

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
DPL Energy Resources, Inc.)
for an Amendment of the 2009 Solar) Case No. 09-2006-EL-ACP
Energy Resource Benchmark, Pursuant)
to Section 4928.64(C)(4), Ohio)
Revised Code)

**COMMENTS REGARDING DPL ENERGY RESOURCES APPLICATION BY THE
OHIO ENVIRONMENTAL COUNCIL AND THE ENVIRONMENTAL LAW &
POLICY CENTER**

I. Introduction

On December 30, 2009, the DPL Energy Resources (“DPLER” or “Company”) filed the above-captioned Application asking the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to waive a portion of DPLER’s 2009 Solar Energy Resource (“SER”) benchmark as required by Ohio Revised Code (“O.R.C.”) §4928.64. DPLER bases its application on a “force majeure” claim. However, Ohio customers should be protected from DPLER’s failure to meet its SER benchmark. The statutory remedy for failing to meet the SER benchmark is to subject DPLER to the Alternative Compliance Payment. Alternatively, if the Commission is inclined to grant the waiver, it should follow its own precedent and require DPLER to recover any waived 2009 SERs in 2010.

II. Applicable Law and DPLER’s Application

Ohio law requires that solar energy resources account for at least 0.50% of the renewable energy generated in Ohio.¹ In addition, utilities must obtain at least half of that requirement from

¹ O.R.C. §4928.64(B)(2).

within Ohio.² The statute requires utilities to begin developing solar resources in 2009 and to meet annual statutory benchmarks until reaching the 0.50% level by 2025. O.R.C.

§4928.64(B)(2) includes a chart setting the annual requirements for solar generation. For 2009, the statute requires utilities to provide at least 0.004% of their renewable energy generation from solar resources.³ Utilities may achieve the SER benchmarks by directly developing solar generation or through the open market purchase of solar Renewable Energy Credits (RECs).⁴

If a utility cannot meet its SER benchmark it

may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. 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.⁵

In order to grant the force majeure application

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. In making this determination, the commission shall consider whether the electric distribution utility or electric services company 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. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.⁶

² O.R.C. §4928.64(B)(3).

³ O.R.C. §4928.64(B)(2).

⁴ O.R.C. §4928.64(B).

⁵ O.R.C. §4968.64(C)(4)(a); see also O.A.C. §4901:1-40-06.

⁶ O.R.C. §4928.64(C)(4)(b).

O.R.C. §4928.64(C)(4)(c) states that a force majeure waiver “shall not automatically reduce the obligation for the electric distribution utility’s...compliance in subsequent years.” Finally, if a utility does not meet its SER benchmark, and the PUCO does not grant a force majeure determination, the utility is subject to an “alternative compliance payment” (“ACP”). The 2009 ACP is \$450 per megawatt-hour (MWh or MW hour) of solar capacity not obtained.⁷ Although DPLER references its Alternative Energy Compliance Plan as a reference for its SER obligations, nowhere in the Application does DPLER state the number of SERs DPLER was to develop or did develop.⁸

DPLER asks the Commission to grant its Application under O.R.C. §4928.64(C)(4) and O.A.C. 4901:1-40-06, and relieve the Company from a portion of its 2009 SER benchmarks. Without providing a specific number, DPLER states it obtained 36% of its 2009 Ohio-sited SER requirement.⁹ DPLER also affirms that it obtained all of its non-Ohio SER requirements, and that it met its non-solar renewable energy benchmark.¹⁰ Consequently, DPLER is seeking a force majeure determination for the balance of its Ohio SER requirements.¹¹

III. Argument and Comments

O.R.C. §4928.64(C)(4)(c) requires that the Commission determine if the necessary solar resources “are not reasonably available” to meet the 2009 SER benchmark. In order for the Commission to waive the 2009 SER benchmark, DPLER must prove that it “made a good faith effort to acquire sufficient...solar energy resources to so comply, including, but not limited to,

⁷ O.R.C. §4928.64(C)(2)(a).

⁸ See *In the matter of the application of DPL Energy Resources, Inc. for a force majeure determination with regard to DPLER’s 2009 Solar Energy Benchmark*, Case No. 09-2006-EL-ACP (“Application”) (December 30, 2009).

⁹ *Id.* at ¶13.

¹⁰ *Id.* at Introduction.

¹¹ *Id.* at ¶7. If the Commission were to impose the ACP, DPLER’s payment is unknown given the lack of information concerning its SER requirements and achievements.

by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts.”¹²

DPLER was aware of its 2009 SER requirements on or before July 31, 2008, when the legislation went in to effect. However, its Application indicates that DPLER did not begin seeking solar RECs until July 2009—a year after the Legislature created the SER benchmarks.¹³

DPLER listed its efforts to meet the 2009 SER requirement consisting of:

- one Request for Proposal (“RFP”) for solar RECs;
- two “reverse” RFPs resulting in unsuccessful bids for solar RECs;
- research of, and contact with solar grant awardees;
- work with REC industry brokers to locate solar RECs;
- conducting searches for SERs in other service territories; and
- direct contact with residents who have small solar projects.¹⁴

Unlike its sister company, Dayton Power & Light (“DP&L”), DPLER is not constructing its own solar facility. In addition, DPLER could have developed a formal residential solar purchase program instead of calling individuals on an ad hoc basis. Had DPLER developed this program, it could have generated additional interest from qualified residential and small commercial consumers. By constructing solar resources or developing a residential REC purchase program, DPLER could have expended additional efforts to comply with all of its 2009 SER requirements.

