

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Alternative :
Energy Portfolio Status Report of : Case No. 11-2470-EL-ACP
Dominion Retail, Inc. :

REPLY COMMENTS
OF
DOMINION RETAIL, INC.

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I. INTRODUCTION

On April 15, 2011, Dominion Retail, Inc. ("Dominion Retail") filed its annual alternative energy portfolio status report in this docket pursuant to Rule 4901:1-40-05(A)(1), Ohio Administrative Code ("OAC"). As demonstrated in its report and the accompanying exhibit,¹ Dominion Retail was in compliance with the applicable Ohio Renewable, Non-Ohio Renewable, and Non-Ohio Solar benchmarks, as determined in accordance with Section 4928.64(B), Revised Code, and Rule 4901:1-40-03(A), OAC, for the calendar 2010 reporting period. However, Dominion Retail was unable to acquire the Ohio-sourced solar RECs ("SRECs") necessary to satisfy its 2010 Ohio Solar obligation, and , thus, reported that it had under-complied by the entire amount of that benchmark (calculated by Dominion Retail to be 10.588 Mwh).² Because Dominion Retail's under-compliance with the 2010 Ohio Solar benchmark was due to the fact that there were insufficient Ohio-sourced SRECs available, Dominion Retail requested relief from this obligation pursuant to the *force majeure* provision of Section 4928.64(C)(4)(a), Revised Code.

¹ See Dominion Retail Status Report, Exhibit A. The unredacted version of Exhibit A was filed under seal pursuant to a motion for a protective order.

² See Dominion Retail Status Report, 4-5.

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On June 27, 2011, the Commission staff (“Staff”) submitted its initial comments regarding Dominion Retail’s request for a *force majeure* determination. In its comments, Staff concluded that, based on the information provided in Dominion Retail’s report, it could not confirm that Dominion Retail had met the Rule 4901:1-40-06(A)(1), OAC, requirements that must be satisfied to support a *force majeure* determination.³ Dominion Retail hereby submits its reply comments in accordance with the procedural schedule established by the attorney examiner’s entry in this docket of May 9, 2011. For the reasons set forth below, Dominion Retail objects to the Staff’s conclusion, and renews its request for a *force majeure* determination and relief from its otherwise applicable 2010 Ohio Solar benchmark obligation.

II. APPLICABLE STANDARDS

Section 4928.64(C)(4)(a), Revised Code, provides that an electric services company may request the Commission to make a *force majeure* determination with respect to all or part of the company’s compliance with a renewable energy resource benchmark for the annual review period in question. Section 4928.64(C)(4)(b), Revised Code, requires that, in considering such requests, the Commission “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.” The statute further requires that, in making this assessment, the Commission consider the availability of renewable energy or solar energy resources in Ohio and other jurisdictions in the PJM and MISO regional transmission organizations. Finally, Section 4928.64(C)(4)(b), Revised Code, provides that, in determining whether to grant relief from a benchmark on *force majeure* grounds, the Commission consider

³ Staff Comments, 4.

whether the subject company has made a good faith effort to acquire the necessary renewable energy and/or solar energy resources.

Although the foregoing statutory requirements speak in terms of the Commission's obligations in connection with *force majeure* determinations, the Commission, by rule, has imposed certain requirements on electric services companies seeking relief from benchmark compliance on *force majeure* grounds.⁴ Rule 4901:1-40-06(A)(1), OAC, provides that an electric services company must "demonstrate that it pursued all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, and long-term contracts." Rule 4901:1-40-06(A)(2), OAC, states that a request for a *force majeure* determination "shall include an assessment of the availability of qualified in-state resources, as well as qualified resources within the territories of PJM and the MISO." Obviously, these requirements are intended to assist the Commission in fulfilling its statutory obligations with respect to *force majeure* determinations. Thus, these Commission rules must be read *in pari materia* with the underlying statute.

III. OBJECTIONS TO THE STAFF ANALYSIS

Although the Staff comments fairly summarize the information presented in Dominion Retail's report,⁵ the conclusions that Staff would have the Commission draw from that information are based on an analysis that is flawed in several respects. At the outset, Dominion Retail notes that the Staff comments contain no reference to the Section 4928.64(C)(4), Revised Code, provisions governing *force majeure* determinations. Rather, Staff's conclusion that Dominion Retail has not made the showing necessary to support *force majeure* relief from its 2010 Ohio Solar benchmark turns solely on Staff's interpretation of the requirements of Rule

⁴ See Rule 4901:1-40-06, OAC.

⁵ See Staff Comments, 2-3.

