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. 11-4625-EL-ACP**

NOTICE THAT THE PROPOSED REQUEST FOR PROPOSAL WILL NOT BE CONDUCTED AND REPLY COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

On August 1, 2011, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submitted their application for approval of a request for proposal ("RFP") to purchase in-state solar renewable energy credits ("SRECs") through ten-year contracts ("Application"). This proceeding involves the Companies' second application[1] filed pursuant to Section A.11 of the Companies' Stipulation and Recommendation, as amended by the Supplemental Stipulation, and further amended by the Second Supplemental Stipulation (collectively, the "Stipulation") approved by the Public Utilities Commission of Ohio ("Commission")

[1] On December 2, 2010, the Companies filed their first application for approval of a request for proposal to purchase RECs, which was approved by the Commission on June 8, 2011. *See In re Application of [Companies] for Approval of Request for Proposal to Purchase Renewable Energy Credits through Ten-year Contracts,* Case No. 10-2891-EL-ACP.

in Docket No. 10-388-EL-SSO.[2] As discussed below, based on 2011 Ohio-sourced solar renewable energy credits ("SRECs") previously contracted for and the recent initial request for proposal ("RFP") results (assuming delivery as promised), the Companies anticipate meeting their SREC statutory requirements, including the Companies' 2010 force majeure carryover requirement, as well as their 2012 and 2013 statutory requirements. Moreover, the terms of the Stipulation did not contemplate that the Companies would hold a second RFP under certain defined usage levels, and those requirements have been met. Therefore, in conjunction with the filing of these Reply Comments, the Companies are hereby notifying the Commission, the parties to this proceeding and all interested stakeholders that the Companies will not be going forward with the RFP contemplated by the Application in this proceeding.

However, in an Entry dated October 5, 2011, the Attorney Examiner in this proceeding established a comment period that allowed interested parties to submit, by October 26, 2011, initial comments on the Companies' Application and reply comments by November 7, 2011. The Commission Staff ("Staff") submitted comments and The Environmental Law and Policy Center ("ELPC") and The Solar Alliance ("SA") submitted joint comments. Despite the fact that the Companies are not going forward with the RFP proposed in this Application, pursuant to the aforementioned Attorney Examiner's Entry, the Companies hereby submit their reply to those comments.

II. RESPONSE TO STAFF'S COMMENTS

In their comments, Staff confirmed that the Companies: (i) timely filed their Application; (ii) incorporated Commission directives from its Entry approving the

[2] *In re Application of [Companies] for Authority to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SS) ("ESP 2 Case"), Second Supplemental Stipulation, pp. 1-2 (Filed July 22, 2010)

Companies' initial RFP application in Case No. 10-2891-EL-ACP; and (iii) made only minor changes to the second REC Agreement ("Agreement") in this Application. (Staff Comments at pp. 2, 6-7.) Staff, however, did raise several issues to which the Companies respond below.

First, in their Comments, Staff addressed the issue of how the Companies will calculate the amount of SRECs they need to purchase in a given RFP under the Stipulation. The Stipulation provides:

> The applications referenced above will seek Commission approval for the Companies to conduct a maximum of four (4) RFPs through which the Companies will seek competitive bids to purchase RECs through ten year contracts as described herein. The first application will seek approval for the first RFP for the Companies to seek competitive bids to purchase through ten year contracts: 1) the annual delivery of 5,000 PUCO-certified solar RECs originating in Ohio, with a delivery period between June 1, 2011 and December 31, 2020 and, 2) the annual delivery of 20,000 non-solar PUCO-certified RECs originating in Ohio, with a delivery period between June 1, 2011 and December 31, 2020. The Companies' three subsequent applications to the PUCO will also provide for three subsequent RFPs to be conducted for ten year contracts for solar REC delivery periods of 2012 through 2021, 2013 through 2022 and finally 2014 through 2023 respectively, conditioned upon the following:
>
> - If the standard service offer load of the Companies is less than 15,000,000 MWh: no additional solar RECs will be purchased that year.
> - If the standard service offer load of the Companies is greater than 15,000,000 MWh and less than 27,000,000, a minimum of an annual delivery of an additional 1,000 solar RECs will be purchased that year.
> - If the standard service offer load of the Companies is greater than 27,000,000 MWh and less than 35,000,000, a minimum of an annual delivery of an additional 2,000 solar RECs will be purchased that year.
> - If the standard service offer load of the Companies is greater than 35,000,000 MWh a minimum of an annual delivery of an additional 3,000 solar RECs will be purchased that year.
>
> The applications for each of the subsequent RFPs shall be filed for Commission approval no later than August 1st of each of 2011, 2012, and 2013. <u>The standard service offer load of the Companies for the purpose of the thresholds set forth above is calculated by multiplying the Companies' prior year non-shopping percentage, as submitted by the Companies to Commission Staff in December of each year, by the Companies' long term</u>

