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**

APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") hereby apply for a rehearing from the Commission's June 8, 2011 Finding and Order ("Order") issued in the above-captioned case on the following issues:

1. **The Commission's Order, which modifies the Companies' 2010 Electric Security Plan Stipulation and Renewable Energy Credit ("REC") 10-Year Request for Proposal ("RFP") Purchase and Sale Agreement to i) require the use a unit-contingent approach to acquire RECs and ii) make delivering of RECs optional for suppliers until their facility is in service is unreasonable and unlawful because it is inconsistent with the Companies' approved Electric Security Plan and Renewable Energy Credit ("REC") 10-Year Request for Proposal ("RFP") Purchase and Sale Agreement.**

2. **The Commission's Order is unreasonable and unlawful because it undermines the Companies' ability to achieve their statutory renewable energy resource benchmarks.**

3. **In the alternative, should the Commission maintain its modifications to the 2010 Electric Security Plan Stipulation and Purchase and Sale Agreement, the Commission should order that the Companies may utilize all contracted unit-contingent and optional delivery RECs, as described in the Commission's Order, for purposes of the Companies' compliance with statutory benchmarks for renewable energy resources, regardless of whether the RECs were actually delivered by the REC supplier.**

For the reasons set forth in greater detail in the Companies' Memorandum in Support, which is attached hereto and incorporated herein by reference, the Companies respectfully request that the Commission grant the Companies' application for rehearing and issue an Entry on Rehearing consistent with this filing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING

I. INTRODUCTION

R.C. §4928.64(B) established benchmarks for an electric utility to acquire a portion of its standard service offer from renewable energy resources, including specified percentages from solar energy resources.

On August 25, 2010, the Commission approved the Companies' Second Supplemental Stipulation in Case No 10-388-EL-SSO ("ESP-2 Stipulation")[1]. In accordance with the ESP-2 Stipulation[2], the Companies met with their collaborative group and, upon reaching agreement in that process, filed an Application and proposed Purchase and Sale Agreement ("Agreement") on December 2, 2010 for approval to conduct a Request for Proposal ("RFP") to purchase in-state renewable energy credits

[1] *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 ("ESP-2"), Opinion and Order at pp. 10-11 (August 25, 2010).
[2] ESP-2 Case, Second Supplemental Stipulation at pp. 1-3 (July 22, 2010).

("RECs") through ten-year contracts.[3] In the Application, the Companies sought approval to implement an RFP to purchase the annual firm delivery of at least 5,000 Ohio solar RECs and 20,000 Ohio non-solar RECs through ten-year contracts.

On June 8, 2011, and contrary to Staff's comments, the Commission issued its Finding and Order that substantively changed the Companies' ESP-2 Stipulation and directed significant modifications be made to the Companies' Agreement by changing the procurement method from firm delivery to a unit contingent approach and making the delivering of RECs optional for suppliers until their facility is in service. Specifically, the Commission found:

> In order to increase flexibility, Section 3.2 of the Purchase and Sale Agreement shall be modified to require the REC supplier to transfer a particular percentage of the output of the facility, or the total output of the facility, up to a contracted amount, rather than requiring quarterly transfer of RECs on a firm basis. For facilities that are not yet in service, REC suppliers may provide a defined quarterly number of RECs for the period until the new facility's in service date and a percentage of the facility's output thereafter.[4]

The Commission's Order requiring the Companies to alter the Agreement to follow the unit-contingent approach and to allow the delivery of RECs to be optional for suppliers until the facility is in service is unlawful and unreasonable in that it is: (i) inconsistent with the Commission-approved ESP-2 Stipulation[5] and (ii) undermines the Companies' ability to comply with statutory benchmarks for renewable energy resources when the contracted RECs are not provided due to supplier failure to deliver (even though it was a winning bidder in the RFP) for a variety of reasons outside of the

[3] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Request to Purchase Renewable Energy Credits Through Ten-Year Contracts*, Case No. 10-2891-EL-ACP.
[4] *Id*., Opinion and Order at p. 10-11 (June 8, 2011).
[5] *See* ESP-2, Opinion and Order at pp. 10-11 (August 25, 2010) (an **annual** delivery of **no less than** 5,000 solar RECs originating in Ohio and an **annual** delivery of **no less than** 20,000 non-solar RECs originating in Ohio).

