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 4928.64(C)(4) of the Ohio Revised Code and Section 4901:1-40-06 of the Ohio Administrative Code.	)	Case No. 11-0411-EL-ACP

COMMENTS IN OPPOSITION TO FIRSTENERGY'S APPLICATION FOR A FORCE MAJEURE DETERMINATION BY THE OHIO ENVIRONMENTAL COUNCIL, THE ENVIRONMENTAL LAW AND POLICY CENTER, AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

The Ohio Environmental Council ("OEC"), the Environmental Law & Policy Center ("ELPC"), and the Office of the Ohio Consumers' Counsel (collectively "OCEA") provide comments in this case in which Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy" or "Companies") request that the Public Utilities Commission of Ohio ("PUCO" or "Commission") approve a force majeure determination for a portion of the Companies' 2010 solar energy resources ("SER" or "solar") benchmark requirements, which would excuse FirstEnergy from meeting the full solar requirements in 2010. The undersigned members of OCEA file these comments on behalf of certain customers, including residential customers of FirstEnergy.

Amended Substitute Senate Bill 221 ("SB 221"), enacted in 2008, established a renewable energy resource ("RES" or "renewable") standard, which mandates that electric distribution utilities ("EDUs" or "utilities") must provide a gradually increasing percentage of their retail electric sales from renewable sources, including solar, wind, hydroelectric power, and renewable biomass.[1] By 2025, utilities must provide at least 12.5 percent of their standard service offer sales from these sources.[2] R.C. 4928.64(B)(2) further mandates that a certain percentage of each utility's renewable benchmark must be met through solar energy resources, half of which must be obtained from sources within Ohio. To this end, utilities must meet gradually increasing SER benchmarks. In 2009, the law required FirstEnergy to obtain .004 percent of its energy from solar resources. In 2010, the solar benchmark increased to .01 percent. FirstEnergy did not meet its collective 2009 SER benchmark, and now the Companies seek a force majeure determination of their 2010 benchmarks to excuse themselves from meeting the full statutory standard.

As described more fully below, FirstEnergy is not entitled to a force majeure determination. "Force majeure" is "an event or effect that cannot be reasonably anticipated or controlled."[3] Here, the Companies were aware of the limited availability of solar renewable energy credits ("SRECs") in Ohio from the experience of trying to procure them on a short-term, last-minute basis in 2009. In addition, FirstEnergy was aware that a different strategy would be required to comply with the law in 2010. The Companies did not undertake a good faith effort to

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[1] R.C. 4928.64(B).

[2] Id.

[3] Dictionary.com, "force majeure," in *Merriam-Webster's Dictionary of Law*. Source location: Merriam-Webster, Inc. http://dictionary.reference.com/browse/force majeure. Available: http://dictionary.reference.com. Accessed: April 01, 2011.

satisfy their 2010 SER benchmarks, nor did the Companies pursue all reasonable options to comply.

FirstEnergy's poor efforts to comply with the in-state solar mandate stand in sharp contrast to the efforts of Ohio's three other investor-owned utilities, each of which is on track to comply with the law. Ohio's other utilities chose to either build solar generation, enter into long-term power purchase agreements with developers, or to enter into long-term commitments with customers.[4] FirstEnergy chose not to pursue any of these prudent and successful efforts towards compliance utilized by Ohio's other EDUs. FirstEnergy achieved 3 percent of its collective SER benchmark in 2009, the first year the solar mandate was in effect, and 3 percent of its solar benchmark in 2010. The Companies have been 97 percent deficient each year and made no effort to adjust or supplement their compliance strategy after the 2009 shortfall.

In 2009, members of OCEA and other parties[5] ("Joint Parties") alerted the Commission and the Companies that FirstEnergy's then-current strategy to comply with its collective SER benchmark under the law would not be successful in 2010.[6] The Joint Parties, in their comments in opposition to FirstEnergy's 2009 force majeure application, provided concrete recommendations on how to comply with the 2010 SER benchmark.[7] Most notably, the Joint Parties stated that FirstEnergy would have to enter into long-term commitments with potential solar developers.[8] Further, the Joint Parties stated that without the assurance of a consistent,

[4] See section III.C below.

[5] See Exhibit A. The joint parties were OCC, OEC, ELPC, Solar Alliance, Citizen Power and the Vote Solar Initiative.

[6] *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*, Case No. 09-1922-EL-ACP, Joint Comments at 9 (March 9, 2010).

[7] Id. at 15-16.

[8] Id.

future revenue stream, potential investors would not have the certainty to finance the construction of solar facilities.[9] Without these facilities, FirstEnergy would be unlikely to achieve its collective 2010 solar benchmark. The Joint Parties' Comments in Opposition to FirstEnergy's 2009 Force Majeure application are relevant to this proceeding and are attached as Exhibit A.

Because FirstEnergy does not satisfy the standard for a force majeure determination for its 2010 SER benchmark found in the Ohio Revised Code and the Ohio Administrative Code, the Commission should reject the Companies' request and assess an Alternative Compliance Payment ("ACP")[10] in the amount of $1,237,600.[11] Furthermore, because FirstEnergy is also in breach of a *conditional* 2009 solar benchmark waiver issued by the Commission,[12] the Commission should assess additional penalties in the amount of $826,650[13] to account for the 2009 shortfall. Pursuant to R.C. 4928.64(C)(2)(a), FirstEnergy should be required to pay a total of $2,064,250 in penalties for non-compliance with its 2010 SER benchmark and for breach of its conditional 2009 waiver. The amount owed will be deposited in Ohio's Advanced Energy Fund to support energy projects within the FirstEnergy service territory.[14] In the alternative, if the Commission makes a force majeure determination, the 2009 and 2010 shortfalls should be

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[9] Id., at 9.

[10] Pursuant to R.C.4928.64(C)(2)(a),

[11] R.C.4928.64(C)(2)(a) states: "The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of under compliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010...."

[12] *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*, Case No. 09-1922-EL-ACP, Finding and Order at 4 (March 10, 2010).

[13] See Section II, below.

[14] R.C. Section 4928.61(B)(4) states: "Advanced energy revenues shall include all of the following: Revenues from renewable energy compliance payments as [...] provided under division (C)(2) of section 4928.64 of the Revised Code...."

carried forward and the PUCO should modify the pending REC purchase RFP in Case No. 10-2981-EL-ACP as presented below.

Rewarding FirstEnergy with a force majeure determination would amount to an undeserved bailout for the Companies, depriving the state of Ohio with money it is authorized to receive under law. Further, it would deprive FirstEnergy customers and Ohioans the benefits of solar resources contemplated by Ohio's statutory policy.[15] Therefore, the PUCO should not grant FirstEnergy's request in this case. Although the Commission has the authority under Ohio law to carry the 2-year shortfall into the 2011 annual requirement, the Companies should each be assessed an alternative compliance payment as prescribed by law for 2009 and 2010 shortfalls in order to assist the development of solar energy resources in FirstEnergy's territory. In the alternative, the RFP process employed by the Companies should be modified to ensure that the 2009 and 2010 shortfalls are covered by the pending RFP.

II. APPLICABLE LAW AND FACTS

On January 24, 2010, for the second year in a row, the Companies filed an Application ("Application") for approval of a force majeure determination for the 2010 Solar Energy Resources Benchmark . SB 221 includes a solar "carve out" or mandate which requires that solar energy resources account for at least 0.50 percent of the renewable energy sold by Ohio's investor-owned utilities by 2025.[16] Utilities must obtain at least half of that requirement from sources within Ohio.[17] In 2009, Ohio EDUs were required to begin developing solar resources

[15] R.C. 4928.02(C): "It is the policy of this state to do the following throughout this state: Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities…."

[16] R.C.§4928.64(B)(2).

[17] R.C. §4928.64(B)(3).

and to meet annual prescribed statutory benchmarks until reaching the 0.50 percent level. R.C. 4928.64(B)(2) includes a chart setting the annual requirements for solar generation.

Utilities may achieve the solar benchmarks by developing the solar generation directly or through the open market purchase of solar Renewable Energy Credits (SRECs).[18] If a utility cannot meet its solar benchmark, it may file an application with the Commission seeking a force majeure determination regarding all or part of the utility's compliance with any minimum benchmark. The Commission may require the utility to make solicitations for renewable energy resource credits as part of its default service before the utility's request of force majeure can be made.[19]

In considering whether to grant a force majeure application, the PUCO must consider certain factors specified in the law:

> [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.[20]

If a utility does not meet its SER benchmark, and the PUCO does not excuse the failure by making a force majeure determination, the utility is subject to an alternative compliance payment ("ACP"). In 2009, the alternative compliance payment penalty was $450 per MWh of

[18] R.C. § 4928.64.

[19] R.C. § 4928.64(C)(4)(a).

[20] R.C. § 4928.64(C)(4)(b).

solar capacity not obtained.[21] For 2010, the ACP is $400 per MWh of solar capacity not obtained.[22]

FirstEnergy already received a force majeure determination from the PUCO to carry over the amount of FirstEnergy's non-compliance for the year 2009, which the PUCO made contingent on meeting the collective 2010 SER benchmarks that are at issue now. In 2009, EDUs were required to provide at least 0.004 percent of their renewable energy generation from solar resources.[23] Specifically, FirstEnergy was required to obtain 1,886 SRECs, half from within Ohio.[24] FirstEnergy failed to meet the 0.004 percent benchmark with per-company SREC deficits of 814 (Ohio Edison), 669 (Cleveland Illuminating Company) and 353 (Toledo Edison Company).[25]

In other words, FirstEnergy met less than 3 percent of its 2009 requirement.[26] The 1,835 SREC deficit mandated an alternative compliance payment of $826,650. FirstEnergy, however, filed an application with the Commission seeking a force majeure determination to excuse it from the 2009 benchmarks. The PUCO ordered "approval of the application *contingent upon* FirstEnergy meeting revised 2010 benchmarks, which [were to be] increased to include the shortfall for the 2009 SER benchmarks."[27] The PUCO Order was aligned with Ohio law which

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[21] R.C. § 4928.64(C)(2)(a).

[22] Id.

[23] R.C. §4928.64(B)(2).

[24] *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*, Case No. 09-1922-EL-EEC, FirstEnergy Application at 2 (December 7, 2009).

[25] Id., at 4.

[26] Id.

