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 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**

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY TO THE ENVIRONMENTAL LAW AND POLICY CENTER 'S APPLICATION FOR REHEARING AND NUCOR STEEL MARION, INC.'S APPLICATION FOR REHEARING AND CLARIFICATION

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Pursuant to Rule 4901-1-35(B), Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submit their Memorandum Contra to the Application for Rehearing ("AFR") filed by The Environmental Law and Policy Center ("ELPC") and Application for Rehearing and Clarification ("AFR") filed by Nucor Steel Marion, Inc. ("Nucor") on September 2, 2011. For the reasons discussed below, the Commission should deny both AFRs.

I. PROCEDURAL BACKGROUND

On April 15, 2011, the Companies submitted both their 2010 Annual Alternative Energy Resource ("AER") Status Report ("2010 Status Report") and an Application for a Force Majeure ("FM") determination with regard to the Companies' 2010 in-state solar renewable energy credits ("SRECs") ("2010 FM Application"). On June 27, 2011, ELPC, the Office of the Ohio Consumers' Counsel (jointly with Citizen Power), The Commission Staff ("Staff"), and The Solar Alliance each submitted comments. Nucor and The Ohio Energy Group submitted comments on the Companies' 2010 Status Report. On July 11, 2011, the Companies filed reply comments. On August 3, 2011, the Commission issued an Opinion and Order granting the Companies' 2010 FM Application ("Order"). On September 2, 2011, both ELPC and Nucor filed their respective AFRs.

II. SUMMARY OF ARGUMENTS

In its AFR, the ELPC initially contends that the Commission improperly shifted the burden of proof to the interveners because the Commission noted in its Order that "neither the interveners nor Staff has demonstrated that substantial quantities of in-state

SRECs were reasonably available in the market."[1] Through this argument, the ELPC also attempts to argue, again, that the Companies failed to demonstrate that they are entitled to a *force majeure* determination. As more fully discussed below, in their 2010 FM Application, the Companies demonstrated a *prima facie* case that there were not sufficient quantities of in-state SRECs reasonably available in the market in order to receive a force majeure determination. At that point, the intervenors, in order to succeed, must refute the Companies' *prima facie* case. They did not. Thus, based on the record evidence, the Commission properly determined that sufficient quantities of in-state SRECs were not available in the market, thus entitling the Companies to a force majeure determination.

Second, the ELPC contends that the Commission improperly considered the Companies' December 2, 2010 Application for Request for Proposal filed in Case No. 10-2891-EL-ACP ("RFP Application") when determining that the Companies made a good faith effort in procuring SRECs because at the time the Commission issued its August 3, 2011 Order in this proceeding, that Application was still pending. As discussed below, the Commission did not base its decision on the RFP Application. Rather, the Commission simply noted that the Companies' could recover the 2010 SREC shortfall by utilizing the recently approved request for proposal ("RFP") process to obtain those SRECs.

[1] *In re Application of [the Companies] for a Force Majeure Determination for Their In-State Solar Resources Benchmark Pursuant to R.C. §4928.64(C)(4)(a),* Case No. 11-2479-EL-ACP ("2011 Force Majeure Case), Order at pp. 13-14 (August 3, 2011).

Lastly, in its AFR, Nucor argues that the Commission should retain an independent auditor to review the Companies' compliance costs.[2] The Commission should deny Nucor's AFR because Nucor and Staff already raised it, and the Commission chose not to address it in its Order. Therefore, the Commission effectively rejected this request.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by Oho Revised Code § 4903.10 and Rule 4901-1-35, Ohio Administrative Code. Under those authorities, applications for rehearing are to be granted only where a Commission order is "unreasonable," "unlawful," "unjust or unwarranted." As set forth below, the Order issued in this case is not "unreasonable," "unlawful," "unjust or unwarranted." Thus, the Commission should deny rehearing.

IV. ARGUMENT

A. The Commission's Order Did Not Improperly Place the Burden of Proof on the Intervenors.

In its AFR, ELPC argues that the Commission "improperly shifted the burden of proof from FirstEnergy to the intervenors and Staff" when it stated in its Order that none of the intervenors showed that substantial quantities of SRECs were reasonably available in the marketplace.[3] ELPC also attempts to bootstrap this "new" argument by repeating its previous assertion in its comments that the Companies failed to exhaust all means available to obtain in-state SRECs.[4] Both of these arguments fail.

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[2] Nucor also requested clarification as to where and how the Commission will address the alternative energy compliance cost and cost cap issues.

[3] ELPC AFR at pp. 5-6.

[4] ELPC's assertion that the Companies had to demonstrate that they exhausted all means available to acquire SRECs is not the correct standard. R.C. § 4928.64(C)(4)(b) clearly states that the Companies must

The Commission did not improperly shift the burden of proof onto the intervenors. The Companies acknowledge that they had the burden of proof to demonstrate a *prima facie* case for a force majeure determination as set forth in O.R.C. §4928.64(C)(4)(b), and as the Commission determined, they did so. However, once the Companies successfully made that demonstration in their 2010 FM Application, if the intervenors and Staff sought to refute that *prima facie* case, they had the burden of presenting evidence for that purpose. They failed to do so.

