BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

INITIAL BRIEF
BY
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***** CONFIDENTIAL VERSION *****

INITIAL BRIEF
BY
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I. INTRODUCTION

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

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

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

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

[4] "RECs" means renewable energy credits.

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

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

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

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

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

[7] *Id.*

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

[8] February 23, 2012 Entry at 1.

[9] *Id.* at 2.

[10] *Id.*

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

[12] Exeter Audit Report at iv.

[13] *Id.*

Renewable obligations."[14] Before filing the Final Audit Report, however, FirstEnergy was provided with a draft of the Audit Report ("Draft Audit Report") for review and comment before filing.[15] And through this public records request[16] the parties learned that, in a pre-filing draft of the Audit Report that parties other than FirstEnergy had not seen, the Exeter Auditor had originally drafted a recommendation for the PUCO to not allow FirstEnergy to collect from customers any procurement of In-State All Renewable Credits above $50/REC.[17] And it was learned that, after FirstEnergy provided comments to the PUCO Staff and the Exeter Auditor regarding the Auditor's draft recommendation,[18] the Auditor's specific recommendation to protect customers was removed from the final Audit Report that was filed in this case.[19]

The recommendation in the draft Audit Report was similar to OCC's position that all costs for In-State All Renewable Credits that were purchased at prices above $45 should not be paid by FirstEnergy's customers.[20] Specifically, in accordance with OCC testimony, "[t]he Commission should disallow[21] $157.7 million from Rider AER, to protect customers from paying for costs resulting from FirstEnergy's imprudent decision to purchase grossly over-priced In-State All Renewable RECs exclusively from its

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[14] *Id.* at 33.

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

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

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

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

[19] *See* Exeter Audit Report.

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

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

affiliate, FES.[22]

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

First, among the critical facts that should shape this Commission's decision, is that FirstEnergy knew the identity of the bidder—FirstEnergy Solutions[23]—at the time that the decision was made to purchase the RECs at prices between $300 per REC and $700 per REC. FirstEnergy knew that its affiliate—FirstEnergy Solutions[24] would benefit from its decision to pay prices for In-State All Renewable Energy Credits that "were well above the prices customarily seen in any of the other RECs market throughout the country."[25] Additionally, the prices paid to FirstEnergy Solutions were, at times, as much as 15 times the applicable forty-five-dollar Alternative Compliance Payment ("ACP").[26]

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

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[22] Direct Testimony of Wilson Gonzalez at 5.

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

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

[25] Exeter Audit Report at 28.

[26] *Id.*

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

proceedings.[28]

FirstEnergy did not even consider making an alternative compliance payment--in lieu of purchasing grossly over-priced RECs--to save significant dollars for consumers. FirstEnergy paid $157.7 million for RECs purchased from its affiliate.[29] If FirstEnergy had paid compliance payments in lieu of such purchases, then it would not have cost its customers a penny. It would have cost FirstEnergy $15.2 million.[30] Because FirstEnergy did not want to pay $15.2 million, it made a decision that was $157.7 million[31] to the detriment of its customers, and a $157.7 million benefit to its affiliate—FirstEnergy Solutions. It was a win-win decision for FirstEnergy's parent corporation and a no-win situation for customers.

Third, instead of waiting for Ohio's renewables market to develop, FirstEnergy significantly compounded its imprudent decision to purchase high-priced non-solar RECs for compliance year 2009 by purchasing high-priced non-solar RECs for compliance years 2010 and 2011, long before purchases were required to meet 2010 and 2011 compliance obligations.[32] This decision was made by FirstEnergy—not Navigant. The only one who benefitted from this imprudent business decision was FirstEnergy's affiliate—FirstEnergy Solutions.

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

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

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

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

[31] *Id.*

[32] *Id.* at 17.

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

Sixth, FirstEnergy knew that the prices bid by FirstEnergy Solutions reflected significant economic rents.[35] They knew that those prices reflected significant economic rents because FirstEnergy later made a counter offer that was $350 less than the amount that FirstEnergy Solutions bid.[36]

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

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

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

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

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

[36] Transcript Volume I, page 205.

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

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

II. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

RECs in 2009 at an offer price of $700.00 per REC and 50,000 In-State All Renewable RECs in 2010 at a weighted average price of $500.00 per REC.[44]

Although the quantity of RECs bid fell significantly short of FirstEnergy's compliance obligations and the bids were remarkably high, Navigant recommended that the bids be accepted.[45] Navigant did, however, warn FirstEnergy that, "the In-State All Renewable market was extremely thin and still developing."[46] Despite only receiving a single offer for In-State All Renewable RECs, FirstEnergy executed a contract with its affiliate, FES, on August 20, 2009, purchasing In-State All Renewable RECs at $700.00 per REC for 20,000 2009 RECs and $500.00 per REC for 50,000 2010 RECs.[47] However, these prices far exceeded any prices known to have been paid in compliance markets in the United States for non-solar RECs.[48]

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

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

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

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

[47] *Id.* at 26.