Companies' control including, among other things:, lack of financing, permitting problems, lack of solar or renewable energy production, environmental issues, equipment degradation or weather issues. Therefore, the Companies request that Commission reinstate their original ESP-2 Stipulation, Application and Agreement, which requires firm delivery of a specific number of RECs. In the alternative, if the Commission requires the Companies to modify their Agreement to allow for a unit contingent approach in their RFP Process and optional delivery by suppliers whose facilities are not yet in service, the Companies request that the Commission expressly allow the Companies to utilize any contracted unit-contingent and optional delivery RECs as described in the Commission's Order, for purposes of the Companies' compliance with statutory benchmarks for renewable energy resources set forth in R.C. § 4928.64, regardless of whether the RECs were actually delivered by the REC supplier.[6] Such an approach would provide for the desired flexibility for REC suppliers referenced in the Order, while not burdening the Companies and their customers with the risks and costs arising from the Companies' inability to effectively plan REC purchases.

II. THE COMMISSION'S ORDER IS UNREASONABLE AND UNLAWFUL BECAUSE IT IS INCONSISTENT WITH THE COMMISSION-APPROVED ESP-2 STIPULATION.

The Commission's Order is unreasonable and unlawful because it modifies the Commission-approved ESP-2 Stipulation by requiring the Companies to conduct an RFP for unit contingent delivery, rather than firm delivery, of RECs. The Commission's

[6] Indeed, in Case No. 11-2479-EL-ACP, the Companies are seeking a force majeure determination regarding their inability to comply with their 2010 in-state solar REC requirements due to conditions beyond their control. By restricting the Companies' ability to procure firm delivery of a specific amount of in-state solar RECs from suppliers, the Commission is forcing the Companies into a situation in which they may not be able to obtain their in-state solar RECs in 2011 and beyond.

Order is also unreasonable and unlawful because it allows for optional delivery of RECs for suppliers whose facilities are not yet in service. In the ESP-2 Stipulation, the Companies were required to do the following:

> 1) Work with any interested Signatory Party or Non-Opposing Party to the Stipulation in Case No. 10-388-EL-SSO to develop four RFPs to purchase RECs through ten year contracts;
>
> 2) File a separate application for approval of each of the four RFPs; and
>
> 3) File a first application to seek approval for the Companies to seek competitive bids to purchase through ten year contracts, **no less than**: a) the **annual** delivery of 5,000 in-state solar RECs with a delivery period between June 1, 2011 and December 31, 2020; and b) the **annual** delivery of 20,000 non-solar in-state RECs with a delivery period between June 1, 2011 and December 31, 2020.[7]

The ESP-2 Stipulation did not permit or require the Companies to seek competitive bids for delivery of unit-contingent RECs. The ESP-2 Stipulation also did not allow for optional delivery for suppliers whose facilities are not yet in service. Rather, the Companies are required to seek competitive bids for annual delivery of no less than 5,000 in-state solar RECs and annual delivery of no less than 20,000 in-state non-solar RECs.[8] Second, the ESP-2 Stipulation requires the Companies to carry over the number of required RECs to the next subsequent RFP only in the event of under-subscription or if such RFPs do not take place.[9] Third, Section 3.2 of the Agreement sets forth the delivery schedule for the annual number of RECs, whereby a supplier is required to deliver an exact amount of RECs equal to the REC Quantity per quarter.. Lastly, recognizing the

[7] *See* ESP-2 Stipulation at p. 1-2 (discussing a new section A.11 of the Stipulation and Recommendation in the Companies ESP-2 case).
[8] The intent of the ESP-2 Stipulation was to provide a firm commitment of annual delivery of no less than 5,000 and 20,000 RECs. The Agreement also contemplates this in Section 3.3.1 of the Agreement where a supplier is held responsible for deficiencies in delivery the required number of RECs.
[9] *Id.* at p. 2.

importance of strict adherence to the ESP-2 Stipulation and RFP process, the ESP-2 Stipulation specifically provides that if the Commission's approval of any of the Companies' RFP applications changes the terms of this Section A.11 of the ESP-2 Stipulation or the Companies' RFP applications filed consistent with the terms of the ESP-2 Stipulation and this Section A.11, the Companies shall have no obligation to conduct the long term RFPs or purchase RECs as described in this Section A.11 of the ESP-2 Stipulation, not an ideal result for anyone involved.

The Commission, unlawfully and unreasonably, modified the ESP-2 Stipulation by requiring the Companies to solicit an RFP for delivery of unit-contingent RECs and by requiring optional delivery of RECs for suppliers whose facilities are not yet in service. Specifically, the Commission modified the ESP-2 Stipulation by:

> 1) requiring the Companies to modify Section 3.2 of the Purchase and Sale Agreement to require the REC Supplier to transfer a particular percentage of the output of the facility, or the total output of the facility, up to a contracted amount; and
>
> 2) allowing REC Suppliers with facilities that are not yet in service, to provide a defined quarterly number of RECs for the period until the new facility's in-service date and a percentage of the facility's output thereafter.[10]

As discussed above, the ESP-2 Stipulation required the Companies to seek RFPs for a specified annual amount of in-state and out-of-state solar RECs. By allowing suppliers the ability to deviate from the firm delivery of this annual number, the Commission deviates from the express language and spirit of the RFP process described in the ESP-2 Stipulation, a process which was developed to assist, if not completely allow, the

[10] In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Request to Purchase Renewable Energy Credits Through Ten-Year Contracts, Case No. 10-2891-EL-ACP, Opinion and Order at p. 10-11 (June 8, 2011).

