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

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

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

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

CONTENTS

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

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

I. INTRODUCTION

The record and the briefing thus far establish certain undisputed points:

1. The Companies had an obligation to obtain renewable energy resources pursuant to Ohio Revised Code Section 4928.64, and the Companies satisfied their obligation through the purchase of renewable energy credits ("REC") for 2009, 2010 and 2011.

2. The Companies' actions in procuring In-State All Renewable Energy Credits ("In-State All Renewables") for 2009, 2010 and 2011 complied with their Electric Security Plan and in no way violated any provision of Ohio Revised Code Section 4928.64 or the regulations promulgated thereunder.

3. The Companies never exceeded the three percent cost level discussed in Ohio Revised Code Section 4928.64(C)(3).

4. The In-State All Renewables market was nascent and thin. There was little or no information regarding prices for those RECs in 2009 and 2010.

Given the above, there should be no question that the Companies acted properly in procuring In-State All Renewables, as statutorily mandated, in 2009, 2010 and 2011 and no further action from the Commission regarding those procurements is necessary. Yet Staff and certain intervenors attempt to argue otherwise.

As demonstrated below, the positions of Staff and those intervenors are improperly based on pure hindsight and otherwise are refuted by the evidence. Their positions are conveniently untethered from the reality that the Companies faced in 2009 and 2010, i.e., that they had a statutory obligation to purchase these RECs and that such RECs were made available to the Companies through an independently designed and managed competitive procurement process conducted by a nationally-recognized independent evaluator. Indeed, in contrast to two of the witnesses presented by the Companies – who together had managed or been otherwise actively involved in over 100 competitive processes – Staff and the Office of the Ohio Consumers' Counsel ("OCC") rely on the testimony of witnesses having no experience in competitive procurements for utilities. Thus, these parties' cases amount to nearly nonsensical, Monday morning quarterbacking, based more on untutored say-so, than on evidence of record or a plain reading of the law.

For example, notwithstanding the undisputed lack of pricing information regarding In-State All Renewables, Staff and certain intervenors contend that the Companies should have known that the prices bid were "too high" because REC prices in other states were lower. But this ignores that the Ohio In-State All Renewables market was unique; and that the information from other states did not reflect actual REC transaction prices, the geographic limitations faced by the Companies, or the substantial volumes of RECs needed by the Companies. The "pricing" information from other states was neither comparable nor informative, and did nothing to change the Companies' statutory obligations.

These parties further suggest hypothetical alternative scenarios. But, befitting the lack of real world perspectives of their witnesses, none of these hypothetical scenarios were even remotely realistic, feasible or legal, let alone reasonable or prudent. Most improbably, these

parties suggest that the Companies should have ignored their statutory obligations to procure RECs and simply paid a nonexistent "Alternative Compliance Payment." Or, they advise, the Companies should have pleaded that In-State All Renewables were not "reasonably available" and thus should have sought force majeure relief. The former suggestion is an avenue for relief that is unavailable in the statute and is contrary to the statute's purpose, i.e., to force utilities to purchase in-state sited renewable energy credits in order to develop such resources in Ohio. The latter suggestion either wishes away the undisputed fact that such RECs *were available* or simply overlooks that cost-based force majeure relief was not possible under Section 4928.64 and the facts of this case. In short, if the Companies' costs were under the three percent level described in Section 4928.64(C)(3), no cost-based relief from procurement was possible. What's more, the suggestion that the Companies should have attempted force majeure relief when RECs were unquestionably at hand is too much coming, as it does, from the very parties at the same time that opposed the Companies' force majeure applications for those products that could not be located at all.

Or even more to the theoretical than practical, these parties suggest that the Companies should have gone to Staff for guidance. Missing from these arguments, however, is the answer to this basic question: to what end? There is nothing in the record or the briefing in this case that alleges or suggests (much less, demonstrates) what such a conference would have yielded or what result it would have changed, or could have changed, given the statutory obligations faced by the Companies.

Similarly, these parties allege that the Commission should disallow the costs incurred by the Companies to purchase the In-State All Renewables, even though they can point to no alternative price that was prudent or reasonable. Moreover, these parties overlook that the

Companies have already recovered virtually all of these costs through Commission-approved tariffs and thus any disallowance would be impermissible retroactive ratemaking.

OCC and the Environmental Law & Policy Center, The Ohio Environmental Council and Sierra Club (collectively, the "Environmental Intervenors") additionally take issue with various rulings relating to the treatment of proprietary material in this case. Tellingly, those parties never mention exactly what interest would be served by disclosing such highly sensitive confidential information. Their arguments, basically repeating identical ones made earlier, should be rejected now as they have been before. For all of those reasons, discussed more fully below, the Commission should reject the intervening parties and Staff's arguments and find that the Companies acted prudently in procuring In-State All Renewables in 2009, 2010 and 2011.

II. THE COMPANIES ACTED PRUDENTLY IN PROCURING IN-STATE ALL RENEWABLES TO MEET THEIR STATUTORY RENEWABLE ENERGY RESOURCE OBLIGATIONS.

In their Post-Hearing Brief, the Companies demonstrated that they acted prudently in procuring In-State All Renewables to meet their 2009, 2010 and 2011 obligations under Section 4928.64.[1] Years later, through post-hoc analysis and unsupported speculation, Staff and certain intervenors make a series of arguments that the Companies should have acted differently. First, even though there is no dispute that the Companies' procurement processes, which were reviewed with Staff, were designed to be competitive and managed by an independent evaluator, these parties complain about various aspects the of design of the competitive procurement

[1] Company Br., at Section IV. The following citation formats are applied in this brief: direct testimony of a witness will be referred to by the witness' last name followed by "Testimony," e.g. "Stathis Testimony;" rebuttal testimony will be referred to by the witness' last name followed by "Rebuttal Testimony"; all citations to the hearing transcript in the proceeding will be in the format "Tr. Vol. __, p. __." with confidential portions of the transcripts indicated in parenthesis; exhibits will be identified by party name and exhibit number, e.g. "Company Ex. 1."; and citations to initial post-hearing briefs will be referred to by an entity's abbreviation, e.g., "OCC," and will be in the format "___ Br., p. ___." Note, the Companies' initial post-hearing brief will be referred to as "Company Br." The following abbreviations will be employed: Office of the Ohio Consumers' Counsel ("OCC"), the Environmental Intervenors ("EI"), the Commission Staff ("Staff"), Mid-Atlantic Renewable Energy Coalition ("MAREC"), Nucor Steel Marion, Inc. ("Nucor"), Interstate Gas Supply, Inc. ("IGS"), and Ohio Energy Group ("OEG").

processes, including the timing of the Companies' first Request for Proposal ("RFP") and product types.[2] But these arguments are contradicted by the evidence, based on suggestions that would have been inconsistent with the Companies' electric security plan ("ESP") and unfounded speculation.

Second, certain parties suggest that the Companies should have adopted a different strategy for their procurements.[3] These parties argue that instead of spreading out purchases of In-State All Renewables over several procurements (using a well-recognized mitigation strategy that this Commission has found to benefit customers),[4] the Companies should have speculatively timed the market and waited with the hope that prices would go down. The evidence that these parties rely on, however, tells a different story. This evidence tells a story regarding RECs from other states with different Alternative Energy Portfolio Standards laws ("AEPS"). For example, there is no evidence that suggests that, before any of the RFPs at issue, there was a discernible trend of price decreases in REC markets generally, much less in Ohio. The indicative price information in other states (to the extent that such data could be relied upon, which is not the case because it did not reflect actual transaction pricing, but only broker quotes with no indication of volume) showed increases in some states or no trend at all in others. Thus, the arguments (about market and procurement timing) are unsupported and are, at best, impermissibly based on hindsight.

---

[2] *See, e.g.,* OCC Br., pp. 27-28; EI Br., p. 9.

[3] *See e.g.*, Staff Br., pp. 4-5; OCC Br., pp. 5, 29; EI Br., pp. 13-14.

[4] Specifically, in the Companies' third ESP proceeding the Commission held that such a risk-mitigation strategy, commonly known as "laddering," was a well-founded industry practice. "The Commission agrees with the Companies and Staff that the laddering of products in order to smooth out generation prices, mitigating the risk of price volatility, will benefit ratepayers and the public interest…[T]he Commission believes that future price uncertainty makes laddering of products in order to mitigate volatility an even greater benefit for ratepayers." *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order, p. 32 (July 18, 2012).

Third, certain intervenors attack the Companies' overall process to purchase In-State All Renewables.[5] They suggest that the Companies could have had a different contingency plan or set a limit price. They fail to provide any suggestion about what contingencies weren't planned for or what the limit prices should have been or how they would have been determined. They similarly fail to provide any evidence that a different contingency plan or the existence of a limit price would have led (or could have) led to a different result. Thus, these arguments are mere abstract, unrealistic quibbles that provide no support for any Commission action.

Fourth, these parties complain about the alleged "excessive prices" that the Companies paid for In-State All Renewables.[6] These arguments disregard several facts including: (a) even with these prices, the Companies' costs fell below the three percent calculation under Section 4928.64(C)(3); (b) the prices the Companies paid for In-State All Renewables cannot be compared to out-of-state prices for different types and volumes of RECs; and (c) data relied upon by these parties was "price indicative" information, not reflecting prices for any actual transaction or any transaction based on the volumes required by the Companies. Simply put, there is no evidence that shows the Companies paid unreasonable prices for In-State All Renewables.

Fifth, the intervenors suggest a series of "alternatives." They suggest that: (a) the Companies should have made an "alternative compliance payment"[7]; (b) the Companies should have rejected RECs procured through the Companies' RFPs and instead filed an application for force majeure[8]; and (c) the Companies could have contacted Staff.[9] But their suggestions

[5] *See e.g.*, OCC Br., pp. 44-46.

[6] *See e.g.*, OCC Br., p. 29; EI Br., p. 7.

[7] *See e.g.*, Staff Br., p. 5; OCC Br., pp. 40-41; EI Br., pp. 21-22.

[8] *See e.g.*, OCC Br., p. 33; EI Br., p. 20.

[9] *See e.g.*, Staff Br., p. 6; OCC Br., p. 32.

conflict with Ohio law. And these alternatives otherwise fail to show that the Companies had any alternative other than to procure In-State All Renewables to comply with their statutory obligations.

[redacted]

In sum, the evidence shows that the Companies acted prudently, and none of the intervenors' arguments rebuts this evidence, let alone overcomes the Companies' presumption of prudence. The intervenors' arguments are improperly based on speculation, unqualified opinions, misstatements of the record, and unfounded conclusions. Therefore, these arguments should be rejected.

A. The Companies' Management Decisions Are Presumed To Be Prudent.

A utility's management decisions are afforded a presumption of prudence.[11] Accordingly, "parties challenging the reasonableness of . . . costs have an obligation to go forward with some *concrete evidence* supporting their position before th[e] burden [of proof] is triggered."[12] The reasonableness of a utility's decisions must be considered under the circumstances at the time the

[10] *See e.g.*, OCC Br., pp. 21-22; EI Br., pp. 22-23.

[11] Company Br., p. 27 (citing *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, *21-23 (Dec. 30, 1986) (finding in the context of an audit of a gas company's procurement policies pursuant to Section 4905.302 that Staff failed to come forward with sufficient evidence to rebut the presumption of prudence)).

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

decisions at issue were made.[13] Importantly for purposes of this case, "[h]indsight should not be used in determining prudence."[14]

The parties opposing the Companies misstate the appropriate standards. For example, Staff citing *In re Application of Duke Energy Ohio* (2012), 131 Ohio St.3d 487, ¶ 8, states "'[I]f the evidence was inconclusive or questionable, the Commission could justifiably reduce or disallow cost recovery.'"[15] In that case, however, Duke Energy Ohio ("Duke") had agreed in a stipulation that it would seek the Commission's approval for the recovery of storm-related costs in a future proceeding in which Duke would bear the burden to proof.[16] Pursuant to the stipulation, the rider for storm cost-recovery was originally set at zero and Duke was charged to produce sufficient evidence in a future proceeding to prove that it had actually incurred the costs for which it sought recovery.[17]

Unlike *Duke*, this proceeding is a review of the Companies' recovery of costs related to Rider AER. These costs have already been incurred and almost all of these costs have already been recovered from customers pursuant to a rider and cost-recovery mechanism previously approved by the Commission. In contrast, in *Duke*, the utility had to file an application with the Commission in a future proceeding prior to the initiation of any cost recovery. Thus, the standard set forth in *Duke* is inapplicable to this proceeding.

---

[13] *Syracuse*, 1986 Ohio PUC LEXIS at *22.

[14] *Id*. at *21. Indeed, Staff witness Dr. Estomin testified that ex post facto analysis should be avoided. Tr. Vol. I, p. 78. He also testified that the appropriate review of the Companies' decisions is to look at the reasonableness of the Companies' decisions based on the facts and circumstances presented to the Companies at the time the decisions were made. *Id*.

[15] Staff Br., p. 3.

[16] 131 Ohio St. 3d 487, ¶ 8; *see also* Case No. 09-1946-EL-RDR, Opinion and Order, pp. 7, 17 (Jan. 11, 2011).

[17] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR, Opinion and Order, p. 9 (July 8, 2009) ("Following the Commission's approval of this stipulation, Duke may file a separate application to establish the initial level of Rider DR [-IKE] and shall docket, with its Rider DR application, all supporting documentation.").

In its discussion of the applicable standards, OCC cites Ohio Revised Code Section 4909.154.[18] That section provides:

> In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall consider the management policies, practices, and organization of the public utility. . . . In any event, the public utilities commission shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.[19]

OCC's reliance on this section is misplaced. Section 4909.154 applies to base rate cases. As the Commission has previously held, "Section 4909.154, of the Revised Code, clearly applies to a rate case. Other sections of the Revised Code are applicable to complaint or investigative cases before the Commission."[20] This proceeding is not a base rate case. Section 4909.154 is thus inapplicable.

Accordingly, as shown in the Companies' Post-Hearing Brief,[21] the appropriate standard for a prudence review is set forth under *Syracuse*.[22] Applying that standard, the evidence demonstrates that at all times the Companies acted prudently in purchasing In-State All Renewables to comply with the law and satisfy their renewable energy resource obligations

---

[18] OCC Br., pp. 15-16.

[19] O.R.C. § 4909.154.

[20] *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, 2002 Ohio PUC LEXIS 564, *34 (June 20, 2002); *See also, In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No. 09-391-WS-AIR, 2010 Ohio PUC LEXIS 479, *133 (May 5, 2010)..

[21] Company Br., pp. 27-28.

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

under Ohio's Alternative Energy Portfolio Standards ("AEPS"). Staff and certain intervenors' arguments to the contrary are unsupported by the facts and improperly engage in the type of improper hindsight-informed *ex post facto* evaluation prohibited under *Syracuse*. The Commission thus should reject Staff and these intervenors' arguments and find that the Companies acted prudently in purchasing In-State All Renewables to comply with Section 4928.64.

B. To Meet Their Renewable Energy Resource Obligations, The Companies Employed A Competitive Procurement Process That Was Consistent With The Companies' Electric Security Plan.

1. The Companies' procurement process was designed and implemented by an independent expert to meet the Companies' renewable energy resource compliance obligations.

At the hearing and as described in their Post-Hearing Brief, the Companies demonstrated that the Companies' procurement process was reasonably designed and implemented. Navigant Consulting, Inc. ("Navigant"), a firm with extensive experience in competitive procurements, including advising clients in approximately 40 procurements since 2001, served as the Independent Evaluator and designed and implemented the Companies' competitive procurement processes.[23] Indeed, there is no dispute that the Companies' independently managed procurements were designed to be competitive.[24]

Nevertheless, OCC and the Environmental Intervenors assert a series of unfounded arguments regarding the Companies' competitive procurement processes. As set forth below, these arguments are contradicted by the evidence and otherwise based on unfounded hypotheticals that show nothing more than improper post-hoc speculation.

[23] Bradley Testimony, pp. 2-3.

[24] Commission Ordered Ex. 2A, at p. ii; Tr. Vol. I, pp. 78-79; Tr. Vol. III, pp. 562-66.

As an initial matter, certain intervenors' complaints about the Companies' competitive solicitations rely heavily on testimony from witnesses who admittedly have no prior experience working with renewable procurement programs.[25] Indeed, OCC witness Gonzalez testified that his only experience with a renewable procurement stems from his involvement in this case.[26]

These intervenors also rely heavily on the Exeter Report and the testimony of Staff witness Dr. Estomin. Neither Exeter nor Dr. Estomin has been involved in an audit of a REC procurement before this proceeding.[27] Dr. Estomin also has never been involved in the implementation of a procurement program for a utility to meet an AEPS.[28] Further, when preparing the Exeter Report, Dr. Estomin testified that he did not look at the results of any RFPs from any other Ohio utility for their procurement of RECs.[29]

Attempting to draw attention away from Navigant's expertise, OCC argues that Navigant's recommendations should be discounted because Navigant did not consider any "alternatives" to purchasing RECs.[30] This argument is based on the false premise that the Companies *had* any reasonable alternative other than procuring RECs to comply with the Companies' statutory procurement obligation.[31] When, in fact, the Companies did not have any alternative but to comply with the law.[32]

In any event, OCC incorrectly infers that Navigant was not aware of the requirements under the Ohio AEPS. The evidence shows otherwise. Company witness Bradley testified that

---

[25] *See e.g.*, OCC Br., p. 27; EI Br., p. 14.

[26] Tr. Vol. III, pp. 551-52.

[27] Tr. Vol. I, p. 73.

[28] *Id.* at 74.

[29] *Id. at* 77.

[30] OCC Br., p. 12.

[31] *Infra* Section II.F.

[32] *Infra* Section II.F.

Navigant: (a) reviewed and analyzed the Ohio AEPS as part of its design of the Companies' solicitation process; [33] (b) would have provided the Companies with the information they needed to support an application for force majeure if RECs were not reasonably available in the marketplace; and (c) performed a three percent calculation in 2009 and had a general understanding of the amount that would trigger the three percent provision.[34] Given that the RFPs attracted sufficient amounts of In-State All Renewables and that the Companies did not trigger the three percent provision, there was no need or cause for Navigant or the Companies to consider any alternative course. Mr. Bradley also explained why Navigant did not consider OCC's suggested "alternative" of making a compliance payment: "Navigant did not view compliance payments as a voluntary means of complying with the AEPS."[35] Mr. Bradley further testified that, unlike "alternative compliance payments" in other states, "compliance payments [in Ohio] would be assessed after a Commission proceeding, and . . . it is not a voluntary act where a check is stapled to an annual report submitted in with compliance."[36] He also explained that the Companies were in compliance with their 2009, 2010 and 2011, so a compliance payment would not have been appropriate.[37]

Next, based solely on Mr. Gonzalez's bald assertion, OCC alleges that the Companies' procurement process did not yield a competitive outcome.[38] OCC's assertion is belied by Mr. Gonzalez's own that the Companies employed an RFP process that was competitive, transparent,

[33] Bradley Testimony, pp. 5-7

[34] Tr. Vol. I, pp. 169, 250 51.

[35] *Id.* at 254.

[36] *Id.* at 254-55.

[37] *Id.* at 255.

[38] OCC Br., p. 27.

offered a clear product, and generally was designed to secure a competitive outcome.[39] Moreover, Exeter found that the Companies' RFPs were open, competitive, and designed to attract suppliers in the industry.[40] Staff witness Dr. Estomin also testified that the Companies' RFPs were designed to produce competitive results and utilized an open, transparent and clear process.[41]

Other than Mr. Gonzalez's unsupported speculation, however, OCC fails to cite any evidence that shows that the Companies' solicitations did not produce a competitive result. At most, in this regard, OCC incorrectly claims that the Companies' solicitations did not produce competitive outcomes because only one bidder participated.[42] But this argument conflicts with both the evidence and the law.[43] In each of the Companies' RFPs, multiple bidders qualified to submit multiple bids on products. In addition, Ohio law does not require that multiple bidders participate in an auction for RECs. OCC's reliance on Ohio Revised Code Section 4928.142(C)(2), which addresses requirements for a *power auction* (not procurements for RECs), is thus misplaced. Indeed, OCC witness Gonzalez testified that this provision is neither within the Ohio AEPS nor the Companies' electric security plans, apparently understanding that Section 4928.142(C)(2) does not apply.[44] Moreover, Mr. Gonzalez acknowledged that, even though

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

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

[41] Tr. Vol. I, pp. 78-79.

[42] OCC Br., pp. 27-28.

