

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Adoption of Rules for	)	
Alternative and Renewable Energy	)	
Technologies and Resources, and Emission	)	
Control Reporting Requirements, and	)	
Amendment of Chapters 4901:5-1, 4901:5-3,	)	Case No. 08-888-EL-ORD
4901:5-5, and 4901:5-7 of the Ohio	)	
Administrative Code, pursuant to Chapter	)	
4928, Revised Code, to Implement Senate Bill	)	
No. 221.	)	

**COMMENTS OF THE AMERICAN WIND ENERGY ASSOCIATION,
WIND ON THE WIRES, OHIO ADVANCED ENERGY, AND ENVIRONMENT OHIO**

The American Wind Energy Association (“AWEA”), Wind on the Wires (“WOW”), Ohio Advanced Energy (“OAE”), and Environment Ohio (“EO”), collectively the “Joint Commenters,” respectfully submit these Comments to the proposed rules implementing the alternative energy portfolio standard in the State of Ohio, and issued by the Public Utilities Commission of Ohio (“Commission”) for comment in its Entry dated August 20, 2008 (“Entry”).

AWEA is a national trade association representing wind power project developers, equipment suppliers, services providers, parts manufacturers, utilities, researchers, and others involved in the wind industry. AWEA currently serves more than 1,500 members.

Launched in 2001, WOW serves as the midwest regional partner of AWEA. WOW is comprised of wind developers, environmental organizations, wind energy experts, tribal representatives, clean energy advocates, and businesses providing goods and services to the wind industry. WOW’s simple mission is to advocate for policies and practices in the Midwest that encourage wind energy development and ensure the delivery of wind power to market.

OAE is the premier Ohio-based business trade association advocating on behalf of advanced and renewable technology industries. Comprised of 22 companies and organizations working in the areas of solar power, wind power, and other advanced energy technologies, OAE's mission is to implement a coherent economic growth strategy for Ohio centered on advanced and renewable energy. OEA advocated in the General Assembly for the alternative energy portfolio standard in Amended Substitute Senate Bill 221 ("S.B. 221"). Its members and supporters have also signed a letter of support for these comments attached hereto as Exhibit A.

Environment Ohio ("EO") is a statewide, citizen-based environmental advocacy organization that focuses exclusively on protecting Ohio's air, water, and open spaces. With over 4,000 citizen members across the state, EO uses independent research to advocate for solutions that will help to improve Ohio's environment. Recently, EO worked with partners in the environmental, consumer, and business community to advocate for strong renewable energy and energy efficiency standards in S.B. 221.

I. PRELIMINARY COMMENTS

S.B. 221 represents the General Assembly's attempt to remake the regulatory structure under which utility companies operate in the State of Ohio. Among other objectives, SB 221 was specifically designed to encourage the development of advanced and renewable energies in Ohio.

At the heart of this regulatory undertaking was the creation of an ambitious alternative energy portfolio standard. The alternative energy portfolio standard mandates that 25 percent of all kilowatt hours of electricity sold by electric distribution utilities and electric services companies to retail electric consumers be obtained from "alternative energy resources" by 2025.¹

¹ See R.C. 4928.64(B).

At least half of the alternative energy requirement (12.5 percent or more) must be generated from “renewable energy resources.” The remaining 12.5 percent may be derived from advanced energy resources, including clean coal and nuclear technology.

At this time, the Commission is provided with a unique opportunity to develop new rules for the implementation of the alternative energy portfolio standard in the State of Ohio. The Commission appropriately proposed an entirely new chapter in the Ohio Administrative Code to implement the alternative energy portfolio standards (“AEPS”).

The Joint Commenters respectfully submit these comments to assist the Commission in more effectively implementing clear and practical rules relating to Ohio’s alternative energy portfolio standard.

II. DISCUSSION OF RULES, COMMENTS AND PROPOSED CHANGES

A. Rule 4901:1-40 – Definitions

(E) “Biomass energy”

Ohio Revised Code Section (“R.C.”) 4728.01(A)(35) defines “renewable energy resource” to include “biomass energy” as well as “non-treated byproducts of the pulping process or wood manufacturing process, including bark, woodchips, sawdust, and lignin in spent pulping liquors.”

Proposed Rule 4901:1-40-01(E) defines the term similarly, adding “forestry waste and residues, “vegetation waste,” and “right of way trimmings” among other wastes and by-products. The Joint Commenters do not object to the inclusion of these additional potential fuel sources. However, in order to avoid creating a perverse incentive to clear cut forests and protected lands and encourage unsustainable land-use practices, the rule should not create a market incentive to clear natural areas. Therefore, the definition of biomass should *exclude* forest and agricultural

crops and crop residues or byproducts derived from federal lands or from land that was not cleared prior to enactment of S.B. 221. To this end, we propose the following change to the proposed definition of “biomass energy” found in proposed Rule 4901:1-40-01(E)

- (E) "Biomass energy" means energy produced from organic material derived from plants or animals and available on a renewable basis, including but not limited to: agricultural crops, tree crops, crop by-products and residues; wood and paper manufacturing waste, including nontreated by-products of the wood manufacturing or pulping process, such as bark, wood chips, sawdust, and lignin in spent pulping liquors; forestry waste and residues: other vegetation waste, and by-products (including fats, oils, greases and manure); biodegradable solid waste; and biologically-derived methane gas. BIOMASS ENERGY DOES NOT INCLUDE FOREST CROPS OR AGRICULTURAL CROPS OR CROP RESIDUES DERIVED FROM FEDERAL LANDS OR FROM LAND THAT WAS NOT CLEARED PRIOR TO ENACTMENT OF S.B. 221.

