

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Long-Term Forecast	)	
Report of Ohio Power Company and	)	Case No. 10-501-EL-FOR
Related Matters.	)	

In the Matter of the Long-Term Forecast	)	
Report of Columbus Southern Power	)	Case No. 10-502-EL-FOR
Company and Related Matters.	)	

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**REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO**

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**ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO**

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**I. INTRODUCTION**

There is no basis for the Public Utilities Commission of Ohio (“Commission”) to determine that there is a “need” for the Turning Point Solar (“TPS”) project. A finding of need cannot be made in a long term forecast report (“LTFR”) and a finding of need cannot be made for a renewable energy facility in any proceeding. Even if a finding of need could be made for a renewable energy facility, such a finding would have to be based on the need of the electric distribution utility (“EDU”)—not the solar renewable energy credit (“SREC”) requirements of the state of Ohio. Regardless, even assuming Ohio Power Company’s (“OP”) and Commission Staff’s (“Staff”) (collectively, “Signatory Parties”) flawed legal position had merit, OP and Staff have failed to carry their burden of showing that insufficient solar generating facilities will be developed by market forces.

The Post Hearing Briefs filed by Staff and OP further demonstrate that the Commission cannot find that there is a need for TPS. Both Staff’s and OP’s Briefs are legally incorrect and lack evidentiary support. Staff and OP cannot alter the legal landscape or lack of evidentiary support through a Stipulation and Recommendation

("Stipulation"). Thus, the Commission should reject all portions of the Stipulation related to TPS.

## **II. STANDARD OF REVIEW AND BURDEN OF PROOF**

The Commission evaluates settlements under a three part test.<sup>1</sup> Staff and OP misapply the test and do not understand that certain things cannot be accomplished through a Stipulation.

First, the Commission is a creature of statute. A settlement cannot provide the Commission with authority to do what the Commission does not otherwise have authority to do or to disrespect procedural or substantive requirements established by the General Assembly or the Commission's rules.<sup>2</sup> There is no legal basis upon which to find that there is a need for TPS. Because a stipulation cannot provide the Commission with authority, the stipulation must be rejected to the extent it recommends a finding of need for TPS.

Additionally, a settlement is not evidence and it is not binding upon the Commission.<sup>3</sup> The Commission must determine what is just and reasonable based upon the evidence presented at the hearing.<sup>4</sup> Thus, the Commission should ignore

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<sup>1</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992). See, also, *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82-83 (2002).

<sup>2</sup> *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896 at ¶26 (2004).

<sup>3</sup> *In re Columbus S. Power Co.*, 129 Ohio St. 3d 46, 49-50 (Ohio 2011).

<sup>4</sup> *Id.*

several different portions of both OP's and Staff's Briefs which seek to rely on the Stipulation for evidentiary support.<sup>5</sup>

The burden of proof is on OP. A finding of need is one of many prerequisites to obtain a non-bypassable surcharge pursuant in an electric security plan ("ESP"). Section 4928.143(C)(1), Revised Code, states, "[t]he burden of proof in the [ESP] proceeding shall be on the electric distribution utility." Since a finding of need must be made in an ESP proceeding, the burden of establishing that TPS is needed is on OP. While it would be unlawful and unreasonable to establish a finding of need outside of an ESP, if such a finding were legal, OP would be required to carry the same burden of proof—and OP has not carried its burden.

### **III. ARGUMENT**

#### **A. A Finding of Need Cannot be Made in a LTFR Proceeding**

The ESP Statute, Section 4928.143, Revised Code, states that a finding of need must be made in an ESP proceeding, and the LTFR Statute, Section 4935.04, Revised Code, states that LTFR proceedings are "limited to issues relating to forecasting."<sup>6</sup> Moreover, a finding of need cannot be made in a LTFR or any other proceeding with respect to a renewable generating facility.<sup>7</sup> Despite the General Assembly's clear indication of where and how a finding of need can be made, the Signatory Parties

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<sup>5</sup> OP states, "the Stipulation itself provides an agreement among the Stipulating Parties that the standard is met." OP Brief at 7. OP states, "The Stipulation, as a package, benefits ratepayers and the public interest. Again this prong of the three-part test is a stipulated matter . . . ." OP Brief at 8. OP also states, "The Stipulation, as a package, does not violate any important regulatory principle or practice. Again, this last prong of the three-part test is a stipulated matter . . . ." OP Brief at 10. Staff Brief at 4.

<sup>6</sup> Section 4935.04(E)(1), Revised Code.