[43] Bradley Testimony, pp. 28, 33, 40, 43. The evidence shows that the Companies purchased In-State All Renewables from multiple bidders. Stathis Testimony, p. 35.

[44] Tr. Vol. III, pg. 644.

OCC agreed to ESP 1 and opposed the Companies' ESPs 2 and 3, OCC had never advocated that the Companies adopt a minimum bidder requirement for their RFPs to procure RECs.[45]

More fundamentally, OCC's argument misunderstands the Companies' competitive solicitation process. Simply put, throughout the process, qualified suppliers did not know how many other suppliers would submit a bid or have submitted bids.[46] As Mr. Stathis explained, "as long as the competitive solicitation process has been designed properly, uses a sealed bid, line [*sic*, blind] bidding process, obviously, that bidder doesn't know how many other potential bidders he's bidding against."[47] As a result, qualified bidders had an incentive to offer their best bid prices into the RFP. The number of bidders thus did not affect and does not determine whether the outcome is competitive.

OCC also claims that the Companies purchases were imprudent simply because the Companies knew the identity of the bidders.[48] Of course, the Companies needed to know who the bidders were in order to qualify them (*e.g.*, for credit-worthiness purposes).[49] More to the point, however, OCC never says exactly what was wrong with having the Companies know bidders' identities. It certainly never points to any fact that demonstrates that the Companies would have acted differently without such information.

Similarly, OCC contends that Exeter was unaware that the Companies knew the names of the bidders and that, if Exeter knew otherwise, Exeter may have made different findings.[50] Although Dr. Estomin testified [redacted]

[45] *Id.*

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

[47] *Id.*

[48] OCC Br., pp. 4, 21-22.

[49] Tr. Vol. II, p. 317.

[50] OCC Br., p. 22.

[redacted],[51] [redacted].[52] In any event, even assuming that Exeter was unaware that the Companies knew the bidders' identities, OCC again never shows what difference a change in Exeter's knowledge would make.

In sum, the Commission should find that the Companies, together with their independent expert, adequately designed and implemented a competitive procurement process for RECs. Any assertion to the contrary should be rejected.

2. The Companies' procurement process was consistent with the Companies' Electric Security Plan.

OCC and the Environmental Intervenors continue their post hoc speculation by complaining about the timing and length of products offered in the Companies' RFPs. Their arguments, however, overlook the requirement of the Companies' electric security plan. They also fail to show that such suggestion would have changed the results of the Companies' RFPs.

Although OCC and the Environmental Intervenors suggest that the Companies should have begun their REC procurements earlier than July 2009,[53] the evidence shows that the Companies acted prudently by waiting for the resolution of their ESP 1 proceeding. ESP 1 resolved the outstanding issue regarding whether wholesale suppliers or the Companies would be responsible for procuring renewable energy or RECs necessary to meet the requirements under Section 4928.64.[54] ESP 1 placed this responsibility on the Companies.[55] Company witness Stathis testified, "It was not viewed as reasonable to either commence a procurement process

[51] Tr. Vol. I, p. 67 (Confidential).

[52] OCC Ex. 9 (Competitively Sensitive Confidential).

[53] OCC Br., p. 7; EI Br., p. 3.

[54] Tr. Vol. I, p. 106.

[55] Case No. 08-935-EL-SSO, Stipulation and Recommendation, pp. 10-11 (Feb. 19, 2009).

when a stipulation addressing the issue was pending before the Commission or to begin incurring procurement costs without some understanding about the specific approval mechanism for the recovery of such costs."[56] Mr. Stathis explained, "Stepping out into the market ahead of having a Commission approved plan that included a cost recovery mechanism may have exposed the FEOUs to the risk of stranded procurement costs and/or renewable procurement provisions inconsistent with those ultimately approved in ESP 1."[57] Indeed, Dr. Estomin acknowledged that there were outstanding issues regarding whether wholesale suppliers or the Companies would procure the renewable energy resources or RECs to meet the Companies' obligations that were not resolved until the end of the Companies' ESP proceeding.[58] This issue was unique to the Companies relative to other Ohio electric utilities given that the Companies do not own generation and purchased their standard service requirements through a competitive bid process. In 2009, all other Ohio electric utilities owned their own generation to meet standard service load requirements and thus could not assign the responsibility of procuring RECs to the winning suppliers in the competitive bid process.

As discussed above, because the Companies' situation was different than other Ohio electric utilities, the Environmental Intervenors' reference to other Ohio utilities July 2008 RFPs is misplaced.[59] In fact, the law governing the procurement of renewable energy resources went into effect on the final day of July, 2008 and at such time not a single rule on the matter was introduced or promulgated. Moreover, there is no evidence regarding the results of those RFPs. In contrast, the testimony suggests that one of these RFPs--the RFP for AEP Ohio--was not

[56] Stathis Testimony, pp. 20-21.

[57] *Id.* at 21.

[58] Tr. Vol. I, p. 106.

[59] EI Br., p. 3.

issued solely to meet the Ohio AEPS.[60] In addition, AEP Ohio's RFP sought a product much different than the RECs sought by the Companies.[61] Thus, the fact that other utilities held RFPs earlier than the Companies does not support the Environmental Intervenors' unfounded inference that if the Companies held RFPs earlier, then any different result would have been obtained.

The Environmental Intervenors also argue that the Companies should have offered long-term contracts before RFP 6. To "support" this argument, they speculate that long-term contracts would have resulted in higher bidder participation and lower prices.[62] This argument fails for at least five reasons. First, the Environmental Intervenors overlook that the Companies' ESP did not authorize recovery of costs for their Ohio AEPS obligations for any period beyond May 31, 2011.[63] Without this authority, the Companies would have risked not being able to recover any costs that they incurred under the long-term contracts. Entering into long-term contracts without the ability to recover costs incurred under those contracts would have been imprudent.

Second, the Environmental Intervenors imply that, after the Companies received Navigant's memorandum suggesting that the Companies seek longer term commitments, the Companies somehow delayed seeking authority for long-term contracts.[64] The timeline of ESP 2 shows otherwise. The Companies received Navigant's memorandum on June 3, 2010. Just one month later, the Companies included in their Second Supplemental Stipulation in ESP 2 a provision that allowed the Companies to seek authority to use long-term contracts in their

[60] Tr. Vol. I, pp. 232-33.

[61] *Id.* at 257. Mr. Bradley explained that AEP's RFP sought 20 year contracts for 300 megawatts of the full resource, i.e. energy and capacity. In comparison, the Companies' competitive solicitations sought unbundled RECs, which is a very different product from the full resource sought in AEP's RFP. *Id*.

[62] EI Br., p. 9.

[63] *See* Case No. 08-935-EL-SSO, Stipulation and Recommendation, pp. 10-11 (Feb. 19, 2009).

[64] EI Br., pp. 11-12.

procurements of RECs to meet their statutory obligations.[65] The Companies' ESP 2 was approved in August 2010.[66] That fall, as required by the ESP 2 Order, the Companies met with other parties to the ESP 2 Stipulation as part of a collaborative process and filed their application with the Commission for authority to offer long-term contracts.[67] In the summer of 2011, the Companies received authority to offer long-term contracts for bid in RFP 6, which was held in September 2011.[68]

Third, the Environmental Intervenors suggest that the Companies should have offered long-term contracts because other FirstEnergy affiliated utilities offer long-term contracts in Pennsylvania and New Jersey.[69] FirstEnergy's strategy for renewable energy resource compliance in Pennsylvania and New Jersey, however, is simply irrelevant to the Companies' solicitations in Ohio. There is no evidence to suggest that, like the Companies, the FirstEnergy utilities in Pennsylvania and New Jersey had not received authority to recover costs incurred under long-term contracts for the term of those contracts. In addition, Mr. Bradley testified, "those are very different markets, and the market we are working at in Ohio is under very different market conditions."[70]

Fourth, the Environmental Intervenors fail to support their conclusion that, during RFPs 1, 2 and 3, the use of long-term contracts would have increased bidder participation or resulted in

---

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

[66] Case No. 10-388-EL-SSO, Opinion and Order, (Aug. 25, 2010) ("Case No. 10-388-EL-SSO").

[67] *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Request for Proposal to Purchase Renewable Energy Credits Through Ten-Year Contracts*, Case No. 10-2891-EL-ACP, Application for Approval of Request for Proposal to Purchase Renewable Energy Credits Through Ten Year Contracts, pp. 1-4 (Dec. 2, 2010).

[68] *Id.*, Entry on Rehearing (Aug. 3, 2011).

[69] EI Br., p. 12.

[70] Tr. Vol. I, p. 231.

lower prices. Although they cite the June 2010 Navigant memorandum, that document does not support the Environmental Intervenors' argument. For example, [redacted][71] The memorandum noted that [redacted]

Further, there is no evidence that offering long-term contracts in RFPs 1 and 2 would have increased the supply offered in those RFPs. As the June 2010 Navigant memorandum noted:

[redacted][73]

The memorandum [redacted]"[74] Thus, there is no support for the notion that long-term contracts would have changed the results of RFPs 1, 2 and 3 offered in 2009 and 2010.

Fifth, the Environmental Intervenors make a series of unfounded statements to "support" their argument. They misleadingly state that Company witness Bradley testified that the

[71] *Id.* at 224-25 (Confidential); ELPC Ex. 1, p. 9 (Competitively Sensitive Confidential).

[72] *Id.* at 9 (Competitively Sensitive Confidential).

[73] *Id.* at 8 (Competitively Sensitive Confidential).

[74] *Id.*

decrease in REC prices in RFP 6 was solely the result of long-term contracts.[75] Not so. Mr. Bradley testified that there were numerous factors that led to lower prices in RFP 6:

> Navigant observed that *the combination* of long-term contracts, maturation of the Ohio renewable energy market, an improved economic landscape, and an increase in In-State All Renewable suppliers resulted in significantly lower In-State All Renewable REC prices than previously observed and increased the number of bidders that were awarded contracts compared with RFP 3 in 2010.[76]

In addition, the Environmental Intervenors incorrectly suggest that other Ohio utilities offered long-term contracts that resulted in lower prices.[77] There is *no evidence* to support this conclusion. Nor could there be. Mr. Bradley testified that the results of other utilities' RFPs were not publicly available.[78] At most, the record contains Mr. Bradley's testimony that he was aware that AEP Ohio had attempted a solicitation for a long-term product.[79] Mr. Bradley also explained that the RFP issued for AEP Ohio was seeking the long-term supply of both energy and capacity from renewable resources.[80] AEP Ohio's RFP involved products that were very different from the Companies' RFPs that were seeking RECs, not energy.[81] Mr. Bradley did not testify that AEP Ohio's RFP resulted in lower-priced RECs.

In sum, OCC and certain intervenors' arguments regarding the Companies' competitive procurement process are contradicted by the evidence and otherwise based on speculation and inaccuracies. The evidence in this case shows that the Companies acted prudently by adopting and implementing a competitive solicitation process to procure RECs to meet their statutory

---

[75] EI Br., pp. 12-13.

[76] Bradley Testimony, pp. 44-45 (emphasis added).

[77] EI Br., p. 12.

[78] Bradley Testimony, p. 45.

[79] Tr. Vol. I, pp. 232-33.

[80] *Id.* at 257.

[81] *Id.*

obligations. OCC and the Environmental Intervernors' unfounded arguments to the contrary should be rejected.

C. The Companies Adopted A Reasonable Strategy To Purchase RECs Over Multiple Competitive Procurements To Meet Their Renewable Energy Resource Obligations.

The Companies pursued a strategy of procuring In-State All Renewables over multiple procurements. In 2009, the Companies procured 2009 and 2010 RECs in RFP 1 and procured 2009, 2010 and 2011 RECs in RFP 2.[82] In 2010, the Companies procured 2010 and 2011 RECs in RFP 3.[83] In 2011, as part of RFP 6, the Companies procured more 2011 RECs[84] and were able to bank those RECs not needed to meet the applicable benchmarks.[85] Thus, the Companies "laddered" the procurements needed to meet their statutory obligations.

Given the nascent market, lack of market price information, substantial uncertainty regarding the future supply and prices of In-State All Renewables and increasing mandatory renewable energy requirements, the Companies acted prudently by adopting a strategy to ladder their purchases of In-State All Renewables.[86] Even though the Commission's precedent holds that a hind-sight analysis should be avoided,[87] OCC and the Environmental Intervenors ask the Commission to do just that. Through the benefit of hindsight, they contend that the Companies should have abandoned their laddering strategy and waited for lower prices.[88] They contend that

[82] Stathis Testimony, p. 24, 27.

[83] *Id.* at 34.

[84] *Id.* at 37.

[85] *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 12-1296-EL-ACP, Application at Exhibit A (April 16, 2012).

[86] Company Br., pp. 29-30.

[87] *See Syracuse*, 1986 Ohio PUC LEXIS 1, at *22.

[88] EI Br., pp. 13-14; OCC Br., p. 5, 29; Staff Br., pp. 4-5.

the Companies should have known that the prices for RECs would eventually go down.[89] In making this argument, these parties reveal themselves as willing to say anything, regardless of whether it's supported by the evidence or whether it is consistent with anything else that they say. For example, the parties arguing that the Companies should have waited to buy In-State All Renewables are the same parties that argue that the Companies didn't start to buy these RECs early enough.[90]

Nevertheless, the evidence that intervenors rely on to support the view that the Companies should have waited tells a different story. As an initial matter, even assuming that the pricing data contained in Figure 3 of the Exeter Report accurately represented prices in the states represented (which it does not),[91] this data shows that in June through October 2009 prices were either increasing or remaining relatively flat.[92] Further, the trends of the price information provided on Figure 3 hardly show that REC prices in each state had declined prior to June 2009.[93]

The additional data presented by OCC witness Gonzalez similarly shows no discernible downward trend in prices during the same period.[94] A graph provided by Mr. Gonzalez shows prices going both up and down in periods prior to 2009.[95] Indeed, in a report relied upon by Mr. Gonzalez, the authors noted, for 2007, "continued high prices" in Massachusetts, "dramatically increasing prices" in Connecticut and "a large spike" in prices of certain RECs in New Jersey.[96]

---

[89] EI Br., p. 14; OCC Br., pp. 29-30.

[90] OCC Br., pp. 7, 28-29; EI Br., pp. 3, 13.

[91] Bradley Testimony, pp. 53-54.

[92] *Id.* at 54.

[93] Commission Ordered Ex. 2A, p. 26.

[94] Gonzalez Testimony, p. 13.

[95] *Id.*

[96] Tr. Vol. III, p. 596.

In addition, to the extent that the data in Figure 3 shows price reductions in late 2009 to mid-2010, this information *would not have been available to Navigant and the Companies* until after RFPs 1, 2 and 3.[97] OCC and the Environmental Intervenors also ignore that this data is not relevant regarding the prices of In-State All Renewables.[98] Instead, this data tells the story of pricing information for different RECS from different states, with different laws.[99]

Perhaps this is why the Environmental Intervenors also try a different argument. They make the unfounded contention that there is "no convincing evidence that would support a belief that RECs would not be available in periods beyond the initial RFPs in 2009."[100] But it is the Environmental Intervenors who have failed to point to any evidence that suggests that the Companies had (or could have had) information that there was going to be RECs available for either 2009 or 2010 if the Companies had rejected the RECs bid into RFP 1 and 2. Instead, the evidence shows without rebuttal that supply of RECs was highly constrained during this time period. For example, Navigant's October 2009 memorandum cited by the Environmental Intervenors found [redacted].[101] Company witness Stathis also testified that, during RFP 2, the Companies received information from brokers that the market for In-State All Renewables was "extremely thin and that the market was still developing."[102] Mr. Stathis

[97] Bradley Testimony, p. 54.

[98] *Id.*

[99] Company Br., pp. 53-59.

[100] EI Br., p. 15.

[101] OCC Ex. 9 (October 18, 2009 Navigant Memorandum at p. 1) (Competitively Sensitive Confidential). The Environmental Intervenors also contend that Navigant's October 2009 memorandum shows [redacted] This is wrong. The memorandum [redacted] The memorandum [redacted] Dr. Estomin's testimony also contradicts the Environmental Intervenors. He testified that the supply of In-State All Renewables was constrained during 2009 through part of 2011. Commission Ordered Ex. 2A, p. 29; Tr. Vol. I, pp. 79-80.

[102] Stathis Testimony, p. 24.

explained, "Few suppliers had certified with the PUCO – one of the necessary conditions to deliver renewable products under the newly enacted Ohio law and Commission rules and the RFP."[103] The Environmental Intervenors also disregard that Navigant recommended the Companies adopt this strategy as a prudent course to mitigate risk in a nascent market.[104]

OCC contends that laddering, while appropriate (and, indeed supported by OCC) in some instances, should not be used here, especially given the "high" prices and constrained market.[105] Notably, OCC cites to nothing for its argument that "sound judgment" would have rejected laddering in such circumstances. Further, OCC misunderstands the reason laddering is widely accepted as a procurement strategy. Specifically, laddering is a risk-mitigation mechanism.[106] Thus, laddering is especially appropriate in new markets when uncertainty—and therefore risk—is high.

Simply put, given the nascent market for In-State All Renewables, lack of market price information, and uncertainty regarding future supply, the Companies acted reasonably in adopting a well-recognized risk mitigation strategy to meet their renewable energy obligations. The Intervening Parties' arguments to the contrary are unsupported.

D. The Companies' Decisions To Purchase In-State All Renewables Were Reasonable and Prudent Under The Circumstances.

As established in the Companies' Post-Hearing Brief, given the nascent market, lack of market information available to the Companies and uncertainty regarding future supply and prices, the Companies' decisions to purchase In-State All Renewables were reasonable and

[103] *Id*. at 28.

[104] Tr. Vol. I, p. 154, 248.

[105] OCC Br., p. 29.

[106] Tr. Vol. I, pp. 107, 151.

prudent.[107] Years later, certain intervenors make various complaints about the Companies' decisions. OCC contends the Companies should have had a contingency plan and that the Companies should have set a "limit price." The Environmental Intervenors contend the Companies should have negotiated prices during RFPs 1 and 2. But these arguments are nothing more than exercises in second-guessing, based on unqualified opinions, impermissible hindsight and speculation; not evidence. As a result, each of these arguments fails to show that the Companies acted unreasonably.

1. The Companies' contingency planning was appropriate.

OCC complains that the Companies acted imprudently because they did not have a contingency plan for purchasing RECs.[108] OCC supports this argument by citing the Exeter Report's finding that the Companies' contingency planning was inadequate.[109] But the principal drafter of the Exeter Report, Dr. Estomin, acknowledged that he did not look at any other Ohio utility's contingency plan for renewable energy procurements.[110] Thus, there is simply no basis to suggest that reasonable contingency planning for the procurement of RECs would include anything other than what the Companies did.

OCC's argument also misstates the record. For example, to make the argument that there was no contingency plan, OCC relies upon notes apparently taken by Exeter regarding its discussion with the Companies about contingency planning.[111] But those notes do not say the Companies lacked a plan. Moreover, Company witness Stathis testified extensively about what

[107] Company Br., pp. 25-49.

[108] OCC Br., pp. 44-46.

[109] *Id.*

[110] Tr. Vol. I, p. 77.

[111] OCC Br., pp. 45-46.

the Companies' contingency plan was.[112] According to Mr. Stathis, the Companies had a flexible contingency plan that allowed the Companies to select a contingency action based on the market conditions at the time and that would be in the best interests of the Companies and their customers.[113] These contingency plans were consistent with both the FirstEnergy Utilities Commodity Risk Management Policy and those employed by the Companies in "previous competitive procurement[s]."[114]

The Companies' contingency plan also allowed sufficient flexibility so the Companies could seize opportunities that reflected the situation at the time. For example, this flexibility allowed [redacted][115] In any event, Company witness Stathis explained that if requested by the Commission, then the Companies will review contingency plans with the Commission or its Staff prior to implementation.[116]

OCC also makes the unfounded claim that "an adequate contingency plan would have prevented the purchase of In-State all Renewable RECs at 'grossly excessive' and 'non-competitive prices.'"[117] As demonstrated below, there is no evidence that supports the conclusion that the Companies paid "grossly excessive or non-competitive prices."[118] Indeed, OCC never explains exactly what was missing in the Companies' plans. Nor is there any evidence that any written contingency plan (as compared to the Companies' contingency plan) would have changed any of the Companies' obligations in this case.

[112] Stathis Testimony, p. 9; Tr. Vol. II, pp. 323-25.

[113] Stathis Testimony, p. 9.

