

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
FirstEnergy Solutions Corp. for Approval)
of its Alternative Energy Annual Status)
Report and for an Amendment of its 2009) Case No. 10-467-EL-ACP
Solar Energy Resources Benchmark)
Pursuant to Section 4928.64(C)(4)(a),)
Revised Code.)

FINDING AND ORDER

The Commission finds:

- (1) FirstEnergy Solutions Corp. (FES) is an electric services company as defined in Section 4928.01(A)(9), Revised Code, and a certified provider of competitive retail electric service (CRES) as defined in Section 4928.01(A)(4), Revised Code.
- (2) Section 4928.64(B), Revised Code, establishes benchmarks for electric services companies to acquire a portion of their electricity supply for retail customers in Ohio from renewable energy resources. Specifically, the statute provides that, for 2009, a portion of the electricity sold by means of retail electric sales in Ohio must come from alternative energy resources, including 0.004 percent from solar energy resources (SER). This requirement increases to 0.010 percent for 2010.
- (3) On April 15, 2010, FES filed an application, requesting, *inter alia*, that the Commission make a *force majeure* determination regarding FES' 2009 SER benchmark. FES states that it fell short of meeting its 2009 SER benchmark by 58 solar renewable energy credits (SRECs).
- (4) Motions to intervene in the above-captioned case were filed by the Ohio Environmental Council (OEC), the Environmental Law and Policy Center (ELPC), and the Ohio Consumers' Counsel (OCC). No party opposed the motions to intervene. The Commission finds that the motions to intervene are reasonable and should be granted.

- (5) On August 26, 2010, a motion *pro hac vice* was filed on behalf of Robert Kelter representing ELPC. No memoranda contra were filed. The Commission finds that this motion is reasonable and should be granted.
- (6) In support of its request for a *force majeure* determination, FES states that, despite its best efforts, it fell short of meeting its 2009 SER benchmark due to a lack of sufficient solar energy resources available for purchase by FES. FES asserts that it confirmed this lack of supply by diligently contacting the largest solar energy producers in Ohio and seeking SRECs from those producers.

Specifically, FES represents that it attempted to enter into a long-term renewable power purchase agreement with the developer of a solar array in Highland County, Ohio, in 2008 and again in 2009 but that it was unable to reach an agreement, in part because the Commission's rules were not yet effective. Additionally, in 2009, FES contacted the owners of the four largest known solar generators in Ohio to pursue bilateral contracts for purchase of their SRECs. One such generator was unaware that its facility qualified for SRECs prior to its discussions with FES. The generator responded by issuing a request for proposals (RFP) that was not won by FES, even though FES had offered to help it build two more solar arrays. FES also contacted an Ohio college and an Ohio military base, which both repeatedly indicated that they did not intend to register or sell their SRECs. Finally, a Toledo-based customer was contacted and, after an RFP process, FES was selected as the successful bidder and obtained the customer's SRECs under a five-year purchase agreement.

FES asserts that, despite this purchase agreement, it was unable to obtain sufficient SRECs to meet its 2009 SER benchmark due to the limited time period in which to comply and the lack of qualified solar energy resources. FES states that it attempted to contact all brokers, aggregators, and generators to discuss spot purchases for any remaining SRECs. FES was able to procure 90 SRECs from an aggregator and two more SRECs from a homeowner in southern Ohio.

As a result of its efforts, FES argues that it obtained 81 percent of the SRECs needed to meet its 2009 SER benchmark and concludes that the shortfall is due to a lack of sufficient solar energy resources that were qualified as renewable energy resources in 2009. FES maintains that the lack of solar energy resources was due in part to the fact that the Commission's rules were not finalized until late 2009, which hampered the development of solar projects during that year.

- (7) On May 17, 2010, OEC, ELPC, and OCC filed comments in opposition to FES' request for a *force majeure* determination. OEC, ELPC, and OCC argue that the Commission should deny FES' request for a *force majeure* determination because FES has not sufficiently explained its efforts to acquire SRECs or otherwise meet its SER benchmark. These parties argue that, pursuant to Section 4928.64(C)(2)(a), Revised Code, FES should be subjected to the alternative compliance payment for its failure to meet the 2009 SER benchmark. OEC, ELPC, and OCC maintain that FES did not expend the appropriate effort to ensure that it met its 2009 SER benchmark and that FES must disclose the contract terms that it offered to potential SREC suppliers in its request for a *force majeure* determination. Alternatively, OEC, ELPC, and OCC argue that FES should be required to recover any waived portion of the 2009 SER benchmark in 2010, just as the 2010 SER benchmarks for other electric utilities and electric services companies were increased when the companies' requests for *force majeure* determinations of their 2009 SER benchmarks were granted.
- (8) On June 1, 2010, FES filed reply comments. FES argues that the Commission has already determined that sufficient SRECs did not exist in Ohio in 2009, as evidenced by the Commission's determinations that *force majeure* conditions existed as to the availability of SRECs for Columbus Southern Power Company and Ohio Power Company (jointly, AEP-Ohio); Toledo Edison Company, Ohio Edison Company, and Cleveland Electric Illuminating Company (collectively, FirstEnergy); Dayton Power and Light Company (DP&L); and certain electric services company

