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

***** UNREDACTED VERSION *****

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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September 6, 2013

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The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the August 7, 2013, Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). This case involves grossly excessive prices[1] paid by FirstEnergy[2] for In-State All Renewable Energy Credits ("RECs") and charged to its customers.

Through this filing, OCC seeks rehearing of the Commission's Order pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The August 7, 2013 Order was unjust, unreasonable, and unlawful because:

A. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase In-State All Renewable Energy Credits (Procured Through The August 2009 RFP, October 2009 RFP, And August 2010 RFP – 2010 Vintage) Because The PUCO Did Not Find

[1] Exeter Audit Report at 28.

[2] The word "FirstEnergy" means the FirstEnergy Ohio electric distribution utilities and is also referred to as "Utility" or "Company."

That FirstEnergy Met Its Burden Of Proof That Those Costs Were Prudently Incurred.

1. The PUCO Erred When It Presumed that FirstEnergy's Management Decisions to Purchase Renewable Energy Credits were Prudent.

2. The PUCO Erred Because There is No Presumption of Prudence When Analyzing Transactions Between Affiliated Companies.

3. Even If the PUCO Did Not Err when it Presumed that FirstEnergy's Management Decisions Were Prudent, the PUCO Erred Because it Failed to Properly Apply Such Presumption.

B. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision to Pay FirstEnergy Solutions $500.00 - $700.00 (Per Renewable Credit) For 70,000 2009 and 2010 Vintage In-State All Renewable Credits.

1. The PUCO Erred In Failing to Find That Prices Above $52 per REC Paid by FirstEnergy Were Unreasonable Based on Available Market Information From All-Renewables Markets Around the Country.

2. The PUCO Erred in Finding that FirstEnergy Was Excused from Filing a Force Majeure Request (Until January 7, 2010) Because FirstEnergy did not Believe that Such a Request Could be Granted Based Solely on the Price of Renewable Energy Credits.

3. The PUCO Erred in Finding that FirstEnergy was Excused from Filing a Force Majeure Request Because FirstEnergy Would Not Have Had Time to Acquire RECs if the Force Majeure Request was Denied.

4. The PUCO Erred in Failing to Make a Specific Determination of Prudence As Required by R.C. 4903.09 To Support The PUCO's Allowance of Cost Recovery from Customers.

C. The PUCO Erred When It Decided that Customers Should Pay The Costs Of FirstEnergy's Decision To Pay FirstEnergy Solutions $481.09 - $683.44 (Per Renewable Credit) In RFP 2 For 95,489 2009, 2010, And 2011 Vintage In-State All Renewable Credits.

D. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision To Pay FirstEnergy Solutions $500.00 (Per Renewable Credit) For 29,676 2010 Vintage In-State All Renewable Credits.

E. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase High-Priced In-State All Renewable Energy Credits In 2009 For Compliance Years 2010 And 2011, Given That FirstEnergy's Purchases Were Imprudent And Otherwise Unreasonable.

F. The PUCO Erred By Failing To Order An Investigation Of Whether FirstEnergy Extended Undue Preference to FirstEnergy Solutions Given, Among Other Things, The Exeter Auditor Finding That "The Prices Bid

By FirstEnergy Solutions Reflected Significant Economic Rents And Were Excessive By Any Reasonable Measure."[3]

G. The PUCO Erred By Failing To Find That Its Entries and Due Process Were Violated When A Key Recommendation In The Draft Exeter Report -- that the PUCO should not allow FirstEnergy to collect from customers any procurement of In-State All Renewable Credits above $50 per REC – Did Not Appear In The Filed Exeter Report After FirstEnergy Objected To The Recommendation In A Private Process Where FirstEnergy, And Not Other Parties, Was Provided The Draft Report And Proposed Changes To The Report.

H. The PUCO Erred By Not Filing "Findings Of Fact And Written Opinions," In Violation Of R.C. 4903.09, To Use The Evidence That The Exeter Auditor's Draft Report Contained A Recommendation For The PUCO To Credit Customers For FirstEnergy's Renewable-Credit Purchases Above $50. This Most Key Auditor Recommendation For Customer Protection Was Not Included In The Final Exeter Audit Report After FirstEnergy Objected To The Draft Recommendation In A Private Process Where It Was Provided A Copy Of The Auditor's Draft.

I. Consistent with R.C. 4901.13 (rules for regulating "the mode and manner of … audits … and hearings…"), the PUCO Erred By Not Ruling That, In Future Cases For Reviews Of FirstEnergy's Alternative Energy Rider And In Cases For Review of Any Electric Utility's Alternative Energy Purchases, Any Commentary On The Draft Audit Report By An Electric

[3] Exeter Audit Report at iv.

Utility Must Be Shared Contemporaneously With Other Parties Who Will Be Given The Same Opportunity As The Utility To Make Substantive Recommendations For The Final Audit Report That Will Be Filed In Such Cases.

J. The PUCO Erred By Preventing The Disclosure Of Public Information Relating To FirstEnergy's Imprudent Purchases Of In State All-Renewable Energy Credits For Which FirstEnergy's Customers Should Not Have To Pay.

1. The PUCO Erred By Improperly Applying R.C. 1331.61(D) and by Violating R.C. 4901.13, R.C. 4905.07, Ohio Adm. Code 4901-1-24(D)(1) and the Strong Presumption in Favor of Public Disclosure Under Ohio Law by Preventing Public Disclosure of Bid-Specific Information, Including the Identities of the Bidders as well as the Price and Quantity of Renewable Energy Credits Bid by Each Specific Bidder.

a. The Identities of Suppliers and the Specific Prices that FirstEnergy Paid for Renewable Energy Credits is not Economically Valuable Information Nor can it be Duplicated to Undermine Future Renewable Energy Credit Procurement Processes.

b. FirstEnergy Failed to Take Sufficient Safeguards to Protect the Identities of Renewable Energy Credit Suppliers and

Their Pricing Information, Allowing Individuals Outside of the Company to Discover the Information.

c. The PUCO Failed to Address the Fact that FirstEnergy's Motion for Protection of Supplier Identities and Pricing Information was Untimely, Which should have Resulted in Denial.

2. The PUCO should make Publicly Available the Complete (Unredacted) Copies of the Exeter Audit Report and All Prior Pleadings (Including Briefs, Motions and Testimony) in this Proceeding.

3. The PUCO Erred in Affirming the Attorney Examiner's Ruling On FirstEnergy's Second Motion For Protective Order because Public Information was Improperly Redacted from the Draft Exeter Audit Report.

4. The PUCO Erred by Granting FirstEnergy's Fourth Motion for Protective Order, Thereby Preventing FirstEnergy's Customers and the Public Generally from Knowing OCC's Recommendation to the PUCO on the Total Dollar Amount that FirstEnergy Should Have to Credit Back to Its Customers for Overcharges.

An explanation of the basis for this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its Order.

Respectfully submitted,

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_____

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

OCC seeks rehearing of the August 7, 2013 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") that fails to adequately protect FirstEnergy's 1.9 million customers from all of the unreasonable and imprudent costs incurred when FirstEnergy decided to buy excessively priced In-State All Renewable Energy Credits (RECs) from its affiliate FirstEnergy Solutions ("FES"). The PUCO correctly decided that customers should not pay FirstEnergy over $43 million dollars for 2011 vintage RECs purchased in August 2010. That is a lot of customer money. But there is a lot more at stake.

The imprudent purchases disallowed by the PUCO are only a portion of the imprudent costs associated with three deals with FES for RECs purchased in 2009-2011. The additional amount of dollars that FirstEnergy should not be permitted to be collected from customers is $110,486,183.50 (plus interest).

FirstEnergy failed to meet its burden of proof to show that its purchases were prudent. The PUCO presumed that FirstEnergy's management decisions were prudent. But such a presumption is unlawful.

Additionally, the Order prevents public disclosure of supplier price and bid information from 2009 – 2011 that cannot reasonably be argued to constitute trade secret information. In this regard, the PUCO will not allow OCC to publicly reveal its own recommendations for protecting customers from FirstEnergy's imprudent purchases of In-State All Renewable Energy Credits. Certainly, if the PUCO can publicly disclose the amount of money that it found FirstEnergy should not be permitted to collect from its customers ($43,362,796.50 plus carrying costs) under Ohio's law regarding trade secret information, then the amount OCC argued should be disallowed should likewise be disclosed ($188,926,647.)

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[4] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[5]

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear."[6] Furthermore, if the Commission grants a rehearing and determines that "the original

[4] R.C. 4903.10.

[5] R.C. 4903.10(B).

[6] *Id.*

order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *."[7]

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the Commission's rule on applications for rehearing.[8] Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

III. LAW AND ARGUMENT

A. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase In-State All Renewable Energy Credits (Procured Through The August 2009 RFP, October 2009 RFP, And August 2010 RFP – 2010 Vintage) Because The PUCO Did Not Find That FirstEnergy Met Its Burden Of Proof That Those Costs Were Prudently Incurred.

1. The PUCO Erred When It Presumed that FirstEnergy's Management Decisions to Purchase Renewable Energy Credits were Prudent.

According to the Stipulation that established Rider AER, FirstEnergy could only collect from its customers the "prudently incurred cost[s] of" renewable energy resource requirements "pursuant to R.C. § 4928.64."[9] That Stipulation, however, granted no presumption that FirstEnergy's management decisions to purchase RECs were prudent.

To the contrary, FirstEnergy bears the burden of demonstrating that its costs for procurement of Renewable Energy Credits were prudently incurred.[10] FirstEnergy

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[7] *Id.*

[8] *See* Ohio Adm. Code 4901-1-35.

[9] *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, Stipulation and Recommendation, at 10-11 (Feb. 19, 2009).

[10] *See In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9; *See also*, R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

acknowledges this requirement,[11] and so does the PUCO.[12] But then the PUCO states that "the Commission should presume that the Companies' management decisions were prudent." [13] This PUCO finding is wrong -- the PUCO has no authority to change the burden of proof set out in relevant statutes.[14] The PUCO's "presumption of prudence" is not created by statute or by PUCO regulation. Instead, as explained below, it was created out of whole cloth by the PUCO through its case decisions.

The PUCO's uncodified application of a presumption of prudence is based on the Commission's ruling in a 1986 purchased gas adjustment clause case involving Syracuse Home Utilities Company, Inc.[15] In that case ("*Syracuse*"), the PUCO adopted the guidelines reported in the National Regulatory Research Institute ("NRRI") paper, "The Prudent Investment Test of the 1980s."[16] The first of these guidelines called for utility decisions to be viewed with a presumption of prudence.[17]

In the *Syracuse* case, the PUCO distinguished the burden of proof from the burden of producing evidence.[18] However, the burden of proof requires that the utility produce evidence to support its position. Regardless of how the Commission worded the burden, it remains with the utility. By requiring the PUCO Staff or another party to produce evidence rebutting any alleged presumption of prudence, the Commission is

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[11] Initial Brief of FirstEnergy at 69.

[12]Order at 21.

[13] Order at 21.

[14] R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

[15] *In the Matter of the Regulation of Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, Case No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, at 21-23 (Dec. 30, 1986) ("Syracuse").

[16] *Id.* [Citing to "The Prudent Investment Test in the 1980s," NRRI-85-16, (April, 1985)].

[17] *Id*. at *22.

[18] *Syracuse* at *22.

asking the challenger to prove a negative. This approach was rejected by the Supreme Court of Ohio.[19]

In the Supreme Court's decision in *Duke Energy*, Duke sought reimbursement for approximately $30.7 million in costs associated with damages caused by Hurricane Ike.[20] Duke argued that "other parties did not conclusively prove that the claimed expenses were unreasonable or imprudent."[21] But, as the Supreme Court held, "that [argument] is irrelevant because those parties did not bear the burden of proof."[22] The Court explained that it is the Utility that has to "prove a positive point: that its expenses had been prudently incurred * * * [t]he commission did not have to find the negative: that the expenses were imprudent."[23] As a result, the Supreme Court upheld the Commission's decision to disallow much of the $30 million that Duke sought to recover from customers for storm damage, flatly rejecting any presumption of prudence. The Supreme Court also noted, "Duke has not been given a blank check, but an opportunity to prove to the commission that it had reasonably and prudently incurred the costs it sought to recover."[24]

Likewise, in this case, according to the Ohio Revised Code, the ESP Stipulation, and the Supreme Court of Ohio's *Duke Energy* decision, FirstEnergy must prove that its expenses were reasonable and prudent. It is not up to the other parties to first prove otherwise. Any shifting of the "burden of producing evidence" takes the burden off of

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[19] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012 Ohio LEXIS 849, 967 N.E.2d 201, ¶8.