In *Revolution Communications Ltd. V. AT&T Ohio,* Case No. 06-427-TP-CSS, the Commission discussed a similar argument relating to the improper shift of the burden of proof.[5] In that case, the Complainant Revolution, having the initial burden of proof, presented sufficient evidence to indicate legitimate issues and concerns with respect to the reasonableness and accuracy of its bills with Respondent AT&T. On rehearing, AT&T argued that the Commission improperly shifted the burden of proof when the Commission allowed Revolution's "bare allegations" to prevail. In its Entry on Rehearing, the Commission rejected AT&T's arguments, stating that "we did not shift the burden of proof" and found that when Revolution presented sufficient evidence to indicate legitimate issues and concerns with billing, "it became incumbent upon AT&T to present evidence which would allow the Commission to substantiate or verify AT&T's bills."[6] Therefore, "in the absence of relevant, credible evidence to support the accuracy

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make "a good faith effort" to acquire sufficient renewable energy. O.A.C. § 4901:1-40-06 states that the Companies have to demonstrate that it pursued all reasonable compliance options. The law does not state that the Companies have to demonstrate that they "exhausted all means available."

[5] *Revolution Communications Ltd. V. AT&T Ohio,* Case No. 06-427-TP-CSS, Entry on Rehearing (April 15, 2009).

[6] *Id.* at p. 4.

of its bills, and to refute Revolution's evidence," the Commission properly found that Revolution should prevail.[7]

Here, similar to the *Revolution* case, the Commission did not shift the burden of proof. The Companies presented sufficient evidence in their 2010 FM Application and Reply Comments demonstrating that there were not enough in-state 2010 vintage SRECs available in the marketplace and that the Companies made a good faith effort to acquire them. The Companies sponsored four SREC Requests for Proposal ("RFPs"), solicited known suppliers for SRECs, contacted SREC brokers and participated in a number of SREC auctions. They hired Navigant Consulting, Inc. ("NCI"), who possesses extensive experience with SREC RFPs, to assist them in procuring 2010 SRECs. Despite these extensive efforts, neither the Companies nor their experts could find any more 2010 Ohio SRECs in the marketplace. Base upon this showing, the Commission determined that the Companies had met their burden of proof.

At that point, as an intervenor, if ELPC sought to challenge the Companies' evidence, it was incumbent upon it to present its own evidence that would allow the Commission to change its conclusion. However, in their comments, none of the commenting parties disputed the fact that there simply were not enough 2010 Ohio SRECs reasonably available in the marketplace to allow the Companies to comply with the in-state SREC benchmark.[8] Therefore, having offered no relevant, credible evidence to refute the Companies' evidence, the Commission simply noted this fact when properly concluding that the Companies' were entitled to a force majeure determination. The

[7] *Id.*
[8] *See* Staff Comments at p. 7 (SA "did not assert that Ohio S-RECs are reasonably available in the marketplace currently...").

Commission did not improperly shift the burden of proof upon the intervenors and this alleged assignment of error should be rejected.

As it relates to the ELPC's argument that the Companies' failed to demonstrate that they were entitled to a force majeure determination, the Commission has already rejected the ELPC's (and other intervenors') assertions that the Companies did not make a good faith effort to acquire SRECs. Parties may not use an application for rehearing to rehash arguments that the Commission has already considered and rejected. *See, e.g., In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider*, Case No. 10-164-EL-RDR, Order dated Oct. 22, 2010 (declining rehearing where the Commission found "OCC has not presented any new arguments for the Commission's consideration that were not previously considered and rejected"); *In the Matter of the Adoption of Rules to Implement Substitute Senate Bill 162*, Case No. 10-1010-TP-ORD, Order dated Dec. 15, 2010 ("OPTC has raised no new arguments that would compel the Commission to modify the language of paragraph (C)(5) of the adopted rule. Rehearing is, accordingly, denied."). ELPC's attempt to disguise its rehash of its previous argument, namely that force majeure was not warranted in the first place, into a different "burden of proof" argument does not change the fact that the Commission has already considered, and rejected, this substantive argument.

Lastly, it is important to note that on the same day that the Commission ruled on the Companies' 2010 FM Application, it also ruled on several other force majeure applications regarding in-state SRECs. Specifically, the Commission stated that:

> the Commission finds that [Direct Energy Business] has presented evidence that an insufficient quantity of in-state SRECs for 2010 was reasonably available in the market to facilitate DEB's compliance with its benchmark. As we recognized in numerous proceedings today, other electric utilities and electric services

> companies likewise experienced difficulties in meeting their in-state SER benchmarks for 2010.[9]

Interestingly, the ELPC did not file an application for rehearing in any of those other cases. Either there were sufficient SRECs for 2010 in Ohio – or there were not. The Commission's determination in this proceeding applies with equal force to each and every electric utility and electric service company in Ohio – not just the Companies. Therefore, if the Commission were to grant rehearing on ELPC's argument in this case, it would have to similarly reverse its Orders as it pertains to the other electric utilities and electric service companies where it found that there was an insufficient quantity of in-state SRECs for 2010.[10] At this stage, and without any evidence to support a reversal, such an action would not make sense, particularly where the only evidence presented showed that there were insufficient quantities of in-state SRECs reasonably available in the market. Therefore, for all of those reasons, the Commission should deny ELPC's AFR.

