

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the matter of Direct Energy |) | |
| Business Solutions LLC For a |) | Case No. 11-2447-EL-ACP |
| Waiver From Meeting the 2010 Ohio |) | |
| Sited Solar Energy Resource Benchmarks |) | |

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**REPLY COMMENTS OF DIRECT ENERGY BUSINESS SOLUTIONS LLC
IN SUPPORT OF ITS APPLICATION FOR A WAIVER OF THE
REQUIREMENT TO PURCHASE OHIO SITED SOLAR RENEWABLE
ENERGY CREDITS FOR CALENDAR YEAR 2010**

Pursuant to the May 5, 2011 Entry of the Attorney Examiner, Direct Energy Business LLC ("DEB"), a competitive retail electric service provider ("CRES") submits these Reply Comments in support of its application to this Commission pursuant to Section 4928.64, Revised Code, for a waiver of the benchmark requirement for Ohio sited Solar Renewable Energy Credits.

I. DEB'S APPLICATION

DEB filed its application on April 14, 2011. DEB is authorized to provide retail generation aggregation, power marketer, and power broker services within Ohio pursuant to Certificate No. 00-019(5). DEB has been an active supplier of generation and other competitive services to commercial and industrial customers in Ohio in several electric distribution service areas. As a certificated CRES, in April of 2010 DEB filed a Renewable Energy Report for calendar year 2009. DEB was able to secure all the required general renewable energy credits for service year 2009, the first year that renewable energy portfolio requirements became effective, but was unable to purchase any solar renewable energy credits ("S-RECs") from facilities located in adjoining states which are deliverable into Ohio ("OHS-RECs").

In 2009, DEB filed a pleading as part of the Retail Energy Suppliers Association demonstrating that there were not enough S-REC facilities to meet the demand for S-RECs. The Commission, in Case No. 10-428-EL-ACP, exercised its authority under Section 4928.64(C)(4), Revised Code, and determined that an insufficient number of S-RECs existed and thus granted a waiver for both S-RECs and OHS-RECs. The Commission though, in its Finding and Order of April 28, 2010, indicated that the S-REC and OHS-REC requirements for 2009, rather than being forgiven as a *force majeure*, were being waived, and that CRES and Electric Distribution Utilities must seek in service year 2010 to obtain not only the S-RECs and OHS-REC in sufficient quantities for service year 2010, but also try to obtain makeup quantities of S-RECs and OHS-RECs missed during 2009.

Suppliers operating in states that have renewable energy portfolio standards, such as Ohio, generally purchase S-RECs from an over the counter type market in which brokers match up buyers and sellers of S-RECs. The brokers receive a commission for matching the sellers with buyers, who then deal directly on the sale and transfer of the S-RECs. Given the infancy of the renewable energy credit market, at this time there are only a few brokers for S-RECs in general and OHS-RECs in particular. DEB contacted four known REC brokers during the course of 2010 and the first quarter of 2011. DEB was able to purchase all of its 2010 requirement of S-RECs.

DEB was not equally successful, though, in obtaining OHS-RECs. None of the brokers contacted were able to locate any 2010 qualified OHS-RECs offered at prices below the Ohio solar Alternative Compliance Payment (ACP) rate of four hundred dollars (\$400) per S-REC. DEB has attached the names of the brokers it has contacted this year in its effort to find S-RECs and OHS-RECs. These are all of the brokers known by DEB who make a market in S-RECs

deliverable to Ohio and OHS-RECs. Appendix A to the April 14 application was provided for purpose of demonstrating that DEB has made a good faith effort to secure the OHS-REC, and to show the small size of the Ohio S-REC market.

DEB maintains that it is in the best interest of the public and in keeping with the goal of Amended Substitute Senate Bill No. 221 to waive the OHS-REC requirement for 2010 and impose the requirement that CRES like DEB be instructed to find OHS-RECs of sufficient quantities in 2011 that will fulfill the total quantity of OHS-RECs for the first 36 months of the renewable energy portfolio standards. Waiving the requirement as opposed to charging the ACP will keep the demand for OHS-RECs robust and that should stimulate construction of Ohio sited solar facilities. The success of DEB and other CRES in 2010 in finding not only S-RECs but quantities sufficient to make up for 2009 demonstrates that the market for renewable energy is growing. There is reason to believe that this time next year CRES such as DEB will be reporting that they are able to not only fulfill 2011 requirements for OHS-RECs, but to start making up for past OHS-REC obligations.

DEB requested that the Commission waive the OHS-RECs requirement for DEB for 2009-2010, on the condition that DEB seek to obtain OHS-RECs in 2011 that would not only fulfill the requirements of calendar year 2011 but make up for some or all of 2009 and 2010 OHS-RECs.