[20] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶2.

[21] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

[22] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

[23] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶8.

[24] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

the Utility and is contrary to Ohio law, Supreme Court of Ohio precedent, and the controlling Stipulation in this matter. Because the Utilities bear the burden of proof, it is axiomatic that there can be no presumption of prudence.

The Supreme Court of Ohio's ruling is consistent with other states as well. For instance, in a Supreme Court of Missouri case, the Missouri Public Service Commission ("PSC") decision to review affiliate transactions with the presumption of prudence was challenged.[25] The Supreme Court of Missouri found that while the burden of proof fell to the utility, the PSC had a practice, though not codified, of applying a presumption of prudence to utility expenditures.[26] The Supreme Court of Missouri noted that "The PSC has no authority to adopt rules changing the burden of proof set out in relevant statutes ***."[27]

Finally, the test upon which the PUCO relied in finding a presumption of prudence for utility decisions was created for a completely different situation. The paper (that the PUCO relied upon in its *Syracuse* decision) is entitled "The Prudent Investment Test of the 1980's." It was designed to be applied to utility investment decisions, namely, investments in large power plants.[28]

The ESP Stipulation that OCC, FirstEnergy and others signed does not provide for a presumption favoring FirstEnergy. The PUCO should enforce Ohio law and the ESP Stipulation and not allow customers to be harmed by a presumption that undermines

[25] *Office of the Public Counsel v. Missouri Public Service Commission*, 2013 Mo. LEXIS 45, at *1 (Missouri 2013).

[26] *Id.* at *12.

[27] *Id.* at *20.

[28] "The Prudent Investment Test in the 1980s," NRRI-85-16, at 62 (April, 1985).

the well-established burden of proof standard. The PUCO erred by misapplying controlling Supreme Court of Ohio precedent, when it created such a presumption.[29]

2. The PUCO Erred Because There is No Presumption of Prudence When Analyzing Transactions Between Affiliated Companies.

There is no presumption of prudence when analyzing transactions between affiliated companies. This principle is recognized by the National Association of Regulatory Utility Commissioners ("NARUC").[30] NARUC states that there are "four widely accepted guidelines to determine whether an investment or expenditure is prudent."[31] It then lists the guidelines, which are the exact same guidelines the Commission used in the *Syracuse* case from the NRRI paper, "The Prudent Investment Test of the 1980s."[32] But NARUC added "**[t]here is no presumption of prudence for affiliate transactions, whether they are for expenditures or investments**" (to the end of the first guideline which is the presumption of prudence.)[33] Additionally, there is a long line of precedent (from other jurisdictions) demonstrating that there is no presumption of prudence in affiliate transactions.

In a Supreme Court of Missouri case (discussed above), the Missouri Public Service Commission ("PSC") decision to review affiliate transactions with the presumption of prudence was challenged.[34] The Supreme Court of Missouri found that

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[29] *See supra*, Order at 21.

[30] Model State Protocols for Critical Infrastructure Protection Cost Recovery, NARUC, July 2004- Version 1, at pg. 21.

[31] *Id.*

[32] *Id*. fn.17.

[33] *Id.* (Emphasis in the original.)

[34] *Office of the Public Counsel v. Missouri Public Service Commission*, 2013 Mo. LEXIS 45, at *1 (Missouri 2013).

while the burden of proof fell to the utility, the PSC had a practice, though not codified, of applying a presumption of prudence to utility expenditures.[35]

The Court, however, held that any presumption of prudence was improper when applied to transactions between affiliates because of the greater risk of self-dealing.[36] The Court cited to a report of a Congressional Staff Investigation into Enron, which it characterized as particularly egregious.[37] The report stated:

> [W]henever a company conducts transactions among its own affiliates there are inherent issues about the fairness and motivations of such transactions. ... One concern is that where one affiliate in a transaction has captive customers, a one-sided deal between affiliates can saddle those customers with additional financial burdens. Another concern is that one affiliate will treat another with favoritism at the expense of other companies or in ways detrimental to the market as a whole.[38]

The Supreme Court of Missouri noted that affiliate transactions are not arm's length transactions and there is simply no place for a presumption of prudence.[39] As discussed above, the Court held that since the presumption of prudence was not codified, the PSC had no authority to change the burden of proof set out in the relevant statutes.[40] The Supreme Court of Missouri also held that a presumption of prudence is inconsistent with the PSC's obligation to prevent regulated utilities from subsidizing their non-

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[35] *Id.* at *12.

[36] *Id*. at *14.

[37] *Id.*

[38] *Id.* [Citing Staff of Senate Comm. on Gov't Affairs, 107th Cong. *Committee Staff Investigation of the Federal Energy Regulatory Commission's Oversight of Enron 26*, n.75 (Nov. 12, 2002)].

[39] *Id.* at *15-16.

[40] *Id*. at *20.

regulated operations.[41] Finally, the Court held that by changing the burden of proof, the PSC required Staff to prove a negative, but that was wrong as the burden of proof is on the company and it would have the records that would allow it to meet its burden.[42]

The Supreme Court of Missouri's decision is in line with many other courts that have intensely scrutinized affiliate transactions. According to the Supreme Court of Idaho, "[t]he reason for this distinction between affiliate and non-affiliate expenditures appears to be that the probability of unwarranted expenditures corresponds to the probability of collusion."[43] The Superior Court of Pennsylvania similarly stated:

> Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care [citations omitted] and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the commission allowances is properly refused. ***
>
> It therefore follows that the commission should scrutinize carefully charges by affiliates, as inflated charges to [an] operating company may be a means to improperly increase the allowable revenue and raise the cost to consumers of utility service as well as the unwarranted source of profit to the ultimate holding company.[44]

The Court of Appeals of Michigan found that, "the utility has the burden of demonstrating that transactions with its affiliate are reasonable."[45] The Supreme Court of Oklahoma has stated, "It is generally held that, while the regulatory agency bears the

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[41] *Id.* at *19.

[42] *Id.* at *25.

[43] *Boise Water Corp. v. Idaho Pub. Util. Comm.*, 97 Idaho 832, 838, 1976 Ida. LEXIS 368, 555 P.2d 163 (Idaho 1976).

[44] *Solar Electric Co. v. Pennsylvania Public Utility Com.*, 137 Pa. Super. 325, 374, 1939 Pa. Super. LEXIS 47, 9 A.2d 447 (November 15, 1939).

[45] *Mich. Gas Utilities v. Mich. Pub. Serv. Comm.*, No. 206234, 199 Mich. App. LEXIS 1954, *6 (February 8, 1999).

burden of proving that expenses incurred in transactions with non-affiliates are unreasonable, the utility bears the burden of proving that expenses incurred in transactions with affiliates are reasonable."[46]

The Supreme Court of Utah also rejected a presumption of prudence in affiliate transactions by stating, "[w]hile the pressures of the competitive market might allow us to assume, in the absence of a showing to the contrary, that non-affiliated expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction."[47] Finally, in his concurring opinion, Justice Scalia of the Supreme Court of the United States, stated, "it is entirely reasonable to think that the fairness of rates and contracts relating to joint ventures among affiliated companies cannot be separated from an inquiry into the prudence of each affiliate's participation."[48]

Precedent clearly demonstrates that transactions between affiliates should never be subject to a presumption of prudence. Affiliate transactions present too many opportunities for self-dealing and potentially fraudulent or inflated contracts. Consistent with the long line of precedent from other jurisdictions, presumptions of prudence in affiliated transactions are inconsistent with the PUCO's duty to prevent regulated entities from subsidizing their unregulated affiliates. The Commission cannot just shift the burden of proof when Ohio law explicitly places that burden on the utility. And even if the PUCO attempted to adopt such a prudence standard, it is not applicable to affiliate

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[46] *Turpen v. Ok. Corp. Comm.*, 1988 OK 126, 769 P.2d 1309, 1320-21 (Okla. 1988).

[47] *US West Communications, Inc. v. Pub. Srv. Comm.*, 901 P.2d 270, 274, 1995 Utah LEXIS 46, 268 Utah Adv. Rep. 27 (Utah 1995).

[48] *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 382, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988) (Scalia, J., concurring).

transaction according to the very organization that oversees the research institute that published the test—NARUC.

FirstEnergy failed to prove that its decision to purchase In-State All Renewable Energy Credits at prices that exceeded $45 was prudent. Indeed, the evidence introduced by the other parties indicated that RECs should not have been purchased at prices anywhere near the prices that FirstEnergy paid to its affiliate—FirstEnergy Solutions. For these reasons, the PUCO erred and should disallow FirstEnergy from overcharging its customers for its unreasonable REC purchases.

3. Even If the PUCO Did Not Err when it Presumed that FirstEnergy's Management Decisions Were Prudent, the PUCO Erred Because it Failed to Properly Apply Such Presumption.

Assuming *arguendo* that the PUCO's decision to presume that FirstEnergy's management decisions were prudent and lawful, the PUCO's application of that presumption was not. Specifically, the PUCO failed to correctly apply its holding in *Syracuse* in regard to such presumption of prudence in deciding that costs for the procurement of In-State All Renewable Energy Credits should be paid by FirstEnergy's customers.

In the 1986 *Syracuse* case, the Commission established guidelines for assessing the prudence of utility decisions.[49] The Commission established a rebuttable presumption of prudence.[50] Black's Law Dictionary defines a presumption as "A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts" and it defines a rebuttable presumption as "An inference drawn from

[49] *In re Syracuse Home Utils. Co.*, Pub. Util. Comm. No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, at *21 (Dec. 30, 1986). (Hereinafter *Syracuse*).

[50] *Syracuse* at *21-23.

certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence."[5152] A rebuttable presumption shifts the burden of producing evidence to the party against whom the presumption operates - a challenger.[53]

Therefore, according to the holding in *Syracuse*, the burden of proof or persuasion that the expenses incurred or decisions made were reasonable or prudent remains with the Company. The "presumption of prudence or reasonableness shifts to the challenger the duty of producing evidence to rebut the presumption."[54] In other words, once a party rebuts the presumption established in *Syracuse*, the Company must meet its burden of proof.[55] The PUCO must first find that evidence rebuts the presumption of prudence, and then find that the Company sufficiently sustained its burden of persuasion.

According to PUCO case law, challengers must produce evidence to rebut the presumption. In *Syracuse*, the Commission decided that a party must do more than disagree to rebut the presumption that utility decisions are prudent.[56] Conclusory statements and unsubstantiated inferences were not enough to shift the burden of producing evidence back to the Company.[57] Yet, precedent does not require a high standard of proof to invalidate the prudence presumption. Challengers do not have to

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[51] *Black's Law Dictionary* 1304 & 1306 (9th Ed. 2009).

[52] *Syracuse* at *22.

[53] *Id*.

[54] *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, *1987* Ohio PUC LEXIS 716, at *3 (March 17, 1987).

[55] *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at *22 (January 12, 1988).In my opinion the language in another case she cites to better matches this point. I would use this cite: *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

[56] *Syracuse* at *22-23.

[57] *Id.*

prove that the Company's decisions were imprudent.[58] PUCO precedent only requires challengers to "go forward with *some* concrete evidence supporting their position."[59] Parties merely have "to provide enough evidence of *potential* imprudence to rebut the presumption."[60] These cases establish a low standard of proof to rebut the presumption.

Requiring a low standard to rebut the presumption is consistent with the Commission's stated purpose in instituting the prudence presumption. The presumption was established to promote fairness and efficiency in proceedings.[61] The presumption was to act in such a way as to focus the issues in a proceeding to matters disputed by the parties.[62] It promoted manageable hearings.

A low standard of proof to rebut prudence presumptions provides the Company and the PUCO with information about each party's concerns with the case. The parties must rebut the presumption by providing some evidence, and the Company can then provide proof as to why its decisions as to those particular issues were reasonable.[63] In this way, the proceedings can be narrowly focused on those particular issues raised by the parties, and the hearing process remains manageable.[64] Yet, by setting a high standard to rebut a presumption, the Commission not only focuses on particular issues, but goes

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[58] *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

[59] *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at *21 (January 12, 1988). (Emphasis added).

[60] *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987). (Emphasis added).

[61] *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at *22 (January 12, 1988).

[62] *Id.*

[63] *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

[64] *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at *22 (January 12, 1988).

beyond its purpose in establishing the presumption. A high standard of proof to rebut the presumption excessively burdens other parties.

