

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
The Dayton Power and Light Company)
for an Amendment of the 2009 Solar) Case No. 09-1989-EL-ACP
Energy Resource Benchmark, Pursuant)
to Section 4928.64(C)(4), Ohio)
Revised Code)

**COMMENTS REGARDING THE DAYTON POWER AND LIGHT COMPANY’S
APPLICATION BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

I. Introduction

On December 23, 2009, the Dayton Power & Light Company (“DP&L” or “Company”) filed the above-captioned Application asking the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to waive a portion of DP&L’s 2009 Solar Energy Resource (“SER”) benchmark as required by Ohio Revised Code (“O.R.C.”) §4928.64. DP&L bases its application on a “force majeure” claim. Contrary to DP&L’s Application, Ohio customers should be protected from DP&L’s failure to meet its SER benchmark. The statutory remedy for failing to meet the SER benchmark is to subject DP&L to the Alternative Compliance Payment. Alternatively, if the Commission is inclined to grant the waiver, it should follow its own precedent and require DP&L to recover any waived 2009 SERs in 2010.

II. Applicable Law and DP&L’s Application

Ohio law requires that solar energy resources account for at least 0.50% of the renewable energy generated in Ohio.¹ In addition, utilities must obtain at least half of that requirement from within Ohio.² The statute requires utilities to begin developing solar resources in 2009 and to

¹ O.R.C. §4928.64(B)(2).

² O.R.C. §4928.64(B)(3).

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. For 2009, the statute requires utilities to provide at least 0.004% of their renewable energy generation from solar resources.³ Utilities may achieve the SER benchmarks by directly developing solar generation or through the open market purchase of solar Renewable Energy Credits (RECs).⁴

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.⁵

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 PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.⁶

O.R.C. §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, and the PUCO does not grant a force majeure

³ O.R.C. §4928.64(B)(2).

⁴ O.R.C. §4928.64(B).

⁵ O.R.C. §4968.64(C)(4)(a).

determination, the utility is subject to an “alternative compliance payment” (“ACP”). The 2009 ACP is \$450 per megawatt-hour (MWh or MW hour) of solar capacity not obtained.⁷ DP&L’s 2009 SER requirement translates to 468 MWh, of which DP&L must obtain 234 MWh’s from Ohio-sited sources.⁸

DP&L asks the Commission to grant its Application under O.R.C. §4928.64(C)(4), and relieve the Company from a portion of its 2009 SER benchmarks. DP&L states it purchased 85 Ohio solar RECs, or 36% of its 2009 Ohio-sited SER requirement.⁹ DP&L also affirms that it obtained an additional 234 solar RECs from sources outside of Ohio, and that it met its non-solar renewable energy benchmark.¹⁰ Consequently, DP&L is seeking a force majeure determination for the balance, or 149 solar RECs.¹¹

III. Argument and Comments

O.R.C. §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 waive the 2009 SER benchmark, DP&L 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 long-term contracts.”¹²

DP&L was aware of its 2009 SER requirements on or before July 31, 2008, when the legislation went in to effect. However, its Application indicates that DP&L did not begin seeking solar RECs, through either development or the open market until July 2009—a year after

⁶ O.R.C. §4928.64(C)(4)(b).

⁷ O.R.C. §4928.64(C)(2)(a).

⁸ *Application* at 2.

⁹ *Id.* at 4.

¹⁰ *Id.* at 1; 3.

¹¹ *Id.* at 3-5. If the Commission were to impose the ACP, DP&L’s payment would be \$67,050.

¹² O.R.C. §4928.64(C)(4)(b).

the Legislature created the SER benchmarks.¹³ DP&L listed its efforts to meet the 2009 SER requirement consisting of:

- obtaining 329 solar RECs;
- one Request for Proposal (“RFP”) for solar RECs;
- two “reverse” RFPs resulting in unsuccessful bids for solar RECs;
- research of, and contact with solar grant awardees;
- work with REC industry brokers to locate solar RECs;
- conducting searches for SERs in other service territories;
- direct contact with residents who have small solar projects; and
- starting development of a 1.1 MW facility at a DP&L substation that is expected to generate approximately 1,000 solar RECs beginning in April 2010.¹⁴

The last effort is particularly important. Although DP&L is constructing a 1.1 MW solar facility, it did not announce the start of construction until December 17, 2009, two weeks before the SER benchmark deadline. DP&L provides no explanation for the delay in starting the project other than to point to “regulatory uncertainties” associated with the promulgation of the PUCO’s Green Rules.¹⁵ The dispute over the Green Rules, however, did not alter the statutory requirement to obtain SERs in 2009. Had DP&L constructed the facility in 2009, it could have been operational by December 31, 2009. Instead, DP&L waited until the end of the year to begin the project.

In addition, DP&L could have developed a formal residential solar purchase program instead of calling individuals on an ad hoc basis. In a stipulation dated February 24, 2009, DP&L agreed that “...the energy efficiency and demand response collaborative will discuss and

¹³ *Application* at 3-4.

¹⁴ *Id.* at 3-5.

consider all of the [Ohio Consumer's Counsel's ("OCC's")] ideas and suggestions, including...A cost-effective residential and small commercial (100 kW or less) REC purchase program, which OCC requests be made available by April 30, 2009.”¹⁶ Had DP&L developed this program, it could have generated additional interest from qualified residential and small commercial consumers. By constructing solar resources sooner or developing a residential REC purchase program, DP&L could have expended additional efforts to comply with all of its 2009 SER requirements.

While DP&L did not ignore its SER obligations, it did not expend the appropriate effort to ensure it met its 2009 benchmarks. If the Commission is inclined to grant DP&L's Application, the PUCO should follow its own precedent and invoke O.R.C. §4928.64(C)(4)(c) and require the Company to recover any waived portion of the 2009 SER benchmark in 2010. In this way, the PUCO will balance DP&L's efforts against its shortfall in seeking solar resources. This equates to increasing DP&L's 2010 benchmark by the 149 solar RECs it failed to obtain in 2009.

The PUCO recently applied this provision when it granted American Electric Power's ("AEP's") application for a force majeure determination, relieving it of a portion of its 2009 SER requirements.¹⁷ 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.*"¹⁸ AEP's application is similar to DP&L's, and it is appropriate to reach a similar result in this case. The Legislature intended DP&L to obtain SERs in 2009, and the Commission should not relieve the company of its

¹⁵ *Id.* at 5.

¹⁶ See Stipulation and Recommendation, Case Nos. 08-1094-EL-SSO et. seq. at 14.

¹⁷ See Entry, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC (January 7, 2010).

¹⁸ *Id.* at 9 (emphasis added).

statutory SER obligations. By requiring DP&L to recover the 149 solar RECs it failed to obtain in 2009 over the next year, the Commission will ensure that the legislation's intent is met.

IV. Conclusion

For the reasons above, the undersigned members of the Ohio Consumer and Environmental Advocates respectfully asks this Commission to condition any SER benchmark waiver on DP&L recovering the shortfall in 2010. In this way, Ohio receives the full benefit of the statutory requirement to develop SERs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comments have been served upon the following parties, via electronic mail, this 26th day of February, 2010.

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Summary: Comments Regarding the Dayton Power & Light Company's Application for an Amendment of the 2009 Solar Energy Resource Benchmarks electronically filed by Mr. Michael E Heintz on behalf of Ohio Consumer and Environmental Advocates