

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

ENTRY

The Commission finds:

- (1) Pursuant to Amended Substitute Senate Bill No. 221 (SB 221), benchmarks were established for electric utility companies to acquire a portion of the electric utility's standard service offer from renewable energy resources as set forth in Section 4928.64, Revised Code. Section 4928.64(B), Revised Code, specifically provides that, for 2009, a portion of the electric utility's electricity supply required for its standard service offer must come from alternate energy resources, including .004 percent from solar energy resources. This requirement increases to .010 percent for 2010.
- (2) On October 26, 2009, as supplemented on December 7, 2009, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or Companies) filed applications to amend the Companies' 2009 Solar Energy Resource (SER) benchmarks. AEP-Ohio explained that the Commission's rules concerning the alternative energy portfolio requirements, including the renewable energy requirements and solar energy requirements, were adopted but are not yet effective, as of the date of filing the application.<sup>1</sup> According to the application, CSP would need to produce 798 Megawatt hours (MWh) of energy from solar energy resources or obtain

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<sup>1</sup> The Commission notes that the rules in Chapter 4901:1-40, Alternative Energy Portfolio Standards became effective on December 10, 2009.

798 renewable energy credits (RECs), with at least half of such RECs from Ohio. Similarly, OP would need to produce 1,028 MWh of energy from solar energy resources or obtain 1,028 RECs with at least half of the RECs from Ohio to comply with the 2009 SER benchmarks. Despite the fact that the rules were not yet effective, the Companies state that, in an effort to meet the 2009 SER benchmarks, the Companies have pursued various compliance activities including:

- (a) Funding and constructing two 70 kilowatts (kW) solar generating facilities at the Companies' service centers.
- (b) American Electric Power Service Corporation (AEPSC), on behalf of AEP-Ohio, issued a competitive request for proposal (RFP) in July 2009 for Ohio solar RECs produced between July 31, 2008, and December 31, 2009. The Companies state that, although the RFP prompted interested entities to submit expression of interest forms, no bids were received.
- (c) AEP-Ohio purchased 13 2009-vintage solar RECs in the open market subject to certification of the producing facility by the Commission.
- (d) AEP-Ohio entered into a 20-year renewable energy purchase agreement with Wyandot Solar LLC in association with the construction of a 10 MW solar farm to be located in Wyandot County, Ohio. The estimated commencement of commercial operation of the solar facility is anticipated to be April 15, 2010, with full production estimated to commence by August 15, 2010.
- (e) AEP-Ohio states that it also explored the possibility of obtaining solar RECs from its own customers that have distributed solar generating facilities. However, the Companies concluded that most of the customers with such facilities do not have utility-grade metering installed and have not pursued the necessary certification from the Commission. The Companies state that, with

the Commission's adoption of an exemption for facilities with 6 kW or less, AEP-Ohio will reevaluate this option for SER benchmark compliance.<sup>2</sup>

- (3) Notwithstanding their efforts to comply with the 2009 SER benchmarks, the Companies claim they will be approximately 1,666 RECs short of compliance depending on the actual output of the Companies' photovoltaic generating facilities. Accordingly, AEP-Ohio requests that the Commission modify its 2009 SER benchmarks by the actual shortfall and increase the Companies' 2010 SER benchmarks to be more than .010 percent, which equates to the 2009 compliance shortfall. AEP-Ohio believes that, through the Wyandot Solar facility, the Companies will obtain sufficient RECs to achieve the increased level of compliance in 2010 at a more reasonable cost. AEP-Ohio argues that its proposal to modify the Companies' 2009 SER benchmarks advances the public interest and preserves future compliance requirements without taking away from the State's energy policy of pursuing alternative energy resources. AEP-Ohio requests that the Commission invoke the *force majeure* provision set forth in Section 4928.64(C)(4), Revised Code, and modify the Companies' 2009 SER benchmarks.
- (4) Motions for intervention and memoranda in support were filed by the following entities: Ohio Energy Group (OEG), the Environmental Law and Policy Center (ELPC), Ohio Partners for Affordable Energy (OPAE), Ohio Consumers' Counsel (OCC), Ohio Advanced Energy (OAE), Industrial Energy Users-Ohio (IEU), Ohio Environmental Council (OEC), The Vote Solar Initiative (VSI) and the Sierra Club-Ohio (Sierra). OPAE's motion for intervention was accompanied by a motion to admit David C. Rinebolt to practice *pro hac vice* before the Commission in these proceedings.
- (5) The Commission finds that OEG, ELPC, OPAE, OCC, OAE, IEU, OEC, VSI and Sierra have each demonstrated a real and substantial interest in this case and, therefore, their respective motions for intervention should be granted. Further, the

