

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbus Southern Power Company)	
for Amendment of the 2009 Solar)	Case No. 09-987-EL-EEC
Energy Resource Benchmark, Pursuant)	
to O.R.C. Section 4928.64(C)(4))	

)	
In the matter of the Application of)	Case No. 09-988-EL-EEC
Ohio Power Company for Amendment)	
Of the 2009 Solar Energy Resource)	
Benchmark, Pursuant to)	
O.R.C. Section 4928.64(C)(4))	

**COMMENTS IN OPPOSITION TO THE APPLICATION BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

I. Introduction

On October 26, 2009, the Ohio Power Company and the Columbus Southern Power Company (together, AEP or “the Companies”) filed the above-captioned Applications asking the Public Utilities Commission of Ohio (PUCO or Commission) to relieve the Companies of the 2009 Solar Energy Resource (SER) benchmarks required by Ohio Revised Code (O.R.C.) §4928.64. AEP claims “force majeure,” as explained in its Application. For the reasons below, the undersigned members of the Ohio Consumers and Environmental Advocates (OCEA) oppose AEP’s Application. OCEA asks this Commission to reject the Companies’ claim of force majeure, or in the alternative, require AEP to meet future commitments, including the development of additional solar resources.

II. Applicable Law and AEP's Application

Ohio law requires that solar energy resources shall account for at least 0.50% of the renewable energy generated in Ohio.¹ Utilities must begin developing solar resources in 2009 and meet annual statutory benchmarks until reaching the 0.50% level by 2025. O.R.C. §4928.64(B)(2) includes a chart setting the annual requirements for solar generation. In 2009, utilities must provide at least 0.004% of their renewable energy generation from solar resources.² Utilities may achieve the SER benchmarks by developing the solar generation directly or through the open market purchase of solar Renewable Energy Credits (RECs).³

If a utility cannot meet its SER benchmark it

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.⁴

In order to grant the force majeure application

the 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

¹ O.R.C. §4928.64(B)(2).

² *Id.*

³ O.R.C. §4928.64(B).

⁴ O.R.C. §4968.64(C)(4)(a).

PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.⁵

If a utility does not meet its SER benchmarks, and the PUCO does not grant a force majeure determination, the utility is subject to an “alternative compliance payment” (ACP). In 2009, the ACP is \$450 per megawatt-hour (MWh or MW hour) of solar capacity not obtained.⁶ Also in 2009, the SER requirement translates to AEP developing at least 1,826 MW hours of solar capacity or obtain 1,826 solar RECs.⁷

AEP asks the Commission to grant its Application under O.R.C. §4928.64(C)(4), and relieve the Companies from their 2009 SER benchmarks. AEP states it failed to obtain 1,670 solar RECs, or 91% of its 2009 requirement.⁸ In return for the force majeure determination, AEP suggests a higher benchmark for 2010.⁹ AEP sets forth several arguments to establish a force majeure; but none relieves the Companies of their statutory requirements.¹⁰

III. Argument

A. The Commission Must Properly Enforce the Force Majeure Standard

AEP’s Application is the first of its kind in Ohio. In this decision, the PUCO will set long-term precedent for future SER force majeure applications. The Commission should not consider applications seeking to excuse compliance with statutory mandates lightly. In order for the Commission to waive the 2009 SER benchmarks, AEP must prove that it “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

⁵ O.R.C. §4928.64(C)(4)(b).

⁶ O.R.C. §4928.64(C)(2)(a).

⁷ *Application* at 3.

⁸ See Case Nos. 09-987-EL-EEC and 09-988-EL-EEC, *Application* filed October 26, 2009 and *Responses to Staff Questions*, filed December 7, 2009.

⁹ *Application* at 6.

¹⁰ See *Application* at 2-5.

long-term contracts.”¹¹ Additionally, O.R.C. §4928.64(C)(4)(c) requires that the Commission determine that the necessary solar resources “are not reasonably available” to meet the 2009 SER benchmark. As explained below, the Legislature passed the SER benchmark in 2008 with a 2009 requirement. Had the Legislature wished to institute solar requirements in 2010, it would have written the statute as such. In its Application, AEP lists its efforts to meet its 2009 SER benchmark. AEP is under a requirement to obtain solar resources in 2009, and has been under that requirement since July 2008. A determination of “reasonably available” should require scrutiny of the Companies’ efforts to meet the statutory benchmark. AEP developed or purchased 156 MW hours of solar generation in 2009. However, it knew it would need over 1,800 MW hours. Based on the facts in this proceeding, the PUCO must find that the Companies could have obtained more solar resources and deny the Application.

