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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

INITIAL COMMENTS OF CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC., CONSTELLATION ENERGY PROJECTS AND SERVICES GROUP, INC.

I. INTRODUCTION

Pursuant to the February 25, 2011 Entry in this matter, now comes Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., and Constellation Energy Projects and Services Group, Inc.

Constellation NewEnergy, Inc. ("CNE") provides electricity and energy-related services to retail customers in Ohio as well as in 15 other states, the District of Columbia and two Canadian provinces and serves over 15,000 megawatts of load and over 10,000 customers. CNE holds a certificate as a competitive retail electric supplier ("CRES") from the Commission to engage in the competitive sale of electric service to retail customers in Ohio. CNE currently provides service to retail electric customers in Ohio.

Constellation Energy Commodities Group, Inc. ("CCG") provides wholesale power and risk management services to wholesale customers (distribution utilities, co-ops, municipalities, power marketers, utilities and other large load serving entities), throughout the United States and Canada, in both regulated and restructured energy markets. CCG is active in the PJM Interconnection, L.L.C. and Midwest Independent System Operator ("MISO") wholesale power

markets and has sold power for wholesale delivery in Ohio. CNE and CCG are subsidiaries of Constellation Energy Group, Inc.

CEPS is a leading solar power developer for commercial and public sector facilities. CEPS contracts, constructs, operates and owns renewable energy generation facilities throughout the country, including Ohio. CNE, CCG, and CEPS (collectively, "Constellation") are wholly owned subsidiaries of Constellation Energy Group, a Fortune 500 North American energy company.

On December 2, 2010, Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company ("the Companies") filed an application for approval to conduct a request for proposal to purchase renewable energy credits through 10-year contracts. This application was filed pursuant to Section A.11 of the Stipulation and Recommendation as amended by the Supplemental Stipulation which was filed and approved by the Commission in Case No. 10-388-EL-SSO. Constellation will comment on only the ten year Purchase and Sale Agreement.

The Companies proposed REC RFP is purportedly designed to ensure financial neutrality to the Companies and to adhere to the following design criteria: (1) well defined products; (2) transparent process; (3) independent oversight; and (4) fair bid evaluation criteria. Constellation has reviewed the Application in light of the above criteria and submits the following comments in response to the Companies proposals on the REC RFP process.

The Companies provided a straw-man agreement and the Companies received a number of changes and accepted some changes including a force majeure provisions that does not excuse suppliers from performing under the Agreement if their costs increase or RECs can be sold to a market at a higher price, an appropriate credit provision which requires suppliers to have an

acceptable credit rating, a guarantor, or post security if their bid exceeds a certain dollar value; and a change in law provisions that enables the Companies to align the amount paid for RECs with the amount the Commission has approved for timely cost recovery. The terms and conditions of the Agreement were attached to the application as Appendix A.

II. CONSTELLATION COMMENTS

In response to the proposed ten year sale and purchase agreement, Constellation offers the following comments and proposed recommendations:

Contract Structure

As an initial matter, Constellation notes that the Application and related Purchase and Sale Agreement are not truly incenting market participants to develop renewable energy facilities. One of the greatest concerns is the lack of flexibility as to timing of the REC supply. The Application seeks approval for an RFP with a delivery period between June 1, 2011 and December 31, 2010. (App., p. 2) That, in and of itself, is not problematic. However, Section 3.2 of the Purchase and Sale Agreement requires that the REC Supplier be prepared to transfer RECs not later than 15 business days following the close of each quarter. As a result, there is no flexibility to allow time for citing or development of a project. By virtue of the structure requiring quarterly transfer of RECs on a firm basis, the RFP will require that a project has already been built or be in an advanced stage of construction. Altering the Purchase and Sale Agreement to be unit-contingent, whereby the REC Supplier would be obligated to deliver a particular percentage of the output of the facility, or deliver the total output of the facility up to a contracted amount,

would permit time for citing and development of facilities. At the same time, it would encourage development of new facilities that would have a known income stream to assist with financing.

