

FILE

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Columbus )  
Southern Power Company for Amendment of the )  
2009 Solar Energy Resource Benchmark, Pursuant )  
to O.R.C. Section 4928.64(C)(4). )

Case No. 09-987-EL-EEC

In the Matter of the Application of Ohio Power )  
Company for Amendment of the 2009 Solar )  
Energy Resource Benchmark, Pursuant to O.R.C. )  
Section 4928.64(C)(4). )

Case No. 09-988-EL-EEC

13  
RECEIVED-DOCKETING L  
2009 DEC 15 PM 2:05  
PUCO

---

**COMMENTS IN OPPOSITION TO AEP's FORCE MAJEURE APPLICATION  
BY OHIO ADVANCED ENERGY AND VOTE SOLAR ("THE SOLAR INDUSTRY")**

---

**I. Facts**

Senate Bill 221: On May 1, 2008, Governor Ted Strickland signed into law a sweeping new energy policy for the state of Ohio, Amended Substitute Senate Bill 221 ("SB 221"). Describing the legislation as "landmark" and "historic," the Governor stated the legislation would "serve as a catalyst to enhance energy industries in Ohio, bringing new jobs while protecting existing jobs" and that the state "will attract the jobs of the future through an advanced energy portfolio standard."<sup>1</sup> The Solar Industry<sup>2</sup>, which advocated aggressively for the advanced energy policy contained in SB 221, believes that the success of this new law will depend upon its implementation and enforcement at the Public Utilities Commission of Ohio ("PUCO").

---

<sup>1</sup> Office of the Governor, Press Release, May 1, 2008. Attached as Exhibit A. See: <http://www.governor.ohio.gov/Default.aspx?tabid=622>

<sup>2</sup> The Solar Industry in this case is represented by Ohio Advanced Energy and Vote Solar. OAE is a statewide trade association of advanced energy companies and their supply chain partners that advocates for state advanced energy policy and was active during the SB 221 legislative process. Vote Solar is a national organization advocating policies to help bring about the economies of scale which will drive down the cost of solar energy.

This is to certify that the images appearing are an  
accurate and complete representation of a case file  
document submitted in the regular course of business.

Notarized D.R. Date Processed 12/15/09

SB 221 contains an alternative energy portfolio standard<sup>3</sup>. The “standard” is a simple mandate that Ohio’s investor-owned electric utilities obtain a given percentage of their generation from a defined list of what the statute terms “renewable” and “advanced” sources. Within the renewable tier of the standard, a separate “solar carveout” requires that a percentage of the renewable tier be derived from solar energy, increasing to .5% by 2025. Utilities may comply by either procuring actual solar energy itself or procuring solar Renewable Energy Credits (“sRECs”). sRECs represent the environmental attribute of solar power produced by a third party, with one sREC equivalent to one MWh of solar electricity.

The subject of robust debate in the General Assembly, the renewable energy requirement, as well as the solar carveout, contain annual “benchmarks” the utilities must meet between 2009 and 2025. While some interested parties had argued against any such annual benchmarks, or for delayed benchmarks in the first several years of the standard, those arguments were rejected. Policymakers instead intended an immediate market impact to spark development of the solar industry.

From the time Governor Strickland signed SB 221, the utilities had *nineteen months* to achieve the 2009 renewable benchmark. Furthermore, the solar requirement for 2009 is merely .004%<sup>4</sup>, a percentage policymakers determined was realistic.

AEP Waiver Request: Nonetheless, on October 26, 2009, AEP filed a request with the PUCO to be excused from compliance with most all of the 2009 solar requirement, alleging it was “unable” to meet the requirements of the law despite its “good faith efforts.” AEP described its 2009 compliance efforts as follows:

- 1) Building two modest 70 kW rooftop solar installations on properties AEP itself owns;

---

<sup>3</sup> See chart outlining SB 221, Ohio’s alternative energy portfolio standard. Attached as Exhibit B.

<sup>4</sup> O.R.C. 4928.64(B)(2)

2) Issuing a short-term RFP for current vintage year sRECs; and

3) Purchasing 13 sRECs on the open market for \$450/each, plus transaction costs.<sup>5</sup>

In need of 1,826 sRECs to meet the 2009 standard, AEP concedes to have fallen well short of its obligation, with a deficit 1,666 MWh.<sup>6</sup> Thus, AEP met 8.7% of its 2009 mandate.