(F) “Clean coal technology”

R.C. 4928.01(A)(34)(c) defines “Clean coal technology” as including any technology with the:

design capability to control or prevent the emission of carbon dioxide, **which design capability the commission shall adopt by rule** and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion; ***

Emphasis added. Thus, the General Assembly has required the Commission to establish specific design capability standards to govern whether a given coal technology application should be designated “clean coal.” However, proposed Rule 4901:1-40-01(F) merely defines “clean coal technology” in the same manner as the statute.²

Far from clarifying the issue, this circular definition leaves open the possibility that a technology with the mere statement that its “design capability” will remove “criteria pollutants

² The proposed rule defines “Clean coal technology” as “any technology that removes or has the design capability to remove criteria pollutants and carbon dioxide from an electric generating facility ***.”

and carbon dioxide” from a coal facility will qualify the facility as “clean coal” for purposes of the advanced energy benchmark. In effect, the proposed rule could allow a proposed project to *designate itself* as a “clean coal technology” because there are no design standards against which to measure a project’s capability. Thus, a coal facility with design capability to be upgraded to an Integrated Gasification Combined Cycle facility might already meet this test, without having removed a single pollutant from the air, merely based upon its own statement of its “design capability.” The same is true for existing and planned coal-fired generation that is designed to accept a back-end sequestration technology.

The Joint Commenters believe that the statutory definition set forth in R.C. 4928.01(A)(34)(c) mandates that the Commission adopt specific design capability standards. To correct this deficiency, this proposed Rule 4901:1-40 should be revised to include specific design capability standards.³

(I) “Deliverable into this state”

For purposes of the renewable tier of the alternative energy portfolio standard, one-half of the electricity supplied shall come from facilities located in the state of Ohio; the other half must be met with resources “that can be shown to be deliverable into this state⁴.”

The Joint Commenters support the definition of “deliverable into this state” in the proposed rule.

(L) “Distributed generation”

Although the proposed definition of “distributed generation” in proposed Rule 4901:1-40-01(L) appears to contemplate including the broadest possible range of electricity production, it does not address the ownership of the projects that comprise the electricity production or

³ The Joint Commenters encourage the Commission to consider the definition of “clean coal” put forth by the Ohio Consumer and Environmental Advocates.

⁴ R.C. 4928.64.

whether such projects may be net-metered. In keeping with the state’s policy of “encouraging distributed generation across customer classes,”⁵ the definition should make clear that all ownership arrangements will qualify as distributed generation. Additionally, it should clarify that net-metered systems will qualify as distributed generation.

The revised definition the Joint Commenters propose will ensure that electricity distribution installed pursuant to power purchase agreements (“PPAs”) will qualify as distributed generation, thereby making distributed generation available to customers who might not otherwise be able to afford it. Additionally, the expanded definition will avoid any ambiguity over whether net-metered systems qualify as distributed generation.

Therefore, the Joint Commenters propose that the draft definition be revised as follows:

(L) “Distributed generation” means electricity production that is on-site or close to the load center and is capable of supplying energy to the utility distribution system. DISTRIBUTED GENERATION INCLUDES, WITHOUT LIMITATION, ELECTRICITY PRODUCTION FROM ALTERNATIVE ENERGY RESOURCES AND RENEWABLE ENERGY RESOURCES, REGARDLESS OF WHETHER ANY SUCH ALTERNATIVE ENERGY RESOURCE OR RENEWABLE ENERGY RESOURCE IS OWNED BY THE UTILITY CUSTOMER, A THIRD-PARTY OR ANOTHER OWNERSHIP ARRANGEMENT. NET-METERED ELECTRICITY PRODUCTION THAT MEETS THE CRITERIA SET FORTH IN THIS DEFINITION SHALL QUALIFY AS DISTRIBUTED GENERATION.

(M) **“Double-counting”**

The Joint Commenters understand the need for a definition of “double-counting” so as to ensure that the multiple policy aims in S.B. 221 are not short-circuited. However, the definition of “double-counting” is proposed in Rule 4901:1-40-01(M) appears somewhat vague and may not lend itself to straightforward interpretation. To provide utilities and regulators with a clear

⁵ Ohio Rev. Code Ann. § 4928.02(K)) (Baldwin 2008).

standard, Joint Commenters propose revising the definition. This revised definition provides a more explicit guide for determining what actions constitute double-counting:

(M) “Double-counting” means utilizing ~~renewable energy~~, AN INDIVIDUAL renewable energy credits-(WHETHER OR NOT BUNDLED WITH ELECTRIC POWER), or energy efficiency savings to (1) satisfy multiple regulatory requirements, (2) support multiple voluntary product offerings, (3) substantiate multiple marketing claims, or (4) some combination of these.

(Y) “Incremental capacity”

In order to clarify that only the upgrades or enhancements that meet the criteria are to be considered “qualified resources,” Joint Commenters recommend the following addition to the proposed Rule 4901:1-40 of “incremental capacity” and that the subsequent definitions be renumbered:

(Y) “INCREMENTAL CAPACITY” MEANS THE ADDITIONAL GENERATION CAPACITY ADDED AS A RESULT OF A MODIFICATION TO AN ELECTRIC GENERATING FACILITY OR SIGNIFICANT IMPROVEMENT TO AN EXISTING FACILITY.

