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

APPLICATION FOR REHEARING
BY
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER,
AND THE OHIO ENVIRONMENTAL COUNCIL

REDACTED (PUBLIC) VERSION

The Sierra Club, Environmental Law and Policy Center, and the Ohio Environmental Council ("Environmental Intervenors") file this Application for Rehearing[1] in response to certain portions of the Public Utilities Commission of Ohio ("PUCO" or "Commission") Opinion and Order in this case issued August 7, 2013. The Opinion and Order ("Order") in this matter disallowed recovery by the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively "Companies" or "FirstEnergy") of more than $43 million for the 2011 vintage renewable energy credits ("RECs") purchased in August of 2010.

The Environmental Intervenors now set forth the following grounds for rehearing:

A. The Commission's Order was unreasonable in declining to initiate a corporate separation investigation into the FirstEnergy electric distribution utilities' relationship with their affiliate companies using the Exeter Report for justification. The facts and circumstances of this case, concurrent with the Commission's obligation to foster and maintain a true competitive generation market, are sufficient that the Commission, on its own initiative, should commence a corporate separation investigation pursuant to Ohio Revised Code 4928.18.

[1] Pursuant to Ohio Revised Code 4903.10 and Ohio Administrative Code 4901-1-35.

B. The Commission unlawfully shifted the burden of proof to intervenors by applying a presumption of prudence to FirstEnergy's purchases.

C. The Commission unreasonably excluded price suppression effects from its proposed cost cap calculation.

D. The Commission unlawfully found certain information to be confidential, including REC prices, seller identity, and recommended penalty amounts.

The attached memorandum in support sets forth an explanation of the basis for each ground for rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In the Order, the Commission considered and declined to commence a corporate separation investigation, citing the Exeter Report filed on the docket August 15, 2012. The Commission unreasonably excluded price suppression benefits from its proposed cost cap calculation and unlawfully shifted the burden of proof in this case to the intervenors. Finally, the Commission unlawfully found certain information to be confidential, including REC prices, seller identity, and recommended penalty amounts. The Environmental Intervenors support the grounds for rehearing in this memorandum. The Environmental Intervenors now respectfully request that the Commission consider the arguments below and modify the August 7 Opinion and Order as presented.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that any party may apply for rehearing on matters decided by the Commission within thirty days after an

order is issued.[2] An application for rehearing must be written and must specify how the order is unreasonable or unlawful.[3] In considering an application for rehearing, the PUCO may grant rehearing requested in an application, if "sufficient reason therefore is made to appear."[4] If the Commission grants a rehearing and determines that its Order is unjust or unwarranted, or should be changed, it may abrogate or modify the Order.[5] Otherwise the Order is affirmed. Under R.C. 4903.10(B), the PUCO is limited on rehearing to granting or denying a "matter [...] specified in such application [for rehearing]."

The Environmental Intervenors meet both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO's rule on applications for rehearing.[6] Environmental Intervenors are a party to the case. Additionally, Environmental Intervenors actively participated in this case, and thus, may apply for rehearing under R.C. 4903.10. The PUCO should determine that Environmental Intervenors have shown "sufficient reason" to grant rehearing on the matters specified below, consider the arguments presented and modify its August 7, 2013, Opinion and Order.

III. ARGUMENT

A. The Commission's Order was unreasonable in declining to initiate a corporate separation investigation into the FirstEnergy electric distribution utilities' relationship with their affiliate companies by citing the Exeter Report and other items for justification. The facts and circumstances of this case are sufficient that the Commission, on its own initiative, should commence a corporate separation investigation pursuant to Ohio Revised Code 4928.18.

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[2] R.C. 4903.10
[3] Id.
[4] Id.
[5] Id.
[6] See Ohio Adm. Code 4901-1-35.

The Commission states in its Opinion and Order ("Order") that it "finds no evidence in the record in this proceeding to support further investigation at this time."[7] The Environmental Intervenors respectfully urge the Commission to revisit and revise this conclusion. In its Opinion and Order, the Commission partially relies on the lack of a recommendation from the auditor to decline to commence a further investigation and to pursue this issue. However, the scope of the auditors' work was designated by the Commission and did not include exploration of these issues. There is sufficient evidence in the case record that justifies a corporate separation investigation as the next logical step in the efforts commenced by the Commission in this case. The Commission should launch such an investigation on its own initiative, as allowed by Ohio law.[8] Such an initiative, accompanied by the right to exercise certain statutory investigative procedures,[9] would allow the Commission and interested parties to complete the proceeding in a thorough, efficient and complete manner. The Environmental Intervenors request that the Commission exercise its statutory authority under Ohio Revised Code Section 4928.18, and investigate any transactions, improper arrangements or communications that may have occurred between the FirstEnergy electric distribution utilities and their unregulated affiliate, FirstEnergy Solutions, within the circumstances revealed by this case.

