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. 13-652-EL-ORD**

INITIAL COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

On June 13, 2014, the Governor of Ohio signed into law Substitute Senate Bill 310 ("Sub. S.B. 310"). That legislation will become effective on September 11, 2014. Sub. S.B. 310 amends portions of Chapter 4928, Revised Code. Among other things, Sub. S.B. 310 eliminates the existing mandate in Section 4928.64(B)(3), Revised Code, for electric utilities and electric services companies to purchase at least one-half of their renewable energy resources from facilities located in the state of Ohio ("In-State Requirement").

I. Background

On July 11, 2014, the Public Utilities Commission of Ohio ("Commission") asked for comments from interested persons to assist in its review of Rule 4901:1-40-03, Ohio Administrative Code ("OAC"), in order to implement Sub. S.B. 310. The Commission asked that the comments be limited to responding to two questions:

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 4901:1-40-03 to eliminate the in-state 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 on the effective date of Sub.S.B. 310 and to eliminate the requirement thereafter?

The Retail Energy Supply Association ("RESA") is a broad and diverse group of 21 retail energy suppliers who share the common vision that competitive energy retail markets deliver a more efficient, customer-oriented outcome than the regulated utility structure. Several RESA members are certificated as Competitive Retail Electric Service ("CRES") providers and are active in the Ohio retail market. RESA's members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent only those of RESA as an organization and not necessarily the views of each particular RESA member.

As explained in further detail below, RESA believes that Sub. S.B. 310 requires the Commission to amend Rule 4901:1-40-03, OAC, so as to eliminate the In-State Requirement for calendar year 2014[1] and thereafter. The plain language Sub. S.B. 310's bill and the statutory rules of construction would prohibit the Commission from continuing to mandate in-state-generated renewable energy even for a portion of calendar year 2014.

[1] Starting with the passage of S.B. 221, meeting the renewable energy resource obligation has been implemented on a calendar year basis. For instance, the Commission requires that the baselines be based on calendar years. See, Rule 4901:1-40-03(B)(1), (B)(2)(a), (B)(2)(b), and (C), OAC. Also, the Commission's report to the General Assembly regarding the utilities' and electric services companies' compliance with the alternative energy requirements were all on a calendar year basis. *See, In the Matter of the Commission's Alternative Energy Portfolio Standard Report to the General Assembly*, Case No. 12-1100-EL-ACP, Final Report for compliance years 2009 and 2010 filed August 15, 2012; Case No. 12-2668-EL-ACP, Final Report for compliance year 2011 filed July 11, 2013; and Case No. 13-1909-EL-ACP, Draft Report for compliance year 2012 filed January 14, 2014.

II. Sub. S.B. 310 is not Ambiguous – It Directly States that the In-State Requirement is Eliminated for Calendar Year 2014 and Thereafter

Offices and agencies created by the Ohio Constitution have reasonable authority to carry out their constitutionally designated tasks. On the other hand, government agencies created by statute only have the authority expressly granted to them by the General Assembly. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 5, 647 N.E.2d at 140 (1995). The Commission, created in Title 49 of the Revised Code, only has what authority the General Assembly has specifically granted it. Thus, the first step to answering the questions in the July 11th Entry is to carefully examine the statutory language on renewable energy resources before and after Sub. S.B. 310. Below in red line is a comparison between the current version of Section 4928.64(B), Revised Code, and the soon-to-be effective edition of that statute:

Section 4928.64(B), Revised Code, as Currently Effective	**Section 4928.64(B), Revised Code, as Changed by Sub. S.B. 310**
(2) At least half [of the alternative energy resources implemented] shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:	(2) ~~**At least half**~~ **The portion** [of the alternative energy resources implemented] **under division (B)(1) of this section** shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:
By end of year [Renewables] [Solars]	**By end of year** [Renewables] [Solars]
* * *	* * *
2014 2.5% 0.12%	2014 2.5% 0.12%
* * *	* * *
(3) 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. (emphasis added.)	(3) ~~**At least one-half of the**~~ **The qualifying** renewable energy resources implemented by the utility or company shall be met ~~**through**~~ **either: (a) Through** facilities located in this state; ~~**the remainder shall be met with**~~ **or (b) With** resources that can be shown to be deliverable into this state. (Highlight added.)

In the current version of the statute there is an expressed requirement that half the alternative energy resources be sited in Ohio. By contrast in the amended version, the requirement for alternative generation resources is either "(a) through facilities located in this state, or (b) with resources that can be shown to be deliverable into this state." Thus, in Sub. S.B. 310, the In-State Requirement is replaced with the lesser standard of the alternative renewable energy resource merely being deliverable to Ohio.

Now we must examine the language to see when the General Assembly directed the Commission to end the current In-State Requirement. In both the pre- and post-Sub. S.B. 310 versions of Section 4928.64(B), Revised Code, the time established for utilities and electric services companies to have their alternative renewable energy resources is by the **"the end of the year."** Further, there is no expressed language in the current statute or the amended statute that requires that the renewable energy credits be generated contemporaneously with when the power is actually used. Finally, there is no language in the Sub. S.B. 310 which requires a utility or an electric services company to obtain a portion of the alternative renewable energy resource prior to the effective date of the statute.

Taken altogether, the plain language of Sub. S.B. 310 then is that the alternative renewable energy resources requirement can be satisfied in one of two ways – sited in Ohio or deliverable to Ohio – and the presentation of compliance with the statutory standard is not until after the end of the year. Thus, the Commission should make corresponding revisions to Rule 4901:1-40-03(A), OAC,[2] such that the utilities and electric services companies do not have to obtain renewable energy resources from in-state facilities in 2014 and thereafter.

