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

***** PUBLIC VERSION *****

INITIAL BRIEF
BY
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TABLE OF CONTENTS

Page

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I. INTRODUCTION

The Public Utilities Commission of Ohio ("PUCO" or "Commission") opened this case[1] for the purpose of reviewing charges for renewable energy that FirstEnergy[2] collects on customers' bills through the Alternative Energy Resource Rider ("Rider AER").[3] A PUCO auditor specifically found that "[t]he FirstEnergy Ohio Utilities paid unreasonably high prices for In-State All Renewables RECs[4]...."[5] OCC's witness, Mr.

[1] Entry at 1 (February 23, 2012); *In Re FirstEnergy*, Case No. 11-2479-EL-ACP, Entry on Rehearing at para. 9 (September 20, 2011).

[2] "FirstEnergy" is the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

[3] Rider AER is a bypassable generation charge, meaning that it is collected from those customers that purchase electric generation from FirstEnergy (and it is not collected from customers who purchase electricity from competitors).

[4] "RECs" means renewable energy credits.

[5] Confidential Final Report Management/Performance Audit of the Alternative Energy Resource Rider (RIDER AER) of the FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011, prepared by Exeter Associates, Inc. ("Exeter Audit Report"), filed on August 15, 2012 in PUCO Case No. 11-5201-EL-RDR at iv.

Gonzalez, agreed[6] and recommended that the PUCO protect customers from paying exorbitant charges to FirstEnergy.[7]

Additionally, the Commission indicated that its review would include a review of FirstEnergy's procurement of renewable energy credits ("RECs") for the purposes of complying with R.C. 4928.64.[8] Goldenberg Schneider, LPA. ("Goldenberg" or "Financial Auditor") was selected to perform the financial portion of the audit.[9] And Exeter Associates, Inc. ("Exeter" or "Exeter Auditor") was selected to conduct the management/performance portion of the audit.[10]

As stated, the Exeter Auditor concluded that "the prices bid by [redacted] reflected significant economic rents[11] and were excessive by any reasonable measure."[12] Exeter specifically found that "[t]he FirstEnergy Ohio Utilities paid unreasonably high prices for In-State All Renewables RECs purchased from [redacted]."[13] In the Final Audit Report, Exeter recommends that the "Commission examine the disallowance of excessive costs associated with purchasing RECs to meet the FirstEnergy Ohio utilities' In-State All

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[6] Direct Testimony of Wilson Gonzalez at 7-8.

[7] *Id.*

at 5-6.The PUCO has not allowed OCC to publicly file the amount that customers should be protected from paying to FirstEnergy, because of FirstEnergy's claim (disputed by OCC on February 25,2013) that Mr. Gonzalez' calculation of the excessive charges would reveal trade secret information if made public.

[8] February 23, 2012 Entry at 1.

[9] *Id.* at 2.

[10] *Id.*

[11] Direct Testimony of Wilson Gonzalez, OCC Exhibit 16 (Public) and Exhibit 16A (Confidential), at 33 ("Economic rents" are "'excessive returns' above 'normal levels' that take place in competitive markets").

[12] Exeter Audit Report at iv.

[13] *Id.*

Renewable obligations."[14] Before filing the Final Audit Report, however, FirstEnergy was provided with a draft of the Audit Report ("Draft Audit Report") for review and comment before filing.[15] And through this public records request[16] the parties learned that, in a pre-filing draft of the Audit 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.[17] And it was learned that, after FirstEnergy provided comments to the PUCO Staff and the Exeter Auditor regarding the Auditor's draft recommendation,[18] the Auditor's specific recommendation to protect customers was removed from the final Audit Report that was filed in this case.[19]

The recommendation in the draft Audit Report was similar to OCC's position that all costs for In-State All Renewable Credits that were purchased at prices above [redacted] should not be paid by FirstEnergy's customers.[20] Specifically, in accordance with OCC testimony, "[t]he Commission should disallow[21] [redacted] from Rider AER, to protect customers from paying for costs resulting from FirstEnergy's imprudent decision to purchase grossly over-priced In-State All Renewable RECs [redacted]

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[14] *Id.* at 33.

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

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

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

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

[19] *See* Exeter Audit Report.

[20] Revised Confidential Exhibit WG-3, OCC Ex. 17A.

[21] As stated above, FirstEnergy has been successful, to date, in preventing OCC from publicly disclosing the amount of money that OCC recommends the PUCO disallow FirstEnergy from collecting from Ohioans. OCC's request for the figure to be publicly filed is an issue that remains pending for a PUCO ruling.

[redacted][22]

FirstEnergy's expenditures at issue in this case are, by nearly any measure, beyond comprehension. And FirstEnergy has been, beyond question, imprudent. What remains is for the PUCO to protect Ohioans from overcharges for renewable energy.

First, among the critical facts that should shape this Commission's decision, is that FirstEnergy knew [redacted][23]—at the time that the decision was made to purchase the RECs at prices [redacted]. FirstEnergy knew that [redacted][24] would benefit from its decision to pay prices for In-State All Renewable Energy Credits that "were well above the prices customarily seen in any of the other RECs market throughout the country."[25] Additionally, the prices paid to [redacted] were, at times, as much as 15 times the applicable forty-five-dollar Alternative Compliance Payment ("ACP").[26]

Second, FirstEnergy failed to seek alternatives, to protect its customers from overcharges, in lieu of purchasing grossly excessive priced In-State All Renewable Energy Credits from [redacted].[27] FirstEnergy did not file a *force majeure* application with this Commission although FirstEnergy has sought and received such relief in other

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[22] Direct Testimony of Wilson Gonzalez at 5.

[23] Direct Testimony of Daniel R. Bradley at 13; Direct Testimony of Dean W. Stathis at 22-23; Transcript Volume III-public, pages 315-317.

[24] Transcript Volume III-public, pages 315-317.

[25] Exeter Audit Report at 28.

[26] *Id.*

[27] FirstEnergy allegedly relied upon the recommendations of its consultant, Navigant Consulting, Inc. in making its decision to purchase such RECs. However, Navigant Consulting's evaluation was limited, per the terms of its contract with FirstEnergy, to market factors. Navigant's recommendations did not consider alternatives set forth in Ohio law to purchasing such RECs, including force majeure filings, alternative compliance payments, or even advice and consultation with PUCO Staff.

proceedings.[28]

FirstEnergy did not even consider making an alternative compliance payment--in lieu of purchasing grossly over-priced RECs--to save significant dollars for consumers. FirstEnergy paid [redacted] for RECs purchased from [redacted].[29] If FirstEnergy had paid compliance payments in lieu of such purchases, then it would not have cost its customers a penny. It would have cost FirstEnergy [redacted].[30] Because FirstEnergy did not want to pay [redacted], it made a decision that was [redacted][31] to the detriment of its customers, and a [redacted] benefit to [redacted]. It was a win-win decision for [redacted] and a no-win situation for customers.

Third, 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, long before purchases were required to meet 2010 and 2011 compliance obligations.[32] This decision was made by FirstEnergy—not Navigant. The [redacted] benefitted from this imprudent business decision was [redacted].

Fourth, FirstEnergy never established a maximum or limit price that FirstEnergy would pay for purchases of non-solar RECs even though the 2009 compliance payment was only $45 per REC.

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[28] Transcript Volume II-public, pages 331-332.

[29] Direct Testimony of Wilson Gonzalez (Confidential) at 5, 36, Revised Exhibit WG-3.

[30] *Id.* at 36 Revised Exhibit WG-3.

[31] *Id.*

[32] *Id.* at 17.

Fifth, FirstEnergy had no written contingency plan for the purchase of RECs.[33] But it should be noted that FirstEnergy has a written contingency plan for the procurement of power in Ohio.[34]

Sixth, FirstEnergy knew that the prices bid by [redacted] reflected significant economic rents.[35] They knew that those prices reflected significant economic rents because FirstEnergy later made a counter offer that was [redacted] less than the amount that [redacted] bid.[36]

Finally, during the audit period, [redacted], controlled a significant share of the market for RECs and was able to exert market power over prices offered in the market during such years.[37] FirstEnergy knew that [redacted] had market power.[38]

These facts, and many others discussed below, show the unreasonableness of FirstEnergy's management decisions that should be reasonable and prudent in the interest of customers. The PUCO now must ensure that utilities, such as FirstEnergy, are held to appropriate standards in purchasing power, especially renewables. More importantly, the PUCO must take appropriate actions to ensure that customers are protected from costly purchasing decisions that are imprudent. This is especially the case where, as here, the transaction involves [redacted].

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[33] *Id.* at 24; Exeter Audit Report at 32-33.

[34] OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-Confidential, at pg. 4 of 10.

[35] Direct Testimony of Wilson Gonzales at 33 ("Economic rents" are "'excessive returns' above 'normal levels' that take place in competitive markets").

[36] Transcript Volume I, page 205.

[37] Exeter Audit Report, at iv; Direct Testimony of Wilson Gonzalez at 33.

[38] OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-Confidential, at pg. 4 of 10.

II. STATEMENT OF FACTS

A. FirstEnergy's Flawed Acquisition Of The In-State All Renewable Energy Credits That It Would Charge to Customers

R.C. 4928.64 requires, in part, that Ohio electric utilities include a portion of the electricity supply required for its standard service offer customers from alternative energy resources. In an effort to meet its obligations under R.C. 4928.64, FirstEnergy acquired its RECs for the years 2009-2011 through a process that consisted of six Requests for Proposals ("RFP").[39] To assist in this process, in May 2009 FirstEnergy retained Navigant Consulting, Inc. to conduct renewable procurements during the period 2009-2011.[40] Although all three of Ohio's other major electric utilities had begun their efforts to obtain RECs more than a year earlier,[41] with the help of Navigant, FirstEnergy issued its first RFP ("RFP 1") on June 24, 2009.

FirstEnergy's RFP 1 sought (a) 63,960 In-State All Renewable RECs for compliance year 2009, (b) 127,400 In-State All Renewable RECs for compliance year 2010 and (c) 105,083 In-State All Renewable RECs for compliance year 2011.[42] In response to RFP 1, only 1 entity submitted bids for In-State All Renewable Energy Credits. That entity was [redacted][43] [redacted] submitted bids for 20,000 In-State All Renewable

[39] Direct Testimony of Daniel R. Bradley at 2, fn. 1; Direct Testimony of Dean W. Stathis at 2, 12-13.

[40] Direct Testimony of Daniel R. Bradley at 3.

[41] *Id.*, at 26-27. AEP Ohio issued an RFP on July 15, 2008. Id. Duke Energy Ohio, Inc. issued an RFP on June 19, 2008. Id. Dayton Power & Light issued an RFP on July 25, 2008. Id.

[42] Direct Testimony of Daniel R. Bradley at 28.

[43] Exeter Audit Report (Redacted) at 31.

RECs in 2009 at an offer price of [redacted] per REC and 50,000 In-State All Renewable RECs in 2010 at a weighted average price of [redacted] per REC.[44]

Although the quantity of RECs bid fell significantly short of FirstEnergy's compliance obligations and the bids were remarkably high, Navigant recommended that the bids be accepted.[45] Navigant did, however, warn FirstEnergy that, "the In-State All Renewable market was extremely thin and still developing."[46] Despite only receiving a single offer for In-State All Renewable RECs, FirstEnergy executed a contract with [redacted], on August 20, 2009, purchasing In-State All Renewable RECs at [redacted] per REC for 20,000 2009 RECs and [redacted] per REC for 50,000 2010 RECs.[47] However, these prices [redacted] any prices known to have been paid in compliance markets in the United States for non-solar RECs.[48]

On September 23, 2009, another RFP was issued ("RFP 2") to the entities on the distribution list.[49] The RFP sought bids of (a) 43,960 In-State All Renewable RECs for compliance year 2009, (b) 77,400 In-State All Renewable RECs for compliance year 2010, and (c) 105,084 In-State All Renewable RECs for compliance year 2011.[50] Six applications were received but two of the applications were rejected for failure to meet the qualification requirements,[51] which included review of the suppliers' non-binding plan for sourcing RECs, review of credit applications for completeness and available

[44] *Id.*; Direct Testimony of Daniel R. Bradley at 29-30.

[45] Direct Testimony of Daniel R. Bradley at 29-30.

[46] Direct Testimony of Dean W. Stathis at 23.

[47] *Id.* at 26.

[48] Exeter Audit Report at 28; Direct Testimony of Wilson Gonzalez at 9.

[49] Direct Testimony of Daniel R. Bradley at 32.

[50] *Id.* at 33.

[51] *Id.*

credit qualification requirements.[52] Of these four bidders, only one bidder, [redacted], submitted bids for In-State All Renewable RECs.[53] OCC notes that this was the same supplier who, two months before, had only been able to bid 20,000 In-State All Renewable RECs for 2009, 50,000 In-State All Renewable RECs for 2010, and no In-State All Renewable RECs for 2011.

While there were no additional bidders for the RFP 2 product, the availability of In-State All Renewable RECs from this one supplier had tripled for 2009, more than doubled for 2010, and gone from zero In-State All Renewable RECs to 105,084 for compliance year 2011. As a result, [redacted] the sole bidder for In-State All Renewable RECs in RFP 2, bid RECs sufficient to meet the requested amount for all three periods ***and*** Navigant recommended that FirstEnergy select all of the RECs bid by that supplier.[54]

In the interim, however, FirstEnergy reduced the target amount of RECs in light of revisions to the baseline calculation of compliance obligations.[55] Again, FirstEnergy paid exorbitant prices for 2009-2011 In-State All Renewable RECs, paying [redacted] per REC for 37,965 2009 RECs, [redacted] per REC for 31,800 2010 RECs, and [redacted] per REC for 26,084 2011 RECs.[56] Again, these prices far exceeded any prices known to have been paid in markets throughout the United States.[57]

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[52] *Id.*

[53] *Id.*

[54] *Id.* at 33-34.

[55] Direct Testimony of Daniel R. Bradley, at 35.

[56] *Id.*

[57] Exeter Audit Report at 28.

Given the limited response to RFP 2, a third request for proposal ("RFP 3") was issued on July 1, 2010.[58] RFP3 resulted in proposals from two (2) entities for In-State All Renewables for 2010 and 2011 compliance years. [redacted] bid [redacted] for 29,676 In-State All Renewable 2010 RECs and 145,269 In-State All Renewable 2011 RECs.[59] Another bidder bid [redacted] for 5,000 In-State All Renewable RECs for compliance year 2011.[60]

Although it had not been done on prior occasions, FirstEnergy negotiated with the high bidder, [redacted], to obtain a price lower than the amount bid ([redacted]) [redacted][61] [redacted][62] As a result of this negotiation, the price of 145,269 2011 RECs bid by the high bidder, [redacted], was reduced from [redacted] per REC to [redacted] per REC.[64]

Interestingly, before FirstEnergy accepted the 2010 bid in RFP 3, Navigant, at the request of FirstEnergy's Regulated Commodity Sourcing ("RCS") group, conducted "additional market research to attempt to find additional sources of RECs and to seek feedback from RFP 1 participants."[65] Navigant's research was provided to RCS on

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[58] Direct Testimony of Daniel R. Bradley at 32.

[59] *Id.* at 41.

[60] *Id.*

[61] [redacted]

[62] Transcript Volume I-confidential, page 203-206.

[63] Transcript Volume I-confidential, page 207-208.

[64] Direct Testimony of Daniel R. Bradley at 42.

[65] *Id.* at 30.

October 9, 2009.[66] Navigant found that all existing wind renewables had been contracted for 2009 and that contract discussions for these existing wind resources were underway for 2010 and 2011.[67] Additionally, many renewable facilities were in the process of beginning the PUCO certification process, a number of which were interested in participating in FirstEnergy RFPs (8 firms) but were concerned about the timing and outcome of the PUCO certification process.[68] Others had not yet explored the PUCO certification process.[69]

The fourth request for proposal ("RFP 4") and fifth request for proposal ("RFP 5") did not solicit In-State All Renewable RECs; therefore, they are not a subject of dispute in this proceeding.[70] Unlike the first three RFPs, in its sixth request for proposal ("RFP 6"), FirstEnergy solicited In-State All Renewable RECs for a ten-year term beginning with compliance year 2011.[71] The use of a ten-year contract had been specifically approved in the Company's 2010 ESP case.[72] In response to RFP 6, FirstEnergy received 42 separate qualifying proposals from 8 different potential suppliers.[73] Twenty-seven (27) proposals were qualified for Phase II.[74] Of these, eleven

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[66] *Id.* at 31.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 42.

[71] *Id.*

[72] *Id.* (citing *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, PUCO Opinion and Order, (Aug. 25, 2010)).

[73] Direct Testimony of Daniel R. Bradley at 43.

[74] *Id.*

(11) proposals were received from seven entities for In-State All Renewables.[75] From these, 5,000 RECs at a price of [redacted] per REC and 15,000 RECs at a price of [redacted] per REC were recommended by Navigant, and purchased by FirstEnergy.[76]

In making the foregoing decisions, FirstEnergy relied heavily upon Navigant Consulting. However, FirstEnergy did not contract with Navigant to evaluate or make recommendations regarding ***alternatives to the purchase of RECs***, and Navigant's recommendations, therefore, did not reflect consideration of such alternatives.[77] Navigant's recommendations, therefore, did not take into account consultation with PUCO Staff, making *force majeure* requests, or making alternative compliance payments in lieu of purchasing RECs.[78] Thus, despite not having reviewed all possible options, Navigant then provided a recommendation to FirstEnergy with respect to the qualifying bids.[79] Consequently, the consideration of alternatives was left exclusively for FirstEnergy to consider without specific input from Navigant on the alternatives.

B. PUCO Selection Of Auditors, Auditing Process And Auditor Findings.

On January 18, 2012, the PUCO determined that an external auditor would be necessary for review of FirstEnergy's REC purchases for the time-period October 2009 through December 31, 2011, as reflected in its Rider AER.[80] The PUCO selected Exeter to conduct a management/performance audit for this time period with respect to the

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[75] *Id.*

[76] *Id.* at 44.

[77] Transcript Volume I-public, page 169, 184-185.

[78] *Id.*

[79] *Id.*

[80] *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*, PUCO Entry (Jan. 18, 2012)

purchase of RECs.[81] Exeter proceeded to perform an audit based on a variety of information.

Exeter reviewed both the procurement process/acquisition approach utilized by FirstEnergy and the solicitation results and procurement decisions made by FirstEnergy, and made findings and recommendations with respect to each. Exeter's recommendations with respect to the procurement process included that (1) FirstEnergy should implement a more robust contingency planning process related to the procurement of RECs and SRECs,[82] (2) a thorough market analysis should precede the issuance of any future RFPs by FirstEnergy for RECs and SRECs, and (3) FirstEnergy should consider a mark-to-market approach to the security requirement for future procurements when the RECs and SRECs market mature to a point where such an approach is feasible.[83]

With respect to the solicitation results and procurement decisions, Exeter made nine (9) findings. Because these findings are critical to this proceeding, OCC provides them verbatim below:

1. The prices paid by the Companies for All-States All Renewables RECs were reasonably consistent with other regional RECs prices.

2. While lower prices would have been available to the Companies were fewer RECs purchased under RFP1 and more RECs purchased under RFP 3, the Companies' decisions to purchase the bulk of the 2009, 2010, and 2011 requirements under RFP1 were not unreasonable.

3. The lower prices available for All-States SRECs in the 2011 timeframe could not have been reasonably foreseen by the Companies.

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[81] *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*, PUCO Entry (Feb. 23, 2012)

[82] "SRECs" means solar renewable energy credits.

[83] Exeter Audit Report, at iii.

4. The FirstEnergy Ohio utilities did not establish a maximum (or limit) price that the Companies were willing to pay for In-State All Renewables RECs prior to the issuance of the RFPs.

5. The FirstEnergy Ohio utilities paid unreasonably high prices for In-State All Renewables RECs purchased from [redacted]

6. Prices for In-State All Renewable RECs in the range of [redacted] exceeded the reported prices paid for non-solar compliance RECs anywhere in the country between July 2008 and December 2011 by at least [redacted] to [redacted].

7. The FirstEnergy Ohio utilities had several alternatives available to the purchase of high-priced In-State All Renewables RECs, none of which were considered or acted upon.

8. The FirstEnergy Ohio utilities should have been aware that the prices bid by [redacted] reflected significant economic rents and were excessive by any reasonable measure.

9. The procurement of In-State Solar RECs by the FirstEnergy Ohio utilities was competitive and, when Ohio SRECs became reasonably available, the prices paid for those SRECs by the Companies were consistent with prices seen elsewhere.

Exeter Audit Report, pp. iii-iv.

Based on these findings, Exeter recommended that the Commission "examine the disallowance of excessive costs associated with purchasing RECs to meet the FirstEnergy Ohio utilities' In-State All Renewables obligations."[84] But it was learned by parties that the Draft Audit Report was provided to FirstEnergy for its review and comment.[85] And the parties learned (over FirstEnergy's objection)[86] that the Exeter Auditor originally recommended (in the draft Audit Report) that all costs incurred in regards to the procurement of In-State All Renewable Credits above $50/REC be excluded from

[84] Exeter Audit Report, p. iv.

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

[86] See FirstEnergy's Motion for Protection filed December 31, 2012.

recovery.[87] After FirstEnergy commented on the draft Audit Report, that original recommendation by the Auditor was not in the filed final version of the Audit Report.

III. THE COMMISSION SHOULD NOT ALLOW FIRSTENERGY TO CHARGE CUSTOMERS FOR EXCESSIVE, UNREASONABLE AND IMPRUDENT COSTS ASSOCIATED WITH FIRSTENERGY'S RENEWABLE ENERGY CREDIT PURCHASING PROGRAM FOR IN-STATE ALL RENEWABLE ENERGY CREDITS.

A. Standard Of Review

FirstEnergy may recover from its customers, through Rider AER, the costs of RECs that FirstEnergy has prudently purchased.[88] But the Commission should disallow making customers pay the costs that were incurred because of imprudent REC purchases at unreasonably excessive prices.[89]

Specifically, the February 19, 2009 Stipulation in FirstEnergy's ESP proceeding provides that Rider AER was "established to recover, on a quarterly basis the *prudently* incurred cost of such [renewable energy] credits pursuant to R.C. §4928.64 including the cost of administering the REP and carrying charges on any unrecovered balances including accumulated deferred interest."[90] Furthermore, with respect to the recovery of charges from customers, R.C. 4909.154 specifically provides that the Commission "shall consider the management policies, practices and organization of the public utility" and "*shall not allow such operating and maintenance expenses of a public utility as are*

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

[88] *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).

[89] *See id.*

[90] *Id.* (Emphasis added.)

incurred by the utility through management policies or administrative practice that the commission considers imprudent." (Emphasis added.) Accordingly, any costs (including the associated carrying costs assessed on any unrecovered balances including deferred interest) that were imprudently incurred due to FirstEnergy's flawed management decisions (to purchase In-State All Renewables Energy Credits at grossly excessive prices) are prohibited from being recovered from customers.[91]

B. Law and Argument

1. The prices paid by FirstEnergy for in-state all renewable energy credits from 2009-2011 were grossly excessive and inappropriate for charging to customers.

a. The management decisions by FirstEnergy to purchase non-solar renewable energy credits at grossly excessive prices were imprudent and disqualify FirstEnergy from collecting its excessive costs from customers.

As indicated above, Exeter recommended the examination of a disallowance, based on its factual findings that: (1) FirstEnergy[92] had not established a price limit on what it would pay for In-State All Renewable RECs; (2) FirstEnergy "paid unreasonably high prices for In-State All Renewable RECs purchased from [redacted];" (3) the prices paid by FirstEnergy for In-State All Renewable RECs "exceeded the reported prices paid for non-solar compliance RECs anywhere in the country between July 2008 and December 2011 by at least [redacted] to [redacted];"[93] (4) FirstEnergy "had several alternatives available to the purchase of high-priced In-State All Renewables RECs, none of which were considered or acted upon;" and (5) FirstEnergy

[91] *Id.*

[92] Exeter refers to The Cleveland Electric Illuminating Company, Ohio Edison Company and the Toledo Edison Company collectively as "the FEOUs" while OCC refers to them as "FirstEnergy."

[93] *Id.*

"should have been aware that the prices bid by [redacted] reflected significant economic rents and were excessive by any reasonable measure."[94]

Furthermore, Exeter found that based on the U.S. Department of Energy ("DOE") reports on non-solar REC prices paid throughout the U.S. between mid-2008 and December 2011, none of the non-solar REC prices reported by DOE were above $45.[95] And in almost all cases, non-solar REC prices were significantly below $45.[96]

Mr. Gonzalez corroborated these findings of the Exeter Auditor (discussed above) and testified that the prices paid by FirstEnergy for In-State All Renewable Energy Credits from 2009-2011 were "grossly excessive" based on the market data shown in Exeter's Figure 3, which is reproduced in Mr. Gonzalez's testimony.[97] That data shows that from January 2008 through October 2011, the prices paid in compliance markets for non-solar RECs were "never more than $52 per REC. For most years, prices were below 40 dollars per REC."[98]

Moreover, as OCC witness Gonzalez testified in response to the testimonies of FirstEnergy witnesses Earle and Bradley,[99] the mere fact that the Ohio market was a "nascent" market "does not explain the extreme prices paid by FirstEnergy."[100] As shown on Mr. Gonzalez's Compliance Markets Table on page 13 of his testimony, "REC prices in eight states listed by the Exeter Audit Report during their nascent renewable

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[94] Exeter Audit Report at 33.

[95] *Id.* at 26.

[96] *Id.*

[97] Direct Testimony of Wilson Gonzalez at 8-9.

[98] *Id.* at 9.

[99] Direct Testimony of Robert Earle at 15-24; Direct Testimony of Daniel R. Bradley at 58-62.

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

market period . . . are a fraction of what FirstEnergy paid."[101] Absent evidence of All Renewable RECs selling for a greater price (whether In-State or otherwise), it is not reasonable to assume that the price in the Ohio market exceeded prices reported in other compliance markets for All Renewable RECs.

Mr. Gonzalez also rebutted the testimony of Navigant witness Bradley in which Mr. Bradley contended that Navigant had seen solar REC prices of up to $700/REC in New Jersey, which had an In-State Solar requirement, in 2009.[102] As Mr. Gonzalez testified, however, "the fallacy of this observation is that prices for solar RECs have been consistently higher than prices for non-solar RECs because of the higher development cost for solar facilities."[103] This fundamental difference between the market prices of solar and non-solar RECs was plainly recognized by the Ohio legislature in establishing "an alternative compliance payment for solar RECs that is initially 10x the magnitude of the Ohio ACP for non-solar RECs ($450 solar compared to $45 non-solar in 2009)."[104] Thus, "[i]t is misleading for Navigant witness Bradley to make an 'Apples to Oranges' comparison between prices for solar RECs and prices for non-solar RECs" when the products "face very different supply curves."[105]

Mr. Gonzalez also rebutted the testimony of Dr. Earle that it is the "in-state geographic requirement" in New Jersey that explains the great discrepancy in price for

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[101] *Id.*

[102] Direct Testimony of Daniel R. Bradley at 36.

[103] Direct Testimony of Wilson Gonzalez at 13.

[104] *Id.* at 14. Further, Mr. Gonzalez noted that the ACP for SRECs "decline to the level of non-solar RECs over 8-years under Ohio law." *Id.*

[105] *Id.*

solar RECs.[106] Dr. Earle claims that this geographic requirement also explains the high prices paid by FirstEnergy for In-State All Renewable RECs.[107] But it doesn't explain it. As discussed above, the high development costs for solar energy explain the high prices for solar, which has been consistent across the country. Furthermore, as discussed by Mr. Gonzalez, "New England states had a similar restriction masked as a stringent delivery into the state requirement . . . but did not experience the economic rents paid by FirstEnergy" for such All Renewable RECs.[108]

As a general measure of the prices paid by other Ohio Electric Distribution Utilities ("EDUs") to meet their compliance obligations, Mr. Gonzalez compared the Rider AER rates calculated by other Ohio EDUs with FirstEnergy's Rider AER rate.[109] Mr. Gonzalez explained that the difference in rates "reflect what FirstEnergy overpaid relative to the other Ohio utilities for their overall renewable compliance...."[110] Mr. Gonzalez further explained that "since the Exeter Audit Report found that FirstEnergy's purchases for the three other renewable products (In-State Solar, Out of State Solar and Out of State All Renewables) were not unreasonable, it is likely that the major discrepancy with the other Ohio utilities is in the In-State All Renewables product."[111] Mr. Gonzalez described the magnitude of these variances as follows:

> The table below shows for each quarter since the last quarter of 2009 to the end of 2011, the factor by which FirstEnergy's AER

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[106] Direct Testimony of Robert Earle at 7-8.

[107] *Id.*

[108] Direct Testimony of Wilson Gonzalez at 14-15. FirstEnergy witness Earle's Attachment RE-12 indicates that 5 other states beside Ohio have an in-state requirement and 8 states have a state delivery requirement.

[109] *Id.* at 10-11.

[110] *Id.* at 11.

[111] *Id.*

> rate was higher than the other Ohio utilities. For example, FirstEnergy paid from 5.3 to 43.3 times what DP&L paid for renewable compliance from 2009-2011. FirstEnergy paid from 3.0 to 9.6 times what AEP-Ohio paid. And FirstEnergy paid from 0.4 to 18.1 times what Duke paid for renewable compliance.[112]

As additional evidence that these numbers are a "good proxy for how much FirstEnergy overpaid for In-State All Renewable RECs,"[113] Mr. Gonzalez reviewed 2010 and 2011 market prices reported by SNL Financial, LLC.[114] While these numbers did not begin to be reported until the beginning of 2011, they show that 2010 vintage In-State All Renewable RECs were priced at approximately $37.00 per REC toward the end of 2010 and had a continued downward trajectory at that point in time.[115] Mr. Gonzalez also compared prices for In-State Solar RECs with All-States Solar RECs and found that the in-state product generally varied "by a factor less than two."[116] Thus, the assumption that an In-State product in a nascent market will be many times the price of an All States product is simply contrary to the facts at hand.

Finally, OCC would emphasize that reports from other states indicated that prices of non-solar RECs were selling at [redacted] than FirstEnergy paid. Pennsylvania's 2009 annual report of REC prices indicated a high price of non-solar RECs of $23 per REC, with a weighted average price of $3.65 per Tier 1 non-solar REC.[117] 2010 non-solar REC prices in Pennsylvania were slightly higher, with a high price of $24.15 per Tier I non-solar REC and a weighted average price of $4.77 per Tier I

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[112] *Id.* at 10 & fn. 9; *See also,* id. at Exhibit WG-2 (showing that the development of the numbers on page 10 controlled for customer shopping volumes).

[113] *Id.* at 11.

[114] Direct Testimony of Wilson Gonzalez, at Attachment 2.

[115] *Id.*

[116] *Id.* at 11, fn.11 & Attachment 1.

[117] Transcript Volume I-public, pp. 174-175.

non-solar REC.[118] And Pennsylvania prices for 2011 had a high price of $50.00 per Tier 1 non-solar REC and a weighted average price of $3.94 per Tier I non-solar REC.[119]

In summary, Mr. Gonzalez concluded that the prices paid by FirstEnergy for In-State All Renewable RECs was "unprecedented" "anywhere or anytime in the country for non-solar RECs," and this was "evident from available data."[120] Further, "[a]lthough other REC market data may not have been readily available for the nascent market in Ohio, to assume that Ohio was such an outlier from every other state is mind-boggling."[121]

b. FirstEnergy's decisions are additionally suspect because [redacted] benefited from FirstEnergy's imprudent decisions to purchase in-state all renewable energy credits at grossly excessive prices that it would charge to customers.

i. FirstEnergy knew that it was purchasing grossly over-priced Renewable Energy Credits from [redacted] that it would charge to its customers.