1. The Commission limited the scope of the investigation prior to hiring Goldenberg and Exeter.

In its Order, the Commission stated that it opened this docket for the purposes of "reviewing Rider AER of [the Companies]" and that such review would include "the

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[7] Order at 29.

[8] Pursuant to R.C. 4928.18.

[9] Please see the Comments of Sierra Club in PUCO Case No. 12-3151-EL-COI: *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Sierra Club Comments at pp. 4-5 (March 1, 2013).

Companies' procurement of renewable energy credits for the purpose of compliance with Section 4928.64 of the Revised Code."[10] It was further noted that the Commission "would determine the necessity and scope of the audit."[11] Thus, the PUCO determined the scope of the of the Exeter and Goldenberg audits prior to retaining Exeter and Goldenberg. This scope of work did not anticipate or include deliverables related to corporate separation.

In the Order, the Commission stated that the Goldenberg evaluation encompassed two primary areas. The first was to check the accuracy of the Rider AER mathematical calculations, and the second was to compare "the Companies' status relative to the three percent provision" in the law.[12] Goldenberg's recommendations were purely financial and related to Rider AER charges, costs and allocations.[13] The areas evaluated plainly were not required to include potential corporate separation statutory violations.

The Exeter Report simply examined the Companies' REC acquisition approach and the "solicitation results and procurement decisions."[14] Exeter stated that market information was limited prior to the first two RFPs issued by FirstEnergy for the solicitation of RECs. And the Commission Report stated that Exeter found the contingency planning "inadequate"[15] – meaning that FirstEnergy did not sufficiently explore other options for REC procurement in the event that problems might occur in the RFP process.

The auditor's report on the RFP results and procurement decisions was revealing. Despite the auditor's observation that the "market information for in-state RECs and overall RECs was limited" prior to the first two solicitations, Exeter noted that "prices paid for all-state RECs were

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[10] Opinion and Order at 2.
[11] Id.
[12] Opinion and Order at 4 (August 7, 2013).
[13] Id. at 5.
[14] Id.
[15] Id.

consistent with regional REC prices."[16] Exeter also found that the purchases of in-state SRECs (Solar RECs) by FirstEnergy was "competitive and the prices were consistent with the prices for SRECs seen elsewhere."[17] So, for three out of four types of RECs (i.e., all-state RECs, all-state SRECs and in-state SRECs), the prices paid were comparable to those paid in other regions and "consistent with the prices…seen elsewhere," despite limited market information. This makes the excessive prices paid for in-state RECs by FirstEnergy between 2009-2011 all the more conspicuous – certainly enough to set off red flags and trigger further available regulatory oversight.

The Commission Order notes that the Exeter audit exposed several issues with in-state RECs:

> "…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."[18] (Emphasis added).

So, for the fourth and final category of RECs, FirstEnergy purchased RECs at prices that were "excessive." These prices were higher than those paid for these types of RECs anywhere else in *the country*. The Companies neglected to consider any alternatives to purchasing these RECs, perhaps purposefully. In addition, these RECs were stated to have been purchased from "a supplier [redacted]

[16] (Emphasis added) Id. at 6.
[17] (Emphasis added) Id. at 6.
[18] Order at 6.

[redacted]

The auditors performed their work within the scope delineated by the Commission and presented their results as required. [redacted] The Commission's reliance on the lack of a recommendation for corporate separation investigation in the auditor's report is therefore unreasonable and confusing given that such issues were outside the scope of the auditor's investigation.

2. Exeter stated that corporate separation issues were beyond the scope of its investigation on the record in this case.

The Commission states that "the Exeter Report did not recommend any further investigation on [corporate separation or undue preference]."[19] Yet the Commission also notes that the record indicates the auditors were limited in the scope of their investigation.[20] As presented above, neither auditor was assigned to review potential corporate separation violations or to pursue these issues in any way. The scope of the work for both Goldenberg and Exeter did not include corporate separation. The lack of a recommendation related to corporate separation in the audit reports is not sufficient reason for the Commission to deny further investigation into potential corporate separation violations.