[27] (Emphasis Added). Case No. 09-1922-EL-ACP, Finding and Order at 4 (March 10, 2010).

states that a force majeure waiver "shall not automatically reduce the obligation for the electric distribution utility's...compliance in subsequent years."[28]

FirstEnergy's solar requirement for 2010 increased to .01 percent, plus the 2009 shortfall. The revised benchmark represented 3,170 out-of-state SRECs and 3,206 SRECs from within Ohio.[29] FirstEnergy reportedly met its out-of-state benchmark.[30] Within Ohio, however, FirstEnergy only obtained 112 of the required 3,206 SRECs.[31] FirstEnergy again achieved only 3 percent of its 2010 in-state requirement. Under the law, the 2010 shortfall of 3,094 SRECs would require an alternative compliance payment of $1,237,600.

FirstEnergy filed its second Application asking the Commission for approval of a force majeure determination under R.C. §4928.64(C)(4) to relieve the Companies from their 2009 shortfall *and* 2010 SER benchmarks. FirstEnergy rationalizes the force majeure request by listing efforts made by the Companies to procure Ohio SRECS. However, these were the same efforts that proved inadequate in 2009. 2010 efforts were not enough to address circumstances that should have been anticipated by FirstEnergy. The Companies' strategies for compliance were within their control. The strategies were not modified, and therefore do not relieve FirstEnergy of its obligations under the statute.

The Commission should not excuse FirstEnergy from complying with the SREC benchmarks for a second consecutive year. This critical case gives the Commission the opportunity to demonstrate that the renewable energy standard mandated by SB 221 is being implemented and enforced. Assessing an ACP, or forfeiture, from the Companies, would also

[28] R.C. § 4928.64(C)(4)(c).

[29] 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 2010 Solar Energy Resources Benchmark Requirement*, Case No. 11-0411-EL-ACP (January 24, 2011).

[30] Id.

[31] Id.

provide another means to develop solar generation in the Companies' territory and allow FirstEnergy's residential customers and Ohioans the opportunities to reap the benefits intended by Ohio law. The undersigned members of OCEA respectfully request that FirstEnergy's Application for a force majeure be denied, and that FirstEnergy be assessed a total alternative compliance payment of $2,064,650 for its failure to comply with its 2009 and 2010 solar benchmarks.

III. ARGUMENT AND COMMENTS

A. The Commission Should Assess an Alternative Compliance Payment in the Amount of $826,650 Because FirstEnergy is in Breach of the Commission's Finding and Order Approving Conditional Waiver of its 2009 SER Benchmarks.

FirstEnergy's Application for a second consecutive force majeure determination of its SER benchmark puts it in breach of the Commission's *conditional* 2009 force majeure determination. In its Finding and Order granting FirstEnergy's request for a waiver of its 2009 SER benchmark, the Commission stated that "FirstEnergy is responsible for meeting the statutory SER benchmarks through all means available."[32] The Commission further stated that "**our approval of FirstEnergy's application is contingent upon FirstEnergy meeting revised 2010 SER benchmarks, which shall be increased to include the shortfall for the 2009 SER benchmarks.**"[33] When applying for a waiver of its 2009 SER benchmark, FirstEnergy represented that it had only secured 49 SRECs, as compared to the total requirement of 1,886 SRECs for the three operative companies.[34] Therefore, in 2009 FirstEnergy fell short by 1,837 SRECs. The Companies only achieved 3 percent of their SER benchmark and were 97 percent

[32] PUCO Case No. 09-1922-EL-ACP, Finding and Order at 4, March 10, 2010.

[33] Id. (Emphasis added).

[34] PUCO Case No. 09-1922-EL-ACP, Application

delinquent in their solar energy obligations. As described above, the statutory ACP for 2009 was $450 per each SREC not obtained. Therefore, by receiving a force majeure determination from the PUCO, FirstEnergy avoided penalties in the amount of $826,650.

The Commission should now impose the penalties of $826,650 that it waived on a conditional basis in its Finding and Order granting FirstEnergy's first waiver request. FirstEnergy was told in unambiguous terms that its waiver was "contingent upon" the Companies satisfying both the 2009 and 2010 SER benchmarks by the end of 2010. At 3 percent compliance, the Companies did not do so. Therefore, FirstEnergy is in breach of the Commission's conditional force majeure waiver of the company's 2009 SER benchmark and subject to the assessment of a forfeiture.

The ACP penalties found in R.C. 4928.64(C)(2)(a) serve an important purpose. They are intended to not only act as an incentive for compliance, but also to mitigate the effects of a utility's non-compliance with the renewable energy benchmarks. All ACP payments are remitted by the Commission to Ohio's Advanced Energy Fund and used to support advanced energy projects in the state of Ohio.[35]

Further, the law requires that the proceeds "shall be distributed among the certified territories of electric distribution utilities and participating electric cooperatives, and among the service areas of participating municipal electric utilities, in amounts proportionate to the remittances of each utility."[36] In other words, the penalties paid by FirstEnergy will be used to support advanced energy projects in the FirstEnergy service territory. The General Assembly intended the ACP penalties to serve as a stopgap measure in addition to serving as an incentive for compliance. The penalties will partially mitigate the effects of FirstEnergy's non-compliance

[35] R.C. 4928.64(C)(2)(c).

[36] R.C. 4928.62

with its SER benchmark by ensuring that some investments in alternative energy resources are still made even though FirstEnergy has failed to make the investments required of it under the law.

B. FirstEnergy is Not Entitled to a Force Majeure Waiver of its 2010 SER Benchmark Because the Company Did Not Make a "Good Faith Effort" to Comply With the Benchmark as Required by R.C. 4928.64(C)(4)(b), Nor Did it Pursue "All Reasonable Compliance Options" as Required by Ohio Administrative Code 4901:1-06-40(A)(1).

FirstEnergy is not eligible for a force majeure waiver of its 2010 in-state solar benchmark because it has not satisfied the standards found in the Ohio Revised Code and the Ohio Administrative Code. FirstEnergy did not, as required by R.C. 4928.64(C)(4)(b), make a "good faith effort to effort to acquire sufficient … solar energy resources to so comply" with its collective statutory 2010 in-state solar benchmark. Further, the Ohio Administrative Code requires each EDU seeking a force majeure to submit specific attempts to comply:

> At the time of requesting such a [force majeure] 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.[37]

FirstEnergy's Application fails to meet either the statutory or the Commission standards of review.

1. FirstEnergy Did Not Pursue Long-Term Contracts as Required by 4928.64(C)(4)(b) for Most of 2010, and its Single Attempt to Procure SRECs Through Long-Term Contracts, Filed in December 2010, is Too Little Too Late and Does Not Meet the Statutory Standard .

FirstEnergy is not eligible for a force majeure determination to excuse its non-compliance with the statutory solar requirements because the Companies did not pursue long-term contracts

[37] Ohio Adm. Code 4901:1-40-06(A)(1).

for solar resources as required by law. The Ohio Administrative Code requires that a utility must "demonstrate that it pursued...long-term contracts" before it may receive a force majeure determination.[38] There is a reason why the law requires utilities to procure SRECs through long-term commitments. In order to obtain financing for a solar project, developers must have the assurance of a consistent, future revenue stream. In other words, before a developer will commit to build a solar facility, there must be certainty in the return on the investment that will be received for a certain period of years. For example, a bank that is considering the financing of such a project will want to know that the investor will receive future revenue before loaning money to support any such project. The long-term commitment requirement built into Ohio's renewable energy law recognized these basic economic truths. The solar energy law likely cannot function without long-term contracts.

The compliance efforts described in paragraphs six through eight of FirstEnergy's Application do not describe efforts to enter into long-term commitments, and therefore these paragraphs do no support the Companies' waiver request. They describe only efforts to enter into short-term, "spot market" contracts for existing SRECs. The company explains that it sponsored three RFPs, "participat[ed] in several SREC auctions," and that its consultant "blanketed the state of Ohio and contiguous states with information regarding the Companies' RFP and conducted extensive outreach efforts."[39] But this litany of facts and compliance efforts contains red herrings that have no bearing on the present Application. The three RFPs and other SREC inquiries described by FirstEnergy were all efforts to secure existing SRECs through short-term contracts. These facts, therefore, do not demonstrate efforts that meet the statutory

[38] Ohio Adm. Code 4901:1-40-06(A)(1).

[39] Application at 3-4.

and administrative standard, nor does this list of minimal efforts support FirstEnergy's waiver request.

FirstEnergy—in conflict with Ohio law and rational economics—sought to meet its SER benchmark through only short-term, "spot market" contracts. FirstEnergy's strategy of looking only for existing SRECs could never support the financing and development of *new* solar energy projects in Ohio, which is, of course, the purpose of the solar energy mandate. This is the same strategy that proved inadequate in 2009.

FirstEnergy's Application argues that it "actively and aggressively pursued SRECs for 2010"[40] and that the company "*considered* long term contracts but could not negotiate a contract that would provide SRECs for the 2010 calendar year."[41] However, these representations, even if accurate, would not satisfy the standard. The law requires an application to demonstrate that it *pursued*—not merely considered—long-term contracts. The Companies are required by law to pursue long-term contracts as a pre-requisite to a force majeure determination.

FirstEnergy did not make a meaningful effort to pursue or secure SRECs through long-term contracts. The Companies' only effort to secure SRECs through long-term contracts consists of a single RFP filed with the Commission on December 2, 2010.[42] The filing requests approval of an RFP process whereby FirstEnergy will seek 5,000 Ohio SRECs and 20,000 non-Ohio SRECs.[43] This RFP, filed *less than a month* before the end of 2010, does not represent a good faith effort to comply with the 2010 benchmark, especially when considering the fact that the Company only acquired 3 percent of its 2009 benchmarks. Even if the RFP was approved by

[40] Application at 4.

[41] Id. at 5. (Emphasis added).

[42] *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 filed December 2, 2010).

[43] Id., Application at 1-2.

the Commission on an expedited basis, it is not reasonable to expect that the solicitation – which was issued (and not then yet approved) with only 29 days remaining in 2010– could provide sufficient SRECs before the end of 2010.

The fact that FirstEnergy recently sought approval for an RFP to purchase SRECs through long-term contracts, as the result of a Stipulation in its most recent ESP case,[44] has no bearing on the Application. This RFP, still pending before the PUCO at this time, was not intended to provide FirstEnergy with SRECs for 2010, and therefore is not relevant to this proceeding. The Companies concede this fact in the force majeure Application, stating that if the RFP application "is approved and the RFP is successful, such Ohio SRECs will be used towards meeting future compliance requirements."[45]

In addition, the Second Supplemental Stipulation only required the Companies to seek competitive bids to purchase 5,000 PUCO-certified SRECs originating in Ohio beginning June 1, 2011.[46] Even if the entire 5,000 REC requirement is procured in 2011, the Companies may still fall short of their 2011 requirements, especially if the Commission were to order a carry-over of the 3,094 SREC shortfalls from 2009 and 2010. A Commission evaluation should only consider the most recent RFP under the circumstances of a future FirstEnergy request for a third consecutive force majeure determination. It should not be considered an effort that supports FirstEnergy's current Application.

