

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Direct Energy)
Services, LLC's Annual Alternative) Case No. 12-1233-EL-ACP
Energy Portfolio Status Report.)

FINDING AND ORDER

The Commission finds:

- (1) Direct Energy Services, LLC (DES) is an electric services company as defined in Section 4928.01(A)(9), Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (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 2011, a portion of the electricity sold by means of retail electric sales in Ohio must come from alternative energy resources (overall renewable energy resources benchmark), half of which must be met with resources located within Ohio (in-state renewable energy resources benchmark), and including 0.030 percent from solar energy resources (overall solar energy resources (SER) benchmark), half of which must be met with resources located within Ohio (in-state SER benchmark).
- (3) Rule 4901:1-40-05(A), Ohio Administrative Code (O.A.C.), requires that, unless otherwise ordered by the Commission, each electric services company file by April 15 of each year an annual alternative energy portfolio status report. The report must analyze all activities the company undertook in the previous year in order to demonstrate how pertinent alternative energy portfolio benchmarks and planning requirements have been or will be met. Additionally, Commission Staff (Staff) must conduct an annual compliance review with regard to the benchmarks. Finally, Rule 4901:1-40-02(A), O.A.C., provides that electric services

companies that do not serve Ohio retail electric customers are not required to comply with the terms of the alternative energy portfolio benchmarks.

- (4) On April 13, 2012, DES filed its 2011 alternative energy portfolio status report, pursuant to Section 4928.64, Revised Code, and Rule 4901:1-40-05(A), O.A.C., along with a motion for protective order.
- (5) Subsequently, on April 12, 2013, DES filed a request for waiver of Rule 4901:1-40-03(B)(2)(b), O.A.C., along with an amended alternative energy portfolio status report for 2011 and amended motion for protective order, which are intended to supersede the status report and motion for protective order filed on April 13, 2012. Specifically, DES requests a waiver of the baseline calculation methodology specified in Rule 4901:1-40-03(B)(2)(b), O.A.C. DES states that it had no Ohio retail sales in 2008, 2009, or 2010, and proposes a baseline based on its actual, rather than projected, Ohio retail sales in 2011. In its amended status report, DES proposes a baseline of 160,143.59 megawatt-hours. Using this baseline and the 2011 statutory benchmarks, DES reports that it met its overall renewable energy resources benchmark, in-state renewable energy resources benchmark, overall SER benchmark, and in-state SER benchmark.
- (6) With respect to its amended motion for protective order, DES asserts that the redacted portions of its amended alternative energy portfolio status report contain data that, if made public, could harm DES' position in the competitive market and its ability to compete. DES explains that it has redacted, and seeks protection of, information regarding the renewable energy credits (RECs) required and obtained by DES, as well as the 10-year forecast of estimated sales and estimated RECs and solar RECs. DES submits that this information is competitively sensitive and constitutes trade secret information. DES states that it does not disclose the redacted information publicly. Therefore, DES requests that the redacted information be treated as confidential.

- (7) On July 10, 2013, Staff filed a review and recommendation in response to DES' request for waiver. Staff recommends that DES' request for waiver be granted, such that DES' baseline be determined based on actual, rather than projected, sales for 2011.
- (8) On August 19, 2013, Staff filed findings and recommendations regarding DES' amended alternative energy portfolio status report. Initially, Staff finds that DES was required to comply with the terms of the alternative energy portfolio benchmarks for 2011, as it had retail electric sales in Ohio. Staff notes that it does not oppose DES' proposed baseline and that DES accurately computed its compliance obligations for 2011.

Additionally, Staff states that it reviewed DES' Generation Attribute Tracking System (GATS) reserve subaccount data and confirms that, for 2011, DES satisfied its overall renewable energy resources benchmark, in-state renewable energy resources benchmark, overall SER benchmark, and in-state SER benchmark. Staff further indicates that it confirmed that the RECs and solar RECs originated from generating facilities certified by the Commission and were associated with electricity generated during the applicable timeframe.

Accordingly, Staff recommends that DES be found to be in compliance with its 2011 alternative energy compliance obligations. Staff further recommends that, for future compliance years in which DES utilizes GATS to demonstrate its Ohio compliance efforts, DES initiate the transfer of the appropriate RECs and solar RECs to its GATS reserve subaccount between March 1 and April 15 so as to precede the filing of its annual alternative energy portfolio status report with the Commission.