[114] *Id.* at 8.

[115] Tr. Vol. II, pp. 368-69 (Confidential).

[116] Stathis Testimony, p. 47.

[117] OCC Br., p. 46.

[118] *Infra* Section II.E.

2. The Companies could not feasibly set a limit price.

Next, OCC contends that the Companies acted unreasonably because they did not establish a price limit on the amount that they would pay for In-State All Renewables.[119] OCC cites to nothing requiring a utility to have a "limit price." Indeed, the only thing in the record suggesting a limit price is the Exeter Report. But Dr. Estomin testified that he is not aware of any utility that has a contingency plan in place for the contingency of high prices.[120]

In any event, the irrefutable evidence shows that the Companies could not feasibly establish a limit price. In short, the Companies did not have sufficient information to set a limit price. Company witness Bradley testified that during the first three RFPs, no Ohio market pricing information was available that could be used to evaluate the pricing level of bids for In-State All Renewables.[121] Company witness Stathis also testified that no market pricing information regarding In-State All Renewables was available during this time period.[122] He explained that, as a result, the Companies lacked sufficient information to create a maximum or limit price for In-State All Renewables.[123] Exeter similarly found:

> At the time [of] the solicitations . . . reliable, transparent information on market prices, future renewable energy projects that may have resulted in future RECs trading at lower prices, or other information that may have directly influenced the Companies' decision to purchase the high-priced RECs was generally not available.[124]

[119] OCC Br., p. 16.

[120] Tr. Vol. I, p. 105.

[121] *Id.*

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

[123] *Id.*

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

Although OCC contends that the "$45 ACP . . . does create a regulatory price limit,"[125] there is no support for this argument under Section 4928.64 or in the record. Put simply, Section 4928.64 does not contain an "ACP."[126] To the extent that OCC is referring to the compliance payment penalty under Section 4928.64, Dr. Estomin's testimony rebuts this contention. At the hearing, Dr. Estomin testified that where, like in Ohio, a compliance payment is not recoverable from customers, it would not act as a cap on market prices.[127] OCC overlooks that even if the Companies had set a maximum price, exceeding that price, by itself, would not constitute a force majeure event or have eliminated the statutory obligation to purchase reasonably available RECs.[128]

3. The Companies could not have reasonably attempted to negotiate In-State All Renewables prices in RFP 1 and 2.

Ignoring the evidence, the Environmental Intervenors complain that the Companies should have negotiated prices during RFPs 1 and 2 and that there would have been no risk in making a counteroffer during RFPs 1 and 2.[129] As noted, there is no dispute that during 2009 (when RFPs 1 and 2 took place), there was limited availability of information regarding the future supply of In-State All Renewables.[130] To make a counteroffer, the Companies would have necessarily had to reject the bids received. (Otherwise, the bidders would have likely "stood pat" rather than offering lower prices.) Thus, if the Companies made a counteroffer, they necessarily would have incurred the risk that their offer would be rejected and the bidder would walk away.

---

[125] OCC Br., p. 48.

[126] *Infra* Section II.E.

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

[128] Stathis Testimony, p. 40.

[129] EI Br., pp. 15-16.

[130] *Supra* Section II.D(2). As discussed below there was additional information acquired during RFP 3 that made it reasonable for the Companies to make a counteroffer at that time.

The Environmental Intervenors thus ignore that, if the Companies made counteroffers, [redacted][131]

Given the limited information available at the time and Navigant's recommendation that the prudent action was to accept the bids offered in RFPs 1 and 2 for 2009 and 2010, the Companies acted reasonably in accepting the RECs that were reasonably available and following their risk mitigation strategy. It is simply irresponsible to suggest that the Companies should have walked away from the bids that they received to gamble that: (a) the Companies could have obtained lower prices or other bids in a constrained market; or (b) they could have convinced the Commission that In-State All Renewables were not reasonably available after the Companies initially had such RECs in hand.

The Environmental Intervenors also overlook the evidence that shows why the Companies made a counteroffer during RFP 3. Company witness Stathis testified that during RFP 3 the Companies had additional information regarding the development of the In-State All Renewables market.[132] This new information included: [redacted].[133] The Companies believed [redacted].[134] [redacted].[135] Of course, what was not known was whether the market was, in fact, improving and, if so, by how much. As Mr. Stathis

[131] Tr. Vol. II, p. 374 (Confidential).

[132] Stathis Testimony, p. 35.

[133] Tr. Vol. II, pp. 369-70 (Confidential).

[134] *Id.*

[135] *Id.* at 369 (Confidential).

explained, [redacted] He further testified, [redacted] [136]

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

OCC and the Environmental Intervenors contend that the Companies acted unreasonably because they should have known that the prices for In-State All Renewables were too high. Their arguments, however, ignore the reality of the market for In-State All Renewables during 2009 and 2010 or that In-State All Renewables are a unique REC market. Thus, pricing information from other states is not a relevant comparison to the prices the Companies paid and does not reflect market prices for In-State All Renewables.

1. The Companies purchased In-State All Renewables that were procured through competitive solicitations at prices that reflected the nascent market and constrained supply of In-State All Renewables at the time.

As established in the Companies' Post-Hearing Brief, in order to comply with their statutory procurement obligations and their electric security plan, the Companies purchased In-State All Renewables during RFPs 1, 2 and 3 at prices that reflected market conditions at the time.[137] These RECs were procured through a competitive process. At all times, the Companies purchased these RECs at or below prices recommended by Navigant.[138]

[136] Tr. Vol. II, pp. 373-74 (Confidential).

[137] Company Br., p. 51.

[138] Company Br., pp. 39-49.

Although OCC, the Environmental Intervenors and Staff contend that the Companies should not have paid those prices for RECs, their arguments ignore the reality of the market for In-State All Renewables in 2009 and 2010. That reality was that even though the market for In-State All Renewables was thin, the aggressive benchmarks under Section 4928.64 – including geographical limitations from where these resources had to be purchased – required the Companies to purchase RECs under these conditions. As a result, it should have surprised no one that, in the first few years of the statutory regime when the markets were thin, the prices for RECs reflected that fact. Indeed, Company witness Bradley explained that Navigant had seen prices similar to the level of the prices bid for In-State All Renewables in another jurisdiction that had a similar geographical restriction.[139] Navigant observed that New Jersey's RPS required that utilities meet their solar renewable energy requirements by obtaining supply of solar resources from within New Jersey.[140] Mr. Bradley further explained that, in 2009, the prices for New Jersey solar RECs were significantly higher than the prices of solar RECs in states that did not have a geographical restriction.[141] Indeed, Staff witness Dr. Estomin testified that, in 2009, solar RECs in New Jersey during 2011 were "as much as 20 times solar RECs in other states."[142] Navigant thus concluded that the prices for In-State All Renewables similarly would be higher

[139] Bradley Testimony, p. 36.

[140] *Id.*

[141] *Id.* OCC apparently misconstrues Mr. Bradley's testimony as comparing the price of New Jersey solar RECs to In-State All Renewables. This is incorrect. Instead, Mr. Bradley explained that [redacted] Tr. Vol. I, p. 258 (Confidential). [redacted] *Id*. at 258-59 (Confidential).

[142] Tr. Vol. I, p. 109.

than in other states because of the limited supply of this product and the volume required to be purchased by Ohio utilities to meet their compliance obligations.[143]

In addition, Company witness Dr. Earle testified that in 2009 and 2010, the sudden increase in demand in Ohio, coupled with the lack of matching supply for In-State All Renewables resulted in a scarcity of supply. As a result of this scarcity of supply, prices would greatly exceed the cost of production.[144] Dr. Earle further testified that the in-state geographical restriction in Ohio also would have caused the average price for In-State All Renewables to be higher than it would otherwise be.[145] This is because the in-state requirement acted like an import quota. Dr. Earle explained that, even under better market conditions, the in-state requirement will cause prices to be higher than RECs that do not have this geographical restriction.[146] For example, from January to June 2012, the price of 2011 In-State All Renewables was 118 to 900 percent more than the price for 2011 All-State All Renewables.[147]

The intervenors' complaints about prices also ignore that the Companies paid prices that fell below the three-percent level described in Section 4928.64(C)(3)—the only provision that the General Assembly provided to excuse compliance based on cost.[148] Notably, there is no dispute that the Companies' costs of purchasing RECs to comply with their renewable resource

[143] Bradley Testimony, p. 37.

[144] Earle Testimony, p. 11.

[145] *Id.* at 16.

[146] *Id*.

[147] *Id*.

[148] *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies, Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code to Implement Senate Bill No. 221*, Case No. 08-888-EL-ORD, DP&L App. for Rehearing, p. 31 (May 15, 2009) ("Case No. 08-888-EL-ORD"); *see also* Commission Ordered Ex. 2A, p. 29.

obligations *did not exceed* the three percent calculation.[149] *The significance of this consensus must be underscored*. As Dr. Estomin acknowledged, the statutory goal of enhancing renewable energy capacity in Ohio should have been expected to create a tension between compliance and affordability.[150] The General Assembly provided utilities with a mechanism to address this tension by including the three percent calculation in Section 4928.64(C)(3). This is the only provision that the General Assembly provided to excuse compliance based on cost.[151] As Exeter explained, "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."[152] The Companies thus did not have any statutory basis to reject these competitively sourced RECs on the basis of price.

Staff and OCC make other arguments that are inconsistent with the evidence in the record. Staff argues that the Companies did not consider the price of bids.[153] Staff "supports" this argument by citing Mr. Stathis' testimony out of context. At the hearing, Staff's counsel directed Mr. Stathis to his prefiled testimony in which he stated, "In the event the supply and demand dynamics proved inadequate, RCS would employ a contingency plan that it had previously used in past power procurements."[154] Staff's counsel then asked Mr. Stathis what he meant by the phrase "dynamics proved inadequate." Mr. Stathis answered, "It means we have an inadequate

---

[149] *See e.g.*, EI Br., p. 33 ("Despite the large sum paid by FirstEnergy for 2009-2011 RECs, there is near consensus among the parties that the 3% cost cap was not triggered.").

[150] Tr. Vol. I, p. 77.

[151] Case No. 08-888-EL-ORD, DP&L App. for Rehearing, p. 31 (May 15, 2009); *see also* Commission Ordered Ex. 2A, p. 29.

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

[153] Staff Br., p. 5.

[154] Tr. Vol. II, p. 406.

number of bids to fill our position."[155] When asked whether this statement does not relate to the price of bids, Mr. Stathis responded "no." Thus, Mr. Stathis did not testify, as Staff suggests, that the Companies did not consider price when determining whether to accept bids for RECs. The testimony cited by Staff refers to Mr. Stathis' testimony regarding a contingency plan; not the Companies' decision making process related to purchasing RECs procured through competitive solicitations.

In any event, the evidence shows that the Companies *did* consider price in three ways when deciding whether to purchase In-State All Renewables. First, the Companies considered price in the context of the three percent calculation under Section 4928.64.[156] It is undisputed that the Companies did not exceed that calculation.[157] Second, the Companies also considered price because Navigant based its recommendations to the Companies on both price and quantity. Company witness Bradley testified regarding Navigant's selection recommendation process that "[i]n Phase II, the bid proposals were entered into Microsoft Excel spreadsheet, separated by category and then sorted by price, lowest price to highest price."[158] Third, the Companies further considered price in the context of their decision to make a counteroffer during RFP 3.[159]

OCC contends that the Companies should have been aware that [redacted]

[155] *Id.*

[156] Tr. Vol. III, p. 519.

[157] *See e.g.*, EI Br., p. 33.

[158] Bradley Testimony, p. 40.

[159] Stathis Testimony, pp. 35-36.

[160] OCC Br., p. 24 (Confidential).

[redacted]

[161] Tr. Vol. II, p. 348.

[162] OCC Br., p. 24 (Confidential).

[163] Tr. Vol. II, pp. 378-79 (Confidential).

[164] Tr. Vol. II, pp. 379-80 (Confidential).

[165] Tr. Vol. II, p. 380 (Confidential).

[166] [redacted]. Vol. III, p. 621.

[167] Company Ex. 9, p. 2 (Baumol and Blinder, *Economics Principles and Policy*, p. 379).

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

[redacted][171] [redacted]

[redacted]

---

[169] [redacted] Tr. Vol. II, p. 379-80 (Confidential).

[170] Tr. Vol. II, p. 381 (Confidential).

[171] *Id.*

[172] Commission Ordered Ex. 2A, p. 31, n. 16.

[173] OCC Br., pp. 25-26 (Confidential).

[174] Stathis Testimony, p. 37.

[redacted]

2. None of the data relied on by certain intervenors demonstrates that the prices paid by the Companies were unreasonable.

Certain intervenors take effort to "support" their conclusions that the Companies paid allegedly "excessive prices" for In-State All Renewables by citing data from other states and data received from brokers. But none of this data shows market prices for In-State All Renewables. Instead, their arguments are based on faulty comparisons. As set forth below, none of this data thus demonstrates that the prices the Companies paid were unreasonable.

a. <u>The level of Ohio's compliance payment does not indicate market prices and does not represent a fair comparison price</u>.

OCC and the Environmental Intervenors argue that the Companies' decision to purchase RECs at price levels that were many times higher than the "ACP" was flawed.[175] They are wrong, for at least three reasons.

First, there is no "ACP" under Section 4928.64.[176] At the hearing, Staff witness Dr. Estomin testified that the terms "alternative compliance payment" or "ACP" do not appear in Section 4928.64.[177] As noted, unlike ACPs in other states, the compliance payment neither relieves the procurement obligation nor is eligible for recovery from customers.

Second, to the extent these intervenors refer to the level of the compliance payment penalty under Section 4928.64(C)(2), there is no evidence that shows this amount is a fair comparison to any price. Dr. Estomin testified that the compliance payment penalty level is not

[175] OCC Br., p. 29; EI Br., pp. 7, 22.

[176] *Infra* Section II.F(1).

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

a market price.[178] (In fact, Dr. Estomin did not know how the legislature even derived the amount of the compliance payment.[179]) Further, Section 4928.64 sets the compliance payment level at the same amount for both All-States All Renewables and In-State All Renewables.[180] Given that the market for In-State All Renewables and All-States All Renewables are separate and distinct, a single price representing both markets is unlikely. Thus, the level of the compliance payment penalty is not a proxy for any market price.

Third, the intervenors' argument rests on the false assumption that the compliance payment level somehow sets a cap on the prices for In-State All Renewables. Dr. Estomin testified that the compliance payment level in Ohio would not act as a cap because the compliance payment penalty is not recoverable from customers.[181] Company witness Dr. Earle similarly testified.[182] Thus, the Environmental Intervenors' claim that "rational market actors" would assume the maximum price would be the "ACP"[183] is belied by the evidence. Simply put, there is no rational basis to compare the level of the compliance payment to the prices that the Companies paid for In-State All Renewables. Arguments otherwise should be rejected.

b. <u>The data in Figure 3 of the Exeter Report and other data cited by OCC witness Gonzalez do not provide any basis to conclude that the prices paid by the Companies were unreasonable</u>.

(1) Figure 3 of the Exeter Report does not provide data relevant to the price level of In-State All Renewables.

OCC, the Environmental Intervenors and Staff rely on Exeter's comparison of the prices paid by the Companies for In-State All Renewables to pricing data in twelve other jurisdictions

[178] Tr. Vol. I, pp. 82-83.

[179] *Id.* at 82.

[180] O.R.C. § 4928.64(C)(2)(b).

[181] Tr. Vol. I, pp. 83-85.

[182] Earle Testimony, pp. 22-23.

[183] EI Br., p. 22.

("Figure 3: Compliance Market for RECs") to argue that the Companies paid unreasonably high prices.[184] Any out-of-state pricing data for RECs, including the data related to the twelve states listed on Figure 3, however, is not comparable to the pricing of In-State All Renewables.[185]

To begin, the market for In-State All Renewables is unique. The differences between Ohio's market for In-State All Renewables and the markets in the states listed on Figure 3 of the Exeter Report are numerous. For example, unlike Ohio, the twelve states listed on Figure 3 in the Exeter Report do not have a geographical restriction that acts like an import quota on the supply of in-state renewables.[186] Ohio's geographical restriction thus causes prices to be higher than they would be otherwise.[187] Indeed, Staff witness Dr. Estomin agreed.[188] He testified, "An in-state requirement would have the effect of reducing the supply of RECs from which you can draw to fulfill the requirement, so other things being equal, you would expect supply to be more constrained under that arrangement and, therefore, you would anticipate upward pressure on prices."[189]

Based on Mr. Gonzalez's prefiled testimony, OCC contends that New England states have a similar geographical restriction and did not experience prices as high as in Ohio.[190] However, Mr. Gonzalez contradicted this position at the hearing. He acknowledged that the

---

[184] OCC Br., p. 17; EI Br., p. 7; Staff Br., p. 4.

[185] Company Br., pp. 53-59. OCC also relies on pricing information for REC prices in Pennsylvania. OCC Br., pp. 18-19. For the same reasons that the data from the states listed on Figure 3 is not comparable, the quoted prices from Pennsylvania also are not comparable to the prices of In-State All Renewables. Company witness Bradley testified that, unlike Ohio, Pennsylvania does not restrict the geographical area from which RECs can be sourced to comply with renewable energy requirements. Tr. Vol. I, p. 174. Mr. Bradley further explained, "the market for Pennsylvania is just vastly different than Ohio both in structure of the market itself and in the geographical area from which RECs can be drawn." *Id.* at 256.

[186] Company Br., pp. 54-55.

[187] Earle Testimony, p. 15.

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

[189] *Id.*

[190] OCC Br., p. 19.

geographical requirement that he was referencing was a requirement into the Commonwealth of Massachusetts; not the New England ISO.[191] Mr. Gonzalez further admitted that, according to a report by the Department of Energy Resources, entitled, "Massachusetts Renewable and Alternative Energy Portfolio Standards Annual Compliance Report For 2010,"[192] only nine percent of renewable energy used in Massachusetts was supplied from within the state.[193] That only nine percent of Massachusetts' renewable resources were in-state demonstrates that, in contrast to Ohio, Massachusetts does not have effective restrictions on out-of-state renewable resources. Mr. Gonzalez's position that New England states have similar in-state requirements thus must be rejected.

Second, none of the states listed on Figure 3 has a product definition consistent with those listed under Section 4928.64.[194] Dr. Earle explained that "comparing prices across these jurisdictions without taking into account the lack of transferability is inappropriate."[195]

Third, each of these twelve states has a more mature market for renewable energy than Ohio's market.[196] Staff witness Dr. Estomin testified that the relative age of the market can affect prices.[197] Company witness Dr. Earle also explained that as a result of the newness of Ohio's compliance obligation, "there would likely be confusion during the 2009-2010 period among potential suppliers about the new rules for the new market and how they should be

[191] Tr. Vol. III, pp. 613-14.

[192] *Id.* at 614-616 (referencing Company Ex. 8).

[193] *Id.* at 615 (quoting Company Ex. 8 at p. 4).

[194] Company Br., p. 57.

[195] Earle Testimony, p. 23.

[196] Company Br., pp. 55-56.

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

interpreted."[198] He further explained that this "confusion would have further contributed to reluctance to participate in the REC markets or to invest in its early stages."[199]

Fourth, the financial challenges caused by the global economic crisis would have had a greater negative impact on Ohio as compared to the more mature markets listed on Figure 3.[200] These challenges, coupled with the nascent nature of Ohio's REC market, would have exacerbated the shortage of RECs in Ohio in 2009.[201] Indeed, in its report, Exeter recognized that during RFPs 1, 2 and 3, the economic recession would have caused renewable energy developers to have difficulty obtaining financing.[202] Thus, due to the relative newness of the Ohio market and the relatively few existing suppliers in that market, the financing challenges to new entrants in Ohio further distinguish the prices of RECs in Ohio from other states.

Fifth, as noted, unlike Ohio's AEPS, each of the twelve states listed on Figure 3 allows a utility to make an alternative compliance payment in lieu of purchasing renewable energy that is recoverable from customers in one way or another.[203] As a result, the alternative compliance payments in these states act as an effective "soft ceiling" on prices.[204] At the hearing, Dr. Estomin testified that a compliance payment that is not recoverable from customers (like the compliance payment in Ohio) would not create a market cap on prices.[205] Thus, the pricing data on Figure 3 does not provide a fair basis to compare the price level of In-State All Renewables.

---

[198] Earle Testimony, p. 20.

[199] *Id.*

[200] Company Br., pp. 56-57.

[201] *Id.* at 22.