During the hearing, the author of the Exeter Report, Steven Estomin, agreed that [redacted]

[19] Order at 29.

[20] Id.

[redacted][21] Further, Dr. Estomin noted that, [redacted]

[redacted][22]

Therefore, it is unreasonable for the Commission to expect a recommendation to pursue a corporate separation investigation from an auditor performing a specific review of procedures and results, but was not asked to include corporate separation review.

In the Entry and RFP issued by the Commission on January 18, 2012, the statutory provisions governing the audit were presented:

> Any auditor who is chosen by the Commission to perform an audit shall execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under Sections 4903.02, 4903.03, 4905.06, 4905.15 and 4905.16, Revised Code.[23]

Omitted from this list is Ohio Revised Code Section 4928.18 - the statute that provides the Commission the authority to investigate potential corporate separation violations. Since R.C. 4928.18 was not included in the list of authority, it is unreasonable for the Commission to now rely on any absence of recommendation for the Commission to pursue issues of corporate separation or undue preference to justify not further investigating these issues.

However, the findings in the review clearly signal further action is needed by the Commission. Additional facts revealed in this case demonstrate that a Commission-initiated corporate separation investigation needs to be the next step in this process – a step that the Commission should outline in an Entry on Rehearing in this case, and upon which swift action should be taken. .

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[21] Tr. Vol. I at 64-65, lines 23-25 and lines 1-3.

[22] Tr. Vol. I at 68-69, lines 20-25 and lines 1-3.

[23] Entry issuing the RFP at 13-14 (January 18, 2013).

3. Facts brought out in the case revealed that FirstEnergy [redacted]

During the hearing, it was revealed that at some point in the RFP process, the Companies became aware that the [redacted]

It is noted in the Order that the Companies made efforts to share their RFP process with the Commission, in order to ensure it was what the Commission had envisioned for the process. Yet, when the results of the RFP were found to be significantly out of step with regional and country-wide prices, the Companies chose not to share this information with the Commission. Further, the fact that the excessive and outrageous prices were [redacted]

[24] Transcript Vol. II, pages 376-378.

[25] Id. at page 379, lines 21-23.

[redacted] it is more than enough for the Commission to take the next step and exercise its statutory investigative authority.

4. **FES was not a party to the case. A Commission investigation would allow affiliate records to be examined.**

The Commission also relies on FirstEnergy's assertion that because discovery yielded no smoking-gun evidence of undue preference, the Commission should not launch an investigation at this time. But it is important to note that the FirstEnergy Solutions was not a party to this case. To obtain discovery responses that addressed the activities of the Companies' affiliate, FirstEnergy Solutions would have been impossible.

No true and full picture of the legality of the actions of FirstEnergy can be made in this case without a review of FirstEnergy Solutions. Without a doubt, the strangest and most inexplicable behavior in this controversy originated at FirstEnergy Solutions, and without a separate Commission-instigated investigation parties will have a more difficult time attempting to review this behavior. The record is clear on several illuminating points. For some reason FirstEnergy Solutions [redacted] In aggregate this behavior is very strange and highly suspicious. Questions concerning this behavior cannot be answered in the current case; as no discovery or information can be conducted or gathered towards FirstEnergy Solutions.

Further, the FirstEnergy electric distribution utilities are not permitted the type of knowledge of FirstEnergy Solutions actions or intentions necessary to resolve these questions.

Because of this fact, any discovery questions or requests made to FirstEnergy asking for information pertaining to the actions or intentions of FirstEnergy Solutions is invalid. Accordingly, the information necessary determine whether or not corporate separation violations were made by the Companies cannot be obtained through discovery in this case. Only the Commission, through the opening of an investigation, may create an avenue to this essential information.

FirstEnergy [redacted] Did FirstEnergy Solutions offer its RECs to other parties, if not – why not? If so – at what price? The Commission should not let the following questions go unanswered, as they go to the very heart of electricity marketplace integrity in Ohio. It is the Commission's responsibility to examine these questions in a separate proceeding.