Additionally, the undersigned are confused by DPLER’s Application. The Application mirrors DP&L’s December 23, 2009 application.¹⁵ The SER searches conducted by DPLER and

¹² O.R.C. §4928.64(C)(4)(b).

¹³ *Application* at ¶8.

¹⁴ *Id.* at ¶¶8-12.

DP&L appear to be the same, with the exception of constructing solar resources, as does the level of success, 36%, in locating Ohio-sited SERs. Further, both companies claim to have met their non-solar and non-Ohio renewable energy requirements. Finally, DPLER suggested that its SER efforts were to be combined with DP&L's, "As provided for in the [DP&L] alternative energy compliance plan as approved by Commission Finding and Order dated June 24, 2009 in [Case No. 08-1094-EL-SSO], DP&L calculated its compliance obligations based upon the retail sales of DP&L and DPLER combined and planned to undertake activities geared toward meeting the requirements of the SER on behalf of both companies."¹⁶ Consequently, it appears that DP&L and DPLER conducted joint efforts to locate SERs. Conversely, DPLER does not seem to be sharing in DP&L's solar resources currently under construction. To that end, the undersigned are not sure why DPLER filed a separate force majeure application.

Despite the curious nature of the Application, DPLER did not ignore its SER obligations, but it did not expend the appropriate effort to ensure it met its 2009 benchmarks. If the Commission is inclined to grant DPLER's Application, the PUCO should follow its own precedent and invoke O.R.C. §4928.64(C)(4)(c) and require the Company to recover any waived portion of the 2009 SER benchmark in 2010. In this way, the PUCO will balance DPLER's efforts against its shortfall in seeking solar resources. This equates to increasing DPLER's 2010 benchmark by the 149 solar RECs it failed to obtain in 2009.

The PUCO recently applied this provision when it granted American Electric Power's ("AEP's") and DP&L's applications for a force majeure determination, relieving both of a

¹⁵ *In the matter of the application of The Dayton Power and Light Company for a force majeure determination with regard to DP&L's 2009 Ohio Solar Energy Resource benchmark*, Case No. 09-1989-EL-ACP (December 23, 2009).

¹⁶ Application at ¶6.

portion of its 2009 SER requirements.¹⁷ The PUCO stated that, “AEP-Ohio’s request for a force majeure waiver of its 2009 SER benchmarks be granted and, *to the extent that the Companies did not comply with the 2009 SER benchmarks, the 2010 benchmarks be increased.*”¹⁸ It extended this ruling in DP&L’s application as well.¹⁹ AEP’s and DP&L’s applications are similar to DPLER’s, and it is appropriate to reach a similar result in this case. The Legislature intended DPLER to obtain SERs in 2009, and the Commission should not relieve the company of its statutory SER obligations. By requiring DPLER to recover the 64% of solar RECs it failed to obtain in 2009 over the next year, the Commission will ensure that the legislation’s intent is met.

IV. Conclusion

For the reasons above, the undersigned members of the Ohio Environmental Council and Environmental Law & Policy Center respectfully asks this Commission to condition any SER benchmark waiver on DPLER recovering the shortfall in 2010. In this way, Ohio receives the full benefit of the statutory requirement to develop SERs.

Respectfully submitted,

/s Michael E. Heintz
Michael E. Heintz (0076264)
Environmental Law & Policy Center
1207 Grandview Ave.
Suite 201
Columbus, Ohio 43212
Telephone: 614-488-3301
Fax: 614-487-7510
E-mail: mheintz@elpc.org

Attorney for the Environmental Law &
Policy Center

¹⁷ See Entry, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC (January 7, 2010); Finding and Order, Case No. 09-1989-EL-ACP (March 17, 2010).

¹⁸ Entry, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC, at 9 (January 7, 2010) (emphasis added).

¹⁹ Finding and Order, Case No. 09-1989-EL-ACP, at ¶7 (March 17, 2010).

/s Nolan Moser (per email authorization)

Nolan Moser

Staff Attorney for the Ohio Environmental
Council

1207 Grandview Avenue, Suite 201

Columbus, Ohio 43212-3449

Telephone: (614) 487-7506

Fax: (614) 487-7510

E-mail: nolan@theOEC.org

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comments have been served upon the following parties, via electronic mail, this 26th day of March, 2010.

/s Michael E. Heintz

Michael E. Heintz

Edward N. Rizer
DPL Energy Resources, Inc.
1065 Woodman Drive
Dayton, OH 45432
Edward.Rizer@DPLINC.com

Judi L. Sobecki
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Judi.Sobecki@DPLINC.com

Attorneys for DPL Energy Resources Inc.

Duane Luckey
Assistant Attorney General
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 E. Broad St., 6th Floor
Columbus, OH 43215
duane.luckey@puc.state.oh.us

Counsel for the Public Utilities Commission of
Ohio

Nolan Moser
Ohio Environmental Council
1207 Grandview Ave.
Suite 201
Columbus, Ohio 43212
nolan@theOEC.org

Attorney for the Ohio Environmental Council

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/26/2010 11:30:48 AM

in

Case No(s). 09-2006-EL-ACP

Summary: Comments Regarding the Application by the Ohio Environmental Council and Environmental Law & Policy Center electronically filed by Mr. Michael E Heintz on behalf of Environmental Law and Policy Center