[2] Rule 4901:1-40-03(A), OAC, closely follows the current version of Section 4928.64(B), Revised Code, and therefore is not repeated in these comments.

III. If Amended Section 4928.64, Revised Code, is found to be Ambiguous, the Commission must Carry Out the Intent of the General Assembly, which is to Allow Renewable Energy Resources to be Met, in Calendar Year 2014 and Thereafter, in One of Two Ways

If the Commission finds that Section 4928.64, Revised Code, is not clear on its face, then the Commission will have to interpret the amended statute. In Ohio, the statutory rules for construction are found in Sections 1.46 and 1.47, Revised Code. When reading the new statute, the Commission must construe the statute in a manner such that: (a) the entire statute is intended to be effective; (b) a just and reasonable result is intended; and (c) the statute is prospective in its operation unless expressly made retrospective. The Ohio Supreme Court has also required that, when interpreting an amendment to an existing statute, the reviewer must presume that the amendments were made to change the effect and operation of the existing law. *Leader v. Glander* (1948), 149 Ohio St. 1, 5, 36 O.O. 326, 328, 77 N.E.2d 69, 71. Additionally, Section 1.49, Revised Code, states that, if a statute is ambiguous, the court, in determining the intention of the legislature, may consider:

(A) The object sought to be attained;
(B) The circumstances under which the statute was enacted;
(C) The legislative history;
(D) The common law or former statutory provisions, including laws upon the same or similar subjects;
(E) The consequences of a particular construction; and
(F) The administrative construction of the statute.

Applying the above statutory and court rules for construction, it is clear that the General Assembly intended to change the effect and operation of Section 4928.64(B), Revised Code, so that utilities and electric services companies could comply with the alternative renewable energy benchmarks without buying credits or power from Ohio-sited facilities. The construction rule that the General Assembly's intent be followed and the *Leader* decision ruling that there must be

change would combine to make a Commission-imposed requirement for the In-State Requirement for most of 2014, one that the Courts would reject.

Similarly, the fact that the General Assembly did not change the percentage amounts for year 2014 adds credence to the argument that the General Assembly intended to change the manner in which utilities and electric services companies could comply with the benchmarks in 2014. To conclude otherwise is to not give effect or operation to the amendments until later, which is not expressed within the statutory amendments.

Additionally, the consequences of construing the statute to mean "prorate and eliminate later" is likewise tantamount to a delay in the effectiveness of this portion of Sub. S.B. 310. However, as Section 1.47, Revised Code, states it is presumed that the at-issue amended language in Section 4928.64, Revised Code, is intended to eliminate the In-State Requirement immediately upon effect because the General Assembly did not state otherwise. Moreover, there is no language in amended Section 4928.64, Revised Code, stating that the utilities and electric services companies had to have obtained some or all renewable energy credits from in-state facilities by the time the amendment takes effect. Also, there is no language in amended Section 4928.64, Revised Code, making the In-State Requirement end, starting in 2015. Instead, amended Section 4928.64 makes the In-State Requirement end upon its effectiveness, which is in 2014. The only just and reasonable interpretation, therefore, is for the utilities and electric services companies have the option to meet the renewable energy requirement by the end of 2014 through either in-state facilities or with resources deliverable to Ohio. Any prorating and subsequent elimination of the In-State Requirement would not match the intent of amended Section 4928.64, Revised Code.

In sum, if the Commission finds that amended Section 4928.64, Revised Code, is ambiguous (RESA believes it is not ambiguous), the Commission should conclude that the only reasonable and just interpretation of the amended statute is that the utilities and electric services companies are not mandated to obtain renewable energy resources from in-state facilities in order to meet the 2014 renewable energy requirements, as well as those requirements in subsequent years. As a result, the Commission should make consistent changes to Rule 4901:1-40-03(A), OAC.

IV. As a Practical Matter, Proration is not in the public interest

The rules of construction require the Commission to take into account the consequences of the possible interpretations.[3] For three significant reasons, it is not a practical to implement Sub. S.B. 310 in such a fashion that, for 2014, utilities and electric services companies must meet the In-State Requirement for eight and one-third months of 2014.[4] The first practical reason is it would be extremely difficult to determine the actual date of electricity consumption for purposes of a monthly allocation. All the major utilities read the residential and most of the commercial customers' meters and bill in cycles that do not correspond to a calendar month. Further, the readings are not discrete by day, so there is no method to take a meter read from June 15th to July 15th and know what kilowatt hours ("kWh") were consumed in June and what kWhs were used in July. What makes the task even more uncertain is that consumption is periodically estimated, and not actual if meters cannot be read or the reading is uncertain. The second reason that prorating is not practical is that prorating the In-State Requirement would require either significant amounts of labor to hand calculate or significant amounts of IT changes to calculate the allocation from a billing computer – assuming that such is even possible. Either by hand or

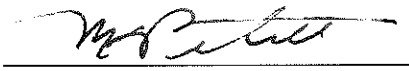
[3] Section 1.49 item E above.
[4] January – September 11 is roughly 8 1/3 months.

by reprogrammed computers, the effort to allocate would be expensive, and it would only be used once. Finally, if the Commission insisted on such calculations to assure compliance, Commission Staff resources would have to be devoted to checking the allocations. In sum, it is simply impossible to implement an In-State Requirement which is prorated for 2014 without expending significant costs and resources, neither of which is likely to supply future benefits.

V. Conclusion

For the foregoing reasons, the Commission should revise Rule 4901:1-40-03(A), OAC, to reflect that the utilities and electric services companies do not have to obtain renewable energy resources from in-state facilities in 2014 and thereafter.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case (those parties are marked with an asterisk below). in addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail or if specially designated by U.S. mail) on 31st day of July 2014 upon all persons/entities listed below.

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