FirstEnergy knew that [redacted] would benefit from FirstEnergy's decision to purchase In-State All Renewable Energy Credits at grossly excessive prices. It was the members of FirstEnergy's internal review team who made the decision whether the recommendations of Navigant in regard to the procurement of renewable energy credits would be accepted.[122] It was unnecessary for the internal review team to know

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[118] *Id.*

[119] Transcript Volume I-public, page 172, OCC Exhibit 2 – Pennsylvania Alternative Energy Credit Program.

[120] Direct Testimony of Wilson Gonzalez at 18.

[121] *Id.*

[122] Transcript Volume II-public, p. 306.

the identities of the qualified bidders in order to make the decision to purchase RECs.[123] But FirstEnergy never directed Navigant to exclude the bidder identities from the internal review team.[124] And Navigant provided the names of the qualified bidders to the internal review team.[125]

The internal review team knew the identities of the bidders when making their decisions whether to purchase the renewable energy credits. This fact became evident when Mr. Bradley testified that [redacted][126] [redacted][127] [redacted][128]

The Exeter Auditor was not aware that [redacted][129] Had FirstEnergy disclosed this fact to the Exeter Auditor, it may have impacted the Auditor's findings.

ii. FirstEnergy should have known that the grossly excessive prices paid for In-State All Renewable Energy Credits contained significant economic

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

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

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

[126] Mr. Stathis testified that Ebony Miller was a member of the internal review team from 2009-2011. Transcript Volume II-public, p. 307-308.

[127] Transcript Volume I-confidential, pp. 202-204.

[128] Transcript Volume I-confidential, p. 204.

[129] [redacted]

rents to [redacted] especially given the market power exhibited by [redacted] in this segment of the market.

The Exeter Auditor and OCC witness Gonzalez both agreed that FirstEnergy should have known "that the prices bid by [redacted] reflected significant economic rents[130] and were excessive by any reasonable measure."[131] The Exeter Auditor made clear that any absence of market information should not have led to a conclusion that prices in the Ohio market for In-State All Renewables would have differed "so markedly from the cost of renewable development elsewhere in the country" where the "underlying economic factors" (such as the costs of developing a newable project) associated with pricing of RECs "are the same."[132] Also, all the In-State All Renewables REC price indicatives in the record are less than the $45 dollar ACP. [133] This evidence supports a scenario where [redacted] would have been able

[130] At least three definitions were provided for economic rent in this proceeding. OCC witness Gonzalez used a more lay person definition, "excess returns above normal levels that take place in competitive markets," Direct Testimony of Wilson Gonzalez, at 33. FirstEnergy witness Stathis' definitions are "extra returns due to positional advantage." Transcript Volume II-public, page 348, and "if somebody has an advantage...," Transcript Volume II-public, page 352. FirstEnergy witness Earle discusses a scarcity rent on pages 13-14 of his testimony, "If the market clears where the (now vertical) supply curve hits the demand curve, there is a scarcity rent, as shown in the figure." All three definitions are in agreement in acknowledging that the supplier is in an advantageous position relative to the market.

[131] Exeter Audit Report (Redacted) at iv, Direct Testimony of Wilson Gonzalez at 33.

[132] Exeter Audit Report (Redacted) at 30. As discussed further below, the "underlying economic factors" associated with REC pricing referred to by the Exeter auditors recognizes that "the price of RECs should be adequate to cover the higher costs of generation using renewable technologies, subject to the economic impacts of the differences in state legislation." *Id.* A quantification of this proposition with Ohio specific data is contained in Transcript Volume I-public, at 88, FirstEnergy Exhibit 5 Appendix B: CREST Analysis Documentation, in "Alternative Energy Resource Market Assessment," a report for the Public Utility Commission of Ohio, September 2011, pages 62-66. The estimation of the REC Revenue Requirement ranges from $10 to $30 for the Base and High Scenarios modeled. Finally, wind price and cost data is contained in the "Annual Report on U.S. Wind Power Installation, Cost, and Performance Trends: 2007" (attached to the Direct Testimony of Wilson Gonzalez) that indicates on page 17 that Cumulative Capacity-Weighted Wind Power Prices never exceeded $50/MWH from1998 – 2007.

[133] *See* Direct Testimony of Wilson Gonzalez, at Attachment 2; Direct Testimony of Daniel R. Bradley, at Attachment DRB-2 (showing Ohio indicative REC pricing starting as early as July 2010).

to purchase the RECs[134] at or below the [redacted] price and then resell them to FirstEnergy at up to [redacted] per REC, realizing sizable economic rents—at the expense of utility customers.

Moreover, the memorandum of Navigant Consulting to FirstEnergy, dated October 18, 2009, is very informative concerning [redacted]

[redacted][136]

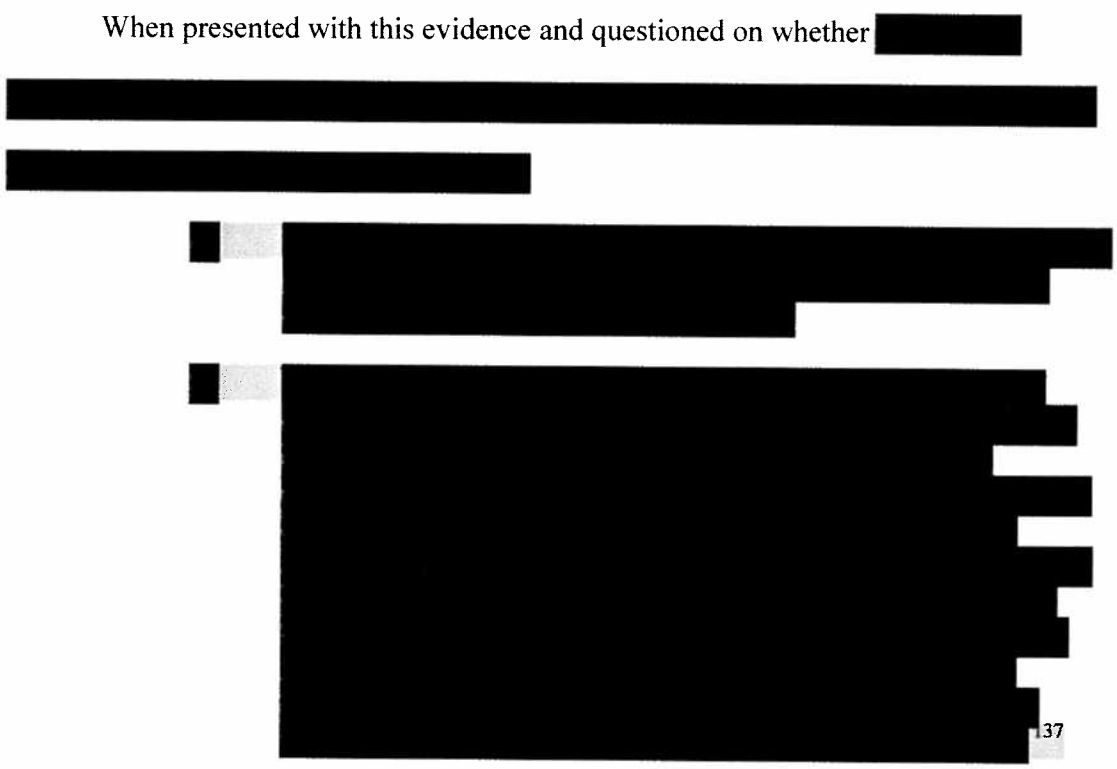
By any stretch of the imagination, the [redacted] provided by Navigant to FirstEnergy should have alerted FirstEnergy that [redacted]

[134] FirstEnergy witness Mikkelsen recalled that [redacted] once owned a facility known as Bayshore. However, when questioned whether she was aware of any other renewable facility owned by [redacted] she indicated "no." She also indicated that she worked for [redacted] from 1998 through June 14, 2010. Transcript Volume III-public at 508-509.

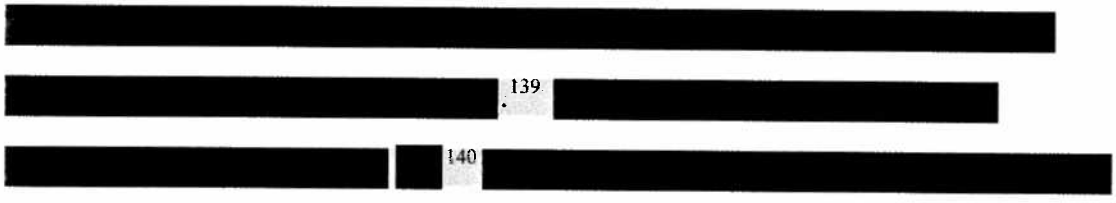
[135] OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-Confidential, at pg. 4 of 10. Navigant also goes on to say that [redacted]

[136] *Id.*

When presented with this evidence and questioned on whether



Finally, the fact that FirstEnergy asked Navigant to present a price counter-offer to in response to its bid in RFP 3 is a resounding admission that significant economic rents were contained in bids.[138]



[137] Transcript Volume II-public, page 352. (Emphasis added.)

[138] Direct Testimony of Dean W. Stathis at 35-36.

[139] Transcript Volume I-confidential, page 202.

[140]

[redacted][141] [redacted]

[redacted][142] With that one transaction alone, FirstEnergy had over [redacted] reasons to know that the prices bid by [redacted] reflected significant economic rents.

Indeed, Navigant witness Bradley indicated that FirstEnergy was probably in a position where it could have [redacted]. In this respect, he stated:

[redacted][143]

The fact was that at the time in August 2010 that FirstEnergy determined to pay [redacted] per REC for 145,269 2011 RECs, the market was easing and pricing information was becoming more readily available. Indeed, at about that time, on August 12, 2010, the Spectrometer report was first published, which showed prices for Ohio In-State Non-Solar RECs of between [redacted] and [redacted][144] per REC.

iii. A Renewable Energy Credit Request for Proposal, even if competitively sourced, does not necessarily equate to a competitive result.

FirstEnergy spent a lot of time and effort in this proceeding trying to convince the Commission that a competitively sourced Renewable Energy Credit Request for Proposal

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[141] Transcript Volume I-confidential, page 203-206.

[142] Transcript Volume I-confidential, page 207-208.

[143] Transcript Volume I-confidential, page 205.

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

("REC RFP") (and RFP process) automatically yields a competitive outcome.[145] The problem with FirstEnergy's argument is that a competitively sourced REC RFP may be a necessary condition towards attaining a competitive result, but not a sufficient condition. As stated by OCC witness Gonzalez:

> Q. Thank you. Mr. Gonzalez, you were asked questions about the design of the competitive process. My question to you is, a process that is designed to obtain a competitive outcome, does it always actually result in competitive results?
>
> A. No, it doesn't. It depends on what the nature of the market is. You -- you could have a -- you could have a competitive -- a competitive process, but if the market has conditions, for example, where there is a large supply that's controlled by an individual supplier, that may not lead to a competitive outcome.[146]

OCC witness Gonzalez' opinion that a competitive process does not always obtain a competitive outcome is illustrated by the testimony of FirstEnergy witness Dean Stathis. Mr. Stathis' direct testimony highlights the concerns that FirstEnergy had with the results of RFP 3. In fact, against the advice of Navigant to purchase 145,269 2011 RECs at the [redacted] per REC bid price, FirstEnergy made a counter-offer to one of two bidders—the high bidder—in RFP 3. Ultimately, that [redacted] accepted $24 million dollars less for its RECs than it requested in its bid.[147]

Furthermore, if a competitive outcome could be accomplished with a single bidder, then it would not be necessary for Ohio law to mandate that at least 4 suppliers bid into

[145] Direct Testimony of Dean W. Stathis, at 2 (stating "...the process used by the FEOUs was open, transparent and produced a competitive price").

[146] Transcript Volume III-public, page 639.

[147] Direct Testimony of Dean W. Stathis at 35-36.

an SSO auction to protect consumers from market power.[148] The fallacy of FirstEnergy's argument is apparent when [redacted] is the only bidder in the first 2 RFPs for In-State All Renewable RECs.[149]

That the RFP process in a constrained market exhibiting market power yielded prices up to 15 times the ACP and produced prices not seen anywhere else in the country should not surprise anyone.[150] What did surprise the Exeter Auditor and OCC witness Gonzalez is that FirstEnergy accepted the grossly excessively priced bids from [redacted] when FirstEnergy had other alternatives available to it. When all is said and done, the heart of this case can be summarized as one where sound management judgment for people (the customers) was suspended in the name of profit. This favoring of profit over people will be to the great detriment of FirstEnergy's customers unless the PUCO acts within its authority to give them the protection of the law.

iv. FirstEnergy's decision to pay grossly excessive prices for In-State All Renewable Energy Credits in 2009 and 2010 for years 2010 and 2011 compounds a poor decision and adds insult to injury to its customers.

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

[148] R.C. 4928.142(C)(2)); *see also* Direct Testimony of Wilson Gonzalez at 19.

[149] Direct Testimony of Wilson Gonzalez at 18; Exeter Audit Report (Redacted) at 4.

[150] Exeter Audit Report at 28.

for 2010 and 2011.[151] This is especially the case since alternatives such as *force majeure* and paying an ACP were available to 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.[152] 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,[153] 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 the two alternatives available to FirstEnergy while the Ohio In-State All Renewables market 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."[154]

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

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

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

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

[154] Direct Testimony of Wilson Gonzalez at 17.

years."[155] 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 and/or should have made the ACP in lieu of purchasing such outrageously priced RECs."[156] 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.[157] Such imprudent decisions must be remedied by this Commission, for customers.

v. To protect its customers, FirstEnergy should have conducted an additional level of review for its renewable energy purchases given that the only bidder for RFPs 1 and 2 [redacted]—and that, for RFP 3, a second bidder had submitted a bid that underscored the excessive prices being extracted by [redacted].

Given the gross excessiveness of the prices offered by a single supplier in RFP 1 and RFP 2 and of the negotiated price in RFP 3, and considering the fact that the single supplier [redacted], it is evident that FirstEnergy should have performed an additional level of review with respect to these bids for In-State All Renewable RECs.[158] As OCC witness Gonzalez testified:

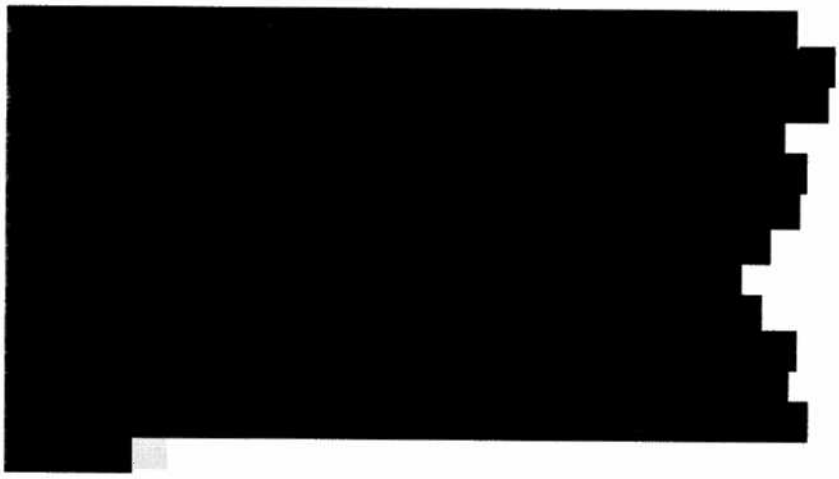
> FirstEnergy's purchase of excessively priced RECs, [redacted]

[155] *Id. at 17.*

[156] *Id.*

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

[158] *See* Direct Testimony of Wilson Gonzalez at 19.



2. FirstEnergy had reasonable alternatives available to it, that it could have exercised to protect its customers—in lieu of purchasing in-state all renewable energy credits at grossly excessive prices from

FirstEnergy takes the position that, under Ohio law and regulations, it had no choice but to purchase the RECs at grossly excessive prices. To support this argument, Mr. Stathis testified that "given the undisputed fact that RECs were available for purchase, there was no basis for the Companies to simply reject the bids."[160] But both the Exeter Auditor and Mr. Gonzalez found that Ohio's regulatory scheme provided FirstEnergy with several alternatives to the purchase of these RECs, for protecting customers.[161] In other words, there was a basis to reject the bids and bids had been clearly established as non-binding. OCC submits that these alternatives were practical and appropriate means to prevent significant harm to customers.

[159] Direct Testimony of Wilson Gonzalez at 18-19. In fact, AEP-Ohio's 2008 renewable RFP contained an prohibition. Transcript Volume III-public at 565.

[160] Direct Testimony of Dean W. Stathis at 31.

[161] Exeter Audit Report at 31-33; Direct Testimony of Wilson Gonzalez at 21-30.

a. FirstEnergy should have consulted with the PUCO before purchasing excessively priced in-state all renewable energy credits from [redacted]

One course of action for FirstEnergy was to present the purchasing issue posed by the excessively priced RECs to the PUCO Staff for an informal review. Yet, according to the Exeter Auditor, "the Companies indicated during the April 20, 2012 interview that approaching the Commission and explaining the circumstances of the solicitation results was not considered."[162] The Exeter Auditor commented on this significant shortcoming in FirstEnergy's consideration of this issue:

> While the Companies were under no statutory obligation to obtain approval by the Commission for RECs purchases, the prices for the In-State All Renewables RECs that were received through the solicitation process were so far above customary prices that consultation with the Commission should certainly have been at least considered by the Companies prior to transacting.[163]

While consultation with the PUCO Staff would have presented no guarantee, it would have given the PUCO Staff an opportunity to provide meaningful guidance to help FirstEnergy avoid an imprudent decision. The Exeter Auditor, therefore, placed appropriate emphasis on consultation with the PUCO as an important alternative.

b. To protect its customers, FirstEnergy should have applied for a *Force Majeure* upon receiving bid proposals from [redacted] that were grossly excessive.

In addition to the alternative of consulting with the PUCO Staff, Ohio's alternative energy portfolio standards ("AEPS") permits an electric distribution utility or electric service company to request a *force majeure* determination. Such a determination

[162] Exeter Audit Report at 32.

[163] *Id.*

should be granted, with respect to all or part of a compliance obligation, if the PUCO finds that the RECs were not "reasonably available."[164] This provision provides for prompt action by the Commission – within 90 days of a *force majeure* request.[165] Both the Exeter Auditor and OCC witness Gonzalez testified that the market constraints and resulting prices from a single bidder made In-State All Renewable not "reasonably available" in the Ohio market during the first year of compliance in 2009.[166] As OCC witness Gonzalez testified:

> Moreover, given the excessive In-State All Renewable [redacted], FirstEnergy could have filed a case before the Commission for *force majeure* by demonstrating that In-State All Renewable RECs were not reasonably available in the marketplace in sufficient quantities. The fact is that when a market is constrained and supply is limited, prices will tend to be high. Therefore, a filing of *force majeure* would have been a prudent alternative for FirstEnergy to pursue, an alternative that would have prevented FirstEnergy from charging Ohio consumers [redacted].[167]

Furthermore, the Exeter Auditor noted that even if there was some merit to FirstEnergy's claim that they were compelled to purchase 2009 RECs before the end of the year at whatever price was offered (which OCC submits would be a plainly unreasonable interpretation of the law), FirstEnergy was certainly not compelled to do so with respect to 2010 and 2011 RECs, and it was not compelled to purchase 2011 RECs in 2010.[168] Although the Exeter Auditor recognized that forward projections are never certain, historic data from other compliance markets showed that "prices would be

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[164] R.C. 4928.64(C)(4).

[165] *Id.*

[166] Exeter Auditor Report, at 32; Direct Testimony of Wilson Gonzalez at 21-22.

[167] Direct Testimony of Wilson Gonzalez at 23.

[168] Exeter Audit Report at 32.

declining and that RECs would be increasingly available as markets respond to the newly created demand for RECs."[169]

And if In-State All Renewable RECs were not available in later years, Exeter concluded that "the Companies would have had a basis for requesting a *force majeure* determination by the Commission." [170] Yet even in August 2010, when FirstEnergy received a bid of [redacted] per REC for 5,000 In-State All Renewable RECs from another supplier,[171] FirstEnergy still paid [redacted] for 145,269 In-State All Renewable RECs at a total cost of [redacted].[172] In doing so, FirstEnergy paid nearly [redacted] it had paid under any individual contract for the purchase of In-State All Renewable RECs. Had FirstEnergy waited until the following year to purchase these RECs at the weighted average price paid of [redacted] per REC for RFP 6 in November 2011,[173] FirstEnergy would have paid [redacted] or approximately [redacted]% of what was actually paid.[174]

The *force majeure* provision under the AEPS provides that the Commission will make a determination "if renewable energy resources are *reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period.*"[175] The AEPS further provide the following guidance:

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[169] Exeter Audit Report at 33.

[170] *Id.*

[171] Direct Testimony of Daniel R. Bradley at 41-42.

[172] Exeter Audit Report at 28, Table 5.

[173] *Id.* at 25, Table 4

[174] 145,269 X [redacted]

[175] R.C. 4928.64(C)(4)(b) (Emphasis added.)

> In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.[176]

Although the phrase "reasonably available" is not defined in the AEPS, what is evident is that the Commission has the authority to make this determination and to consider whether the EDU or Electric Services Company ("ESC") acted in "good faith." Given the significant cost at issue, it was evident that "reasonable" availability meant price and other terms as well as "availability." Furthermore, given the significant costs at issue, it should have been evident that the Commission has an amount of discretion in its application of this provision. And, under the circumstances, a *force majeure* request to the Commission was an essential part of FirstEnergy's obligation to its customers to protect them from unreasonable prices and terms of acquiring renewable energy.

That result was per a plain reading of R.C. 5928.64(C)(4)(b).[177] The Commission's decisions in other proceedings support this interpretation. For example, in a 2011 case,[178] the Commission directly addressed the question if price was a factor to be considered in determining whether RECs were reasonably available. The Commission

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[176] *Id.*

[177] R.C. 1.42.

[178] *In the Matter of Direct Energy Business LLC for a Waiver from Meeting the 2010 Ohio Sited Solar Energy Resource Benchmarks,* Case No. 11-2447-EL-ACP, 2011 Ohio PUC LEXIS 931, PUCO Finding & Order (Aug. 3, 2011).

accepted Direct Energy's request for a *force majeure* determination based on the fact that the market price of SRECs exceeded the alternative compliance payment.

The Commission did not follow the PUCO Staff's position that Direct Energy should consult with Staff if the price of SRECs exceeds the ACP. Instead, the Commission held:

> DEB states that the market for SRECs has not yet developed fully and that the asking price for in-state SRECs is above the ACP amount. In light of the preceding, the Commission finds that DEB has presented evidence that an insufficient quantity of in-state SRECs for 2010 was reasonably available in the market to facilitate DEB's compliance with its benchmark. As we have recognized in numerous proceedings today, other electric utilities and electric services companies likewise experienced difficulties in meeting their in-state SER benchmarks for 2010. It is apparent that the market for in-state solar resources is still advancing to the point at which there will be sufficient resources available for all electric utilities and electric services companies to be able to meet the statutory standard, which was merely in its second year of implementation in 2010. However, although we have found today that an adequate market for in-state SRECs did not exist in 2010, the Commission expects all electric utilities and electric service companies to fully comply with the statutory requirement to engage in good faith efforts to acquire sufficient solar energy resources as set forth in Section 4928.64(c)(4)(b), Revised Code.[179]

Similarly, in another 2011 case,[180] the PUCO Staff argued that "there is no statutory or regulatory requirement that establishes the applicable ACP as a pricing threshold that cannot be exceeded."[181] Declining to adopt that position, the Commission

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[179] *Id.* at 9-10.

[180] *In the Matter of the Application by Noble Americas Energy Solutions LLC for a Waiver from 2010 Ohio Sited Solar Energy Resource Benchmarks,* Case No. 11-2384-EL-ACP, 2011 Ohio PUC LEXIS 944, PUCO Finding & Order (Aug. 3, 2011).

[181] *Id.*

granted *force majeure* to Noble Americas, finding that "demand has so far outstripped the supply that the asking price for in-state 2010 SRECs is above the ACP amount."[182]

Furthermore, the Commission has recognized that the limited time available for development of the REC market is appropriately a factor considered in determining whether EDUs or ESCs have made a good faith effort to comply with the AEPS mandates. For example, in a case involving DPL Energy Resources, the Commission stated that "recognizing the limited time available for the development of new SERs [Solar Energy Resources] to meet the statutory standard in its first year, the Commission finds that DPLER's request for a *force majeure* determination is reasonable and should be granted."[183] Similarly, in connection with an application filed by FirstEnergy Solutions, the Commission stated that it "recognizes that its certification process for SRECs was in its infancy in 2009, and, as such, a limited number of SRECs were available." The PUCO thus was appropriately taking into consideration the limitations resulting from regulatory lag as well as the challenges of an infant marketplace in determining whether good faith efforts had been made.[184]

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[182] *Id.*

[183] *In the Matter of the Application of DPL Energy Resources Inc. for an Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code,* Case No. 09-2006-EL-ACP, 2011 Ohio PUC LEXIS 371, PUCO Finding & Order (Mar. 23, 2011) (emphasis in original).

[184] *In the Matter of the Application of FirstEnergy Solutions Corp. for Approval of its Alternative Energy Annual Status Report and for an Amendment of its 2009 Solar Energy Resources Benchmark Pursuant to Section 4928.64(C)(4)(a), Revised Code,* Case No. 10-467-EL-ACP, 2011 Ohio PUC LEXIS 238, PUCO Finding & Order (Feb. 23, 2011); *see also, In the Matter of Duke Energy Retail Sales, LLC's Annual Alternative Energy Portfolio Status Report & In the Matter of Duke Energy Retail Sales, LLC's Request for Force Majeure Determination,* Case No. 10-508-EL-ACP & Case No. 10-509-EL-ACP, 2011 Ohio PUC LEXIS 255, PUCO Finding & Order (Feb. 23, 2011) (reaching similar conclusions regarding the infant state of the Commission's certification process and state of the market); *In the Matter of the Application of the Retail Electric Supply Association for an Amendment to the 2009 Solar Energy Resource Benchmark Pursuant to Section 4928.64(C)(4), Revised Code,* Case No. 10-428-EL-ACP, 2010 Ohio PUC LEXIS 455, PUCO Finding & Order (Apr. 28, 2010) (recognizing that the Commission's rules did not become effective until December 10, 2009 and that the certification process for S-RECs was in its infancy).

Thus, the terms "reasonably available" and "good faith effort" reflected the General Assembly's recognition that the application of the *force majeure* provisions of the law would be driven by factual circumstances, and should take into account a range of considerations, including the price at which RECs or SRECs were available, the length of time the market had to develop, the period during which necessary rules of implementation were in effect, the status of the certification process, and other factors

To the extent that FirstEnergy relied on Navigant's recommendation to purchase the RECs, as discussed above, it is essential to recognize that, as Mr. Bradley testified, Navigant's recommendations were made strictly from the standpoint of REC availability without any consideration of whether *force majeure* could be obtained or compliance payments could be made as alternatives to the purchase of RECs.[185] Indeed, as discussed above, Navigant's recommendations [redacted]

Moreover, as OCC witness Gonzalez emphasized, while FirstEnergy had no difficulty in "seeing the wisdom of a *force majeure* request" in the absence of bids for In-State Solar RECs, it "lacked this wisdom when it came to purchasing In-State All Renewable RECs at excessive prices [redacted][186] And FirstEnergy could not explain the basis for this conclusion to the Exeter Auditor because they "do not believe it is appropriate to render a legal opinion on this matter."[187]

[185] Transcript Volume I-public, pages 169, 172.

[186] Direct Testimony of Wilson Gonzalez at 26.

[187] Exeter Audit Report at page 31, footnote 18; Direct Testimony of Wilson Gonzalez at Exhibit WG-4.

In reality, FirstEnergy's decision-making was highly reliant on legal interpretation. The entire structure of the RFPs is set up based upon legal and regulatory, as well as business, considerations. It is, and has been, disingenuous for FirstEnergy to selectively decline to express a position on what obligations the AEPS law imposed when the entire renewables program is organized around legal obligations associated with meeting the benchmarks, how to calculate those benchmarks, what resources can be used to meet those benchmarks, to what periods of time the benchmarks apply, how long RECs can be banked, etc.

But when it comes to interpreting those provisions of the law that would enable FirstEnergy to obtain relief from meeting the benchmarks, *i.e., force majeure and compliance payment provisions,* FirstEnergy's management is unable to express an opinion or advise the Exeter Auditor regarding the basis for their decisions or position. As Mr. Gonzalez testified: "Its decision-making was apparently driven by its interpretation of the law. But it refused to provide the auditor with the basis for that interpretation."[188]

Additionally, it appears to be FirstEnergy's position that if it were successful in obtaining *force majeure* determinations with respect to the In-State All Renewable RECs, FirstEnergy's compliance obligations may nonetheless be increased in subsequent years to make up for the shortfall for which it was granted *force majeure.*[189] The law is clear that the Commission *may* increase compliance obligations in subsequent years in

[188] Direct Testimony of Wilson Gonzalez at 26.

[189] Direct Testimony of Dean W. Stathis at 44-45.

response to *force majeure* requests.[190] And the Commission has done so in a number of cases.[191] But the fact that the Commission might increase compliance obligations in subsequent years as the market eased should not have prevented FirstEnergy from requesting *force majeure* when the market was highly constrained and the price and other terms demanded by suppliers made In-State All Renewables RECs not "reasonably available."

c. If FirstEnergy had made a Force Majeure request and the PUCO had rejected it, then FirstEnergy could have made a compliance payment.

Another alternative, recommended by the Exeter Auditor and OCC but dismissed by FirstEnergy, was to make compliance payments at the applicable rate -- $45 per REC for 2009.[192] Those payments would be in lieu of purchasing the RECs if the Commission found that FirstEnergy's under-compliance or noncompliance was avoidable.[193] Under the law, compliance payments would be required by the Commission in its annual review pursuant to R.C. 4928.64(C)(1) and 49286.64(C)(2) if the Commission found that the under compliance or noncompliance was avoidable.

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[190] R.C. 4928.64(C)(4)(c) provides that if the Commission determines that renewables are "not reasonably available . . . the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding." Further, such a determination "shall not automatically reduce the obligation for . . . compliance in subsequent years. *Id.* Finally, subsection 4928.64(C)(4)(c) provides that if it modifies an obligation under the *force majeure* provision, it "***may*** require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section." *Id.*

[191] With respect to In-State Solar RECs, FirstEnergy filed for *force majeure* in prior Case Nos. 09-1922-EL-ACP, 10-499-EL-ACP and 11-2479-EL-ACP. In 09-1922-EL-ACP, the Commission increased the 2010 SREC benchmarks by the 2009 shortfall. *See* Direct Testimony of Wilson Gonzalez at 24.

[192] In accordance with R.C. 4928.64(C)(2)(b), compliance payments for All Renewables RECs are $45 per REC in 2009 and such amount is adjusted annually in accordance with the consumer price index, but not less than $45 per REC.

[193] R.C. 4928.64(C)(1).

According to the law, the Commission, in its review, "shall identify any under compliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control."[194] Again, OCC would emphasize that, even with the application of compliance payments, the Commission must consider whether there were "resource shortages" and whether the under-compliance or noncompliance is outside of the control of the EDU. Given this provision and under the circumstances, OCC submits that FirstEnergy would have had a reasonable basis to claim that its under-compliance with respect to 2009-2011 RECs was due to resource shortages and was outside of its control given the nascent market in which it was purchasing.

