

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke) Case No. 10-2586-EL-SSO
Energy Ohio for Approval of a Market Rate)
Offer to Conduct a Competitive Bidding)
Process for Standard Service Offer Electric)
Generation Supply, Accounting)
Modifications, and Tariffs for Generation)
Service.)

POST-HEARING BRIEF
BY
THE OHIO ENVIRONMENTAL COUNCIL

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I. INTRODUCTION

In this proceeding, Duke Energy Ohio (“Duke”) is seeking Commission approval of its Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation (“MRO”). Duke submits this request pursuant to the provisions codified by Amended Substitute Senate Bill 221 (“S.B. 221”). S.B. 221 requires utilities to conduct a standard service offer (“SSO”) for electricity supply through either an Electric Security Plan (“ESP”) or an MRO.¹ Duke applies for the approval of its MRO application filed pursuant to R.C. 4928.141 and R.C. 4928.142. Duke has chosen to provide its SSO through a proposed MRO that provides for a gradual transition to a competitive bidding process. S.B. 221 fundamentally changed the way electric energy sales are regulated in Ohio, providing a path for utilities to conduct competitive power sales through MRO filings. An MRO, unlike an ESP, provides the utility with more certainty of cost recovery because it is not time bound and exists indefinitely.

S.B. 221 also established Ohio’s Renewable Energy Standard (“RES”), codified in R.C. 4928.64, which requires electric distribution utilities to provide a portion of their retail power sales from “renewable energy resources.” The law specifically requires that utilities must obtain a certain percentage of their renewable energy benchmark from solar energy resources.² More specifically, utilities must procure one-half of their SRECs (“Solar Renewable Energy Credits”) from facilities located in Ohio. The law allows utilities to comply with the SER (“Solar Energy Resource”) benchmarks either by building generation or by purchasing SRECs.

The OEC intervened in this case to comment on Duke’s strategy to comply with S.B. 221’s SER benchmarks by entering into short-term REC purchases. Duke failed to achieve its

¹ R.C. 4928.141(A).

² R.C. 4928.64(B)(2).

most recent SER benchmark relying on this strategy, and it is not clear that the company will achieve different results under the current MRO. The continued development of the solar industry, moreover, requires the certainty provided by long-term contracts. The Commission, if it approves Duke's MRO, should require the company to enter into a certain number of long-term SREC transactions. Long-term SREC transactions will help ensure that Duke is able to comply with future SER benchmarks and will support the future development of solar energy in Ohio. If its MRO application is approved, Duke will have no justification for only entering into shorter-term SREC transactions.

II. ARGUMENT

A. Duke's Strategy to Comply with its SER Benchmarks Through Short-Term SREC Purchases is Not Adequate and Will Not Ensure that the Company Will Comply With its SER Benchmarks.

In Direct Testimony filed with its MRO application, Duke explains that it intends to rely primarily on short-term (approximately three year) contracts to secure SRECs as its strategy for complying with the SER benchmarks.³ This strategy is flawed because it is unlikely that it will ensure Duke's achievement of SER benchmarks.

Duke has not satisfied its past SER benchmark obligations utilizing the above strategy. In 2009, Duke sought a Commission waiver of its SER benchmarks, citing a lack of available Ohio SRECs.⁴ More specifically, Duke requested that the Commission allow it to use out-of-state SRECs to comply with the in-state requirement.⁵ In the alternative—in the event that the Commission did not allow Duke to use out-of-state SRECs to satisfy the in-state requirement—Duke requested a force majeure waiver pursuant to Ohio Administrative Code ("O.A.C.") Rule

³ Duke Witness Andrew Ritch, Direct Testimony at 4 (Duke "favor[s] shorter term REC transactions to the extent possible and practical.")

⁴ Duke Energy Ohio's Alternative Energy Portfolio Status Report, Case No. 10-511-EL-ACP, et. al.

⁵ Id. at 8.

4901:1-40-06.⁶ Thus, it is clear that Duke was unable to satisfy its SER benchmark, unless the Commission makes an exception to the law.

Witness Ritch testified during the evidentiary hearing that Duke has no plans to build or own solar generation.⁷ Therefore, for the foreseeable future, Duke will be relying exclusively on SREC purchases to satisfy its SER benchmark. Considering that Duke could not secure sufficient SRECs in 2009, that it has no plans to build generation, and that the SER benchmarks increase each year, it seems that Duke may have a challenge obtaining sufficient SRECs in the future.

B. Potential Developers of Solar Projects and Investors Need Long-Term Contracts to Fully Develop in Ohio.

Solar developers need the certainty of long-term contracts, and the assurance of future revenue streams, in order for the solar industry to fully develop in Ohio. As the solar industry develops more new projects, Ohio utilities will find a more robust and competitive marketplace for SRECs. Duke Witness Ritch recognizes this fact in his testimony in this proceeding:

Q: So commercial developers of solar projects would be more likely to make investments if they were confident that they would be able to recoup their expenses through a long-term contract?
A: Yes.⁸

Duke also recognizes this basic economic truth with regard to its Residential REC purchase program, which incorporates 15 year commitments. Witness Ritch discussed this position during cross examination, stating that the design of the Duke Residential REC purchase program is intended to create the certainty necessary for residential customer investment in these

⁶ Id. at 10.

