

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Alternative Energy)
Portfolio Status Report for 2012 of Direct) Case No. 13-891-EL-ACP
Energy Services, LLC.)

FINDING AND ORDER

The Commission finds:

- (1) Direct Energy Services, LLC (Direct Energy Services or Company) is an electric services company as defined in R.C. 4928.01(A)(9) and, as such, is subject to the jurisdiction of this Commission.
- (2) R.C. 4928.64(B)(2) establishes benchmarks for electric services companies to acquire a portion of their electricity supply for retail customers in Ohio from renewable energy resources. Half of the renewable benchmark must be met with resources located within Ohio (in-state renewable benchmark), including a portion from solar energy resources (solar benchmark), half of which must be met with resources located within Ohio (in-state solar benchmark). The specific renewable compliance obligations for 2012 are 1.50 percent (which includes the solar requirement) and 0.06 percent for solar. R.C. 4928.65 provides that an electric utility or electric services company may use renewable energy credits (RECs) and solar energy credits (SRECs) to meet its respective renewable energy and solar benchmarks. Ohio Adm.Code 4901:1-40-01(BB) defines a REC as the environmental attributes associated with one MWh of electricity generated by a renewable energy resource, except for electricity generated by facilities as described in Ohio Adm.Code 4901:1-40-04(E).
- (3) Ohio Adm.Code 4901:1-40-05(A) requires each electric services company to annually file by April 15 an annual alternative energy portfolio status report (AEPS report), unless otherwise ordered by the Commission. The AEPS report must analyze all activities the company undertook in the previous year in order to demonstrate how pertinent alternative energy portfolio benchmarks have been met. Staff then conducts an annual compliance review with regard to the benchmarks.

- (4) On April 12, 2013, Direct Energy Services filed its 2012 AEPS report, pursuant to R.C. 4928.64 and Ohio Adm.Code 4901:1-40-05(A), with a motion for protective order. With respect to its motion for protective order, Direct Energy Services seeks to prevent disclosure of its calculation of its REC requirements and compliance results for 2012, including supporting documentation for RECs and SRECs obtained, as well as its ten-year forecast of sales and REC requirements. Direct Energy Services asserts that this data, if made public, could harm its ability to compete in Ohio's retail electric generation marketplace. The Company states that it has taken measures to maintain the confidentiality of this data, and requests that the redacted information be treated as confidential.
- (5) With respect to its motion for protective order, Direct Energy Services seeks to prevent disclosure of its calculation of REC requirements for 2012 on the first page of its AEPS report, and its ten-year forecast of sales and REC requirements on the second page of its AEPS report, as well as supporting documentation showing the facility names, certificate serial numbers, and Ohio certificate numbers for the RECs and SRECs obtained. Direct Energy Services asserts that this data, if made public, could harm its ability to compete in Ohio's retail electric generation marketplace. The Company states that it has taken measures to maintain the confidentiality of this data, and requests that the redacted information be treated as confidential.
- (6) R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of R.C. Title 49. R.C. 149.43 specifies that the term "public records" excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373 (2000). Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law. R.C. 1333.61(D) defines a trade secret as information, including the whole or any portion or phase of any scientific or technical

information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). In that case, the Court also listed six factors for analyzing a trade secret claim: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Plain Dealer*, 524-525, 687 N.E.2d 672, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131, 134-135, 7 OBR 165, 169, 454 N.E.2d 588, 592. Further, an entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy. *See, Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 181, 707 N.E.2d 853, 862.

- (7) Applying the statutory requirements and the Court's six-factor test discussed in *Plain Dealer* and *Besser*, the Commission has held that motions for protective orders with respect to AEPS reports should be granted for projected data, but denied for any current or historical data that has been publicly disclosed, such as a company's historical intrastate sales or REC requirements that are a mathematical function of publicly-reported sales. *See, e.g., Direct Energy Services, LLC*, Case No. 12-1233-EL-ACP, Finding and Order (December 11, 2013) at 5-6.

