

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Duke Energy Retails,	)	
Sales, LLC’s Annual Alternative Energy	)	
Portfolio Status Report	)	Case No. 10-508-EL-ACP
	)	
	)	
In the Matter of Duke Energy Retails,	)	Case No. 10-509-EL-ACP
Sales, LLC’s Request for Force Majeure	)	
Determination	)	

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**COMMENTS REGARDING THE REPORT AND REQUEST FOR FORCE MAJEURE  
BY THE ENVIRONMENTAL LAW AND POLICY CENTER, AND THE OHIO  
ENVIRONMENTAL COUNCIL**

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**I. Introduction**

Pursuant to Ohio Administrative Code (O.A.C.) §4901:1-40-05(B), the undersigned hereby file comments on the Annual Alternative Energy Portfolio Status Report (Report) submitted in the above-captioned matter. Duke Energy Retail Sales, LLC (DERS) submitted its Report on April 15, 2010. In accordance with O.A.C. §4901:1-40-05(B), which allows “any person [to] file comments regarding the...alternative energy portfolio status report within thirty days of the filing of such report,” the undersigned offer the following comments for consideration by the Public Utilities Commission of Ohio (PUCO or Commission) and its Staff. As explained more fully below, the following should be taken into account when evaluating DERS’s Report and Request for Force Majeure.

**II. Law and Comments**

According to O.A.C. §4901:1-40-05(A), “[E]ach electric utility and electric services company shall file...an annual alternative energy portfolio status report analyzing all activities

undertaken in the previous calendar year to demonstrate how the applicable alternative energy portfolio benchmarks and planning requirements have or will be met.” DERS is to submit the following information for Staff consideration of its compliance report:

(1) Beginning in the year 2010, the annual review will include compliance with the most recent applicable renewable- and solar-energy resource benchmark.

(2) Beginning in the year 2025, the annual review will include compliance with the most recent applicable advanced energy resource benchmark.

(3) The annual compliance reviews shall consider any under-compliance an electric utility or electric services company asserts is outside its control, including but not limited to, the following:

(a) Weather-related causes.

(b) Equipment shortages for renewable or advanced energy resources.

(c) Resource shortages for renewable or advanced energy resources.<sup>1</sup>

While DERS submits basic information in its report, there are additional questions as to DERS’s activities comply with the statutory benchmarks.

*A. Baseline Calculations and Benchmark Compliance*

Because DERS only recently began supplying its retail customers with electricity, it calculated its 2009 benchmark pursuant to O.A.C. §4901:1-40-03(B)(2).<sup>2</sup> That section allows DERS to make a “reasonable projection its retail electric sales in the state for a full calendar year” in place of using a 3-year average baseline calculation.<sup>3</sup> DERS estimated its “reasonable

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<sup>1</sup> O.A.C. §4901:1-40-05(A)

<sup>2</sup> *In the Matter of Duke Energy Retail Sales, LLC’s Annual Alternative Energy Portfolio Status Report and Request for Force Majeure Determination*, Case Nos. 10-508-EL-ACP and 10-509-EL-ACP (Report), at 3 (April 15, 2010).

<sup>3</sup> O.A.C. §4901:1-40-03(B)(2).

projection” to be 934,540 MW hours.<sup>4</sup> DERS then goes on to explain how it complied with necessary REC benchmarks, with the exception of its solar REC benchmark.<sup>5</sup> Following a request for a force majeure determination for its solar energy resources benchmark, DERS concludes its Report with a discussion of future compliance efforts. Despite all of this information, DERS’s Report raises additional questions that it should answer before PUCO approval.

DERS explains that because it does not own, or expect to own, generation resources, it is left with obtaining needed RECs through the market.<sup>6</sup> Purchasing RECs on the market is acceptable so long as the purchases result in benchmark compliance. Despite its anticipated market activity, DERS is under an obligation to obtain renewable energy resources to comply with statutory benchmarks by any means available. DERS should not limit itself to only REC purchases, but should also consider its own generation of renewable power in the event the REC market stagnates. Especially concerning the solar REC market, DERS should maintain the flexibility to generate its own solar resources should the Ohio market be slow to develop.

In addition to its general statement concerning REC purchases, DERS addresses its long-term planning requirements pursuant to O.A.C. 4901:1-40-03(C). DERS states that because of its recent entry into retail electricity sales, it is unable to accurately predict or describe: 1) its 2010 baseline for benchmark calculation, 2) the nature or quantity of power purchase agreements, 3) its detailed 2010 compliance strategy, and 4) a full evaluation of compliance impediments for future benchmarks.<sup>7</sup> While the uncertainty facing DERS is understandable

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<sup>4</sup> Report at 3.

<sup>5</sup> Report at 4-5.

<sup>6</sup> Report at 5, 9.

<sup>7</sup> Report at 9-10.

given its recent retail sales, DERS is still under an obligation to provide this information to the Commission and interested parties. As such, DERS should supplement its Report when it obtains the information it is unable to detail now.