> forecast as filed with the Commission on April 15 for the year in which an RFP **may occur.** (emphasis added). ***
>
> 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, or that the purchase of those RECs would cause the Companies to exceed the cost cap set forth in R.C. § 4928.64(C)(3), then the Companies will not be required to purchase those RECs.[3]

When the Companies filed their Application on August 1, 2011, the Companies assumed that the RFP would occur in 2011, which, based on the 2010 non-shopping percentage and the 2011 forecasted load, would have put the Companies' SREC purchase requirement in the second threshold or 1,000 SRECs purchased that year, meaning in 2011. However, given the established procedural schedule, it now appears that, if an RFP is to be issued at all, the RFP "may occur" in 2012, putting the Companies' SREC purchase requirement, based on the estimated 2011 non-shopping percentage and the 2012 forecasted load, in the first threshold, meaning no additional SRECs will be purchased that year.

In its Comments, Staff described its interpretation of the phrase "RFP may occur" to be a reference to when the RFP is issued, while, as Staff correctly noted, the Companies believe that the phrase pertains to when the RFP process is completed up to and including the notification of awards. The Companies believe that their interpretation is correct and reasonable and more in line with the intent of the Stipulation. Moreover, the Stipulation also states, when referring to the four thresholds above, that the SRECs will be "purchased that year." If the RFP process is launched even in late 2011, the SRECs would not actually be purchased until 2012. In order to give meaning to all portions of the language of the Stipulation, as must have been intended by the Signatory

[3] *Id.*

Parties and approved by the Commission, the language must be read in conjunction with the other language in the paragraph. Therefore, the phrase "RFP may occur" read in conjunction with the phrase "purchased that year" would most reasonably be interpreted to mean that the thresholds will be determined in the year the actual RFP process is completed.

Second, the Companies address Staff's comments related to the quantity of SRECs that they intend to purchase in conjunction with this Application. Although the Stipulation refers to a "minimum" of 1,000 SRECs (under the assumption that the RFP occurs in 2011), the Companies projected that they would only pursue the minimum of 1,000 SRECs based on: i) their projected benchmark requirements for 2012 through 2014; and ii) the risk that the actual shopping percentage would be even higher causing an even lower benchmark than projected. However, because it does not appear that the RFP will occur in 2011, the Companies now project that they will not be required to hold a ten-year RFP in 2012 for additional SRECs, which is in accordance with the Stipulation. The Companies calculated this amount because their 2012 projected standard service offer load will be less than 15,000,000 MWh.

Third, Staff requested that the Companies address the issue of whether any shortfall from the initial RFP would be added to the Application. The Companies are pleased to report that the initial RFP completed on November 3, 2011 was successful and that the Companies can confirm no shortfall from that RFP will be added to the Application. In fact, the initial RFP resulted in receiving more qualified proposals than the Companies required. Therefore, at this time, based on 2011 Ohio-sourced SRECs previously contracted for and the initial RFP results (assuming delivery as promised), the

Companies anticipate meeting their Ohio-sourced 2011 solar statutory requirements, including the Companies' 2010 force majeure carryover requirement, as well as their 2012 and 2013 statutory requirements.

III. THE COMPANIES DO NOT ANTICIPATE CONDUCTING A SECOND RFP.

For the reasons described above, it now appears that the second RFP is neither required nor necessary. The Companies do not intend to put interested parties through the exercise of the RFP process when there is no expectation that additional SRECs would be purchased. Other than not being contemplated or required under the Stipulation, there are several additional reasons to not conduct the second RFP. First, purchasing 1,000 SRECs at this time, which would all be in excess of the statutory benchmark, would cause customers to pay now for SRECs that are not needed. Second, as the market for SRECs matures and supply increases, SREC prices could decline in future periods. Third, parties have already filed in opposition to the Companies' recovery of costs of compliance with statutory mandates.[4] Fourth, the Stipulation only requires a "maximum" of four RFPs – holding an RFP is not mandatory if SRECs are not needed or not warranted due to the thresholds outlined in the Stipulation, which as explained above these conditions have been met. Lastly, pursuant to Rule 4901:1-40-04(D)(3), Ohio Administrative Code, RECs have a "shelf life" of five years. The Companies do not want to purchase SRECs that they cannot use in the next three years and erode the "shelf life"

[4] *See In re Application of [Companies] for Approval of Request for Proposal to Purchase Renewable Energy Credits through Ten-year Contracts*, Case No. 10-2891-EL-ACP, Nucor Steel Marion, Inc.'s Motion for Intervention, Memorandum in Support, and Comments Proposing Clarification and Modification (December 22, 2010) and Reply Comments by Nucor Steel Marion, Inc. (March 28, 2011); *In the matter of the application of [Companies] for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*¸ Case No. 08-0935, Motion and Memorandum in Support of Nucor Steel Marion, Inc., for an Order directing FirstEnergy to Apply Statutory 3% Cost Cap and to Initiate an Investigation of FirstEnergy Alternative Energy Compliance Costs (September 9, 2011).

of those SRECs. Therefore, by not holding the second RFP, the Companies are complying with the Stipulation, balancing the interests of all interested stakeholders, including their customers, and still meeting their statutory benchmarks.

