARANCES:

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

7 and

8 Jones Day
9 By Mr. David A. Kutik
10 and Ms. Lydia M. Floyd
11 North Point
12 901 Lakeside Avenue
13 Cleveland, Ohio 44114-1190

14 On behalf of the FirstEnergy Companies.

15 Bruce J. Weston, Ohio Consumers' Counsel
16 By Ms. Melissa Ranay Yost
17 Mr. Edmund "Tad" Berger
18 Mr. Michael J. Schuler
19 10 West Broad Street, Suite 1800
20 Columbus, Ohio 43215

21 On behalf of the Residential
22 Consumers of the FirstEnergy Company.

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

On behalf of the Sierra Club.

Environmental Law & Policy Center
By Mr. Trent A. Dougherty
Mr. Nicholas A. McDaniel
Ms. Cathryn N. Loucas
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212

On behalf of the Ohio Law & Policy
Center.

1 APPEARANCES (Continued) :

2 Boehm, Kurtz & Lowry
3 By Mr. Michael L. Kurtz
4 and Ms. Jody Kyler Cohn
5 36 East Seventh Street
6 Suite 1510
7 Cincinnati, Ohio 45202-4454

8 On behalf of the Ohio Energy Group.

9 Bricker & Eckler, LLP
10 By Mr. J. Thomas Siwo
11 and Mr. Terrence O'Donnell
12 100 South Third Street
13 Columbus, Ohio 43215-4291

14 On behalf of Mid-Atlantic Renewable
15 Energy Coalition.

16 Bricker & Eckler, LLP
17 By Mr. Frank L. Merrill
18 100 South Third Street
19 Columbus, Ohio 43215-4291

20 On behalf of Ohio Manufacturers
21 Association.

22 Vorys, Sater, Seymour and Pease, LLP
23 By Mr. M. Howard Petricoff
24 and Mr. Stephen M. Howard
25 52 East Gay Street
Columbus, Ohio 43216-1008

On behalf of Interstate Gas Supply.

Mike DeWine, Ohio Attorney General
William L. Wright, Section Chief
Public Utilities Section
By Mr. Thomas Lindgren
and Mr. Ryan O'Rourke
180 East Broad Street, Sixth Floor
Columbus, Ohio 43215-3793

On behalf of the Staff of the Public
Utilities Commission.

1 APPEARANCES (Continued)

2 Brickfield, Burchette, Ritts & Stone, P.C.
3 By Mr. Michael K. Lavanga
4 1025 Thomas Jefferson Street N.W.
Eighth Floor, West Tower
Washington, D. C 20007

5 On behalf of the Nucor Steel Marion, Inc.

6 - - -
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

- - -

WITNESS

PAGE

Dean W. Stathis

Direct Examination by Mr. Kutik 292

Cross-Examination by Ms. Yost 293

Cross-Examination by Mr. Dougherty 393

Cross-Examination by Mr. Lavanga 398

Cross-Examination by Mr. Lindgren 404

Examination by Examiner Price 424

Redirect Examination by Mr. Kutik 429

Robert Earle

Direct Examination by Mr. Kutik 435

Cross-Examination by Mr. Berger 437

- - -

INDEX

- - -

COMPANIES' EXHIBITS

IDFD ADMTD

2	- Direct Testimony of Dean W. Stathis - Public	291	433
---	--	-----	-----

2A	- Direct Testimony of Dean W. Stathis - Confidential	291	433
----	--	-----	-----

3	- Direct Testimony of Robert Earl	434	495
---	-----------------------------------	-----	-----

- - -

OCC EXHIBITS

IDFD ADMTD

9	- Navigant Consulting Report, 8/21/09, Confidential	I-272	434
---	---	-------	-----

10	- Responses to Request EA Set 1-Int-12	308	434
----	--	-----	-----

11	- Annual Status Report in Case No. 11-2479-EL-ACP	333	434
----	---	-----	-----

12	- OCC Set 3-INT-2 Attachment DWS-2	387	434
----	------------------------------------	-----	-----

13	- OCC Set 3-INT-2 Attachment 26	461	--
----	---------------------------------	-----	----

14	- NREL Technical Report, July 2012	475	496
----	------------------------------------	-----	-----

15	- OCC Set 3-INT-2 Attachment 25 Confidential	491	496
----	--	-----	-----

- - -

1 Wednesday Morning Session,
2 February 20, 2013.

3 - - -

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

11 My name is Gregory Price. With me is
12 Mandy Chiles. We are the attorney examiners assigned
13 to preside over today's hearing. This is day two of
14 our hearing in the proceeding. We will dispense with
15 taking any further appearances at this time.

16 Mr. Kutik.

17 MR. KUTIK: Your Honor, for our next
18 witness the company calls Dean W. Stathis.

19 (Witness sworn.)

20 EXAMINER PRICE: Please be seated and
21 state your name and business address for the record,
22 after turning your microphone on.

23 THE WITNESS: My name is Dean W. Stathis.
24 My business address is 2800 Pottsville Pike, Reading,
25 Pennsylvania, 19612.

1 EXAMINER PRICE: Please proceed,
2 Mr. Kutik.

3 MR. KUTIK: Your Honor, at this time we
4 ask to be marked as Company Exhibit 2 a document
5 entitled "Direct Testimony of Dean W. Stathis on
6 Behalf of the Ohio Edison Company, The Cleveland
7 Electric Illuminating Company, and The Toledo Edison
8 Company.

9 EXAMINER PRICE: It will be so marked.

10 (EXHIBIT MARKED FOR IDENTIFICATION.)

11 MR. KUTIK: We would also like to have
12 marked as Company Exhibit 2A the confidential version
13 of that document.

14 EXAMINER PRICE: That will also be so
15 marked.

16 (EXHIBIT MARKED FOR IDENTIFICATION.)

17 MR. KUTIK: Your Honor, does the Bench
18 need a copy of either?

19 EXAMINER PRICE: I need a copy of 2A.

20 MR. KUTIK: May I approach?

21 EXAMINER PRICE: You may.

22 EXAMINER CHILES: I'm good, thank you.

23 - - -

24

25

1 DEAN W. STATHIS

2 being by me first duly sworn, as hereinafter
3 certified, deposes and says as follows:

4 DIRECT EXAMINATION

5 By Mr. Kutik:

6 Q. Mr. Stathis, do you have before you what
7 has been marked as Company Exhibit 2 and Company
8 Exhibit 2A?

9 A. Yes.

10 Q. What are those, please?

11 A. The confidential version of my testimony
12 and the redacted version of my testimony.

13 Q. And the redacted version is 2 and the
14 confidential version is 2A?

15 A. Yes.

16 Q. Do you have any additions or corrections
17 to make today?

18 A. Yes.

19 Q. What are they?

20 A. On page 5, page 5, lines 16 and 17,
21 should read "over seventy competitive power and
22 renewable procurements."

23 Q. So you are inserting the word "and
24 renewable" after the word "power," and before the
25 word "procurements."

1 A. Correct.

2 Q. Do you have any other corrections to
3 make?

4 A. Yes. On page 13, line 12, in the
5 parenthetical insert the word "joint" before
6 "Navigant."

7 Q. Do you have any other corrections to
8 make?

9 A. Yes, one final correction, page 36,
10 line 12, "24" should be "25."

11 Q. With those corrections and additions, if
12 I asked you the questions that appear in Exhibits
13 2 and 2A, would your answers be the same today?

14 A. Yes.

15 MR. KUTIK: No further questions.

16 EXAMINER PRICE: Thank you.

17 Consumers' Counsel.

18 MS. YOST: Thank you, your Honor.

19 - - -

20 CROSS-EXAMINATION

21 By Ms. Yost:

22 Q. Good morning, Mr. Stathis.

23 A. Good morning.

24 EXAMINER PRICE: If you could use your
25 microphone.

1 Q. Could you please turn to your testimony,
2 which you have in front of you, page 5. Can you
3 still not hear me, sir?

4 Page 5 in your testimony. Can you hear
5 me okay now?

6 A. Yes.

7 Q. And you just included the term "renewable
8 power" on line 17, correct?

9 A. That's correct.

10 Q. And you discovered those -- that phrase
11 was missing during our deposition -- during the
12 deposition I took of you, correct?

13 A. That's correct.

14 Q. And when you use the term "renewable
15 power," did that include the procurement of renewable
16 energy credits?

17 MR. KUTIK: Your Honor, I object,
18 mischaracterizes testimony. It's not "renewable
19 power," "power and renewables."

20 MS. YOST: I'm sorry?

21 EXAMINER PRICE: The correction is the
22 two words were added "and renewable" so the phrase
23 will now read "competitive power and renewable
24 procurements."

25 MR. KUTIK: He doesn't use the phrase

1 "renewable power."

2 MS. YOST: Thank you.

3 EXAMINER PRICE: Does not use the phrase
4 "renewable power."

5 Q. (By Ms. Yost) So the inclusion of
6 renewable procurements, does that include the
7 procurement of renewable energy credits?

8 A. Yes.

9 Q. And you have experience with the
10 procurement of renewable energy credits in Ohio,
11 Pennsylvania, and New Jersey, correct?

12 A. Yes; and also Maryland.

13 Q. And in regards to the "over seventy" that
14 you speak of in your testimony, would six of those be
15 from this proceeding in Ohio?

16 A. 6 would be from this proceeding in Ohio,
17 2 additional in Ohio, 4 in Pennsylvania, and an
18 additional eight in New Jersey for a total of 20
19 renewable procurements.

20 Q. I didn't hear you. You said for a total
21 of 20 procurements related to renewable energy?

22 A. I believe if my math is correct, it's 8
23 total in Ohio, 4 in Pennsylvania, and an additional 8
24 in New Jersey for a grand total of 20.

25 Q. And the four in Pennsylvania, those were

1 through requests for proposal?

2 A. Yes. The four -- the four procurements
3 in Pennsylvania were in a request for proposal format
4 using laddering or laddering strategy that is a basic
5 backbone of our risk management policy and the way we
6 do procurement in both power and renewables.

7 MS. YOST: Your Honor, I ask the part of
8 the answer to my question that was not responsive be
9 stricken.

10 EXAMINER PRICE: Which part was that?

11 MS. YOST: After "yes."

12 EXAMINER PRICE: Can I have the answer
13 back, please.

14 (Record read.)

15 EXAMINER PRICE: I deny the motion to
16 strike this time, but I will ask the witness to make
17 sure you please attempt to answer the questions as
18 directly as possible.

19 Q. In regards to the eight procurements in
20 New Jersey, were those through requests for proposal?

21 A. Yes.

22 Q. How much -- in your job duties how much
23 of your work is focused on the procurement of
24 renewable energy credits?

25 A. Well, I oversee both power renewables and

1 also some settlement-related functions. I would
2 estimate more than 25, 30 percent of my time.

3 Q. And would the remaining 75 or more
4 percent of your time be focused on the procurement of
5 energy?

6 A. Between procurement of energy and
7 settling transactions that are both part of renewable
8 and power, so that's kind of a separate job duty, to
9 make sure when we go out for both power and renewable
10 procurements that we make -- enter the transactions
11 settled properly in our accounts, and the suppliers
12 are billed the correct totals.

13 Q. Could you turn to page 3 of your
14 testimony, starting on line 16. Starting on line 16
15 you state that "Other comments by Exeter should
16 similarly be rejected. For example, the suggestion
17 that the FEOUs should have discussed their decisions
18 with Staff ignores that Staff, in fact, had
19 information regarding the Companies' process and
20 decisions available to it."

21 The information that you're referencing
22 in line 18, that information is the structured
23 process of the RFP and the GATS deliveries the
24 companies accepted, correct?

25 A. I believe the phrase "other information"

1 includes the presentation that was given to staff on
2 or about the time of RFP 1. I don't recall the exact
3 date, but both Navigant and FEOU personnel met with
4 staff to explain the RFP process and issues related
5 around the RFP process. In addition, staff had the
6 opportunity -- or staff was informed about the RFP
7 web -- webinars, given an opportunity to attend those
8 webinars.

9 In addition, the information that once we
10 retire a renewable energy certificate in GATS, it is
11 set up in a so-called reserve account for the
12 purposes of meeting compliance, and that account is
13 accessible by staff.

14 Q. And continuing on the same page, line 19,
15 your testimony indicates that "Further, the idea put
16 forward by Exeter that the FEOUs should have included
17 better contingency planning -- including planning for
18 'high' prices or setting a maximum or limit price --
19 was unworkable."

20 Throughout your testimony you use RCS.
21 What does that stand for?

22 A. Regulated commodity sourcing.

23 Q. And you're part of the RCS, correct?

24 A. Correct.

25 Q. And when I refer to the FirstEnergy, I

1 refer to the EDUs, in regards to the company would be
2 responsible for -- and when I use the word company
3 also. Who would have been responsible for
4 determining or establishing such a price cap or price
5 limit?

6 Strike that. Let me ask it this way.
7 The risk control group would have been responsible
8 for determining any such price cap or price limit,
9 correct?

10 A. The risk control group performs many
11 support functions to the regulated commodity sourcing
12 group. One of those functions is an analytical
13 function, and in the analytical function category is
14 the development required, if needed or requested, to
15 develop a price ceiling or limit price such as is
16 done in the power procurements.

17 Q. So the answer to my question is "yes"?

18 A. Yes.

19 Q. And you're not a member of the risk
20 control group, correct?

21 A. No. I'm in regulated commodity sourcing.

22 Q. And you're a member of the internal
23 review team, correct?

24 A. As it applies to RFPs 1 through 6, yes.

25 Q. And the risk control group would not have

1 conducted such analysis to determine whether there
2 could be a price cap unless the internal review team
3 made such a request, correct?

4 A. That's correct.

5 Q. And the internal review team never
6 requested that the risk control group do any analysis
7 to establish a price cap for all renewables RECs in
8 Ohio, correct?

9 A. While there was no formal request, a
10 member of the internal review team is -- there are
11 both myself and a risk member on the internal review
12 team. Both of us knew from past experience in
13 developing reservation prices or limit prices for
14 power procurements that an extensive time series of
15 history -- of good price history is needed, and we
16 knew that did not exist for renewable procurements,
17 so because of that limitation, no request was made.

18 MS. YOST: Your Honor, I ask everything
19 beyond "no request was made" be stricken from the
20 record as nonresponsive to the question.

21 EXAMINER PRICE: I think you want before
22 "no request was made," not beyond, right?

23 MS. YOST: I'm sorry?

24 EXAMINER PRICE: You want before "no
25 request," just to be clear.

1 MS. YOST: Yes.

2 EXAMINER PRICE: We will grant the motion
3 the strike.

4 Mr. Stathis, if you can please try to
5 confine your answers to the actual question that's
6 being asked, I'm sure Mr. Kutik will be happy to ask
7 any follow-up questions on redirect if you feel the
8 record needs to be filled out.

9 Q. Mr. Stathis, you have never performed an
10 analysis to establish whether a price cap could be
11 determined for all in-state renewable RECs in Ohio.

12 A. No.

13 MS. YOST: Your Honor, at this time I
14 would like to make a motion to strike.

15 EXAMINER PRICE: Okay.

16 MS. YOST: At this time OCC moves to
17 strike the testimony, the direct testimony, of
18 Mr. Stathis, page 3, starting with lines 19 through
19 22 on page 3, and on page 29 -- excuse me -- 39,
20 lines 12 through 18, and then continuing onto
21 page 40, lines 1 and 2.

22 The grounds for my motion are the
23 witness --

24 EXAMINER PRICE: One second. I'm a step
25 behind you. Page 39, line 12 through?

1 MS. YOST: 18.

2 EXAMINER PRICE: 18; and ending at
3 "price" on 18?

4 MS. YOST: Should be -- I'm sorry?

5 EXAMINER PRICE: If it begins on page 39,
6 line 12.

7 MS. YOST: No, the reverse, page 39.
8 Line 12.

9 EXAMINER PRICE: And ends?

10 MS. YOST: On page 40, line 2, 1 and 2.

11 EXAMINER PRICE: Okay. Grounds?

12 MS. YOST: Yes. This witness does not
13 have knowledge whether a maximum on limit prices is
14 unworkable. There was never a request for such an
15 analysis. This is not the job duties of this witness
16 to perform an analysis. He has not performed such an
17 analysis, so he doesn't have personal knowledge
18 whether this type of analysis was unworkable.
19 Accordingly, it should be stricken from his
20 testimony.

21 MR. KUTIK: May I respond, your Honor?

22 EXAMINER PRICE: I just want to take a
23 minute.

24 Yes, Mr. Kutik.

25 MR. KUTIK: In my response, your Honor, I

1 would move you reconsider your ruling on the last
2 motion to strike Mr. Stathis answered because this --
3 the information that Ms. Yost does not want in the
4 record speaks directly to the current motion to
5 strike. Mr. Stathis explained in that answer that he
6 was involved with another member of the internal
7 review team and has been involved in the past with
8 these folks on the internal review team who represent
9 the risk control group, which does perform the
10 analysis.

11 Based on his experience and his dealings
12 with the -- his fellow team member from the risk
13 control group, he knew and was experienced to know
14 that a limit price was not appropriate in these
15 circumstances given the lack of market data, which
16 was exactly his answer that you struck.

17 EXAMINER PRICE: Well, I struck his
18 answer because it was not responsive.

19 MS. YOST: Now I want it in the record.

20 EXAMINER PRICE: I understand that, but
21 at this point we are going to deny the motion to
22 strike, and if you feel the need to fill in the
23 record on redirect, you will have the opportunity to
24 do so, and at that point if Ms. Yost feels he still
25 cannot make his statement in his prepared testimony,

1 she will renew her motion to strike or she won't.

2 Thank you.

3 Q. (By Ms. Yost) You're familiar with
4 procurements of energy in Ohio, as you testified,
5 correct?

6 A. Yes.

7 Q. And you're aware of an analysis that was
8 performed to set a limit or price cap in regards for
9 the procurement of energy in Ohio, correct?

10 A. Yes.

11 Q. And you did not perform that analysis,
12 correct?

13 A. No.

14 Q. Who performed that analysis, sir?

15 A. The risk group.

16 Q. And sitting here today, you can't testify
17 that -- strike that.

18 And you don't know whether there's enough
19 price history at this point in time that the company
20 could structure a limit on price in regards to
21 in-state all renewable RECs, correct?

22 MR. KUTIK: Objection.

23 EXAMINER PRICE: Grounds?

24 MR. KUTIK: Relevance. Whether there's
25 appropriate information at this time has no bearing

1 on any -- on any issue with respect to what was
2 happening with the RFPs during the audit period.

3 EXAMINER PRICE: Ms. Yost, care to
4 respond?

5 MS. YOST: Yes. This witness has
6 testified that such a price limit was unworkable, so
7 I'm just following up with questions in regard to
8 this witness's understanding of when such a price
9 limit would be workable, what was necessary to make
10 it workable.

11 EXAMINER PRICE: I think you can phrase
12 your question in a manner that doesn't ask him to --
13 that you can phrase your question in such a manner
14 that reflects the facts and circumstances available
15 to the company at the time of the RFPs rather than at
16 this point in time. So we're going to sustain the
17 objection.

18 Q. (By Ms. Yost) At what point in time will
19 the company have such price history to construct such
20 a price limit?

21 MR. KUTIK: Same objection.

22 EXAMINER PRICE: Sustained.

23 MS. YOST: I'll rephrase that.

24 Q. At any point during requests for
25 proposals 1 through 6, did the company have

1 sufficient price history to construct such a price
2 limit?

3 A. Can you repeat the question, please.

4 EXAMINER PRICE: Please.

5 (Record read.)

6 A. From my knowledge of what was required in
7 the sense of time series data, continuous time series
8 data of renewable pricing, at no point in the
9 timeline between RFPs 1 and 6 did the companies have
10 the requisite history.

11 Q. And did you attempt to analyze or
12 calculate a price cap for prices for in-state all
13 renewable RECs at any time during 2009 through 2011?

14 THE WITNESS: I'm sorry, could you repeat
15 the question.

16 EXAMINER PRICE: Please.

17 (Record read.)

18 A. Given the paucity of data and lack of,
19 really, any price markets relevant to that category,
20 I did not do that.

21 Q. Who made this decision whether the
22 recommendations of Navigant in regards to the
23 procurement of renewable energy credits should be
24 accepted?

25 A. The internal review team.

1 Q. Who is on the internal review team?

2 A. From a decision-making standpoint, credit
3 representative, FE rates representative, FE legal
4 representative, and myself.

5 Q. And the credit representative, what is
6 his name?

7 A. Tom Sims.

8 Q. And the legal representative, what is
9 their name?

10 A. Over what time period?

11 Q. 2009 to 2011.

12 A. I believe for most of that time Ebony
13 Miller was a legal representative.

14 Q. And who was the person, representative
15 from the rates department?

16 A. Kevin Warvell.

17 EXAMINER PRICE: I have a question. You
18 indicated from a decision-making perspective, not
19 asking for the names right now, but who would be on
20 the team from a nondecision-making perspective?

21 THE WITNESS: We have a business services
22 member that needs to track what transactions we are
23 involved in for purposes of ensuring it is billed
24 properly and goes to the properly account.

25 EXAMINER PRICE: That makes sense. Is

1 that it?

2 THE WITNESS: That is it.

3 Q. Did we miss anyone from the internal
4 review team, yourself, Tom Sims, Ebony Miller, Kevin
5 Warvell?

6 A. That's it, from a decision-making
7 standpoint.

8 Q. Just to make that clear, the internal
9 review team made the decision regarding REC purchases
10 in this proceeding?