Had FirstEnergy paid the compliance payments in lieu of purchasing the In-State All Renewable RECs at grossly excessive prices, the costs under discussion for possible consumer payment would have been much less. The costs would have amounted to [redacted][195] rather than the [redacted][196] The latter figure is what consumers will be billed for the excessively priced In-State All Renewable RECs that were purchased from [redacted].

However, FirstEnergy has taken the position that subjecting the utility to compliance payments was not a realistic option since, under the law, if RECs were available for purchase at any price, ***compliance payments are not to be passed through***

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[194] *Id.*

[195] This amount can be calculated by [redacted] from data shown in the Exeter Audit report, Table 5, p. 28 or from Mr. Gonzalez's Confidential Revised Exhibit WG-3.

[196] *See* Direct Testimony of Wilson Gonzalez at Confidential Revised Exhibit WG-3.

to consumers under the terms of R.C. 4928.64(C)(2)(c). In other words, FirstEnergy, because its shareholders would be responsible for the amount of any compliance payments imposed by the PUCO, instead elected to purchase these high-priced RECs at an expense to customers of [redacted] the amount of such compliance payments.

The Exeter Audit Report summarized the position expressed by FirstEnergy at Exeter's interview of FirstEnergy personnel on April 20, 2012:

> The issue of reliance on the ACP as an alternative to the procurement of the high-priced RECs was raised during the April 20, 2012 interview with FirstEnergy Ohio utilities and Navigant Consulting personnel. During the interview, the personnel from the Companies expressed the perspective that the Alternative Compliance Payment is not an alternative to procuring RECs. In a separate request for information, the Companies were unwilling to provide a legal opinion on this issue, but noted that there is no language in the legislation to suggest that the Alternative Compliance Payment is an alternative to compliance through the procurement of RECs.[197]

Additionally, it appears to be FirstEnergy's position that, similar to its position on *force majeure,* making compliance payments would not necessarily relieve FirstEnergy of its obligation to purchase RECs. And it is FirstEnergy's position that its compliance obligations may be increased in subsequent years to make up for under-compliance in earlier years.[198] However, it also is clear from a plain reading of the statute (R.C. 4928.64(C)(5)) that there is nothing indicating that compliance obligations are not resolved through the making of compliance payments.[199] Rather, the law provides that, after the Commission's annual studies of the AER market, the Commission "***may*** increase the amount [of the compliance payment] to ensure that payment of compliance

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[197] *Id.* at 25 (citing FirstEnergy's Response to Exeter Associates' Request for Information, Set 5, Item 3).

[198] *See id.* at 28.

[199] R.C. 4928.64(C)(5).

payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources."[200] Neither this provision, nor any other provision in the law, indicates that compliance obligations are not resolved when compliance payments are made. FirstEnergy's position in this respect is simply unsupported by the law.

As OCC witness Gonzalez noted, the Commission has followed the law in accepting compliance payments in lieu of meeting compliance obligations, without any additional requirement imposed in subsequent years to meeting increased compliance obligations.[201] Mr. Gonzalez further testified on this point:

> In both cases, the Commission approved the individual compliance filings and accepted the compliance payment in lieu of purchased RECs. Although a number of Ohio utilities have been required in Commission Orders concerning "force majeure" to increase their REC purchase obligations in the following years, this would not necessarily have been required, nor should the possibility of having to purchase additional RECs in future years have deterred FirstEnergy from making the alternative compliance payment where prices were so grossly excessive. Therefore, paying the ACP was a viable alternative for FirstEnergy, one that could have saved consumers [redacted].[202]

3. FirstEnergy lacked a Contingency Plan to protect customers

One of the Exeter Auditors' primary criticisms of FirstEnergy's purchasing practices was that, at the time of its RFPs that are the subject of this proceeding, FirstEnergy did not have a contingency plan in place to address the grossly excessive

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[200] R.C. 4928.64(C)(5).

[201] Direct Testimony of Wilson Gonzalez at 29-30 (citing *In the matter of the Annual Alternative Energy Compliance Report of Glacial Energy*, Case No. 11-2457-EL-ACP, PUCO Finding and Order (Aug. 29, 2010); *In the matter of the Smart Papers Holdings LLC Portfolio Status Report*, Case No. 11-2650-EL-ACP, PUCO Second Finding and Order (Oct. 3, 2012) (adding compliance obligations for force majeure determinations but not for compliance payments made in lieu of purchases)).

[202] *Id.* at 30-31.

REC pricing with which it was presented.[203] Instead, FirstEnergy "indicated that it relied on the 'FirstEnergy Corp FE Utilities Commodity Portfolio Risk Management Policy' to provide guidance on contingency planning" for this period.[204]

However, Exeter reviewed these documents for 2009-2011, and it found that "***there is no requirement for contingency planning contained therein***."[205] Dr. Estomin testified that none of First Energy's Risk Management Policies – for 2009, 2010, or 2011 -- contained a contingency plan. [206] FirstEnergy never provided any testimony to the contrary.

Nonetheless, FirstEnergy's witness Stathis defended the absence of a written contingency plan, contending that "contingency events are contemplated in regulated procurements as part of a well-structured competitive solicitation process."[207] However Mr. Stathis did acknowledge on cross-examination there was no "downside to specifically laying out a written contingency plan specifically for renewables ...."[208] And Mr. Stathis also acknowledged that FirstEnergy has a written contingency plan for energy procured for Ohio.[209]

Despite testimony that FirstEnergy implemented "contingency events," the absence of a thoughtful, written contingency plan was clearly a factor contributing to these imprudent decisions. As Dr. Estomin testified:

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[203] Exeter Audit Report at 9-10, 12.

[204] Exeter Audit Report at 9.

[205] Exeter Audit Report at 9. (Emphasis added.)

[206] Transcript Volume II-public, pp. 52-53.

[207] Direct Testimony of Dean W. Stathis at 42-43.

[208] Transcript Volume II-public, p. 327.

[209] Transcript Volume II-public, pp. 326-327.

> Based on the actions undertaken by the FirstEnergy Ohio utilities following the issuance of the first RFP, the general approach was to re-issue RFPs with relatively minor modifications in hopes of attracting a larger pool of bidders than the previous RFP for particular categories of RECs. No formal contingency plan was in place to guide the follow-up actions of the FirstEnergy Ohio utilities in the event insufficient bids were received or if bid prices were excessive based on pre-established criteria.[210]

Exeter notes in its Audit Report that, in "follow-up to a discussion held among Exeter, PUCO Staff and the FirstEnergy Ohio utilities" FirstEnergy provided Mr. Stathis' testimony on behalf of FirstEnergy's Pennsylvania utilities for its default service plans for June 1, 2013 to May 31, 2015 as indicative of the efforts FirstEnergy would make to address contingencies.[211] However, Exeter found that the Pennsylvania contingency plan "entailed short-term purchases on the PJM spot market (which has no meaningful application to RECs markets) followed by inclusion of the unfilled (or defaulted upon) Default Service power supply tranches in the next available power supply RFP."[212]

As Exeter notes, these plans "have only limited applicability in Ohio with regard to the satisfaction of the Ohio AEPS" and "do not address the issue of unacceptable bids due to non-competitive pricing."[213] The plans, for purposes of Ohio – and they are not specific to Ohio – only provide that if the RFP is unsuccessful in obtaining bids, that another RFP is to be issued.[214] This limitation was also made clear to Exeter when it interviewed FirstEnergy's staff. Exeter's notes of that meeting state:

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[210] Exeter Audit Report at 9.

[211] Exeter Audit Report at 9.

[212] Exeter Audit Report at 9-10.

[213] Exeter Audit Report at 10.

[214] Exeter Audit Report at 10.

The fact that FirstEnergy did not have a contingency plan for purchasing RECs including, and in particular, how to address the circumstance of non-competitive pricing, was clearly imprudent. If there had been an adequate contingency in place, then FirstEnergy would have had to consider alternatives, such as consultation with the PUCO Staff, *force majeure* and alternative compliance payments in lieu of purchasing over-priced RECs [redacted].

The implementation of an adequate contingency plan would have prevented the purchase of In-State All-Renewable RECs at "grossly excessive" and "non-competitive" prices. As OCC witness Gonzalez testified, FirstEnergy did not have a contingency plan in place to handle a nascent and constrained REC market.[216] It was imprudent for FirstEnergy not to have such a plan in place. Neither FirstEnergy witness Mr. Bradley nor Mr. Earle took issue with the Exeter Auditor's finding that FirstEnergy's contingency planning was inadequate.

[215] OCC Ex. 1 (Confidential), p. 2.

[216] Direct Testimony of Wilson Gonzalez at 24, citing Exeter Audit Report at 9.

4. It Was Imprudent For FirstEnergy Not To Establish A Price Limit To Be Paid For The Purchase of In-State All Renewable Energy Credits, So That Ohio Customers Would Be Protected From Excessive Charges.

As part of the solicitation process, FirstEnergy retained the right to reject any and all bids. It therefore, had the option to simply reject all of [redacted] high-priced bids. But FirstEnergy did not reject the high-priced bids and never established a maximum price at which it would purchase the In-State All Renewable RECs.[217] The Exeter Auditor explained FirstEnergy's selection process as follows:

> The mechanism employed by the FirstEnergy Ohio utilities for purchasing RECs through the RFP process was to stack the conforming bids received from eligible bidders from lowest price to highest price and to purchase the number of RECs needed to comply with the In-State All Renewables requirement regardless of the price bid. No limit price was established by the Companies prior to the receipt of bids, that is, the Companies indicated that prior to the receipt of bids, the Companies did not establish a maximum price that they would be willing to pay for RECs, or a price that would trigger embarking on a contingency plan. Reliance on this approach resulted in the purchase of more than 337,000 In-State All Renewables RECs at prices between [redacted] and [redacted] dollars.[218]

Consequently, in making the recommendation to examine a disallowance in this matter, the Exeter Auditor found that "FirstEnergy Ohio utilities did not establish a maximum (or limit) price that the Companies were willing to pay for In-State All Renewables RECs prior to the issuance of the RFPs."[219]

In responding to the Exeter Auditor's finding that FirstEnergy's failure to establish a maximum price was a reason for this Commission to examine a disallowance,

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[217] Exeter Audit Report at 28-29, 32.

[218] Exeter Audit Report at 28-29.

[219] Exeter Audit Report at 33.

FirstEnergy witness Stathis testified that "RCS did not plan – and due to the paucity of market data, could not have planned – for a contingency if lowest priced bids exceeded a certain maximum or limit price that is not defined by SB221 or by the Commission's regulations."[220] Of course, this testimony depends upon Mr. Stathis's opinion, as informed by counsel, that the $45 alternative compliance payment would not have released FirstEnergy from its obligation to purchase the RECs for which it was making compliance payments. It is this position that is the crux of FirstEnergy's justification for its imprudent decision-making, and the Commission must recognize the fallacy of this position. Ohio's $45 ACP for non-solar RECs does create a regulatory price limit. FirstEnergy should plainly have recognized that regulatory price limit and established a hard price cap in their RFPs. Its failure to do so was grossly imprudent and it could not reasonably explain the basis for this position to the Exeter Auditor.

In particular, footnote 18 from the Exeter Audit Report describes FirstEnergy's inability to explain this as follows:

> The issue of reliance on the ACP as an alternative to the procurement of the high-priced RECs was raised during the April 20, 2012 interview with FirstEnergy Ohio utilities and Navigant Consulting personnel. During the interview, the personnel from the Companies expressed the perspective that the Alternative Compliance Payment is not an alternative to procuring RECs. In a separate request for information, the Companies were unwilling to provide a legal opinion on this issue, but noted that there is no language in the legislation to suggest that the Alternative Compliance Payment is an alternative to compliance through the procurement of RECs.[221]

Furthermore, although FirstEnergy's witnesses, in guiding the Company's purchasing decisions, had deferred to counsel for opinions on the application of the ACP,

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[220] Direct Testimony of Dean W. Stathis at 43.

[221] Exeter Audit Report at p. 31, n.18 (citing OCC Ex. 1 (Confidential).)

they nonetheless took up such opinions in their testimony, in some cases without reference to counsel. Specifically, while FirstEnergy's independent evaluator's scope of work did not include considering the ACP as an alternative, Mr. Bradley nonetheless opined on this issue in his testimony.[222] FirstEnergy's policy witness Mr. Earle opined that the Ohio ACP was not recoverable from customers. And he relied upon counsel for the opinion that compliance obligations were not released by making compliance payments.[223] And, despite his unwillingness to share his viewpoint with the Exeter Auditor at the February 20, 2012 meeting, Mr. Stathis now opines as if a legal expert in his testimony on this issue.[224]

OCC submits that the Exeter Auditor was correct in its determination that a maximum price should have been imposed on the purchase of In-State All Renewable RECs. This should have been set at the level of Ohio's ACP. The arguments that Ohio's ACP did not establish a regulatory price cap should be rejected. And FirstEnergy should be found to have been imprudent in ignoring the plain intent of the General Assembly, as well as the plain language of the law.

C. Relief Sought

1. The PUCO should disallow [redacted] that FirstEnergy paid for in-state all renewable RECs for compliance periods 2009 through 2011, because of FirstEnergy's imprudent purchasing decisions. And FirstEnergy should also refund to customers [redacted] in carrying costs associated with the recovery of such costs from customers.

As discussed above, the Exeter Audit Report recommended that the PUCO "examine the disallowance of excessive costs associated with purchasing RECs to meet

[222] Transcript – Volume I, pp. 184-185.

[223] Direct Testimony of Earle at 485

[224] Direct Testimony of Dean W. Stathis at 44-45.

the FirstEnergy Ohio utilities' In-State All Renewables obligations."[225] But the evidence shows that initially, the Exeter Auditor recommended, in the Draft Audit Report, that all costs incurred in regards to the procurement of In-State All Renewable Credits above $50/REC be excluded from recovery.[226]

OCC witness Gonzalez recommended and quantified a disallowance of FirstEnergy's In-State All Renewable RECs that "it unreasonably and imprudently purchased." The disallowance he recommended is [redacted] as shown on Exhibit WG-2 (Attached to the Direct Testimony of Wilson Gonzalez), which removes all In-State All Renewable REC purchases made during the audit period by FirstEnergy [redacted]. Additionally, Mr. Gonzalez recommended that [redacted] in carrying costs associated with customers' payments made to FirstEnergy for the imprudent AER charges be reimbursed.

Of this total amount of dollars recommended to be disallowed and reimbursed, Mr. Gonzalez recommended that a portion of the dollars, representing an "ACP equivalent payment for FirstEnergy's In-State All Renewable REC requirements" be deposited to the credit of the Advanced Energy Fund created under R.C. 4928.61. This amount is [redacted].[227]

Under R.C. 4928.64(C)(2(c) and Ohio Admin. Code 4901:1-40-08, amounts paid for compliance payments are to be paid to the PUCO to the credit of the Advanced Energy Fund. Although this amount would not technically be a compliance payment since the RECs were actually purchased, it is the amount that should have been paid to

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[225] Exeter Audit Report at iv.

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

[227] Direct Testimony of Wilson Gonzalez at 36.

the advanced energy fund in lieu of the purchases of these excessive priced Renewable Energy Credits. And "would have gone into promoting advanced energy, including incentives to renewable developers."[228] Mr. Gonzalez explained how the payments to the Advanced Energy Fund to provide incentives for renewables developers would have contributed to resolving the very issues for which FirstEnergy made its excessive payments:

> Those [renewables] developers [receiving incentives from the advanced energy fund] in turn would have developed more renewable energy projects in Ohio, increasing the supply of In-State All Renewable RECs. The increased RECs would have placed downward pressure on the price of In-State All Renewable RECs.[229]

2. The Commission should credit the amount of the disallowance plus carrying costs to the balance of the Rider AER, so that customers can receive the return of their money.

Upon a determination that a cost collected from customers through the Rider AER is unreasonable and should be disallowed (including any carrying costs assessed to that cost included in any unrecovered balances), the Commission should credit the amount of the disallowance to Rider AER with interest. By crediting Rider AER, customers should receive the benefits of the credit starting with the next quarterly Rider AER filing subsequent to a Commission order in this case.

A credit to a rider mechanism that carries a balance and is adjusted quarterly to determine future rates has been previously authorized by the Commission under similar circumstances. For example, in a Fuel Adjustment Clause (FAC) proceeding, the Commission determined that a credit against American Electric Power Company's (AEP-

[228] *Id.* at 31.

[229] *Id.*

Ohio) FAC under-recovery was appropriate when the Commission determined that AEP-Ohio had charged its customers more than its prudently incurred cost of fuel.[230] The Commission disallowed the pass through of the cost that was above and beyond its true, or actual, cost incurred for the purchase of fuel, and credited the disallowance to the FAC Rider.[231]

Similarly, in the case at bar, FirstEnergy passed on to customers the cost of RECs that were purchased at unreasonably high prices by charging customers through the AER Rider. The cost for those RECs purchased at an unreasonable price should be disallowed and a credit should be applied to the AER Rider, which will have the affect of adjusting the customers' AER Rider rates in subsequent quarters.

The application of such a credit is lawful and does not constitute retroactive ratemaking. The Commission has specifically addressed this issue in an analogous FAC case, stating:

> *Keco* does not apply in this situation. The Commission is not considering modifying a previous rate established by a Commission order through the ratemaking process as the Court considered in *Keco*. Rather, the Commission, by ordering [AEP-Ohio] to credit more of the proceeds from the Settlement Agreement to [AEP-Ohio's] deferral balance, is establishing a future rate based upon the real cost of the coal used by [AEP-Ohio] to generate electricity during the 2009 FAC audit period.[232]

In the instant proceeding, by crediting the disallowance plus interest to the AER Rider, the Commission would not be refunding unlawfully collected rates, but would be

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[230] *In the Matter of Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, Opinion and Order at 12 (Jan. 23, 2012), *reh'g denied*, Entry on Rehearing at 6 (Apr. 11, 2012), *appeal pending*, S.Ct. Case No. 2012-1484 ("FAC Case").

[231] *Id.*

[232] *Id.* at 13.

establishing a future rate based upon the reasonable price that should have been paid for RECs purchased by FirstEnergy during 2009, 2010, and 2011.

While the Ohio Supreme Court has not specifically addressed the acquisition of RECs, a comparison can be made to the Supreme Court's review of FAC procedures. The Court has historically advised, in cases involving FAC procedures, that "a distinction must be recognized between the statutory rate-making process involved in establishing fixed rate schedules, and the statutory procedure governing variable rate schedules under the fuel cost adjustment procedure."[233] The Court has noted that the function of the Commission is to determine whether rates as proposed are just and reasonable.[234]

In contrast, where an electric utility is authorized to pass on to its customers its reasonable costs incurred for compliance with the renewable energy resource benchmark (including any reasonable costs incurred in purchasing RECs), the rates are varied and independent from the formal rate-making process.[235] Additionally, in responding to retroactive ratemaking arguments, the Court recognizes the "filed rate doctrine" codified in Sections 4905.22 and 4905.32 of the Ohio Revised Code, but states that "it is axiomatic that before there can be retroactive ratemaking, there must, at the very least, be ratemaking."[236]

Therefore, consistent with Ohio law, the Commission should direct FirstEnergy to apply the amount of the disallowance plus interest to the AER Rider as a credit, which

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[233] *Office of Consumers' Counsel v. PUCO* (1979), 57 Ohio St.2d 78, 82, 38 N.E.2d 1343, 1346.

[234] *Id.*

[235] *See* Ohio Adm. Code 4901:1-40-03(A)(3), 4901:1-40-04(D), 4901:1-40-07(B).

[236] *River Gas Co. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 509, 512, 433 N.E.2d 568, 571.

will flow through to customers through the AER Rider rates established in subsequent AER quarterly filings.

3. The Commission should order an [redacted]

Given the significance of the issues [redacted] and the negative impact on customers, the Commission should require [redacted] Although the Exeter Auditor raised the issue [redacted][237] it is evident that the Exeter Auditor [redacted].[238] In this regard, the Exeter Auditor perceived certain limitations in the scope of its work. It did not [redacted],,[239]

During his testimony, Exeter Auditor Steven Estomin testified regarding this limitation in the scope of work as follows:

Q. [redacted]

[237] Exeter Audit Report at 31.

[238] Direct Testimony of Wilson Gonzalez at 19-20.

[239] *Id.* at 20, (citing Exeter Audit Report at 31).

A. [redacted][240]

As a result, the Exeter Auditor conducted a limited investigation into this issue. He stated, regarding the language in the Management/Performance Audit on page 31, [redacted]

[redacted]

Q. [redacted]

A. [redacted]

Mr. Estomin further explained limitations on the scope of work conducted by the Exeter Auditor:

Q. [redacted]

A. [redacted]

Q. [redacted]

[240] Transcript Volume I-confidential, pages 64-65.

[241] *Id.*

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

[redacted]

[242] *Id.* at 68-69.

[redacted][243][redacted]

4. The PUCO should impose an appropriate penalty on FirstEnergy to encourage future consumer protection, and not merely disallow overcharges.

In addition to recommending disallowance of the costs associated with imprudent purchasing of In-State All Renewable RECs from 2009 – 2011, OCC witness Gonzalez

[243] Direct Testimony of Daniel R. Bradley at 13; Direct Testimony of Dean W. Stathis at 22-23; Transcript Volume III-public, pages 315-317.

[244] Transcript Volume I-confidential, pages 69.

also recommended that, upon a finding that FirstEnergy acted inappropriately and should reimburse customers for these charges, the Commission "should impose a penalty to be paid by FirstEnergy."[245] Mr. Gonzalez testified that the disallowance of cost recovery and reimbursement to customers is "not an adequate disincentive or deterrent to FirstEnergy against its repeating this inappropriate purchasing of RECs."[246]

Consequently, the Commission should investigate the determination of an appropriate penalty. And the Commission can impose a forfeiture on the utility [redacted] of up to $25,000 per day, per violation, under R.C. 4928.18.[247]

IV. APPEALS TO THE FULL COMMISSION FROM RULINGS OF THE ATTORNEY EXAMINER.

Ohio Adm. Code 4901-1-15(F) allows a party that is adversely affected by an Attorney Examiner's ruling to seek, upon its brief, the full Commission's review and decision. OCC is seeking reversal of certain rulings that granted FirstEnergy's requests to prevent public disclosure of key information in this case.

A. The Commission Should Reverse the Attorney Examiner's Entries That Granted FirstEnergy's Motions to Protect From Public Disclosure Certain Supplier Information and Prices Paid by FirstEnergy for Renewable Energy Credits.

This Commission should reverse the Attorney Examiner's two rulings that granted FirstEnergy's motions for protective order, which barred the public release of supplier-identifying and supplier-pricing information.

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[245] Direct Testimony of Wilson Gonzalez at 35.

[246] *Id.*

[247] Transcript Volume III-public, page 635.

As stated, Ohio Adm. Code 4901-1-15(F) allows a party that is adversely affected by an Examiner ruling to seek the full Commission's review and ruling through the party's post-hearing brief. It is under this authority that the OCC seeks reversal of the Attorney Examiner's rulings on FirstEnergy's First and Second Motions for Protective Order, respectively.

In this case, FirstEnergy failed to establish that the information over which it sought protection falls under the narrow exception for trade secrets as defined under R.C. 1333.61. Moreover, the public's interest in disclosure is great because the public interest is not served when a public utility is relieved from producing information that is relevant and material to the ultimate issue in this proceeding—whether the price that FirstEnergy unreasonably paid for In-State All Renewable RECs should be paid by its customers.

For the reasons more fully explained below, this Commission should reverse the Attorney Examiner's rulings And the Commission should find that the supplier-pricing and supplier-identifying information is not trade secret and is subject to public disclosure.

1. Procedural History And Factual Background.

As discussed earlier, the Commission opened this action for the purpose of "reviewing the Companies' Rider AER, including the Companies procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code."[248] As part of that process, the Commission retained two companies, Exeter and Goldenberg to conduct the audit. It is only the Exeter Audit Report, which was generated as a result of the contract that commenced on February 23, 2012, that was at issue it the Attorney Examiner's rulings.

[248] *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, Entry on Rehearing, p. 3 (Sept. 20, 2011).

Exeter completed the audit and filed a Final Audit Report under seal with the Commission on August 15, 2012. A redacted copy of the Final Exeter Audit Report, whereby FirstEnergy omitted information containing the pricing and identities of alternative energy credit bids, was also filed with the Commission and made available for public inspection.

After numerous unsuccessful attempts (beginning August 16, 2012) to acquire an unredacted version of the Final Exeter Audit Report informally, OCC resorted to seeking a copy of the unredacted Final Exeter Audit Report through a discovery request. In response, FirstEnergy filed a Motion for Protective Order ("First Motion for Protective Order") on October 3, 2012, seeking to prevent "public disclosure of the redacted supplier information contained in the Exeter Report."[249] The next day, FirstEnergy responded with an objection to the OCC's discovery request arguing that the "request seeks the confidential and proprietary information of third parties."[250] As a result, the OCC was forced to file a Motion to Compel on October 23, 2012, to obtain the confidential version of the report of the PUCO's auditor--a report that was made under the auspices of the PUCO and that was being controlled from release by the very utility that was criticized in the report.

The Attorney Examiner conducted a hearing on November 20, 2012, and granted the FirstEnergy and OCC's motions in part and denied them in part.[251] The only substantive basis for the Attorney Examiner's ruling was that "[t]he Commission has

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[249] Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion for a Protective Order ("FirstEnergy's First Motion for Protective Order"), at 1 (October 3, 2012).

[250] OCC Set 1-RPD-1.

[251] November 20, 2012 Hearing Transcript, at 17 (attached as Exhibit A).

generally ruled that bidder-specific information including prices, quantities, and the identity of bidders to be trade secret information."[252] Based on this limited reasoning, the Attorney Examiner held that the redacted portions of the Final Exeter Audit Report contained trade secret information that should be subject to a protective order. However, the Attorney Examiner did not conduct any analysis applying R.C. 1331.61(D).[253] The Attorney Examiner further held that the OCC was entitled to an unredacted copy of the Final Exeter Audit Report upon the parties reaching a mutually acceptable confidentiality agreement.[254]

During the non-transcribed questioning of the Exeter Auditor that the PUCO Staff had arranged in response to FirstEnergy's request, OCC learned something about the Audit Report. A draft of the Exeter Audit Report had been provided to FirstEnergy in advance of filing.[255] Moreover, FirstEnergy was provided an opportunity to review the report and comment upon it[256] ("Draft Exeter Audit Report") before the Final Exeter Audit Report was filed with the Commission.

OCC then 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]." FirstEnergy then filed a Motion for

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[252] *Id.* (Emphasis added.)

[253] *Id.*

[254] *Id.* at 18.

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

[256] 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 based on these comments. Primary among the changes made was to recommend that the Commission "examine" a disallowance. The original 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.

Protective Order ("Second Motion for Protective Order") to ask the PUCO to prevent OCC from being provided the Draft Report.[257]

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.[258] The Attorney Examiner further held that the document would be released in redacted form (meaning some information would not be shown in the public version).[259] It was dismaying to learn that, during FirstEnergy's review and comment on the draft audit, FirstEnergy opposed the Auditor's recommendation for a disallowance[260] and that recommendation was removed from the Audit Report that was filed at the PUCO.[261]

OCC now respectfully asks the full Commission to reverse the Attorney Examiner's rulings on FirstEnergy's First and Second Motions for Protective Order, that have prevented a fuller transparency in this case.

2. There Is A Strong Presumption In Favor Of Disclosure Whereby The Party (Here, FirstEnergy) Seeking A Protective Order Must Overcome Such Presumption By Showing Harm Or That Its Competitors Could Use The Information To Its Competitive Disadvantage.

This Commission's approach to resolving motions for protective orders recognizes that there is a "strong presumption in favor of disclosure, which the party

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[257] Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for a Protective Order Regarding the Office of the Ohio Consumers'' Counsel's Request for Public Records ("FirstEnergy's Second Motion for Protective Order") at 1 (Dec. 31, 2012).

[258] *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).

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

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

[261] *See* Exeter Auditor Report.

claiming protective status must overcome."[262] This presumption is created by the Ohio public record laws, which are applicable to the Commission[263] and "intended to be liberally construed to 'ensure that governmental records be open and made available to the public * * * subject to only a very few limited exceptions.'"[264] As such, confidential treatment should only be given in "extraordinary circumstances."[265] For that reason, "[t]he party requesting such protection shall have the burden of establishing that such protection is required."[266]

The Commission has made it clear that in order to meet the aforementioned burden, a movant who seeks to protect information from the public must raise "specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage."[267] This is consistent with Ohio Adm. Code 4901-1-24(D)(3) that requires movants for confidentiality to file a pleading "setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure * * * ."[268] Moreover, the movant's interest in maintaining confidentiality

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[262] *In the Matter of the Joint Application of The Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ART, 1990 Ohio PUC LEXIS 1138, Opinion and Order, at 4 (Oct. 18, 1990).

[263] R.C. 4901.12 and 4905.07.

[264] *See, e.g., In the Matter of the Application of NOPEC, Inc. for Authority to Operate as a Certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 1, (citing *State ex rel Williams v. Cleveland*, 64 Ohio St.3d 544, 549 (1992)).

[265] *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, *Entry* at 2-3 (Sept. 6, 1995).

[266] Ohio Adm. Code 4901-1-27(B)(7)(e).

[267] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain* Assets, Case No. 89-365-RC-ATR, *Opinion and Order* at 5-6 (Oct. 18, 1990).

[268] The Commission has recognized that this rule is intended to strike a reasonable balance between the legitimate interests of a company in keeping a trade secret confidential and the obligations of the

of the information must outweigh the public's interest in full disclosure.[269] In this case, the Attorney Examiner erred when granting the First and Second Motions for Protective Order because FirstEnergy failed to meet its burden of proof necessary to establish an exception to Ohio's public records law.

R.C. 149.43 is Ohio's Public Records Law, which broadly defines public records to include records kept at any state office. Under R.C. 4901.12, all proceedings of the public utilities commission and all documents and records in its possession are public records under R.C. 149.43. Additionally, under R.C. 4905.07, "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." Accordingly, "[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (R.C. 149.43) and as consistent with the purposes of Title 49 of the Revised Code."[270]

The Commission has often used a balancing approach in its review of motions for protective orders. For instance, the PUCO has noted that:

> it is necessary to strike a balance between competing interests. On the one hand, there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open process, being careful to establish

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Commission relative to the full disclosure requirements mandated by Ohio law and public policy. *See In the Matter of the Amendment of Chapters 4901-1 et al. of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, *Entry* at 11 (Mar. 21, 1998).

[269] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5-6 (Oct. 18, 1990).

[270] *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).

> a record which allows for public scrutiny of the basis for the Commission's decision.[271]

The balance should fall in favor of public dissemination of information, especially where, as here, FirstEnergy's primary purpose is to avoid the publication of information that it may consider to be embarrassing and detrimental to its public image.

B. The Supplier-Identity And Supplier-Pricing Information Of Alternative Energy Marketers Does Not Constitute Trade Secret Information.

The Attorney Examiner erred when he granted FirstEnergy's Motions for Protective Orders, agreeing with FirstEnergy that alternative energy supplier-identity and supplier-pricing information was exempt from public disclosure under the "trade secret" exception to the public records laws. Under the Ohio Revised Code, a "trade secret" is defined as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies ***both*** of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[272]

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[271] *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, *Entry* at 2-3 (Oct. 1, 1999); *see also In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR at 7 (Oct. 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.").

[272] R.C. 1333.61(D) (Emphasis added.)

