

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison)
Company, The Cleveland Electric Illuminating)
Company and The Toledo Edison Company for)
Approval of Request for Proposal to Purchase)
Renewable Energy Credits Through Ten Year)
Contracts)

Case No. 10-2891-EL-ACP

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NUCOR STEEL MARION, INC.'S
MOTION FOR INTERVENTION, MEMORANDUM IN SUPPORT, AND COMMENTS PROPOSING
CLARIFICATION AND/OR MODIFICATION

Michael K. Lavanga*
E-Mail: mkl@bbrslaw.com
Counsel of Record
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
(202) 342-0800 (Main Number)
(202) 342-0807 (Facsimile)
*Pending admission *pro hac vice*

Attorney for Nucor Steel Marion, Inc.

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**NUCOR STEEL MARION, INC.'S
MOTION FOR INTERVENTION, MEMORANDUM IN SUPPORT, AND COMMENTS PROPOSING
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I. MOTION FOR INTERVENTION

Pursuant to Ohio Revised Code ("RC") § 4903.221 and Ohio Administrative Code ("OAC") 4901-1-11, Nucor Steel Marion, Inc. ("Nucor") respectfully moves the Commission for leave to intervene in the above-captioned dockets, for the reasons more fully set forth in the below Memorandum in Support.

II. MEMORANDUM IN SUPPORT

From the standpoint of both the substantive merits and timeliness of its request, Nucor respectfully submits that it is entitled to intervene in this proceeding. For purposes of considering requests for leave to intervene in a Commission proceeding, OAC 4901-1-11(A) provides that:

Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that: ... (2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that

interest, unless the person's interest is adequately represented by existing parties.

Further, RC § 4903.221(B) and OAC 4901-1-11(B) provide that the Commission, in ruling upon applications to intervene in its proceedings, shall consider the following criteria:

(1) The nature and extent of the prospective intervenor's interest; (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

OAC 4901-1-11(B) also provides that an additional factor in considering a request to intervene will be the extent to which the person's interest is represented by existing parties.

Nucor is a large industrial consumer of electricity delivered to it by the Ohio Edison Company ("Ohio Edison"). Nucor uses electricity throughout its operations, but in particular, uses substantial quantities of electricity to melt steel scrap, recycling it to make new steel. Nucor pays Ohio Edison millions of dollars per year for electricity. The cost of electricity is critical to Nucor's competitiveness in the national and international steel markets.

In the above-captioned proceeding, Ohio Edison, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy") seek approval to conduct a Request for Proposal ("RFP") to purchase Renewable Energy Credits ("RECs") through ten year contracts. FirstEnergy's proposal could affect the cost of electric service to Nucor and, accordingly, Nucor has direct, real, and substantial interests in this proceeding. Moreover, the disposition of this proceeding without Nucor's participation would prejudice and impede Nucor's ability to protect its substantial business interests.

Further, others participating in this proceeding do not represent Nucor's interests.

Inasmuch as others participating in these proceedings cannot adequately protect Nucor's interests, it would be inappropriate to determine this proceeding without Nucor's participation. Nucor submits that its unique perspectives will contribute to the full, equitable, and expeditious resolution of this proceeding. Lastly, Nucor's timely intervention will not unduly delay the proceeding, or unjustly prejudice the interests of any existing party to this proceeding.

III. COMMENTS PROPOSING CLARIFICATION AND/OR MODIFICATION TO FIRSTENERGY'S PROPOSAL

On December 2, 2010, FirstEnergy submitted its Application in this proceeding requesting approval to conduct a request for proposal to purchase renewable energy credits through ten year contracts. As the Application explains, FirstEnergy is submitting this proposal pursuant to Section A.11 of the electric security plan ("ESP") Stipulation in Case No. 10-388-EL-SSO, which was approved earlier this year.¹

Nucor is a signatory to the ESP Stipulation and we participated in the collaborative process to develop the RFP process and the associated Purchase and Sale Agreement. While Nucor does not oppose FirstEnergy's overall proposal, there are two key elements of the proposal that require closer scrutiny and should be clarified or modified by the Commission:

- First, the "change of law" provision in the proposed Purchase and Sale Agreement and the Application should be clarified to provide better protection for ratepayers in the unlikely event that the renewable energy mandates under S.B. 221 (the sole reason FirstEnergy even has to purchase RECs in the first place) are modified in or eliminated from the statute. To address this concern, the Commission should either improve the

¹ Case No. 10-388-EL-SSO, *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*, Opinion and Order (August 25, 2010).

change of law provision to specifically provide protection, or at a minimum, clarify that by approving FirstEnergy's Application, the Commission is reserving its rights and not making a determination on whether cost recovery for ten year RECs should be allowed to continue in the future in the event that the statutory renewable energy requirements are modified or eliminated.

