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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 Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	)	**10-388-EL-SSO**

POST-HEARING BRIEF BY THE ENVIRONMENTAL LAW AND POLICY CENTER AND THE OHIO ENVIRONMENTAL COUNCIL

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I. Introduction

In this action, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (together FirstEnergy or "the Companies") seek approval of a Stipulation and Agreement in order to make a Standard Service Offer in the form of an Electric Security Plan (ESP). FirstEnergy files the Stipulation and Agreement (Stipulation) with over 20 signatory or non-opposing parties, including FirstEnergy Services, the Industrial Energy Users of Ohio, the Ohio Energy Group, the Ohio Partners for Affordable Energy, the Staff of the Public Utilities Commission of Ohio (PUCO or Commission), and others. Should the Commission approve the Stipulation, the Environmental Law & Policy Center (ELPC) and the Ohio Environmental Council (OEC) request the Commission to modify one portion.[1] For the reasons below, ELPC and OEC ask the Commission to require FirstEnergy to seek Renewable Energy Credits (RECs) through long-term contracts, defined as contracts at least 10 years long, and allow FirstEnergy to recover the costs of such contracts concurrent with the contract length.[2] One of the many purposes of SB 221 is to encourage the development of alternative energy technologies in Ohio. Without the financing that follows the financial security of a long-term REC contract, developers are not likely to construct renewable energy facilities in Ohio leading to future REC shortages.

II. Applicable Law

FirstEnergy applies for the approval of the Stipulation as an ESP under Ohio Revised Code (O.R.C.) §4928.143, enacted by Am. Sub. Senate Bill 221 (SB 221). That section allows electric distribution utilities (EDUs) to use an ESP make the "standard service offer of all

[1] ELPC and OEC are not signatories to the Stipulation.

competitive retail electric services necessary to maintain essential electric service to consumers" mandated by O.R.C. §4928.141.[3] While the burden of proof to show the ESP complies with O.R.C. §4928.143 is on the EDU,[4] the Commission may modify the proposal as part of PUCO approval:

> Subject to division (D) of this section, the commission *by order shall approve or modify and approve* an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.[5] (emphasis added)

However, should the Commission modify the ESP, the EDU may withdraw the application and file a new standard service offer.[6]

In the proposed Stipulation, FirstEnergy addresses its requirement to procure renewable energy, or equivalent RECs, under O.R.C. §4928.64. This statute requires EDUs to obtain electricity from alternative sources such as wind, solar, and biomass.[7] A specific portion of the electricity is to come from solar resources and at least half of the electricity generated from all alternative resources must come from within Ohio.[8] An EDU's alternative energy and solar requirement is cumulative, resulting in annual benchmarks that increase over time.[9] Ultimately, an EDU is to obtain at least 25% of its electricity from alternative sources, with at least 0.5%

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[2] To the extent this brief does not address the remaining issues in the Stipulation, ELPC and OEC do not take any position, either in support or in opposition, on those issues.

[3] O.R.C 4928.141; O.R.C. 4928.143(B).

[4] O.R.C. 4928.143(C)(1).

[5] O.R.C. 4928.143(C)(1).

[6] O.R.C. 4928.143(C)(2)(a).

[7] O.R.C. 4928.64(B).

[8] O.R.C. 4928.64(B)(1), (2).

[9] O.R.C. 4928.64(B)(2).

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coming from solar resources, by 2025.[10] Under the proposed Stipulation, FirstEnergy proposes to achieve these requirements by purchasing RECs on three-year contracts. However, without a long-term guarantee on a developer's investment, banks are not likely to provide the necessary financing to build renewable energy facilities. Less investment leads to less construction of alternative energy facilities, which in turn leads to increased REC waiver applications.

III. Applicable Facts

In the Stipulation, FirstEnergy proposes that "renewable energy resource requirements for the period June 1, 2011 through May 31, 2014...will be met using a separate Request for Proposal (RFP) process to obtain RECs."[11] The Stipulation specifies further that

> The costs related to the procurement of all RECs, including any costs associated with administering the RFP, will be included in Rider AER for recovery in the year in which the RECs are utilized to meet the Companies' renewable energy requirements, with any reconciliation between actual and forecasted information being recognized through Rider AER in the subsequent quarter.[12]

As a result, the Stipulation provides for FirstEnergy to obtain needed RECs through contractual arrangements and to recover the costs associated with those contracts from ratepayers through Rider AER.