Levying the statutory alternative compliance penalties on FirstEnergy for the 2009 and 2010 shortfalls will give FirstEnergy a clean slate in 2011 at successfully achieving compliance

[44] Id., Case No. 10-2891-EL-ACP, Application at 1 (December 2, 2010).

[45] FirstEnergy Force Majeure Application at 5, ¶10 (January 24, 2011)..

[46] *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 2-3 (December 2, 2010).

using the residential REC purchase program and the long-term contracts as negotiated in the ESP. In the alternative, if the PUCO modifies the Companies' 2011 in-state solar benchmark to include the 2009 and 2010 shortfalls, the pending RFP must be modified. The RFP did not contemplate a carry-over of previous in-state solar requirements. Therefore, if the PUCO decides, for the second year in a row, to grant a force majeure and excuse FirstEnergy from the statutory solar requirements by allowing a carry-over of its shortfalls, the RFP must be modified to reflect the total 2011 in-state solar REC requirements. A failure to increase the amount of RECs sought by the RFP would likely result in a third failure by FirstEnergy to acquire sufficient RECS to meet the benchmark.

Further, it is important to note that FirstEnergy only agreed to issue this RFP—its single effort to procure SRECs through long-term contracts—as a means to achieve a partial settlement of its Standard Service Offer ("SSO") proceeding.[47] The RFP, therefore, represents a concession that the Companies incurred in the course of resolving litigation. It does not represent the Companies' own strategy or efforts to achieve compliance with the solar benchmarks.

FirstEnergy made this concession on July 22, 2010, following approximately four months of litigation and negotiations, and did not act on this commitment until December 2, 2010, when it filed its RFP proposal with the Commission. FirstEnergy cannot in good faith represent to the Commission that this single RFP—a settlement concession filed late in 2010—proves that it "aggressively pursued SRECs" through long-term commitments in 2010.

Finally, it is clear that the company has experience procuring RECs through long-term contracts, but simply chose not to make an effort to do so to comply with its SER benchmark.

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[47] *In the Matter of the Application and Stipulation and Recommendation of Ohio Edison Company, The Cleveland Electric Illuminating and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.* Case No. 10-388-EL-SSO, Second Supplemental Stipulation at 1-3 (July 22, 2010).

FirstEnergy has entered into a twenty-year power purchase agreement ("PPA") to satisfy its non-solar RES requirement.[48] There is no reason that FirstEnergy could not have employed a similar contracting strategy to secure SRECs in Ohio.

2. FirstEnergy's Efforts did not Meet The Standard in Ohio Adm. Code 4901:1-40-06(A)(1) that Requires an EDU to "Pursue All Reasonable Compliance Options" Nor did it Comply with the Commission's Order to Pursue its Adjusted 2010 Benchmark By "All Means Available" Including by Constructing New Solar Generation.

R.C. 4928.64(B)(2) requires investor-owned utilities such as FirstEnergy to provide a portion of their standard service offer from solar resources. The law allows but does not require a utility to obtain solar resources exclusively through REC purchases. The Commission stated in its Order granting FirstEnergy's 2009 application for a force majeure determination that the Companies would be required to comply with their adjusted 2010 benchmarks "through all means available."[49] Even if the purchase of SRECs is FirstEnergy's anticipated or preferred means of compliance, it must still attempt to comply with the law through other means if it is unable to procure sufficient SRECs. In the alternative, it must demonstrate efforts at compliance by other means in order for the PUCO to consider a force majeure request.

FirstEnergy points to language in a previous Electric Security Plan ("ESP") Stipulation[50] which allowed the company to comply with the SER benchmark through SREC purchases. The relevant portion of that Stipulation provides that "Renewable energy resource requirements for

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[48] For example, FirstEnergy Solutions Corporation, the company's competitive supplier, recently entered into a long-term PPA to purchase 100 MW of wind power from a developer in western Ohio. The contract will provide the company with the requisite assurance of investment recovery to allow the project to go forward. See FES Press Release,
http://www.firstenergycorp.com/newsroom/news_releases/firstenergy_solutionsandiberdrolarenewablessignpoweragreementwit.html (February 2, 2011).

[49] PUCO Case No. 09-1922-EL-ACP, Finding and Order at 4 (March 10, 2010).

[50] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Stipulation at 10, (February 26, 2009).

January 1, 2009, through May 31, 2011, will be met by using a separate request for proposal (RFP) process to obtain renewable energy credits."[51] However, when granting FirstEnergy's 2009 solar waiver request, the Commission made clear that this language does not absolve the company from complying with its SER benchmark through other means:

> "although the stipulation in the ESP proceeding envisions that FirstEnergy's renewable energy resource requirements will be met using an RFP process to obtain RECs, FirstEnergy is responsible for meeting the statutory SER benchmarks through all means available, if the RFP proves not to be a viable means to meet the statutory requirement."[52]

FirstEnergy is therefore obligated to comply with the law through all means available, including by building its own generation as other utilities have chosen to do. As the Solar Alliance states in its comments on this docket, "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 for systems someone else financed and constructed 'on spec.'"[53] As discussed throughout this pleading, other Ohio utilities have built or purchased solar facilities. DP&L has constructed solar generation to satisfy its benchmark. DP&L's Yankee Solar Array opened in 2010 and produced 1,334 RECs between April and December of 2010, which will allow DP&L to exceed its statutory solar obligations in 2010.[54] AEP has satisfied its obligations in part through a twenty-year PPA that financed the construction of actual facilities. Duke, which came the closest to meeting its 2009 benchmarks, owns multiple smaller-scale solar facilities.

3. FirstEnergy's Residential Program Should be Modified to Eliminate Flaws Similar to the Company's SREC Contracting Strategy and

[51] Id. at 10.

[52] PUCO Case No. 09-1922-EL-ACP, Finding and Order at 4 (March 10, 2010).

[53] PUCO Case No. 11-411-EL-ACP, Comments of the Solar Alliance at 1-2 (March 4, 2011).

[54] *In the Matter of Dayton Power and Light Company's Annual Alternative Energy Portfolio Status Report*, Case No. 10-489-EL-ACP, Status Report at 6, ¶5 (April 15, 2010).

Extended by FirstEnergy to Further Ohio's Statutory Policy in 4928.02(C).

FirstEnergy's residential REC purchase program suffers from the same flaws as the Companies' SREC contracting strategy. FirstEnergy argues that economic conditions prevented this program from being successful:

> "Although 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 this property. The Companies currently have eight customers currently under contract and anticipate obtaining up to 40 Ohio SRECs from this program."[55]

FirstEnergy's excuse for the program's lack of success is a red herring that should be rejected by the Commission. "Tough economic times" have not prevented customers from installing renewable energy sources; FirstEnergy's refusal to provide customers with the certainty of long-term commitments has prevented the development of the program.

In response to OCC Interrogatory number 1-15, the Companies attempt to substantiate the position that tough economic times have made it difficult for customers to pursue renewable energy[56] by stating that "...only 143 facilities had completed interconnection agreements with the Companies' distribution systems."[57] However, the Residential REC purchase program was developed to address exactly that point. This program provides residential customers with income from the RECs created by their facilities which assist in obtaining financing. Although some aspects of this program should be redesigned, such as long term price transparency,

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[55] Application at 5.

[56] An assertion made in the Application at page 5, ¶9.

[57] Attached as Exhibit B.

FirstEnergy notes in its Application that the program has generated customer interest[58] and they have contracted for 51 RECs of 2010 vintage from 8 separate facilities.[59]

In response to OCC Data Request 7, FirstEnergy states that it does not intend to continue offering this program.[60] Despite the "tough economic times," FirstEnergy has seen participation in this program increase nearly four fold from 2009 to 2010. In their 2009 status report, the Companies report acquiring 13 RECs from this program.[61] In response to OCC Data Request 8, the Companies report having contracted for 51 RECs in 2010 through this program.[62]

It is unclear why FirstEnergy does not plan to continue a successful program that is generating additional customer interest and supplying the Companies with a significant portion of its obtained SRECs. The Companies simply state that the PUCO has not ordered them to continue the program.[63] However, in the Second Supplemental Stipulation, approved on August 25, 2010 and covering operating years 2011-2014, FirstEnergy agreed that "the Companies' solar REC requirements will be filled first by the Companies' Residential REC program."[64]

The four fold increase in SRECs procured by the Companies from 2009 to 2010 indicates that the program holds great potential as a source for in-state SRECs. The Commission should require FirstEnergy to honor the agreements that were made in the Second Stipulation and continue this program. This Stipulation represents a careful balancing of the interests of both the

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[58] Application at 5.

[59] SEE FirstEnergy response to OCC Interrogatory 1-8, Attached as Exhibit C.

[60] Attached as Exhibit D.

[61] *FirstEnergy 2009 Renewable Energy Status Report,* Case No. 10-499-EL-ACP, Status Report at 4 (April 15, 2010).

[62] See Exhibit C.

[63] See Exhibit D.

[64] *In the Matter of the Application and Stipulation and Recommendation of Ohio Edison Company, The Cleveland Electric Illuminating and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Second Supplemental Stipulation in at 2-3 (July 22, 2010).

Companies and interested stakeholders in these proceedings. Further, it aligns the Company with state policies encouraging distributed and small generating facilities.[65]

C. FirstEnergy's Minimal Efforts Contrast with Those of Other Utilities That Are Complying With the Law By Utilizing Long-Term Contracts and Investing in Ohio Solar Energy Projects.

Ohio's three other investor-owned utilities have made significant efforts to comply with the SER benchmarks and as a result have performed markedly better than FirstEnergy. Each is expected to comply with the 2010 solar benchmark. AEP has made significant investments in Ohio solar energy projects, which will allow the company to comply with its benchmark. After failing to meet its 2009 in-state SER benchmark, AEP undertook an aggressive compliance effort that included long-term PPAs to finance solar projects. For example, AEP's long-term contract with Wyandot Solar financed the 10 MW facility in Upper Sandusky, one of the largest in the country.[66] AEP's long-term PPA will also finance the construction of a 75 MW solar facility in southeast Ohio, which will be the largest photovoltaic facility east of the Mississippi.[67]

DP&L, likewise, after meeting only 57 percent of its SER benchmark in 2009, has chosen to comply with its 2010 benchmark by making a direct investment in generation. DP&L has built a 1.1 MW facility—Yankee Solar Array—which opened in 2010 and will allow the company to meet its initial solar benchmark requirements. Duke Energy was the closest of all the Ohio utilities to meeting its 2009 in-state SER benchmark, achieving 84 percent of its

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[65] R.C. 4928.02

[66] See *In the matter of the application of Columbus Southern Power Company for amendment of the 2009 Solar Energy Resource Benchmark, pursuant to Section 4928.64(C)(4), Ohio Revised Code,* Case No. 09-987-EL-ACP, Application at 4 (October 26, 2009).

