

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)	Case No. 10-2891-EL-ACP
Edison Company for Approval of Request)	
for Proposal to Purchase Renewable Energy)	
Credits Through Ten-Year Contract)	

COMMENTS OF THE ENVIRONMENTAL LAW AND POLICY CENTER

I. Introduction

On December 2, 2010, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively referred to as “FirstEnergy”) filed an Application for Approval of a Request for Proposal to Purchase Renewable Energy Credits (“Application”). In its Application, FirstEnergy requests that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) approve the initial Renewable Energy Credits (“REC’s”) Request for Proposal (“RFP”) and authorize FirstEnergy to seek competitive bids to purchase REC’s through ten year contracts.

FirstEnergy submitted its Application pursuant to Section A, II of the Electric Security Plan (“ESP”) Supplemental Stipulation, filed in Docket No. 10-388-EL-SSO on July 22, 2010 (“Stipulation”). The Stipulation was filed as a result of negotiations within a collaborative group that was established to address issues in FirstEnergy’s ESP. The collaborative included representatives from Kroger Company (with input provided on behalf of American Municipal Power), Nucor Steel Marion, Inc., Northeast Ohio Public Energy Council (with input on behalf of American Wind Energy Association), Ohio Partners for Affordable Energy, Ohio Energy

Group, Industrial Energy Users-Ohio, Constellation New Energy, Inc., and Constellation Energy Commodities Group, Inc., Ohio Hospital Association, Council of Smaller Enterprises, Staff of the Commission, FirstEnergy, and the Environmental Law & Policy Center (with input provided by The Solar Alliance), collectively referred to as “the Collaborative”. The Stipulation set forth a framework for FirstEnergy to work with signatory parties and non-opposing parties (as defined in the Stipulation) to assist in developing a REC RFP to purchase REC’s through ten year contracts. The Stipulation was filed with and approved by the PUCO. In this case, FirstEnergy’s Application is tailored to align with the language set forth in the Stipulation.¹

On December 22, 2010, Nucor Steel Marion, Inc. (“Nucor”) filed a Motion to Intervene, Memorandum in Support, and Comments Proposing Clarification and/or Modification (“Nucor Comments”). Nucor is a signatory to the Stipulation. In Nucor’s Comments, Nucor requested (1) that the PUCO amend FirstEnergy’s change of law provision to say that any termination of renewable requirements results in the termination of the contract, regardless of whether or not repayment will continue; and (2) if the PUCO refuses to do (1), then it should leave open whether or not termination of renewable requirements terminates the contract.² The Environmental Law and Policy Center (“ELPC”) opposes Nucor’s proposed changes, and asks that the Commission approve the Change of Law language contained in Section 9.1 (“Change of Law provision”) of Appendix A of FirstEnergy’s Application, Purchase and Sale Agreement for Renewable Energy Credits.

¹ See *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*, p. 2.

² See *Motion to intervene, memorandum in support, and comments proposing clarification and/or modification filed on behalf of Nucor Steel Marion, Inc.*, pp. 3-4.

II. Law and Analysis

A. Consistent with the Commission-Approved Stipulation, the Change of Law Provision Proposed in FirstEnergy's Application Distributes Risk Between FirstEnergy and Investors and Developers

Article 9 of FirstEnergy's Application addresses any changes in law:

9.1 Change in Law. 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 customer. However, if the 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.³

The purpose of FirstEnergy's Change of Law provision is to specify which changes of law (excluding changes that make performance impossible) will have an effect on the ten year contracts. This language is consistent with the PUCO-approved Stipulation that the Collaborative negotiated. After numerous meetings and discussions, in which Nucor participated, the Collaborative that executed the Stipulation recognized that the more opportunity that exists for the termination of contracts, the less likely it will be that an investor or developer will invest in solar development. In considering the big picture, this means that the greater the risk for investors and developers, the less likely it is that FirstEnergy will be able to meet their annual solar benchmark requirements as mandated under Amended Senate Bill 221 (SB 221).

³ See *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*, Appendix A, p. 14.

If Ohio's renewable portfolio standard is modified by the Legislature, the value of RECs would decrease. Recognizing that investors and developers should not carry all of the risk, the Stipulation was drafted with language that investors and developers could support. FirstEnergy's Change of Law provision seeks to minimize that risk. Nucor's comments suggest that the PUCO should amend the Application's Change of Law provision as drafted by FirstEnergy so that all of the risk in ten year contracts falls on developers and investors.

If the PUCO adopts Nucor's proposal and amends the Change of Law provision to state that any termination of renewable requirements results in the termination of the contract, regardless of whether or not repayment will continue, there will be added (and unnecessary) uncertainty regarding whether the contracts will last their intended ten years.

Nucor's second proposal is that if the PUCO refuses to modify the Change of Law provision, then the PUCO should leave open whether or not termination of renewable requirements terminates the contract. This proposed language would be equally, if not more, detrimental to the solar industry than Nucor's first proposal. Not only does this language allow uncertainty about whether or not the renewable requirements might be terminated to affect investor and developer's decisions, but it also creates uncertainty about what will happen should the requirements be terminated.

ELPC does not propose that FirstEnergy be denied cost recovery under the ten year contracts in the event that the statutory requirements are changed or eliminated. Rather, ELPC seeks approval of the compromise arrived at through the collaborative process that distributes risk so as to maximize investment in long-term solar projects. Notably, the law authorizes cost recovery through riders such as First Energy's Rider AER.