Companies to comply with the rigorous renewable energy resource statutory benchmarks. Indeed, the RFP structure outlined in both the Agreement and the ESP-2 Stipulation permits the Companies to rely upon a firm delivery amount of RECs for the year and identify with certainty any under-subscription from the ten-year RFP. With this knowledge, the Companies could then take steps to address any short fall in an effort to comply with the statutory benchmarks, or at least know with specificity the amount that would be carried over into the next ten-year RFP. By modifying the ESP-2 Stipulation, the Commission has unreasonably and unlawfully impeded the Companies' ability to conduct these RFPs, which are a part of the Companies' strategy in complying with their statutory benchmarks for renewable energy resources. Therefore, the Commission should grant rehearing and reinstate the Companies' original ESP-2 Stipulation, Application and Agreement.

III. THE COMMISSION'S ORDER IS UNREASONABLE AND UNLAWFUL IN THAT IT UNDERMINES THE COMPANIES' ABILITY TO RELY UPON THE RFP OUTCOMES IN MEETING THEIR STATUTORY BENCHMARKS FOR RENEWABLE ENERGY RESOURCES.

By modifying the Companies' ESP-2 Stipulation and Agreement, the Commission's Order undermines the Companies' ability to rely upon the RFP outcomes in meeting their statutory benchmarks for renewable energy resources. Recently, the Companies filed a request seeking a force majeure determination regarding their 2010 in-state solar REC requirement because they were unable to meet that requirement for reasons beyond their control.[11] In a continued effort to meet the challenging and

[11] *See* In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and The Toledo Edison Company for a *Force Majeure* Determination for Their In-State Solar Resources Benchmark Pursuant to R.C. Section 4928.64(C)(4)(a), Case No. 11-2479-EL-ACP.

aggressive in-state solar (and non-solar) REC benchmarks, the Companies designed an effective and meaningful RFP process as described above. The RFP process strikes a reasonable balance between the Companies' desire to purchase current vintage RECs to meet their current statutory benchmarks and the REC suppliers' and State's desire for investment in future solar and renewable energy resources. Unfortunately, the Commission's modifications to the ESP-2 Stipulation and Agreement upset this balance.

First, by requiring the delivery requirement in the Agreement to be unit contingent and allowing for optional delivery of RECs by suppliers whose facilities are not yet in service, the Commission has put the Companies at a significantly greater risk of noncompliance with the statutory benchmarks for renewable energy resources. While the Companies could, and intend to, take appropriate and reasonable steps to conduct a proper RFP, should the Commission's Order stand, the Companies' could receive delivery of only a fraction of the contracted RECs through failure on the part of the REC supplier to deliver, through operational disruptions, funding issues, or other reasons beyond the Companies' control. As discussed in the Companies' recent application for a *force majeure* determination, this situation is highly possible to occur especially in the case of the current in-state solar REC market where current-vintage in-state solar RECs are difficult to procure. If the Companies cannot secure firm numbers of in-state solar and non-solar RECs, the Companies are at the mercy of the Commission to grant them *force majeure* status or face the possibility of substantial compliance penalties. The Companies would have no recourse from their suppliers under the Commission's modifications to their ESP-2 Stipulation and Agreement, since those modifications

relieve REC suppliers of the obligation to deliver RECs under the Agreement until their facility goes into service, and thereafter only on a contingent basis.

Second, because the Companies do not have assurance that the winning supplier(s) will, in fact, deliver, the Companies may be forced to take extraordinary steps to acquire RECs from whatever source at whatever price to meet the statutory benchmarks, which may have a negative economic impact on customers.

