

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission’s Review)	
of its Rules for the Alternative Energy)	
Portfolio Standard Contained in Chapter)	Case No. 13-652-EL-ORD
4901:1-40 of the Ohio Administrative)	
Code.)	

**COMMENTS OF UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA F. JOHNSON**

Union Neighbors United, Julia F. Johnson, and Robert and Diane McConnell submit the following comments in response to the Attorney Examiner’s Entry in this matter dated July 11, 2014.

I. ABOUT THE COMMENTERS

Union Neighbors United (“UNU”) is a nonprofit corporation formed for the purpose of promoting the safety and well-being of the Champaign County community by addressing issues relating to the siting of industrial wind turbines. UNU consists of ten trustees and officers, all of whom reside in the area that would be affected by the Buckeye Wind and Champaign Wind projects previously certificated by the Ohio Power Siting Board.

Robert and Diane McConnell reside at 4880 E. U.S. Route 36, Urbana, Ohio. Julia Johnson resides at 4891 E. U.S. Route 36, Urbana, Ohio. The McConnells and Ms. Johnson are trustees of UNU, but are also commenting in their individual capacities.

Since 2007, UNU, the McConnells, and Ms. Johnson have actively educated themselves and the community concerning the implications of wind development for Champaign County and the State of Ohio. For example, Ms. Johnson and Ms. McConnell served as members of the Champaign County Wind Turbine Study Group convened by former Champaign County

Prosecutor Nick Selvaggio. *Id.* Ms. Johnson also served as a stakeholder in the Ohio Wind Working Group, representing consumer interests. *Id.* UNU submitted extensive written comments on the Power Siting Board's wind turbine siting rules, O.A.C. Chapter 4906-17. UNU, Ms. Johnson, and the McConnells also participated as intervenors in the Ohio Power Siting Board proceedings relating to the Buckeye Wind and Champaign Wind projects. *Application of Buckeye Wind, LLC for a Certificate to Construct a Wind Powered Electric Generating Facility in Champaign County, Ohio*, OPSB Nos. 08-666-EL-BGN, 13-360-EL-BGA; *Application of Champaign Wind, LLC for a Certificate to Construct a Wind Powered Electric Generating Facility in Champaign County, Ohio*, OPSB No. 12-160-EL-BGN.

Although the McConnells and Ms. Johnson join in these comments in their individual capacities, these comments will refer to them and to UNU collectively as "UNU" for simplicity.

II. THE COMMISSION SHOULD ELIMINATE THE IN-STATE REQUIREMENT OF OHIO ADM. CODE 4901:1-40-03 IN ITS ENTIRETY

Prior to S.B. 310, R.C. 4928.64(B)(3) stated that at least one-half of the renewable energy resources implemented by a utility or company pursuant to 4928.64(B) must be met through electricity generated by facilities located in Ohio. The same requirement is found in the Commission's rules at Ohio Adm. Code 4901:1-40-03(A)(2)(a). Effective September 12, 2014, S.B. 310 eliminates the in-state requirement. After that date, utilities and companies may meet their renewable energy obligations either with electricity generated by facilities located in Ohio, or with resources that can be shown to be deliverable into Ohio. 2014 S.B. 310 (R.C. 4928.64(B)(3)).

In his July 11 Entry in this matter, the Hearing Officer invited comments regarding (a) whether the amendment of § 4928.64(B)(3) requires the Commission to eliminate the in-state requirement from its rule in its entirety, or (B) whether the Commission should prorate the in-

state requirement for 2014 by reference to the effective date of S.B. 310, and eliminate the requirement thereafter. The in-state requirement should be eliminated from Ohio Adm. Code 4901:1-40-03(A)(2)(a) in its entirety, without proration or retention of any portion for 2014, because S.B. 310 contemplates that result and because the in-state requirement is unconstitutional and unenforceable.

Revised Code 4928.64(B)(2) sets forth annual benchmarks for renewable energy that must be met by the end of each year. The former statute permitted utilities or companies to meet the benchmarks, or a portion thereof, at any time before the end of the year. There were no mid-year milestones. Therefore, with the elimination of the in-state component effective September 12, there is no statutory basis to retain any portion of the in-state component of the benchmark, by proration or otherwise. Furthermore, there is absolutely no legal basis to justify retaining the in-state requirement through the end of 2014, as suggested by commenter SRECTrade.