⁷ Tr. Vol. II at p. 277, January 12, 2011.

⁸ Id. at 275.

essential projects.⁹ The increased development of solar projects in Ohio, through the encouragement of long-term contracts, will help the SREC marketplace mature and stabilize, eventually bringing down costs of compliance.

Finally, Ohio law requires utilities to consider entering into longer term agreements as a prerequisite to applying for a waiver of SER benchmarks. O.A.C. 4901:1-40-06 contemplates long-term contracts as one means through which utilities must demonstrate reasonable efforts to comply with the SER benchmarks. The standard for a force majeure determination by the Commission requires utilities to demonstrate that they attempted to secure SRECs through long-term contracts:

- (1) At the time of requesting such a determination from the commission, an electric utility or electric services company shall demonstrate that it pursued all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, **and long-term contracts.**¹⁰

Clearly, the Commission recognized the need to build investment stability through long term contracts, which works to ensure that in-state solar projects are developed, bringing more SRECs onto the market, creating competition among developers, and lowering costs over time. The Commission should apply this policy that supports O.A.C. 4901:1-40-06(A)(1) to Duke by requiring the company to enter into a certain number of long-term SREC agreements.

C. Upon the Approval of its MRO Application, Duke Will Be Able To Enter Into Long-Term SREC Transactions With Little Risk.

Upon approval of its MRO application, Duke should be required to enter into long-term contracts as a means of satisfying a percentage of its SER benchmarks. In testimony filed in this proceeding, Duke makes several arguments for why it is not prudent to undertake the risk of

⁹ Id. at 273.

¹⁰ O.A.C. 4901:1-40-06(A)(1).

entering into long-term REC transactions, none of which are persuasive. First, Witness Ritch discusses the “risk” the company must consider:

“With respect to risk, we consider many factors including any cost recovery risks and the uncertainty of the availability and cost of RECs in future periods as compared to present. Cost recovery risk is present due to the short-term nature of the Company’s Electric Security Plan.”¹¹

The cost-recovery risk cited by Witness Ritch should be minimal upon approval of its MRO application. Unlike an ESP, an MRO is not time bound. Therefore, any recovery riders will continue indefinitely, ensuring that Duke is able to recover SREC procurement costs with little risk. Witness Ritch, during cross examination conceded this point. In response to the question, “Doesn’t [switching to an MRO] alleviate some of the uncertainty” regarding cost-recovery, Witness Ritch responded “I feel it would, yes.”¹² Duke’s justification for choosing not to pursue long-term REC contracts because of cost-recovery risks, therefore, does not apply after approval of an MRO.

Duke also cites the risk of “customer switching” in future years as another reason not to enter into long-term contracts: “customer choice...introduces a risk associated with long-term REC purchases.”¹³ This statement is without merit and contradicts the company’s own statements in its Long-Term Forecast and Resource Plan (“LTFR”) filing. Duke’s LTFR estimates that customer switching will not present a major challenge for the company, and the LTFR estimates are confirmed by Witness Ritch on cross examination:

Q: ...And with regard to customer switching that you discuss on page 6, are you aware that Duke’s long-term forecast report assumes that you’re going to win back a lot of these switching customers?

¹¹ Duke Witness Andrew Ritch, Direct Testimony at 6.

¹² Id.

¹³ Id.

A: I am.¹⁴

Considering these facts, Duke's argument that it cannot undertake the risk of long-term contracts is without merit. As demonstrated above, long-term contract opportunities are in the best interest of both developers and Duke: long-term contracts boost development prospect, working to fill the SREC marketplace with the Ohio-sourced credits necessary for compliance with Ohio's advanced energy laws.

D. Other Ohio Utilities Have Prudently Chosen To Pursue Long-Term SREC Transactions.

Two other Ohio investor-owned utilities have chosen to enter into long-term SREC contracts and/or build solar generation projects. American Electric Power ("AEP") and FirstEnergy have both made commits to procure a certain percentage of their SER benchmark compliance through long-term contracts. Furthermore, Dayton Power & Light ("DP&L") is investing in a solar energy facility in addition to produce its own solar energy and SRECs.

Duke would, therefore, be an outlier among Ohio utilities if it both failed to commit to long-term contracts in the commercial sector and failed to build solar generation. Duke, as the first utility to receive MRO approval would have little justification for failing to enter into long-term REC transactions.

III. CONCLUSION

Duke's current SREC contracting strategy, as defined in testimony in this proceeding, is inadequate to ensure that the company will comply with its SER benchmarks or ensure that adequate solar resources are developed in Ohio. Upon the Commission's approval of its MRO, Duke will have no justification for relying on short-term REC transactions to satisfy its SER benchmarks.

¹⁴ Id. at 275-276.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class and/or electronic mail this 27th day of January, 2011.

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