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

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

[50] *Id.* at 33.

[51] *Id*.

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

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

In the interim, however, FirstEnergy reduced the target amount of RECs in light of revisions to the baseline calculation of compliance obligations.[55] Again, FirstEnergy paid exorbitant prices for 2009-2011 In-State All Renewable RECs, paying $683.44 per REC for 37,965 2009 RECs, $575.57 per REC for 31,800 2010 RECs, and $481.09 per REC for 26,084 2011 RECs.[56] Again, these prices far exceeded any prices known to have been paid in markets throughout the United States.[57]

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[52] *Id.*

[53] *Id.*

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

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

[56] *Id.*

[57] Exeter Audit Report at 28.

Given the limited response to RFP 2, a third request for proposal ("RFP 3") was issued on July 1, 2010.[58] RFP3 resulted in proposals from two (2) entities for In-State All Renewables for 2010 and 2011 compliance years. FES bid $500.00/REC for 29,676 In-State All Renewable 2010 RECs and 145,269 In-State All Renewable 2011 RECs.[59] Another bidder bid $26.50 for 5,000 In-State All Renewable RECs for compliance year 2011.[60]

Although it had not been done on prior occasions, FirstEnergy negotiated with the high bidder, FirstEnergy Solutions, to obtain a price lower than the amount bid (but still far greater than the low bidder.) Specifically, FirstEnergy made a counter-offer of $150/REC or over $50 million less[61] than what FirstEnergy Solutions had bid.[62] FirstEnergy Solutions made a counter-offer to FirstEnergy's offer of $325/REC.[63] As a result of this negotiation, the price of 145,269 2011 RECs bid by the high bidder, FirstEnergy Solutions, was reduced from $500.00 per REC to $325.00 per REC.[64]

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

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

[59] *Id.* at 41.

[60] *Id.*

[61] ($500- $150 = $350) ($350 x 145,269 = $50,844,150).

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

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

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

[65] *Id.* at 30.

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

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

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[66] *Id.* at 31.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 42.

[71] *Id.*

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

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

[74] *Id.*

(11) proposals were received from seven entities for In-State All Renewables.[75] From these, 5,000 RECs at a price of $6.90 per REC and 15,000 RECs at a price of $8.50 per REC were recommended by Navigant, and purchased by FirstEnergy.[76]

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

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

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

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[75] *Id.*

[76] *Id.* at 44.

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

[78] *Id.*

[79] *Id.*

[80] *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, PUCO Entry (Jan. 18, 2012)

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

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

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

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

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

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

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[81] *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, PUCO Entry (Feb. 23, 2012)

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

[83] Exeter Audit Report, at iii.

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

5. The FirstEnergy Ohio utilities paid unreasonably high prices for In-State All Renewables RECs purchased from their competitive affiliate, FirstEnergy Solutions.

6. Prices for In-State All Renewable RECs in the range of $300 to $700 exceeded the reported prices paid for non-solar compliance RECs anywhere in the country between July 2008 and December 2011 by at least $250 to $650.

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

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

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

Exeter Audit Report, pp. iii-iv.

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

[84] Exeter Audit Report, p. iv.

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

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

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

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

A. Standard Of Review

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

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

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

[88] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Stipulation and Recommendation, at 10-11 (Feb. 19, 2009).

[89] *See id.*

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

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

B. Law and Argument

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

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

As indicated above, Exeter recommended the examination of a disallowance, based on its factual findings that: (1) FirstEnergy[92] had not established a price limit on what it would pay for In-State All Renewable RECs; (2) FirstEnergy "paid unreasonably high prices for In-State All Renewable RECs purchased from their competitive affiliate, FirstEnergy Solutions;" (3) the prices paid by FirstEnergy for In-State All Renewable RECs "exceeded the reported prices paid for non-solar compliance RECs anywhere in the country between July 2008 and December 2011 by at least $250 to $650;"[93] (4) FirstEnergy "had several alternatives available to the purchase of high-priced In-State All Renewables RECs, none of which were considered or acted upon;" and (5) FirstEnergy

[91] *Id.*

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

[93] *Id.*

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

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

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

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

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[94] Exeter Audit Report at 33.

[95] *Id.* at 26.

[96] *Id.*

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

[98] *Id.* at 9.

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

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

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

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

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

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[101] *Id.*

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

[103] Direct Testimony of Wilson Gonzalez at 13.

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

[105] *Id.*

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

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

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

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

[107] *Id.*

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

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

[110] *Id.* at 11.

