**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. )

**Reply Comments of Industrial Energy Users-Ohio**

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.[[1]](#footnote-1) 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.[[2]](#footnote-2) 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.[[3]](#footnote-3) OEC concedes that required in-state compliance under SB 221 does not attach to any specific year, but rather attaches to the total 2024 compliance target.[[4]](#footnote-4) 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.[[5]](#footnote-5) 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.[[6]](#footnote-6) Accordingly, even if the Commission was not directed by SB 310 to revise its rules, it should not leave an unlawful rule in place.

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.”[[7]](#footnote-7) 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.

Respectfully submitted,

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**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 12th day of August 2014, *via* electronic transmission, except those specifically designated as being served via U.S. mail.

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1. 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. [↑](#footnote-ref-1)
2. 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. [↑](#footnote-ref-2)
3. Section 4928.64(B)(3), Revised Code. [↑](#footnote-ref-3)
4. 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. [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. *Cent. Ohio Joint Vocational Sch. Dist. Bd of Educ. v. Ohio Bureau of Emp't Servs.,* 21Ohio 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). [↑](#footnote-ref-6)
7. SRECTrade Initial Comments at 1. [↑](#footnote-ref-7)