For reasons described below, the Solar Industry does not believe AEP's efforts meet the "good faith" standard required to invoke *force majeure* under the law. We believe granting the application would set a poor precedent in this case of first impression and send the wrong signal to the Solar Industry: namely, the Ohio solar marketplace promised by SB 221 is illusory, or at best, fraught with uncertainty.

We therefore urge the PUCO to delay ruling on the application and instead exercise its statutory authority to require AEP to issue an RFP for long-term sREC contracts in the amount of their 2009 deficit before making a *force majeure* determination. In the alternative, we request the PUCO require AEP to pay the renewable energy compliance payment as required by statute, in the amount of \$749,700.00.

## **II. Analysis and Argument**

SB 221 contains a mechanism for the PUCO to excuse a utility from compliance with a benchmark for a given year by invoking the "*force majeure*" clause. Literally "superior force," and historically linked to "acts of God" in contract law, this mechanism is meant to serve as a sort of escape clause for utilities who fail to meet a benchmark due to extraordinary circumstances beyond their control that cause marketplace shortages. ORC 4928.64(C)(1) introduces the concept:

---

<sup>5</sup> AEP also describes efforts to meet future solar benchmarks through construction of a large scale solar facility in Wynandot County. The facility will not be operational in 2009 and therefore is not applicable to the 2009 benchmark.

<sup>6</sup> AEP *Force Majeure* Application, Para 11.

“The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.” (Emphasis added).

In its filing, AEP does not allege that any such weather-related events or equipment shortages prevented their compliance. In fact, market conditions are such in 2009 that the price of solar panels has been steadily falling and they remain available in abundant supply.

The statute then defines the standard for the PUCO to invoke *force majeure*.

“The Commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period.” *Id.*

AEP has not introduced any evidence of “insufficient quantities” of solar resources available in the marketplace. In fact, their filing indicates they were able to construct two 70 kW systems on their own property. AEP had the option to build larger systems, but chose not to.

AEP does assert that sRECs were not available. However, it is important to understand that the reason sRECs were not available is for a reason that is wholly in AEP's control. The reason AEP did not secure sRECs through its RFP solicitations is because it chose to attempt to procure only immediately available, current vintage year sRECs, which could only be generated by solar systems already constructed (of which there are relatively few in Ohio). To finance the construction of a solar system, solar developers must monetize both the revenue from the sale of electricity and the resulting sRECs upfront. That is, solar developers must have signed, long-term contracts for both the electricity and the sRECs before they can obtain financing from a bank and proceed

to build the solar system. Because AEP only solicited approximately 1-year of immediately available sRECs, no developer was able to finance a system based on AEP's RFP.<sup>7</sup>

Fortunately, during the SB 221 legislative process, the Governor and the General Assembly foresaw the potential for utilities to only solicit short-term sRECs and specifically addressed this scenario in the *force majeure* statute itself. The statute states:

In making [a *force majeure*] determination, the commission shall consider whether the [utility] has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts.<sup>8</sup> (Emphasis added).

In its application, AEP fails to address the statutory definition of “good faith” and does not explain why it failed to “seek the resources through long-term contracts” as required by law before *force majeure* is triggered.

Furthermore, AEP mentions that it will comply with the 2010 solar benchmark (and beyond) with a large scale facility in Wyandot County because it “entered into a 20-year renewable energy purchase agreement (REPA)” for the power.<sup>9</sup> By entering into a long term contract for the Wyandot County system, AEP demonstrates its understanding of the mechanics of financing solar systems and the necessity of long-term agreements. It could have chosen to issue an RFP for sRECs under long-term contracts in 2008 or in early 2009 in order to provide time for an Ohio-based system to be built in 2009.

---

<sup>7</sup> Either that, or the price of 1-year worth of sRECs would need to capture all of the sREC value over the life of the system in year 1, artificially driving the price of a 1-year sREC astronomically high— and well above the renewable energy compliance payment in statute.

<sup>8</sup> O.R.C. §4928.64(C)(4)(b).

<sup>9</sup> AEP *Force Majeure* Application, Para 9.

If the PUCO grants *force majeure* in this case, it risks establishing the precedent that a utility RFP for current-vintage year sRECs, with a 1-year term, constitutes “long-term” for purposes of the renewable energy standard. This would ensure that systems will never be financed and will ensnare the Solar Industry in a perpetual cycle where alleged “market shortages” could be used as a means for declaring *force majeure* in any given year.