members of the Retail Electric Supply Association (RESA).¹ FES further contends that it is not required to disclose the confidential and proprietary terms of its contracts and that FES provided sufficient information to demonstrate that it made a good faith effort to acquire sufficient solar energy resources to comply with its statutory benchmark. Finally, FES maintains that the Commission should not increase FES' 2010 SER benchmark by the number of SRECs that it failed to obtain in 2009 because sufficient SRECs do not exist in the Ohio market. FES argues that, if the Commission should increase its 2010 SER benchmark, such increase should be contingent upon the existence of sufficient SRECs in the market.

- (9) Upon review of the application and the other filings in this proceeding, and recognizing the limited time available for the development of new solar energy resources to meet the statutory standard in its first year, the Commission finds that FES' request for a *force majeure* determination is reasonable and should be granted. Section 4928.64(C)(4), Revised Code, authorizes the Commission to determine whether an insufficient quantity of renewable energy resources was reasonably available in the market to facilitate an electric service company's compliance with the statutory benchmarks. The statute further provides that the Commission shall consider the electric service company's good faith effort to acquire sufficient renewable energy resources to comply with the benchmark and the availability of renewable energy resources in Ohio or other jurisdictions within PJM Interconnection, L.L.C. and the Midwest Independent Transmission System Operator.

¹ In the Matter of the Application of Columbus Southern Power Company of Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code, Case No. 09-987-EL-EEC, et al., Entry (January 7, 2010); In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code, Case No. 09-1922-EL-ACP, Finding and Order (March 10, 2010); In the Matter of the Application of The Dayton Power and Light Company for Approval of a Force Majeure Determination for a Portion of the 2009 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code, Case No. 09-1989-EL-ACP, Finding and Order (March 17, 2010); In the Matter of the Application of the Retail Electric Supply Association for an Amendment to the 2009 Solar Energy Resource Benchmark Pursuant to Section 4928.64(C)(4), Revised Code, Case No. 10-428-EL-ACP, Finding and Order (April 28, 2010).

The Commission notes that FES attempted to accomplish its goal of purchasing sufficient SRECs by contacting the largest solar energy producers in Ohio, participating in two RFPs and communicating with SREC industry brokers, aggregators, and generators. FES explored numerous bilateral contracts and successfully entered into a five-year purchase agreement. Even with these efforts, however, FES was unable to obtain sufficient SRECs to satisfy its 2009 SER benchmark. Moreover, FES represents that there were insufficient solar energy resources installed in Ohio or contiguous states in 2009. The Commission recognizes that its certification process for SRECs was in its infancy in 2009, and, as such, a limited number of SRECs were available. In addition, as pointed out by FES, the Commission has already recognized that other electric utilities and electric services companies likewise had difficulties in meeting their 2009 SER benchmarks.

Therefore, we find that there was an insufficient quantity of solar energy resources reasonably available in the market and that FES has presented sufficient grounds for the Commission to reduce FES' 2009 SER benchmark to the level of SRECs actually obtained by FES.

- (10) In its reply comments, FES submits that the Commission should not increase its 2010 SER benchmark by the number of SRECs that it failed to obtain in 2009, because sufficient SRECs do not exist in the Ohio market. However, the question of whether sufficient SRECs existed in the market in 2010 is not yet before the Commission. If FES believes that sufficient SRECs did not exist in the market in 2010, FES may address that issue in its annual alternative energy portfolio status report for 2010. Therefore, pursuant to Section 4928.64(C)(4)(c), Revised Code, our approval of FES' request for a *force majeure* determination is contingent upon FES meeting its revised 2010 SER benchmark, which shall be increased to include the shortfall for the 2009 SER benchmark.

It is, therefore,

ORDERED, That the motions to intervene filed by OEC, ELPC, and OCC be granted. It is, further,


ORDERED, That the motion *pro hac vice* to admit Robert Kelter be granted. It is, further,

ORDERED, That FES' request for a *force majeure* determination be granted. It is, further,

ORDERED, That FES' 2010 SER benchmark be increased as set forth in finding (10). 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



Steven D. Lesser, Chairman



Paul A. Centolella



Valerie A. Lemmie



Cheryl L. Roberto

SJP/sc

Entered in the Journal

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Renee J. Jenkins

Secretary