

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**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

STIPULATION AND RECOMMENDATION

I. INTRODUCTION

Pursuant to the Supreme Court’s January 24, 2018 decision (*see* 2018-Ohio-243 and 2018-Ohio-229) and the Attorney Examiner’s June 22, 2018 Entry, the Signatory Parties¹ to this Stipulation and Recommendation (“Stipulation”) have engaged in comprehensive and detailed settlement negotiations regarding the Public Utilities Commission of Ohio’s (“Commission”) rulings on the motions for protective order and the designation of certain information as trade secret in this proceeding. As a product of those negotiations, the Signatory Parties have reached agreement to resolve all of the remaining issues in this proceeding, as described in detail in the Terms and Conditions below. Thus, the Signatory Parties recommend that the Commission approve this Stipulation.

II. BACKGROUND

From 2009 through 2011, the Companies, through a process designed and conducted by Navigant Consulting, Inc., issued a series of Requests for Proposals (“RFPs”) to purchase a certain amount of renewable energy credits (“RECs”) in order to comply with Ohio law. During

¹ The Signatory Parties are the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”), the Environmental Law and Policy Center (“ELPC”), and the Office of the Ohio Consumers’ Counsel (“OCC”).

that period of time, the Companies purchased RECs through RFPs held in August 2009 (“RFP 1”), September and October 2009 (“RFP 2”), July 2010 (“RFP 3”), March 2011 (“RFP 4”), August 2011 (“RFP 5”), and October 2011 (“RFP 6”). These RFPs generated certain information related to REC suppliers’ bidding strategies including: (a) the identities of specific REC suppliers who participated in the RFP process; and (b) the specific prices for the RECs bid by those suppliers in response to each RFP (collectively, the “REC Procurement Data”).

On September 20, 2011, the Commission opened the docket in this proceeding to audit the Companies’ Alternative Energy Resource Rider (“Rider AER”). The purpose of the Rider AER audit was to review the Companies’ REC purchases from 2009 through 2011. Due to the nature of the proceeding, access to the REC Procurement Data was often necessary to the analysis and opinions of the parties, their witnesses, and their expert consultants.

During this proceeding, the Companies sought eight protective orders to safeguard the REC Procurement Data from public disclosure, asserting that the REC Procurement Data qualified as a trade secret under Ohio law. The Commission issued its Opinion and Order on August 7, 2013 (the “Order”). *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*, No. 11-5201-EL-RDR, Opinion and Order (Aug. 7, 2013). In the Order, the Commission, among other things, granted numerous pending motions for protective order relating to the REC Procurement Data and affirmed previous rulings by the Attorney Examiner relating to the Companies’ motions for protective order. Order at 11-12. The Commission’s only modification to the Attorney Examiner’s previous orders was that the Commission permitted the generic disclosure of one of the Companies’ REC suppliers, FirstEnergy Solutions Corp., as a successful bidder in the RFP process. *Id.* The Commission

affirmed these rulings in its Second Entry on Rehearing. *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*, No. 11-5201-EL-RDR, Second Entry on Rehearing at 4 (Dec. 18, 2013).

On December 24, 2013, the Companies filed an appeal with the Supreme Court of Ohio from the Order and Second Entry on Rehearing. In that appeal, the Companies did not take issue with the Commission's trade-secret determinations concerning the REC Procurement Data. Thereafter, on February 18, 2014, ELPC and OCC separately filed cross-appeals, raising as assignments of error, among other things, that the Commission had unlawfully and unreasonably held that the REC Procurement Data qualified as trade secret.

On January 16, 2018, the Supreme Court of Ohio issued a decision resolving the Companies' appeal as well as the cross-appeals of ELPC and OCC. *See In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (Jan. 16, 2018) (the "*Rider AER Case*"). In pertinent part to ELPC's and OCC's cross-appeals, the Ohio Supreme Court held that the Commission's decision that the REC Procurement Data qualified as a trade secret lacked sufficient record support and ordered, on remand, that the Commission must either cite evidence explaining its reasoning to qualify this information as trade secret or publicly disclose the information that had been protected. *Id.* at ¶ 39.