[67] John Funk, "Huge Solar Panel Farm Coming to Southeast Ohio," Plain Dealer, October 5, 2010: http://www.cleveland.com/business/index.ssf/2010/10/huge_solar_panel_farm_coming_t.html .

requirements through short and long-term REC purchases.[68] Duke's future solar compliance plans include long-term, 15-year, commitments with residential customers, and Duke also owns numerous small-scale solar arrays in its service territory.[69]

There is no excuse for FirstEnergy's recalcitrance and repeated failure, especially when compared to the good faith effort and success of Ohio's other utilities. The PUCO should not find that FirstEnergy's minimal efforts at compliance through short-term acquisitions and a belated long-term offer resulting from an ESP stipulation constitute good faith effort at compliance.

D. A Showing of Force Majeure Requires the Applicant to Meet a High Burden, Which FirstEnergy Has Not Satisfied.

Finally, the Commission should consider that a showing of force majeure requires the applicant to meet a very high burden under law. Typically, force majeure clauses in contracts require the party seeking enforcement to demonstrate that compliance with the contract's terms was not possible due to an "act of God" or "an event or effect that cannot be reasonably anticipated or controlled."[70] Certainly, as Ohio courts have held, "The inability to purchase a commodity at an advantageous price is not a contingency beyond a party's control."[71] It is in this context that FirstEnergy's request should be considered.

Considering this stringent standard, FirstEnergy's claimed excuse of relatively few existing, current-year SRECs does not equal an "an event or effect that cannot be reasonably

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[68] See *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning its Advanced and Renewable Energy Baseline and Benchmark,* Case No. 10-511-EL-ACP, Status Report at 11-15 (April 15, 2010).

[69] Id.

[70] Dictionary.com, "force majeure," in *Merriam-Webster's Dictionary of Law*. Source location: Merriam-Webster, Inc. http://dictionary.reference.com/browse/force majeure. Available: http://dictionary.reference.com. Accessed: April 01, 2011.

[71] *Stand Energy Corp. v. Cinergy Servs.*, 144 Ohio App. 3d 410, 416 (2001).

anticipated or controlled" sufficient for a force majeure determination. As discussed above, FirstEnergy had many options for compliance that it did not utilize, including constructing its own solar energy facilities and entering into long-term contracts or PPAs with developers and residential customers.

FirstEnergy made a business decision *not* to utilize those reasonable, prudent compliance options, including making a good faith effort to secure long-term SREC commitments or building its own generation—options that Ohio's other utilities chose to utilize. But FirstEnergy's circumstances are not those of a force majeure. No event beyond the Companies' reasonable anticipation or control prevented the company from using sound economic judgment and engaging in long-term commitments with solar developers, as other Ohio utilities have done. Conditions were not more favorable for AEP, DP&L, and Duke Energy. Nothing prevented FirstEnergy from building solar generation, or entering into an agreement with a solar developer, or properly structuring its residential REC program, or utilizing any of the other commonsense options that would have allowed the company to comply with Ohio law. SREC scarcity is a problem created by FirstEnergy, well within its control. Ohio's other utilities do not face this problem. Therefore, there has been no showing of force majeure.

IV. CONCLUSION

FirstEnergy has not justified an order from the PUCO excusing FirstEnergy from meeting its statutory solar energy requirements. FirstEnergy has not satisfied the standard for a force majeure determination because the Companies have not pursued long-term contracts as required by law. The arguments made by FirstEnergy are not only exaggerated, unpersuasive, and irrelevant—but they have been made by the Companies before.

In their comments in opposition to FirstEnergy's 2009 waiver request, the Joint Parties alerted the Commission and the Companies that "Under FirstEnergy's practices for compliance, without a change, history is likely to repeat itself and FirstEnergy will be requesting a waiver yet again next year."[72] The Joint Parties' 2009 comments have proven prescient, and indeed history has repeated itself. FirstEnergy did not alter its compliance strategy following its 2009 failure and is now seeking a second consecutive waiver by recycling the same arguments that it used last year. This should not be tolerated. The Commission should not reward FirstEnergy with a second consecutive waiver, amounting to a multi-million dollar bailout.

If the Commission grants FirstEnergy's request for a force majeure waiver of its SER benchmark for the second consecutive year, the Commission would be condoning a corporate strategy aimed at recalcitrance and disregard for the solar requirements in Ohio law. And the PUCO would be allowing a retreat from the Ohio-specific requirements in the law for economic development of the Ohio solar energy industry within this state. While other utilities have led, FirstEnergy has lagged. The Commission should not reward FirstEnergy for its poor performance by granting the company a waiver of its SER benchmark for a second consecutive year. The Commission should assess an Alternative Compliance Payment in the amount of $2,064,250, which will be remitted to Ohio's Advanced Energy Fund. In the alternative, a force majeure determination in this case should be accompanied by a carry-over of the unachieved portion of FirstEnergy's 2009 and 2010 benchmarks.

Respectfully Submitted,

<u>/s/ Tara C. Santarelli</u>
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[72] PUCO Case No. 09-1922-EL-ACP, OCEA Comments at 8.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Comments has been served upon the following parties by first class or electronic mail this 4th day of April, 2011.

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EXHIBIT A

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 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code.	)	Case No. 09-1922-EL-EEC

COMMENTS IN OPPOSITION TO FIRSTENERGY'S FORCE MAJEURE APPLICATION AND WAIVER REQUEST BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL LAW & POLICY CENTER, CITIZEN POWER, THE VOTE SOLAR INITIATIVE, AND THE SOLAR ALLIANCE

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THE PUBLIC UTILITIES COMMISSION OF OHIO

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COMMENTS IN OPPOSITION TO FIRSTENERGY'S FORCE MAJEURE APPLICATION AND WAIVER REQUEST
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL LAW & POLICY CENTER, CITIZEN POWER, THE VOTE SOLAR INITIATIVE, AND THE SOLAR ALLIANCE

I. INTRODUCTION

On May 1, 2008, Governor Ted Strickland signed into law a sweeping new energy policy for the state of Ohio, Amended Substitute Senate Bill 221 (SB 221). Describing the legislation as "landmark" and "historic," the Governor stated the legislation would "serve as a catalyst to enhance energy industries in Ohio, bringing new jobs while protecting existing jobs" and that the state "will attract the jobs of the future through an advanced energy portfolio standard."[1] In the spirit and letter of the new law, the undersigned parties oppose the force majeure request made by FirstEnergy and believe the promise of SB 221 can only be fulfilled if the Public Utilities Commission of Ohio ("PUCO" or "Commission") properly enforces the mandates in the new law. This

[1] Office of the Governor, Press Release, May 1, 2008. Attached as Exhibit A. *See*: http://www.governor.ohio.gov/Default.aspx?tabid=622.

important case offers the PUCO an opportunity to demonstrate that the renewable energy marketplace created by SB 221 will be viable and robust instead of merely symbolic or illusory.

On December 7, 2009, the Ohio Edison Company, the Toledo Edison Company, and the Cleveland Electric Illuminating Company (collectively "FirstEnergy" or "Companies") filed the above-captioned Application asking the Commission to relieve FirstEnergy of most all of its 2009 Solar Energy Resource ("SER") benchmarks required by Ohio Revised Code (O.R.C.) §4928.64. FirstEnergy bases this Application on a "force majeure" claim. FirstEnergy makes the claim because it failed to meet its 2009 SER benchmark by a huge margin and does not demonstrate the good faith effort required to meet the statutory test for force majeure. Thus, pursuant to its statutory authority, the PUCO should require FirstEnergy to issue a good faith, long-term Request for Proposal ("RFP") for solar energy or Renewable Energy Credits immediately. Alternatively, the Commission should require FirstEnergy to pay the statutory Alternative Compliance Payment (that exists in the law to ensure diligence in efforts to obtain the statutory benchmarks). However, if the Commission is inclined to grant the waiver, it should follow its own precedent and defer the Companies' 2009 shortfall to 2010 as a supplement to its existing 2010 solar mandate.

II. APPLICABLE LAW AND FIRSTENERGY'S APPLICATION

Ohio law requires investor-owned utilities to meet annual solar benchmarks beginning in 2009, and increasing every year thereafter until reaching 0.50% of generation by 2025.[2] In addition, utilities must obtain at least half of that requirement from within Ohio.[3] For 2009, the solar benchmark is 0.004%.[4] Utilities may achieve the SER benchmarks by building solar generation or through the purchase of solar Renewable Energy Credits ("RECs").[5]

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

> [A utility] 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.[6]

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

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[2] R.C. §4928.64(B)(2).

[3] R.C. §4928.64(B)(3).

[4] R.C. §4928.64(B)(2).

[5] R.C. §4928.64(B).

[6] R.C. §4968.64(C)(4)(a).

> PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.[7]

Ohio Revised Code §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, the PUCO may require the utility to issue a long-term solicitation for the deficiency or pay an "alternative compliance payment" ("ACP") of $450 per megawatt-hour ("MWh") of solar capacity not obtained.[8]

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 2009 SER benchmarks. FirstEnergy's cumulative 2009 SER requirement translates to a total of 1,886 RECs (814 SERs for Ohio Edison, 668 SERs for The Cleveland Electric Illuminating Company, and 353 SERs for Toledo Edison).[9] Yet FirstEnergy states it purchased only 49 solar RECs.[10] *This means that FirstEnergy met*

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[7] R.C. §4928.64(C)(4)(b).

[8] R.C. §4928.64(C)(2)(a).

[9] *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, Application at 3 (December 7, 2009).

[10] FirstEnergy states that it is required to obtain 1,886 solar RECs, and that it purchased 49 solar RECs on the market. *See* Application at ¶¶5, 8. The aggregate shortfall is then 1,837 solar RECs. However, FirstEnergy states the individual company shortfalls are 814 solar RECs for the Ohio Edison Company, 668 solar RECs for The Cleveland Electric Illuminating Company, and 353 solar RECs for the Toledo Edison Company (Application at ¶8). The sum of 814, 668, and 353 is 1,835. The statements on aggregate and individual company shortfalls are inconsistent. On information in the Application, FirstEnergy is short either 1,837 or 1,835 solar RECs depending on how the deficiency is calculated.

just 3% of its 2009 SER requirement.[11] Under the law, this shortfall of 1,835 RECs requires an Alternative Compliance Payment of $826,650. FirstEnergy now seeks a force majeure determination to waive the 97% balance.[12]

III. ARGUMENT AND COMMENTS

A. The Commission Cannot Make the Force Majeure Determination Requested by FirstEnergy Because the Companies Did Not Make a "Good Faith Effort" to Obtain Solar RECs.

