

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Alternative)	
Energy Status Report of Ohio Edison)	
Company, The Cleveland Electric)	
Illuminating Company and the Toledo Edison)	Case No. 11-2479-EL-ACP
Company)	
)	
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 R.C. §)	
4928.64(C)(4)(a))	

APPLICATION FOR REHEARING

The Environmental Law and Policy Center submits this Application for Rehearing pursuant to Ohio Revised Code § 4903.10 and Ohio Administrative Code § 4901-1-35(A) regarding the Public Utilities Commission of Ohio's Finding and Order issued on August 3, 2011 in the above-captioned case. ELPC maintains that the Commission's Entry was unlawful and unreasonable for the following reasons:

- A. Assignment of Error 1: The Commission's Order is unlawful because it violates Ohio Administrative Code § 4901:1-40-06(A)(1) because the Commission improperly places the burden of proof on the intervenors.**

- B. Assignment of Error 2: The Commission's Order violates Ohio Revised Code § 4928.64(C)(4)(b) because the Order improperly considered FirstEnergy's Application for Request for Proposal as a good faith effort to procure sufficient SRECs, even though that Application is still pending.**

For the reasons described in the attached memorandum in support, the Environmental Law and Policy Center respectfully requests that the Commission grant this Application for Rehearing and hold a hearing to determine what modifications to the Finding and Order are necessary.

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MEMORANDUM IN SUPPORT

I. Introduction

Senate Bill 221 includes a solar mandate which requires that solar energy resources (“SER”) account for at least 0.50 percent of the renewable energy sold by Ohio’s investor-owned utilities by 2025.¹ Utilities must obtain at least half of that requirement from sources within Ohio, a requirement that went into effect in 2009.² That year, Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively “FirstEnergy” or “Companies”) filed and received a force majeure determination from the Public Utilities Commission of Ohio (“PUCO” or “the Commission”).³ The PUCO made the 2009 force majeure determination contingent on FirstEnergy meeting revised 2010 SER benchmarks.⁴

¹ ORC 4928.64(B).

² *Id.*

³ See 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, Case No. 09-1922-EL-EEC.

⁴ *Id.*, Finding and Order (March 10, 2010).

FirstEnergy, however, failed to meet the 2010 revised SER benchmark. On January 24, 2011, FirstEnergy filed an application for a force majeure determination for the second year in a row (“January Application”).⁵ In their January Application, FirstEnergy stated that it achieved only 3 percent of its 2010 in-state requirement.⁶ Members of OCEA and the Solar Alliance filed comments in that case requesting that the PUCO deny FirstEnergy’s force majeure request.⁷ PUCO Staff filed comments requesting additional information.⁸ FirstEnergy withdrew the January Application before the PUCO ruled on it.

On April 15, 2011, FirstEnergy filed a second application for a force majeure determination (“Application”). The Environmental Law and Policy Center (“ELPC”) and the Solar Alliance filed comments with the PUCO arguing that FirstEnergy had an obligation to meet benchmarks for 2009 and 2010 and failed to make a good faith effort to obtain the necessary SRECs. PUCO Staff also filed comments stating that staff did not believe that “the Companies fully evaluated all reasonable compliance options.”⁹

On August 3, 2011, the Commission entered a Finding and Order (“Order”) and granted FirstEnergy’s force majeure request. The PUCO reasoned that “in light of the recently approved RFP to purchase RECs and the fact that the Companies may procure part of the 2010 shortfall from the RFP, the Companies have demonstrated a good faith effort to acquire sufficient in-state SRECs.”¹⁰

However, FirstEnergy’s efforts were late in the process and were incomplete, which is in direct conflict with the governing statute. Therefore, the Commission should grant this

⁵ 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 2010 Solar Energy Resources Benchmark Requirement, Case No. 11-0411-EL-ACP.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Initial Comments Filed by PUCO Staff (June 27, 2011), p. 12.

¹⁰ See Finding and Order (August 3, 2011), Case No. 11-2479-EL-ACP, p. 13.

Application for Rehearing and hold a hearing to determine what modifications to the Finding and Order are necessary.

II. Standard of Review

Applications for Rehearing are governed by Ohio Revised Code (“ORC”) § 4903.10 and Ohio Administrative Code (“OAC”) § 4901-1-35. ORC § 4903.10 provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."¹¹ OAC § 4901-1-35 enumerates similar requirements to those contained in the Ohio Revised Code.

In considering an application for rehearing, Ohio law provides that the Commission:

"may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."¹² Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same."¹³

III. Argument

A. The Commission’s Order is unlawful because it violates Ohio Administrative Code § 4901:1-40-06(A)(1) because the Commission improperly places the burden of proof on the intervenors.

Under Ohio statute, an electric distribution utility may request that the Commission grant a force majeure determination. After reviewing the utility’s filing:

...the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or

¹¹ ORC §R.C. 4903.10.

¹² *Id.*

¹³ *Id.*

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. [emphasis added].

ORC § 4928.64(C)(4)(b).

Significantly, when requesting a force majeure determination, it is the **utility** that “shall demonstrate that it pursued all reasonable compliance options [emphasis added].”¹⁴ The plain language of the statute places the burden of proof on the utility. Nothing in the Ohio Revised Code or the Ohio Administrative Code places any burden on the intervening parties. As is true for virtually all legal issues and areas of law, the party seeking to excuse its performance of certain terms should bear the burden of proof. More specifically, courts generally hold that “in order to use a force majeure clause as an excuse for nonperformance, the nonperforming party bears the burden of proving that the event was beyond the party's control and without its fault or negligence.”¹⁵ In this case, FirstEnergy had the burden of demonstrating that a force majeure determination was appropriate.