4901:1-40-06(A)(1), OAC.⁶ Unfortunately, this narrower focus has resulted in a finding by Staff that Dominion Retail's request for a *force majeure* determination is deficient when, in fact, Dominion Retail has provided the Commission with all the information necessary to grant *force majeure* relief from the Ohio Solar benchmark pursuant to Section 4928.64(C)(4), Revised Code.

A. Dominion Retail Has Demonstrated That It Has Pursued The Only Reasonable Compliance Option Available To It In View Of Its Business Model.

Although reciting the Rule 4901:1-40-06(A)(1), OAC, requirement that an electric services company seeking a *force majeure* determination “must demonstrate that it pursued all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, and long-term contracts,” Staff ignores the word “reasonable” in finding that Dominion Retail has failed to make the requisite showing.

As discussed in detail in its report, Dominion Retail focuses on the residential market and serves the vast majority of its residential customers pursuant to one-year contracts.⁷ Moreover, Dominion Retail typically does not impose an early termination fee on its residential customers with fixed price contracts, which means, of course, that these customers can switch to another supplier at any time without penalty.⁸ In addition, Dominion Retail makes multiple offers over the course of a calendar year, which further contributes to significant fluctuations in its customer base not only from year-to-year, but within any given year.⁹ These factors, coupled with market and regulatory uncertainties, mean that Dominion Retail must maintain a high degree of flexibility in its supply arrangements, which must be geared to serve the amount of load secured by contract at any point in time. Accordingly, Dominion Retail does not serve Ohio

⁶ Staff Comments, 4.

⁷ Dominion Retail Status Report, 7.

⁸ *Id.*

⁹ *Id.*

customers through owned generation, nor does it buy physical power forward under long-term contracts.¹⁰ Thus, the only reasonable compliance option available to Dominion Retail it is to purchase RECs and SRECs – which is precisely what it did to satisfy its 2010 Ohio Renewable, Non-Ohio Renewable, and Non-Ohio Solar benchmark obligations.¹¹

Although Staff acknowledges that Dominion Retail’s compliance strategy is based on the purchase of RECs and SRECs,¹² Staff later states that “Dominion Retail’s perceived need for flexibility does not preclude consideration of certain compliance options given the ability to bank and/or sell any excess RECs or S-RECs.”¹³ Dominion Retail respectfully submits that this is a total non sequitur.

First, Dominion Retail’s need for flexibility is more than a “perceived” need. For reasons explained above, maintaining flexibility in its supply arrangements is fundamental to Dominion Retail’s business model, which is why the long-term contract option identified in Rule 4901:1-40-06(A)(1) is not a reasonable option for Dominion Retail. Indeed, Staff did not expressly criticize Dominion Retail for failing to consider the long-term contract option, so it may be that Staff agrees that this is not a reasonable option for Dominion Retail.

Second, “the ability to bank and/or sell any excess RECs or S-RECs”¹⁴ would be a compliance option only if Dominion Retail had excess Ohio SRECs in its portfolio. Dominion Retail could not consider banked Ohio-sourced SRECs as a 2010 compliance option because it

¹⁰ *Id.*

¹¹ Indeed, this is the same compliance strategy Dominion Retail has routinely utilized to meet similar alternative energy portfolio requirements in other jurisdictions in which it operates. *See* Case No. 10-2986-EL-ACP, Dominion Retail 2009 Status Report, 3-4.

¹² *See* Staff Comments, 2.

¹³ Staff Comments, 4.

¹⁴ It is not clear to Dominion Retail why Staff included “RECs” in this statement, as Dominion Retail has, in fact, purchased sufficient RECs to meet both the Ohio Renewable and Non-Ohio Renewable benchmarks. The issue here goes to the availability of SRECs, and, specifically, Ohio-sourced SRECS, as Dominion Retail purchased more than enough non-Ohio sourced SRECs to meet the Non-Ohio Solar benchmark during the calendar 2010 reporting year. *See* Dominion Retail Status Report, Exhibit A.

had none. Indeed, it is well documented that Ohio SRECs were also in short supply in 2009 (the first year the statutory benchmark requirements were in place).¹⁵ Thus, it is far from clear why Staff would believe that Dominion Retail would have banked Ohio SRECs on hand to apply to its 2010 Ohio Solar obligation, when virtually every subject company was granted *force majeure relief* from the Ohio Solar benchmark because Ohio SRECs were basically non-existent in 2009. This should not be taken to mean that utilizing banked RECS or SRECs is not an appropriate compliance strategy. In fact, Dominion Retail has already acquired more Ohio SRECs this year than are necessary to meet its estimate of its 2011 Ohio Solar obligation, and fully intends to bank the excess and to apply them in future years to the extent permitted by the Commission's rules. But Dominion Retail certainly cannot be faulted for failing to consider a 2010 compliance strategy that it had no ability to carry out.¹⁶

