

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Direct Energy Business)
LLC for a Waiver from Meeting the 2010) Case No. 11-2447-EL-ACP
Ohio Sited Solar Energy Resource)
Benchmarks.)

FINDING AND ORDER

The Commission finds:

- (1) Direct Energy Business LLC (DEB) 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 requires that, for 2010, 0.50 percent of the electricity sold by means of retail electric sales in Ohio must have been generated from renewable energy resources, including 0.010 percent from solar energy resources (SER), half of which must be met with resources located within Ohio.
- (3) Additionally, 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, LLC (PJM) and the Midwest Independent Transmission System Operator (MISO).
- (4) On April 14, 2011, DEB filed an application, pursuant to Section 4928.64(C)(4), Revised Code, requesting that the Commission make a *force majeure* determination regarding DEB's

compliance with the SER benchmark for 2010. In the application, DEB notes that it made a similar request for 2009 that was approved by the Commission, contingent upon DEB meeting a revised 2010 SER benchmark, which was increased to include the shortfall for 2009.¹ DEB states that it was unable to meet its revised 2010 SER benchmark. Consequently, DEB requests that the Commission grant DEB's application for a *force majeure* determination.

- (5) On May 5, 2011, the attorney examiner issued an entry establishing a deadline of May 26, 2011, for the filing of comments on DEB's application for a *force majeure* determination and June 6, 2011, for the filing of reply comments. By entry issued May 26, 2011, the attorney examiner granted Staff's motion to extend the respective deadlines to June 15, 2011, and June 29, 2011.
- (6) In support of its application for a *force majeure* determination, DEB asserts that there are only a few brokers for solar renewable energy credits (SRECs), given the infancy of the market. DEB states that it contacted four known brokers during the course of 2010 and the first quarter of 2011 and that, despite these efforts, DEB was unable to obtain any SRECs generated from in-state resources, as the brokers were unable to locate any such SRECs priced below the amount of the alternative compliance payment (ACP) provided for in Section 4928.64(C)(2), Revised Code, which is currently \$400.00 per megawatt hour. DEB argues that it made a good faith effort to obtain the necessary SRECs and concludes that the Ohio market for SRECs is small in size.

Accordingly, DEB proposes that its revised 2010 SER benchmark should be reduced to the amount of SRECs actually acquired by DEB, contingent upon DEB meeting a revised 2011 SER benchmark that is increased to include the shortfall for 2009 and 2010. DEB argues that granting its application for a *force majeure* determination, as opposed to ordering that DEB be charged the ACP, will keep the demand for SRECs robust and

¹ 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).

stimulate the construction of solar facilities in Ohio. As the market for SRECs is growing, DEB asserts that it expects to demonstrate by next year that it was able to comply with the SER requirements for 2011 and begin to make up for its past obligations.

- (7) On June 15, 2011, Staff filed comments regarding DEB's application for a *force majeure* determination. Initially, Staff notes that an electric services company requesting a *force majeure* determination is required to demonstrate, pursuant to Rule 4901:1-40-06(A), Ohio Administrative Code (O.A.C.), that it pursued all reasonable compliance options, including, but not limited to, SREC solicitations, SREC banking, and long-term contracts. Staff further observes that the rule requires that a *force majeure* request include an assessment of the availability of qualified in-state resources, as well as qualified resources within the territories of PJM and MISO.

Staff finds that, in accordance with the rule, DEB bears the burden of proof to demonstrate that it pursued all reasonable compliance options prior to seeking a *force majeure* determination. Staff reports that, although DEB contacted several brokers, DEB did not indicate whether it pursued any of the other options enumerated in the rule. Staff concludes that it cannot confirm whether DEB satisfied the requirements of the rule and, therefore, DEB has not demonstrated that a *force majeure* determination is warranted.

Additionally, Staff points out that the ACP should not represent an automatic price ceiling, noting that there is no statutory or regulatory requirement that establishes the ACP as a pricing threshold that cannot be exceeded.² Staff asserts that Section 4928.64(C)(4), Revised Code, requires the Commission, in making a *force majeure* determination, to decide if renewable energy resources are reasonably available. Staff suggests that, rather than use the ACP as a *de facto* measure of whether such resources are reasonably available, electric services companies should engage in an informal dialogue with Staff in the event that SREC prices appear to exceed the applicable ACP by a certain amount (*i.e.*, 125 percent of the ACP). Under this

² Staff acknowledges the cost cap provisions of Section 4928.64(C)(3), Revised Code, but notes that DEB does not contend that those provisions have been triggered.

approach, Staff recognizes that it would be unable to offer any binding assurances to the electric services company but that it would afford the opportunity to discuss the matter prior to the company making a commitment in one direction or the other.

