

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) Case No. 06-1112-EL-UNC
Edison Company for Authority Establish a)
Competitive Bid Process to Supply Market-)
Based Generation.)

ORDER ON REMAND

The Commission finds:

- (1) On October 21, 2003, The Cleveland Electric Illuminating Company (CEI), The Toledo Edison Company (TE), and Ohio Edison Company (OE) (FirstEnergy¹ or the Companies) filed an application in Case No. 03-2144-EL-ATA (03-2144), *et al.*, for authority to continue and modify certain regulatory accounting practices and procedures, for tariff approvals, and to establish regulatory transition charges following the market development period (MDP). FirstEnergy also requested regulatory authority to establish rates for generation service under Chapter 4928, Revised Code, to be effective as of the end of the MDP (January 1, 2006). On June 9, 2004, the Commission issued its Opinion and Order in 03-2144 (03-2144 Order). In the 03-2144 Order, the Commission established the FirstEnergy shopping credit values for 2005, directed FirstEnergy to undertake a competitive bidding process for generation service after the end of the MDP, and established a rate stabilization plan (RSP) for the period of January 1, 2006, through December 31, 2008, as modified by the Order. On August 4, 2004, the Commission issued an entry granting and denying applications for rehearing. On September 29, 2004, the Commission issued an entry granting and denying applications for rehearing to the August 4, 2004, entry, filed by various parties to this proceeding. On November 23, 2004, the Commission issued an entry denying FirstEnergy's application for rehearing to the September 29, 2004, entry. The

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¹ OE, CEI, and TE are electric distribution utility operating companies of FirstEnergy Corporation and, therefore, will be referred to jointly as FirstEnergy.

Commission's decision was appealed, as of right, to the Ohio Supreme Court.

- (2) Next, on January 4, 2006, the Commission issued its Opinion and Order in Case No. 05-704-EL-ATA, *et al.*, *In the Matter of the Joint Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Generation Charge Adjustment Rider; In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals* regarding the establishment of a rate certainty plan (RCP), approving, as clarified, the initial stipulation and the supplemental stipulation entered into by FirstEnergy and various parties to those proceedings.² The Commission's January 4, 2006 Order approving the RCP, and the January 25 and March 1, 2006 Entries on Rehearing, also amended the Companies' RSP.
- (3) On May 3, 2006, the Supreme Court of Ohio issued an Opinion in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St. 3d 328, 2006-Ohio-2110 (2006), an appeal from Case No. 03-2144. The Opinion affirmed the Commission's decision in the 03-2144 Order regarding its approval of the Companies' rate stabilization charge, shopping credits, interest on shopping credits, and FirstEnergy's corporate separation plan. The Court's decision did conclude that the RSP, as adopted by the Commission, did not comply with Section 4928.14(B), Revised Code, because it failed to provide an option for customer participation in the electric market through competitive bids or other reasonable means, in addition to the market-based RSP generation pricing already in place. The Court remanded that portion of the case back to the Commission for further consideration. The Court stated that the decision of the PUCO was affirmed in all other respects.
- (4) By Commission entry issued July 26, 2006, in the 03-2144 case, the Commission directed First Energy to file, in a new docket, its plan for complying with the requirements of Section

² The Companies filed an application for a rate certainty plan under Case Nos. 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, which included the initial stipulation. The supplemental stipulation was also filed in these dockets.

4928.14(B), Revised Code. Also by the July 26, 2006 entry, the Commission declared that the RSP, as amended by the RCP, would remain in effect as the Section 4928.14(A), Revised Code, standard service offer.