(II) Solid wastes

“Solid wastes” are included in the definition of renewable energy resources in S.B. 221. Proposed Rule 4901:1-40-01(II) defines “solid wastes” by reference to R.C. 3734.01. The definition there appears as follows:

[U]nwanted residual solid or semisolid material as results from industrial, commercial, agricultural, and community operations, excluding earth or material from construction, mining, or demolition operations, or other waste materials of the type that normally would be included in demolition debris, nontoxic fly ash and bottom ash, including at least ash that results from the combustion of coal and ash that results from the combustion of coal in combination with scrap tires where scrap tires comprise not more than fifty per cent of heat input in any month, spent nontoxic foundry sand, and slag and other substances that are not harmful or inimical to public health, and includes, but is not limited to, garbage, scrap tires, combustible and noncombustible material, street dirt, and debris. “Solid

wastes” does not include any material that is an infectious waste or a hazardous waste.⁶

However, in S.B. 221 the General Assembly *narrowed* the definition to include only fuel derived from solid wastes “through fractionation, biological decomposition, or other process that does not principally involve combustion.”⁷

Oddly, this limitation is not reflected in the proposed rules either in the definition of solid wastes in proposed Rule 4901:1-40-01(II) or in the list of qualifying resources in proposed Rule 4901:1-40-04(A)(5). The Joint Commenters urge that it be incorporated in both places to prevent solid waste technologies principally involving combustion to qualify as a renewable resource. The change the Joint Commenters suggest is as follows:

- (II) “Solid wastes” has the meaning set forth in section 3734.01 of the Revised Code, AS MODIFIED IN SECTION 4928.01 (A)(35) TO INCLUDE ONLY FUEL DERIVED THROUGH FRACTIONATION, BIOLOGICAL DECOMPOSITION, OR ANOTHER PROCESS THAT DOES NOT PRINCIPALLY INVOLVE COMBUSTION.”

B. Rule 4901:1-40-02(B) – Blanket authority to waive alternative energy requirements

Proposed Rule 4901:1-40-02(B) gives the Commission blanket authority to waive any requirement of the AEPS. This overly broad language clearly oversteps the specific and comprehensive method for excused compliance that the General Assembly specifically sets forth in R.C. 4928.64, and may increase the cost of implementing the AEPS by decreasing the predictability of the standard.

R.C. Section 4928.64(C)(3) provides the Commission with ample authority to excuse compliance and otherwise provide relief under well-defined, predictable circumstances. The Commission may excuse a utility from meeting a benchmark if its cost of compliance is

⁶ R.C. 3734.01.

⁷ R.C. 4928.01(A)(35).

reasonably expected to exceed the cost of otherwise producing or acquiring the requisite energy by three percent or more.⁸

Further, the Commission may make a determination that a utility or company's noncompliance is due to *force majeure*, in which case the Commission must modify that utility or company's obligation "*as the commission determines appropriate.*"⁹

Finally, the Commission may change the compliance payment, including submitting downward adjustments of the compliance payment to the General Assembly for legislative enactment.¹⁰

Together, these measures allow the Commission significant discretion without compromising the regulatory certainty that alternative and renewable energy developers and investors require.

Under proposed Rule 4901:1-40-02(B), however, the Commission could alter, delay or eliminate the standard at any future time, with no particular process or showings delineated. This significantly reduces regulatory risk for electric utilities and electric service companies, while creating no apparent limit on the regulatory risk faced by alternative and renewable energy developers seeking to do business with the electric utilities and electric service companies. Although contracted projects existing prior to a waiver would be protected, a significant risk premium could attend all future investment in renewable energy development in the state. Thus, while the waiver provision is presumably designed to protect ratepayers from unanticipated market conditions, ratepayers are clearly already directly protected, and open-ended ability to suspend or terminate compliance requirements may perversely have the unintended consequence of exposing ratepayers to higher costs.

⁸ R.C. 4928.64(C)(3).

⁹ Id. 4928.64(C)(4) (emphasis added).

¹⁰ Id. 4928.64(C)(5).

This subject was much discussed in the legislature and the statute clearly identifies the allowed justifications for relief; the proposed rule clearly oversteps the statutory design.

For these reasons, the final rules should omit proposed Rule 4901:1-40-02(B):

~~B) — The commission may waive any requirement of Chapter 4901:1-40 of the Administrative Code for good cause shown.~~

C. Rule 4901:1-40-04(B) – Qualified resources, advanced energy

Proposed Rule 4901:1-40-04(B) sets out the list of technologies that qualify as “advanced energy,” and thus are eligible for the advanced tier of the alternative energy portfolio standard. Among these resources are both “any modification to a... facility... that increases its generation output without increasing [its] carbon dioxide emission rate...” and “nuclear enhancements,” which include “[s]ignificant improvements [at] existing facilities.”

Obviously the General Assembly intended to credit certain classes of upgrades at existing facilities toward the advanced energy benchmark. But the rules should clarify that credit toward the advanced energy benchmark for such capacity additions and efficiency improvements does not render an *entire* existing generating facility an “advanced energy resource.”

Otherwise it could be interpreted, for example, that a 5 MW capacity addition to an existing 500 MW electric generating facility could arguably qualify the *entire facility* for meeting the advanced energy benchmark. As another example, a 500 MW coal plant could be reclassified as an “advanced energy resource” if its annual carbon dioxide emission rate were to be decreased slightly due to a minor modification. While the alternative energy portfolio standard clearly recognizes that such minor (but prudent) upgrades to existing facilities may be credited toward the standard, the Commission should clarify that it is the incremental gain in output or benefit associated with the modification that is credited toward the advanced energy benchmark.

For reference, Joint Commenters note that the federal Environmental Policy Act of 2005 defines “incremental” for the purposes of hydropower. That definition is as follows:

- (B) DETERMINATION OF INCREMENTAL HYDROPOWER PRODUCTION
 - (i) IN GENERAL- For purposes of subparagraph (A), incremental hydropower production for any taxable year shall be equal to the percentage of average annual hydropower production at the facility attributable to the efficiency improvements or additions of capacity placed in service after the date of the enactment of this paragraph, determined by using the same water flow information used to determine an historic average annual hydropower production baseline for such facility. Such percentage and baseline shall be certified by the Federal Energy Regulatory Commission.
 - (ii) OPERATIONAL CHANGES DISREGARDED- For purposes of clause (i), the determination of incremental hydropower production shall not be based on any operational changes at such facility not directly associated with the efficiency improvements or additions of capacity.