<sup>7</sup> Neither OP's nor Staff's Briefs address this legal flaw in their position. See Sections 4928.64(E) and 4928.143(B), Revised Code.

entered into a Stipulation that requests a finding that is beyond the scope of the Commission's authority.

In their Initial Briefs, the Signatory Parties persist in their endeavor of egregiously mischaracterizing the scope and effect of the LTFR and ESP Statutes. Staff's Brief claims that there are seven traditional forecasting determinations that must be made, citing to the seven determinations required by Section 4935.04(F), Revised Code. Staff then claims, "[w]ith the passage of SB 221 an additional issue has been added. R.C. 4928.143(B)(2)(c) allows the imposition of a non-bypassable charge by an EDU for a generating facility that meets a number of conditions."<sup>8</sup> While Staff then cites to the statutory language that requires need to be determined in a ESP, Staff is only cares about the statute's reference to the resource plan.<sup>9</sup> Accordingly, Staff claims, "Statutorily, resource plans for EDU's are submitted in forecasting cases . . . . Thus, where an EDU is contemplating seeking a non-bypassable charge through an ESP. . . the EDU must have the need for that facility considered in a forecasting case."<sup>10</sup>

First, contrary to Staff's claim, Amended Substitute Senate Bill 221 ("SB 221") did not add anything to the LTFR Statute. The LTFR Statute was left completely unaltered by SB 221. But, SB 221 did create the ESP Statute, which included the following language: "no surcharge shall be authorized unless the commission first determines in the proceeding that there is a need for the facility based on resource planning projections."<sup>11</sup> Accordingly, it is clear where need must be determined. While resource

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<sup>8</sup> Staff Brief at 3 (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> Staff Brief at 3 (footnote omitted).

<sup>11</sup> Section 4928.143(B)(2)(c), Revised Code (emphasis added).

plans may be submitted in LTFR proceedings, the Commission's review is limited to whether the resource plan is accurate, reasonable, and complete.<sup>12</sup> A finding of need for a particular generating facility must be determined in an ESP.

OP's Brief is fatally doomed inasmuch as its ambition to establish the need for TPS in a LTFR rests on an incorrect definition of "major utility facility." Particularly, OP states:

The statutory basis for the determination of need in a LTFR proceeding can be found in R.C. 4935.04. R.C. 4935.04(C)(3) requires electric utilities owning generating facilities to submit a long-term forecast report to the Commission. According to R.C. 4935.04(C), the report shall contain "[a] description of major utility facilities planned to be added or taken out of service in the next ten years\*\*\*." R.C. 4935.04(C)(6) requires the report to "describe the major utility facilities that, in the judgment of such person, will be required to supply system demands during the forecast period."

A hearing is not required every time a report is filed, but under R.C. 4935.04(D), however, if a hearing is required for good cause then the utility is required to notice that hearing in each county in which the person furnishing the report has or intends to locate a major utility facility under this part of the statute. If a hearing is held the scope of that hearing is defined under R.C. 4935.04(E).<sup>13</sup>

Apparently, OP believes that TPS is a major utility facility that must be described in the LTFR. OP is wrong. Major utility facility is defined by Section 4935.04(A)(1), Revised Code, as a transmission line. Particularly, it is defined as "[a]n electric transmission line and associated facilities of a design capacity of one hundred twenty-five kilovolts or more."<sup>14</sup>

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<sup>12</sup> Section 4935.04(F), Revised Code.

<sup>13</sup> OP Brief at 10 (emphasis added).

<sup>14</sup> Section 4935.04(A)(1), Revised Code.

Perhaps OP's version of the Ohio Revised Code predates Amended Substitute Senate Bill 3 ("SB 3"). At one point in time, the definition of major utility facility included generating facilities of 50 megawatts ("MW") or more. But SB 3 struck the following language from the definition: "[a]n electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more." SB 3 also struck language in the LTFR Statute that requires a public hearing based on a substantial change due to the addition or cancelation of a new generating facility of 50MWs or more.

The fact that the definition of a major utility facility once did, but no longer includes generating facilities, further undercuts OP's argument that need can be determined in a LTFR. In SB 3, the General Assembly clearly decreased the role of the LTFR with respect to the addition of specific generating facilities. SB 221 did not change that approach—the LTFR Statute was untouched. Rather, SB 221 added the requirement that the need for a new generating facility be determined in an ESP.

OP's additional claims are just attempts to throw arguments up into the air in the hope that something sticks. First, OP concedes that the hearing is limited to forecasting under Section 4935.04(E), Revised Code,<sup>15</sup> but OP then claims "the proceeding is not limited."<sup>16</sup> OP relies on language in Section 4935.04(E)(2), Revised Code, stating "the hearing shall include, but not be limited to, a review of . . . [t]he estimated installed capacity and supplies to meet the projected load requirements."<sup>17</sup> OP's argument is a

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<sup>15</sup> OP Brief at 10.

