

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO**

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Pursuant to the Attorney Examiner's July 11, 2014 Entry ("Entry") in the above-captioned matter, parties including Industrial Energy Users-Ohio ("IEU-Ohio") filed initial comments addressing the questions posed in that Entry:

- (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 upon the effective date of Sub.S.B. 310 and to eliminate the requirement thereafter?

The majority of the parties that filed initial comments, including IEU-Ohio, supported a recommendation that the Public Utilities Commission of Ohio ("Commission") amend its rules to remove any requirement that electric distribution utilities ("EDUs") or competitive retail electric service ("CRES") providers secure renewable energy resources from facilities located in this State to satisfy compliance with the Commission's 2014 compliance review.

The Ohio Environmental Council (“OEC”), the Sierra Club, and SRECTrade, Inc. (“SRECTrade”), however, filed initial comments which urge the Commission to not make any changes to its rules and to ignore both current and future law in favor of requiring EDUs and CRES providers to secure a certain amount of in-state renewable energy resources for 2014 compliance.<sup>1</sup> In other words, OEC, Sierra Club and SRECTrade invite the Commission to rewrite the law rather than fulfill its duty to faithfully follow the law.

Initially, and as discussed in IEU-Ohio’s Initial Comments, current law as implemented under Amended Substitute Senate Bill 221 (“SB 221”) requires EDUs and CRES providers to comply with an overall 2024 compliance target, but it does not specify any compliance quantity that must be met in any given year.<sup>2</sup> Under current law, at least one-half of the total renewable energy resources implemented by the EDUs or CRES providers to comply with the December 31, 2024 compliance requirement must be met through facilities located in Ohio (“the in-state requirement”); the remainder may be met with resources that can be shown to be deliverable into Ohio.<sup>3</sup> OEC concedes that required in-state compliance under SB 221 does not attach to any

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<sup>1</sup> OEC argues that the General Assembly signaled support for a continued in-state requirement for 2014 because the General Assembly did not alter the 2014 benchmark level. OEC Initial Comments at 3-5 (July 31, 2014). OEC’s argument confuses the difference between the specified benchmark level [which Substitute Senate Bill 310 (“SB 310”) did not alter for 2014] and the resources that qualify towards meeting that benchmark. The Sierra Club argues that because SB 310 did not direct the Commission to alter its rules relative to the in-state preference but did so regarding other matters, the General Assembly did not intend the PUCO to alter its rule giving preference to more expensive in-state resources. Sierra Club Initial Comments at 2-3 (July 31, 2014). SRECTrade agrees that SB 310 removed the in-state preference, but argues that the elimination of the in-state preference should not be implemented until 2015, and should only last until January 1, 2017, based upon policy arguments (“preserving stability and confidence in the market, and encouraging continued growth of renewable energy resources in-state”). SRECTrade Initial Comments at 1-2.

<sup>2</sup> Section 4928.64, Revised Code. This obligation can also be satisfied by purchasing or acquiring renewable energy credits (“RECs”) and solar renewable energy credits (“SRECs”). Section 4928.65, Revised Code.

<sup>3</sup> Section 4928.64(B)(3), Revised Code.

specific year, but rather attaches to the total 2024 compliance target.<sup>4</sup> Additionally, under the Commission's rules, there is no partial year compliance requirement with the in-state (or overall) renewable energy resource requirement. Finally, SB 310 clearly repeals the in-state requirement.<sup>5</sup> Accordingly, the result advocated by OEC, the Sierra Club, and SRECTrade is contrary to current law and contrary to SB 310.

OEC and Sierra Club support Commission inaction based upon arguments that SB 310 did not alter the 2014 renewable energy resource benchmark and did not specifically direct the Commission to revise its rules regarding an in-state preference. While SB 310 did not alter the 2014 benchmark (which OEC concedes is not an annual compliance requirement but part of the overall compliance required by 2024), SB 310 removes the in-state preference in Ohio law. Additionally, although SB 310 did not direct the Commission to revise its rules regarding the in-state preference, SB 310 clearly removed any such preference on in-state resources. Because the Commission's current rule conflicts with the law, the rule is void.<sup>6</sup> Accordingly, even if the Commission was not directed by SB 310 to revise its rules, it should not leave an unlawful rule in place.

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<sup>4</sup> OEC Initial Comments at 3. OEC correctly notes that the annual compliance review is a function of the Commission's implementation of SB 221 and is not a requirement found in current law.

<sup>5</sup> SB 310 modified Section 4928.64(B)(3) to provide:

~~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.

<sup>6</sup> *Cent. Ohio Joint Vocational Sch. Dist. Bd of Educ. v. Ohio Bureau of Emp't Servs.*, 21 Ohio St.3d 5, 10 (1986)); see also *Brindle v. State Med. Bd of Ohio*, 168 Ohio App.3d 485, 2006-Ohio-4364, ¶ 30 (10th Dist.); *Woodbridge Partners Group, Inc. v. Ohio Lottery Comm.*, 99 Ohio App.3d 269, 273, 650 N.E.2d 498 (10th Dist. 1994); *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St. 3d 232, 234-235 (1988).