11 A. Yes.

12 MS. YOST: Your Honor, may I approach the
13 Bench and have OCC Exhibit 10 marked at this time?

14 EXAMINER PRICE: You may.

15 (EXHIBIT MARKED FOR IDENTIFICATION.)

16 Q. Please take a moment to familiarize
17 yourself with Exhibit 10.

18 Please let me know when you're ready to
19 proceed.

20 A. I'm ready.

21 Q. Mr. Stathis, you have seen --

22 MR. KUTIK: Stathis.

23 Q. Stathis, you have seen what has been
24 marked as OCC Exhibit 10, correct?

25 A. Yes.

1 Q. And this is what has been marked Exeter &
2 Associates Set 1 and Interrogatory 12 and the request
3 is "Please provide the names of the FirstEnergy
4 personnel that were routinely involved in decisions
5 regarding REC purchases and decisions regarding the
6 method of procurement. For each individual, please
7 provide."

8 Did you provide the response to Exeter
9 Associates?

10 A. Yes.

11 Q. And in the response you indicate two
12 persons, that would be yourself indicated under small
13 a, the first small a under "Response," and who do you
14 indicate under the second small a under the response?

15 A. Rich Schreader.

16 Q. And who is he?

17 A. Manager of regulated commodity sourcing,
18 Jersey Central and East region.

19 Q. Is he a member of the internal review
20 team?

21 A. No.

22 Q. Are the other members of the internal
23 review team listed on OCC Exhibit 10?

24 A. They wouldn't be listed due to the
25 question.

1 Q. So they're not listed, correct?

2 A. They are not listed.

3 MR. KUTIK: Objection.

4 EXAMINER PRICE: Grounds?

5 MR. KUTIK: The witness answered, your

6 Honor --

7 EXAMINER PRICE: I will strike if the
8 objection is relevance.

9 MR. KUTIK: Asked and answered, answered
10 again.

11 Q. The internal review team or group --
12 which do you prefer to call it?

13 A. Team.

14 Q. Team. The internal review team met to
15 decide whether Navigant's recommendations should be
16 followed, correct?

17 A. Yes.

18 Q. And you've stated that you're a member of
19 that team, correct?

20 A. Yes.

21 Q. And there's no specific leader to the
22 internal review team, correct?

23 A. There's not a leadership position,
24 correct.

25 Q. And everyone has an opportunity to voice

1 an opinion, correct?

2 A. Everyone has an opportunity to discuss
3 the topics, correct.

4 Q. And the decisions are made with a -- when
5 a consensus is reached, correct?

6 A. Yes.

7 Q. If I could have you turn to your
8 testimony, page 17.

9 EXAMINER PRICE: I have a follow-up
10 question to that.

11 MS. YOST: Sure.

12 EXAMINER PRICE: You have a member of the
13 legal department on the internal review team. Are
14 they solely for the legal advice, or are they
15 offering an opinion as to whether or not a given rate
16 is too high?

17 MR. KUTIK: Well, your Honor, if someone
18 else was asking that, I would object on the grounds
19 it assumes that those are the only two things, the
20 only two bases that a legal representative could be
21 involved.

22 EXAMINER PRICE: Okay. Let me just
23 simply rephrase my question, fair enough.

24 Does the legal department member of your
25 internal review team solely give legal advice, or do

1 they give their opinions on other topics, other
2 issues?

3 More fair?

4 A. The role as envisioned was predominantly
5 to provide legal support and predominantly that's
6 what the representatives did.

7 EXAMINER PRICE: Okay, thank you.

8 Thank you, Ms. Yost.

9 Q. (By Ms. Yost) Are you at page 17 of your
10 testimony?

11 A. Yes.

12 Q. Starting with line 11, there's a question
13 that states, "How did RCS complete step four
14 reviewing and posting of the Supplier Master
15 Agreement ('SMA')?"

16 "Answer: The SMA used in all agreements
17 was developed by the FEOUs. The SMA was a
18 non-negotiable agreement with uniform terms and
19 conditions for all bidders that enabled the
20 comparison of bids to be based solely on price within
21 each RFP."

22 Would you agree that the comparison of
23 bids based solely on price was so that there would be
24 no bidder preference, correct?

25 A. So there would be no ability by suppliers

1 to renegotiate terms.

2 Q. Did the decisions of the internal review
3 team as to whether RECs were procured based on bidder
4 information specifically the identity of the bidder?

5 MR. KUTIK: May I have the question read,
6 please.

7 EXAMINER PRICE: Please.

8 (Record read.)

9 MR. KUTIK: Your Honor, I'm not sure what
10 the question is.

11 MS. YOST: Let me strike that and
12 rephrase that.

13 EXAMINER PRICE: Thank you.

14 Q. (By Ms. Yost) Would you agree that the
15 internal review team did not need to know the
16 identity of the bidders to determine whether a bid
17 should be accepted?

18 A. In Phase I where credit information is
19 being processed, the internal review team
20 representing the credit and risk control department
21 needs to know that information to do their credit
22 evaluation. In Phase II, we see a spreadsheet that
23 is analyzed on price and decisions are made on price.

24 MS. YOST: Your Honors, I'd ask the
25 witness be instructed to answer the question.

1 MR. KUTIK: Your Honor, the witness did
2 answer the question. It's not a "yes" or "no"
3 answer. It can't be, given the process as he
4 explained it.

5 EXAMINER PRICE: I think the witness gave
6 a fair answer to your question.

7 Q. (By Ms. Yost) The internal review group
8 met to decide whether the recommendations of Navigant
9 in regards to the procurement of renewable energy
10 credits happened at the end of Phase II, correct?

11 A. The internal review team's decision to
12 purchase, correct, happens after Phase II.

13 Q. So there was no need for the internal
14 review group to have the identity of the bidders in
15 order to make their decision whether RECs should be
16 procured, correct?

17 MR. KUTIK: Objection, asked and
18 answered, same question she asked two --

19 EXAMINER PRICE: I'm going to allow it
20 this time.

21 THE WITNESS: I'm sorry. Could you
22 repeat the question.

23 EXAMINER PRICE: Please.

24 (Record read.)

25 A. The decisions we made would have been the

1 same whether or not we had identities or bidder 1,
2 bidder 2, generic labels.

3 MS. YOST: Objection, your Honor. Could
4 you instruct the witness to answer the question?

5 MR. KUTIK: Your Honor, the witness did
6 answer the question.

7 MS. YOST: It's not responsive.

8 MR. KUTIK: It is responsive.

9 EXAMINER PRICE: Stop crosstalking. I
10 think the witness gave a responsive answer.
11 Overruled. The witness gave a responsive answer.
12 You can ask a follow-up, if you like.

13 I'll ask a follow-up. Isn't it true the
14 bidder identities were unnecessary for your
15 decision-making process?

16 THE WITNESS: Yes.

17 EXAMINER PRICE: Thank you.

18 MR. KUTIK: Your Honor, your question
19 related to Phase II?

20 EXAMINER PRICE: Yes, Phase II.

21 MR. KUTIK: Thank you, your Honor.

22 Q. (By Ms. Yost) When the internal review
23 group looked at individual bid proposals recommended
24 by Navigant, at that point had it already been
25 determined that those bidders were what they termed

1 qualified bidders?

2 A. First off, the internal review team
3 doesn't look at bid proposals. Navigant looks at the
4 bid proposals and then prepares a spreadsheet that is
5 delivered to the internal review team in Phase II for
6 the internal review team to make their decision. So
7 I'm not sure -- could you rephrase your question,
8 please?

9 Q. Yes.

10 MS. YOST: Could you read back my
11 question.

12 (Record read.)

13 MS. YOST: Could you read the answer
14 back.

15 (Record read.)

16 Q. The bidder included on the spreadsheet by
17 Navigant provided to the internal review team in
18 Phase II, does that spreadsheet only include
19 qualified bidders?

20 A. Yes.

21 Q. And did you ever ask Navigant to exclude
22 bidder identities from the spreadsheet?

23 A. No, I don't recall asking them to do
24 that.

25 Q. Did you ever ask or direct Navigant to

1 include bidder identities on the spreadsheet that was
2 provided in Phase II to the internal review group?

3 A. No.

4 EXAMINER PRICE: I have a question before
5 we leave this topic. Does the internal review team
6 review Navigant's decisions as to who was qualified
7 to bid at the end of Phase I?

8 THE WITNESS: They see information, yes.

9 EXAMINER PRICE: At the end of Phase I.

10 THE WITNESS: Yes.

11 EXAMINER PRICE: Then the internal review
12 team also reviews the decisions -- makes the final
13 decision to procure at the end of Phase II.

14 THE WITNESS: Let me make it clear, the
15 credit person sees -- in Phase I the credit person
16 sees that information.

17 EXAMINER PRICE: Maybe more precisely the
18 credit person from the internal review team reviews
19 Navigant's decisions as to who is qualified to bid.

20 THE WITNESS: Yes.

21 EXAMINER PRICE: And at the end of Phase
22 II, the entire internal review team makes the
23 decision whether to accept Navigant's recommendations
24 as to who the winning bidders are.

25 THE WITNESS: Correct.

1 EXAMINER PRICE: Thank you.

2 Q. (By Ms. Yost) Would you turn to page 20
3 of your testimony, sir. In regards to the question,
4 "Did the FEOUs consider beginning their renewable
5 procurements before the ESP 1 renewable plan was
6 approved in March 2009," you state "No."

7 And would you agree that the FEOUs did
8 not consider beginning their renewable procurements
9 before the ESP I renewable plan was approved in
10 March, 2009, because the companies could potentially
11 incur costs that were not recognized as recoverable?

12 THE WITNESS: Yes; in addition to not
13 knowing whether or not the renewable obligation would
14 remain with the utility or with the suppliers that
15 were part of the SSO auctions.

16 Q. (By Ms. Yost) And would you agree with me
17 that the first step in the commencement of a
18 procurement process for renewable energy credits is
19 to understand the regulatory background and
20 obligations, procurement obligations, specifically?

21 A. That's usually a logical first step.

22 Q. And is it your testimony that the
23 companies did not take that first step, meaning to
24 understand the regulatory background and obligations
25 regarding procurement, until after the entry of the

1 March, 2009, order?

2 A. Could you rephrase -- would you repeat
3 the question, please.

4 Q. Sure. We agreed that the first step in
5 the commencement of a procurement process for
6 renewable energy credits is to understand the
7 regulatory background and obligations, correct?

8 A. Yes.

9 Q. And is it your testimony that the
10 companies did not understand the regulatory
11 background and obligations prior to the March, 2009,
12 order approving the ESP I stipulation?

13 A. Certainly some facts are coming to bear
14 during the first quarter, during -- before the final
15 order was issued, but, largely, I think from a
16 renewable procurement standpoint, we had to wait
17 until the final order to understand specific details,
18 and particularly not only the cost recovery but
19 whether or not the renewable obligation would be with
20 the utility or with the SSO supplier.

21 Q. Page 29 -- excuse me, 21 of your
22 testimony, starting line 7 is the question, and
23 line 8 is the answer. In line 8 you state that
24 "Because the regional renewable energy markets were
25 still in the early stages of development, RCS

1 expected it would hold 3 RFPs for all 4 renewable
2 products one per year. RCS believed that the 2009
3 RFP would seek 100% of 2009 compliance obligation,
4 and some percentage of 2010 and 2011; the 2010 RFP
5 would seek the remaining percentages needed for 2010
6 compliance and some additional percentage of the
7 2011; and the 2011 RFP would seek the residual
8 percentages, per product, needed for 2011 compliance.
9 Initially, RCS believed that this purchasing strategy
10 (assuming renewable supply was adequate) would bring
11 some diversity to the procurement pricing."

12 The companies, meaning the FirstEnergy
13 EDUs, did not rely on input from Navigant to develop
14 its beliefs as communicated on lines 9 through 17 on
15 page 21, correct?

16 A. Correct. This laddering strategy is
17 pointed to in many of our other procurements and the
18 risk policy.

19 Q. And this strategy on page 21, lines 9
20 through 17, was developed before receipt of any
21 market studies from Navigant, correct?

22 A. Yes.

23 Q. And, again, on page 21, continuing with
24 line 17 it states, "In the event the supply and
25 demand dynamics proved inadequate, RCS would employ a

1 contingency plan that it had previously used in past
2 power procurements: namely, to issue an additional
3 RFP in the event of insufficient supplier interest or
4 to pursue spot suppliers (broker market supply in
5 this case) if enough time was not available to
6 conduct an additional RFP."

7 RCS has never applied for -- excuse me.
8 I meant FirstEnergy has never applied for a force
9 majeure in regard to past power procurements,
10 correct?

11 MR. KUTIK: Objection, your Honor.

12 EXAMINER PRICE: Grounds?

13 MR. KUTIK: I'm not aware there's any
14 requirement in the law that they do so, so it's
15 irrelevant. In fact, I'm not sure how a force
16 majeure process would work for SSO load.

17 MS. YOST: That is my point, your Honor.

18 MR. KUTIK: That's exactly the point,
19 it's irrelevant.

20 MS. YOST: And this is the power
21 procurement contingency plan that they used. I'm
22 just trying to distinguish the differences between --

23 EXAMINER PRICE: I understand what you
24 are trying to do, and I also appreciate his point
25 it's not relevant. So why don't you see if you can

1 get about it in a different way. Just ask him more
2 directly.

3 MS. YOST: Please read back the question.

4 (Record read.)

5 Q. Mr. Stathis, your testimony on lines 17
6 and 18 states that "the RCS would employ a
7 contingency plan," correct?

8 A. Yes.

9 Q. And would you expect a contingency plan
10 of a -- would you expect that a contingency plan for
11 a power procurement to include a force majeure
12 provision?

13 A. No.

14 Q. And is there a contingency plan in place
15 now for renewable energy credits procured in Ohio?

16 MR. KUTIK: Objection.

17 MS. YOST: Let me rephrase that.

18 Q. During the applicable period, 2009 to
19 2011, did -- was a force majeure an option in regards
20 to the procurement of renewable energy credits?

21 MR. KUTIK: Objection.

22 EXAMINER PRICE: Grounds?

23 MR. KUTIK: The question is unclear as to
24 whether we're talking hypothetically or talking with
25 respect to the decisions the company was actually

1 making given the facts and circumstances the
2 companies had at the time.

3 EXAMINER PRICE: Overruled. He can
4 answer if he knows.

5 A. At the time of the renewable RFPs,
6 starting with the RFP 1 in 2009, the shared
7 expectations of our internal review team was based on
8 our risk management policy with respect to
9 contingency planning which is basically get to a
10 competitive solicitation as quick as possible in the
11 event you fail the first time.

12 In the event you still fail and it's the
13 end of the year, end of the reporting year, and you
14 found yourself short of RECs, then a force majeure
15 was certainly part of the shared expectations.

16 Q. So the answer to my question is "yes"?

17 A. Yes.

18 Q. And, in fact, the stipulation that
19 established the rider AER does not prohibit
20 FirstEnergy from seeking a force majeure, correct?

21 A. Again, in the event the company finds
22 itself short of its compliance targets, that is an
23 option for the company to pursue, a force majeure.

24 Q. And there was never during this period of
25 time, 2009 to 2011, a written contingency policy in

1 place for the renewable energy credits, correct?

2 A. While there's no written policy
3 specifically for these RFPs, they bear heavily on the
4 risk management policy, Section 3.2.1, which I just
5 explained if there's -- it specifically states,
6 absent a commission-ordered written contingency plan,
7 the preference is to pursue the reissuance of the RFP
8 as soon as possible and to bridge the gap with
9 short-term purchases. If you're in power and there's
10 a PJM-administered spot market, you would draw on
11 that market for your short-term supply until you get
12 to the next RFPs. In renewables since there is no,
13 quote-unquote, PJM spot markets, potentially you
14 could look at the broker markets, even though that
15 usually does not have much volume with it --

16 MS. YOST: Your Honor --

17 MR. KUTIK: Let him finish his answer,
18 please.

19 MS. YOST: That's what I'm objecting to.
20 It's not responsive.

21 MR. KUTIK: Let him finish his answer.

22 EXAMINER PRICE: Number one, let the
23 witness finish his answer. Counsel can make any
24 motion she feels appropriate.

25 A. Again, they're similar because power and

1 renewables are obviously different. The end game is
2 the same, to get to the next competitive
3 solicitation. The risk policy basically states
4 that's what we are supposed to do, to competitively
5 price our products that we get so there's
6 transparency. So to answer your question, they're
7 similar, not exact contingency plans.

8 MS. YOST: Your Honor.

9 EXAMINER PRICE: Yes?

10 MS. YOST: I can't even recall what my
11 question is at this point.

12 Rosemary, could you please read the
13 question.

14 (Record read.)

15 MS. YOST: Move to strike the entire
16 answer as nonresponsive.

17 MR. KUTIK: May I be heard, your Honor?

18 EXAMINER PRICE: No, we are not going to
19 strike the testimony because I think it's relevant
20 for the Commission's consideration, but I will ask
21 the witness myself directly, was there a written
22 contingency plan in place?

23 THE WITNESS: For the --

24 EXAMINER PRICE: For the renewables.

25 THE WITNESS: No.

1 EXAMINER PRICE: Thank you.

2 Q. (By Ms. Yost) In regards to the RECs that
3 are procured in Pennsylvania -- strike that.

4 There is a written contingency in place
5 for Pennsylvania RECs, correct?

6 A. Since the renewable procurement process
7 is preapproved by the Commission, embedded in that
8 approval is a contingency process that's approved and
9 written, yes.

10 Q. And there is a written contingency plan
11 in place for the procurement of renewable energy
12 credits in New Jersey, correct?

13 A. There's a statement in the bid rules
14 that's approved by the Commission about the potential
15 to issue an RFP, which I consider a contingency, but
16 it's not labeled officially a contingency, but the
17 language is in the approved bid documents that are
18 approved by New Jersey BPU.

19 EXAMINER PRICE: This was the bid rules
20 approved prior to bids by the Public Utilities
21 Commission or whatever that --

22 THE WITNESS: Yes. Board of Public
23 Utilities.

24 Q. (By Ms. Yost) And for Ohio, the
25 contingency plan for the procurement of energy, that

1 contingency plan is in writing, correct?

2 A. I believe it is, yes.

3 Q. And what you call shared expectations,
4 whose expectations are shared in regards to actions
5 that can be taken -- strike that. Let me rephrase
6 that.

7 Can you identify any reasons why a
8 contingency plan for the procurement of renewable
9 energy credits in Ohio should not be committed to
10 writing?

11 A. Again, I don't see any downside to
12 specifically laying out a written contingency plan
13 specifically for the renewables, although the risk
14 policy certainly served as an effective guide for the
15 shared expectations of the group.

16 Q. How would you summarize the shared
17 expectations in regards to the procurement of RECs
18 from 2009 to 2011?

19 A. With respect to contingencies?

20 Q. Yes.

21 A. I believe the group fully understands
22 that the risk policy objective of the contingency
23 plan is to get to the next competitive solicitation
24 as quick as possible, so I think the ordering of that
25 contingency plan of reissue, potentially look at

1 broker markets if the quantity you need to fill is
2 small, and then pursue force majeure in the event you
3 end up short for your compliance year and that you
4 convinced yourself you've looked -- you've exhausted
5 all potential means to acquire that supply.

6 Q. And during the 2009 to 2011 time period
7 in regards to actions taken, there were actions taken
8 that were not included in the shared expectations,
9 correct?

10 A. Well, there were actions that were taken
11 that were not part of the initial shared
12 expectations. It's also -- it's also obvious to the
13 internal review team and to myself, who has testified
14 in Pennsylvania on contingency plans, that you cannot
15 ahead of time foresee all contingency plans, so you
16 need flexibility that you can build in your plan to
17 potentially deal with new situations that you didn't
18 expect.

19 EXAMINER PRICE: If you don't mind my
20 interrupting, your shared expectations versus a force
21 majeure, you would only pursue a force majeure in any
22 event that the market did not produce sufficient RECs
23 irrespective of price; is that correct?

24 THE WITNESS: Correct. It was finding --
25 if we couldn't find competitively-priced supply, and

1 we looked everywhere that we could look for available
2 supply, then we would --

3 EXAMINER PRICE: Price was not a factor
4 whatsoever.

5 THE WITNESS: No.

6 EXAMINER PRICE: If some broker had the
7 last 10,000 RECs, you would have paid any price for
8 the last 10,000 RECs?

9 THE WITNESS: And I don't know what the
10 probability is for a broker having 10,000 RECs. It's
11 a small probability. And, again, this gets into
12 other areas, like the 3 percent calculation because
13 I'm sure there's a combination of prices and
14 quantities for all four products that potentially
15 could have the companies significantly exceed Section
16 (C) (3) of 4928.64.

17 EXAMINER PRICE: I guess that that gets
18 to the flexibility you were talking about earlier,
19 but the outside limits, you were looking at what REC
20 purchases that would trigger the 3 percent cap.

21 THE WITNESS: Yeah, I guess, yes,
22 there's --

23 EXAMINER PRICE: That's the only outside
24 limits that you considered possible.

25 THE WITNESS: Yes.

1 EXAMINER PRICE: Thank you, Ms. Yost.

2 Q. (By Ms. Yost) These shared expectations
3 that you just testified, who all shared the same
4 expectations?

5 A. Members of the internal review team and
6 others in my department.

7 Q. And could you name those persons, please?

8 A. You want me to rename this internal
9 review team?

10 Q. Well, is it your testimony the entire
11 internal review team had the same shared expectations
12 in regards to the contingency plan?

