

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE  
ALTERNATIVE ENERGY RESOURCE 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

## SECOND OPINION AND ORDER

Entered in the Journal on January 13, 2021

### I. SUMMARY

{¶ 1} The Commission approves the stipulation filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, the Ohio Consumers' Counsel, and the Environmental Law and Policy Center.

### II. DISCUSSION

#### A. *Procedural History*

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} On September 20, 2011, the Commission issued an Entry on Rehearing in *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP. In that Entry on Rehearing, the Commission stated that it had opened the above-captioned proceeding for the purpose of reviewing FirstEnergy's Rider AER.<sup>1</sup> Additionally, the Commission stated that its review would include the Companies' procurement of renewable energy credits (RECs) for purposes of compliance with R.C. 4928.64.

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<sup>1</sup> Rider AER recovers all costs associated with securing compliance with the alternative energy resource requirements including, but not limited to, all renewable energy credit costs and associated carrying costs.

{¶ 4} On August 7, 2013, following a hearing, the Commission issued an Opinion and Order (Order), finding that FirstEnergy should be disallowed recovery in the amount of \$43,362,796.50 associated with certain REC purchases. The Commission also granted multiple pending motions for protective orders and affirmed the attorney examiners' rulings on motions for protective orders regarding REC procurement data appearing in the draft auditor report, as well as various pleadings in this proceeding discussing the draft auditor report. This REC procurement data consisted of supplier-identifying information and pricing information related to the six requests for proposals (RFP) issued to procure the RECs from 2009 to 2011. However, we note that the ten-year contracts resulting from winning bids in the sixth RFP (RFP 6), were entered into pursuant to a stipulation filed in the Companies' second electric security plan, under R.C. 4928.143, and obtained through an RFP process approved by the Commission. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) at 10-11; *In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case No. 10-2891-EL-ACP, Finding and Order (Jun. 8, 2011). As stated in the Order, the Commission found that the REC procurement data is trade secret information and its release was, thereby, prohibited under state law. R.C. 1333.61(D).

{¶ 5} The Commission affirmed its decision as to the disallowance and motions for protective order on December 18, 2013. *In re FirstEnergy*, Case No. 11-5201-EL-RDR, Second Entry on Rehearing (Dec. 18, 2013).

{¶ 6} FirstEnergy filed an appeal with the Supreme Court of Ohio from the Order and Second Entry on Rehearing on December 24, 2013, pursuant to R.C. 4903.11 and 4903.13. In its notice of appeal, FirstEnergy argued that the Commission had unreasonably found that the Companies did not meet their burden of proof that the purchases of certain RECs in 2010 were prudent and should, therefore, be disallowed recovery of the costs associated with those purchases.

{¶ 7} Thereafter, on February 18, 2014, the Environmental Law and Policy Center (ELPC) and the Ohio Consumers' Counsel (OCC) filed cross-appeals with the Supreme Court of Ohio from the Order and Second Entry on Rehearing, pursuant to R.C. 4903.11 and 4903.13. OCC and ELPC raised several assignments of error, one of which was that the Commission had unlawfully and unreasonably held that certain information was confidential, including REC prices, seller identities, and recommended penalty amounts, upon granting the motions for protective order.

{¶ 8} On January 16, 2018, the Supreme Court of Ohio reversed the Commission's order disallowing the Companies' recovery of \$43 million of costs under Rider AER, stating that the Commission had engaged in retroactive ratemaking by disallowing recovery of these costs. Additionally, the Court found that the Commission's trade secret determination lacked 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 has been protected. *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (Jan. 16, 2018) (*Rider AER Case*).

{¶ 9} By Entry issued 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 then motions for protective order and the designation of certain information as trade secret in this proceeding. The hearing was scheduled for July 24, 2018.

{¶ 10} Following a telephonic prehearing conference held on June 21, 2018, the attorney examiner stayed the procedural schedule indefinitely in order to provide parties the opportunity for additional settlement negotiations.

{¶ 11} On March 5, 2019, FirstEnergy, ELPC, and OCC (collectively, Signatory Parties), filed a joint stipulation and recommendation, which the Signatory Parties aver resolve the remaining issues related to the protective order in this proceeding. The

Signatory Parties also filed a joint motion for approval of the stipulation for the Commission's consideration, requesting that the Commission waive the requirement that a stipulation be supported by the testimony of at least one signatory party under Ohio Adm.Code 4901-1-30, as the stipulation is not subject to any opposition and balances the interests of the Signatory Parties with respect to the protective treatment of the long-term REC procurement data. For similar reasons, the Signatory Parties request that the Commission approve the stipulation without holding an evidentiary hearing.

