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

FINDING AND ORDER

The Commission finds:

(1) The applicants, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the Companies), are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of the Commission.

(2) Section 4928.64(B), Revised Code, establishes benchmarks for electric utilities to acquire a portion of the electric utility's standard service offer from renewable energy resources. Specifically, the statute provides that a portion of the electric utility's electricity supply for its standard service offer must come from alternative energy resources, including specified percentages from solar energy resources (SERs).

(3) On December 2, 2010, the Companies filed an application for approval to conduct a request for proposal (RFP) to purchase renewable energy credits (RECs) through ten-year contracts pursuant to the Commission-approved combined stipulation in its most recent electric security plan proceeding. *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 Opinion and Order (August 25, 2010) (*2010 ESP Case*). More specifically, the Companies' application in this proceeding seeks authorization to elicit competitive bids to purchase

through ten-year contracts the annual delivery of 5,000 Ohio solar RECs and 20,000 Ohio non-solar RECs. Additionally, the application seeks recovery of all reasonable costs associated with acquiring RECs through purchase and sale agreements, irrespective of the Companies' need for RECs to meet their statutory benchmark requirement, as well as recovery of such costs associated with administering the RFP. Finally, the application requests that such costs be recovered through Rider AER or another rider that shall be established to effectuate the recovery of such costs.

(4) Motions to intervene in the above-captioned case were filed by Nucor Steel Marion, Inc. (Nucor) and the Environmental Law and Policy Center (ELPC). No party opposed the motions to intervene. The Commission finds that the motions to intervene are reasonable and should be granted.

(5) On December 22, 2010, Nucor filed comments on the Companies' application. Additionally, on December 22, 2010, Nucor filed a motion for admission *pro hac vice*, requesting that Michael K. Lavanga be admitted to practice before the Commission in this proceeding. Mr. Lavanga represents Nucor, is an active member of the District of Columbia and Virginia Bars, and has participated in numerous proceedings addressing energy and utility matters. The Commission finds that the motion for admission *pro hac vice* is reasonable and should be granted.

(6) By entry issued February 25, 2011, the attorney examiner established a procedural schedule requiring comments to be filed by March 18, 2011, reply comments to be filed by March 28, 2011, and motions to intervene to be filed by April 11, 2011.

(7) On March 18, 2011, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., and Constellation Energy Projects and Services Group, Inc. (collectively, Constellation), ELPC, and Staff filed initial comments. On March 28, 2011, Nucor and Staff filed reply comments.

(8) In its comments on the Companies' application, Nucor initially states that it does not oppose the Companies' overall

proposal; however, Nucor requests two clarifications and/or modifications to the Companies' proposal. First, Nucor requests clarification of the "change of law" provision in the proposed purchase and sale agreement in order to provide better protection for ratepayers in the event that the renewable energy benchmarks are modified or eliminated from the statute. Nucor suggests that the Commission improve the change of law provision to specifically provide protection or, at a minimum, clarify that, in approving the application, the Commission is reserving its rights and is not making a determination on whether cost recovery for ten-year RECs should be allowed to continue in the future if the statutory renewable energy mandates are modified or eliminated.

Next, Nucor discusses the Companies' requests for approval for recovery of costs associated with the REC RFP through (a) Rider AER or (b) such other rider that shall be established to effectuate the recovery of costs. Nucor recommends option (b), under which the Commission would direct the Companies to establish new riders. Nucor reasons that, since the ten-year REC RFP costs will be fixed costs, and not energy-related costs that vary based on usage, the new riders should allocate and recover the costs on a customer basis, rather than through Rider AER, which is a uniform per kWh charge across all customer classes.

(9) In its comments on the Companies' application, Constellation discusses the following areas of the proposed purchase agreement: (a) contract structure, (b) definition of REC, (c) transfer date, (d) penalties, (e) unaccepted RECs, (f) administrative burdens, (g) change in law, (h) REC compliance, and (i) calculation of damages.

