

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Duke Energy Retail Sales, )  
LLC's Annual Alternative Energy Portfolio ) Case No. 10-508-EL-ACP  
Status Report. )

In the Matter of Duke Energy Retail Sales, )  
LLC's Request for Force Majeure ) Case No. 10-509-EL-ACP  
Determination. )

FINDING AND ORDER

The Commission finds:

- (1) Duke Energy Retail Sales, LLC (DERS) is an electric services company as defined in Section 4928.01(A)(9), Revised Code, and a certified provider of competitive retail electric service (CRES) as defined in Section 4928.01(A)(4), Revised Code.
- (2) Section 4928.64(B), Revised Code, establishes benchmarks for electric services companies to acquire a portion of their electricity supply for retail customers in Ohio from renewable energy resources. Specifically, the statute provides that, for 2009, a portion of the electricity sold by means of retail electric sales in Ohio must come from alternative energy resources, including 0.004 percent from solar energy resources (SER). This requirement increases to 0.010 percent for 2010.
- (3) On April 15, 2010, DERS filed an application, requesting, *inter alia*, that the Commission make a *force majeure* determination regarding its 2009 SER benchmark. DERS states that it was unable to obtain any solar renewable energy credits (SRECs) and that it owns no solar generation facilities. Therefore, DERS requests a waiver of its 2009 SER benchmark, and asks that the Commission increase DERS' 2010 SER benchmark by 38 MWh, an amount equal to its unmodified 2009 SER benchmark.
- (4) Motions to intervene in the above-captioned cases were filed by the Ohio Environmental Council (OEC) and the Environmental Law and Policy Center (ELPC). No party opposed the motions to intervene. The Commission finds that the motions to intervene are reasonable and should be granted.

- (5) On August 26, 2010, a motion *pro hac vice* was filed on behalf of Robert Kelter representing ELPC. No memoranda contra were filed. The Commission finds that this motion is reasonable and should be granted.
- (6) In support of its request for a *force majeure* determination, DERS states that it was unable to locate sufficient Ohio and qualified out-of-state solar projects through various consulting entities. DERS represents that it established SREC banking accounts through the Generation Asset Tracking System (GATS) and pursued all reasonable compliance options, including, but not limited to, SREC solicitations. DERS points out that it was able to obtain 8,815 non-solar renewable energy credits (RECs), far exceeding its 2009 benchmark for electricity generated from renewable energy resources and demonstrating its commitment to providing electricity through renewable energy resources. DERS submits that it has been unable to obtain any SRECs because insufficient liquidity exists in the market and few SRECs are available through bilateral contracts.

DERS contends that it experienced the same inability to obtain SRECs as Columbus Southern Power Company and Ohio Power Company (jointly, AEP-Ohio); Toledo Edison Company, Ohio Edison Company, and Cleveland Electric Illuminating Company (collectively, FirstEnergy); and Dayton Power and Light Company (DP&L). DERS, therefore, argues that, because the Commission determined that *force majeure* conditions existed as to the availability of SRECs for AEP-Ohio, FirstEnergy, and DP&L,<sup>1</sup> and DERS experienced the same difficulties as those utilities in procuring SRECs, the Commission should also determine that a *force majeure* condition existed in 2009 for DERS.

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<sup>1</sup> In the Matter of the Application of Columbus Southern Power Company of Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code, Case No. 09-987-EL-EEC, et al., Entry (January 7, 2010); In the Matter of the 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 Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code, Case No. 09-1922-EL-ACP, Finding and Order (March 10, 2010); In the Matter of the Application of The Dayton Power and Light Company for Approval of a Force Majeure Determination for a Portion of the 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code, Case No. 09-1989-EL-ACP, Finding and Order (March 17, 2010).

Finally, DERS argues that it is apparent from the total solar generation capacity of all certificated solar facilities with electricity deliverable into Ohio that SRECs simply were not available in 2009. DERS maintains that, given the lack of operating solar facilities that were certified as of March 2010, the Commission should grant DERS the same type of compliance postponement granted to AEP-Ohio, FirstEnergy, and DP&L.

- (7) On May 17, 2010, OEC and ELPC filed comments in opposition to DERS' request for a *force majeure* determination. OEC and ELPC argue that the Commission should deny DERS' request for a *force majeure* determination because DERS has not sufficiently explained its efforts to acquire SRECs or otherwise meet its SER benchmark. While acknowledging that DERS did not ignore its REC obligations, as evidenced by the number of non-solar RECs that DERS obtained, OEC and ELPC maintain that DERS did not expend the appropriate effort to ensure that it met its 2009 SER benchmark. Alternatively, OEC and ELPC argue that DERS should be required to recover any waived portion of the 2009 SER benchmark in 2010, just as the 2010 SER benchmarks for AEP-Ohio, FirstEnergy, and DP&L were increased when the companies' requests for *force majeure* determinations of their 2009 SER benchmarks were granted.
- (8) Upon review of the application and the other filings in these proceedings, and recognizing the limited time available for the development of new solar energy resources to meet the statutory standard in its first year, the Commission finds that DERS' request for a *force majeure* determination is reasonable and should be granted. Section 4928.64(C)(4), Revised Code, authorizes the Commission to determine whether an insufficient quantity of renewable energy resources was reasonably available in the market to facilitate an electric service company's compliance with the statutory benchmarks. The statute further provides that the Commission shall consider the electric service company's good faith effort to acquire sufficient renewable energy resources to comply with the benchmark and the availability of renewable energy resources in Ohio or other jurisdictions within PJM Interconnection, L.L.C. and the Midwest Independent Transmission System Operator.

The Commission notes that DERS attempted to accomplish its goal of purchasing sufficient SRECs by working with various consulting entities and soliciting SRECs. DERS also explored bilateral contracts and determined that no bilateral contracts were available to meet the 2009 SER benchmark. Despite its efforts, DERS was unable to obtain any SRECs. Moreover, DERS represents that there were insufficient solar energy resources installed in Ohio or contiguous states to meet its 2009 SER benchmark. The Commission recognizes that its certification process for SRECs was in its infancy in 2009, and, as such, a limited number of SRECs were available. In addition, as pointed out by DERS, the Commission has already recognized that electric utilities likewise had difficulties in meeting their 2009 SER benchmarks.

Therefore, we find that there was an insufficient quantity of solar energy resources reasonably available in the market and that DERS has presented sufficient grounds for the Commission to grant a waiver of its 2009 SER benchmark. Further, pursuant to Section 4928.64(C)(4)(c), Revised Code, our approval of DERS' request for a *force majeure* determination is contingent upon DERS meeting its revised 2010 SER benchmark, which shall be increased to include the shortfall for the 2009 SER benchmark.

It is, therefore,

ORDERED, That the motions to intervene filed by OEC and ELPC be granted. It is, further,

ORDERED, That the motion *pro hac vice* to admit Robert Kelter be granted. It is, further,

ORDERED, That DERS' request for a *force majeure* determination be granted. It is, further,

ORDERED, That DERS' 2010 SER benchmark be increased as set forth in finding (8). It is, further,


ORDERED, That a copy of this finding and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Steven D. Lesser, Chairman

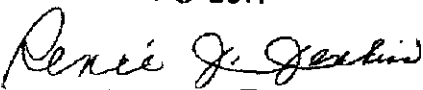
  
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Renee J. Jenkins  
Secretary