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 4901:1-40 of the Ohio Administrative Code	)))))	Case No. 13-0652-EL-ORD

COMMENTS OF THE OHIO ENVIRONMENTAL COUNCIL

On July 11, 2014 the Attorney Examiners in the above captioned case docket ordered interested parties to submit comments on two singular questions concerning the recent amendments to Revised Code §4928.64(B)(3). Specifically, the attorney examiner asks stakeholders:

> (A)Does the General Assembly's amendment to R.C. 4928.64(B)(3) by Sub.S.B. 310 require the Commission to amend Ohio Adm.Code 4901:103 to eliminate the instate requirement in its entirety, including the portion of 2014 prior to the effective date of Sub.S.B. 310?
>
> (B)Does the General Assembly's amendment to R.C. 4928.64(B)(3) by Sub.S.B. 310 require the Commission to amend Ohio Adm. Code 4901:1-40-03 to prorate the in-state requirement for 2014 based upon the effective date of Sub.S.B. 310 and to eliminate the requirement thereafter?[1]

The Ohio Environmental Council ("OEC"), hereby, respectfully submits its comments in answer to these questions. OEC suggests that these two questions are more appropriately considered as concerning those renewable energy benchmarks for 2014 and separately those concerning benchmarks for 2015 and thereafter. Since the Ohio General Assembly cannot pass

[1] *In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code*. Attorney Examiner Entry, page 2 (July 11, 2014).

retroactive legislation, and did not as it pertains to the 2014 renewable energy benchmarks, the Commission has neither the authority or requirement to amend its regulations (prorated or in its entirety). However, as it pertains to those benchmarks for 2015 and beyond, the Commission is authorized to amend its rules as it pertains to those benchmarks reflected in the recently enacted legislation. OEC's comments focus, primarily, on the in-state benchmarks for 2014 only.

BACKGROUND

The 127th Ohio General Assembly, in 2008, enacted Senate Bill 221, which, among other provisions, looked to encourage a robust renewable energy market in Ohio through the development of a renewable energy standard. The renewable energy standard's goal of 12.5% by 2025, was to be achieved through annual benchmarks beginning in 2009 through 2025. Within those annual benchmarks, regulated utilities were to procure:

> "At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state."[2]

On June 13, 2014, Governor John Kasich signed into law Substitute Senate Bill 310 (S.B. 310). S.B. 310, among other provisions, "froze" the renewable energy standards for a two year period beginning in 2015, and resuming, pending the status of the legislation's Study Committee findings, in 2017, but with a less of an annual increase. The legislation also amended §4928.64(B)(3) of the Revised Code to remove the "at least one-half requirement" for in-state renewable energy. These changes to Revised Code §4928.64 gave rise to the questions before us today.

[2] Ohio Rev. Code §4928.64(B)(3)

COMMENTS AND ANSWERS TO QUESTIONS PRESENTED

As it pertains to vintage 2014 renewable energy requirements, OEC answers both of the Attorney Examiners' questions in the negative. Senate Bill 310 alters the annual benchmarks starting with the freeze to the annual benchmarks for years 2015 and 2016, and extension of the benchmarks at a less stringent pace thereafter. Senate Bill 310 **does not**, however, alter the 2014 renewable energy benchmark, and therefore, the Commission has neither the statutory requirement nor the authority to amend any of rules pertaining to 2014 benchmarks.

Concerning the Attorney Examiner's first question, the Commission must look to the issue as pertaining to 2014 verses 2015 and beyond. The language of SB310 only requires the Commission to amend Ohio Adm. Code 4901:103 to eliminate the instate requirement as it pertains to 2015 and beyond – the current year of 2014 is another story.

The Ohio Constitution, Article II, Section 28 prohibits the general assembly from passing retroactive laws.[3] With that elementary understanding, the General Assembly could not, and did not, alter the benchmarks for the current year. This adherence is evidenced by the fact that, while the Act "freezes" the requirements for 2 years with the thaw and reduced benchmarks occurring in 2017, those requirements were left intact for the year 2014, in their entirety.

