

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Annual Alternative)
Energy Status Report of Ohio Edison)
Company, The Cleveland Electric) Case No. 11-2479-EL-ACP
Illuminating Company, and The Toledo)
Edison Company.)

ENTRY ON REHEARING

The Commission finds:

- (1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this 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, for 2010, a portion of the electric utility's electricity supply for its standard service offer must come from alternative energy sources (overall renewable energy resources benchmark), including 0.010 percent from solar energy resources (overall solar energy resources (SER) benchmark), half of which must be met with resources located within Ohio (in-state SER benchmark). This requirement increased to 0.030 percent for 2011.
- (3) On April 15, 2011, FirstEnergy filed an application requesting a *force majeure* determination regarding its 2010 in-state SER benchmark.
- (4) Intervention in this proceeding was granted to the Environmental Law and Policy Center (ELPC), Ohio Energy Group, Nucor Steel Marion (Nucor), the Solar Alliance, Ohio Manufacturer's Association Energy Group, Citizen Power, and Ohio Consumers' Counsel.
- (5) On August 3, 2011, the Commission issued its Finding and Order (August 3 Finding and Order) finding that FirstEnergy presented sufficient grounds for the Commission to reduce the

Companies' overall 2010 SER benchmark to the level of SRECs acquired in 2010.

The Commission found that, in light of the recently-approved RFP to purchase RECs in *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 (RFP Case), and the fact that the Companies may procure part of the 2010 shortfall from the RFP, the Companies had demonstrated a good faith effort to acquire sufficient in-state RECs. Additionally, the Commission specifically found that "the Companies sought the required SRECs by sponsoring four RFPs, soliciting known suppliers for SRECs, contacting SREC brokers, and participating in SREC auctions." August 3 Finding and Order at 13. The Commission further noted that neither the intervenors nor Staff offered any evidence that substantial quantities of in-state SRECs were reasonably available on the market. August 3 Finding and Order at 13-14. Consequently, the Commission concluded that the Companies had presented sufficient grounds for the Commission to reduce the Companies' overall 2010 SER benchmark to the level of SRECs acquired in 2010.

Additionally, the Commission noted that the scope of FirstEnergy's application was limited to the request for a *force majeure* determination. Consequently, the Commission stated that it "declines to comment in this case on the parties' comments concerning the three percent cost consideration in Section 4928.64(C)(3), Revised Code, which the Commission agrees would be more appropriately addressed in the AER Rider proceedings." August 3 Finding and Order at 14.

- (6) On September 2, 2011, Nucor and ELPC filed applications for rehearing regarding the Commission's August 3 Finding and Order. Thereafter, on September 12, 2011, FirstEnergy filed a memorandum contra Nucor's and ELPC's applications for rehearing.
- (7) In its application on rehearing, Nucor requests rehearing for purposes of clarification of two issues. Nucor requests clarification of the Commission's statement that issues concerning the three percent cost cap would be more appropriately addressed in the AER Rider proceedings. Specifically, Nucor requests that the Commission clarify that

the AER Rider proceedings refer to the proceedings in which FirstEnergy files its quarterly AER Rider updates. In the alternative, Nucor requests that the Commission establish a new proceeding to address these issues. Finally, Nucor requests that the Commission address Staff's recommendation that an independent auditor be retained to evaluate issues related to the application of the three percent cap.

- (8) In its memorandum contra, FirstEnergy argues that Staff's recommendation of an independent auditor to audit the Companies' AER Rider is unnecessary. Specifically, FirstEnergy argues that the Companies already have an effective review process with Staff and that it is unnecessary and not cost-effective to employ an outside auditor to undertake the same review costs.
- (9) The Commission clarifies that "AER Rider proceedings" refers to a new docket, *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, which the Commission has opened for purposes of review of the Companies' Rider AER, including the Companies procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code. Nonetheless, the Commission affirms its finding in the August 3 Finding and Order that the scope of FirstEnergy's application was limited to the request for a *force majeure* determination. August 3 Finding and Order at 14. Consequently, as stated in the August 3 Finding and Order, the parties' comments concerning the three percent cost cap are more appropriate for discussion in the new docket. August 3 Finding and Order at 14. Further, it is more appropriate to determine the necessity and scope of an external auditor and the parameters of staff review within the new docket. Consequently, with the aforementioned clarifications, rehearing as requested by Nucor is denied.
- (10) In its application on rehearing, ELPC contends that the August 3 Finding and Order is unreasonable and unlawful based on two assignments of error:
 - (a) The Commission's Order violates Rule 4901:1-40-06(A)(1), Ohio Administrative Code, because the Commission improperly places the burden of proof on the intervenors.