[111] *Id.*

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

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

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

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

[113] *Id.* at 11.

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

[115] *Id*.

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

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

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

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

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

i. FirstEnergy knew that it was purchasing grossly over-priced Renewable Energy Credits from its affiliate, FirstEnergy Solutions that it would charge to its customers.

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

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[118] *Id.*

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

[120] Direct Testimony of Wilson Gonzalez at 18.

[121] *Id.*

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

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

The internal review team knew the identities of the bidders when making their decisions whether to purchase the renewable energy credits. This fact became evident when Mr. Bradley testified that a member of the internal review team[126] contacted him (in regard to Navigant's recommendations to FirstEnergy regarding the purchase of RECs in response to RFP 3)[127] and requested that "Navigant reach out to FirstEnergy Solutions to conduct a negotiation through a counteroffer."[128]

The Exeter Auditor was not aware that FirstEnergy was provided the names of the qualified bidder before the decision whether to purchase the RECs was made by FirstEnergy.[129] Had FirstEnergy disclosed this fact to the Exeter Auditor, it may have impacted the Auditor's findings.

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

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

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

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

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

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

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

[129] EXAMINER PRICE: And then later they opened the bids and chose on price. When they chose on prices, did Navigant inform the companies that FirstEnergy Solutions was the successful bidder or was applying?

THE WITNESS: I don't believe at that point that the company was informed that FirstEnergy was the successful bidder. I think they were simply provided price information, is my understanding. Transcript Volume I-confidential, p. 67.

rents to FirstEnergy Solutions, especially given the market power exhibited by FirstEnergy Solutions in this segment of the market.

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

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

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

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

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

to purchase the RECs[134] at or below the $45 ACP price and then resell them to FirstEnergy at up to $700 per REC, realizing sizable economic rents—at the expense of utility customers.

Moreover, the memorandum of Navigant Consulting to FirstEnergy, dated October 18, 2009, is very informative concerning the Ohio REC supply and PUCO certifications of Ohio In-State Renewable facilities during the early period of Ohio alternative energy compliance. Specifically, that Navigant memorandum states:

- "The FirstEnergy Solutions Corp. applications bid into the FirstEnergy RFP that have either been granted PUCO certification or are in pending status represent over 75% of the total estimated Ohio-REC production for 2010."[135]
- "When limited to PUCO certified applications; the FirstEnergy Solutions Corp. applications represent over 90% of the total certified Ohio REC production for 2010."[136]

By any stretch of the imagination, the market control information provided by Navigant to FirstEnergy should have alerted FirstEnergy that market power was and could be exerted by FirstEnergy Solutions in the Ohio In-State All Renewable segment of the

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

[135] OCC Exhibit 9, EA Set 3-INT – 3 Attachment 2-Confidential, at pg. 4 of 10. Navigant also goes on to say that "Based on a review of available information, NCI has not been able to determine whether the remaining 25% of 2010 Ohio would have controlled 100 percent of the Ohio In-State All Renewable RECs as of October 16, 2009." That the only bid received in both the 2009 and 2010 auctions came from FirstEnergy Solutions lends credibility to that possibility.

[136] *Id.*

compliance market. With this market power, FirstEnergy Solutions had the ability to affect the total quantity or the price in the Ohio In-State All Renewable Energy Credits market for the period of the FirstEnergy RFPs.

When presented with this evidence and questioned on whether FirstEnergy Solutions was in a position to exert market power Company, FirstEnergy witness Stathis admitted the possibility of economic rents.

> Q. So if a seller controlled over 50 percent of the supply in the in-state all renewable REC markets, could that seller receive excess or extra returns due to positional advantage?
>
> A. If you're saying can he earn economic rents? I think economic rents are something that exists in most markets. The only market that economic rents are zero are in a -- theoretically in the economic textbooks under perfect competition where price equals marginal costs, there are no economic rents. But those other markets are not defined as perfectly competitive so there's usually some, yes. If somebody has an advantage making some sort of innovation for earning economic rents. I think that's healthy in a marketplace and drives new suppliers into the market. So to answer your question, it's certainly possible and expected that *somebody in that position could be earning economic rents.*"[137]

Finally, the fact that FirstEnergy asked Navigant to present a price counter-offer to FirstEnergy Solutions in response to its bid in RFP 3 is a resounding admission that significant economic rents were contained in FirstEnergy Solutions bids.[138] Specifically, FirstEnergy Solutions submitted a bid to sell 145,269 In-State All Renewable Energy Credits for 2011 at a price of $500/REC.[139] FirstEnergy made a counter-offer of $150/REC, or over $50 million less[140] than what FirstEnergy Solutions had bid for the In-

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

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

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

[140] ($500- $150 = $350) ($350 x 145,269 = $50,844,150)

State All Renewable Energy Credits.[141] FirstEnergy Solutions agreed to reduce its bid price to $325/REC.[142] With that one transaction alone, FirstEnergy had over 50 million reasons to know that the prices bid by FirstEnergy Solutions reflected significant economic rents.