In order to achieve this goal, the Joint Commenters recommend the following changes to the proposed Rule 4901:1-40-04:

- (B)(1) Any modification to an electric generating facility that increases its generation output ~~without increasing~~ WHILE REDUCING the facility’s TOTAL ANNUAL carbon dioxide emissions.
 - (a) THE FACILITY’S INITIAL BASELINE SHALL BE CALCULATED BY DETERMINING ITS AVERAGE ANNUAL EMISSIONS FOR THE LAST THREE YEARS PRIOR TO THE MODIFICATION TO AN ELECTRIC GENERATING FACILITY THAT INCREASES ITS CAPACITY.
 - (b) ONLY GENERATION FROM THE INCREMENTAL CAPACITY RESULTING FROM THE MODIFICATION TO AN ELECTRIC GENERATING FACILITY THAT INCREASES ITS GENERATION OUTPUT SHALL QUALIFY FOR MEETING THE ADVANCED ENERGY RESOURCE BENCHMARKS.

(B)(4) ONLY GENERATION FROM THE INCREMENTAL
CAPACITY ADDED FROM SIGNIFICANT IMPROVEMENTS
TO EXISTING FACILITIES SHALL QUALIFY FOR MEETING
THE ADVANCED ENERGY RESOURCE BENCHMARKS.

D. Rule 4901:1-40-04(D)(3) – Banking of Renewable Energy Credits

Renewable energy credits, or “RECs,” are the currency of the AEPS. By statute, these tradable instruments represent one megawatt of electricity,¹¹ and the utilities must acquire enough RECs to demonstrate compliance with a renewable benchmark in a given year.

Because of their value to the utility in meeting the requirements of the AEPS, each REC has significant cash value to renewable energy developers—realized upon sale of the REC to a utility. This revenue is, of course, critical to the financing of renewable energy projects.

Equally critical, the producers of renewable energy must be able to predict the value of a REC with some certainty so they can price out projects several years into the future. In order for the developers to obtain this certainty about the value of the REC, the basic rules of the REC marketplace must be transparent and fixed at the outset. One such rule is the length of time a REC is valid. Knowing this variable enables renewable energy generators to calculate the approximate volume of RECs the utilities still need to acquire to meet a given benchmark.

The General Assembly provided some guidance about the life of a REC, stating that a utility may utilize a REC “in any of the five calendar years following the date of its purchase or acquisition.”¹²

The proposed rule merely reiterates the statutory language. However, in order to bring needed transparency and clarity to the REC market, the Commission should clarify that a REC is first “purchased or acquired” *upon the generation of the renewable energy*, since this is when the

¹¹ R.C. 4928.65

¹² R.C. 4828.65

REC is “first acquired” by the owner of the generating system, or first purchased under a power purchase agreement. This begins the commencement of the five-year clock immediately and will allow market actors to easily calculate the expiration date of a REC.

In the absence of this clarification, a producer could generate renewable energy in 2010, sell the REC in 2013 (arguably the date it is “first purchased” by the utility) and the utility might utilize it five years later, in 2018. Market participants may not know this first date of purchase, and therefore not be able to analyze the state of the REC market and thus be unable to price their products appropriately. In order to eliminate this confusion, the Joint Commenters propose the following language:

- (3) A REC may be used for compliance any time in the five calendar years following the date of its initial purchase or acquisition. FOR PURPOSES OF THIS RULE, A REC IS “ACQUIRED” BY ITS OWNER IMMEDIATELY UPON THE GENERATION OF THE RENEWABLE ENERGY AND THEREFORE EXPIRES FIVE YEARS FROM THAT DATE.

E. Rule 4901:1-40-04(E) and (F) – Certification of Advanced or Renewable Energy Resource

The General Assembly authorized the Commission to classify new technologies as advanced or renewable energy resources under R.C. 4928.64(A)(2). Proposed Rule 4901:1-40-04(E) sets forth the procedure by which individuals can make application to the Commission for such a determination. The process does not appear to require any notice, a hearing, or third party input. Further, if the Commission does not act within 60 days, the application is simply deemed approved.

Classifying new technologies or additional resources as an advanced energy resource or renewable energy resource should be a rigorous process and allow for sufficient public input. Entities investing to meet Ohio’s alternative energy requirements must have confidence that resource eligibility requirements and the rules governing those requirements will be certain and

consistent. Transparency regarding the addition of eligible resources will reduce the risks to investors, thereby, optimizing Ohio's alternative energy markets. Moreover, there will undoubtedly be a limited number of legitimate certifications required and thus a participation process will not be unduly burdensome to the Commission.

In order to strengthen the process and increase transparency, the Joint Commenters suggest modifying subsection (E)(2) as follows:

- ~~(2) The commission may approve, suspend or deny an application within sixty day of it being filed. If the commission does not act within sixty days, the application is deemed automatically approved on the sixty first day after the filing date.~~
- (2) THE COMMISSION SHALL ALLOW AT LEAST FIFTEEN DAYS FOR PUBLIC COMMENT AND FIFTEEN DAYS FOR REPLY COMMENTS WITHIN FIFTEEN DAYS OF RECEIVING THE APPLICATION.
- (3) THE COMMISSION SHALL SET A PUBLIC HEARING FOR CONSIDERATION OF THE RESOURCE OR TECHNOLOGY CERTIFICATION OF THE APPLICATION WITHIN FIFTEEN DAYS OF RECEIVING REPLY COMMENTS.
- (4) THE COMMISSION SHALL CONSIDER ALL PUBLIC COMMENTS AND REPLY COMMENTS IN MAKING ITS DETERMINATION.
- (5) THE COMMISSION MAY APPROVE, SUSPEND, OR DENY AN APPLICATION WITHIN SIXTY DAYS OF THE END OF THE REPLY PUBLIC COMMENT PERIOD.

