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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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POST-HEARING BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
E-mail: cdunn@firstenergycorp.com

David A. Kutik (0006418)
Lydia M. Floyd (0088476)
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
E-mail: lmfloyd@jonesday.com
ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies" or the "FirstEnergy Ohio Utilities") at all times have complied with their obligations to purchase renewable energy and solar renewable energy resources. No party questions that fact. The issue presented by this case is largely this: whether the Companies paid the proper price for certain renewable resources originating in Ohio during 2009-2011 ("In-State All Renewables"). The unrebutted evidence demonstrates that all In-State All Renewables purchased by the Companies were procured through independently managed competitive solicitations which produced prices that reflected the market at the time. These renewables were thus reasonably available. The competitive solicitations were conducted by Navigant Consulting, Inc. ("Navigant"), an independent, nationally recognized consulting firm with significant experience in conducting competitive solicitations for renewable energy products. The Companies' purchase decisions were based on recommendations from Navigant.

The unrebutted evidence also demonstrates that the Companies' cost for procuring renewable and solar resources never exceeded the statutory three percent threshold for potentially seeking relief from their purchase obligations. Those parties questioning the Companies' purchase decisions baldly claim that the price paid for certain In-State All Renewables was too high. But, as the record shows, given that the Ohio In-State All Renewables market was unlike other renewable markets in that there was simply no data on market prices (other than the results of the Companies' independently managed competitive solicitation processes), there is simply no credible evidence to support a claim that the Companies paid too much.

Ohio Revised Code Section 4928.64(B) mandates that an electric distribution utility obtain a prescribed amount of renewable energy and solar renewable energy resources as part of their electricity supply, including requiring that at least half of the renewable energy resources be In-State All Renewables. Consequently, during 2009 through 2011, the Companies were required to comply with the renewable energy benchmarks for those years. In fact, the Commission has previously found that the Companies have at all times complied with those obligations.[1]

[1] The Companies complied with the requirements of Section 4928.64 through the purchase of renewable energy credits as permitted under Section 4928.65. *See In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Annual Status Report*, Case No. 10-499-EL-ACP, Finding and Order, p. 4 (Mar. 14, 2012) ("Case No. 10-499-EL-ACP") ("[T]he Commission finds that FirstEnergy is in compliance with its 2009 overall renewable energy resources benchmark and adjusted overall SER benchmark."); *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric, Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP, Finding and Order, pp. 3-4 (Aug. 15, 2012) ("Case No. 11-2479-EL-ACP") ("[T]he Commission finds that FirstEnergy is in compliance with its 2010 overall renewable energy resources benchmark, in-state renewable energy resources benchmark, overall SER benchmark, and adjusted in-state SER benchmark, including its shortfall of solar RECs carried over from 2009."); *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 12-1246-EL-ACP, Finding and Order, p. 3 (Oct. 10, 2012) ("Case No. 12-1246-EL-ACP").

Section 4928.64 provides only two potential avenues of relief from the obligation to purchase renewable or solar energy resources. Section 4928.64(C)(4)(a) provides a narrow force majeure exception. The Companies did not qualify for this exception because there were In-State All Renewables reasonably available in the marketplace in sufficient quantities from 2009-2011. Specifically, because the Companies were able to procure In-State All Renewables through competitive solicitations, such resources were available. Thus, the Companies were statutorily mandated to purchase the renewable energy credits ("RECs") and force majeure was inapplicable.

Section 4928.64(C)(3) provides that an electric utility "need not comply" if a company's cost of complying with the statutory mandates exceeds three percent of "its reasonably expected cost of otherwise producing or acquiring the requisite electricity." Although this is not a mandatory path to relief from the purchase obligation (because the statute provides only that a company "need not comply", rather than "shall not be required to comply"), the unrefuted record evidence in this case shows that the Companies' cost of compliance with the statutory mandates did not exceed the three percent cost provision.[2] Therefore, the Companies could not invoke any option related to this provision. Put simply, under the facts of this case, and consistent with the Commission's previous determination, the law did not provide any alternative

[2] Gonzalez Testimony, p. 32 ("FirstEnergy did not meet or exceed the 3% provision of Ohio law even while purchasing In-State All Renewable RECs. . ."): Tr. Vol. III. p. 523 (Company witness Eileen Mikkelsen testified that FirstEnergy did not meet or exceed the three percent cost provision during 2009 through 2011). *See also* Commission Ordered Ex. 1 at p. 30. The following citation formats are applied in this brief: direct testimony of a witness will be referred to by the witness's last name followed by "Testimony," e.g. "Stathis Testimony;" rebuttal testimony will be referred to by the witness's last name followed by "Rebuttal Testimony"; all citations to the hearing transcript in the proceeding will be in the format "Tr. Vol. __, p. __." with confidential portions of the transcripts indicated in parenthesis; and exhibits will be identified by party name and exhibit number. e.g. "Company Ex. 1.".

other than to comply with the statutory mandates through the purchase of reasonably available In-State All Renewables.[3] As noted, the Companies complied.

Those questioning the Companies' purchase decisions seek to apply convenient but incorrect hindsight. Certain parties even suggest that the Companies should have ignored the law and paid an "alternative compliance payment,"[4] a suggestion that cannot be taken seriously and must be dismissed out of hand. Moreover, having the Companies pay an "alternative compliance payment" in lieu of their purchase obligation is simply unavailable under the plain language of Section 4928.64. There is no provision for this type of waiver of compliance in Section 4928.64.

Despite the fact that the Companies complied with the law, Staff and certain intervenors contend that the Companies acted imprudently by paying unreasonably high prices to purchase In-State All Renewables during 2009 through 2011. They base that conclusion on findings set forth in Exeter Associates, Inc.'s Confidential Final Report Management/Performance Audit of the Alternative Energy Resource Rider (Rider AER) of the FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011 (the "Exeter Report"). In that report, Exeter contended that the Companies paid unreasonably high prices for In-State All Renewables for 2009, 2010 and 2011. From 2009 through 2011, six Requests for Proposals ("RFPs") were held to procure RECs to comply with Ohio Revised Code Section 4928.64. But Exeter's conclusion regarding price is wholly unsupported by Exeter's own report and the record. For example,

[3] Case No. 08-888-EL-ORD, 2009 PUC LEXIS 429, *35-37 (June 17, 2009). *See* discussion infra at pp. 21-22.

[4] Commission Ordered Ex. 2A at p. 31; Gonzalez Testimony, pp. 30-31.

Exeter agreed that the Companies' RFPs were competitive solicitations.[5] Exeter's representative admitted that prices from competitive solicitations would reflect market prices.[6] Exeter observed that, during the Companies' first three RFPs, there was no relevant market pricing information available to the Companies.[7]

Those questioning the price paid by the Companies for certain In-State All Renewables base their arguments on the relationship of the prices actually paid to the level of the compliance payment penalty or to prices for RECs in other markets. These comparisons are wrong. As Exeter's representative admitted, the compliance payment penalty was not based on a market price.[8] The indicative pricing information that Exeter relied on and other parties cited does not even represent actual prices of RECs or RECs in quantities sufficient to meet the Companies' benchmarks. Further, no other market was similar to the Ohio In-State All Renewables market. For example, unlike other states, Ohio law: (a) prescribes a geographic limitation in the form of any in-state purchase requirement; and (b) lacks an Alternate Compliance Payment ("ACP") that could be recovered from customers and therefore act as a price cap. Simply put, there is no credible evidence that shows that prices that the Companies paid for In-State All Renewables during 2009 through 2011 were unreasonable. Given this fact, disallowance of any costs in this case would be unreasonable and unlawful. Therefore, the Commission should find that the costs incurred by the Companies in complying with their renewable energy benchmarks during 2009 through 2011 were prudently incurred costs and dismiss this audit proceeding.

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[5] Commission Ordered Ex. 2A at p. ii.

[6] Tr. Vol. I, p. 79.

[7] Commission Ordered Ex. 2A at p. 29.

[8] Tr. Vol. 1, p. 83.

II. PROCEDURAL HISTORY

On September 20, 2011, the Commission initiated this audit proceeding by opening a docket to review Rider AER.[9] To assist with the audit, the Commission requested that the Staff secure the services of outside auditors.[10] Staff selected Exeter and Goldenberg Schneider, LPA ("Goldenberg") as outside auditors.[11] Exeter was selected to perform a management/performance audit and Goldenberg was selected to perform a financial audit.[12] On August 15, 2012, the Exeter and Goldenberg reports were filed with the Commission.

In its report, Exeter explained that it "examined the FirstEnergy Ohio [U]tilities' procurement process for evaluation relative to the following important characteristics: (1) competitiveness; (2) transparency; (3) cost; and (4) ability to obtain adequate industry response."[13] Exeter found that "[e]ach of these considerations appears to have been satisfied by the REC acquisition approach employed by the Companies."[14] Exeter also found that "[t]he RFPs issued by the FirstEnergy Ohio utilities are reasonably developed and do not appear to incorporate any provisions or terms that could be assessed to be anticompetitive."[15] It further found that the Companies employed adequate mechanisms to obtain industry response to the RFPs. Exeter thus concluded that the Companies' RFPs were competitive, transparent and designed to obtain adequate industry response.

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[9] *See In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Entry, p. 1 (Jan. 18, 2012) ("Case No. 11-5201-EL-RDR").

[10] *See* Case No. 11-5201-EL-RDR, Entry, p. 1 (Feb. 23, 2012).

[11] *See id.*, p. 2.

[12] *See id.*

[13] Commission Ordered Ex. 2A at p. ii.

[14] *Id.*

[15] *Id.*

In addition, Exeter determined that the Companies employed adequate mechanisms to review and evaluate bid results and that the Companies used an acceptable approach to solicit industry feedback regarding the strengths and weaknesses of RFPs.[16] Exeter found that the Companies effectively used this information to modify subsequent RFPs.[17] Exeter found that for compliance years 2009 through 2011, the Companies paid reasonable prices for All-State All Renewables, All-State Solar, and to the extent RECs were available, In-State Solar.[18] Regarding the prices that the Companies paid for In-State All Renewables, Exeter found that, at the time of RFPs 1, 2 and 3, "the market for In-State All Renewables in Ohio was still nascent; reliable, transparent information on market prices, future renewable energy projects that may have resulted in future RECs trading at lower prices, or other information that may have directly influenced the Companies' decisions to purchase the high-priced RECs was generally not available." Yet, Exeter nevertheless concluded that the Companies paid excessive prices to satisfy their in-state renewable compliance obligations for 2009 through 2011.[19] Exeter based this finding on a comparison of the prices that the Companies paid for In-State All Renewables with the level of compliance payment penalties and indicative information regarding the prices of RECs in other states. As demonstrated below, neither comparison is correct.

Exeter also suggested that the Companies could have pursued four alternative courses instead of procuring In-State All Renewables: (1) the Companies should have made an "alternative compliance payment" in lieu of procuring RECs; (2) the Companies could have

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[16] *Id.*

[17] *Id.*, at pp. ii-iii.

[18] *Id.*, at pp. iii-iv.

[19] *Id.*, at p. iv.

consulted with the Staff of the Commission; (3) the Companies could have sought force majeure on the basis of high prices even though the required RECs were reasonably available for purchase in the marketplace; or (4) the Companies could have delayed their decisions to purchase in-state renewables based on high prices.[20] Exeter further recommended that the Commission "examine" a disallowance for the costs associated with the Companies' purchase of In-State All Renewable RECs.[21] The Exeter Report, however, did not recommend that any such disallowance be ordered or provide any specific amount that should be considered for a disallowance.

Goldenberg's Report focused on the verification of the accuracy of the Companies' calculations involving Rider AER and the associated compliance transactions, as well as a review of the Companies' accounting treatment of such compliance activities.[22] Per the Commission's request, Goldenberg also evaluated the Companies' status relative to the three percent provision contained within Section 4928.64(C)(3).[23] In its Report, Goldenberg first made a few recommendations regarding the calculation of the Quarterly Rider AER, but Goldenberg verified the mathematical accuracy of the quarterly Rider AER calculations and traced the data to various sources provided by the Companies.[24] Second, Goldenberg recommended that the Companies should calculate carrying costs based on the difference between monthly revenues booked and expenditures incurred for the month.[25] Third,

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[20] *Id.*, pp. 31-33.

[21] *Id.*, p. 33.

[22] Commission Ordered Ex. 1. p. 3.

[23] *Id.*

[24] *Id.*, p. 6.

[25] *Id.*, p. 7.

Goldenberg confirmed that it was able to verify invoices to the REC contracts.[26] Fourth, Goldenberg recommended that the Companies use the policy implemented in 2011 related to the retirement of RECs in the future.[27] Fifth, Goldenberg discussed various methodologies related to the three percent calculation, but ultimately recommended that the Companies provide their own three percent calculation for: (i) the next calendar year; (ii) for the balance of the standard service offer ("SSO") period; and (iii) a historical calculation.[28]

The Companies and various intervenors subsequently engaged in discovery. A hearing took place before the Commission from February 19 to February 25, 2013. At the hearing, Staff offered the Exeter Report and the Goldenberg Report into evidence. Staff also presented Dr. Steven Estomin from Exeter and Donald Storck from Goldenberg for cross-examination.

Through the Exeter Report, Staff apparently contended that the Companies paid high prices for In-State All Renewable RECs and that the Companies should have pursued the alternative suggestions set out in the Exeter Report. OCC, through the testimony of Wilson Gonzalez, [redacted].[29] Mr. Gonzalez also contended that the Companies should have pursued the alleged alternatives laid out in the Exeter Report either by seeking force majeure or by making a compliance payment even though RECs were reasonably available for purchase in the market.[30]

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Gonzalez Testimony (Confidential), p. 36.

[30] Gonzalez Testimony, pp. 21-24 and pp. 25-28.

As demonstrated below, the evidence at the hearing shows that Staff and OCC's contentions are unsupported. Instead, the evidence shows that the Companies complied with their statutory obligations under Section 4928.64 and acted reasonably in procuring In-State All Renewables to meet those obligations. Accordingly, the Companies request that the Commission find that the Companies' costs of procuring In-State All Renewables were prudently incurred, reject any arguments to the contrary and dismiss this audit proceeding.

III. THE COMPANIES, AT ALL TIMES, COMPLIED WITH OHIO REVISED CODE SECTION 4928.64.

A. The Companies Had A Duty, To Meet The Statutory Renewable Energy Requirements Contained In Ohio Revised Code Section 4928.64—And The Companies Complied With That Duty.

Section 4928.64 and the related regulations promulgated thereunder establish the Companies' duty to comply with renewable energy benchmarks. This duty also is set forth in the Companies' ESPs. During 2009 through 2011, the Companies satisfied their in-state renewable energy benchmarks by procuring, through four independently managed competitive RFPs, a sufficient supply of In-State All Renewables to meet those benchmarks.

1. Section 4928.64 and Chapter 4901:1-40 of the Ohio Administrative Code create a duty for a utility to comply with the renewable energy benchmarks established under Section 4928.64.

Ohio's alternative energy compliance regime is established by Sections 4928.64 and 4928.65 of the Ohio Revised Code. By 2025, "twenty-five percent of the total number of kilowatt hours of electricity sold" by an "electric distribution utility" must come from "alternative energy resources."[31] At least half of these resources must "be generated from

[31] R.C. § 4928.64(B).

renewable energy resources, including one-half percent from solar energy resources."[32] In addition, "*at least one-half of the renewable energy resources . . . shall be met through facilities located in this state.*"[33] Utilities may meet their annual compliance obligations through the procurement and redemption of RECs.[34] RECs come in two forms: non-solar and solar ("SRECs").

There are only two possible exceptions to meeting the required benchmarks: (1) if a force majeure situation precludes a company's ability to comply; and (2) if a company's costs to comply exceed three percent of its cost of otherwise acquiring requisite electricity.[35] If these exceptions do not apply, then a utility must comply with the statutory benchmarks.[36] The limited exceptions to compliance further the legislative intent to force utilities to purchase in-state renewable resources and thus grow the renewable energy industry in Ohio.[37]

Notably, the only provision in Section 4928.64 that references the cost of procuring renewable energy resources is the three percent provision of Section 4928.64(C)(3).[38] The three percent provision, however, does not exclude the possibility that a utility will have to make up any alternative energy compliance shortfall in a subsequent compliance year. Indeed, the

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[32] R.C. § 4928.64(B)(2).

