

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

**In the Matter of the Adoption of Chapter)
4901:1-42, Ohio Administrative Code)
Regarding Green Pricing Programs, to) Case No. 12-2157-EL-ORD
Implement Am. Sub. S.B. 315.)**

COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

I. INTRODUCTION

Am. Sub. S.B. 315, which includes rules governing green pricing programs, was signed into law on June 11, 2012 and became effective on September 10, 2012. On July 25, 2012, the above-referenced docket was initiated in order to incorporate the requirements set forth in Am. Sub. S.B. 315 into the Ohio Administrative Code ("O.A.C."). FirstEnergy Solutions ("FES") was one of several parties participating in the August 16, 2012 workshop to discuss appropriate revisions to the O.A.C. Pursuant to the Commission's Entry of October 17, 2012, FES hereby files comments to the proposed rules for Green Pricing Programs and creation of Chapter 4901:1-42 of the Ohio Administrative Code.

FES respectfully requests Staff to consider the responses and comments and appropriately modify the proposed rules.

II. COMMENTS TO STAFF'S PROPOSED RULES

1. General Comments

Pursuant to R.C. 4928.70, the Commission “may periodically review any green pricing program offered in this state as part of competitive retail electric service.” The proposed rules of 4901:1-42 are not a simple periodic review as many items impose additional regulation that was surely not contemplated by the Ohio legislature.

The Commission, as a creature of statute, is not empowered to act in conflict with legislative intent and the statutes enacted by the legislature. Unfortunately, as pointed out below, the proposed rules do just that by attempting to reserve the authority to regulate green pricing programs prospectively, rather than simply conducting the annual review contemplated by the legislature.¹ The Commission’s rules must closely reflect the express language of the statute and may not vary from or go beyond the Ohio legislature’s intent as delineated in the text of Am. Sub. S.B. 315. The Commission must also prescribe rules that do not cause an undue burden on business interests, outlined in Executive Order 2011-01K and R.C. 107.52.

While the Commission included Executive Order 2011-01K – the “Common Sense Initiative” – as an attachment to the October 17, 2012 Entry in the instant proceeding, several of the proposed rules appear to violate the Order by increasing the cost of compliance and creating new rules that are ineffective, inefficient and needlessly

¹ Though the Commission is authorized to review green pricing programs, the Commission has no authority to require CRES providers to obtain prior approval from the Commission before making such offers. Compare R.C. § 4928.70 “(A) The public utilities commission may periodically review any green pricing program offered in this state as part of competitive retail electric service. At the conclusion of a review, the commission may make recommendations to improve or expand the program subject of the review.” (emphasis added); with Proposed Rule 4901:1-42-03(B) “Any program or marketing materials being used by an Ohio EDU or CRES that address green pricing programs shall be provided to commission staff for review at least 10 business days prior to the initial distribution to existing or potential customers.” (emphasis added).

burdensome. More significantly, the proposed rules are beyond the authority granted to the Commission by the General Assembly since they seek to regulate green pricing offers rather than simply conducting the “review” authorized by R.C. § 4928.70.

In certain instances outlined below, the proposed rules go well beyond the intent of the statute and directly contradict and impede business growth.

2. Rule 4901:1-42-03 “Requirements”

Section (B): This section states that “Any program or marketing materials being used by an Ohio EDU or CRES that address green pricing programs shall be provided to commission staff for review at least 10 business days prior to the initial distribution to existing or potential customers.”

This proposed language goes beyond what was envisioned in Am. Sub. S.B. 315, which clearly states that the Commission may “periodically review” programs. Forcing CRES providers to provide copies of confidential marketing materials prior to distribution to Ohio customers exceeds the scope of R.C. 4928.70 by moving the Commission from a “review” to a “pre-approval” of green pricing offers. An annual review of any green pricing programs a CRES provider offers would sufficiently comply with R.C. 4928.70 without the need to provide marketing materials on an ongoing basis.

Even if the Commission was authorized to collect marketing materials in advance under R.C. 4928.70 – which it is not - this section ignores the realities of a competitive marketplace, namely the speed at which products and programs need to be launched. A delay of 10 business days will adversely impact the ability of a CRES provider to expeditiously respond to competitive offers in the marketplace and satisfy customer needs. If Staff is concerned that an annual review of green pricing programs is not

sufficient, then FES suggests that rather than creating new rules, Staff rely instead on Section 4901:1-23-03(D) of the Administrative Code, which states that "... CRES providers shall furnish to the director of the service monitoring and enforcement department or the director's designee the following information, transmitted by e-mail or facsimile *within four calendar days of making such offers to Ohio customers:*" (emphasis added). 4901:1-23-03(D) balances the Commission and Staff's need for information with the speed at which a CRES provider must move to be successful in the competitive marketplace. Notifying the PUCO within four calendar days of making the offer to Ohio customers is consistent with current practices and does not further delay a CRES provider from effectively competing in the marketplace.