Furthermore, the question's implication that the 2014 instate requirement can be while the statute currently in effect, as well as the statute effective after the effective date of SB310, does not specifically stipulate yearly benchmarks for the in-state requirement for any specific year or years, it has been the practice of this Commission and the electric distribution utilities to treat the annual renewable energy requirements as four separate buckets: in-state solar REC, in-

[3] Ohio Const., Art. II, §28.

state non-solar REC, all-state solar REC, and all-state non-solar REC.[4] A poignant example in a recent case where the Commission found for the disallowance of First Energy's recovery of $43,362,796.50 for 2011 vintage REC purchases highlighted this:

> "Section 4928.64, Revised Code, establishes benchmarks for electric distribution utilities to provide a portion of electricity for customers in Ohio from renewable energy resources. The statute requires that a portion of the electricity must come from alternative energy resources (overall or all-state renewable energy resources benchmark), half of which must be met with resources located within Ohio (in-state renewable energy resources benchmark), and including a percentage from solar energy resources (overall or all-state solar energy resources benchmark), half of which must be met with resources\ located within Ohio (in-state solar energy resources benchmark)."[5]

Thus, as the Commission and utilities have looked to achieve four sets of benchmarks, and since no part of the 2014 renewable energy benchmark was amended, the Commission has neither the authority nor the requirement to amend any of these four benchmarks for 2014. Per the language of SB310, however, this is not necessarily the case for 2015 and beyond.

The Attorney Examiner's second question, too, as it pertains to 2014, must be answered in the negative. While it is our contention that the General Assembly did not retroactively amend the benchmarks for all of 2014, if the General Assembly wished to amend any of the benchmarks for the period of the effective date of SB310 through the remainder of 2014 it could have provided guidance for the Commission. The General Assembly, in SB310, had the chance to have directed the Commission to prorate the in-state requirement or otherwise modify its

[4] *See In the matter of the Report for AEP Ohio Annual Alternative Energy Portfolio Compliance Plan,* Application, page 6 ("Pending Commission approval of the Timber Road REPAs, the Company entered into a separate short-term non solar REC purchase agreement with Timber Road from which a majority of RECs for its 2012 In-State Non-Solar benchmarks were sourced.") (emphasis added). *See also, In the matter of the report of Duke Energy Ohio, Inc. concerning its advanced and renewable energy baseline and benchmarks*, Entry Paragraph 12 (February 9, 2011). ("Upon review of the application and the other filings in these proceedings . . . the Commission finds that Duke's request that the Commission make a force majeure determination regarding its 2009 in-state SER benchmark . . . should be granted.") (emphasis added).

[5] *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*. PUCO Case No. 11-5201-EL-RDR Opinion & Order, page 3 (August 7, 2013).

regulations in regard to 2014 in-state requirements. The legislature's silence on this issue speaks volumes. Prorating of the benchmarks is discussed nowhere in the current or amended versions of Revised Code §4928.64, and the Commission should not feel compelled to assume a directive that the General Assembly did not provide. The elimination of instate renewable benchmark coincides with the bill's amendments to the benchmarks *in toto* – which begins with the 2015 requirements, and those are the benchmarks the Commission should concern itself.

CONCLUSION

Revised Code §4928.64(B)(3) does not, therefore, and cannot eliminate the instate requirement for the portion of 2014 prior to the effective date of SB310. The Commission cannot use SB310 as a mechanism to eliminate the requirement from its rules for that year. Nevertheless, for years beyond 2014, the Commission has the authority to alter its regulation to follow the language of the statute effective September 12, 2014 for the years 2015 and thereafter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **COMMENTS OF THE OHIO ENVIRONMENTAL COUNCIL**, was served by electronic mail, upon the following Parties of Record, this 31st day of July, 2014.

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Summary: Comments Comments of the Ohio Environmental Council electronically filed by Mr. Trent A Dougherty on behalf of Ohio Environmental Council