In this case, the PUCO applied the *Syracuse* precedent.[65] The Commission presumed that FirstEnergy's management decisions to procure RECs were prudent. Because of this presumption and because the prudence of these costs was not disputed in the proceeding, the Commission allowed FirstEnergy to collect from its customers the costs of the its purchases of All-State SRECs, In-State SRECs, and All-State RECs. The PUCO also presumed that the decisions to purchase In-State All Renewable Energy Credits were prudent. However, the PUCO found that this presumption of prudence was rebutted.[66] The Commission explicitly stated:

> 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.[67]

This finding is consistent with PUCO precedent. The duty of the parties to produce rebuttable evidence is not high. The Exeter Report along with other factors such as the Commission's finding that the Company should have consulted with the PUCO given the unavailability of reliable market information,[68] the various potential, alternative options presented by parties, and the costly, adverse outcome of FirstEnergy's decisions are evidence that rebuts the prudence presumption.

[65] Order at 21.

[66] Order at 21.

[67] Order at 21.

[68] Order at 23, 24.

A rebutted presumption of prudence creates a duty on the Company to produce evidence proving that the costs were reasonable and recoverable.[69] It then becomes the function of the PUCO to disallow the costs for which the Company fails to meet its burden, i.e. were imprudently incurred.[70] Having determined that the Exeter Report rebutted the presumption of prudence,[71] the PUCO must require FirstEnergy to meet its burden of proof. Instead, the PUCO placed the burden of persuasion on other parties.[72] The PUCO expected other parties to establish that the Company's actions were unreasonable or imprudent. This is inconsistent with Ohio law, Supreme Court of Ohio precedent and PUCO precedent, because it unlawfully shifts the burden of proof away from FirstEnergy and onto other parties.

The Commission found that the alternatives proposed by other parties were not viable options. First, the PUCO was "not persuaded" that a reasonable reserve price could have been calculated.[73] Second, the PUCO found that "the Companies were not required to consider making compliance payments in lieu of purchasing RECs offered through a competitive auction."[74] The PUCO also found that there was "no evidence that payment of market prices resulting from a competitive process, above the statutory compliance payment level, is necessarily unreasonable."[75]

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[69] *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *65 (July 16, 1987).

[70] *Id. at *137.*

[71] Order at 21.

[72] Order at 23-24.

[73] Order at 22.

[74] *Id.* The Commission did not find that FirstEnergy could not have made compliance payments.

[75] Opinion and Order at 23.

Yet, these findings do not hold FirstEnergy to its burden of proof. Nowhere in the PUCO's Opinion and Order does the Commission find that FirstEnergy's decisions to purchase In-State All Renewable Energy Credits were prudent. The law requires FirstEnergy to prove that its decisions were prudent and reasonable. The law does not require other parties to prove the unreasonableness or imprudence of FirstEnergy's actions.[76] The law does not require these parties to convince the PUCO that these alternative options were necessarily the better option. Again, the burden is on the Company to prove its decisions were reasonable.[77] Assuming, *arguendo*, that there was a burden, the challengers met their burden, but the Commission did not require the Company to meet its burden of proof.

Finally, the PUCO's Opinion and Order is contradictory in its finding regarding the presumption of prudence. The PUCO expressly stated that the Exeter Report was sufficient evidence to rebut the presumption of prudence as to the procurement of In-State All Renewable RECS.[78] The Commission then concluded that the costs to procure August 2009 RFP, October 2009 RFP, and August 2010 RFP – 2010 Vintage RECs should be paid by FirstEnergy's customers. To reach these conclusions, the PUCO did not weigh the Company's evidence regarding the reasonableness of its managers' decisions. Instead, the Commission reasoned that the Company's neglect in consulting with PUCO Staff was "not sufficient to overcome the presumption that the Companies'

[76] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9; R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

[77] *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, *64-65 (July 16, 1987).

[78] Order at 21.

management decisions were prudent."[79] The PUCO then states that this factor also does not "support the disallowance of the costs of the REC purchases."[80] This statement contradicts the former one. Earlier in its Opinion, the Commission expressed its finding that the presumption regarding In-State All Renewables RECs was rebutted by the Exeter Report.[81]

Because the PUCO determined that the Exeter Report rebutted the presumption of prudence, FirstEnergy had the burden to produce evidence proving the prudence of its decisions. The PUCO did not hold FirstEnergy to its burden. Instead, the PUCO's Order lets FirstEnergy keep $110,486,183.50 (plus interest) wrongfully collected from its customers. The PUCO should approve this Application for Rehearing and find that FirstEnergy failed to prove that its decisions to purchase August 2009 RFP, October 2009 RFP, and August 2010 RFP – 2010 Vintage RECs were prudent.

B. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision to Pay FirstEnergy Solutions $500.00 - $700.00 (Per Renewable Credit) For 70,000 2009 and 2010 Vintage In-State All Renewable Credits.

In its Opinion and Order, the PUCO found that customers would have to pay for 20,000 2009 In-State All-Renewable RECs FirstEnergy purchased for $700.00 per REC on August 20, 2009, in response to RFP1 issued the month before.[82] In reaching its decision, the PUCO identified three reasons why it believed that FirstEnergy's decision to purchase these 2009 In-State All-Renewable RECs at $700.00 per REC should not be

[79] Order at 23-24.

[80] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9; R.C. 4909.19; R.C. 4928.142(D)(4); R.C. 4928.1473(E) and (F).

[81] Order at 24.

[82] Order at 21-24.

disallowed.[83] First, the PUCO found 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."[84]

Second, the PUCO found that when FirstEnergy decided to purchase these RECs in August 2009, FirstEnergy did not know that the PUCO would find that the excessiveness of price was an appropriate basis for a *force majeure* request.[85] The PUCO points out that it did not issue a ruling indicating its position on this issue until it issued its January 7, 2010 Opinion and Order in regard to an AEP *force majeure* application.[86] Thus, the PUCO found that it was reasonable for FirstEnergy to believe that *force majeure* was not an option.[87] Third, the PUCO found that there was insufficient time from August 2009 until the end of the compliance period for FirstEnergy to go back into the market if its *force majeure* request was rejected.[88]

1. The PUCO Erred In Failing to Find That Prices Above $52 per REC Paid by FirstEnergy Were Unreasonable Based on Available Market Information From All-Renewables Markets Around the Country.

While the PUCO found that reliable, transparent market information related to Ohio's In-State, All-Renewable nascent REC market was "generally not available" in

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[83] Order at 21-24.

[84] Opinion and Order of August 7, 2013 at 21.

[85] Opinion and Order of August 7, 2013 at 23.

[86] Opinion and order of August 7, 2013 at 23, *citing In re Columbus Southern Power Co. and Ohio Power Co.,* Case Nos. 09-987-EL-EED, Entry (PUCO January 7, 2010) (*AEP Ohio Case).*

[87] Opinion and Order of August 7, 2013 at 23.

[88] Opinion and Order of August 7, 2013 at 23.

August 2009 – it was still not prudent for FirstEnergy to purchase All-Renewable RECs from its affiliate, FES, at a price of $700 per REC. As both the Exeter Auditor and OCC witness Gonzalez testified, such prices had never been reported for any All-Renewables product in any state.[89]

According to Exeter, the prices that FirstEnergy paid for 2009 RECs in RFP1 exceeded the prices paid anywhere in the country by $650 per REC.[90] Prices paid in compliance markets for non-solar RECs, between January 2008 and October 2011, were never more than $52 per REC and, in most years, were below 40 dollars per REC.[91] Even in other states' nascent markets, prices like those paid by FirstEnergy had not been seen.[92] While Ohio's In-State requirement differed from other states' requirements, there was no basis to conclude that Ohio's REC requirements would drive prices to levels unseen anywhere else in the country.[93]

The Commission also erred to the extent it relied on FirstEnergy's attempt to compare prices that utilities paid for solar RECs in other states with the prices that it paid for non-solar RECs in Ohio.[94] The Ohio General Assembly understood the difference between the market price of these two distinct products when it established an alternative compliance payment of $450 per REC for solar RECs and $45 per REC for All Renewable RECs (irrespective of whether they were In-State or All-State). Thus, the General Assembly did not find a reasonable market basis to support a price differential

[89] Exeter Audit Report at 26, 33; Direct Testimony of Wilson Gonzalez at 8-9.

[90] Exeter Audit Report at 33.

[91] Direct Testimony of Wilson Gonzalez at 9.

[92] Direct Testimony of Wilson Gonzalez at 12-13.

[93] Direct Testimony of Wilson Gonzalez at 12-13.

[94] Direct Testimony of Wilson Gonzalez at 13.

between In-State and All-States All Renewable RECs.[95] For these reasons, it was unreasonable and imprudent for FirstEnergy to purchase All-Renewable RECs, whether In-State or All-States, at prices above $45/REC, the non-solar alternative compliance payment.

In rejecting Exeter's overall evaluation that FirstEnergy paid excessive prices for In-State All Renewable RECs, the PUCO relied on Exeter's conclusion that "the RFPs issued by the Companies were competitive and that the rules for the determination of winning bids were uniformly applied."[96] As emphasized by OCC witness Gonzalez, while a competitively-sourced REC RFP may be a necessary condition towards attaining a competitive result, it is not a sufficient condition to secure a competitive bid in and of itself.[97] Competitive outcomes are unlikely to exist where only a few suppliers (or a single supplier) control available supply.[98]

In requiring at least 4 bidders for SSO auctions, the Ohio General Assembly acknowledged the need to protect consumers from market power.[99] Exeter's conclusion that the RFPs were conducted in an appropriate manner does lead, on the surface, to the conclusion that FirstEnergy's purchasing decisions were appropriate. But it was unreasonable for the PUCO to equate the two. The PUCO should consider the entirety of Exeter's evaluation, not simply its evaluation of the manner in which the RFP was conducted. The competitiveness of a single bidder's bid in a nascent market where there

[95] Direct Testimony of Wilson Gonzalez at 14; *see R.C. 4928.64(C)(2)(a) – R.C. 4928.64(C)(2)(b)*

[96] Order at 22.

[97] Initial Brief of OCC at 26-28, *citing* Transcript Volume III-public, p. 639.

[98] Initial Brief of OCC at 26-28, *citing* Transcript Volume III-public, p. 639.

[99] R.C. 4928.142(C)(2); Direct Testimony of Wilson Gonzalez at 19.

is a constrained supply should be carefully assessed and all reasonable alternatives should be considered.

FirstEnergy failed to exercise an appropriate level of care and caution before accepting the bid from FES. This is particularly true where, as recognized by FirstEnergy's consultant (Navigant), FirstEnergy Solutions' bids "represent[ed] over 75% of the total estimated Ohio-REC production for 2010" and "over 90% of the total certified Ohio REC production for 2010."[100]

Furthermore, the simple act of bidding does not mean it reflects a competitive market price, much less that accepting the offer would be a prudent decision. This is why the Exeter Auditor explained that an absence of market information should not have led to a conclusion that prices for In-State All Renewable RECs in the Ohio market would have differed "so markedly from the cost of renewable development elsewhere in the country," where "underlying economic factors *** are the same."[101] The price indicatives for In-State All Renewables reflected a market price of less than $45.[102]

Because the prices bid were so high[103] and FirstEnergy knew, prior to making the decision to purchase In-State All Renewable RECs, that they were bid by its generation

[100] OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-confidential, at p. 4 of 10. Navigant also goes on to say that "Based on a review of available information, NCI has not been able to determine whether the remaining 25% of 2010 Ohio-REC production is already under contract to other parties."

[101] Exeter Audit Report at 30.

[102] Direct Testimony of Wilson Gonzalez at Attachment 2; Direct Testimony of Daniel R. Bradley at Attachment DRB-2; *see infra*, Section F.

[103] *See* Exeter Audit Report at 25-26.

affiliate[104] with market power,[105] it was incumbent upon the Utility to recognize the absence of a competitive market.[106] At a minimum, prudence demanded an additional level of review, if for no other reason than to explore other options (e.g. ACP and/or *force majeure*) prior to purchasing grossly over-priced RECs from its affiliate. Had alternatives been implemented, FirstEnergy would not have collected millions of dollars in imprudent costs from its customers through Rider AER.

The PUCO found that "other states had experienced significantly higher REC prices in the first few years after enactment of a state renewable energy portfolio standard." And the PUCO found that, as the prices paid for the RECs were within the range predicted by the Companies' consultant." But, in making these statements, the PUCO inappropriately mixes the history of solar REC prices with the history of All-Renewables RECs prices. This mixing of apples and oranges is just what FirstEnergy – and Navigant – did in trying to justify the purchase of these All-Renewable RECs. As noted above, Navigant explained that such prices had been seen before, but proceeded to cite to prices for solar RECs in New Jersey in 2009. However, it is widely recognized that solar RECs had an initial price point that was far higher because of the initial development costs associated with solar RECs.[107]

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[104] Transcript Volume II-public, p. 316.