Constellation first contends that the application and related purchase and sale agreement will not truly incent market participants to develop renewable energy facilities because the structure of the application and agreement requires quarterly transfer of RECs on a firm basis and will require utilization of projects that have already been built or are in an advanced stage of construction. Consequently, Constellation argues that the structure lacks flexibility to allow time for siting or development of new projects.

Constellation proposes that the purchase and sale agreement be modified to be unit contingent, whereby the REC supplier would be obligated to deliver a certain percentage of the output of the facility or deliver the total output of the facility up to a contracted amount to permit time for siting and development.

Next, Constellation argues that the definition of REC should be clarified to identify those things a REC does not include for purposes of an RFP. Constellation suggests that the following language should 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."

Constellation next suggests that the purchase and sale agreement be modified to allow RECs to be transferred within 45 business days following the close of the quarter, instead of 15 days. Constellation argues that this is necessary because RECs are not reflected in a GATS account until approximately 35 days after the end of the month, making a 15-day time period insufficient. In the same vein, Constellation argues that the cure period should be expanded to a minimum of 45-days to allow time for GATS recording and an additional 10 days as is appropriate and customary.

Constellation further disputes the portion of the purchase and sale agreement indicating that the seller may be responsible for a Commission-imposed penalty. Constellation argues that, because the RFP process itself is conducted without Commission oversight, it is

inappropriate to subject the seller to reimbursement of such a penalty. Additionally, Constellation points out that the purchase and sale agreement permits the seller to sell unaccepted RECs and invoice the buyer for the price difference. Constellation argues that the seller should also be permitted to invoice the buyer for administrative costs, including fees or broker costs, associated with reselling the unaccepted RECs.

Constellation next argues that, in order to ensure that sellers will not be overly burdened, the purchase and sale agreement should place a commercially reasonable limit on the buyer's obligation to "execute other documents." Constellation suggests addition of the following sentence: "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."

Next, Constellation contends that the change of law provision in the purchase and sale agreement allowing the buyer to reduce the contract price if regulatory action reduces its ability to recover costs in rates is non-standard and unworkable from a seller's perspective. Specifically, Constellation argues that this provision could make it difficult for a developer to obtain bank financing and would attract fewer qualified bidders.

Constellation next disputes the requirement in the purchase and sale agreement requiring a REC seller to provide substitute RECs and reimburse the buyer for related expenses in the event that the RECs delivered are determined to have been noncompliant. Constellation argues that, given the 10-year term of the contract, it would be difficult for a seller to anticipate the effect that any potential subsequent legislation could have on the compliance status of RECs. Consequently, Constellation suggests inclusion of language whereby the parties agree that, in the instance of a noncompliance determination as a result of a change of law, the parties will negotiate in good faith to amend the agreement to conform to the change and maintain the parties' original intent.

Finally, Constellation disputes the calculation of damages provision in the purchase and sale agreement which provides for a termination payment only to the non-defaulting party as non-standard and problematic. Constellation contends that the agreement should utilize a two-way termination payment, as it is commonly used within the industry and is a component of the Companies' other Ohio RFPs for standard service offers.

(10) In its comments, ELPC states that the change of law provision in the application distributes the risk that the value of RECs will decrease between the Companies, investors, and developers and is consistent with the Commission-approved stipulation. ELPC argues that Nucor's proposal, which suggests amending the change of law provision to provide that termination of the REC requirements will result in termination of the contract, shifts all of the risk of the ten-year contracts to developers and investors. Further, ELPC disputes Nucor's second proposal that, if the Commission declines to modify the change of law provision, the Commission should leave open whether or not termination of REC requirements terminates the contract. ELPC argues that both of Nucor's suggestions will create uncertainty regarding the contracts and, consequently, will be detrimental to the solar industry.

ELPC next argues that Nucor's proposal to provide that termination of the REC requirements will result in termination of the contract will create illusory contracts that will prohibit the successful implementation of renewable energy projects. Specifically, ELPC argues that Nucor's proposal provides that the Companies will not be bound by 10-year contracts but that the developers will be bound and that this results in an illusory contract prohibited by law and does not support investment in renewable energy products.

(11) In its comments, Staff addresses each of the Companies' three primary requests.