- Second, FirstEnergy requests approval for recovery of the costs associated with the REC RFP through Rider AER or "such other rider that shall be established to effectuate the recovery of such costs."² Nucor recommends the second option and requests that the Commission specifically direct FirstEnergy to establish a new rider to allocate and recover these costs. Since the ten year REC RFP costs will be fixed costs and not energy-related costs that will vary based on kwh usage, the new rider should allocate and recover these costs on a more appropriate basis (such as by customer), rather than passing the costs through Rider AER, which is a uniform per kWh charge across all customer classes.

A. Change of Law Provision

FirstEnergy proposes to purchase ten year REC supply to meet part of its statutory requirements through the RFP process proposed in the Application. While a ten year contract with a utility clearly benefits REC suppliers, a contract with such a long term also poses significant risks for ratepayers. The renewable energy requirements of Section 4928.63, Revised Code, are the only reason why FirstEnergy needs to purchase RECs. If, in the unlikely event that these renewable energy requirements are eliminated from the law, and FirstEnergy

² Application at 2.

has no way to exit the contract, ratepayers would end up paying for unneeded RECs for the remainder of the contract. Assume, for example, that the renewable energy requirements are eliminated three years after FirstEnergy enters a ten year contract with a REC supplier – would it be reasonable for ratepayers to pay for seven years worth of RECs that serve absolutely no purpose?

A straightforward change of law provision that gives FirstEnergy the right to terminate the contract if the renewable energy requirements of Section 4928.63 are someday eliminated from Ohio law would protect ratepayers against this unlikely scenario. Unfortunately, the change of law provision contained in the Form of Purchase and Sale Agreement included in the Application is not so clear. Article 9 of the Purchase and Sale Agreement, titled “Change in Law,” provides:

Buyer’s obligations under this Agreement are contingent on, and limited by the Buyer’s ability to recover all costs incurred by it under this Agreement from its retail customers in full and on a current basis. In the event any finding and order of the PUCO has the effect of suspending, limiting, or denying Buyer’s ability to recover fully such costs from its retail customers on a current basis, Buyer may continue performing under the Agreement and pay the REC Supplier only the costs for, and associated with, the RECs which the Buyer is permitted to recover on a current basis from its retail customers. However, if Buyer reduces its payments under this Agreement to that which it is permitted to recover on a current basis from its retail customers as a result of an action of the PUCO, REC Supplier may terminate this Agreement upon not less than 30 calendar days notice.

The change of law provision provides protection for FirstEnergy (by giving FirstEnergy the right to reduce its payments to the REC Supplier if FirstEnergy cannot recover the REC costs from its retail customers), and it provides protection for REC suppliers (by giving them the right to terminate the contract if payments under the contract are reduced), but practically speaking it does not provide clear protection for ratepayers in the event that the statutory renewable

energy requirements are changed or eliminated. In fact, though titled a “change of law” provision, the actual language of this provision makes no reference to a change in law. Therefore, even if the law is someday changed to eliminate the renewable energy requirements, a supplier and/or FirstEnergy could argue that the ten year contract is binding, notwithstanding the elimination of the statutory requirement that gave rise for the need for RECs in the first place (of course, we would likely argue that the Commission should disallow recovery, which would kick in FirstEnergy’s rights under this provision).

Unfortunately, the language of the Application itself is also problematic in this regard, since it requests approval for “recovery of all reasonable costs associated with acquiring RECs through the Purchase and Sale Agreement for Renewable Energy Credits . . . for the full ten year period . . . *irrespective of the Companies’ need for RECs to meet their statutory requirement.*”³ Obviously, we do not agree with FirstEnergy’s request in this regard and believe that the Commission should not provide such sweeping approval.

The best that can be said of the change of law provision is that it implies (but certainly does not guarantee) a possible avenue for a party to go to the Commission and request that FirstEnergy be denied cost recovery under the ten year contracts in the event that the statutory requirements are changed or eliminated. This provision will have the most value, however, only if the Commission makes clear that it will consider such a request at the time it is made, and that by approving FirstEnergy’s Application, the Commission is not guaranteeing cost recovery for the full ten years, irrespective of what happens to the statutory renewable energy requirements in that time period. In other words, if the renewable energy requirements are

³ Application at 2 (emphasis added).

ever modified or eliminated, the Commission could then take a fresh look to determine whether it would be reasonable and prudent for FirstEnergy to continue to purchase the RECs and pass those costs onto ratepayers, the ten year REC contracts notwithstanding.