[105] *See* OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-confidential, at p. 4 of 10. Navigant also goes on to say that "Based on a review of available information, NCI has not been able to determine whether the remaining 25% of 2010 Ohio-REC production is already under contract to other parties." *See also* the Exeter Auditor's conclusion that "RECs prices of that magnitude indicate that some degree of **market power** is being exercised by a segment of the market given offered prices well above the cost of production." Exeter Audit Report at 31. (Emphasis added.)

[106] *See* Direct Testimony of Wilson Gonzalez at 18-19.

[107] Direct Testimony of Wilson Gonzalez at 13.

And the purchase prices that Navigant recommended to FirstEnergy, as indicated in Navigant's July 30, 2009 memo that FirstEnergy relied upon, were much lower than the prices that FirstEnergy actually paid. That same memorandum informed FirstEnergy that it "should be prepared to go at least as high as $100/REC or $5,000/S-REC."[108] While the memorandum went further to suggest that FirstEnergy "may reasonably need to pay even a multiple of these numbers," that statement suggests virtually no limit on what FirstEnergy could pay for RECs and should be given little value.[109] In fact, Mr. Bradley testified that it may have been reasonable, and that he may have even recommended that FirstEnergy pay up to $35,000 per SREC.[110] And it was apparent that Navigant would have recommended upwards of $1,000 per REC, which was Navigant's calculation of the three percent cost cap set forth in R.C. 4928.64(C)(3).[111] Other than the three percent cost cap, price was not a component in Navigant's assessment of whether RECs were reasonably available.

Rather than relying upon Navigant's recommendations, the PUCO should look at the price ranges for All-Renewable RECs actually reflected in Navigant's report. The highest prices reflected in that report are for Connecticut and Massachusetts, which were between $25 - $35 per REC.[112] Navigant even states that these prices "are generally higher than in surrounding states" because of state RPS regulations, which require "a

[108] OCC Exh. 5 at 2-3.

[109] OCC Exh. 5 at 3.

[110] Transcript Volume I-confidential, page 197.

[111] Transcript Volume I-public, page 188.

[112] OCC Exh. 5 (Confidential), pp. 1-2.

higher % of RECs as an overall share of energy requirements compared with other states in the region."[113] To pay more than this was folly and imprudent.

Moreover, Texas, which also has an In-State All Renewables REC market, did not see price-outliers such as the prices that FirstEnergy paid. [114] Although FirstEnergy contrasted the Texas In-State All Renewable market with the Ohio In-State All Renewable market, suggesting that prices in the Ohio In-State All Renewable market would necessarily be grossly higher,[115] there was no merit to this suggestion. While the Texas market was far more developed at the time of Ohio's market opening,[116] there is no data indicating that Texas In-State All Renewables prices during Texas's nascent compliance period grossly exceeded prices in All-States Renewables markets during the initial compliance period.

Indeed, the Table on page 13 of Mr. Gonzalez's testimony, taken from the 2007 Annual Wind Power report and in Exeter Auditor's Figure 3, show that prices in Texas's infant All Renewable REC market, between 2002 through October 2011, consistently remain below $20 per REC.[117] To suggest that Ohio's In-State All Renewable REC market could reasonably see prices between 16 times ($320 per REC) and 35 times ($700 per REC) the highest prices reported in Texas's All Renewables market simply makes no sense.

It was FirstEnergy that inscrutably failed to reasonably assess the prices bid by its affiliate, FES, in light of the available information from across the country. That failure

[113] OCC Exh. 5 (Confidential), pp. 1-2.

[114] Exeter Audit Report at 26; Direct Testimony of Wilson Gonzalez at 13.

[115] Initial Brief of FirstEnergy at 55-56.

[116] Direct Testimony of Robert Earle, Attachment RE-13, page 2.

[117] Direct Testimony of Wilson Gonzalez at 13 & OCC Exhibit 17; Exeter Audit Report at 26.

prevented it from establishing a reasonable maximum price that it would pay. FirstEnergy also failed to consider that the prices bid by a single bidder reflected that bidder's market power. As a result, FirstEnergy accepted bids "well above the cost of production," which were "composed largely of economic rents."[118] The PUCO erred in finding that the record lacked evidence from which FirstEnergy could have determined that the bids it received for In-State All-Renewables RECs in RFP 1 were grossly excessive.

2. The PUCO Erred in Finding that FirstEnergy Was Excused from Filing a *Force Majeure* Request (Until January 7, 2010) Because FirstEnergy did not Believe that Such a Request Could be Granted Based Solely on the Price of Renewable Energy Credits.

The PUCO found that FirstEnergy could not have known that the PUCO would find that excessively-priced RECs were not "reasonably available" in regard to a force majeure determination. That ruling is in error and should be abrogated.[119]

It was imprudent for FirstEnergy not to request *force majeure* by seeking a PUCO determination that such exorbitantly-price RECs were not "reasonably available."[120] The plain language "reasonably available" meant that the REC purchase requirement would be excused if RECs could not be acquired under reasonable circumstances.[121] AEP Ohio knew this as indicated by its filing for *force majeure*, which was approved by the PUCO

[118] Exeter Audit Report at 31. FirstEnergy witness Earle acknowledged that the "price of RECs in the market is determined by many factors. One of the factors is certainly the cost of development." Transcript Volume II-public at 440.

[119] Opinion and Order of August 7, 2013 at 23.

[120] R.C. 4928.64(C)(4)(b).

[121] R.C. 4928.64(C)(4)(b).

on January 7, 2010.[122] It was unreasonable for the PUCO to find that FirstEnergy's purchases were not unreasonable simply because the AEP Ohio decision had not been rendered at the time that FirstEnergy conducted its first and second RFPs.[123] If AEP Ohio was able to make the determination to file an application for *force majeure* prior to the existence of precedent, it would logically follow that it would have been prudent for FirstEnergy to do the same, irrespective of Commission precedent.

For FirstEnergy to conclude that consideration of price did not figure into the determination of whether RECs were "reasonably available," was contrary to the plain language of the law. And the PUCO had no difficulty in recognizing, in the context an AEP Ohio *force majeure* request, that the law provided for *force majeure* where prices in Ohio's nascent market were so far out of line with prices seen in other states for comparable products.

It was also an unsound basis on which FirstEnergy should have proceeded to purchase RECs priced at between $500 and $700 per REC. Ohio law clearly provides that words are to be construed according to their common usage and that the entire statute is intended to be effective.[124] The term "reasonable" is a common modifier in legal provisions and has a common and well-established meaning.[125] FirstEnergy's construction of the *force majeure* provision construed this provision as excluding the term "reasonable" and, therefore, was inconsistent with Ohio laws on statutory construction.

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[122] *In the Matter of the Application of the Columbus Southern Power Company of Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928(C)(4), Ohio Revised Code*, Case No. 09-987-EL-EEC, Entry (Jan. 7, 2010).

[123] Order at 23.

[124] R.C. 1.42 and R.C. 1.47(B).

[125] *See, e.g. Chester v. Custom Countertop & Kitchen,* 1999 Ohio App. LEXIS 6138 (1999).

3. The PUCO Erred in Finding that FirstEnergy was Excused from Filing a *Force Majeure* Request Because FirstEnergy Would Not Have Had Time to Acquire RECs if the *Force Majeure* Request was Denied.

The PUCO's third basis for its decision – that FirstEnergy would not have had time to acquire the RECs if the PUCO rejected FirstEnergy's *force majeure* request, overstates the time that would have been required to rebid these RECs under the circumstances. And FirstEnergy never asserted this position or produced evidence to support it on the record of this proceeding. Furthermore, it ignores that 50,000 of the RECs acquired through the August 2009 RFP (RFP 1) were purchased to meet the 2010 compliance requirement that did not have to be met until March 31, 2011--more than a year later. And, even for the 2009 vintage RECs, the PUCO's decision mistakenly suggests that these RECs had to be acquired by the end of 2009 when the compliance period actually extended through the end of March, 2010.[126]

Although the renewable energy associated with RECs of a particular vintage – whether 2009 or any other year -- must be retired/produced in the vintage year, the RECs may be acquired after the vintage year. Thus, 2009 RECs would only have had to be purchased by the time of the filing of FirstEnergy's annual compliance report – March 31, 2010. As the PUCO knows, it is not uncommon for RECs to be acquired to meet compliance obligations after the calendar year in which they are retired. FirstEnergy still had significant time in which to acquire these RECs. Thus, FirstEnergy could have acquired these RECs long after the PUCO would have had to render a decision on an application for *force majeure*.

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[126] *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, PUCO Opinion and Order at 14 (August 3, 2011).

Navigant tabulated the results of the RFP1 bids on August 12, 2009. FirstEnergy could have filed a *force majeure* application soon thereafter. Even if an application were not filed until the end of August 2009, the PUCO would have had to issue a decision by the end of November, 2009.[127] If the PUCO rejected its *force majeure* request, FirstEnergy still had options. FirstEnergy could have: 1) purchased the RECs from FES[128] or 2) issued another RFP. Based on this timetable, there was adequate time to file a *force majeure* application in regard to RFP1 2009 vintage RECs. There was more than enough time (4 months) to file a *force majeure* application in regard to RFP1 2010 vintage RECS. Thus, the PUCO's reasoning that FirstEnergy's failure to make a *force majeure* request was not unreasonable because of the consequences if such a request were to be rejected does not jibe with the facts regarding the time available to rebid.

4. The PUCO Erred in Failing to Make a Specific Determination of Prudence As Required by R.C. 4903.09 To Support The PUCO's Allowance of Cost Recovery from Customers.

In reaching its decision, the PUCO stated only that FirstEnergy's In-State All-Renewable REC purchases in RFP 1 should not be disallowed.[129] But the PUCO did not make findings that FirstEnergy's decisions were prudent. And, as discussed above, the PUCO wrongly applied an erroneous presumption of prudence. Thus, FirstEnergy did not carry its burden of proof in its claim for collection of these costs from its customers. And the PUCO did not adequately set forth the reasons supporting its determination to

[127] Given that price was a consideration in the AEP order according to the PUCO, there was a high probability that a *force majeure* based on the exorbitant REC prices would have been granted.

[128] It is reasonable to expect that FES's excessively-priced RECs would likely still have been available given the absence of evidence that RECs have been purchased at such prices by any entity other than FirstEnergy in these affiliate transactions.

[129] Order at 21.

allow these costs under R.C. 4909.154.[130] Instead, the PUCO takes issue with the evidence offered by other parties challenging FirstEnergy's claims.

As discussed above, the burden of proof in this case rests with FirstEnergy and the PUCO must find that FirstEnergy showed that its costs were prudently incurred. This is required by the terms of the Stipulation in the ESP proceeding as well as by the Revised Code.[131] Merely saying that the Utility's actions were "not unreasonable," that the claim should not be disallowed, or that the evidence produced by opposing parties does not overcome the so-called "presumption" of prudence is not sufficient. The PUCO erred in allowing FirstEnergy to collect money from customers for the excessively-priced 2009 and 2010-vintage In-State All Renewable REC costs in RFP 1 in the absence of a specific finding of prudence.

C. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision To Pay FirstEnergy Solutions $481.09 - $683.44 (Per Renewable Credit) In RFP 2 For 95,489 2009, 2010, And 2011 Vintage In-State All Renewable Credits.

The PUCO also found that FirstEnergy's decision in October 2009 to purchase, in response to the October 2009 RFP (RFP 2), 95,489 In-State All-Renewable RECs at prices between $481.09 and $683.44 per REC should not be disallowed.[132] However, these REC acquisitions were also imprudent for reasons similar to those set forth above with respect to RFP1.

Although Ohio's nascent market may not have been perfectly transparent in 2009, experience across the country, as previously discussed, indicated that prices above $52

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[130] R.C. 4903.09.

[131] *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, Stipulation and Recommendation at 10-11 (Feb. 19, 2009); R.C. 4909.154.

[132] Order at 24.

per REC for an All-Renewables product was simply unheard-of.[133] It was unreasonable for FirstEnergy to pay such a price for 2009-vintage RECs, let alone for 2010 and 2011 vintage RECs. It was also unreasonable for FirstEnergy to ignore the *force majeure* provisions of the law, and the facially compelling conclusion that RECs at these prices were not "reasonably available."