Thus, in order to protect information as "trade secret" under R.C. 1331.61(D), the moving party must establish that: the information has "independent economic value" and was kept under circumstances that maintain its secrecy. This Commission has held that the trade secret exception is a very limited and narrow exception.[273]

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,[274] 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[275]

Although this six-factor test is well-known, in its First Motion for Protective Order, FirstEnergy appears to address only two of the six factors, limiting its argument to factors (1) and (3). [276] In its Reply in support of the First Motion for Protective Order ("Reply"), FirstEnergy attempted to address the other factors. However, despite its attempts to fill in the gaps created by its earlier more narrow approach to the issues, it fell far short of meeting the six-factor test.

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[273] *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).

[274] *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).

[275] *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).

[276] *See* FirstEnergy's First Motion for Protective Order.

Nonetheless, the Attorney Examiner granted FirstEnergy's Motions without providing any substantive analysis of the trade secret exception to the public records laws. For these reasons, and the reasons explained more fully below, the Commission should reverse the Attorney Examiner's rulings on the First and Second Motions for Protective Order and order that this information, which can hardly be said to be competitively sensitive at this point in time, should be released publicly.

1. FirstEnergy failed to carry the burden of demonstrating that supplier-identifying and supplier-pricing information provides "independent economic value, actual or potential, from not being known" under R.C. 1333.61(D).

The Attorney Examiner granted the First and Second Motions for Protective Order despite FirstEnergy's failure to provide any meaningful demonstration of how this information, some that is as much as 3 years old, provides "independent economic value, actual or potential, from not being known" as required under the trade secret statute, R.C. 1333.61(D). FirstEnergy provided no evidence of any economic value within the redacted information nor did it identify any specific parties who would gain economic value from the disclosure of the redacted information.

Instead, FirstEnergy relied upon conclusory allegations. Conclusory statements alone, however, are not sufficient to meet the burden of proof to establish that information is a trade secret under R.C. 1331.61(D).[277] It is well-established by this Commission that a moving party must state "reasonable grounds" for a protective order and "explain why the information that it seeks to keep confidential is entitled to protection as a trade secret."[278]

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[277] *Mondell v. Ohio Bell Telephone Co.*, Case No. 89-221-TP-PEX, *Entry* at 4 (May 16, 1989).

[278] *In the Matter of the Commission's Investigation into Continuation of Ohio's Telecommunications Relay Service*, Case No. 01-2945-TP-COI, *Finding and Order* at 12-13 (Apr. 27, 2005); *See also, In the Matter*

FirstEnergy did not meet its burden of establishing "how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage."[279] Rather, FirstEnergy argued, without evidence, that "[t]his information has independent economic value because it would not otherwise be available to competitive bid participants."[280] However, the PUCO has held that "economic value" is not derived simply by the fact that the information is not generally known by other persons.[281] Rather, R.C. § 1333.61(D)(1) requires that the information in question derive an "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.*" (Emphasis added.) There is no value to be gained in the competitive market from historic information identifying who provided RECs to FirstEnergy or how much was paid for them more than 3 years ago in some cases.

FirstEnergy also argued that disclosure of the redacted (supplier-identifying and supplier-pricing) information will be to the detriment of the competitive bid participants by releasing their bid processes and thereby hindering the Companies' ability to conduct

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of the Application of Ameritech Ohio for Approval of the Interconnection Agreement Between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996, Case No. 96-604-TP-UNC, Attorney Examiner Entry at 3 (July 10, 1996) (public records statutes in Ohio require more than a desire to keep the information confidential).

[279] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain* Assets, Case No. 89-365-RC-ATR, *Opinion and Order* at 5-6 (Oct. 18, 1990); *see also In the Matter of Duke Energy's Annual Alternative Energy Portfolio Status Report*, Case No. 11-2517-EL-ACP, *Entry* at 6 (May 26 2011) (holding that Duke "has identified no information that requires protection from disclosure" because it would harm their ability to compete).

[280] Memorandum in Support (October 3, 2012 Motion for Protection) at page 3.

[281] *In the Matter of the Application of the Ohio Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, *Entry* at 10 ((November 25, 2003). There the Commission found that data compiled by SBC Ohio that listed locations where broadband service had been deployed was not a trade secret. *Id.*

future auctions.[282] It has not been shown how the disclosure of outdated supplier-identity and suppler-pricing information hinders the "bid processes." Indeed, the bid process itself, as has been argued ad nauseum by FirstEnergy in this case, was "open and transparent."

Under FirstEnergy's argument, disclosing bid process information would allegedly compromise both their and their suppliers' ability to obtain competitive pricing in the REC market.[283] However, FirstEnergy provided no evidence to demonstrate that disclosure of supplier identities or bid prices will hinder bidding at future auctions. The information that FirstEnergy seeks to protect -- outdated bidding information -- does not reflect the current or past processes of any of the competitive bid participants. Bidding information that is now upwards of three years old is historical in nature. The Commission has previously held that it will not protect such historical information.[284]

FirstEnergy failed to establish that the information it sought to protect satisfies the two-part test set forth in R.C. 1333.61(D). It provided no evidence, beyond a few conclusory statements, to support the claim and it did not identify that there is any economic value in the information or to whom it could be of use. FirstEnergy merely asserted, without providing specific examples, that disclosure of the information would be harmful to both it and the participants in its competitive bid process. There is no evidence as to how disclosure would harm these parties or how three-year old information is still relevant to potential future bidders. Thus, FirstEnergy failed to carry

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[282] Memorandum in Support (October 3, 2012 Motion for Protection) at page 3.

[283] *Id.*

[284] *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.)

its burden of establishing that the information has independent economic value as required under R.C. 1333.61(D) of the Revised Code.

2. The Commission's prior rulings do not support the Attorney Examiner's rulings which granted FirstEnergy's Motions for Protective Orders.

Not only did FirstEnergy fail to meet its burden of showing that outdated supplier-identifying and supplier pricing information harms anybody competitively, but numerous Commission holdings over the years lend themselves to a determination that the Attorney Examiner's decision on this issue was in error.

Specifically, the Commission has held that financial data, including basic financial arrangements, do not contain proprietary information worthy of trade secret protection.[285] Additionally, financial statements of an inter-exchange carrier have likewise been found not to be a trade secret.[286] Even detailed financial information such as balance sheets, plant, accumulated depreciation and amortization fails to meet the trade secret definition.[287]

This Commission has also determined that the details of business arrangements between utilities and third parties do not qualify for protection from disclosure. For instance, contracts between a utility and its customers have been found not to meet the

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[285] *See In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, *Entry* at 5 (Aug. 11, 2004). While the Commission granted the motions for protective orders in part, it was only for projected information, not historic information. Moreover, the Commission noted that no memoranda contra were filed, and the protective order expired after 18 months. *See supra*, Section IV(B)(2).

[286] *In the Matter of the Application of Rapid Transmit Technology, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Attorney Examiner *Entry* at 2-3 (Oct. 1, 1999).

[287] *In the Matter of the Filing of Annual Reports by Regulated Public Utilities*, Case No. 89-360-AU-ORD, *Entry* at 7-11 (Aug. 1, 1989). *See also In the Matter of the Application of Ernest Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services in the State of Ohio*, Case No. 01-3079-TP-ACE, *Finding and Order* at 3 (May 14, 2003) (holding that year 2000 financial statements were not trade secrets).

definition of trade secrets.[288] The Commission has also held that inter-connection agreements containing the rates, terms, and conditions of interconnection between a local exchange company and a competitive local service provider do not amount to a trade secret.[289]

Moreover, the Commission has found on occasion that sensitive business information may not be protected from disclosure. For instance, the Commission has declined to interpret as trade secret, calling data that reveals business information such as traffic volume and revenues from interLATA calls between exchanges.[290] Interconnection demand letters and timelines for interconnection have been determined not to amount to trade secrets.[291] The Commission has also ruled that the fair market value and net book value of assets sought to be transferred need not be protected from disclosure.[292]

While FirstEnergy cited to a number of Commission rulings to support its main (if not exclusive) argument that the Commission has previously held that bid pricing

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[288] *In the Matter of Several Applications of Cincinnati Bell Telephone Company for Approval of a Contract or Other Arrangement between Cincinnati Bell Telephone Company and Various Customers*, Case No. 96-483-TP-AEC, *Entry* at 4-7 (Feb. 12, 1998).

[289] *In the Matter of Application of Ameritech Ohio for Approval of an Interconnection Agreement between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996* , Case No. 96-604-TP-UNC, Attorney Examiner *Entry* at 2-3 (July 10, 1996).

[290] *In the Matter of the Petition of Alvahn L. Mondell, et al. v. The Ohio Bell Telephone Company Relative to a Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, *Entry* (May 16, 1989). *See also, In the Matter of the Petition of Michael and Carol Schlagenhauser, Relative to a Request for Two-Way, Non-Optional Extended Area Service*, Case No. 02-954-TP-PEX, *Entry* (July 30, 2002) (Commission held that information containing the number of access lines in the Perrysville exchange was not a trade secret).

[291] *See In the Matter of the Application of CTC Communications Corp. for a Certificate of Public Convenience and Necessity to Provide Local and Telecommunication services in Ohio*, Case No. 00-2247-TP-ACE, *Entry* at 3-4 (Feb. 8, 2001).

[292] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets,* Case No. 89-365-RC-ATR, *Opinion and Order* at 3-8 (Oct. 18, 1990).

information is subject to protection under the trade secret exception to the public records act, those cases are distinguishable and inapposite. While not raised in the First Motion for Protective Order, and instead raised for the first time in the Reply in Support of its Motion, FirstEnergy relied heavily upon the Commission's granting of motions for protective orders in the FirstEnergy and Duke standard service offer ("SSO") competitive bid filings.[293] In both cases, the Commission approved stipulations that allowed for a competitive bidding process ("CBP") to determine retail generation rates for supplying the standard service offer supply load.[294] The FirstEnergy CBP was held on May 13-14, 2012,[295] and the Duke CBP was held on May 22, 2012.[296] The PUCO Staff filed Motions for Protective Orders in each case on May 14, 2012[297] and May 23, 2012[298] respectively. In so doing, Staff sought to protect the CBP auction results as "competitively sensitive."[299]

The Commission granted the motions for protection in part, and denied them in part. Under the Commission's ruling, "the names of the bidders who won tranches in the CBP auction; the number of tranches won by each bidder; the first round ratio of tranches offered compared to tranches needed; and the redacted reports detailing the CBP auction

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[293] *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, 2012) ("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").

[294] *FirstEnergy SSO* at 1; *Duke SSO*, at 1

[295] *FirstEnergy SSO* at 2.

[296] *Duke SSO* at 2.

[297] *FirstEnergy SSO* at 2.

[298] *Duke SSO* at 2.

[299] *FirstEnergy SSO* at 2; *Duke SSO* at 2.

proceedings," was publicly released "after a brief period of time to allow the winning bidders to procure any necessary capacity to serve the SSO load."[300] However, "the names of unsuccessful bidders, price information, including starting price methodologies and round prices/quantities for individual bidders; all information contained in Part I and Part II bidder applications; and indicative pre-auction offers," were deemed to contain sensitive material that would remain under seal.[301]

The Duke and FirstEnergy SSO competitive bid cases do not support the Attorney Examiner's ruling, which protects supplier-identifying and supplier-pricing information from the public view. To the contrary, in those cases, this Commission specifically found that the identities of the winning bidders were to be publicly released.[302] It was only the unsuccessful bidders' identities that were to be kept confidential under the trade secret doctrine.[303] In this case, however, OCC seeks the public release of only the identity of any winning bidder(s) from RFPs occurring more than 3 years ago.

Moreover, the Commission found that supplier-pricing information was sensitive in nature because it could "be highly prejudicial to the bidding parties and the viability of any future auction in Ohio."[304] However, the supplier-pricing information was only one day old at the time of the Commission's order. Thus, it can be assumed, that the Commission granted the protective order because the information was timely and currently relevant, therefore public release could be prejudicial to the parties. The fact

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

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

[302] *FirstEnergy SSO* at 3; *Duke SSO* at 3 (holding "the Commission finds that certain information regarding the CBP auction should be released to the public" including "the names of the bidders who won tranches in the CBP auction").

[303] *FirstEnergy SSO* at 3; *Duke SSO* at 3

[304] *Duke SSO* at 2.

that the Commission only granted protection for 18-months further supports this concept – after 18 months, the information would be historic in nature and no longer prejudicial to the parties. In this case, however, some of the pricing information is as much as four years old, and all of it is more than a year old. Such historic information is hardly prejudicial to future bids.

The other cases cited by FirstEnergy, and presumably relied upon by the Attorney Examiner when granting both Motions for Protective Order, suffer from many of the same deficiencies. For instance, FirstEnergy cited to the Commission's 2011 Order in the *Columbus Southern Power* ("*CSP*") case[305] where, like the Duke and FirstEnergy ESP cases, the parties sought protection of the actual and projected electricity usage and the prices paid for actual usage. The Commission held that current and projected information was sensitive in nature and its disclosure could jeopardize the third-party suppliers' ability to compete.[306]

Unlike the *CSP* case, however, FirstEnergy seeks protection of information that is neither current actual nor projected; rather it is information that is historic. It is information pertaining to past purchases with no implication for future use. Historic prices of RECs are not indicative of current or future prices, and therefore, do not result in a competitive advantage in the market today. Further distinguishing the *CSP* case, the third party suppliers (bidders) filed the motions for protective orders.[307] Moreover, the

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[305] *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 ("Columbus Southern Power Rider")*, Case No. 11-4570-EL-RDR, 2011 Ohio PUC LEXIS 1107, Finding and Order at *2 (October 12, 2011).

[306] *Id.* at *3-4; *See also*, FirstEnergy Reply in Support of First Motions for Protective Order, at 13.

[307] Although the utility, Columbus Southern Power, also filed a motion for protective order, it was only to preserve the right for the suppliers. Moreover, the Commission only ruled on the third party suppliers' motions for protective orders.

Commission relied, in part, on the fact that no parties in the case filed a memorandum contra.[308]

Similarly, in *Ohio Edison Co.*, which was also cited by FirstEnergy, the Commission granted 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.[309] The Commission, however, 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.[310] The Commission also stated that because of changes in the market, the one-and-a-half year old reports would not be of much present value.[311] In fact, it was FirstEnergy that recommended the release of the full unredacted reports just over a year after requesting the initial protective order.[312]

Monongahela Power, to which FirstEnergy also cites, is very similar to *Ohio Edison*, so much so that the orders were filed on the same day,[313] and the Commission, simply applied the ruling from *Ohio Edison Co.* granting an 18-month protective order.[314] In *Monongahela Power*, the utility filed an application to establish a fixed-rate market-

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[308] *Id.* at 3.

[309] *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).

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

[311] *Id.* at ¶5.

[312] *Id.* at ¶4.

[313] *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).

[314] *Id.*

based standard service offer, through a competitive bidding process. Taking preventative measures, the utility sought a protective order over all bidding process documents that would be filed with the Commission at the conclusion of the bidding process.[315] Like the rest of the cases cited by FirstEnergy, Monongahela Power sought protection of current information and future projections that were germane to the bidding process.

Moreover, a review of the *Monongahela Power* docket turns up no subsequent filings seeking to extend the term of the protective order. Thus, it appears that the parties no longer considered the bidding information to be of any value after the 18 month period. Furthermore, like the *Columbus Southern Power* case, third party suppliers filed the motions for protective order, not the utility. But, as previously mentioned, no third-party supplier has made any such filing in this action.

Finally, FirstEnergy cited to, *Ohio Tel. Relay Serv.*, where again, the portions of the proposals that were granted protection contained current and future pricing information as well as information pertaining to future improvements and internal company operations.[316] In *Ohio Tel. Relay Serv.*, the Commission issued a request for proposal on February 21, 2002.[317] Three utilities filed proposals and requested protective orders for their respective bids on April 15, 2002.[318] Two of the utilities wanted confidential treatment for the portion of their proposal that contained information

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[315] *Id.*

[316] Memorandum in Support (October 3, 2012 Motion for Protection) at page 3.

[317] *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, at *1, (May 2, 2002).

[318] *Id.* at *2.

regarding their proposed bid price.[319] The Commission ordered protective orders for proposed bid prices only for the time it took for them to select the winning bidder, at which point the complete bid proposals would become public record.[320] The Commission filed an order on June, 27, 2002, announcing the winning bid from the three utilities' proposals.[321] Therefore, the longest protection granted in the case was for 18 months.

Further review of the *Ohio Tel. Relay Serv.* docket produced an Order from the Commission denying a protective ordered requested by the utility chosen in the June 27, 2002 Order.[322] The utility filed a motion to augment the contract that it won on June 27, 2002, to include a new type of service.[323] The utility also requested a protective order over certain information within the motion which the utility described as "the specific costs associated with business practices" used to offer the service.[324] Included in the information it sought to protect was the price that the utility was going to charge the state of Ohio to offer the service.[325] The Commission approved the motion to augment but denied the protective order.[326] The Commission stated that the price of the new service could only be considered proprietary until the Commission approved it, at which point

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[319] *Id.* The other utility sought protection, not for its bid price, but for information regarding its employee training, quality control and evaluation processes, and proposed future improvements to its infrastructure and services, which is not applicable to the issues in this case.

[320] *Id.* at *3.

[321] *Ohio Tel. Relay Serv.*,. Case No. 01-2945-TP-COI, 2002 Ohio PUC LEXIS 585, at *16, (June 27, 2002). A review of the docket, however, does not show the three utilities' proposals as being filed as public until October 26, 2007, but there were no filings within the docket to extend the term of the protective orders.

[322] *Ohio Tel. Relay Serv.*, Pub. Util. Comm. Case No. 01-2945-TP-COI, 2005 Ohio PUC LEXIS 211, at *12, Finding and Order (Apr. 27, 2005).

[323] *Id.* at *1.

[324] *Id.* at *11.

[325] *Id.* at *12.

[326] *Id.*

the state becomes obligated to pay the price on behalf of its citizens and, as a matter of public policy, that type of information should be public.[327]

Likewise, in this case, FirstEnergy seeks to have its customers pay a certain price for a service and is now attempting to hide that price from them. FirstEnergy has to purchase a certain amount of RECs to meet statutory requirements and it can then pass those costs onto to their customers, to the extent reasonably and prudently incurred, as a "specific cost associated with business practices." But FirstEnergy's customers have the right to know the price FirstEnergy paid for RECs and to what entity FirstEnergy paid this excessive amount. That is the exact information that FirstEnergy is attempting to conceal.

FirstEnergy cannot rely on any of the above cases that it cited in support of its Motion because none of them are representative of the facts in the current case. Here, the information at issue is historic in nature and would provide no competitive advantage. That information, alone, cannot fairly be argued to be appropriately protected as a trade secret. In contrast, all of the protective orders granted in cases cited by FirstEnergy lasted for a period of time that is shorter than the amount of time that has lapsed since some of the information was used in this case.

3. FirstEnergy failed to show that the information is kept under circumstances that maintain its secrecy as required under the Trade Secret Statute, R.C. 1333.61(D).

The information that FirstEnergy sought to protect also did not meet the second requirement of R.C. 1333.61(D). Under the second requirement, it was necessary for the Attorney Examiner to find that reasonable efforts were expended to protect the secrecy of

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[327] *Id.*

the information. FirstEnergy argued that this element was satisfied because the "REC Procurement Data had not been revealed to any third parties outside of this audit proceeding," and because it executed confidentiality agreements with the bidding REC suppliers.[328] These arguments, however, are not supported by the facts of this case.

It should be emphasized that a number of media outlets, including *The Plain Dealer*, have further publicized this price point by stating [redacted] that FirstEnergy paid "for credits than the three local companies would have spent had they just paid the fines, a management audit by Exeter Associates of Columbia, Md., found."[329] The media outlets also identified the supplier for FirstEnergy's REC requirements in this case.[330] The facts in this case show that, once released, FirstEnergy did not take prompt action to protect this information, thereby allowing publication of supplier-identifying and supplier-pricing information on a number of different occasions.

Nor can FirstEnergy find solace in the fact that it had entered into confidentiality agreements with some of the third-party REC suppliers. While the Attorney Examiner did not explicitly rule that the confidentiality agreements played any part in the decision to grant FirstEnergy's Motions for Protective Order, to the extent this Commission relies

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[328] FirstEnergy Frist Motion for Protective Order, at 3-4, FirstEnergy Reply in Support of First Motions for Protective Order, at p. 12.

[329] 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).

[330] John Funk, "Audit finds FirstEnergy overpaid for renewable energy credits, passed on expenses to customers," (stating "The audits found that the Illuminating Co., Ohio Edison and Toledo Edison relied [redacted] to buy credits from people and organizations that generate renewable energy"); *see also*, Associated Press, "Audits: FirstEnergy Overpaid for Credits," available at http://www.wkyc.com/news/article/256501/3/Audits-FirstEnergy-overpaid-for-credits (last accessed April 2, 2013).

on that argument, it should be rejected. The Supreme Court of Ohio has long held that the existence of a confidentiality agreement alone will not protect information from public disclosure.[331] The Court also held that the mere existence of a confidentiality agreement cannot prevent the disclosure of information that does not meet the definition of "trade secret" such that it is subject to disclosure under the Public Records Act.[332] Because FirstEnergy has failed to establish the first prong of the trade secrets test, they also cannot rely on the fact that there is a confidentiality agreement protecting the information from public dissemination.

Irrespective of rulings by the Supreme Court of Ohio, the contracts with the REC suppliers themselves do not bar public disclosure of the information that FirstEnergy seeks to protect. FirstEnergy cites to three specific provisions in the supplier agreements to support the argument that this information should be protected.[333] First, the utility relies on First Motion for Protective Order Exhibit 1, Article 13 (Publicity and Disclosure), which provides "Seller shall not disclose the details of this Agreement or related transaction(s) without securing prior written approval from Buyer."[334] Article 13 only restricts the **Seller** from publicly releasing the Buyer's information. Because FirstEnergy is a Buyer, it is under no such obligation to protect the Seller's information under Article 13.[335]

FirstEnergy also relied on Article 13.1 of Exhibit 2 in its First Motion for Protective Order, a *Form of Purchase and Sale Agreement For Firm Renewable Energy*

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

[332] *Id.*

[333] Memorandum in Support (October 3, 2012 Motion for Protection) at page 4.

[334] FirstEnergy's First Motion for Protective Order, Exhibit 1, at 17.

[335] Id.

Credits, FirstEnergy Service Company, As Agent for The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company, which states that neither party will release the other's information without their consent.[336] However, FirstEnergy fails to include the very next part of the agreement, Article 13.2 (Required Disclosure),[337] which renders Article 13.1 inapplicable to this proceeding.

Article 13.2, governs the release of information to a Governmental Authority, including the PUCO and other parties.[338] Specifically, Article 13.2 (Required Disclosure), states that the parties may disclose confidential information in the process of a governmental authority ordered audit as long as the disclosing party notifies the other party so that they may (if they choose) request that the governmental authority treat the disclosed information as confidential.[339] Therefore, under the agreement upon which FirstEnergy relies, it is the responsibility of the supplier to protect their information not FirstEnergy. Thus, FirstEnergy has no standing to assert that the information that was provided to the PUCO and the Exeter Auditor is confidential. Moreover, none of the competitive bid participants have requested that the PUCO treat their information as confidential in this proceeding, much less in a timely fashion.[340]

Finally, FirstEnergy relies on Article 14.7 (Confidential Information) in Exhibit 1 of its First Motion for Protective Order, arguing that it imposes a duty of non-disclosure. However, Article 14.7 only applies to information that the supplier "clearly marked as

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[336] Memorandum in Support (October 3, 2012 Motion for Protection) at page 4.

[337] Exhibit 2 attached to FirstEnergy's Motion for Protective Order at page 19.

[338] Exhibit 2 at Article 13.2 attached to FirstEnergy Motion.

[339] *Id.*

[340] As discussed *supra*, any party (supplier) seeking such protection must do so by filing a motion for protection on or before the filing date of the allegedly confidential information in accordance with Ohio Adm. Code 4901-1-02 (E).

being confidential information."[341] While the Ohio Supreme Court has held that the existence of an agreement, such as Article 14.7, cannot block that disclosure,[342] FirstEnergy never provided any documentation to prove that any of the suppliers specifically marked their selling price and/or name as "confidential information." Absent such a marking, Article 14.7 does not apply to supplier information.

Moreover, by the terms of Article 14.7, the obligation to protect information that was "clearly marked as being confidential information," expires one year from the termination of the Agreement.[343] Thus, even if any information was so marked (though nothing indicates that it was) FirstEnergy is no longer under a duty to protect the information because all three contracts have expired – the contracts for 2009, 2010 and 2011 vintages expired on December 31, 2010, December 31, 2011 and December 31, 2012, respectively.[344] Thus, because more than a year has passed since the contract terms terminated, the obligation to keep the information confidential, if any, no longer exists.[345]

Finally, Article 14.7 provides that "[n]othing in this Agreement shall limit either Party's use or disclosure of information which: (i) is now generally known or available on an unrestricted basis to the public or becomes so known or available on an unrestricted basis through no fault of the receiving Party ***. As previously argued, however, the Exeter Audit Report has already revealed some of the information that FirstEnergy seeks to keep secret from the public, including the identity of a supplier ([redacted]

[341] FirstEnergy's First Motion for Protective Order, Exhibit 1, at 19.

[342] *State ex. Rel. Plain Dealer v. Ohio Dept. of Insurance*, 80 Ohio St.3d 513, 527, 687 N.E.2d 661 (1998).

[343] FirstEnergy's Motion for Protective Order, Exhibit 1, at 19.

[344] *See id.* at pages 4, 7, 19 and 22.

[345] *Id.* at pages 4 and 7 and 19.

[redacted])[346] and the price it paid for non-solar RECs (more than $675 in some cases.)[347] Thus, even FirstEnergy's Purchase and Sale Agreement, upon which it relies, allows the disclosure because this information is already public.

FirstEnergy also fails to meet the second prong of the test set forth in R.C. 1331.61(D). FirstEnergy has not taken reasonable efforts to maintain the secrecy of supplier-identifying and supplier-pricing information. Rather, this information has been publicly released, even after FirstEnergy was afforded the opportunity to request that it be redacted from the public version of the Exeter Audit Report that was filed with the Commission's docketing division. Moreover, there is no evidence in the record that any of the suppliers, upon which FirstEnergy relies, [redacted].[348] For these reasons, the Attorney Examiner's rulings on FirstEnergy's Motions for Protective Order should be reversed.

4. The public interest weighs in favor of disclosure.

The Attorney Examiner's decisions should be reversed because of a failure to weigh the public interest, which would dictate public disclosure of the supplier-identifying and supplier-pricing information FirstEnergy seeks to protect. As explained in Section III(B), to overcome the presumption in favor of disclosure, the movant's interest in maintaining the confidentiality of the information must outweigh the public's interest in full disclosure. Such a decision to prevent disclosure should only be done in

[346] Exeter Audit Report at iv.

[347] *Id.* at iv and 28 (Stating the Companies at times paid more than 15 times the price of the applicable forty-five-dollar Alternative Compliance Payment) (15 x $45 = $675).

[348] Transcript Volume II-confidential at pp. 391-392.

extraordinary circumstances.[349] FirstEnergy and the Attorney Examiner failed to appropriately weigh, or specifically, address this balancing. In fact, FirstEnergy failed to provide any evidence or specific allegation that the utility or suppliers will be harmed in a way that outweighs the public's right to this information. To the contrary, FirstEnergy's attempt to conceal from the public domain the price it paid to [redacted] for renewable energy credits in 2009 is not an extraordinary circumstance that warrants confidential treatment.[350] The public, which has already paid for a vast majority of the costs incurred with the acquisition of these RECs, has a right to know how much money was paid and to whom that money was paid. The public's interest in supplier-identifying and supplier-pricing information far outweighs FirstEnergy's interest in keeping historic bidding information secret simply because it is embarrassing to the utility. Indeed, imprudent decision making, like that of FirstEnergy, is precisely the kind of information that should be subject to public scrutiny. While it is OCC's position that payments by a public utility that are then charged to customer through rates or the identities of vendors to whom those amounts were paid should never be concealed, certainly that information should not be concealed years after the bids occurred when the market is changing on a daily basis in any event.

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[349] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5-6 (Oct. 18, 1990).

[350] *See for example, In the Matter of the Petition of Alvahn L. Mondell et al v. The Ohio Bell Telephone Company, Relative to A Request for Two-Way , Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, *Entry* at 4 (May 16, 1989) (finding that "due to the lack of detail offered" in the motion for protective order, "the Commission can not find the information should be afforded protected status"); *See also In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 6-7 (finding that joint applicants had failed "by not raising specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage.")

C. Granting FirstEnergy's October 3, 2012 Motion For A Protective Order Was Error Because FirstEnergy's Motion Was Untimely Under the PUCO' Rules.

Another reason the Commission should reverse the Attorney Examiner's ruling is that FirstEnergy failed to meet the procedural requirements to seek a protective order. Ohio Admin. 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." The information that FirstEnergy sought to protect was filed on August 15, 2012. However, FirstEnergy waited to seek protection until its filing on October 3, 2012.

In its Reply in support of its First Motion for Protective Order, FirstEnergy argues that the document was filed under seal; therefore, it was assumed that the information would be kept confidential by the Commission and its Staff. But Ohio Admin. Code 4901-1-02(E) is very strict in its wording: "Unless 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."

FirstEnergy cites to cases to defend its interpretation of Rule 2 (*See supra*, Section III(C)(2)). But in those cases the parties timely filed their motions for protective order, unlike FirstEnergy here. For instance in *Ohio Edison Co.*, and *Ohio Tel. Relay Serv.* cases, the parties filed their motions for protective order on the same day that the trade secret information was filed with the Commission.[351] Moreover, the suppliers in the *CSP* case filed their motions for protective order the day after CSP filed its application with

[351] *Ohio Edison Co.*, at 1; Ohio Tele Relay Serv. at 1.

the Commission.[352] Finally, in the *Monongahela Power* case, the utility filed its motion to protect the bidding information before the auction even took place.[353] Thus, for all of the reasons discussed above, and because FirstEnergy did not timely file its First Motion for Protective Order, the Attorney Examiner's rulings should be reversed.

D. The Commission Should Reverse The Attorney Examiner's Ruling On FirstEnergy's Second Motion For Protective Order Because Public Information Was Improperly Redacted.

The disallowance of FirstEnergy's purchase of In-State All Renewable RECs initially recommended in the Exeter Auditor was wrongfully redacted as a result of the February 14, 2013 Attorney Examiner's ruling. 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" and Attached as Exhibit C), 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" and Attached as Exhibit D).

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 recovery of all In-State All Renewable RECs cost incurred by FirstEnergy in excess of [redacted] per REC. The release of that disallowance recommendation was subsequently modified by the Attorney Examiner.[354] In doing so, the Attorney Examiner protected any portion of the Draft Report Line Edits that identified the dollar amount that was [redacted].

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[352] *Columbus Southern Power Rider* at 1-2.

[353] *Monongahela Power Co.* at 1, 9.

[354] *See* Exhibit 6 (attached) at page IV.

The Attorney Examiner did not, however, redact that same information from the Draft Report Supplement.[355] And a discussion of the amount of the recommended disallowance is part of the public record in this proceeding.[356] Because this information is already publicly available (through the Draft Report Supplement and public transcript), the Attorney Examiner's ruling should be reversed, and the Draft Report Line Edits should be reproduced without the redaction of Exeter's recommended minimum disallowance of any REC that was purchased for more than [redacted].

E. The Commission Should Rule That the Aggregated Dollar Value of OCC's Recommendation--to Disallow FirstEnergy From Collecting Excess Renewables Expenditures From Customers--Is A Public (Not Secret) Figure.

In OCC's Memorandum Contra (at page 4), filed February 25, 2013, OCC asked the PUCO to reject FirstEnergy's request to prevent OCC from publicly filing its overall recommendation for protecting customers in this case. As of the filing of this Brief, there is no ruling on OCC's request.