Indeed, Navigant witness Bradley indicated that FirstEnergy was probably in a position where it could have "walked away" from the transaction. In this respect, he stated:

> At that point we had recommended to the FEOUs that they select the RECs, and Ebony Miller contacting me in our discussion it – it became clear that at this point there seemed – time seemed to be on the side of the FEOUs such that if FES had walked away, and given that we are talking for 2011 RECs, there may have been time, you know, for an attempt to procure these RECs from the marketplace.[143]

The fact was that at the time in August 2010 that FirstEnergy determined to pay $325 per REC for 145,269 2011 RECs, the market was easing and pricing information was becoming more readily available. Indeed, at about that time, on August 12, 2010, the Spectrometer report was first published, which showed prices for Ohio In-State Non-Solar RECs of between $32.00 and $36.00[144] per REC.

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

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

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

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

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

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

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

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

OCC witness Gonzalez' opinion that a competitive process does not always obtain a competitive outcome is illustrated by the testimony of FirstEnergy witness Dean Stathis. Mr. Stathis' direct testimony highlights the concerns that FirstEnergy had with the results of RFP 3. In fact, against the advice of Navigant to purchase 145,269 2011 RECs at the $500.00 per REC bid price, FirstEnergy made a counter-offer to one of two bidders—the high bidder—in RFP 3. Ultimately, that bidder—FirstEnergy Solutions—accepted $24 million dollars less for its RECs than it requested in its bid.[147]

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

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

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

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

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

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

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

The Exeter Auditor and OCC witness Gonzalez both acknowledge that FirstEnergy compounded the financial harm to its customers by locking in the grossly excessive REC prices in the 2009 compliance year to meet the renewable requirements

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

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

[150] Exeter Audit Report at 28.

for 2010 and 2011.[151] This is especially the case since alternatives such as *force majeure* and paying an ACP were available to FirstEnergy.

FirstEnergy's apparent self-serving reason for paying grossly excessive prices for In-State All Renewable Energy Credits beyond 2009 was for the purposes of price risk mitigation.[152] In the abstract, a laddering concept has some merit in reducing customer price risk. At times, OCC has been supportive of Ohio utilities incorporating laddering in their SSO auctions. However, in real life, no one using sound judgment executes laddering when the prices bid are the highest ever seen, including more than 15 times greater than the ACP,[153] in a market that is constrained and exhibits the exercise of market power.

A more measured and prudent management approach would have been to exercise the two alternatives available to FirstEnergy while the Ohio In-State All Renewables market matured and more projects came on line and were certified by the Commission. As stated in OCC witness Gonzalez' testimony, "When FirstEnergy 'doubled down' (locked in excessive prices in 2009 to meet the renewable requirements for 2010 and 2011 for In-State All Renewable RECs), it resulted in an even larger losing bet for consumers, especially given the increased volumes of RECs purchased in later years."[154]

Mr. Gonzalez further testified that these decisions to purchase In-State All Renewable RECs at grossly excessive prices beyond the initial period were "particularly imprudent," "especially given the increased volumes of RECs purchased in later

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

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

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

[154] Direct Testimony of Wilson Gonzalez at 17.

years."[155] As he testified, "[i]f FirstEnergy believed that the In-State All Renewables RECs were going to be permanently short and constrained, it should have made a 'force majeure' filing as permitted by law and/or should have made the ACP in lieu of purchasing such outrageously priced RECs."[156] Thus, FirstEnergy's imprudent decision-making was compounded by its purchasing of In-State All Renewable RECs in 2009 for 2010 and 2011 and its purchase of In-State All Renewable RECs in 2010 for 2011.[157] Such imprudent decisions must be remedied by this Commission, for customers.

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

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

> FirstEnergy's purchase of excessively priced RECs, especially when they were purchased from an affiliate in a nascent market, should have been carefully vetted. Certainly, the prospect of paying over 15 times the ACP and similar multiples of prices paid in other states for comparable products, in a related party transaction, should have set off some internal alarms.