On May 31, 2018, the Attorney Examiner issued a procedural schedule setting a time for hearing to address the Supreme Court of Ohio's decision regarding the Commission's rulings on the Companies' motions for protective order and the designation of the REC Procurement Data as trade secret. Entry at 3-4 (May 31, 2018). Following a telephonic prehearing conference on June 21, 2018, the Attorney Examiner indefinitely stayed the procedural schedule in order to

provide the parties with the opportunity to engage in settlement negotiations. Entry at 3 (June 22, 2018). Since that time, the parties have engaged in comprehensive and detailed settlement discussions and have reached agreement on settlement terms.

Rule 4901-1-30, Ohio Administrative Code, provides that any two or more parties to a proceeding may enter into a written stipulation covering the issues presented in such a proceeding. The purpose of this document is to set forth the understanding and agreement of the Signatory Parties and to recommend that the Commission approve and adopt the Stipulation, resolving all of the remaining issues in this proceeding.

This Stipulation is supported by adequate information; represents a just and reasonable resolution of issues in this proceeding; violates no regulatory principle or precedent; is the product of serious bargaining among knowledgeable and capable Signatory Parties in a cooperative process; and is undertaken by Signatory Parties representing a wide range of interests to resolve the aforementioned issues. The Stipulation represents the culmination of an exhaustive process and is an accommodation of the diverse interests represented by the Signatory Parties. It is entitled to careful consideration by the Commission. For purposes of resolving the remaining issues raised by this proceeding, the Signatory Parties stipulate, agree, and recommend as set forth below.

III. PARTIES

The Stipulation is entered into by and among the Signatory Parties. All the Signatory Parties have agreed to fully support the Stipulation.

IV. RECITALS

WHEREAS, on September 20, 2011, the Commission opened this proceeding;

WHEREAS, the Signatory Parties engaged in extensive discovery, serving and/or responding to voluminous discovery requests;

WHEREAS, the Commission issued the Order on August 7, 2013 and the Second Entry on Rehearing on December 18, 2013;

WHEREAS, the Companies filed an appeal with the Supreme Court of Ohio from the Order and the Second Entry on Rehearing December 24, 2013, and ELPC and OCC filed cross-appeals on February 18, 2014;

WHEREAS, on January 16, 2018, the Supreme Court of Ohio issued a decision that resolved the Companies' appeal in the Companies' favor and granted, in part, the cross-appeals of OCC and ELPC, remanding the cause for further consideration and ordering the Commission to either cite evidence explaining its reasoning to qualify the REC Procurement Data as trade secret or publicly disclose the information that had been protected by the Commission's prior orders;

WHEREAS, by Entry dated May 30, 2018, the Attorney Examiner issued a procedural schedule setting a time for hearing to address the Supreme Court of Ohio's decision regarding the Commission's rulings on the Companies' motions for protective order and the designation of the REC Procurement Data as trade secret. By Entry dated June 22, 2018, the Attorney Examiner indefinitely stayed the procedural schedule in order to provide the parties with the opportunity to engage in settlement negotiations;

WHEREAS, the Companies, ELPC, and OCC have engaged in meaningful settlement discussions; and

WHEREAS, all of the remaining issues and concerns raised by the Signatory Parties in this proceeding are addressed in this Stipulation, and reflect, as a result of such discussions and compromises by the Signatory Parties, an overall reasonable resolution of all such issues. This Stipulation is the product of the discussions and negotiations of the Signatory Parties, and is not

intended to reflect the views or proposals which any individual party may have advanced acting unilaterally. Accordingly, the Stipulation represents an accommodation of the diverse interests represented by the Signatory Parties and is entitled to careful consideration by the Commission.

NOW, THEREFORE, the Signatory Parties stipulate, agree, and recommend that the Commission approve this Stipulation and issue its Opinion and Order in accordance herewith.