Joint Commenters also urge that in making these determinations, the Commission apply a commonly accepted definition of "renewable" and fully consider the attributes of a given technology. Joint Commenters propose that Rule 4901:1-40-04(F) should be modified to state:

- (F) IN MAKING THE DETERMINATION THAT ANY NEW TECHNOLOGY OR ADDITIONAL RESOURCE IS A RENEWABLE ENERGY RESOURCE, THE COMMISSION SHALL CONSIDER THAT RENEWABLE ENERGY IS COMMONLY DEFINED AS DERIVED FROM SOURCES THAT ARE NATURALLY REPLENISHED AS SOON AS

THEY ARE CONSUMED OR OTHERWISE REPLENISHED IN A RELATIVELY SHORT PERIOD OF TIME. IN ADDITION, IN MAKING THE DETERMINATION THAT ANY NEW TECHNOLOGY IS A RENEWABLE RESOURCE, THE COMMISSION SHALL CONSIDER THE IMPACT THE NEW TECHNOLOGY MAY HAVE UPON AIR QUALITY, INCLUDING CARBON DIOXIDE AND OTHER GREENHOUSE GAS EMISSIONS, WATER QUALITY, AND WATER QUANTITY.

The modification of subsection (E)(2) and the insertion of a new (F) necessarily impacts proposed Rule 4901:1-40-04(F), which would become (G). Currently proposed paragraph (F) provides the Commission with the discretionary power to, *sua sponte*, classify new technologies as advanced or renewable energy resources. So as to mirror the transparency and public comment provisions added to subsection (E)(2), this subsection should be modified as follows:

- (G) At its discretion, the commission may classify additional resources as an advanced energy resource or a renewable energy resource AFTER NOTICE, HEARING, AND AN OPPORTUNITY FOR INTERESTED PERSONS TO SUBMIT COMMENTS IN THE SAME PROCESS DESCRIBED IN SUBSECTION (E).

F. Rule 4901:1-40-06(A) – Force Majeure

SB 221 creates a *force majeure* provision that gives the Commission discretion in some cases to waive all, or part, of a utility’s compliance with the renewable energy benchmarks established as part of the State’s AEPS.¹³ The statute first identifies the procedure by which a utility may request the Commission review its compliance with the renewable energy benchmarks. The statute also sets forth the standard by which the Commission determines whether a utility must comply with those benchmarks – namely whether “renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility to comply with the benchmark.”

¹³ See R.C. 4928.64(C)(4)(b).

Although the *force majeure* provision in proposed Rule 4901:1-40-06(A) tracks the language of the statute with respect to process, it fails to outline or clarify the standard utilized in determining whether an event qualifies as *force majeure*. Instead of giving the Commission unbridled discretion to invoke *force majeure*, the rule should contain the same standard as the statute: whether “renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility to comply with the benchmark.”

In addition, the rule should clarify that *force majeure* is only appropriate where compliance has been made impossible by events *outside the utility’s control*. That is the essence of *force majeure*, and would preclude excusing a utility’s failure to comply with a benchmark for inadequate planning or mere speculation about future equipment shortages.

Rather, unlike the cost cap test discussed below, the *force majeure* analysis is *backward-looking*. To support a *force majeure* contention, the utility must prove that an event beyond their control has occurred which has made renewable energy resources and RECs not reasonably available such that compliance is excusable.

Forward-looking concerns about *future* marketplace conditions and prices may be perfectly legitimate. However, those concerns will always be reflected in the price of obtaining renewable energy generation, so are appropriately addressed by the cost cap provisions, not *force majeure*.

Joint Commenters propose the following language as consistent with the provisions of R.C. 4928.64(C)(4)(b):

(A)(2) If the commission determines that AN EVENT HAS OCCURRED THAT WAS BEYOND THE CONTROL OF THE UTILITY OR COMPANY AND NOT REASONABLY FORESEEABLE, AND THAT EVENT CAUSED ~~force majeure conditions exist~~ RENEWABLE ENERGY RESOURCES TO NOT BE REASONABLY AVAILABLE IN THE MARKETPLACE IN

SUFFICIENT QUANTITIES FOR THE UTILITY OR COMPANY TO COMPLY WITH THE SUBJECT MINIMUM BENCHMARK, it may modify that compliance obligation of the electric utility or electric services company as it considers appropriate to accommodate the finding.

G. Rule 4901:1-40-07(C) – 3% Cost Cap Calculation

While S.B. 221 set forth an annual schedule of renewable energy benchmarks for utilities to meet between 2009 and 2025, it also contains a mechanism to protect ratepayers from potential price spikes: the so-called “3% cost cap.”

To implement this cost cap provision appropriately, the Commission must balance its responsibility to reduce ratepayer impacts with the need to provide enough certainty to support investment on the part of renewable energy developers, who will be required to invest several billion dollars in Ohio in the form of facilities, equipment commitments, and financing for demand that may be years into the future.

If properly implemented, the cost cap provision should not materially impact or reduce the amount of renewable energy developed under the alternative energy portfolio standard. Nor should it undermine a predictable investment climate which will motivate renewable energy investments at competitive costs. The cost cap should also be understood as one layer of cost control to be integrated on top of the preferred and most basic cost control mechanism of the statute, the renewable energy compliance payment (“RECP”).¹⁴ In general, the cost cap should be expected to be *less restrictive* on price than the more specific RECP if the RECP is to have any worthwhile function, and the principles of statutory construction would indicate that the RECP was included for a reason and is therefore expected to function.

