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**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

REPLY COMMENTS OF NUCOR STEEL MARION, INC.

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Pursuant to the February 25, 2011 Entry in the above-captioned proceeding, Nucor Steel Marion, Inc. ("Nucor") submits the following reply comments. As noted in our December 22, 2010 comments in this proceeding ("Nucor Comments"), Nucor is a signatory to the ESP Stipulation in Case No. 10-388-EL-SSO,¹ one provision of which requires FirstEnergy to conduct a request for proposals ("RFP") for 10-year renewable energy credits ("RECs") contracts. Nucor does not oppose FirstEnergy's overall proposal in this proceeding, but recommends certain specific modifications related to the change in law provision in the proposed Purchase and Sale Agreement, and to how FirstEnergy proposes to recover the cost of the 10-year RECs from customers. In these Reply Comments, Nucor briefly responds to comments made by other parties in this proceeding on these issues.

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 4828.143, Revised Code, in the Form of an Electric Security Plan*, Opinion and Order (August 25, 2010) (approving the ESP Stipulation).

I. CHANGE IN LAW PROVISION

Nucor recommends that, with regard to the change of law provision in the proposed Purchase and Sale Agreement, the Commission should modify the provision to give FirstEnergy the right to terminate the agreement in the event that the renewable energy requirements of Section 4928.63, Revised Code, are eliminated from the law, and, at a minimum, should clarify that the Commission will reserve its right to make a determination of 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.²

The Environmental Law and Policy Center ("ELPC") opposes both of Nucor's proposals. ELPC's main argument is that Nucor's proposals would shift risk over to renewable investors and developers, and could result in projects not getting financed.³ Nucor understands ELPC's concern, and agrees that investors and developers would prefer a change of law provision that gives them as much certainty and as little risk with regard to their own cost recovery as possible. The fact remains, however, that under the change of law provision as proposed, the primary risk in the event that the renewable energy requirements are eliminated rests with the ratepayer. ELPC does not even attempt to refute this basic point.

ELPC maintains that if there is a significant risk that FirstEnergy will cancel any ten year contract, projects will not get financed and "the law does not work."⁴ ELPC provides no evidence, however, that renewable projects will not get built or that FirstEnergy will be unable to acquire the RECs necessary to meet their benchmarks if the Purchase and Sale Agreement

² Nucor Comments at 4-7.

³ Comments of the Environmental Law and Policy Center ("ELPC Comments") at 4-5.

⁴ ELPC Comments at 5.

includes a change of law provision like the one proposed by Nucor. Moreover, if Nucor's proposed change of law provision is adopted, the statutory renewable energy requirements are eliminated, and the 10-year REC contract is cancelled, the REC provider will still have opportunities to recover its costs. The provider could sell its RECs elsewhere, for example, perhaps even at a higher price than it was receiving under the 10-year contract depending on the market. And, it is important to remember that FirstEnergy is proposing to purchase RECs only – not energy or capacity.⁵ Renewable projects will also have the opportunity to sell their energy and capacity regardless of whether they are getting paid for the RECs. In contrast to these options available to REC suppliers, if ratepayers bear the entire risk of a change of law that eliminates the renewable energy requirements, as apparently urged by ELPC, ratepayers could end up paying for many years worth of unneeded RECs.⁶

ELPC also states that Nucor's proposal argues for a system of illusory contracts between utilities and renewable investors and developers, noting that a contract is illusory when "by its terms the promisor retains an unlimited right to determine the nature or extent of his performance."⁷ Nucor's proposed change of law provision would not make the Purchase and Sale Agreement illusory. It would not give FirstEnergy an unlimited right to determine the

⁵ 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.").

⁶ ELPC takes issue with Nucor's statement that if the renewable energy requirements are eliminated after three years, customers could end up having to pay for seven years worth of RECs "which serve absolutely no purpose." ELPC Comments at 6. ELPC disagrees that the RECs would serve no purpose, and asserts that "[f]inancing a renewable energy facility benefits the company and customers by diversifying FirstEnergy's energy supply and by providing cleaner sources of energy." It is worth pointing out again, however, that the RFP FirstEnergy is proposing in this proceeding is for RECs only – not for energy or capacity. While renewable facilities will have the opportunity to sell their energy and capacity to other purchasers, there is no basis for the claim that the 10-year REC contracts will benefit the company and customers by diversifying FirstEnergy's energy supply when FirstEnergy is under no obligation to the purchase energy from the renewable facilities that are producing the RECs.

⁷ ELPC Comments at 5 (citing *Smith v. GuideOne Insurance Co.*, 3d. No. 02AP-1096, 2003-Ohio-4823).

nature or extent of its performance. To the contrary, it would give FirstEnergy the right to cancel the contract only under a limited, defined circumstance. Such a change of law provision would make the contract no more illusory than does the early termination provision at Section 2.2 of the proposed Purchase and Sale Agreement, which sets forth specific circumstances under which the agreement may be terminated prior to the termination date. In any event, even if this "illusory" legal argument were a concern regarding the RFP change of law provision, it does not apply to whether the Commission reserves the right to prohibit FirstEnergy from recovering future REC costs in the event of a change in law.

