

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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 2010 Solar Energy Resources)	
Benchmark Requirement Pursuant to Section)	Case No. 11-0411-EL-ACP
4928.64(C)(4) of the Ohio Revised Code and)	
Section 4901:1-40-06 of the Ohio Administrative)	
Code.)	

**COMMENTS IN OPPOSITION TO FIRSTENERGY’S FORCE MAJEURE APPLICATION
BY THE SOLAR ALLIANCE**

I. INTRODUCTION

FirstEnergy Corp. (“FirstEnergy” or the “Company”) once again comes before the Public Utilities Commission of Ohio (“PUCO” or the “Commission”) to seek a waiver of its solar requirement under Amended Substitute Bill 221 (“SB 221”) (“Application”). And once again, FirstEnergy is woefully short of its statutory requirement, meeting only 3 percent of its in-state benchmark for 2010, on the heels of meeting only 3 percent of its total solar requirement in 2009.

FirstEnergy makes substantially the same argument as before¹ to support its position: that the solar market in Ohio is simply too underdeveloped to support the Company’s efforts to comply with Ohio’s advanced energy law. The fundamental flaw in FirstEnergy’s argument, of course, is that SB 221 requires utilities to build new solar generation—not simply scour the state

¹ See *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-EEC (later designated as Case No. 09-1922-EL-ACP), Application at 1 (filed December 7, 2009).

for systems someone else financed and constructed “on spec.” The company’s statutory duty is to enter into long-term contracts for solar energy resources to ensure the state’s energy portfolio includes new solar generation. As FirstEnergy acknowledges in its filing, it is now pursuing such long-term contracts for 2011 compliance.² Based on the spirit and letter of SB 221, the Solar Alliance opposes FirstEnergy’s *force majeure* application and requests the Commission to enforce the law. The Commission should require FirstEnergy to issue a good-faith, long-term RFP for solar energy or solar renewable energy credits (“SRECs”) immediately to cover its 2010 shortfall (a number that also includes its 2009 solar energy resource (“SER”) benchmark shortfall³).

Alternatively, the Commission should require FirstEnergy to pay the renewable energy compliance payment as required by statute, in the amount of \$1,323,800. We note with particular concern that continued “rolling over” of the requirements into future years should not have the effect of permitting payment at subsequent years’ lower compliance payment levels. If the Commission is inclined to grant the waiver, it should follow its own precedent⁴ and defer the Company’s 2009 and 2010 shortfalls as a supplement to its existing 2011 solar mandate.

II. APPLICABLE LAW AND FIRSTENERGY’S APPLICATION

Ohio law requires investor-owned utilities to meet annual solar benchmarks that increase every year until reaching 0.50 percent of generation by 2025.⁵ In addition, utilities must obtain

² See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Request for Proposal to Purchase Renewable Energy Credits Through Ten Year Contracts*, Case No. 10-2891-EL-ACP, Application at 1-2 (December 2, 2010).

³ See *Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 09-1922-EL-ACP (*Finding and Order* dated March 10, 2010) at ¶8 (“Order”). In this case, the Commission deferred FirstEnergy’s 2009 solar benchmark to 2010.

⁴ *Id.*

⁵ Ohio Revised Code Section (“R.C.”) 4928.64(B)(2). See the attached chart, Ex. 1.

at least half of that requirement from within Ohio.⁶ For 2009, the solar benchmark was 0.004 percent, and for 2010, it was 0.010 percent.⁷ Utilities may achieve the benchmarks by building solar generation or through the purchase of SRECs.⁸

If a utility cannot meet its benchmark, the utility can apply for a waiver and

may request the commission to make a force majeure determination . . . regarding all or part of the utility's or company's compliance with any minimum benchmark . . . The commission may require the . . . 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 . . . can be made.⁹ (Emphasis added).

In considering whether to grant the *force majeure* application, the Commission must make certain determinations:

[T]he 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.¹⁰ (Emphasis added).

In addition to ordering an SREC solicitation, if a utility does not meet its benchmark, the PUCO may require the utility to pay a compliance payment” of \$450 per megawatt-hour of solar

⁶ R.C. 4928.64(B)(3).

⁷ R.C. 4928.64(B)(2).

⁸ R.C. 4928.64(B).

⁹ R.C. 4968.64(C)(4)(a).