- (8) With respect to the instant case, we find that the Company's motion should be denied with respect to its calculation of REC requirements and compliance results for 2012 shown on the second page of its AEPS report. The Company's intrastate sales total for 2012 is publicly available in its annual report to this Commission for fiscal assessment, and the corresponding REC requirements can be calculated from this published data. Further, the Company's results in achieving or missing its benchmarks is the primary focus of the AEPS report and these reports are docketed to provide, rather than discourage, public access. However, we also find that Direct Energy Services' motion should be granted with respect to its ten-year forecast of sales and REC requirements shown on the third page of its AEPS report, as well as the supporting documentation for the RECs and SRECs obtained shown on the sixth page of the report, as the Company asserts that this information has not been publicly disclosed. Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded to the redacted materials on the third and sixth pages of the Company's AEPS report for a period ending two years from the issuance of this order. Any motion to extend such period of confidential treatment must be filed at least 45 days in advance of the expiration date, pursuant to Ohio Adm.Code 4901-1-24(F), or this information may be released without prior notice.
- (9) While we are granting the Company's motion with respect to the supporting data as discussed above, Direct Energy Services is advised that the submission of such data is not necessary for Staff's review, and need not be included in future AEPS reports.
- (10) On February 14, 2014, Staff filed its review and recommendations of the Company's AEPS report. Staff finds that Direct Energy Services accurately calculated its baseline and compliance obligations for 2012. Further, Staff reviewed the Company's reserve subaccount data with the PJM EIS Generation Attribute Tracking System (GATS) and concluded that Direct Energy Services has satisfied its compliance obligations for 2012. Staff also confirmed that the RECs and SRECs originated from generating facilities certified by the

Commission and were associated with electricity generated during the applicable timeframe. Therefore, Staff recommends that Direct Energy Services be found to be in compliance with its 2012 renewable energy compliance obligations. Finally, Staff recommends that, for future compliance years in which the Company utilizes GATS to demonstrate its Ohio compliance efforts, Direct Energy Services initiate the transfer of the appropriate RECs and SRECs to its GATS reserve subaccount between March 1 and April 15 so as to precede the filing of its annual AEPS report with the Commission.

- (11) Upon review of the Company's AEPS report, as well as Staff's findings and recommendations, the Commission finds that Direct Energy Services is in compliance with its 2012 AEPS obligations. Accordingly, the Company's AEPS report for 2012 should be accepted as filed. The Commission also directs that, for future compliance years, Direct Energy Services initiate the transfer of the appropriate RECs and SRECs to its GATS reserve subaccount between March 1 and April 15, consistent with Staff's recommendations.

It is, therefore,

ORDERED, That the Company's AEPS report for 2012 be accepted as filed. It is, further,

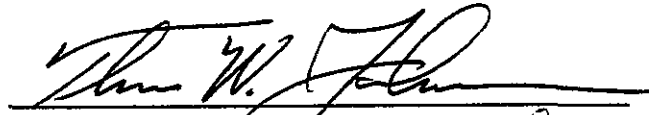
ORDERED, That Direct Energy Services' motion for protective order be granted for a period of two years from the issuance of this order with respect to the redacted materials on the third and sixth pages of its AEPS report filed under seal on April 12, 2013. It is, further,

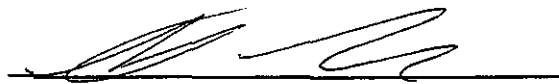
ORDERED, That Direct Energy Services' motion for protective order be denied with respect to the REC requirement calculations and actual compliance results for 2012 shown on the second page of its AEPS report. It is, further,

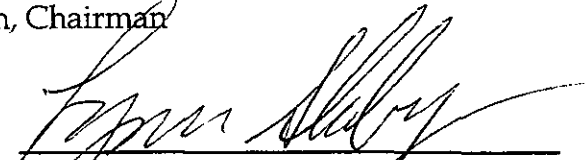
ORDERED, That, no sooner than 31 days after the issuance of this order, the Docketing Division shall release the second page of the Company's AEPS report filed under seal on April 12, 2013. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all parties of record.

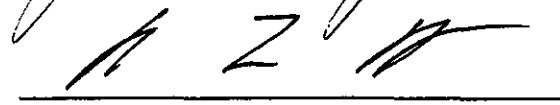
THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser


Lynn Slaby

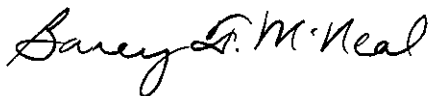

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Entered in the Journal

JUL 30 2014



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Secretary