Finally, Staff indicates that DEB did not clearly address, in its application, the disposition of its shortfall from 2009, which was added to its SER requirements for 2010. Staff recommends that *DEB clarify the status of its efforts with regard to the shortfall.*

- (8) On June 30, 2011, DEB filed its reply comments, as well as a motion for a one-day extension of the deadline for filing such comments. In the motion, DEB states that, although its reply comments were prepared by the filing deadline, its counsel was unable to file the comments until the next day due to the press of other business. DEB requests that a one-day extension be granted so that its reply comments may be considered by the Commission.

Initially, in its reply comments, DEB states that it agrees with Staff's accounting of its SRECs for 2009 and 2010 and that there appear to be no philosophical differences between Staff and DEB as to the obligation of a CRES provider to obtain SRECs.

DEB clarifies that it obtained no SRECs for 2009 and no SRECs generated from resources in Ohio for 2010. DEB states that it will not contest assessment of the ACP for its non-compliance; however, DEB notes that it would be more effective to reduce its revised 2010 SER benchmark to the amount of SRECs actually acquired by DEB, contingent upon DEB meeting a revised 2011 SER benchmark that is increased to include the shortfall for 2009 and 2010. DEB asserts that the latter approach would more effectively aid in the development of solar facilities.

Finally, DEB indicates that it is a relatively small contributor to the total state baseline for electric sales and that, given its small size, it is largely dependent on the development of a liquid market for SRECs. Noting that the statutory benchmarks are just two years old, DEB contends that it is not surprising that the market for SRECs has not fully developed and that the shortage of liquidity appears to be a temporal issue, as

evidenced by the fact that DEB was unable to obtain any SRECs for 2009 but was successful in doing so for 2010. Further, according to DEB, brokers expect that SRECs generated from in-state resources will be available in the near future.

- (9) Initially, the Commission finds that DEB's motion for a one-day extension of time in which to file its reply comments is reasonable and should be granted.
- (10) Upon review of DEB's application for a *force majeure* determination, Staff's comments, and DEB's reply comments, the Commission finds that DEB's application should be granted. As noted above, 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. Additionally, the statute provides that the Commission shall consider the electric service company's good faith effort to acquire sufficient renewable energy resources in Ohio.

The Commission notes that DEB attempted to accomplish its goal of purchasing sufficient SRECs by contacting four known brokers. Despite its efforts, however, DEB was unable to obtain sufficient SRECs to satisfy its 2010 SER benchmark, including the shortfall for 2009. Further, DEB states that the market for SRECs has not yet developed fully and that the asking price for in-state SRECs is above the ACP amount. In light of the preceding, the Commission finds that DEB has presented evidence that an insufficient quantity of in-state SRECs for 2010 was reasonably available in the market to facilitate DEB's compliance with its benchmark. As we have recognized in numerous proceedings today,³ other electric utilities and electric services companies likewise experienced difficulties in

³ *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, Finding and Order (August 3, 2011); *In the Matter of the Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Case No. 11-2470-EL-ACP, Finding and Order (August 3, 2011); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for a Force Majeure Determination for Their In-State Solar Resources Benchmark Pursuant to Section 4928.64(C)(4)(a), Revised Code*, Case No. 11-2479-EL-ACP, Finding and Order (August 3, 2011); *In the Matter of the Alternative Energy Resources Report for Calendar Year 2010 from SMART Papers Holdings LLC*, Case No. 11-2650-EL-ACP, Finding and Order (August 3, 2011).

meeting their in-state SER benchmarks for 2010. It is apparent that the market for in-state solar resources is still advancing to the point at which there will be sufficient resources available for all electric utilities and electric services companies to be able to meet the statutory standard, which was merely in its second year of implementation in 2010. However, although we have found today that an adequate market for in-state SRECs did not exist in 2010, the Commission expects all electric utilities and electric service companies to fully comply with the statutory requirement to engage in good faith efforts to acquire sufficient solar energy resources as set forth in Section 4928.64(c)(4)(b), Revised Code.

Consequently, the Commission finds that DEB has presented sufficient grounds for the Commission to reduce DEB's revised 2010 SER benchmark to the actual level of SRECs acquired in 2010. Pursuant to Section 4928.64(C)(4)(c), Revised Code, our approval of DEB's application is contingent upon DEB meeting its revised 2011 SER benchmark, which shall be increased to include the shortfall for the 2009 and 2010 SER benchmarks.

It is, therefore,

ORDERED, That DEB's motion for a one-day extension of time in which to file its reply comments be granted. It is, further,

ORDERED, That DEB's application for a *force majeure* determination be granted. It is, further,

ORDERED, That DEB's SER benchmark for 2011 be increased to include the shortfall for its 2009 and 2010 SER benchmarks, in accordance with 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


Todd A. Smithler, Chairman

Paul A. Centolella



Andre T. Porter

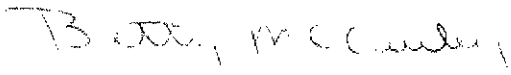


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Secretary

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