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

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

[204] Company Br., p. 58.

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

Indeed, OCC's comparison of out-of-state pricing data to the prices that the Companies paid for In-State All Renewables contradicts the testimony of its own witness. At the hearing, OCC witness Gonzalez testified that it would not be reasonable to argue that relatively low prices for RECs in one state demonstrate that REC prices in another state were too high.[206] Mr. Gonzalez agreed that different states' markets are separate because different things affect markets in each state and thus each state's prices may be different.[207]

In addition, the comparison of the "prices" on Figure 3 is marred with other problems. Notably, the pricing information for the twelve states contained on Figure 3 does not reflect market prices of RECs in those states.[208] At the hearing, Dr. Estomin testified that the broker data on Figure 3 may not even represent the actual price of any transaction.[209] Dr. Estomin further acknowledged that this information is broker data from only *one* of 89 brokers listed on the Department of Energy's website.[210] In addition, in a September 2011 report that provided an analysis of the Ohio market and in which Exeter participated, broker data was described as reflecting "short-term deals . . . which are only a small part of the market."[211] Since brokers represent only a small portion of the market,[212] the data on Figure 3, at best, represents an insubstantial position in the market.

The intervenors also overlook that Figure 3 provides no information regarding the volumes of RECs associated with any price information offered on the chart.[213] Instead, they

---

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

[207] *Id.* at 592-94.

[208] Company Br., p. 59.

[209] *Id.* at 89.

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

[211] *Id.* at 88-89 (quoting Company Ex. 5).

[212] *Id.* at 153.

[213] Bradley Testimony, p. 61.

blindly compare price data information for RECs from other states to specific prices the Companies paid for large volumes of RECs. This is particularly troublesome given that [redacted][214] At the hearing, Company witness Stathis explained that, [redacted] Mr. Stathis further testified that [redacted][215]

Figure 3 also lacks information regarding the length of any commitment attached to the data points.[216] As pointed out by the Environmental Intervenors in their brief, the length of the pricing commitment may affect the price level.[217] Yet, none of intervenors has provided evidence to indicate that the information from Figure 3 shows any actual transactions and if so, the volume and length of any such transactions. In sum, no credible comparisons can be made regarding how the broker-provided price data points in Figure 3 would compare to the prices necessary to procure a volume of RECs sufficient to meet the Companies' renewable energy requirements.[218] The intervenors' arguments based on the data from Figure 3 should be rejected.

(2) The SNL Financial data cited by OCC does not show market prices.

OCC also contends that the SNL Financial data relied on by OCC witness Gonzalez demonstrates that in-state RECs prices in a nascent market will not be many times the price of

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

[215] *Id.*

[216] Bradley Testimony, p. 54.

[217] EI Br., p. 9.

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

all-state RECs and that In-State All Renewables traded at [redacted] at the end of 2010.[219] The SNL Financial Data does not support OCC's argument. OCC apparently misunderstands—or ignores—the difference between a market price that reflects an actual REC transaction and data that shows "market indicatives." SNL Financial expressly provided this disclaimer: "[D]ata is compiled from a range of market indicatives and do not necessarily represent completed trades."[220]

Moreover, at the hearing, OCC witness Gonzalez contradicted OCC's argument that the level of the SNL Financial Data can be compared to any other data. Mr. Gonzalez testified that "'indicative' could mean the midpoint between a bid and ask for a certain product."[221] This is significant because bid or asks are not prices that are actually traded.[222] As a result, as Company witness Mr. Bradley testified, "if a transaction does not occur when there are bid-ask prices, then there is no market price for that 'transaction.'"[223] Indeed, Mr. Gonzalez further admitted that he did not know whether the single data point for a 2010 In-State All Renewables is an actual price point. Nor did he know the volume of RECs represented by the single 2010 data point.[224] Notably, Mr. Gonzalez testified that the actual price that the REC was traded for could be a fraction or a multiple of the price shown on his SNL attachment.[225]

---

[219] OCC Br., p. 20.

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

[221] *Id.* at 607.

[222] Bradley Testimony, p. 61. Company witness Dr. Earle also explained that [redacted] Tr. Vol. II, p. 492 (Confidential). Dr. Earle further testified that [redacted] *Id*.

[223] Bradley Testimony, p. 61

[224] *Id.*

[225] *Id.* at 608.

(3) The Compliance Market Table cited by OCC does not show market prices.

OCC argues that OCC witness Gonzalez demonstrated in his "Compliance Market Table"[226] that prices of RECs in other states during their "nascent market period . . . are a fraction of what FirstEnergy paid."[227] Mr. Gonzalez's Compliance Market Table is a graph that is reproduced from the Annual Report on Wind Power Installation Costs Performance Trends 2007 by the U.S. Department of Energy. The Compliance Market Table that OCC and Mr. Gonzalez relied on contained notations and a headline that belied any comparison of the graph's pricing data to the prices the Companies paid for In-State All Renewables. The commentary below the graph noted, "[T]he figures to the right present *indicative monthly data* on spot-market REC prices in both compliance and voluntary markets."[228] At the hearing, Mr. Gonzalez testified that "indicative prices" may or may not be representative of actual prices.[229]

What's more, Mr. Gonzalez's testimony also contradicts OCC's argument that the Compliance Market Table shows indicative price data "for the time when markets were nascent."[230] At the hearing, he testified that the information on the graph included periods of time outside of the three-year window that he defined as a nascent market.[231] He also admitted that some data on the graph even preceded the effective dates of some of the states' RPS statutes.[232]

---

[226] OCC Br., pp. 17-18. In their Post-Hearing Brief, the Companies referred to this table as the "Wind Power Table." Company Br., p. 61.

[227] OCC Br., pp. 17-18.

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

[229] *Id.* at 596.

[230] *Id.* at 602.

[231] *Id.* at 604-606.

[232] *Id.* at 603, 606.

Indeed, the report containing the Compliance Market Table actually highlighted that the trends in REC prices vary in each state. For example, the Compliance Market Table contained the headline, "REC Markets Remain Fragmented and Prices Volatile."[233] The report noted:

> Key trends in 2007 compliance markets include continued high prices to serve the Massachusetts RPS, dramatically increasing prices under the Connecticut RPS, high initial prices to serve the Rhode Island RPS, and a large spike in the price for Class I certificates under the New Jersey RPS. Prices remained relatively low in Texas, Maryland, Pennsylvania, and Washington, D.C. due to a surplus of eligible renewable energy supply relative to RPS-driven demands in those markets.[234]

Accordingly, the Compliance Market Table does not support OCC's argument that indicative price data in other states showed that Companies paid unreasonably high prices for In-State All Renewables.

(4) OCC's reliance on the Goldenberg chart to compare compliance obligation costs is misplaced.

Based on Mr. Gonzalez's prefiled testimony, OCC also contends that a comparison of the Companies' Rider AER charges to other utilities' Rider AER charges shows that the Companies "overpaid" for In-State All Renewables.[235] Yet, at the hearing, Mr. Gonzalez testified that he did not know the specific price paid for any renewable product for any utility other than the Companies.[236] Instead, he attempted to rely on the chart on page 9 of the Goldenberg Report to compare the utilities' Rider AER charges. Notwithstanding his reliance on the Goldenberg chart, he testified that he made no effort to verify the numbers on it.[237] The Goldenberg chart, on its face, only purported to compare rates charged by the various Ohio EDUs to recover renewable

[233] *Id.* at 593.

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

[235] OCC Br., pp. 19-20.

[236] Tr. Vol. III, p. 609.

[237] *Id.* at 610.

resource procurement costs. As Mr. Gonzalez acknowledged, there is a "mismatch" between the load used to calculate the Companies' compliance obligation and the load over which the Companies recover the costs of that obligation.[238] Indeed, he admitted that where a utility has a greater increase in shopping, then there will be a greater mismatch.[239] Mr. Gonzalez also testified that he did not compare how these "mismatches" affected the various utility companies and the various purported rates shown on the Goldenberg chart.[240]

Company witness Mikkelsen testified that these mismatches were created because the Companies experienced rapid change in shopping levels.[241] Ms. Mikkelsen further explained that the numbers on the Goldenberg chart are not comparable to the Companies' Rider AER charges. Ms. Mikkelsen pointed out that, unlike the Companies, Duke Energy Ohio ("Duke") did not calculate its compliance baseline based on its historical average (a position that the Commission later rejected).[242] In addition, DP&L did not change its renewable rate during this time period so shopping is irrelevant to the DP&L number shown on the table.[243] Further, AEP Ohio had minimal shopping during this time period.[244] As a result, the numbers on the Goldenberg chart for the other utilities are not comparable to the Companies' numbers.

In any event, Mr. Gonzalez simply misconstrued the nature of the data on page 9 of the Goldenberg Report. In his prefiled testimony, Mr. Gonzalez contended that this data showed that the Companies overpaid for RECs in comparison to other utilities.[245] But Staff witness

---

[238] *Id.* at 611.

[239] *Id.*

[240] *Id.* at 611-12.

[241] Mikkelsen Rebuttal Testimony, p. 12

[242] *Id*.

[243] *Id*. at 15.

[244] *Id*.

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

Mr. Storck from Goldenberg, one of the authors of the report, testified that the chart was *not* indicative of either the actual prices paid by each electric utility for RECs or each utility's cost to comply with the 2009, 2010 and 2011 renewable energy mandates.[246] Mr. Storck testified that "this [chart] is just basically information pulled from [utilities'] tariffs . . . [it] doesn't necessarily have reconciliations in it. So I can't tell you exactly what's in these [numbers], especially for companies other than the FirstEnergy companies."[247] Accordingly, OCC's argument that the Companies overpaid for In-State All Renewables as compared to other Ohio utilities is wholly unsubstantiated.

c. <u>The development costs of renewable facilities are not a stalking horse for market prices</u>.

Relying on the Exeter Report, OCC argues that even if the Companies did not have market information, the prices in Ohio could not have differed "so markedly from the cost of renewable development elsewhere in the country."[248] OCC further concludes that the Companies should have known that these bids thus contained significant economic rents.[249]

OCC's argument and Exeter's "finding," however, disregard basic economic principles. First, as discussed above, economic rents are expected in a developing market and contribute to market growth.[250] Second, OCC and Exeter apparently disregard the fact that prices are determined by other factors; namely, supply and demand. Dr. Earle testified that the assumption that development costs are the sole determinant of the price of RECs is flawed.[251] As he explained, "There are many factors that determine the price of RECs at any given point in

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

[247] *Id.* at 42-43.

[248] OCC Br., p. 23.

[249] *Id.*

[250] *Supra* Section II.E(1).

[251] Earle Testimony, p. 4.

time."[252] He further stated, "[T]here's the overall supply/demand dynamic of whether there is a lot of supply or a little bit of supply."[253] Dr. Earle also testified that the shortage of supply in the Ohio market would result in a market price above the cost of supply.[254] He further testified, "There are many things that go into the cost of development so that at any given point in time the price of RECs could either be greater than the cost of development or it could be less."[255] Indeed, at the hearing, Dr. Estomin agreed that prices are determined by other factors, including supply and demand.[256]

OCC and Exeter also overlook other factors that would have caused developers in 2009 and 2010 to seek higher prices in Ohio than in other states.[257] For example, Dr. Earle testified that "when there is scarcity of supply, prices can greatly exceed the costs of production."[258] He further explained, "Scarcity of supply can often happen in nascent markets when there is a sudden increase in demand without matching supply available as happened in the Ohio In-State All Renewables REC market in 2009 and 2010."[259]

Company witness Bradley provided another reason why developers may have sought higher prices in Ohio than in other states. Mr. Bradley explained that, in 2009, there was little history available to developers regarding how Ohio's renewable mandates would be administered and what additional risks to developers may arise.[260] Thus, according to Mr.

---

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

[253] *Id.*

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

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

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

[257] Bradley Testimony, p. 57.

[258] Earle Testimony, p. 11.

[259] *Id.*

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

Bradley, developers in Ohio had less competition and more uncertainty due to the nascent state of the Ohio market than resource suppliers in other states.[261]

Mr. Bradley also noted that developers in Ohio may have sought higher prices than in other states because of the difficulty in obtaining financing for new electrical generation projects in 2009-2010. Mr. Bradley explained that the nascent market in Ohio, coupled with the difficulty in obtaining financing, made the development of any new renewable projects in Ohio challenging at best.[262] As a result, one could expect higher prices in Ohio for in-state products than similar products in other states.[263]

F. The Alternatives Suggested By Certain Intervenors Were Neither Feasible Nor Reasonable.

Those intervenors that argue that the Companies' acted imprudently by purchasing In-State All Renewables uniformly base their arguments on the premise that the Companies had other alternatives. Indeed, Exeter acknowledged, "[I]f 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."[264] Not surprisingly, these intervenors thus contend that the Companies had "alternatives" to purchasing the In-State All Renewables to comply with Section 4928.64. These proposed "alternatives," however, conflict with Ohio law and the evidence in this case. Thus, the Commission should reject the intervenors arguments based on these "alternatives."

1. Ohio law does not allow a utility to make a compliance payment in lieu of meeting its renewable energy resource requirements.

[261] *Id.* at 58.

[262] *Id.* at 59.

[263] *Id.* at 60.

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

Staff, OCC, and the Environmental Intervenors contend that the Companies could have simply made an alternative compliance payment in lieu of procuring In-State All Renewables.[265] Section 4928.64(C)(2), however, does not provide a utility with an option to make a compliance payment in lieu of meeting the utility's compliance obligations.[266] Instead, the compliance payment referenced under Section 4928.64(C)(2) is a penalty that is imposed after the Commission makes findings that: (a) a utility failed to comply with the statutory benchmarks; and (b) the utility's compliance penalty is a certain amount.[267] At the hearing, Dr. Estomin acknowledged that "a company that's not in compliance just can't write out a check and attach it to its compliance report."[268] The suggestion that the Companies could have made a compliance payment would have required the Companies to shirk their renewable energy obligations under Section 4928.64 (and specifically, RECs that were effectively in hand) and wait for the Commission to find that the Companies failed to comply with the law. Thus, Staff, OCC, and the Environmental Intervenors' proposed "alternative" was for the Companies to ignore their statutory duties. This suggestion (like any suggestion to ignore the law) should be rejected outright.

OCC also argues that there is nothing in Section 4928.64 that says that a compliance payment does not resolve a utility's compliance obligations.[269] But Section 4928.64 does not say that a compliance payment would *resolve or excuse a utility's obligations* either. Moreover, the language in Section 4928.64 suggests that the compliance payment cannot be used to achieve

[265] OCC Br., pp. 40-41; EI Br., pp. 21-22; Staff Br., p. 5.

[266] Company Br., p. 13-14

[267] O.R.C. § 4928.64(C)(2).

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

[269] OCC Br., p. 42.

compliance.[270] Specifically, Section 4928.64(C)(5) provides, "the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing renewable energy."[271] Further, unlike Ohio's AEPS, other states' RPS expressly provide utilities with the option to make a compliance payment in lieu of meeting renewable resource requirements which resolves the utility's obligations.[272] Thus, a reasonable interpretation of Section 4928.64 is that a compliance payment does not resolve a utility's compliance obligations.

The decisions cited by OCC – *In the matter of the Annual Alternative Energy Compliance Report of Glacial Energy*, Case No. 11-2457-EL-ACP and *In the matter of Smart Papers Holdings LLC Portfolio Status Report*, Case No. 11-2650-EL-ACP – do not show otherwise.[273] These decisions were issued in August and October 2012—a substantial period of time after the Companies made their purchase decisions.[274] These decisions thus have no bearing on whether the Companies acted reasonably in purchasing RECs in 2009 and 2010. In addition, neither of these cases were contested. Thus, neither stand for the proposition that the Commission has the proper authority to excuse a procurement obligation when a compliance payment is made.

---

[270] *See also* IGS Br., pp. 1-2.

[271] O.R.C. § 4928.64(C)(5).

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

[273] OCC Br., p. 43, n. 201.

[274] Although OCC and the Environmental Intervenors also contend that compliance payments are "common," Mr. Gonzalez's testimony contradicts their argument. At the hearing, Mr. Gonzalez testified that out of 150 compliance reviews, he is only aware of four times when a compliance payment was made. Tr. Vol. III, p. 561. Four times is not a common occurrence.

Moreover, neither case involved compliance obligations that are anywhere near the magnitude of those involved in this proceeding. Instead, these cases involved marketers who agreed to make compliance payments involving a few thousand dollars.[275] The obligations they sought to avoid and the payments these marketers made ($10,000 and $2,250 respectively)[276] are not comparable to the renewable energy obligations at issue in this proceeding.[277]

Accordingly, Staff, OCC and the Environmental Intervenors fail to show that the Companies acted unreasonably. Their proposed suggestion that the Companies should have simply not complied with their renewable energy duties and instead made a compliance payment was not a reasonable option and is contrary to the law.

2. Under Ohio law, the Companies could not obtain relief for their In-State All Renewables requirements under force majeure.

OCC and the Environmental Intervenors erroneously contend that the Companies could have sought a force majeure determination from the Commission on the basis of purportedly high REC prices.[278] As established in the Companies' Post-Hearing Brief, this contention is

---

[275] Gonzalez Testimony, pp. 29-30 (quoting Case No. 11-2457-EL-ACP, Finding and Order (August 29, 2012) and Case No. 11-2650-EL-ACP, Finding and Order (Oct. 3, 2012).

[276] *Id*.

[277] In similar fashion to other parties, counsel for Staff appeared to contend at hearing that the Commission's decision in *In the Matter of the Application of Columbus Southern Power Company for Amendment of the 2009 Solar Energy Benchmark, Pursuant to Section 4928.64(C)(4), Revised Code,* Case No. 09-987-EL-EEC, granted a force majeure application based on the high cost of compliance. Tr., Vol. I, p. 28; Vol II, p. 420. That suggestion is belied by the application and decision in that case. In its application, AEP Ohio referred to the cost of SRECs, but the ultimate reason that it sought relief was that "there is an insufficient supply in the solar REC market to achieve compliance." *Id*. Application, p. 4. (Notably, the prices that AEP Ohio paid were deemed to AEP Ohio to be "competitive and consistent with present conditions in the solar REC market" and that "the insufficient supply for 2009 solar RECs is inflating the current price." *Id.*) To be sure, the Commission noted in its entry approving AEP Ohio's requested relief that AEP Ohio argued that delaying AEP Ohio's benchmarks would lower the cost of compliance ultimately paid by customers. *Id*. Entry (Jan. 7, 2010), p. 8. But the Commission based its decision on the uncertainty and lack of supply then present in the market which, among other things, made compliance not possible. Simply put, there is nothing in AEP Ohio's application or the Commission's entry that could have shown the Companies that the Commission would grant force majeure relief on the basis that prices for RECs were too high where the Companies did not exceed the three percent level called out in statute and RECs were reasonably available in the market.

[278] OCC Br., p. 33; EI Br., p. 20.

baseless and, indeed, flies in the face of a plain reading of the force majeure provision contained in Section 4928.64(C)(4)(b).[279] Specifically, the statute charges the Commission with making a determination of whether "renewable energy resources are *reasonably available in the market place in sufficient quantities* for the utility or company to comply with the subject minimum benchmark during the review period."[280] The statute then requires the Commission to consider, in light of whether renewable energy resources are "reasonably available," if the utility seeking force majeure made a "good faith effort to acquire sufficient renewable energy resources . . . to so comply."[281] As demonstrated below, the construction of the force majeure provision proffered by OCC and the Environmental Intervenors falls flat. Price alone does not afford a sufficient justification for seeking force majeure.

OCC argues that "[g]iven the significant cost at issue, it was evident that 'reasonable' availability meant price and other terms as well as 'availability'."[282] OCC further argues: "Thus, the terms "reasonably available" and 'good faith effort' reflected the General Assembly's recognition that 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" of RECs.[283] Likewise, the Environmental Intervenors apparently argue that price alone is sufficient grounds for seeking force majeure.[284]

OCC and the Environmental Intervenors' tortured reading of the force majeure provision fails. The terms "cost" and "price" are nowhere to be found in the force majeure provision.

---

[279] *See* Company Br., pp. 19-24.

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

[281] *Id.*

[282] OCC Br., p. 35.

[283] *Id*. at 38.

[284] EI Br., p. 20.

Presumably, if the legislature had intended price or cost to function as a "statutory off-ramp" for compliance, then it would have written the force majeure provision accordingly.