13 A. Possible exception being the support
14 personnel but the decision makers, yes.

15 Q. And who else had these shared
16 expectations?

17 A. Various team members in RCS, Rich
18 Schreader, Chris Wehr, Kevin Merioionale. Those
19 members would certainly have shared in those
20 expectations.

21 Q. So at least seven persons had the shared
22 expectations in regards to the contingency plan
23 actions to be taken specific to the procurement of
24 renewable energy credits?

25 A. Well, to the extent a team member who is

1 not in my group has discussions with others in the --
2 in their organizations, for example, risk control,
3 I'm sure there were others that had that expectation.
4 I don't control that.

5 Q. And making a counteroffer to a qualified
6 bidder was not part of the shared expectations,
7 correct?

8 A. Making a counteroffer was part of the
9 flexibility we just spoke about.

10 Q. Is everything included in the flexibility
11 you just spoke of?

12 A. What do you mean by "everything"?

13 Q. Does flexibility mean anything, any
14 contingency action can be taken, or how is this
15 flexibility defined, since it's not written?

16 A. Again, I think -- given the circumstances
17 at that time, would a reasonable person consider
18 other actions that aren't specific to the plan but
19 could be considered contingency actions to close the
20 exposure as required by the risk policy.

21 Q. And FirstEnergy has -- you have testified
22 and characterized the force majeure provision as the
23 last resort; is that fair to say?

24 A. Yes.

25 Q. And, in fact, FirstEnergy has filed for

1 three separate applications for force majeure in
2 regards to solar benchmarks, correct?

3 A. I believe three is the correct number.
4 I'm not positive, but.

5 Q. And after the filing of one of the force
6 majeure applications, an RFP was issued, correct?

7 EXAMINER PRICE: Can you ask a more
8 specific question? I'm not clear as to the answer.
9 Are you saying an RFP for solar RECs was issued after
10 the filing of one of applications for force majeure
11 or an RFP for some other sort of RECs was issued?

12 MS. YOST: I have an exhibit that would
13 be helpful.

14 Your Honor, if I could have a few minutes
15 to find the exhibit here.

16 EXAMINER PRICE: You may.

17 MR. KUTIK: Are we off the record now,
18 your Honor?

19 EXAMINER PRICE: Let's go off the record.
20 Everybody can take five minutes.

21 (Recess taken.)

22 EXAMINER PRICE: Back on the record.

23 Ms. Yost.

24 MS. YOST: Yes, your Honor. May I
25 approach the Bench and have OCC Exhibit No. 11

1 marked?

2 EXAMINER PRICE: You may approach, and it
3 will be so marked.

4 (EXHIBIT MARKED FOR IDENTIFICATION.)

5 Q. (By Ms. Yost) Please take a look at OCC
6 Exhibit 11 and let me know when you are ready to
7 proceed.

8 A. Yes.

9 Q. Have you seen OCC Exhibit 11 before?

10 A. Yes.

11 Q. And if I could have you turn your
12 attention to page 2, footnote 2 is a footnote that
13 "The Companies previously filed a force majeure
14 application on January 24, 2011, in Case No.
15 11-0411-EL-ACP. Subsequent to that filing, the
16 Companies were able to secure an additional
17 1,517 Ohio SRECs."

18 Do you recall the January 24, 2011, force
19 majeure was in regards to solar RECs for 2010; is
20 that correct?

21 A. I believe that's correct.

22 Q. And how was the companies able to secure
23 an additional 1,517 Ohio SRECs after that filing?

24 A. On or about the January filing, we
25 learned that a counterparty, who was scheduled to

1 deliver their RECs in 2011, was agreeable to deliver
2 their RECs earlier for 2010 compliance, thereby,
3 improving our quantities and lowering the amount of
4 shortfall that would be required in the force majeure
5 filing. So -- and this is the importance of having
6 someone in our IRT in legal, they decided that
7 would -- it would be appropriate, prudent to pull the
8 application, secure the RECs, and to refile showing a
9 more favorable quantity of supply and a lower force
10 majeure request.

11 Q. The companies issued a request for
12 proposal after filing a force majeure, correct, for
13 those same RECs?

14 A. I believe at the same time we were
15 convinced if we put one more RFP out, it was possible
16 we could close the entire gap quickly.

17 MS. YOST: Your Honor, could you instruct
18 the witness to answer the question.

19 EXAMINER PRICE: Let's have the question
20 and answer back again.

21 (Record read.)

22 EXAMINER PRICE: If you could be more
23 responsive to the question, please.

24 A. Yes, we issued another RFP in hopes of
25 remedying the entire shortfall.

1 Q. And the RFPs issued after the force
2 majeure was filed, correct?

3 A. That would have been RFP 4. I don't have
4 the date in front of me. RFP 4 was put out to the
5 market. They were close. I don't know the exact
6 timing.

7 EXAMINER PRICE: So just to make the
8 record clear then, the force majeure application was
9 filed on January 24, 2011. RFP 4 was issued on some
10 date in or around that time frame, and you're not
11 precisely sure whether it was before or after the
12 force majeure filing.

13 THE WITNESS: Your Honor, I think we
14 pulled the January one to refile with the new
15 quantities in April, that April filing.

16 EXAMINER PRICE: Now I'm thoroughly
17 confused. You had filed that force majeure on
18 January 24, 2011; is that right?

19 THE WITNESS: Correct.

20 EXAMINER PRICE: And around the same time
21 RFP 4 went out?

22 THE WITNESS: No, around the same time we
23 learned we could initiate an early delivery with a
24 supplier.

25 EXAMINER PRICE: Okay. Which came first,

1 the withdrawal of the RFP -- I'm sorry. Which came
2 first, the withdrawal of the force majeure filing or
3 RFP 4?

4 THE WITNESS: The withdrawal of the
5 force -- the withdrawal of the force majeure.

6 EXAMINER PRICE: But to answer Ms. Yost's
7 question, technically you did file an RFP after you
8 filed for force majeure; you simply had withdrawn the
9 force majeure before you issued the RFP.

10 THE WITNESS: Yes.

11 EXAMINER PRICE: Thank you.

12 Q. (By Ms. Yost) Mr. Stathis, is it your
13 opinion the company had an obligation to purchase the
14 RECs procured through competitive means, correct?

15 A. Yes.

16 Q. In regards to the price of a REC, a REC
17 is too high to purchase only if it exceeds the
18 3 percent test, correct?

19 A. Well, the 3 percent test and whether a
20 REC is reasonably developed -- reasonably available
21 and, therefore, an outgrowth of a competitive
22 solicitation, those are two separate things. We
23 don't run a 3 percent test contemporaneously with an
24 RFP to make that determination.

25 Q. Is there a price of renewable energy

1 credit that is too high that would make it not
2 reasonably available?

3 A. Theoretically speaking, I think there's
4 probably a set of -- when you look at the four
5 different products, in-state solar, in-state all
6 renewable, all-state solar, all-state all renewable,
7 there's probably a set of four product -- four
8 quantities and prices when taken all together could
9 result in the companies significantly exceeding the
10 3 percent test.

11 How to pull a specific price out of that,
12 I don't know how to do it, so it's really a
13 cost-based -- it's a cost-based rule that's being
14 impacted by some theoretical set of prices.

15 EXAMINER PRICE: Let's go back to my
16 hypothetical earlier about --

17 MS. YOST: Your Honor, if I may, I would
18 like to go to the deposition transcript for the
19 question.

20 EXAMINER PRICE: I'm sorry. We will come
21 back to my question.

22 Q. Mr. Stathis, do you have a copy of your
23 deposition transcript in front of you, specifically
24 Volume I?

25 A. Yes.

1 MS. YOST: Your Honor, may I approach the
2 Bench? I have additional copies.

3 EXAMINER PRICE: You may.

4 Q. If you could turn to page 63 of Volume I
5 of your deposition transcript.

6 A. Yes, I'm here.

7 Q. Starting on line 1, "Question: In your
8 opinion is there a price of a renewable energy credit
9 that is too high that would make it not reasonably
10 available?"

11 Answer, line 8, "If that price or prices
12 would cause the company to exceed its 3 percent
13 test."

14 Did I read that correctly, sir?

15 A. Yes.

16 MS. YOST: Go ahead, your Honor, that's
17 all I had.

18 EXAMINER PRICE: Okay. Let's go back to
19 my hypothetical earlier about the broker. If this
20 had been 2009 and was an in-state SREC and some
21 broker had bid 100, which you ended being short on in
22 your auction, but some broker had hypothetically bid
23 100 SRECs at \$5,000, you would have thought that --
24 you would approve that price. There was no upper
25 limit of the price you would pay because you were

1 short anyway up to the 3 percent cost test?

2 MR. KUTIK: I'm sorry, you said up to the
3 3 percent cost test?

4 EXAMINER PRICE: Yes.

5 THE WITNESS: Your hypothetical is coming
6 the broker market; it's not competitively determined.

7 EXAMINER PRICE: I probably misspoke.
8 The last 100 that were bid into your RFP. It was bid
9 into your RFP.

10 THE WITNESS: Oh, that's the last 100 bid
11 into the RFP.

12 MR. KUTIK: Yes. It happened this broker
13 had 100 on the market.

14 THE WITNESS: And he bid that into the
15 RFP.

16 EXAMINER PRICE: Yes.

17 THE WITNESS: Yeah, I mean, the company,
18 again, is trying to extract prices through
19 competitive means. Again, I'm assuming -- the
20 assumption is it is well publicized, reasonably
21 developed.

22 EXAMINER PRICE: It was your auction.

23 THE WITNESS: Right, properly designed
24 auction, and there was issue with the RFP, so the RFP
25 mechanism has assessed as competitive. It reflects

1 prevailing market conditions, we would recommend
2 purchasing that last 100.

3 EXAMINER PRICE: Would you purchase
4 irrespective of the price?

5 MR. KUTIK: Your earlier question was
6 subject to --

7 EXAMINER PRICE: Subject to the 3.

8 THE WITNESS: Subject to the 3 percent.

9 EXAMINER PRICE: I am trying to keep the
10 number small so it wouldn't push you over.

11 Okay. Thank you, Ms. Yost.

12 Q. (By Ms. Yost) If I could have you turn
13 back to OCC Exhibit 11, page 6, line 1, footnote 7.

14 THE WITNESS: Do I have OCC 11?

15 A. Is that the force majeure? Yes.

16 Q. Are you there, sir?

17 A. Yes. I'm sorry.

18 Q. It indicates, footnote 7, page 6, that
19 "One of the Companies' RFPs was conducted after the
20 filing of their initial 2010 force majeure
21 application in Case No. 11-0411-EL-ACP." Do you see
22 that there, sir?

23 A. Yes.

24 Q. Does that refresh your recollection that
25 after the filing of the force majeure a request for

1 proposal was filed?

2 A. Again, yes, under the circumstances I
3 just described in order to improve the shortfall.

4 Q. But I just wanted to clarify, previously
5 you testified that the company did not file -- did
6 not issue a request for proposal after the filing of
7 the force majeure.

8 MR. KUTIK: I'll object, your Honor. I
9 think you clarified it in your questions.

10 EXAMINER PRICE: I'm not sure what you're
11 asking here, Ms. Yost.

12 MS. YOST: I'll strike that question.

13 Q. Just to clarify that the company did
14 issue a request for proposal after the filing of that
15 2010 initial force majeure application, correct?

16 A. Yes.

17 Q. So even after the force majeure
18 application had been filed, the company attempted to
19 secure additional solar RECs, correct?

20 A. When the companies knew through the
21 flexibility of the contingency process that they
22 could potentially and probably improve their
23 shortfall, yes.

24 Q. So in the case of 11-0411, the filing of
25 the force majeure was not the last resort, correct?

1 A. Again, the shared expectations with
2 respect to contingency plan that has the force
3 majeure as a last resort, there are circumstances due
4 to that flexibility that arise that will end up being
5 beneficial to the companies' procurement of RECs and,
6 therefore, beneficial to industry development, yes.

7 Q. Fair. Are you aware of the provisions
8 regarding renewable energy credit procurement that
9 are contained in the ESP I stipulation, correct?

10 A. Yes.

11 Q. And is it your understanding that the
12 company can only recover prudently incurred costs?

13 A. It's my understanding that the companies
14 can recover costs that are deemed reasonable, given
15 the circumstances at the time, yes.

16 Q. Do you know what words in the stipulation
17 were used to describe those costs?

18 A. Not off the top of my head, no.

19 EXAMINER PRICE: Do you have a copy of
20 the stipulation in the ESP case with you?

21 THE WITNESS: Not with me here.

22 MS. YOST: I have one, your Honor.

23 MR. KUTIK: Your Honor, I'm not sure what
24 the point of all this is. The stipulation says what
25 it says he indicated in the answer with respect to

1 what prudent was. I'm not sure why showing go him
2 that stip is relevant or moves this case along.

3 EXAMINER PRICE: Ms. Yost.

4 MS. YOST: Your Honor, he did indicate --
5 he said "reasonably incurred."

6 MR. KUTIK: No, I think the last word of
7 his answer was "yes."

8 EXAMINER PRICE: I think the last word of
9 the answer he could not recall the exact words used.

10 MR. KUTIK: No, in terms does the
11 stipulation call for prudently incurred or something
12 like that.

13 EXAMINER PRICE: Let's just -- we are
14 spending more time arguing about this than it would
15 take to go through this so let's quickly get through
16 this line of questioning.

17 MS. YOST: May I approach the witness,
18 your Honor?

19 EXAMINER PRICE: You may.

20 MR. KUTIK: Could you show me what you're
21 showing him, please, specifically what you're showing
22 him.

23 Q. (By Ms. Yost) Take a moment to
24 familiarize yourself with that.

25 Ready to proceed?

1 A. Yes.

2 Q. And is it your understanding that this
3 stipulation provides for a bypassable rider that the
4 company can seek prudently incurred costs associated
5 with the renewable energy credits?

6 A. Yes.

7 Q. And would you agree that if the
8 Commission determines that costs were imprudently
9 incurred that it cannot be recovered through the
10 bypassable rider?

11 MR. KUTIK: Objection.

12 EXAMINER PRICE: Grounds?

13 MR. KUTIK: Legal conclusion. There's no
14 foundation this witness is familiar with the
15 ratemaking process or how -- and what's allowable or
16 not allowable in rider AER.

17 EXAMINER PRICE: Sustained.

18 Q. (By Ms. Yost) Do you agree in the market
19 where one bidder controls a significant and material
20 portion of the supply for that market, it is not a
21 fully competitive market?

22 A. No, not necessarily. Some highly
23 concentrated industries have -- exist for a short
24 period of time and due to low barriers to entry, that
25 condition can be remedied quickly.

1 Q. Do you agree that a market where one
2 bidder controls 50 percent of the supply for that
3 market, it's not a fully competitive market?

4 A. Again, I don't know the time frame you're
5 talking about because is that a sustained 50 percent?
6 It could be, again, for a very short period of time.
7 As more entrants come into a market, the
8 concentration ratio will drop.

9 Q. In general --

10 MR. KUTIK: Objection. I don't think
11 that answers the witness's query.

12 MS. YOST: It's a general concept.

13 THE WITNESS: Could you read -- could I
14 hear the question again, please?

15 (Record read.)

16 A. Again, in general, I think -- I'd have to
17 know about what is meant by "control of supply" for
18 the duration, but barriers to entry are low in that
19 particular industry, I think competition with still
20 exist with 50 percent control.

21 Q. Do you agree that a market where one
22 bidder controls 100 percent of the supply for that
23 market, it is not a fully competitive market?

24 A. If somebody is controlling 100 percent of
25 the supply and that's sustained, then there's a

1 possibility that, yes, that's not a fully competitive
2 market.

3 EXAMINER PRICE: What would cause that
4 control to be sustained?

5 THE WITNESS: Some sort of advantage that
6 no one else can overcome, a high barrier to entry
7 that is going to exist for a long period of time.

8 Q. In past power procurements, has an
9 auction ever resulted in just having one qualified
10 bidder?

11 MR. KUTIK: Could I have the question
12 read, please.

13 EXAMINER PRICE: You may have the
14 question reread, but, actually, I would ask that
15 counsel rephrase the question a little more
16 specifically if you referring to 70 power
17 procurements he talks about in his testimony, please
18 specify that. Read the question back.

19 MR. KUTIK: Well no, if she rephrases,
20 I'll hear it again.

21 EXAMINER PRICE: Okay.

22 Q. (By Ms. Yost) In your experience have you
23 been involved in any power procurements where an
24 auction has resulted in just one qualified bidder?

25 A. No.

1 Q. If there's a procurement through an RFP
2 process and there's only one qualified bidder, does
3 that raise any questions whether that one bidder has
4 market power?

5 MR. KUTIK: Your Honor, at this time I
6 object. This is an incomplete hypothetical.
7 There's -- what market are we talking about? What
8 periods of time are we talking about?

9 EXAMINER PRICE: The witness can answer
10 to the extent that he knows, but if he needs to add
11 some qualifications, feel free to do so.

12 Q. My question is in general.

13 THE WITNESS: Could you read the
14 question, please.

15 (Question read.)

16 A. No, not necessarily. I think as long as
17 the competitive solicitation has been designed
18 properly, uses a sealed bid, line bidding process,
19 obviously, that one bidder doesn't know how many
20 other potential bidders he's bidding against, so I
21 think not only is the outcome deemed competitive,
22 again, one bidder should necessarily have a bearing
23 on whether or not that is deemed a competitive price
24 outcome.

25 Q. If the seller controlled over 50 percent

1 of the supply in in-state all renewable REC markets,
2 could that seller exert market power?

3 MR. KUTIK: Again, your Honor, note my
4 objection.

5 EXAMINER PRICE: Again, I will allow the
6 question because it is a very open-ended question,
7 but I will give the witness the opportunity to give a
8 full response.

9 A. The FERC, Federal Energy Regulatory
10 Commission, defines market power as withholding
11 supply, the large market participant withholding
12 supply. As long as that is not being observed, then
13 I think market power may not be an issue at all.

14 Q. Well, have you defined market power as
15 excess or extra returns due to positional advantage?

16 A. I think I defined economic renewable
17 power as extra returns due to positional advantage.
18 So if someone has an innovation or is first to
19 market, you may have a temporary advantage, earn
20 economic rents for a period of time until more
21 competitors come into the marketplace and whittle
22 away that advantage.

23 Q. Could I have you turn to page 192 of your
24 deposition transcript, please.

25 EXAMINER PRICE: Could I have a page

1 reference.

2 MS. YOST: 192.

3 EXAMINER CHILES: Is that the Volume I?

4 MS. YOST: Volume II, I did not give it
5 to you. I have copies.

6 EXAMINER CHILES: Thank you.

7 MS. YOST: May I approach, your Honor?

8 EXAMINER PRICE: You may.

9 Q. (By Ms. Yost) Are you at page 192, sir?

10 A. Yes, I am.

11 Q. I will give the examiners some time to
12 turn to that page.

13 A. I'm there.

14 Q. Page 192, line 3, "Question: Do you have
15 a definition for market power when used in the
16 competitive procurement markets?

17 "Answer: I personally --

18 "Question: Sir, you're the director of
19 competitive procurement, correct?"

20 There's an objection there, line 10,
21 "Answer: Market power may be defined as excess or
22 extra returns due to positional advantage."

23 Did I read your answer on lines 10 and
24 11 correctly?

25 A. You did. However, I gave --

1 Q. Thank you --

2 A. -- that same response to a question about
3 economic rents.

4 Q. So using your definition --

5 MR. KUTIK: Your Honor, the witness
6 didn't finish the answer.

7 A. I'd like to correct the record. When you
8 asked me a definition about economic rents, I gave
9 you this definition. Market power is classified by
10 FERC, or defined by FERC, as market participants,
11 large market participants, who are withholding
12 supply.

13 Q. Using your definition of market power on
14 lines 10 and 11, if a seller controlled over
15 50 percent of the supply in the in-state all
16 renewable REC market --

17 EXAMINER PRICE: I'm sorry, page 10 and
18 11 of what?

19 MS. YOST: I'm sorry. I was using the
20 definition of market power on lines 10 and 11 of his
21 deposition transcript, page 192, that "market power
22 may be defined as excess or extra returns due to
23 positional advantage."

24 Q. Using that definition, if a seller
25 controlled over 50 percent of the supply in the

1 in-state all renewable REC markets, could that seller
2 exert market power?

3 A. Again --

4 MR. KUTIK: Objection.

5 EXAMINER PRICE: There's an objection
6 pending.

7 Grounds, Mr. Kutik?

8 MR. KUTIK: Your Honor, the witness said
9 what his definition of market power is. He does not
10 believe market power is what he said in his
11 deposition, and he said he wanted to correct that,
12 and he has. It's unfair for him now that he
13 indicated that is not the correct definition to se
14 that definition.

15 EXAMINER PRICE: Sustained.

16 Q. Mr. Stathis, are you now stating that
17 anytime you use the term "market power," you're
18 referring to the FERC definition for market power?

19 A. The FERC definition of market power is a
20 definition that all regulated commodity sourcing
21 employees in their training about affiliate
22 restrictions and antimarket manipulation training
23 have to observe and agree to.

24 Q. So that's a very specific definition of
25 market power related to affiliate transactions,

1 correct?

2 A. Yes.

3 Q. So if a seller controlled over 50 percent
4 of the supply in the in-state all renewable REC
5 markets, could that seller receive excess or extra
6 returns due to positional advantage?