Moreover, the fact that significant additional RECs were bid in RFP 2, just two months after RFP 1, indicated a quickly expanding REC market even if the bidder was still attempting to exact significant economic rents. Yet the PUCO found that what FirstEnergy "knew or should have known" in October 2009 was still insufficient to justify FirstEnergy pursuing *force majeure* or other alternatives.

With respect to 2011 RECs purchased in RFP2, while the PUCO "is concerned that the Companies chose to purchase vintage 2011 RECs in 2009 when the market was nascent and illiquid," the PUCO accepted "the Companies claim that this was part of the laddering strategy" and amounted to "only 15 percent of the 2011 compliance requirement."[134] But 15% of the 2011 compliance requirement is not so insignificant as the PUCO suggests. Fifteen percent is 26,084 In-State All-Renewable RECs and when the price is $481.09 per REC, the total cost to customers is $12,548,751. That is a huge cost for a small number of RECs.

Had those RECs been purchased at the weighted average price of RECs purchased through RFP 6 in 2011, the price would have been $211,280, not the millions of dollars that FirstEnergy paid. Even at prices seen in the higher-priced Connecticut and Massachusetts markets as reported by Navigant in 2009, FirstEnergy would have saved

[133] Direct Testimony of Wilson Gonzalez at 9; Exeter Audit Report at 33.

[134] Order at 24.

customers huge sums of money had it recognized – as it should have – that other states' prices provided reasonable guidance for REC purchasing.

The PUCO, in disallowing 2011-vintage RECs purchased in RFP3 in August 2010,[135] discusses Navigant's market assessment report dated October 18, 2009 that "the supply of Ohio RECs will continue to be very constrained through 2010."[136] But the purchase of 2011-vintage RECs in 2009 made even less sense because FirstEnergy was already in possession of the October 2009 Navigant report, which indicated that the market would probably remain constrained through 2010.

The PUCO's reliance on this report to deny 2011-vintage RECs purchased in 2010 compels the same conclusion for 2011-vintage RECs purchased in 2009. It means that the PUCO should place the same significance on this information in evaluating both the RFP2 and RFP3 purchases of vintage 2011 In-State All Renewable RECs. Accordingly, purchases of vintage 2011 In-State All-Renewable Credits in both RFP2 and RFP3 should be disallowed because both were based on Navigant's conclusion that market constraints would end in 2010.

Finally, the PUCO again failed to find that FirstEnergy's actions were reasonable and prudent and that the Utility carried its burden of proof. Merely stating that the costs should not be disallowed and that the record evidence does not show "a significant change in the amount of market information available between August 2009 and October 2009" does not indicate a determination that FirstEnergy carried its burden of proof. The PUCO erred in making customers pay for the excessively-priced 2010-vintage In-State

[135] Order at 25-28.

[136] Order at 25-26.

All Renewable REC costs in RFP 3 in the absence of a specific finding that they were prudent.

D. The PUCO Erred When It Decided That Customers Should Pay The Costs Of FirstEnergy's Decision To Pay FirstEnergy Solutions $500.00 (Per Renewable Credit) For 29,676 2010 Vintage In-State All Renewable Credits.

The PUCO allowed recovery of $14,838,000 for 29,676 2010 Vintage In-State All Renewable RECs purchased, as part of RFP3, in August 2010 at a price of $500.00 per REC.[137] That ruling was unreasonable. In allowing these costs, the PUCO stated that "[t]here 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."[138] The PUCO refers to Navigant's market assessment report of October 18, 2009, stating that "the supply of Ohio RECs will continue to be very constrained through 2010."[139]

In reaching these conclusions, FirstEnergy and the PUCO relied, in error, on a market report released on October 18, 2009--10 months before the decision was made to purchase the RECs. But record evidence showed a changing market. During the very month that FirstEnergy purchased 29,676 In-State All Renewable RECs at $500.00 per REC, the Spectrometer report was published in Ohio showing Ohio In-State All Renewable RECs were priced between $32.00 per REC to $36.00 per REC.[140] Certainly, rather than paying $500 per REC for 2010 Vintage RECs, FirstEnergy should have

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[137] Order at 24-25.

[138] Order 24-25, *citing* FirstEnergy Exh. 1 (Bradley Testimony) at 37-38.

[139] Order at 25, *citing* FirstEnergy Exh. 1 (Bradley Testimony) at 34-35.

[140] OCC Initial Brief at 26; OCC Exhibit 15, Set 3-INT-2, Attachment 25 (Confidential); *see also,* Transcript Volume II-confidential, page 493.

recognized that the market was easing and prices were decreasing. FirstEnergy knew the market was changing and prudence demanded that it should have responded accordingly.

In addition to the Spectrometer report, the evidence shows that the All-Renewables market around the country was continuing to see relatively low prices. 2010 non-solar REC prices in Pennsylvania saw a high price of $24.15 per Tier I non-solar REC and a weighted average price of $4.77 per Tier 1 non-solar REC.[141] FirstEnergy failed to produce evidence that prices anywhere in the country or elsewhere in Ohio that approached those accepted by FirstEnergy for an All-Renewables product, whether In-State or All-States. It was unreasonable for the PUCO to find it acceptable that FirstEnergy only relied on Navigant's dated report instead of looking into other price sources, including brokers, in determining the reasonableness of the pricing offered by 1 supplier for 2010 Vintage RECs.

Moreover, little weight can be given to the PUCO's rationale that requesting *force majeure* was not a viable option because the Company didn't have time to go back into the market if its *force majeure* request were rejected.[142] It cannot be disputed that FirstEnergy could have issued its RFP 3 earlier, giving it plenty of time to make an appropriate *force majeure* request and save customers many, many dollars. But further indicating FirstEnergy's imprudent decision-making, it failed to timely issue RFP 3. And, as discussed above, FirstEnergy had until March 31 of the following year (2011) to obtain 2010 vintage RECs. Indeed, given the magnitude of RFP3 prices, FirstEnergy could have waited until October or November and issued another RFP for 2010 RECs if a request for *force majeure* was denied.

[141] Transcript Volume I-public, pp. 174-75.

[142] Order at 25.

The PUCO erred by failing to disallow FirstEnergy's purchase of 29,676 2010 Vintage In-State All Renewable RECs in RFP3. In addition, the PUCO failed to find that FirstEnergy's actions were reasonable and prudent and that the Utility carried its burden of proof. Merely stating that the costs should not be disallowed is insufficient to support a determination that FirstEnergy carried its burden of proof. The PUCO erred in finding that customers should pay the excessively-priced 2010-vintage In-State All Renewable REC costs in RFP 3 in the absence of a specific finding that they were prudent.

E. The PUCO Erred When It Decided That Customers Should Have To Pay For FirstEnergy's Decisions To Purchase High-Priced In-State All Renewable Energy Credits In 2009 For Compliance Years 2010 And 2011, Given That FirstEnergy's Purchases Were Imprudent And Otherwise Unreasonable.

Instead of waiting for Ohio's renewables market to develop, FirstEnergy significantly compounded its imprudent decision to purchase high-priced non-solar RECs for compliance year 2009 by purchasing high-priced non-solar RECs for compliance years 2010 and 2011. Those purchases were made long before the purchases were required to meet 2010 and 2011 compliance obligations.[143] This decision was made by FirstEnergy—not Navigant. The only one who benefitted from this imprudent business decision was FES.

In its Order, the PUCO found that "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."[144] But, as the Supreme Court held in *Duke Energy*, "that [argument] is irrelevant because those parties did not bear the burden of proof."[145] The

[143] Direct Testimony of Wilson Gonzalez at 17.

[144] Order at 22.

[145] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶9.

Court explained that it is the Utility that has to "prove a positive point: that its expenses had been prudently incurred * * * [t]he commission did not have to find the negative: that the expenses were imprudent."[146]

But FirstEnergy's laddering strategy was inherently flawed. And there is plenty of evidence in the record as to why it was flawed.

The Exeter Auditor and OCC witness Gonzalez both acknowledge that FirstEnergy compounded the financial harm to its customers by locking in the grossly excessive REC prices in the 2009 compliance year to meet the renewable requirements for 2010 and 2011.[147] This is especially the case since (as previously discussed) applying for a *force majeure* was an option for FirstEnergy.

FirstEnergy's apparent self-serving reason for paying grossly excessive prices for In-State All Renewable Energy Credits beyond 2009 was for the purposes of price risk mitigation.[148] In the abstract, a laddering concept has some merit in reducing customer price risk. At times, OCC has been supportive of Ohio utilities incorporating laddering in their SSO auctions. However, in real life, no one using sound judgment executes laddering when the prices bid are the highest ever seen, including more than 15 times greater than the ACP,[149] in a market that is constrained and exhibits the exercise of market power.

A more measured and prudent management approach would have been to exercise an alternative available to FirstEnergy while the Ohio In-State All Renewables market

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[146] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶8.

[147] Direct Testimony of Wilson Gonzalez at 16; Exeter Audit Report (Redacted), at 32.

[148] Transcript Volume II-public, page 320.

[149] Exeter Audit Report (Redacted) at page 28.

matured and more projects came on line and were certified by the Commission. As stated in OCC witness Gonzalez' testimony, "When FirstEnergy 'doubled down' (locked in excessive prices in 2009 to meet the renewable requirements for 2010 and 2011 for In-State All Renewable RECs), it resulted in an even larger losing bet for consumers, especially given the increased volumes of RECs purchased in later years."[150]

Mr. Gonzalez further testified that these decisions to purchase In-State All Renewable RECs at grossly excessive prices beyond the initial period were "particularly imprudent," "especially given the increased volumes of RECs purchased in later years."[151] As he testified, "[i]f FirstEnergy believed that the In-State All Renewables RECs were going to be permanently short and constrained, it should have made a 'force majeure' filing as permitted by law ***."[152] Thus, FirstEnergy's imprudent decision-making was compounded by its purchasing of In-State All Renewable RECs in 2009 for 2010 and 2011 and its purchase of In-State All Renewable RECs in 2010 for 2011.[153] Such imprudent decisions must be remedied by this Commission, for customers.

Additionally, the Order states that "The Commission is concerned that the Companies chose to purchase vintage 2011 RECs in 2009 when the market was nascent and illiquid."[154] That PUCO finding alone is fatal to FirstEnergy's burden to show that its purchase of vintage 2011 RECs in 2009 was prudent. Accordingly, customers should not have to pay the costs resulting from FirstEnergy's imprudent laddering strategy.

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[150] Direct Testimony of Wilson Gonzalez at 17.

[151] *Id. at 17.*

[152] *Id.*

[153] *Id.* at 16-17.

[154] Order at 24.

F. The PUCO Erred By Failing To Order An Investigation Of Whether FirstEnergy Extended Undue Preference to FirstEnergy Solutions Given, Among Other Things, The Exeter Auditor Finding That "The Prices Bid By FirstEnergy Solutions Reflected Significant Economic Rents And Were Excessive By Any Reasonable Measure."[155]

The PUCO erred when it failed to order an investigation into FirstEnergy's and FES' compliance with the corporate separation rules contained in R.C 4928.17 and Ohio Adm. Code 4901:1-20-16. The PUCO unreasonably held that "there is no evidence in the record in this proceeding to support further investigation at this time."[156] To the contrary, evidence in the record raises serious concerns about the possibility that the purchase of the excessively priced RECs resulted from inappropriate undue preference. In light of the limited scope of Exeter's audit, an audit of whether there were improper communications that contributed to FirstEnergy's decision to purchase In-State All Renewable Energy Credits at prices as high as $700 per REC from its affiliate, FirstEnergy Solutions, warrants further investigation.

In declining to order an investigation into whether there was a violation of the corporate separation rules, the PUCO cites primarily to the Exeter Auditor Report. Although the Exeter Auditor did not recommend further investigation because it did not find "evidence that FES received any special treatment by the FirstEnergy Ohio utilities," Exeter did not investigate these issues.[157] The PUCO's RFP does not require or request the Auditor to look into inappropriate communications and/or corporate separation violations.[158]

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[155] Exeter Audit Report at iv.

[156] Order at 29.

[157] Order at 29; Exeter Audit Report at 31.

[158] Entry, Request for Proposal, Attachment 1 (Jan. 18, 2012).

And the primary auditor for Exeter, Dr. Steven Estomin, testified that he did not believe that investigating whether FES received special treatment, in violation of the corporate separation rules, was within the Auditor's scope of work.[159] However, the PUCO failed to acknowledge that Exeter did not perform a detailed investigation of communications between FirstEnergy and FES based upon the Auditor's perceived limitations on its scope of work. It is unreasonable to expect the Auditor to find evidence of something that it was not even investigating.