R.C. 4928.18 allows the Commission to examine affiliate books and records insofar as they relate to the interrelationships between affiliates. This statutory authority - that the Commission did not extend to the auditors, although it could have – would allow the Commission to efficiently access all records that go beyond the intended limited scope of this case, and that were not available in this case, but that should now be examined as a result of this

case. Environmental Intervenors respectfully submit that the Commission's authority under R.C. 4928.18, and its obligation under 4928.02 require the Commission to take such a next step.

5. The Commission has an obligation and responsibility under 4928.02 to launch this investigation.

As stated in R.C. 4928.17, the idea of corporate separation is to assist and enable the realization the policy goals of Ohio Revised Code Section 4928.02. These policy goals include a diversity of supplies and suppliers, creating a competitive environment, and encouraging distributed generation. The corporate separation requirements must be enforced by the Commission, per 4928.18.

The facts of this case, and the obligations of the Commission under 4928.02 and 4928.18 warrant an investigation in which the Commission exercises its statutory authority. In order to have the diversity of supplies and suppliers as envisioned in Ohio law, the Commission must fulfill its obligations and review the interrelationships between FirstEnergy and FirstEnergy Solutions that – from the facts of this case – show a wholly inappropriate and knowing [redacted] between regulated companies and their unregulated affiliate at the expense of Ohio utility customers, the emerging Ohio generation market and with complete disregard for Ohio law. The Environmental Intervenors urge the Commission to launch a corporate separation investigation.

B. The Commission unlawfully shifted the burden of proof to intervenors by applying a presumption of prudence to FirstEnergy's purchases.

The Commission recognized in its Opinion and Order that *In re Duke* requires that FirstEnergy bear the burden of proving that its expenses were prudently incurred.[26] The Ohio Supreme Court unequivocally held in *In re Duke* that a utility "[bears] the burden of proving that its expenses were reasonable."[27] However, after correctly determining that the Supreme Court's holding imposes the burden of proof on FirstEnergy, the Commission purported to apply a presumption "that the Companies' management decisions were prudent."[28]

A presumption of prudence is entirely inconsistent with the Supreme Court's holding in *In re Duke*. Logically, FirstEnergy cannot simultaneously bear the burden of proof and also, at the same time, enjoy a presumption of prudence. A presumption of prudence necessarily places the burden on intervenors to prove that the utility's actions are imprudent. The Commission's misapplication of the burden is clear throughout the Opinion and Order, as the Commission repeatedly weighed the evidence presented by intervenors against the backdrop that "the Companies' management decisions are presumed to be prudent."[29] Rather than determine if there was sufficient evidence to overcome the Companies' presumption of prudence, the Commission must instead ask whether the Companies have met the burden of proving that the purchases were prudent and reasonable. FirstEnergy, not intervenors, must "prove a positive point: that its expenses ha[ve] been prudently incurred."[30]

The Commission's misapplication of the burden of proof had a material impact on a number of the Commission's findings. Because of the improper presumption of prudence

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[26] *See* Opinion and Order at 21 (citing *In re Duke*, 131 Ohio St. 3d 487 (2012)).

[27] *In re Duke*, 131 Ohio St. 3d at 488.

[28] *See* Opinion and Order at 21.

[29] *See id.* at 25.

[30] *In re Duke*, 131 Ohio St. 3d at 488.

applied to FirstEnergy, the Commission erred in finding FirstEnergy's August 2009 and October 2009 purchases were prudent. With regard to the August 2009 purchases, the Commission concluded that "the Companies could have consulted with the Staff given the nascent market and the unavailability of reliable market information."[31] The Commission went on to state, however, that "this factor alone is not sufficient to overcome the presumption that the Companies' management decisions were prudent."[32] Whether Staff or intervenors "conclusively prove[d] that [FirstEnergy's] expenses were unreasonable or imprudent . . . is irrelevant because those parties did not bear the burden of proof."[33] Given that FirstEnergy bears the burden of proof, the Commission must conclude that FirstEnergy failed to meet that burden with respect to the August 2009 purchases.

Similarly, with regard to the October 2009 purchases, the Commission expressed its "concern[] that the Companies chose to purchase vintage 2011 RECs in 2009 when the market was nascent and illiquid."[34] The Commission's concern demonstrates that any evidence supporting FirstEnergy's purchase of vintage 2011 RECs was, at best, "inconclusive or questionable," and, because FirstEnergy bears the burden of proof, *In re Duke* explains that cost recovery should be disallowed in those instances.[35] The fact that these purchases represented only 15% of FirstEnergy's 2011 obligations is not a fact supporting the prudence of the decision to make the purchase.[36] Fifteen percent of FirstEnergy's 2011 obligations is a significant amount

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[31] *See* Opinion and Order at 23-24.