At the evidentiary hearing, only three witnesses addressed the proposed Stipulation's provision concerning RECs. Under cross-examination, FirstEnergy Witness William Ridmann confirmed that the Companies will seek the RECs necessary to comply with Revised Code

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[10] O.R.C. 4928.64(B).

[11] *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. 10-388-EL-SSO, Stipulation and Recommendation, at 9 (March 23, 2010) (hereinafter "Stipulation").

[12] Stipulation at 9.

§4928.64 through contracts not exceeding a three-year term.[13] Witness Ridmann also testified that the specific three-year provision resulted from the Stipulation's negotiations.[14] Nothing in the record suggests that FirstEnergy is under a duty to use short-term contracts, and the Companies provide no substantive reason for using 3-year contracts other than three years is what the parties agreed to in the Stipulation. Witness Ridmann confirmed that the parties could have agreed on a longer term for REC contracts because the process for negotiating the Stipulation "gets to basically could the parties agree to a stipulation which would provide for different provisions than which they agreed to. And I guess the answer is sure, if all the parties agreed to something different. The fact of the matter is the parties didn't, they agreed to this ESP with all the nuances and all the provisions put into it."[15] In the Stipulation, FirstEnergy does use 10 and 25 year cost recovery in Riders AMI and DFC, respectively.[16]

Ohio Environmental Council (OEC) Witness Carrie Cullen Hitt highlighted the need for long-term contracts for RECs in her testimony and cross-examination, focusing specifically on the need for solar RECs. She agreed that the renewable energy market in Ohio is "immature" and that some providers are having difficulty developing projects in some parts of the country.[17] As she explained,

> Long term contracts are needed to provide some greater predictability and stability of future SREC revenues. "Securitization" is of fundamental importance to the solar market [because]...[f]inancing of solar projects depends on investor confidence in a long-term revenue stream to defray the initial capital investment. In nascent SREC markets, investors are likely

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[13] Tr. Vol. 1, at page 79:9-17 (April 20, 2010) (rough version).

[14] Tr. Vol. 1, at pages 79:20-80:5 (April 20, 2010) (rough version).

[15] Tr. Vol. 1, at pages 82:23-83:4 (April 20, 2010) (rough version).

[16] Stipulation at 23; Tr. Vol. 1 at pages 80:25-81:4 (April 20, 2010) (rough version).

[17] Tr. Vol. 2, at pages 540:21-541:25 (April 21, 2010) (rough version).

to discount future revenue streams due to a variety of market and regulatory risks.[18]

Witness Hitt also noted that the current solar REC shortage in Ohio resulted in force majeure waiver requests by AEP-Ohio and Dayton Power & Light.[19] In addition, FirstEnergy was also a victim of solar REC shortages in Ohio, requiring force majeure determinations from the Commission for each of the Companies.[20] FirstEnergy obtained 48 solar RECs in 2009, none sited in Ohio.[21] FirstEnergy also purchased an additional 13 Ohio-sited RECs through its residential REC purchase program pursuant to 15-year contracts.[22] Before the Commission granted the force majeure determination revising the Companies' alternative energy benchmarks to zero, FirstEnergy was required to obtain 1,885 solar RECs.[23]

The facts above highlight the need for long-term REC contracts for developers to obtain the necessary financial backing to build the facilities that will develop a robust alternative energy

[18] *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. 10-388-EL-SSO, Direct Testimony of Carrie Cullen Hitt (April 15, 2010) (hereinafter "Hitt Direct"), at page 3:13-19.

[19] Hitt Direct, at pages 4:16-5:4.

[20] Hitt Direct, at page 4:16-18; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code*, Case No. 09-1922-EL-ACP, Finding and Order (March 10, 2010).