Indeed, the Commission considered this very issue in *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD. In its application for rehearing regarding concerns over the lack of a "statutory out" for possible high compliance costs, save for the three-percent mechanism, a utility raised the following issue: "The regulations should provide a more clear [sic] mechanism to permit a utility to seek a waiver of the requirement when prices are too high, even if the three percent of total generation costs has not yet been breached."[285] The Commission rejected this suggestion, stating that it was bound by the language of the statute:

> The statute contains two provisions by which an electric utility or electric service company may be excused from meeting a required benchmark, that being force majeure or reaching a cost cap. *There is no additional statutory direction concerning the scenario proposed by [the utility]*.[286]

The "scenario proposed by" the utility and rejected by the Commission in Case No. 08-888-EL-ORD is exactly the situation alleged by OCC and the Environmental Intervenors here. But again, pursuant to Section 4928.64, the only way that the price or cost of RECs factors into a waiver or excuse from a utility's AEPS compliance obligations is via the three-percent mechanism. By implication, a utility may only seek force majeure if, after a good faith effort, that utility cannot physically locate the quantity of RECs necessary to meet a particular

[285] Case No. 08-888-EL-ORD, DP&L App. for Rehearing, p. 31 (May 15, 2009).

[286] Case No. 08-888-EL-ORD, Entry on Rehearing, p. 21 (June 17, 2009) (emphasis added).

benchmark.[287] Because In-State All Renewable products were "reasonably available in the marketplace" during the audit period, the Companies had no legal basis upon which to pursue a force majeure application.

The Environmental Intervenors make the strange argument that because the Companies were forced to resort to force majeure due to their inability to secure sufficient quantities of SRECs, they were "clearly aware that force majeure was an option."[288] And they further suggest that the Companies could have applied for force majeure as a "backup plan."[289] Similarly, OCC argues that the Companies "had no difficulty in 'seeing the wisdom of a force majeure request' in the absence of bids for In-State Solar RECs, but the Companies "lacked the wisdom when it came to purchasing In-State All Renewable RECs. . ."[290] On an initial note, the Environmental Intervenors' and OCC's reference to the Companies' application for force majeure for SRECs is comparing apples to oranges. In Case Nos. 09-1922-EL-ACP and 10-499-

[287] The cases cited by OCC in this regard thus miss the mark. *See* OCC Br, p. 35-36 (citing *In the Matter of Direct Energy Business LLC for a Waiver from Meeting the 2010 Ohio Sited Solar Energy Resource Benchmarks*, Case No. 11-2477-EL-ACP, 2011 Ohio PUC LEXIS 931 (Aug. 3, 2011); *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 (Aug. 3, 2011)). Specifically, both decisions are dated August 3, 2011, near the end of the audit period. Thus, whatever their worth, they could not have provided any guidance to the Companies during their RFP process. Indeed, Mr. Gonzalez testified that at the time of the Companies' RFPs 1, 2 and 3, the Commission had not granted a force majeure application on behalf of any of the four utilities. Tr. Vol. III, p. 583. Moreover, both decisions involve very small electric services companies that have correspondingly limited REC compliance obligations.

[288] EI Br., p. 20.

[289] *Id.*

[290] OCC Br., p. 38. OCC also incorrectly contends that in response to a discovery request issued by Exeter, the Companies could not explain why they did not seek force majeure. OCC further contends that the Companies have been "disingenuous" by not expressing a position on the AEPS. *Id*. at 38-39. To support this argument, OCC relies on Mr. Gonzalez's testimony that the Companies responded to a discovery request from Exeter by stating, the Companies "do not believe it is appropriate to render a legal opinion on this matter." *Id*. But the evidence shows that it is OCC that is being disingenuous; not the Companies. At the hearing, Mr. Gonzalez admitted that the Companies did provide an additional response after the language that Mr. Gonzalez selectively quoted. *See* Tr. Vol. III, p. 559-60. In addition, OCC overlooks the fact that that discovery request referenced by Mr. Gonzalez does not seek any information related to force majeure. Instead, this discovery request seeks information regarding why the Companies did not believe that an "Alternative Compliance Payment" could be used in lieu of meeting their compliance obligations. Gonzalez Testimony, at Exhibit WG-4. Thus, OCC fails to cite any evidence to support its claim that the Companies could not explain their position that an application for force majeure would not have been an option for In-State All Renewables because these RECs were reasonably available.

EL-ACP (the cases to which the Environmental Intervenors cite), the Companies sought – and were granted – force majeure relief because they could not secure sufficient quantities of SRECs to meet their statutory benchmarks.[291] Price was not the issue; the physical dearth of SRECs was.[292]

Ironically, in their briefing in those proceedings, both OCC and the Environmental Intervenors *opposed* the Companies' applications for force majeure. These parties specifically alleged that the Companies did not do enough to secure sufficient quantities of SRECs. For example, in a joint brief in Case No. 09-1922-EL-EEC, OCC, ELPC and OEC claimed that the Companies "made little serious effort to locate solar RECs."[293] And further: "the efforts [the Companies] did expend were minimal and insufficient to obtain any" SRECs.[294] Similarly, in its brief in Case No. 11-2479-EL-ACP, ELPC, one of the Environmental Intervenors, claimed that "[t]he Companies did not undertake a good faith effort to satisfy their 2010 SER benchmarks, nor did the Companies *pursue all reasonable options* to comply."[295]

OCC and the Environmental Intervenors thus attempt to place the Companies in a "damned if you do, damned if you don't" position. On the one hand, when the Companies, after

---

[291] *See* Case No. 09-1922-EL-EEC, Finding and Order, pp. 3-4 (granting force majeure based upon a finding that "there was an insufficient quantity of solar energy resources reasonably available in the market") (Mar. 10, 2010); Case No. 11-2479-EL-ACP, Finding and Order, p. 4 (granting force majeure due to insufficient quantity of available SRECs).

[292] The Environmental Intervenors follow this odd argument with the hastily generalized claim that simply because Company witness Stathis stated that he was not familiar with other Ohio utilities' force majeure filings "the Commission should dismiss [the Companies] views on what does or does not qualify for a force majeure determination." EI Br., p. 20. This argument is unfounded. There is no evidence that Mr. Stathis would make this decision on behalf of the Companies. Indeed, the Environmental Intervenors fail to show what significance, if any, other Ohio utilities' force majeure filings would have had on the Companies' decisions in this case.

[293] Case No. 09-1922-EL-EEC, Comments In Opposition to FirstEnergy's Force Majeure Application and Waiver Request by OCC, OEC, ELPC, Citizen Power, The Vote Solar Initiative, and the Solar Alliance, p. 15 (Mar. 9, 2010).

[294] *Id*. at 7.

[295] Case No. 11-2479-EL-ACP, ELPC's Comments in Opposition to FirstEnergy's Application for a Force Majeure Determination, p. 2 (June 27, 2011) (emphasis added).

strenuous good faith efforts, and through no fault of their own, simply cannot meet a statutory benchmark – such as in Case Nos. 09-1922-EL-EEC and 11-2479-EL-ACP-OCC and the Environmental Intervenors accuse the Company of doing too little. On the other, when the Companies, again through strenuous good faith efforts, comply with the law and meet their statutory benchmarks – such as here – OCC and the Environmental Intervenors accuse them of doing too much. In addition, the Environmental Intervenors' opposition to the Companies' force majeure applications for SRECs shows that their contention that the Companies should have rejected In-State All Renewables to wait for lower priced RECs and relied on force majeure as a "backup option" is disingenuous.

Given the above, it is clear that force majeure was not an option for the Companies with regard to meeting their In-State All Renewables statutory requirements. These RECs were reasonably available in the marketplace; the Companies, through their good faith efforts, were able to secure these though competitive RFP processes. Doing so enabled the Companies to meet their relevant statutory benchmarks and comply with the law. The arguments by OCC and the Environmental Intervenors to the contrary miss the mark. The Commission should so rule accordingly.

3. There is no evidence that contacting Staff prior to the procurement decisions would have or could have changed the Companies' procurement requirements.

In their briefs, OCC and Staff parrot the Exeter Report's suggestion that one of the alternatives to purchasing the RECs at issue would have been for the Companies to have consulted with Staff or the Commission prior to doing so. As demonstrated in the Companies' Post-Hearing Brief, there is no suggestion, much less evidence, about what such a course of

action would have accomplished.[296] As the Exeter Report acknowledged, the Companies were "under no statutory obligation to obtain approval by the Commission for RECs purchases."[297]

Moreover, neither Section 4928.64 nor the rules promulgated thereunder contain any provision for "approaching the Commission or Staff on the basis of price or cost." OCC states that consulting with Staff would have given Staff "an opportunity to provide meaningful guidance."[298] OCC, however, fails to provide any substantive discussion as to what such "meaningful guidance" would have consisted. Likewise, Staff states that it could have offered "guidance" should the Companies have chosen to consult with Staff.[299] But Staff, again like OCC, fails to state what such "guidance" would have amounted to.

The failure of OCC and Staff to substantiate what they mean by "guidance" has a ready explanation. Pursuant to Ohio's AEPS, there are only two potential "statutory outs" that either excuse or waive a utility's AEPS compliance obligations: force majeure and the three-percent mechanism.[300] Because there were In-State All Renewables "reasonably available in the marketplace in sufficient quantities," the Companies could not avail themselves of force majeure.[301] Because the Companies did not cross the three-percent threshold, there was no basis under Ohio's AEPS regime to opt out on the basis of price.[302] Therefore, the Companies had no

---

[296] Company Br., pp. 67-68.

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

[298] OCC Br., p. 32.

[299] Staff Br., p. 6.

[300] *See generally* O.R.C. §4928.64. *See also* Case No. 08-888-EL-ORD, 2009 Ohio PUC LEXIS 429, Entry on Rehearing, *35-37 (June 17, 2009).

[301] O.R.C. §4928.64(C)(4)(b).

[302] *See* Case No. 08-888-EL-ORD, 2009 Ohio PUC LEXIS 429, Entry on Rehearing, *35-37 (June 17, 2009). *See also* Gonzalez Testimony, p. 32 (stating that the Companies did not exceed the three-percent threshold); Tr. Vol. III, p. 523.

other legal option but to procure the requisite RECs at issue in order to comply with the law. Consulting with Staff could not have altered this result.

[redacted]

303 [redacted]

304 [redacted]

305 [redacted]

306 [redacted]

[redacted]

307 [redacted]

308 [redacted]

309 [redacted]

310 [redacted]

311 [redacted]

312 [redacted]

[redacted]

III. THERE IS NO SUPPORT FOR EITHER A DISALLOWANCE OF ANY OF THE COMPANIES' COSTS TO COMPLY WITH OHIO REVISED CODE SECTION 4928.64 OR A PENALTY PAYMENT.

A. There Is No Evidence Supporting The Calculation Of A Proposed Disallowance Amount.

As set forth above in Section II, and as demonstrated throughout their Post-Hearing Brief, the Companies acted prudently by procuring In-State All Renewables to meet their compliance obligations. Notwithstanding the clear evidence to the contrary, Staff and OCC attempt to argue the opposite.[315] Yet, even if Staff and OCC are correct (which they are not), Commission precedent requires a firm evidentiary and methodologically sound basis for ordering a disallowance. No party to this proceeding, including Staff and OCC, has provided an appropriate methodology for calculating the scale of any proposed disallowance. Instead, witnesses for Staff and OCC--the only parties even to attempt to propose a disallowance amount--have relied on vague, unsubstantiated generalizations that lack proper evidentiary support. Thus, the suggestions made by Staff and OCC, whether at hearing or in their initial briefs, cannot form the basis for any proposed disallowance.

---

[313] [redacted]

[314] [redacted]

[315] *See, e.g.,* Staff Br., pp. 6-7; OCC Br., p. 4.

As noted, Commission precedent mandates that a party seeking a disallowance must come forward with concrete evidence to support its calculation thereof. Both at hearing and in their initial briefs, Staff and OCC have failed to do so. As the Companies have previously shown, even when the Commission has found that a utility had imprudently entered into unreasonable procurement contracts with an affiliate (such that the utility purchased too much gas at too high of a price), the Commission has denied a disallowance when the calculations for a suggested disallowance were methodologically unsound.[316] The Commission has held that, where there was no "firm basis for determining the cost to Columbia's ratepayers of [any] imprudence," "[t]he Commission cannot order a [disallowance] of the magnitude recommended on such a scant basis."[317]

In their initial briefs, no party to this proceeding has pointed to any firm record support or sound methodological basis for calculating a proposed disallowance amount. There is no denying that the Companies purchased In-State All Renewables as required. Thus, even if one were to suggest that some amount should be disallowed, the Companies should get credit for *some* price for those RECs. Accordingly, any proposed disallowance amount must begin with what a reasonable price for In-State All Renewable RECs purchased by the Companies should have been. Notably, in their initial briefs, none of the Intervening Parties, including Staff and OCC, can point to any evidence regarding such an amount. As a result, there is no way to calculate how much of the costs incurred by the Companies were supposedly imprudent. Indeed,

[316] *In The Matter of The Investigation Into The Gas Purchasing Practices and Policies of Columbia Gas of Ohio, Inc.*, Case No. 83-135-GA-COI, 1985 Ohio PUC LEXIS 18 (Oct. 8, 1985), *41-44.

[317] *Id.* at *41-42, *44.

Staff witness Dr. Estomin admitted that the price that the Companies "should have paid" is unknowable.[318]

Instead, both Dr. Estomin and OCC witness Gonzalez rely on vague generalizations and fail to provide any sound methodological basis for calculating a disallowance amount. Dr. Estomin offered the compliance payment, adjusted by some indeterminate amount upward, as a possible basis for quantifying a proposed disallowance.[319] He admitted, however, that he had no idea as to why the legislature had set the compliance payment at the level it did, and further, that the compliance payment was not a market price.[320] Thus, this testimony fails to provide any reasonable basis, let alone a firm basis for calculating an amount of disallowance.

Dr. Estomin also suggested [redacted][321] But under questioning from the Attorney Examiner, Dr. Estomin admitted that this approach was decidedly problematic. Specifically, Dr. Estomin testified that [redacted][322] Dr. Estomin's recommendations thus fall far short of providing the sound methodological basis necessary for calculating a proper disallowance amount.[323]

---

[318] Tr. Vol. I, p. 130.

[319] *Id.* at 130-31.

[320] *Id.* at 82.

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

[322] *Id.* at 133 (Confidential). The Attorney Examiner took this to mean, [redacted] *Id*.

[323] On page 3 of its brief, OCC states that a draft version of the Exeter Report contained a recommendation to disallow all costs over $50 per REC. *See* OCC Br., p. 3. OCC further states that this recommendation was removed subsequent to comments by the Companies, thereby implying that the Companies somehow orchestrated the removal thereof. *See id*. Nothing could be further from the truth. First, the RFP that authorized the audit required that draft audit reports be sent to the Companies for review prior to the filing of the official audit report.

Mr. Gonzalez, [redacted][324] Mr. Gonzalez testified that [redacted].[325] In her rebuttal testimony, Company witness Mikkelsen further observed that Mr. Gonzalez's "recommendation of a disallowance amount of the total REC cost is equivalent to assuming, contrary to fact, that the RECs were never purchased and that the Companies wholly failed to comply with their statutory mandates—all of which simply isn't true."[326] Therefore, the record reflects the absence of any evidentiary and methodological support for a disallowance of any amount. To no surprise, Staff and OCC's briefs add nothing here.

B. Any Disallowance In This Proceeding Would Violate Ohio's Rule Against Retroactive Ratemaking.

In its brief, OCC argues that the Commission should disallow revenues already collected by the Companies pursuant to Rider AER and issue a credit for OCC's requested disallowance

(continued…)

See Case No. 11-5201-EL-RDR, Entry, Request for Proposal No. EE12-FEAER-1, p. 6 (Jan. 18, 2012). Thus, the Companies properly had the right to review and comment on the Exeter Report. Second, given that the draft report's reference to a specific REC price had no basis, it should not be surprising that the Companies may have objected to it and, more to the point, that Exeter agreed to remove the reference. Third, regardless of what was in the draft version of the Exeter Report, the final version of the Exeter Report is authoritative and it does not contain any such recommendation. Fourth, as demonstrated in the Companies' Initial Post-Hearing Brief, and here, a bald recommendation of an over-$50/REC disallowance lacks the requisite evidentiary and methodological support to form the basis for a permissible disallowance amount. *See* Company Br., pp. 72-75.

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

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

[326] Mikkelsen Rebuttal Testimony, p 3. Further, [redacted] Tr. Vol. III, p. 623 (Confidential). In addition, even though Mr. Gonzalez admitted [redacted] *Id.* Company witness Mikkelsen testified that the customers did not begin to pay for the RECs at the time the contracts were executed. Mikkelsen Rebuttal Testimony, pp. 4-5.

amount.[327] As demonstrated below, OCC's proposal would require the Commission to engage in the very type of retroactive ratemaking activity explicitly prohibited by the Supreme Court of Ohio.[328] Specifically, "[t]he commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable" but "[t]he substitution has prospective effect only."[329]

OCC asks the Commission to issue a credit via Rider AER, "which will have the affect of adjusting the customers' AER Rider rates in subsequent quarters."[330] Such a request is purportedly permissible, according to OCC, because "by crediting the disallowance plus interest to the AER Rider, the Commission *would not be refunding unlawfully collected rates*, but would be establishing a future rate based upon the reasonable price that *should have been paid*" by the Companies "*during 2009, 2010, and 2011*."[331] This is retroactive ratemaking, pure and simple. The proposed "credit," because it is based upon "prices that should have been paid" for Commission-authorized rates already collected, would require the Companies to give back monies previously paid to the Companies pursuant to rate-schedules filed with and approved by the Commission. The putative "credit" suggested by OCC is thus nothing more than a refund by another name. It is clearly prohibited by settled Supreme Court of Ohio precedent: "The rule against retroactive rates . . . also prohibits refunds."[332]

---

[327] OCC Br., pp. 52-53.

[328] *Keco Industries, Inc. v. Cincinnati & Suburban Tel. Co.* (1957), 166 Ohio St. 254; *Lucas County Comm. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344; *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St. 3d 512.

[329] *Lucas County*, 80 Ohio St. 3d at 347.

[330] OCC Br., p. 52.

[331] *Id.* at 52-53 (emphasis added).

[332] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d at 515-516. *See also, Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009), 121 Ohio St.3d 362, 367 ("[A]ny refund order would be contrary to our precedent declining to engage in retroactive ratemaking."); *Green Cove Resort Owners Assoc. v. Pub. Util. Comm.*

In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company, upon which OCC relies to support its refund claim, does not change this analysis.[333] In that case, the Commission found that the application of the proceeds from a lump-sum settlement agreement to an under-recovery for fuel costs was not retroactive ratemaking. Instead, it was an accounting decision necessary "to match . . . revenues and benefits incurred."[334] The settlement occurred because a coal supplier was seeking to buy its way out of a long-term supply contract with the utility. To do so, the coal supplier provided the utility with a coal reserve and payments amounting to several million dollars.[335] Due to the severe economic recession, the utility had also experienced a significant under-recovery for its fuel costs, the balance of which it had deferred.[336]

The Commission found that the utility should apply the proceeds of the settlement to its outstanding fuel recovery deferral balance.[337] This case involved "unique" circumstances, i.e., the application of what was essentially a multi-million dollar windfall received through the buy-out of a contract. [338] The settlement amount was not collected from customers and thus did not count as a rate. Insofar as the Commission sought to match revenues with benefits it was not attempting to refund previously collected rates. This case is simply not on point with the instant matter.

(continued…)

(2004), 103 Ohio St.3d 125, 130 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*").

[333] Case No. 09-872-EL-FAC, Opinion and Order (Jan 23, 2012); Entry on Rehearing (April 11, 2012).

[334] *Id.*, Opinion and Order, p. 13.

[335] *Id.*, Entry on Rehearing, p. 3.

[336] *Id.*

[337] *Id*.

[338] Case No. 09-872-EL-FAC, Opinion and Order, p. 12.