- (9) Initially, the Commission will address DES' request for waiver and amended alternative energy portfolio status report. With respect to DES' request for a waiver of the baseline calculation methodology required by Rule 4901:1-

40-03(B)(2)(b), O.A.C., the Commission finds that the request is reasonable and should be granted. Further, upon review of DES' amended alternative energy portfolio status report and Staff's findings and recommendations, the Commission finds that DES is in compliance with its 2011 overall renewable energy resources benchmark, in-state renewable energy resources benchmark, overall SER benchmark, and in-state SER benchmark. Consequently, the Commission finds that DES' amended alternative energy portfolio status report for 2011 should be accepted. With respect to future compliance years, the Commission directs DES to initiate the transfer of the appropriate RECs and solar RECs to its GATS reserve subaccount between March 1 and April 15, consistent with Staff's recommendation.

- (10) Next, we turn to DES' amended motion for protective order. Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373 (2000).
- (11) Similarly, Rule 4901-1-24, O.A.C., allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."
- (12) Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper

means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code.

- (13) The Commission has reviewed the redacted information covered by DES' amended motion for protective order, as well as the assertions set forth in the memorandum in support. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,¹ the Commission finds that DES' motion for protective order should be granted, in part, and denied, in part. With respect to the information regarding the RECs required and obtained by DES, as reported at item (3) on the second page of the amended alternative energy portfolio status report and as shown on the attachment at the end of the report, the Commission finds that the number of RECs and solar RECs required to meet DES' 2011 renewable energy benchmark requirements may be easily derived from DES' publicly available actual retail electric sales. The information is, therefore, not a trade secret. Accordingly, the Commission's docketing division should move the second page of DES' 2011 amended alternative energy portfolio status report and the attachment at the end of the report, as filed under seal on April 12, 2013, to the public file, no sooner than 14 days after the date of this finding and order, or November 27, 2013.
- (14) With respect to DES' 10-year forecast, as reported at item (5a) on the third page of the amended status report, the Commission finds that the redacted portion of the 10-year forecast constitutes trade secret information. Its release is, therefore, prohibited under state law. The Commission finds that non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

¹ See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

- (15) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this finding and order, or until May 13, 2015. Until that date, the docketing division should maintain, under seal, the information filed confidentially on the third page of DES' 2011 amended alternative energy portfolio status report, as filed under seal on April 12, 2013.
- (16) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a *protective order to file an appropriate motion at least 45 days in advance of the expiration date*. If DES wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to DES.

It is, therefore,

ORDERED, That DES' request for waiver be granted. It is, further,

ORDERED, That DES' amended alternative energy portfolio status report for 2011 be accepted in accordance with finding (9). It is, further,

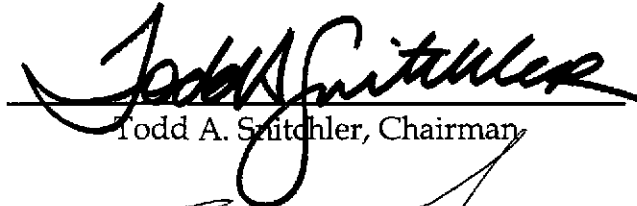
ORDERED, That the amended motion for protective order filed by DES be granted, in part, and denied, in part. It is, further,

ORDERED, That, no sooner than 14 days after the date of this finding and order, or November 27, 2013, the Commission's docketing division shall remove the second page of DES' 2011 amended alternative energy portfolio status report and the attachment at the end of the report, as filed under seal on April 12, 2013, from the sealed record in this case and place them in the public file. It is, further,

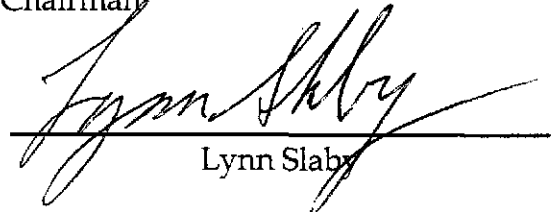
ORDERED, That the Commission's docketing division maintain, under seal, the third page of DES' 2011 amended alternative energy portfolio status report, as filed under seal on April 12, 2013, for a period of 18 months, ending on May 13, 2015. It is, further,

ORDERED, That a copy of this finding and order be served upon all parties of record.

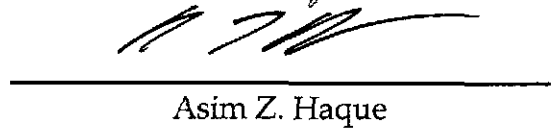
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Switchler, Chairman


Steven D. Lesser


Lynn Slaby

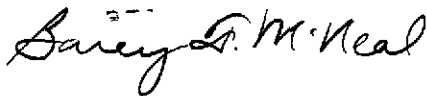

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Secretary