[33] R.C. § 4928.64(B)(3) (emphasis added).

[34] R.C. § 4928.65.

[35] R.C. § 4928.64(C)(3)-(4). In the case of the three percent calculation, Section 4928.64(C)(3) provides that a utility "*need not comply with a benchmark*...to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected *cost* of otherwise producing or acquiring the requisite electricity by *three percent or more*." R.C. §4928.64(C)(3) (emphasis added). Thus, this provision is discretionary in that a utility "need not comply" with its annual benchmarks once the three percent calculation has been met.

[36] Entry on Rehearing, Case No. 08-888-EL-ORD, 2009 Ohio PUC LEXIS 429, *35-37 (June 17, 2009).

[37] Bradley Testimony, p. 45, n. 15 (citing the October 1, 2008 letter from Speaker Jon Husted of the Ohio House of Representatives to Alan Schriber, Chairman of the PUCO).

[38] *See* Stathis Testimony, p. 39; Tr. Vol. II, p. 431. *See also* Tr. Vol. I, p. 96.

Commission has reserved the right to impose a "catch-up requirement" for any under-compliance caused by the three percent provision.[39]

With respect to force majeure relief under Section 4928.64(C)(4), the Commission must "determine if renewable energy resources are *reasonably available in the marketplace in sufficient quantities* for the utility or company to comply with the subject minimum benchmark during the review period."[40] The Commission also must determine if the utility made a "good faith effort" to meet its compliance obligations for the benchmark in question.[41] The Commission may grant force majeure only if it finds that "renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility . . . to comply, during the period of review, with the subject minimum benchmark."[42]

A force majeure determination, however, does not "automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years."[43] The Commission thus may require a utility to make up the benchmark shortfall subject to the force majeure determination in subsequent compliance years.[44] In fact, the Commission has typically done so when force majeure relief has been granted.[45]

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[39] Case No. 08-888-EL-ORD, Opinion and Order, April 15, 2009 at p. 38.

[40] R.C. § 4928.64(C)(4)(b) (emphasis added).

[41] *Id.*

[42] R.C. § 4928.64(C)(4)(c).

[43] *Id.*

[44] *Id.*

[45] Case No. 10-499-EL-ACP, Finding and Order, at p. 4 (Mar. 4, 2010); Case No. 11-2479, Finding and Order, p. 4 (Mar. 14, 2010); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of The 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code*, Case No. 09-1922-EL-ACP, Finding and Order, p. 3 (Mar. 10, 2010) ("Case No. 09-1922-EL-ACP").

Section 4928.64 also requires the Commission to conduct an annual review of each utility to ensure compliance, and to "identify any under-compliance or noncompliance," with the relevant annual benchmarks.[46] If an electric distribution utility fails to meet its annual compliance obligation, then Section 4928.64(C)(2) provides that the Commission "shall impose a renewable energy compliance payment on the utility" should the Commission determine that "noncompliance" was "avoidable."[47]

Chapter 4901:1-40 of the Ohio Administrative Code implements the requirement of Sections 4928.64 and 4928.65. The rules provide a methodology for computing a utility's "baseline for compliance"[48] and require each utility, beginning in 2010, to file a plan for compliance with the benchmarks contained within Section 4928.64.[49]

The rules also mandate that a utility file an annual status report with the Commission demonstrating compliance with a previous compliance year's benchmarks.[50] In the case of under-compliance or noncompliance, the Commission may impose a compliance payment as specified in the statute.[51] The rules provide that such payments are not recoverable from customers and, further, do not specifically provide that the payment thereof can be made in lieu

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[46] R.C. § 4928.64(C)(1).

[47] R.C. § 4928.64(C)(2).

[48] Rule 4901:1-40-03(B)(1). O.A.C. The Rule specifically provides:

> For electric utilities, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold under its standard service offer to any and all retail electric customers whose electric load centers are served by that electric utility and are located within the electric utility's certified territory. The calculation of the baseline shall be based upon the average, annual, kilowatt-hour sales reported in that electric utility's three most recent forecast reports or reporting forms.

[49] *See* Rule 4901:1-40-03(B)(1) and (C), O.A.C.

[50] *See generally*. Rule 4901:1-40-05, O.A.C.

[51] *See* Rule 4901:1-40-08(A)-(D), O.A.C.

of actual compliance with the relevant benchmark.[52] As mandated by the statute, the rules contain provisions for force majeure determinations and the three percent calculation.[53] Once again, considerations of cost of compliance only factor into the three percent calculation; there is no reference to cost of compliance in the rules as a basis for a force majeure determination.[54]

2. The Companies' ESPs required the Companies to procure RECs to meet the requirements of Section 4928.64 and established Rider AER to recover the costs that the Companies incurred to meet those requirements.

In *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Case No. 08-935-EL-SSO for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO ("Case No. 08-935-EL-SSO"), the Companies and various intervenors entered into a stipulation to establish an electric security plan ("ESP 1") that authorized the Companies to recover their compliance costs associated with Section 4928.64.[55] For the period of January 1, 2009 through May 31, 2011, ESP 1 required that the Companies use an RFP process to meet their renewable energy resource requirements.[56] The Companies agreed

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[52] *See* Rule 4901:1-40-08(D), O.A.C.

[53] *See generally*, Rules 4901:1-40-06 and 4901:1-40-07, O.A.C.

[54] Indeed, *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD, the Commission rejected the argument that Section 4928.64 allowed for a statutory waiver of benchmarks in the cases of high compliance costs that did not cross the threshold of the three percent calculation. 2009 Ohio PUC LEXIS 429, *35-37 (June 17, 2009) ("Case No. 08-888-EL-ORD").

[55] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Stipulation and Recommendation, p. 10 (Feb. 19, 2009) ("Case No. 08-935-EL-SSO").

[56] Stathis Testimony, pp. 19-20.

that any waiver of the alternative energy resource requirement would be limited to those waivers identified in Section 4928.64.[57]

On March 25, 2009, the Commission approved the stipulation.[58] On May 27, 2009, the Commission approved the Companies' revised tariff, which included the Companies' alternative energy rider, Rider AER.[59] On May 29, 2009, pursuant to the Commission's May 27, 2009 Finding and Order, the Companies filed their revised tariffs, including their original tariff sheet for Rider AER, on the docket for ESP 1.[60]

After the approval of the Stipulation in ESP 1 and throughout the audit period, the Companies made 27 timely quarterly filings in accordance with their tariffs.[61] Each quarterly filing stated the Rider AER charges per kWh by rate schedule under the term "RATE."[62]

Each quarterly Rider AER tariff sheet also contained the following language:

> PROVISIONS:
>
> The charges set forth in this Rider recover costs incurred by the Company associated with securing compliance with the alternative energy resource requirements in Section 4928.64, Revised Code. The costs initially deferred by the Company and subsequently fully

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[57] *Id.*, p. 2; Case No. 08-935-EL-SSO, Stipulation and Recommendation, p. 11 (Feb. 19, 2009) ("The Companies agree that for any waiver of the alternative energy resource requirements shall be limited to those waivers identified in R.C. §4928.64.").

[58] *See* Case No. 08-935-EL-SSO, Second Opinion and Order, p. 23 (Mar. 25, 2009).

[59] *See* Case No. 08-935-EL-SSO. Finding and Order, p. 2 (May 27, 2009).

[60] In Case No. 10-388-EL-SSO, the Commission approved a similar version of Rider AER for the recovery of REC compliance costs for the period June 1, 2011 through May 31, 2014. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order, pp. 9-10 (Aug. 25, 2010) ("Case No. 10-388-EL-SSO").

[61] *See* Docket, Case No. 08-935-EL-SSO.

[62] Case No. 08-935-EL-SSO. Ohio Edison Company, P.U.C.O. No. 11, Original Sheet 84, 8th Revised Sheet Page 1 of 1 (May 29, 2009). The Rider AER tariff sheets for The Toledo Edison Company and The Cleveland Electric Illuminating Company are identical.

> recovered through this Rider will be *all costs associated with securing compliance with the alternative energy resource requirements including, but not limited to, all Renewable Energy Credits costs*, any reasonable costs of administering the request for proposal, and applicable carrying costs.
>
> RIDER UPDATES:
>
> The charges contained in this Rider shall be updated and reconciled on a quarterly basis. *No later than December 1st, March 1st, June 1st and September 1st of each year, the company shall file with the PUCO a request for approval of the rider charges which, unless otherwise ordered by the PUCO, shall become effective on a service rendered basis on January 1st, April 1st, July 1st and October 1st of each year, beginning October 1, 2009.*[63]

The above language states that the quarterly Rider AER tariff sheets are filed on the Case No. 08-935-EL-SSO docket as "a request for [Commission] approval," and "unless otherwise ordered by the PUCO" become effective approximately one month after filing.[64] The charges for rates collected pursuant to Rider AER are thus subject to Commission review for approximately 30 days prior to becoming 'effective'. Subject to the Commission's review period, the rates in each of the Companies 27 quarterly Rider AER tariffs became effective 30 days after the Companies filed them. As a result, the Companies have collected amounts from non-shopping customers under Rider AER since October 2009, reflecting the Companies' cost of complying with Section 4928.64.

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[63] *Id.* (emphasis added).

[64] *See also*, Case No. 11-5201-EL-RDR, Request for Proposal attached to Entry, p. 1 (Jan. 18, 2012) ("Rider AER, which began in October 2009, is adjusted quarterly. The Companies make filings to the Commission no later than March 1st, June 1st, September 1st, and December 1st of each year, *with the proposed rates becoming effective one month later....unless otherwise ordered by the Commission.*") (emphasis added).

3. Through their competitive RFPs, the Companies procured a sufficient supply of RECs to meet their required in-state renewable energy benchmarks.

Upon the approval of Rider AER, and in accordance with their tariffs and the stipulation in Case No. 08-935-EL-SSO, the Companies proceeded to issue RFPs, entertain and accept bids, and enter into binding, confidential contracts for the purchase of RECs with various suppliers to comply with the provisions of Section 4928.64. For compliance years 2009 and 2010, the Companies satisfied their statutorily-mandated alternative energy compliance benchmarks for All-State Renewables and In-State All Renewables. The Companies could not physically secure the requisite number of SRECs to meet their solar requirements for 2009 and their in-state solar requirements for 2010. Because these SRECs were not reasonably available in the marketplace in sufficient quantities, the Companies applied for and the Commission granted force majeure relief for those requirements.[65] The Companies were successful through their RFP process in meeting their benchmarks in all four statutorily-mandated alternative energy compliance categories for compliance year 2011.[66]

As required by Rule 4901:1-40-05 of the Ohio Administrative Code, the Companies filed their alternative energy compliance reports for compliance years 2009, 2010 and 2011 in April

[65] Case No. 09-1922-EL-ACP, Finding and Order, p. 4 (Mar. 10, 2010) ("Therefore, we find that there was an insufficient quantity of solar energy resources reasonably available in the market and that FirstEnergy has presented sufficient grounds for the Commission to reduce the three electric utilities' aggregate 2009 SER benchmark to the level of SRECs acquired through FirstEnergy's 2009 RFP process."); Case No. 11-2479-EL-ACP, Finding and Order, pp. 13-14 (Aug. 3, 2011) (granting the Companies' force majeure application because "the Companies have demonstrated a good faith effort to acquire sufficient in-state SRECs. ...Further, the Commission notes neither the interveners nor Staff has demonstrated that substantial quantities of in-state SRECs were reasonably available in the market").

[66] Case No. 12-1246-EL-ACP, Finding and Order, p. 3 (Oct. 10, 2012).

of the year following the compliance period.[67] In each of the Companies' status reports, the Companies explained their efforts to meet their annual renewable energy portfolio standard benchmarks.[68] The Companies also explained their need to seek force majeure for SRECs and Ohio SRECs for the 2009 compliance year and for Ohio SRECs for the 2010 compliance years.[69] The Companies explained that they were unable to procure sufficient supply to meet their benchmark for these products.[70]

The Commission reviewed, and subsequently approved, the Companies' annual, timely-filed alternative energy portfolio status reports for compliance years 2009, 2010 and 2011.[71] Specifically, the Commission found that:

- The Companies were in compliance with their 2009 overall renewable energy resources benchmark and adjusted overall Solar Energy Resources ("SER") benchmark;[72]

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[67] Case No. 10-499-EL-ACP (Companies' Annual Status Report and 2009 Compliance Review dated April 15, 2010); Case No. 11-2479-EL-ACP (Companies' Annual Status Report and 2010 Compliance Review dated April 15, 2011); Case No. 12-1246-EL-ACP (Companies' Annual Status Report and 2011 Compliance Review dated April 15, 2012). This report must include an analysis of "all activities undertaken in the previous calendar year to demonstrate how the applicable alternative energy portfolio benchmarks and planning requirements have or will be met." This rule also requires Staff to conduct annual compliance reviews with regard to the benchmarks under the alternative energy portfolio standard.

[68] *See* Case No. 10-499-EL-ACP, Finding and Order, p. 2 (Mar. 14, 2012) ; Case No. 11-2479-EL-ACP, Finding and Order, p. 2 (Aug. 15, 2012); Case No. 12-1246-EL-ACP, Finding and Order, pp. 2-3 (Oct. 10, 2012).

[69] *See* Case No. 10-499-EL-ACP, Finding and Order at p. 2; Case No. 11-2479-EL-ACP, Finding and Order, at p. 3; Case No. 12-1246-EL-ACP, Finding and Order, at pp. 2-3.

[70] *See* Case No. 10-499-EL-ACP, Finding and Order at p. 2; Case No. 11-2479-EL-ACP, Finding and Order, at p. 3; Case No. 12-1246-EL-ACP, Finding and Order, at pp. 2-3.

[71] Case No. 10-499-EL-ACP, Finding and Order, at p. 4 ("[T]he Commission finds that FirstEnergy is in compliance with its 2009 overall renewable energy resources benchmark and adjusted overall SER benchmark."); Case No. 11-2479-EL-ACP, Finding and Order, at pp. 3-4 ("[T]he Commission finds that FirstEnergy is in compliance with its 2010 overall renewable energy resources benchmark, in-state renewable energy resources benchmark, overall SER benchmark, and adjusted in-state SER benchmark, including its shortfall of solar RECs carried over from 2009."); Case No. 12-1246-EL-ACP, Finding and Order, at p. 3.

[72] Case No. 10-499-EL-ACP, Finding and Order, at p. 4.

- The Companies were in compliance with their 2010 renewable energy resources benchmark, in-state renewable energy resources benchmark, overall SER benchmark, and adjusted in-state SER benchmark, including their shortfall of solar RECs carried over from 2009:[73] and

- The Companies were in compliance with their 2011 overall renewable energy resources benchmark, in-state renewable energy resources benchmark, overall SER benchmark, and in-state SER benchmark, including its shortfall for solar RECs carried over from 2010.[74]

Thus, there is no dispute that the Companies met their compliance obligations for 2009, 2010 and 2011. Indeed, Staff witness Dr. Estomin and OCC witness Gonzalez both testified that the Companies complied with their obligations to purchase In-State All Renewables for 2009, 2010 and 2011.[75]

Accordingly, during 2009, 2010, and 2011, the Companies had a duty to comply with their renewable energy benchmarks for In-State All Renewables. The Companies complied with that duty by procuring RECs through four competitive solicitations. Importantly, the Commission found that the Companies met their requirements to procure In-State All Renewables for the 2009, 2010, and 2011 compliance years. The Companies thus were required to comply (and did comply) with Ohio law by purchasing In-State All Renewables.

B. Under Ohio Law, The Companies Could Not Obtain Relief Based Upon Force Majeure.

The Commission may excuse a utility's inability to comply with a particular annual benchmark through a determination of force majeure. Specifically, Section 4928.64(C)(4)(a) provides:

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[73] Case No. 11-2479-EL-ACP. Finding and Order, at p. 4.

[74] *Id.*, at p. 3.

[75] Tr. Vol. I, pp. 137-138 (Dr. Estomin); Tr. Vol. III, pp. 590-91 (Mr. Gonzalez).