Ohio Revised Code §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 consider waiving or deferring the 2009 SER benchmark, it must also 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 or by seeking the resources through long-term contracts."[13] FirstEnergy did not make the required showing of a good faith effort.

FirstEnergy was aware of its SER requirements on or before July 31, 2008, when SB 221 took effect. However, FirstEnergy did not begin seeking solar RECs in the open market until it issued its first RFP in July 2009 —a full *year* after SB 221 became effective.[14] FirstEnergy conducted a second RFP in September 2009, again seeking 2009

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[11] *Application* at 4.

[12] *Id.*

[13] R.C. §4928.64(C)(4)(b).

[14] *Application* at ¶7.

vintage solar RECs.[15] In addition to the RFPs, FirstEnergy initiated a residential solar resource program to assist in the purchase of solar RECs from FirstEnergy customers.[16] However, the Companies filed the application for a residential REC purchase program according to the ESP settlement on June 30, 2009—six months from the SER benchmark deadline.[17] FirstEnergy then revised the program twice, once in July and once in September 2009.[18] As explained below, the program is still not operational.

In pursuit of its 97% waiver, FirstEnergy relies upon the "limited availability of qualified solar product for the 2009 term…."[19] However, by comparison, American Electric Power (AEP) built two modest solar installations of its own, purchased 156 solar RECs, and entered into a 20-year power purchase agreement with a developer to build a massive 10 MW solar field in Wynadot County.[20] Dayton Power & Light (DP&L) purchased 319 solar RECs and announced plans to build a 1.1 MW utility-scale solar field.[21] Despite having the same amount of time as the other utilities, FirstEnergy only purchased 49 solar RECs and made no attempt to create or secure its own solar resources.

Anticipating this argument, FirstEnergy points to the Stipulation language in its Electric Security Plan ("ESP") case allowing it to comply with the SER benchmark

[15] *Id.*

[16] *Id.*

[17] *Id.* at ¶9.

[18] *Id.*

[19] *Id.* at ¶13.

[20] *See Columbus Southern Power's and Ohio Power's Application and Request for Expedited Consideration*,, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC (October 26, 2009).

[21] *See DP&L Application for a Force Majeure Determination*, Case No. 09-1989-EL-ACP (December 23, 2009).

through solar REC purchases, and states the Companies do not generate electricity. However, the Stipulation does not limit FirstEnergy to only open market solar REC purchases. Stipulation Paragraph 9 reads, "Renewable energy resource requirements for January 1, 2009, through May 31, 2011, will be met by using a separate request for proposal (RFP) process to obtain renewable energy credits."[22] FirstEnergy could have developed its own solar resource generation. Moreover, if the Stipulation language is limited to the exclusive use of solar RECs for benchmark compliance, FirstEnergy could have contracted with solar resource generators to develop SERs exclusively for the Companies, similar to AEP's power purchase agreement. FirstEnergy has not announced any plans to develop or arrange for its own solar resource generation.

FirstEnergy did not conduct a "good faith effort" to secure SERs in 2009. It delayed its market search until 2009 was half over and has done very little to secure SERs for compliance with future benchmarks. When it did start searching, FirstEnergy's efforts consisted of a general description of mailing and calling those with SERs to attempt to purchase the solar RECs. FirstEnergy's efforts were not "good faith," and it should not be eligible for the requested waiver. In addition, and as explained below, the efforts FirstEnergy did expend were minimal and insufficient to obtain any SERs.

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[22] *See In the matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan,* Case No. 08-935-EL-SSO, Stipulation and Recommendation at 9 (February 19, 2009), approved March 25, 2009.

B. FirstEnergy's RFPs Were Insufficient to Satisfy the "Good Faith Effort" Required for a Force Majeure Determination Because Its RFP Requirements Were Inherently and Structurally Defective, and Inconsistent with Current Industry Practice.

The undersigned parties note the FirstEnergy RFP was flawed because it was inconsistent with the manner in which the solar industry currently finances projects. FirstEnergy asserts that a waiver is justified because 2009 solar RECs were scarce. However, the reason 2009 solar RECs were limited is wholly in FirstEnergy's control. FirstEnergy did not procure very many solar RECs through its RFP solicitations is because it was only willing to purchase immediately available, current vintage year RECs—and no more. In other words, FirstEnergy only sought RECs from solar systems already constructed, of which there are relatively few in Ohio.

To finance the construction of new solar systems, which of course was the purpose of the RPS in SB 221, solar developers must monetize *both* the revenue from the sale of electricity and the resulting solar RECs upfront. That is, solar developers must obtain signed, long-term contracts for both the electricity and the solar RECs before they can obtain financing from a bank and proceed to build the solar system. Because FirstEnergy only solicited very short-term, "spot market" solar RECs, no developer was able to finance a system based on their RFP. Hence, the 97% shortfall.

Given these requirements for a solar developer, it was unlikely that any solar developer would happen to have unsold vintage solar RECs (without the energy) available for purchase. FE could have chosen a different path that would have allowed it to secure RECs not only for this year, but for many years to come. Under FE's practices for compliance, without a change, history is likely to repeat itself and FE will be requesting a waiver yet again next year. This should not be tolerated.

In its Application, FirstEnergy briefly addresses the issue of long-term contracts, making the odd claim that no long-term contracts were available to meet the 2009 SER benchmark:

> [FirstEnergy] considered the potential of long-term contracts as a compliance option. *However, [its consultant] determined there are no long term contracts available to meet the 2009 SER benchmark...Although certain parties contacted by [its consultant] stated that they would be interested in a long term contract with the Companies, none of those parties could deliver Ohio SRECs in 2009.*[23] (Emphasis added).

The claim that "no long term contracts were available" is strange because as FirstEnergy admits, the solar developers to whom it spoke were eager to enter into those very types of agreements. In other words, *long-term agreements were not "available" solely because FirstEnergy itself refused to enter into them* and made long-term contracts ineligible under their RFP.

Had FirstEnergy solicited long-term agreements, such as ten years, as opposed to merely nineteen months, and given the industry a four-to-five month lead-time, the industry likely would have been able to meet FirstEnergy's 2009 deadline easily as well as helped it satisfy the Companies' requirements for 2010 and beyond.

Moreover, FirstEnergy's RFP requested a significant variation in the number of solar RECs from one year to the next: 1,040 in 2009, 2,600 in 2010, and 3,250 in 2011. In terms of system size, this equates to approximately 950 kW in 2009, 2.4 MW in 2010, and 3 MW in 2011. REC output from a solar system does not vary significantly on an annual basis—typically less than 5%. FirstEnergy tied its RFP to specific projects – requiring the developer to submit the physical location of the solar system in the

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[23] *Application* at ¶12.

qualification process. To comply, a solar developer would either have to triple the size of the facility in later years, or overbuild in year-one and speculate on the chance to sell RECs on the spot market in the out years. This represents another serious flaw in FirstEnergy's RFP and explains why no one was able to meet its impossible terms.[24]

In addition, the total 2009 volume of solar RECs issued for compliance in Virginia, Maryland, Pennsylvania, New Jersey, and Delaware during calendar year 2009 in the PJM - GATS system was 73,935, with 16,561 reported retired for compliance.[25] Given the allowance in SB 221 for half of the annual solar benchmarks to come from outside if Ohio (subject to a deliverability test), FirstEnergy also could have made a good faith effort to procure RECs from other jurisdictions. They submit no evidence of having done so.

FirstEnergy did not solicit solar resources through "long-term contracts" to encourage solar industry participation and provide the Companies with an opportunity to comply with their 2009 statutory benchmarks. Therefore, FirstEnergy failed to demonstrate the good faith effort required to obtain a force majeure ruling. The Commission should not make a force majeure determination nor grant a waiver of the Companies' 2009 Solar Benchmark requirements.

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[24] This issue is not unique to the solar industry or to Ohio. See article "Wanted: Stability in Restructured Electricity Markets" from wind industry journal North American Windpower, from February 2010. Attached as Exhibit B.

[25] *See e.g.*: https://gats.pjm-eis.com/myModule/rpt/myrpt.asp?rpt=230

C. FirstEnergy's Efforts Regarding Residential Solar RECs Were Incomplete and Appear to Lack the Diligence Required to Justify a Force Majeure Determination by the PUCO.

Similar to its RFP, First Energy's efforts to procure residential solar RECs in Ohio fall short. If FirstEnergy expected residential customers to use the RFP process to sell RECs to the Companies, such an expectation was unreasonable. The RFP process is not aimed at residential customers. The elaborate process and time investment required for a residential solar system homeowner to produce the necessary documentation required to submit a bid is effectively a barrier to participation.

As per the Navigant bidding process, a residential solar customer is required to become certified with the PUCO, register with GATS, complete the credit application, draw up a pricing proposal and review all legal contracts in order to successful complete a bid. While some of these requirements are applicable in any circumstance, such as Commission certification, expecting this level of business expertise and understanding of utility bidding from the average homeowner is unreasonable. The transactional costs of participating in the bidding process outweigh the value that a homeowner stands to gain. The average residential solar system produces just over four solar RECs annually. Using the ACP as a market price, the maximum value an average residential system could expect to earn from the sale of one year of solar RECs is $1,800 in 2009, and less in subsequent years. In reality, however, the actual value is likely much lower. Those proceeds are easily eroded in the application process and the need for legal review. Add the time commitment required for participating in the RFP process and completing the necessary forms, and the potential $1,800 seems less appealing.

Even if the RFP process was navigable for a potential residential customer, FirstEnergy insufficiently marketed the RFP process to residential customers. The

Companies should have provided marketing materials to residential solar installers. There is no indication FirstEnergy made such materials available to the retailers and installers. Often, installation companies assist solar customers in navigating the various federal, state, local, and utility incentives and help determine the paybacks on a residential solar system. There is no evidence FirstEnergy provided the necessary information to residential installation companies to help clients register and sell solar RECs.

Alternatively, FirstEnergy could procure in-state solar RECs through its Residential REC purchase program, as stipulated in FirstEnergy's ESP plan.[26] However, FirstEnergy's Ohio Residential REC Purchase Agreement is still not available to the public, as its own website reads "Coming Soon."[27] The Residential REC Purchase agreement contains the fixed annual price for solar RECs, and is a critical piece to any residential purchase program. However, it was not available for residential solar REC owners to consider investing in solar energy in 2009. For successful participation, the agreement needs to be available as soon as possible. Potential residential solar customers need time to understand how the solar REC purchase interacts with the other solar incentives and tax credits to finance a project successfully.