AEP first points to the Commission’s delayed promulgation of O.R.C. §4928.64’s implementing rules in PUCO Case No. 08-888-EL-ORD as a reason why it failed to meet the 2009 benchmark on. Apart from the rules, O.R.C. §4928.64 became effective on July 31, 2008, formally putting AEP on notice of the requirements at that time. O.R.C. §4928.64(B) clearly delineates the benchmarks as annual and increasing requirements. The implementing rules did not prevent AEP from planning to meet a 0.004% benchmark in 2009. Additionally, AEP made no statement why the 08-888 rules contributed its inability to meet statutory requirements. Instead, AEP relies on generic “uncertainties.”¹² However, these “uncertainties” did not prevent AEP from taking the minimal actions it did. AEP’s basic failure to plan eighteen months in advance to meet a statutory benchmark, and not the PUCO’s rulemaking process, caused the shortfall.

¹¹ O.R.C. §4928.64(C)(4)(b).

¹² See *Application* at 2.

Next, the PUCO must reject AEP's argument that it attempted to meet the SER benchmark by developing two solar generating facilities plus an additional facility still under construction but not yet operational. The Companies have 140 kW of generating capacity, the equivalent of 143 MW hours, in operation.¹³ AEP also has an additional 10 MW under development at a facility in Wyandot County, but it will not generate electricity until at least April 2010.¹⁴ The sum total of these three facilities does not approach the 1,800 MW hours needed to comply with the statute. Developing these facilities is not a "good faith effort" to meet necessary benchmarks. AEP had no other facilities planned or under development. Given AEP knew of its 2009 SER benchmark since at least July 31, 2008, it had nearly 18 months to generate or obtain credits for over 1,800 MW hours of solar capacity. AEP fails to demonstrate why creating 143 MW hours of solar capacity over 18 months, when it needs 1,800 MW hours, constitutes a "good faith effort" to meet the SER benchmark. Consequently, the Commission should deny the Application.

Finally, AEP suggests that the market for solar RECs was too expensive and had insufficient supply to comply with the 2009 SER benchmark. Both arguments are unpersuasive. Under the statute, AEP has two choices; it can purchase solar RECs for the market price, or elect to pay the ACP of \$450 per REC.¹⁵ Consequently, the ACP caps the cost of solar RECs available in the market. Indeed, AEP purchased thirteen solar RECs on the open market for "\$450/REC plus transaction costs."¹⁶ AEP does not describe why it believes there is an "insufficient supply" of solar RECs. AEP merely makes a blanket conclusion that there is an

¹³ See AEP's Responses to Staff Questions, filed December 7, 2009.

¹⁴ *Application* at 4.

¹⁵ O.R.C. §4928.64(C)(2)(a).

¹⁶ *Application* at 4.

“insufficient supply” of solar RECs in the marketplace.¹⁷ AEP made only a limited showing, through the RFP explained below, of the sources it investigated to obtain the necessary RECs, the cost of the RECs, or any other reason for an “insufficient supply.” Consequently, AEP did not make a “good faith effort” to find solar RECs.

Thus, AEP fails to demonstrate that it could not find RECs to purchase or that the RECs cost more than the \$450 ACP price. Moreover, as explained below, AEP could have used long-term contracts or distributed generation in order to help meet the 2009 benchmark. Given that it did not, this Commission cannot conclude that AEP made a “good faith effort” to comply with O.R.C. §4928.64.

B. AEP Could Have Sought Long-Term Contracts

Before granting a force majeure 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.*”¹⁸ The Legislature intended to encourage the development of a robust solar industry in Ohio. However, that industry will not develop unless there are financing tools available to induce the necessary investment into building and operating medium and large-scale facilities. Medium to large-scale solar resource generating facilities will not develop unless there is a firm source of financing. Like other capital projects, solar generating facilities have a “return on the investment.” The return on investment for a solar facility is the energy produced and the solar RECs it generates. The solar generation industry will not construct generation facilities without some assurance that a utility will purchase the

¹⁷ *Application* at 4.

¹⁸ O.R.C. §4928.64(C)(4)(b) (emphasis added). Note that the statute does not define “long term”.

solar RECs. Utilities that seek current year solar RECs do not provide the necessary market stability to induce the solar industry to construct and operate solar farms.

AEP entered into only one renewable energy purchase agreement that is longer than one year—the 20-year energy purchase agreement for the Wyandot facility that will be operational in 2010.¹⁹ Additionally, in its “response to Staff questions,” AEP provided the RFP it used to seek solar RECs to meet the 2009 SER benchmark.²⁰ In that RFP, the Companies sought solar RECs generated between July 31, 2008 and December 31, 2009.²¹ AEP did not indicate it was willing to purchase 2009 RECs in conjunction with future RECs, similar to the Wyandot purchase agreement. AEP has the ability to enter into long-term arrangements, as the Wyandot contract shows, but it chose not to investigate those options. Other than Wyandot, AEP did not make any effort, much less a “good faith effort,” to seek out long-term contracts to purchase solar RECs.