Staff characterizes the Companies' first request as soliciting approval for the first RFP to seek competitive bids to purchase through ten year contracts: (a) the annual delivery of 5,000 Commission-certified solar RECs originating in

Ohio with a delivery period between June 1, 2011, and December 31, 2020, and (b) the annual delivery of 20,000 non-solar Commission-certified RECs originating in Ohio with a delivery period between June 1, 2011, and December 31, 2020. Staff comments that it finds the initial request to be consistent with the terms in the Second Supplemental Stipulation filed in the *2010 ESP Case*, which was adopted as part of the combined stipulation in that proceeding. Staff states that it has no further comments on this request, other than to clarify that the Commission does not technically certify RECs but certifies the renewable energy resource generating facilities.

Staff characterizes the Companies' second request as seeking approval for recovery of all reasonable costs associated with acquiring RECs through the aforementioned 10-year contracts, including the costs associated with administering the RFP, irrespective of the Companies' need for the RECs to meet their statutory requirement. Such costs are proposed to be recovered each year in which the RECs are delivered, including any period for reconciliation, irrespective of the date the RECs may be retired. Staff indicates that it finds most of the components of the second request to be consistent with the terms in the Second Supplemental Stipulation in the *2010 ESP Case*, but questions the portion of the application on page 2 allowing for cost recovery "irrespective of the Companies' need for RECs to meet their statutory requirement[.]" Staff states that this language is inconsistent with language found in Section A.11(d) of the Second Supplemental Stipulation providing that "such RFP shall provide that should the Companies determine prior to entering into contracts that the Companies do not require those RECs to meet the requirements of R.C. §4928.64, . . . then the Companies will not be required to purchase those RECs." Staff notes that, rather than an inconsistency, the phrase "irrespective of the Companies' need for RECs" may refer to the Companies' immediate need for RECs, rather than banking the RECs and using them for a future compliance year.

Consequently, Staff proposes that, in this application as well as any future applications filed in conjunction with the

proposed REC RFPs in the Second Supplemental Stipulation, the Companies should file details describing how they intend to perform the assessment of their immediate and long-term need for RECs sought under the RFP, as well as their status relative to the three percent cost cap as described in Section 4928.64(C)(3), Revised Code.

As to the Companies' third request, Staff notes that the Companies request that reasonable costs associated with the RFP, including the costs of acquiring RECs and administering the RFP, be recovered through Rider AER or such other rider that shall be established to effectuate the recovery of such costs. Staff comments that recovery of REC costs on a per kWh basis through Rider AER is the most appropriate mechanism for the recovery of reasonable costs associated with securing RECs through the RFP and recommends that the Commission grant such recovery as it is consistent with the design of the alternative energy portfolio standard in Section 4928.64, Revised Code. Staff notes that, while Nucor has stated its preference that recovery occur on a per customer basis, Nucor also appears unopposed to recovery of RFP REC costs from the customer classes.

(12) In its reply comments, Nucor disputes ELPC's comment that Nucor's proposals concerning the change in law provision would improperly shift risk to investors and developers. However, Nucor points out that, under the change of law provision as proposed, the primary risk in the event that REC requirements are eliminated rests with the ratepayer. Additionally, Nucor argues that ELPC has provided no evidence to support its contention that, without ELPC's suggested modifications, renewable projects will not get built or that the Companies will be unable to acquire the RECs necessary to meet their benchmarks.

Additionally, Nucor disputes ELPC's contention that Nucor's proposal will result in a system of illusory contracts. Nucor contends that its proposed change of law provision would not give the Companies an unlimited right to determine the nature or extent of performance but only to cancel the contract under a limited, defined circumstance.

Next, Nucor disputes Staff's conclusion that recovery of REC costs on a per kWh basis through Rider AER is the most appropriate mechanism. Nucor maintains that the costs are more akin to fixed costs than variable costs and, consequently, should be recovered similar to a fixed cost such as through a customer charge or appropriate rider.

(13) Staff argues in its reply comments that it is not opposed to efforts, such as those proposed by Constellation, to modify timing of REC supply, REC transfer schedules, and permissible cure periods in order to ensure a reasonable degree of flexibility, provided that the outcome does not deviate from the terms of the Second Supplemental Stipulation.

