BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

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

APPEARANCES:

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

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

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

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

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

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

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

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

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

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

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

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

OPINION:

I. <u>HISTORY OF PROCEEDINGS:</u>

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

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

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

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

II. APPLICABLE LAW

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

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

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

III. SUMMARY OF THE AUDIT REPORTS

A. Goldenberg Report

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

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

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

B. Exeter Report

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

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

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

IV. PROCEDURAL ISSUES

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

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

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

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

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

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

B. Review of Rulings on Motions for Protective Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Similarly, Rule 4901-1-24, O.A.C., allows the Commission to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Ohio law defines a trade secret as "information * * * that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code.

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

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

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

C. Pending Motions for Protective Orders

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

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

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

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

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

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

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

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

V. DISCUSSION AND CONCLUSIONS

A. Prudency of Costs Incurred

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) August 2009 RFP (RFP1)

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

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

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

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

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

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

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

(2) October 2009 RFP (RFP2)

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

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

(3) August 2010 RFP (RFP3)

(a) 2010 Vintage RECs

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

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

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

(b) 2011 Vintage RECs

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

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

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

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

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

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

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

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

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

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

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

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

(c) Other REC Purchases

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

B. Undue Preference

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

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

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

C. Statutory Three Percent Provision

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

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

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

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

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

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

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

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

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

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

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

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

(Goldenberg Report at 30.)

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

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

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

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

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

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

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

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

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

It is, therefore,

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

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

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

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

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

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

MWC/GAP/sc

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AUG 07 2013

Barcy F. McNeal
Secretary