[21] *The Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, Annual Status Report and 2009 Compliance Review*, Case No. 10-499-EL-ACP (April 15, 2010), at page 4; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code*, Case No. 09-1922-EL-ACP, Finding and Order, at ¶6 (March 10, 2010).

[22] *The Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, Annual Status Report and 2009 Compliance Review*, Case No. 10-499-EL-ACP (April 15, 2010), at page 4.

[23] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code*, Case No. 09-1922-EL-ACP, Finding and Order, at ¶6 (March 10, 2010).

market in Ohio, avoid a continuing REC shortage, and assist the EDUs' compliance with SB 221.

IV. The Commission Should Require FirstEnergy to Enter Into Long-Term Contracts and Cost Recovery to Procure Necessary Renewable Energy Credits.

FirstEnergy's attempt to obtain RECs, especially solar RECs, in the same year they are needed, is not working—evidenced by FirstEnergy's force majeure application. Recently, FirstEnergy stated that it is likely "to face an additional challenge" in meeting its REC requirement in 2010 due to a shortage of RECs in the marketplace and its lack of direct electricity generation.[24] If Ohio's renewable energy market was developing on its own, there would not be the REC shortage the utilities are experiencing. Without the security of a long-term return on investment, renewable energy developers will not get the needed financing to construct renewable energy facilities.

Witness Hitt succinctly stated the overarching issue: "In the absence of long-term contracts[,] developers will be reluctant to invest and build, leading to a potential shortfall of [solar] RECs available in the marketplace for the utility to purchase."[25] Furthermore, "The lack of guaranteed cost recovery for necessary long-term solar renewable energy credits ('SREC') contracts between FirstEnergy and providers could result in higher prices and persistent SREC market scarcity."[26] Just as a developer could not obtain financing to build a new coal-fired power plant on a three-year power purchase contract, renewable energy plants need a longer payback period than the Companies are offering. FirstEnergy should position itself to comply with the REC requirement by engaging in long-term alternative energy development contracts.

[24] *Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, Alternative Energy Resource Plan, 2010 through 2020*, Case No. 10-506-EL-ACP (April 15, 2010), at pages 4-6.

[25] Hitt Direct, at page 4:10-11.

Although Witness Hitt focuses on solar RECs, the economics likely apply to all renewable energy construction. Without some form of guaranteed return to secure construction financing, alternative energy developers will not enter Ohio and provide alternative energy and RECs to EDUs. Consequently, the Commission should require FirstEnergy to seek REC contracts at least 10-years long, and allow FirstEnergy to recover its reasonable costs concurrent with the term of the REC contracts.

FirstEnergy's observation concerning future REC scarcity, and Witness Hitt's testimony that without financial certainty to enter the marketplace, alternative energy developers will not create new generation in Ohio, leads to the conclusion that without a change the stagnate market will continue. Long-term contracts between utilities and renewable energy providers present the solution to both problems. American Electric Power and Wyandot Solar recognized this solution and entered into a 20-year REC contract in 2009.[27] By securing long-term REC arrangements, developers receive a secure payback period needed to obtain construction and related financing, while EDUs can ensure a steady stream of RECs for future years and reduce its reliance on the thin open market for RECs. Moreover, using long-term contracts would allow FirstEnergy to reduce its reliance on the market further and negotiate custom REC purchase agreements.

While a contract's structure can take many forms, there are certain pieces that parties should account for in order to make the arrangement beneficial. Witness Hitt testified that long-term contracts should be no less than 10 years; however, 15 years would be more conducive to market development.[28] In this way, alternative energy developers and utilities have the

[26] Hitt Direct, at page 3:6-9.

[27] Hitt Direct, at page 6:15-7:3. PECO also recently obtained solar RECs under a 10-year contract in Pennsylvania. Hitt Direct at 7:1-3.