¹⁰ R.C. 4928.64(C)(4)(b).

capacity not obtained in 2009 and \$400 per megawatt-hour of solar capacity not obtained in 2010.¹¹

FirstEnergy requests the Commission grant its Application under R.C. §4928.64(C)(4), and relieve the Company from compliance with the vast majority of its required 2010 benchmark for SRECs originating in Ohio, which includes its shortfall in 2009.¹² FirstEnergy’s cumulative Ohio Solar Benchmark requirement for 2009 and 2010 is 3,206 SRECs.¹³ Yet FirstEnergy states it purchased only 112 SRECs.¹⁴ *This means that FirstEnergy met just 3 percent of its Ohio Solar Benchmark.* Under the law, this 97 percent shortfall of 3,094 SRECs equates to a compliance payment of \$1,323,800¹⁵ to be deposited in the state’s advanced energy fund. FirstEnergy now seeks a force majeure determination to waive the 97 percent balance.¹⁶

III. ARGUMENT AND COMMENTS

R.C. 4928.64(C)(4)(c) requires that the Commission determine if the necessary solar resources “are not reasonably available” for FirstEnergy to comply with its combined 2009 and 2010 Ohio Solar Benchmark. In its analysis, the Commission must determine whether FirstEnergy made “a good faith effort to acquire sufficient . . . solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits

¹¹ R.C. 4928.64(C)(2)(a).

¹² Order at ¶8.

¹³ Application at 1-2.

¹⁴ *Id.* at 2. The aggregate shortfall is 3,094 SRECs. FirstEnergy states that the individual company shortfalls are 1,387 SRECs for Ohio Edison Co., 1,115 SRECs for Cleveland Electric Illuminating Co., and 592 SRECs for Toledo Edison Co. *Id.* at ¶11.

¹⁵ The total compliance payment equals the 2009 compliance payment of \$775,800 (calculated by multiplying the 1,724 SREC shortfall for 2009 (the 1,836 SREC shortfall for 2009 minus the 112 in-state SRECs purchased in 2010) by \$450), plus the 2010 compliance payment of \$548,000 (calculated by multiplying the remaining 1,370 SREC shortfall for 2010 by \$400).

¹⁶ Application at 2.

or by seeking the resources through long-term contracts.”¹⁷ Applying these standards, FirstEnergy did not make the required showing of a good-faith effort.

A. Short Term RFPs Are Insufficient

In its Application, FirstEnergy argues that “through no fault of [its] own” it was unable to comply with its 2010 Ohio Solar Benchmark.¹⁸ The Company writes that despite an “aggressive” compliance strategy that included sponsoring three RFPs for short-term SRECs, contacting SREC brokers for short-term SRECs, and participating in a number of SREC auctions for short-term SRECs, it could not locate sufficient SRECs originating in Ohio.¹⁹

But this line of argument ignores once again that to the extent SRECs were not available, it was for a reason wholly in FirstEnergy’s control. The reason FirstEnergy did not secure enough SRECs through RFPs and auctions is because it chose to attempt to procure immediately available, current vintage year SRECs, which could only be generated by solar systems already constructed. As FirstEnergy knows, 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 FirstEnergy solicited only immediately available SRECs, no developer was able to finance a system based on FirstEnergy’s offers. Seeking only immediately available SRECs from existing systems and refusing to solicit long-term contracts required for new system construction is on its face a violation of the good-faith standard required to support a *force majeure* determination by the Commission.

¹⁷ R.C. 4928.64(C)(4)(b) (emphasis added).

¹⁸ Application at 2.

¹⁹ *Id.*

B. FirstEnergy's Residential Program is Flawed

FirstEnergy's Ohio Residential Renewable Energy Credit ("REC") Program, which offers fifteen-year contracts to residential customers for the purchase of RECs produced by customer-sited renewable energy systems, likewise fails to meet the good-faith standard and suffers from the same defect as short term RFPs. FirstEnergy writes in its application that "[a]lthough this program has generated customer interest, the capital investment required in these tough economic times has made it difficult for a number of customers to install a renewable energy resource on their property."²⁰ Across FirstEnergy's entire Ohio territory, the Company has only *eight* customers under contract through the residential REC program and expects to obtain up to 40 SRECs.²¹

The inherent flaw in the design of FirstEnergy's residential REC purchase program is the re-setting of REC purchase prices on an annual basis.²² This defect, and not the "economic times" is the primary reason that its residential customers have struggled to secure financing for renewable energy systems. Forcing customers to accept a "floating" REC price determined anew every year, does nothing to alleviate the uncertainty accompanying short-term contracts and has made residential renewable energy systems essentially un-financeable under the program. That is to say, a "long-term contract" for purchases in which future prices are totally unspecified does not constitute a long-term contract at all.

²⁰ *Id.* at ¶9.

²¹ *Id.* Information on FirstEnergy's residential REC purchase program is available at http://www.firstenergycorp.com/Residential_and_Business/Products_and_Services/Ohio_Residential_Rec/index.html. A copy of a REC purchase agreement offered through the program is attached hereto as Ex. 2.

²² Ex. 2 at ¶5.

C. Long Term Contracts Are The Solution

FirstEnergy notes that it “considered long term contracts but could not negotiate a contract that would provide SRECs for the 2010 calendar year.”²³ “Considering” a long term contract does not meet the statutory test.