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[155] *Id. at 17.*

[156] *Id.*

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

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

> Given that on two occasions -- RFP 1 and RFP 2 -- FES was the only qualified bidder for In-State All Renewables, that should have raised a red flag not only in terms of evaluating the reasonableness of the offer but also in terms of evaluating whether the Code of Conduct applicable to affiliate transactions was being drawn into question. (footnote 21 omitted) Indeed, Ohio law requires that at least 4 suppliers bid into an SSO auction to protect consumers from market power. (footnote 22 omitted) If this had been a purchase of power, FirstEnergy's transaction with its affiliate would almost certainly have been investigated by FERC and the Federal Trade Commission. (footnote 23 omitted) Buying these excessively priced RECs from FES, and over multiple years, was egregious.[159]

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

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

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

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

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

a. FirstEnergy should have consulted with the PUCO before purchasing excessively priced in-state all renewable energy credits from its affiliate—FirstEnergy Solutions.

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

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

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

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

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

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[162] Exeter Audit Report at 32.

[163] *Id.*

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

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

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

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

[165] *Id.*

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

[167] Direct Testimony of Wilson Gonzalez at 23.

[168] Exeter Audit Report at 32.

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

And if In-State All Renewable RECs were not available in later years, Exeter concluded that "the Companies would have had a basis for requesting a *force majeure* determination by the Commission." [170] Yet even in August 2010, when FirstEnergy received a bid of $26.50 per REC for 5,000 In-State All Renewable RECs from another supplier,[171] FirstEnergy still paid $325 per REC to FES for 145,269 In-State All Renewable RECs at a total cost of $47,212,425.[172] In doing so, FirstEnergy paid nearly double the highest dollar amount it had paid under any individual contract for the purchase of In-State All Renewable RECs. Had FirstEnergy waited until the following year to purchase these RECs at the weighted average price paid of $8.10 per REC for RFP 6 in November 2011,[173] FirstEnergy would have paid $1,176,679 or approximately 2.5% of what was actually paid.[174]

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

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[169] Exeter Audit Report at 33.

[170] *Id.*

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

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

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

[174] 145,269 X $8.10 = $1,176,767; $1,176,767 / $47,22,425 = 2.5%

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

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

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

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

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[176] *Id.*

[177] R.C. 1.42.

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

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

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

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

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

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

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

[181] *Id.*

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

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

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[182] *Id.*

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

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

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

To the extent that FirstEnergy relied on Navigant's recommendation to purchase the RECs, as discussed above, it is essential to recognize that, as Mr. Bradley testified, Navigant's recommendations were made strictly from the standpoint of REC availability without any consideration of whether *force majeure* could be obtained or compliance payments could be made as alternatives to the purchase of RECs.[185] Indeed, as discussed above, Navigant's recommendations ignored any standard of reasonableness in suggesting that the cost of RECs in the nascent Ohio market could be "multiples" of prices paid in other compliance markets.

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

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

[186] Direct Testimony of Wilson Gonzalez at 26.

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

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

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

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

[188] Direct Testimony of Wilson Gonzalez at 26.

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

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

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

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

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

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

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

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

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

Had FirstEnergy paid the compliance payments in lieu of purchasing the In-State All Renewable RECs at grossly excessive prices, the costs under discussion for possible consumer payment would have been much less. The costs would have amounted to $15,181,335[195] rather than the $157,698,605.[196] The latter figure is what consumers will be billed for the excessively priced In-State All Renewable RECs that were purchased from its affiliate, FES.

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

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[194] *Id.*

[195] This amount can be calculated by multiplying the quantity of RECs purchased for more than the compliance payment by the amount of the compliance payments for each year, from data shown in the Exeter Audit report, Table 5, p. 28 or from Mr. Gonzalez's Confidential Revised Exhibit WG-3.

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

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

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

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

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

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

[198] *See id.* at 28.

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

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

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

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

3. FirstEnergy lacked a Contingency Plan to protect customers

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

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

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

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

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

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

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

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

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

[204] Exeter Audit Report at 9.

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

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

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

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

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

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

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

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

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[210] Exeter Audit Report at 9.

[211] Exeter Audit Report at 9.

[212] Exeter Audit Report at 9-10.

[213] Exeter Audit Report at 10.

[214] Exeter Audit Report at 10.

2. Did the Companies have a contingency plan in place in the event of an inadequate response to the initial RFP? If so, was the approach used following the initial FRP consistent with the contingency plan?

FE: FE's normal business practice for overseeing all procurement is through the key document "FirstEnergy Commercial Portfolio Risk Management." One of the key principles in the document is to factor in contingent planning. In 2009, there was very little known about the Ohio REC market so the plan was that if the RFP was unsuccessful they would hold another one.[215]

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

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

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

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

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

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

> The mechanism employed by the FirstEnergy Ohio utilities for purchasing RECs through the RFP process was to stack the conforming bids received from eligible bidders from lowest price to highest price and to purchase the number of RECs needed to comply with the In-State All Renewables requirement regardless of the price bid. No limit price was established by the Companies prior to the receipt of bids, that is, the Companies indicated that prior to the receipt of bids, the Companies did not establish a maximum price that they would be willing to pay for RECs, or a price that would trigger embarking on a contingency plan. Reliance on this approach resulted in the purchase of more than 337,000 In-State All Renewables RECs at prices between $300 and $700 dollars.[218]

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

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

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

[218] Exeter Audit Report at 28-29.