Although the Auditor, in the absence of conducting an actual inquiry, did not see any obvious evidence of undue preference, evidence on the record does warrant further investigation of whether there was undue preference. Specifically, Exeter found that "the prices bid by FirstEnergy Solutions reflected significant economic rents and were excessive by any reasonable measure."[160] That Auditor finding was not made about any other bidder.

Additionally, FirstEnergy knew that FirstEnergy Solutions was a bidder at the time it chose to purchase high-priced RECs from its affiliate.[161] Company witness Dean Stathis was Director of FirstEnergy Service Company's Regulated Commodity Sourcing ("RCS"), which was responsible for developing and implementing renewable energy procurement processes.[162] RCS developed a process that hired an independent evaluator ("Navigant"),[163] which ultimately made a recommendation to an internal review team.[164]

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[159] Transcript Volume I-confidential, p. 64-65.

[160] Exeter Audit Report at iv.

[161] Transcript Volume II-public, pp. 316.

[162] Stathis Direct Testimony at 4.

[163] Stathis Direct Testimony at 13-14.

[164] Stathis Direct Testimony at 14-15.

The internal review team then decided whether to accept Navigant's recommendations regarding the procurement of renewable energy credits.[165]

While it was unnecessary for the internal review team to know the identities of the bidders,[166] Mr. Stathis testified that Navigant provided the internal review team with the names of the bidders along with its recommendation.[167] Knowing that its corporate affiliate was the sole bidder of In-State All-Renewable RECs in RFP 1 and RFP 2, and bid the vast majority of the In-State All-Renewable RECs in RFP 3, including all of the excessively-priced RECs, the internal review team still knowingly elected to purchase the excessively-priced RECs from its corporate affiliate for as much as $700 per REC.

The fact that FirstEnergy knew that its affiliate was a bidder raises important questions regarding undue preference when other Ohio EDUs do not even permit corporately affiliated companies to bid RECs.[168] It is also telling that FirstEnergy did not inform Exeter that it knew FES was the bidder of the excessively-priced RECs at the time it was determining whether to purchase the RECs.[169] With all the access and input that FirstEnergy is now known to have had regarding the draft Audit Report, it is inappropriate that FirstEnergy failed to inform Exeter that FirstEnergy knew the identity of the bidder of the excessively-priced RECs.

In declining to further investigate whether there was undue preference, the PUCO unreasonably relied on FirstEnergy's argument that the intervening parties had ample

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[165] Stathis Direct Testimony at 15; Transcript Volume II-public, pp. 306-308.

[166] Transcript Volume II-public, pp. 314-315.

[167] Transcript Volume II-public, pp. 316.

[168] Transcript Volume III-public, pp. 565, 640 (As explained by OCC witness Wilson Gonzalez, AEP Ohio's 2008 RFP for renewable energy credits contained a provision that prohibited affiliate participation).

[169] Transcript Volume I-confidential p.67.

time to conduct discovery to further develop the record.[170] The discovery process, however, cannot be used as a substitute for a Commission-ordered investigation. An investigation carries the full-weight and authority of the PUCO. And, unlike the strict rules that govern the discovery process, the PUCO can bestow an investigator (whether its own staff or a retained investigator) with greater abilities, like requiring the Utility to have discussions with the investigator.

The management and performance audit was an investigation of whether the costs to purchase RECs were prudently incurred.[171] It was not until after the audit was completed that facts came to light, through discovery and the development of the record in this case, which necessitates a further review of whether there FirstEnergy extended undue preference to its affiliate FirstEnergy Solutions resulting in purchase of the excessively-priced RECs in violation of the corporate separation rules. For these reasons, the Commission should reconsider and grant the Application for Rehearing by ordering such an investigation.

[170] Order at 29.

[171] Entry, Request for Proposal at 4 (Jan. 18, 2012).

G. The PUCO Erred By Failing To Find That Its Entries and Due Process Were Violated When A Key Recommendation In The Draft Exeter Report -- that the PUCO should not allow FirstEnergy to collect from customers any procurement of In-State All Renewable Credits above $50 per REC – Did Not Appear In The Filed Exeter Report After FirstEnergy Objected To The Recommendation In A Private Process Where FirstEnergy, And Not Other Parties, Was Provided The Draft Report And Proposed Changes To The Report.

AND

H. The PUCO Erred By Not Filing "Findings Of Fact And Written Opinions," In Violation Of R.C. 4903.09, To Use The Evidence That The Exeter Auditor's Draft Report Contained A Recommendation For The PUCO To Credit Customers For FirstEnergy's Renewable-Credit Purchases Above $50. This Most Key Auditor Recommendation For Customer Protection Was Not Included In The Final Exeter Audit Report After FirstEnergy Objected To The Draft Recommendation In A Private Process Where It Was Provided A Copy Of The Auditor's Draft.

AND

I. Consistent with R.C. 4901.13 (rules for regulating "the mode and manner of … audits … and hearings…"), the PUCO Erred By Not Ruling That, In Future Cases For Reviews Of FirstEnergy's Alternative Energy Rider And In Cases For Review of Any Electric Utility's Alternative Energy Purchases, Any Commentary On The Draft Audit Report By An Electric Utility Must Be Shared Contemporaneously With Other Parties Who Will Be Given The Same Opportunity As The Utility To Make Substantive Recommendations For The Final Audit Report That Will Be Filed In Such Cases.

Throughout this case, the PUCO has emphasized that "Any conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding."[172] But that did not happen.

Before the filing of the Exeter Report, FirstEnergy was provided with a draft of

[172] January 18, 2012 Entry at 2; see also Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 2; February 23, 2012 Entry at 3.

the Exeter Report ("Draft Exeter Report"). The Request for Proposal (attached to the January 18, 2012 Entry) did provide that a copy of the final draft of the Exeter Report was to be provided to FirstEnergy and the PUCO Staff at least ten days prior to the due date of the report.[173] Per the terms of the Request for Proposal, the draft final report was provided to FirstEnergy because FirstEnergy was required to "diligently review the draft audit report(s) for the presence of information deemed to be confidential, and shall work with the auditor(s) to assure that such information is treated appropriately in the report(s)."[174]

But FirstEnergy did more than that. FirstEnergy went far beyond the scope of what was permitted under the terms of the PUCO's RFP. Specifically, FirstEnergy requested substantive modifications to the Draft Exeter Report, and did so in part by marking up an electronic draft of the Auditor's Report.[175]

Through a public records request[176] the parties learned that, in a pre-filing draft of the Exeter Report that parties other than FirstEnergy had not seen, the Exeter Auditor had originally drafted a recommendation for the PUCO to not allow FirstEnergy to collect from customers any procurement of In-State All Renewable Credits above $50/REC.[177] And it was learned that, after FirstEnergy provided comments to the PUCO Staff and the Exeter Auditor regarding the Auditor's draft recommendation,[178] the Auditor's specific

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[173] Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 6. Transcript Volume III-public, page 512, lines 16-23.

[174] Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 5.

[175] See Exhibit A and B (attached).

[176] February 14, 2013 Entry at paragraph 10.

[177] Transcript Volume III-public, page 512, line 24 through page 513, line 4.

[178] Transcript Volume III-public, page 512, lines 16-23.

recommendation to protect customers was removed from the final Audit Report that was filed in this case.[179]

FirstEnergy engaged in a private process, a process lacking due process for other parties, where it was given the Exeter Auditor's report in draft form before the report's public issuance.[180] Instead of merely assisting the Exeter Auditor in the identification of any alleged confidential information, FirstEnergy took this opportunity to dispute the findings and conclusions in the Draft Exeter Audit Report.[181] FirstEnergy's objections to the draft Audit Report included its disputing of what would have been a key Auditor recommendation -- for the PUCO to protect customers from paying for all costs for In-State All Renewable Credits that FirstEnergy purchased above $50/REC. But that auditor recommendation, that appeared in the draft report, was eliminated when the final report was filed at the PUCO.[182]

This private process was not fair to the other participants to the proceeding who did not receive the same opportunities (as FirstEnergy received) to review a draft version of the Audit Report and advocate for what should or should not appear in the final version that was filed. And the private process was not fair to the Commission that benefits from participation by all parties on the issues for purposes of its decision-making under R.C. 4903.09. The unfairness of the process (and lack of due process) was especially highlighted by FirstEnergy's private advocacy to prevent the filing of a

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[179] *See* Exeter Audit Report.

[180] Transcript Volume III-public, page 512, line 24 through page 513, line 4.; s*ee also* Initial Brief of OCC at 49-50; Exhibits A and B (attached.)

[181] See Exhibits A and B (attached.).

[182]Initial Brief of OCC at 49-50.

recommendation in the draft Audit Report that was favorable to customers.[183] The PUCO should find that its Entries that limited the scope of FirstEnergy's review of the draft audit report and due process were violated.

Further, the PUCO had before it the evidence of the recommendation that appeared in the draft Audit Report. That evidence should have been used in the Order in favor of protecting customers from paying for FirstEnergy's purchase of renewable credits above $50. That evidence should now be used on rehearing to rule favorably on all of OCC's above claims of error to obtain further credits on customers' bills.

Finally, the private process – that allowed FirstEnergy the unilateral opportunity to make recommendations regarding the draft audit report – should not be repeated in any future cases involving audits of FirstEnergy's alternative energy purchases. And it should not be allowed in any future cases involving audits of an electric utility's alternative energy purchases. What occurred was not contemplated by the PUCO's Entries in this case. Therefore, any further steps needed to prevent recurrence of such a process should be taken, including that a copy of an electric utility's (including FirstEnergy's) commentary on a draft audit report should be contemporaneously provided to all other parties for their input.

J. The PUCO Erred By Preventing The Disclosure Of Public Information Relating To FirstEnergy's Imprudent Purchases Of In State All-Renewable Energy Credits For Which FirstEnergy's Customers Should Not Have To Pay.

The PUCO erred when it granted FirstEnergy's Motions for Protection despite the Utility's failure to meet its burden of establishing that REC procurement data, and OCC's

[183] January 18, 2012 Entry at 2; see also Request for Proposal No. EE12-FEAER-1 (attached to the January 18, 2012 Entry) at 2; February 23, 2012 Entry at 3.

aggregated disallowance, is "trade secret" information. As the PUCO properly noted, information is "trade secret" and exempt from the public records laws if 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."[184]

To assist in determining whether a trade secret claim meets the statutory definition as codified in R.C. 1333.61(D), the Ohio Supreme Court has adopted, and this Commission has recognized,[185] a six-factor test:

> (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.[186]

But this Commission has held that the trade secret exception is a **very limited and narrow exception**.[187] Therefore, the burden is on the moving party, in this case FirstEnergy, to prove that the information has "independent economic value" and was kept under circumstances that maintain its secrecy under the six-prong test.

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[184] R.C. 1331.61(D).

[185] *See In the Matter of the Application of Constellation NewEnergy, Inc. for Renewal of its Certification as a Retail Electric Service Provider*, Case No. 09-870-EL-AGG, *Entry* at 2 (November 21, 2011); *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, *Entry* at 8-9 (Nov. 25, 2003) (citations omitted).

[186] *State ex rel. Plain Dealer v. Department of Insurance*, 80 Ohio St. 3d 513, 524-524 (1998)(citations omitted); *see also The State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 414 (2009).

[187] *See In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No 93-487-TP-ALT, *Entry* at 7 (Nov. 25, 2003) (citations omitted) (emphasis added).

In its Opinion and Order, the PUCO failed to properly apply this burden. And to the extent that the PUCO relied upon the arguments set forth by the Utility, FirstEnergy failed to provide ample evidence to support its argument that it met the six-prong test.

While the General Assembly has allowed for the PUCO to protect trade secrets, the General Assembly has emphasized in the law that the public has a right to know the considerations in PUCO cases that affect their bills for vital utility services. For example, R.C. 4901.13 provides that "all hearings shall be open to the public." That requirement is not satisfied in this case that had various closures of hearings for FirstEnergy's assertions of trade secret information.

Similarly, R.C. balances the allowance of information to be protected with the expectation that "all facts and information in the possession of the public utilities commission shall be public…."[188] And Ohio Adm. Code 4901-1-24(D)(1) limits redactions for confidentiality to only that information that is "essential to prevent disclosure of the allegedly confidential information." As OCC sets forth in this application for rehearing, FirstEnergy has succeeded in preventing public disclosure of information that goes far beyond what is essential to protect any confidentiality.