*B. DERS's Solar REC Waiver Application*

1. Applicable Law and Facts

Ohio law requires that solar energy resources account for at least 0.50% of the renewable energy generated in Ohio.<sup>8</sup> In addition, utilities must obtain at least half of that requirement from within Ohio.<sup>9</sup> The statute requires utilities to begin developing solar energy resources (SERs) in 2009 and to 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.<sup>10</sup> Utilities may achieve the SER benchmarks by directly developing solar generation or through the open market purchase of solar Renewable Energy Credits (RECs).<sup>11</sup>

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.<sup>12</sup>

In order to grant the force majeure application

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<sup>8</sup> O.R.C. §4928.64(B)(2).

<sup>9</sup> O.R.C. §4928.64(B)(3).

<sup>10</sup> O.R.C. §4928.64(B)(2).

<sup>11</sup> O.R.C. §4928.64(B).

<sup>12</sup> O.R.C. §4968.64(C)(4)(a); see also O.A.C. §4901:1-40-06.

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.<sup>13</sup>

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 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.<sup>14</sup>

DERS asks the Commission to grant its Application under O.R.C. §4928.64(C)(4) and O.A.C. §4901:1-40-06, and relieve the Company from a portion of its 2009 SER benchmarks. DERS states that it did not obtain or develop any of the 38 solar RECs it needed.<sup>15</sup> DERS affirms that it met its non-solar renewable energy benchmark of 2,299 MWh by procuring 8,815 non-solar RECs.<sup>16</sup> Consequently, DERS is seeking a force majeure determination for the 38 solar RECs it did not obtain.<sup>17</sup>

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<sup>13</sup> O.R.C. §4928.64(C)(4)(b).

<sup>14</sup> O.R.C. §4928.64(C)(2)(a).

<sup>15</sup> Report at 6-7 (April 15, 2010).

<sup>16</sup> *Id.* at 4; 7.

<sup>17</sup> *Id.* at 6-9. If the Commission were to impose the ACP, DERS’s payment would be \$17,100.

2. The Commission Should Deny DERS's Application or Increase DERS's 2010 SER Requirement by the 2009 Shortfall.

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, DERS 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.”<sup>18</sup>

Despite no retail sales prior to last year, DERS was aware of its 2009 SER requirements on or before July 31, 2008, when the statutory requirements went in to effect. However, other than listing the three organizations that DERS communicated with concerning solar REC availability and a literature review, DERS does not explain the efforts it used to attempt to find solar RECs.<sup>19</sup> DERS provides an overview of the current solar REC market in Ohio, but does not list the REC owners it contacted or attempted to contract with concerning REC purchases. Notably, DERS explains that it does not own any solar generation facilities, but does not explain why it could not construct such facilities.<sup>20</sup>

DERS did not ignore its REC obligations, evidenced by the number of non-solar RECs it obtained, but it did not expend the appropriate effort to ensure it met its 2009 SER benchmarks- including construction of its own solar facility. However, if the Commission is inclined to grant DERS'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 DERS's efforts against its shortfall in

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<sup>18</sup> O.R.C. §4928.64(C)(4)(b).

<sup>19</sup> *Request* at 7.

seeking solar resources. This equates to increasing DERS's 2010 benchmark by the 38 solar RECs, 19 Ohio-sited and 19 non-Ohio sited, it failed to obtain in 2009. In fact, DERS requests this treatment in its Request.<sup>21</sup>

The PUCO recently applied this provision when it granted American Electric Power's ("AEP's"), Dayton Power & Light's, the Cleveland Electric Illuminating Company's, the Toledo Edison Company's, and the Ohio Edison Company's applications for a force majeure determination, relieving all companies of a portion of their 2009 SER requirements.<sup>22</sup> In the first case to address a force majeure waiver, 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.*"<sup>23</sup> In the listed applications for a force majeure determination, the PUCO applied this result and pushed unfulfilled portions of the 2009 requirement into 2010. All of these applications are similar to DERS's, and it is appropriate to reach a similar result in this case. The Legislature intended DERS to obtain SERs in 2009, and the Commission should not relieve the company of its statutory SER obligations. By requiring DERS to recover the solar RECs it failed to obtain in 2009 over the next year, the Commission will ensure that DERS meets the legislation's intent.

### **III. Conclusion**

For these reasons, the undersigned request the Commission and its Staff to consider these comments and arguments concerning DERS's annual compliance report and request for force majeure with regards to its solar energy resources benchmark compliance. DERS should

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<sup>20</sup> Report at 7.

<sup>21</sup> Report at 7.

<sup>22</sup> See Entry, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC (January 7, 2010); Finding and Order, Case No. 09-1989-EL-ACP (March 17, 2010); Finding and Order, Case No. 09-1922-EL-ACP (March 10, 2010).

<sup>23</sup> Entry, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC, at 9 (January 7, 2010) (emphasis added).

supplement this Report when it has more detail concerning its benchmark and compliance options. Further, the Commission should deny DERS's request for a force majeure determination, or alternatively, increase DERS's 2010 benchmark by the amount of its 2009 solar REC shortfall.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comments to the Report and Request for Force Majeure has been served upon the following parties, via electronic mail, this 17th day of May, 2010.

/s Michael E. Heintz

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Summary: Comments Regarding the Report and Request for Force Majeure by the Environmental Law & Policy Center and The Ohio Environmental Council electronically filed by Mr. Michael E Heintz on behalf of Environmental Law and Policy Center