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<sup>2</sup> Prior to the rules becoming effective, facilities applying for REC certification were required to have utility-grade meters. That requirement is now only applicable to facilities with generating capacity of more than 6 kW (See Rule 4901:1-40-04(D)(1), O.A.C.).

motion to admit Mr. Rinebolt to practice *pro hac vice* before the Commission in these matters should also be granted.

- (6) In their respective memoranda, OCC and OAE make brief comments in opposition to AEP-Ohio's application. Further, comments in opposition to the application were filed by OEC on December 8, 2009 and by ELPC, OEC, and OCC (jointly, the Ohio Consumer and Environmental Advocates or OCEA) and OAE and VSI (jointly, the Solar Industry) on December 15, 2009. AEP-Ohio filed reply comments on December 15, and December 16, 2009.
- (7) OCC, OEC, OCEA, and the Solar Industry argue that AEP-Ohio has been aware of the 2009 SER benchmarks since the enacting legislation became effective on July 31, 2008, and the Companies should have been prepared to comply. OCC and OEC implore the Commission not to establish a weak precedent for future *force majeure* requests by waiving or delaying AEP-Ohio's 2009 solar benchmark requirements. OCEA argues that the delay of the enactment of the administrative rules to implement the benchmark requirements did not prevent AEP-Ohio from complying with the 2009 SER benchmark.
- (8) AEP-Ohio states that OCEA's criticism of the uncertainty surrounding the Commission's final rules is unfounded, as certain issues addressed in the rules, including double counting, the definition of RECs, registration requirements, and metering requirements for distributed generation facilities, were only recently finalized.
- (9) In its memorandum in support of its motion to intervene, OAE requests that the Commission consider additional information concerning AEP-Ohio's claim that it has made a good faith attempt to comply with the 2009 benchmarks. OEC contends that the *force majeure* demonstration requires the applicant to meet a high burden. OEC explains that *force majeure* generally requires the applicant to show that an "act of God" or other significant, unforeseen event, beyond the control of the electric utility, is the reason for the lack of compliance. OEC reasons that relatively high prices for RECs does not equal "an act of God" or event beyond the control of AEP-Ohio.

- (10) In response, AEP-Ohio reiterates that its request is to simply defer compliance in order to significantly reduce the compliance costs to be paid by all of its customers due to the lack of RECs in the market in 2009. The Companies contend that granting a deferral of compliance, rather than an excusal from compliance, is not precedent for allowing electric utility companies or service companies to avoid compliance. AEP-Ohio argues that OEC's assertion that *force majeure* is equivalent to an "act of God" is an extreme view, which is unsupported by the General Assembly's manifest intent as reflected in the plain language of the statute. The proper standard, according to AEP-Ohio, is whether renewable energy resources are reasonably available in the market to allow the electric utility or service company to comply with the minimum benchmark requirements. Further, AEP-Ohio argues that the statute does not presume that a fully justified excusal would be subsequently made-up, as Section 4928.64(C)(4)(c), Revised Code, merely provides that any Commission's modification "shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years." Therefore, AEP-Ohio reasons that, if anything, the statutory presumption is that a justified excusal will normally, but not necessarily, result in being permanently excused from compliance and the Companies' proposal to fully catch-up in 2010, at a more reasonable cost, is even more appropriate in light of this statutory standard.
- (11) OEC argues that AEP-Ohio could have been preparing to build more solar capacity, to utilize customer-sited generation or to pursue long-term REC contracts to meet the solar benchmarks. OCEA notes that AEP-Ohio's efforts to comply with the benchmarks only resulted in the obtainment of the equivalent of 143 MWh, which is only a fraction of the 1,800 MWh needed for compliance. Further, OCEA notes that AEP-Ohio has the option of purchasing solar RECs under the statute to meet its compliance requirement, and notes that the Companies did, in fact, purchase 13 RECs. In light of these circumstances, OCEA further notes that AEP-Ohio failed to explain the basis for AEP-Ohio's claim that there is an insufficient supply of solar RECs in the market. For these reasons, OCEA claims that AEP-Ohio did not make a good faith effort to find solar RECs. The Solar Industry and OCEA argue that AEP-Ohio also could have entered into long-term contracts for distributed generation to meet its compliance benchmarks. OCEA notes that the