1. The PUCO Erred By Improperly Applying R.C. 1331.61(D) and by Violating R.C. 4901.13, R.C. 4905.07, Ohio Adm. Code 4901-1-24(D)(1) and the Strong Presumption in Favor of Public Disclosure Under Ohio Law by Preventing Public Disclosure of Bid-Specific Information, Including the Identities of the Bidders as well as the Price and Quantity of Renewable Energy Credits Bid by Each Specific Bidder.

While the PUCO allowed "the generic disclosure of FES as a successful bidder in the competitive solicitations,"[189] it was unreasonable and not in accordance with law to

[188] R.C. 4905.07
[189] Order at 12, 14.

grant FirstEnergy's Motions for Protection thereby preventing public disclosure of "specific [REC procurement] information related to bids by FES"[190] and other competitive bidders. Specifically, historic procurement data that is anywhere from two to four years old, including pricing associated with supplier identities, does not have any economic value that may be duplicated in today's market. Nor did FirstEnergy take necessary precautions to protect the information from public disclosure.

Moreover, FirstEnergy's attempt to protect the procurement information was untimely under Ohio Admin. Code 4901-1-02(E). Thus, while FirstEnergy claims to seek protection of REC procurement information because it is competitively-sensitive "trade secret," the evidence suggests that FirstEnergy really seeks to prevent the public disclosure of specific supplier identity and pricing information because it is embarrassing. But embarrassing information is not "trade secret" and the PUCO erred by finding that such information was of the nature to meet the strict standard set forth in R.C. 1331.61(D) and the Supreme Court's *Plain Dealer* decision.

a. The Identities of Suppliers and the Specific Prices that FirstEnergy Paid for Renewable Energy Credits is not Economically Valuable Information Nor can it be Duplicated to Undermine Future Renewable Energy Credit Procurement Processes.

The PUCO erred when it found that FirstEnergy presented sufficient evidence to meet its burden of establishing that the identity of the REC suppliers and the prices that they bid was trade secret information that has independent economic value. The PUCO provided little reasoning to support its decision for presumably finding that this historic procurement information has economic value. Rather, the PUCO simply acknowledged

[190] Order at 12, 14.

FirstEnergy's conclusory argument that "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."[191] Without supporting evidence, which does not exist in the record,[192] such a conclusory statement is not sufficient to meet the high burden required for establishing that the information falls under the very limited exception for "trade secret" information.

Contrary to the PUCO's holding, the supplier-identity and pricing information does not have independent economic value because it is historic in nature and has no impact on the current REC market. It is uncontested, and the record is replete with evidence, that the In-State All Renewables REC market was nascent during the first two years during which FirstEnergy purchased the RECs that are contested in this matter.[193] Since then, however, the market has changed because it has been continually easing and relieving.[194] In fact, the PUCO disallowed over $43 million because there was evidence that the market constraints were to be relieved not long after the August 2010 RFP.[195] There is no economic value or competitive advantage to be gained in the current competitive market from such historic information identifying the bidders that provided RECs to FirstEnergy and how much the Utility paid for those RECs more than 3 years ago (in some cases).

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[191] Order at 10; FirstEnergy Reply Brief at 90 (citing Navigant Consulting, Inc. Comments Letter, p. 2 (Oct. 26, 2012).

[192] FirstEnergy Reply Brief at 88, 91, 100 (citing to a "Navigant Consulting, Inc. Comments Letter" that was allegedly produced on October 26, 2012). This document, however, was not admitted into evidence.

[193] Order at 15, 17, 19, 21, 24.

[194] Order at 19; OCC Exhibit 15, Spectrometer Report; Transcript I, p. 154, Daniel Bradley (the market "has some of the characterization of a more liquid and transparent market, I would still characterize it as relatively nascent"); *See also*, Transcript III, p 602-603.

[195] Order at 25 (citing Transcript II, p. 360); Opinion and Order at 27 (citing Transcript II, pp. 369-370).

Moreover, the PUCO has recognized that historical information is not sufficient to establish the trade secret exception[196] – an argument raised in OCC's Initial Brief[197] that was not even acknowledged in the PUCO's Opinion and Oder. The PUCO did, however, cite to *In re Duke Energy Ohio, Inc.*, Case No. 10-2326-GE-RDR,[198] which is distinguishable from the current matter. Unlike the historic information at issue in this case, Duke sought to protect spreadsheets that contained **future projections** of "growth rates as applied to the price of electricity and gas, as well as the amount of energy consumed and the number of installed meters."[199] In that case, the PUCO did not protect historic information that was as little as two years old.

And to the extent that the PUCO relied upon Case No. 08-935-EL-SSO and Case No. 11-6000-EL-UNC as cited by FirstEnergy (although not cited in its Opinion and Order) in those cases the PUCO denied the motions for protection, in part, to allow public dissemination of winning bids and the identities of those bidders.[200] It was only the unsuccessful bidders' identities that were to be kept confidential under the trade secret doctrine.[201] And while FirstEnergy argues that the PUCO has yet to lift the seal in the

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[196] *In the Matter of the Application of CAT Communications International, Inc.*, Pub. Util. Comm. Case No. 02-496-TP-ACE, Ohio PUC LEXIS 405, at *4, (Apr. 25, 2002). (Commission denying a protective order over information that failed to be established as a trade secret and was three years old.)

[197] OCC Initial Brief at 69.

[198] Order at 10.

[199] *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Entry at 2 (Jan. 25, 2012).

[200] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, 08-935-EL-SSO, Finding and Order, at 3 (May 14, 2009) ("FirstEnergy SSO"); *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, 11-6000-EL-UNC, Finding and Order at 3 (May 23, 2012) ("Duke SSO").

[201] *FirstEnergy SSO* at 3; *Duke SSO* at 3.

Duke SSO case, the original Protective Order was only granted for 18 months and will expire on November 23, 2013.[202] Moreover, there is no indication that the SSO auction market has changed like the REC market. Thus, unlike the auction bidding information at issue in the *Duke SSO* case, release of the REC procurement data would not chill future REC bidding because is not relevant to current market conditions.

Instead, the PUCO should find direction from another case where it granted an 18-month protection over auction reports that contained the identities of all bidders, the actual bids, exit prices, and the indicative bids, which were only four months old at the time.[203] In that case, the PUCO rescinded the protective order just over a year later when FERC requested the unredacted reports for *In Re First Energy Solutions Inc.*, which was pending before them at the time.[204] The PUCO also stated that because of changes in the market, the one-and-a-half year old reports would not be of much present value.[205] In fact, it was FirstEnergy that recommended the release of the full unredacted reports just over a year after requesting the initial protective order.[206] Likewise, the bid information in this case is now between 3-4 years old and the bids relate to REC purchases that were finalized in 2011 (at the latest). There is no reason to protect this information anymore, even if there may have been some reason to do so during the period that the RECs were purchased.

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[202] FirstEnergy Reply Brief at 87; *Duke SSO*, at 3.

[203] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid process to Bid Out Their Retail Electric Load* ("*Ohio Edison Co.*"), Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, at *8, (Apr. 6, 2005).

[204] *Id.* at ¶2 & ¶5, (April 19, 2006).

[205] *Id.* at ¶5.

[206] *Id.* at ¶4.

Moreover, there is no concern that others could duplicate the information because (1) the bids are from 2009-2011, which have long been completed and (2) the market is not as constrained as it was during that time. FirstEnergy failed to provide any evidence to the contrary, instead, relying on conclusory arguments that fall woefully short of the high burden for meeting the trade secret exception. The information that the PUCO has allowed FirstEnergy to protect is no longer current and certainly would not undermine the integrity of the REC process that has fundamentally changed since the bidding of those RECs (*Plain Dealer* prong 6). Therefore, it is of no economic value, necessitating a ruling by the PUCO denying FirstEnergy's Motions for Protection.

b. FirstEnergy Failed to Take Sufficient Safeguards to Protect the Identities of Renewable Energy Credit Suppliers and Their Pricing Information, Allowing Individuals Outside of the Company to Discover the Information.

The PUCO also erred by finding that FirstEnergy took precautions to safeguard the supplier identities and pricing information (*Plain Dealer* prong 3) such that it was not known by those outside of the Company (*Plain Dealer* prong 1). It is difficult to understand the PUCO's ruling in this case. While the PUCO failed to provide a detailed rationale of its decision to protect specific supplier identity and pricing information, it appears as though it relied, in part, upon FirstEnergy's argument that procurement data was not disclosed to third parties.[207] Yet, the Commission acknowledged that this information was made publicly available in the Exeter Audit Report.[208]

[207] Order at 9; FirstEnergy Reply Brief at 97.

[208] Order at 12, 14.

The record also reflects that specific bidder identities and pricing information is publicly available in a number of media articles.[209] In fact, the PUCO even modified the Attorney Examiner's ruling to permit "generic disclosure of FES as a successful bidder in the competitive solicitations," because "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."[210] The Commission went so far as to find that "this fact has been placed in the public domain and has been **widely disseminated**."[211] However, the PUCO inexplicably stopped short of addressing the fact that the Exeter Audit Report also publicly explained that FirstEnergy paid "in some cases more than 15 times the price of the applicable forty-five-dollar Alternative Compliance Payment."[212]

In limiting the scope of its decision, the PUCO appeared to rely on FirstEnergy's argument that repeatedly blames the PUCO Staff for "inadvertent and involuntary disclosure of some of the REC procurement data in the public version of one of the audit reports."[213] Yet, the Commission failed to give sufficient weight to the fact that FirstEnergy waited forty-nine (49) days before filing its first Motion for Protection of the REC procurement data.[214]

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[209] John Funk, "Audit finds FirstEnergy overpaid for renewable energy credits, passed on expenses to customers," available at http://www.cleveland.com/business/index.ssf/2012/08/audit_finds_firstenergy_overpa.html (last accessed April 2, 2013); Gina-Marie Cheeseman, "FirstEnergy Paid Way Too Much to Comply With Ohio's Renewable Mandate," available at http://www.triplepundit.com/2012/08/firstenergy-ohio-renewable-mandate (last accessed February 13, 2013.

[210] Order at 12, 14.

[211] Order at 12.

[212] Exeter Audit Report at 28.

[213] Order at 10; FirstEnergy Reply Brief at 76, 90, 94-96, 98-99.

[214] Order at 9; OCC Initial Brief at 85.

The Exeter Audit Report was publicly filed on August 15, 2012, and the evidence in the record indicates that FirstEnergy was well aware of the supplier identity and pricing information that was made public in that filing.[215] But FirstEnergy chose not to file its first Motion for Protection until October 3, 2012.[216] And FirstEnergy's reliance on case law that applies the Freedom of Information Act[217] and petitions for writs of mandamus[218] is inapposite and misplaced.

In an attempt to establish that it properly safeguarded the procurement information, FirstEnergy provided evidence of confidentiality provisions in its third party contracts with the REC suppliers.[219] But, to the extent the PUCO relied on this argument,[220] it was in error because the Supreme Court of Ohio has held that the mere existence of confidentiality provisions alone will not protect information from public disclosure.[221]

Moreover, the precedent to which FirstEnergy cited involved the third party suppliers exercising their rights to confidentiality, not the procurer seeking protection of that information.[222] In this case, however, the docket reflects that no third-party REC

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[215] Transcript Volume III-confidential, page 653-54; FirstEnergy Reply Brief at 94.

[216] FirstEnergy Reply Brief at 94.

[217] FirstEnergy Reply Brief at 95-95 (citing *Pub. Citizen Health Research Group v. FDA*, 953 F. Supp. 400 (D.C. 1996)).

[218] FirstEnergy Reply Brief at 95-95 (citing *State ex rel. Perrea v. Cincinnati Public Schools*, 123 Ohio St.3d 410 (2009)).

[219] FirstEnergy Reply Brief at 89-90.

[220] Order at 10.

[221] *State ex. Rel. Plain Dealer v. Ohio Dept. of Insurance*, 80 Ohio St.3d 513, 527, 687 N.E.2d 661 (1997).

[222] *See, In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5), Ohio Administrative Code*, Case No. 11-4570-EL-RDR, 2011 Ohio PUC LEXIS 1107, Finding and Order at *2 (October 12, 2011); *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power Company*, Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181 at *18, (Apr. 6, 2005).

supplier ever filed a Motion for Protection to exercise the confidentiality clause of those contracts or sought protection of the procurement information in anyway. And many of those protective orders that were granted in the cases, to which FirstEnergy cites, have subsequently expired.[223] Based upon this precedent, and the evidence in the record, the PUCO erred by finding that FirstEnergy carried its burden of meeting the six-prong test set forth in the *Plain Dealer* decision.

c. The PUCO Failed to Address the Fact that FirstEnergy's Motion for Protection of Supplier Identities and Pricing Information was Untimely, Which should have Resulted in Denial.