In sum, it is important that some protection be established for ratepayers should the law change, just as FirstEnergy proposes some protection be established for it if it is not permitted to recover its costs. Only the Commission can step in and provide the necessary ratepayer protection and avoid the risk of establishing a new set of long-term potentially stranded REC costs should the Legislature act at some point in the future. It should be noted that nothing in the ESP Stipulation in Case No. 10-388-EL-SSO addresses the appropriate terms and conditions of the change of law provision in this RFP and nothing precludes the Commission from reserving its rights to protect ratepayers in the event of a change of law.

II. Cost Recovery

Instead of recovering the costs of the 10-year RECs through Rider AER as FirstEnergy proposes, Nucor proposes that the costs of the ten-year RECs should be recovered through a separate rider applicable only to these costs, recognizing that these costs are different from those recovered through Rider AER. Under the new rider, Nucor recommends use of a customer charge, or, in the alternative, allocating and recovering the costs consistent with how

PJM capacity costs are recovered under the ESP Stipulation.⁸ The PUCO Staff supports FirstEnergy's request to use Rider AER to recover the 10-year REC costs, noting that the alternative energy portfolio standard introduced in S.B. 221 is based on sales volumes to determine compliance obligations.⁹

Nucor does not agree with Staff's ultimate conclusion and offers the following response to Staff's argument. Nucor agrees with Staff that, under Section 4928.64(B) of the Revised Code, a utility's overall alternative energy requirement is established, in part, based on a percentage of the utility's kwh sales. However, this is not the controlling consideration -- the quantity of RECs that FirstEnergy will be purchasing under the 10-year contracts at issue in this proceeding is fixed, and therefore will not vary at all, despite the fact that FirstEnergy's overall annual alternative energy compliance obligations vary based, in part, on FirstEnergy's total energy sales.¹⁰

Also, more generally, just because total energy sales are used to calculate FirstEnergy's preliminary overall alternative energy requirement does not mean that a straight volumetric energy charge is the appropriate way to allocate the costs of RECs to, and recover those costs from, customers. Unlike other variable costs, such as fuel, in the case of RECs, there is not a one-to-one relationship between each kwh that a customer consumes, and the quantity of RECs a utility must procure to meet its alternative energy benchmark. An individual customer's energy consumption in a given year will not directly determine the level of RECs FirstEnergy will

⁸ Nucor Comments at 7-8.

⁹ Comments Submitted on behalf of PUCO Staff at 5.

¹⁰ 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 RFP process.

need to procure to meet its statutory benchmarks. Rather, the total annual requirement will be determined based on the average of FirstEnergy's kwh sales for the previous three years. Also, RECs will only be used to meet the renewable energy resource portion of the overall alternative energy resource requirements, and the annual renewable energy resource requirement is based on fixed percentages specified in Section 4928.64(B)(2) of the Revised Code. Most importantly, the variability of the utility's renewable energy resource requirement is limited by the cost cap of Section 4928.64(C)(3) of the Revised Code, which effectively limits the amount of recovery to a fixed figure, regardless of sales.

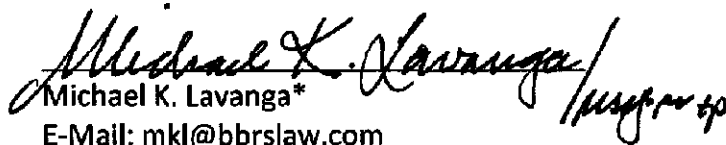
All of these features make the costs of RECs a very different animal from the types of variable costs that are typically recovered through straight per-kwh energy charges. While Nucor agrees with Staff that sales volume is a component of the alternative energy portfolio standard, we submit that, at least with respect to the purchase of RECs, the statutory requirements discussed above (and the fact that there are no actual energy costs associated with RECS), make these costs more akin to fixed costs than variable costs. And, as discussed above, in the case of the specific 10-year RECs being addressed in this proceeding, there is no question that the costs are fixed because the actual quantity of RECs to be acquired is fixed in accordance with the ESP Stipulation and will not vary based on customers' energy usage. Accordingly, recovering these specific costs similar to how other types of fixed costs are recovered (preferably through a customer charge, or, as an alternative, through allocating and recovering the costs in the same way as is done for capacity costs under a *separate rider*), would be more reasonable than passing the costs through Rider AER based on energy usage. Passing these costs through on the basis of energy usage unfairly and substantially over-

allocates the cost of RECs to large manufacturing operations with higher load factors.

III. CONCLUSION

For the reasons set forth above and in the comments filed on December 22, 2010, Nucor respectfully requests the Commission adopt the recommendations made by Nucor in this proceeding.

Respectfully submitted,


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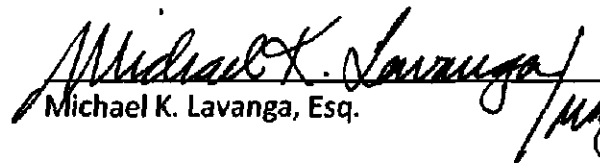
It is hereby certified that a true copy of the foregoing was served by electronic and regular U.S. mail, postage prepaid on March 28, 2011 upon the following:

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