7 A. If you're saying can he earn economic
8 rents? I think economic rents are something that
9 exists in most markets. The only market that
10 economic rents are zero are in a -- theoretically in
11 the economic textbooks under perfect competition
12 where price equals marginal costs, there are no
13 economic rents. But those other markets are not
14 defined as perfectly competitive so there's usually
15 some, yes.

16 if Somebody has an advantage making some
17 sort of innovation for earning economic rents. I
18 think that's healthy in a marketplace and drives new
19 suppliers into the market. So to answer your
20 question, it's certainly possible and expected that
21 somebody in that position could be earning economic
22 rents.

23 MS. YOST: Your Honor, may I have a few
24 minutes. We may be concluding with the public
25 version. I can move on to the --

1 EXAMINER PRICE: Let's go off the record.

2 (Discussion off the record.)

3 (Recess taken.)

4 EXAMINER PRICE: Back on the record.

5 Please proceed.

6 MS. YOST: Thank you.

7 Q. (By Ms. Yost) Would you agree there was
8 independent broker market price and liquidity
9 information in regards to RFP 1 for in-state all
10 renewable RECs?

11 A. For the Ohio in-state all renewable REC
12 category in RFP 1, we had liquidity information that
13 we received telephonically from brokers, but I don't
14 recall any indications on any -- any price indication
15 bid and ask, any indications on any products.

16 Q. Would you agree that there was
17 independent broker market price and liquidity
18 information in regards to RFP 2 for in-state all
19 renewable RECs?

20 A. Again, for that same category, I think
21 the state of the broker market in the RFP 2 in 2009
22 was basically still limited to -- was extremely
23 limited, limited to liquidity information.

24 Q. And would your answer be the same for
25 2010? Excuse me, for RFP No. 3.

1 I will restate the question. Was there
2 independent broker market price and liquidity
3 information in regard to request for proposal 3 for
4 in-state all renewable RECs?

5 A. I'm trying to recall the timing, because
6 by the end of 2010, there was a few quotes that I
7 saw -- again, they were quotes, there's not any
8 indications of actual deals, nor did they indicate a
9 volume. But I still believe at the time RFP 3 went
10 to market, the only thing the FEOU utilities had was
11 liquidity information from brokers.

12 Q. What was the last date that the companies
13 could have purchased renewable energy credits to
14 comply with the 2009 renewable energy benchmarks?

15 A. I believe post dates this three year --
16 excuse me -- three-month true-up period following the
17 end of the energy year, so in this case for calendar
18 year 2009, I believe March 31, thereabouts,
19 March 31 would have been the amount of time.

20 Q. You mean March 31, 2010?

21 A. Yes, excuse me.

22 EXAMINER PRICE: Do you have a reference
23 for the benefit of our understanding, a rule you can
24 refer to?

25 THE WITNESS: I think in the -- I think

1 in most states that rule is laid out -- I don't know
2 if it's in 4901. It might be. I know most states
3 have a three year -- excuse me -- a three-month
4 window to true-up.

5 EXAMINER PRICE: Do you have a present
6 recollection of Ohio's rule?

7 THE WITNESS: I don't.

8 EXAMINER PRICE: Okay.

9 MS. YOST: I'm sorry, your Honor.

10 EXAMINER PRICE: I'm done.

11 Q. (By Ms. Yost) Was the PUCO staff informed
12 of the prices of the results of RFP 1 before those
13 results were accepted?

14 A. Of RFP 1?

15 Q. Yes.

16 A. Were they informed? Not to my knowledge.

17 Q. Was the staff informed of the prices of
18 the results of the RFP 2 before those results were
19 accepted?

20 A. Before they were accepted, not to my
21 knowledge.

22 Q. And is your answer for RFP 3 the same?

23 A. The same, not to my knowledge.

24 EXAMINER PRICE: Was the Commission staff
25 affirmatively notified of the results of RFP 1 and

1 RFP 2 before the planning process for RFP 3 began?

2 THE WITNESS: The prices received in RFPs
3 1 and 2, we have begun retiring RECs received during
4 those RFPs on March 31, 2010. So at some point,
5 March 31, 2010, the reserve account would have
6 reflected a lot of those retirement transactions
7 along with the pricing. Of course, the RFP went out
8 to the market in the summer, July of 2010.

9 EXAMINER PRICE: Thank you, but that's
10 not really what I'm asking. I understand the staff
11 could have known if they happened to look at the GATS
12 reserve account what the prices were. Did
13 FirstEnergy affirmatively notify the staff of the
14 results of RFP 1 or RFP 2 prior to the planning
15 process or the issuance of RFP 3?

16 THE WITNESS: Not to my knowledge.

17 EXAMINER PRICE: Is there any reason to
18 believe that somebody -- you would not have known.

19 THE WITNESS: I would not have known.

20 EXAMINER PRICE: Thank you.

21 MS. YOST: Your Honor, I believe that
22 concludes the portion of my public questions for the
23 witness.

24 Thank you.

25 EXAMINER PRICE: Thank you. At this time

1 we take a break until 1:30. At that time we will
2 resume OCC's cross-examination of the witness under
3 the confidential transcript.

4 Off the record.

5 (At 12:24 p.m., a lunch recess was taken
6 until 1:35.)

7 - - -
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

358

Wednesday Afternoon Session,
February 20, 2013.

- - -

EXAMINER PRICE: Let's go back on the
record. We will now proceed to the confidential
portion of our transcript.

(CONFIDENTIAL PORTION.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(PUBLIC PORTION.)

EXAMINER PRICE: Mr. Allwein, any

1 questions?

2 MR. ALLWIEN: I have no questions.

3 EXAMINER PRICE: Mr. Dougherty.

4 MR. DOUGHERTY: I just have a couple.

5 - - -

6 CROSS-EXAMINATION

7 By Mr. Dougherty:

8 Q. Good afternoon, I'm Trent Dougherty. I
9 represent the Ohio Environmental Council, and I just
10 have a couple of questions.

11 First, if you can go to your testimony, I
12 will go to it myself, on page 39 of your testimony,
13 line 18, where the sentence starts "since there was,"
14 and then it continues on page 40 with "no reliable
15 price history available for the In-State All
16 Renewable category, no statistical analysis could be
17 legitimately applied to develop such a limit price."
18 Do you see that?

19 A. Yes.

20 Q. What was missing that could have been
21 usable?

22 A. A continuous time series of data, of
23 renewable price data by product to develop limit
24 prices by product.

25 Q. And does that -- strike that.

1 Would you characterize that as a
2 limitation on the ability to -- a limitation on the
3 market?

4 A. Yes. That data did not exist, primarily
5 because there was no activity, or virtually no
6 activity, in that market so there was no recorded
7 pricing.

8 Q. And does that limitation exist now?

9 MR. KUTIK: Objection.

10 EXAMINER PRICE: Grounds?

11 MR. KUTIK: Same as before when Ms. Yost
12 asked that question, relevance.

13 EXAMINER PRICE: Sustained. This
14 proceeding is only examining what FirstEnergy -- the
15 information available to FirstEnergy in the years
16 2009, 2010, 2011.

17 Q. How would you characterize the market at
18 the time of RFP 1?

19 A. Is this the market for in-state all
20 renewables?

21 Q. In-state all renewables, correct.

22 A. Highly constrained.

23 Q. How would you describe the market in RFP
24 3, in-state renewable?

25 A. Constrained.

1 Q. How would you characterize the market
2 during the time of RFP 6?

3 A. Supply conditions are improving.

4 Q. Comparing the market during the time
5 of --

6 EXAMINER PRICE: Off the record.

7 (Discussion off the record.)

8 EXAMINER PRICE: Back on the record.

9 Q. All right. Let me restate my question.
10 So between the time of RFP 1 and the time of RFP 3,
11 would it be fair to say that the market has greatly
12 increased?

13 MR. KUTIK: Are we still talking in-state
14 all renewables?

15 MR. DOUGHERTY: In-state all renewables.
16 I will be talking about in-state all renewables for
17 the next couple minutes, only.

18 A. I believe given what I just -- the state
19 of the market I just characterized, I think it's fair
20 to say that the supply picture improved somewhat in
21 that time frame going from highly constrained to
22 constrained to improving.

23 Q. In the other 14, perhaps -- I think you
24 mentioned 20 RFPs, is that correct, that you have
25 dealt with?

1 A. 20 minus the 8 in Ohio.

2 Q. Correct. So in those others, have you
3 been a part of RFPs during a process such as this
4 where a brand-new market emerged?

5 A. The Ohio market is unique because -- the
6 in-state all renewable category is unique because we
7 had an RFP right in the inaugural year. I'm not sure
8 that's been the case elsewhere. Markets were a
9 little more mature before we stepped in with an RFP
10 in Pennsylvania and New Jersey.

11 Q. When were you made aware that the other
12 investor-owned utilities in Ohio had issued RFPs for
13 2009 RECs, be them in-state, be them all renewables,
14 proposed in Senate Bill 221?

15 MR. KUTIK: Objection, I don't know if
16 the witness testified that he was aware that other
17 utilities had issued RFPs for 2009. I think he said
18 they were able to fulfill the requirements.

19 EXAMINER PRICE: Why don't you ask him
20 the foundation question first.

21 Q. Were you aware that the other Ohio
22 investor-owned utilities had issued RFPs for 2009
23 RECs?

24 A. Not all of the utilities mentioned in Dan
25 Bradley's presentation, but some, yes.

1 Q. Which ones?

2 A. I heard of the DP -- Dayton Power and
3 Light, and I think there's an AEP.

4 Q. You said you heard of those. Did you
5 know any of the details?

6 A. No.

7 Q. Was it solely in the FEOUs' control as to
8 when to conduct RFP 1?

9 A. Are you referring to the exact timing?

10 Q. Yes.

11 A. To the extent it couldn't happen before
12 we got the final order in March, 2009, where for the
13 first time we're learning the details of the MRO,
14 which basically for the first time acknowledged the
15 renewable requirement will not be part of the SSO
16 auction, and, therefore, the responsibility of
17 suppliers. It will now be the responsibility of the
18 utilities. And once you learn that, you have to
19 start preparing now that you know you're going to
20 have to hold RFPs. Much of the first part of the
21 year is eliminated.

22 But, yeah, to the extent the latter half
23 of the year is basically under the utility's control
24 to determine when to step into the market, if I heard
25 your question correctly.

1 MR. DOUGHERTY: I don't know if -- can I
2 get my question?

3 THE WITNESS: Could I get the question
4 and answer reread?

5 (Record read.)

6 Q. So is the answer "yes"?

7 MR. KUTIK: Objection.

8 Q. After the order.

9 MR. KUTIK: I withdraw my objection.

10 MR. DOUGHERTY: I got it.

11 EXAMINER PRICE: Thank you.

12 A. Yes, after the order.

13 MR. DOUGHERTY: Thank you. No further
14 questions.

15 EXAMINER PRICE: Mr. McDaniel.

16 MR. McDANIEL: No questions.

17 EXAMINER PRICE: Ms. Kyler.

18 MS. COHN: No questions.

19 EXAMINER PRICE: Mr. Lavanga.

20 MR. LAVANGA: Yes, your Honor.

21 - - -

22 CROSS-EXAMINATION

23 By Mr. Lavanga:

24 Q. Good afternoon, Mr. Stathis.

25 A. Good afternoon.

1 Q. My name is Michael Lavanga, and I'm the
2 attorney for Nucor Steel. I just have a couple
3 questions for you. Can you turn to page 24 of your
4 testimony. Are you there?

5 A. Yes.

6 Q. Okay. Now, this chart shows the RFP
7 results for RFP 1, correct?

8 A. Correct.

9 Q. And in RFP 1 you procured REC's for years
10 2009, 2010, and 2011, correct?

11 A. Across all four categories, no, just for
12 in-state all renewable and the all states renewable,
13 that's correct.

14 Q. Okay. But you attempted to procure REC's
15 for all three of those years.

16 A. Correct.

17 Q. Instead of trying to procure REC's for
18 2010 and 2011 in 2009, you could have just waited
19 until 2010 to, say, procure the REC's needed for 2010
20 compliance assuming those REC's were available in the
21 market, correct?

22 A. Again, I think -- well, a lot of
23 different structures are possible, certainly the one
24 you just mentioned. The overriding philosophy that's
25 part of not only our risk policy but the way we do

1 all procurements, whether it's power or renewable, is
2 a laddering approach. You want to add time,
3 diversity. You don't want to gamble. You don't want
4 to speculate as to, hey, we think the market is going
5 to be illiquid for this amount of time, therefore, I
6 won't ladder.

7 That's the whole point of laddering, to
8 take the guesswork out, the speculation out, and buy
9 over time, and that's been consistently used in New
10 Jersey, Pennsylvania, and Ohio on the power side and
11 the renewable side.

12 Q. Thank you. But theoretically you still
13 could buy all of what you needed in that compliance
14 year?

15 MR. KUTIK: Objection, asked and
16 answered.

17 EXAMINER PRICE: Sustained.

18 Q. Is there a period of time you need to
19 wait after you have purchased a REC to retire it?

20 A. Well, it has been delivered to you in
21 GATS. Once it's delivered, it moves into what we
22 call a CEEPs account, and it sits there until we're
23 ready to retire it. We move it to a reserve account
24 in GATS that allows the Commissions in various states
25 to accept it for compliance.

1 Q. Okay. What's that time frame?

2 A. I don't know that off the top of my head.

3 Q. Okay. Do you know if there's a time over
4 the course of a year by which RECs need to be
5 purchased if you want to retire those RECs in that
6 same year?

7 A. Well, they need to be -- remember,
8 there's a three-month true-up period, so I believe
9 you can procure them or buy them by March 31 --

10 Q. Of the following year?

11 A. Of the following year, as long as they're
12 the right vintage. If they're vintage 2009 and the
13 GATS certificate has been created, you can move it
14 into your account and use it for compliance.

15 Q. Okay. And the benchmark for a given
16 compliance year, let's use 2010 as an example, that's
17 the three-year average nonshopping kilowatt in sales
18 for three previous years, correct?

19 A. Correct.

20 Q. Is it fair to say you don't know the
21 exact numbers of RECs you are going to need to buy
22 for a compliance year until that compliance year?

23 A. Yes.

24 Q. Mr. Stathis, can you turn to page 39 of
25 your testimony. I refer you to footnote 4. Footnote

1 4 reads, "The only reference in Ohio Revised Code
2 Section had 4928.64 to anything related to cost is
3 the three percent test set forth in
4 Section 4928.4(C)(3). Even then, under the
5 Commission's rules, a failure of the three percent
6 test does not automatically allow a utility to avoid
7 its statutory procurement obligation. At most,
8 'failing' the test would provide a utility with the
9 option to file an application which, if granted,
10 would only delay (rather than totally relieve) the
11 compliance obligation."

12 My question, Mr. Stathis, is do you know
13 whether there's anything in the statute that says
14 that if a utility files an application asking to be
15 relieved from the compliance test due to failing the
16 3 percent test, that the compliance obligation would
17 be delayed and not relieved?

18 A. I don't know. I've seen the exact words
19 in 4928.64; however, I have not reviewed 4901.

20 Q. Do you know whether it says anywhere in
21 the Commission's rules or regulations if a utility
22 files an application asking for relief from its
23 compliance obligation due to failing the 3 percent
24 test that this compliance obligation would only be
25 delayed and not relieved?

1 THE WITNESS: Can I have the question
2 read back.

3 (Record read.)

4 A. There may be a reference in 4901. I
5 can't state that authoritatively right this minute.

6 Q. Do you have a copy of 4901, the rules,
7 with you, Mr. Stathis?

8 A. 4928.64.

9 Q. I'm referring to the Commission's rules.

10 A. I do not have a copy.

11 MR. LAVANGA: Your Honor, may I approach?

12 EXAMINER PRICE: You may.

13 Q. Mr. Stathis, if I could ask you to review
14 the cost cap section.

15 A. Okay.

16 Q. I'll ask my question again. Now, does it
17 say anywhere in that rule, which addresses the cost
18 cap, that if the utility files an application asking
19 to be relieved from its compliance obligation due to
20 failing the 3 percent test, that the compliance
21 obligation would only be delayed and not relieved?

22 A. While that exact language is not here,
23 Section (b) (3) does say, in case the Commission makes
24 such a determination, the electric utility or
25 electric service company may not be required to fully

1 comply with a specific benchmark.

2 Q. Mr. Stathis, can I refer your attention
3 to the section immediately above that, the force
4 majeure section in the rules. Can you read to me
5 Section (B) (2)?

6 A. The Commission retains the right to
7 increase a future year's compliance obligation by the
8 amount of any under-compliance in the previous year
9 that is attributed to a force majeure determination.

10 Q. You'll agree with me that same or similar
11 language is not contained in the cost cap provision.

12 A. Yes.

13 MR. LAVANGA: Thank you, Mr. Stathis.
14 That's all I have.

15 EXAMINER PRICE: Staff.

16 MR. LINDGREN: Thank you, your Honor.

17 - - -

18 CROSS-EXAMINATION

19 By Mr. Lindgren:

20 Q. Good afternoon, Mr. Stathis. My name is
21 Tom Lindgren. I'm one of the staff attorneys in this
22 case.

23 A. Good afternoon.

24 Q. Could you turn to page 3 of your
25 testimony, please. On page 3 of your testimony

1 beginning on line 11, you refer to the "undisputed
2 fact that RECs were available for purchase." Would
3 you say that the RECs were reasonably available for
4 purchase at this time period?

5 A. Yes.

6 Q. In your view is there any difference
7 between the terms "available" and "reasonably
8 available"?

9 A. Reasonably available is procured through
10 competitive means, through an RFP process that is a
11 reasonably designed one. Available may mean RECs
12 that are procured through a noncompetitive manner or
13 a manner that has been deemed as not competitive in
14 nature.

15 Q. So in your view the term "reasonably"
16 just refers to the process for procurement?

17 A. It means through a competitive process.

18 Q. And the term "reasonably" in your review
19 would not relate at all to the price?

20 A. Not if it's been procured through a
21 competitive process.

22 Q. Thank you. Now, would you now turn to
23 page 21 of your testimony. On page 21, beginning on
24 line 17, you make this statement that "In the event
25 the supply and demand dynamics proved inadequate, RCS

1 would employ a contingency plan that it had
2 previously used in past power procurements."

3 With regard to that statement, would you
4 explain what you mean by the "dynamics proved
5 inadequate"? What does that mean?

6 A. It means we have an inadequate number of
7 bids to fill our position.

8 Q. So it simply refers to the sufficiency of
9 supply; is that right?

10 A. The quantity of supply.

11 Q. And it does not relate at all to the
12 price of the bids?

13 A. No.

14 Q. Would you turn to page 24 of your
15 testimony. I'm looking at the chart you have at the
16 top of page 24. Near the bottom of that chart you
17 have some notes, first is "C=constrained" and then in
18 parentheses "Less than desired number of bids or no
19 sufficient broker market offers/recorded
20 transactions." What would be the desired number of
21 bids for purposes of that definition?

22 A. Meaning 100 percent of column 2 -- column
23 3, RFP desired RECs.

24 Q. So we simply refer to the -- whether the
25 number of RECs were fulfilled and not to the number

1 of bidders; is that right?

2 A. Yes.

3 Q. And then under that you have "A=Readily
4 Available," and then in parentheses "Adequate bids or
5 significant broker market offers/recorded
6 transactions."

7 Where does the term -- what is your
8 definition or understanding of the term "adequate
9 bids"?

10 A. Achieving your desired bid target.

11 Q. And what would be the desired bid target?
12 Would that be the number of RECs?

13 A. Yes.

14 Q. So once again, this would not refer to
15 the number of bids submitted.

16 A. Correct.

17 Q. Would you now turn to page 28 of your
18 testimony. On page 28 beginning on line 11, you make
19 that statement, "This requirement proved to be a
20 significant barrier to participation by suppliers."

21 What do you mean by "this requirement"?

22 MR. KUTIK: I'm sorry, counsel, where are
23 you referring to?

24 MR. LINDGREN: Page 28, beginning on line
25 11.

1 MR. KUTIK: Thank you.

2 MR. LINDGREN: Sure.

3 Q. What does "this requirement" refer to?

4 A. The requirement to be certified.

5 Q. And why do you see that as a significant
6 barrier to participation?

7 A. After discussions with Navigant, it was
8 their view that this process was not well -- well
9 understood by potential suppliers.

10 Q. Aren't there published rules for
11 certification as to suppliers?

12 MR. KUTIK: Objection.

13 EXAMINER PRICE: Grounds?

14 MR. KUTIK: Argumentative.

15 EXAMINER PRICE: Sustained.

16 Q. Would you now turn to page 31 of your
17 testimony. I'm going to skip that. Please turn now
18 to page 32. Beginning on line 16, you refer to "The
19 FEOUs commissioned Navigant to canvass potential
20 suppliers of in-state RECS in an effort to solicit
21 feedback that may lead to an improved procurement
22 process." My question is, what areas, if any, did
23 you view as deficient that led to this engagement of
24 Navigant?

25 A. I'm not sure there was one particular

1 area that we viewed as deficient. We simply wanted
2 to put forth the best RFP solicitation that would
3 maximize bidder interest and make it bidder friendly
4 so we were sure it wasn't the bid instrument that was
5 keeping participation levels low.