The proposed rule relative to the statutory three percent cost cap appears to set out a workable process in the event a utility asserts the cost cap is triggered: the utility invokes the

¹⁴ See R.C. 4928.64(C)(2).

cap, and then has the duty to demonstrate that even though it pursued all reasonable compliance options, it simply could not meet a given year's benchmark without exceeding the cap. The Commission decides whether the cap is triggered, and if it is, has discretion in altering the benchmark.

However, the proposed rule must be strengthened to provide a reasonable degree of certainty with respect to how the Commission will calculate the cost cap by specifying that the proposed formula “shall” be utilized rather than “may” be used. The current optional language introduces an element of risk that could discourage investment by reducing certainty in a critical fashion.

Proposed Rule 4901:1-40-07(C) states that “[c]alculations involving the cost cap *may* consist of comparing the projected generation rate of an electric utility or electric services company, exclusive of any reasonable costs associated with satisfying an alternative energy portfolio requirement, to the projected generation rate of an electric utility or electric services company including any reasonable costs of satisfying an alternative energy portfolio standard requirements.” (Emphasis added.)

The Joint Commenters believe the substantive test laid out by the proposed rule—comparing generation rates with and without the alternative energy portfolio standard—is a straightforward implementation of the statutory provision and appears to offer a clear test for the application of the cap.

This test, however, appears wholly optional. The proposed rule leaves open the possibility that while this reasonably understandable calculation *might* be used to determine whether the cost cap is triggered, some other unknown, undescribed, potentially much more

onerous and restrictive test might be employed in its stead to trigger the cost cap at any given moment, throwing out benchmarks and instantly devaluing the REC market.

Therefore, to fix this problem and establish and maintain a stable environment in which investors and developers of renewable energy projects can function, the cost cap test laid out in this proposed rule should be the mandatory and exclusive test for calculating the cost cap, so all parties including renewable energy developers, utilities, and consumers, know at the outset how this cost cap will be calculated. Paragraph (C) of proposed Rule 4901:1-40-07 should be amended to state:

- (C) Calculations involving the cost cap ~~may~~ SHALL consist of comparing the projected generation rate of an electric utility or electric services company, exclusive of any reasonable costs associated with satisfying an alternative energy portfolio requirements, to the projected generation rate of an electric utility or electric services company including any reasonable costs of satisfying an alternative energy portfolio standard requirements.

H. Rule 4901:1-40-07(D) – Cost Cap, Unavoidable Surcharges

In implementing the statutory cost cap, the Commission is required to compare renewable energy generation to conventional energy generation [See the statement of the calculation as set out in (C) above]. In order to ensure a fair “apples-to apples” comparison, the Commission must consider the full cost of generating conventional energy (i.e., coal-fired power plants), just as the Commission considers the full cost of renewable energy generation.

However, proposed Rule 4901:1-40-07(D) states:

- (D) [a]ny costs included in a commission-approved unavoidable surcharge for construction expenditures or environmental expenditures of generation resources may be excluded from consideration as a cost of compliance under the terms of the alternative energy portfolio standard.

This provision seems to suggest that if the Commission approves an unavoidable, non-bypassable surcharge to pay for costs associated with environmental upgrades to existing coal

plants (such as scrubbers or carbon sequestration), those costs would be *simply ignored* when determining the cost of conventional energy generation.

This would, of course, have the effect of artificially masking the actual cost of generating conventional energy—concealing the billions of dollars that may be required to clean coal or capture and sequester carbon underground. By comparison, the cost of generating renewable energy would seem artificially and unfairly much more costly, causing the 3% cost cap to be prematurely triggered.

There is no statutory basis for discounting the actual costs of conventional energy in this manner, ignoring environmental and construction costs. Therefore, this section should be deleted in its entirety as follows:

~~(D) — Any costs included in a commission-approved unavoidable surcharge for construction expenditures or environmental expenditures of generation resources may be excluded from consideration as a cost of compliance under the terms of the alternative energy portfolio standard.~~

I. Rule 4901:1-40-07(D), Cost Cap, Competitive Procurement

As has been discussed, the cost cap formula described in the rule essentially requires the Commission to compare a utility's generation rate inclusive of the AEPS versus the generation rate exclusive of the AEPS. If the AEPS increases rates beyond the statutory threshold of 3%, the cost cap is triggered and the Commission is empowered to modify a benchmark to protect ratepayers. The proposed rule requires utilities to “pursue all reasonable compliance options” prior to requesting relief under the cap.

Implicit in the requirement that a utility pursue all reasonable compliance options is a requirement that the utility procure renewable energy through competitive selection to ensure the least cost. The Joint Commenters believe that in order to ensure the cost cap is not invoked inappropriately or prematurely, the Commission should explicitly require that utilities maintain a

procurement process with complete public transparency. In support of transparency, the Commission should require utilities to obtain renewable energy at the most competitive prices the marketplace can offer through a competitive request for proposal (“RFP”) process. By adopting this requirement, the Commission will avoid utilities overspending on renewable energy generation and inappropriately encroaching on the cost cap. Transparency and the RFP requirement protect ratepayers, in furtherance of the policy aims of the cost cap.

The Joint Commenters recognize that utilities may decide to develop and construct their own renewable energy projects, rather than procuring energy contracts and are neutral on this where cost effective. Consistent with an RFP requirement, if a utility desires to consider “self-build,” the utility should utilize a third party bid administrator to evaluate the proposals, and then can submit a bid if it so chooses. Alternatively, the Commission could evaluate bids where utility bids are contemplated. In either case, all renewable energy developers (utilities included) compete on a level and transparent playing field to provide least cost renewable energy.