[28] Tr. Vol. 2, at pages 549:25-550:3 (April 21, 2010).

necessary market certainty to obtain financing and initiate projects.[29] Furthermore, long-term contracts need not secure 100% of the necessary generation over the length of the contract.[30] As shown in FirstEnergy's Pennsylvania operations, long-term contracts can satisfy portions of renewable energy requirements. Additionally, through long-term contracts, the parties can account for changes in the market, including Ohio's decreasing Alternative Compliance Payment, to account for future REC prices—much as EDUs do for projecting long-term energy needs. Overall, the parties should be free to negotiate the specific terms of the contract so that it is acceptable to all signatories. By using long-term contracts, alternative energy developers have the guaranteed return needed to obtain financing, utilities have a firm source of RECs into the future allowing them to reduce their reliance on spot markets, and the parties can use the free market to reach mutually beneficial arrangements.

In return for using long-term contracts, utilities should be permitted to seek recovery of alternative energy costs concurrent with the length of the REC contract, as FirstEnergy does with Riders AMI and DFC. Utilities should have the opportunity to be made whole from efforts to comply with the statute.

Despite the Companies' desire to use three-year contracts, and like long-term cost recovery, long-term REC arrangements are not foreign to FirstEnergy. In addition to the 15-year contracts in its residential program, FirstEnergy purchased solar RECs under a 10-year contract in Pennsylvania. FirstEnergy, through Metropolitan Edison Company and Pennsylvania Electric Company, contracted for 85% of an annual 10,000 REC requirement for the next ten years.[31] The contract did not obtain all of the necessary generation in Pennsylvania through its RFP,

[29] Hitt Direct, at page 5:6-12.

[30] Tr. Vol. 2, at page 550:16-23 (April 21, 2010) (rough version).

[31] Hitt Direct, at pages 6:15-7:3.

thereby allowing for some short-term market maneuverability, as FirstEnergy seems to prefer in Ohio.[32] FirstEnergy should easily be able to transfer its Pennsylvania success into Ohio.

Finally, OCC Witness Wilson Gonzalez noted that should the PUCO approve this Stipulation, the next ESP would not occur until 2014.[33] While most agree the REC market in Ohio is "immature,"[34] utilities are under an obligation to obtain renewable energy resources, or equivalent RECs, now. FirstEnergy received a solar REC waiver in 2009, and based on recent Commission filings, it anticipates a similar shortage in 2010. By the time of FirstEnergy's next ESP in 2014, the Companies will be five years into its alternative energy requirement. Short-term contracts do not provide the necessary market certainty for renewable energy developers to secure a loan and come to Ohio. Allowing FirstEnergy to continue with business as usual until 2014 will effectively limit the renewable energy goals in SB 221. The Commission should not let the market languish under a continuing cycle of short-term contracts coupled with force majeure applications while waiting for the market to mature.

Looking to the totality of FirstEnergy's circumstances, the Commission should require FirstEnergy to obtain its RECs through long-term contracts. In this way, FirstEnergy can help develop the renewable energy market in Ohio while providing the Companies a necessary tool to meet statutory REC requirements. FirstEnergy shows an ability to use, and in some cases, an affinity for, long-term contracts and cost-recovery. In order to alleviate the REC shortage FirstEnergy and other utilities are experiencing, the Commission should require the Companies to expand their use of long-term contracts and cost-recovery to include REC arrangements. In this way, alternative energy providers will be eligible for the needed financing to build a facility

[32] Hitt Direct, at pages 6:20-7:3.

[33] Tr. Vol. 4, at page 867:1-11 (April 23, 2010) (rough version).

[34] Tr. Vol. 2, at page 541:23-25 (April 21, 2010) (rough version).

in Ohio and develop an "immature" renewable energy market, thereby helping FirstEnergy comply with SB 221 and avoid future force majeure applications.

V. Conclusion

Should the Commission approve the proposed Stipulation, ELPC and OEC respectfully request that the PUCO modify the terms to require FirstEnergy to seek RECs pursuant to long-term contracts, defined as contracts at least 10 years long, and allow cost recovery concurrent with the contract length. In this way, FirstEnergy can contribute to the development of the renewable energy industry in Ohio and protect itself against REC shortfalls that have resulted in force majeure applications in 2009.

Respectfully submitted,

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I hereby certify that a true and accurate copy of the foregoing Post-Hearing Brief of the Environmental Law & Policy Center and the Ohio Environmental Council has been served upon the following parties, via electronic mail, this 30th day of April, 2010.

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