

**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. 13-0652-EL-ORD
4901:1-40 of the Ohio Administrative Code)	
)	

REPLY COMMENTS OF THE OHIO ENVIRONMENTAL COUNCIL

On July 11, 2014 the Attorney Examiner in the above captioned case docket ordered interested parties to submit comments in response to two questions concerning Revised Code §4928.64(B)(3), as amended by Substitute Senate Bill 310 of the 130th General Assembly (“S.B. 310”). Pursuant to the Attorney Examiner’s procedural schedule, the Ohio Environmental Council (“OEC”) submitted comments in answer to these questions on July 31, 2014, and hereby submits its reply comments. While OEC attempts to reply to the issues and concerns expressed by all of the comments submitted pursuant to the above referenced order, OEC’s omission of reference or reply to any specific commenter or any specific issue expressed in any comments shall not be construed as OEC’s support for or acquiescence to the argument of that commenter or that issue.

OEC, in this reply, maintains that S.B. 310 did not alter the 2014 renewable energy benchmark, and therefore, the Commission has neither the statutory requirement nor the authority to amend any of its rules pertaining to 2014 benchmarks. Since the Ohio Constitution prohibits the General Assembly from passing retroactive legislation,

the legislation in question cannot alter the benchmarks of the current year. As it pertains to those benchmarks for 2015 and beyond, however, the Commission may be authorized to amend its rules for compliance years beginning January 1, 2015.

Sierra Club, in its comments, expressed the same legal concern with the Commission's attempt to potentially retroactively apply the amendments to §4928.64, and further expressed the practical concern of Commission action that may jeopardize current renewable energy resources and investments:

Absent a specific directive from the legislature, the Commission should not attempt to apply the law retroactively or create disruption of current procurement, construction and manufacturing efforts related to in-state procurement. The Commission should take no action that discourages continued investment in renewable (alternative) resources within the state of Ohio.¹

RESA provides for the Commission a handy table showing the current and post-September 12, 2014 versions of §4928.64(B) and (C), and thus showing some (but not all) of the changes to that section. The major missing piece to the RESA chart is the amendments to the benchmarks starting in 2015. Nevertheless, thanks to RESA's chart, it is clear and unambiguous that benchmarks for 2014 were not altered nor amended. Yet despite this, commenting parties such as FES and RESA suggest the intent of the General Assembly was to alter the 2014 benchmarks.² However, these neither of these parties (nor any others) offer an explanation why, if this was the intent, the benchmark was left unchanged. Their silence on this issue is due, we can only infer, as recognition of the unconstitutionality of the General Assembly actually furthering this so called intent.

¹Initial Comments of Sierra Club at page 4.

² See Initial Comments of RESA at page 5; See also Initial Comments of FES at page 2.

IEU provided a footnote containing the actual intent language found in Section 3 of SB 310,³ which in its entirety, states that:

It is the intent of the General Assembly to ensure that customers in Ohio have access to affordable energy. It is the intent of the General Assembly to incorporate as many forms of inexpensive, reliable energy sources in the state of Ohio as possible. It is also the intent of the General Assembly to get a better understanding of how energy mandates impact jobs and the economy in Ohio and to minimize government mandates. Because the energy mandates in current law may be unrealistic and unattainable, it is the intent of the General Assembly to review all energy resources as part of its efforts to address energy pricing issues.

Therefore, it is the intent of the General Assembly to enact legislation in the future, after taking into account the recommendations of the Energy Mandates Study Committee, that will reduce the mandates in sections 4928.64 and 4928.66 of the Revised Code and provide greater transparency to electric customers on the costs of future energy mandates, if there are to be any.⁴

IEU, while acknowledging that there is no need to inquire into the intent of the legislature to answer the posed question, suggests that because the intent language mentions a goal of avoiding extra costs, that some retroactive treatment is justified.⁵ OEC contends that this intent language does not support such a reading. Nowhere in this rather lengthy intent clause is there reference to the legislature's desire to make the amendments retroactive, to impact benchmarks not otherwise amended in the body of the statute, or direct the Commission's treatment of the modified benchmarks to 2014.⁶ Thus the statute's language, supported by the Section 3 intent clause, sustains the OEC's argument that Revised Code §4928.64(B)(3) does not eliminate the instate requirement for the portion of 2014 and the Commission cannot use S.B. 310 as a mechanism to eliminate requirements from its rules for that year.

³ See Initial Comments of IEU at page 4 (footnote 5).

⁴ 130th GA Sub S.B. 310 Section 3.

⁵ See Initial Comments of IEU at page 4.

⁶ *Id.*

Comments of RESA further state that, “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.”⁷ While this is true, RESA’s argument in support of this statement apparently attempts to interject into the Revised Code that the RECs must only be obtained on 31st day of December of each year, or as the above quote suggests, only after September 12. Similarly, commenter Direct Energy actually states that the effective date of the benchmark *is* December 31, 2014.⁸ These readings, OEC respectfully suggest, are flawed. No version of the statute makes the effective date of the annual benchmarks September 12, December 31, or any other specific day of the year. The benchmarks are annual benchmarks reflecting activity occurring throughout the year – from January 1 **through** December 31.

As Sierra Club points out, unlike other modified sections of the law, there is no directive in 4928.64(B)(3) that requires Commission action. Comments submitted by a number of commenting parties⁹ rightfully point out that government agencies created by statute (like the Commission) only have the authority expressly granted to them by the General Assembly.¹⁰ Thus, the Commission cannot go beyond the directives of the Commission. Despite the arguments professing what the General Assembly wanted to do for 2014, the language of the bill shows that General Assembly did not, and the Constitution of the state of Ohio says the General Assembly could not legally retroactively amend the 2014 in-state benchmarks.

⁷ Id. at 4.

⁸ Initial Comments of Direct Energy at page 3.

⁹ See Initial Comments of RESA, First Energy Solutions, and Sierra Club

¹⁰ Initial Comments of RESA at page 3

Finally, while our comments did differ from a number of the commenting stakeholders, it was unanimous that SB 310 does not require the Commission to promulgate rules under Ohio Adm. Code 4901:1-40-03 to prorate the in-state requirement for 2014. We agree with RESA that, “as a practical matter, proration is not in the public interest,”¹¹ and First Energy Solutions that there is nothing in SB310’s language that indicates the intent of the General Assembly to prorate the existing requirements.¹²

Again, in conclusion, OEC reaffirms its contention that since the Ohio General Assembly cannot pass 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).

Respectfully submitted,

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¹¹ Initial Comments of RESA at page 7.

¹² Initial Comments of FES at 2

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY COMMENTS OF THE OHIO ENVIRONMENTAL COUNCIL was served by electronic mail, upon the following Parties of Record, this 12th day of August, 2014.

/s/ Trent Dougherty

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