On the contrary, *Columbus Southern Power Co.*[339] proves particularly instructive. On remand from the Supreme Court, the Commission rejected a proposal by OCC and other intervenors to reduce an approved Fuel Adjustment Clause ("FAC") deferral balance because other previously collected rates had been found by the Supreme Court to be unlawful.[340] These parties argued that such a reduction would be purely prospective in nature.[341] The Commission, however, properly rejected OCC's proposal because it would have required the Commission to engage in retroactive ratemaking:

> The Commission agrees with AEP-Ohio that an adjustment to the FAC deferral balance, which we previously authorized to be collected as a means to recover the Companies' actual fuel expenses incurred plus carrying costs, would be contrary to the Court's prohibition against retroactive ratemaking and refunds. Although OCC, OPAE, and EU-Ohio characterize their proposed adjustment as a prospective offset to amounts deferred for future collection, they essentially ask the Commission to provide customers with a refund to account for the Companies' past POLR and environmental carrying charges, which were collected from April 2009 through May 2011. *Consistent with the Court's precedent, we cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified*.[342]

So too here, OCC's advocacy of a "credit," which "will have the affect of adjusting the customers AER Rider Rates in subsequent quarters," is no different than the proposed adjustment to the FAC deferral balance in *Columbus Southern Power*. Neither are prospective in nature. Indeed, both would involve a refund of previously collected rates that would run counter to Ohio's prohibition on retroactive ratemaking. OCC's proposed credit is thus not permissible under settled Ohio law.

---

[339] Case No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011).

[340] *Id.* at 35.

[341] *Id.*

[342] *Id.* at 36 (emphasis added).

OCC also cites *River Gas Co. v. Pub. Util. Comm*.[343] But this case involved an application of Section 4905.302 and the Uniform Purchased Gas Adjustment Clause ("UPGA"),[344] which is required to be in the tariff of every natural gas company. The UPGA provides a detailed, multi-step formula for the calculation of expected gas cost ("EGC").[345] It is designed to estimate the future costs of purchasing natural gas from wholesale suppliers and to match these anticipated costs with expected revenues.[346] Section 4905.302 and the UPGA "represent a statutory plan to pass variable fuel costs directly to consumers."[347] Given the direct pass-through of variable fuel costs, the Court concluded that "it does not appear that *application of the UPGA* constitutes ratemaking in its usual and customary sense."[348] The incurrence and recovery of costs in the instant proceeding are entirely different than the application of the UPGA in *River Gas*. The costs recovered through Rider AER were actual costs incurred, not estimated future costs as with the UPGA. Further, the Rider AER costs were not direct pass-through costs but instead were filed 30 days in advance to allow a reasonable opportunity for Commission review.[349] In no instance did the Commission determine that the rates should not be effective as filed. Hence, *River Gas* involves the application of the UPGA, which applies exclusively to natural gas companies.

---

[343] (1982), 69 Ohio St.2d 509. OCC also cites to *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 57 Ohio St.2d 78 which is simply the predecessor to *River Gas* and to which *River Gas* cites heavily. OCC Br., p. 53.

[344] *See* Rule 4901:1-14, O.A.C.

[345] *See* Rule 4901:1-14-05, O.A.C., Appendix "Gas Cost Recovery Rate Calculation."

[346] "The EGC mechanism attempts to match future gas revenues for the upcoming quarter with the anticipated cost to procure gas supplies." *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Piedmont Gas Company and Related Matters In the Matter of the Uncollectible Expense Rider of Piedmont Gas Company and Related Matters*, 2012 Ohio PUC LEXIS 783, *4 .

[347] *River Gas,* 69 Ohio St.2d at 513.

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

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

Ohio's AEPS does not contain a corresponding pass-through mechanism. Consequently, the type of direct pass-though contemplated by the UPGA and discussed in *River Gas* is not present. OCC attempts to show otherwise by citing to Rules 4901:1-40-03(A)(3), 4901:1-40-04(D) and 4901:1-40-07(B). But none of these rules has anything to do with a direct pass-through of AEPS compliance costs.[350] Rule 4901:1-40-03(A)(3) involves the avoidable nature of REC compliance costs for shopping customers.[351] Rule 4901:1-40-04(D) provides that a utility may use RECs to comply with its AEPS obligations.[352] Rule 4901:1-40-07(B) addresses the three-percent mechanism.[353] OCC's reliance on *River Gas* is thus misplaced.

Indeed, as shown in the Companies' Post-Hearing Brief, and consistent with *Lucas County*, the Commission approved both Rider AER and the tariff in which it is contained.[354] Pursuant to their Rider AER tariff obligations, the Companies timely made 27 quarterly filings stating the rate schedules for Rider AER from 2009 through 2011. The proposed rates in these filings became effective 30 days after filing, subject to Commission review, "unless otherwise ordered by the Commission."[355] Thus, here, as in *Keco Industries* and *Lucas County*, a "Commission-approved rate schedule" has been in effect and there is "no statutory authorization for the ordering of . . . a credit or rebate."[356]

C. There Is No Basis To Order A Penalty Payment.

[350] OCC Br., p. 53, n. 235.

[351] *See* Rule 4901:1-40-03(A)(3), O.A.C.

[352] *See* Rule 4901:1-40-04(D), O.A.C.

[353] *See* Rule 4901:1-40-07(B), O.A.C.

[354] *See* Company Br., pp. 77-78.

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

[356] *Lucas County*, 80 Ohio St.3d at 347; *see also Keco Industries*, 166 Ohio St. 254, Syllabus, par. 2.

OCC suggests that the Commission impose a penalty on the Companies.[357] There is no basis in law or fact for the unspecified penalty advocated by OCC. Moreover, there can be no penalty unless the Commission finds that the Companies violated some law or order of the Commission. At all times during the audit period, however, the Companies complied with the provisions of Section 4928.64 and the relevant rules promulgated thereunder. No party asserts otherwise and there is no record evidence to the contrary. Indeed, the authors of the Exeter Report, OCC witness Gonzalez, and Staff all admit that the Companies did not violate the statutory and regulatory requirements of Ohio's AEPS regime.[358] Given that the Companies operated well within the boundaries of the law throughout the audit period, OCC's contention that the Commission should assess a penalty against the Companies is simply groundless.

IV. THE COMMISSION SHOULD ADOPT A METHOD OF CALCULATING THE THREE PERCENT PROVISION THAT IS CONSISTENT WITH SECTION 4928.64.

Section 4928.64(C)(3) provides that an electric utility "need not comply" if a company's cost of complying with the statutory requirements exceeds three percent of "its reasonably expected cost of otherwise producing or acquiring the requisite electricity." As part of this proceeding, the Commission asked Goldenberg to recommend methods for calculating the three percent calculation under Section 4928.64(C)(3). The Commission also provided that the Companies and the intervenors may examine any of Goldenberg's recommendations for calculating the three percent mechanism.[359]

---

[357] *See* OCC Br., pp. 57-58.

[358] *See* Commission Ordered Ex. 2A, p. 29 ("[W]e found no indication that the FirstEnergy Ohio utilities operated outside of the legal requirements established by the Ohio AEPS legislation."); Tr. Vol. III (Wilson Cross), pp. 578-79 (admitting that the Companies did not violate the provisions of Section 4928.64); Staff Br., p. 4 ("The audit report did not find any violations of the letter of the applicable legislation.").

[359] Case No. 11-5201-EL-RDR, Entry, p. 2 (January 18, 2012).

The Companies recommend that the Commission calculate the three percent mechanism in a manner that is consistent with Section 4928.64 and that follows the method adopted by the Companies. This method is described as follows. For any particular compliance year, a utility calculates its cost to acquire the requisite electricity. To do this, the utility takes the average of the prior three years of non-shopping megawatt-hour sales and multiplies that by the average SSO generation price, including adjustments for distribution losses, for the applicable year. Indeed, OEG and Nucor witness Dr. Goins agreed that this approach is consistent with Section 4928.64.[360] Finally, the utility compares its cost to acquire requisite electricity without renewable energy benchmarks (calculated as described above) with its "reasonably expected cost" of procuring renewable energy to satisfy the benchmarks under Section 4928.64 for the compliance year. The utility's reasonably expected cost of compliance with Section 4928.64 should be based on the same sales volume as its reasonably expected cost of acquiring the requisite electricity. As Goldenberg explained, these volumes should be the same "to ensure there is not a mismatch of sales volumes that can cause a companies' [sic] 3% calculation to be misleading."[361]

With three exceptions, discussed below, Staff and OEG, Nucor and MAREC recommend methods that generally follow the method discussed above. Importantly, all of these recommended methods are for calculations in the future.[362] None of the intervenors advocate that their recommended method would have any effect on the Companies' past calculations of the three percent provision. In addition, there is no dispute that the Companies' costs of

[360] Tr. Vol. III, p. 530.

[361] Commission Ordered Ex. 1, p. 27.

[362] OEG Br, p. 4; Tr. Vol. III, p. 529 (OEG/Nucor witness Dr. Goins testified that his recommendation is prospective); Tr. Vol. IV, p. 678 (MAREC witness Burcat testified that his recommendation is prospective).

procuring renewable energy during 2009 through 2011 did not exceed three percent.[363] For example, OCC witness Gonzalez testified, "FirstEnergy did not meet or exceed the 3% provision of Ohio law."[364] Similarly, Company witness Mikkelsen testified that the Companies did not exceed the three percent cost calculation during 2009 through 2011.[365] Ms. Mikkelsen further testified that the results of the Companies' three percent cost calculations are accurately set forth in the Goldenberg Report.[366]

There are three recommendations asserted by Staff and certain intervenors that should be rejected because they are inconsistent with Section 4928.64, among other reasons. First, Staff, OEG and Nucor contend that the Commission should make the three percent provision a mandatory cap on a company's renewable energy costs.[367] Staff also contends that the cap should be mandatory unless the Commission orders otherwise.[368] These suggestions, however, conflict with Section 4928.64. Simply put, a mandatory cap is not supported by the language of Section 4928.64. As noted, the statute provides only that a company "need not comply" with the statutory benchmarks if its costs exceed the three percent provision.[369] It does not provide that a company "shall not" comply with the statutory benchmarks if its costs exceed the three percent provision. Thus, this provision is discretionary.

Although Nucor and OEG contend that Section 4928.64(C)(2) and Rules 4901:1-40-07 and 4901:1-40-08 reference a "cost cap,"[370] they overlook that none of these provisions in

---

[363] EI Br., p. 33.

[364] Gonzalez Testimony, p. 32.

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

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

[367] Nucor Br., p. 11; OEG Br., pp. 2-4; Staff Br., p. 10.

[368] Staff Br., p. 10.

[369] O.R.C. § 4928.64(C)(3).

[370] Nucor Br., p. 14; OEG Br., p. 2.

Section 4928.64 mandates that a utility not exceed the cap. Rather, the Commission has declined to adopt a position that the three percent calculation is a mandatory cap on a utility's costs of complying with its renewable energy benchmarks. As Nucor and OEG point out,[371] in *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies, Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221*, Case No. 08-888-EL-ORD, the Companies contended that the three percent calculation established a "reasonable ceiling" and that Section 4928.64 "mandates" that the Commission excuse the Companies from compliance with the statutory benchmarks if the Companies' costs exceed the three percent provision.[372] The Companies made this argument in response to the Commission's April 15, 2009 Opinion and Order in which the Commission reserved the right to impose a "catch-up requirement" for any under-compliance caused by the three percent provision.[373] In its June 17, 2009 Entry on Rehearing, the Commission, however, did not address the Companies' argument and held that all arguments not expressly discussed were rejected.[374] Thus, the Commission rejected the position that the three percent provision mandates that a company is excused from compliance if its costs exceed the three percent provision.

Second, the Commission should reject the recommendation by Nucor and OEG that the Commission apply a cap on the Companies' Rider AER by rate class.[375] There is no support

---

[371] Nucor Br., pp. 14-15; OEG Br., p. 3.

[372] Case No. 08-888-EL-ORD, Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Rehearing, pp. 25-26 (May 15, 2009).

[373] *Id.*; *see also* Case No. 08-888-EL-ORD, Opinion and Order, p. 38 (April 15, 2009).

[374] Case No. 08-EL-ORD, Entry on Rehearing, p. 2 (June 17, 2009).

[375] Nucor Br., pp. 22-23; OEG Br., pp. 5-7.

under Section 4928.64 for a cap based on the Companies' rate design. Neither Nucor nor OEG cite to any Commission precedent that would support a cap based on a company's rate design in this manner. Indeed, Nucor/OEG witness Goins testified that he is not aware of any case in which the Commission has applied a cap on a rider per rate class based on a comparison of the rider to the company's generation rider.[376]

In addition, Nucor and OEG ignore that a cap on Rider AER would require an impermissible deviation from the Companies' current electric security plan ("ESP 3"). ESP 3 provides that the Companies' rate design in effect at the time of the Stipulation will remain in effect throughout the term of ESP 3.[377] At the hearing, Nucor/OEG witness Goins testified that ESP 3 does not include a three percent cap on the Rider AER rate schedule.[378] Nucor's argument that nothing in the Commission's rules and policies or the Companies' current electric security plan ("ESP 3") prevents the Companies from spreading out any under-recovery of Rider AER costs[379] thus misses the point. ESP 3 prohibits the Companies from modifying their rate design to implement the cap recommended by Nucor and OEG.

Third, MAREC and Staff advocate that the Commission should include a "suppression benefit" in the calculation of the three percent provision.[380] But there is no support under Section 4928.64 to include this calculation in the three percent calculation. Nor is there any evidence to support a calculation of this "benefit." Neither MAREC nor Staff provides any recommendation regarding how a "suppression benefit" would be calculated. At the hearing,

---

[376] Tr. Vol. III, p. 532.

[377] Mikkelsen Testimony, p. 8; *In re the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Stipulation, p. 12 (Apr. 13, 2012).

[378] Tr. Vol. III, p. 532.

[379] Nucor Br., p. 23.

[380] MAREC Br., pp. 3-4; Staff Br., p. 10.

MAREC witness Burcat acknowledged that he did not recommend any method of calculating a "suppression benefit," noting, "it would have to be dealt with at some future date by the Commission in some kind of proceeding to determine how to calculate that price suppression effect."[381] This omission is telling. As stated in the Goldenberg Report, "[A]n estimate of the approximate magnitude of this benefit can be achieved through use of a nodal production cost simulation software or other modeling techniques, *although it will always be difficult to calculate precisely*."[382]

The Commission also should reject a "suppression benefit" because it will likely increase costs for customers. At the hearing, Mr. Burcat acknowledged that adding a price suppression benefit into the three percent provision will result in a higher number.[383] Thus, a suppression benefit will likely increase the amount of costs that a company will be required to incur to meet its renewable energy benchmarks before the Companies can apply for any cost-based relief.

For all these reasons, the Commission should reject the recommendations for a mandatory cap, a cap on the rate design of Rider AER, and the inclusion of a "suppression benefit." Instead, the Commission should adopt the method of calculating the three percent provision recommended by the Companies and agreed to by all parties subject to the three exceptions noted above.

V. THE COMMISSION CORRECTLY PROTECTED CONFIDENTIAL AND PROPRIETARY SUPPLIER PRICING AND SUPPLIER INDENTIFYING INFORMATION FROM DISCLOSURE.

Throughout the history of these proceedings, the Attorney Examiner has consistently and correctly found that the highly competitively-sensitive supplier-identifying and pricing

[381] Tr. Vol. IV, p. 678; *see also Id*. at 683.

[382] Commission Ordered Ex. 1, p. 29 (emphasis added).

[383] Tr. Vol. IV, p. 679.

information contained in the Exeter Report warrants protection as a trade secret. Further, the Companies have at all times sought to protect this information. To the detriment of consumers, the Companies and their suppliers, OCC and the Environmental Intervenors have requested that the Commission reverse the Attorney Examiner's well-founded determinations. Indeed, the public dissemination of this information would have a chilling effect on supplier participation in future REC solicitations because suppliers would fear the loss of confidentiality regarding their proprietary bidding strategies. This suppression of participation would undermine competition and may well lead to higher prices for renewable products.

Further, every party to this proceeding that has entered into a protective agreement with the Companies has received access to the competitively sensitive confidential information at issue. In keeping with the Commission's commitment to open and transparent proceedings, the Companies deliberately have kept any redactions to a minimum and sought only to protect what is truly competitively sensitive. For the reasons that follow, the Commission should affirm the Attorney Examiner's rulings on this issue and reject the arguments of OCC and the Environmental Intervenors.

A. The Companies Have At All Times Safeguarded The REC Procurement Data.

As noted, in order to comply with their AEPS obligations, and pursuant to the ESP Stipulation in Case No. 08-935-EL-SSO, the Companies began issuing RFPs in the summer of 2009 to procure the requisite number of RECs. The Companies then proceeded to entertain, evaluate and accept bids, and to enter into binding, confidential contracts for the procurement of RECs with various suppliers to comply with the provisions of Section 4928.64.[384] The Companies adhered to the same REC procurement process throughout the audit period.

[384] Stathis Testimony, pp. 14-15.

In 2011, the Commission initiated this audit proceeding to review the Companies' REC procurement practices and selected Exeter and Goldenberg as auditors. In its January 18, 2012 Entry, and again in its February 22, 2012 Entry, the Commission cautioned Staff and the auditors that, pursuant to Section 4901.16, there was a prohibition on divulging any confidential information acquired during the course of the audit.[385] To assist Exeter and Goldenberg, the Companies provided both them and Staff with highly competitively sensitive proprietary information, including: (a) the specific identities of specific REC suppliers who participated in the RFPs; (b) the specific prices for the RECs bid by specific suppliers in response to each RFP; and (c) detailed financial information regarding specific REC transactions between suppliers and the Companies (the "REC Procurement Data").[386]

Prior to providing this information to Staff and the auditors, the Companies also met with Staff to address the Companies' confidentiality concerns.[387] The Companies provided the REC Procurement Data to the auditors and Staff with the understanding that they would keep this information confidential and not release it to the public.[388] The Companies further understood in their meetings with Staff that the auditors' reports incorporating the REC Procurement Data would be filed under seal and that such unredacted reports would be kept under seal until the Commission ruled otherwise.[389]

On August 15, 2012, the Exeter Report was filed with the Commission under seal. On the same day, a redacted version of the Exeter Report was made available to the public on the

---

[385] Case No. 11-5201-EL-RDR, Entry, pp. 2-3 (Jan. 18, 2012); *Id*., Entry, p. 2 (Feb. 23, 2012).

[386] *Id.*, Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, Stathis Affidavit ("Stathis Aff."), ¶4 (Oct. 25, 2012).

[387] *Id.*

[388] *Id.*

[389] *Id.*

docket for this proceeding.[390] Only information identifying specific supplier bids and prices was redacted; the auditors' recommendations and conclusions were made available in the public version. [redacted][391] The public version of the Exeter Report, filed by Staff, was improperly redacted and inadvertently disclosed [redacted]

On September 26, 2012, OCC filed a motion for a prehearing conference seeking to have the Companies turn over unredacted versions of the Exeter Report to any intervenor who requested them, notwithstanding the absence of a confidentiality and protective order.[392] On October 11, 2012, the Commission denied OCC's request, holding that "OCC filed its motion prior to the due date for the requested discovery, failed to exhaust all other means of resolving the alleged discovery dispute . . ., and failed to file a motion to compel discovery."[393]

On October 3, 2012, the Companies filed a Motion for a Protective Order and Memorandum in Support. In this motion, the Companies sought to prevent the public disclosure of the REC Procurement Data contained in the Exeter Report by keeping the unredacted version of the Exeter Report under seal, thereby protecting the REC Procurement Data.[394] During a hearing on November 20, 2012, the Attorney Examiner granted the Companies' motion for a protective order to prevent the public dissemination of the REC Procurement Data.[395] Specifically, the Attorney Examiner held:

---

[390] *See* Docket, Case No. 11-5201-EL-RDR (August 15, 2012).

[391] Tr. Vol. III, pp. 650- 651 (Confidential).

[392] Case No. 11-5201-EL-RDR, Entry, p. 2 (Oct. 11, 2012).

[393] *Id*. at 3.

[394] *Id.* at 2.

[395] *See* Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).

> 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.[396]

The Attorney Examiner also held, "I'd like to emphasize that all parties will maintain the confidentiality of the confidential information contained in the unredacted audit reports [and] . . . none of that information may be publicly disclosed, and any information containing documents [that contain this information] filed with this Commission will be filed under seal."[397]

After the November 20, 2012 hearing, the Companies entered into confidentiality and protective agreements with various parties including OCC, the Environmental Intervenors, OEG and Nucor. Counsel for each of these parties then received an unredacted version of the Exeter Report as well as copious amounts of competitively sensitive material that the Companies had previously made available to the auditors. The aforementioned parties thus had access to the REC Procurement Data prior to the hearing in this matter which commenced on February 19, 2013.

On December 21, 2012, OCC filed a public records request with the Commission seeking the public release of an unredacted confidential draft version of the Exeter Report.[398] This draft report contained comments from the Companies involving the REC Procurement Data.[399] After

[396] *Id.*

[397] *Id*. at 18:19-19:1.