B. The Commission Did Not Consider the Companies' Application for Request for Proposal In Determining that the Companies Were Entitled to a Force Majeure Determination.

In its second argument, the ELPC argues that the Commission, when concluding that the Companies demonstrated a good faith effort to acquire sufficient in-state SRECs, improperly considered the existence of the Companies' recently approved RFP. The ELPC's hard-to-follow argument is misplaced. First, the Companies advised the

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[9] *In the Matter of Direct Energy Business LLC for a Waiver from Meeting the 2010 Ohio Sited Solar Energy Resource Benchmarks*, Case No. 11-2447-EL-ACP, Finding and Order at pp. 5-6 (August 3, 2011). *See also In the Matter of the Application by Noble Americas Energy Solutions LLC for a Waiver from 2010 Ohio Sited Solar Energy Resource Benchmarks*, Case No. 11-2384-EL-ACP, Finding and Order (August 3, 2011); *In the Matter of the Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Case No. 11-2470-EL-ACP, Finding and Order (August 3, 2011); *In the Matter of the Alternative Energy Resources Report for Calendar Year 2010 from SMART Papers Holdings LLC*, Case No. 11-2650-EL-ACP, Finding and Order (August 3, 2011).

[10] *Id.*

Commission that they had a recently approved RFP process in place so that the Commission would recognize that the long term RFP would assist in obtaining any shortfall that the Commission may impose. Moreover, given the details surrounding the procedures to be followed by the Companies when soliciting long-term SRECs, the Companies wanted the Commission to understand that it would have been impractical and potentially harmful to the settlement process for the Companies to pursue long-term contracts on their own during those settlement discussions.

Second, the Commission did not base its decision on the fact that the Companies have a recently approved RFP. Rather, the Commission made its decision "upon review of the application and comments filed in this proceeding and the fact that the Companies "sought the required SRECs by sponsoring four RFPs, soliciting known suppliers for SRECs, contacting SREC brokers, and participating in SREC auctions."[11] By stating that the Companies could procure part of the 2010 in-state SREC shortfall from the recently approved RFP, the Commission simply made clear that there was no prejudice in granting force majeure for 2010 because the Companies still would be required to make the investment for the number of SRECs they could not obtain in 2010. The Commission recognized that the Companies made, and will continue to make in the future, good faith efforts to acquire SRECs through their long-term RFP process. Consequently, because it did not rely upon the Companies' Application for RFP in determining that they were entitled to a force majeure determination, the Commission should deny this alleged assignment of error included in the ELPC's AFR.

[11] August 3, 2011 Order at pp. 13-14.

C. **An Independent Auditor Is Not Necessary.**

In its AFR, Nucor requests that the Commission rule on Staff's recommendation to retain an independent auditor to evaluate the Companies' compliance costs. As Nucor indicated in its comments, Staff recommended that an independent auditor audit the Companies' Rider AER[12] As the Companies already asserted, this recommendation is unnecessary. The Companies have established an effective review process with Staff for recovery of costs through Rider AER, which has been working as designed. Staff has access to information on the cost of RECs incurred through the bidding process. The Companies incur Rider AER costs in their efforts to comply with the statutory benchmarks set forth in R.C. §4928.64. The Companies do not believe it is necessary or cost-effective to employ an outside auditor to undertake the same review process that is already in place with the Staff and will only increase costs of compliance which will have to be paid by customers. This recommendation was before the Commission and it rejected it. Therefore, the Commission should deny Nucor's AFR on this issue.

In addition, Nucor suggests that if an independent auditor is retained, Nucor should have the full opportunity to participate in that process, including discovery rights. This suggestion should be rejected. Should an *independent* auditor be retained, there would be no need for a separate review by any third party. Moreover, during the audit, the auditor could obtain highly confidential, proprietary and sensitive information that should not be disclosed to third parties. Disclosing this information to third parties could potentially violate mutual confidentiality agreements that prohibit the Companies from

[12] Staff Comments, pp. 10-11.

making such disclosures. Put simply, Nucor and other intervenors, should not have access to such sensitive information.

V. CONCLUSION

For all of the foregoing reasons, the Companies respectfully request that the Commission deny the AFR filed by the ELPC and the AFR filed by Nucor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra* was filed electronically this 12th day of September, 2011, with the Public Utilities Commission of Ohio. A copy of this Memorandum Contra was served via electronic mail on the following parties below. Notice of this filing will also be sent via e-mail to subscribers by operation of the Commission's electronic filing system.

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Summary: Memorandum Contra to the Environmental Law and Policy Center's Application for Rehearing and Nucor Steel Marion, Inc.'s Application for Rehearing and Clarification electronically filed by Ms. Carrie M Dunn on behalf of The Cleveland Electric Illuminating Company and Ohio Edison Company and The Toledo Edison Company