- (5) On September 29, 2006, FirstEnergy filed its proposed plan, in Case No. 06-1112-EL-UNC, to establish a competitive bid process to provide an option for customer participation in the electric market and to comply with the requirements of Section 4928.14, Revised Code. FirstEnergy submits that its proposed plan, entitled the "Market-Based Generation Supply Program" (Market-Based Program), provides the opportunity for customers to participate and take service from a competitive supplier based upon the lowest price submitted by competitive suppliers through a competitive bidding process. The Market-Based Program provides that the customer notifies FirstEnergy of his/her desire to take service under the rates established through this competitive bid offering. Upon receipt of this notification, customers would then be switched, from generation service provided by the Companies, to a competitive supplier at a price made available under the Market-Based Program and selected by the customers. The switch of the customer's generation supplier would take place on the date of the customer's next regularly scheduled meter read and following the switching rules in the Companies' supplier tariffs. FirstEnergy conducted a technical conference on December 1, 2006, for potential suppliers and other interested persons to ask questions and raise issues or concerns about the proposed plan. Representatives of low-income consumers, residential, commercial and industrial consumer advocates, electric marketers, and Commission Staff attended the technical conference.
- (6) Motions to intervene were filed by the Ohio Energy Group (OEG), Industrial Energy Users-Ohio (IEU-Ohio), the Office of the Ohio Consumers' Counsel (OCC), the Northwest Ohio Aggregation Coalition (NOAC), Ohio Partners for Affordable Energy (OPAE), and WPS Energy Services, Inc (WPS-ESI). A motion was also filed to permit David C. Rinebolt to appear before the Commission *pro hac vice* on behalf of OPAE in this proceeding. The Commission finds that the motions to intervene and the motion to admit David C. Rinebolt *pro hac vice* are reasonable and should be granted.

- (7) To assist in its review of FirstEnergy's proposed plan, by entry issued December 13, 2006, the Commission invited interested parties to file written comments by January 12, 2007. By entry issued January 18, 2007, the case schedule was amended for reply comments to be submitted by January 29, 2007.
- (8) Initial comments were filed by the Commission Staff, OCC, OP&A, NOAC, Constellation NewEnergy, Inc., WPS-ESI, and IEU-Ohio. Reply comments were filed by FirstEnergy, OP&A, IEU-Ohio, NOAC, and OCC.
- (9) On May 29, 2007, FirstEnergy, OCC, and the Staff (Signatories) filed a Stipulation and Recommendation (Stipulation) addressing the issues presented in this case. The Stipulation presents a new Green Resource tariff offering (Green Resource Program) that is in addition to the new Market-Based Program for standard electric generation outlined in the Companies' September 29, 2006 initial filing and modified by their January 29, 2007 reply comments. In the Stipulation, the Signatory Parties agree, among other things, that:
 - (a) The Stipulation is fully supported by data and information contained in the record of this proceeding and represents a just and reasonable resolution of such issues in this proceeding. The Stipulation does not violate any regulatory principle or precedent and benefits, as a package, ratepayers and the public interest. The Stipulation is the product of lengthy serious bargaining among knowledgeable and capable parties in a cooperative process to settle this case.

Market-Based Program

- (b) PUCO Staff and OCC will not oppose FirstEnergy's competitive bid Market-Based Program for standard generation to comply with Section 4928.14, Revised Code, and the Court's order issued on May 3, 2006.
- (c) The Companies may proceed with the competitive bid Market-Based Program for standard electric generation as outlined in their September 29, 2006 filing and their January 29,

2007 reply comments, except that the Companies will notify customers of this competitive bid program through a bill insert.

- (d) The Companies are authorized to recover the administrative cost associated with the Market-Based Program.

Green Resource Program

- (e) The terms of FirstEnergy's Green Resource tariff offering, including the proposed tariff attached to the Stipulation, should be adopted as it fulfills the requirements of the Commission's directive to file a plan which complies with Section 4928.14, Revised Code, and the Court's order issued on May 3, 2006.
- (f) FirstEnergy's Green Resource tariff offering provides that all of FirstEnergy's metered customers, except Percentage of Income Payment Plan (PIPP) customers, are eligible to participate. Customer participation would be based on customers voluntarily choosing to purchase Renewable Energy Certificates (RECs). The Green Resource (i.e., RECs) will be offered in blocks of 100 kWh. Customers may elect to purchase a minimum of two 100 kWh blocks per month up to a maximum of fifty 100 kWh blocks per month of Green Resource. Customers who choose to participate in the Green Resource Program may participate for the entire period or may discontinue their participation in the program on a meter read date at any time during the program by providing notice to the Companies.
- (g) Two simultaneous and independent Request for Proposals (RFPs) will be conducted for 75,000 RECs per RFP. The first RFP will be for RECs that are certified in accordance with the Green-e Renewable Electricity Certificate Program

standard ("9A RFP").³ The second RFP will be for RECs resulting from green resources located inside or outside of the state of Ohio. These green resources are defined as wind, solar photovoltaic, biomass co-firing of agricultural crops, hydro (as certified by the Low Impact Hydro Institute),⁴ incremental improvements in large scale hydro, pumped hydro, compressed air, coal mine methane, landfill gas and biogas digesters, co-firing of all woody waste including mill residue (but excluding painted or treated lumber), solar thermal, geothermal, fuel cells, and waste coal, and any other resource developed or discovered hereafter that is determined to qualify as a REC by the Commission ("9B RFP").⁵ REC suppliers submitting Green Resource bids must provide adequate documentation and certification of the green energy, under the green power definitions discussed above.