[32] *Id.* at 24.

[33] *In re Duke*, 131 Ohio St. 3d at 489.

[34] Opinion and Order at 24.

[35] *See In re Duke*, 131 Ohio St. 3d at 488.

[36] *See* Opinion and Order at 24 (pointing to the small percentage of purchased 2011 RECs as a reason to allow cost recovery).

considering the exorbitant and unreasonable prices paid by FirstEnergy, which will cost customers millions of dollars, negatively impacts the competitive market for electricity supply, and distorts the perceived price of renewable energy in Ohio.

The Commission should grant rehearing and properly apply the burden of proof, which does not allow for a presumption of prudence in favor of FirstEnergy.

C. The Commission unreasonably excluded price suppression effects from its proposed cost cap calculation.

The three percent cost cap provision of R.C. § 4928.64(C)(3) states that "[a]n electric distribution utility . . . 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."[37] A number of parties, including Staff, recommended that the benefits of price suppression from renewable energy be factored into the cost cap calculation to ensure that all customer costs and benefits are accounted for. The Commission concluded, however, that price suppression benefits should not be included in the calculation, reasoning that "inserting price suppression benefits . . . would add a subjective element to an objective calculation" and that "price suppression benefits are difficult to calculate."[38]

The Commission's reasons for excluding price suppression benefits all centered on the idea that the benefits were subjective and difficult to calculate or quantify. To the contrary, a recent report by the PUCO, released in August 2013 shortly after the Opinion and Order, demonstrates that the price suppression benefits of renewable energy are objective, quantifiable,

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[37] *Id.* at 4 (quoting R.C. § 49228.64(C)(3)).

[38] Opinion and Order at 33.

and very significant.[39] According to the PUCO Report, which "examine[d] the relationship between renewable resource additions and wholesale electricity markets in Ohio," "[p]rice suppression is a widely recognized phenomenon by which renewable resources produce lower wholesale market clearing prices."[40] In order to objectively quantify the price suppression effects, Staff used a particular modeling software that is "one of the most powerful tools available to Commission Staff to analyze wholesale electricity markets and has been utilized by Staff and its consultants in various proceedings before the Commission."[41]

The results of this verifiable analysis show that renewable generation resources reduce wholesale electricity market prices in Ohio. The PUCO Report found that already-operational renewable energy projects reduce wholesale prices by 0.15%, or over $8.4 million.[42] If the analysis includes all projects approved by the Ohio Power Siting Board, wholesale prices are reduced by 0.51%, or over $28.5 million. To properly evaluate the costs and benefits of renewable energy generation, these savings should be included in the cost cap calculation.

Given the recent PUCO Report and the demonstration of the feasibility of objectively and accurately calculating price suppression benefits, the Commission should grant rehearing on this issue. The Commission should adopt Staff's proposed methodology in full, which provides for the incorporation of price suppression benefits.

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[39] *See Renewable Resources and Wholesale Price Suppression*, PUCO Report (August 2013), Exhibit 1 to the Motion to Take Administrative Notice or in the Alternative to Supplement the Record by the Environmental Intervenors ("PUCO Report").

[40] *Id.* at 2.

[41] *Id.* at 3.

[42] *Id.* at 5-6.

D. The Commission unlawfully found certain information to be confidential, including REC prices, seller identities, and recommended penalty amounts.

1. Outdated REC prices and seller identities do not qualify as trade secrets

In its Opinion and Order, the Commission sided with FirstEnergy's claim that information related to REC prices and the identity of sellers satisfies the statutory definition of trade secrets, including the requirement that "REC Procurement Data bears independent economic value."[43] However, the Commission failed to address the fact that this information is extremely outdated and reflective of a REC market that has changed significantly since 2009 and 2010. Once the market changes to the point that this information does not support or create independent economic value, the information no longer satisfies the first of the two statutory elements of what constitutes a trade secret. Absent the label of trade secret, there is no privilege associated with the information and it must be subject to public disclosure.

Under the *Uniform Trade Secrets Act*, Title XIII of the Ohio Revised Code, section 1333.61(D), "trade secret" is defined as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[43] *See* Opinion and Order at 11-12.