<sup>16</sup> OP Brief at 11.

<sup>17</sup> OP Brief at 10; Section 4935.04(E), Revised Code.



red herring. Even if the Commission were to review TPS as part of OP's estimated installed capacity, the Commission cannot determine the issue of need for TPS in a LTFR proceeding.

Likewise, the Commission should reject OP's claim that the need for TPS is an appropriate issue for a LTFR proceeding because "[t]he Commission is statutorily required to consider plans for expansion of the power grid."<sup>18</sup> The LTFR Statute requires to the Commission to determine if the LTFR considers plans for expansion of the power grid—it does not authorize the Commission to determine that there is a need to expand the power grid through a particular facility contained in the LTFR.

OP also misreads Section 4935.04(H), Revised Code, claiming that it provides "examples of the proceedings it will be evidence in."<sup>19</sup> No such language exists in the statute. Section (H) provides:

The hearing record produced under this section and the determinations of the commission shall be introduced into evidence and shall be considered in determining the basis of need for power siting board deliberations under division (A)(1) of section 4906.10 of the Revised Code. The hearing record produced under this section shall be introduced into evidence and shall be considered by the public utilities commission in its initiation of programs, examinations, and findings under section 4905.70 of the Revised Code, and shall be considered in the commission's determinations with respect to the establishment of just and reasonable rates under section 4909.15 of the Revised Code and financing utility facilities and authorizing issuance of all securities under sections 4905.40, 4905.401, 4905.41, and 4905.42 of the Revised Code. The forecast findings also shall serve as the basis for all other energy planning and development activities of the state government where electric and gas data are required.

While the evidentiary record and Commission determinations may be introduced in certain proceedings, an ESP proceeding is not one of them. Moreover, it is compelling

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<sup>18</sup> OP Brief at 11; Section 4935.04(F), Revised Code.

<sup>19</sup> OP Brief at 11.

that the LTFR Statute provided that the record may be considered in determining the basis of need for power siting board deliberations but the LTFR Statute did not expressly provide for consideration of the record in ESP proceedings.

The Commission should also reject OP's claim that the Commission's rules support finding that there is a need for TPS in a LTFR proceeding. Regardless of what the Commission's rules provide, the rules must be interpreted as to not conflict with Section 4928.143(B)(2)(c), Revised Code.<sup>20</sup> Since that Section provides that a finding of need must be made in an ESP proceeding, any claim that Rules 4901:5-5-03 or 4901:1-5-5-06,<sup>21</sup> Ohio Administrative Code, provide otherwise must be rejected.

Also, OP wrongly claims that Commission precedent supports determining that there is a need for TPS in a LTFR proceeding.<sup>22</sup> OP's argument is improper because it is based upon a stipulation.<sup>23</sup> Indeed, the *DP&L Stipulation* explicitly states that neither it nor any Commission order approving it may be relied upon as precedent, stating, "[e]xcept for purposes of enforcement of the terms of this Stipulation, this Stipulation, the information and data contained therein or attached and any Commission rulings adopting it, shall not be cited as precedent in any future proceeding for or against any Party or the Commission itself."<sup>24</sup> OP's practice of citing to stipulations that by their very

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<sup>20</sup> See *Youngstown Sheet & Tube Company v. Lindley*, 38 Ohio St. 3d 232, 234 (1988).

<sup>21</sup> The Commission should reject OP's claim that the portion of the Stipulation that cites to these rules is unopposed and should be approved. FES cross-examined Mr. Castle to determine whether the LTFR Supplement complies with the Commission's rules, and he admitted that the LTFR Supplement falls short in several areas. Tr. Vol. I at 32-34.

<sup>22</sup> OP Brief at 13.

<sup>23</sup> *In the Matter of the Long Term Forecast Report of Dayton Power and Light Company and Related Matters*, Case No. 10-505-EL-FOR, Stipulation and Recommendation (Jan. 14, 2011) (hereinafter "*DP&L Stipulation*").

<sup>24</sup> *Id.* at 2.

nature do not carry evidentiary weight is part of the reason why is difficult to settle cases.<sup>25</sup>

**B. The Stipulation Unlawfully Requests that the Commission Determine that TPS is Needed to Satisfy Statewide SREC Requirements**

A finding of need cannot be determined in a LTFR<sup>26</sup> and it cannot be made with respect to a renewable generating facility.<sup>27</sup> Even assuming that this was a correct proceeding to determine the need for a generating facility, and such a determination could made with respect to TPS, it would be unlawful to determine that a potential statewide SREC shortage justifies determining that there is a need for TPS.<sup>28</sup> While OP's and Staff's Post Hearing Briefs contain scant few citations, it is clear that OP and Staff believe that need may be based on potential shortage of statewide SRECs.