***B. Summary of the Stipulation***

{¶ 12} As noted above, the stipulation was filed on March 5, 2019, which the Signatory Parties aver resolves all issues raised in this proceeding relative to the protective treatment of REC procurement data. The following includes a non-exhaustive list of the provisions set forth in the stipulation:

{¶ 13} All REC procurement data previously deemed by the Commission to qualify as trade secret under Ohio law relating to (i) the first through fifth RFPs issued to procure the necessary RECs 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.

{¶ 14} 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 which, the Companies have the right to seek trade secret protection for information regarding those contracts with the Commission.

{¶ 15} The fact that there were 11 ten-year contracts entered into a result of winning bids in RFP 6, and there were nine suppliers of ten-year REC products as a result of winning bids in RFP 6, will be considered in the public domain.

{¶ 16} No party shall disclose the names of the winning bidders of ten-year contracts entered into as a result of RFP 6; however, none of the REC suppliers under the ten-year contracts arising from RFP 6 was FirstEnergy Solutions Corp.<sup>2</sup> or any other entity affiliated with the Companies.

{¶ 17} Finally, upon approval of the stipulation, OCC and ELPC may publicly refile identified 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 the stipulation.

### C. Consideration of the Stipulation

{¶ 18} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding upon the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123,125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

{¶ 19} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re The Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies

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<sup>2</sup> While the Commission found that the REC procurement data consisted of trade secret information, and was, thus, protected from disclosure, the Commission previously permitted the generic disclosure of one of the Companies' REC suppliers, FirstEnergy Solutions Corp., as a successful bidder in the RFP process, given that the auditor had inadvertently disclosed the name of the supplier in the public version of the audit report filed on August 15, 2012. Order (Aug. 7, 2013) at 12.

considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

{¶ 20} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve cases in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Supreme Court of Ohio stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 21} The Commission finds that the stipulation appears to be the product of serious bargaining among capable, knowledgeable parties. We note that the Signatory Parties routinely participate in complex Commission proceedings and that counsel for the Signatory Parties have extensive experience practicing before the Commission in utility matters.

{¶ 22} The second criterion is that the settlement, as a package, should benefit ratepayers and the public interest. The Signatory Parties argue that the stipulation will result in increased transparency for ratepayers while still appropriately protecting REC procurement data regarding long-term contracts entered into as a result of winning bids in RFP 6, which the Companies consider to be highly confidential and to be matters they are contractually obligated to treat as confidential. Accordingly, we find that the stipulation, as a package, benefits ratepayers and the public interest.

{¶ 23} The Commission further finds the stipulation does not appear to violate any important regulatory principle or practice and, thus, satisfies the third and final criterion. We agree that the stipulation promotes transparency in Commission proceedings and respects the confidentiality of information that the Companies consider to be trade secret information, the public disclosure of which is prohibited by Ohio law and Commission precedent.

{¶ 24} As a final matter, as the stipulation strikes an appropriate balance of the interests of the Signatory Parties regarding the limited issues at hand and is not opposed by any other party involved in this proceeding, we find that no additional evidentiary hearing regarding the reasonableness of the stipulation will be necessary and grant the Signatory Parties' request to waive the requirement for supportive testimony set forth in Ohio Adm.Code 4901-1-30. We have previously approved stipulations without the need of holding an evidentiary hearing. See *In re Complainants Against Clear Cutting v. Duke Energy Ohio, Inc.*, Case No. 17-2344-EL-CSS, Opinion and Order (Jan. 15, 2020); *In re Columbus S. Power Co. and Ohio Power Co.*, Case Nos. 03-2570-EL-UNC and 04-23-EL-UNC, Finding and Order (Jan. 21, 2004). Our decision is also warranted given the recent guidelines issued by the Commission to support social-distancing efforts of the state of Ohio during the existing state of emergency. *In re The Proper Procedures and Process for the Commission's Operations and Proceedings during the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC. We note that we will, nonetheless, maintain jurisdiction over any disputes between the parties arising from the stipulation or its implementation. Accordingly, we find that the stipulation is reasonable and should be approved.

### III. ORDER

{¶ 25} It is, therefore,

{¶ 26} ORDERED, That the stipulation be approved. It is, further,

{¶ 27} ORDERED, That a copy of this Second Opinion and Order be served upon all parties of record.

COMMISSIONERS:

*Approving:*

M. Beth Trombold

Dennis P. Deters

Daniel R. Conway

*Recusal:*

Lawrence K. Friedeman

MJA/kck



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**in**

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

Summary: Opinion & Order approving the stipulation filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, the Ohio Consumers' Counsel, and the Environmental Law and Policy Center. electronically filed by Kelli C. King on behalf of The Public Utilities Commission of Ohio