Without the details of the RFP, it is difficult to provide detailed comments on the contract. Consequently, Constellation reserves the right to provide further feedback on the contract when additional information on the RFP is released. Aside from altering the structure of the Purchase and Sale Agreement, Constellation offers the following comments.

Definition of Renewable Energy Credit or REC

The definition of Renewable Energy Credit or REC fails to address certain attributes or issues that should be clear at the outset. In order to provide clear and transparent RFP, and ultimately a bid, it is important to identify those things that a REC does not include, for purposes of the RFP. Constellation therefore suggests that the following language be added to the definition:

"provided, however, that the [Product][RECs] do[es] not include: (i) state and federal production tax credits, investment tax credits, and any other tax credits or tax benefits, (ii) cash payments or outright grants of money (except any cash payments or grants related to any environmental greenhouse gas or emissions cap and trade program), (iii) other financial incentives which, if achieved, will result in cash payments by the party providing such incentives and which are specific to project development or project operation and (iv) any item that would otherwise be an environmental benefit or attribute under this definition, but (a) cannot be transferred by REC Supplier in accordance with applicable law or (b) cannot be transferred by REC Supplier without incurring material expenses."

Transfer Date

In addition to the issue surrounding contract structure identified above, the requirement that RECs be transferred within 15 business days following the close of the quarter, according to Section 3.2.1, is problematic for a second reason. RECs generated during any given month are not reflected in the GATS account until approx 35 days after the end of the month. Consequently, 15 business days is an insufficient time for the RECs to be reflected in the Supplier's account, much less be able to be transferred to the FE account. Although paragraph 3.2.1, includes an "[i]n the event..." disclaimer, the language is needlessly confusing. Constellation recommends that the Purchase and Sale Agreement be modified to allow for transfer within 45 days.

Penalties

Failure to Deliver RECs under paragraph 3.3.1 includes an insufficient cure period, and unknown, potentially excessive, penalties. As with the above discussion regarding the transfer date in paragraph 3.2.1, the cure period is not sufficient for the RECs to appear in a GATS account, and subsequently transferred. GATS recording requires 35 days, and an additional 10 days is appropriate and customary for delivery dates for Over-The-Counter contracts of this type. Consequently, the cure period should be revised to allow a minimum of 45 days after the end of the Reporting Year.

Additionally, the Purchase and Sale Agreement indicates that Seller may be responsible for a PUCO-imposed penalty. The only reason that the Purchase and Sale Agreement is being reviewed in the current proceeding is by virtue of a requirement in a settlement. However, the RFP process itself is being conducted without PUCO oversight, and the results of the RFP will result in a bi-lateral contract with general commercial terms. Given those facts, it is inappropriate

that Seller would be subject to reimbursement of a PUCO-imposed penalty that is imposed on Buyer, particularly when the Purchase and Sale Agreement requires no action or defense by Buyer in any proceeding. Should Seller (or Buyer) not adhere to the terms of the Purchase and Sale Agreement, the appropriate remedy is for the counter-party to pursue their rights and remedies under general commercial law.

Unaccepted RECs

Paragraph 3.3.2 permits Supplier to sell unaccepted RECs and invoice Buyer for the difference between the REC Price and the Sales Price. Seller should also be permitted to invoice Buyer for the reasonable administrative costs, including any fees or broker costs, associated with reselling the unaccepted RECs.

Administrative Burdens

Paragraph 3.5.4 indicates that Sellers will be responsible for fulfilling Buyer requests to "execute other documents". However, Sellers will bear additional expense as a result, and there is no limitation on the number or types of documents that may be requested. While Constellation appreciates that there may be modest requests, to ensure that Sellers will not be overly burdened, Constellation recommends that there be a commercially reasonable limit set forth in the contract. Specifically, Constellation recommends that the following sentence be added: "REC Supplier agrees to use commercially reasonable efforts to execute documents or instruments, at its reasonable expense, necessary to effectuate the delivery of the RECs to Buyer as may be reasonably requested by Buyer."