SRECTrade agrees that SB 310 removes the in-state requirement from Ohio law, but argues that the elimination of the in-state preference should not be implemented until January 1, 2015, and should be reinstated effective January 1, 2017, based upon the policy argument of “preserving stability and confidence in the market, and encouraging continued growth of renewable energy resources in-state.”<sup>7</sup> In other words, SRECTrade urges the Commission to ignore the law on policy grounds. However, the Commission lacks the legal capacity to grant the relief requested by SRECTrade. The General Assembly has removed the preference for in-state renewable energy resources effective September 12, 2014. And, unlike a few other provisions of SB 310, the deletion of the in-state preference is permanent and not limited to the period ending December 31, 2016.

In sum, the in-state preference specified under SB 221 has been eliminated by SB 310, which becomes effective on September 12, 2014. Prior to September 12, 2014, current Ohio law (SB 221) does not require any EDU or CRES provider to secure any amount of in-state renewable energy resources for purposes of satisfying the 2014 compliance benchmark. Accordingly, the in-state requirement should be, for purposes of measuring and counting compliance, eliminated in its entirety from the Commission’s rules.

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<sup>7</sup> SRECTrade Initial Comments at 1.

Respectfully submitted,

/s/ Matthew R. Pritchard

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Samuel C. Randazzo (0016386)

(Counsel of Record)

Frank P. Darr (0025469)

Matthew R. Pritchard (0088070)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>TH</sup> Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

(willing to accept service by e-mail)

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for Movants to the following parties of record this 12<sup>th</sup> day of August 2014, *via* electronic transmission, except those specifically designated as being served via U.S. mail.

/s/ Matthew R. Pritchard

Matthew R. Pritchard

Kathy J. Kolich (Counsel of Record)  
(0038555)  
Carrie M. Dunn (0076952)  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
kjkolich@firstenergycorp.com  
cdunn@firstenergycorp.com

**ON BEHALF OF THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, OHIO EDISON  
COMPANY AND THE TOLEDO EDISON  
COMPANY**

Kimberly W. Bojko  
Rebecca L. Hussey  
Mallory M. Mohler  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, OH 43215  
bojko@carpenterlipps.com  
hussey@carpenterlipps.com  
mohler@carpenterlipps.com

**ON BEHALF OF OMA ENERGY GROUP**

David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, OH 45840  
drinebolt@ohiopartners.org

**ON BEHALF OF OHIO PARTNERS FOR  
AFFORDABLE ENERGY**

Steven T. Nourse  
Matthew J. Satterwhite  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
stnourse@aep.com  
mjsatterwhite@aep.com

**ON BEHALF OF OHIO POWER COMPANY**

Michael K. Lavanga  
Brickfield Burchette Ritts & Stone  
1025 Thomas Jefferson Street, NW  
8<sup>th</sup> Floor, West Tower  
Washington, DC 20007  
mkl@bbrslaw.com

**ON BEHALF OF NUCOR STEEL MARION, INC.**

David Gardiner  
Executive Director  
The Alliance for Industrial Efficiency  
David Gardiner & Associates, LLC  
2609 11<sup>th</sup> Street North  
Arlington, VA 22201  
jennifer@dgardiner.com

**ON BEHALF OF THE ALLIANCE FOR  
INDUSTRIAL EFFICIENCY**

Susan Brodie  
Executive Director  
The Heat is Power Association  
2215 South York Road, Suite 202  
Oak Brook, IL 60523  
Susan@heatispower.org

**ON BEHALF OF THE HEAT IS POWER  
ASSOCIATION**

John Cuttica  
Director  
Energy Resources Center  
University of Illinois at Chicago  
1309 South Halsted  
Chicago, IL 60607-7022  
cuttica@uic.edu

**ON BEHALF OF ENERGY RESOURCES CENTER**

Mark A. Hayden (0081077)  
Associate General Counsel  
Scott J. Casto (0085756)  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
haydenm@firstenergycorp.com  
scasto@firstenergycorp.com

**ON BEHALF OF FIRSTENERGY SOLUTIONS  
CORP.**

Amy B. Spiller (0047277)  
Deputy General Counsel  
Elizabeth H. Watts (0031092)  
Associate General Counsel  
Duke Energy Business Services LLC  
139 East Fourth Street, 1303-Main  
PO Box 960  
Cincinnati, OH 45201-0960  
Amy.spiller@duke-energy.com  
Elizabeth.watts@duke-energy.com

**ON BEHALF OF DUKE ENERGY OHIO, INC.**

Richard L. Sites  
General Counsel & Senior Director of  
Health Policy  
Ohio Hospital Association  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215-3620  
ricks@ohanet.org

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
tobrien@bricker.com

**ON BEHALF OF THE OHIO HOSPITAL  
ASSOCIATION**

Judi L. Sobecki (0067186)  
The Dayton Power and Light Company  
1065 Woodman Drive  
Dayton, OH 45432  
Judi.sobecki@aes.com