OCC's recommendation appears under seal, for example, in the testimony of Mr. Gonzalez and in this Brief. OCC's recommendation is based on aggregated information. The PUCO's precedent is that aggregated information can be publicly used even where some information that forms the aggregate is protected.[357]

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[355] Exhibit 7 (attached) at page 1.

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

[357] 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").

No ruling is the equivalent of an adverse ruling since OCC cannot publicly reference its primary position on behalf of consumers in this case. For that matter, the PUCO will be in the unusual (and problematic) situation of not being able to publicly reference in its Order the primary position of a party (OCC). Therefore, the PUCO should rule that OCC's recommended disallowance is in the public domain.

[redacted][358][redacted][359][redacted][360][redacted]

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[358] Transcript Volume I-confidential, page 14-15; *see also*, Exeter Audit Report (public), at iv.

[359] Transcript Volume IV-confidential, page 686-691, attached as Confidential Exhibit E.

[360] Transcript Volume I-confidential, page 14, 16-17.

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Initial Brief (Public Version) was served on the persons listed below, via electronic service, this 15th day of April 2013.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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PROCEEDINGS

before Mr. Gregory Price, Hearing Examiner, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-C, Columbus, Ohio, called at 10:00 a.m. on Tuesday, November 20, 2012.

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On behalf of the Staff.

- - -

Tuesday Morning Session,
November 20, 2012.

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EXAMINER PRICE: Let's go on the record please.

Good morning. The Public Utilities Commission has set for this time and this place a prehearing conference in Case No. 11-5201-EL-RDR, being 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.

My name is Gregory Price, I'm the Attorney Examiner assigned to preside over today's prehearing conference.

Let's begin by taking appearances starting with the company.

MR. BURK: On behalf of the companies, James W. Burk and Carrie M. Dunn, 76 South Main Street, Akron, Ohio, and also on behalf of the companies David Kutik, the Jones-Day law firm, North Point, 901 Lakeside Avenue, Cleveland, Ohio.

EXAMINER PRICE: Mr. Lindgren?

MR. LINDGREN: On behalf of the staff of the Commission, Ohio Attorney General Mike DeWine, by

Thomas G. Lindgren, Assistant Attorney General, 180 East Broad Street, 6th Floor, Columbus, Ohio, 43215.

EXAMINER PRICE: Thank you.

MR. HOWARD: Your Honor, on behalf of the Interstate Gas Supply, Inc., d/b/a IGS Energy, please have the record reflect the appearance of the law firm of Vorys Sater, Seymour and Pease, 52 East Gay Street, Columbus, Ohio, 43216, by M. Howard Petricoff and Stephen M. Howard. Thank you.

EXAMINER PRICE: Thank you.

MS. YOST: Good morning. On behalf of the Ohio Consumers' Counsel, Bruce J. Weston, Consumers' Counsel, Melissa Yost, 10 West Broad Street, Suite 1800, Columbus, Ohio, 43215.

EXAMINER PRICE: Thank you.

MR. DOUGHERTY: Your Honor, on behalf of the Ohio Environmental Council, Trent Dougherty and Catherine N. Lucas, 1207 Grandview Avenue, Suite 201, Columbus, Ohio, 43212.

EXAMINER PRICE: From the OMA?

MR. WARNOCK: On behalf of the OMA Energy Group, Matt Warnock from the law firm of Bricker & Eckler, 100 South Third Street, Columbus, Ohio.

MR. ALLWEIN: Good morning, your Honor. On behalf of the Sierra Club, Christopher J. Allwein,

1373 Grandview Avenue, Suite 212, Columbus, Ohio, 43212.

EXAMINER PRICE: Thank you.

The purpose of today's prehearing conference is to --

MR. SIWO: Your Honor, on behalf of the Mid-Atlantic Renewable Energy Coalition, J. Thomas Siwo, Terrence O'Donnell, Bricker & Eckler, 100 South Third Street, Columbus, Ohio, 43215.

EXAMINER PRICE: Thank you.

Once again, the purpose of today's prehearing conference is to take up the two motions we have regarding discovery issues. We have pending before us a motion for protective order filed by FirstEnergy and a motion to dismiss filed by the Consumers' Counsel.

We've reviewed the pleading -- motion for protection and to compel discovery filed by Consumers' Counsel. I've reviewed the pleadings filed by the parties but I thought we'd start by allowing the parties to briefly summarize and supplement any arguments that they made in the pleadings, and we'll start with the company.

MR. KUTIK: Thank you, your Honor. Good morning.

Your Honor, the only thing that really is at issue here is whether the parties and the Public Utilities Commission get to see the names of the suppliers that are in the Exeter Report. Although the Exeter Report also contains and the public version has redacted pricing information, we have offered to the parties, particularly OCC, the opportunity to see that information under a protective agreement.

With respect to the identity of the suppliers, your Honor, we believe that that is trade secret, and in very similar circumstances this Commission has determined and has held that type of information to be protected from the public.

And in our briefs, as you know, your Honor, we cited the competitive bidding process cases in the companies' and other's ESPs where the company -- where information as to specific bidders being tied to specific bids was kept confidential and remained from public view.

We believe that that information again is information that the Commission in this instance should keep from the public as well.

As indicated by Navigant which ran the competitive processes here, that information would be

deleterious if it was disclosed to the future viability of RFPs and competitive bidding processes.

Parties that have participated in the process, parties that are anticipating participating in the process need to understand the rules. The rules were understood to be that information with respect to their specific bids and their identities with respect to specific bids would remain confidential even if that information was given to the Commission.

We were obligated under our contracts to, if the information was provided to the Commission or to their auditors, keep that information confidential and take steps to do so.

We had agreements with the staff and with the auditors that that information that they were given that were in the published report would remain confidential and that was the reason why the staff did file the document under seal and file the redacted document.

We believe that the process that was filed by the staff was in large part appropriate and we believe that the confidentiality of the information should be maintained.

EXAMINER PRICE: Mr. Kutik, I have one

question for you. It's my understanding that the companies object to releasing the identities of the bidders to the other parties even under a protective agreement.

MR. KUTIK: Correct.

EXAMINER PRICE: Can you explain why you believe that that information should not be disclosed to the parties under protective agreement which would shield it from the public?

MR. KUTIK: Well, your Honor, again, that information with respect to suppliers, one, we believe that there hasn't been any demonstration of relevance. The OCC, for example, has had four occasions, four briefs to demonstrate relevance and they haven't done so.

But with respect to the confidentiality, your Honor, we believe that given that there is no need for that information, given that the specifics of the supplier information is one of the I think key pieces of proprietary information, we believe that there has to be an extra special showing for them to see that information beyond what they would get with redaction.

EXAMINER PRICE: But, Mr. Kutik, they don't need to show relevance, they need to show that

this is something that's reasonably calculated to lead to discoverable materials.

MR. KUTIK: That's true, your Honor, and they haven't done that either.

EXAMINER PRICE: Thank you.

Consumers' Counsel?

MS. YOST: Thank you, your Honor.

First, I'd like to point to the Commission's entry regarding this process here. Specifically, the Commission has held in two separate entries, the first being January 18, 2012, paragraph 7, the second being February 23, 2012, paragraph 9, that any conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding.

OCC is requesting the information that the Commission mandated would be available to any party in this proceeding for its review.

What I'd like to really focus on is the fact of the matter is the arguments that FirstEnergy raised are meritless. The information, the Exeter audit report was filed on August 15, 2012. At that time there was no motion for protection filed with that report.

That's contrary to the Commission's

rules, specifically 4901-1-02(E), that holds that any document will be treated as public unless a motion for protection is filed at the same time.

Second, or the next issue is the information that FirstEnergy seeks to protect is not their information. In their initial motion for protection they acknowledged that, that they say this information is third-party information.

In regard to any alleged contracts all --

EXAMINER PRICE: But that's not unprecedented, Ms. Yost. We have proceedings all the time where utilities holding third party confidential information will file for protective orders in order to protect the information. That's not unprecedented at all, is it?

MS. YOST: No, especially where there's a duty to protect it, but here is where we lack the duty.

With their motion for protection they filed two exhibits, Exhibit 1, Exhibit 2. They cite to three different articles of those exhibits to bestow upon them this duty to protect the information.

One of the articles they cite to in regards to one of the articles clearly is

inapplicable. It's about the buyer's obligation -- excuse me, the seller's obligation.

In regards to Exhibit 2, that agreement specifically puts upon -- the duty to protect the information upon the suppliers. It speaks to audits by the Commission and has language that imposes any obligation to protect that information upon the suppliers.

Here we are months into this proceeding and no supplier has motioned the Commission to protect their information.

In regards to the other exhibit, any duty to protect that information expired one year after the term of the contract. In regards to the vintages of 2009-2010, that term of the contract has already expired so any obligations that there was has expired, and the third term of that contract expires at the end of this year, December 31, 2012.

But that obligation to keep information confidential was only imposed upon FirstEnergy if there was an actual request. And there's been no evidence that any of the suppliers requested that information being protected.

EXAMINER PRICE: But a supplier under your theory would have to disclose their identity

that they were a bidder in order to protect the information, wouldn't they?

They're going to have to come before the Commission and say I'm a supplier and I would like my information to be protected.

MS. YOST: Sure. To the extent that they were a winning bidder, and I believe everybody's a winning bidder, yes. And I don't think that's something that they would shy away from. I think they want to be in the business of selling recs and would want people out there to know that's what they do. But that's a fair assessment.

That being said, even for the company to put forth any statements of fact or affidavits that XYZ bidder asked them to do that, and we've seen none of that. The information that they're seeking to protect beyond not being theirs is historical; most of it is over three years old.

I look to the most recent Commission precedent hot off the press November 16 regarding the most recent auction in the Duke case, and I cite to paragraph 10 of the November 16, 2012, Commission entry which in essence after 21 days will be releasing the names of the bidders who won tranches in the competitive bid auction.

The number of tranches won by each bidder, the first round of ratio tranche is supplied compared to the tranches needed, and other information.

So the names of the suppliers are information that the Commission generally always releases. The cases that they cite to they misinterpret and do not support their position and in fact, would support OCC.

So my final thoughts are the information, if it were trade secret information, we do not dispute trade secret information should be protected. The problem with FirstEnergy's argument is it's not trade secret information and therefore OCC would like to see the entire report.

Why this identity of the suppliers is relevant: The identity of the suppliers is relevant because we need to know if it's affiliate transactions or non-affiliate transactions.

EXAMINER PRICE: You know there's some affiliate transactions.

MS. YOST: Yes, but I think it would help a person in this position if -- I do know there's some affiliate transactions which --

EXAMINER PRICE: So what more do you need

if you know some of the transactions are affiliate transactions? That's public. What more do you need to know to put on your case?

There's no evidence in the audit report that there were improper controls on the affiliate transactions.

MS. YOST: Well, they say it didn't violate the statute, but the corporate separation law always speaks to the Commission's obligation or authority to amend corporate separation.

So to the extent that if there were other transactions where such as the auditor found that there were excessively high prices paid and it was a non-affiliate, that would kind of mitigate our concerns that it's just about corporate separation.

So to the extent that ABC Wind Farm receives $675 for recs, that would be helpful to us to say hey, you know what, this may be an issue that's just not about corporate separation and we could rule that out, but if it's only the affiliate companies, which it seems like all signs are showing received what amounts that are over $675 for recs that were $45 that the auditor found to be a seriously flawed business decision, that's why it's important.

So with that, thank you.

EXAMINER PRICE: Thank you.

Any other party care to speak to this?

Mr. Kutik, response?

MR. KUTIK: Yes, your Honor, briefly.

With respect to the relevance, I'm not sure I understand what the relevance case is. There's nothing that prevents them if they think that the proper protections were not accorded here in terms of keeping corporate separation. There's nothing that can prevent them from doing whatever discovery they want to do with respect to the process.

There's nothing in the report that they can talk about or cite to which helps them in terms of their case on that particular issue.

So they haven't made their case for relevance, as you pointed out, to show that this is likely to lead to discovery of admissible evidence.

The bottom line here is that it is in all parties' interests, particularly customers' interests, for the process to be a competitive one, that the process be one that suppliers want to participate in, and to protect the process to get a competitive process that will lead to the best prices

and hopefully the lowest price that can be obtained in the market.

If we change rules that allow information that suppliers reasonably believe would be protected from public disclosure or disclosure at all to be disclosed after the fact, there will be some concerns that suppliers have and that will question -- pose questions about the integrity of the process and will retard the development of a rec market and particularly the effectiveness of the RFP process by the companies.

EXAMINER PRICE: Thank you.

At this time the motion for protective order and the motion to dismiss will be granted in part and denied in part. The Commission has generally ruled that bidder-specific information including prices, quantities, and the identity of bidders to be trade secret information.

The Examiner finds that the redacted portions of the auditor reports have independent economic value and the information was subject to reasonable efforts to maintain its secrecy.

Further, the Examiner finds the redacted portions of the auditor's reports meet the six-factor test specified by the Supreme Court.

Therefore, the Examiner finds that the redacted portions of the auditor's reports are trade secrets and a protective order should be granted pursuant to Rule 4901-1-24 of the Ohio Administrative Code.

However, FirstEnergy will disclose unredacted copies of the auditor's reports to Ohio Consumers' Counsel. No bid-specific information will be withheld, no bidder identities will be withheld.

This disclosure will be contingent upon the agreement of a mutual acceptable protective agreement between FirstEnergy and Consumers' Counsel.

The Examiner expects the protective order will be consistent with the agreements entered into between the parties in prior Commission proceedings. To the extent that no mutual acceptable protective agreement can be reached, the parties should raise this issue with the Examiners.

All parties -- I'd like to emphasize that all parties will maintain the confidentiality of the confidential information contained in the unredacted audit reports.

No information may be -- none of that information may be publicly disclosed, and any information containing documents filed with this

Commission will be filed under seal, and at the hearing we'll take appropriate measures to protect the confidentiality of that information.

Further, the Examiner would like to emphasize that no ruling has been made with respect to any evidence contained in the auditor's reports at this time.

MS. YOST: Your Honor, you said "motion to dismiss."

EXAMINER PRICE: I said it again. You know, I wrote it down that way wrong too.

The proper ruling is the motion for protective order and the motion to compel will be granted in part and denied in part.

Thank you, Ms. Yost.

MS. YOST: I have another separate matter in regard to the report, if this is the time to bring it up.

EXAMINER PRICE: Yes.

MS. YOST: Again, speaking to the redacted report that was filed on August 15, your Honor, do you have a copy of it in front of you?

EXAMINER PRICE: I do.

MS. YOST: I only have the redacted copy but if I could point the Bench's attention to what is

page Roman Numeral iv, specifically the sentence that is numbered 8 at the top that reads "The FirstEnergy Ohio Utility should have been aware that the prices bid by FirstEnergy Solutions reflected significant economic grants and were excessive by any reasonable measure."

If you could turn now to page 33 of the same document, specifically paragraph 5.

EXAMINER PRICE: Yes.

MS. YOST: Again I have only the redacted copy, that's all I've been provided, but to the extent that the redacted portion of sentence 5 says "FirstEnergy Solutions," which it appears to be the identical sentence, OCC would move to have that sentence 5 unredacted because it's already been publicly released on page iv, paragraph 8. If it is the identical sentence. I don't know, it appears to be.

EXAMINER PRICE: I suspect it is but I don't have the unredacted copy with me either.

Mr. Kutik?

MR. KUTIK: Well, your Honor, frankly, the unredacted portion of No. 8 should have been redacted. And without agreeing or admitting anything with respect to No. 5 on page 33, even assuming that

it was the same, we would argue that since 8 was improper, then 5 should remain redacted.

EXAMINER PRICE: We're going to deal with it this way: You're going to give them at some point in the near future the unredacted copy and they can raise this issue on hearing to the extent they need to.

If it's identical, I don't know what it would add to the record, and if it's not identical, then it will be a different issue that we'll have to deal with at that time.

MS. YOST: Your Honor, I only raise that to the extent we are able to negotiate a protective agreement that is given to us and we don't want it to be confusing whether we are releasing information that is already publicly there.

EXAMINER PRICE: If you quote page I-4, you will be just fine.

MS. YOST: Thank you, your Honor.

EXAMINER PRICE: Mr. Allwein.

MR. ALLWEIN: You mentioned this unredacted report would be released to OCC upon the execution of a protective agreement. Is that available to all parties?

EXAMINER PRICE: Available to all parties

who are willing to sign a protective agreement that is substantially consistent with protective agreements filed in other Commission proceedings.

MR. ALLWEIN: Thank you, your Honor.

EXAMINER PRICE: Any other issues for the Bench?

MR. KUTIK: Yes, your Honor.

EXAMINER PRICE: Yes, sir.

MR. KUTIK: We have two issues, both relate to staff. The scheduling order, as far as I understand it, your Honor, does not specify a date for staff to file its testimony if any. And we would ask that the Bench set such a date.

EXAMINER PRICE: Mr. Lindgren?

MR. LINDGREN: The Commission customarily allows the staff until a day prior to the start of the hearing to file its testimony.

EXAMINER PRICE: I don't know about the Commission but that certainly is my custom, and I expect the staff will be reasonable and will file it not the day before the hearing date but at some point prior to the hearing.

MR. LINDGREN: Yes, it will be filed prior to the hearing.

MR. KUTIK: Well, your Honor, that raises

another point, and that relates to our ability to adequately prepare our case. We expect that most of the case will be a dialogue in essence between our witness' position and the witnesses of the staff consultants, technically the auditor.

We would like obviously an opportunity before the hearing begins to be able to understand what staff's consultant's testimony is. So we would ask that we would be given at least a week before the hearing to get their testimony.

EXAMINER PRICE: I don't know that there's -- I guess let me step back.

I suspect that the auditor's testimony is not going to be anything other than what's currently in the audit reports. That the auditor's testimony is simply going to be these are our reports and everything in there is truthful and accurate.

Is there any reason to believe that's not correct, Mr. Lindgren?

MR. LINDGREN: It's possible they would have a correction to make, but otherwise their testimony is --

EXAMINER PRICE: Not going to be any supplemental or additional issues beyond what's in the audit report.

MR. LINDGREN: That's my understanding.

MR. KUTIK: So, for example, your Honor, if I could inquire, there wouldn't be any specific, for lack of a better term, rebuttal or response to things that are explained or pointed out by the companies.

I would expect that the staff would want that opportunity and would do so in terms of their consultant.

EXAMINER PRICE: If the staff is going to put on rebuttal evidence, they would have to ask for permission to put on rebuttal evidence at the conclusion of this case in chief.

MR. KUTIK: "Rebuttal" is probably the wrong word. The better word is "response." Because, frankly, I think it's the company that has probably the opportunity for rebuttal since we file our testimony first.

EXAMINER PRICE: I said "ask."

MR. KUTIK: Correct, I would have the opportunity I think I said.

So that if they were going to put things in their testimony as staff consultants that would be responding to specific points that the company's witnesses would make, points that would be beyond

things that were pointed out in the report, that's a scenario where we would like to have more than a day to respond before the hearing.

EXAMINER PRICE: And again, I guess what I'm trying to say is to the extent that staff is going to rebut or respond or address any issues in testimony that your witnesses raise, I would expect they'll do it in the rebuttal phase and will have to ask the Bench's indulgence to file such testimony. At that point we'll work out an appropriate schedule.

MR. KUTIK: May I have one minute, your Honor?

EXAMINER PRICE: Yes.

MR. KUTIK: The other thing, your Honor, is --

EXAMINER PRICE: Let me, before we move off topic.

Mr. Lindgren, is the staff going to put on anybody other than the auditors?

MR. LINDGREN: May I have a moment to consult my clients?

EXAMINER PRICE: You may.

MR. LINDGREN: Your Honor, at this time the staff does not plan to put on any additional witnesses.

EXAMINER PRICE: Thank you.

Thank you, Mr. Kutik

MR. KUTIK: Your Honor, in regard to the witnesses that are going to be the consultants, we would like to have the opportunity to take the depositions of those witnesses.

And the reason I bring it up now, not having filed a motion, not having notice, I didn't want to be down the line where we are at the eve of hearing and leave this unresolved. That's why I'm bringing it up now.

If it would be more appropriate to do it later, I'm certainly glad to do that.

EXAMINER PRICE: Mr. Lindgren, do you care to respond?

MR. LINDGREN: If he's suggesting that he wants to take the deposition of the auditors, the Commission has ruled in previous cases that the auditors who were retained pursuant to the Commission order are treated the same as the staff and depositions are not permitted of them.

EXAMINER PRICE: Mr. Kutik?

MR. KUTIK: Your Honor, the rule that the Commission has excepts out for discovery depositions members of the staff. And it particularly uses the

word "members" of the staff. It does not use the word "consultant," it does not use the word "contractor," uses the word "member." So that under the language of the Rule, the clear language of the Rule, we believe we should have an opportunity to take a deposition of a witness even if they had a contract with the staff.

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

(Off the record.)

EXAMINER PRICE: Let's go back on the record.

At this time the Bench will defer ruling on FirstEnergy's request for a deposition of the auditors. We do have usual practices and procedures around here and I would like the parties to see if they can informally resolve this without necessity of a ruling from the Bench.

Anything else?

Seeing none, we are adjourned for the day. Thank you, all.

(Hearing adjourned at 10:33 a.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, November 20, 2012, and carefully compared with my original stenographic notes.

_____

Julieanna Hennebert, Registered Professional Reporter and RMR and Notary Public in and for the State of Ohio.

My commission expires February 19, 2013.

(JUL-1928)

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in

Case No(s). 11-5201-EL-RDR

Summary: Transcript of Ohio Edison Company, Cleveland Electric Illuminating Company and Toledo Edison Company hearing held on 11/20/12 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Hennebert, Julieanna Mrs.

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

ENTRY

The attorney examiner finds:

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

(2) By entry issued on February 23, 2012, the Commission selected Exeter Associates, Inc. (Exeter), to conduct the management/performance portion of the audit and Goldenberg Schneider, LPA (Goldenberg), to conduct the financial portion of the audit in accordance with the terms set forth in the RFP.

(3) On August 15, 2012, Exeter and Goldenberg filed final audit reports on the management/performance portion and financial portion of Rider AER, respectively.

(4) On September 26, 2012, Ohio Consumers' Counsel (OCC) filed a motion for a prehearing conference in order to obtain a non-redacted copy of the management/performance portion of the audit report,

which the attorney examiner denied by entry issued on October 11, 2012, finding that OCC's motion was premature.

(5) On October 3, 2012, FirstEnergy filed a motion for protective order to protect from public disclosure confidential supplier pricing and supplier-identifying information that appears in the unredacted version of the final report of the management/performance audit of Rider AER.

(6) Thereafter, on October 23, 2012, OCC filed a motion to compel FirstEnergy to provide a completely unredacted copy of the final report of the management/performance portion of the audit.

(7) On October 29, 2012, Daniel Bradley, Director of Navigant Consulting, filed correspondence with the Commission recommending against the release of the unredacted final report of the management/performance portion of the audit.

(8) FirstEnergy filed a memorandum contra OCC's motion to compel on November 7, 2012.

(9) On November 20, 2012, a prehearing was held in this proceeding pursuant to the procedural schedule. At the prehearing conference, the presiding attorney examiner addressed FirstEnergy's pending motion for protective order and OCC's pending motion to compel, granting them, in part, and denying them, in part. More specifically, the presiding attorney examiner found that the redacted portions of the auditor report have independent economic value, are subject to reasonable efforts to maintain its secrecy, and meet the six-factor test specified by the Supreme Court of Ohio. Nevertheless, the presiding attorney examiner found that FirstEnergy should disclose unredacted copies of the audit report to OCC, contingent upon a mutually acceptable protective agreement between FirstEnergy and OCC.

(10) Thereafter, on December 31, 2012, FirstEnergy filed a second motion for protective order, requesting a protective order regarding a public records request made by OCC on

December 21, 2012. According to FirstEnergy, OCC's public records request at issue requested documents reflecting the Companies' comments on a confidential draft of the final report of the management/performance audit of Rider AER for October 2009 through December 31, 2011 (draft documents). FirstEnergy argues that the Commission should grant a protective order as to the confidential draft documents because they contain information on renewable energy credit supplier pricing and identities, which was already held to be confidential trade secret information subject to a protective order preventing public disclosure and limiting disclosure to OCC subject to a protective agreement at the November 20, 2012, prehearing. FirstEnergy asserts that, as a result, the confidential draft documents are not subject to disclosure under a public records request. Secondly, FirstEnergy contends that the confidential draft documents are not subject to disclosure under a public records request pursuant to Section 4901.16, Revised Code, because they were provided to Staff as confidential materials pursuant to Staff's audit of Rider AER. FirstEnergy argues that OCC's public records request is an inappropriate attempt to sidestep the Commission's discovery process.

(11) On January 15, 2013, OCC filed a memorandum contra FirstEnergy's motion for protective order. In its memorandum contra, OCC argues that the Commission should deny FirstEnergy's motion for protective order because none of the information contained in the draft documents qualifies as trade secret information under Ohio law; because FirstEnergy failed to meet the burden associated with specifically identifying the need for protection from disclosure; because the draft documents must be produced in a redacted form; because Section 4901.16, Revised Code, does not prevent public disclosure of the draft documents pursuant to a public records request; and, because public policy supports denial of FirstEnergy's motion for protective order. In its memorandum contra, OCC also states that a draft copy of the audit report was filed with the Commission.

(12) On January 22, 2013, FirstEnergy filed a reply to OCC's memorandum contra the Companies' motion for protective

order. In its reply, FirstEnergy initially points out that OCC incorrectly contends in its memorandum contra that the confidential draft documents were filed with the Commission. FirstEnergy notes that the draft documents were not filed with the Commission, but were provided to Staff as part of the audit process as contemplated by the RFP with the understanding that the documents would be kept confidential. Consequently, FirstEnergy reemphasizes its argument that the confidential draft documents fall within the ambit of Section 4901.16, Revised Code, and are not subject to disclosure under a public records request. Further, FirstEnergy argues that, even if the documents were not protected by Section 4901.16, Revised Code, the plain language of Section 149.43(v), Revised Code, excludes from the definition of public records those that are prohibited from disclosure by state or federal law.

(13) The attorney examiner has conducted an *in camera* review of the document subject to the public records request to determine whether the document contains trade secrets or confidential information and whether any such information can be redacted from the document.

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

(15) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is

not inconsistent with the purposes of Title 49 of the Revised Code."

(16) Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code.

(17) The attorney examiner has reviewed the information included in FirstEnergy's motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,[1] the attorney examiner finds that, consistent with the ruling at the November 20, 2012, prehearing conference, confidential supplier pricing and supplier-identifying information that appears in the draft document contains trade secret information. Its release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that FirstEnergy's motion for protective order is reasonable with regard to the confidential supplier pricing and supplier-identifying information that appears in the draft document and should be granted to the extent discussed herein.

(18) Having determined that the supplier pricing and supplier-identifying information contains trade secret information, the attorney examiner now must evaluate whether the document can be reasonably redacted to remove the confidential information contained therein without rendering the remaining document incomprehensible or of little meaning. The attorney examiner does find that it is

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1 See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

possible to redact the document and release a redacted version of the document. Therefore, the document will be released in redacted form in seven days unless otherwise ordered. Finally, the parties to the proceeding may review *in camera* at the offices of the Commission the redacted document prior to its scheduled release.

(19) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. However, in this case, the attorney examiner finds that confidential treatment shall be afforded for a period ending 24 months from the date of this entry or until February 13, 2015.

(20) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If FirstEnergy wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to FirstEnergy.

It is, therefore,

ORDERED, That the motion for protective order filed by FirstEnergy is granted as set forth in Finding (17). It is, further,

ORDERED, That, unless otherwise ordered by the Commission, the redacted document be released in seven days in accordance with Finding (18). It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy Willey Chiles
By: Mandy Willey Chiles
Attorney Examiner

GAP/sc

This foregoing document was electronically filed with the Public Utilities

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in

Case No(s). 11-5201-EL-RDR

Summary: Attorney Examiner Entry granting motion for protective order and ordering release of redacted version of document in seven days. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio

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Confidential Pursuant to O.R.C. 4901.16

CONFIDENTIAL DRAFT

MANAGEMENT/PERFORMANCE AUDIT

OF THE ALTERNATIVE ENERGY RESOURCE RIDER (RIDER AER)

OF THE FIRSTENERGY OHIO UTILITY COMPANIES

FOR OCTOBER 2009 THROUGH DECEMBER 31, 2011

CASE NO. 11-5201-EL-RDR

PREPARED FOR:

PUBLIC UTILITIES COMMISSION OF OHIO

180 EAST BROAD STREET

COLUMBUS, OHIO 43215-3793

JUNE 1, 2012

PREPARED BY

EXETER

ASSOCIATES, INC.
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Suite 300
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Executive Summary

On September 20, 2011, the Public Utilities Commission of Ohio ("PUCO") issued an entry on rehearing In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Case No. 11-2479-EL-ACP. In that entry on rehearing, the PUCO stated that it had opened Case No. 11-5201-EL-RDR for the purposes of reviewing the Alternative Energy Resource Rider ("Rider AER") of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy Ohio utilities" or "Companies"). Additionally, the PUCO indicated that its review would include the Companies' procurement of renewable energy credits for purposes of compliance with Ohio's Alternative Energy Portfolio Standard ("AEPS"). The PUCO further noted that it would determine the necessity and scope of an external auditor for this matter.

The PUCO subsequently decided that an external auditor would be necessary for the review, and on January 18, 2012 directed Staff to issue a request for proposals ("RFP") for audit services. After consideration of the proposals received, the PUCO selected Exeter Associates, Inc. ("Exeter"), to conduct the management/performance portion of the audit and Goldenberg Schneider, LPA ("Goldenberg"), to conduct the financial portion of the audit.

This report presents the findings of Exeter's management/performance audit of the Rider AER of the FirstEnergy Ohio utility companies for the time period ~~October~~ June 2009 through December 31, 2011. Dr. Steven L. Estomin and Mr. Thomas S. Caitlin acted as the primary investigators for this audit.

The principal information on which this management/performance audit is based is from a variety of sources, including:

- Responses of the First-Energy Ohio utilities to requests for information prepared by Exeter Associates, Inc.
- Independent research conducted by Exeter Associates, Inc. related to the availability and market prices of SRECs and RECs in Ohio and elsewhere.
- Orders issued by the Public Utilities Commission of Ohio related to Ohio's AEPS and the FirstEnergy Ohio utilities Rider AER.
- Interview of personnel from the FirstEnergy Ohio utilities and Navigant Consulting, Inc., consultant to the Companies.

General SREC/REC Acquisition Approach

The FirstEnergy Ohio utilities employed Requests for Proposals ("RFPs"), with responses provided in sealed bids, to secure all four categories of Renewable Energy Credits ("RECs") – In-State Solar RECs; All-State Solar RECs; In-State All Renewables RECs; and All-State All Renewables RECs. In total, six RFP's were issued.

Exeter examined the FirstEnergy Ohio utilities' procurement process to see if it met the following important characteristics: (1) competitiveness; (2) transparency; (3) cost; and (4)

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ability to obtain adequate industry response. Each of these considerations appears to have been met by the REC acquisition approach employed by the Companies.

Exeter also considered the key elements of the RFPs issued as well as the processes associated with advance market research, issuance, dissemination of information to potential bidders, evaluation of bids, and handling of feedback obtained from bidders. The RFPs were assessed for the following key elements: (1) clarity; (2) financial/security requirements; (3) time between bid receipt and award; and (4) bidder feedback. Also examined was the RFP planning process ~~with~~ which was assessed for: (1) preparation and mechanics; (2) market research; and (3) contingency planning.

Exeter's analysis led to the following findings and recommendations on the RFPs and RFP processes:

Findings.