Change in Law

The Change in Law provision under paragraph 9.1 allows Buyer to reduce the contract price if regulatory action reduces their ability to recover costs in rates. Such a provision is non-standard, and is not seen in a single REC RFP in which Constellation has participated in a number of different states throughout the country, of which there have been many. Moreover, it is entirely unworkable from a Supplier perspective. Given the uncertainty that this provision creates, it is unlikely that a renewable developer would be able to use this contract to obtain bank financing. Even if the REC Supplier is not relying on this contract to obtain financing, it makes it difficult, if not impossible, for a REC Supplier to effectively hedge their price risk. Such a provision would ultimately attract fewer qualified bidders, and lead to higher bid prices in order to compensate for a risk that is wholly unknown.

REC Compliance.

The REC Compliance Status provision under paragraph 3.6 requires that if the RECs delivered by REC Supplier are later determined to have been, as of the applicable Delivery Date, unable to be used by Buyer for any reason, REC Supplier must provide substitute RECs and must reimburse Buyer for any costs or penalties incurred as a result of the non-compliant RECs. This is problematic because, given the 10-year term, it is difficult to anticipate the effect that any potential subsequent legislation could have on the compliance status of the RECs (including on a retroactive basis). The preferred approach is to include language whereby, in the instance of a non-compliance determination as a result of a change in law, the Parties agree to negotiate in good faith to amend the Agreement to conform with whatever new statute, regulation, or rule has led to such a determination, in order to maintain the original intent of the parties under the Agreement.

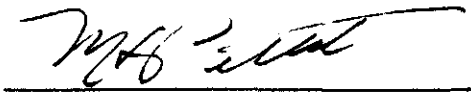
Calculation of Damages.

The Calculation of Damages provision under paragraph 11.2 only provides for a termination payment to the non-defaulting party. Due to the scope of potential defaults that go beyond the traditional scenario of an intentional "breach", this is approach is problematic for this type of contract. A one-way termination mechanism is inconsistent with industry standard, can directly affect a party's credit ratings and ongoing financial liquidity, and does not allow the parties to preserve the benefit of the bargain originally agreed upon between by the parties. Two-way termination payments are not only commonly used within the industry, but are a component of FirstEnergy's other Ohio RFPs for Standard Service Offer, the relevant portion of which is as follows:

> **Termination Payment**. The Non-Defaulting Party will calculate a single payment (the "Termination Payment") by netting out (i) the sum of the Settlement Amount under this Agreement payable to the Defaulting Party, plus similar settlement amounts payable to the Defaulting Party under any other agreements between the Companies and the applicable SSO Supplier for the provision of SSO Supply or similar service (each, an "Other SSO Supply Agreement") being terminated due to the event giving rise to the Event of Default plus, at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party under this Agreement or Other SSO Supply Agreements and actually received, liquidated and retained by the Non-Defaulting Party, plus any or all other amounts due to the Defaulting Party under this Agreement and, at the option of the Non-Defaulting Party, Other SSO Supply Agreements, and (ii) the sum of the Settlement Amount under this Agreement payable to the Non-Defaulting Party, plus similar settlement amounts payable to the Non-Defaulting Party under any Other SSO Supply Agreement plus, at the option of the Non-Defaulting Party, any cash or other form of security then available to the Defaulting Party under this Agreement or Other SSO Supply Agreements and actually received, liquidated and retained by the Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement and, at the option of the Non-Defaulting Party, Other SSO Supply Agreements. The Termination Payment will be due to or due from the Non-Defaulting Party as appropriate …
> (Master Standard Service Offer Supply Agreement, pp. 26-27)

A two-way termination payment mechanism, whereby the termination payment would be due either to or from the non-defaulting party, is appropriate and should be added to the Purchase and Sale Agreement.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 18th day of March, 2011 by regular U.S. mail, postage prepaid, or by electronic mail, upon the persons listed below.

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