V. TERMS AND CONDITIONS

The Signatory Parties stipulate that the Commission should enter an order providing as follows:

- A. All REC Procurement Data previously deemed by the Commission to qualify as trade secret under Ohio law relating to (i) RFP 1 through RFP 5 and (ii) one-year contracts entered into as a result of winning bids in RFP 6 shall be considered to be in the public domain.
- B. The weighted average price for all ten-year contracts entered into as a result of winning bids in RFP 6 shall be considered to be in the public domain. No party shall disclose the price paid to any supplier under any ten-year contract entered into as a result of winning bids in RFP 6 until after December 31, 2021. After that date, the Companies have the right to seek trade secret protection for information regarding those contracts from the Commission.
- C. The following facts shall be considered to be in the public domain: (i) that there were eleven ten-year contracts entered into as a result of winning bids in RFP 6; and (ii) that there were nine suppliers of ten-year REC products as a result of winning bids in RFP 6.
- D. No party shall disclose the names of the winning bidders of ten-year contracts entered into as a result of RFP 6, *provided however* that the following information shall be considered to be in the public domain: that none of the REC suppliers under the ten-year contracts arising from RFP 6 was FirstEnergy Solutions Corp. or any other entity affiliated with the Companies.

- E. Upon the approval of this Stipulation, OCC and ELPC may publicly refile testimony and briefs previously filed under seal in this proceeding and in Supreme Court Case No. 2013-2026, *provided however* that such filings do not disclose any REC Procurement Data that is not expressly permitted to be publicly disclosed by the terms of this Stipulation. The following testimony and briefs may be refiled:
- The Direct Testimony of Wilson Gonzalez on Behalf of the Office of the Ohio Consumers' Counsel initially filed in Case No. 11-5201-EL-RDR on January 31, 2013 may be filed unredacted, with the following exception: On Exhibit WG-3, under 2011 Vintage, the "Price/REC" and "Total" columns will remain redacted for November 2011.
 - The Initial Brief by the Office of the Ohio Consumers' Counsel initially filed in Case No. 11-5201-EL-RDR on April 15, 2013 may be filed completely unredacted.
 - The Reply Brief by the Office of the Ohio Consumers' Counsel initially filed in Case No. 11-5201-EL-RDR on May 6, 2013 may be filed completely unredacted.
 - The Application for Rehearing by the Office of the Ohio Consumers' Counsel initially filed in Case No. 11-5201-EL-RDR on September 6, 2013 may be filed completely unredacted.
 - The Second Merit Brief of Appellee/Cross-Appellant the Office of the Ohio Consumers' Counsel initially filed in Ohio Supreme Court Case No. 2013-2026 on October 23, 2014 may be filed completely unredacted.
 - The Fourth Merit Brief of Appellee/Cross-Appellant the Office of the Ohio Consumers' Counsel initially filed in Ohio Supreme Court Case No. 2013-2026 on December 24, 2014 may be filed completely unredacted.
 - The Initial Brief by the Environmental Law & Policy Center, the Ohio Environmental Council, and the Sierra Club initially filed in Case No. 11-5201-EL-RDR on April 15, 2013 may be filed unredacted with the following exceptions: the pricing and number of RECs for RFP 6 referred to on page 6 and in footnote 49 on page 12 .
 - The Reply Brief by the Environmental Law & Policy Center, the Ohio Environmental Council, and the Sierra Club initially filed in Case No. 11-5201-EL-RDR on May 6, 2013 may be filed completely unredacted.

Signatory Parties

/s/ Scott J. Casto

Ohio Edison Company

/s/ Christopher M. Healey

Office of the Ohio Consumers' Counsel

/s/ Scott J. Casto

The Toledo Edison Company

/s/ Madeline Fleisher

Environmental Law & Policy Center

/s/ Scott J. Casto

The Cleveland Electric Illuminating
Company

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3/5/2019 4:15:58 PM

in

Case No(s). 11-5201-EL-RDR

Summary: Stipulation and Recommendation electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company