Wyandot RFP only sought solar REC's generated between July 31, 2008 and December 31, 2009, as opposed to including a component for future REC's, and suggests that AEP-Ohio should have been more proactive in pursuing customer-sited solar distributed generation. The Solar Industry requests that the Commission delay its ruling on the application and direct AEP-Ohio to issue an RFP for long-term REC contracts in the amount of the deficit for the 2009 solar benchmarks, or that the electric utility be directed to pay the compliance payment pursuant to Section 4928.64(C)(2)(a), Revised Code.

AEP-Ohio argues that the implication that the Companies could have complied with the solar benchmarks by constructing more solar capacity is misplaced and in contradiction to Sections 4928.64 and 4928.65, Revised Code, and the language regarding renewable energy resource REC's in the market. The Companies argue that the Solar Industry improperly criticizes and dismisses as inconsequential the substantial efforts made by AEP-Ohio to achieve long-term and short term compliance with the 2009 SER benchmarks. The Solar Industry, according to AEP-Ohio, concludes that AEP-Ohio's Wyandot project is "not applicable to the 2009 benchmark", and incorrectly concludes that the project is not relevant to the 2009 deferral request. AEP-Ohio reiterates that the Wyandot agreement will enable the companies to "catch up" in 2010 and even produce enough REC's to meet the 2011 solar benchmarks at a much more reasonable cost than attempting to continue purchasing the 2009 REC's that are available on the market now, at high market prices. AEP-Ohio notes that none of the intervenors filing comments have offered evidence that REC's or renewable energy resources are reasonably available in the market. AEP-Ohio argues that it is inappropriate for the Solar Industry to merely second-guess AEP-Ohio's decisions after-the-fact and simply set forth a list of things that could have been done, as the Companies assert that they have made a good faith effort to comply with the SER benchmarks in a cost-responsible manner and that AEP-Ohio is further committed to Ohio-based projects to meet 100 percent of their 2010 and 2011 benchmarks requirements rather than the 50 percent which is allowed under SB 221.

- (12) The Solar Industry requests that the Commission delay its ruling on the *force majeure* application and direct AEP-Ohio to solicit financeable solar REC contracts, with a minimum term of

10 years, pursuant to Section 4928.64(C)(4)(a), Revised Code. OEC states that if the Commission determines that AEP-Ohio's application should be granted, OEC recommends that the order be very narrowly tailored and that the 2009 benchmarks be added to the Companies' 2010 compliance benchmarks. However, OCEA argues that AEP-Ohio should be subject to the alternative compliance payment pursuant to Section 4928.64(C)(2)(a), Revised Code. In addition, OCEA states that, in the event that the Commission grants AEP-Ohio's application, the Commission should direct AEP-Ohio to meet additional solar REC requirements to account for the potential savings to the Companies associated with delayed implementation and the time value of money. OCEA argues that these additional requirements should include a directive that AEP-Ohio implement a program to obtain no less than 30 percent of its solar resources from residential generation, as well as long-term contracts for solar generating capacity.

- (13) According to AEP-Ohio, the Solar Industry's proposal to delay ruling on the application and order AEP-Ohio "to solicit long-term, financeable REC contracts" fails to provide the Commission with any different result than the Wyandot project and should be rejected. Moreover, AEP-Ohio reasons that the Solar Industry's suggestion to impose a noncompliance fine completely ignores its right to due process and a hearing.