[398] Case No. 11-5201-EL-RDR, Entry, p. 3 (Feb. 14, 2013).

[399] *Id*.

conducting an *in camera* review of the draft report, the Attorney Examiner denied OCC's public records request.[400] Consistent with his November 20, 2012 ruling, the Attorney Examiner held:

> 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, 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.[401]

Thus, on two separate occasions, the Attorney Examiner found that the REC Procurement Data constituted trade secrets under Ohio law and warranted protection accordingly.

Since the Attorney Examiner's November 20, 2012 ruling, the Companies have repeatedly filed protective orders related to documents containing the REC Procurement Data. These materials include:

- Unredacted Exeter Report (October 3, 2012)
- OCC Public Records Request (December 31, 2012)
- Stathis and Bradley Direct Testimonies (January 23, 2013)
- OCC witness Wilson Gonzalez Deposition Testimony (February 12, 2013)
- Mikkelsen Rebuttal Testimony (February 22, 2013)
- The Companies' Initial Post-Hearing Brief (April 15, 2013)

To protect the REC Procurement Data, the Attorney Examiner also bifurcated the hearing on this matter into confidential and public sessions, and provided for confidential and public versions of the transcripts as well.

[400] *Id.* at 5.

[401] *Id.*

B. The Attorney Examiner Correctly Found That The REC Procurement Data Constituted A Trade Secret Under Ohio Law.

On a preliminary note, OCC continues to labor under a misconception regarding the "Commission's approach to resolving motions for protective orders."[402] OCC points to a putative "strong presumption in favor of disclosure" in Commission proceedings and cites *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*.[403] The quoted statement, however, actually comes from a Commission summary and rejection of an argument put forward by OCC. As the Commission observed, "*OCC argues* that Section 4901.12 . . ., which provides that all documents and records in the Commission's possession are public records, *provides a strong presumption in favor of disclosure*, which is contradicted by the Commission's directive for informal submission"[404] The Commission rejected OCC's argument as "misguided."[405]

Similarly, relying on *In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement With American Steel & Wire Corporation*,[406] OCC contends that the Commission should only provide for confidential treatment of proprietary information under "extraordinary circumstances."[407] In *American Steel,* the utility filed a service agreement and application under seal.[408] The utility then moved for a confidentiality order to protect the agreement in its entirety.[409] The Commission found that the

---

[402] OCC Br., p. 62.

[403] Case No. 08-1229-GA-COI, p. 3 (Feb. 1, 2012).

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

[405] *Id.*

[406] Case No. 95-77-EL-AEC, 1995 Ohio PUC LEXIS 663, *3 (Sept. 6, 1995).

[407] OCC Br., p. 63.

[408] *American Steel*, Case No. 95-77-EL-AEC, 1995 Ohio PUC LEXIS 663 at *3.

[409] *Id.* at *1.

agreement contained trade secrets, could not be redacted and therefore granted an 18-month protective order.[410] Thus, under this precedent, trade secrets satisfy the "extraordinary circumstances" standard. Indeed, a document containing such material is deserving of complete protection given that, in *American Steel*, the Commission permitted the protection of an entire agreement from public disclosure due to the competitively sensitive information contained therein.[411]

Moreover, within the context of competitive solicitations, the Commission has routinely held that the supplier-identifying and pricing information deserved trade secret protection. For example, in *In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan* ("Case No. 08-935-EL-SSO"), the Commission stated, "the Commission finds that the following information will be protected from public release: the names of unsuccessful bidders; price information, including starting price methodologies and round prices/quantities for individual bidders; all information in [the first two parts of the] bidder applications; and indicative pre-auction offers."[412]

For issues relating to competitive solicitations, the Commission has worked to ensure that the proper balance is struck between the need to serve the public's right to know versus the need to prevent the disclosure of proprietary information that would provide competitors in these

[410] *Id*. at *2.

[411] *Id.* at *3.

[412] Case No. 08-935-EL-SSO, Finding and Order, p. 3 (May 14, 2009). *See also*, *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc*., Case No. 11-6000-EL-UNC, 2012 Ohio PUC LEXIS 500, Finding and Order, *3-4 (May 23, 2012) (protecting the same types of information from public disclosure); *In the Matter of the Application of Ohio Edison Company, Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load*, Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, Finding and Order, *6 (April 6, 2005) (same).

solicitation processes with an untoward advantage. The Commission has noted that it must "attempt to balance the interests of ensuring the confidentiality of proprietary information, encouraging participation in future auctions and maintaining public accountability of the auction process."[413] In weighing that balance, the Commission has determined that to permit disclosure of supplier names and prices bid would undermine the "viability of future auctions in Ohio."[414]

Likewise, as demonstrated below, the REC Procurement Data readily satisfies the requirements of Section 1331.61(D) and the six-factor test set down in *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*.[415] Thus, the Commission should affirm the Attorney Examiner's findings and refuse to permit the public disclosure of the REC Procurement Data.

1. The REC Procurement Data constitutes a trade secret pursuant to Section 1331.61(D).

Section 1333.61(D) of the Ohio Revised Code provides a two-pronged test for the determination of trade secret status:

> (D) "Trade secret" means 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*.[416]

[413] *Ohio Edison*, 2005 Ohio PUC LEXIS 177, at *9.

[414] *Duke*, 2012 Ohio PUC LEXIS 500, at *4.

[415] (1997), 80 Ohio St.3d 513, 524-25.

[416] O.R.C. § 1331.61(D) (emphasis added).

OCC and the Environmental Intervenors claim that the REC Procurement Data fails to satisfy either prong. They are simply wrong. As the Attorney Examiner correctly held, the REC Procurement Data warrants the Commission's protection and falls outside of the purview of the public records disclosure requirements of Section 149.43 of the Ohio Revised Code.[417]

a. The REC Procurement Data bears independent economic value.

OCC and the Environmental Intervenors argue that the REC Procurement Data lacks independent economic value solely because it is "historic information."[418] These parties fail to realize that the age of proprietary information is neither a necessary nor a sufficient determinant of whether that information bears independent economic value. Again, the Commission's handling of confidential bidding data in the competitive solicitation cases proves instructive.

For example, in Case No. 08-935-EL-SSO, two evaluative post-auction market monitor reports from a competitively bid auction for SSO load were filed under seal.[419] While certain information was released to the public after 21 days to allow the winning bidders to procure additional capacity to serve the SSO load, other information was deemed highly sensitive and confidential, and ordered to remain under seal "indefinitely."[420] The sealed information included the identities of unsuccessful bidders, price information (including starting price methodologies and round prices/quantities for individual bidders), and "indicative pre-auction offers."[421]

---

[417] *See State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA* (2000), 88 Ohio St. 3d 166, 172 ("The Ohio Uniform Trade Secrets Act, R.C. 1333.61 through 1333.69, is a state law exempting trade secrets from disclosure under R.C. 149.43.").

[418] OCC Br., p. 68; EI Br., pp. 29-30.

[419] *See* Case No. 08-935-EL-SSO, Entry, pp. 1-2 (May 23, 2011).

[420] *Id*. at 2.

[421] *Id.*

Approximately two years later, another utility sought to have the auction bidding data publicly disclosed and the Commission called for comments from concerned parties.[422] The Companies and several of their suppliers opposed the release of the bidding data, even though by then it was over 24 months old.[423] Indeed, an industry trade group, the Electric Power Supply Association ("EPSA"), moved to intervene in the proceeding to oppose the release of the report to the public.[424]

Most tellingly, the auction manager from CRA International, Inc. d/b/a Charles River Associates ("CRA") filed a detailed letter detailing the policy reasons for keeping the auction bidding data under seal, even though it was over 24 months old.[425] CRA observed that the competitive bidding processes at issue involved a series of auctions over time, many of which have the same bidders. Specifically:

> There are two key factors in promoting a competitive bidding process: encourage participation by bidders and prevent collusive behavior among bidders. *To that end, careful consideration must be given to what information is disclosed, to whom it is disclosed, and when it is disclosed.*[426]

---

[422] *Id*.

[423] *See* Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, p. 1 (June 7, 2011) ("Release of the Report will jeopardize the competitiveness and integrity of future SSO auctions because it will discourage participation by bidders."); Comments of Exelon Generation Company, LLC Regarding AEP's Release of Data, p. 1 (June 7, 2011) ("This report contains highly competitively sensitive information regarding bid pricing methodologies and bidding strategies of the various auction participants."); Comments of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., p. 1 (June 7, 2011), ("Constellation strongly objects to release of the . . . .Report [because it] contains highly confidential and proprietary information regarding bids submitted during the . . . auction."); and FirstEnergy Solutions Corp.'s Comments Regarding the Disclosure of the Report of the Commission's Consultant, p. 1 (June 7, 2011) ("As a participant and winning bidder in the auction, FES has a real and substantial interest in maintaining the confidentiality of the Report. Disclosure of the Report, and the information therein, would have a drastic, negative effect on the developing competitive electric generation market in Ohio and would jeopardize bidder participation in future auctions."). All of the aforementioned are from Case No. 08-935-EL-SSO.

[424] *See* Case No. 08-935-EL-SSO, Motion For Limited Intervention and Comments of EPSA, p. 1 (June 7, 2011) ("EPSA agrees with the attorney examiner's finding that the . . . report should remain under seal indefinitely.").

[425] *See Id.*, CRA International, Inc. Comments Letter, p. 1 (June 6, 2011).

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

CRA urged that "the identity [sic] of Qualified Bidders" should not be disclosed because such bidders "believe disclosure . . . may put them at a competitive disadvantage."[427] Further, CRA stated, "detailed bidding data" can reveal "bidding strategies and valuations" and the disclosure thereof can "discourage bidders from participating in future auctions" and enable other bidders to try to "game" the system.[428] These pressing policy considerations led CRA to conclude that the release of the sealed report "may be harmful to future competitive bidding processes."[429]

The Commission presumably accepted these arguments because it has yet to lift the seal. The auction bidding data from Case No. 08-935-EL-SSO is now over 44 months old—older than the oldest possible REC Procurement Data.[430] This auction bidding data is directly analogous to the REC Procurement Data contained in the Exeter Report. Public disclosure of such highly competitively sensitive information would have a chilling effect on future REC procurement processes by possibly betraying supplier bidding strategies. As Navigant Consulting, Inc.

---

[427] *Id.*

[428] *Id.* at 2.

[429] *Id.*

[430] *See also In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc*., Case No. 11-6000-EL-UNC, 2012 Ohio PUC LEXIS 500, *3-4 (May 23, 2012) (agreeing with Staff and granting 18 month extension for auction bidding data because "disclosure of this information would be highly prejudicial to the bidding parties and the viability of any future auction in Ohio"); *In the Matter of the Application of Ohio Edison Company, Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load*, Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, *8 (April 6, 2005) (finding that auction bidding data meets the requirements for trade secret status under Section 1331); *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power Company*, Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181, *18 (Apr. 6, 2005) (same). OCC's attempt to distinguish these cases fails. Regarding *Duke,* OCC makes much of the fact that the Commission required the disclosure of the identity of the winning bidder. OCC Br., p. 73. But, as OCC recognizes, the Commission did so for the essential reason of "'allow[ing] the winning bidders to procure any necessary capacity to serve the SSO load'." *Id.* (quoting *Duke* at *5). Similarly, in *Ohio Edison*, the Commission removed the confidential status of the reports at issue after a request from FERC for use in a related proceeding in what, in many ways, is equivalent to a court-ordered disclosure. Neither of the aforementioned circumstances pertain here. *Id.* (citing to *Ohio Edison* at *6). In *Monongahela Power*, the utility allowed the protection order to expire after 18 months. OCC apparently takes this to mean that competitive bidding data only has an 18-month shelf life. OCC thus assumes that all cases involving protective orders are identical, which, of course, is simply false. As noted above, a case-by-case approach is necessary. Here, as in Case 08-935-EL-SSO, the bidding data at issue warrants continuing protection.

("Navigant"), the independent evaluator for the Companies' REC RFPs, indicated in a letter posted on the docket for this proceeding:

> Bidders in general do not want their bidding data disclosed, as that could reveal their bidding strategies and valuations, and discourage them from participating in future procurements. Since bidders have become extremely sophisticated, disclosing details of bids could also allow bidders to discern bidding strategies of other bidders which can lead to gaming of future bidding processes, resulting in less than competitive outcomes.[431]

Indeed, a supplier could use such information to try to game the REC RFP and procurement system. Disclosure of the REC Procurement Data would also undermine the competitive integrity of the REC RFP process. The REC Procurement Data thus bears independent economic value and the Companies have met the first prong of the Section 1331.61(D) test.

b. The Companies have made reasonable efforts to ensure the secrecy of the REC Procurement Data.

The Companies have consistently exercised reasonable efforts to preserve the secrecy of the REC Procurement Data, thereby satisfying the second prong of Section 1331.61(D). The REC Procurement Data has not been revealed to any third parties outside of this audit proceeding.[432] It has also only been revealed to those parties to this proceeding that have executed a confidentiality and protective agreement with the Companies. Further, it was provided to Staff and the outside auditors with the understanding that it would be kept confidential and remain under seal.[433]

[431] *See* Case No. 11-5201-EL-RDR, Navigant Consulting, Inc. Comments Letter, p. 2 (Oct. 26, 2012).

[432] Stathis Aff., ¶3.

[433] *Id*., ¶4.

Moreover, the REC Procurement Data was acquired through contracting with various suppliers and these contracts contained strict confidentiality provisions.[434] Internally, the REC Procurement Data was segregated and only provided to the Companies' employees on a need-to-know basis.[435] As detailed above, the Companies also have consistently moved to protect the REC Procurement Data contained in any filings in this matter. To further safeguard the REC Procurement Data, the hearing in this matter was bifurcated into confidential and public portions with access to the transcripts for the confidential portions restricted accordingly.[436] Because the Companies have taken "active steps to maintain [the] secrecy" of the REC Procurement Data, they have satisfied the second prong of the Section 1331.61(D) test.[437] As the Attorney Examiner correctly found on two separate occasions, the REC Procurement Data thus satisfies the statutory requirements for trade secret status under Section 1331.61(D). The Commission should thus affirm the Attorney Examiner's prior rulings on this matter.

2. The REC Procurement Data readily satisfies the six-factor test set down in *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*.

Contrary to the claims of OCC and the Environmental Intervenors, the REC Procurement Data satisfies the six-factor test articulated by the Ohio Supreme Court in *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*. There, in order to elucidate further the requirements of Section 1331.61(D), the Court adopted the following six factors regarding the analysis of trade secret claims:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the

[434] *See* Case No. 11-5201-EL-RDR, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion for a Protective Order, Ex. 1, Section 14.7 and Ex. 2, Article 13 (Oct. 3, 2012).

[435] Stathis Aff., ¶3.

[436] *See* Case No. 11-5201-EL-RDR, Entry, p. 2 (Mar. 19, 2013).

[437] *State ex rel. Perrea v. Cincinnati Pub. Sch*. (2009), 123 Ohio St.3d 410, 414.

> 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.[438]

With regard to the first factor, as noted, the Companies have consistently protected the REC Procurement Data and the small fraction thereof inadvertently disclosed in the improperly redacted public version of the Exeter Report occurred without the Companies' knowledge or permission.[439] The vast majority of the REC Procurement Data is thus not known outside of the confines of the Companies, Navigant or the protected limited disclosure permitted in this case. Further, and in line with the second factor, employees of the Companies were only granted access to the REC Procurement Data on a "need-to-know" basis. It thus was not widely disseminated within the Companies.[440]

As also noted, concerning the third factor, the Companies have taken a host of precautions to safeguard the REC Procurement Data. The Companies acquired the REC Procurement Data via contracts containing strict confidentiality provisions; the Companies have at all times ensured the secrecy of the REC Procurement Data; and all of the Companies' filings containing the REC Procurement Data have been done under seal.[441] As further previously noted, with regard to the fourth factor, the REC Procurement Data bears independent economic value. Its dissemination would likely cause competitive harm to the Companies by undermining the

---

[438] *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance* (1997), 80 Ohio St.3d 513, 524-25.

[439] Stathis Aff., ¶3. As demonstrated below, the partial disclosure of the REC Procurement Data that occurred with the filing of the improperly redacted Exeter report does not constitute 'abandonment' of trade secret protection.

[440] Stathis Aff., ¶3.

[441] *See* Docket, Case No. 11-5201-EL-RDR.

integrity of future REC procurement efforts due to decreased supplier participation in the Companies' RFPs.[442]

Concerning the fifth factor, as detailed in the Exeter Report, the Companies incurred significant expenses in retaining Navigant and conducting an open, transparent and fulsome series of REC RFPs, the means by which the Companies acquired the REC Procurement Data.[443] Lastly, regarding the sixth factor, it is difficult to envision how another entity could acquire the REC Procurement Data, aside from its public dissemination, regardless of the time and expense expended. Hence, the strenuous efforts on the part of the Companies to ensure the protection of the REC Procurement Data since its generation during the RFP process. Accordingly, the REC Procurement Data also satisfies the six-factor test recognized in *The State ex rel. The Plain Dealer.*

Moreover, the Commission has regularly found that pricing and bidding information along the lines of the REC Procurement Data meets the six-factor test. For example, in *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*,[444] a utility sought trade-secret protection for confidential pricing and growth projections data contained in several spreadsheets attached to its application to adjust a rider. The utility argued that the "information should be protected as proprietary information because it would enable competitors to use it in conjunction with public information to manipulate bids in the competitive marketplace."[445] The Commission agreed and found that the pricing and growth projection information at issue passed the six-factor test.[446]

---

[442] *See* Case No. 11-5201-EL-RDR, Navigant Consulting, Inc. Comments Letter, p. 2 (Oct. 26, 2012).

[443] Commission Ordered Ex. 2, pp. 3-6.

[444] Case No. 10-2326-GE-RDR, 2012 Ohio PUC LEXIS 89, *3-6 (Jan. 25, 2012).

[445] *Id.* at *3.

[446] *Id*. at *5.

The Commission has made similar determinations in a variety of contexts involving financial information.[447] Here, the Commission should adhere to its past precedent and reject OCC and the Environmental Intervenors' claims that the REC Procurement Data does not meet the six-factor test.

C. The Companies Never "Abandoned" The REC Procurement Data And Their Motion To Protect The REC Procurement Data Was Timely.

Contrary to the claims by the Environmental Intervenors, the Companies did not "abandon" the REC Procurement Data when an improperly redacted public version of the Exeter Report was placed on the docket for this proceeding.[448] In that version of the Exeter Report, [redacted] This in no way constitutes the abandonment of the REC Procurement Data by the Companies.

First, as detailed in the transcript of this proceeding, the inadvertent and involuntary disclosure of some of the REC Procurement Data in the public version of the Exeter Report provides no basis to claim that abandonment somehow occurred. [redacted][449] [redacted][450]

[447] *See, e.g.*, *In the Matter of the Application of Waterville Gas Company for Approval of a Natural Gas Transportation Agreement with Johns Manville International, Inc*., Case No. 11-5437-GA-AEC, 2011 Ohio PUC LEXIS 1256, *4-5 (Nov. 22, 2011) (pricing information and length of term in a contract for natural gas transportation agreement were trade secrets and satisfied six-factor test); *In the Matter of the Application of Youngstown Thermal, LLC and Youngstown Thermal Cooling, LLC to Issue Securities*, Case No. 11-2914-HT-AIS, 2011 Ohio PUC LEXIS 1007, *4-5 (Sept. 13, 2011) (finding that financial information and arrangements met six-factor test); *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for 2010 In the Matter of the Application of Duke Energy Ohio, Inc. to Establish its System Reliability Tracker of its Market-Based Standard Service Offer for 2010*, Case Nos. 10-974-EL-FAC, 10-975-EL-RDR, 2011 Ohio PUC LEXIS 682, *6 (June 1, 2011) (finding that capacity costs and prices met the six-factor test).

[448] *See* EI Br., pp. 24-27.

[449] Tr. Vol. III, p. 648 (Confidential).

[450] *Id*. (Confidential).

[redacted][451]

[redacted]

[redacted]

[redacted][452] [redacted]

[redacted][453] The Commission subsequently granted Staff's request for an extension until August 15, 2012.[454]

On or about August 13, 2012, [redacted]

[redacted][455] [redacted][456] [redacted]

[redacted][457] The public version of the Exeter Report was not properly redacted, [redacted] was inadvertently disclosed. Given that the public version of the Exeter Report was not filed by the Companies and that the Companies lacked an opportunity for final review before the public filing of the report, the Companies clearly had no control over the disclosure of this portion of the REC Procurement Data. Thus, the disclosure of this information was *involuntary* on the Companies' part, and could hardly be described as "abandonment." Hence, this involuntary and inadvertent disclosure of the specific REC Procurement Data at issue simply does not amount to an abandonment of the REC Procurement Data.[458]

---

[451] *Id*. at 650 (Confidential).