Section (B) should be amended to read, "Any program being offered by and Ohio EDU or CRES that addresses green pricing programs shall be reviewed by the commission staff periodically upon request by the commission staff." Should the Commission determine that annual periodic review is not sufficient, and that the requirements of 4901:1-23-03(D) which already provides for a similar advanced review is not clear enough, Section (B) should be, at the very least, amended as follows: "Any program or marketing materials being used by an Ohio EDU or CRES that address green pricing programs shall be provided to commission staff for review within four calendar days of making such offers to Ohio customers."

Section (C): This section states that "Any Ohio EDU or CRES offering a green pricing program shall semi-annually file details including, but not limited to, the monthly number of participants and the monthly volume of participation measured in renewable megawatt-hours." FES strongly objects to filing this highly sensitive competitive

information. Although CRES providers must, under Section 4901:1-24-07(B) of the Ohio Administrative Code, provide competitively-sensitive information related to annual intrastate sales of kilowatt-hours of electricity, this is required under statute R.C. 4928.06(F). There is no corresponding language in R.C. 4928.70 that specifically requires a CRES to provide this competitively sensitive information, and the Commission is clearly going beyond the scope of Am. Sub. S.B. 315. To remedy this overreach, section (C) should be deleted in its entirety.

Section (D): Section D states that “Each year the Commission shall initiate a docket in which the required filings covering that calendar year shall be docketed. All filed information shall be treated as public information unless the Company files, and the Commission approves, a motion for protective order pursuant to Rule 4901:1-24 of the Ohio Administrative Code.” As with Section C, FES strongly objects to the proposed rules’ requirement to provide highly confidential and competitive sales information. As demonstrated above, the Commission does not have the statutory authority to request such information. Information requested in 4901:1-42-03(C), including customer counts and megawatt-hour sales, is the core confidential and competitive information of a CRES provider’s business. Disclosure of such information will lead to the loss of a CRES provider’s competitive advantage gained in the marketplace through its green product offerings and will impede future business growth for these products.

Therefore, section (D) should be deleted in its entirety. If the Commission errs and chooses to include this provision in its final rules, FES requests that such reports be treated as protected confidential information upon submission to the Commission.

Section (E) and Section (F): FES requests that verified audits of green pricing programs, such as those conducted as part of the Green-e certification process be acceptable verification for Sections (E) and (F). The Green-e annual certification process is a rigorous review of a CRES provider's marketing materials and verification of renewable offerings. This annual compliance review accomplishes the intent of Sections E, F and G, ensuring that the supplier has procured the needed RECs and that they are only used once. FES requests that CRES providers participating in the Green-e program be allowed to provide the most recent annual Green-e audit to satisfy the Commissions information requests in Sections E and F.

For non-Green-e products, FES requests that internal audited reports satisfy the requirements under Sections E and F. In light of Executive Order 2011-01K, CRES providers should not be forced to create a special report when internal documents already contain the necessary information.

III. CONCLUSION

FES commends the Staff for its work in producing the proposed green pricing program rules. Nevertheless, FES asks Staff to carefully consider the legislature's intent in Am. Sub. S.B. 315 and the potentially negative impact on suppliers providing green products, green energy producers, and the customers for those green energy products as it considers making changes to the proposed rules. The market for green energy products is relatively new in Ohio, and rules and regulations, like those proposed, that go beyond what is necessary to accomplish the oversight contemplated under Am. Sub. S.B. 315 risk stifling and restraining current growth of green energy product offerings. Accordingly,

FES respectfully requests Staff consider making changes to its proposed rules based on the above comments.

Respectfully submitted,

/s/ Mark A. Hayden

Mark A. Hayden (0081077)
Scott J. Casto (0085756)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com
scasto@firstenergycorp.com

N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
talexander@calfee.com

Attorneys for FirstEnergy Solutions Corp.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/19/2012 3:08:55 PM

in

Case No(s). 12-2157-EL-ORD

Summary: Comments of FirstEnergy Solutions Corp. electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.