In its comments, Staff notes that, under Rule 4901:1-40-06, OAC, the party seeking a *force majeure* determination has the burden of demonstrating that it has pursued all reasonable compliance options.¹⁷ As explained in its report, the purchase of RECs and SRECs was, and is, the only reasonable compliance option available to Dominion Retail. Thus, the only question for

¹⁵ See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Amendment of the 2009 Solar Energy Resource Benchmarks*, Case No. 09-987-EL-EEC, *et al.* (Entry dated 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*, Case No. 09-1922-EL-ACP (Finding and Order dated 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*, Case No. 09-1989-EL-ACP (Finding and Order dated 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*, Case No. 10-428-EL-ACP (Finding and Order dated April 28, 2010); and *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 Solar Energy Resources Benchmark*, Case No. 10-467-EL-ACP (Finding and Order dated February 23, 2011).

¹⁶ Staff's reference to the ability to sell SRECs as a compliance strategy is equally confounding. If, contrary to fact, Dominion Retail had Ohio-sourced SRECs in its 2010 portfolio, it would certainly have applied them to its own benchmark obligation rather than sell them.

¹⁷ Staff Comments, 3.

the Commission is whether Dominion Retail made the good-faith effort to acquire the necessary Ohio-sourced SRECs required by Section 4928.64(C)(4)(b), Revised Code.

B. Dominion Retail's Effort To Acquire Ohio-Sourced SRECs Was Reasonable Under The Circumstances And Represented A Good-Faith Effort To Achieve Compliance With The 2010 Ohio Solar Benchmark.

As Staff correctly observes, Dominion Retail reported that it had contacted the area's leading REC broker in an effort to acquire the Ohio-sourced SRECs necessary to meet its 2010 Ohio Solar obligation and was advised that there were no Ohio SRECs available at any price.¹⁸ Although Staff does not expressly question whether this constituted a good faith effort on Dominion Retail's part, Staff's later reference to Dominion Retail "contacting a single broker"¹⁹ seems to suggest that Staff does not believe that this represented an adequate effort. Two points bear mention.

First, Dominion Retail provides competitive retail electric service in states other than Ohio, several of which – namely, Pennsylvania and certain New England states – have alternative energy portfolio requirements that have been in place for a number of years. As evidenced by the fact that Dominion Retail has continuously fully complied with the alternative energy portfolio requirements in these other jurisdictions, Dominion Retail takes these obligations very seriously. Moreover, because, as in Ohio, Dominion Retail's compliance strategy in these jurisdictions relies on the purchase of RECs, Dominion Retail is quite familiar with the REC market, generally, and with the process of acquiring RECs through brokers. REC brokers are, after all, in the business of arranging for the sale and purchase of RECs. Thus, once advised by a leading area broker that there were no Ohio SRECs available at any price,

¹⁸ Staff Comments, 2, citing Dominion Retail Status Report, 7.

¹⁹ Staff Comments, 3.

Dominion Retail had no reason to doubt that representation and no reason to call another broker, if, indeed, that is what Staff is suggesting it should have done.

Second, it is important to bear in mind that Dominion Retail acquired more than enough RECs and SRECS to meet its 2010 Ohio Renewable, Non-Ohio Renewable, and Non-Ohio Solar benchmark obligations.²⁰ Any suggestion that Dominion Retail's request for *force majeure* relief from the 2010 Ohio Solar benchmark represents a deliberate attempt to dodge this particular obligation, when it has complied fully with these other obligations, should be rejected out of hand. Indeed, Dominion Retail has demonstrated its good faith by warranting in its report that it will not oppose adjusting its 2011 Ohio Solar benchmark to include the 2010 shortfall, and as noted above, has already obtained sufficient Ohio SRECs this year to meet next year's Ohio Solar obligation. In addition, it should be remembered that, as a gesture of good faith, Dominion Retail made the compliance payment resulting from its failure to meet the 2009 Ohio Solar benchmark, notwithstanding that the Commission routinely granted relief from this benchmark to other companies on *force majeure* grounds. In short, there is no basis for the Commission to find that Dominion Retail did not make a good faith effort to pursue the only reasonable compliance option available to it.