Additionally, Staff addresses Constellation's, ELPC's, and Nucor's comments to the extent they concern perceived risk in the change of law provision. Staff claims that most of these proposals to modify the change in law provision do not reduce, but merely redistribute risk, and that ratepayers' risk is already adequately addressed in the proposals.

Finally, Staff disputes ELPC's comment that Ohio law requires that utilities enter into long-term contracts by citing to Rule 4901:1-40-06(A)(1), Ohio Administrative Code (O.A.C.). Staff points out that this Rule references *force majeure* determinations. Further, Staff expresses its belief that there is no such requirement, but rather that utilities must explore the universe of compliance options, presumably including consideration of long-term contracts.

(14) Despite Nucor's preference that new riders be established to allow cost recovery on a per customer basis, the Commission agrees with Staff's recommendation that recovery of REC costs on a per kWh basis through Rider AER is the most appropriate mechanism for recovery, as this method most closely aligns with the design of the alternative energy portfolio standard in Section 4928.64, Revised Code. Additionally, despite Nucor's and Constellation's proposed modifications to the change of law provision, the Commission agrees with Staff's assessment that these modifications would not reduce, but merely redistribute,

perceived risk and that risk is appropriately distributed in the Companies' proposal.

Additionally, we note that, in the Companies' recently withdrawn application for a force majeure determination in Case No. 11-411-EL-ACP, ELPC, the Ohio Environmental Council, and the Ohio Consumers' Counsel filed comments requesting that the amount sought in the RFP be increased by any REC shortfall carried forward from 2009 and 2010. We decline to grant this request because the amount of RECs sought in the RFP was set by the Commission-approved combined stipulation in the *2010 ESP Case*. However, we emphasize that the Companies are obligated to meet their statutory benchmark for RECs and nothing in this Finding and Order precludes the Companies from procuring part of the 2010 shortfall from the RFP.

Therefore, upon review of the application, the comments, and the reply comments, the Commission concludes that the Companies' application should be approved, with the following modifications and clarifications.

(a) In order to clarify the Companies' intended meaning of the phrase "irrespective of the Companies' need for RECs to meet their statutory requirement," on page 2 of the application, the Companies shall file details within 90 days of the date of this Finding and Order describing how they intend to assess their immediate and longer-term need for RECs under the RFP.

(b) 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.

(c) Further, the Companies are directed to file their applications for the 2013 and 2014 RFPs to allow sufficient time for the RFPs to take place in advance of the first delivery year in order to allow new facilities to use the resulting contractual commitments to obtain financing.

(d) In order to allow sufficient time for RECs generated during any given month to be reflected in a GATS account, Section 3.2.1 of the Purchase and Sale Agreement shall be modified to require RECs to be transferred within 45 days following the close of the quarter.

(e) In order to allow sufficient time for RECs generated during any given month to be reflected in a GATS account, Section 3.2.1 of the Purchase and Sale Agreement shall be modified to include a cure period of 45 days following the end of the reporting year.

(15) At this time, the Commission concludes that the preceding modifications are necessary so that the proposed RFP to purchase RECs will incent market participants to develop renewable energy facilities, to allow a reasonable amount of flexibility in the transfer of RECs, and to ensure consistency between the application and the requirements of the Second Supplemental Stipulation in the *2010 ESP Case*. Additionally, the Commission finds that all reasonable costs associated with the RFP should be recoverable through the Companies' existing Rider AER. Therefore, the Commission finds the proposed RFP, as modified herein, to be both reasonable and consistent with Sections 4928.64 and 4928.65, Revised Code.

It is, therefore,

ORDERED, That the motions to intervene filed by Nucor and ELPC be granted. It is, further,

ORDERED, That the motion for admission *pro hac vice* of Michael K. Lavanga be granted. It is, further,

ORDERED, That the application filed on December 2, 2010, as modified in finding (14), be approved. It is, further,

ORDERED, That nothing in this Finding and Order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this Finding and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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