Furthermore, the geographic preference for in-state renewable energy violates the Commerce Clause of the U.S. Constitution. U.S. Constitution Article I, Section 8, cl. 3. Though the clause is stated as a grant of regulatory power to Congress, the Supreme Court has construed the Commerce Clause to have a “negative” or “dormant” aspect that prohibits the states from unjustifiably burdening or discriminating against the flow of interstate commerce. *E.g., Emerson Electric Co. v. Tracy* (2000), 90 Ohio St.3d 157, 159. “Barriers to the free flow of commerce based on point of origin or other geographic factors to benefit local interests are virtually *per se* invalid.” *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See also Energy and Environmental Legal Inst. v. Epel*, No. 11-CV-00859-WJF-BMB, 2014 WL 1874977 at *5 (D. Colo. May 9, 2014), *citing Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996); *Emerson Electric Co.*, 90 Ohio St.3d at 159-160.

The U.S. Supreme Court has cited the Dormant Commerce Clause as grounds to invalidate numerous state laws that have discriminated between in-state and out-of-state sources of energy. For example, the Court struck down a New Hampshire law prohibiting an in-state utility from selling its hydroelectric energy outside the state. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982). The Court similarly struck down an Oklahoma law requiring all Oklahoma coal-fired electrical generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10% Oklahoma-mined coal. *Wyoming v. Oklahoma*, 502 U.S. 437, 440 (1992). And in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988), the Court invalidated an Ohio law that denied a tax credit for out-of-state ethanol fuel if its state of origin did not provide a reciprocal tax credit to ethanol manufactured in Ohio.

The Seventh Circuit Court of Appeals recently observed that a Michigan statute mandating the availability of renewable energy “trips over an insurmountable constitutional objection” insofar as that law discriminated in favor of in-state energy sources and against out-of-state sources. *Illinois Commerce Comm’n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013). The court stated, “Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy.”¹ *Id.* Numerous commentators agree. See Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 Env’tl & Energy Law and Policy J. 34, 64 (2009) (“Any requirement that the energy used to meet the [Renewable Portfolio Standard] threshold must be generated within the state itself would almost certainly be

¹ Although several other federal courts have recently ruled on the constitutionality of state renewable energy laws under the Commerce Clause, those decisions did not focus on the discriminatory effect of the laws in question. In *Energy and Environmental Legal Inst. v. Epel*, No. 11-CV-00859-WJF-BMB, 2014 WL 1874977 (D. Colo. May 9, 2014), the plaintiffs did not allege such discriminatory effect. In *North Dakota v. Heydinger*, the U.S. District Court for the District of Minnesota struck down a Minnesota renewable energy statute on the basis of its extraterritorial effect, not on the basis that it discriminated against interstate commerce. *North Dakota v. Heydinger*, No. 11-CV-3232 (SRN/SER), 2014 WL 1612331 at * 16. UNU has raised the discriminatory effect of former R.C. 4928.64(B)(3) in its pending appeal of the Power Siting Board’s certificate for the Champaign Wind project. *In the Matter of the Application of Champaign Wind LLC*, No. 13-1874.

found to violate the Dormant Commerce Clause”); Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, Harv. J. on Legis. 260, 270 (2008) (such a requirement “would almost certainly be struck down as serving no purpose other than economic protectionism”).

As stated at page 3, above, a state law that discriminates against interstate commerce is *per se* invalid under the Commerce Clause. According to the U.S. Supreme Court, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 550 U.S. 330, 338 (2007). The in-state requirement of former R.C. 4928.64(B)(3) is discriminatory insofar as it required utilities and companies to obtain half of their renewable energy from sources located within the State of Ohio, to the exclusion of out-of-state sources. Since such a requirement violates the federal Commerce Clause, it is unlawful and unenforceable, and should not be prorated or otherwise retained in Ohio Adm. Code 4901:1-40-03. The Commission should eliminate the in-state requirement in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Ohio Adm. Code 4901-1-05, the Commission's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that I sent a service copy of the foregoing comments to the following parties this 31st day of July 2014, via electronic transmission, except those specifically designated as being served via U.S. mail.

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Summary: Comments of Union Neighbors United, Julia F. Johnson, and Robert and Diane McConnell electronically filed by Mr. Christopher A Walker on behalf of Union Neighbors United and McConnell, Robert Mr. and McConnell, Diane Mrs. and Johnson, Julia F. Ms.