6 Q. Turn to page 33 of your testimony,
7 beginning on line 3 you discuss a report produced by
8 Navigant. Do you know how many bidders were surveyed
9 or potential bidders were surveyed by Navigant and
10 how many actually responded?

11 A. I don't have that memorized, but Navigant
12 kept that data.

13 Q. Thank you. Would you now turn to page
14 34 of your testimony. On page 34, line 5, you make
15 the statement, "Only 2 bidders qualified and
16 submitted offers for this product in RFP 3." Are you
17 aware if both bidders bid on both 2010 and 2011 RECs?

18 A. I believe one bidder bid on both and the
19 other bidder bid -- only bid on one year, but I don't
20 know which of the years.

21 Q. Thank you. Continuing on page --

22 EXAMINER PRICE: Mr. Lindgren -- go
23 ahead. I had a question before we left page 34.

24 MR. LINDGREN: Thank you.

25 Q. Continuing on page 34 you have a chart at

1 the top there. On the lower part, which is headed
2 "2011 RECs," they're in-state all renewables and in
3 column labeled "2011 RFP desired RECs," you have
4 150,000. And the number of bid RECs bid were
5 150,269. There were more RECs bid than desired, it
6 appears. Yet over in the column on the right you
7 still label it C as constrained market. That doesn't
8 seem to square with your previous explanation. Can
9 you explain why you labeled it constrained?

10 A. Clearly the market is constrained from
11 not having any price information for brokers for
12 recorded transactions, and clearly the number of
13 certifications would also indicate a constrained
14 market. We didn't have an adequate number of bids in
15 that case.

16 Q. Well, I thought you told me previously
17 that the definition of constrained only referred to
18 the -- whether you had an adequate number of RECs
19 bid; is that right?

20 A. Yes.

21 Q. So are you changing that answer now?

22 A. I think from an RFP perspective, my
23 answer stands. But from a market perspective, I
24 believe the market liquidity rankings or qualifiers
25 that are on that chart are still correct. So the

1 column on the right is probably poorly labeled.

2 Q. Thank you. Mr. Stathis, you just made a
3 distinction between an RFP perspective and a market
4 perspective. From a market perspective is there a
5 desired number of bids?

6 A. I think from a market perspective, you
7 want to see broker information that's indicative that
8 the market has some liquidity to it and you can see
9 some transparent pricing. It was one of the things
10 we were hoping to do in our IRT meetings, was compare
11 Navigant --

12 Q. What's IRT?

13 A. Internal review team meetings, was to be
14 able to compare our RFP results with some liquid
15 market information, which ended up being nonexistent.

16 Q. From a market perspective, did you desire
17 more than one bid?

18 A. I think any -- any RFP you want a high
19 rate of participation. You want as many suppliers
20 coming in as possible.

21 Q. Thank you. Would you now turn to
22 page 35 of the testimony.

23 EXAMINER PRICE: Actually, Mr. Lindgren,
24 before you move from the page, I have questions on
25 the page.

1 I want to make sure I understand your
2 column headings first.

3 THE WITNESS: Okay.

4 EXAMINER PRICE: The second column has
5 date and says "REC Compliance Obligations." That is
6 your understanding at that point in time --

7 THE WITNESS: No.

8 EXAMINER PRICE: Why don't you tell me
9 what that -- explain the second column.

10 THE WITNESS: The second column, that was
11 our actual obligation.

12 EXAMINER PRICE: It was your
13 understanding of your obligation at that point in
14 time.

15 THE WITNESS: No, at the end of the year,
16 at the end of the compliance year.

17 EXAMINER PRICE: At the end of the
18 compliance year.

19 THE WITNESS: Right.

20 EXAMINER PRICE: But that was your state
21 of knowledge at the time of the bid.

22 THE WITNESS: The state of knowledge at
23 the time of the bid was second.

24 EXAMINER PRICE: Right.

25 THE WITNESS: So the third column is

1 really a forecast of what we think we're going to
2 have to use for compliance.

3 EXAMINER PRICE: Okay. And then "RECs
4 Bid" obviously is self-explanatory.

5 THE WITNESS: Right.

6 EXAMINER PRICE: You published the number
7 in the third column, right? The bidders knew, for
8 example, in 2010, all in-state all renewables bidders
9 knew you were looking for precisely 29,676 RECs.

10 THE WITNESS: Yes.

11 EXAMINER PRICE: And that's why one
12 bidder got that number -- pegged it right on the
13 nose.

14 THE WITNESS: Yes.

15 EXAMINER PRICE: Then we have
16 Navigant-recommended RECs, the actual number you
17 purchased, and then what is the last -- the next
18 column, cumulative percentage of obligations
19 purchased?

20 THE WITNESS: As you step through the
21 obligations 1, 2, and 3, this testimony is trying to
22 show the reader a benchmark of how we're doing on a
23 cumulative basis.

24 EXAMINER PRICE: Okay.

25 THE WITNESS: So by the third RFP, we've

1 now completed 100 percent of our 2010 and 2011
2 obligation.

3 EXAMINER PRICE: Excellent. Now, turning
4 back to page 21 of your testimony, the sentence
5 beginning line 11, I ask you to read that for me,
6 please.

7 THE WITNESS: Line 11?

8 EXAMINER PRICE: Yes, the sentence
9 beginning line 11.

10 THE WITNESS: "RCS believed that the 2009
11 RFP would seek 100% of 2009 compliance obligations,
12 and some percentage of 2010 and 2011; the 2010 RFP
13 would seek the remaining percentages needed for 2010
14 compliance and some additional percentage of 2011;
15 and the 2011 RFP would seek the residual percentages,
16 per product, needed to 2011 compliance."

17 EXAMINER PRICE: And this explains your
18 laddering strategy which was to hold one RFP per
19 year.

20 THE WITNESS: Yes.

21 EXAMINER PRICE: But in reality for 2011,
22 you only had a two-step ladder; is that right? You
23 would purchase whatever you would get in 2009 and the
24 balance in 2010, and some additional percentage of
25 2011 meant whatever was remaining; is that correct?

1 THE WITNESS: Yes.

2 EXAMINER PRICE: So your ladder was two
3 steps.

4 THE WITNESS: Ended up being, yes.

5 EXAMINER PRICE: That was the intent.

6 THE WITNESS: Yes.

7 EXAMINER PRICE: That isn't what it ended
8 up being, that was your intent.

9 THE WITNESS: Yes.

10 EXAMINER PRICE: Thank you, Mr. Lindgren.

11 Q. (By Mr. Lindgren) Mr. Stathis, would you
12 please turn to page 35 in your testimony. Beginning
13 on line 19, you make this statement, "The FEOUs
14 suggested the possibility of declining Navigant's
15 purchase recommendation for the 2011 In-State All
16 Renewable RECs at \$500.00/REC and pursuing a
17 counteroffer."

18 Do you know who specifically with the
19 FEOUs made this suggestion? Do you know the name of
20 the person or persons?

21 A. I believe the person who brought that up
22 was Ebony Miller.

23 Q. Thank you. And did you say she was part
24 of the internal review team at that time?

25 A. Yes.

1 Q. On page 36 of your testimony, continuing
2 with your answer to that question, you discuss
3 Navigant reviewing the bid rules and concluding that
4 a counteroffer of this type was not precluded under
5 those rules. Do you know if the -- if they would
6 have been permitted under the bid rules for RFP 1 and
7 RFP 2?

8 A. Since I wasn't privy to a lot of the
9 findings from Navigant on that issue or the legal
10 review of that issue since I was cut away from that
11 negotiations, I'd have to say I don't know.

12 Q. Thank you. Are you aware of anyone from
13 the FEOUs raising the possibility of making a
14 counteroffer in response to RFPs 1 and 2?

15 A. No.

16 Q. On page 36 of your testimony beginning on
17 line 10, you make the statement that "The lower price
18 for 2011 In-State All Renewable supply saved the
19 FEOUs and their customers approximately \$24 million."

20 MR. KUTIK: Actually, it's 25, as
21 corrected.

22 MR. LINDGREN: Okay, I'm sorry.

23 Q. How was this figure of \$25 million
24 calculated?

25 MR. KUTIK: Your Honor, I believe that

1 could reveal confidential information, so I wonder if
2 it would be acceptable with that caveat to have the
3 witness just state generally without confirming
4 specific numbers.

5 EXAMINER PRICE: That would be fine with
6 the Bench.

7 Mr. Lindgren?

8 MR. LINDGREN: Yes, that would be
9 acceptable to me.

10 MR. KUTIK: If he can respond as such.

11 A. Yes. Once I learned the final price, the
12 final negotiated price, I took the difference between
13 that and the original offer, the original bid price
14 that came in, that differential times the quantity of
15 145,269 to get that price.

16 Q. Thank you. Would you now turn to page 38
17 of your testimony. Beginning on line 9 you discuss
18 the contingency methods employed during the RFPs. Is
19 it correct that price was not a consideration for
20 these contingency plans for RFP 1 and RFP 2?

21 A. Are you asking me were there price
22 contingencies for RFP 1 and RFP 2?

23 Q. Yes.

24 A. RFP 2 was, in fact, a contingency RFP.
25 There was an attempt to reenter the markets reissuing

1 the RFP to seek additional supply.

2 I mean, to the extent -- to the extent
3 supply and demand are now evident again or we're now
4 in the market doing another RFP, it's a contingency.
5 It's going to result in some new price, presumably.
6 So I don't know if that answers your question.

7 Q. I believe you've already testified that
8 no limit price was established with these RFPs; is
9 that right?

10 A. Right. Yes.

11 Q. Beginning on line 16, on page 38, you
12 make the statement, "When limited results were
13 achieved through its traditional contingency methods,
14 RCS modified its contingency approach in light of the
15 constrained supply market conditions and expanded its
16 contingency approach in light of constrained supply
17 market conditions and expanded its contingency
18 actions to include supply counter-offer, early
19 deliveries from suppliers (in-state solar) and, as a
20 last resort, force majeure filings."

21 My question is, did the FEOUs interpret
22 the result of RFP 1 and RFP 2 as indicative of the
23 constrained supply market and, if so, why did it not
24 expand its contingency actions at that time?

25 A. Which product are you talking about?

1 Q. The in-state all renewables.

2 MR. KUTIK: I'll still object. What
3 year? What years?

4 MR. LINDGREN: RFP 1 and RFP 2.

5 MR. KUTIK: They are still multi-years.

6 EXAMINER PRICE: Please specify by RFP
7 1 and RFP 2 which compliance year are you talking
8 about.

9 MR. LINDGREN: I believe it was 2009.

10 THE WITNESS: Could you read back the
11 question again, please.

12 (Record read.)

13 A. From an RFP perspective, we met our
14 compliance. We had enough bids at the end of RFP
15 2 to satisfy 100 percent of our 2009 need. So while
16 the market may have remained constrained, we had
17 adequate RECs to be in compliance.

18 Q. So you saw no need based on the prices
19 bid to expand your contingency actions at that time;
20 is that right?

21 A. That's right.

22 Q. Thank you. Would you now turn to page 40
23 of your testimony. Beginning on line 3 you make the
24 statement, "Further, exceeding a maximum price
25 established by the independent evaluator or FEOUs, by

1 itself, would not be a sufficient basis to constitute
2 a force majeure event or have eliminated the
3 statutory obligation to purchase the RECs when
4 available."

5 Mr. Stathis, are you aware that the
6 American Electric Power Ohio utilities made a force
7 majeure application citing, in part, the costs bid
8 into their market and that that application was
9 granted?

10 MR. KUTIK: Objection, assumes facts not
11 in evidence.

12 MR. LINDGREN: I'm just asking if he's
13 aware of that.

14 MR. KUTIK: That assumes facts.

15 EXAMINER PRICE: We'll allow it.

16 A. What year was that?

17 Q. It was in 2009.

18 A. No, I'm not aware.

19 Q. Thank you. Would you now turn to
20 page 42 of your testimony --

21 EXAMINER PRICE: I would like to follow
22 up with that. Did you review the force majeure
23 filings before preparing your testimony? More
24 importantly -- that's not a fair question. In your
25 role with RCS did you review the force majeure

1 filings that were made with the Commission by other
2 utilities? I'm sure you reviewed your own force
3 majeure filings. Did you review the force majeure
4 filings by other utilities to get an understanding of
5 having the Commission's perspective on favorable
6 determinations?

7 THE WITNESS: Did I read them?

8 EXAMINER PRICE: Yes.

9 THE WITNESS: No.

10 EXAMINER PRICE: No, okay, thank you.

11 Q. (By Mr. Lindgren) Thank you. Return to
12 page 42 of your testimony, beginning on line 11, you
13 make the statement that "RCS employed a number of
14 contingency events over the first three RFPs due to
15 the constrained supply conditions for three of the
16 four renewable products."

17 Would you explain what contingency events
18 RCS employed?

19 A. As my testimony points out, issuing
20 additional RFP, entering broker market transactions,
21 counteroffers, early deliveries, and force majeure
22 for solar.

23 Q. And which renewable products were those
24 used for?

25 A. Issuing additional RFPs for in-state

1 solar, all state solar, and in-state all renewable;
2 entering into broker market transactions when
3 available was for both solar, counteroffer was
4 in-state all renewable, obtaining early deliveries
5 was from in-state solar. Filing of force majeure was
6 for both in-state solar and all state solar.

7 Q. Thank you. Would you now turn to
8 page 43 of your testimony. Beginning on line 18, you
9 make this statement, "None of these alternatives" --
10 referring to the alternatives suggested under the
11 Exeter report -- "would have likely yielded a
12 different result or would have been feasible." What
13 is your basis for making that statement?

14 A. Given that we had provided staff with
15 information on our approach and were giving them
16 process information through webinars and also the
17 results of our RFPs on a delayed basis through our
18 GATS account transfer, the FEOUs did not see any
19 upside of meeting with the Commission to discuss the
20 results that were given.

21 Q. But you never directly conveyed the
22 results of RFPs 1 and 2 to the Commission staff, did
23 you?

24 A. The FEOUs did not.

25 Q. Thank you. So you don't know what the

1 Commission or staff would have suggested had you
2 conveyed that information to them directly, do you?

3 A. I personally don't.

4 Q. Thank you. Now turn to page 46 of your
5 testimony. Page 46, beginning on line 16, you make
6 the statement, "Further, as far as RCS is aware,
7 there was no published information on development
8 costs in Ohio in 2009 and 2010." Did you know prior
9 to entering into contracts with the suppliers, from
10 what facilities the RECs were to be sourced under the
11 bids?

12 MR. KUTIK: Could I have the question
13 read, please.

14 EXAMINER PRICE: Please.

15 (Record read.)

16 A. In Phase I, suppliers offer indicative
17 sourcing of where they think they may want to source
18 their bids from. It's not a requirement that that
19 end up being the exact source if they're a successful
20 bidder.

21 Q. Thank you. What about Phase II?

22 A. I don't recall on the spreadsheet seeing
23 a source.

24 MR. LINDGREN: Thank you. Thank you, I
25 have no further questions.

1 EXAMINER PRICE: Thank you.

2 Before we go onto redirect, I had a
3 couple follow-up questions.

4 - - -

5 EXAMINATION

6 By Examiner Price:

7 Q. I wanted to go back to clarify this issue
8 about what does and doesn't qualify for force
9 majeure. At the time you reviewed the results from
10 RFP 3, had you reviewed any of the pending or any of
11 the Commission approvals of other utilities or
12 FirstEnergy's first force majeure determinations?

13 A. I reviewed FirstEnergy's.

14 Q. Did you review any other utilities?

15 A. I personally didn't. That's not to say
16 someone in our rate department may have done that.

17 MR. KUTIK: I'm sorry, what time period
18 was your question?

19 Q. My question is at the time they reviewed
20 RFP 3, I believe there were some force majeure
21 determinations issued between RFP 2 and RFP 3.

22 But you had not?

23 A. I personally had not.

24 Q. Had you reviewed them at the time you
25 prepared your testimony when you say what is and

1 isn't the basis or causes for a force majeure
2 determination?

3 A. I did not.

4 Q. If you could turn to page 40 again,
5 beginning on line 12, you relate some factors from a
6 Navigant market assessment report; is that correct?

7 A. Yes.

8 Q. And you received that report on
9 October 18, 2009?

10 A. On or about October 18, correct.

11 Q. When was the next Navigant assessment
12 report you would have received?

13 A. You are talking about a documented
14 report, not the information we normally get?

15 Q. Right.

16 A. From Navigant.

17 Q. From Navigant.

18 A. Summer, 2010.

19 Q. June?

20 A. June.

21 Q. 2010?

22 A. Correct.

23 Q. In the Navigant market report they
24 indicated, "Supply conditions for In-State All
25 Renewable product were marked by few willing and

1 certified suppliers"; is that correct?

2 A. Yes.

3 Q. And they indicated that "there were major
4 uncertainties with respect to economic conditions
5 that could support new and renewable project
6 development"; is that correct?

7 A. That's correct.

8 Q. Further, they indicate credit conditions,
9 be it stemming from the economic difficulties in 2008
10 and '09, credit conditions concerning financing for
11 new projects were a significant limiting factor as
12 specified by Witness Bradley and Earle.

13 A. That's correct.

14 Q. And you put these in your testimony
15 because you thought they were significant; is that
16 correct?

17 A. Yes.

18 Q. Were they obstacles?

19 MR. KUTIK: Your Honor, I guess I would
20 object. Obstacles to what?

21 EXAMINER PRICE: Obstacles to
22 FirstEnergy's compliance with the renewable
23 requirement.

24 Q. Let me rephrase, impediments to
25 FirstEnergy's compliance with the renewable

1 compliance.

2 A. To the extent they hindered development
3 and supply, yes.

4 Q. Did you communicate any of these factors
5 to the Commission staff in between RFP 2 and RFP 3?

6 A. I personally did not.

7 Q. I will hand you a document. Mr. Kutik,
8 I'm sure, would like to come and see it. It is dated
9 April 15, 2010, Case No. 10-506-EL-ACP, the
10 Alternative Energy Resource Plan, for FirstEnergy for
11 2010 through 2020.

12 A. Yes.

13 Q. Have you seen the document before?

14 A. Yes.

15 EXAMINER PRICE: By my own motion we will
16 take administrative notice of this document at this
17 time.

18 Q. Now, can you show me in this document
19 where those significant impediments are related to
20 the Commission? Take your time.

21 A. While those specific references aren't
22 identified, they are encapsulated in the first
23 sentence on page 6, which references a "tight
24 market."

25 Q. Limited availability of renewable energy

1 resources. In fact, you go on to point out it is the
2 in-state requirements that was the difficulty.

3 A. Yes.

4 Q. Then you go on, for example, to use solar
5 RECs.

6 A. Yes.

7 Q. For which you already received a force
8 majeure determination and already made the case that
9 NCI had only identified one megawatt per solar
10 resources installed in Ohio.

11 A. Correct.

12 Q. Can you show me where in this document
13 you indicate that FirstEnergy was aware that the Ohio
14 in-state all renewables market was going to be
15 constrained for a period of one year ending after
16 your RFP 3?

17 A. I cannot.

18 EXAMINER PRICE: Thank you. That's all I
19 have.

20 Redirect.

21 MR. KUTIK: Your Honor, my colleague,
22 Mr. Harvey, is on route for a document I may need,
23 and I'd like to confer with my colleagues.

24 EXAMINER PRICE: How much time do you
25 need?

1 MR. KUTIK: I think I need ten minutes.

2 EXAMINER PRICE: Let's make it 15 because
3 I think everybody needs a break. Come back at 4:30.

4 (Recess taken.)

5 EXAMINER PRICE: Okay. Let's go back on
6 the record. We are on the public portion of the
7 transcript; is that correct?

8 Just remind everybody we are in the
9 public portion of the transcript.

10 EXAMINER PRICE: Mr. Kutik, redirect.

11 MR. KUTIK: Thank you, your Honor.

12 - - -

13 REDIRECT EXAMINATION

14 By Mr. Kutik:

15 Q. Much earlier today, you attempted to
16 provide an explanation to your -- the basis of your
17 understanding about the bases needed for limit
18 pricing, and the motion to strike your response was
19 granted.

20 Would you like to now provide us with the
21 bases of your understanding about the bases for limit
22 pricing.

23 A. Yes. From my experience with how the
24 risk group calculates the power procurement
25 reservation prices used in the Ohio auctions, those

1 folks typically need, at a minimum, three years of
2 high quality data in order to construct a limit
3 price.

4 Now, of course, on the power side you're
5 talking electricity and hourly pricing for PJM, so
6 that's a fairly extensive amount of data for them to
7 plug into their statistical models. So it's high
8 quality data and that type of data, while I think
9 we'll eventually get there on a daily basis for
10 renewables, to have three years of that type of data
11 on the renewable side just does not exist today.

12 Q. You were also asked some questions about
13 the companies' plan for laddering and particularly
14 when that plan was decided versus or at least there
15 was a decision made or a tentative decision made
16 relative to the time that Navigant was brought
17 onboard. Did you have discussions with Navigant
18 subsequent to Navigant's consult -- retention as a
19 consultant, as an independent evaluator?

20 A. Before they were brought on?

21 Q. At the time and after they were brought
22 on.

23 A. Yeah. After they were brought on,
24 Navigant reviewed our laddering approach and thought
25 it was a very reasonable way to add time, diversity

1 to our portfolio.

2 Q. You were also asked some questions from
3 Attorney Examiner Price about the various reports
4 that Navigant provided about market conditions, and
5 these were, to be clear, written reports, correct?

