

FILE

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of Direct Energy Business :  
Solutions LLC For a Waiver From : Case No. 11-2447-EL-ACP  
Meeting the 2010 Ohio ACP Sited Solar :  
Energy Resource Benchmarks. :

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**INITIAL COMMENTS**  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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On April 14, 2011, Direct Energy Business LLC ("DEB") filed an application seeking waiver of the requirement to purchase Ohio-sited solar renewable energy credits (S-RECs) for the 2010 calendar year.

On May 5, 2011, the attorney examiner in this case established a deadline for the submittal of comments and reply comments. This schedule was subsequently revised<sup>1</sup> to include the following deadlines:

- Initial comments filed by June 15, 2011
- Reply comments filed by June 29, 2011

Staff files these comments in accord with the revised schedule established in this proceeding.

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<sup>1</sup> *In re Direct Energy Business Solutions*, Case No. 10-2447-EL-ACP (Entry) (May 26, 2011).

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## **A. Summary of DEB's Filing**

In its filing, DEB states that it satisfied a portion of its 2010 solar obligation but that it was unable to obtain any solar renewable energy credits (S-RECs) from Ohio facilities. DEB indicates that it contacted several brokers<sup>2</sup> in its search for Ohio S-RECs, but that the brokers were unable to locate any Ohio S-RECs priced below the alternative compliance payment (ACP) of \$400/MWh.<sup>3</sup> DEB argues that, in light of its “good faith effort to secure Ohio S-RECs,” the shortfall should be added to their 2011 compliance obligation rather than being satisfied through an assessment of the ACP.<sup>4</sup> DEB believes that delaying this requirement to 2011 will do more to stimulate construction of Ohio solar facilities than would an assessment of the ACP.<sup>5</sup>

## **B. Staff Analysis, Conclusions, and Recommendations**

Ohio Administrative Code (O.A.C.) Section 4901:1-40-06 allows entities to seek a *force majeure* determination from the Commission, for all or part of a renewable or solar energy benchmark. A party making such a request must show that it pursued all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, and long-term contracts. Additionally, an assessment

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<sup>2</sup> Evolution Markets, Inc.; ICAP United, Inc.; TFS Energy, LLC; Spectron Energy, Inc.

<sup>3</sup> *In re Direct Energy Business Solutions*, Case No. 10-2447-EL-ACP (Application at 2) (April 14, 2011).

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

of the availability of qualified in-state resources, as well as qualified resources within the territories of PJM and the MISO must be included as part of any filing seeking a *force majeure* determination from the Commission.<sup>6</sup>

Staff's analysis considers that O.A.C. Section 4901:1-40-06 assigns to the requesting party the burden of proof to demonstrate that it pursued all reasonable compliance options prior to seeking a *force majeure* determination. While DEB indicates that it contacted several brokers, its filing does not indicate if it pursued any of the other options enumerated in the rule. Based on the information in DEB's filing, Staff cannot confirm that DEB satisfied the requirements in O.A.C. Section 4901:1-40-06(A)(1) to support a *force majeure* determination. Therefore, Staff concludes that DEB failed to demonstrate that a *force majeure* determination is warranted.

Also, implicit in DEB's procurement strategy is a position that the solar ACP represents a price ceiling when considering available S-RECs. Specifically, DEB indicated the following in its filing:

None of the brokers contacted were able to locate any 2010 qualified OHS-RECs offered at prices below the Ohio solar Alternative Compliance Payment (ACP) rate of four hundred dollars (\$400) per S-REC.<sup>7</sup>

Staff is not aware of any statutory or regulatory requirement that establishes the applicable ACP as a pricing threshold that cannot be exceeded. Staff acknowledges that

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<sup>6</sup> Ohio Admin. Code § 4901:1-4-06 (A)(1) and (2) (West 2011).

<sup>7</sup> Ohio Rev. Code Ann. § 4928.64(C)(2)(a) (West 2011).

the statute includes language<sup>8</sup> in which an electric distribution utility or electric services company could potentially be excused of full compliance if certain cost increases are experienced, however DEB has not indicated that this portion of the statute was near being triggered.

Staff agrees that RECs and S-RECs should not be pursued at any cost, but Staff does not believe that the ACP automatically represents a price ceiling. The statutory language<sup>9</sup> on *force majeure* talks of RECs or S-RECs being “reasonably available.” Rather than using the ACP as a *de-facto* measure of “reasonably available,” Staff proposes an approach in which any entities with a compliance obligation enter into an informal dialogue with Staff in the event that REC or S-REC prices appear to exceed the applicable ACP by a certain amount (*i.e.*, 125% of the ACP). While the Staff could not offer any binding assurances during such dialogues, it would afford an opportunity for the issues to be discussed prior to a commitment in one direction or another.

Also, the disposition of DEB’s 2009 solar shortfall, which the Commission determined<sup>10</sup> should be added to the 2010 solar requirement, is not clearly addressed in the filing. Staff believes that DEB’s solar shortfall from 2009, including both in-state and other S-RECs, remains outstanding and need be accounted for in this case. Although DEB

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<sup>8</sup> Ohio Rev. Code Ann. § 4928.64(C)(3) (West 2011).

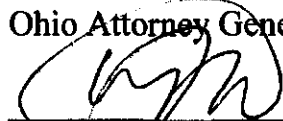
<sup>9</sup> Ohio Rev. Code Ann. § 4928.64(C)(4)(b) (West 2011).

<sup>10</sup> *In the Matter of the Application of the Retail Electric Supply Association for an Amendment to the 2009 Solar Energy Resource Benchmark Pursuant to Section 4928.64(C)(4), Revised Code*, Case No. 10-428-EL-ACP (Finding and Order) (April 28, 2010).

indicates that it "was able to purchase all of its 2010 requirements of S-RECs," it does not appear that DEB's efforts were inclusive of the 2009 shortfall. Therefore, Staff encourages DEB to clarify this point in its reply comments.

Respectfully submitted,

**Michael DeWine**  
Ohio Attorney General



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## **PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing **Initial Comments** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following Parties of Record, this 15<sup>th</sup> day of June, 2011.



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**William L. Wright**  
Assistant Attorney General

### **Parties of Record:**

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