### **III. Remedy**

In resolving this case, the PUCO should first consider that the absence of long-term contracts for 2009 sRECs has had serious consequences for Ohio’s solar marketplace. Without that financing tool, the market for customer-sited, net-metered systems (“distributed generation”) has not and will not develop.

This is in direct contrast to the state energy policy as articulated in SB 221, which is to “encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues<sup>10</sup>...” and “[e]ncourage the education of small business owners in this state regarding the use of, and encourage the use of... alternative energy resources in their businesses.”<sup>11</sup>

Further, fulfilling the solar requirement with only utility-scale projects will mean that Ohio misses the opportunity to gain the benefits that result from distributed generation. Those benefits include:

- 1) Speedy Deployment: Customer-sited systems can be deployed very quickly. The permitting, contracting, and financing requirements are much less than with utility-scale fields, making distributed generation an attractive option for the 2009 benchmark.

---

<sup>10</sup> ORC 4928.02(K)

<sup>11</sup> ORC 4928.02(M)

- 2) Grid Efficiency: Behind-the-meter solar energy improves grid efficiency because it is located at the point of use. Widely deployed, these systems help avoid the need for expensive upgrades of the transmission and distribution system.
- 3) Leveraging Private Investment: Net metered systems leverage private investment, and therefore can provide competitive sREC pricing, which saves ratepayers from bearing the full cost of a system.
- 4) Green Jobs: Distributed generation systems contribute can significantly to the development of green jobs in Ohio.<sup>12</sup> A diverse array of small and medium-sized projects results in stable industry growth. That growth leads to competition and downward pressure on prices. Utilizing only utility-scale projects can cause a “boom and bust” cycle as opposed to sustained economic growth.

For the reasons cited above, the Solar Industry requests the PUCO to delay ruling upon the AEP *force majeure* application and instead exercise its statutory authority to require AEP to solicit long-term, financeable sREC contracts. The authorizing statute states:

The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility’s or company’s request of *force majeure* under this division can be made.<sup>13</sup>

The Solar Industry believes if the terms of the solicitation comply with SB 221 and are consistent with the basic mechanics of solar finance, AEP would receive

---

<sup>12</sup> Distributed generation solar installations create 25 direct jobs per MW installed as compared with 9.5 direct jobs per MW for central station PV installations. Navigant Consulting, September 2009 Report. Smellof, Ed. 2005. Quantifying the benefits of Solar Power for California.

[http://votesolar.org/wp-content/uploads/2009/11/tools\\_QuantifyingSolarBenefits.pdf](http://votesolar.org/wp-content/uploads/2009/11/tools_QuantifyingSolarBenefits.pdf)

<sup>13</sup> O.R.C. §4968.64(C)(4)(a).

multiple competitive responses. We would propose that the term for the RFP be a minimum of ten years.

While the power would be produced in 2010, the first 1,666 MWh produced could retroactively count to AEP's 2009 obligation. (Because the *force majeure* statute specifically grants the PUCO authority to impose this remedy, and because *force majeure* applications will generally fall near the end of the calendar year, it seems clear that this "retroactive" creation of sRECs is intended).

In the alternative, consistent with its duties under SB 221, the Commission should impose a "renewable energy compliance payment" of "\$450 per megawatt hour of undercompliance" for 2009.<sup>14</sup> The deficit of 1,666 MWh would require a renewable energy compliance payment of \$749,700.00 which may not be charged back to ratepayers.<sup>15</sup>

#### **IV. Conclusion**

The Solar Industry remains enthusiastic about the opportunity to fulfill the promise of SB 221. Solar is a strategic competency for Ohio. Our homegrown thin film technologies have placed us among the lowest cost solar module providers in the world. Our vast solar supply chain, including glass and frame manufacturing capabilities and lean manufacturing expertise, are second to none. SB 221 was intended to create the marketplace for these products, and we are well-positioned to capture it. With the proper regulatory framework, we believe this market opportunity will indeed allow Ohio to create "the jobs of the future" as articulated by Governor Strickland the day he signed the bill.

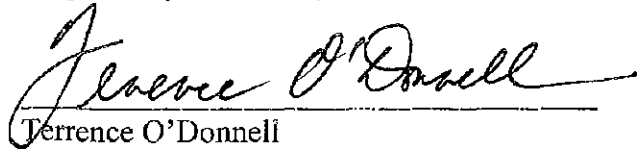
---

<sup>14</sup> ORC 4928.64(C)(2)

<sup>15</sup> ORC 4928.64(C)(2)(c)



Respectfully submitted,


A handwritten signature in cursive script, reading "Terrence O'Donnell", written over a horizontal line.