An earlier Ohio definition of "trade secret" included an explicit presumption of secrecy where the owner takes measures designed to prevent dissemination.[44] The present definition, adopted in 1994, conspicuously omits this presumption, setting a stricter standard, such that the owner of the information has the burden to prove that it "derive[s] independent economic value" from its secrecy, and that the information not be otherwise "readily ascertainable by proper means."[45]

The Ohio Supreme Court has adopted six additional factors for the purpose of analyzing "trade secret" claims.[46] The six factors "for determining whether information constitutes a trade secret pursuant to R.C. 1333.61(D)" are:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.[47]

Neither FirstEnergy nor the Commission's Opinion and Order explain how information regarding the prices FirstEnergy paid for RECs has any conceivable "value to the holder in having the information as against competitors."

More importantly, even assuming that this information had some independent economic value at the time the bids were made and accepted, it held this value for only a short period of time. In analyzing the Companies' management decisions and purchases throughout 2009 and

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[44] *See* O.R.C. Section 1333.51 (repealed).

[45] O.R.C. § 1333.61(D)-(D)(1).

[46] The factors were derived from the Restatement of Torts § 757, despite the Restatement's warning that "[a]n exact definition of a trade secret is not possible." Restatement (First) of Torts § 757, comm. *b* (1939).

[47] *Id.*; *Al Minor & Assoc., Inc. v. Martin*, 117 Ohio St. 3d 58, 61 (2008) (quoting *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St. 513, 526 (1997)).

2010, the Commission's Opinion and Order recognizes that the Ohio REC market experienced significant changes and development since SB 221 was enacted in 2008. In fact, in disallowing cost recovery for 2011 vintage RECs purchased in August 2010, the Commission explains that "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."[48] These changing market conditions since the Companies' 2009 and 2010 purchases demonstrate that the information is no longer relevant or economically valuable. The Commission's Opinion and Order does not address the fact that REC purchase prices and seller identities cannot maintain any supposed independent economic value in the face of this significant market change.

The information can provide, now, no independent economic value for upcoming REC purchasers. The Opinion and Order improperly accepts First Energy's conclusory claims that public dissemination would have a "chilling effect" on supplier participation in future REC solicitations. As OCC stated in its Post-Hearing Brief in this case, "conclusory statements, alone . . . are not sufficient to meet the burden of proof to establish that information is a trade secret under R.C. 1331.61(D)".[49]

In addition to outdated REC prices and seller identities, the Commission's Opinion and Order also fails to allow for public disclosure of certain recommendations by Exeter and OCC Witness Gonzalez. OCC Witness Gonzalez's total recommended disallowance amount, included in his direct testimony, cannot be considered a trade secret and subject to confidential treatment. In fact, the Commission has already recognized that total, aggregated penalty or disallowance amounts are not confidential–in its Opinion and Order, the Commission publically disclosed the

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[48] Opinion and Order at 25.

[49] OCC Brief at 67 (citing Mondell v. Ohio Bell Telephone Co., Case No. 89-221-TP-PEX (May 16, 1989)).

disallowance it was imposing on FirstEnergy. Logically, the Commission should also allow Witness Gonzalez's recommended disallowance to be disclosed.

The Opinion and Order also failed to address the issue of whether certain information in Exeter's draft report should be subject to public disclosure. In its draft report, Exeter recommended that the Commission, at a minimum, disallow recovery of all In-State RECs costs in excess of a certain price per REC. As with Witness Gonzalez's recommendations and the Commission's own disallowance ruling, this initial recommendation in the Exeter draft report does not qualify as a trade secret and should not be kept confidential. Moreover, the Commission's own Entry establishing the audit process requires that the information be disclosed. The January 18, 2012 Entry provides that "[a]ny conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding." The Commission's failure to allow for disclosure of Exeter's recommendations is inconsistent with this requirement.

FirstEnergy has failed to prove any economic harm resulting from disclosure of outdated REC prices, seller identities, and recommended penalty amounts. The only harm of disclosing this information might be harm to FirstEnergy's image from the public knowledge of the amount borne by the ratepayers. While there may be the potential for harm to FirstEnergy from the embarrassment of disclosure of such information, that type of harm is certainly not what the trade secret protection is designed to shield.