If there is a significant risk that FirstEnergy will cancel any ten year contracts, ultimately the projects will not get financed, and the law does not work. Implementation of SB 221 depends on basic contract law, meaning that utilities should enter into contracts and be bound by them. Nucor raises the hypothetical question of what will happen if SB 221 is modified or repealed. SB 221 remains the law, however, and the current law is all the Commission should consider.

B. Nucor's Proposed Modification Advocates for the Creation of Illusory Contracts that Will Prohibit the Successful Implementation of Renewable Energy Projects as Mandated by SB 221

Nucor presents the following hypothetical in their comments:

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.⁴

Essentially, Nucor's proposal argues for a system of illusory contracts between utilities and renewable investors and developers that gives the utilities an "out". A contract is illusory when "by its terms the promisor retains an unlimited right to determine the nature or extent of his performance... An apparent promise which according to the terms makes performance [with the promisor optional] is in fact no promise".⁵ Under Nucor's hypothetical, FirstEnergy will not be bound by ten year contracts, but developers *will* be bound. Not only would this create an illusory contract which is prohibited by law, but such a system would not support investment in projects, which is essential for Ohio's renewable energy standard to be successful. If investors and

⁴ See *Motion to intervene, memorandum in support, and comments proposing clarification and/or modification filed on behalf of Nucor Steel Marion*, p. 5.

⁵ *Smith v. GuideOne Insurance Co.*, 3d No. 02AP-1096, 2003-Ohio-4823.

developers constantly fear that their contracts will be cancelled, investors and developers will simply not invest. Essentially, that attitude defeats the purpose of a long-term contract.

A basic tenet of contract law is that impracticability is not enough to terminate a valid contract.⁶ If FirstEnergy enters into a contract to finance a project, First Energy should be bound by those terms under the rules of contract, regardless of a change of law. A change in law only terminates a contract if the change in law makes performance impossible.⁷ Unforeseen difficulties, however great, will not excuse performance and do not constitute ‘impossibility’.⁸ In other words, generally, so long as a contract is capable of performance in any mode contemplated by the parties, its performance cannot be said to have become impossible.⁹ In our case, Nucor proposes that any termination of renewable requirements results in the termination of the contract, regardless of whether or not repayment will continue. Nucor failed to identify how a change in law would make performance of the contract impossible.

Under the hypothetical described above, Nucor also suggests that if the renewable energy requirements are eliminated three years into a contract, it would be unreasonable for ratepayers to pay for seven years worth of REC’s “which serve absolutely no purpose”. While Nucor may hold the opinion that the REC’s would serve no purpose, ELPC (and likely many others including parties to the Stipulation) disagrees with such a brash statement. Financing a renewable energy facility benefits the company and customers by diversifying FirstEnergy’s energy supply and by providing cleaner sources of energy.

In addition, long-term contracts are required under SB 221 for the purpose of financing new projects. If a utility fails to meet its annual benchmarks, the utility may file for a force

⁶ *Id.*

⁷ *London & Lancashire Indem. Co. v. Board of Comm'rs.* (1923), 107 Ohio St. 51, 64.

⁸ *The Morris Coal Co. v. Thompson* (1914), 2 Ohio App. 345, 354.

⁹ *Board of Education v. Townsend* (1900), 63 Ohio St. 514.

majeure determination and request that the Commission waive all or part of the minimum renewable or solar energy requirements.¹⁰ Under Ohio Administrative Code (“OAC”) § 4901:1-40-06(A)(1), when seeking a force majeure determination, the electric utility must demonstrate that it pursued all reasonable compliance options including long-term contracts.

Nucor’s comments also state that “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 4928.63¹¹, Revised Code, are the only reason why FirstEnergy needs to purchase REC’s** [emphasis added].”¹² This attitude is Nucor’s fundamental premise for requesting that FirstEnergy’s Change of Law provision be modified and demonstrates Nucor’s unfamiliarity with Ohio’s renewable energy standard. Ohio law *requires* that utilities enter into long-term contracts.¹³ Not only should Ohio utilities make good faith efforts to comply with the law, but many have demonstrated a sincere interest in diversifying their energy supply and investing in renewable energy resources. In other words, there are numerous reasons, and considerable benefits, for why FirstEnergy should pursue ten year contracts and purchase REC’s.

III. Conclusion

The Change of Law provision contained in FirstEnergy’s Application, tailored to meet the terms of the Commission-approved Stipulation, is designed to encourage investment in the renewable energy industry. Nucor proposes that the Commission modify FirstEnergy’s proposal and adopt a broad change of law provision which would significantly detract from solar

¹⁰ OAC § 4901:1-40-06.

¹¹ Throughout its comments, Nucor repeatedly cites O.R.C. §4928.63 as the basis for modifying the Change of Law provision. Ohio’s renewable energy standard, however, is codified in O.R.C. §4928.64.

¹² See *Motion to intervene, memorandum in support, and comments proposing clarification and/or modification filed on behalf of Nucor Steel Marion*, p. 4.

¹³ OAC § 4901:1-40-06(A)(1).

investment and make solar advancement in Ohio virtually impossible. Accordingly, the Environmental Law & Policy Center respectfully requests that the PUCO reject Nucor's request for modification and adopt the Change of Law provision contained in FirstEnergy's Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Intervene has been served upon the following parties, electronically and via regular U.S. mail, postage prepaid, this 18th day of March, 2011.

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Summary: Comments electronically filed by Tara Santarelli on behalf of Environmental Law & Policy Center