1. The RFPs issued by the FirstEnergy Ohio utilities are reasonably developed and do not appear to incorporate any provisions or terms that could be assessed to be anti-competitive.

~~1.~~2. The basic terms and conditions contained in the RFP were generally acceptable by the industry and to the extent that individual bidders were unwilling to provide bids in response to the solicitations, those decisions were based on specific elements contained in the RFPs that were at odds with the individual business models. Such conditions include the duration of the contract periods and the firmness of the supply requirements.

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~~1.~~3. The security requirements contained in the RFPs are assessed to strike a reasonable balance between safeguarding the FirstEnergy Ohio utilities and making the RFP attractive to potential bidders.

~~1.~~4. The processes in place to disseminate information to potential bidders and to address issues and questions that arose during the time that potential bidders were deciding whether to proffer a bid and the offer due dates was adequate.

~~1.~~5. The mechanisms in place to review and evaluate the bids were adequate, although a shorter period of time between the bid due date and the award in the first RFP would have been an improvement. The approximately three-week review period established by the FirstEnergy Ohio utilities was generally deemed excessive by industry participants and this was rectified in subsequent RFPs.

Comment [MCM1]: Did this provision have any impact on the outcome of or participation in the bidding process?

~~1.~~6. The mechanisms in place to solicit industry feedback, through both the nature of the questions and comments raised by potential bidders and the conduct of a survey by NCI, are seen as an acceptable approach to inform the FirstEnergy Ohio utilities about the strengths and weaknesses of the issued RFPs. Further, the information obtained through the process was effectively used and served as a basis for modifications in RFPs subsequent to the conduct of the survey.

~~1.~~7. The market research conducted by the FirstEnergy Ohio utilities prior to the first ~~two~~ three RFPs was satisfactory in light of the limited information available~~inadequate and failed to provide the FirstEnergy Ohio utilities with sufficient information by which to fully assess and evaluate the responses to the first and second RFPs.~~

Comment [MCM2]: Inadequate by what standard?

Comment [MCM3]: Refer to point 1 on The Companies' Major Comments Regarding the Executive Summary document.

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~~1.~~8. The contingency planning in place for the first three RFPs was ~~inadequate~~ satisfactory and reflected the Companies' risk management policies from a supply-side perspective. ~~should have encompassed a specific set of fall-back approaches, or in the alternative, specified a mechanism by which to distill the information gained from the solicitations to develop an modified approach.~~

Comment [MCM4]: Refer to point 2 on The Companies' Major Comments Regarding the Executive Summary document.

~~1.~~Recommendations.

1. The FirstEnergy Ohio utilities should implement a more robust contingency planning process as it relates to the procurement of RECs and SRECs in compliance with Ohio's AEPS. We also recommend that the contingency plan be subject to review by the PUCO Staff prior to its implementation.

Comment [MCM5]: Refer to point 3 on The Companies' Major Comments Regarding the Executive Summary document.

2. A thorough market analysis should precede the issuance of any RFPs by the FirstEnergy Ohio utilities for RECs and SRECs in compliance with Ohio's AEPS.

Comment [MCM6]: Refer to point 4 on The Companies' Major Comments Regarding the Executive Summary document.

3. The FirstEnergy Ohio utilities should consider a mark-to-market approach to the security requirement for future procurements.

Comment [MCM7]: Will all utilities and CRES be expected to adopt this approach? If not, why not?

Solicitation Results and Procurement Decisions

As part of the management/performance audit, Exeter Associates, Inc. reviewed the results of the FirstEnergy Ohio utilities' procurement of SRECs and RECs to meet the Ohio AEPS requirements for 2009, 2010, and 2011. In particular, Exeter reviewed the quantities of SRECs and RECs bid, the prices associated with those bids, and the decisions of the FirstEnergy Ohio utilities regarding the bids (quantity and price) received. Exeter's analysis resulted in the following findings and recommendations.

Comment [MCM8]: Refer to point 5 on The Companies' Major Comments Regarding the Executive Summary document.

Findings:

- The prices paid by the Companies for All-States All Renewables RECs were reasonably consistent with other regional RECs prices.
- While lower prices would have been available to the Companies, there were more fewer RECs purchased under RFP 1 and more RECs purchased under RFP 3, the Companies' decisions to purchase the bulk of the 2009, 2010, and 2011 requirements under RFP 1 were not unreasonable and were consistent with the recommendations of the independent RFP manager.

Comment [MCM9]: This is a post RFP analysis and was not within the Companies' knowledge at the time of the RFPs.

- The lower prices available for All-States SRECs in the 2011 timeframe could not have been reasonably foreseen by the Companies. The prices paid by the Companies for All-States SRECs are consistent with SRECs price regionally.
- The FirstEnergy Ohio utilities paid ~~unreasonably~~ high prices for In-State All Renewables RECs purchased from a particular supplier but under the circumstances the prices resulted from a competitive bid under nascent conditions and were consistent with the recommendations of the independent RFP manager. ~~from~~ [redacted]

Comment [MCM10]: Refer to point 6 on The Companies' Major Comments Regarding the Executive Summary document.

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- Prices for In-State All Renewable RECs in the range of $[redacted] to $[redacted] exceeded the prices paid for non-solar compliance RECs anywhere in the country by at least $[redacted] to $[redacted] but cannot be determined to be out of line with the Ohio in-state market at that time.
- The FirstEnergy Ohio utilities had several alternatives available to the purchase of high-priced In-State All Renewables RECs, ~~none of~~ which were considered ~~or acted upon~~ but not adopted. Results were competitively determined and fully subscribed.
- The FirstEnergy Ohio utilities should have been aware that the prices bid by one Supplier [redacted] reflected significant economic rents and were high as compared with the national market ~~excessive by any reasonable measure.~~
- The procurement of In-State Solar RECs by the FirstEnergy Ohio utilities was competitive and, when Ohio SRECs became reasonably available, the prices paid for those SRECs by the Companies were consistent with prices for SRECs seen elsewhere. This is the same approach and process followed for Ohio All Renewable RECs.

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Comment [MCM11]: Refer to point on The Companies' Major Comments Regarding the Executive Summary document.

Comment [MCM12]: Refer to point on The Companies' Major Comments Regarding the Executive Summary document.

Recommendations:

Based on the findings presented above, we recommend that the Commission, at a minimum, establish a review process of future procurements similar to power procurement. Since this was a nascent market and FE had the obligation to comply with a new law, it would not be appropriate to disallow recovery of costs paid and credits that have been used to assure compliance. The Commission should consider establishing a more structured procurement process in the future, including Staff oversight of the process and submittal of the process to the Commission for acceptance or rejection within 2-3 business days, in order that the Commission is more fully apprised and engaged in future solicitations. Staff should be apprised of the results of the RFP. The independent RFP manager should issue a report of market conditions and the RFP, and Staff should monitor the RFP and raise any concern prior to the Companies' acceptance of the bids. If the Commission rejects the results of the RFP, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year. ~~disallow recovery of all In-State All Renewables RECs costs incurred by the FirstEnergy Ohio utilities in excess of $[redacted] per REC,~~ [redacted]

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Miscellaneous Issues

During the course of conducting the management/performance audit of the FirstEnergy Ohio utilities, several issues emerged that warrant brief discussion, though these issues are not directly related to the FirstEnergy Ohio utilities and affect all of the regulated utilities in Ohio with respect to compliance with Ohio's AEPS legislation. Specifically, there are three aspects of either the legislation or the method by which the legislation is implemented that may warrant some reconsideration by the appropriate bodies. These issues are addressed below.

Comment [MCM13]: Why isn't the baseline methodology addressed in this section?

Recovery of ACP Charges

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Ohio's AEPS legislation does not permit the Ohio utilities to recover the costs associated with Alternative Compliance Payments. The fundamental purpose of the ACP is to set a limit on the exposure of retail customers for the costs of RPS (or AEPS) compliance. Not allowing recovery of the ACP provides a significant deterrent to regulated firms from employing the ACP in lieu of the procurement of RECs, even at prices well in excess of the ACP.

Commission Approval of RECs Purchases

A second modification that merits consideration is a requirement that the Commission approve the process whereby the Companies purchase ~~of~~ RECs ~~for the retail suppliers of~~ associated with SSO service before the RECs contracts are signed. That requirement would eliminate the types of issues that have arisen in the context of this management/performance audit. If the Commission rejects purchase of RECs, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year. Further, this recommendation is subject to the limits of the Commission's jurisdiction.

Comment [MCM14]: What is the basis for this conclusion?

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Application of the Three-Percent Rule

The legislation does not clearly lay out how the "three-percent rule" is to be applied. The apparent intent of the rule is to limit the degree to which retail customers are exposed to excessive costs related to the satisfaction of the renewable energy requirements. The rule, however, is based on "expected" impacts. An algorithm based on expected sales volumes that account for customer migration and projections of market pricing for power is recommended as a better approach.

Comment [MCM15]: What is the basis for the determination of the "apparent intent" of legislation?

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Table of Contents

List of Tables

List of Figures

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CONFIDENTIAL DRAFT

MANAGEMENT/PERFORMANCE AUDIT

OF THE ALTERNATIVE ENERGY RESOURCE RIDER (RIDER AER)

OF THE FIRSTENERGY OHIO UTILITY COMPANIES

FOR OCTOBER 2009 THROUGH DECEMBER 31, 2011

I. INTRODUCTION

On September 20, 2011, the Public Utilities Commission of Ohio ("PUCO") issued an entry on rehearing *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP. In that entry on rehearing, the PUCO stated that it had opened Case No. 11-5201-EL-RDR for the purposes of reviewing the Alternative Energy Resource Rider ("Rider AER") of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy Ohio utilities" or "Companies"). Additionally, the PUCO indicated that its review would include the Companies' procurement of renewable energy credits for purposes of compliance with Ohio's Alternative Energy Portfolio Standard ("AEPS"). The PUCO further noted that it would determine the necessity and scope of an external auditor for this matter.

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- Interview of personnel from the FirstEnergy Ohio utilities and Navigant Consulting, Inc., consultant to the Companies.

The remainder of this management/performance report is organized into three sections. The following section, Section 2, addresses the approach used by the Companies to procure Solar and Non-solar Renewable Energy Credits. This section includes assessment of the general approach, the structure of the request for Proposals, the Companies' treatment of industry feedback on the solicitation document, market research, and contingency planning.

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Comment [CBH16]: The first RFP was issued in July 2009, with execution in August 2009. As the report clearly references RFP1, this time is incorrect.

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Section 3 of the report addresses the results of the acquisition process, including the effectiveness of the solicitations and the prices ultimately paid for Solar and Non-solar Renewable Energy credits, both in-State and out-of-State.

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Section 4 of the report addresses certain miscellaneous issues that emerged during the conduct of the management/performance audit.

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Findings and recommendations are presented throughout the document following the discussion of the relevant issues.

II. GENERAL SREC/REC ACQUISITION APPROACH

The FirstEnergy Ohio utilities employed Requests for Proposals ("RFPs"), with responses provided in sealed bids, to secure all four categories of Renewable Energy Credits ("RECs") – In-State Solar RECs; All-States Solar RECs; In-State All Renewables RECs; and All-States All Renewables RECs. Because the competitive RFP approach did not fully satisfy all of the Companies'~~FE~~'s requirements for in-State solar and non-solar for 2010 and 2011, the Companies also pursued broker transactions and bilateral arrangements following the issuance of the third RFP (October 2010). In addition, a limited number of Solar RECs ("SRECs") were available to the Companies internally from the operation of programs to promote renewable energy development within the Companies'~~FE~~ service areas. In total, six RFP's were issued. The specifics of the RFP approach employed by the Companies is addressed below followed by an assessment of the alternative approaches employed to supplement the bids received through the RFP process.

A. RFP Approach Overview

The appropriateness of any particular acquisition approach needs to be judged on basis of several important characteristics. Most important among the characteristics are: (1) competitiveness; (2) transparency; (3) cost; and (4) the ability to obtain adequate industry response. Each of these considerations appears to have been met by the approach employed by the Companies.

The sealed bid RFP protocol used by the FirstEnergy Ohio utilities entailed a two-part submission, which is a common practice used in the electric utility industry for the purchase of

~~not only~~ RECs ~~but also for electric power supplies~~. Potential bidders are required to submit documents verifying credit-worthiness and the financial capability of meeting the requirements of the RFP. Once the credit/financial qualifications have been reviewed and a set of qualified bidders identified, the Phase 2 price/quantity bids submitted in response to the RFP are then evaluated purely on the basis of least cost, that is, lowest price. Offers are accepted from lowest price to highest until the specified requirement is filled. Typically, the seller conditions the RFP to permit rejection of bids even if the full requirement is not met. This allows the buyer to avoid paying for supplies assessed to be above market or to adjust the amount purchased due to circumstances that have developed since the issuance of the RFP.

Competitiveness. – The sealed-bid pricing requirement of the RFPs for SRECs/RECs issued by the FirstEnergy Ohio utilities is assessed to be ~~a~~ competitive and to minimize the potential for bidder collusion and "gaming" of the process. Because bidders recognize that there may be only one opportunity to secure a buyer, bidders tend to provide competitive prices reflective of market conditions.

Winning bidders are paid their own individual bid prices, in contrast to certain other competitive procurement methods (for example, descending clock auctions) where all selected bidders are paid the marginal bid, that is, the highest price bid selected that fulfills the established requirement. Paying the individual bid prices eliminates incentives on the part of bidders to potentially influence the clearing price, for example by bidding some supplies at low prices and other supplies at higher prices. Because all bids are paid the bid price, no bidder can influence the price paid to bidders below the marginal price – the price of the last accepted bid.

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Transparency. – The sealed-bid RFP process is transparent due to its simplicity and tractability. A paper trail exists for the bids and the awards, and the approach is straightforward and one with which industry participants are familiar and comfortable.

RFP Cost. – The sealed bid RFP method is relatively low-cost in comparison to alternative approaches that rely on a live auction platform. Using an RFP does not require monitoring of the bid process to attempt to identify collusive bidding practices. Bid evaluation is straightforward. Because the FirstEnergy Ohio utilities issued multiple RFPs, the same set of documents with only minor modifications were able to be relied upon, which eliminated the incurrence of duplicative costs.

Adequate Industry Response. – The RFPs issued by the FirstEnergy Ohio utilities generally succeeded in obtaining bids from a variety of potential suppliers and were structured so as not to prelude bids from small entities wishing to bid only a small number of SRECs/RECs. The table below (Table 1~~Table 1~~~~Table 1~~) shows the number of successful bids and the number of successful bidders responding to each of the six RFPs. To place the number of responses in context, the type of RECs solicited in each RFP and the quantity of RECs solicited are also shown.

Table ~~11~~1 FirstEnergy Ohio REC RFPs 2009 – 2011

	In-State Solar		In-State All Renewables		All-States Solar		All-States All Renewables	
	Number of Successful Bidders	Number of Successful Bids	Number of Successful Bidders	Number of Successful Bids	Number of Successful Bidders	Number of Successful Bids	Number of Successful Bidders	Number of Successful Bids
RFP1	---	---	1	6	---	---	2	8~~8~~9~~0~~
RFP2	2	7	1	79	2	5	---	---
RFP3	9	4~~7~~5	~~5~~2	~~6~~4	3	~~8~~9	~~6~~2	~~3~~27
RFP4	2	2	---	---	---	---	---	---
RFP5	~~1~~211	~~1~~411	---	---	~~1~~13	~~3~~67	---	---

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Comment [MCM18]: Industry response needs to be considered in light of when SB 221 established requirements for in-state RECs – that seems to be missing from this analysis
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Comment [CBH19]: This is not correct.
Comment [CBH20]: This table contains inconsistencies in the definition of a "Successful Bidder." In some instances, the numbers in this table reflect the selected bids/bidders, in some instances the numbers in this table reflect the total number of bids/bidders, and in some instances the numbers are just incorrect. The numbers represented here are the number of selected bidders/bids for each RFP, hence "Successful" means selected by FE.
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Comment [CBH21]: This error was due to double counting of tranches that were broken up based on price. The tranche is counted twice even though there was only 1 bid.

RFP6	~~158~~	~~1910~~	~~62~~	~~102~~	---	---	---	---

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B. RFP Elements

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This section addresses the key elements of the RFPs issued by the FirstEnergy Ohio utilities, as well as the processes associated with advance market research, issuance, dissemination of information to potential bidders, evaluation of bids, and handling of feedback obtained from bidders.

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Clarity. – All six RFPs issued by the FirstEnergy Ohio utilities were assessed for clarity with respect to the submissions required; the deadlines for submission; the type, quantities, and vintage of RECs sought to be procured; and the means by which potential bidders could obtain additional information and have questions addressed. All RFPs were found to be adequate with respect to clarity.

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Financial/Security Requirements. – All RFPs contained financial and security documentation requirements to ensure that the bidders had the financial capabilities of satisfying the contract terms and conditions based on the number of RECs bid in aggregate by the bidder. Additionally, posting of security following award was required. The security requirements serve to protect ~~FirstEnergy~~ the Companies in the event that the supplier defaults on the contract and ~~FirstEnergy~~ the Companies must then go back to the market to obtain the necessary RECs. This circumstance could emerge, for example, in the case of a winning bidder filing for bankruptcy protection before ~~fullfillment~~fulfillment of the contract. If market prices for RECs increased during the contract period, the contract could be voided by a bankruptcy judge and ~~FirstEnergy~~ the Companies could be required to replace the undelivered RECs with RECs obtained at market

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prices higher than those contained in the contract. Security requirements often serve as an impediment to bidders, especially smaller companies.

The first five RFPs contained financial/security terms that exempted bidders offering less than $100,000 of RECs from having to obtain security guarantees. This arrangement facilitated participation by smaller entities offering a relatively small number of RECs. For those bidders offering RECs with an aggregate value (the product of price and the number of RECs) greater than $100,000, security of ten percent of the value of the bid was required. The requirement was placed on the aggregate value to avoid suppliers attempting to circumvent the security requirement by offering multiple smaller bids. Since the potential existed that the bidder would be awarded all the bids proffered, the aggregate bid requirement utilized by the FirstEnergy Ohio utilities was appropriate.

The sixth RFP, which was to obtain in-State SRECs for a term up to 10 years, raised the threshold for security from $100,000 to $250,000. Given the longer term of the resulting contracts, the $100,000 threshold, if left intact, would serve only to exempt bidders offering only a very small number of SRECs and may have served to effectively preclude the submission of bids from potentially viable sources. The higher threshold did not serve to put the Companies, or the Companies' customers, at a significant additional risk relative to the lower security threshold contained in the prior RFPs since any risk exposure was spread out over a ten-year period rather than concentrated in just one or two years.

RFPs are sometimes issued with a requirement that security be posted not later than the time of the bid, that is, the bidder must provide a security commitment (for example, a letter of credit, a parent-company guarantee, or cash) on or before the submission of the price/quantity

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bid. If the bidder is not selected, the security commitment can then be cancelled. The RFPs issued by the FirstEnergy Ohio utilities did not require the posting of security until the contract was awarded. The approach employed by the FirstEnergy Ohio utilities reduces the cost associated with bid preparation and is conducive to enhancing ~~to~~ the pool of potential bidders without imposing added risks on the Companies or the Companies' electric customers.

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An alternative approach to the one used by the Companies is to adjust the security periodically on a mark-to-market ("MtM") basis. Under this alternative approach, the winning bidders are required to increase the amount of security in accordance with the differential between the market price and the bid price. If market prices rise above the bid (award) price such that the initial security requirement is insufficient to cover the differential in the event of default, the seller is required to post additional security to provide protection to the buyer. When market prices decline below the bid (award) price, the level of security can be reduced since the buyer would not require price protection in the event of default, that is, the relevant commodity can be purchased in the market by the buyer at a price below the bid (award) price. The contracts awarded by the FirstEnergy Ohio utilities do not contain an MtM security adjustment mechanism. The absence of an MtM adjustment clause in the contracts is appropriate given the nature of the market for Ohio RECs. Determining the market price in any meaningful way, particularly for In-State Solar and In-State All Renewables RECs, would have proven difficult given the lack of maturity in those markets at the time that the RFPs were issued. Consequently, any MtM adjustment would have been subject to significant uncertainty given the lack of liquidity in the markets. As the markets mature, however, and market price data become more transparent and more readily available, the Companies should give consideration to reliance on an MtM security mechanism, particularly for longer term contracts where the potential for

differential between the market prices and the bid prices can become more pronounced over time.

Comment [MCM22]: FE takes exception as there is no known market price for RECs and REC prices are volatile

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Time Between Bid Receipt and Award. – The amount of time between the receipt of bids by the buyer and the award of contracts affects the risk to which the bidders are exposed. The longer the time interval, the greater the degree of risk since market conditions could change and adversely affect the financial position of the sellers. To compensate for increased risk related to an extended time between bid and award, bidders will sometimes increase the bid price over what it would be were the interval shorter. While the interval between bid receipt and award is much more important in the context of electric power supply procurement than it is for the procurement of RECs, bidders have a strong preference for shorter intervals (e.g., a few days) than for longer intervals (e.g., two or more weeks). However, the recommended Commission approval will add 2-3 days, but is recommended to prevent further instances of uncertainty and costs for the utility and the Commission. If the Commission rejects the results of the RFP, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year

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The first RFP issued by the FirstEnergy Ohio utilities for the procurement of both SRECs and RECs, both in-State and out-of-State, contained a time interval of 17 days. This was shortened in subsequent RFPs to less than a week in response to feedback obtained from bidders. This bid/award interval, as modified following the issuance of the first RFP, is reasonable and

appropriate, affords the Companies adequate time to evaluate the bids and select a suite of awards, and does not expose the bidders to unwanted and unnecessary risk.

Bidder Feedback. – Obtaining the perspective of potential bidders is critically important to structuring an RFP that is capable of eliciting broad industry participation. The FirstEnergy Ohio utilities held bidder conferences to address questions and also received questions from bidders outside of the bidder conferences. Questions and responses were posted and available to all potential bidders so as not to provide any bidding advantage to any one entity.

In addition to compiling and addressing the comments of potential bidders on each of the RFP issuances, the FirstEnergy Ohio utilities also directed Navigant Consulting, Inc. ("NCI") to conduct a survey of supplier views on the 2009 RFPs.[1] Various types of suppliers were contacted (e.g., regional developers, national developers, marketers, generators) to allow NCI to obtain a range of views on the RFPs based on the alternative perspectives of various survey participants. Several of the modifications suggested by the various survey respondents were implemented by the FirstEnergy Ohio utilities, including: (1) shortening the time between bid and award notification,[2] (2) allowing for unit-contingent bids, and (3) extending the length of the contract period.

C. RFP Planning

Planning for the issuance of the RFP can be divided into three elements:

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[1] Navigant Consulting, *Market Research Report Regarding Supplier Views on REC RFPs*, June 3, 2010. Prepared for FirstEnergy. Provided in response to Exeter Associates, Inc.'s first information request, interrogatory 3.
[2] The modification was implemented in the second RFP issued by the FirstEnergy Ohio utilities, prior to the compilation of the survey by NCI.

- Preparation of the relevant documents and the putting in place of the mechanisms to effectuate the execution of the issuance of the RFP and the evaluation of results;
- Market research prior to issuance of the RFP; and
- Contingency planning.

Each of these elements is addressed below.

Preparation and Mechanics. – The FirstEnergy Ohio utilities appear to have exercised reasonable care in preparation of the documents for the solicitations and arranged the appropriate mechanisms for the evaluation of the bids received to allow award to be made within the timeframes specified in the solicitations. The Companies also put in place adequate mechanisms to address issues and questions raised by potential bidders and to resolve those issues within a reasonable amount of time.

Market Research. – The RECs markets within which the FirstEnergy Ohio utilities operate currently, and during the period addressed by this management and performance audit, are extremely complex. The markets contain geographic and product definition dimensions which need to be recognized and information available as to the quantity of applicable RECs generated (or that will likely be generated during the contract performance period) is difficult to assemble and verify. This is largely the result of the nascent nature of the markets, particularly in 2009 and 2010 and also, although to a lesser extent, in 2011.

In essence, the FirstEnergy Ohio utilities were operating in four separate, but overlapping, markets the All-States All Renewables market; the All-States Solar market; the Ohio All Renewables market; and the Ohio Solar market. In the case of the All-States All Renewables market, the RECs available to the FirstEnergy Ohio utilities are also (largely)

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eligible to satisfy the Renewable Portfolio Standards ("RPS") in other states located in the mid-Atlantic area. For example, wind power generated in West Virginia, the RECs for which would be eligible to be used for compliance with the Ohio requirement, can also be used to satisfy RPS requirements for Pennsylvania; Maryland; Delaware; Washington, D. C., New Jersey, and other states. In assessing the market, the quantity of such RECs that would be available to the FirstEnergy Ohio utilities cannot be viewed in isolation, but must also consider the requirements of the other states for which those RECs are eligible. Confounding that analysis is that the various states have different definitions of what types of fuels and technologies can be used for RPS compliance. For example, Pennsylvania's list of eligible resources includes facilities that produce electricity from waste coal; and Maryland's list of eligible resources includes facilities generating electric power from black liquor (a waste by-product of paper production). Consequently, West Virginia wind power competes against these eligible resources in those states, which affects the availability of the West Virginia resources to meet the Ohio AEPS requirements. These considerations extend to the Ohio All Renewables market, recognizing that RECs generated in Ohio can be used to not only satisfy the Ohio requirements but also the requirements in other states for which those resources are eligible.

Comment [MCM23]: Note that each STATE RPS sets forth its own requirements

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The market research conducted by the FirstEnergy Ohio utilities prior to the issuance of the first and second RFPs consisted principally of review of the prices for RECs being traded in nearby states. This avenue of research is limited with respect to what information might be able to be gleaned as it would relate to the initial two RFPs.

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While information on market prices that the FirstEnergy Ohio utilities could expect to pay for All-States All Renewables and All-States Solar RECs would be reasonably obtainable from these sources, the amount of available (or potentially available) RECs and SRECs meeting

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the Ohio in-State criterion would not be available in any meaningful way. In the context of prices for In-State All Renewables RECs and In-State Solar RECs, those markets were nascent at the time of the first two RFPs and market data were not generally reported and available to potential market participants. The information from the PJM queue would also be of little help, since most of the projects in the queue at any particular time, and at the time of the first two RFPs in particular given the nation's economic condition, do not ultimately get developed.

Following the issuance of the second RFP, and prior to the issuance of the third RFP, the FirstEnergy Ohio utilities directed NCI to conduct a market analysis. That study was completed in July 2010. A previous study focusing on In-State Solar and All Renewables RECs was conducted by Navigant in October 2009. By the time these studies were completed, the FirstEnergy Ohio utilities had already purchased virtually all of the All Renewables RECs required (both In-State and All-States) to meet the utilities' requirements for years 2009, 2010, and 2011.

Contingency Planning. – The FirstEnergy Ohio utilities indicated that it relied on the "FirstEnergy Corp FE Utilities Commodity Portfolio Risk Management Policy"[3] to provide guidance on contingency planning for the purchase of RECs and SRECs to satisfy the Ohio AEPS requirements for 2009, 2010, and 2011. The document (2009, 2010, and 2011 versions) was reviewed and there is no requirement for contingency planning contained therein.

Based on the actions undertaken by the FirstEnergy Ohio utilities following the issuance of the first RFP, the general approach was to re-issue RFPs with relatively minor modifications in hopes of attracting a larger pool of bidders than the previous RFP for particular categories of

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Comment [MCM25]: Contract for 3rd RFP was not awarded until August, 2010. Therefore this statement is not correct.

Comment [MCM26]: If the market was nascent and complex, and if market information about Ohio RECs was generally unavailable, what meaningful information would have been learned by doing a market study earlier? What basis does Exeter have to support its view that any meaningful information would have been learned?

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[3] Provided in response to Exeter Associates' request for information, set 5, item 1.

RECs. No formal contingency plan was in place to guide the follow-up actions of the FirstEnergy Ohio utilities in the even insufficient bids were received or if bid prices were excessive based on pre-established criteria.

Figure 1

~~Figure 1~~Figure 1 shows the dates of RFP issuance and the RECs solicited under each of the six RFPs along with other key dates related to SREC/REC procurement activities.

Comment [MCM27]: What would an acceptable contingency plan have included? Would it have included one or more of the three options that Exeter suggests that FE should have considered (i.e., pay ACP, consult the Commission, or seek force majeure)? If not, what would a plan have looked like? Do other utilities have plans that include those suggestions?

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Figure ~~11~~1 Timeline of RFPs for RECs by FirstEnergy Ohio Utilities Calendar Years: 2009, 2010, and 2011

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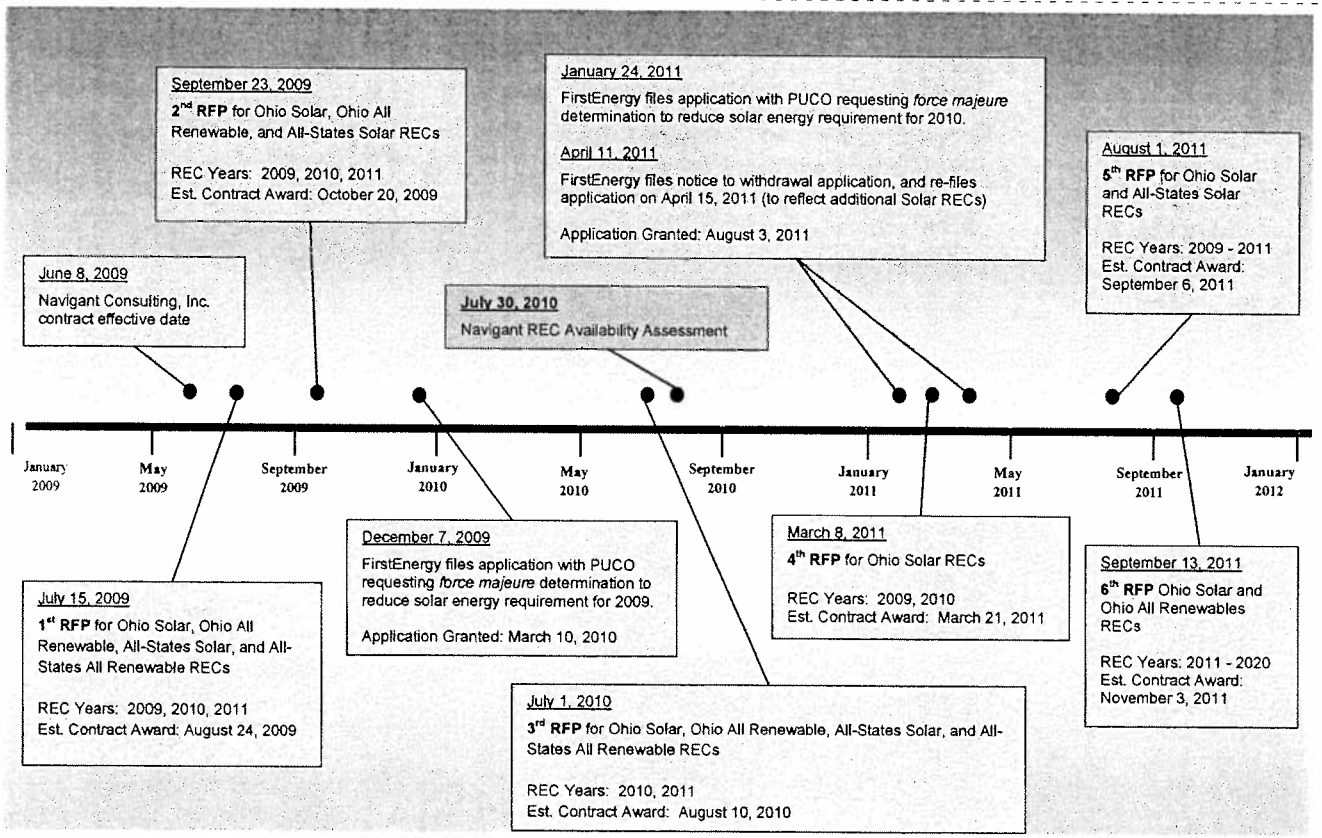

D.