> An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division(B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section.[76]

The standard under which the Commission reviews these requests is also statutory:

> Within ninety days after the filing of a request by an electric distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources *are reasonably available in the marketplace in sufficient quantities* for the utility or company to comply with subject minimum benchmark during the review period. *In making this determination, the commission shall consider whether the electric utility or electric services company has made a good effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the Midwest system operator or its successor.*[77]

Exeter suggested that the Companies had the alternative to reject the bids for In-State All Renewables and seek force majeure relief on the basis that the prices of RECs were too high.[78] This suggestion, however, is at odds with the evidence and law. There are two reasons why.

First, the RECs were reasonably available, thus precluding force majeure relief. There is no dispute that a sufficient quantity of In-State All Renewables was available in the market. Indeed, OCC witness Gonzalez testified that, during RFPs 1, 2 and 3, the supply of In-State All

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[76] O.R.C. § 4928.64(C)(4)(a).

[77] O.R.C. § 4928.64(C)(4)(b) (emphasis added).

[78] Commission Ordered Ex. 2A, p. 32.

Renewable RECs at least equaled demand.[79] Further, these RECs were reasonably available given that they were procured through a process that was undisputedly competitive, unbiased and implemented by an independent evaluator who is well regarded as an expert in such procurements.[80]

Second, the suggestion that force majeure relief could be available if prices were too high has no support in the language of the statute. For force majeure relief to be appropriate, Section 4928.64(C)(4) requires that RECs not be reasonably available. The word "available" means accessible or obtainable: *i.e.*, RECs could be obtained. The word "reasonably" denotes the ease by which the RECs could be obtained. Thus, the statute does not require that a utility use any conceivable means to obtain RECs: it only requires that a company use reasonable efforts. It is for this reason that the statute requires the Commission to consider "whether the electric utility or electric services company made a good faith effort" to acquire the RECs claimed not to be available.

Contrary to the suggestion by Dr. Estomin, the phrase "reasonably available" does not refer to the price of the RECs. Neither Section 4928.64(C)(4) nor the rules promulgated thereunder use the word "price" or even "cost." The force majeure relief allowed under the statute only relates to a company's inability to obtain RECs with reasonable "good faith" efforts.

In fact, the Commission has previously rejected the argument that a utility can seek a waiver of its compliance obligations based on prices that are high but not above the three percent mechanism under Section 4928.64(C)(3). In, *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and*

[79] Tr. Vol. III, p. 583.

[80] Tr. Vol. II, p. 405; Stathis Testimony, pp. 2-3.

Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221, Case No. 08-888-EL-ORD, the Commission solicited comments and proposed rule modifications from all interested parties regarding Rule 4901:1-40, O.A.C. ("Alternative Energy Portfolio Standard"). During those proceedings, one electric utility, Dayton Power & Light ("DP&L"), argued (as the Exeter Report suggested in this case) that electric utilities should be able to seek a waiver of compliance if REC prices are high but are still within the three percent cost calculation.[81] Specifically, DP&L contended:

> Because the renewable energy requirements in 2009 and for the first few years are a relatively small percentage of the total kWh that will be generated or purchased by a utility, this appears to mean that the utility has no "statutory out" if faced with renewable energy offered only at exorbitant prices. The regulations should provide a more clear [sic] mechanism to permit a utility to seek a waiver of the requirement when prices are too high, even if the three percent of total generation costs has not yet been breached.[82]

The Commission rejected DP&L's argument that Section 4928.64 provides for a waiver based on high prices that fall under the three percent cost calculation:

> The statute contains two provisions by which an electric utility or electric service company may be excused from meeting a required benchmark, that being force majeure or reaching a cost cap. There is no additional statutory direction concerning the scenario proposed by DP&L.[83]

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[81] *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD, DP&L App. for Rehearing, p. 31 (May 15, 2009) ("Case No. 08-888-EL-ORD"). .

[82] *Id.*

[83] Case No. 08-888-EL-ORD, 2009 Ohio PUC LEXIS 429, Entry on Rehearing, *35-37 (June 17, 2009).

Thus, the Commission held that "[u]nless a cost cap is triggered or an event of force majeure can be proven, the Commission would expect the benchmarks to be realized."[84]

The testimony of Staff witness Dr. Estomin, moreover, shows that a decision to seek a force majeure application when RECs were reasonably available would have been an imprudent decision. Dr. Estomin testified that, for a company to decide to seek force majeure, it would be prudent for the company to be confident in its position that force majeure relief would be granted.[85] He further testified that, in a force majeure proceeding, the Commission would look to determine what the Companies did to find available RECs.[86] He agreed that one way the Companies could make their case for force majeure relief would be to do a competitive solicitation to show that RECs in a particular category were not reasonably available.[87] Dr. Estomin acknowledged that there were appropriately certified In-State All Renewable RECs that could be purchased and used to comply with the Companies' obligations during RFPs 1, 2, and 3.[88] Under this analysis, a decision to seek force majeure would have been imprudent because the Companies could not demonstrate a need for force majeure.

In sum, the Companies had no statutory basis to seek a force majeure determination for their In-State All Renewable requirements. The Companies thus were under a duty, and met that duty, to procure RECs to comply with their 2009, 2010, and 2011 benchmarks. Accordingly, Exeter's suggestion that the Companies should have rejected bids and filed force majeure based

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[84] *Id.*

[85] Tr. Vol. I, p. 97.

[86] *Id.*, p. 95.

[87] *Id.*, pp. 95-96.

[88] *Id.*, p. 138.

on the price of In-State All Renewable RECs is inconsistent with the law, Commission precedent and prudent business decision-making.

C. The Companies' Costs Of Compliance Would Not Be A Basis To Excuse The Companies' Procurement Obligation.

Section 4928.64 allows a utility, at its option, to seek relief based on the company's cost of compliance. Section 4928.64(C)(3) provides:

> An electric distribution utility or an electric services company *need not comply* with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more.[89]

This is the only provision in Section 4928.64 that references the cost of procuring renewable energy resources as a basis for noncompliance with an annual benchmark.

Relief was unavailable to the Companies under the three percent provision. The unrefuted evidence in this case shows that the Companies' procurement of RECs did not exceed the three percent calculation set forth under Section 4928.64(C)(3). As OCC witness Gonzalez testified, "FirstEnergy did not meet or exceed the 3% provision of Ohio law."[90] Similarly, Company witness Mikkelsen testified that the Companies did not exceed the three percent cost calculation during 2009 through 2011.[91] Ms. Mikkelsen further testified that the results of the Companies' three percent cost calculations are accurately set forth in the Goldenberg Report.[92] Therefore, the Companies could not invoke any process under Commission rules related to this provision.

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[89] R.C. § 4928.64(C)(3)(emphasis added).

[90] Gonzalez Testimony, p. 32.

[91] Tr. Vol. III, p. 523.

[92] *Id.* (citing Commission Ordered Ex. 1 at p. 30).

D. The Law Does Not Allow The Companies To Pay A Compliance Payment In Lieu of Actual Compliance.

Exeter also suggested that the Companies not comply with their statutory mandates and suggested that "[o]ne of the options available to the Companies was payment of the ACP in lieu of the procurement of RECs."[93] Exeter's suggestion is squarely at odds with the plain language of Section 4928.64.

Section 4928.64 does not provide a utility with any option to make an "alternative compliance payment" in lieu of complying with the required benchmarks. And there is no dispute that an "alternative compliance payment" does not appear in Section 4929.64.[94] Indeed, Company witness Bradley explained that the absence of an alternative compliance payment makes Ohio law different than the Renewable Portfolio Standards ("RPS") in other states. He testified that "the Ohio [statute and regulations] differed from many state RPS laws in that they did not provide an alternative compliance, i.e., a payment which may be made in lieu of procuring RECs."[95]

The language of Section 4928.64 also demonstrates that the "compliance payment" referenced in subsection (C)(2) is not the same as an alternative compliance payment. It is a penalty. Unlike an alternative compliance payment, this payment cannot be used in lieu of complying with the statutory benchmarks.[96] The statute makes no mention of relieving any company of its procurement obligation if a compliance payment is made. This contrasts with

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[93] Commission Ordered Ex. 2A, p. 31.

[94] For example, at the hearing, Staff witness Dr. Estomin testified that Section 4928.64 does not contain the term "alternative compliance payment" or the abbreviation "ACP." Tr. Vol. I, p. 82.

[95] Bradley Testimony, p. 45. Indeed, in its report, Exeter noted, "Ohio's AEPS legislation does not permit the Ohio utilities to recover the costs associated with Alternative Compliance Payments." Commission Ordered Ex. 2A, at p. 38.

[96] R.C. § 4928.64(C)(5).

language in other states' RPS where the ability to be relieved of the procurement obligation upon paying an ACP is expressly stated.[97] In addition, it is not recoverable from customers.[98] Further, a utility cannot simply volunteer to make such a payment. The compliance payment is assessed against the utility only after the Commission has held a hearing and made a determination that a company has failed to comply with its procurement obligations—a fact that does not exist in this case. Thus, the compliance payment is a penalty provision that is assessed after the Commission makes a finding that a utility failed to comply with the statutory benchmarks.[99]

Exeter's suggestion that the Companies should have made the "compliance payment" provided for under Section 4928.64 should be rejected for another reason -- it would have required the Companies to turn their backs on reasonably available RECs and wait for the Commission to find that the Companies failed to comply with the law. Yet, at the hearing, Dr. Estomin confirmed that "a company that's not in compliance just can't write out a check and attach it to its compliance report."[100] Accordingly, Exeter's suggestion that the Companies should have simply not complied with their renewable energy duties was not an option that the Companies considered or that this Commission should consider being a reasonable one.

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[97] *See e.g.*, N.J. ADMIN. CODE § 14:8-2.10 ("A supplier/provider may choose to comply with RPS requirements by submitting one or more alternative compliance payments (ACPs) or solar alternative compliance payments (SACPs). . ."); MASS. GEN. LAWS ch. 25A, § 11F(f) (2012) ("The department shall establish and maintain regulations allowing for a retail supplier to discharge its obligations under this section by making an alternative compliance payment in an amount established by the department for Class I and Class II renewable energy generating sources."); DEL. CODE ANN. tit. 26, § 358(d) ("In lieu of standard means of compliance with this statute, any retail electricity supplier may pay into the Fund an alternative compliance payment of $25 for each megawatt-hour deficiency between the credits available and used by a retail electricity supplier in a given compliance year and the credits necessary for such retail electricity supplier to meet year's renewable energy portfolio standard.").

[98] R.C. § 4928.64(C)(2)(c).

[99] R.C. § 4928.64(C)(2).

[100] Tr. Vol. I, p. 85.

IV. THE COMPANIES MADE PRUDENT AND REASONABLE DECISIONS IN PURCHASING RECs TO MEET THEIR STATUTORY BENCHMARKS.

When evaluating the prudence of a utility's management decisions, the Commission adopts a presumption that the utility's decisions are prudent.[101] In addition, the Commission considers the reasonableness of the utility's decisions under the circumstances at the time; hindsight should not be used as part of its evaluation.[102] The presumption of prudence in utility decision-making is particularly "important."[103] It "shift[s] the burden of producing evidence to the opposing party" even though the "burden of persuasion" or "burden of proof" may ultimately remain on the utility.[104] Indeed, in light of the presumption of prudence, "parties challenging the reasonableness of . . . costs have an obligation to go forward with some concrete evidence supporting their position before th[e] burden [of proof] is triggered."[105]

The Companies' purchases of In-State All Renewables thus are presumed to be prudent. The Companies' purchases also must be evaluated based on the market conditions existing at the

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[101] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, Case No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, *21-23 (Dec. 30, 1986) (finding in the context of an audit of a gas company's procurement policies pursuant to Section 4905.302 that Staff failed to come forward with sufficient evidence to rebut the presumption of prudence).

[102] *Id.*, at *21.

[103] *Syracuse*, Case No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, *21-22. The presumption of prudence regarding utility management decisions is a venerable one. *See, e.g., West Ohio Gas Co. v. Pub. Util. Comm. Of Ohio*, 294 U.S. 63, 72 (1935) ("Good faith is to be presumed on the part of the managers of a business.... In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.").

[104] *Syracuse*, 1986 Ohio PUC LEXIS 1 at *21-22.

[105] *In the Matter of the Investigation into the Perry Nuclear Power Station*, 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, *21 (Jan. 12, 1988).

time that were reasonably known by the Companies. An *ex post facto* review of the outcome of the Companies' decisions to make those purchases is thus inappropriate.[106]

As demonstrated below, the Companies' purchases of In-State All Renewables to comply with their statutory renewable energy benchmarks for the 2009, 2010, and 2011 compliance years were prudent. The evidence shows that the Companies acted prudently in procuring RECs through a solicitation process that was competitive and transparent. The evidence also shows that given the information available to the Companies at the time, the Companies acted prudently by purchasing In-State All Renewables at prices that then reflected the market. In contrast, there is no evidence that shows that the Companies acted unreasonably by purchasing RECs to comply with the renewable energy obligations. Accordingly, Exeter and certain intervenors' arguments to the contrary are unsupported and must be rejected. As a result, the Commission should find that the Companies acted prudently in purchasing In-State All Renewables to comply with Section 4928.64.

A. The Companies' Procurement Process Was Developed And Implemented In A Competitive, Transparent And Reasonable Manner.

Once ESP 1 was approved in March 2009, the Companies took several actions to develop and implement a competitive and transparent RFP process to enable the Companies to meet their renewable energy obligations under Section 4928.64. These actions included: (1) adopting a laddering strategy for the procurement of RECs; (2) hiring Navigant Consultants, Inc. to develop

[106] *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for* Approval *of a Gas Price Hedging Pilot Program*, Case No. 01-1674-GA-UNC, 2001 Ohio PUC LEXIS 457, *4-5 (Aug. 2, 2001); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The Cincinnati Gas & Electric Company and Related Matters*, Case No. 01-218-GA-GCR, 2001 Ohio PUC Lexis 590, *4 (Aug. 30, 2001).

an effective RFP process; and (3) implementing, through Navigant, the RFPs in a manner that was open, inclusive, competitive and attractive to potential suppliers.[107]

1. The Companies adopted a laddering strategy for the procurement of RECs needed to meet the renewable energy benchmarks required by Section 4928.64.

Before the Companies' first RFP, the Companies' Regulated Commodity Sourcing Group ("RCS") reviewed the Companies' renewable energy benchmarks required by Section 4928.64 and planned that the Companies would hold multiple RFPs to meet those benchmarks.[108] During its first RFP in 2009, RCS planned to purchase 100% of the Companies' 2009 compliance obligations and some percentages of their 2010 and 2011 compliance obligations.[109] RCS planned to hold a second RFP in 2010 in which the Companies would purchase the remaining percentages needed for their 2010 compliance obligations and some additional percentage of RECs to meet their 2011 compliance obligations. RCS also planned to hold a third RFP in 2011 to seek residual percentages, per product, that were needed to meet the Companies' 2011 compliance obligations.

The Companies' strategy to ladder RFPs over a course of years is a well-recognized strategy used in the electric industry for the procurement of RECs. Staff witness Dr. Estomin testified that "laddering is a well-recognized procurement strategy to hedge against uncertainty in the marketplace."[110] Company witness Stathis similarly testified that "[t]his laddering strategy is pointed to in many of our other procurements and the risk policy."[111] He explained that "you

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[107] Stathis Testimony, p. 14; Commission Ordered Ex. 2A, at p. ii.

[108] Stathis Testimony, p. 21.

[109] *Id.*

[110] Tr. Vol. I, p. 107.

[111] Tr. Vol. II, p. 320.

want to add time, diversity . . . the whole point of laddering [is] to take the guesswork out, the speculation out, and buy over time."[112] Company witness Bradley also testified, "[Navigant] felt [that laddering] was a prudent course of action."[113]

Moreover, in contexts where future price uncertainty permeates a market, the Commission has found the practice of laddering to be appropriate: "The Commission agrees with the Companies and Staff that the laddering of products in order to smooth out generation prices, mitigating the risk of price volatility, will benefit ratepayers and the public interest....[T]he Commission believes that future price uncertainty makes laddering of products in order to mitigate volatility an even greater benefit for ratepayers."[114]

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[112] *Id.*, pp. 399-400.