Therefore, Joint Commenters propose the following paragraph (G) to the rule:

- (G) BEFORE BUILDING OR ACQUIRING ANY RENEWABLE ENERGY RESOURCES OR ACQUIRING RENEWABLE ENERGY CREDITS, A UTILITY OR ELECTRIC SERVICES COMPANY SHALL ENGAGE IN AN OPEN COMPETITIVE BIDDING PROCESS. THE PROCESS SHALL INCLUDE ISSUING REQUESTS FOR PROPOSAL (RFPs) DESIGNED TO SECURE RENEWABLE ENERGY RESOURCES AT THE LOWEST COST TO CONSUMERS. THIS PROVISION SHALL NOT PREVENT A UTILITY OR ELECTRIC SERVICES COMPANY FROM SUBMITTING A COMPETITIVE BID IN RESPONSE TO ITS OWN RFP TO PROVIDE RENEWABLE ENERGY RESOURCES. HOWEVER, IF A UTILITY OR ELECTRIC SERVICE COMPANY SUBMITS A BID ON ITS OWN RFP, THE BIDS SHALL BE EVALUATED AND AWARDED BY THE COMMISSION OR AN INDEPENDENT THIRD PARTY APPOINTED BY THE COMMISSION.

J. Rule 4901:1-40-08 – Compliance Payments

Proposed Rule 4901:1-40-08(A)(3) relative to compliance payments requires the Commission staff to conduct a review on at least an annual basis to assess the renewable energy marketplace. Such a review may of course look both backward at any events that might be considered to be *force majeure*, as well as forward, not to merely provide a snapshot of the current marketplace but also judge the large amounts of growth and increased production seen in the renewable energy sector. Like proposed Rule 4901:1-40-09 requiring an annual report regarding compliance with the AEPS, this rule should also allow for notice and third party comment before the report on the renewable energy marketplace. The Joint Commenters recommend revising the proposed rule as follows:

- (A)(3) At least annually, the staff shall conduct a review of the renewable energy resource market, including solar, both within this state and within the regional transmission systems active in the state. PRIOR TO FINALIZING ITS REPORT, THE REPORT SHALL BE ISSUED FOR PUBLIC COMMENT BY INTERESTED PERSONS FOR 30 DAYS UNLESS OTHERWISE ORDERED BY THE COMMISSION. THE PROCESS AND TIMEFRAMES FOR SOLICITING PUBLIC COMMENT SHALL BE SET BY ENTRY OF THE COMMISSION, THE LEGAL DIRECTOR, THE DEPUTY DIRECTOR, OR ATTORNEY EXAMINER. The results of this review shall be used to determine if changes to the solar or renewable energy compliance payments are warranted, as follows:

K. Renewable Energy Credits, Small Customer-Sited Installations

While not directly addressed in the proposed rules, S.B. 221 gives the Commission broad authority and specific direction to consider a wide range of regulatory tools to promote renewable distributed generation. Specifically, S.B. 221 requires the Commission to adopt rules which “shall allow customer-sited projects or actions the broadest opportunities to be eligible for

obtaining renewable energy credits.”¹⁵ In addition, the Commission can implement the following state policies:

- (D) Encourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;...
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;...
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;
- (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;...
- (M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses.¹⁶

S.B. 221 clearly contemplates a market where customers invest in qualifying renewable energy systems designed primarily to serve on-site load, and sell the associated RECs to the utility for the additional revenue necessary to make the investment feasible.

Experience in other states has shown that a market for smaller customer-sited, customer owned renewable energy systems, especially residential solar installations, can benefit from having fixed, long-term offers for RECs. There are several advantages. First, a fixed incentive provides the necessary financial certainty about system economics in order to make a sale. Second, smaller installers may not have the financial or organizational resources to effectively

¹⁵ R.C. 4928.65.

¹⁶ R.C. 4928.02:

participate in a floating REC-trading market. Finally, fixed REC contracts reduce the administrative burden on utilities and regulators considerably.

In order to give customer-sited projects the “broadest opportunities” to sell RECs, the Commission should create a relatively fixed, public price for RECs in the case of low- or no – fuel cost renewables such as solar and wind. The efficiencies of capturing market dynamics with a more fluid commodity are simply non-existent when the economics of the deal are effectively set on “Day One”, when the project finance is completed.

This is done in other states where the regulator develops “standard offer REC contracts” to certain customer classes with highly standardized, long-term contracts and transparent pricing. This is accomplished through a long-term planning process or through an annual review of utilities’ renewable standard implementation plans.

For example, Arizona has a process by which residential installations are offered an up-front incentive based on the capacity of the system, in exchange for the RECs from the expected production of the system. Larger solar systems are offered a choice of 10, 15, and 20 year REC contracts. In Colorado, a periodic RFP process for larger renewable systems generates a standard offer price that is then made available to smaller systems on a standard offer basis until the next RFP. Utilities in New Mexico, responding to a distributed generation solar requirement in the states’ renewable portfolio standard, offer a fixed 20-year REC contract.

The Joint Commenters recommend the Commission direct electric utilities and electric service companies to develop standard offers for smaller customer-owned, customer-sited renewable energy systems. The standard-offer programs should be designed to facilitate an efficient market for customer-sited, customer-owned renewables, and exert downward pressure

on prices, and to minimize any inherent transactional advantage of developer size. The programs should be overseen by the Commission with annual input from stakeholders.