[219] Exeter Audit Report at 33.

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

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

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

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

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

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

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

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

C. Relief Sought

1. The PUCO should disallow $157.7 million that FirstEnergy paid for in-state all renewable RECs for compliance periods 2009 through 2011, because of FirstEnergy's imprudent purchasing decisions. And FirstEnergy should also refund to customers $31.2 million in carrying costs associated with the recovery of such costs from customers.

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

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

[223] Direct Testimony of Earle at 485

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

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

OCC witness Gonzalez recommended and quantified a disallowance of FirstEnergy's In-State All Renewable RECs that "it unreasonably and imprudently purchased." The disallowance he recommended is $157.7 million as shown on Exhibit WG-2 (Attached to the Direct Testimony of Wilson Gonzalez), which removes all In-State All Renewable REC purchases made during the audit period by FirstEnergy above the ACP. Additionally, Mr. Gonzalez recommended that $31.2 million in carrying costs associated with customers' payments made to FirstEnergy for the imprudent AER charges be reimbursed.

Of this total amount of dollars recommended to be disallowed and reimbursed, Mr. Gonzalez recommended that a portion of the dollars, representing an "ACP equivalent payment for FirstEnergy's In-State All Renewable REC requirements" be deposited to the credit of the Advanced Energy Fund created under R.C. 4928.61. This amount is $15.3 million.[227]

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

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[225] Exeter Audit Report at iv.

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

[227] Direct Testimony of Wilson Gonzalez at 36.

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

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

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

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

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

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[228] *Id.* at 31.

[229] *Id.*

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

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

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

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

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

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

[231] *Id.*

[232] *Id.* at 13.

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

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

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

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

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

[234] *Id.*

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

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

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

3. The Commission should order an investigation of the corporate separation between FirstEnergy and FirstEnergy Solutions.

Given the significance of the issues involving affiliate transactions and the negative impact on customers, the Commission should require an investigation of whether there were any inappropriate communications (regarding the purchase of In-State All-Renewable Energy Credits) between FirstEnergy (or its representatives) and FirstEnergy Solutions. Although the Exeter Auditor raised the issue of "improper conveyance of information to FES by FirstEnergy Ohio utilities,"[237] it is evident that the Exeter Auditor did not go far enough in evaluating this issue.[238] In this regard, the Exeter Auditor perceived certain limitations in the scope of its work. It did not conduct an investigation of corporate separation issues even though the Exeter Auditor stated in the audit report that it "found no evidence that FES received any special treatment by the FirstEnergy Ohio utilities in the context of the In-State All Renewables solicitations and we found no evidence of any improper conveyance of information to FES by the FirstEnergy Ohio utilities."[239]

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

> Q. Would you agree that an investigation into whether FES received any special treatment by the FirstEnergy Ohio utilities in the context of the in-state all renewable solicitations was not within your scope of work?

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[237] Exeter Audit Report at 31.

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

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

A. It was not.[240]

As a result, the Exeter Auditor conducted a limited investigation into this issue. He stated, regarding the language in the Management/Performance Audit on page 31, that the Exeter Auditor did not conduct a search to determine whether FES had received any special treatment by FirstEnergy:

> Q. In regards to that language in the report, my question is what did you review to determine whether FES received any special treatment by the FirstEnergy Ohio utilities in the context of the in-state all renewables solicitations?
>
> A. We were not specifically looking for any information regarding what might be perceived of as improper, so we did not conduct a search of that. Of all the documents we did review that were provided in response to our data requests, and consistent with our interview over the telephone, we didn't see anything in those documents to suggest that there was any special treatment afforded FES, but we did not specifically look for that type of information.[241]

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

> Q. Would you agree that an investigation into whether any improper conveyance of information to FES by FirstEnergy Ohio utilities was beyond your scope of work for this proceeding?
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> A. Yes.
>
> Q. Did you have any communications with representatives from FES, meaning FirstEnergy Solutions, during your audit?

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

[241] *Id.*

A. I did not.

Q. Have you ever conducted a review to determine whether there was improper conveyance of information in regards to an RFP process?

A. No.

Q. Would you agree that any investigation into whether there was any improper conveyance of information to FirstEnergy Solutions by the FirstEnergy Ohio utilities should include discussions with personnel from FirstEnergy Solutions?

A. Yes.

Q. In your opinion, should the Commission order a review into whether there were any improper conveyances of information to FirstEnergy Solutions by the FirstEnergy Ohio utilities?