AEP waited until July 15, 2009 to issue its RFP to purchase 2009-vintage solar RECs, thus failing to provide enough time for operators of solar farms to build operational facilities. AEP sought current year solar RECs with only minimal attention to long-term arrangements. Entering into one 20-year agreement for a facility that will not operate until April 2010 is not a “good faith effort” to meet the 2009 SER benchmark. While OCEA does not take a position concerning the definition of a “long-term contract,” certainly an RFP seeking current year solar RECs does not meet the definition of “long-term.”

¹⁹ *Application* at 4.

²⁰ *See Responses to Staff Questions* at #4.

²¹ *See generally, Request For Proposals For up to 1,800 Renewable Energy Certificates (RECs) Associated with electricity generated between July 31, 2008 and December 31, 2009 from one or more solar Renewable Resources*, available at:

https://www.aepohio.com/global/utilities/lib/docs/b2b/rfp/2009solarrfp/AEP_Ohio_Solar_REC_RFP_July-14-2009.pdf.

C. AEP Failed to Adequately Encourage the Development of Distributed Generation

Like long-term contracts, the Companies could have made a “good faith effort” towards its SER benchmark by encouraging wider use of customer-sited systems. AEP does not explain its effort to establish residential solar systems as related to its effort to meet its 2009 SER benchmark. It merely relies on the general statement that, “customers do not have utility-grade metering in place and have not yet sought the required certification from the Commission for their facilities.”²²

In contrast to AEP, utilities around the country have offered to purchase solar RECs, in the form of upfront rebates and performance based incentives, to encourage customers to build residential systems. Such incentives encourage customer investment into solar energy generation. Additionally, customer-sited systems are faster to deploy than large-scale solar farms. These “behind the meter” solar systems do not require complex and time consuming permitting, contracting, or financing requirements. The Companies stated that they “explored the possibility” of purchasing solar RECs from customers, but for reasons involving non-utility grade meters and Commission certification of these resources, did not follow-through. However, AEP does not explain how it determined that obtaining solar RECs from its customers was not feasible or how the Companies tried to induce customer participation. It merely relies on the general statement that customers had the wrong “grade” meters or did not obtain Commission certification. The Commission should reject AEP’s argument that customers lacked appropriate meters or failed to file certification applications for residential solar resources as a reason to grant its Application.

²² *Application* at 5.

Furthermore, AEP's Application serves to deprive Ohio of the economic benefits a robust residential solar program would provide.²³ The economic benefits of customer-sited systems are particularly important in Ohio where efforts that stimulate job and economic growth are critically important. The 0.50% solar requirement, when filled with a large portion of customer sited solar projects, will result in a measured and stable solar industry. Fostering the solar industry leads to competition among industry participants resulting in a downward pressure on prices—making additional solar projects more cost efficient. By contrast, when utilities meet solar obligations by single, large projects, a boom and bust industry cycle results, benefiting neither economic growth nor ratepayers.

Finally, solar energy generates more jobs per megawatt of power installed, per unit of energy produced, and per dollar of investment, than the fossil fuel-based energy sector.²⁴ Moreover, customer-sited systems create more jobs per megawatt than large utility scale solar systems. A September 2009 Navigant Consulting report found that residential solar installations created 25 direct jobs per MW installed. By comparison, larger, central installations create 9.5 direct jobs per MW.²⁵ Jobs will not materialize without the utility encouraging the development of residential sited solar systems.

AEP could have taken a more active role in encouraging its customers to consider residential solar projects. Such efforts would have resulted in progress towards meeting the SER benchmark as well as economic benefits. Instead, the Companies point to meters and the customer's responsibility to file certification applications. AEP could have encouraged

²³ O.R.C. §4928.64(B)(3) states that "At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state." The Legislature intended there to be economic development in Ohio in conjunction with renewable energy development.

²⁴ Kammen, Daniel, Kamal Kapadia and Mattias Fripp. *Putting Renewables to Work: How Many Jobs Can the Clean Energy Industry Generate?* University of California, Berkeley, 2006.

additional distributed generation, and such efforts were certainly within the Companies' control. Consequently, AEP did not exert a "good faith effort" to meet its SER benchmark with regard to distributed generation of solar resources. For these reasons, the Commission should deny AEP's Application.