6 A. Correct.

7 Q. Between the written reports, were there
8 discussions between you and Navigant about market
9 conditions?

10 A. Yes. Frequently Navigant conveyed their
11 perceptions, their discussions with others concerning
12 market conditions and the availability of different
13 products that we were looking for, not exclusively to
14 in-state, but also the solar categories which were
15 very constrained at the time as well.

16 Q. You were asked a question this morning
17 which I believe went as follows: "Does the company
18 have an obligation to procure all RECs procured
19 through a competitive process?" And your answer was
20 "Yes." Would you like to expound on that answer?

21 A. Yes. The company believes the
22 regulations 4964 -- 4928.64 create an obligation for
23 us as utilities to procure RECs through a competitive
24 process and to meet our obligation in (B)(2).
25 Nothing in the standards -- or nothing in the

1 regulations, we feel, besides the two off-ramps,
2 based on -- based on cost by the 3 percent test and
3 the other force majeure based on availability is, in
4 the companies' view, something that the regulations
5 are trying to incent or offer up.

6 Q. Is -- are the benchmarks also a potential
7 limitation?

8 A. Well, obviously, we are trying to hit the
9 benchmarks but, yes.

10 MR. KUTIK: Those are all my questions,
11 your Honor.

12 EXAMINER PRICE: Thank you.

13 OCC.

14 MS. YOST: No, thank you, your Honor.

15 EXAMINER PRICE: Mr. Allwein.

16 MR. ALLWEIN: No thanks.

17 EXAMINER PRICE: Mr. Dougherty.

18 MR. DOUGHERTY: No questions.

19 EXAMINER PRICE: ELPC.

20 MR. McDANIEL: No, your Honor.

21 EXAMINER PRICE: OMG.

22 MS. COHN: No, your Honors.

23 Mr. Lavanga.

24 MR. LAVANGA: No questions, your Honor.

25 EXAMINER PRICE: Staff.

1 MR. LINDGREN: No questions.

2 EXAMINER PRICE: Thank you, sir. You are
3 excused.

4 MR. KUTIK: At this time the company
5 moves for the admission of Companies' Exhibits 2 and
6 2A.

7 EXAMINER PRICE: Any objection to the
8 admission of Companies' Exhibits 2 and 2A?

9 Seeing none, they will be admitted.

10 (EXHIBITS ADMITTED INTO EVIDENCE.)

11 EXAMINER PRICE: Ms. Yost.

12 MS. YOST: I'm sorry, did you say my
13 name?

14 EXAMINER PRICE: Yes.

15 MS. YOST: Oh, yes. At this time OCC
16 would like to move OCC Exhibits 9, 10, 11, 12 into
17 evidence.

18 EXAMINER PRICE: Any objections to the
19 admission of OCC Exhibits 9, 10, 11, or 12?

20 MR. KUTIK: Your Honor, may I have a
21 moment?

22 EXAMINER PRICE: Yes. Let's go off the
23 record.

24 (Discussion off the record.)

25 EXAMINER PRICE: Back on the record.

1 Mr. Kutik.

2 MR. KUTIK: No objection, your Honor.

3 EXAMINER PRICE: Seeing none, those
4 documents will be admitted.

5 (EXHIBITS ADMITTED INTO EVIDENCE.)

6 EXAMINER PRICE: Let's go off the record
7 again briefly.

8 (Discussion off the record.)

9 EXAMINER CHILES: Let's go back on the
10 record then.

11 Mr. Kutik.

12 MR. KUTIK: Your Honor, at this time we
13 call Dr. Robert Earle.

14 (Witness sworn.)

15 EXAMINER CHILES: Thank you. You may be
16 seated.

17 MR. KUTIK: Your Honor, we would like to
18 have marked at this time as Companies' Exhibit 3 a
19 document entitled "Direct Testimony of Robert Earle
20 on behalf of Ohio Edison, The Cleveland Electric
21 Illuminating Company, and The Toledo Edison Company."

22 EXAMINER CHILES: So marked.

23 (EXHIBIT MARKED FOR IDENTIFICATION.)

24 - - -

25

1 ROBERT EARLE

2 being first duly sworn, as prescribed by law, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 By Mr. Kutik:

6 Q. Please introduce yourself.

7 A. My name is Robert Earle. I work at the
8 Analysis Group. My business address is 650
9 California Street, Floor 23, San Francisco,
10 California 94108.

11 Q. Do you have before you the document we
12 have marked for identification as Company Exhibit 3?

13 A. I do.

14 Q. What is it?

15 A. It's my direct testimony in this case.

16 Q. Do you have any additions, corrections,
17 or explanations to your testimony?

18 A. I do. First one is I have a correction
19 to Attachment 11. We in --

20 Q. Let's get to Attachment 11.

21 A. We inadvertently left off a source for
22 this -- for this attachment. The name of the source
23 is "Solar Renewable Energy Certificate Market Status
24 and Trends." It's put on by the National Renewable
25 Energy Laboratory in 2011.

1 Q. Is that the source you actually cite as
2 source No. 1 in Attachment RE-12?

3 A. No. That's -- that's a related source, a
4 related document.

5 Q. All right. Do you have any other
6 corrections?

7 A. I wouldn't call this necessarily a
8 correction, but I did want to bring it to the Court's
9 attention that on Attachment RE-13, for Massachusetts
10 under Class 1, new renewable energy, we had listed
11 the first compliance year as 2004. The source we got
12 this from lists 2003 in one place and lists 2004 in
13 another place, and we picked up the later date. It
14 doesn't really make any difference for my testimony.

15 EXAMINER CHILES: Thank you.

16 Q. What is the source?

17 A. I'm sorry. The source is the DSIRE
18 Database. That's D-S-I-R-E, and that stands for
19 Database of State Incentives for Renewable Energy.

20 Q. Who runs that?

21 A. That's an authoritative source that is
22 funded by the DOE through the National Renewable
23 Energy Laboratory.

24 Q. Do you have any other corrections or
25 explanations?

1 A. I do not.

2 Q. If I asked you the questions that appear
3 in Company Exhibit 3, subject to the corrections and
4 explanations you've given today, would your answers
5 be the same?

6 A. Yes, they would.

7 MR. KUTIK: I have no further questions,
8 your Honor.

9 EXAMINER CHILES: Thank you.

10 Mr. Berger.

11 MR. BERGER: Thank you.

12 - - -

13 CROSS-EXAMINATION

14 By Mr. Berger:

15 Q. Good afternoon, Dr. Earle.

16 A. Good afternoon.

17 Q. As you may know, my name is Tad Berger.
18 I previously spoke to you during your deposition. I
19 just have some, hopefully, limited questions on your
20 direct testimony here.

21 MR. KUTIK: Mr. Berger, could I ask you
22 to just move the mic closer to you. Thank you.

23 MR. BERGER: Sure. Okay. I think that
24 should be good. Closer?

25 MR. KUTIK: A little closer.

1 MR. BERGER: All right.

2 EXAMINER PRICE: Let's go off the record.

3 (Discussion off the record.)

4 EXAMINER PRICE: Back on the record.

5 Q. (By Mr. Berger) Dr. Earle, on page 4 of
6 your testimony at the top you summarize your
7 conclusions. And I just want to briefly go over
8 those conclusions. Specifically at lines 2 to 5 you
9 say, "REC market prices have many determinants other
10 than the cost of development of renewable energy
11 projects." Do you see that?

12 A. I'm sorry, which line?

13 Q. Lines 2 to 5.

14 A. Oh, yes, I do.

15 Q. Okay. Is that something that, in your
16 opinion, the Exeter report disagrees with?

17 A. That's my understanding of the Exeter
18 report.

19 Q. Okay. Is there somewhere in the Exeter
20 report you can point me to where they say that?

21 A. I can point you, I believe, to the area
22 where they discuss this, and if you'll give me a
23 minute to look.

24 Q. Yes, if you would.

25 A. So on page 30 of the Exeter report, this

1 is in the first paragraph, I'll count down the lines.
2 I believe it's line 9. It reads, "The market value
3 of the RECs, therefore, should approximate the
4 additional revenue required by project owners to
5 facilitate the development of eligible renewable
6 Projects."

7 And then at the bottom of page 30 the
8 last sentence states, "There is no basis for
9 concluding that the cost of renewable energy
10 development in Ohio differs" --

11 Q. Hold on. You are being careful, I take
12 it, that there is a confidential number here.

13 A. Thank you for reminding me -- for
14 reminding me.

15 MR. KUTIK: Thank you, Mr. Berger.

16 A. "There is no basis for concluding the
17 cost of renewable energy development in Ohio differs
18 so markedly from the cost of renewable development
19 elsewhere in the country to warrant REC prices of"
20 blank "or more in Ohio compared to REC prices seen
21 elsewhere."

22 So while it's true on this page they do
23 talk about other factors, it seems to me that part of
24 their conclusion is definitely anchored in this area
25 that the price of RECs should be determined by the

1 cost of renewable development at any given point in
2 time.

3 Q. Would you agree with me that that would
4 be the case where there is market disequilibrium, it
5 would not necessarily approximate that? They are
6 talking about this in the context of market
7 disequilibrium, if you look at that whole paragraph
8 that starts on page 29, aren't they?

9 A. I guess I don't understand your question.

10 Q. Okay. You say that "Market prices will
11 not necessarily approximate additional revenue
12 required by project owners to develop new projects."
13 Would you agree it would bear some relationship,
14 however, to the cost of development?

15 A. The cost of development of -- excuse me.
16 The price of RECs in the market is determined by many
17 factors. One of the factors is certainly the cost of
18 development. There are other factors, however, as
19 well.

20 Q. And that's all -- that's all I was
21 asking.

22 MR. KUTIK: May he finish his answer?

23 EXAMINER CHILES: Mr. Berger, please let
24 the witness give a full answer, and then if you need
25 to follow up, you can follow up.

1 MR. BERGER: Thank you, your Honor.

2 A. Thank you. There are many factors that
3 determine the price of RECs at any given point in
4 time. There's the overall supply/demand dynamic of
5 whether there is a lot of supply or a little bit of
6 supply. There are many things that go into the cost
7 of development so that at any given point in time the
8 price of RECs could either be greater than the cost
9 of development or it could be less.

10 Q. And would you agree with me that Exeter
11 would agree with that, it could be more or it could
12 be less, based upon a variety of factors? And they
13 list -- they have some bulleted points there, and
14 they indicate there it could be different for a
15 variety of factors.

16 A. Well, what I -- what I see them doing is
17 saying before they list those factors that "the
18 market value of the RECs, therefore, should
19 approximate the additional revenue required by
20 project owners," and they say, well, these can differ
21 in various regions for these reasons.

22 Q. But they don't say --

23 MR. KUTIK: Your Honor, he's not finished
24 with his answer.

25 MR. BERGER: I didn't think he was

1 done -- I thought he was done. Excuse me.

2 EXAMINER CHILES: Please continue.

3 A. I'm sorry. I may speak a little slowly.
4 I grew up in the deep South and --

5 MR. KUTIK: He's not that slow.

6 A. So -- so what they -- what they say
7 before they list those factors is, "The market value
8 of the RECs, therefore, should approximate the
9 additional revenue required by project owners to
10 facilitate the development of eligible renewable
11 projects."

12 Then they say, "We would expect, and in
13 fact see, different values of RECs in different
14 states based on a multitude of factors," and then
15 they list a bunch of factors. And then they
16 conclude, page 30, again, referring back to the cost
17 of renewable energy development.

18 So the factors they list, it seems to me,
19 in the context they are putting it in are saying,
20 well, yeah, these factors differ from state to state,
21 and they are saying the cost of developing renewable
22 energy in Ohio isn't appreciably different. But
23 that's -- but that's a different point because the
24 point is that at any given point in time for a given
25 market, the price could be above, it could be below;

1 it depends on supply and demand conditions.

2 Plus I guess I have to disagree with
3 their final statement, that there is no basis for
4 concluding that the cost of renewable energy in
5 development in Ohio differs so markedly.

6 MR. BERGER: Your Honor, I move to
7 strike --

8 MR. KUTIK: He isn't even finished with
9 his answer.

10 MR. BERGER: He's beyond the question I
11 asked.

12 EXAMINER CHILES: Let's let the witness
13 finish his answer, and if you want to make a motion
14 to strike, make a motion to strike at that time.

15 Were you finished with your answer?

16 THE WITNESS: I just want to finish this
17 last thought.

18 A. So -- so I think that we're -- where I
19 depart from what they are saying and, perhaps, your
20 interpretation of this, if I understand you, is
21 that -- is that they are not taking into account the
22 idea that there are general supply and demand
23 conditions that apply, so that this notion of, well,
24 let's just look at development costs is the only
25 issue.

1 MR. BERGER: Your Honor, I am going to
2 move to strike as nonresponsive. Basically
3 everything he said was nonresponsive except perhaps
4 the first sentence, and I think all I asked him is
5 whether they -- he was in agreement that the Exeter
6 report stated that they would agree -- that they --
7 that there are a multitude of factors that cause it
8 to vary in that price.

9 MR. KUTIK: Your Honor --

10 EXAMINER CHILES: Are you moving to
11 strike his entire answer, or everything except the
12 first sentence?

13 MR. BERGER: Everything except the first
14 sentence.

15 EXAMINER CHILES: Except the first
16 sentence.

17 Mr. Kutik.

18 MR. KUTIK: Your Honor, he was asked
19 about Mr. Berger's interpretation of doesn't --
20 doesn't this page indicate that there are
21 differences, and Mr. -- and Dr. Earle is indicating
22 while the differences are discussed in one fashion at
23 the bottom, they are discounting those differences to
24 base a comparison on development costs, which the
25 conclusion we are talking about he says is wrong. So

1 he gave a full -- gave a full explanation of why he
2 disagrees with the suggestion from counsel.

3 EXAMINER CHILES: Thank you. Would you
4 please read the question back to me.

5 (Record read.)

6 EXAMINER CHILES: I am going to deny the
7 motion to strike, but I will ask the witness to more
8 directly answer the question. While I want you to
9 provide an answer, if you could refrain from
10 elaborating so much, that would be very helpful.

11 THE WITNESS: Yes, your Honor.

12 EXAMINER CHILES: Thank you.

13 Q. (By Mr. Berger) Dr. Earle, would you
14 agree with me all markets for renewable -- renewable
15 energy credits have at one point or -- at one point
16 or another in the last ten years been nascent and
17 restricted in nature?

18 A. Most markets in the U.S. for renewable
19 energy have begun in the past ten years.

20 Q. So the answer is "yes"?

21 A. Well, it sounded like a compound
22 question, so if you could repeat it, maybe I could --
23 because I think you characterized them in two ways.

24 Q. Right. With respect to whether those
25 markets are nascent, would you agree with that?

1 A. I would -- I would agree that most of the
2 markets in the U.S. are -- in the past ten years have
3 been nascent.

4 Q. And would you agree most of the markets
5 in the last ten years, direct renewable markets, in
6 the last ten years have been restricted or
7 constrained?

8 A. I'm not sure I would agree with that.

9 Q. Okay. Now, you say in your testimony
10 that "The restriction of supply to Ohio of in-state
11 all renewable RECs is one factor that has affected
12 market prices in Ohio"; is that correct?

13 A. That's correct.

14 Q. Okay. And at the time you prepared your
15 testimony, had you studied the prices paid by other
16 purchasers of in-state all renewable RECs in the Ohio
17 market?

18 A. I'm sorry. Repeat the question.

19 Q. At the time you prepared your testimony,
20 had you studied the prices paid by other purchasers
21 of in-state all renewable RECs in Ohio?

22 MR. KUTIK: Objection, your Honor.

23 EXAMINER CHILES: Grounds?

24 MR. KUTIK: Assumes such information is
25 available. No foundation has been laid.

1 EXAMINER CHILES: I'm going to allow the
2 witness to answer the question if he holds an opinion
3 on the matter.

4 A. Well, for the 2009-2010 time period that
5 I was focusing on, there -- there was no information
6 available that I was aware of.

7 Q. My question, however, was did you make an
8 effort to study the prices paid by other purchasers
9 in the in-state all renewables market?

10 A. I looked for such information.

11 Q. Okay. Do you have a copy of your -- of
12 the transcript of your deposition there?

13 A. I do.

14 MR. BERGER: Your Honor, may I approach
15 the witness?

16 EXAMINER CHILES: You may.

17 MR. BERGER: Actually, if I may just
18 provide your Honors a copy of the transcript for
19 reference.

20 EXAMINER CHILES: Thank you.

21 EXAMINER PRICE: Thank you.

22 Q. (By Mr. Berger) Would you turn to page 64
23 of your deposition transcript, Dr. Earle.

24 A. I'm there.

25 Q. And there I asked you: "Are you familiar

1 with the comparative price of compliance with the
2 alternative energy portfolio standards that have been
3 incurred by other Ohio electric utilities besides
4 FirstEnergy?" Do you see that?

5 A. I'm sorry, what line are you on?

6 Q. On page 64, line 11.

7 A. Oh, okay, got it. Thank you.

8 Q. Let me read that again. "Dr. Earle, are
9 you familiar with the comparative price of compliance
10 with the alternative energy portfolio standards that
11 have been incurred by other Ohio electric utilities
12 besides FirstEnergy?" Do you see that?

13 A. Yeah.

14 Q. And there was an objection there, but I
15 attempted to ask the question again on page 65 where
16 at line 2, "Are you aware of how FirstEnergy's costs
17 of complying with the act compared to the comparative
18 costs that other Ohio electric utilities have
19 incurred to comply with the Act?" And what did you
20 say?

21 A. I said, "I don't know."

22 Q. Okay. And here on line 7 it says, "Did
23 you research or analyze the compliance experience of
24 other Ohio electric utilities?" What did you say?

25 A. I said, "No."

1 Q. Okay. Thank you.

2 MR. KUTIK: Objection, your Honor. Move
3 to strike. It's improper impeachment. It's not
4 inconsistent with anything he said earlier in his
5 testimony.

6 EXAMINER CHILES: Mr. Berger.

7 MR. BERGER: Well, I believe it was
8 inconsistent. His earlier answer indicated there
9 wasn't a market available, and my question here which
10 I asked him was, "Have you studied the prices paid by
11 other purchasers in the all-state renewable RECs
12 market?"

13 MR. KUTIK: That's the question he asked
14 here. He didn't ask that question in his deposition.

15 MR. BERGER: Well, I said Ohio electric
16 utilities, your Honor.

17 MR. KUTIK: No. You asked about costs.
18 You asked about compliance experience. You didn't
19 ask about price.

20 EXAMINER CHILES: I agree, that was a
21 different question, so I'm going to grant the motion
22 to strike.

23 Q. (By Mr. Berger) Well, let me ask you the
24 question here. Dr. Earle, did you research or
25 analyze the compliance experience of other Ohio

1 electric utilities?

2 A. I looked for information. I didn't find
3 any that I considered relevant. So -- so in that
4 sense, I did not analyze the experience of other Ohio
5 electric utilities.

6 Q. What do you interpret as the meaning of
7 "research"? Does that mean look for information?

8 A. I wouldn't call research merely -- merely
9 looking for information. I would -- I would call it
10 going -- going through documents, thinking about
11 what's in them, are you aware of how FirstEnergy
12 costs of complying with the act comparing to the
13 costs of other Ohio electric utilities have incurred
14 to comply with the act. I don't know how their costs
15 compares.

16 Q. Okay. Are you aware of any other
17 purchaser in Ohio during the period 2009 to 2011 that
18 paid market prices in the range paid by FirstEnergy
19 Ohio utilities for in-state all renewable RECs?

20 MR. KUTIK: Objection.

21 EXAMINER CHILES: Grounds?

22 MR. KUTIK: Again, your Honor, these are
23 misleading questions because it assumes that
24 information is available and that this witness by
25 knowing or not knowing that information is either

1 being fulsome in his research or somehow is not being
2 candid with the Commission.

3 EXAMINER CHILES: Mr. Berger.

4 MR. BERGER: Your Honor, I'm asking if he
5 is aware, give him an opportunity to say he's not
6 aware and the reason why. If he is not aware, he can
7 certainly say why.

8 MR. KUTIK: That wasn't his question.

9 EXAMINER CHILES: With that
10 clarification, the objection is overruled.

11 MR. KUTIK: So the question now, your
12 Honor, to the witness is what?

13 EXAMINER CHILES: The question he
14 initially asked with his clarification, which I
15 suppose is a modified question.

16 Do you want to restate your question just
17 for clarity?

18 Q. (By Mr. Berger) Are you aware of any
19 other purchaser in Ohio who during the period of 2009
20 to 2011 paid market prices in the range paid by
21 FirstEnergy Ohio utilities for in-state all
22 renewables during that time period?

23 A. I looked for such information. I didn't
24 find any. I'm not aware of any other entity that
25 paid in that price range.

1 Q. Are you aware of a Spectron market report
2 that was published in August, 2010, that indicated an
3 in-state all renewables price of, I believe, \$34 per
4 REC?

5 MR. KUTIK: Objection.

6 EXAMINER CHILES: Grounds?

7 MR. KUTIK: Assumes facts not in
8 evidence. If he has the report, show the report, lay
9 a foundation.

10 EXAMINER CHILES: Mr. Berger.

11 MR. BERGER: He can state whether he is
12 aware of it or not.

13 MR. KUTIK: Well, for the question to
14 have any relevance, it would have -- there would have
15 to be such a report. There is no report in the
16 record.