[113] Tr. Vol. I, p. 248.

[114] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order, p. 32 (July 18, 2012) ("Case No. 12-1230-EL-SSO").

2. Navigant developed an effective procurement process.

In May 2009, the Companies hired Navigant to serve as the "Independent Evaluator" and oversee the development and implementation of the Companies' RFPs.[115] Navigant's expertise and independence was unquestioned.[116] As the Independent Evaluator, Navigant's objective was to ensure that all of the Companies' procurements were conducted in a fair, consistent and unbiased manner that was consistent with Ohio law and the rules established for each RFP.[117]

As part of its role as Independent Evaluator, Navigant determined whether RECs were reasonably available in the market.[118] Company witness Bradley, who served as independent manager of the RFPs, explained, "[w]e did that by designing and implementing, issuing, soliciting, evaluating a very open, flexible RFP . . . in addition to that, we developed the distribution list with a tremendous amount of market outreach to encourage as many bidders as possible."[119] If Navigant determined that RECs were not reasonably available (as was the case for In-State SRECs), then Navigant provided support for the Companies' force majeure application.[120]

During May and June 2009, Navigant worked with the Companies to develop a series of competitive RFPs to meet the Companies' renewable energy benchmarks required by Section

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[115] Stathis Testimony, p. 14.

[116] In addition, there is no question that Navigant acted independently to fulfill its role. For example, OCC witness Gonzalez testified that [redacted]. Tr. Vol. III, p. 624 (Confidential). Staff witness Dr. Estomin, who was one of the principal drafters of the Exeter Report, testified that he did not find any evidence to the contrary. Tr. Vol. I, p. 79. Dr. Estomin further testified that Navigant used adequate mechanisms to solicit interest in the RFPs and that the process did not favor or disadvantage any particular bidder. *Id.*, pp. 78-79.

[117] Bradley Testimony, p. 4.

[118] Tr. Vol. I, pp. 250-251.

[119] *Id.*, p. 251.

[120] *Id.*

4928.64 for the 2009 through 2011 compliance years. To begin this process, Navigant reviewed Section 4928.64 and the draft regulations related to Ohio's renewable energy requirements. Next, Navigant met with the Companies to discuss Ohio's renewable energy requirements and the status of the Companies' compliance with respect to the mandated four procurement products: (a) All-State Solar; (b) In-State Solar; (c) All-State All Renewable; and (d) In-State All Renewable.[121] The Companies and Navigant also discussed the process for implementing the RFPs, including website design, bidder presentation material, webinar logistics, and the time reasonably needed to complete Phase I (pre-bidder qualification) and the Phase II (bid proposal evaluation) components of the first RFP.

The Companies requested that Navigant design a two-phase evaluation and RFP selection process, which was a standard procurement design in the industry.[122] A two-phase RFP evaluation and selection process requires bidders to accept the terms and conditions of the standard agreement as a prerequisite for being qualified as a bidder in the RFP. Company witness Bradley explained the benefits of this type of RFP to include allowing straightforward comparison of bidders based on price and quantity bid, providing uniform terms and conditions and setting the expectation that by requiring bidders to agree to a non-negotiation agreement as a prerequisite for qualifying for the RFP, that the process would solicit the best price a bidder is willing to bid.[123] In addition, the RFPs were designed so that the qualified bidders did not know

[121] Stathis Testimony, p. 16.

[122] Bradley Testimony, p. 15.

[123] *Id.*, pp. 15-16.

how many other potential bidders they were bidding against.[124] The number of bidders thus did not affect whether the outcome would be competitive.[125]

In 2009, Navigant and representatives of the Companies met with Staff to discuss the strategic approach to the RFPs and the Companies' plans to meet their compliance obligations.[126] Staff was thus aware of the design of the Companies' RFP process and how the Companies planned to run their RFPs during the Companies' first RFP.[127]

3. Navigant implemented the Companies' RFPs in a manner that made the RFPs open, inclusive, competitive and attractive to potential suppliers.

As planned, Navigant used a two-phased process to implement each RFP.[128] Before the first phase, to maximize participation, Navigant researched potential suppliers to develop a distribution list to build awareness of and announce each of the RFPs.[129] Navigant also conducted informational sessions (*i.e.*, webinars) and facilitated the Frequently Asked Questions

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[124] Tr. Vol. II, p. 347.

[125] *Id.*

[126] Stathis Testimony, p. 43.

[127] Tr. Vol. I, pp. 98-99.

[128] Stathis Testimony, p. 22. Specifically, there were nine steps: (1) website design and layout; (2) developing bid rules, communication protocol and application forms; (3) conducting marking research to identify available and potential supply and developing distribution list of potential suppliers; (4) finalizing the procurement calendar and announcing the RFP; (5) administering the FAQ process, which allowed potential suppliers and the public to ask questions regarding the RFP; (6) holding a webinar to present an overview of the RFP process to bidders and the public; (7) administer the Phase I evaluation to determine whether potential bidders were qualified to submit a bid; (8) administer the Phase II ranking of bid proposals by sorting bid proposals by product category and ranking within each category, each bid proposal by price; and (9) recommending of Phase II bid proposals to the Companies for selection. Bradley Testimony, pp. 8-13.

[129] *Id.*, p. 21. Navigant updated this list for each RFP. *Id.*

("FAQs") placed on the RFP website before each of the RFPs.[130] For each RFP, numerous entities and individuals submitted many FAQs and attended the Webinar.[131]

In Phase I of each RFP, Navigant collected financial and credit information from prospective bidders and provided this to the Risk Department of FirstEnergy Service Company to determine whether these bidders met the credit and financial standards in the bidding rules.[132] Bidders meeting the credit and financial standards were qualified to offer a bid for any of the auction products in the RFP.[133] For each RFP, financial and credit information was submitted and reviewed from multiple entities and multiple entities were qualified to submit a bid in Phase II.[134]

In Phase II of each RFP, Navigant collected and analyzed the bids offered by qualified bidders.[135] To do this, Navigant sorted the bids by product category and ranked the bids within each category by price.[136] Navigant also noted the quantity of RECs that the Companies sought for each product.[137] Based on this information, Navigant made recommendations to the Companies, including specific recommendations regarding In-State All Renewables. If fewer RECs were bid than were sought in a category, then Navigant recommended that the Companies select all of the bids in that category.[138] Navigant then provided its recommendations to the

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[130] *Id.*, p. 11.

[131] *Id.*, p. 28, 32, 40, 43; Tr. Vol. I. p. 242.

[132] Stathis Testimony, p. 22.

[133] *Id.*

[134] Bradley Testimony, pp. 28, 33, 40, 43.

[135] Stathis Testimony, p. 22.

[136] Bradley Testimony, p. 13.

[137] *Id.*

[138] *Id.*

Companies.[139] The Companies largely followed the purchase recommendations made by Navigant.[140] In no case did the Companies ever purchase more or higher-priced RECs than recommended by Navigant.[141]

There is no dispute that the Companies' RFP process was open, competitive and attractive to suppliers.[142] Exeter found that the Companies' RFPs were open and competitive and designed to attract suppliers in the industry.[143] Staff witness Dr. Estomin also testified that the Companies' RFPs were designed to be competitive.[144] He agreed that the RFPs were based on an open, transparent and clear process.[145] He also testified that "adequate mechanisms [were] used by Navigant to solicit or attempt to solicit interest in the RFPs."[146] He further testified that the process did not favor or disfavor any bidder.[147] OCC witness Gonzalez similarly testified that the RFP process that the Companies used was competitive, transparent, offered a clear product and generally designed to obtain a competitive outcome.[148]

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[139] Stathis Testimony, p. 22.

[140] *Id.*, pp. 2, 26, 29, 36, 37.

[141] *Id.*

[142] *See e.g.*, Tr. Vol. I, p. 79 (Dr. Estomin testified that the Companies' RFPs were competitive); Tr. Vol. III, p. 567 (Mr. Gonzalez testified that the Companies' RFPs were competitive).

[143] Commission Ordered Ex. 2A, at p. ii.

[144] Tr. Vol. I, p. 79.

[145] *Id.*, p. 78.

[146] *Id.*

[147] *Id.*, pp. 78-79.

[148] Tr. Vol. III, pp. 562-566.

B. Given the Nascent Market, The Lack Of Market Information Available To The Companies At The Time, And Uncertainty Regarding Future Supply And Prices, The Companies' Decisions To Purchase In-State All Renewables Were Reasonable and Prudent Under The Circumstances.

As a result of RFPs 1, 2, 3 and 6, the Companies competitively procured a sufficient supply of In-State All Renewables to meet their required benchmarks under Section 4928.64 for 2009-2011.[149] Under the circumstances that existed at the time, the Companies' decisions to purchase these RECs were reasonable and prudent.

1. The Companies were required to purchase In-State All Renewables during a time when Ohio's alternative energy law was in its infancy and the market was nascent and highly constrained.

In 2009, Ohio's alternative energy law was in its infancy and the market for In-State All Renewables was nascent and highly constrained. The General Assembly enacted Section 4928.64 and Section 4928.65 in 2008 and those statutes did not go into effect until July 31, 2008. Nevertheless, the Companies were required to meet renewable energy benchmarks beginning in 2009. Indeed, the Commission's rules related to the procurement obligations under these statutes did not go into effect until the end of 2009.[150] Moreover, the Commission's process for certifying potential suppliers of RECs, which was a critical part of developing the market (since a supplier could not deliver RECs to a utility unless it was PUCO-certified, was not finalized until August 31, 2009.[151]

Navigant's and the Companies' market research indicated that the market in 2009 for In-State All Renewable RECs was nascent and supply was highly constrained.[152] For example,

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[149] Stathis Testimony, pp. 2, 33.

[150] Bradley Testimony, pp. 4-5.

[151] *Id.*, p. 22.

[152] *Id.*, pp. 23, 34; Stathis Testimony, p. 23.

information from brokers indicated that the market for In-State All Renewables was "extremely thin and still developing."[153]

At the time of RFP 1, Navigant's research showed that only a small number of generating facilities appeared to qualify as renewable facilities that were capable of producing all renewable RECs.[154] In addition, other utilities had conducted RFPs prior to the Companies' RFP 1 thus potentially diminishing further the supply of In-State All Renewables .[155] Navigant advised the Companies [redacted][156]

Like Navigant, Exeter also found that the market for In-State All Renewables was nascent during 2009 and 2010.[157] Indeed, at the hearing, Dr. Estomin also testified that the market for In-State All Renewable RECs was nascent and constrained during 2009 and 2010.[158] OCC witness Gonzalez agreed with this conclusion as well.[159]

2. During RFPs 1, 2, and 3, no market price information was available to the Companies and as a result substantial uncertainty existed regarding the amount of supply and prices for In-State All Renewables.

During RFPs 1, 2 and 3, no market price information on In-State All Renewables was available to the Companies.[160] Company witness Bradley testified that during the first three

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[153] Stathis Testimony, p. 23.

[154] Bradley Testimony, p. 22. These suppliers consigned of 7 MW of wind generating capacity; 1 MW of hydroelectric generating capacity; and 37 MW of biomass/landfill gas generating capacity. *Id.*

[155] *Id.*, p. 27.

[156] OCC Ex. 9 (Oct. 18, 2009 Navigant Memorandum at p. 1) (Confidential).

[157] Commission Ordered Ex. 2A, p. 29.

[158] Tr. Vol. I, pp. 79-80.

[159] Tr. Vol. III, p. 603; *see also* Tr. Vol. III, pp. 561-562.

[160] Bradley Testimony, p. 53.

RFPs, no Ohio market pricing information was available that could be used to evaluate the pricing level of bids for In-State All Renewables.[161] Company witness Stathis also testified that no market pricing information regarding In-State All Renewables was available during this time period.[162] He explained that, as a result, the Companies lacked sufficient information to create a maximum or limit price for In-State All Renewables.[163] Exeter similarly found, "[a]t the time [of] the solicitations . . . reliable, transparent information on market prices, future renewable energy projects that may have resulted in future RECs trading at lower prices, or other information that may have directly influenced the Companies' decision to purchase the high-priced RECs was generally not available."[164]

The evidence also shows that, during RFPs 1, 2 and 3, Navigant and the Companies did not have sufficient information to forecast future prices for In-State All Renewables. Company witness Bradley testified, "At the time that the decision that Navigant was making with respect to RECs recommended to the FEOUs for purchase, we had limited reasonable availability of information that we could rely upon to forecast going forward to determine whether the prices of RECs would go up or down."[165] For example, there was substantial uncertainty regarding the amount of supply of In-State All Renewables that would be available in 2010 and 2011 to satisfy the Companies' renewable energy benchmarks.[166] Exeter expressly found that there was

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[161] *Id.*

[162] Stathis Testimony, pp. 39-40.

[163] *Id.*

[164] Commission Ordered Ex. 2A, p. 29.

[165] Tr. Vol. I, p. 151.

[166] Indeed, this uncertainty was not surprising given the financial crisis at the time. At the hearing, Staff witness Dr. Estomin testified that finding financing for renewable energy was relatively difficult during this time period. *Id.*, p. 108.

"significant uncertainty associated" with assessing the potential availability of the future supply of In-State All Renewables.[167] Exeter also found that "the amount of available (or potentially available) RECs and SRECs . . . would not be available in any meaningful way."[168] Staff witness Dr. Estomin similarly testified that "the amount of RECs that might be potentially available also was unreliable."[169] Thus, Exeter recognized that during RFPs 1, 2 and 3 there was "significant uncertainty" regarding the level of future prices for In-State All Renewables.[170] This uncertainty lasted through RFP 3. Staff witness Dr. Estomin acknowledged that in September 2011, his colleagues at Exeter published an analysis of the Ohio market for RECs.[171] In that report, Exeter explained that "[i]n Ohio, as in many other states, there is very little REC price transparency."[172]

3. The Companies, at all times, purchased In-State All Renewables at prices at or below those recommended by Navigant.

During each RFP, the Companies used a two-step decision making process to arrive at specific procurement decisions.[173] First, RCS and an internal review team met with Navigant regarding the bid results.[174] Second, after meeting with Navigant, RCS convened a separate meeting with the internal review team. During this step, the internal review team reviewed, to

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[167] Commission Ordered Ex. 2A, p. 29.

[168] *Id.*, p. 8.

[169] Tr. Vol. I, p. 81.

[170] Exeter found that "there was significant uncertainty associated with assessing changes in future RECs [sic] prices and the potential availability of future RECs." Commission Ordered Exhibit 2A, p. 29. At the hearing, Dr. Estomin similarly testified that "there was significant uncertainty associated with assessing changes in future REC prices and the potential availability of RECs during the time of RFP 1, 2, and 3." Tr. Vol. I, p. 81.

[171] *Id.*, pp. 88-89 (referencing Company Ex. 5).

[172] *Id.* (quoting Company Ex. 5, p. 12).

[173] Stathis Testimony, p. 22.

[174] *Id.*

the extent it was available, market price and liquidity information and how this information aligned with Navigant's recommendations.[175] The internal review team also considered whether, in light of Navigant's recommendations, there was any need for contingency actions.[176] The Companies followed this process for each of their RFPs. The Companies purchased In-State All Renewables in RFPs 1, 2, 3 and 6 at or below prices recommended by Navigant.

a. RFP 1

In July 2009, the Companies held their first competitive procurement to comply with the renewable energy benchmarks set forth under Section 4928.64. Eighty individuals signed up for the webinar regarding this RFP. Navigant responded to ninety-nine Frequently Asked Questions ("FAQs") submitted by potential participants.[177] During Phase I, Navigant reviewed each qualifying application for completeness and conformity with the RFP requirements.[178] Three bidders were qualified to submit bids for any of the renewable products.[179] After Navigant and RCS discussed the results of Phase I, Navigant opened up the bid proposals submitted by the qualified bidders. Navigant sorted the bid proposals by category and price.[180]

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[175] *Id.*, pp. 22-23.