- (b) The Commission's Order violates Section 4928.64(C)(4)(b), Revised Code, because the Order improperly considered FirstEnergy's RFP as a good faith effort to procure sufficient SRECs, even though that application is still pending.
- (11) In its first assignment of error, ELPC argues that the August 3 Finding and Order improperly shifted the burden of demonstrating that the utility pursued all reasonable compliance options on the intervenors. In support, ELPC cites a portion of finding (25), in which the Commission stated that "[n]either the intervenors nor Staff have demonstrated that substantial quantities of in-state SRECs were reasonably available in the market." August 3 Finding and Order at 14.
- (12) In its memorandum contra, FirstEnergy argues that the Commission's August 3 Finding and Order did not improperly place the burden of proof on the intervenors. Specifically, FirstEnergy argues that the Finding and Order demonstrates that the Commission determined the Companies met their burden of proof for a *force majeure* determination and that the Commission noted that the intervenors offered no relevant, credible evidence to refute the Companies' evidence.
- (13) The Commission finds that ELPC's argument concerning the above-quoted portion of finding (25) ignores the preceding sentence in finding (25), specifically, that "the Companies sought the required SRECs by sponsoring four RFPs, soliciting known suppliers for SRECs, contacting SREC brokers, and participating in SREC auctions." August 3 Finding and Order at 13. Further, as discussed in the August 3 Finding and Order, FirstEnergy asserted in its application that "despite actively and reasonably pursuing all options of obtaining in-state SRECs, there was an insufficient number of in-state SRECs available for the Companies to meet their 2010 in-state SER benchmark." August 3 Finding and Order at 3. Consequently, finding (25) does not indicate placement of the burden on the intervening parties but indicates the Commission's finding that FirstEnergy satisfied its burden and that neither Staff nor any intervenor produced any evidence to the contrary. Therefore, rehearing on ELPC's first assignment of error should be denied.
- (14) In its second assignment of error, ELPC argues that the August 3 Finding and Order improperly considered FirstEnergy's RFP application as a good faith effort to procure

sufficient SRECs, even though that application is still pending. Initially, ELPC contends that the RFP does not demonstrate good faith because it was not filed until December 2010 and was not approved until June 8, 2011, and because the RFP was intended to procure RECs to be used toward complying with *future* requirements. Finally, ELPC argues that the RFP application is still pending and, consequently, the Commission should not have used it as a basis for granting the request for a *force majeure* determination.

- (15) In its memorandum contra, FirstEnergy argues that the Commission based its decision to grant the *force majeure* on the Companies' sponsoring of four RFPs, solicitation of known suppliers for SRECs, contacting of SREC brokers, and participation in SREC auctions, and that the Commission's discussion of the RFP application merely clarified that the Companies could procure part of the 2010 in-state SREC shortfall from the recently-approved RFP.
- (16) Initially, the Commission notes that FirstEnergy's application for approval to conduct an RFP was approved by Finding and Order on June 8, 2011, and that the subsequent entry on rehearing which modified a portion of the RFP was issued on August 3, 2011. *RFP Case* (August 3, 2011) Entry on Rehearing. Consequently, the RFP was approved as modified and was no longer pending when the August 3 Finding and Order was issued.

Finally, as stated in the August 3 Finding and Order, the Companies' application provided for competitive bids to purchase through ten-year contracts the annual delivery of 5,000 in-state SRECs and 20,000 overall RECs, and that the Companies may procure part of the 2010 shortfall from the RFP. August 3 Finding and Order at 13. Although ELPC points out that the application was not approved until June 8, 2011, this does not demonstrate FirstEnergy's lack of good faith but unanticipated regulatory lag. Further, although a goal of the RFP is to procure RECs to be used toward FirstEnergy's future benchmarks, the Commission specifically stated that the RECs obtained in the RFP may be used to satisfy the 2010 shortfall. August 3 Finding and Order at 13. In summary, the Commission found that the RFP was a factor demonstrating the Companies' good faith effort to acquire sufficient in-state SRECs and the arguments set forth by ELPC fail to demonstrate

otherwise. Consequently, rehearing on ELPC's second assignment of error should be denied.

It is, therefore,

ORDERED, That the application for rehearing filed by Nucor be denied. It is, further,

ORDERED, That the application for rehearing filed by ELPC be denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella



Steven D. Lesser


Andre T. Porter


Cheryl L. Roberto

MLW/ sc

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Secretary