In summary, a change of law provision that provides a clearer right for FirstEnergy to terminate the contract in the unlikely event that the Legislature eliminates the statutory renewable energy requirements (compliance with which is the sole reason why FirstEnergy must purchase RECs) would provide much more certainty for ratepayers than the current Article 9 contained in the proposed Purchase and Sale Agreement. If the Commission does not require FirstEnergy to modify Article 9 to provide for such a right, Nucor requests that the Commission at least clarify that if the statutory renewable energy requirements are ever modified or eliminated, the Commission has reserved the right to, and will at that time, evaluate whether allowing FirstEnergy to continue to recover the ten year REC costs from ratepayers is reasonable and prudent.

B. Cost Recovery

As the Application notes, the ESP Stipulation allows for recovery of the ten year REC costs either through Rider AER, or through some other rider that may be established to recover the costs.⁴ Currently, FirstEnergy recovers the cost of all RECs through Rider AER.

A new rider should be established to recover the costs of these ten year RECs, as expressly permitted by the Stipulation. Pursuant to the Stipulation, FirstEnergy will recover a fixed quantity of RECs through the ten year RFP.⁵ This number will not vary based on energy

⁴ Application at 3.

⁵ Under Section A.11 of the ESP Stipulation, FirstEnergy commits to purchase 5,000 PUCO-certified solar RECs originating in Ohio, and 20,000 non-solar PUCO-certified RECs originating in Ohio through the proposed ten year

consumption. Further, the costs of the ten-year RECs are not energy costs. As the Purchase and Sale Agreement makes clear, FirstEnergy is purchasing renewable attributes only – it will not be purchasing energy or capacity.⁶ Accordingly, treating these costs as energy through the use of a uniform per kwh energy charge such as Rider AER is inconsistent with cost-causation, and could result in over-recovery of the ten year REC costs from the higher load factor customer classes, and from individual customers with high levels of kwh usage.

A better way would be to allocate and recover these costs on a per customer basis (with a customer charge). A less preferable alternative, but better than the approach in Rider AER, would be for FirstEnergy to allocate the costs to and recover the costs from the customer classes consistent with how PJM capacity costs are allocated and recovered under the ESP Stipulation – *i.e.*, allocated based on the average of the customer class coincident peak demands for the months June through September and recovered based on energy.⁷ Either of these alternatives would be a more reasonable and fair way of allocating and recovering the costs of the ten year RECs than simply passing the costs through Rider AER.

IV. CONCLUSION

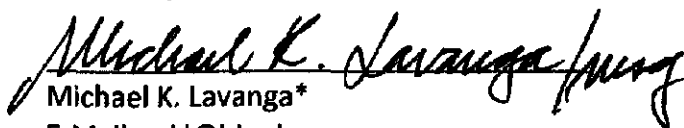
For the reasons set forth above, Nucor respectfully requests the Commission to grant Nucor's request to intervene in the above-captioned proceeding, and that the Commission consider Nucor's comments in evaluating FirstEnergy's Application.

contracts. Section A.11 provides for the possibility of three additional RFPs to acquire fixed levels of solar RECs if certain conditions are met.

⁶ See Purchase and Sale Agreement at Section 3.7 (providing that the Agreement "does not include the purchase of, and Buyer shall not purchase, or have any responsibility for the costs of, any energy or capacity from REC supplier whatsoever.").

⁷ ESP Stipulation at Section A.5(iv).

Respectfully submitted,

A handwritten signature in black ink, reading "Michael K. Lavanga". The signature is fluid and cursive, with the first name "Michael" and last name "Lavanga" being the most prominent parts.

Michael K. Lavanga*

E-Mail: mkl@bbrslaw.com

Counsel of Record

Brickfield, Burchette, Ritts & Stone, P.C.

1025 Thomas Jefferson Street, N.W.

8th Floor, West Tower

Washington, D.C. 20007

(202) 342-0800 (Main Number)

(202) 342-0807 (Facsimile)

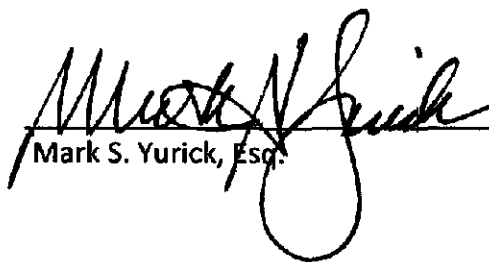
* Pending admission *pro hac vice*

Attorney for Nucor Steel Marion, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties of record or as a courtesy, via U.S. Mail postage prepaid and electronic transmission on December 22, 2010.

Ebony L. Miller
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Email: elmiller@firstenergycorp.com



Mark S. Yurick, Esq.

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