2. There are overwhelming public policy reasons why information related to the REC purchases must be disclosed

A fully-functioning REC market is the ultimate goal of this Commission, the policy makers that created Ohio's renewable energy laws and regulations, and the general public. All parties to this proceeding concede that Ohio's REC market was in some ways nascent in 2009

and 2010, in part because of a lack of market information. The Commission itself acknowledges this initial lack of market information in its Opinion and Order and through the disallowance issued. In order to continue to develop and maintain a fully-functioning REC market in Ohio, the REC information and FirstEnergy's imprudent actions must be fully understood; therefore the stale bid information must be examined. This information lacks economic value to any party, yet it retains significant public policy value. This is particularly true at a time where the public, stakeholders at the Commission, and the Commission itself are working to re-evaluate rules pertaining to renewable energy.[50]

We agree with FirstEnergy that "the Commission has worked to ensure that the proper balance is struck between the need to serve the public's right to know versus the need to prevent the disclosure of proprietary information".[51] It is, however, that steadfast adherence to balancing interests of public policy and private information that demands public disclosure in this case.

The generally well-known policy motivations for trade secret legislation in both Ohio and the nation include (1) the maintenance of commercial morality, (2) the encouragement of invention and innovation, and (3) the protection of investments.[52] As outlined in this brief, the price and bidding information being withheld is not being withheld with these policy reasons in mind. The invention and innovation of the REC market, as characterized in this proceeding as significantly transforming from constrained to developed from 2009 to 2011, has occurred *despite* of the lack of transparency from the Companies. Secondly, there is no need to protect any investments, as the RECs have already been purchased and accounted for toward the

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[50] *See* PUCO Case No. 13-0652-EL-ORD.

[51] FirstEnergy Brief at 83.

[52] *See Valco Cincinnati, Inc. v. N & D Machining Service, Inc.*, 24 Ohio. St. 3d 41, 48 (1986).

benchmarks for 2009, 2010, and 2011. Finally, commercial morality is not maintained by the *withholding* of this information, but maintained by the *disclosure* of this information to maintain faith in the Ohio REC market and faith in the dealings of Ohio's investor-owned utilities.

Even if the Companies' information met the letter of the law for trade secret protection, which it does not, the policy reasons for disclosure dramatically outweigh any conjured injury from disclosure. Public disclosure and transparency of the results of these REC procurements maintains faith in the renewable energy market and in the actions of utilities to comply with the renewable energy standard. FirstEnergy's actions in Ohio's REC marketplace in 2009 and 2010 led to un-economic results that imposed extensive and unnecessary costs upon customers. The excessive costs that accrued in these years is worthy of detailed examination to ensure it does not happen again. It is not enough that the Commission and parties subject to confidentiality agreements are able to view the information. Instead, it is essential that the public as a whole have an opportunity to review the results of these initial years in the marketplace in order to ensure through rule reform as well as market monitoring that these results are not repeated.'

Furthermore, the public should have the opportunity to fully evaluate FirstEnergy's REC purchases, including the seller identity and prices paid, as ratepayers are ultimately responsible for paying these costs. The public is not aware of the excessive costs paid by FirstEnergy [redacted] for RECs. The public deserves to know this information. FirstEnergy's REC purchases represent aberrant behavior that [redacted] Rates paid for RECs by the public to FirstEnergy far exceed the rates paid by customers of Duke Energy, AEP, and Dayton Power and Light. It is essential that ratepayers in the FirstEnergy service territory have the opportunity to examine how

and what they paid for RECs. Without disclosure of this data, the public will not be able to adequately evaluate these payments or the Ohio renewable energy market as a whole.

3. The Commission should further unredact the Exeter Report in alignment with its August 7 Opinion and Order.

In its August 7 Opinion and Order, the Commission stated that it would modify the attorney-examiners ruling on confidential issues and "permit the disclosure of FES as a successful bidder in the competitive stipulations."[53] In the event that the Commission does not further modify its Order on the confidentiality issues in this case, the Environmental Intervenors request that the Exeter Report be further unredacted to align the redactions in the report with its most recent decision on the issue. This will increase the information available on the case to interested persons and Ohioans, and allow the Commission to demonstrate a greater degree of transparency regarding the information in this case.

IV. CONCLUSION

The Environmental Intervenors respectfully request that the Commission consider the above arguments, grant rehearing, and modify the August 7 Opinion and Order as outlined above.

Respectfully submitted,

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[53] Opinion and Order at 12.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was electronically file and was delivered to the following persons via electronic mail this 6th day of September, 2013:

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