[176] *Id.*, p. 23. Company witness Stathis explained that if an unforeseen contingency arose, then the Companies would consider next steps in light of the market conditions and results of the solicitation to arrive at a course of action to achieve an outcome that would be in the best interests of the Companies. *Id.*, p. 9. As Mr. Stathis further stated, "[m]ost notable among these planned contingencies was that the [Companies] would address potential product volume shortfalls by issuing additional RFPs for unfilled volumes and by attempting to access the market through brokers or otherwise." *Id.*, p. 8. These contingency plans were consistent with those employed by the Companies in "previous competitive procurement[s]." *Id.* At the hearing, Mr. Stathis further explained, "the shared expectations of our internal review team . . . with respect to contingency planning [] is basically get to a competitive solicitation as quick as possible in the event you fail the first time. In the event you still fail and it's the end of the year, [the] end of the reporting year, and you find yourself short of RECs, then a force majeure was certainly part of the shared expectations." Tr. Vol. II, p. 323.

[177] Bradley Testimony, p. 28.

[178] *Id.*

[179] *Id.*

[180] *Id.*, pp. 28-29.

For the In-State All Renewables, multiple pricing proposals were received from one qualified entity.[181] The bids received for that category, however, made up only thirty-five percent of the 2009 desired amounts and only forty-five percent of the 2010 desired amounts.[182] No bids were received for In-State All Renewables for delivery in 2011.[183]

On August 12, 2009, Navigant provided its selection recommendations to the Companies.[184] For the In-State All Renewable category, Navigant recommended that the Companies select all of the bids for 2009 and 2010 In-State All Renewables.[185]

Based on the market research that Navigant had conducted prior to RFP 1, Navigant did not believe that a strategy of rejecting bids in RFP 1 and waiting for additional 2009-2010 In-State All Renewables to be available in the market was reasonable.[186] Company witness Bradley explained that Navigant believed "rejecting bids at that time would create a serious risk that these RECs would not be available later; the In-State All Renewable supplier could sell its RECs to another buyer or simply bank the RECs to be sold in a future year."[187] If the RECs were not available later, then the Companies would not meet their 2009 and 2010 In-State All Renewable REC compliance obligations.[188] Mr. Bradley testified that "[Navigant] felt the reasonable and prudent recommendation to our client was to recommend that they purchase the RECs."[189]

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[181] *Id.*, p. 29.

[182] Stathis Testimony, p. 23.

[183] *Id.*

[184] Bradley Testimony, p. 29.

[185] *Id.*, pp. 29-30.

[186] *Id.*, p. 30.

[187] *Id.*

[188] *Id.*

[189] Tr. Vol. I, p. 151.

The Companies also shared Navigant's concerns about the thinness of the supply of In-State All Renewables.[190] Company witness Stathis testified that the results of RFP 1 confirmed the Companies' concerns that the market for In-State All Renewables was developing slowly.[191] After considering Navigant's recommendations and the concerns regarding the sufficiency of supply for In-State All Renewables, the Companies decided to accept the winning bids for 2009 and 2010 In-State All Renewables.[192]

The Companies also decided to re-enter the market with a second RFP within 2009 for the three products with supply concerns, including In-State All Renewables.[193] The Companies recognized that if they did not receive sufficient supply in the next RFP, then they might need to file a force majeure application regarding their renewable energy requirements for 2009.[194] The Companies also asked Navigant to conduct additional research to attempt to find additional sources of RECs and to seek feedback from the participants in RFP 1.[195]

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[190] *Id.*, p. 25.

[191] *Id.*

[192] *Id.*, p. 26

[193] *Id.*, p. 25.

[194] *Id.*

[195] Bradley Testimony, p. 30.

b. RFP 2

A second RFP was issued on September 23, 2009.[196] During RFP 2, the Companies received the results of the additional research that they requested from Navigant. This research continued to show that the supply for In-State All Renewables was very thin and the market was still developing.[197] It showed that few suppliers were certified with the PUCO.[198]

In RFP 2, four bidders were qualified for Phase II.[199] Navigant reviewed the bids and sorted them by category and price.[200] Consistent with the nascent and highly constrained nature of the market, the Companies again received multiple pricing proposals from one qualified bidder for In-State All Renewables.[201]

As part of its decision-making process to determine what recommendations to make to the Companies, Navigant considered the limited supply of In-State All Renewables. Navigant believed that rejecting the bids proposed in RFP 2 for In-State All Renewables raised the risk of noncompliance given the potential that a supplier could sell its RECs elsewhere or hold the RECs for sale in a future year.[202] In addition, Navigant was not aware of any potential new renewable sources from which the Companies could ultimately meet their In-State All Renewable requirements for 2009 and 2010.[203] Further, the timing of when new renewable

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[196] *Id.*, p. 32.

[197] Stathis Testimony, p. 28.

[198] *Id.*

[199] Bradley Testimony, p. 33.

[200] *Id.*

[201] Stathis Testimony, p. 28.

[202] Bradley Testimony, p. 37.

[203] *Id.*

resources in Ohio would increase supply of RECs also was uncertain.[204] As Company witness Bradley explained, "Navigant believed that without the In-State All Renewable RECs bids garnered in RFP 1 and RFP 2, the FEOUs would not have been able to meet their compliance obligations in 2009 or 2010."[205] As a result, Navigant recommended that the Companies select all of the bids for 2009, 2010 and 2011 In-State All Renewables.[206]

The Companies similarly were concerned about the availability of the supply of In-State All Renewables to fulfill the Companies' obligations.[207] Company witness Stathis testified that while the Companies considered rejecting the bids in RFP 2 (as well as RFP 1), "given the undisputed fact that RECs were available for purchase, there was no basis for the Companies to simply reject the bids."[208] Mr. Stathis also testified that "[t]here were, in addition, a number of factors which gave rise to considerable uncertainty that the FEOUs could get additional bidders, much less bidders willing to come in at a lower price."[209] He explained that, at the time the bids were considered for RFP 2, there were only 47.8 MW of facilities certified for In-State All Renewable resources.[210] The Companies expected that there would be very few bidders or projects that could increase the supply of In-State All Renewables in the near future.[211] Mr. Stathis testified, "[i]n short there was virtually no evidence that supply conditions were

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[204] *Id.*, p. 38.

[205] *Id.*, pp. 37-38.

[206] *Id.*, p. 34.

[207] Stathis Testimony, p. 28.

[208] *Id.*, p. 31.

[209] *Id.*

[210] *Id.*, pp. 31-32.

[211] *Id.*

going to significantly improve over the near term or certainly in time to meet the FEOUs obligations for 2009 and 2010."[212]

Given the Companies' concerns over lack of supply and the need to procure RECs, the Companies followed Navigant's recommendation and accepted bids for In-State All Renewables for the 2009, 2010 and 2011 categories.[213] The Companies made these decisions knowing that there was virtually no evidence that supply conditions were going to improve significantly in time to meet the Companies' obligations for 2009 and 2010.[214]

The result of RFP 2 was that the Companies executed contracts to purchase 37,965 RECs for the In-State All Renewables category. When combined with the RECs from RFP 1, at the end of RFP 2, the Companies held enough supply to satisfy one hundred percent of their 2009 compliance obligation.[215] Additionally, the Companies procured 31,800 and 26,084 of 2010 and 2011 In-State All Renewables, respectively.[216] These purchases, when combined with RFP 1 procurements, resulted in the Companies achieving seventy-three percent and fifteen percent of their respective 2010 and 2011 compliance target for this product.[217]

Before the bids were awarded in RFP 2, RCS asked Navigant to conduct an additional review of the In-State All Renewables market to determine how long supply constraints were

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[212] *Id.*, p. 32.

[213] *Id.*, p. 29. The Companies purchased a smaller amount of these products than the amounts recommended by Navigant because during the RFP 2 process the non-shopping load was lowered and therefore the Companies' future renewable obligations were lowered from RFP 1 levels. *Id.*

[214] *Id.*, p. 32.

[215] *Id.*, p. 26.

[216] *Id.* The Companies procured less than their originally desired amounts because the Companies' future renewable obligations were lowered from RFP 1 levels because the non-shopping load was lowered. *Id.*, p. 29.

[217] *Id.*, p. 26.

likely to continue.[218] As noted, Navigant concluded that the market for In-State All Renewables would likely remain constrained for at least another year.[219]

c. RFP 3

Given that the Companies still needed RECs for 2010 and 2011 and given the Companies' belief (based on, among other things, Navigant's market research) that the market would remain constrained, the Companies decided to hold a third RFP in the summer of 2010.[220] Seeking to maximize participation in RFP 3, the Companies commissioned Navigant to solicit feedback from potential suppliers.[221] Navigant provided the results of this research in a report dated June 3, 2010.[222] The Companies were able to incorporate that feedback into later RFPs.[223]

Because Navigant's market research had indicated that the market for RECs may start to improve during the second half of 2010,[224] the Companies held RFP 3 in July 2010.[225] Navigant facilitated responses to over 100 FAQs and one hundred individuals signed up for the Webinar.[226] During Phase I, Navigant received and logged 16 qualifying applications.[227] Navigant prepared a confidential spreadsheet and discussed this information with RCS on August 3, 2010.[228]

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[218] *Id.*, p. 30.

[219] *Id.*

[220] *Id.*

[221] *Id.*, p. 32.

[222] *Id.*, p. 33; *see also* ELPC Ex. 1 (Competitively Sensitive Confidential).

[223] *Id.*

[224] *Id.*, p. 35.

[225] Bradley Testimony, p. 40.

[226] *Id.*

[227] *Id.*

[228] *Id.*

During Phase II, Navigant logged and sorted the bid proposals submitted by bidders qualified in Phase I.[229] For the first time, more than one entity submitted pricing proposals for In-State All Renewables.[230] Based on the Companies' renewable energy compliance obligations,[231] Navigant recommended that the Companies select: (1) the bids for all of the 2010 In-State All Renewables; (2) the bids for 5,000 2011 In-State All Renewables offered by "Bidder 1";[232] and (3) a partial amount of the 145,269 2011 In-State All Renewables offered by "Bidder 2."[233]

The results of RFP 3 provided the Companies with additional information regarding the development of the In-State All Renewables market.[234] The Companies considered that the participation of a second qualified bidder who bid on In-State All Renewables and the upcoming expiration of the twelve-month constrained supply time frame Navigant had identified suggested that the market may be possibly improving.[235] The Companies also had information that other Ohio utilities were meeting their in-state benchmarks – an[other] indication that the market was quite possibly beginning to expand."[236]

The Companies accepted Navigant's recommendations to accept all of the bids for 2010 In-State All Renewables and all of the 2011 In-State All Renewables bid by the lowest priced

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[229] *Id.*

[230] *Id.*

[231] *Id.*, p. 41.

[232] Because the identity of specific bidders is confidential and proprietary, this brief will refer to specific bidders by a number, *e.g.*, "Bidder 1," "Bidder 2," etc.

[233] *Id.*

[234] Stathis Testimony, p. 35.

[235] *Id.*

[236] *Id.*

bidder.[237] As a result of these new in-state market developments, the Companies, however, considered declining Navigant's recommendation to purchase the partial amount of 2011 In-State All Renewables offered by Bidder 2 and pursuing a counteroffer in the hopes of reducing costs.[238] The Companies asked Navigant to review the bid rules to determine whether making a counteroffer on the basis of price alone to Bidder 2 was an acceptable option.[239] After reviewing the bid rules, Navigant concluded that the rules did not prohibit the Companies from seeking a reduced price from Bidder 2.[240]

After consulting with Navigant, the Companies instructed Navigant to make a counteroffer to Bidder 2 to see if the Companies and Bidder 2 could reach an agreement for the 2011 In-State All Renewables product.[241] Company witness Stathis testified that this effort was successful and resulted in a lower price for the 2011 In-State All Renewables, which saved the Companies, and ultimately their customers, approximately $25 million.[242]

d. RFP 6

During RFP 6, which took place in October 2011, the Companies sought In-State All Renewables for the 2011 compliance year.[243] The Companies received eleven pricing proposals

[237] *Id.*, p. 35; Bradley Testimony, p. 41.

[238] Stathis Testimony, p. 35.

[239] *Id.*, p. 36.

[240] Bradley Testimony, p. 41.

[241] Stathis Testimony, p. 36.

[242] Stathis Testimony, p. 36; Tr. Vol. II, p. 293; Bradley Testimony, p. 42.

[243] Stathis Testimony, p. 37.

that were submitted by six bidders for 2011 In-State All Renewables.[244] The results of this RFP showed that the In-State All Renewables market was improving.[245]

During Phase II, Navigant sorted each of the bids by cost. On October 25, 2011, Navigant provided RCS with the results of Phase II and its recommendations.[246] Navigant recommended that the Companies accept all 20,000 RECs proposed for the period of 2011 from the lowest cost bidders.[247] The Companies accepted Navigant's recommendation and successfully fulfilled their compliance obligations for In-State All Renewables for the 2011 compliance year. Company witness Stathis testified that "[t]he results of RFP 6 satisfied the volume target for In-State All Renewable RECs by multiple suppliers with pricing falling from prior solicitations for both products procured."[248] Unlike previous RFPs, the results from RFP 6 demonstrated that a greater supply for In-State All Renewables was becoming available and this market was becoming more transparent and liquid, which created greater competition that resulted in lower prices for the Companies and ultimately customers.[249]

4. Exeter's suggestion that the Companies should have delayed their purchases of In-State All Renewables is unsupported and therefore unreasonable.

In contrast to evidence set forth above, Staff and the Intervenors provided no evidence that, under the circumstances known at the time, it would have been reasonable for the Companies to delay their decisions to purchase In-State All Renewables. Indeed, Exeter's

[244] Bradley Testimony, p. 44.

[245] Stathis Testimony, p. 37.

[246] Bradley Testimony, p. 44.

[247] *Id.*

[248] Stathis Testimony, p. 37.

[249] *Id.*, p. 38.

suggestion that the Companies should have delayed their purchases really is a suggestion that the Companies should have timed the market.[250] But there is no evidence which indicates that the Companies had sufficient information to do that. On the other hand, Company witness Dr. Earle testified that the Companies did not have this information:

> It is not reasonable to suggest that the FirstEnergy Ohio utilities could have known that prices for In-State All Renewables RECs would have declined in time to meet their requirements at a lower cost and therefore the FirstEnergy Ohio utilities should have necessarily delayed some of its purchases of In-State All Renewables RECs.[251]

Given the limited information that the Companies had at the time, a decision to delay purchases would have amounted to an unsupported decision to gamble on the Companies' ability to meet their statutory compliance obligations. The Companies' risk management policy and the way they do business does not allow for this type of decision-making. Company witness Stathis also testified that gambling stands in stark contrast to the Companies' risk policy:

> The overriding philosophy that's part of not only our risk policy but the way we do all procurements, whether its power or renewable, is a laddering approach. You want to add time, diversity. You don't want to gamble. You don't want to speculate as to, hey, we think the market is going to be illiquid for this amount of time, therefore, I won't ladder.[252]

In addition, Exeter's suggestion, that if as a result of delaying purchase decisions In-State All Renewables were not available then the Companies could have relied on force majeure to meet their renewable obligations, is unsupported by the law. There is no provision for a utility to retroactively seek force majeure. A force majeure determination, moreover, does not

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[250] Earle Testimony, p. 14.

[251] *Id.*, p. 15.

[252] Tr. Vol. II, pp. 399-400.

"automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years."[253] The Commission must first determine whether "renewable energy resources are *reasonably available in the marketplace in sufficient quantities* for the utility or company to comply with the subject minimum benchmark during the review period" and whether the utility made a "good faith effort" to meet its compliance obligations for the benchmark in question.[254] Indeed, Staff witness Dr. Estomin testified that if the Companies had waited until the end of the compliance period (the second quarter of the following year) to file force majeure, then the Companies would not have had the option to purchase RECs later to comply with their obligations. As a result, if the Companies did not timely procure In-State All Renewables that were reasonably available to meet their compliance obligations, and the Commission denied the Companies' force majeure application, then the Companies would have violated the law.

Accordingly, the Companies' decisions to purchase In-State All Renewable RECs, and therefore not to gamble on their ability to meet their compliance obligations, were reasonable under the circumstances at the time. There is no evidence to the contrary.