Further, AEP-Ohio notes that, since 2008, AEP-Ohio has consistently informed the Commission through its ESP applications and testimony (Case Nos. 08-917-EL-SSO and 08-918-EL-SSO) of its plan to comply in 2009 primarily by purchasing RECs. AEP-Ohio's interpretation of the Commission's Order and Entries on Rehearing is that the Commission authorized a fuel adjustment clause that includes pass through of prudently incurred renewable energy purchase costs and REC purchase costs. Further, AEP-Ohio states that the high prices found in today's solar REC market due to lack of supply are beyond the control of AEP-Ohio and form a valid basis for granting the instant application. The applicant states that OCEA's comments improperly ignore the requirements of Section 4928.65, Revised Code, and the Wyandot project which will permit AEP-Ohio to exceed the in-state solar REC requirement. As to OCEA's criticism that AEP-Ohio should have further stimulated development of distributed generation, the Companies note that they have filed proposals for a

Renewable Energy Technology Program to provide long-term (20 year) incentives for solar photovoltaic and small wind resources to encourage residential and non-residential customers to install renewable energy resources on the customers' premises (Case Nos. 09-1871-EL-ACP and 09-1872-EL-ACP), and for a Renewable Energy Credit Purchase Program to purchase solar photovoltaic and small wind RECs from residential and non-residential customers with existing customer-sited resources (Case Nos. 09-1873-EL-ACP and 09-1874-EL-ACP). The Companies note that it would be unwise for an electric utility to roll out such programs before the Commission's rules were substantially completed.

AEP-Ohio requests that the Commission deny OCEA's punitive remedies as inappropriate and unjustified in light of AEP-Ohio's plan to focus on Ohio-based solar generation in excess of the Ohio-specific mandates and the Companies' proposal to fully catch-up in 2010 at more reasonable costs.

- (14) Section 4928.64(C)(4), Revised Code, permits the Commission to find that an insufficient quantity of renewable energy resources was reasonably available in the market to facilitate an electric utility's compliance with minimum benchmarks. The section further provides that the Commission shall consider the electric utility's good faith effort to acquire sufficient solar energy resources to comply with the minimum benchmark, and the availability of renewable energy or solar energy resources in Ohio or other jurisdictions within PJM Interconnection, L.L.C. and the Midwest Independent Transmission System Operator.

We note that AEP-Ohio has completed efforts to construct facilities, acquire RECs, and enter into contracts to meet its SER benchmarks. The Commission also notes that, to date, we have approved approximately 64 certification applications for solar renewable energy resource generating facilities. We recognize that the question of some electric utilities as to whether the SER benchmarks are annual requirements or imposed as of 2025 was only recently answered by the Commission's rules. Those rules, included in the Alternative Energy Portfolio Standards at Chapter 4901:1-40, Ohio Administrative Code, recently became effective on December 10, 2009, after repeated review by the Commission and completion of the Joint Committee on Agency Rule Review process. As a result thereof, key issues regarding



renewable energy facilities, renewable energy credits, and qualified resources were finalized after AEP-Ohio filed the instant application, a factor which is beyond AEP-Ohio's control. In light of the uncertainty regarding the Commission's compliance requirements this first year of the benchmarks, the good faith efforts AEP-Ohio has made to comply, and given that, as AEP-Ohio requests, any shortfall for 2009 compliance requirements will be added to and included as part of the Companies' compliance requirements for 2010, we find that AEP-Ohio has presented adequate reason for the Commission to grant AEP-Ohio's request to invoke *force majeure* and revise the Companies' 2009 SER benchmarks. Accordingly, we find that AEP-Ohio's application is reasonable and should be granted.

It is, therefore,

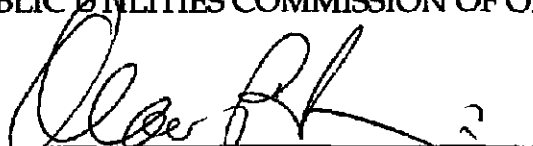
ORDERED, That OEG's, ELPC's, OPAE's, OCC's, IEU's, OAE's, OEC's, VSI's and Sierra's motions to intervene be granted. It is, further,

ORDERED, That OPAE's motion to admit David C. Rinebolt to practice *pro hac vice* before the Commission be granted. It is, further,

ORDERED, That AEP-Ohio's request for a *force majeure* waiver of 2009 SER benchmarks be granted and, to the extent that the Companies did not comply with the 2009 SER benchmarks, the 2010 SER benchmarks be increased. It is, further,

ORDERED, That a copy of this entry be served upon all interested persons of record in this case.

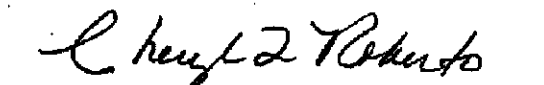
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