A. It is not a recommendation I made in my report. It is not something that was included in my scope of work, and I would leave that to the Commission to make a determination as to how they move forward on that.[242]

OCC submits that it was not within the Exeter Auditor's scope of work to evaluate whether there were any improper communications between FirstEnergy and FES and whether that relationship played any part in the decisions that were made to purchase the excessively priced RECs. Consequently, Exeter did not specifically evaluate this issue. Yet it is evident that the FirstEnergy-FES relationship may have been a significant factor in the determination to purchase the excessively priced RECs, notwithstanding that the Exeter Auditor did not discover any evidence that it played such a role since it was not specifically looking for such information. In fact, FirstEnergy knew the identity of

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

the bidder—FirstEnergy Solutions—at the time that the decision was made to purchase the RECs at prices between $300 per REC and $700 per REC.[243] It is not surprising therefore, that Mr. Estomin testified that this issue was the proverbial elephant in the room, even though it was not specifically investigated by Exeter:

> Q. Mr. Estomin, what was the purpose, as we just discussed that it was beyond the scope of your work in this case to determine whether FES received any special treatment or whether there were any improper conveyance of information to FES by FirstEnergy Ohio utilities, why was this language included in your report specific to page 31 under "Counterparty Issues"?
>
> A. The reason I included that language was simply recognition of the reality that the high-priced transaction were between the FirstEnergy Ohio utilities and FirstEnergy Solutions. This is a natural outcropping of that recognition. It seemed to me it would have been, frankly, silly to not even raise it as a question, so we made the observation.[244]

The Commission should recognize the limited scope of the audit that admittedly was conducted by Exeter. Accordingly, based on the evidence in this case, the Commission should now order a complementary investigation of the "elephant in the room" issue that remains to be investigated and that is central to assuring FirstEnergy's adherence to its Corporate Separation Plan and Codes of Conduct.

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

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

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

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

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

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

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

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

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

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

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[245] Direct Testimony of Wilson Gonzalez at 35.

[246] *Id.*

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

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

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

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

1. Procedural History And Factual Background.

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

[248] *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP, Entry on Rehearing, p. 3 (Sept. 20, 2011).

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

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

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

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

[250] OCC Set 1-RPD-1.

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

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

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

OCC then submitted a public records request to the PUCO seeking "any and all records that reflect edits or comments on draft version of the Audit Report by employees, outside consultants, and/or counsel of [FirstEnergy]." FirstEnergy then filed a Motion for

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

[253] *Id.*

[254] *Id.* at 18.

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

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

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

In a February 14, 2013 Entry, the Attorney Examiner ruled that the supplier-pricing and supplier-identifying information that appears in the Draft Exeter Audit Report is trade secret information in accordance with the November 20, 2012 ruling.[258] The Attorney Examiner further held that the document would be released in redacted form (meaning some information would not be shown in the public version).[259] It was dismaying to learn that, during FirstEnergy's review and comment on the draft audit, FirstEnergy opposed the Auditor's recommendation for a disallowance[260] and that recommendation was removed from the Audit Report that was filed at the PUCO.[261]

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

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

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

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

[258] *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison*, Entry at 5 (Feb. 14, 2013) (attached as Exhibit B).

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

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

[261] *See* Exeter Auditor Report.

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

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

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

[263] R.C. 4901.12 and 4905.07.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To assist in determining whether a trade secret claim meets the statutory definition as codified in R.C. 1333.61(D), the Ohio Supreme Court has adopted, and this Commission has recognized,[274] a six-factor test:

> (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information[275]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[283] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[295] *FirstEnergy SSO* at 2.

[296] *Duke SSO* at 2.

[297] *FirstEnergy SSO* at 2.

[298] *Duke SSO* at 2.

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

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

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

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

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

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

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

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

[304] *Duke SSO* at 2.

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

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

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

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[305] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5), Ohio Administrative Code ("Columbus Southern Power Rider*"), Case No. 11-4570-EL-RDR, 2011 Ohio PUC LEXIS 1107, Finding and Order at *2 (October 12, 2011).

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

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

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

Similarly, in *Ohio Edison Co.*, which was also cited by FirstEnergy, the Commission granted 18-month protection over auction reports that contained the identities of all bidders, the actual bids, exit prices, and the indicative bids, which were only four months old.[309] The Commission, however, rescinded the protective order just over a year later when FERC requested the unredacted reports for *In Re First Energy Solutions Inc.*, which was pending before them at the time.[310] The Commission also stated that because of changes in the market, the one-and-a-half year old reports would not be of much present value.[311] In fact, it was FirstEnergy that recommended the release of the full unredacted reports just over a year after requesting the initial protective order.[312]

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

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[308] *Id.* at 3.