There are significant policy issues at stake in selecting a methodology for setting a standard REC offer and determining under what conditions it is offered (size of system, size of market, etc). The Commission might consider a workshop on the matter for residential system installers. Alternatively, the Joint Commenters offer the following potential language to be added to the proposed rules:

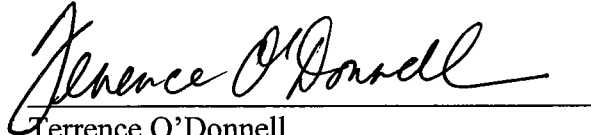
4901:1-40-10, RECs FOR SMALL CUSTOMER-SITED INSTALLATIONS

- (A) NOT LESS THAN ONCE PER YEAR EVERY ELECTRIC UTILITY COMPANY SHALL REQUEST PROPOSALS FOR ENERGY AND/OR RENEWABLE ENERGY CREDITS FROM SOLAR AND WIND INSTALLATIONS LARGER THAN 100 KW IN CAPACITY.
- (B) SUBSEQUENT TO SUCH RFP AND AT A PRICE DETERMINED BY SAME, EVERY ELECTRIC UTILITY COMPANY SHALL OFFER A STANDARD OFFER LONG-TERM CONTRACT FOR THE PURCHASE OF RENEWABLE ENERGY CREDITS FROM ANY NET-METERED AND SMALL CUSTOMER INSTALLATION LESS THAN 100 KW IN CAPACITY.
- (C) THE CONTRACT SHALL BE FILED AND APPROVED BY THE COMMISSION. THE ELECTRIC UTILITY COMPANY SHALL REFERENCE THE STANDARD CONTRACT IN ITS TARIFF AND SHALL BE OBLIGATED TO PROVIDE A COPY OF THE STANDARD CONTRACT TO CUSTOMERS WHO CONTACT THE COMPANY REGARDING THEIR RENEWABLE ENERGY INSTALLATION.

III. CONCLUSION

The Joint Commenters appreciate the opportunity to work with the Commission to implement the alternative energy portfolio standards in S.B. 221, and respectfully request that this Commission adopt their recommendations in this proceeding.

Respectfully submitted,

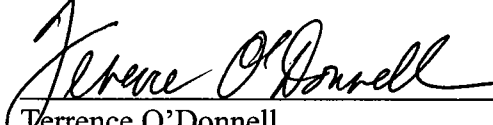
A handwritten signature in black ink, reading "Terrence O'Donnell", is written over a horizontal line.

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Attorneys for the American Wind Energy Association,
Ohio Advanced Energy, Wind on the Wires, and
Environment Ohio

CERTIFICATE OF SERVICE

Pursuant to Commission's Entry dated August 20, 2008, the undersigned hereby certifies that a copy of the foregoing Comments was served this 9th day of September 2008 *via* regular mail upon the parties of record that requested a paper copy of the Comments.


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Bio-Gas Technologies Ltd.

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Renewable Energy Systems, Americas Inc.

Rudolph Libbe

Solar Fields, LLC

SunEdison, LLC

University Of Toledo

Watt Works

WebCore Technologies, Inc.

Xunlight Corporation

September 9, 2008

Dear Public Utilities Commissioners of Ohio:

Harnessing Ohio's natural strengths and manufacturing expertise in advanced and renewable energy technology has the potential to power our state economy for the next generation and make us world leaders in the energy revolution now underway. This is a critical moment for Ohio's fragile economy and as active members of Ohio's business community, we wish to highlight to you the importance of ensuring we capitalize on the energy opportunity before us.

The Governor and the General Assembly saw the benefits of developing Ohio's clean energy resources and passed S.B. 221 to harness this opportunity. The result: Ohio's landmark alternative energy portfolio standard, requiring electric utilities to obtain 25% of their loads from alternative energy by 2025, with annual benchmarks and an enforcement mechanism for all of the renewable energy procured along the way. As you implement this law through administrative regulations, we ask that you work to maximize the benefits to our state that this law can provide, which include:

Job Creation: Currently, there are more than 100 companies in Ohio that are already an active part of the renewable energy supply chain and dozens more that are involved in producing and installing energy efficiency equipment. From the solar manufacturing pioneers in Northwest Ohio, to the wind developers in Ohio's rural areas, this economic sector is experiencing exponential growth, and the S.B. 221 rules should not stand in the way.

Energy Independence: Energy imports cost Ohioans billions of dollars. By increasing our clean, homegrown energy resources we can keep more Ohio dollars in state.

A Healthier Environment: Wind turbines and solar panels produce energy without utilizing polluting fuels or leaving behind toxic emissions or waste. By increasing the energy we produce from these resources, and reducing overall consumption through energy efficient technologies, we will create a healthier and cleaner future for our State.

September 9, 2008

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This future can become a reality if you ensure that the policies laid out in S.B. 221 are properly implemented. That is why we, the undersigned, urge you to implement strong renewable energy and energy efficiency programs that are fair, transparent, and signal to the advanced energy community that Ohio is "open for business." The rules you adopt should not include unnecessary barriers or loopholes that would undermine the policies the Governor and General Assembly carefully crafted in S.B. 221, and the rules should provide a predictable and stable environment for those developing and financing advanced and renewable energy projects.

Business trade groups including Ohio Advanced Energy, the American Wind Energy Association, and Wind on the Wires, along with broader interests including Environment Ohio and the Ohio Consumer and Environmental Advocates, have provided detailed comments to you regarding the proposed rules. We support these comments which relate to advanced energy and energy efficiency, and urge you to make the proposed changes to ensure Ohio is positioned to build a robust advanced energy economy.

Please contact Terrence O'Donnell with Bricker & Eckler LLP, at 614.227.2345 should you require anything further. We look forward to working with you to build Ohio's clean energy economy.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Norm Johnston", with a stylized, cursive script.

Norman W. Johnston
Chairman, Ohio Advanced Energy
CEO, Solar Fields LLC

This foregoing document was electronically filed with the Public Utilities

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Case No(s). 08-0888-EL-ORD

Summary: Comments of The American Wind Energy Association, Wind on the Wires, Ohio
Advanced Energy and Environment Ohio electronically filed by Teresa Orahod on behalf of
American Wind Energy Association