Based on the foregoing discussion and analysis, the following findings and recommendations are provided:

Findings

1. The RFPs issued by the FirstEnergy Ohio utilities are reasonably developed and do not appear to incorporate any provisions or terms that could be assessed to be anti-competitive.

~~1.~~2. The basic terms and conditions contained in the RFP were generally acceptable by the industry and to the extent that individual bidders were unwilling to provide bids in response to the solicitations, those decisions were based on specific elements contained in the RFPs that were at odds with the individual business models. Such conditions include the duration of the contract periods and the firmness of the supply requirements.

~~1.~~3. The security requirements contained in the RFPs are assessed to strike a reasonable balance between safeguarding the FirstEnergy Ohio utilities and making the RFP attractive to potential bidders.

~~1.~~4. The processes in place to disseminate information to potential bidders and to address issues and questions that arose during the time that potential bidders were deciding whether to proffer a bid and the offer due dates was adequate.

~~1.~~5. The mechanisms in place to review and evaluate the bids were adequate, although a shorter period of time between the bid due date and the award in the first RFP would have been an improvement. The approximately three-week review period established by

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the FirstEnergy Ohio utilities was generally deemed excessive by industry participants and this was rectified in subsequent RFPs.

~~1.~~6. The mechanisms in place to solicit industry feedback, through both the nature of the questions and comments raised by potential bidders and the conduct of a survey by NCI, are seen as an acceptable approach to inform the FirstEnergy Ohio utilities about the strengths and weaknesses of the issued RFPs. Further, the information obtained through the process was effectively used and served as a basis for modifications in RFPs subsequent to the conduct of the survey.

~~1.~~7. Market information for In-State Solar and All Renewables RECs was limited prior to the issuance of the first and second RFPs.

~~1.~~8. The contingency planning in place for the first three RFPs was inadequate and should have encompassed a specific set of fall-back approaches, or in the alternative, specified a mechanism by which to distill the information gained from the solicitations to develop an modified approach.

Recommendations.

1. The FirstEnergy Ohio utilities should implement a more robust contingency planning process as it relates to the procurement of RECs and SRECs in compliance with Ohio's AEPS. We also recommend that the contingency plan be subject to review by the PUCO Staff prior to its implementation.

2. A thorough market analysis should precede the issuance of any future RFPs by the FirstEnergy Ohio utilities for RECs and SRECs in compliance with Ohio's AEPS. While market information was relatively modest prior to the issuance of the first two RFPs,

greater market information regarding In-State Solar and All Renewables is currently available.

~~2.~~3. The FirstEnergy Ohio utilities should consider a mark-to-market approach to the security requirement for future procurements.

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III. SOLICITATION RESULTS AND PROCUREMENT DECISIONS

As part of the management/performance audit, Exeter Associates, Inc. reviewed the results of the FirstEnergy Ohio utilities' procurement of SRECs and RECs to meet the Ohio AEPS requirements for 2009, 2010, and 2011. In particular, Exeter reviewed the quantities of SRECs and RECs bid, the prices associated with those bids, and the decisions of the FirstEnergy Ohio utilities regarding the bids (quantity and price) received. In the broadest terms, the procurement results can be characterized as follows:

- All-States All Renewables
  - All required RECs were secured at reasonable prices, though additional temporal diversity in establishing the REC portfolio would be desirable.
- All-States Solar
  - Based on information available at the time the bids were received, the Companies' purchasing decisions are found to be generally reasonable.
- In-State All Renewables
  - The Companies purchased significant quantities of RECs for 2009, 2010, and 2011 compliance years at prices assessed to be ~~unreasonable~~ high on their face and also in comparison to prices paid elsewhere throughout the country.
- In-State Solar
  - The unavailability of Ohio SRECs in 2009 and 2010 led the Companies to request *force majeure* determinations from the Commission, which were granted. The procurements of Ohio SRECs made by the Companies when such SRECs became available were made at prices comparable to SRECs traded elsewhere.

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While the principal concerns of the procurements center on the costs of the Ohio All Renewables RECs, each of the categories of SREC and REC purchases are discussed below.

A. All-States All Renewables RECs

Table 2~~Table 2~~Table 2 provides a summary of the bids received for All-States All Renewables RECs by the FirstEnergy Ohio utilities by compliance year and by RFP issued. Where SRECs and/or RECs were acquired through bilateral transactions or supplied by the FirstEnergy Ohio utilities directly, that is so indicated.

The bulk of All-States All Renewables RECs required to meet the 2009, 2010, and 2011 AEPS requirements were procured through the first RFP. Under that RFP, all of the 2009 requirement, 93 percent of the 2010 requirement (based on kWh sales data available in 2009), and 60 percent of the 2011 requirement (based on kWh sales data available in 2009) were procured. Prices ranged between $[redacted] and $[redacted] for the 2009 requirement, $[redacted] and $[redacted] for the 2010 requirement, and $[redacted] and $[redacted] for the 2011 requirement.

Additional RECs for 2010 were acquired through a transfer of excess 2009 RECs from 2009. This level of RECs purchases more than fulfilled the 2010 RECs requirement.

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Table 222 FirstEnergy Ohio – All-States All Renewables RECs

	2009	2010	2011
REC Requirement [1] [2] [3]	57,965	111,477	176,156
RECs Acquired [4]	**2009**	**2010**	**2011**
RFP1	87,360	104,000	105,084
RFP2	(a)	(a)	(a)
RFP3	(a)	(a)	49,351
RFP4	(a)	(a)	(a)
RFP5	(a)	(a)	(a)
RFP6	(a)	(a)	(a)
Bilateral Transactions	(b)	(b)	(b)
Adjustment/Transfer	(29,396)	29,396 (21,920)	21,920
TOTAL	87,360	133,396	176,355
Percent of Total	**2009**	**2010**	**2011**
RFP1	151%	93%	60%
RFP2	(a)	(a)	(a)
RFP3	(a)	(a)	28%
RFP4	(a)	(a)	(a)
RFP5	(a)	(a)	(a)
RFP6	(a)	(a)	(a)
Bilateral Transactions	(b)	(b)	(b)
Adjustment/Transfer	(51%)	26% (20%)	12%
TOTAL	100%	100%	100%
Price Range ($/REC) [4]	**2009**	**2010**	**2011**
	MIN MAX	MIN MAX	MIN MAX
RFP1	[redacted]	[redacted]	[redacted]
RFP2	(a) (a)	(a) (a)	(a) (a)
RFP3	(a) (a)	(a) (a)	[redacted]
RFP4	(a) (a)	(a) (a)	(a) (a)
RFP5	(a) (a)	(a) (a)	(a) (a)
RFP6	(a) (a)	(a) (a)	(a) (a)
Bilateral Transactions	(b) (b)	(b) (b)	(b) (b)
Adjustment/Transfer		0.00 0.00	[redacted]
Weighted Average Price ($/REC) [4]	**2009**	**2010**	**2011**
RFP1	[redacted]	[redacted]	[redacted]
RFP2	(a)	(a)	(a)
RFP3	(a)	(a)	2.17
RFP4	(a)	(a)	(a)
RFP5	(a)	(a)	(a)
RFP6	(a)	(a)	(a)
Bilateral Transactions	(b)	(b)	(b)
Adjustment/Transfer		0.00	[redacted]

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Table 2 FirstEnergy Ohio – All-States All Renewables RECs (Continued)

Notes:
(a) This RFP did not solicit the indicated type of REC for the given energy year.
(b) No RECs were procured through bilateral transactions for the given energy year.

Sources:
(1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(4) Calculated based on EA Set 1-INT-5 Attachment 1.

For 2011, an additional 49,351 All-States All Renewable RECs were procured through the third RFP issued in ~~August~~ July 2010 and 21,920 All-States All Renewable RECs, which fulfilled the 2011 requirement, were obtained through a transfer of excess 2010 RECs. The 2011 All-States All Renewable RECs were bid at prices between $[redacted] and $[redacted]. The transferred RECs were purchased at a price of $[redacted] per REC.

Figure 2~~Figure 2~~~~Figure 2~~ shows non-solar REC prices in Pennsylvania, Maryland, and New Jersey over the 2009 through 2011 period. As is shown in Figure 2~~Figure 2~~~~Figure 2~~, RECs prices in New Jersey tended to be above the prices paid by the FirstEnergy Ohio utilities in 2009 for 2009 Vintage RECs and the Pennsylvania RECs are shown to entail prices below the RECs purchased by the FirstEnergy Ohio utilities. The pattern of prices evident in New Jersey and Pennsylvania is not atypical of RECs price trends elsewhere, that is, in the first years of enactment of a state portfolio standard, prices tend to be higher than in following years as the market adjusts and more projects become built and certified.

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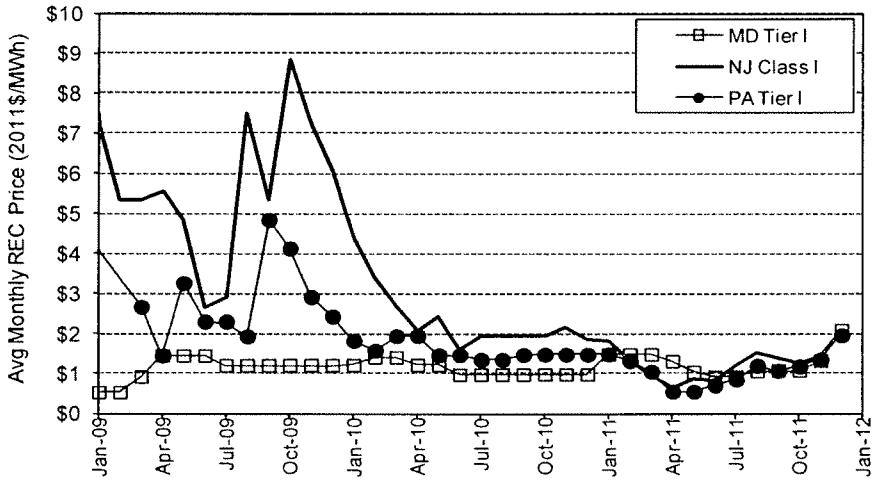
Figure 222 Historical Maryland, New Jersey, and Pennsylvania Compliance RECs Prices



Sources: Evolution Markets (through 2007) and Spectron (2008 onward). Plotted values are the last trade (if available) or the mid-point of Bid and Offer prices, for the earliest compliance year traded in each month.

Note: Figure provided to Exeter by personnel from the National Renewable Energy Laboratory (NREL), May 2012

As seen with the FirstEnergy Ohio utilities' experience, substantially higher prices were paid in 2009 (for 2009, 2010, and 2011 vintage RECs) than were experienced in 2011 for 2011 vintage RECs. These price relationships indicate that lower-cost compliance would have been achieved for the All-States All Renewables component of the AEPS requirement had the FirstEnergy Ohio utilities procured a greater proportion of 2011 RECs in 2011 and, perhaps, a portion of 2010 RECs in 2010. This conclusion is clear from *ex poste* analysis. However, we find that the FirstEnergy Ohio utilities' decisions to purchase the All-States All Renewables RECs reasonable.

With respect to whether an alternative strategy for procurement of these RECs should have been pursued by the FirstEnergy Ohio utilities based on *ex ante* information is less clear. The Companies indicated during the Exeter interview conducted on April 20, 2012, that there

was concern on the part of the Companies that the needed RECs might not be available in the timeframe required for compliance were the Companies to defer the purchase of 2010 and 2011 RECs in 2009. Notwithstanding this concern, a preferred method of risk management would have been to temporally diversify the purchases to avoid exposure to prevailing prices at one point in time. This method to help manage risk would have been beneficially employed by the FirstEnergy Ohio utilities with respect to REC purchases, that is, purchases of RECs should have been spread out over time.[4]

Related to the issue of risk mitigation is the pattern of REC prices that has tended to emerge following the initial implementation of renewable energy portfolio standards in other states. The general downward trend, fueled by increases in the availability of RECs that has come from industry response, should have informed the FirstEnergy Ohio utilities' decision to purchase almost all RECs needed to meet the 2009 through 2011 All-States All Renewables requirement in 2009.

While we believe that an alternative approach should have been relied upon by the FirstEnergy Ohio utilities, there are considerations that may have reasonably influenced the Companies' decision to maximize purchases in 2009 to fulfill the 2009 through 2011 AEPS requirements for All-States All Renewables RECs. One such consideration, as noted above, was the potential unavailability of the necessary RECs in later months. Given the annual increases in the percentage renewable requirements over time, not only in Ohio but in other states from which the FirstEnergy Ohio utilities could expect to draw RECs, this perspective is not without some basis. A related concern would emerge in the context of pricing, which could increase in the

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[4] We note that this approach is not employed for purposes of cost minimization but rather for purposes of risk mitigation.

face of tightening market conditions. Even with growth in the amount of RECs available, the increases in RECs offered on the market would need to be greater than the increase in renewable requirements to induce downward pressure on prices and ensure availability.

A final factor simply relates to the structure of incentives faced by the FirstEnergy Ohio utilities. The Companies were required to secure the necessary RECs for the 2009 through 2011 period. Absent the availability of RECs post 2009, the Companies would be faced with either obtaining a *force majeure* ruling from the Commission, for which a risk would be incurred (i.e., the Commission could deny the request) or, in the event that the required number of RECs were unavailable, the Company could pay the alternative compliance payment ("ACP") of $45 per REC. The Companies, however, could not recover the ACP expense from customers pursuant to the legislation. As a consequence, the Companies had every incentive to secure the required number of RECs and avoid the incurrence of any risk that the RECs would be unavailable in the future. In that way, the Companies would avoid any potential of incurring a non-recoverable ACP expense.

Findings

1. The prices paid by the Companies for All-States All Renewables RECs were reasonably consistent with other regional RECs prices.

~~1.~~2. While lower prices would have been available to the Companies were more fewer RECs purchased under RFP 1 and more RECs purchased under RFP 3, the Companies' decisions to purchase the bulk of the 2009, 2010, and 2011 requirements under RFP 1 were not unreasonable.

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Comment [MCM32]: Paying ACP doesn't equate to purchasing RECs to comply, the shortfall can be added to the following years larger requirement and if supply isn't available, the Companies are now deeper in a hole.

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B. All-States Solar RECs

Table 3~~Table 3~~~~Table 3~~ shows a summary of the RFP results (and bilateral arrangements) related to the procurement of All-States Solar RECs by the FirstEnergy Ohio utilities. As shown in Table 3~~Table 3~~~~Table 3~~, the Companies procured enough Solar RECs in each year to meet their All-States Solar RECs requirements. Though the first RFP failed to solicit any All-States Solar REC purchases, the second RFP (in 2009) resulted in the successful procurement of enough 2009 All-States Solar RECs to meet the 2009 requirement along with a small number of 2010 and 2011 All-States Solar RECs. Prices for the 2009 All-States Solar RECs ranged from $[redacted] to $[redacted]

The third RFP in 2010 resulted in the Companies procuring 551 vintage 2010 All-States Solar RECs. However, the majority of the Solar RECs procured in the 2010 auction were for the 2011 compliance year (3,331 vintage 2011 SRECs). The Companies engaged in extensive efforts to execute deals with brokers and make bilateral trades to meet the bulk of the 2010 All-States Solar RECs requirement. The Companies purchased a total of 2,454 Solar RECs from brokers and through other bilateral arrangements. The price range for the vintage 2010 All-States Solar RECs procured through the 2009 RFP was $[redacted] to $[redacted] The price range for the vintage 2010 All-States Solar RECs procured through the 2010 RFP was very similar -- $[redacted] to $[redacted] As noted earlier, the bulk of the 2010 All-States Solar RECs were procured through bilateral trades and the price range for these transactions was $[redacted] to $[redacted]

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Table 333 FirstEnergy Ohio – All-States Solar RECs

	2009	2010	2011
SREC Requirement [1] [2] [3]	48	3,169	5,447
SRECs Acquired [4]	**2009**	**2010**	**2011**
RFP1	0	0	0
RFP2	498	208	4
RFP3	(a)	5501	3,331
RFP4	(a)	(a)	(a)
RFP5	0	0	2,200
RFP6	(a)	(a)	(a)
Bilateral Transactions	(b)	2,454	37
TOTAL	48	3,213	5,572
Percent of Total	**2009**	**2010**	**2011**
RFP1	0%	0%	0%
RFP2	100%	7%	0%
RFP3	(a)	17%	61%
RFP4	(a)	(a)	(a)
RFP5	0%	0%	40%
RFP6	(a)	(a)	(a)
Bilateral Transactions	(b)	77%	1%
TOTAL	100%	101%	102%

Price Range ($/SREC) [4]	**2009**		**2010**		**2011**	
	MIN	MAX	MIN	MAX	MIN	MAX
RFP1	N/A	N/A	N/A	N/A	N/A	N/A
RFP2	[redacted]					
RFP3	(a)	(a)				
RFP4	(a)	(a)	(a)	(a)	(a)	(a)
RFP5	N/A	N/A	N/A	N/A		
RFP6	(a)	(a)	(a)	(a)	(a)	(a)
Bilateral Transactions	(b)	(b)				

Weighted Average Price ($/SREC) [4]	**2009**	**2010**	**2011**
RFP1	N/A	N/A	N/A
RFP2	[redacted]		
RFP3	(a)		
RFP4	(a)	(a)	(a)
RFP5	N/A	N/A	80.34
RFP6	(a)	(a)	(a)
Bilateral Transactions	(b)		

Notes:
(a) This RFP did not solicit the indicated type of REC for the given energy year.
(b) No RECs were procured through bilateral transactions for the given energy year.
Sources:
(1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(4) Calculated based on EA Set 1-INT-5 Attachment 1.

Comment [CBH33]: This table contains some inconsistencies with the RFP results.

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For the 2011 compliance year, the Companies procured 3,331 All-States Solar RECs through the 2010 RFP at a price range of $[redacted] to $[redacted]. The Companies also procured 37 vintage 2011 All-States Solar RECs through an internal bilateral trade executed in 2011 at a price of $[redacted] per SREC. The remaining portion of the 2011 All-States Solar RECs requirement was procured through an RFP held in mid-2011. The price range for the 2,200 All-States Solar RECs purchased through this RFP was $[redacted] to $[redacted] significantly lower than the prices paid for the vintage 2011 All-States Solar RECs procured in the 2009 and 2010 RFPs and through the bilateral internal trade.

As with the All-States All Renewables RECs, an *ex poste* analysis indicates that FirstEnergy Ohio utilities would have paid significantly less for 2011 All-States Solar RECs if they had waited until 2011 to purchase these SRECs. As discussed in the section on All-States All Renewables RECs, the Companies expressed concerns that the needed SRECs might not be available in the timeframe required to meet for compliance.

As discussed previously in this audit report, the appropriateness and reasonableness of any particular RECs transaction cannot be assessed on the basis of information that would not have been available at the time of the transaction, such as RECs prices that would have been knowable only after the fact. The prices paid by the FirstEnergy Ohio utilities for All-States Solar RECs were roughly consistent with prices paid in other nearby states with a solar set-aside. SREC prices in Pennsylvania in 2009 averaged about $275 and in 2010 rose to approximately $325 per SREC.[5] New Jersey SRECs (which must all be generated in-State) were generally priced between $600 and $700 in 2009, 2010, and the first half of 2011.[6] By the end of 2011,

[5] www.srectrade.com/blog/SREC/SREC-markets/Pennsylvania/page/3 (and page/4).
[6] http://markets.flettsexchang.com/new-jersey-SREC

New Jersey SREC prices declined to between 150 and 250.[7] In Maryland, which also requires that SRECs be generated in-State, prices in 2010 were between $350 and $400; between $100 and $350 in 2011; and declined to about $200 in 2012.[8]

While neither New Jersey nor Maryland SRECs can be used in Ohio to satisfy the All-States Solar requirement, both New Jersey and Maryland SRECs can be used in Pennsylvania. Pennsylvania SRECs can be used for the Ohio All-States Solar requirement. Therefore, while the pricing dynamics are complicated, there are relationships among the SREC prices in New Jersey, Maryland, Pennsylvania, and Ohio.

As a general proposition, temporal diversity in purchasing to help manage risk is a prudent practice, the number of All-States SRECs that the FirstEnergy Ohio utilities were purchasing in the 2009 and 2010 timeframe were relatively small, and through the circumstances that evolved over the procurement history, a degree of temporal diversity was achieved. In aggregate, the 2009 and 2010 requirement was approximately 3,200 RECs, which were purchased through two RFPs and a set of bilateral transactions.

2011 All-States Solar RECs were almost entirely purchased through two RFPs (RFP 3 and RFP 5). Average prices of Solar RECs under the RFP 3 procurement were approximately $[redacted] The RFP 5 Solar RECs prices averaged $[redacted] and some Solar RECs under that procurement were purchased for less than $[redacted] This pattern of Solar RECs prices over the 2009 through 2011 time period is consistent with the pricing observed in other nearby states as the supply of available Solar RECs generally exceeded the Solar RECs compliance requirements in the

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[7] Ibid.
[8] http://markets.flettsexchange.com/maryland-SREC

regional market. The excess supply of All-States Solar RECs evident in 2011 is not a circumstance that the FirstEnergy Ohio utilities could have been reasonably expected to foresee.

Findings

1. The lower prices available for All-States SRECs in the 2011 timeframe could not have been reasonably foreseen by the Companies. The prices paid by the Companies for All-States SRECs are consistent with SRECs prices regionally.

C. In-State All Renewables RECs

Fifty percent of the All Renewables requirement under the Ohio AEPS legislation is set aside for qualifying renewable energy generated in Ohio. In 2009, the supply of Ohio-generated RECs appears to have approximated (or was slightly below) the State-wide compliance requirement.[9] The FirstEnergy Ohio utilities were able to successfully procure the required number of 2009, 2010, and 2011 In-State All Renewables RECs through bids offered in four RFPs. RFP 1 provided 2009 and 2010 RECs; RFP 2 provided RECs for all three compliance years; RFP 3 provided RECs for 2010 and 2011; and RFP 6 secured additional 2011 vintage RECs.

The fundamental issue associated with the FirstEnergy Ohio utilities' procurement of In-State All Renewables RECs for compliance with the 2009, 2010, and 2011 requirements centers on the prices paid for the RECs. Significant numbers of RECs were purchased at prices as high as $[redacted] per REC. Table 4~~Table 4~~~~Table 4~~ summarizes the procurement history of the In-State All Renewables RECs for the 2009, 2010, and 2011 compliance years. As seen on Table 4~~Table~~

[9] Ed Holt and Associates, Inc. and Exeter Associates, Inc., *Alternative Energy Resource Market Assessment*, prepared for the Public Utility Commission of Ohio and the National Association of Regulatory Utility Commissioners, September 30, 2011, p.6.

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4~~Table 4~~, all of the 20,000 RECs purchased through RFP 1 for 2009 were priced at $[redacted]. In addition, the 50,000 RECs purchased in RFP 1 for 2010 were priced between $[redacted] and $[redacted], with a weighted average price of $[redacted]. RFP 2, which resulted in purchases of RECs for all three compliance years addressed in this audit (2009, 2010, and 2011), had associated weighted average prices of $[redacted], $[redacted] and $[redacted], respectively. In aggregate, 95,849 In-State All Renewables RECs were purchased through this solicitation. RFP 3 resulted in procurement of almost 180,000 In-State All Renewables RECs, with average prices of $[redacted] (for the 29,676 RECs purchased for 2010) and $[redacted] for the 150,269 RECs purchased for 2011. RFP 6 entailed the purchase of an additional 20,000 2011 RECs at an average price of $[redacted].

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Table 444 FirstEnergy Ohio – In-State All Renewables RECs

	2009	2010	2011
REC Requirement [1] [2] [3]	57,965	111,477	176,155
RECs Acquired [4]	**2009**	**2010**	**2011**
RFP1	20,000	50,000	0
RFP2	37,965	31,800	26,084
RFP3	(a)	29,676	150,269
RFP4	(a)	(a)	(a)
RFP5	(a)	(a)	(a)
RFP6	(a)	(a)	20,000
Bilateral Transactions	(b)	1	(b)
TOTAL	57,965	111,477	196,353
Percent of Total	**2009**	**2010**	**2011**
RFP1	35%	45%	0%
RFP2	65%	29%	15%
RFP3	(a)	27%	85%
RFP4	(a)	(a)	(a)
RFP5	(a)	(a)	(a)
RFP6	(a)	(a)	11%
Bilateral Transactions	(b)	0%	(b)
TOTAL	100%	100%	111%
Price Range ($/REC) [4]	**2009**	**2010**	**2011**
	MIN MAX	MIN MAX	MIN MAX
RFP1	[redacted]	[redacted]	N/A N/A
RFP2	[redacted]	[redacted]	[redacted]
RFP3	(a) (a)	[redacted]	[redacted]
RFP4	(a) (a)	(a) (a)	(a) (a)
RFP5	(a) (a)	(a) (a)	(a) (a)
RFP6	(a) (a)	(a) (a)	[redacted]
Bilateral Transactions	(b) (b)	[redacted]	(b) (b)
Weighted Average Price ($/REC) [4]	**2009**	**2010**	**2011**
RFP1	[redacted]	[redacted]	N/A
RFP2	[redacted]	[redacted]	[redacted]
RFP3	(a)	[redacted]	[redacted]
RFP4	(a)	(a)	(a)
RFP5	(a)	(a)	(a)
RFP6	(a)	(a)	[redacted]
Bilateral Transactions	(b)	[redacted]	(b)

Notes:
(a) This RFP did not solicit the indicated type of REC for the given energy year.
(b) No RECs were procured through bilateral transactions for the given energy year.

Sources:
(1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(4) Calculated based on EA Set 1-INT-5 Attachment 1.

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The U.S. Department of Energy ("DOE") reports on solar and non-solar RECs prices throughout the U.S. Between mid-2008 and December 2011, none of the non-solar REC prices reported by DOE was above $45 and in almost all cases significantly below that level.[10] The states covered include Connecticut, the District of Columbia, Delaware, Illinois (wind RECs), Massachusetts, Maryland, Maine, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Texas (See Figure 3~~Figure 3~~Figure 3). Additionally, the overall trend in REC prices has been declining during the period from January 2008 through mid-2011. Beginning in mid-2011, there have been marked increases in the prices of RECs for some of the states included in the DOE reporting due to certain state changes to renewable eligibility and also increasing percentage requirements for renewables.

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Comment [MCM34]: None of which were from Ohio.

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Comment [MCM35]: REC prices are in many states not public, and 'prices' can mean quotes which aren't actual prices paid

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Comment [MCM36]: Based on state RPS program designs, not all state designs are equal

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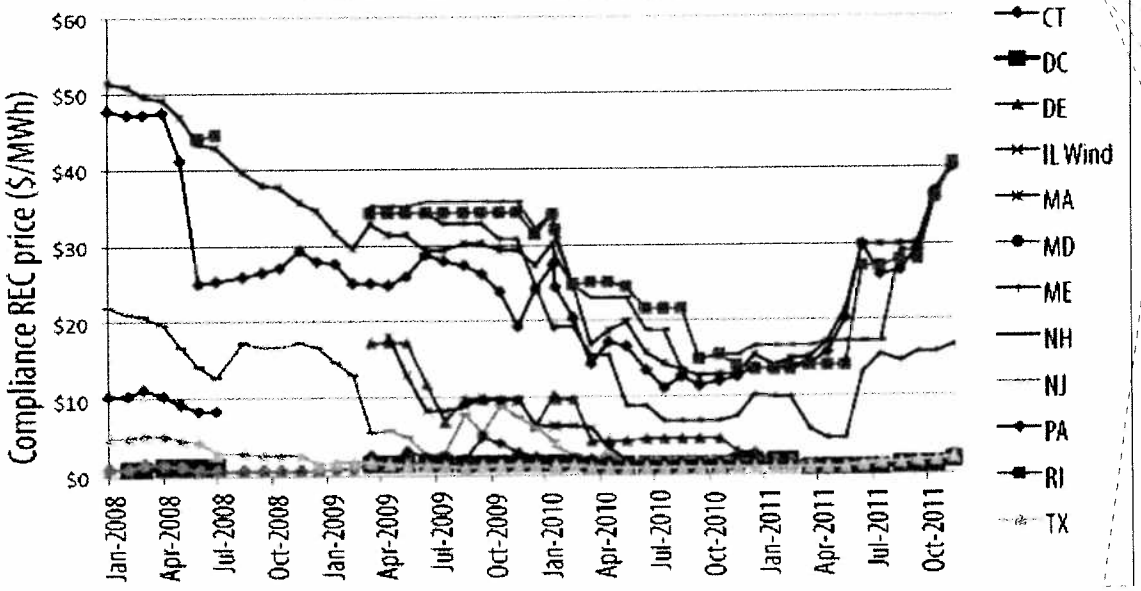
[10] http://apps3.eere.energy.gov/greenpower/markets/certificates.shtml?page=5

Figure 333 Compliance Markets for RECs



Compliance market (primary tier) REC prices, January 2008 to December 2011
Source: apps3.eere.energy.gov/greenpower/markets/certificates.shtml?page=5

Note: Plotted values are the last trade (if available) or the mid-point of bid and offer prices for the current or nearest compliance year for various state compliance RECs.

Two qualifications, however, should be noted. First, the price decreases over time were not monotonic over the time period considered. While the average annual prices declined over time, there were interim months in which prices increased compared to prior months. Second, the specifics of the Renewable Portfolio Standard legislation in place in the various states differ from the Ohio AEPS legislation. These differences include the types of renewable resources eligible to meet the requirements and the geographic areas from which the RECs may originate. Particularly with respect to the second factor, the Ohio AEPS legislation is more restrictive than the legislation in other states, including the New Jersey, Maryland, and the Pennsylvania legislation, which, other factors equal, could result in higher REC prices in Ohio than elsewhere.

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Comment [MCM37]: This is a false comparison – these are spot market quotations from the Spectron Group (a broker) and may represent levels of pricing in which there were no actual transactions – Spectron has no access to many of the bilateral pricing – without contesting the relative direction or magnitude, it has to be pointed out that this chart is not based on some data trove of actual historical transacted prices

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Consequently, the non-Ohio REC prices discussed above cannot serve as a proxy for Ohio In-State All Renewables RECs prices. Rather, they provide a broad reference to what RECs have been trading for elsewhere over the relevant period under a wide range of RPS specifics and market conditions.

Comment [MCM38]: If Ohio market not developed at same level of other states and the products differ then how can this be used as a broad reference – what is the reasonable adder to apply to prices from other states to then be able to compare to Ohio for reasonableness?

Table 5 shows the details of the purchases of In-State All Renewables RECs by the FirstEnergy Ohio utilities, including the dates of the purchases, the vintage year of the purchases, the quantity purchased, and the price paid. Total RECs purchased and costs incurred are also shown. The issue that is addressed below, which draws heavily on the information contained in Table 5, is the reasonableness of the prices paid by the FirstEnergy Ohio utilities for In-State All Renewables RECs for the compliance years 2009, 2010, and 2011. In addressing the reasonableness of these purchases, we avoid assessment based on *ex poste* analysis and restrict the assessment to what would be considered reasonable at the time the transactions were entered into.