17 EXAMINER CHILES: The objection is
18 sustained.

19 Mr. Berger, I think you need to ask some
20 foundational questions.

21 Q. (By Mr. Berger) Are you aware of the
22 Spectron market report from August, 2010?

23 A. I know I looked at some Spectron reports
24 in the course of my research on this engagement. I
25 don't remember the date -- dates, rather, of those --

1 of those broker sheets.

2 MR. BERGER: One moment, your Honor.

3 EXAMINER CHILES: Take your time.

4 MR. BERGER: May I approach the witness,
5 your Honor?

6 EXAMINER CHILES: You may.

7 Q. I am going to show you, Dr. Earle, a
8 report by Spectron.

9 EXAMINER CHILES: Would you show counsel
10 first.

11 MR. KUTIK: Your Honor, I believe what he
12 is going to show him is confidential so I would
13 object. This is from a broker, your Honor, and the
14 information, I think, as it shows at the bottom, is
15 marked confidential, so anything that's in it would
16 be proprietary, so even the suggestion of a price in
17 open session is improper.

18 MR. BERGER: I'll hold it for the
19 confidential session. I apologize.

20 EXAMINER CHILES: Thank you.

21 Q. (By Mr. Berger) Dr. Earle, on page 14 of
22 your testimony, you say at the top there that "Texas
23 REC prices fell by fifty to sixty-six percent from
24 January 2005 to July 2006." Do you see that?

25 A. I do.

1 Q. Do you know what the original price of
2 Texas RECs were in January of 2005?

3 A. I don't recall.

4 Q. Is that shown on any of your schedules?

5 A. I'm sorry, what do you mean by
6 "schedules"?

7 Q. Your attachments.

8 A. It's not in the attachments.

9 Q. You also point out there that New Jersey
10 SRECs prices fell 90 percent from January, 2011, to
11 November, 2012.

12 A. That's right.

13 Q. Is that correct?

14 A. That's correct.

15 Q. You would agree with me, however, that
16 SREC prices have generally been higher than all
17 renewable prices.

18 A. I would agree with you that from the
19 published information that I've seen, that would be
20 true. I don't know that I would go so far as to say
21 that that's true in general, but a lot of the
22 published information, which doesn't take into
23 account nonreported deals from, say, RFPs, so
24 certainly if you look at some sources, SREC prices
25 are often higher.

1 Q. You also say at lines 4 to 5 that the
2 "prices in Ohio for All-State All Renewables RECs
3 have shown great variation since their inception."
4 Would you -- are you familiar with Exeter's -- the
5 Exeter report at page 19 where it says that those
6 prices have been reasonably consistent with other
7 regional REC prices?

8 MR. KUTIK: Your Honor, I would ask that
9 if the witness is going to be --

10 EXAMINER CHILES: I'm sorry, Mr. Kutik,
11 could you turn on your microphone?

12 MR. KUTIK: I apologize. If the witness
13 is going to be asked about something specific from
14 the Exeter report, I would ask that the witness be
15 directed to that portion of the Exeter report.

16 MR. BERGER: I believe I said page 19.

17 EXAMINER CHILES: Can you give us a more
18 specific reference than that? I agree with Mr. Kutik
19 that that would be helpful.

20 MR. BERGER: I will try to do so.

21 EXAMINER CHILES: Thank you.

22 MR. BERGER: I think finding 1 at the
23 bottom of the page.

24 MR. KUTIK: Can I hear the question now,
25 your Honor?

1 EXAMINER CHILES: Please reread the
2 question.

3 (Record read.)

4 MR. KUTIK: Objection, mischaracterizes
5 the document. It says "the price paid by the
6 Companies."

7 MR. BERGER: I'm sorry, price paid by
8 what?

9 MR. KUTIK: "By the companies," as
10 opposed to "prices."

11 EXAMINER CHILES: Mr. Berger?

12 MR. BERGER: Prices paid by the
13 companies. I'll modify my question to say prices
14 paid by the companies have been reasonably consistent
15 with other regional RECs.

16 EXAMINER CHILES: Could you restate your
17 question just for clarity purposes?

18 MR. BERGER: Sure.

19 Q. (By Mr. Berger) You also say in your
20 testimony that "prices in Ohio for all state all
21 renewables have shown great variations since
22 inception." Would you agree with me that -- that
23 Exeter also found that the prices in -- paid by the
24 companies were -- for all state all renewables were
25 reasonably consistent with other regional REC prices?

1 A. So you're asking me whether I'm reading
2 finding 1 on page 19, and -- I mean, the answer to
3 that is, yes, but there is no tension or
4 contradiction between my statement on page 14 about
5 variation in all state all renewables RECs prices in
6 Ohio. Their statement on page 19 doesn't mean that
7 regional RECs prices did not vary as well. And I
8 think if you look on page 26 of the Exeter report, on
9 their Figure 3, it shows variation.

10 Q. Well, I am talking about all states all
11 renewables, and if you look at Figure 2 on page 18,
12 Dr. Earle, doesn't that show the variation in all
13 state all renewable REC prices for three states in
14 the PJM area?

15 A. And Figure 2 shows different degrees of
16 variation, as does -- as does Figure 3. And most of
17 the -- well, really all but one of the prices shown
18 in Figure 3 is not for in-state prices.

19 Q. I'm not talking about in-state prices.
20 I'm commenting on your page 14 where you talk about
21 all states prices.

22 MR. KUTIK: Excuse me. And may we have
23 the question, your Honor?

24 MR. BERGER: Your Honor, I am trying to
25 get him to answer my questions.

1 MR. KUTIK: He is answering the question,
2 your Honor.

3 MR. BERGER: No, he didn't answer the
4 question.

5 MR. KUTIK: He did.

6 EXAMINER CHILES: Would you read back the
7 question, please.

8 MR. KUTIK: May I finish my --

9 EXAMINER PRICE: Okay. One second. We
10 are going to knock off the crosstalk. You people
11 will direct your comments to the Bench and not to
12 each other.

13 MR. BERGER: Thank you.

14 EXAMINER CHILES: Please reread the
15 question.

16 (Record read.)

17 MR. KUTIK: And, your Honor, the witness
18 answered that question and indicated that Figure 3,
19 which was a point where he was cut off earlier, also
20 shows the variation.

21 EXAMINER CHILES: Thank you.

22 MR. KUTIK: He's answered the question.

23 EXAMINER CHILES: Mr. Berger, do you have
24 a response?

25 MR. BERGER: I don't think he answered

1 the question with respect to Figure 2, your Honor.
2 That's what I asked him about.

3 MR. KUTIK: He said it did and Figure 3
4 does, too.

5 EXAMINER CHILES: If you have a follow-up
6 question or you would like to rephrase your question,
7 I think that would be helpful.

8 Q. (By Mr. Berger) Dr. Earle, on page 16,
9 Exeter shows the FirstEnergy all states all renewable
10 REC prices. I understand and I note the numbers
11 there are confidential. But if we look back at the
12 chart on page 18, the prices shown on page 16 that --

13 MR. KUTIK: Your Honor, if he is going to
14 make a comparison to prices that are confidential,
15 necessarily he is going to be revealing those prices,
16 so I would object to discussion of comparison of the
17 prices to any particular figure, any particular chart
18 outside the confidential session.

19 EXAMINER CHILES: Mr. Berger, are you
20 finished asking your question?

21 MR. BERGER: No, I didn't, your Honor.

22 EXAMINER CHILES: Okay. Please finish
23 asking your question, and then, Mr. Kutik, if you
24 have an objection.

25 MR. KUTIK: The reason why I stopped,

1 your Honor, I believe that the question was going to
2 be revealing confidential information or suggesting
3 confidential information, which this counsel has
4 already done in this session, so I'm trying to
5 preclude that.

6 I understand that I shouldn't be
7 interrupting, but I need to interrupt where I believe
8 some confidences will be revealed in open session.

9 EXAMINER CHILES: Mr. Berger, would you
10 be willing to reserve this question until the
11 confidential session, just --

12 MR. BERGER: That's fine, your Honor.

13 EXAMINER CHILES: -- because of that
14 possibility? Thank you.

15 Q. (By Mr. Berger) On page 17, Dr. Earle,
16 you say -- you reference Exeter's comparison of Tier
17 I REC prices in 12 other jurisdictions to Ohio
18 in-state all renewables. Then you say, "Apart from
19 Texas, none of the jurisdictions have in-state
20 requirements for all renewable RECs."

21 MR. BERGER: At this point in time, your
22 Honor, I would like to have marked OCC Exhibit No.
23 13.

24 EXAMINER CHILES: That was 13?

25 MR. BERGER: Yes.

1 EXAMINER CHILES: So marked.

2 (EXHIBIT MARKED FOR IDENTIFICATION.)

3 MR. BERGER: I will come back to that in
4 a minute, your Honor.

5 EXAMINER CHILES: Okay.

6 MR. BERGER: Your Honor, may I approach
7 the witness?

8 EXAMINER CHILES: You may.

9 Thank you.

10 Q. (By Mr. Berger) Now, Dr. Earle, in
11 purchasing -- in deciding whether to proceed with
12 purchasing the in-state all renewables, do you think
13 that FirstEnergy should have looked at the
14 information that was available to them, including
15 those 12 jurisdictions where you indicate that there
16 was purchasing information available?

17 MR. KUTIK: May I have the question read?

18 EXAMINER CHILES: Please.

19 (Record read.)

20 MR. KUTIK: I'll object at this point.

21 EXAMINER CHILES: Basis?

22 MR. KUTIK: Outside the scope of
23 testimony. This witness isn't an expert on what one
24 should do as far as procurement is concerned. He is
25 testifying about Exeter's observations about prices

1 and pricing trends, among other things, but not about
2 what the appropriate procurement process should be
3 and due diligence as part of that process.

4 EXAMINER CHILES: Thank you.

5 Mr. Berger, do you care to respond?

6 MR. BERGER: Yes, your Honor. I believe
7 he is testifying regarding the prudence of the
8 purchasing that was done by the companies, and he's
9 commenting specifically on Exeter's report regarding
10 this issue, and I don't see how it could possibly be
11 considered to be --

12 EXAMINER CHILES: I am going to sustain
13 the objection.

14 MR. BERGER: Your Honor, I just want to
15 emphasize that the scope of cross-examination shall
16 be permitted on all relevant matters and matters
17 affecting credibility, so if this goes to whether
18 those 12 jurisdictions were providing available data
19 that could or should have been looked at, then that
20 is an appropriate area for cross-examination.

21 EXAMINER PRICE: Who should have looked
22 at it?

23 MR. BERGER: Pardon?

24 EXAMINER PRICE: Who should have looked
25 at it?

1 MR. BERGER: Dr. Earle, in evaluating the
2 prudence of his decision making.

3 EXAMINER PRICE: That wasn't his
4 question. You asked if FirstEnergy should have
5 looked at it.

6 MR. BERGER: Well, it's Exeter commenting
7 on the prudence and Dr. Earle commenting on the
8 prudence of the FirstEnergy's decisions, yes.

9 MR. KUTIK: The word "prudence" never
10 appears in Dr. Earle's testimony. He's commenting on
11 the observations that Exeter made about the markets.
12 Dr. Earle is here to testify about markets and market
13 behavior. He is not here to testify about what
14 people should do in the procurement process.

15 MR. BERGER: Your Honor, cross is not
16 limited by the scope of the direct testimony in Ohio.

17 MR. KUTIK: It is at the Commission.

18 MR. BERGER: Rule 6111(B) -- 611(B). It
19 talks about scope of cross-examination.

20 MR. KUTIK: Well, your Honor, if I may be
21 heard on that point, I don't want to crosstalk.

22 EXAMINER CHILES: Your response is noted
23 for the record, Mr. Berger, but the objection is
24 sustained. So please continue.

25 Q. (By Mr. Berger) On lines 19 to 21, you

1 say that "Only six states arguably have in-state
2 requirements; the rest either require delivery to the
3 state or to the Regional Transmission Organization in
4 which the state is located." Do you see that?

5 EXAMINER CHILES: Do you have a page
6 reference, Mr. Berger?

7 MR. BERGER: Page 17, lines 19 to 21.

8 EXAMINER CHILES: Thank you.

9 A. Yes.

10 Q. Okay. Did you look at the state data
11 that you refer to here?

12 A. I'm not sure what you mean by that
13 question.

14 Q. Well, you talk about in-state
15 requirements in six other states. Do you see that?

16 A. Yes.

17 Q. Did you look at that data?

18 A. I -- I principally looked at the DSIRE
19 database.

20 Q. Okay. And was -- was OCC Exhibit 13 an
21 attachment that was prepared by you showing the
22 in-state requirements, as you had assessed them, and
23 the regional requirements, as you had assessed them,
24 among other things?

25 A. I have to say I'm not recognizing this

1 exhibit at this time.

2 MR. BERGER: Your Honor, may I approach
3 the Bench? OCC Exhibit 4 indicates the exhibits that
4 Dr. Earle --

5 Q. Dr. Earle, you don't recall -- I think
6 you said you didn't recall reviewing this?

7 A. I have to say I don't recall seeing this.
8 It's not coming to my memory, no.

9 Q. Okay. Did you -- in support of your
10 statement that only six states, arguably, have
11 in-state requirements, you performed a review of
12 those requirements?

13 A. I looked at -- I looked at those
14 requirements.

15 Q. Okay. And would you agree with me that
16 in performing its review, FirstEnergy -- in
17 performing its decision to purchase renewable energy
18 credits or renewables, that FirstEnergy should have
19 known what else was happening in the marketplace,
20 including in these other exhibits --

21 MR. KUTIK: Objection.

22 Q. -- to the extent the information was
23 available?

24 MR. KUTIK: Objection.

25 EXAMINER CHILES: Mr. Kutik.

1 MR. KUTIK: Same objection I made last
2 time, no foundation. This witness is being
3 produced -- or has expertise in prudence -- prudence
4 or reasonable activities of utilities to procure
5 RFP -- procure RECs. He is here to testify about
6 Exeter's observations about the markets. He is an
7 expert on REC markets and market behavior.

8 EXAMINER CHILES: Mr. Berger.

9 MR. BERGER: Your Honor, he is talking
10 about these particular prices and this particular
11 information from other states as a basis for his
12 evaluation of whether Exeter is right or not and
13 whether FirstEnergy made prudent decisions or not.
14 Maybe he doesn't use the word "prudent" in assessing
15 the reasonableness of their purchases and, therefore,
16 if -- your Honor, if -- if I can't ask him questions
17 about the information that's in his testimony,
18 frankly, in connection with the FirstEnergy purchases
19 that is the subject of this proceeding, this
20 information should be stricken from the testimony and
21 if -- frankly, it's very relevant.

22 EXAMINER CHILES: Mr. Kutik, did you have
23 something else to say?

24 MR. KUTIK: Yes, your Honor. With
25 respect to that last observation, the problem with

1 counsel's thought process is that it ignores what
2 Exeter did. Exeter, in part, made evaluations based
3 upon the price levels paid by the FirstEnergy Ohio
4 utilities and -- in making certain observations about
5 markets and market prices. That last part,
6 evaluation of the markets and the market prices and
7 the utility of that data in terms of understanding
8 what prices are, is what Dr. Earle is here to testify
9 about and where he has expertise. He has not stated
10 in his testimony, nor has he been asked, about any
11 involvement with respect to purchasing RECs for RPS
12 or APS requirements or procuring RECs in any way.
13 And so --

14 EXAMINER CHILES: Thank you.

15 MR. KUTIK: The question is it reasonable
16 or should FirstEnergy have looked at goes to
17 questions that Dr. Earle hasn't addressed, nor has it
18 been demonstrated he has any experience with.

19 EXAMINER CHILES: Thank you. The
20 objection is sustained.

21 MR. BERGER: Then, your Honor, I would
22 move to strike his testimony on lines 17 through --
23 on page 17, line 17 -- let me restate that, line 13
24 where he starts talking about the 12 other
25 jurisdictions, through page 18, line 16, where he

1 starts talking about Texas and comparing them to the
2 situation in Ohio, since I'm not allowed to ask
3 questions regarding that comparison.

4 EXAMINER CHILES: For clarity purposes,
5 we are talking about page 17, line 13, through page
6 18, line 16; is that correct?

7 MR. BERGER: Yes, your Honor.

8 EXAMINER CHILES: Mr. Kutik.

9 MR. KUTIK: May I respond? Thank you,
10 your Honor. Counsel misconstrues what he is being
11 allowed and not allowed by the Bench's rulings to
12 talk about. He can talk to Mr. -- Dr. Earle until
13 the Bench's pleasure as to what these prices mean in
14 terms of an evaluation of prices in Ohio or the
15 relevance of prices to Ohio. He can go ahead and
16 ask those questions. He is not being precluded from
17 doing so.

18 My objections, and I think the ruling
19 from the Bench, I think, supports this view, is that
20 he's not here to render opinions as to what
21 FirstEnergy should have done or should have known.
22 So Dr. Earle, in this portion of the testimony, is
23 commenting on Exeter's use of other states' data to
24 determine why FirstEnergy's purchases were
25 unreasonable.

1 EXAMINER CHILES: Thank you.

2 Mr. Berger, do you have a brief response?

3 MR. BERGER: Yes, I have a brief
4 response. Your Honor, I mean, his conclusion as
5 stated on page 4, he says at lines 13 to 15, "For
6 these reasons, the Exeter Report does not support its
7 conclusion that prices paid by the FirstEnergy Ohio
8 utilities for In-State All Renewables RECs in RFP1,
9 RFP2 and RFP3 were unreasonable." He is specifically
10 commenting upon the reasonableness.

11 EXAMINER PRICE: He is commenting on the
12 Exeter report and what they said. And he is
13 attacking -- he is not here to support FirstEnergy.
14 He is here solely to attack the Exeter report, and
15 you can ask all the questions you want about his
16 comparisons to the Exeter report numbers.

17 MR. BERGER: But, your Honor, his
18 comparisons have to do with the purchasing by
19 FirstEnergy and whether it was reasonable or
20 unreasonable, and he specifically criticizing
21 Exeter --

22 EXAMINER PRICE: And if you succeed in
23 undermining this witness's testimony, the Commission
24 will pull it all together, okay? If you succeed in
25 undermining his testimony, then the Commission will

1 understand that Exeter was right, and FirstEnergy
2 will have to deal with that. You're trying to bridge
3 the gap here.

4 MR. BERGER: Well, I am looking at his
5 testimony as having to do with the reasonableness of
6 FirstEnergy's purchases, since that's what Exeter's
7 report has to do with.

8 EXAMINER PRICE: No. He is saying -- he
9 is saying Exeter used an improper standard and that's
10 all he is saying, right?

11 THE WITNESS: That's right.

12 MR. BERGER: Your Honor, can I have a
13 10-minute break to review my notes in light of the
14 rulings you've made?

15 EXAMINER CHILES: We'll take a 10-minute
16 recess at this time.

17 (Recess taken.)

18 EXAMINER CHILES: Let's go back on the
19 record.

20 Q. (By Mr. Berger) Dr. Earle, on page 18 of
21 your testimony --

22 MR. KUTIK: Counsel, could you turn on
23 your microphone, please.

24 EXAMINER CHILES: I don't think it's on
25 yet. I think you just have to press the button one

1 more time. Thank you.

2 Q. You compare the market in Texas for
3 renewables to the market in Ohio, and you cite some
4 statistics in 2010. Do you see that, starting on
5 line 9?

6 A. I do.

7 Q. Okay. And would you agree that the
8 market in Texas has been open since 2006, according
9 to your schedule -- your Attachment RE-13?

10 A. 2006 was the first compliance year.

11 Q. The first compliance year. Would you
12 agree that's the timeframe since the market has been
13 open, or is there another timeframe you would use?

14 A. I don't remember what the ability to buy
15 RECs in Texas was. And so there might have been the
16 possibility of there being market activity ahead of
17 that. Certainly the legislation happened in 1999, a
18 bit before then, so there may have been market
19 activity leading up to that first compliance year.

20 Q. Okay. So you're saying there may have
21 been voluntary REC market transactions prior to '06?

22 A. That isn't what I was saying, though.
23 That's a possibility as well. What I was saying is
24 that in anticipation of the compliance here in 2006,
25 utilities might have gone out earlier to think about

1 their requirements.

2 Q. Okay. And you -- you refer -- you say
3 that Texas's renewable generation was 8.1 percent of
4 the state's retail sales, while Ohio's renewable
5 generation in 2010 was .7 percent of its retail
6 sales. Do you see that?

7 A. I do.

8 Q. And would you agree that given the
9 state -- the timing of the markets that there could
10 reasonably be expected to be a significant difference
11 in the development of the markets in -- by 2010,
12 given that Ohio opened in 2009, Texas opened for
13 compliance purposes in 2006. Would you agree with
14 that?

15 A. I would agree with that. In fact, that's
16 one of the points I tried to make in my testimony
17 about what Exeter is saying is that Texas is a very
18 different market than Ohio, and to compare the prices
19 in Texas with those in Ohio does not seem correct to
20 me.

21 Q. Well, actually, I just asked you about
22 whether the market -- the timing of the market was --
23 was different and that that affected where -- where
24 the development was in 2010. Do you agree with that?

25 A. I think that the timing of the market

1 certainly has something to do with it.

2 Q. Okay. Thank you. And you reference a
3 source here in footnote 20, "EIA State Electric --
4 Electricity Profiles, 2010. And is that where you
5 gathered the information -- I'm sorry, 2000 -- State
6 Renewable Electricity Profiles, 2010, that's footnote
7 21, March, 2012. Is that where you gathered this
8 information that's on lines 10 to 12?