But OP's SREC requirements have nothing to do with the cumulative statewide SREC requirements. OP's compliance obligation is determined by the amount of kilowatt hours it sells to standard service offer customers.<sup>29</sup> Thus, even if it were legal to determine the need for a renewable generating facility based on a need to comply with SREC requirements, the finding would have to be based on OP's need for SRECs—not the state of Ohio's need in general. Based on OP's own shopping

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<sup>25</sup> Unless the Commission sends a clear signal that this practice is not acceptable, parties will be forced to resolve all contested legal issues through protracted litigation.

<sup>26</sup> Section 4928.143(B)(2)(b) and (c); see 4935.04, Revised Code.

<sup>27</sup> Section 4928.64(E), Revised Code; Section 4928.143(B), Revised Code.

<sup>28</sup> IEU-Ohio Post Hearing Brief at 14-15.

<sup>29</sup> Section 4928.64(B)(2), Revised Code.

forecast, OP's long term purchase power contract with Wyandot Solar will produce<sup>30</sup> more than enough SRECs to satisfy OP's compliance requirement through 2020.<sup>31</sup> OP carries the burden of proof. Since OP has not provided any evidence regarding its SREC requirements based on current and projected shopping, OP has failed to meet its burden.

### **C. The Signatory Parties Have Failed to Satisfy the Burden of Demonstrating that Ohio Needs TPS**

Even under the Signatory Parties flawed theory that need may be based on statewide SREC requirements, the Signatory Parties have failed to carry their burden of proof. Staff and OP have submitted no reliable evidence to support a finding of need for TPS.

Staff's Brief claims that a potential SREC shortage is "worrisome", and TPS is the only certain way to ensure SREC requirement compliance, claiming:

Mr. Bellamy analyzed four scenarios, with and without Turning Point . . . . The results of this analysis are worrisome in that to achieve compliance with the statutory mandate, large capacity installations are needed. . . . The Turning Point Solar project is the only certain means to deal with the problem before the Commission. In this sense the Turning Point Solar project is needed.<sup>32</sup>

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<sup>30</sup> Tr. Vol. I at 28.

<sup>31</sup> IEU-Ohio Exhibit 4; Direct Testimony of Dr. Jonathon Lesser at JAL-5. During cross-examination, OP's counsel tried to demonstrate that shopping forecasted in the affidavit of OP witness William Allen would only reach 80% if the Commission approved reliability pricing model ("RPM") capacity. Tr. Vol. I at 179-183. But, Mr. Allen's affidavit claims that 6.8% of OP's load switched at the capacity price of \$255 MW/day and that switching is expected to continue at the price due to falling energy prices. IEU-Ohio Ex. 2 at 8.

<sup>32</sup> Staff Brief at 7.

Staff's Brief is contradicted by Staff's own witness and the record evidence. To be clear, Mr. Bellamy did not create a forecast of the solar projects that he believed would be constructed in Ohio—he claimed that he had no idea what would be built.<sup>33</sup>

Rather than forecasting the level of development of solar generating facilities in Ohio, Mr. Bellamy modeled four scenarios based on the amount of solar that he claimed was constructed in 2010 and 2011 with certain modifications with and without the development of TPS.<sup>34</sup> Thus, the model assumed that the level of solar development (in the absence of building TPS) would never exceed 2010 and 2011 levels.<sup>35</sup> Moreover, Mr. Bellamy admitted that if development continued at the same level as 2010 and 2011, Ohio would over-comply with SREC requirements by a large margin through 2025.<sup>36</sup>

Furthermore, the model contained incorrect calculations with respect to the level of small solar projects (under 2 MW) that would be developed in a given year.<sup>37</sup> Incorrect calculations aside, Mr. Bellamy's assumptions with respect to small solar projects were contradicted by the pace of development of small solar projects in the first

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<sup>33</sup> Tr. Vol. I at 119.

<sup>34</sup> Staff Ex. 1 at 4-7.

<sup>35</sup> Staff Ex. 1 at 4-7; Tr. Vol. I at 120.

<sup>36</sup> Staff Ex. 1 at 6 (Figure 2); Tr. Vol. I at 115.