**ON BEHALF OF THE DAYTON POWER AND  
LIGHT COMPANY**

Terrence N. O'Donnell  
Christopher M. Montgomery  
Dickinson Wright PLLC  
150 East Gay Street, Suite 2400  
Columbus, OH 43215  
todonnell@dickinsonwright.com  
cmontgomery@dickinsonwright.com

**ON BEHALF OF OHIO ADVANCED ENERGY  
ECONOMY**

Matthew White (Counsel of Record)  
Interstate Gas Supply, Inc.  
6100 Emerald Parkway  
Dublin, OH 43016  
mswhite@igsenergy.com

**ON BEHALF OF INTERSTATE GAS SUPPLY,  
INC.**

Bruce J. Weston  
Ohio Consumers' Counsel  
Terry L. Etter  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
Terry.etter@occ.ohio.gov

**ON BEHALF OF OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

Trent A. Dougherty  
Managing Director of Legal Affairs  
Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212-3449  
trent@theoec.org

**ON BEHALF OF OHIO ENVIRONMENTAL  
COUNCIL; AND OHIO COALITION FOR  
COMBINED HEAT & POWER**

Nicholas McDaniel  
Staff Attorney  
Environmental Law & Policy Center  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
NMcDaniel@elpc.org

**ON BEHALF OF THE ENVIRONMENTAL LAW &  
POLICY CENTER**

Christopher J. Allwein  
Williams, Allwein and Moser, LLC  
1373 Grandview Avenue, Suite 212  
Columbus, OH 43212  
callwein@wamenergylaw.com

**ON BEHALF OF THE SIERRA CLUB**

John Finnigan  
Senior Regulatory Attorney  
Environmental Defense Fund  
128 Winding Brook Lane  
Terrace Park, OH 45174  
jfinnigan@edf.org

**ON BEHALF OF ENVIRONMENTAL DEFENSE  
FUND**

Samantha Williams  
Staff Attorney  
Natural Resources Defense Council  
20 N. Wacker Drive, Suite 1600  
Chicago, IL 60606  
swilliams@nrdc.org

**ON BEHALF OF NATURAL RESOURCES  
DEFENSE COUNCIL**

Joseph Patrick Meissner  
Citizens Coalition  
5400 Detroit Avenue  
Cleveland, OH 44102  
meissnerjoseph@yahoo.com

**ON BEHALF OF CITIZENS COALITION**

Cliff Haefke, President  
Patricia F. Sharkey, Policy Committee Chair  
Midwest Cogeneration Association  
Environmental Law Counsel  
180 N. LaSalle Street  
Suite 3700  
Chicago, IL 60601

**ON BEHALF OF MIDWEST COGENERATION  
ASSOCIATION\***

\*Served via U.S. Mail as no email address was  
provided

Evelyn R. Robinson  
Attorney at Law  
2750 Monroe Boulevard  
Audubon, PA 19403  
Evelyn.robinson@pjm.com

**ON BEHALF OF PJM ENVIRONMENTAL  
INFORMATION SERVICES**



Allyson Umberger  
Director of Regulatory Affairs & General  
Counsel  
SRECTrade, Inc.  
90 New Montgomery St., Suite 333  
San Francisco, CA 94105

**ON BEHALF OF SRECTRADE, INC.\***

\*Served via U.S. Mail as no email address was  
provided

Christopher A. Walker (0040696)  
Van Kley & Walker, LLC  
137 N. Main St., Suite 316  
Dayton, Ohio 45402  
cwalker@vankleywalker.com

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

Joseph M. Clark (Counsel of Record)  
Direct Energy  
21 East State Street, 19th Floor  
Columbus, OH 43215  
joseph.clark@directenergy.com

**ON BEHALF OF DIRECT ENERGY SERVICES,  
LLC AND DIRECT ENERGY BUSINESS, LLC**

M. Howard Petricoff (0008287)  
Gretchen L. Petrucci (0046608)  
VORYS, SATER, SEYMOUR AND PEASE  
LLP  
52 East Gay Street  
Columbus, Ohio 43216-1008  
Tel. (614) 464-5414  
mhpetricoff@vorvs.com  
glpetmcci@vorvs.com

**ON BEHALF OF THE RETAIL ENERGY SUPPLY  
ASSOCIATION**

William Wright  
Assistant Attorney General  
Chief, Public Utilities Section  
180 East Broad Street, 12th Floor  
Columbus, OH 43215  
William.wright@puc.state.oh.us

**ON BEHALF OF THE STAFF OF THE PUBLIC  
UTILITIES COMMISSION OF OHIO**

Richard Bulgrin  
Bryce McKenney  
Attorney Examiners  
Public Utilities Commission of Ohio  
180 E. Broad Street  
Columbus, OH 43215-3793  
Richard.bulgrin@puc.state.oh.us  
bryce.mckenney@puc.state.oh.us

**ATTORNEY EXAMINERS**

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