Terrence O'Donnell  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215  
Telephone: (614) 227-2345  
Facsimile: (614) 227-2390  
e-mail: [todonnell@bricker.com](mailto:todonnell@bricker.com)

Attorney for Ohio Advanced Energy and Vote Solar

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comment has been served upon the following parties, via regular U.S. mail, postage prepaid, this 15<sup>th</sup> day of December, 2009.

  
Terrence O'Donnell

Steven T. Nourse  
Marvin I. Resnik  
American Electric Power Service Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215

David C. Rinebolt  
Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, OH 45839-1793

Will Reisinger  
Nolan Moser  
Ohio Environmental Council  
1207 Grandview Avenue  
Columbus, OH 43212

Terry L. Etter  
Gregory J. Poulos  
Office of the Ohio Consumers' Counsel  
10 W. Broad Street, Suite 1800  
Columbus, OH 43215

Michael E. Heintz  
Environmental Law & Policy Center  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43204

Todd M. Williams  
Williams & Moser, LLC  
P.O. Box 6885  
Toledo, OH 43612

David Boehm  
Michael Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202

Joe Clark  
Samuel C. Randazzo  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215

Ohio.gov Office of the Governor Press Releases

### 5.1.08 - Governor Signs Historic Energy Legislation

Columbus, Ohio – Governor Ted Strickland today signed into law Senate Bill 221, a landmark energy reform bill that will ensure predictability of affordable energy prices and serve as a catalyst to enhance energy industries in Ohio, bringing new jobs while protecting existing jobs.

Strickland made the following comments today before signing SB 221 in the Ohio Statehouse Atrium.

“One year ago today I spoke to the Toledo Chamber of Commerce and outlined a set of principles to guide our efforts in transforming our electric structure in the State of Ohio.

These principles were focused on:

Transparency and accountability

Making sure customers have equal footing with utilities

Energy efficiency

A strong renewable and advanced energy portfolio

Modernizing Ohio’s electric infrastructure

The need to reduce green house gas emissions

Establishing a stable balance between the protections of regulation and the opportunities of competitive markets.

Today I am proud to say that with the help of legislative leaders in both parties we have kept our word to Ohioans on these important and guiding principles.

This bill, Senate Bill 221, will ensure predictability of affordable energy prices and maintain state controls necessary to protect Ohio jobs and businesses.

We will safeguard Ohio families by empowering consumers and modernizing Ohio’s energy infrastructure.

And we will attract the jobs of the future through an advanced energy portfolio standard—and today’s action by Ohio means that a majority of states now agree that these technologies represent the future of energy in the United States.

This requirement means that 25% of the energy sold in Ohio must come from advanced and renewable energy technologies—from clean coal to wind turbines—by 2025.

This could not have been accomplished without the hard work of many of you here today as well as citizens across the state—and I want to thank you for your tireless efforts to get us to this point and remind you that you will continue to play a vital role as we work to implement this plan.

Staff at the Public Utilities Commission, and its commissioners, deserve an enormous amount of gratitude for the work they have already begun and will continue to do as we see these legislative objectives through to the finish line.

I am proud to be here today with Ohio's legislative leadership. We can all be proud of this bill."