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[26] *Application* at ¶9; *see also Second Opinion and Order*, 08-935-EL-SSO (March 25, 2009) at 9.

[27] *See* *http*://www.firstenergycorp.com/Residential_and_Business/Products_and_Services/Ohio_Residential_Rec/index.html.

D. FirstEnergy Has Failed to Inform Customers of its REC Purchase Program which Could Have Yielded Additional RECS

Furthermore, there are indications that FirstEnergy did not pursue individual customer solar projects within its service territory capable of supplying additional solar RECs. Two FirstEnergy customers, both of whom have operational photovoltaic systems, recently filed letters in this case docket noting that FirstEnergy made no effort to contact them about possible solar REC purchases.[28]

The first letter, from Alvin Compaan, states that a 4.3 kW photovoltaic system located at his residence has been in operation since 2004.[29] Mr. Compaan filed an application to become a renewable energy resource generating facility with the PUCO in October 2009.[30] This system recently received certification.[31] Mr. Compaan further notes that Toledo Edison checked his system several times since the installation, thus becoming aware of it through on-site verification.[32]

The second letter, from the Sylvania United Church of Christ, notes that its 6.4kW photovoltaic system has been operational since 2005.[33] The Church is a Toledo Edison customer.[34] The letter notes that the church is currently in the process of becoming a

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[28] See Letters from the Sylvania United Church of Christ (March 4, 2010) and Alvin Compaan (March 4, 2010).

[29] Letter from Alvin Compaan, page 1 (March 4, 2010).

[30] *Id.* at 2.

[31] *Id.*, See also *Certificate 10-SPV-OH-GATS-0032*, Case No. 09-910-EL-REN (January 27, 2010).

[32] *Id.*

[33] Letter from Sylvania United Church of Christ, page 1 (March 4, 2010).

[34] *See* Sylvania United Church of Christ solar presentation: http://sylvaniaucc.org/downloads/SylUCC-1PL.pdf.

certified renewable energy generating facility and suggests, "FirstEnergy could perform a valuable service to its customers by assisting them with this certification, registration, and SREC marketing process."[35]

Both letters note that FirstEnergy, with minimal diligence, is capable of discovering these and other opportunities that exist either within its service territory. Both of these projects received grants from the Ohio Department of Development's Advanced Energy Fund. As noted by the Sylvania church, these grants are "publicly disclosed."[36] Thus, this information is readily available to FirstEnergy. Additionally, both of these customers filed applications at the PUCO for renewable certification. This information is also easily accessible to FirstEnergy. Finally, another Ohio utility, Dayton Power & Light, contacted both of these customers about purchasing solar RECs, indicating that other utilities are utilizing these or similar resources to discover solar REC purchase opportunities. FirstEnergy cannot claim a "good faith effort" to secure solar RECs when it is ignoring opportunities within its own territory.

Moreover, as part of the ESP supplement settlement, FE was required to provide one-stop shopping and a package of information to customers considering solar a installation regarding net-metering, interconnection and the purchase of solar RECs.[37] The Commission should require as part of this Order for FirstEnergy to demonstrate what

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[35] Letter from Sylvania United Church of Christ, page 1 (March 4, 2010).

[36] Letter from Sylvania United Church of Christ, page 1 (March 4, 2010).

[37] *In the matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Supplemental Stipulation at 9 (February 26, 2009), approved March 25, 2009.

it has done to comply and to further require them to make information on all of the above, easily and readily available on their website.

IV. REMEDY

Overall, FirstEnergy's efforts to obtain solar RECs fall short. FirstEnergy made little serious effort to locate solar RECs and designed an RFP for solar with terms that were impossible to meet. The Commission should not consider such offers serious attempts by the Companies to meet the SER benchmarks and therefore should not make a force majeure determination in this case nor grant the Companies a waiver of their 2009 solar benchmarks.

Despite its actions in Ohio, FirstEnergy understands the necessity of a long-term contract in order to build energy generation. FirstEnergy issued one such long-term, viable RFP in 2009 for solar resources—*in our neighboring state of Pennsylvania.*[38] The RFP was for ten years and requested a consistent 10,000 solar RECs annually. While the results of the RFP have not been announced, it is expected to produce multiple responsive requests.

The undersigned parties also urge the Commission to consider the precedent it will set in this case. If a utility can obtain a force majeure waiver for having achieved only 3% of its requirement and after having issued only spot market REC solicitations, this could set a precedent whereby only short term RFPs are ever issued and no new renewable energy projects are built in the State of Ohio. The undersigned parties believe this result would be disastrous for the

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[38] A copy of FirstEnergy's Pennsylvania solar RFP is available at: http://www.firstenergycorp.com/utilitypowerprocurements/pa/mepn/srec/Supplier_Documents.html.

advanced energy industry in Ohio and would fail to deliver little if any of the potential environmental benefits associated with the advanced energy policy in SB 221.

Fortunately, during the SB 221 legislative process, the Governor and the General Assembly foresaw the potential for utilities to only solicit short-term solar RECs and specifically addressed this scenario in the "force majeure" statute itself. The statute states:

> In making [a force majeure] determination, the *commission shall consider whether the [utility] 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.*[39] (Emphasis added).

FirstEnergy's efforts to obtain solar RECs do not meet the good faith test in SB 221. Its effort to locate solar RECs was not thorough and FirstEnergy did not issue solar RFPs capable of generating any real interest from those in the industry. Therefore, the Companies' efforts lack the "good faith effort" required for a force majeure determination. For these reasons, FirstEnergy only met a paltry 3% of its 2009 solar requirement. The Commission should reject FirstEnergy's Application and instead order FirstEnergy to immediately issue a long term RFP for 1,835 solar RECs under the same or substantially similar terms as its Pennsylvania RFP, or impose the ACP of $826,650.

In the alternative, if the Commission is inclined to grant FirstEnergy's Application, the PUCO should follow its own precedent, invoke Ohio Revised Code §4928.64(C)(4)(c), and require the Companies to achieve any waived portion of the 2009

[39] R.C. §4928.64(C)(4)(b).

SER benchmark in 2010. This equates to increasing Ohio Edison's 2010 benchmark by the 814 solar RECs, The Cleveland Electric Illuminating Company's 2010 benchmark by 668 solar RECs, and Toledo Edison's 2010 benchmark by 353 solar RECs.

The PUCO recently applied this provision when it granted AEP's application for a force majeure determination, relieving it of a portion of its 2009 SER requirements.[40] 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.*"[41] (Emphasis added). The Legislature intended FirstEnergy to obtain 1,886 solar RECs in 2009, and the Commission should not relieve FirstEnergy of its statutory SER obligations. By requiring FirstEnergy to recover the 1,835 solar RECs it failed to obtain in 2009 over the next year, the Commission will ensure FirstEnergy meets the statute's intent.

Finally, the Commission should also require FirstEnergy to finalize and launch its Residential Solar REC purchase program so the Companies may utilize the potential opportunities that may exist to obtain RECs from customers who have installed residential solar systems. In addition, finalizing the program will encourage others in FirstEnergy's service territory to install additional solar systems, thereby increasing the number of RECs available for purchase and furthering state policy of encouraging distributed generation.[42] Allowing FirstEnergy to continue to delay its residential solar REC program will only delay the further implementation of solar systems in Ohio.

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[40] *See* Entry, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC (January 7, 2010).

[41] *Id.* at 9

[42] R.C. 4928.02(C)

V. CONCLUSION

For the reasons above, the Office of the Ohio Consumers' Counsel, the Ohio Environmental Council, the Environmental Law & Policy Center, the Vote Solar Initiative, the Solar Alliance, and Citizen Power respectfully asks this Commission to deny FirstEnergy's Application and require it to issue long-term RFPs for solar RECs or impose the Alternative Compliance Payment of $826,650. This ruling would send the signal that Ohio's RPS is creating a robust solar marketplace consistent with the Governor's and legislature's intent in SB 221. In the alternative, the undersigned parties request the Commission to condition a waiver on the Companies' recovering the 2009 SER shortfall in 2010. Under this alternative scenario, FirstEnergy should obtain an additional 1,835 solar RECs beyond its 2010 requirements. In either circumstance, FirstEnergy should be required to complete and launch its Residential Solar REC Purchase Program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comments in Opposition has been served upon the following parties, via electronic transmission, this 9th day of March, 2010.

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Exhibit A

Office of the Governor Press Releases

5.1.08 - Governor Signs Historic Energy Legislation

Columbus, Ohio ? Governor Ted Strickland today signed into law Senate Bill 221, a landmark energy reform bill that will ensure predictability of affordable energy prices and serve as a catalyst to enhance energy industries in Ohio, bringing new jobs while protecting existing jobs.

Strickland made the following comments today before signing SB 221 in the Ohio Statehouse Atrium.

?One year ago today I spoke to the Toledo Chamber of Commerce and outlined a set of principles to guide our efforts in transforming our electric structure in the State of Ohio.

These principles were focused on

- Transparency and accountability
- Making sure customers have equal footing with utilities
- Energy efficiency
- A strong renewable and advanced energy portfolio
- Modernizing Ohio?s electric infrastructure
- The need to reduce green house gas emissions
- Establishing a stable balance between the protections of regulation and the opportunities of competitive markets.

Today I am proud to say that with the help of legislative leaders in both parties we have kept our word to Ohioans on these important and guiding principles.

This bill, Senate Bill 221 will ensure predictability of affordable energy prices and maintain state controls necessary to protect Ohio jobs and businesses.

We will safeguard Ohio families by empowering consumers and modernizing Ohio?s energy infrastructure.

And we will attract the jobs of the future through an advanced energy portfolio standard?and today?s action by Ohio means that a majority of states now agree that these technologies represent the future of energy in the United States.

This requirement means that 25% of the energy sold in Ohio must come from advanced and renewable energy technologies?from clean coal to wind turbines?by 2025.

This could not have been accomplished without the hard work of many of you here today as well as citizens across the state?and I want to thank you for your tireless efforts to get us to this point and remind you that you will continue to play a vital role as we work to implement this plan.

Staff at the Public Utilities Commission, and its commissioners, deserve an enormous amount of gratitude for the work they have already begun and will continue to do as we see these legislative objectives through to the finish line.

I am proud to be here today with Ohio's legislative leadership. We can all be proud of this bill.?

Exhibit B

north american
WINDPOWER®
Reprinted with permission from the February 2010 issue

Wanted: Stability In Restructured Electricity Markets

The interaction between RPS policy and electricity market design has created a bias toward short-term contracts.