The PUCO erred when it failed to substantively address the fact that FirstEnergy's Motion for Protection should be denied because it was untimely and not filed in accordance with the PUCO's rules. Ohio Adm. Code 4901-1-02(E) provides that "[u]nless a request for a protective order is made concurrently with or prior to the reception by the commission's docketing division of any document that is case-related, the document will be considered a public record." But FirstEnergy waited to seek protection until its filing on October 3, 2012, long after the information claimed to be confidential was filed on August 15, 2012. Despite FirstEnergy's Argument on Reply, that the document was filed under seal and therefore, it was assumed that the information

[223] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid process to Bid Out Their Retail Electric Load* ("*Ohio Edison Co.*"), Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, at *8, (Apr. 6, 2005) (protective order granted for 18 months but dissolved in an April 19, 2006 Entry); *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power Company* ("*Monongahela Power Co.*"), Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181 at *18, (Apr. 6, 2005) (granting 18 month protective order, which expired on October 6, 2007); *In the Matter of the Commission's Investigation Into Continuation of the Ohio Tel. Relay Service* ("*Ohio Tel. Relay Serv.*"), Case No. 01-2945-TP-COI, 2002 Ohio PUC LEXIS 378, Entry at *1, (May 2, 2002) (holding that bidding information would remain protected until the Commission selected a successful bidder, and, in an April 27, 2005 Finding and Order, the Commission denied a subsequent request to extend the Protective Order after a successful bidder was selected).

would be kept confidential by the Commission and its Staff,[224] -- Ohio Admin. Code 4901-1-02(E) is very strict in its wording.

To the extent the PUCO relied on the cases to which FirstEnergy cited to support its argument that it timely filed its Motion for Protection, it did so in error. The parties in those cases filed their motions **on or before** the day the trade secret information was filed with the Commission.[225] FirstEnergy, on the other hand, waited forty-nine (49) days, despite its knowledge that the information was filed on the PUCO's public docket. Again, opting instead to blame the PUCO Staff without taking any accountability for failing to timely file a Motion for Protection.[226] For these reasons, which were not substantively addressed in the Opinion and Order, the PUCO erred by granting FirstEnergy's Motions for Protection, thus, protecting supplier identifying and pricing information from public disclosure.

2. The PUCO should make Publicly Available the Complete (Unredacted) Copies of the Exeter Audit Report and All Prior Pleadings (Including Briefs, Motions and Testimony) in this Proceeding.

Because the PUCO erred by finding that procurement information is "trade secret," for the reasons explained in Assignment of Error (J)(1), which are hereby adopted and incorporated by reference, the PUCO should make unredacted copies of the Exeter Audit Report and all previously filed pleadings in this case publicly available.

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[224] FirstEnergy Reply Brief at 78.

[225] *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 Competitive Bid process to Bid Out Their Retail Electric Load*, Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, at *8, (Apr. 6, 2005); *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power,* Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181 at *18, (Apr. 6, 2005).

[226] FirstEnergy Reply Brief, at 98-99.

3. The PUCO Erred in Affirming the Attorney Examiner's Ruling on FirstEnergy's Second Motion for Protective Order because Public Information was Improperly Redacted from the Draft Exeter Audit Report.

While it did not provide any specific reasoning for its denial, the PUCO erred by affirming the Attorney Examiner's ruling granting FirstEnergy's Second Motion for Protection filed on December 31, 2012, which redacted public information from the draft Exeter Audit Report.[227] OCC later learned that in advance of filing the Final Exeter Audit Report, a draft of the Exeter Audit Report had been provided to FirstEnergy.[228] OCC also learned that FirstEnergy provided comments upon the Draft Exeter Audit Report.[229] Consequently, OCC submitted a public records request to the PUCO seeking "any and all records that reflect edits or comments on draft version of the Audit Report by employees, outside consultants, and/or counsel of [FirstEnergy]," to which FirstEnergy filed a second Motion for Protective Order. In a February 14, 2013 Entry, the Attorney Examiner ruled that the supplier-pricing and supplier-identifying information that appears in the Draft Exeter Audit Report is trade secret information in accordance with the November 20, 2012 ruling.[230] The Attorney Examiner further held that the document would be released in redacted form.[231]

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[227] See Exhibit A (attached.)

[228] Transcript Volume III-public, page 512, lines 16-23. It is noted that Exeter did not accept all of the changes proposed by FirstEnergy, but it did make changes in several critical respects after receiving FirstEnergy's commentary. Primary among the changes made was to recommend that the Commission merely "examine" a disallowance. The original draft recommendation, to quantify the specific amount of a proposed disallowance to protect customers, was deleted. *See* Draft Exeter Audit Report at IV (attached as Exhibit C; *see also* Exhibit D); Exeter Audit Report at iv.

[229] Transcript Volume III-public, page 512, lines 16-23.

[230] *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*, Entry at 5 (Feb. 14, 2013) (attached as Exhibit B).

[231] *Id.* at 6-7.

The Draft Exeter Audit Report consisted of two primary pieces: [1] a line-edited draft of the Exeter Audit Report (hereinafter referred to as "Draft Report Line Edits"),[232] and [2] a supplemental document labeled "The Companies' Major Comments Regarding the Executive Summary Draft Management/Performance Audit Report" (hereinafter referred to as "Draft Report Supplement").[233] The Draft Report Line Edits that were initially released in response to the OCC's public records request identified that the Exeter Auditor, in its draft report, recommended that the Commission, at a minimum, disallow FirstEnergy's recovery from customers of all In-State All Renewable RECs cost incurred by FirstEnergy in excess of $50 per REC. The release of that disallowance recommendation was subsequently modified by the Attorney Examiner.[234] In doing so, the Attorney Examiner protected any portion of the Draft Report Line Edits that identified the dollar amount that was recommended for disallowance.

The Attorney Examiner did not, however, redact that same information from the Draft Report Supplement.[235] And a discussion of the amount of the recommended disallowance is part of the public record in this proceeding.[236] Therefore, the PUCO erred by affirming) the Attorney Examiner's decision because this information is already publicly available.

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[232] Attached as Exhibit A.

[233] Attached as Exhibit B.

[234] *See* Draft Report Line Edits at page IV (attached to OCC's Initial Brief.)

[235] Exhibit B at page 1 of 3 (attached.)

[236] Transcript Volume III-public, page 512.

4. The PUCO Erred by Granting FirstEnergy's Fourth Motion for Protective Order, Thereby Preventing FirstEnergy's Customers and the Public Generally from Knowing OCC's Recommendation to the PUCO on the Total Dollar Amount that FirstEnergy Should Have to Credit Back to Its Customers for Overcharges.

The PUCO erred when it prevented public disclosure of the total dollar amount that OCC maintains that FirstEnergy's customers should not have to pay. In accordance with paragraph 9 of the Protective Agreement, to which OCC and FirstEnergy agreed on February 1, 2013, OCC sent notice to FirstEnergy of its intent "to publicly release the total dollar amount of FirstEnergy's renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers plus interest."[237] In response, FirstEnergy filed its Fourth Motion for Protective Order, on February 7, 2013, to prevent disclosure of this particular dollar value, despite the fact that it does not contain specific pricing information or the names of any of the bidders. In its Opinion and Oder in this case, the PUCO summarily granted FirstEnergy's Fourth Motion for Protective Order by unlawfully applying R.C. 1331.61(D).

Presumably, the PUCO was persuaded by FirstEnergy's argument, in its Fourth Motion for Protection, that if the aggregated number were disclosed, "REC pricing data could be derived using publicly available information."[238] However, there is no evidence indicating that someone would be able to "reverse engineer"[239] the number to arrive at the

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[237] *See* Feb. 1, 2013 Letter, attached as Exhibit 1 to Memorandum, Contra FirstEnergy's Motion for Protective Oder by The Office of the Ohio Consumers' Counsel (Feb. 25, 2013).

[238] Order at 11; *see also*, Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for a Protective Order Regarding Trade Secret Information Contained in the Direct Testimony to be Offered by The Office of the Ohio Consumers' Counsel, at 3 (Feb. 7, 2013). FirstEnergy continues to argue out of both sides of its mouth – at certain times the Utility complains about the "inadvertent" public release of procurement information, but then attempts to use it to its advantage to prohibit the disclosure of an aggregate number.

[239] FirstEnergy Reply Brief at 103.

specific bidding prices. To the contrary, even though the number of RECs that were purchased is public information, releasing the total amount of disallowance would not provide ample information to calculate specific REC prices. At most, it would only create an ability to calculate an average price per REC. Moreover, the PUCO made the amount of disallowance associated with RFP3, an amount of $43,362,796.50, publicly available.[240] It is no easier to discern the prices paid from that number than from the total disallowance contained in OCC witness Wilson Gonzalez's testimony.

Nevertheless, as discussed in Assignment of Error 6a, *supra*, the prices that FirstEnergy paid to purchase renewable energy credits (RECs), which have already been provided to the public, does not constitute trade secret. It logically follows, therefore, that the aggregate number derived from information that is public (and not subject to "trade secret" protection) should likewise be publicly produced.

But even if the PUCO were to continue to find that supplier pricing and identifying information should be protected "under a veil of secrecy"[241] characterized as "trade secret," the total amount of disallowance, as determined by OCC witness Gonzalez, should still be made publicly available. The total disallowance contained in Mr. Gonzalez's testimony is based on aggregated information, which does not reveal such specific prices or identities of In-State All-Renewables bidders.

Moreover, this PUCO has held that aggregated information is not subject to confidential treatment. In 2002, Verizon sought a protective order requesting confidentiality of the number of access lines in the Montrose Exchange as of May

[240] Order at 25.

[241] Ohio Power Company's Motion to Intervene and Reopen Proceedings at 4 (June 21, 2013).

2002."[242] The attorney examiner noted that "the aggregate figure does not reveal the access line count provided by any particular carrier."[243] Although FirstEnergy attempts to distort the holding in that decision,[244] the PUCO further held that aggregated information can be publicly used even where some information that forms the aggregate is protected.[245] For these many reasons, the Commission erred by not, at a minimum, denying FirstEnergy's February 7, 2013 Motion for Protection. The public should be allowed to know the dollar amount that OCC has asked the PUCO to order FirstEnergy to credit to customers' bills to protect customers from paying for FirstEnergy's overcharges.

IV. CONCLUSION

For all the reasons discussed above, the PUCO should grant rehearing on OCC's claims of error and modify or abrogate its August 7, 2013 Opinion and Order consistent with Ohio law and reason.

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[242] *In the Matter of the Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio v. Ameritech Ohio and Verizon North Incorporated*, Case No. 02-1752-TP-TXP, 2002 Ohio PUC LEXIS 889, Entry at 1 (Sept. 30, 2002).

[243] *Id.* at 1-2; *See also, In the Matter of the Petition of Dean Thomas and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Telephone Company of Ohio dba Sprint*, Case No. 02-880-TP-TXP, 2002 Ohio PUC LEXIS 679, Entry at 3 (Jul. 31, 2002); *In the Matter of the Commission's Promulgation of Rules for Market Monitoring Pursuant to Chapter 4928, Revised Code*, Case No. 99-1612-EL-ORD, 2000 Ohio PUC LEXIS 445, Finding and Order at 6 (Mar. 30, 2000) (stating "The fact that the information is confidential, however, does not preclude the Commission or Commission Staff from publishing [] data in an aggregated form").

[244] FirstEnergy Reply Brief at 102-103.

[245] OCC Memorandum Contra, at 4-5 (Feb. 25, 2013); *In the Matter of the Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio v. Ameritech Ohio and Verizon North Incorporated*, Case No. 02-1752-TP-TXP, 2002 Ohio PUC LEXIS 889, Entry at 1-2 (Sept. 30, 2002); *See also, In the Matter of the Petition of Dean Thomas and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Telephone Company of Ohio dba Sprint*, Case No. 02-880-TP-TXP, 2002 Ohio PUC LEXIS 679, Entry at 3 (Jul. 31, 2002); *In the Matter of the Commission's Promulgation of Rules for Market Monitoring Pursuant to Chapter 4928, Revised Code*, Case No. 99-1612-EL-ORD, 2000 Ohio PUC LEXIS 445, Finding and Order at 6 (Mar. 30, 2000) (stating "The fact that the information is confidential, however, does not preclude the Commission or Commission Staff from publishing [] data in an aggregated form").

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Application for Rehearing (CONFIDENTIAL VERSION), was served via electronic mail to the persons listed below this 6th day of August, 2013.

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Summary: App for Rehearing 4 - Application for Rehearing Unredacted Filed by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.