

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
FirstEnergy Solutions Corp. For Approval)
of its Alternative Energy Annual Status) Case No. 10-467-EL-ACP
Report and for an Amendment of its 2009)
Solar Energy Resources Benchmark)
Pursuant to R.C. § 4928.64(C)(4)(a))

**FIRSTENERGY SOLUTIONS CORP.’S RESPONSE TO COMMENTS OF
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

I. INTRODUCTION

In the Ohio Consumer and Environmental Advocates’s (“OCEA”) Comments on FirstEnergy Solutions Corp.’s¹ (“FES”) annual status report and force majeure request, OCEA argued that the Commission should not approve FES’s request for a force majeure determination because FES has not demonstrated that it made “reasonable efforts” to satisfy its solar energy resources benchmark. Yet FES’s Application describes the extensive efforts it made to secure Solar Renewable Energy Credits (“SRECs”), including FES’s attempts to enter into long-term contracts and its efforts right up until the final days of 2009 to make spot purchases of SRECs to satisfy its 2009 solar energy resources benchmark. It is undisputed and indisputable that sufficient quantities of solar resources simply are not available in the marketplace.

Nevertheless, the OCEA argues that the Commission should require FES to provide the specific contract terms that it offered to potential SREC providers. Comments, p. 6. However, FES, an electric services company, operates in an extremely competitive market. Were it to disclose the terms of its SREC purchase contracts, it would be providing its competitors with confidential and proprietary information that would harm it in the marketplace. FES provided as

¹ In its Comments, the OCEA incorrectly identifies FirstEnergy Solutions Corp. as FirstEnergy Services Corp., which does not exist.

much information as it reasonably could in its Application. As demonstrated in its Application, and the applications of other public utilities and electric services companies, there simply were not enough solar energy resources available in 2009 to enable FES to satisfy its benchmark. The Commission should grant FES's force majeure request.

II. LAW AND ANALYSIS

1. The Commission already has determined that sufficient SRECs did not exist in Ohio in 2009.

In its Application, FES described the extensive efforts it made to obtain enough SRECs to satisfy its statutory benchmark. Application, pp. 6-7. FES attempted to reach an agreement with a solar array developer on two separate occasions; contacted the four largest solar generators in Ohio; and contacted solar brokers, aggregators and generators to discuss spot purchases of SRECs. Application, pp. 6-7. Despite these efforts, FES was unable to secure enough SRECs to meet its benchmark due to a lack of sufficient solar energy resources in the market.

FES was not alone in its failure to meet its benchmark. At least seven other entities failed to meet their solar energy resource benchmarks and also requested a force majeure waiver from the Commission.² The Commission granted each request. *In the matter of the application of Columbus Southern Power Company for amendment of the 2009 Solar Energy Resource Benchmark*, Case No. 09-0987-EL-EEC (Entry, January 7, 2010); *In the matter of the application of Ohio Power Company for amendment of the 2009 Solar Energy Resource Benchmark*, Case No. 09-0988-EL-EEC (Entry, January 7, 2010); *In the matter of the*

² The entities are Columbus Southern Power Company and Ohio Power Company in Case Nos. 09-987-EL-EEC and 09-988-EL-EEC, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company in Case No. 09-1922-EL-EEC, Dayton Power and Light Company in Case No. 09-1989-EL-ACP, and the Retail Electric Supply Association in Case No. 10-428-EL-ACP.

application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a Force Majeure Determination for a portion of the 2009 Solar Energy Resources Benchmark, Case No. 09-1922-EL-EEC (Finding and Order, March 10, 2010); 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 (Finding and Order, March 17, 2010); In the matter of the application of RESA for an amendment to the 2009 Solar Energy Resource Benchmark, Case No. 10-0428-EL-ACP (Finding and Order, April 28, 2010). The Commission should disregard the OCEA's Comments and grant FES's request as well.