<sup>37</sup> During cross-examination, when Mr. Bellamy was asked to calculate the amount of small projects that could be built based on current trends, he said that you would have to subtract the Bryan facility. Tr. Vol. I at 131-134. Since Mr. Bellamy appears to be using the Bryan facility to reduce the amount of development in 2011, as well, Mr. Bellamy double counted the impact of the Bryan facility. *Cf* Staff Ex. 1 at 4-5.

few months of 2012.<sup>38</sup> Since small projects provided a baseline for each of Mr. Bellamy's four scenarios, his model is incorrect in its entirety.<sup>39</sup>

Staff witness Bellamy also did not conclude that large capacity installations must be constructed to meet the statewide SREC requirements.<sup>40</sup> Mr. Bellamy conceded that the statewide SREC requirements could be completely satisfied by small projects.<sup>41</sup> Regardless, even if small solar projects do not satisfy the statewide SREC requirements, there are 215 MWs of Ohio-based large scale projects in the PJM Interconnection LLC's ("PJM") Generation Queue. As Mr. Bellamy agreed, "it would make sense, you know, through economies of scale that a large facility would be cheaper to buy than -- or, I'm sorry, cheaper to build than a bunch of little ones."<sup>42</sup> Accordingly, it would make sense if the projects in the PJM Queue went forward.

Mr. Bellamy's analysis cannot be relied upon to satisfy OP's burden of demonstrating that TPS is needed to meet statewide SREC requirements. The model is not a forecast. It contains incorrect calculations and makes assumptions that are contradicted by Mr. Bellamy's own testimony.

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<sup>38</sup> Tr. Vol. I at 133-137; FES Ex. 1 at 39-40. 2 MWs of small projects had already been approved in the first two months. And 2.7 MW of small solar projects were pending at the time of the hearing from just four projects, not including residential and small commercial solar projects under 0.49 MW. Tr. Vol. I at 62-64; see administratively noticed projects in Case No. 12-0546-EL-REN, Case No. 12-277-EL-REN, Case No. 12-520-EL-REN, and Case No. 12-827-EL-REN.

<sup>39</sup> Staff Ex. 1 at 4-5.

<sup>40</sup> Tr. Vol. I at 133-137.

<sup>41</sup> *Id.*

<sup>42</sup> Tr. Vol. I at 118-119. See also FES Ex. 1 at 39.

OP's Brief is so barren of factual support regarding the need for TPS that it is difficult to respond to. In fact, most of OP's Brief works against OP's claim that TPS is needed.

First, OP makes the ludicrous statement that TPS is in the public interest because it will address "in-state renewable requirements in Ohio through investment in Ohio."<sup>43</sup> The statement has a nice ring to it but it is meaningless. In-state SREC requirements can only be met by facilities located in Ohio. So all facilities relied upon to meet in-state SRECs will be a result of Ohio investment. Second, OP admits that Mr. Bellamy does not know what will be built; thus, the Commission should give little weight to Mr. Bellamy's testimony.<sup>44</sup> Third, OP admits that its LTFR Supplement was wrong with respect to the amount of solar that would be constructed in Ohio in 2010 and 2011.<sup>45</sup> After admitting the Supplement was wrong,<sup>46</sup> OP falls back on the same logic—if there is no additional solar construction there will eventually be a shortage. But Mr. Castle conceded that solar will be developed in Ohio.<sup>47</sup> Since Mr. Castle's testimony does not address what amount of solar will be developed in Ohio, OP cannot rely upon it to satisfy its burden of proving that TPS is needed.

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<sup>43</sup> OP Brief at 8; AEP Ex. 1 at 4.

<sup>44</sup> OP Brief at 9.

<sup>45</sup> OP Brief at 8.

<sup>46</sup> OP Brief at 8.

<sup>47</sup> Tr. Vol. I at 39-40.

#### **IV. CONCLUSION**

The Commission's authority is set by statute. A settlement cannot expand the Commission's authority. But that is exactly what the Stipulation proposed to do—to permit the Commission to determine that TPS is needed in a LTFR proceeding. No such authority exists. LTFR proceedings are limited to forecasting issues, and the ESP Statute requires a finding of need to be made in an ESP proceeding. Even if a finding of need could be determined in a LTFR proceeding, no such finding could be made with respect to a solar generating facility.

Finally, OP and Staff have failed to submit sufficient evidence to support their own flawed legal theory. A settlement is not evidence in and of itself. The burden of proof has not been met; thus, inasmuch as the Stipulation recommends that the Commission determine that there is a need for TPS, the Stipulation must be rejected.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio*, was served upon the following parties of record this 4<sup>th</sup> day of May 2012, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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**ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES  
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