II. STAFF ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

The Staff filed its initial comments on June 15, 2011. The Staff stated that a party making a request for a *force majeure* determination must show that it pursued all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, and long-term contracts. The Staff also stated that an assessment of the

availability of qualified in-state resources, as well as qualified resources within the territories of PJM and the MISO must be included as part of any filing seeking a *force majeure* determination from the Commission.

The Staff stated that DEB had the burden of proof to demonstrate that it pursued all reasonable compliance options prior to seeking a *force majeure* determination. The Staff stated that the DEB filing did not indicate if it pursued any of the other options enumerated in the rule. Based on the information in DEB's filing, the Staff stated that it could not confirm that DEB satisfied the requirements in Rule 4901:1-40-06(A)(1) of the Ohio Administrative Code to support a *force majeure* determination and therefore the Staff concluded that DEB failed to demonstrate that such a determination was warranted.

The Staff also took issue with the DEB procurement strategy position that the solar ACP represents a price ceiling when considering available S-RECs. The Staff stated that it was not aware of any statutory or regulatory requirement that established the application ACP as a pricing threshold that could not be exceeded. The Staff acknowledged that Section 4928.64(C)(3), Revised Code included language in which an electric distribution utility or electric services company could potentially be excused of full compliance if certain cost increases were experienced. The Staff believed that DEB had not indicated that the portion of the statute was near being triggered.

The Staff agreed that RECs and S-RECs should not be pursued at any cost but did not believe that the ACP automatically represented a price ceiling. The Staff referenced the language in Section 4928.64(C)(4)(b), Revised Code on *force majeure* of RECs or S-RECs as being "reasonably available". Rather than using the ACP as a *defacto* measure of "reasonably available", the Staff proposed an approach in which any entities with a compliance obligation

enter into an informal dialogue with the Staff in the event that REC or S-REC prices appear to exceed the applicable ACP by a certain amount (i.e., 125% of the ACP). The Staff stated that while it could not offer any binding assurances during such dialogues, it would afford an opportunity for the issues to be discussed prior to a commitment in one direction or another.

The Staff also stated that the disposition of DEB's 2009 solar shortfall, which the Commission determined should be added to the 2010 solar requirement, was not in the Staff's view clearly addressed in the filing. The Staff believed that DEB's solar shortfall from 2009, including both in-state and other S-RECs, remains outstanding and need to be accounted for in this case. The Staff stated that it did not appear that DEB's efforts to purchase all of its 2010 requirements of S-RECs were inclusive of the 2009 shortfall. The Staff encouraged DEB to clarify this point in its reply comments.

III. DEB'S REPLY COMMENTS

DEB agrees with Staff's accounting of its S-RECs for calendar years 2009 and 2010. Similarly DEB does not believe there are any philosophical differences between it and Staff as to the obligation of Competitive Retail Electric Service (CRES) providers to obtain S-REC and OHS-RECs. DEB believes that CRES are to make a good faith attempt to secure all the S-RECs and OHS-RECs required to meet the percentage of their baseload. DEB was successful in finding enough S-RECs to meet its 2010 obligation, but not make up for S-REC 2009 and once again DEB was unable to secure OHS-RECs

At this point the Commission can either assess the penalty for 2009 S-REC and 2009 and 2010 OHS-RECs as per the statutory amount. In the alternative, the Commission could once again wave the obligation for and carry forward the unfulfilled S-RECs and OHS-RECs to the next calendar year. DEB will not contest either approach, but observes that if the goal of the S-

REC and particularly the OHS-REC program is to incentivize the development of solar generation the carryover of the S-REC and OHS-REC obligation would be more effective in aiding the development of solar facilities. As DEB's confidential report indicates it is relatively speaking a small contributor to the total state baseline for electric sales. Given its size DEB is largely dependent on the development of a liquid market for S-RECs and OHS-RECs. Since Ohio's renewable portfolio standards are just two years old, it is not surprising that market for S-RECs and OHS-RECs is not fully developed. The shortage of liquidity though seems to be a temporal issue. For as noted in its 2010 Report, DEB was able to secure S-RECs for 2010 where such as not available in 2009, and the brokers DEB talked with expect to have OHS-RECs in the near future. Thus, DEB is not asking to be excused from obtaining the RECs only to a waiver to obtain the S-RECs and OHS-RECs it has not been able to obtain in the past.

IV. CONCLUSION

Granting waivers and instructing CRES such as DEB to secure the make-up S-RECs and OHS-RECs this year for 2009 and 2010 is one way the Commission could aid in the development of the Ohio REC market. Should the Commission elect not to do that then DEB will pay the statutory fee.

Respectfully submitted,

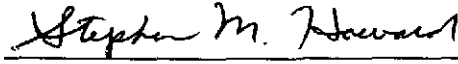


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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served via electronic mail upon the following person this 30th day of June, 2011.

A handwritten signature in black ink, reading "Stephen M. Howard", is written over a horizontal line.

Stephen M. Howard

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