9 A. The information would have been in the
10 sources of both footnote 20 and footnote 21.

11 Q. Okay. And then in footnote 22 you talk
12 about another source where you are referring to the
13 statement that "Texas' technical potential for
14 renewable generation is ten times that in Ohio." Do
15 you know -- can you tell me what "technical
16 potential" as used in that report means?

17 A. I haven't memorized their definition of
18 it, but, roughly, technical potential refers to the
19 amount of whatever it is you are talking about, in
20 this case renewable energy, that could be -- that
21 could be built in the state.

22 Q. Okay. And would that -- would one of the
23 factors involve the size of the state, for example,
24 as reflecting technical potential?

25 A. There are a number of factors that go

1 into the size of technical potential, including the
2 topography of the land and what it's useful for, the
3 weather, determining how the wind blows and how the
4 sun shines. You know, obviously, if you make the
5 same area bigger with all the same characteristics,
6 that increases the technical potential.

7 MR. BERGER: I have a copy of the report
8 here. Your Honor, if I could provide that. I have
9 two copies you provided me earlier. If I could
10 supply your Honors with one and the witness with
11 another.

12 MR. KUTIK: You don't have a copy for me?

13 MR. BERGER: It's an attachment to one of
14 the discovery responses.

15 MR. KUTIK: You don't have a copy for me.

16 MR. BERGER: I don't, no.

17 EXAMINER CHILES: Could you please show
18 Mr. Kutik.

19 MR. BERGER: I would be happy to show
20 him. I assumed he had it.

21 MR. KUTIK: Do you see the discovery
22 responses here?

23 MR. BERGER: I see a lot of information
24 there.

25 MR. KUTIK: Your Honor, may I have a

1 minute to retrieve this document?

2 EXAMINER CHILES: Yes. Take a minute,
3 please. Thank you.

4 While we are waiting, Mr. Berger, did you
5 intend to mark this?

6 MR. BERGER: Yes. Let's mark this as OCC
7 Exhibit 14.

8 EXAMINER CHILES: So marked.

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 MR. KUTIK: Your Honor, I will hand it to
11 the witness now.

12 EXAMINER CHILES: Thank you.

13 Q. (By Mr. Berger) Would you turn to page 1
14 of that report, Dr. Earle.

15 A. Page 1?

16 Q. Yes.

17 A. I'm there.

18 Q. This is the report, isn't it, that you
19 cite in your testimony?

20 A. It is.

21 Q. Okay. And would you just read for me the
22 first sentence there on page 1 where it talks about
23 the definition of technical potential.

24 A. "Renewable energy technical potential as
25 defined in this study represents the achievement

1 generation of a particular technology given system
2 promise, topographic limitations, environment, and
3 land use constraints."

4 Q. And on page 2, the report provides a
5 description of what this report does. Would you read
6 that first paragraph for me?

7 MR. KUTIK: Your Honor, is there a point
8 to reading it since it's -- since I assume it will be
9 offered as an exhibit? And we will not object to its
10 admission. It's a late hour. Do we really have to
11 read a lengthy paragraph?

12 EXAMINER CHILES: Mr. Berger.

13 MR. BERGER: I'll try to move through it
14 without -- without having him read it.

15 EXAMINER CHILES: Thank you.

16 Q. (By Mr. Berger) Would you agree with me
17 that available land area is one consideration in
18 performing this analysis?

19 A. Yes.

20 Q. Would you agree that installed capacity
21 is another consideration?

22 A. Yes.

23 Q. Would you agree with me there were only
24 six different technologies looked at in this
25 analysis?

1 A. That appears to be true.

2 Q. All right. Would you agree with me,
3 turning to paragraph 3 of that page, that these
4 estimates do not consider availability of
5 transmission infrastructure, cost, reliability, or
6 time of dispatch, current or future electricity
7 loads, or relevant policies?

8 A. Yes, that's what it says.

9 Q. Okay. Thank you. On page 20 of your
10 testimony, Dr. Earle --

11 EXAMINER PRICE: Mr. Berger, I am going
12 to accuse you of friendly cross. I don't understand
13 what -- where you are going with those questions.

14 MR. BERGER: Your Honor, the point is to
15 demonstrate that there are many factors in the
16 analysis of technical potential and the development
17 of generation including, for example, the size of the
18 state and certainly we all know that Texas is far
19 larger and these other factors and also to show that
20 many factors weren't considered in the analysis that
21 the EIA performed.

22 MR. KUTIK: Your Honor, we'll stipulate
23 the Texas market is different than the Ohio market.

24 EXAMINER PRICE: Okay. Okay. Thank you.
25 I understand.

1 MR. BERGER: Thank you.

2 Q. (By Mr. Berger) Dr. Earle, on page 20 you
3 say Illinois passed legislation in 2007 with the
4 first compliance year of 2008; is that correct?

5 A. Can you give me line numbers, please?

6 MR. KUTIK: I think he is referring to
7 line 2.

8 THE WITNESS: Thank you.

9 Q. Lines 2 to 3, I think, page 20.

10 A. Yeah. So, yes.

11 Q. Would you agree with me the period from
12 legislation to compliance was roughly equal to Ohio?

13 A. Yes, though they in one case started
14 earlier than Ohio and the other case had more lead-up
15 time.

16 Q. I'm sorry. Are you saying -- when you
17 are saying in one case they started earlier than Ohio
18 and the other case, are you talking about two
19 different products? Can you just be a little bit
20 more specific?

21 A. So Illinois enacted their legislation in
22 '07. Their first compliance year was 2008, the year
23 before Ohio's compliance year. New Hampshire had
24 more time, on the other hand, because their
25 legislation was enacted in 2007 with their first

1 compliance year in 2009.

2 Q. Okay. But I was talking about Illinois
3 specifically.

4 A. Oh, okay.

5 Q. Okay. So with respect to Illinois, their
6 period from statute adoption to compliance was
7 approximately the same as Ohio, correct?

8 A. Similar.

9 Q. Okay. And would you agree with me that
10 they also have an in-state requirement for wind
11 generation?

12 A. Not really. The in-state requirement is
13 basically a preference for in-state power, and it's
14 the Illinois Power Authority that goes out and, at
15 least, oversees or it goes out and does the shopping
16 for the two major utilities.

17 They have two mechanisms that have
18 allowed them to get out of the in-state requirement.
19 The first is a -- is a provision that is somewhat
20 similar to the 3 percent provision that Ohio has,
21 though I believe the percentages are lower.

22 The second part of this, however, allows
23 the Illinois Power Authority to set a price at which
24 it deems that it's allowable to go out of state
25 and -- and purchase out of state.

1 Q. Okay. Would you agree with me that their
2 compliance requirement for wind is 3 percent by 2010,
3 whereas, Ohio's requirement is .5 percent for
4 in-state -- for all renewables?

5 A. Yes.

6 Q. Okay. With respect to your comments on
7 pages 21 to 22, go clear down to the bottom of page
8 21 that you are talking about finances at line 20 and
9 continuing on to the next page. Do you see that?
10 Have you had a chance to read that?

11 A. Yes. I'm there.

12 Q. With respect to the cost of financing,
13 you didn't perform any systematic analysis of the
14 impact of differences in financing costs in one state
15 versus another in the renewables marketplace, did
16 you?

17 A. I think it depends on what you mean by
18 systematic. I mean, what I did do was I looked at
19 the amount of grants that Ohio received under the
20 ARRA, the American Reinvestment and Recovery Act.
21 And it turned out that they received by July, 2010,
22 less than 2/10ths of a percent.

23 Q. Dr. Earle, would you look at page 58 of
24 your deposition transcript, lines 15 to 21, where I
25 asked you that very same question and you said "No."

1 EXAMINER CHILES: Would you repeat that
2 page reference, please, Mr. Berger.

3 MR. BERGER: Yes, page 58, lines 15 to
4 21.

5 A. I see the reference.

6 Q. Okay. Is your response here today
7 different than the "No" response you gave at that
8 time?

9 A. No. It's the same. It's the same
10 response. I think all I'm doing is I'm elaborating
11 on the response today so that it's clear what I did
12 and what I didn't do.

13 Q. Okay. Would you agree with me that
14 the -- that the compliance payment in Pennsylvania is
15 not recoverable from ratepayers?

16 A. Yes.

17 Q. Okay. Would you agree with me that
18 Ohio's law in that respect is consistent with
19 Pennsylvania's?

20 A. Pennsylvania I understand to be somewhat
21 complicated, and I don't have an opinion on
22 Pennsylvania.

23 Q. Well, I am just talking about with
24 respect to the compliance payment being recoverable
25 from ratepayers or not.

1 A. I don't have insight into that.

2 Q. You do know that the compliance payment
3 in Pennsylvania is not recoverable from ratepayers.
4 You just testified to that, did you not?

5 A. I'm sorry? I don't --

6 MR. BERGER: Your Honor, could we have
7 the court reporter read back my first question in
8 this area.

9 EXAMINER CHILES: Would you please reread
10 the question.

11 MR. KUTIK: Why don't you put the
12 question to the witness.

13 EXAMINER CHILES: I think that would be
14 helpful.

15 MR. BERGER: The problem, your Honor, I
16 am trying to understand if there is an inconsistency
17 with what he said before, so it would be the first
18 questioning having to do with compliance payments in
19 Pennsylvania.

20 MR. KUTIK: Can you not repeat the
21 question, counsel?

22 EXAMINER CHILES: Let's see if we can
23 find it to reread it.

24 Mr. Berger, why don't we please have you
25 repeat the first question you were talking about.

1 MR. BERGER: Yes.

2 Q. (By Mr. Berger) Dr. Earle, do you know
3 whether the compliance payment in Pennsylvania is
4 recoverable from ratepayers?

5 A. I do not know.

6 Q. On page 22 of your testimony you -- at
7 lines 11 to -- and following, you talk about the ACP,
8 or alternative compliance payment, and that it can
9 act as a safety valve or price cap on REC prices as
10 illustrated in Attachment RE-6; is that right?

11 A. That's right.

12 Q. But it's your opinion, isn't it, that for
13 two reasons the -- a price cap -- an alternative
14 compliance payment cannot act as a price cap in Ohio.
15 Is that the way that it's currently designed? Is
16 that right?

17 A. I'm sorry, I got lost in your question.
18 Can you please repeat it.

19 Q. Okay. Well, following this statement,
20 you indicate that the compliance payment in Ohio is
21 not recoverable by utilities.

22 A. That's correct.

23 Q. Okay. And you say that because of that
24 it -- it would not have acted as a price cap, as
25 noted in the Exeter report, because the burden of the

1 compliance payment would fall upon utility
2 shareholders. Do you see that?

3 A. Yes, I do.

4 Q. Okay. And is that based on your own
5 reading of the Ohio legislation?

6 A. It's based on a number -- a number of
7 sources, including the Exeter report, including
8 what's in the DSIRE database. I think it's there and
9 the statutes as well.

10 Q. But in terms of whether it's recoverable
11 from ratepayers, that based upon your reading of the
12 statute, or is that something you were advised by
13 counsel?

14 A. This is my own conclusion.

15 Q. Okay. And then going down to the next
16 line, sentence at line 15, you say "As I understand
17 from counsel, payment of the compliance payment in
18 Ohio would not have relieved the FirstEnergy Ohio
19 utilities of the obligation to procure RECs." Do you
20 see that?

21 A. Yes.

22 Q. Did you -- is that based solely on
23 counsel's input, or did you come to that conclusion
24 on your own?

25 A. I relied on counsel for the conclusion

1 that the compliance payment in Ohio would not have
2 relieved FirstEnergy Ohio utilities of the obligation
3 to procure RECs. But because of that, I do not think
4 the compliance payment acts as a price cap.

5 Q. Okay. And if I were to tell you in
6 Pennsylvania that the price cap is not recoverable
7 from ratepayers, would you agree that then it doesn't
8 act as a safety valve, as you describe here?

9 MR. KUTIK: Objection, your Honor,
10 assumes facts -- in fact, contrary to the facts that
11 are in evidence in this case. Dr. -- Mr. Bradley was
12 asked about it, and Mr. Bradley talked about how --
13 and it was demonstrated how that the force majeure
14 provisions of the Pennsylvania statute allow recovery
15 of the ACP from ratepayers, so counsel's advising the
16 witness about a fact that is demonstrably incorrect
17 based upon this record.

18 EXAMINER CHILES: Mr. Berger.

19 MR. BERGER: Your Honor, we provided the
20 regulation in Pennsylvania for compliance payments
21 that specifically stated compliance payments are not
22 recoverable from ratepayers. Mr. Bradley was talking
23 about a special provision where the Commission
24 determines force majeure.

25 MR. KUTIK: So down --

1 MR. BERGER: I am not asking about that.

2 MR. KUTIK: Your Honor, may I respond?

3 EXAMINER CHILES: Yes, you may respond.

4 MR. KUTIK: Counsel is admitting what it
5 showed Mr. Bradley was misleading, that it only
6 showed part of the recovery mechanism for the ACP.
7 Counsel's statement that they showed Mr. Bradley a
8 provision of ACP is only partially right. He did not
9 show him, as he now admits -- excuse me. Let me
10 finish -- that there is a force majeure provision.

11 Given that statement that he just made,
12 not only is he admitting that OCC was misleading
13 previously, but his question is misleading, and he
14 has not laid a proper foundation here.

15 EXAMINER CHILES: Mr. Berger.

16 MR. BERGER: Your Honor, I am asking him
17 about the compliance payment in Pennsylvania, and I
18 am certainly not here to testify regarding what I
19 asked Mr. Bradley about and what he responded. He's
20 the one who was testifying, not me. I was asking
21 questions.

22 MR. KUTIK: The point --

23 MR. BERGER: I would like the response to
24 my question regarding compliance payments in
25 Pennsylvania and whether they act as a safety valve.

1 That's my only question. Mr. Kutik is making a much
2 bigger issue --

3 MR. KUTIK: No. The point of the
4 question, your Honor -- the point of the objection is
5 that the question is premised on a fact that counsel
6 now admits is not true. If he wants to ask him if
7 the Pennsylvania ACP provisions act as a cap, let him
8 do that, but that's not what he asked.

9 EXAMINER CHILES: Would you please reread
10 the initial question to me.

11 (Record read.)

12 EXAMINER CHILES: Thank you. The
13 objection is sustained. I think you need to rephrase
14 your question.

15 MR. BERGER: Your Honor, may I approach
16 the witness with OCC Exhibit 7?

17 EXAMINER CHILES: You may.

18 MR. BERGER: Which shows the language on
19 alternative compliance payments in Pennsylvania.

20 EXAMINER CHILES: You may.

21 MR. KUTIK: Your Honor.

22 EXAMINER CHILES: Yes, Mr. Kutik.

23 MR. KUTIK: I object. No foundation has
24 been laid to address this issue, this particular
25 document with this witness. This witness has already

1 said that he doesn't have an opinion on that issue.
2 And -- well, I'll just stop there.

3 EXAMINER CHILES: Mr. Berger.

4 MR. BERGER: Your Honor, he is comparing
5 other states to Ohio's situation in terms of the
6 alternative compliance payment so I'm trying to
7 determine from him whether he believes Pennsylvania,
8 which also has a provision that says that the
9 compliance payment is not recoverable from
10 ratepayers, whether that acts as a safety -- whether
11 Pennsylvania has a safety valve despite that or not.

12 MR. KUTIK: I also object, your Honor,
13 because this is the same misleading tactic that we
14 saw before with Mr. Bradley. Given counsel's
15 admission that there is a force majeure statute that
16 does provide for recovery of an ACP, showing him this
17 shows nothing and is a waste of the time and is
18 misleading.

19 EXAMINER PRICE: Mr. Berger, have you
20 given the witness all the applicable Pennsylvania
21 laws to recovery of an alternative compliance payment
22 both in a force majeure situation and not in a force
23 majeure situation?

24 MR. BERGER: No, I didn't, your Honor. I
25 gave him the situation in a non-force majeure

1 situation, which is the situation I'm asking him
2 about, and in terms of whether there is a force
3 majeure situation, counsel is certainly free to
4 redirect his witness on this issue, should he feel it
5 appropriate to do so.

6 MR. KUTIK: The problem, if I may, your
7 Honor, is that there is a representation that this is
8 the statute with respect to ACP recovery, and as
9 counsel has admitted, it's not.

10 MR. BERGER: There is another statement
11 on force majeure, your Honor, just like every
12 state -- many states have statutes on force majeure
13 and have different provisions on force majeure, some
14 of which comment on recoverability in that context
15 and others which don't. I'm asking him about
16 alternative compliance payments.

17 MR. KUTIK: Right. And when counsel asks
18 about the recovery of that, he hasn't shown him the
19 documents which he admits today would be relevant to
20 that determination.

21 EXAMINER CHILES: Thank you. The
22 objection is sustained. I think we need to move on,
23 please.

24 MR. BERGER: Just a minute, your Honor.
25 I am almost ready to move on to the confidential

1 section.

2 EXAMINER CHILES: Thank you.

3 MR. BERGER: I am ready to move on to the
4 confidential section.

5 EXAMINER CHILES: Thank you. Please let
6 the record reflect we have moved into the
7 confidential portion of the transcript.

8 (CONFIDENTIAL PORTION.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(PUBLIC RECORD.)

Mr. Allwein, do you have any questions?

MR. ALLWEIN: I have no questions, your

1 Honor. Thank you.

2 EXAMINER CHILES: Mr. McDaniel.

3 MR. McDANIEL: No questions.

4 EXAMINER CHILES: Ms. Kyler.

5 MS. COHN: No questions.

6 EXAMINER CHILES: Mr. Lavanga.

7 MR. LAVANGA: No questions.

8 EXAMINER CHILES: Mr. O'Rourke.

9 MR. O'ROURKE: No questions.

10 EXAMINER CHILES: All right. Redirect?

11 MR. KUTIK: Your Honor, may I have a
12 moment? I do mean a moment.

13 EXAMINER CHILES: Sure.

14 MR. KUTIK: Your Honor, I am ready to
15 proceed.

16 EXAMINER CHILES: Go ahead.

17 MR. KUTIK: We have no questions, your
18 Honor.

19 EXAMINER CHILES: Thank you.

20 I have no questions. Thank you. You are
21 excused.

22 MR. KUTIK: Your Honor, at this time the
23 company moves for the admission of Companies' Exhibit
24 3.

25 EXAMINER CHILES: Are there any

1 objections to the admission of Companies' Exhibit 3?

2 Hearing none, Companies' Exhibit 3 will
3 be admit.

4 (EXHIBIT ADMITTED INTO EVIDENCE.)

5 EXAMINER CHILES: Mr. Berger.

6 MR. BERGER: Yes. At this time OCC moves
7 the admission of OCC Exhibits 13 through 15, your
8 Honor.

9 MR. KUTIK: I'm sorry?

10 MR. BERGER: 13 through 15, 13, 14, and
11 15.

12 EXAMINER CHILES: We will go through
13 these individually. Is there any objection to OCC
14 Exhibit 13?

15 MR. KUTIK: Yes, your Honor.

16 EXAMINER CHILES: Would you, please.

17 MR. KUTIK: The witness was shown the
18 document, and he said he doesn't know what it is,
19 hasn't seen it before. No foundation laid.

20 EXAMINER CHILES: Mr. Berger?

21 MR. BERGER: We'll withdraw the motion
22 with respect to Exhibit 13, your Honor.

23 EXAMINER CHILES: Exhibit 13 will not be
24 admitted.

25 As to OCC Exhibit 14, are there any

1 objections to the admission of this exhibit?

2 MR. KUTIK: I am trying to recall, your
3 Honor, since there was a paucity of copies what that
4 was. If I may have a moment.

5 EXAMINER PRICE: It's the U.S. Renewable
6 Energy --

7 EXAMINER CHILES: Technical --

8 MR. KUTIK: Oh, I already said I have no
9 objection to that.

10 EXAMINER CHILES: Hearing no other
11 objections, OCC Exhibit 14 will be admitted.

12 (EXHIBIT ADMITTED INTO EVIDENCE.)

13 EXAMINER PRICE: Are there any objections
14 to the admission of OCC Exhibit 15?

15 MR. KUTIK: Other than to note, your
16 Honor, that that should be treated in the
17 confidential portion of the record.

18 EXAMINER CHILES: So noted, and hearing
19 no objections OCC Exhibit 15 will be admitted.

20 (EXHIBIT ADMITTED INTO EVIDENCE.)

21 EXAMINER CHILES: Is there anything
22 further to come before us today?

23 EXAMINER PRICE: Let's go off the record
24 and talk about witnesses tomorrow.

25 EXAMINER CHILES: Off the record.

1 (Discussion off the record.)

2 EXAMINER PRICE: At this time we have
3 discussed witnesses scheduled for tomorrow, and we
4 are adjourned for the evening.

5 Thank you, all.

6 (The hearing adjourned at 6:30 p.m.)

7 - - -

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE

2 I do hereby certify that the foregoing is
3 a true and correct transcript of the public
4 proceedings taken by me in this matter on Wednesday,
5 February 20, 2013, and carefully compared with my
6 original stenographic notes.

7
8
9
10 Rosemary F. Anderson, Registered
Professional Reporter.

11
12 Karen Sue Gibson, Registered
Merit Reporter.

13 (KSG-5666)

14 - - -
15
16
17
18
19
20
21
22
23
24
25

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/6/2013 2:21:49 PM

in

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

Summary: Transcript in the matter of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company hearing held on 02/20/13 - Volume II - Public Version electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.