- (10) The Court found that the Commission exceeded its authority by approving a rate stabilization plan without also providing consumers a second option to either obtain service at a price determined by a reasonable competitive bidding process under the Commission's rules or other reasonable means of providing consumers with access to markets.

In deciding this case based on the remand from the Court, we emphasize that we are not reaching the questions as to whether the market for retail electric services, including the market for electric generation service, is efficient and, in fact, effectively competitive or whether it would be reasonable for a competitive bidding option to be used as the market-based standard service offer.

³ Under the terms of the Stipulation, the Signatory Parties identified two types of RECs, for purpose of this proceeding, which are defined at paragraphs 9(A) and 9(B) of the Stipulation.

⁴ The Low Impact Hydropower Institute (LIHI) is a non-profit 501(c)(3) organization dedicated to reducing the impacts of hydropower generation through the voluntary certification of environmentally responsible, low impact hydropower.

⁵ Only green resources that have been brought into service on or after January 1, 1997, shall qualify.

In this case, the stipulation includes two means for consumers to gain access to energy markets outside of FirstEnergy's standard service offer, FirstEnergy's "Market-Based Program" and a separate "Green Resource" offering. The presence of these two opportunities for consumers to access the market reflects the fact that there are different electricity products and separate markets for energy commodities undifferentiated by environmental quality and for a "green" energy product based on renewable and other clean resources that reduce net system-wide environmental impacts. Given that the Companies are providing additional access to electricity markets, the presence of both offers ensures that the Companies are not giving an undue advantage to consumers who prefer either one of these product options or creating an unreasonable barrier or disadvantage in accessing the relevant market for consumers who would prefer the other product. We find that the combination of FirstEnergy's Market Based Program and a Green Resource program is sufficient to comply with the requirements of Section 4928.14 (B), Ohio Revised.

- (11) Furthermore, the Commission finds that the Stipulation filed in this proceeding is reasonable and should be adopted. Rule 4901-1-30, Ohio Administrative Code (O.A.C.), authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. *See Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). In reviewing a stipulation, the Commission's primary concern is whether the stipulation is in the public interest.
- (12) The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Ohio-American Water Co.*, Case No. 99-1038-WW-AIR (June 29, 2000); *The Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993). The ultimate issue for the Commission's consideration is whether the stipulation, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission utilizes the following criteria: (a) Is the settlement a product of serious bargaining among capable, knowledgeable

parties? (b) Does the settlement, as a package, benefit ratepayers and the public interest? (c) Does the settlement package violate any important regulatory principle or practice?

- (13) The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues 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 (1994) (citing *Consumers' Counsel, supra*, at 126). In *Industrial Energy Consumers*, the Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. (*Id.*)
- (14) Based on our three-part standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, has been met. The parties to the negotiations have been involved in many cases before the Commission and represent a diverse constituency. The Signatory Parties to the Stipulation include the residential consumers, as well as the Staff. Further, none of the intervening parties filed objections to the Stipulation.
- (15) The Stipulation filed in this case also meets the second criterion. As a package, the Stipulation advances the public interest by addressing all the issues raised in the proceeding without the need for costly litigation. Further, the Stipulation offers customers interested in protecting the environment and/or encouraging investment in renewable resources an opportunity to purchase electric power in accordance with such interests. The Green Resource tariff offering presented in the Stipulation also encourages innovation in the retail electric market.
- (16) Finally, the Stipulation does not violate any important regulatory principle or practice. Upon review of the Stipulation filed, we conclude that the terms and conditions of both tariff offerings comply with Section 4928.14(B), Revised Code, and the Court's order on remand. Furthermore, the Stipulation represents a reasonable resolution of the issues in this case. Accordingly, the Stipulation filed by the Signatory Parties on May 29, 2007 should be adopted in its entirety.