2. FES is not required to disclose the confidential terms of its contracts.

The OCEA claims that in order to justify its force majeure request, FES must disclose the contract terms it offered to potential SREC suppliers and discuss those terms "in detail." Comments, p. 6. The OCEA attempts to read such a requirement into R.C. § 4928.64(4)(b). However, that statute only requires that FES demonstrate "a good faith effort to acquire sufficient ... solar energy resources." R.C. § 4928.64(4)(b). The statute does not require that FES disclose the contract terms that it offered to potential suppliers. Such a requirement would harm FES by providing highly confidential and proprietary information to its competitors. Obviously, given that the demand for SRECs in Ohio far outstrips supply, details of acquisitions and proposed transactions are competitively sensitive. Disclosing confidential contract terms would tell FES's competitors how much FES is paying for its SRECs and from which entities it is purchasing them.

Notwithstanding the OCEA's assertions otherwise, FES's Application provided sufficient information to demonstrate that it made a good faith effort to acquire sufficient solar energy

resources to comply with its statutory benchmark. FES explained that it successfully negotiated a five-year purchase agreement with a Toledo-based customer. Application, p. 6. FES further described its attempts to enter into long-term contracts with various solar energy resource providers and its attempts to make spot purchases of SRECs. *Id.* at pp. 6-7. Providing its confidential contract terms is simply not required by the Revised Code or the Commission's rules and would give FES's competitors an unfair advantage. Accordingly, the Commission should reject the OCEA's attempts to read such a requirement into Ohio law.

3. The Commission should not increase FES's 2010 benchmark by the number of SRECs that it failed to obtain in 2009.

The OCEA argues that if the Commission does grant FES's force majeure request, it should increase FES's 2010 solar energy resource benchmark by the 58 SRECs that FES failed to acquire in 2009. Comments, p. 7. R.C. § 4928.64(c) states that if the Commission modifies FES's 2009 benchmark, it "may require the utility or company, *if sufficient renewable energy resource credits exist in the marketplace*, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section." (emphasis added). As demonstrated in FES's Application, and the force majeure requests of at least seven other public utilities and electric services companies, sufficient SRECs simply do not exist in the Ohio market. Thus, the Commission should not increase FES's 2010 benchmark by the amount that it modifies FES's 2009 benchmark. At the very least, any such increase should be contingent upon the existence of sufficient renewable energy resource credits in the marketplace.

III. CONCLUSION

Despite the OCEA's assertions, FES is not required to disclose the competitively sensitive terms of its contracts in this filing. The Commission already has determined that there

are not sufficient quantities of solar resources in the marketplace and modified the benchmarks of seven entities. It should make that determination once again and grant FES's force majeure request. Further, given the lack of sufficient renewable energy resource credits in the marketplace, the Commission should not increase FES's 2010 benchmark by the amount of its modified 2009 obligation.

Respectfully submitted,

/s/ Kevin P. Shannon

Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
Kevin P. Shannon (0084095)
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
kshannon@calfee.com

ATTORNEYS FOR FIRSTENERGY
SOLUTIONS CORP.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Response to Comments of the Ohio Consumer and Environmental Advocates* was filed this 1st day of June, 2010 with the Public Utilities Commission of Ohio Docketing Information System. Notice of this filing will be sent via e-mail to subscribers by operation of the Commission's electronic filing system, and courtesy copies were provided by electronic mail to the persons listed below.

Christopher J. Allwein
Office of the Ohio Consumers' Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215
allwein@occ.state.oh.us

Attorney for the Office of the Ohio
Consumers' Counsel

Michael E. Heintz
Environmental Law & Policy Center
1207 Grandview Ave.
Columbus, OH 43212
mheintz@elpc.org

Attorney for the Environmental Law
& Policy Center

Will Reisinger
Nolan Moser
Trent A. Dougherty
Megan De Lisi
The Ohio Environmental Council
1207 Grandview Ave., Suite 201
Columbus, OH 43212-3449

Attorneys for the Ohio
Environmental Council

/s/ Kevin P. Shannon
One of the Attorneys for FirstEnergy Solutions
Corp.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/1/2010 3:01:21 PM

in

Case No(s). 10-0467-EL-ACP

Summary: Response to Comments of the Ohio Consumer and Environmental Advocates electronically filed by Mr. Kevin P. Shannon on behalf of FirstEnergy Solutions Corp.