C. The Prices Paid By The Companies For In-State All Renewables Reflected the Market And Therefore Were Reasonable.

The evidence shows that the prices at which the Companies purchased In-State All Renewables were market prices that reflected the current state of the market.[255] This evidence is undisputed. For example, Company witness Bradley explained that "the prices that are bid into

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[253] R.C. § 4928.64(C)(4)(c).

[254] R.C. § 4928.64(C)(4)(b) (emphasis added).

[255] Tr. Vol. I, p. 153.

an RFP from the marketplace represent market prices."[256] He further testified that "although prices were high, they would be expected to be higher than in other state's REC markets given: (1) the very limited supply of In-State All Renewable RECs available to buyers; and (2) the volume required to be purchased by Ohio utilities for compliance."[257] Staff witness Dr. Estomin also testified that the prices that resulted from the Companies' RFPs reflected the market.[258] OCC witness Gonzalez testified that generally a competitive process produces a competitive result.[259] Accordingly, the Companies acted reasonably in purchasing In-State All Renewables at market prices.

D. There Is No Evidence That The Prices Paid By The Companies For In-State All Renewables Were Unreasonable.

Despite the undisputed evidence that the Companies paid market prices to purchase In-State All Renewables, Exeter and OCC criticize the prices that the Companies paid for In-State All Renewables as too high. These criticisms, however, incorrectly rely on the level of the compliance payment or pricing information from other states. Neither of these appropriately reflects market prices for In-State All Renewables.

1. The compliance payment level does not indicate market prices and does not represent a fair comparison price.

Both Exeter and OCC witness Gonzalez referred to the level of the compliance payment penalty as a basis to conclude that the Companies paid prices that were too high.[260] The compliance payment penalty level, which is set by Section 4928.64, does not represent the

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[256] *Id.*

[257] Bradley Testimony, p. 37

[258] Tr. Vol. I, p. 79.

[259] Tr. Vol. III, pp. 567-68.

[260] Commission Ordered Ex. 2A, at p. 28; Gonzalez Testimony, p. 11.

market prices of RECs in Ohio. At the hearing, Staff witness Dr. Estomin confirmed that the compliance payment does not represent a market price for a REC.[261] Indeed, he testified, "I don't know specifically what approach the legislature used to arrive at that number [for the compliance payment]."[262]

That the level of the compliance payment penalty is not a fair comparison to a market price for In-State All Renewables is also demonstrated by this fact: the compliance payment penalty for all non-solar RECs is the same.[263] Given that the market for In-State All Renewables and other RECs are separate and distinct, a single price representing both markets is unlikely. Simply put, there is no evidence that shows the basis for the compliance payment level in Ohio.[264] Thus, the level of the compliance payment is not a relevant measure of the prices that the Companies paid for In-State All Renewables.

2. Pricing information from other states is not relevant.

Exeter also asserted that the Companies should have been aware that the prices they paid for In-State All Renewables were not in line with pricing data regarding non-solar RECs elsewhere in the country. To "support" this finding, Exeter compared the prices paid by the Companies for In-State All Renewables to REC pricing data in twelve other jurisdictions ("Figure 3: Compliance Market for RECs").[265]

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[261] Tr. Vol. I. pp. 82-83.

[262] *Id.*, p. 82.

[263] O.R.C. § 4928.64(C)(2)(b).

[264] *See also* Bradley Testimony, p. 48 ("Navigant is unaware of any public information about the basis of this payment amount.").

[265] *See* Commission Ordered Ex. 2A, p. 26. The jurisdictions relied on by Exeter were Connecticut, Delaware, the District of Columbia, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Texas. There is no dispute that Figure 3 does not represent market pricing for In-State All Renewable RECs in Ohio. *See* Bradley Testimony, p. 53.

The out-of-state pricing data for RECs that Exeter relied on as support for its position that the Companies paid unreasonably high prices is not comparable to the pricing of In-State All Renewables. Indeed, when specifically asked whether relatively low prices for RECs in one state would be a reasonable basis to argue that REC prices in another state were too high, OCC witness Gonzalez rejected such a notion.[266] He agreed that different states' markets are separate because different things affect markets in each state and thus each state's prices may be different.[267]

As the record shows, there are at least five reasons why pricing data from other states including data contained on Figure 3 in the Exeter Report, is not comparable to the prices of In-State All Renewable RECs.

a. The requirement under Section 4928.64(B)(3) that half of a utility's renewable resources requirements must be supplied by facilities located in Ohio acts as an import quota that limits supply and increases price.

First, the requirement under Section 4928.64(B)(3) that fifty percent of the supply of RECs to come from facilities located in Ohio is unique. As observed by Company witness Dr. Earle, this geographic requirement is equivalent to an import quota.[268] As a result, this geographical restriction causes prices to be higher than they would be otherwise. As Dr. Earle explained, "[a] basic application of the economics of import quotas suggests that Ohio's In-State All Renewables requirement means the average price paid for In-State All Renewables RECs will be higher than what it would be otherwise."[269] Indeed, Staff witness, Dr. Estomin also

[266] Tr. Vol. III, pp. 591-92.

[267] *Id.*, pp. 592-94.

[268] Earle Testimony, p. 15.

[269] *Id.*, p. 16.

acknowledged that a geographical restriction increases prices. At the hearing, he testified, "An in-state requirement would have the effect of reducing the supply of RECs from which you can draw to fulfill the requirement, so other things being equal, you would expect supply to be more constrained under that arrangement and, therefore, you would anticipate upward pressure on prices."[270]

The pricing data on Figure 3 in the Exeter Report, however, shows information from states that do not have geographical restrictions similar to Ohio's restriction. To be sure, Texas is the only one of the 12 states for which the Exeter Report compares Ohio In-State All Renewables prices that has an in-state requirement for all renewable RECs.[271] But the situation in Texas is very different from that in Ohio.[272] For example, in 2010, the retail electricity sales in Texas were 2.3 times that in Ohio. In that same year, Texas's renewable generation was 8.1 percent of the state's retail sales while Ohio's renewable generation was 0.7 percent of its retail sales.[273] Texas also has a much greater potential for renewable generation than Ohio.[274] Company witness Dr. Earle explained, "As a result both the market for renewable energy and the potential supply of Renewable power in Texas were very different from those in Ohio, and REC

[270] Tr. Vol. I, pp. 90-91.

[271] Earle Testimony, p. 17. Even though, in his prefiled testimony, OCC witness Gonzalez contended that New England states have in-state requirements similar to Ohio, his position crumbled on the stand. Gonzalez Testimony, p. 14. At the hearing, Mr. Gonzalez acknowledged that the Department of Energy Resources' Massachusetts Renewable and Alternative Energy Portfolio Standards Annual Compliance Report For 2010 included a discussion of the various renewable energy being used in the state of Massachusetts for 2010. Tr. Vol. III, pp. 614-616 (referencing Company Ex. 8). He agreed that this report indicates that nine percent of renewable energy used in Massachusetts was supplied from within the state. *Id.*, p. 615 (quoting company Ex. 8 at p. 4). A nine percent in-state supply threshold simply does not act as an import quota. Mr. Gonzalez' position that New England states have similar in-state requirements thus must be rejected.

[272] Earle Testimony, p. 18.

[273] *Id.*

[274] *Id.*

prices in Texas are not comparable to Ohio In-State All Renewables REC prices in 2009 and 2010."[275]

b. In 2009 and 2010, the Ohio REC market was nascent relative to other states' REC markets.

Second, the REC market in Ohio was nascent relative to other markets in 2009 and 2010.[276] As discussed above, pricing information regarding In-State All Renewables was not available in 2009 and only limited price-indicative information relating to this product was available during the second half of 2010.[277]

Staff witness Dr. Estomin testified that the relative age of the market can affect prices.[278] Company witness Dr. Earle also explained in his prefiled testimony that as a result of the newness of Ohio's compliance obligation, "there would likely be confusion during the 2009-2010 period among potential suppliers about the new rules for the new market and how they should be interpreted."[279] He further explained that this "confusion would have further contributed to reluctance to participate in the REC markets or to invest in its early stages."[280]

Indeed, none of the 12 states included on Figure 3 of the Exeter Report had Renewable Portfolio Standards ("RPS") enacted as late as 2008 with the first compliance year the next year, in 2009.[281] Dr. Earle testified that the newness of the Ohio RECs markets in 2009 and 2010, and the lack of pricing information related to this market, would have caused potential renewable

[275] *Id.*

[276] *Id.*, pp. 18-19.

[277] Supra Section IV(B)(2).

[278] Tr. Vol. I, p. 93.

[279] Earle Testimony, p. 20.

[280] *Id.*

[281] *Id.*, pp. 19-20.

developers to view the Ohio market with caution and require a premium for entering the market. He further testified, "[t]his resulted in In-State All Renewables REC prices in Ohio being higher than they would have been in other, more mature jurisdictions, making Ohio In-State All Renewables REC prices not comparable to those elsewhere."[282]

c. Financial challenges would have had a greater affect on Ohio's nascent REC market.

Third, financing challenges that resulted from the global economic crisis would have had a greater negative impact in Ohio than most other states because the Ohio market was relatively new during this time period.[283] These challenges, coupled with the nascent nature of Ohio's REC market, would have exacerbated the shortage of RECs in Ohio in 2009.[284] Indeed, in its report, Exeter recognized that during RFPs 1, 2 and 3, the economic recession would have caused renewable energy developers to have difficulty obtaining financing.[285] Thus, due to the relative newness of the Ohio market and the relatively few existing suppliers in that market, the financing challenges to new entrants in Ohio further distinguish the prices of RECs in Ohio from other states.

d. Section 4928.64 provides for different product definitions than other states' renewable energy statutes.

Fourth, as acknowledged by Exeter, states have different product definitions that make comparisons across markets difficult. Dr. Earle explained that "comparing prices across these jurisdictions without taking into account the lack of transferability is inappropriate."[286] Figure 3

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[282] *Id.*, p. 21.

[283] *Id.*, pp. 21-22.

[284] *Id.*, p. 22.

[285] Commission Ordered Ex. 2A, p. 29.

[286] Earle Testimony, p. 23.

in the Exeter Report does not account for the different product definitions between the states included on the chart and Ohio.

e. Unlike many states, Ohio does not have an alternative compliance payment mechanism that can act as a safety valve or price cap on REC prices.

Fifth, Ohio does not have an alternative compliance payment mechanism that can act as a safety valve or price cap on REC prices by allowing a utility to pay the ACP in lieu of purchasing RECs and by allowing that payment to be recovered from customers.[287] To be sure, even though Section 4928.64 has a compliance payment penalty, as noted in the Exeter Report and acknowledged by Dr. Estomin, the compliance payment penalty in Ohio does not act as a price cap because the burden of the payment falls on the utility's shareholders.[288] Dr. Earle also testified that the compliance payment does not act as a price cap because it does not relieve a utility of the obligation to purchase RECs and because it cannot be recovered from customers.[289]

Unlike Ohio, in states with laws that allow a utility to make an ACP, the ACP serves as an effective "soft ceiling" on REC prices.[290] At the hearing, Staff witness Dr. Estomin testified as such. He explained, "[i]n states that have an alternative compliance payment where it is recoverable from customers and where the ACP can be a mechanism that can be used in lieu of the . . . procurement obligation . . . you would believe that the level of the ACP would act as a market cap on prices subject to that ACP."[291]

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[287] *Id.*, p. 22 (noting that the assumption is that the utility would apply to recover the ACP from ratepayers).

[288] *Id.* (citing Commission Ordered Ex. 2A, p. iv).

[289] Tr. Vol. II, pp. 484-85.

[290] Bradley Testimony, p. 48.

[291] Tr. Vol. I, p. 83.

On the other hand, states without an ACP (like Ohio) may have higher REC prices than states that have an alternative compliance payment mechanism that acts as a price cap. Comparing prices in other markets that have an ACP to the price of In-State All Renewables is thus problematic.[292] Yet OCC witness Gonzales inappropriately attempted to do just that by comparing prices of In-State All Renewables to Figure 3 of the Exeter Report. At the hearing, Mr. Gonzalez testified that each of the states that are shown on Figure 3 has an ACP and that the ACP in each of these states is recoverable from customers in one way or another.[293] A comparison of the prices that the Companies paid for In-State All Renewables to the data on Figure 3 is thus an apples to oranges comparison and must be rejected.

3. The data relied on by Exeter and OCC did not provide any basis to conclude that the prices paid by the Companies were unreasonable.

The attempt by certain parties in this case to compare In-State All Renewables prices with price information from other states is improper in yet another way. Aside from the fact that, as demonstrated above, each state's REC market is different, the pricing information from other states cited in this case does not reflect market prices in those other states. Indeed, price data may not even represent an actual price paid for a REC. Therefore, none of this data supports a *finding that the Companies paid unreasonably high prices for* In-State All Renewables.

Testimony at the hearing demonstrated that the "prices" on Figure 3 in the Exeter Report that Exeter and OCC witness Gonzalez compared to the prices that the Companies paid for In-State All Renewables are not market prices. Dr. Estomin testified that this information is broker

[292] Earle Testimony, p. 23.

[293] Tr. Vol. III, pp. 598-99.

data from only one of 89 brokers listed on the Department of Energy's website.[294] Dr. Estomin further testified that the broker data on Figure 3 may not even represent the actual price of any transaction.[295]

None of the broker data relied upon by Exeter and OCC witness Gonzalez showed any information regarding the volume of RECs associated with a particular price offered.[296] At the hearing, Company witness Stathis explained [redacted][297] Thus, no comparisons can be made regarding how the broker-provided price data points would compare to the prices necessary to procure a volume of RECs sufficient to meet the Companies' renewable energy requirements.[298]

Figure 3 in the Exeter Report also failed to indicate the length of the pricing commitment represented by any particular "price".[299] Simply put, the testimony at the hearing demonstrated that the broker data on Figure 3 is unreliable and not relevant to the prices that the Companies paid for In-State All Renewables.

Similarly, the SNL Financial Data relied on by OCC witness Gonzalez (Attachment 2 to OCC witness Gonzalez's testimony) also does not reflect market prices or even actual prices. In fact, SNL Financial specifically provided this disclaimer: "Data is compiled from a range of

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[294] Tr. Vol. I, pp. 86-87.

[295] *Id.*, p. 89.

[296] *Id.*, p. 90.

[297] Tr. Vol. II, p. 372 (Confidential).

[298] Bradley Testimony, p. 61; *See also* O.R.C. § 4928.64(C)(4)(b) (providing that before granting an application for force majeure, "the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period").

[299] Bradley Testimony, p. 54.

market indicatives and do not necessarily represent completed trades."[300] At the hearing, Mr. Gonzalez testified that "'indicative' could mean the midpoint between a bid and ask for a certain product."[301] Further, of the SNL Financial data provided, there was only one data point for 2010 (and none for 2009). Mr. Gonzalez admitted that he did not know whether even that the one data point for a 2010 In-State All Renewables is an actual price point. Nor did he know the volume of RECs represented by the single 2010 data point.[302] Indeed, Mr. Gonzalez testified that the actual price that the REC was traded for could be a fraction or a multiple of the price shown on his SNL attachment.[303]

Mr. Gonzalez's comparison of the prices that the Companies paid for In-State All Renewables to the "REC prices" indicated on a table from the Annual Report on Wind Power Installation Costs Performance Trends 2007 by the U.S. Department of Energy (the "Wind Power Table") unraveled at hearing. In his prefiled testimony, Mr. Gonzalez contended that this table showed that the "REC prices" of the eight states depicted on the table were at "a fraction of what FirstEnergy paid".[304] But the table that Mr. Gonzalez relied on contained notations and a headline that belied any comparison of the table's pricing data to the prices the Companies paid for In-State All Renewables. The commentary below the table noted, "[t]he figures to the right present *indicative monthly data* on spot-market REC prices in both compliance and voluntary markets; data for compliance markets focus on the 'Class I' or 'Main Tier' of the RPS

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[300] Tr. Vol. III, p. 606.

[301] *Id.*, p. 607.

[302] *Id.*

[303] *Id.*, p. 608.