FirstEnergy is well-versed in the formation of long-term contracts to procure SRECs. It has entered those contracts in Pennsylvania, a state with similar economic, geographic and technical circumstances as Ohio, but wherein FirstEnergy has been able to fully comply with RPS purchase requirements amounting to several orders of magnitude larger than its purchase requirements in Ohio. In fact, in a separate application before this Commission, it is seeking approval of an RFP to purchase SRECs through ten-year contracts as part of its standard service offer (“SSO”).²⁴ In this case, FirstEnergy notes that if its RFP application “is approved and the RFP is successful, such Ohio SRECs will be used towards meeting future compliance requirements.”²⁵

It is also worth noting that FirstEnergy Solutions recently announced that it entered into a long term (twenty-year) power purchase agreement (“PPA”) with a wind developer to buy 100 MW of wind power being developed in western Ohio.²⁶ The FirstEnergy Solutions deal follows on the heels of American Electric Power’s announcement that it signed a twenty-year PPA with a wind developer for all of the output of a 99 MW wind farm in Paulding County, Ohio.²⁷ Similarly, AEP entered into a 20-year PPA for solar power in Wyandot County, which enabled

²³ Application at ¶10.

²⁴ See Case No. 10-2891-EL-ACP, Application (filed December 2, 2010).

²⁵ Application at ¶10.

²⁶ See Press Release at <http://www.firstenergycorp.com/NewsReleases/2011-02-08%20FirstEnergy%20Solutions%20and%20Iberdrola%20Renewables%20Si.pdf>.

²⁷ See Press Release at <https://www.aepohio.com/info/news/viewRelease.aspx?releaseID=951>.

the 10 MW project there to be financed, constructed, and now placed in service. These recent Ohio developments provide concrete, real-world evidence of the positive impact of long-term contracts on the Ohio renewable marketplace and show how the state's advanced energy policy, properly implemented, is achieving its objective.

That FirstEnergy is now pursuing long-term contracts to meet future compliance requirements is no basis for a waiver of its 2009 and 2010 SER benchmarks. SB 221 explicitly considers the pursuit of long-term contracts a critical factor in the determination of whether a utility should receive a *force majeure* determination waiving its renewable benchmarks. In this case, FirstEnergy did not seriously pursue long-term contracts for SRECs in 2009 and 2010, and therefore did not put forth a good-faith effort to comply with SB 221. The Commission should not grant its application for a *force majeure* waiver.

IV. REMEDY

As demonstrated above, FirstEnergy's self-styled "aggressive" compliance strategy had little chance of producing the necessary SRECs and does not meet the statutory requirement of seeking long-term contracts to comply with SB 221.

The Solar Alliance requests the Commission to exercise its statutory authority under R.C. 4968.64(C)(4)(a) to require FirstEnergy to solicit long-term, financeable SREC contracts to meet its 2010 Ohio Solar Benchmark. If the terms of the solicitation comply with SB 221 and are consistent with the basic mechanics of solar finance, as addressed in the current FirstEnergy RFP request, FirstEnergy would receive multiple competitive responses. We propose that the term for the RFP be a minimum of ten years. The proposed RFP in FirstEnergy's SSO case can serve as a template. The RFPs should be separately issued, giving the industry additional opportunities to provide the requisite SRECs and increasing the likelihood of FirstEnergy's

compliance. Under the terms of the RFP we are seeking in this case, the Commission should expressly require that the first 3,094 SRECs purchased under the RFP be used to retire the Company's 2009 and 2010 obligations.

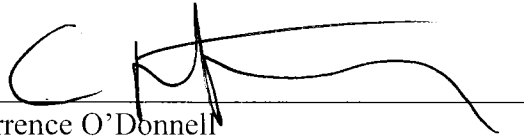
Alternatively, the Commission should require FirstEnergy to pay the renewable energy compliance payment as required by statute, in the amount of \$1,323,800. However, if the Commission is inclined to grant the waiver, it should follow its own precedent and defer the Company's 2009 and 2010 shortfalls as a supplement to its existing 2011 solar mandate. This equates to increasing Ohio Edison Company's 2011 benchmark by 1,387 SRECs, The Cleveland Electric Illuminating Company's 2011 benchmark by 1,115 SRECs, and The Toledo Edison Company's 2011 benchmark by 592 SRECs.²⁸

V. CONCLUSION

For the reasons above, the Solar Alliance respectfully asks the Commission to require FirstEnergy to issue long-term RFPs for SRECs or impose the Alternative Compliance Payment of \$1,323,800. This ruling would send the signal that Ohio is committed to building a robust solar marketplace consistent with the legislature's intent in SB 221. In the alternative, the Solar Alliance requests the Commission to condition a waiver on FirstEnergy's recovering the 2009 and 2010 shortfalls in 2011. Under this alternative scenario, FirstEnergy should obtain an additional 3,094 SRECs beyond its 2011 requirements.

²⁸ See Footnote 14.

Respectfully submitted,

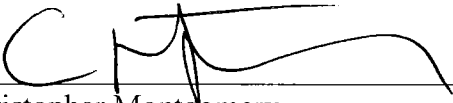
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CERTIFICATE OF SERVICE

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 ~~4th~~ day of March, 2011.


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