IV. RESPONSE TO SA AND ELPC'S COMMENTS

SA and ELPC submitted joint comments. In their Comments, they argued that: (i) the Companies second RFP would not allow new facilities to realistically participate in the RFP process; (ii) the second RFP timeline does not allow for new development; and (iii) the Commission should review and approve the Companies' bidding rules. For the reasons discussed above, SA and ELPC's comments are moot given that the Companies do not anticipate conducting a second RFP. However, the Companies will address SA and ELPC's comments to the extent that they criticize the Companies' operation of the initial RFP.

First, SA and ELPC lament about the timing of the initial and planned second RFPs. The Companies filed for the initial RFP on December 2, 2010. The Companies did not receive initial approval of their application until June 8, 2011, and due to the fact that the order provided for unit-contingent and not firm delivery of SRECs the Companies sought rehearing on that issue, which was granted on August 3, 2011. The Companies accelerated the more typical schedule and issued the initial RFP on September 13, 2011. Thus, the Companies held the initial RFP as soon as it was reasonably possible to do so. Similarly, the Companies filed for the second RFP on August 1, 2011, in accordance with the Stipulation. The timeline of the proceeding in this case would now not permit a second RFP in 2011.

Next, SA and ELPC argue that the bidding rules and Agreement prevent new facilities from participating because the Companies have required firm delivery of initial year SRECs. As SA and ELPC correctly note, the bidding rules and Agreement do not prevent bidders from purchasing initial year SRECs that exist in the marketplace and utilizing those to fulfill their agreement. However, SA and ELPC argue that the Companies' force majeure filings from 2009 and 2010 indicate that there is a shortage of Solar RECs in the marketplace. While it is true that in 2009 and 2010 there was a shortage of Solar RECs in the marketplace, as discussed above, the Companies anticipate meeting their 2011 obligations through SRECs currently in the market, thus indicating a maturation of this market. Lastly, as discussed in the Companies' Application for Rehearing in Case No. 10-2891-EL-ACP (with which the Commission agreed), unit contingent deliveries were inconsistent with the Stipulation and put the Companies at greater risk of noncompliance. Therefore, the Companies bidding rules and Agreement are reasonable, in accordance with the Stipulation and do not need to be altered.

Third, SA and ELPC criticize the Companies' terms and conditions contained in the Agreement, namely what is considered an "Event of Default" and the remedies provided to the Companies thereunder. They contend that the Agreement does not allow any remedy to the seller to cure minor deficiencies. However, both SA and ELPC were part of the collaborative group that assisted in the development of the Agreement. Moreover, the terms and conditions are the same terms and conditions that were approved by the Commission in the initial RFP process. Under the Agreement, sellers are given thirty days to cure after they are provided notice of an "Event of Default."

Given that the Companies do not anticipate conducting a second RFP, there is no need for the Commission to address SA and ELPC's comments at this time. However, for the reasons discussed above, in the future, the Commission should reject the changes to the Agreement and bidding rules requested by SA and ELPC.

V. CONCLUSION

Because of the success of the initial RFP and because the Companies do not need to conduct a second RFP based on the terms of the Stipulation, the Companies do not anticipate conducting a second RFP at this time.

Respectfully submitted,

/s/ *Carrie M. Dunn*

Carrie M. Dunn (Attorney No. 0076952)
Counsel of Record
Kathy J. Kolich (Attorney No. 0038855)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-2352 (telephone)
(330) 384-3875 (fax)
cdunn@firstenergycorp.com
kjkolich@firstenergycorp.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Comments* was filed electronically this 7th day of November, 2011, with the Public Utilities Commission of Ohio. A copy of these Reply Comments 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.

/s/ Carrie M. Dunn
One of the Attorneys for Ohio Edison Company,
The Cleveland Electric Illuminating Company and
The Toledo Edison Company

William Wright
Assistant Attorney General
Chief, Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
william.wright@puc.state.oh.us

Tara Santarelli
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
tsantarelli@elpc.org

Terrence O'Donnell
Bricker & Eckler
100 South Third Street
Columbus, OH 43215
todonnel@bricker.com

Summary: Notice That the Proposed Request for Proposal Will Not Be Conducted and Reply Comments electronically filed by Ms. Carrie M Dunn on behalf of The Cleveland Electric Illuminating Company and Ohio Edison Company and The Toledo Edison Company