[304] Gonzalez Testimony, pp. 12-13.

policies."[305] At the hearing, Mr. Gonzalez testified that "indicative prices" may or may not be representative of actual prices.[306]

In his prefiled testimony, OCC witness Gonzalez also asserted that the Wind Power Table was meant to show "indicative price data in the time when markets were nascent."[307] At the hearing, however, he testified that the information on the table provided data from periods of time outside of the three-year window that he defined as a nascent market.[308] He also admitted that some data on the table even preceded the effective dates of some of the states' RPS statutes.[309] Indeed, the report containing the Wind Power Table relied upon by Mr. Gonzalez contradicted any attempt to conclude that prices in one state are relevant to another state's market prices for RECs. For example, the Wind Power Table contained the headline, "REC Markets Remain Fragmented and Prices Volatile."[310] Even though Mr. Gonzalez did not know what "fragmented" meant at the hearing, Mr. Gonzalez testified at his deposition that the headline to this table, including the word "fragmented," meant that different states have different markets so that different things in each state affect the prices of RECs in each state.[311] Further, the report noted dissimilar market trends in different states. Specifically, the report noted:

> Key trends in 2007 compliance markets include continued high prices to serve the Massachusetts RPS, dramatically increasing prices under the Connecticut RPS, high initial prices to serve the Rhode Island RPS, and a large spike in the price for Class I certificates under the New Jersey RPS. Prices remained relatively

[305] Tr. Vol. III, p. 595 (emphasis added).

[306] *Id.*, p. 596.

[307] *Id.*, p. 602.

[308] *Id.*, pp. 604-606.

[309] *Id.*, pp. 603, 606.

[310] *Id.*, p. 593.

[311] *Id.*, pp. 593-94.

> low in Texas, Maryland, Pennsylvania, and Washington, D.C. due to a surplus of eligible renewable energy supply relative to RPS-driven demands in those markets.[312]

Accordingly, the Wind Power Table did not in any way support Mr. Gonzalez's argument (or any argument) that indicative price data in other states showed that Companies paid unreasonably high prices for In-State All Renewables.

Improperly relying on other data, Mr. Gonzalez incorrectly contended that a comparison of the Companies' Rider AER charges to other utilities' Rider AER charges indicated differences in the prices paid by various utilities and, by implication, that the Companies paid more for RECs. Notably, at the hearing, Mr. Gonzalez testified that he did not know the specific price paid for any renewable product for any utility other than Ohio.[313] Instead, he attempted to rely on the chart on page 9 of the Goldenberg Report to compare the utilities' Rider AER charges. Notwithstanding his reliance on the Goldenberg chart, he testified that he made no effort to verify the numbers on the chart.[314] The Goldenberg chart, on its face, only purported to compare rates charged by the various Ohio EDUs to recover renewable resource procurement costs. As Mr. Gonzalez acknowledged, there is a "mismatch" between the load used to calculate the Companies' compliance obligation and the load over which the Companies recover the costs of that obligation.[315] Indeed, he admitted that where a utility has a greater increase in shopping, then there will be a greater mismatch.[316] Mr. Gonzalez also testified that he did not compare

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[312] *Id.*, pp. 596-97 (quoting Company Ex. 8. p. 18).

[313] *Id.*, p. 609.

[314] *Id.*, p. 610.

[315] *Id.*, p. 611.

[316] *Id.*

how these "mismatches" affected the various utility companies and the various purported rates shown on the Goldenberg chart.[317]

In any event, Mr. Gonzalez simply misconstrued the nature of the data on page 9 of the Goldenberg Report. In his prefiled testimony, Mr. Gonzalez contended that this data showed that the Companies overpaid for RECs in comparison to other utilities.[318] But Staff witness Mr. Storck from Goldenberg, one of the authors of the report, testified that the chart was *not* indicative of either the actual prices paid by each electric utility for RECs or each utility's cost to comply with the 2009, 2010 and 2011 renewable energy mandates.[319] Mr. Storck testified that "this [chart] is just basically information pulled from [utilities'] tariffs. . . [it] doesn't necessarily have reconciliations in it. So I can't tell you exactly what's in these [numbers], especially for companies other than the FirstEnergy companies."[320] Accordingly, Mr. Gonzalez's reliance on the Goldenberg chart to argue that the Companies paid higher prices for RECs than other utilities was wholly unsubstantiated.

4. The development costs of renewable facilities are not a stalking horse for market prices.

In its report, Exeter contended that the Companies should have been aware that the prices they paid for In-State All Renewables were unreasonably high because the cost of development of renewable energy in Ohio does not differ markedly from the cost of renewable development

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[317] *Id.*, pp. 611-12.

[318] Gonzalez Testimony, pp. 10-11; Tr. Vol. III, p. 608.

[319] Tr. Vol. I, pp. 41-42.

[320] *Id.*, pp. 42-43.

elsewhere in the country.[321] Exeter further suggested that these differences illustrated that the prices paid by the Companies included economic rents.[322]

Exeter's argument, however, conflicts with basic economic principles. First, Exeter improperly suggests that economic rents are somehow unexpected and negatively impact a nascent market.[323] Not so. The presence of economic rents induces suppliers to enter markets, thereby increasing the supply of the commodity at issue and lowering prices for that commodity accordingly.[324] As Companies' witness Stathis testified, in a developing market economic rents are "healthy" and "drive[] new suppliers into the market."[325]

Second, Exeter's argument that development costs somehow determine prices conflicts with the basic economic principle that prices are determined by both supply and demand and that development costs are not the sole determinant of the price of RECs.[326] Dr. Earle explained that "[t]here are many factors that determine the price of RECs at any given point in time."[327] He explained that "[t]here's the overall supply/demand dynamic of whether there is a lot of supply or a little bit of supply."[328] Dr. Earle also testified that the shortage of supply in the Ohio market would result in a market price above the cost of supply.[329] He further testified, "[t]here are many things that go into the cost of development so that at any given point in time the price of RECs

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[321] Commission Ordered Ex. 2A, p. 30.

[322] *Id.*, p. 31.

[323] *See id.*

[324] Tr. Vol. II, p. 352.

[325] *Id.*; *See also id.*, p. 348.

[326] Earle Testimony, p. 4.

[327] Tr. Vol. II, p. 441.

[328] *Id.*

[329] Earle Testimony, pp. 11-12.

could either be greater than the cost of development or it could be less."[330] Indeed, at the hearing, Dr. Estomin agreed that prices are determined by other factors, including supply and demand.[331]

Regarding the Ohio market, there were factors that would have caused developers in 2009 and 2010 to seek higher prices in Ohio than other states.[332] For example, Dr. Earle testified that "when there is scarcity of supply, prices can greatly exceed the costs of production."[333] He further explained, "[s]carcity of supply can often happen in nascent markets when there is a sudden increase in demand without matching supply available as happened in the Ohio In-State All Renewables REC market in 2009 and 2010."[334] Company witness Bradley provided another reason why developers may have sought higher prices in Ohio than other states. Mr. Bradley explained that, in 2009, there was little history available to developers regarding how Ohio's renewable mandates would be administered and what additional risks to developers may arise.[335] Thus, according to Mr. Bradley, developers in Ohio had less competition and more uncertainty due to the nascent state of the Ohio market than resource suppliers in other states.[336]

Mr. Bradley also noted that developers in Ohio may have sought higher prices than in other states because of the difficulty in obtaining financing for new electrical generation projects in 2009-2010. Mr. Bradley explained that the nascent market in Ohio coupled with the difficulty in obtaining financing made the development of any new renewable projects in Ohio challenging

[330] Tr. Vol. II, p. 441.

[331] Tr. Vol. I, p. 94.

[332] Bradley Testimony, p. 57.

[333] Earle Testimony, p. 11.

[334] *Id.*

[335] Bradley Testimony, pp. 57-58.

[336] *Id.*, p. 58.

at best.[337] As a result, one could expect higher prices in Ohio for in-state products than similar products in other states.[338]

E. There Is No Evidence That Contacting Staff Prior To The Procurement Decisions Would Have Or Could Have Changed The Companies' Procurement Decisions.

Exeter also suggested that, even though there was no obligation to do so, the Companies should have contacted the Commission Staff prior to accepting bids for In-State All Renewables.[339] Exeter, however, failed to explain what Staff would have done or could have done given the statutory requirements. There is no record evidence that contacting Staff prior to the procurement decisions would have changed the Companies' procurement decisions or statutory obligations. Indeed, Dr. Estomin testified that he did not know what the Commission or Staff would have done had the Companies provided the information from Navigant to Staff.[340]

In any event, the evidence shows that the Companies, in fact, met with Staff and that Staff had information regarding the Companies' RFPs and the prices the Companies paid for RECs. Company witness Stathis testified that representatives of the Companies met with Staff regarding the Companies' strategic approach to meet their compliance obligations under Section 4928.64.[341] Staff also had information available via the PJM GATS system that Staff could review regarding the prices of RECs that the Companies had procured.[342] Mr. Stathis testified

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[337] *Id.*, p. 59.

[338] *Id.*, p. 60.

[339] Staff Ex. 2A, p. 32.

[340] Tr. Vol. I. p. 101.

[341] Stathis Testimony. p. 43.

[342] Tr. Vol. II, p. 356.

that, for the 2009 compliance year, this information would have been available on GATS starting on March 31, 2010.[343]

Staff witness Dr. Estomin also testified about the information available to Staff. Dr. Estomin testified that by the third quarter of 2011, the Commission had information available to it that indicated there was sufficient supply to meet demand for In-State All Renewables.[344] He also testified that one of those data points was the report from Exeter that was sponsored by NARUC (Company Ex. 5).[345] He acknowledged that Staff was aware of the RFP process implemented by the Companies and Navigant.[346] And he acknowledged that Staff had opportunities to look at the Companies' RFP website and attend webinars related to the RFPs.[347] Dr. Estomin further testified that neither the statute nor the regulations required the Companies to approach Staff regarding the status of the Companies' RFPs.[348] The Staff also had the quarterly Rider AER filings made by the Companies.

Further, there is no evidence that Staff asked for any additional information. Mr. Stathis explained that "[g]iven that we had provided [S]taff with information on our approach and were giving them process information through webinars and also the results of our RFPs on a delayed basis through our GATS account transfer," the Companies did not see how additional meetings

[343] Stathis Testimony, p. 44.

[344] Tr. Vol. I, p. 98.

[345] *Id.*

[346] *Id.*

[347] *Id.*, pp. 98-99.

[348] *Id.*, p. 100.

with the Staff to discuss the results would have aided the process, especially since the Companies had a statutory obligation to procure.[349]

In sum, Exeter's suggestion that the Companies should have contacted Staff provides no alternative to purchasing the RECs. It is thus not relevant to the Commission's decision in this case.

V. BECAUSE THE COMPANIES COMPLIED WITH SECTION 4928.64 AND THE EVIDENCE DEMONSTRATES THAT THE COMPANIES MADE PRUDENT AND REASONABLE DECISIONS IN PURCHASING RECs TO MEET THEIR STATUTORY BENCHMARKS, THE COMMISSION SHOULD NOT – AND LAWFULLY CANNOT – DISALLOW ANY OF THE COMPANIES' COSTS RECOVERED UNDER RIDER AER.

A. The Companies' REC Procurement Decisions Were Prudent.

As set forth above, the Companies' management decisions regarding the procurement of RECs were consistently prudent across the audit period. Indeed, Staff, OCC and the other Intervenors have failed to come forward with sufficient evidence to rebut the presumption of prudence that the Companies' management decisions are afforded.[350] While the Companies may bear the ultimate burden of proof, prior to this burden being "triggered," Staff and Intervenors must come forward with "concrete evidence supporting their position."[351] As the record in this proceeding aptly demonstrates, they have failed to do so.

Further, even if Staff and the Intervenors shifted the burden of production (which they have not), the Companies' management decisions still emerge as reasonable and prudent. Staff

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[349] Tr. Vol. II, p. 422.

[350] *See In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, Case No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, *21-22 (Dec. 30, 1986) (finding in the context of an audit of a gas company's procurement policies that Staff failed to come forward with sufficient evidence to rebut the presumption of prudence).

[351] *In the Matter of the Investigation into the Perry Nuclear Power Station*, 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, *21 (Jan. 12, 1988).

and the Intervenors' Monday-morning quarterbacking aside, the prudence of the Companies' REC procurement decisions should "be based on information and market conditions that existed at the time the decisions were made."[352] Given the constrained and nascent state of Ohio's in-state renewable market during 2009 and 2010, and the uncertainty that surrounded future prices and supply of In-State All Renewables, the Companies' REC procurement policies were reasonable. As noted, the Companies began their procurements before the rules under Section 4928.64 were even finalized. The RFPs for 2009 RECs were undertaken by an unquestionably independent expert[353] and were preceded by diligent market research[354] and outreach.[355] As confirmed by Navigant,[356] the Companies had little choice but to purchase their 2009 In-State All Renewables in the first two RFPs in that year.[357] The Companies, as ratified by Navigant, also committed to a laddered procurement strategy.[358] Thus, in order to diversify their procurements, the Companies properly purchased In-State All Renewables for 2009, 2010 and 2011 in 2009 to at least meet a fraction of the statutory requirements.[359]

The story for the RFP in 2010 (RFP 3) was much the same. Given the tight market, the Companies appropriately pursued 2010 In-State All Renewables. Given the Companies' laddering strategy, the Companies also properly sought to procure 2011 RECs for this product.

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[352] *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Gas Price Hedging Pilot Program*, Case No. 01-1674-GA-UNC, 2001 Ohio PUC LEXIS 457, *4-5 (Aug. 2, 2001).

[353] Supra Section IV(A)(2).

[354] Supra Section IV(B)(1); *see also* Tr. Vol. I, p. 102.

[355] Supra Section IV(A)(2).

[356] Bradley Testimony, pp. 30, 37-38.

[357] Stathis Testimony, pp. 25, 31-32.

[358] Tr. Vol. II, pp. 430-31.

[359] Supra Section, IV(B)(3)(c).

The Companies received and, following Navigant's recommendation, accepted a bid for a sufficient amount of In-State All Renewables that enabled the companies to satisfy all of their remaining 2010 in-state renewable resource obligations.[360] For the 2011 In-State All Renewables, the Companies believed that the uncertainty surrounding the market and the presence for the first time of a second qualified bidder in this category, presented an opportunity for them to potentially negotiate a lower price for their 2011 In-State All Renewables obligations.[361] As a result, after consulting with Navigant, the Companies first accepted all of the bids for 2011 In-State All Renewables offered from a lowest bidder.[362] The Companies through Navigant also were able to renegotiate a price for certain 2011 In-State All Renewables offered by the highest bidder that resulted in a price reduction worth approximately $25 million for 2011 In-State All Renewables.[363] By the time of RFP 6 (the last of the RFPs that sought In-State All Renewables for 2011),[364] the market had developed sufficiently enough so that no party has questioned the RECs purchased then.

It was no secret that the General Assembly, in enacting Section 4928.64, sought to develop a renewable energy market in Ohio rapidly through aggressive benchmarks, including the geographic limitations of from where these resources had to be purchased.[365] It thus should have surprised no one that in the first few years of the regime established under Section 4928.64 markets were thin and prices reflected that fact. Other than the Companies' successful effort to

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[360] Stathis Testimony, p. 35.

[361] *Id.*

[362] *Id.*, pp. 35-36.

[363] *Id.*, p. 36.

[364] The Companies did not seek to procure In-State All Renewables in RFPs 4 and 5. *See* Bradley Testimony, p. 42.

[365] *Id.*, p. 45, n. 14.

renegotiate a bid which resulted in substantial customer savings, the Companies' actions have reflected the approved product procurement policies in place previously.[366] Further, all of the Companies' procurement decisions were either recommended or otherwise approved by an independent market expert.[367] The Companies thus have more than met any burden of proof regarding the prudence of their decision to procure the necessary quantities of reasonably available RECs to meet their statutory compliance obligations.

B. There Is No Basis Upon Which Any Disallowance Could Be Calculated.

Even disregarding the overwhelming evidence of the propriety of the Companies' actions, there is no basis upon which the Commission could determine the amount of any disallowance. Any disallowance must be calculated based on evidence in the record. Staff and the Intervenors have failed to present any such evidence.