Despite this clearly defined burden placed on the utility, the Commission comments in its Order that “neither the interveners nor Staff have demonstrated that substantial quantities of in-state SRECs were reasonably available in the market.”¹⁶ In other words, the Commission improperly shifted the burden of proof from FirstEnergy to the intervenors and staff. Essentially, the Commission’s Order considers the fact that none of the intervenors, such as

¹⁴ OAC § 4901:1-40-06(A)(1).

¹⁵ *Stand Energy Corp. v. Cinergy Servs.*, (2001), 144 Ohio App. 3d 410 (case addressing force majeure clause in contract case).

¹⁶ Finding and Order (August 3, 2011).

ELPC and staff, showed that substantial quantities of SRECs were reasonably available in the market. But, again, that is not the duty of the intervenors. FirstEnergy has the burden of showing that there were *not* enough SRECs. One way a utility can show that there were not enough SRECs, as discussed below, is by showing that the utility exhausted all means available. FirstEnergy failed to make that showing.

Because the Commission placed the burden of proof on the intervenors and staff, the Entry violates the Commission rule. Therefore, the PUCO should grant this application for rehearing and hold a hearing on FirstEnergy's performance.

B. The Commission Order violated Ohio Revised Code § 4928.64(C)(4)(b) and improperly considered FirstEnergy's Application for Request for Proposal as a good faith effort to procure sufficient SRECs, even though that RFP Application is still pending.

FirstEnergy was required by ORC § 4928.64(C)(4)(b) to make a "good faith effort to acquire sufficient ... solar energy resources to so comply" with its collective statutory 2010 in-state solar benchmark. Further, the Ohio Administrative Code required FirstEnergy to submit its specific attempts to comply with the Commission:

At the time of requesting such a [force majeure] determination from the commission, an electric utility or electric services company shall demonstrate that it *pursued* all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, and long-term contracts. (Emphasis added).¹⁷

In granting FirstEnergy's force majeure request, the Commission placed significant emphasis on FirstEnergy's Application for Approval of Request for Proposal ["RFP"] to Purchase Renewable Energy Credits through Ten Year Contracts:

The Commission finds that, in light of the recently approved RFP to purchase RECs and the fact that the Companies may procure part of the 2010 shortfall

¹⁷ OAC § 4901:1-40-06(A)(1).

from the RFP, the Companies have demonstrated a good faith effort to acquire sufficient in-state SRECs.¹⁸

FirstEnergy's RFP Application fails to demonstrate the good faith effort that is required by statute. FirstEnergy did not file their RFP Application until December 2, 2010.²⁰ In other words, FirstEnergy allowed eleven months of 2010 to pass before requesting Commission approval for the plan that described FirstEnergy's efforts on how FirstEnergy planned to obtain the necessary SRECs for the year. FirstEnergy's RFP Application was not even approved until June 8, 2011- almost six months after FirstEnergy filed their January Application requesting a force majeure determination.

Further, it is significant to recognize FirstEnergy's original intent with the RFP Application. In the January 24, 2011 Application that FirstEnergy filed requesting a force majeure determination, FirstEnergy commented that they "considered long-term contracts...for the 2010 calendar year" but were unsuccessful²¹. FirstEnergy acknowledged that it filed an RFP Application in December 2010, and noted that "if this Application [was] approved and the RFP [was] successful, such Ohio SRECs would be used towards meeting *future* compliance requirements [emphasis added]."²²

Three months later, when FirstEnergy filed their second Application for force majeure in this case, and after FirstEnergy was aware of intervenor and staff comments to the January Application, FirstEnergy tried to bolster the Application filed in this case by including the RFP

¹⁸ See Finding and Entry, p. 13, citing In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Request for Proposal to Purchase Renewable Energy Credits Through Ten Year Contracts, Case No. 10-2891-EL-ACP.

²⁰ See Application (December 2, 2010), Case No. 10-2891-EL-ACP.

²¹ See 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 2010 Solar Energy Resources Benchmark Requirement, p. 5, Case No. 11-0411-EL-ACP.

²² *Id.* at p. 5.

Application as evidence of their good faith attempt to meet the benchmark.²³ The PUCO should not consider FirstEnergy's RFP Application as a "good faith effort" because it was filed in the twelfth hour in 2010 and, even according to FirstEnergy, was intended to secure SRECs for *future* compliance. The Order issued in this case wrongly justifies a force majeure determination for FirstEnergy by emphasizing an event (the PUCO's approval of FirstEnergy's RFP Application) that occurred after the first force majeure request was even filed.

Notably, the RFP Application is still pending before the Commission. On July 8, 2011, FirstEnergy filed an Application for Rehearing. On August 3, 2011, the Commission granted FirstEnergy's Application for Rehearing. Essentially, in their Order granting FirstEnergy's force majeure request in this case, the Commission relies on an RFP Application that is still pending. A pending case should not be the basis for granting force majeure.

IV. Conclusion

FirstEnergy carries the burden of proving that a force majeure determination is appropriate. In the Order in this case, the Commission improperly places part of the burden on intervenors and staff. Also, the arguments FirstEnergy made in their Application for a force majeure determination is an argument that the Commission has heard before. FirstEnergy waited until December 2010 to file its RFP Application, which fails to meet the good faith effort required by statute. Also, the PUCO improperly places emphasis on an RFP Application that is still pending. In conclusion, ELPC respectfully requests that this Application for Rehearing be granted so that a hearing can be conducted to determine what modifications to the Finding and Order are necessary.

²³ See 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 R.C. § 4928.64(C)(4)(a), Case No. 11-2479.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Comments has been served upon the following parties by first class or electronic mail this 2nd day of September, 2011.

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