D. If The Commission Grants the Application, it Should Impose Additional Requirements Upon the Companies

OCEA maintains that AEP did not meet the threshold for the Commission to grant the Companies' Application and should therefore be subject to the ACP. However, if the PUCO decides to grant the Application, the PUCO should subject AEP to increased future requirements. In fact, AEP offered to increase its 2010 SER compliance benchmark in order to recover the solar resources not developed in 2009.²⁶ However, this offer does not go far enough given the circumstances, including AEP's non-compliance this year.

The Legislature's intent with O.R.C. §4928.64 is clear: it directs utilities to begin developing solar generation resources in 2009. Because AEP did not spend the resources necessary to achieve the 2009 SER benchmark, it delayed its costs to develop solar generation. The delayed implementation of solar resources results in financial savings to the Companies even if AEP expends resources in the future through the "time value of money." AEP should not financially benefit from the delayed "time value" of pushing solar resource development into the future. Even with its offer to recover lost solar resources in 2010, AEP stands to benefit from not implementing such resources in 2009 through the savings from delayed implementation. To account for AEP's benefit of delayed implementation, the Commission should accept AEP's offer to recover the lost generation from 2009 in 2010 and require the Companies to meet

²⁵ *Capturing the Solar Spectrum*, Navigant Consulting, October 2009, available at: <http://www.navigantconsulting.com/emarketing/Documents/Energy/SolarPower09NavigantConsultingExecBreakfastBriefingFinal.pdf>

additional requirements. This way, the Companies will meet the intent of O.R.C. §4928.64 by developing all of the solar resources the Legislature required. The Commission should also require the Companies to develop solar resources in excess of the 2009 benchmark. Based on its own numbers, AEP should generate 156 Ohio-based solar REC's in 2009.²⁷ To account for the delayed implementation, the Commission should require AEP to generate 1,670 Ohio-based solar REC's, as the Companies offer, plus the 2010 baseline times 0.060% in 2010. AEP, however, may elect to use the recovered 1,670 solar REC's for over compliance or early compliance in a future year. In this way, AEP is compensating for the delayed development of the 91% of its 2009 requirements. AEP's offer to recover in 2010 the 2009 SER benchmark it did not develop, is merely meeting the statutory requirements, but a year late. If the Commission grants AEP's Application, without subjecting the Companies to the ACP, AEP stands to benefit from delaying solar resource implementation. By requiring AEP to go beyond its SER benchmarks as outlined above, the Commission ensures that AEP will not receive a financial windfall from delaying solar resource development.

Furthermore, because AEP could have expended additional efforts in 2009 to encourage distributed generation of solar resources, and because AEP stated that it is in a better position to revisit distributed generation with its customer base, the Commission should also require AEP to obtain specific solar resources from distributed generation in the future. To achieve this, the Commission should require the Companies to implement a standard offer program to obtain no less than 30% of its solar resources from residential generation.

Finally, the Commission should require AEP to seek out and establish long-term contracts to create solar generating capacity. The statute identifies long-term contracts as a tool

²⁶ *Application* at 6.

²⁷ *See Responses to Staff's Questions* at 1.

for meeting the SER benchmarks. The Commission should require the use of this statutory tool. Without long-term contracts to encourage financing, solar facilities will be slow to develop.

In sum, the Companies have not made the necessary showing that allows the Commission to grant the Application. AEP made only minimal effort over the last 18 months to create, encourage, or seek out solar generating capacity to meet its 2009 SER benchmark. The Legislature intended there to be a robust solar industry in Ohio with development beginning in 2009. The Commission should not permit the use of force majeure applications without a significant showing of the efforts and accomplishments. The Companies established only two functioning solar facilities since July 31, 2008, have made no showing as to the availability or cost of solar RECs on the open market, and have made no showing as to its efforts to enter into long-term contracts with developers or distributed generation with its residential customers. Consequently, AEP's attempt to establish force majeure falls short. That said, should the Commission grant the Application and relieve AEP of a majority of its 2009 solar SER benchmark, the Commission should do so only with increased requirements placed onto the Companies for additional development in the future.

IV. Conclusion

Because AEP has not met the requirements to meet O.R.C. §4928.64, the Commission should not excuse the Companies from complying with the solar SER benchmarks. In the alternative, should the Commission grant the Application, it should require AEP to meet its 2009 solar SER benchmark in 2010 in addition to other requirements that exceed statutory mandates.

Respectfully submitted,

/s Michael E. Heintz

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Intervene has been served upon the following parties, via regular U.S. mail, postage prepaid, this 15th day of December 2009.

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Summary: Comments in opposition to AEP's application for a waiver of its 2009 Solar Energy Resource Benchmarks electronically filed by Mr. Michael E Heintz on behalf of Ohio Consumer and Environmental Advocates