Third, while the Companies do not oppose flexibility for REC suppliers, utilizing a unit contingent delivery approach coupled with no obligation to provide RECs during the period between contract execution and the facility in-service date, severely undermines the usefulness of the RFP for ten-year contracts. The Companies cannot be expected to be clairvoyant and know, absent the RFP process outlined in the ESP-2 Stipulation, from year to year, how many RECs they will receive, potentially causing them to take inefficient or uneconomic steps in an attempt to comply with the statutory benchmarks. The long-term nature of the contracts only serves to exacerbate the problem, as the Companies will have to contend with this inability to reasonably plan REC acquisitions for many years into the future.[12] By taking away the Companies' ability to rely on firm delivery of a specific number of RECs each year, the Commission subjects the Companies to further uncertainty, scrutiny, criticism and penalties.[13]

Lastly, the Commission's modification of the ESP-2 Stipulation and Agreement whereby REC suppliers are under no obligation to deliver RECs during the period

[12] In the Companies' ESP-2 Stipulation proceedings, the OCEA and the OEC recommended that the Commission require the Companies' to enter into long-term contracts with REC suppliers in order to **ensure** that sufficient RECs are produced to meet the Companies requirements under SB 221. In approving the ESP-2 Stipulation, the Commission noted that the second supplemental stipulation "appears to substantially address [this] one issue raised by the OCEA and OEC." ESP-2 Case, Opinion and Order at p. 32.

[13] In 11-2479-EL-ACP, opponents to the Companies' force majeure application have continued to recommend that the Companies' enter into long-term contracts for the purchase of solar RECs.

between contract execution and the date their facility goes into service is unreasonable. As written, the required modification to the Agreement makes the delivery of RECs prior to the in-service date optional for REC suppliers. Flexibility is one thing, but relieving REC suppliers from delivering RECs is another. The Companies do not believe this was the intent of the Commission given that such a provision hampers, rather than helps the Companies meet their statutory benchmarks.

Thus, the Companies seek rehearing on the ordered modifications to the ESP-2 Stipulation and Agreement and request that the Commission reinstate the firm delivery aspect as it exists in the RFP Process. While the REC suppliers may view the RFP Process as having less flexibility than desirable, such suppliers have the ability to build the risk associated therewith into their bid price. On the other hand, the Companies are mandated by statute to comply with the statutory benchmarks for renewable energy resources. The Companies should not be placed in the position of having contracted for specified amounts of RECs to meet those statutory requirements only to not have those RECs delivered, and thereby having the Companies as well as their customers bear the risk and cost associated with such non-delivery. The Commission should grant rehearing and reinstate the Companies' ESP-2 Stipulation, Application and Agreement.

IV. IN THE ALTERNATIVE, SHOULD THE COMMISSION MAINTAIN ITS MODIFICATIONS TO THE ESP-2 STIPULATION AND AGREEMENT, THE COMMISSION SHOULD ORDER THAT THE COMPANY MAY UTILIZE ANY CONTRACTED, BUT NOT DELIVERED, UNIT-CONTINGENT OR OPTIONAL-DELIVERY RECS, AS DESCRIBED IN THE COMMISSION'S ORDER, FOR PURPOSES OF THE COMPANIES' COMPLIANCE WITH STATUTORY BENCHMARKS FOR RENEWABLE ENERGY RESOURCES.

While the Companies believe and recommend that firm delivery of RECs be included as part of the ESP-2 Stipulation and Agreement, should the Commission decide to retain its modification of the ESP-2 Stipulation and Agreement, the Commission should order that the Companies may utilize any contracted, unit-contingent and optional-delivery RECs for purposes of the Companies' compliance with statutory benchmarks for renewable energy resources, whether actually delivered or not. This outcome would both permit the unit contingent/optional delivery approach required by the Order, while protecting the Companies and their customers from the risks and costs discussed above. The solution would be to conduct the RFP on a unit contingent delivery basis and continue to have delivery of RECs optional for REC suppliers during the period until their facility is in-service, but have the Companies' compliance with the statutory benchmarks evaluated on the total amount of RECs ***contracted for*** with the REC supplier rather than the amount of RECs actually delivered by the REC supplier. This approach will provide the level of flexibility for REC suppliers discussed in the Order while allowing the Companies to plan REC purchase strategies in a reasonable fashion, since they will be able to determine how many RECs they need to meet the benchmarks based on the amounts that have already been contracted for as opposed to what may or may not be delivered under the Agreement as modified by the Commission.

To leave the Order unchanged, however, will leave the Companies in the untenable position of not knowing, and not being able to know, whether they have met their statutory benchmarks, putting the Companies at risk of penalty for not meeting the very same benchmarks. Such a result is unreasonable, unlawful and will put the Companies and their customers at risk for higher costs associated with the Companies' compliance.

V. CONCLUSION

The Companies respectfully ask that the Commission issue its Entry on Rehearing consistent with the foregoing and rule expeditiously so as to avoid delays which may significantly reduce the benefit the RFP may have on the Companies' ability to meet their future REC benchmarks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Application for Rehearing and corresponding Memorandum in Support was served this 8th day of July, 2011, on the persons set forth below via both electronic mail and U.S. Mail, postage prepaid.

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Summary: App for Rehearing electronically filed by Ms. Carrie M Dunn on behalf of The Cleveland Electric Illuminating Company and Ohio Edison Company and The Toledo Edison Company