In *In the Matter of the Investigation Into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio, Inc.*,[368] the Commission found that a utility had imprudently entered into unreasonable procurement contracts with an affiliate such that the utility purchased too much gas at too high of a price.[369] OCC demanded a disallowance in the form a "reconciliation adjustment" of several million dollars.[370] The Commission denied OCC's request because OCC failed to come forward with evidence to support the amount of the proposed disallowance and its calculations were methodologically unsound.[371] Specifically, the Commission held:

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[366] Supra Section IV(B)(3)(a) – (d).

[367] Stathis Testimony, p. 2.

[368] Case No. 83-135-GA-COI, 1985 Ohio PUC LEXIS 18 (Oct. 8, 1985).

[369] *Id.*, at *23-24.

[370] *Id.*, at *24-26.

[371] *Id.*, at *41-44.

> Although the record is sufficient to show that Columbia was imprudent in its purchasing practices during the audit period, [the record] *does not provide a firm basis for determining the cost to Columbia's ratepayers of that imprudence*...With regard to a remedy for this imprudence, OCC provided several suggested reconciliation adjustments, but has *failed to provide a strong enough basis* for those recommendations. *The Commission cannot order a reconciliation adjustment of the magnitude recommended on such a scant basis.*[372]

Here, the record similarly demonstrates a lack of sufficient evidence to support any disallowance. As set forth above, there is no evidence to show that the Companies paid unreasonably high prices for RECs.

Staff witness Dr. Estomin and OCC witness Gonzalez were the only two witnesses who discussed a potential disallowance. Neither, however, could testify regarding a sound methodology for calculating any proposed disallowances. Staff witness Dr. Estomin testified that one possible calculation might be to use the compliance payment and adjust that upward by an indeterminate amount.[373] But Dr. Estomin also testified that he does know why the legislature set the compliance payment at the level that it did.[374] And he further testified that the compliance payment level is not a market price. Indeed, Dr. Estomin also admitted that the price that the Companies should have paid is unknowable.[375] Such a haphazard approach provides little, if any, guidance for quantifying any proposed disallowance.

Dr. Estomin also testified that [redacted][376] But under questioning from

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[372] *Id.*, at *41-42; *44 (emphasis added).

[373] Tr. Vol. I. pp. 130-31.

[374] *Id.*, p. 82.

[375] *Id.*, p. 130.

[376] Tr. Vol. I. p. 133 (Confidential) (emphasis added).

the Attorney Examiner, Dr. Estomin admitted that this methodology would be improper. Specifically, Dr. Estomin testified [redacted][377] Dr. Estomin's "alternatives" thus fail to provide a sound methodological basis for calculating any proposed disallowance.

OCC witness Gonzalez's proposed method of calculating a disallowance is similarly unsupported by the evidence. Mr. Gonzalez simply proposed [redacted][378] For example, Mr. Gonzalez testified that [redacted][379] In her rebuttal testimony, Company witness Eileen Mikkelsen further observed that Mr. Gonzalez's "recommendation of a disallowance amount of the total REC cost is equivalent to assuming, contrary to fact, that the RECs were never purchased and that the Companies wholly failed to comply with their statutory mandates—all of which simply isn't true."[380] Further, [redacted][381] Company witness Eileen Mikkelsen testified that the

[377] *Id.*, p. 133. The Attorney Examiner took this to mean, [redacted] *Id.*

[378] Gonzalez Testimony, p. 34 (Confidential).

[379] Tr. Vol. III (Confidential), p. 622.

[380] Mikkelsen Rebuttal Testimony, p 3.

[381] Tr. Vol. III, p. 623 (Confidential).

customers did not begin to pay for the RECs at the time the contracts were executed.[382] Mr. Gonzalez's testimony failed to provide the requisite concrete insight or acceptable methodology to determine an allegedly appropriate disallowance amount. Thus, there is no evidence to support an order of a disallowance.

C. Disallowing Revenues Already Recovered By The Companies Would Be Unlawful.

Any Commission order requiring the refund of any monies already collected by the Companies pursuant to the rate schedule in Rider AER would violate Ohio's prohibition on retroactive ratemaking. The rule against retroactive ratemaking strictly limits the circumstances under which refunds can be issued—none of which apply here.

1. Ohio law prohibits retroactive ratemaking.

The rule against retroactive ratemaking has a long and well-established history. In *Keco Industries, Inc. v. Cincinnati Suburban Tel. Co.*,[383] a customer sought restitution for payments to a utility related to an increase in rates approved by the Commission but later found to be unlawful by the Supreme Court.[384] The Court held that Ohio law, "in the absence of a statute therefore, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."[385] As such, "a consumer is not entitled to a refund of excessive rates paid during proceedings seeking a reduction in rates."[386] Indeed, pursuant to Section 4905.32, a

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[382] Mikkelsen Rebuttal Testimony, pp. 4-5.

[383] 166 Ohio St. 254 (1957).

[384] *Id.* at 255.

[385] *Id.* at 255, Syllabus, para. 2.

[386] *Id.* at 259. The 'no-refund' rule predates *Keco Industries*. *See Great Miami Valley Taxpayers Ass'n v. Pub. Util. Comm.* (1936), 131 Ohio St. 285, 286 (affirming Commission finding that Section 614-23 of the Ohio General Code (the forerunner of Section 4905.26) prohibited refunds for complaints of excessive rates already collected). *See also, Pub. Util. Comm. Of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 464 (1943) ("[Section 614-23]

utility has no option but to "collect the rates set by the commission and is *clearly forbidden to refund any part of the rates so collected.*"[387]

Likewise, in *Lucas County Comm's v. Pub. Util. Comm.*,[388] the Ohio Supreme Court affirmed the Commission's dismissal of a complaint where the customers of a natural gas utility sought a credit or rebate for charges collected pursuant to a Commission-approved experimental weather normalization adjustment ("WNA") program. The Lucas County Commissioners claimed that the WNA resulted in overpayments of approximately $8.5 million because it led to natural gas rates being higher than they otherwise would have been.[389]

In upholding the Commission's decision, the Court held that there was "no statutory authorization for the ordering of . . . a credit or rebate."[390] "[W]hile a rate is in effect, a public utility must charge its customers in accordance with the commission-approved rate schedule."[391] Indeed, the Court held: "the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable. *The substitution has prospective effect only.*"[392] The Commission also closely adheres to the rule.[393]

(continued...)

gives the Commission power to prescribe...rates prospectively...[t]here is no basis...for concluding that the Commission's orders can be retroactive to the date when the Commission's inquiry into the rates was begun.").

[387] *Keco Industries,* 166 Ohio St. at 257 (emphasis added).

[388] 80 Ohio St. 3d 344 (1997).

[389] *Id.*, Prior History, at *2.

[390] *Id.* at 347.

[391] *Id.* (citing to Section 4905.32).

[392] *Id.* (emphasis added). *See also, In re Application of Columbus S. Power Co.* (2011), 128 Ohio St. 3d 512, 515-516 ("The unlawful rate increase [at issue] lasted until the end of 2009 and *has been fully recovered*, so reversing the retroactive increase will not reduce ongoing rates. The rule against retroactive rates, however, also *prohibits refunds.*") (emphasis added); *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009), 121 Ohio St. 3d 362,

2. Any disallowance in this proceeding would violate the rule against retroactive ratemaking.

Under Ohio law, no refund or disallowance for monies already collected pursuant to the rates charged under Rider AER is permissible in the present proceeding. The Rider AER tariff imposed rates on customers by rate schedule to enable the companies to recoup the costs of meeting their AEPS compliance obligations from 2009 to 2011. As in *Lucas County*, Rider AER was approved by the Commission and resulted in a Commission-approved tariff containing Rider AER. Pursuant to the AER tariff, the Companies made 27 on-time quarterly filings stating their updated rate schedule for Rider AER during 2009 through 2011. Consistent with the ESP Stipulation, the proposed rates in these filings took effect 30 days after filing, subject to Commission review, "unless otherwise ordered by the Commission."[394] Thus, here, as in *Keco Industries* and *Lucas County*, a "Commission-approved rate schedule" is in effect and there is "no statutory authorization for the ordering of . . . a credit or rebate."[395]

(continued...)

367 ("[A]ny refund order would be contrary to our precedent declining to engage in retroactive ratemaking."); *Green Cove Resort Owners Assoc. v. Pub. Util. Comm.* (2004), 103 Ohio St. 3d 125, 130 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*").

[393] *See, e.g.*, in *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, 2011 Ohio PUC LEXIS 1084, *86-87 (Oct. 3, 2011) ("The Commission agrees with [the utility] that an adjustment to the FAC deferral balance, which we previously authorized to be collected as a means to recover the Companies' actual fuel expenses incurred plus carrying costs, would be contrary to the Court's prohibition against retroactive ratemaking and refunds."); *Northeast Ohio Public Energy Council v. Ohio Edison Company*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, *8-9 (July 8, 2009) ("Based upon the Supreme Court's decision in *Keco Industries*....[complainants] and their customers may not be entitled to a refund of switching fees already collected by FirstEnergy even if the Commission determines that such fees are unjust or unreasonable.")

[394] *See, e.g.*, Case No. 08-0935-EL-SSO, Ohio Edison Company, P.U.C.O. No. 11, Sheet 84, 8th Revised Sheet Page 1 of 1 (Effective Date: July 1, 2011).

[395] *Lucas County*, 80 Ohio St. 3d at 347; *see also Keco Industries*, Syllabus, par. 2.

Even if allegedly excessive prices were paid for RECs (which they were not), these prices were reflected in the amounts collected from customers pursuant to Rider AER. As Company witness Mikkelsen testified, by July 31, 2013, the Companies will have collected all but $4.9 million of REC-related costs from 2009 through 2011.[396] Thus, the Commission cannot order a refund without engaging in prohibited retroactive ratemaking activity. As such, any changes or adjustments to Rider AER can have a prospective effect only. In the case of rates already collected, disallowances, refunds, credits or disgorgements of any sort, simply are not permissible.

VI. THE COMPANIES ACCURATELY CALCULATED RIDER AER.

Goldenberg verified the mathematical accuracy of the quarterly Rider AER calculations and traced the data to various sources provided by the Companies.[397] Goldenberg was also able to verify the invoices to the REC purchases.[398] In its Report, Goldenberg also made a number of recommendations.[399] The Companies agree with many of the recommendations made by Goldenberg and are willing to implement those if ordered to do so by the Commission on a going forward basis, if the Companies have not already done so. The Companies, however, cannot implement some of the recommendations due to regulatory commitments made as part of their Electric Security Plan(s) approved by the Commission.[400]

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[396] Mikkelsen Rebuttal Testimony, p. 4. If the Companies had not agreed to a smoothing of Rider AER rates through the course of ESP 3, all of these costs would have been recovered by February 2013. *See Id.*

[397] Goldenberg Report, p. 6.

[398] *Id.*, p. 7.

[399] *Id.*, p. 31.

[400] Mikkelsen Testimony, p. 3.

On page 31 of its Report, Goldenberg made several recommendations[401] related to improvements the Companies could make to the quarterly rider AER calculations and how certain costs are calculated. As Company witness Mikkelsen testified, the Companies agree with Recommendations (5), (6), (8), (9), (10), (13), (14) and (15) and, if the Companies have not done so already, will implement them upon Commission approval on a going forward basis.[402]

Goldenberg also made recommendations generally attempting to align the costs recovered each quarter under Rider AER more closely with the costs estimated to be incurred in that quarter; i.e., to have any over or under recovery included in the Rider for the second subsequent quarter. Goldenberg also made one recommendation related to the under recovered deferral balance as of December 31, 2011.[403] In Recommendation (1) on page 31 of its Report, Goldenberg further recommended that the overall Rider AER rate calculated for each operating company should be used rather than allocating to rate schedule based on loss factors.[404] As Ms. Mikkelsen testified, however, the Companies "are bound by regulatory commitments that preclude the Companies from implementing these recommendations".[405] Specifically, on July 18, 2012, in Case No. 12-1230-EL-SSO, the Commission adopted a Stipulation and approved the Companies' third Electric Security Plan.[406] In that Order, the Commission approved the continued recovery of the cost of renewable energy requirements through the Rider AER mechanism. Specifically, the Commission adjusted the recovery period such that costs would be

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[401] *See* Goldenberg Report, p. 31; Recommendations (5), (6), (8), (9), (10), (13), (14) and (15).

[402] Mikkelsen Testimony, pp. 4-5.

[403] *See* Goldenberg Report, p. 31; Recommendations (2), (3), (4), (7).

[404] *Id.*, p. 31, Recommendation (1).

[405] Mikkelsen Testimony, p. 6.

[406] *Id. See generally,* Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012).

recovered, on a levelized basis, through May 31, 2016.[407] The Companies' ESPs require that the rate design in effect at the time of the Stipulation remain in effect throughout the term of the ESP unless expressly modified in the ESP.[408] At hearing, Staff witness Storck, on behalf of Goldenberg, agreed with Ms. Mikkelsen that there are now regulatory commitments from the Order in Case No. 12-1230-EL-SSO that would prevent the Companies from implementing the recommendations in the Goldenberg Report relating to the timing and term of recovery.[409] For all of those reasons, the Commission should not approve Goldenberg's Recommendations (1), (2), (3), (4), (7).

VII. CONCLUSION

For all of these reasons, the Commission should find that the costs incurred by the Companies in complying with their renewable energy benchmarks during 2009 through 2011 were reasonably and prudently incurred costs and dismiss this audit proceeding.

DATED: April 15, 2013

Respectfully submitted,

/s/ David A. Kutik
James W. Burk, Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 761-7735
Facsimile: (330) 761-7735
E-mail: burkj@firstenergycorp.com

David A. Kutik
Lydia M. Floyd

[407] Mikkelsen Testimony, p. 6; Case No. 12-1230-EL-SSO, Opinion and Order, at p. 35.

[408] Mikkelsen Testimony, p. 8; Case No. 12-1230-EL-SSO, Opinion and Order, at p. 8.

[409] Tr. Vol. I, p. 40.

JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the following persons by e-mail this 15th day of April, 2013:

Terrence O'Donnell
J. Thomas Siwo
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2345
Facsimile: (614) 227-2390
E-mail: todonnell@bricker.com
tsiwo@bricker.com

Attorneys for Mid-Atlantic Renewable Energy Coalition

Bruce J. Weston
Melissa Yost
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: (Serio) (614) 466-9565
Facsimile: (614) 466-9475
E-mail: yost@occ.state.oh.us

Attorneys for Office of the Ohio Consumers' Counsel

William Wright
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
E-mail: William.wright@puc.state.oh.us

Attorneys for the Staff of the Public Utilities Commission of Ohio

David F. Boehm
Michael L Kurtz
Jody M. Kyler
Boehm Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Telephone: (513) 421-2255
Facsimile: (513) 421-2764
E-mail: dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkyler@BKLlawfirm.com

Attorneys for The Ohio Energy Group

Christopher J. Allwein
Williams, Allwein & Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
Telephone: (614) 429-3092
Facsimile: (614) 670-8896
E-mail: callwein@wamenergylaw.com

Attorney for the Sierra Club

Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone PC
1025 Thomas Jefferson Street NW
8th Floor West Tower
Washington, DC 20007
Telephone: (202) 342-0800
Facsimile: (202) 342-0807
E-mail: mkl@bbrslaw.com

Attorney for Nucor Steel Marion, Inc.

Cathryn Loucas
Trent A. Dougherty
Ohio Environment Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
Telephone: (614) 487-7506
Facsimile: (614) 487-7510
E-mail: cathy@theoec.org
trent@theoec.org

Attorneys for the OEC

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: lmcalister@bricker.com
mwarnock@bricker.com

Attorneys for The OMA Energy Group

Nicholas McDaniel
ENVIRONMENTAL LAW &
POLICY CENTER
1207 Grandview Ave., Suite 201
Columbus, OH 43212
NMCDaniel@elpc.org

Attorney for ELPC

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
Telephone: (412) 421-7029
Facsimile: (412) 421-6162
E-mail: robinson@citizenpower.com

Attorney for Citizen Power

M. Howard Petricoff
Michael J. Settineri
Lija Caleps-Clark
VORYS, SATER, SEYMOUR AND PEASE
LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-5414
mhpetricoff@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com

Attorneys for Interstate Gas Supply, Inc.

/s/ David A. Kutik
An Attorney For Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company