BY PETER TOOMEY AND ERIC THUMMA

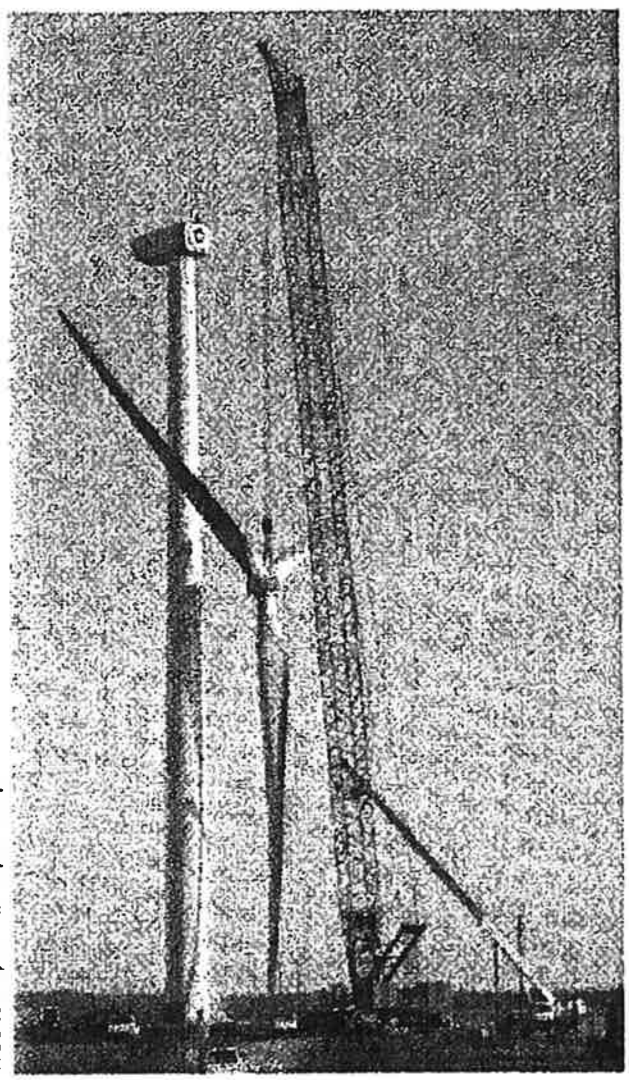

Photo courtesy of Wind Capital Group

We are at a critical point for renewable energy policy in the U.S. Since the late 1990s, renewable portfolio standards (RPS) have been passed in more than half of the U.S. states. When combined with federal tax incentives, these policies have successfully promoted the widespread deployment of utility-scale renewables, including 30,000 MW of wind energy capacity. Furthermore, the Obama administration and Congress may buttress these efforts by passing a national renewable electricity standard (RES).

Despite this broadly supportive policy environment, the rapid expansion of renewable energy capacity will only continue if regional, state and local policies are employed to address a growing list of challenges.

While the most publicized challenges relate to transmission constraints and grid-integration of variable resources, an emerging trend in the context of RPS is the inability of developers to secure economical, long-term contracts for energy and renewable energy certificate (REC) output.

Long-term contracts are necessary to encourage the cost-effective development of renewable energy, because they provide developers and investors with the confidence needed to deploy capital.

Without access to long-term contracts, developers and investors are forced to decide between making a potentially higher-risk investment in a merchant project – which will demand a higher expected return due to higher financing charges and other risk-related considerations – or to postpone the project until a long-term contract is available.

This problem has proven particularly acute in restructured electricity markets, where the interaction between RPS policy and electricity market design has created a bias toward short-term contracts.

In restructured markets, RPS-obligated retail electric suppliers are rarely certain of what the compliance requirements will be more than a few years into the future. The uncertainty can make them hesitant to enter into long-term contracts, particularly if renewable premiums are robust. This is true for bundled contracts, which includes energy, RECs and REC-only contracts.

Instead, these entities often choose to enter into short-term contracts that align with foreseeable RPS obligations. The lower power prices and general risk aversion that are the byproducts of the recession have bolstered this trend and further dissuaded RPS-obligated entities from taking any perceived risks associated with long-term contracts.

Unfortunately, this trend is accelerating at a time when many state RPS targets are aggressively ramping up. If anything, the rate of renewable development will need to accelerate to keep up with state RPS goals (and any federal RES that may be enacted). This will be difficult unless developers can secure long-term contracts for their output.

Regulators in restructured electricity markets should adopt one of two policy options to promote long-term contracts. The first would require utilities to engage in long-term contracts to meet RPS obligations associated with default service load. To a limited extent, this is something that is already happening in some states.

Another option, which is broken into two parts, requires a fundamental reconsideration of RPS design in restructured electricity markets.

First, it would require the RPS obligation to be transferred from the retail electric suppliers – which is the status quo – to the distribution utilities (whether or not they are also the retail suppliers). This transfer would shift the compliance requirement from an entity that is, by nature, highly uncertain of its future RPS obligations because of load migration, to one that can be assured of serving the entire load in its service territory indefinitely.

Second, these distribution companies would be required to file an RPS compliance plan with the state utility commission that demonstrates they are taking the steps necessary to meet their short-, medium- and long-term RPS obligations. This plan would require that a certain percentage of the utilities' anticipated RPS demand be met via long-term contracts.

Employing either of these options would help foster an environment conducive to investments in new projects. On the other hand, a failure to make the necessary revisions to RPS policy could lead to a future in which renewable targets are missed because developers are unable to secure financing and deploy the capital necessary to get steel in the ground.

Restructured markets

According to the U.S. Energy Information Administration, 14 states have restructured or are in the process of restructuring their electricity markets. Though the nature of restructuring varies by state, it generally implies disaggregating the generation, transmission and distribution functions traditionally served by a single, regulated utility. It also tends to imply the promotion of competition at the retail level.

All 14 of these restructured states have also promulgated an RPS, either through the legislative or regulatory process. In the sections that follow, we explain how the interaction between restructured electricity markets and RPS policies as currently designed tends to create a bias against long-term renewable energy contracts. We also provide examples of how the existing structure of default service procurements in various states contributes to this bias.

In restructured electricity markets, the legal obligation for complying with the RPS rests with retail electric suppliers. These entities can either be competitive electric suppliers, distribution utilities, or both.

Customers who have remained with utilities are referred to as default service or basic generation service customers and can contribute to as much as half the retail electricity sales in a given state. Competitive suppliers serve the balance of the retail load.

Because utilities no longer own generation in most restructured electricity markets, they must contract with wholesale electric suppliers in order to supply electricity to default service customers.

In accordance with state restructuring rules aimed at promoting retail competition – and in recognizing that there is generally nothing to stop retail customers from switching to a competitive supplier – utilities tend to procure electricity for default service customers under short-term contracts.

These contracts are often for full-requirements products, meaning that the wholesaler supplies not only the electricity, but also other services that are required to deliver electricity to customers, such as capacity and ancillary services.

Under these fixed-price full-requirements contracts, the wholesale suppliers are often required to deliver RECs to meet the portion of the utility's RPS obligation associated with the load being served. This essentially shifts the RPS obligation from the distribution utility to the wholesale electric supplier. This scenario has unfolded in a number of states.

In New Jersey, for example, default service load is procured by the state's investor-owned utilities through a process known as the basic generation service auction (BGSA), a centralized, declining clock auction designed to provide default ratepayers with competitive market-based rates.

Bidders participate by offering full-requirements electricity products, which include energy, capacity, ancillary services and RECs. This annual auction is conducted in approximately 100 MW tranches, with the utilities procuring one-third of their load for the subsequent three years. The stag-

Eastern Restructured States Electricity Demand And RPS Comparison

State	2007 Loa	R 5 Requirement
Maine	11,860,202	10% by 2017
New Hampshire	11,235,856	16% by 2025
Massachusetts	57,138,822	15% by 2020
Connecticut	34,129,107	[illegible]
Rhode Island	8,013,022	16% by 2020
New York	148,177,827	[illegible]
New Jersey	81,934,334	20% by 2021
Pennsylvania	151,572,950	8% by 2021
Maryland	65,390,660	18% by 2022
Delaware	11,860,202	[illegible]
District of Columbia	12,110,185	20% by 2020
Ohio	161,770,827	12.5% by 2025
Michigan	109,296,749	10% by 2015
Illinois	146,055,151	25% by 2025

Source: Energy Information Administration, Electric Power Annual 2007, State Data Tables www.dsireusa.org. Note: RPS percentages indicate Tier 1 (renewable) resources only
*New renewables only

gered three-year approach is used to ensure that utilities' default service customers are supplied electricity at market rates, while reducing the impact of year-to-year price volatility.

New Jersey's RPS has been in effect since 2004 and requires 17.88% of retail sales to be met through renewables, culminating in 20% renewables by 2021.

Though the number can vary due to retail switching, approximately 75% of the load served in New Jersey is allocated via the BGSA process, meaning that this percentage of the state's RPS requirement is met by wholesale electric suppliers that have a known obligation that extends, at most, three years into the future.

The short-term nature of the procurement provides these suppliers limited incentive to enter into REC contracts longer than three years, especially if they believe there is a chance that REC prices could fall.

Pennsylvania's RPS requires retail suppliers to acquire 8% renewables by 2021. The state's utilities – some of which are not yet obligated to comply with the RPS, as of December 2009 – will be required to procure energy capacity and ancillary services to serve their default service load. Similar in many ways to New Jersey, Pennsylvania's utilities will likely undertake a staggered competitive auction process to acquire full requirements, including RECs.

Unlike New Jersey, each Pennsylvania utility will likely have slightly different procurement plans. However, it is expected that they will procure a large portion of their full requirement load in staggered one- and two-year contracts with a small percentage of spot-market purchases. This expectation has been reinforced by the structure of the procurement plans filed by PPL Corp. and PECO, two of Pennsylvania's largest utilities. Utilities or wholesale suppliers would purchase RECs in increments that reflect the terms of the default service procurements.

Massachusetts, which has a 15% by 2020 RPS, has adopted a default service procurement approach similar to those in New Jersey and Pennsylvania. The Massachusetts Department of Public Utilities requires that the state's default service load be procured by the regulated utilities through competitive solicitations. Procurement is done by customer groups (residential, commercial and industrial) and by the location of the load at fixed monthly prices for residential and commercial customers.

While there is some minor variation among utilities, each one puts forward a request for proposals for all requirements on a periodic basis. Supply for residential or commercial classes of default service customers are procured on a three- to 12-month forward basis, while supply for default service industrial customers is procured quarterly. Some of the state's utilities, such as NSTAR, have procured RECs for default service customers separately from electricity, and the terms of these procurements tend to be no more than two years.