- (17) In approving the "Green Resource" offer, we recognize that this Stipulation addresses a limited pilot program extending only through December 2008. And, under the terms of the stipulation, "The parties do not agree that the definitions of RECs as provided for [in the stipulation] are necessarily appropriate in any other proceedings or forums and have agreed to them in this proceeding only for settlement purposes."

In marketing its "Green Resource" offer, the Companies are directed to follow the Commission's marketing and solicitation rules for Competitive Retail Electric Service (CRES) providers. Rule 4901:1-21-05(C), O.A.C., provides:

"No CRES provider may engage in marketing, solicitation, or sales acts, or practices which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRES. Such unfair, misleading, deceptive, or unconscionable acts or practices include, but are not limited to, the following: ...

(9) Marketing, advertising, or claiming that the environmental characteristics of any generation service energy source(s) provide an environmental advantage that does not exist."

We note that included in the "Renewable Energy Credits" under Section 9 (B) of the stipulation are credits from pumped hydro and compressed air energy storage facilities as well as from waste coal generation. We further note these sources are not generally considered to be renewable resources and the use of these resources may tend to increase, rather than decrease, total system wide emissions of CO₂ and other air pollutants.

- (18) As noted in Section 1 of the stipulation, the Companies will provide bill inserts describing the green product and advise customers on how they may participate in the program. The Commission directs the Companies to work with all signatory parties to provide a consistent message to customers in all green product marketing materials, including accurate messages regarding the sources included in the green product program.

It is, therefore,

ORDERED, That the motions to intervene filed by OEG, IEU-Ohio, OCC, NOAC, OPAAE, and WPS-ESI are granted. It is, further,

ORDERED, That the motion to admit David C. Rinebolt *pro hac vice* is granted. It is, further,

ORDERED, That the Stipulation filed in this case is adopted in its entirety. It is, further,

ORDERED, That the terms and conditions of the Green Resource Rider tariff offering, as attached to the Stipulation and subject to Finding (18) of this order, are approved. The Green Resource rider rate, which will be determined after the bid process is complete, will be reviewed by the Staff to ensure that the rate is in compliance with the terms of the Stipulation. It is, further,

ORDERED, That the terms and conditions of the Market-Based Program, as outlined in the Companies' September 29, 2006 initial filing, the January 29, 2007 reply comments, and as modified by the Stipulation, are approved. The rider rate, which will be determined after the bid process is complete, will be reviewed by the Staff to ensure that the rate is in compliance with the terms discussed above. It is, further,

ORDERED, That the effective date of the Green Resource tariff offering shall be the date upon which four complete printed copies of final tariffs are filed with the Commission. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That the effective date of the Market-Based Program tariff offering shall be the date upon which four complete printed copies of final tariffs are filed with the Commission. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That OE, CEI, and TE are authorized to file in final form four complete copies of their respective tariffs consistent with this Order on Remand. Each company shall file one copy in its TRF docket (or may make such filing electronically as directed in Case No. 06-900-AU-WVR) and one copy in this case docket. The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy and Water Division of the Commission's Utilities Department. It is, further,

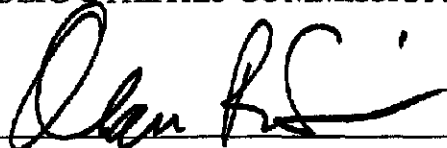
ORDERED, That the Applicants shall notify all affected customers via a bill message or bill insert within 30 days of the effective date of each tariff approved by this Order on Remand. A copy of the customer notices shall be submitted to the Commission's

Service Monitoring and Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

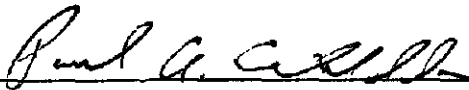
ORDERED, That nothing in this Order on Remand shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule or regulation. It is, further,

ORDERED, That a copy of this Order on Remand be served upon FirstEnergy, all certified electric suppliers, and all other interested persons of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO



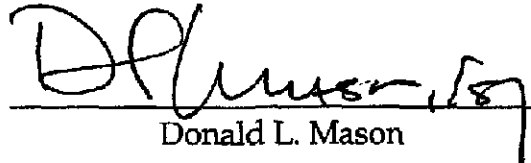
Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



Donald L. Mason

Valerie A. Lemmie

JKS:ct

Entered in the Journal

AUG 15 2007



Renee J. Jenkins
Secretary