[452] *Id*. (Confidential).

[453] *Id*. (Confidential).

[454] Case No. 11-5201-EL-RDR, Entry, p. 2 (June 14, 2012).

[455] Tr. Vol. III, p. 651 (Confidential).

[456] *Id*. (Confidential).

[457] *Id*. (Confidential).

[458] Cases involving the directly analogous scenario, the involuntary, inadvertent disclosure of privileged information, prove instructive here. For example, in *Hamilton County, Ohio v. Hotels.Com, L.P.*, Case No. 3:11 CV 15, 2011 U.S. Dist. LEXIS 83520 (N.D. Ohio July 29, 2011), the court found that involuntary disclosure of

Second, OCC and the Environmental Intervenors contend that the Companies somehow waived the right to seek protection of the trade secret material left unredacted by Staff.[459] This ignores several salient facts. As noted, [redacted][460] [redacted][461] [redacted][462] [redacted] As explained at the beginning of the evidentiary hearing, [redacted]

(continued…)

privileged information did not waiver any privilege. Defendant internet travel sites moved to strike plaintiff counties' use of privileged and work product information attached to the counties' notice of supplemental authority. *Id.* at *2. The counties claimed that the internet travel sites had waived any such privilege/work product protection because a Georgia state court had ordered the material produced. *Id.* at *9. Subsequently, a member of the Florida General Assembly somehow obtained copies of the privileged material and had disseminated it to other assembly members as well as the media. *Id.* at *10. Approximately 2-3 months had passed since the material had originally been disclosed via the Georgia court order. *Id.* The court granted the motion to strike of the internet travel sites. The court found that compliance with a Georgia state court's order "was not a voluntary disclosure which resulted in a waiver of the privilege." *Id*. In light of this finding, the court subsequently held: "Clearly, *the involuntary and unauthorized public dissemination of a privileged document or documents filed with a court pursuant to a court order does not constitute a waiver of the privilege*. Rather, any such disclosure must be voluntary…" *Id.* at *11 (emphasis added). *See also*, *Florida House of Representatives v. U.S. Dept. of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992) (holding that deliberative process privilege not waived when privileged information produced to Congress under a threat of subpoena and pursuant to a Freedom of Information Act request because "[i]f documents are exempt from disclosure under the FOIA, the fact that they were involuntarily disclosed by means other than the FOIA should not lead to a finding of waiver").

[459] OCC Br., p. 82; EI Br., p. 24.

[460] Tr. Vol. III, p. 651 (Confidential).

[461] *Id*. (Confidential).

[462] *Id*. at 653-54 (Confidential).

[redacted][463] That opportunity came on the first day of the evidentiary hearing.

Moreover, given that the disclosure at issue was involuntary, the Companies must be given—and under case law, have—considerable leeway as to the timing of their efforts to rectify the improper disclosures. For example, in *Pub. Citizen Health Research Group v. FDA*[464], as part of a Freedom of Information Act request, the defendant government agency inadvertently released information containing trade secrets to the plaintiff. The defendant-intervenor corporations then filed a motion for a protective order to have the inadvertently disclosed trade secrets placed under seal. Notably, the corporations filed their motion approximately three months after learning of the inadvertent disclosure by the government agency.[465] The plaintiff argued that the passage of time effected a waiver of trade secret status.[466]

The court disagreed. The court began by drawing a sharp distinction between voluntary disclosure, i.e., instances wherein "the escape of the information into the public domain . . . was due to a conscious choice by the party seeking to have the information's dissemination halted," and involuntary disclosure, i.e., instances such as those "where the government inadvertently inserted Defendant-Intervenors' information into the public domain."[467] The court held that these two types of cases were "qualitatively different" from one another.[468] The court then proceeded to dismiss the plaintiff's waiver argument: "[w]hile Defendant-Intervenors did not move with all dispatch in requesting a protective order, their inaction does not constitute a

[463] Tr. Vol. I, p. 19 (Confidential)

[464] 953 F. Supp. 400 (D.C. 1996).

[465] *Id*. at 402.

[466] *Id.*

[467] *Id.* at 404.

[468] *Id.*

waiver of any confidentiality interests they may have had in the information."[469] A similar analysis obtains in the analogous context of the involuntary, inadvertent disclosure of privileged information.[470]

Here, there was no "conscious choice" by the Companies to "insert" the REC Procurement Data "into the public domain." The exposure of [redacted] in the improperly redacted version of the Exeter Report occurred without the Companies' knowledge, consent or control. Had the Companies been afforded the opportunity of final review, which they were promised but subsequently denied, [redacted] Given the involuntary nature of the disclosure of this proprietary information, the passage of time since its disclosure simply does not affect a waiver of its trade secret status.

Third, under Ohio law, partial disclosure of a trade secret neither compromises nor defeats trade secret status, and most certainly does not constitute "abandonment." For example, in *State ex rel. Perrea v. Cincinnati Public Schools*,[471] a public school teacher sought a writ of mandamus to compel the release, pursuant to a public records request, of a set of exam questions created by a school district. The teacher argued that because the school district had disseminated the confidential scoring guidelines for the exams, the exam questions themselves had been disclosed.[472] The Court disagreed: "Even if the scoring guidelines could be used to reconstruct

[469] *Id.* at 405.

[470] *See supra* note 458, discussing *Hamilton County, Ohio v. Hotels.Com, L.P.*, Case No. 3:11 CV 15, 2011 U.S. Dist. LEXIS 83520, *9-10 (N.D. Ohio July 29, 2011) (upholding privilege approximately three months after involuntary disclosure of privileged information occurred via state court order, and ultimately through the media, because of the involuntary nature of the disclosure).

[471] 123 Ohio St.3d 410, 415 (2009).

[472] *Id.*

the four constructed-response questions, this partial disclosure would not foreclose the possibility of a trade secret."[473]

So too here, the partial disclosure of the REC Procurement Data does not undermine its status as a trade secret. Indeed, [redacted] was revealed in the improperly redacted Exeter Report. As such, the Environmental Intervenors' claim that "the seller and pricing information is readily ascertainable through the publicly available Exeter report" is simply false.[474] [redacted] has not been disseminated, and, as detailed above, the Companies have endeavored to safeguard the REC Procurement Data, including the data inadvertently disclosed. The cases relied upon by the Environmental Intervenors are thus inapposite to this proceeding because those cases involved the total disclosure and complete public dissemination of the trade secrets at issue.[475]

In a similar vein, OCC argues that the Companies' first motion for protective order, filed on October 3, 2012 was untimely because the redacted version of the Exeter Report was filed on

---

[473] *Id.* (citing *State ex rel. The Plain Dealer v. Ohio Dept. of Ins*. (1997), 80 Ohio St.3d 513, 528; *State ex rel. Lucas County Bd. of Comm'rs. v. Ohio EPA* (2000), 88 Ohio St.3d 166, 174).

[474] EI Br., p. 27.

[475] For example, the Environmental Intervenors rely on *State ex rel. Rea v. Ohio Dept. of Ed.* (1998), 81 Ohio St.3d 527. In that case, the plaintiffs sought to compel the release of various standardized tests arguing that the tests were public records. *Id*. at 529. The Ohio Department of Education countered that the tests were immune from disclosure because they were trade secrets. *Id.* The Supreme Court rejected this argument by questioning whether public entities could ever have their own protected trade secrets, holding that "the protection of competitive advantage in private not public, business underpins trade secret law." *Id*. at 532. The Court further held that since the entirety of the tests at issue were "effectively disseminated into the public domain," the tests could not be considered trade secrets. *Id*. Here, the "protection of competitive advantage" is between private entities; not public entities. Further, the entirety of the REC Procurement Data has not been "effectively "disseminated into the public domain." *See also State ex. rel. Perrea*, 123 Ohio St. 3d at 415-516 (distinguishing *State ex rel. Rea* by holding that public entities can have trade secrets and that the test questions in *State ex. rel. Rea* were drawn from a source that consisted primarily of questions recycled from tests that had been administered previously). The Environmental Intervenors also rely on *Rogers Indus. Prods., Inc. v. HF Rubber Mach, Inc.*, 188 Ohio App.3d 570, 578 (Ohio Ct. App. 2010) in which the court held that a trade secret had been disclosed previously in a patent application. The court ruled that "there is no trade secret protection for confidential information that is disclosed in a published patent application." *Id*. at 576. Unlike the trade secret in *Rogers Indus. Prods.*, in this case, only a small portion, and not the entirety, of the REC Procurement Data has been disclosed. As such, the case law upon which the Environmental Intervenors rely is inapposite to the present proceeding because those cases involve the total disclosure of the trade secrets at issue, as opposed to the partial disclosure that obtains here.

August 15, 2012. For authority, the OCC relies on a strained reading of Rule 4901-1-02(E). That rule provides: "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." Therefore, according to OCC, the Attorney Examiner should have denied the Companies' motion because the mere filing of the Exeter Report somehow automatically rendered it a public document. OCC's arguments fail and the Commission should rule accordingly.

To begin, the Companies did not file the Exeter Report, Staff did. As discussed above, the REC Procurement Data was never publicly filed or disclosed in any way beyond the Companies' provision of it to Staff and the auditor. Indeed, the Companies provided the REC Procurement Data to Staff and the auditors with the understanding that it would remain confidential, and the unredacted version of the Exeter Report was filed under seal. Moreover, in the January 18, 2012 Entry in this proceeding, the Attorney Examiner ruled that any outside auditor chosen by Staff was subject to Section 4901.16. Specifically, the Commission has observed:

> The auditor is subject to the Commission's statutory duty under Section 4901.16, Revised Code, which states:
>
> > Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent.[476]
>
> In turn, the Ohio Supreme Court has construed Section 4901.16 as follows:

[476] Case No. 11-5201-EL-RDR, Entry, pp. 2-3 (Jan. 18, 2012).

> [Section] 4901.16 provides that no PUCO employee or agent is permitted to disclose information acquired in the course of his or her duties except as provided therein. Specifically, the statute prevents employees or agents of the PUCO who examine the accounts, records, or memoranda kept by public utilities pursuant to R.C. 4905.13 from divulging information regarding "the transaction, property, or business" of the public utility other than in reports to the PUCO or testimony in court or commission proceedings…. [Section] 4901.16 *imposes a duty of confidentiality on PUCO employees and agents.*[477]

Hence, Staff was under a continuing duty to keep the REC Procurement Data confidential and the mere filing of a redacted version of the Exeter Report on the docket for this proceeding in no way altered, abridged or suspended that duty. Further, OCC's odd claim aside, the mere filing of the Exeter Report by Staff did not render it a "public document" nor was the Companies original motion for a protective order untimely. Trade secrets, which the unredacted version of the Exeter Report contains, are exempt from Ohio's public records disclosure statutes.[478] OCC's argument is thus misplaced.

D. Disclosing the REC Procurement Data Does Not Serve The Public Interest.

OCC also claims that the disclosure and dissemination of the REC Procurement Data serves the public interest.[479] Nothing could be further from the truth. Indeed, OCC never describes how the public would benefit from disclosure or the specific public interest that would be served. As noted, the disclosure of the REC Procurement Data would likely have a chilling

---

[477] *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.* (2007), 113 Ohio St.3d 180, 191-192 (emphasis added). *See also*, *In the Matter of the Commission's Investigation Into the Adequacy and Availability of Electric Power for the Summer Months of 2001 from Ohio's Investor-Owned Electric Utility Companies*, Case No. 01-985-EL-COI, 2001 Ohio PUC LEXIS 179, *5-6 (May 3, 2001) (holding that Section 4901.16 requires Staff to maintain the confidentiality of proprietary information acquired from a utility during the course of a Commission-sponsored investigation).

[478] *See State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA* (2000), 88 Ohio St. 3d 166, 172 ("The Ohio Uniform Trade Secrets Act, R.C. 1333.61 through 1333.69, is a state law exempting trade secrets from disclosure under R.C. 149.43.").

[479] OCC Br., p. 83.

effect on supplier participation in Ohio's still-developing REC markets.[480] Access to the REC Procurement Data could reveal proprietary supplier bidding strategies, the potential public disclosure of which could clearly make a supplier think twice before bidding into an Ohio-based REC RFP.[481]

The better course is to maintain the status quo. Under the Commission's obligation "to balance the interests of ensuring the confidentiality of proprietary information, encouraging participation in future auctions and maintaining public accountability of the auction process,"[482] the present course strikes just the right balance. The public has access to the very minimally redacted Exeter Report, while the proprietary pricing and supplier-identifying information remains under seal. Maintaining the status quo thus serves the public's right to know and suppliers' rights to have their proprietary bidding data properly safeguarded. OCC's argument to the contrary is wrong and should be rejected.

E. The Attorney Examiner Correctly Found That The REC Procurement Data Contained In Confidential Drafts Of The Exeter Report Warranted Protection As A Trade Secret.

On December 21, 2012, OCC made a public records request to the Commission for documents that reflect the Companies' comments on a confidential draft of the Exeter Report (the "Draft Exeter Report"). In an Entry dated February 14, 2013, the Attorney Examiner, subsequent to an *in camera* review, denied OCC's request. In that Entry, the Attorney Examiner correctly determined that "confidential supplier pricing and supplier-identifying information that

[480] See Case No. 11-5201-EL-RDR, Navigant Consulting, Inc. Comments Letter, p. 2 (Oct. 26, 2012).

[481] *See Duke*, 2012 Ohio PUC LEXIS 500, at *4 (finding that permitting disclosure of CBP data would undermine the "viability of any future auction in Ohio"). *See also*, Case No. 08-935-EL-SSO, CRA International, Inc. Comments Letter, p. 1 (June 7, 2011); Case No. 11-5201-EL-RDR, Navigant Consulting, Inc. Comments Letter, p. 2 (Oct. 26, 2012).

[482] *Ohio Edison*, 2005 Ohio PUC LEXIS 177, at *9 (ordering protection of competitive auction bidding data).

appears in the draft document contains trade secret information."[483] OCC's current challenge to this determination is meritless.

The Draft Exeter Report, which consists of unpublicized and confidential drafts of the Exeter Report and related commentary from the Companies, contains the identical supplier-identifying and pricing information as the unredacted version of the filed Exeter Report and deserves the same protection. As demonstrated above, the REC Procurement Data satisfies the requirements of Section 133.61(D) and the *Plain Dealer* six-factor test. Further, and pursuant to Section 4901.16, Staff and the auditors were under a strict obligation to safeguard the confidential and proprietary information provided to them by the Companies and contained in the Draft Exeter Report.[484]

Moreover, adhering to Section 4901.16 promotes an important policy goal: it encourages utilities, like the Companies, to share confidential and proprietary information with the Commission and Staff. As the Commission has previously held, refusing to follow Section 4901.16 "would have the impact of discouraging utilities from sharing information with the [S]taff for fear that it will be considered to be a public record that must be disclosed upon request (contrary to the likely purpose of Section 4901.16, Revised Code)."[485] Thus, the Commission should affirm the Attorney Examiner's ruling regarding the Draft Exeter Report.

---

[483] Case No. 11-5201-EL-RDR, Entry, p. 5 (Feb. 14, 2013) (relying on Section 1331.61(D) and the *Plain Dealer* six-factor test).

[484] *See Id.*, Entry, pp. 2-3 (Jan. 18, 2012).

[485] *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, 2004 Ohio PUC LEXIS 271, *9-10 (July 28, 2004).

F. The Proposed Disallowance Amount Contained In The Confidential Version Of The Direct Testimony Of OCC Witness Wilson Gonzalez Warrants Commission Protection.

In his direct testimony, OCC witness Wilson Gonzalez proposed a disallowance amount and interest charges based upon the prices that the Companies paid for RECs.[486] The disallowance and interest amounts are mere aggregates of the confidential REC pricing information discussed above. Releasing the proposed disallowance and interest amounts contained therein would enable anyone, with little effort, to arrive at the confidential REC pricing data already deemed worthy of trade secret protection. Specifically, given that the number of RECs is public, releasing the total amount paid for those RECs would allow the price paid for the RECs to become public.[487] Therefore, the proposed disallowance and interest amounts need to remain under seal.

In essence, OCC argues that aggregates of confidential and proprietary information "can be publicly used."[488] The Commission decisions relied on by OCC, however, actually support the Companies' position. For example, in *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,*[489] a telecommunications provider sought to have an aggregate figure regarding data related to "access line counts" placed under trade secret protection. The aggregate number at issue had been compiled from generic data in such a way that it could not be

[486] Gonzalez Testimony, p. 36.

[487] The interest payment proposed by Mr. Gonzalez is derivative of the total amount paid by the Companies and thus similarly needs to be protected to avoid a similar reverse engineering of REC prices.

[488] OCC Br., p. 87.

[489] Case No. 02-1752-TP-PEX, 2002 Ohio PUC LEXIS 889, *1 (Sept. 30, 2002).

broken down into specific access line counts (which were confidential information).[490] Further, the telecommunications provider had historically not sought protection for such information.[491]

In denying the telecommunications provider's motion for a protective order, the Commission found that "the redacted information is an aggregate figure that in no way reveals or could be useful in revealing" specific access line counts (i.e., confidential information).[492] Of particular note was the Commission's rationale that allowing the disclosure of the aggregate number of access lines would not: "(a) *permit the discernment* of the number of access lines within the . . . exchange served by one or more [providers]; or (b) *compromise the confidentiality of any information* related to orders for services."[493] Thus, under the reasoning in *Petition of Deborah Davis*, if the disclosure of an aggregate number can be "useful in revealing confidential information," or "permits the discernment" thereof, or in any way "compromises the confidentiality" of any of its constituent components then that aggregate figure warrants Commission protection.

Here, permitting disclosure of the proposed disallowance and interest amounts – based as they are on an aggregate of specific REC pricing information – would essentially enable anyone to "reverse engineer" these amounts to arrive at the confidential and proprietary constituents thereof. Following *Petition of Deborah Davis*, publicizing the proposed disallowance amount would "permit the discernment" of specific REC prices and "compromise the confidentiality" thereof. For these compelling reasons, the proposed disallowance and interest amounts contained in the direct testimony of OCC witness Gonzalez need to remain under seal.

---

[490] *Id.*

[491] *Id.* at *3.

[492] *Id.* at *6.

[493] *Id.* at *7 (emphasis added).

[redacted]

For the foregoing reasons, the Commission should affirm the Attorney Examiner's rulings granting protective orders regarding the REC Procurement Data.

VI. CONCLUSION

For all of these reasons and the reasons set forth in the Companies' Post-Hearing Brief, the Commission should find that: (a) the costs incurred by the Companies in complying with their renewable energy benchmarks during 2009 through 2011 were reasonably and prudently incurred costs; (b) the Companies' method for the three-percent calculation set forth in Ohio Revised Code Section 4928.64(C)(3) is appropriate; and (c) the Companies did not exceed the three-percent cost figure for their renewable procurements in 2009, 2010 and 2011. The Commission should also adopt the recommendation in the Exeter and Goldenberg Reports that

[494] *See* OCC Br., p. 88 (Confidential).

[495] *See State ex. rel. Perrea v. Cincinnati Pub. Schools* (2009), 123 Ohio St.3d 410, 415-516.

were agreed to by Company witnesses Stathis and Mikkelsen and otherwise dismiss this proceeding.

Date: May 6, 2013

Respectfully submitted,

s/ David A. Kutik

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
(330) 761-7735

David A. Kutik (0006418)
Lydia M. Floyd (0088476)
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 586-3939
ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the following persons by e-mail this 6th day of May, 2013:

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

Attorneys for Mid-Atlantic Renewable Energy Coalition

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

Attorneys for Office of the Ohio Consumers' Counsel

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

Attorneys for the Staff of the Public Utilities Commission of Ohio

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

Attorneys for The Ohio Energy Group

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

Attorney for the Sierra Club

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

Attorney for Nucor Steel Marion, Inc.

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

Attorneys for the OEC

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

Attorney for Citizen Power

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

Attorneys for The OMA Energy Group

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

Attorneys for Interstate Gas Supply, Inc.

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

Attorney for ELPC

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

Summary: Reply Brief electronically filed by Lydia M. Floyd on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company