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

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

[311] *Id.* at ¶5.

[312] *Id.* at ¶4.

[313] *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power Company* ("*Monongahela Power Co.*"), Case No. 04-1047-EL-ATA, 2005 Ohio PUC LEXIS 181 at *18, (Apr. 6, 2005).

[314] *Id.*

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

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

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

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[315] *Id.*

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

[317] *In the Matter of the Commission's Investigation Into Continuation of the Ohio Tel. Relay Service* ("*Ohio Tel. Relay Serv.*"), Case No. 01-2945-TP-COI, 2002 Ohio PUC LEXIS 378, at *1, (May 2, 2002).

[318] *Id.* at *2.

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

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

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

[320] *Id.* at *3.

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

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

[323] *Id.* at *1.

[324] *Id.* at *11.

[325] *Id.* at *12.

[326] *Id.*

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

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

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

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

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

[327] *Id.*

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

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

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

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

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

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

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

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

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

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

[332] *Id.*

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

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

[335] Id.

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

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

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

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

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

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

[339] *Id*.

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

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

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

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

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

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

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

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

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

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

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

4. The public interest weighs in favor of disclosure.

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

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[346] Exeter Audit Report at iv.

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

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

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

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

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

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

Another reason the Commission should reverse the Attorney Examiner's ruling is that FirstEnergy failed to meet the procedural requirements to seek a protective order. Ohio Admin. Code 4901-1-02(E) provides that "[u]nless a request for a protective order is made concurrently with or prior to the reception by the commission's docketing division of any document that is case-related, the document will be considered a public record." The information that FirstEnergy sought to protect was filed on August 15, 2012. However, FirstEnergy waited to seek protection until its filing on October 3, 2012.

In its Reply in support of its First Motion for Protective Order, FirstEnergy argues that the document was filed under seal; therefore, it was assumed that the information would be kept confidential by the Commission and its Staff. But Ohio Admin. Code 4901-1-02(E) is very strict in its wording: "Unless a request for a protective order is made concurrently with or prior to the reception by the commission's docketing division of any document that is case-related, the document will be considered a public record."

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

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

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

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

The disallowance of FirstEnergy's purchase of In-State All Renewable RECs initially recommended in the Exeter Auditor was wrongfully redacted as a result of the February 14, 2013 Attorney Examiner's ruling. The Draft Exeter Audit Report consisted of two primary pieces: [1] a line-edited draft of the Exeter Audit Report (hereinafter referred to as "Draft Report Line Edits" and Attached as Exhibit C), and [2] a supplemental document labeled "The Companies' Major Comments Regarding the Executive Summary Draft Management/Performance Audit Report" (hereinafter referred to as "Draft Report Supplement" and Attached as Exhibit D).

The Draft Report Line Edits that were initially released in response to the OCC's public records request identified that the Exeter Auditor, in its draft report, recommended that the Commission, at a minimum, disallow recovery of all In-State All Renewable RECs cost incurred by FirstEnergy in excess of $50 per REC. The release of that disallowance recommendation was subsequently modified by the Attorney Examiner.[354] In doing so, the Attorney Examiner protected any portion of the Draft Report Line Edits that identified the dollar amount that was recommended for disallowance.

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

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

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

The Attorney Examiner did not, however, redact that same information from the Draft Report Supplement.[355] And a discussion of the amount of the recommended disallowance is part of the public record in this proceeding.[356] Because this information is already publicly available (through the Draft Report Supplement and public transcript), the Attorney Examiner's ruling should be reversed, and the Draft Report Line Edits should be reproduced without the redaction of Exeter's recommended minimum disallowance of any REC that was purchased for more than $50.

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

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

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

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

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

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

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

F. The Commission Should Reverse the Examiner's Ruling that Prohibits Parties from Referring to a Sentence on Page iv of the Exeter Audit Report Even Though the Sentence Appears in the Publicly Filed Version of the Audit Report.

There is a sentence in the publicly filed Exeter Audit Report that FirstEnergy considers a trade secret.[358] FirstEnergy then obtained a ruling that parties are prohibited from publicly referencing the sentence in their Briefs even though the sentence is in the public domain.[359]

Anyone anywhere in the world with internet access can read or use this sentence and has had the ability to read or use this sentence since August 15, 2012. Indeed, it appears that the sentence was a part of a basis for a news story.

For its part, FirstEnergy seems to blame the PUCO Staff for the publicly filed status of the sentence.[360] But it should be noted that, in noncompliance with Ohio Adm. Code 4901-1-02(E), FirstEnergy did not contemporaneously seek protection of the sentence. And such protection was not sought by FirstEnergy until seven weeks after filing on August 15, 2012.

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

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

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

The Commission should reverse the ruling and not limit use of the publicly filed sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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