Although Staff cites the Rule 4901:1-40-06(A)(2), OAC, requirement that a request for a *force majeure* determination "must include an assessment of the availability of qualified in-state resources, as well as qualified resources within the territories of PJM and the MISO" in its Comments,²¹ it is not clear what role, if any, this requirement played in Staff's conclusion.²²

²⁰ Dominion Retail Status Report, Exhibit A.

²¹ Staff Comments, 3.

²² Dominion Retail's uncertainty in this regard stems from the fact that Staff's stated determination was that, based on the information in the Status Report, "Staff cannot confirm that Dominion Retail satisfied the requirements in O.A.C. Section [sic] 4901:1-40-06(A)(1) to support a *force majeure* determination." Staff Comments, 4. There is no mention of Rule 4901:1-40-06(A)(2), OAC, in Staff's conclusion.

Because Dominion Retail's request relates solely to Ohio Solar benchmark, the status of the availability of qualified resources in the PJM and MISO territories outside of Ohio is not relevant for purposes at hand. However, Dominion Retail submits that reporting that it was advised by the area's leading REC broker that there were no Ohio-sourced SRECs available at any price constitutes an assessment of the availability of the relevant qualified in-state resources and, thus, satisfies the requirement of this rule. Moreover, under the statute, the obligation to assess the availability of renewable energy or solar energy resources in Ohio and other jurisdictions in the PJM and MISO regional transmission organizations is the Commission's responsibility. Plainly, in imposing this requirement on the Commission, the legislature contemplated that the Commission's assessment would be based on more than the experience reported by a single company. The fact is that other companies have also sought relief from their 2010 Ohio Solar benchmark requirements on *force majeure* grounds.²³ Cumulatively, these requests show that there were insufficient Ohio-sourced SRECs available in 2010 to permit all companies to comply with the Ohio Solar benchmark during the calendar 2010 reporting period, which confirms the representation made by Dominion Retail in seeking a *force majeure* determination.

To provide additional support for this assessment, Dominion Retail has appended hereto, as Attachment A, the letter it received from a brokerage firm specializing in energy commodities in response to Dominion Retail's request for information regarding the availability of Ohio-sourced SRECs in 2010. Dominion Retail respectfully submits that there is more than adequate information available to the Commission to support a determination that Ohio-sourced SRECs

²³ See, e.g., *In the Matter of the Alternative Energy Resources Report for Calendar Year 2010 From Direct Energy Business, LLC*, Case No. 11-2469-ACP (Application Dated April 15, 2011); *In the Matter of the Application by Noble Americas Energy Solutions LLC for a waiver from 2010 Ohio Sited Solar Energy Resource Benchmarks*, Case No. 11-2384-EL-ACP (Application dated April 11, 2011); *In the Matter of the Application of Glacial Energy Ohio, Inc. for Approval of its 2010 Alternative Energy Annual Status Report*, Case No. 11-2457-EL-ACP (Application dated April 15, 2011).

were not reasonably available in the marketplace in sufficient quantities to permit Dominion Retail to comply with the Ohio Solar benchmark during the review period.

WHEREFORE, Dominion Retail respectfully renews its request for a *force majeure* determination with respect to the otherwise applicable 2010 Ohio Solar benchmark and urges the Commission to find that its request is well made and should be granted.

Respectfully submitted,



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Attorneys for Dominion Retail, Inc.

ATTACHMENT A



July 6, 2011

To: Mr. David Gelemter,
Environmental Markets Trading Group
Dominion Resources Inc.
120 Tredegar Street, Clearing House
Richmond, VA 23219

Mr. Gelemter,

Spectron has diligently pursued in-state SREC generators for Ohio's Alternative Energy Resource Standard. While we have brokered a small volume of deals, we have been unable to satisfy the full demand for in-state Ohio solar RECs generated in 2010, even at prices approaching the ACP.

Spectron Energy is an agency, neutral only brokerage firm with a focus on energy commodities. I run the eastern compliance REC desk here at Spectron Energy and we cover all REC compliance markets. I can personally attest to the fact that finding 2010 In-state Ohio SRECs was extremely difficult and a number of our clients were unable to procure RECs at prices below the SACP.

This market is still extremely nascent but we do expect it to take some time before we see liquidity pick up. I will keep you abreast of all incoming offers.

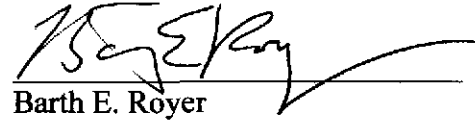
Best regards,

Jack Velasquez
Vice President of Environmental Products
Spectron Energy

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class mail, postage prepaid, this 11th day of July 2011.


Barth E. Royer

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