Regardless of exactly how default service load is procured, there are various ways the wholesale electric suppliers can manage RPS compliance exposure. At one end of the spectrum, they can enter into long-term bundled power purchase agreements or REC-only contracts. Often, in restructured markets, the supply of long-term contracts for RECs exceeds contracted demand. Such an event is commonly known as being "long RECs."

At the more risk-averse end of the spectrum, wholesale suppliers can "back-to-back" their RPS obligation by buying renewable power or RECs for a volume and term that match the requirement under default service contracts.

Given the perceived risks of being long RECs and potentially not having a market to sell supply in the future, many wholesale suppliers will lean toward the latter option, especially if REC prices are high.

Approximately half the load in many restructured markets is contracted through default service procurements, creating a substantial bias against long-term off-take contracts. This bias makes it difficult for owners of renewable generation to hedge their exposure to power and REC price risk, discouraging the development of renewable capacity and, potentially, impeding the achievement of state RPS targets.

Notably, retail suppliers face a similar dilemma when serving the customers who have made the decision to switch over from default service. For this portion of a state's load, which can be as much as 50%, most customers are committed under contracts with competitive electric suppliers that can be even shorter in duration than the default service wholesale contracts. This means that, if anything, the bias toward short-term contracting for renewables is even greater for the portion of the state's RPS-eligible load served outside of default service.

Option one

One option for dealing with the short-term bias is to mandate long-term procurements for the portion of a state's RPS target associated with default service load. Default service load makes up approximately 50% or more of the load in many restructured states. Much of this is residential or small commercial load, which has shown little tendency for migration to competitive suppliers.

In New Jersey, for example, only 12 of 3,329,704 residential customers were signed up with a competitive supplier as of early 2009. In Massachusetts, over 80% of the residential and small commercial load was being served by default service in June 2009.

For those utility territories in Pennsylvania where generation rate caps have expired, roughly 10% to 20% of residential load has switched to a competitive supplier. These statistics are consistent with results elsewhere, and although it is certainly possible that more switching could occur in the future, it is highly likely that a meaningful portion of residential and small commercial load – and the associated RPS obligation – will remain with the default service providers for the foreseeable future.

With this in mind, it is reasonable to suggest that some percentage of the RPS for default service load could be procured under long-term contracts without the utilities incurring significant risk that load will migrate to the competitive market and leave them with a REC surplus. While this solution would, at best, result in long-term contracts for half of a state's RPS target, it would also establish useful long-term price signals and help inspire confidence throughout the market that the state is committed to achieving its RPS targets.

The details of these procurements would, of course, be very important. For instance, contracts would need to be "firm" and require sellers to provide the utility with adequate assurance that it would be able to meet its obligations over the term of the contract. If the contracts are for RECs only, they should be product-based, rather than project-based. A product-based contract is one for any RECs that would meet utilities' RPS requirement, while a project-based contract is tied to a specific generation facility.

Product-based contracts are beneficial for a few reasons. First, they guard against the possibility that specific facilities will fail to get built or will underperform over the life of the contract. This problem has occurred in RPS markets where project-specific contracts have been relied upon to meet compliance targets, such as in California and New York.

Product-based contracts also provide the seller with the flexibility to source from any eligible facility or portfolio of facilities. Along with this flexibility comes the responsibility to effectively manage development and production risk, and the contractual obligation to pay liquidated damages to the utility in the event that the contracted volumes are not delivered.

Product-based procurement also increases the universe of creditworthy counterparties eligible to participate in long-term REC procurements, because the counterparties will not need to own generation or be locked into long-term renewable energy contracts at the time of the procurement. Another benefit of product-based procurements is the facilitation of a secondary REC market, which is likely to increase liquidity and price transparency and generally foster a more efficient market for renewable energy.

Under a product-oriented regime, RPS-obligated entities should not have the option of using contracts to demonstrate compliance; it should be the RECs themselves that are the sole means of demonstrating compliance.

To the extent that RECs are not obtained in the necessary volumes, irrespective of contract performance, the utilities should be forced to pay noncompliance penalties. If noncompliance is the fault of the utility's supplier, then these penalties will effectively be borne by the supplier in the form of liquidated damages, shielding both the utility's ratepayers and shareholders from noncompliance risk.

Two perceived risks associated with long-term REC procurements for default service load are over-procurement and poor market timing. One way to deal with the problem of over-procurement is to require utilities to have a plan filed with the commission that provides the utility with a means of reselling excess RECs and refunding the ratepayer for the cost of those RECs.

There is still the chance that the utility will be reselling these RECs at a lower price than the price at which they were purchased, thus leaving the utility with a stranded cost that must be paid by the remaining default service customers or the utility's shareholders. To the extent that an RPS market allows RECs to be banked for use in future compliance years, over-procurement as a result of long-term REC contracts could be mitigated by simply reducing the magnitude of future purchases.

Public utility commissions (PUCs) or state legislatures could also give utilities additional banking rights for RECs procured under long-term contracts to mitigate the risk of possibly having to resell the RECs into a potentially weak market.

The risk of poor market timing can be dealt with by staggering procurements, which results in dollar-cost averaging. This can reduce the risk that utilities commit to long-term contracts for the bulk of their load when prices are relatively high. This is an approach that is already being employed, albeit for shorter terms, when utilities procure electricity for their default service load. If these design elements are considered, it is likely that long-term renewable energy contracts could be executed without undue harm to ratepayers or shareholders and at a great benefit to a state's renewable energy goals.

Option two

One of the shortcomings of the aforementioned option is that long-term contracts would be used to meet a fraction of a state's RPS requirement. While this would be beneficial to the market and an improvement over the status quo, it would mean that approximately half of all RECs procured to meet a state's RPS would still be purchased under short-term contracts or on the spot-market.

This would imply that the revenues associated with thousands of megawatts of renewable energy capacity would be subject to market volatility. As mentioned earlier, developers and investors would require higher rates of return to compensate for taking this type of market risk – if they invest at all. As a result, the cost of achieving state RPS targets and, thus, the cost of the program to the ratepayer, would be higher.

A way to increase the percentage of RPS compliance that can be secured through long-term contracts would be to shift the entire RPS obligation to the distribution utility. For one, this would mitigate the issue of default service load migrating to competitive suppliers. The utilities would then be able to implement an approach much like the one previously discussed, but for a much higher percentage of a state's RPS requirement.

In the event that a state's utilities were to meet large percentages of their expected default service RPS obligation through long-term contracts, the existence of competitive electric suppliers would likely mean that a majority of the RPS demand would still be met through shorter-term or spot-market transactions, ensuring that a competitive and liquid REC market is sustained.

Again, this is almost certainly an improvement over the status quo, but not likely to be the most cost-effective way to meet RPS targets. Conversely, if utilities are responsible for meeting 100% of a state's RPS obligation, the percentage of renewables locked into long-term contracts would grow to 75%. This would be a dramatic improvement over the status quo and would help ensure that states meet their renewable energy goals at the lowest possible cost.

For the remaining 25% of RPS demand, the utilities could procure RECs through short-term solicitations approved by the state's PUC. Concerns about balancing REC supply and demand in a given year could be addressed through banking provisions or pre-approved processes for small-volume transactions, as discussed above.

RPS programs in restructured electricity markets are often designed in a way that is not conducive to long-term contracting. As a positive sign that this problem is starting to be recognized by regulators, some states are considering initiatives aimed at promoting long-term contracts. For instance, the Massachusetts Green Communities Act, passed in 2008, included a requirement that utilities offer competitive long-term procurements (10 to 15 years) for power and that RECs be generated by in-state RPS-eligible sources.

While these early and largely uncoordinated efforts suggest that the issue is slowly moving ahead, it is likely that a more concerted effort to encourage long-term contracts will be required. Arguably, mandating or otherwise incentivizing distribution utilities to enter into long-term contracts – preferably for bundled energy and RECs – is the approach that is most likely to be successful.

Over the next few years, many state RPS targets will ramp up significantly, and it is important that regulators move quickly to put provisions in place to reduce the risk of incurring higher-than-necessary compliance costs – or, worse yet, non-achievement of RPS targets. **NWP**

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EXHIBIT B

OCC Set 1
DR-15

Case No. 11-411-EL-ACP

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 4928.64(C)(4) of the Ohio Revised Code and Section 4901:1- 40-06 of the Ohio Administrative Code

RESPONSES TO DATA REQUESTS

OCC Set 1 - 15 What is the Company's basis for the statement in the Force Majeure Application on page 5, paragraph 9, that "...the capital investment in these tough economic times has made it difficult for a number of customers to install a renewable energy resource on their property."

Response: Out of the millions of customers in the Companies' three Ohio territories, only 143 facilities had completed interconnection agreements with the Companies' distribution systems. Given the small number and based on the economic climate, it appears that there is a correlation between the economic climate and the fact that customers are not installing renewable energy resources on their properties.

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RESPONSES TO DATA REQUESTS

OCC Set 1 - 8 For distributed generation facilities using solar photovoltaic systems to generate electricity in the FirstEnergy EDUs service territory:

c. How many are interconnected with the FirstEnergy EDUs distribution systems?

b. How many of these facilities do the FirstEnergy EDUs have agreements with to purchase RECs?

c. How many RECs do the FirstEnergy EDUs estimate they will purchase from these facilities?

d. What is the total KW capacity interconnected with the FirstEnergy EDUs distribution systems?

Response:

a. As of 12/31/2010 143 solar systems had completed interconnection agreements with the FirstEnergy Ohio EDU's.
b. 8 facilities in 2010
c. 51 RECs of 2010 vintage were purchased from the 8 facilities
d. As of 12 31/2010 the 143 facilitates referenced in a. immediately above had 5,901.1 kW of solar capacity interconnected with the FirstEnergy Ohio EDU's. Please see OCC Set 1 DR-8 Attachment 1.

Case No. 11-411-EL-ACP

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 4928.64(C)(4) of the Ohio Revised Code and Section 4901:1- 40-06 of the Ohio Administrative Code

RESPONSES TO DATA REQUESTS

OCC Set 1 - 7

Do the FirstEnergy EDUs plan to continue offering the Residential REC purchase program, approved in PUCO Case Number 09-551-EL-UNC, after the current approval period expires?

a. If no, why not?

b. If yes, what modifications will be made to the program?

Response: No. Approval of this program came in Case No 08-935-EL-SSO and the program had an end date of 5/31/2011. The PUCO did not order an extension of the Residential REC purchase program in Case No 10-388-EL-SSO.

Residential customers will be able to participate in future RFP's that will be held for the FirstEnergy Ohio EDU's. FirstEnergy Ohio EDU's intend to contact residential customers who have solar photovoltaic generating systems that are interconnected with the FirstEnergy EDUs distribution systems with information regarding future RFP's.