<http://www.governor.ohio.gov/Default.aspx?tabid=622>

# Ohio Senate Bill 221

## Alternative Energy Portfolio Standard

Alternative Energy Technologies	2025 R.P.S. Benchmarks			In-State Requirements	Renewable Energy Credits	Enforcement/ Compliance Payments																																																			
Renewable ORC 4928.01(A)(35) • Solar – Photovoltaic • Solar – Thermal  • Wind  • Hydropower  • Certain Solid Waste  • Biomass  • Bio-Methane Gas  • Fuel Cells  • Wind Turbines – Lake Erie  • Off Peak Storage Facilities Utilizing Renewables  • Distributed Generation Facilities Utilizing Renewables	Renewable and Solar Benchmarks: 12.5% + ORC 4928.64(B)(2) <table><tr><th>Y</th><th>R</th><th>S</th></tr><tr><td>2009:</td><td>.25%</td><td>.004%</td></tr><tr><td>2010:</td><td>.50%</td><td>.010%</td></tr><tr><td>2011:</td><td>1.0%</td><td>.030%</td></tr><tr><td>2012:</td><td>1.5%</td><td>.060%</td></tr><tr><td>2013:</td><td>2.0%</td><td>.090%</td></tr><tr><td>2014:</td><td>2.5%</td><td>.120%</td></tr><tr><td>2015:</td><td>3.5%</td><td>.150%</td></tr><tr><td>2016:</td><td>4.5%</td><td>.180%</td></tr><tr><td>2017:</td><td>5.5%</td><td>.220%</td></tr><tr><td>2018:</td><td>6.5%</td><td>.260%</td></tr><tr><td>2019:</td><td>7.5%</td><td>.300%</td></tr><tr><td>2020:</td><td>8.5%</td><td>.340%</td></tr><tr><td>2021:</td><td>9.5%</td><td>.380%</td></tr><tr><td>2022:</td><td>10.5%</td><td>.420%</td></tr><tr><td>2023:</td><td>11.5%</td><td>.460%</td></tr><tr><td>2024:</td><td>12.5%</td><td>.500%</td></tr></table>			Y	R	S	2009:	.25%	.004%	2010:	.50%	.010%	2011:	1.0%	.030%	2012:	1.5%	.060%	2013:	2.0%	.090%	2014:	2.5%	.120%	2015:	3.5%	.150%	2016:	4.5%	.180%	2017:	5.5%	.220%	2018:	6.5%	.260%	2019:	7.5%	.300%	2020:	8.5%	.340%	2021:	9.5%	.380%	2022:	10.5%	.420%	2023:	11.5%	.460%	2024:	12.5%	.500%	At least ½ of renewable energy resources to be implemented by the utilities shall be met through facilities located in Ohio.  The remainder shall be met with resources that can be shown to have been delivered into this state. ORC 4928.64(B)(3)	Utilities may use R.E.C.s in any of the 5 calendar years following acquisition to comply with both the renewable and solar energy resource requirements.  1 R.E.C. shall equal 1 Mw Hour of electricity from renewable resources. ORC 4928.65	1) Annual PUCO Review ORC 4928.64(C)(1)  2) If Not in Compliance: ORC 4928.64(C)(2)  A) Solar Benchmark \$ per Mw hour : 2009: \$450 2010: \$400 2012: \$350 2014: \$300 2016: \$250 2018: \$200 2020: \$150 2022: \$100 2024: \$50  B) Renewable Benchmark 2009: \$45 Adjusted annually per CPI
Y	R	S																																																							
2009:	.25%	.004%																																																							
2010:	.50%	.010%																																																							
2011:	1.0%	.030%																																																							
2012:	1.5%	.060%																																																							
2013:	2.0%	.090%																																																							
2014:	2.5%	.120%																																																							
2015:	3.5%	.150%																																																							
2016:	4.5%	.180%																																																							
2017:	5.5%	.220%																																																							
2018:	6.5%	.260%																																																							
2019:	7.5%	.300%																																																							
2020:	8.5%	.340%																																																							
2021:	9.5%	.380%																																																							
2022:	10.5%	.420%																																																							
2023:	11.5%	.460%																																																							
2024:	12.5%	.500%																																																							

<b>Advanced</b> ORC 4928.01(A)(34) <ul style="list-style-type: none"> <li>Clean Coal</li> <li>Advanced Nuclear</li> <li>Energy Efficiency</li> <li>Fuel Cells</li> <li>Co-gen</li> <li>Certain Solid Waste</li> </ul>	<b>Advanced Energy</b> Requirement: 12.5% ORC 4928.64(B)(1)
<b>Mercantile Sited</b> ORC 4928.01 (A)(1) <ul style="list-style-type: none"> <li>Real/Reactive Power</li> <li>Waste Heat Efficiency</li> <li>Demand/Load storage</li> <li>Advanced/Renewable</li> </ul>	

### Key A.E.P.S. Cost Containment Mechanisms

3% Cost Cap	Force Majeure Provision
Utilities not required to comply with benchmark to the extent compliance will result in 3+% increase in electricity production or acquisition costs. ORC 4928.64(C)(3)	Utility may request PUCO to determine whether renewable resources are sufficiently available to enforce R.P.S. benchmark requirement. If utility shows good faith effort to comply with renewable benchmarks but cannot, PUCO may reduce obligation. Modification does not automatically reduce future benchmarks. ORC 4928.64(C)(4)

#### For more information contact:

Terrence O'Donnell	614.227.2345	todonnell@bricker.com
Kurt Tunnell	614.227.8837	ktunnell@bricker.com
Brett Breitschwerdt	614.227.2301	bbreitschwerdt@bricker.com