Table 5 In-State All Renewables RECs Prices Paid by FirstEnergy Ohio Utilities

2009 Vintage	Purchase Date	Quantity	Price/REC	Total
	August 2009	20,000	$ [redacted]	$ [redacted]
	October 2009	960	[redacted]	[redacted]
		37,005	[redacted]	[redacted]
			[redacted]	[redacted]
	February 2010	13	[redacted]	[redacted]
	SUBTOTAL	57,978		$ [redacted]
2010 Vintage	August 2009	10,000	$ [redacted]	$ [redacted]
		10,000	[redacted]	[redacted]
		10,000	[redacted]	[redacted]
		10,000	[redacted]	[redacted]
		10,000	[redacted]	[redacted]
	October 2009	30,400	[redacted]	[redacted]
		1,400	[redacted]	[redacted]
	August 2010	29,676	[redacted]	[redacted]
	April 2011	1	[redacted]	[redacted]
	SUBTOTAL	111,477		$ [redacted]
2011 Vintage	October 2009	1,084	$ [redacted]	$ [redacted]
		25,000	[redacted]	[redacted]
	August 2010	145,269	[redacted]	[redacted]
		5,000	[redacted]	[redacted]
	November 2011	5,000	[redacted]	[redacted]
		15,000	[redacted]	[redacted]
	SUBTOTAL	196,353		$ [redacted]
	TOTAL	365,808		$ [redacted]

Based on our review of the legislation, the responses of the FirstEnergy Ohio utilities to our requests for information, and various Commission filings, and our interview with FirstEnergy Ohio utility personnel and personnel from Navigant Consulting, there do not appear to be any technical violations of the Ohio's AEPS statute and the FirstEnergy Ohio utilities appear not to have violated the letter of the legislation. That said, we believe that the management decisions made by the FirstEnergy Ohio utilities to purchase non-solar RECs at prices in some cases more than 15 times the price of the applicable forty-five-dollar Alternative

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Comment [MCM40]: The Companies also complied with the spirit of the legislation, which was to comply.
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Compliance Payment to have been ~~seriously flawed~~concerning. The prices paid by the FirstEnergy Ohio utilities for these RECs were well above the prices customarily seen in any of the other RECs markets throughout the country contemporaneous with (as well as preceding and subsequent to) the purchasing decisions made by the FirstEnergy Ohio utilities.

The mechanism employed by the FirstEnergy Ohio utilities for purchasing RECs through the RFP process was to stack the conforming bids received from eligible bidders from lowest price to highest price and to purchase the number of RECs needed to comply with the In-State All Renewables requirement regardless of the price bid. No limit price was established by the Companies prior to the receipt of bids, that is, the Companies indicated that prior to the receipt of bids, the Companies did not establish a maximum price that they would be willing to pay for RECs, or a price that would trigger embarking on a contingency plan. Reliance on this approach resulted in the purchase of more than 337,000 In-State All Renewables RECs at prices between $[redacted] and $[redacted] dollars.

There are several issues that were considered in our assessment of the reasonableness of the high-priced RECs transactions entered into by the FirstEnergy Ohio utilities. Each is discussed in turn below.

Statutory Violations – While this audit is not a legal review and the following opinion is not based on a legal review, we found no indication that the FirstEnergy Ohio utilities operated outside of the legal requirements established by the Ohio AEPS legislation. There is nothing in the legislation that limits the price that the Companies could pay for RECs, other than the requirement that on an expected (forward looking) basis, the cost of compliance should not

exceed three percent of the Companies charges for the provision of power supply. This limitation appears not to have been violated based on a reasonable application of the rule.

The solicitations issued by the Companies, as discussed earlier in this report, were competitive and the rules for the determination of winning bids appear to have been applied uniformly. We found nothing to suggest that the FirstEnergy Ohio utilities operated in a manner other than to select the lowest cost bids received from a competitive solicitation to satisfy the annual In-State All Renewables requirement established by the legislation.

Market Information – At the time the solicitations resulting in the procurement of the high-cost RECs were conducted, the market for In-State All Renewables in Ohio was still nascent; reliable, transparent information on market prices, future renewable energy projects that may have resulted in future RECs trading at lower prices, or other information that may have directly influenced the Companies' decision to purchase the high-priced RECs was generally not available. While information on planned renewable energy projects can be gleaned from the PJM interconnection queues, that information is highly unreliable. Some projects are entered multiple times (with variations on project specifics such as location or size) and most projects appearing in the queues do not come to fruition. The unreliability of the PJM queue information was further exacerbated by the economic recession and the difficulties faced by renewable energy developers in obtaining project financing. Consequently, we believe that there was significant uncertainty associated with assessing changes in future RECs prices and the potential availability of future RECs.

Market Competition – We have noted above that the procurement methods employed by the Companies are assessed to have been competitive. That does not mean, however, that the

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Comment [MCM41]: To be more clear that Exeter is commenting on the policy and structural design of the State Legislatures SB221 and not anything that FEOU conceived

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market in which the Companies were operating was competitive. The bids received by the FirstEnergy Ohio utilities should have been interpreted by the Companies as indicative of serious market disequilibrium. The fundamental concept behind the creation of renewable energy portfolio standards, regardless of the state implementing the standard, is that to promote the development of renewable energy resources, an additional stream of revenue is required to be provided to the project owners to overcome the higher cost of renewable energy relative to energy generated from conventional sources. Absent the additional revenue stream associated with the marketability of the environmental attributes of renewable energy, i.e., the renewable energy credits, renewable technologies would not be able to effectively compete in the power markets. The market value of the RECs, therefore, should approximate the additional revenue required by project owners to facilitate the development of eligible renewable projects. We would expect, and in fact see, different values of RECs in different states based on a multitude of factors, most importantly including:

Comment [MCM42]: Request support for the price that would in their determination be sufficient to facilitate development in their determination given all of the issues they note with respect to development (or lack thereof)

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- The geographical area from which eligible RECs can be drawn; generally, the larger the geographical area from which the RECs can originate, the lower the price of the RECs;

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- The types of resources that qualify as "renewable"; those states allowing relatively low-cost resources to qualify as renewable, such as black liquor or waste coal, tend to exhibit lower prices for RECs;

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- The level of prevailing energy prices; the higher the price of energy, the lower the price of RECs, other factors equal;

- The size of the renewable requirement; the larger the percentage of the power supply that is required to be supplied from renewable resources, the higher is the price of the RECs, other factors equal;
- The size of the alternative compliance payment (ACP); the size of the ACP limits the market price of the RECs since RECs would not be purchased at prices higher than the ACP if energy providers can pay the ACP in lieu of paying for higher-priced RECs.

As noted previously in this report, none of the RECs prices elsewhere in the country were trading at prices more than $45 per REC during the relevant period, and many were selling for prices considerably lower. While this information does not translate to what RECs prices in Ohio should be, the underlying economic factors are the same, that is, the price of RECs should be adequate to cover the higher costs of generation using renewable technologies, subject to the economic impacts of the differences in state legislation. There is no basis for concluding that the cost of renewable energy development in Ohio differs so markedly from the cost of renewable development elsewhere in the country so as to warrant RECs prices of $[redacted] or more in Ohio compared to the RECs prices seen elsewhere.

RECs prices of that magnitude clearly 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. Consequently, the prices offered for the high-priced RECs, and accepted by the Companies, were composed largely of economic rents.[11] As regulated entities, those costs were in turn passed on to Standard Service Offer ("SSO") customers.

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Comment [MCM43]: Request support for what price based on their analysis would meet their defined requirement of "adequate to cover the higher costs of generation using renewable technologies

Comment [MCM44]: Regardless of cost, if the market was nascent and the Companies had to meet the standards, what evidence is there that the price paid for the RECs at issue wasn't the market price?

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[11] We note that the economic rents received may not necessarily accrue to the party selling the RECs to the FirstEnergy Ohio utilities. For example, if the seller purchased the RECs from a third party at high prices, the rents

[redacted]

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Comment [MCM46]: Information contained in footnote should be included in the body of the report

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Comment [MCM47]: N[redacted] prohibition in statute

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may have accrued to the third party. Economic rents can be defined as the return to the investment in excess of the minimum required to induce the investment.

[12] [redacted]

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Available Alternatives – The FirstEnergy Ohio utilities' decisions related to acceptance of the bids for In-State All Renewables RECs at prices ranging from $[redacted] to $[redacted] needs to be assessed in the context of alternatives that were available to the Companies. If the Companies had no option other than to purchase these RECs at the prices offered, the decision would be evaluated differently than if alternatives existed. We believe that at least three alternatives were available to the Companies, and each of these is discussed below.

- Alternative Compliance Payment – One of the options available to the Companies was payment of the ACP in lieu of the procurement of RECs. The Companies indicated that they did not view the ACP as an alternative to the procurement of RECs and that payment of the ACP did not relieve them of the requirement to actually purchase RECs.[13] Under

[13] The issue of reliance on the ACP as an alternative to the procurement of the high-priced RECs was raised during the April 20, 2012 interview with FirstEnergy Ohio utilities and Navigant Consulting personnel. During the interview, the personnel from the Companies expressed the perspective that the Alternative Compliance Payment is not an alternative to procuring RECs. In a separate request for information, the Companies' were unwilling to provide a legal opinion on this issue, but noted that there is no language in the legislation to suggest that the

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Comment [MCM48]: It is one thing to say it "could affect" Commission decisions governing future REC transactions but it is entirely different to use it to recommend historical disallowances.

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the assumption that the Companies' interpretation of the legislation is incorrect, that is, that the ACP could have been used as an alternative to the procurement of RECs, that option was available to the Companies. The legislation, however, precludes the Companies from recovery of any costs related to Alternative Compliance Payments.[14] This provision of the legislation provides a serious deterrent to the State's utility companies from reliance on the ACP and payment of the ACP rather than procuring RECs, even at prices higher than the $45 ACP. Personnel from the Companies indicated during the April 20, 2012 interview that they did not consider use of the ACP as a mechanism to avoid the cost of the high-priced RECs.

- Consultation with the Commission – FirstEnergy Ohio utilities' personnel were asked whether they considered informing the Commission of the status of the bids received to obtain Commission input regarding a decision to purchase. The Companies indicated during the April 20, 2012 interview that approaching the Commission and explaining the circumstances of the solicitation results was ~~not~~ considered but was not pursued due to the prompt decisions that were needed to be made on the submitted bids. While the Companies were under no statutory obligation to obtain approval by the Commission for RECs purchases, the prices for the In-State All Renewables RECs that were received through the solicitation process were so far above customary prices outside of Ohio that consultation with the Commission should certainly have been more thoroughly

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Comment [MCM49]: Exeter is suggesting that the Companies should have incurred an unrecoverable cost of compliance instead of following through with a purchase of RECs, established through a competitively neutral RFP and corroborated by an independent consultant.

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Alternative Compliance Payment is an alternative to compliance through the procurement of RECs. (FirstEnergy Ohio utilities' response to Exeter Associates' request for information, set 5, item 3.)

[14] Competitive suppliers are also precluded from explicit recovery of these costs, that is, a competitive supplier cannot include a line item on its invoices separately identifying ACP costs as part of its billing. Competitive suppliers, however, can incorporate the ACP into their overall energy price to recover their costs. That option, however, is not available to regulated utilities supplying SSO energy.

considered, despite the timing constraint, at least considered by the Companies prior to transacting.

- Rejection of High-Priced Bids – As part of the solicitation process, the Companies retained the right to reject any and all bids. In the face of the high prices received from the Supplier[redacted] for the provision of In-State All Renewables RECs, the Company had the option of simply rejecting the bids. That would likely have necessitated the Companies filing a *force majeure* determination request with the Commission on the basis that In-State All Renewables RECs were not "reasonably" available (which appears to be accommodated in the legislation).[15]

A second alternative would have been to procure the high-priced RECs for compliance with the 2009 requirements, but reject those bids for the 2010 and 2011 requirements. That decision would be based on an assessment that In-State All Renewables RECs would become more available over time and could be secured at lower prices in the future. The risk of that approach, expressed by FirstEnergy Ohio utilities personnel, was that In-State All Renewables RECs would not increase in availability and would be in shorter supply in the coming years. That circumstance would expose the Companies to being unable to procure the requisite RECs for compliance years 2010 and 2011. Based on information available from other states, a decision to delay the purchases of RECs would have been preferred. For example, the Companies were able to procure 20,000 2011-vintage RECs in 2011at an average price of $[redacted] compared to the average prices of $[redacted] (RFP 2) and $[redacted] (RFP 3). While the Companies could not know with certainty that prices would be declining over time or that the required number of In-State All

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Comment [MCM50]: What would Exeter have thought would have resulted if the Companies had consulted with the Commission? What evidence is there that the Commission would have come to any different conclusion?

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Comment [MCM51]: How is this different from the situation with all state RECs, where Exeter concluded that ex post information about price decreases was not a proper consideration, especially in light of the Companies' concern about meeting the legislative requirements?

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[15] Note that this is not a legal opinion and is based on a lay reading and interpretation of the statute.

Renewables RECs would be available at any price in sufficient time to meet the compliance requirements, the experience in other states suggested that prices would be declining and that RECs would be increasingly available as markets responded to the newly created demand for RECs. If circumstances emerged such that In-State All Renewables RECs were not available in later years, the Companies would have had a basis for requesting a *force majeure* determination by the Commission.

Findings

Based on the foregoing discussion, our findings related to the FirstEnergy Ohio utilities procurement of In-State All Renewables RECs for compliance years 2009, 2010, and 2011 are:

1. The FirstEnergy Oho utilities paid ~~unreasonably~~ high prices for In-State All Renewables RECs purchased from [redacted] one supplier [redacted]

2. Prices for In-State All Renewable RECs in the range of $[redacted] to $[redacted] exceeded the prices paid for non-solar compliance RECs anywhere in the country by at least $[redacted] to $[redacted].

3. The FirstEnergy Oho utilities had several alternatives available to the purchase of high-priced In-State All Renewables RECs, ~~none of~~ which were considered but not adopted~~or acted upon~~.

4. The FirstEnergy Ohio utilities should have been aware that the prices bid by [redacted] he Supplier reflected significant economic rents and were ~~excessive~~ high by any reasonable measure.

Comment [MCM52]: But elsewhere in the report, Exeter says that Ohio isn't like other states. So why is the experience of other states instructive? What specific information was available to the Companies that prices were expected to decline?

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Comment [MCM53]: Excluding price equilibrium at the supply and demand curve intersection

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Recommendations

Based on the findings presented above, we recommend that the Commission, at a minimum, establish a process of review for RECs similar to power procurement. Staff should be apprised of the results of the RFP following the auction. The independent RFP manager should issue a report assessing the RFP, and Staff may monitor the RFP and raise any concerns prior to FE acceptance of the bids. The Commission should review the process of the RFP based on the the report submitted by the independent RFP manager and render a written opinion within 2-3 days after the results on whether the process was followed. If the Commission rejects purchase of RECs, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECs which would have been procured absent the Commission's rejection, for that compliance year.

~~disallow recovery of all In-State All Renewables RECs costs incurred by the FirstEnergy Ohio utilities in excess of~~ [redacted]

~~D.~~ In-State Solar RECs

Table 6~~Table 6~~~~Table 6~~ shows a summary of the RFP results (and bilateral arrangements) related to the procurement of In-State Solar RECs by the FirstEnergy Ohio utilities. As shown on Table 6~~Table 6~~~~Table 6~~, the Companies were unable to secure adequate solar RECs from in-State sources to meet the 2009 requirement, which necessitated a request for a *force majeure* ruling from the Commission. The Commission determined that the adequate solar RECs were not available to the Companies and granted the *force majeure* request, moving the 2009 In State

requirement to 2010. A similar *force majeure* request was made in 2010 for 2010 vintage In-State Solar RECs, and again was granted by the Commission. The unfulfilled obligation for 2010 was extended to 2011.

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Table 666 FirstEnergy Ohio – In-State Solar RECs

	2009	2010	2011
SREC Requirement [1] [2] [3]	13	1,629	7,026
SRECs Acquired [4]	**2009**	**2010**	**2011**
RFP1	0	0	0
RFP2	0	6	1,~~347~~345
RFP3	(a)	~~182~~175	946
RFP4	0	11	(a)
RFP5	0	0	~~4,653~~5224
RFP6	(a)	(a)	5,000
Bilateral Transactions	13	1,569	1,057
TOTAL	13	1,768	13,003
Percent of Total	**2009**	**2010**	**2011**
RFP1	0%	0%	0%
RFP2	0%	0%	19%
RFP3	(a)	11%	13%
RFP4	0%	1%	(a)
RFP5	0%	0%	66%
RFP6	(a)	(a)	71%
Bilateral Transactions	100%	96%	15%
TOTAL	100%	109%	185%

Price Range ($/SREC) [4]	**2009**		**2010**		**2011**	
	MIN	MAX	MIN	MAX	MIN	MAX
RFP1	N/A	N/A	N/A	N/A	N/A	N/A
RFP2	N/A	N/A	[redacted]			
RFP3	(a)	(a)				
RFP4	N/A	N/A			(a)	(a)
RFP5	N/A	N/A	N/A	N/A		
RFP6	(a)	(a)	(a)	(a)		
Bilateral Transactions						

Weighted Average Price ($/SREC) [4]	**2009**	**2010**	**2011**
RFP1	N/A	N/A	N/A
RFP2	N/A	[redacted]	
RFP3	(a)		
RFP4	N/A		(a)
RFP5	N/A	N/A	
RFP6	(a)	(a)	
Bilateral Transactions			

Notes:
(a) This RFP did not solicit the indicated type of REC for the given energy year.
Sources:
(1) PUCO Case No. 10-499-EL-ACP, Annual Status Report and 2009 Compliance Review, Appendix A: 2009 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(2) PUCO Case No. 11-2479-EL-ACP, Annual Status Report and 2010 Compliance Review, Appendix A: 2010 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(3) PUCO Case No. 12-1246-EL-ACP, Annual Status Report and 2011 Compliance Review, Appendix A: 2011 Alternative Energy Resource Benchmarks and Compliance Reconciliation.
(4) Calculated based on EA Set 1-INT-5 Attachment 1.

Comment [CBH54]: This table contains some inconsistencies with the RFP results.
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With respect to the 2009 and 2010 procurements for In-State Solar RECs, our assessment comports with the Commission rulings. The Companies exercised reasonable efforts to secure the subject Solar RECs and market conditions were such that the RECs were not available in the quantities needed. Given the Commission's review and decisions, no further examination of the Companies' efforts to secure 2009 and 2010 In-State Solar RECs was conducted pursuant to this management/performance audit.

For 2011, the Companies were able to obtain the required number of In-State Solar RECs through a combination of bilateral contracts and the issuance of the sixth RFP, which provided additional flexibility to bidders relative to previous RFPs. In particular, bidders were provided the option of bidding unit-contingent Solar RECs rather than having to bid firm quantities. The arrangement (also included in the fourth and fifth RFPs) eliminated an important source of risk for the In-State Solar RECs bidders. A second and more substantial change to the RFP structure was that the time period covered by the solicitation was extended to ten years. The longer duration of the contracts was an issue raised by the regional developers surveyed by NCI on behalf of the Companies and also was raised as an issue in the context of questions submitted to the Companies by certain potential bidders in the earlier RFP rounds. Finally, the security requirements were modified to accommodate protection under the longer contract period, while at the same time not being so onerous as to discourage bidders.

The prices paid for In-State Solar RECs for 2011 generally comport with prices seen in other nearby markets (e.g., Pennsylvania, New Jersey). As is the case for non-solar RECs, Solar RECs prices in any particular state reflect the market parameters contained in the governing legislation. New Jersey, for example, only allows for Solar RECs generated in-State to be used to meet the solar requirement. The same is true for Maryland. Maryland, however, has a fixed

Solar ACP specified in the legislation whereas New Jersey's Solar ACP is established by the Board of Public Utilities. Pennsylvania allows out-of-State Solar RECs to be used to meet the Pennsylvania solar energy requirement and the Commission determines the ACP based on a multiple prevailing market prices. The In-State Solar RECs market in Ohio is influenced by the markets in other nearby states. Ohio In-State Solar RECs can be used to satisfy the Pennsylvania RPS requirement, as can Maryland, Delaware, and New Jersey Solar RECs. Consequently, there are complex interrelationships among these various markets.

Irrespective of the differences in the levels of the Solar RECs carve-outs contained in the legislation of the various states, the level of prevailing energy prices, and the nature/levels of the ACPs, the prices paid by the FirstEnergy Ohio utilities for In-State Solar RECs (2011 vintage) were comparable to the prices for Solar RECs in other states. Table 7~~Table 7~~~~Table 7~~ shows the Solar RECs prices for 2011 RECs in several nearby jurisdictions compared with the prices paid by the FirstEnergy Ohio utilities. Based on the information presented in Table 7~~Table 7~~~~Table 7~~, the competitive solicitations (as modified over time to elicit greater market response) issued by the FirstEnergy Ohio utilities appear to have successfully secured In-State Solar RECs at reasonable prices.

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Table ~~777~~ Weighted Average Monthly SREC Prices ($/SREC)

2011	Delaware	Maryland	New Jersey	Pennsylvania
Jan	229.49	332.72	573.62	293.97
Feb	275.92	335.07	614.88	274.03
Mar	210.34	275.34	632.14	233.13
Apr	197.19	304.94	638.17	227.17
May	259.04	298.08	632.17	239.82
Jun	158.08	271.79	610.38	172.25
Jul	205.34	285.38	588.92	223.01
Aug	259.51	276.52	541.27	222.24
Sep	210.40	274.39	558.45	135.41
Oct	197.56	288.67	553.47	182.85
Nov	119.00	257.17	448.74	143.18
Dec	192.29	256.86	405.89	212.38

Source: PJM GATS

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Findings

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1. The procurement of In-State Solar RECs by the FirstEnergy Ohio utilities was competitive and, when Oho SRECs became reasonably available, the prices paid for those SRECs by the Companies were consistent with prices for SRECs seen elsewhere.

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IV. MISCELLANEOUS ISSUES

During the course of conducting the management/performance audit of the FirstEnergy Ohio utilities, several issues emerged that warrant brief discussion, though these issues are not directly related to the FirstEnergy Ohio utilities and affect all of the regulated utilities in Ohio with respect to compliance with Ohio's AEPS legislation. Specifically, there are three aspects of either the legislation or the method by which the legislation is implemented that may warrant some reconsideration by the appropriate bodies. These issues are addressed below.

A. Recovery of ACP Charges

Ohio's AEPS legislation does not permit the Ohio utilities to recover the costs associated with Alternative Compliance Payments. The ACP is currently set at $45, which is comparable to the ACPs in other states. The fundamental purpose of the ACP is to set a limit on the exposure of retail customers for the costs of RPS (or AEPS) compliance. While the legislation is applicable to both regulated and competitive companies, the workings of the market are such that the legislation only affects the regulated utilities. Not allowing recovery of the ACP provides a significant deterrent to regulated firms from employing the ACP in lieu of the procurement of RECs, even at prices well in excess of the ACP. Consequently, the ACP does not accomplish what it is designed to accomplish for customers purchasing power from the regulated utilities.

One of the presumed goals of the legislation is to provide a strong inducement to the power suppliers to satisfy the renewable energy requirements using RECs rather than ACPs. One method to effectively ensure this result would be to require a regulated utility to seek Commission approval to use the ACP rather than RECs and to make a showing that RECs were

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not available at prices at or below the ACP. Such a modification would serve three related purposes. First, it would protect retail customers from high compliance costs. Second, it would discipline the market, that is, sellers of RECs would not be inclined to offer RECs at prices above the ACP. Third, it would limit (though not eliminate) the economic rents to sellers of RECs.[16]

B. Commission Approval of RECs Purchases

~~A second modification that merits consideration is a requirement that the Commission approve the purchase of RECs for the retail suppliers of SSO before the RECs contracts are signed. That requirement would eliminate the types of issues that have arisen in the context of this management/performance audit. While the review and authorization requirement would add time to the procurement process, that is, the time between when the bid is made and when a purchase commitment can be made, the review and authorization activities can be structured so as not to add more than a day or two. This additional time should not adversely affect the price of the bids to any significant degree. This approach is successfully employed in other States, including Pennsylvania and Maryland.~~

C. Application of the Three-Percent Rule

The legislation does not clearly lay out how the "three-percent rule" is to be applied. The language in the legislation related to the three-percent rule is:

> Calculations involving a three percent cost cap shall consist of comparing the total expected cost of generation to customers of an electric utility or electric services

[16] The ACP needs to be set at a level that would generate a reasonable level of economic rent as a mechanism to induce market entry. The current ACP of $45 accomplishes that goal since the costs of renewable energy production are below the level of the ACP when added to the market prices of energy.

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Comment [CMD57]: See Companies' alternative approach outlined above.

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company, while satisfying an alternative energy portfolio standard requirement, to the total expected cost of generation to customers of the electric utility or electric services company without satisfying that alternative energy portfolio standard requirement.[17]

The apparent intent of the rule is to facilitate the limitation of the degree to which retail customers are exposed to excessive costs related to the satisfaction of the renewable energy requirements. The rule, however, is based on "expected" impacts, and it is not unreasonable for the utilities to base the calculations related to the rule on the same algorithm used to compute the quantity of RECs required for compliance in any particular compliance year, that is, the average level of MWh sales in prior three years. This approach, at least temporarily, has an upward bias since over time we would expect that the number of shopping customers (the number of customers taking competitive electric service) to increase. An algorithm based on expected sales volumes that account for customer migration and projections of market pricing for power is recommended in order to eliminate this bias.

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[17] Ohio Code; Chapter 4901:1-40 [Alternative Energy Portfolio Standard], Section 4901:1-40-07 Cost Cap. (C).

The Companies' Major Comments Regarding the Executive Summary
Draft Management/Performance Audit Report
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The Companies are initially concerned about the ultimate recommendation of the auditor that all amounts above $50/REC be disallowed for all In-State All Renewable RECs purchased by the Companies in the 2009-2011 timeframe. The report does not contain a reasonable basis for the $50 amount, particularly in light of the lack of market information relevant to Ohio in the 2009-2010 timeframe. Further, the disallowance recommendation appears inconsistent with the majority of conclusions reflected throughout the remainder of the report.

General SREC/REC Acquisition Approach

1) The Companies disagree with the conclusion in Finding 7 regarding the adequacy of the market research conducted prior to the first two RFPs. The underlying reality was that there was no market data available, particularly in 2009 since at that the Commission had not yet qualified any resources. As the Companies indicated in the phone interview with Exeter, the Companies did conduct informal market research in 2009 and 2010, by reaching out to brokers (primarily SPECTRON) to get a sense of what was being offered across all four products. For both in-state Ohio categories (Solar and All Renewables), the Companies' broker intelligence revealed little to no supply for these categories. This market research, together with market supply information from Navigant, provided the Companies with a fairly accurate picture of the contemporaneous supply situation for the products being sought in the market. In Ohio, there are no reporting or transparency requirements for REC transactions, thus no information on market prices. It is important to note that there was hardly any change in price transparency between the time when the first two RFPs were conducted and the point in which RFP 3 was held, other than the knowledge that was gained through the first two RFPs. At that time, the market was nascent and complex, and if market information about Ohio RECs was generally unavailable, what meaningful information would have been learned by doing a market study earlier? What basis does Exeter have to support its view that any meaningful information would have been learned?
2) The Companies disagree with the conclusion in Finding 8 that the contingency planning for the first three RFPs was inadequate in that it should have included a specific set of "fall-back" approaches or a mechanism to develop a modified approach. The Companies' contingency plans focus on insufficient bidder interest and/or supplier default. If the solicitations are competitive and fully subscribed, they represent the outcome of what supply and demand conditions exist at that point in time. This report seems to suggest that the contingency definition be expanded to include a price threshold examination, which the Companies would view as a speculative feature to an already well-functioning contingency process. To add a price evaluation contingency planning element may be viewed by the market as speculative and may dampen bidder participation. What would an acceptable contingency plan include? Would it have included one or more of the three options that Exeter suggests that the Companies should have considered (i.e., pay ACP, consult the Commission, or seek force majeure)? If not, what would a plan have

The Companies' Major Comments Regarding the Executive Summary
Draft Management/Performance Audit Report
CONFIDENTIAL PURSUANT TO O.R.C. 4901.16

looked like? Do other utilities have plans that include those suggestions? It should be noted that paying the ACP doesn't equate to purchasing RECs to comply, the shortfall can be added to the following years larger requirement and if supply isn't available, even a greater number of RECs may have to be purchased.

3) The Companies agree with Recommendation 2 and already undertake a market analysis before RFPs are issued.
4) The Companies disagree with Recommendation 3, and do not think a mark-to-market approach to the security requirement for future procurements is appropriate at this time. Such an approach would be extremely complex and difficult to explain to small renewable owners. Further, the 'market price' to which this is proposing to 'mark to' doesn't exist as REC and SREC transaction prices are not publically disclosed. In addition, incorporating such an approach may discourage particularly smaller bidders such as residential customers from participating in the RFPs. Should transparent pricing become available in the future to support such an approach and mark to market is identified as the preferred approach by the Commission, the Companies will modify their credit requirements at that time.

Solicitation Results and Procurement Decisions

5) The Companies disagree with Finding 4 that they paid "unreasonably" high prices for In-State All Renewable RECs. The basis for the finding, at least in part, is based on information from outside the State (different product definitions) at points in time that are different from the Companies' procurement dates, and therefore results in an unreliable comparison. The basis for the conclusion of unreasonably high prices is unclear and generally unsupported in the report, particularly given the Companies' obligation to comply with SB 221 mandates and the lack of availability of both applicable market pricing information and lower cost REC's offered as part of the RFPs.
6) The Companies disagree with Finding 6 and do not believe other alternatives existed that would have resulted in the Companies complying with the requirements of SB 221. The REC purchases were competitively determined and fully subscribed. Alternatives were evaluated and rejected as it risked the Companies ability to comply with the SB 221 benchmarks.
7) [redacted]
8) The Companies disagree with Finding 7 that the prices bid were "excessive by any reasonable measure." The Companies were in the position where, having conducted multiple RFPs, these were the only in-State RECs available for purchase in order to

The Companies' Major Comments Regarding the Executive Summary
Draft Management/Performance Audit Report
CONFIDENTIAL PURSUANT TO O.R.C. 4901.16

comply with statutory benchmarks. The suggestion that the Companies had insight into the bidders' cost structure (and therefore the profit margin) is unsupported and not accurate. The Companies are not in a position to investigate individual bidders' cost structures as part of any procurement process. The Companies purpose was to meet the regulatory requirements through arms-length, competitively derived, fully subscribed procurements that conform to our bid rules and credit requirements.

9) The Companies believe that one avenue to address the auditor's concerns would be to have the Commission approve the process whereby the Companies purchase RECs associated with SSO service before the RECs contracts are signed. Such an approach may eliminate the types of issues that have arisen in the context of this management/performance audit. If the Commission rejects purchase of RECs, the event shall be deemed a force majeure and the Companies shall incur no penalty. In such event, the Companies shall be relieved of the obligation to procure the number of RECS which would have been procured absent the Commission's rejection, for that compliance year. Further, this recommendation is subject to the limits of the Commission's jurisdiction.

Confidentiality Concerns

10) In the draft report, the Companies have highlighted in yellow (or underlined where highlight was not available due to comments), all information that must be held in confidence and redacted from the public version of the report that is filed with the Commission. Information related to an individual bidder/supplier and all pricing information related to what the Companies paid for RECs should be redacted or removed from the public version of the report. The Companies have an obligation to protect individual supplier names or contract information. Further, it would be inappropriate to disclose the REC pricing for the Companies, when similar information has not been disclosed for the other EDUs in Ohio.

CONFIDENTIAL Exhibit E – Omitted from filing in OCC's Public Brief

Summary: Brief Initial Brief (Public Version) by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Yost, Melissa Ms.