BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of 4901:1-42 Ohio Administrative Code Regarding Green Pricing Programs to Implement Am Sub SB 315	)))	Case No. 12-2157-EL-ORD

COMMENTS OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

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I. INTRODUCTION

As a part of Am. Sub. S.B. 315, a new statute granted the Public Utilities Commission of Ohio (the "Commission" or "PUCO") authority to periodically review green pricing programs by Competitive Retail Electric Service providers ("CRES providers"). See Section 4928.70 (A), Ohio Rev. Code. In an Entry dated October 17, 2012, the Commission Staff published proposed rules and requested comments from interested parties on the proposed rule changes and business impact analysis.

Direct Energy Services, LLC is a certified CRES provider in the state of Ohio, holding certificate number 00-019E(6). Direct Energy Business, LLC is also a certified CRES provider in the state of Ohio, holding certificate number 00-005E(7). Direct Energy Services, LLC and Direct Energy Business, LLC ("Direct Energy") respectfully submit the following comments in response to the October 17th Entry.

As a general matter, Direct Energy finds that the proposed rules duplicate many of the requirements already imposed by the CRES rules in the Ohio Admin. Code (see Sections 4901:1-21 and 25) or go beyond what is required by S.B. 315 and, if adopted, would create confusing compliance requirements. There is no need to reinvent the wheel on many of these requirements

and the proposed rule changes could lead to non-compliance or confusion in reporting. Direct Energy encourages the Commission to consider already existing rules before creating wholly separate and new rules related to green pricing programs. In addition, Direct Energy urges the Commission to consider that CRES providers are competitors in the marketplace, not public regulated entities, when requiring disclosure of competitively sensitive data.

II. COMMENTS

A. Proposed 4901:1-42-03(A) Any Ohio EDU or CRES offering a green pricing program shall ensure that any program materials distributed to customers accurately portray the product.

Direct Energy does not oppose this proposed rule but reminds the Commission to consider that existing rules already require that "(n)o CRES provider may engage in marketing, solicitation, or sales acts, or practices which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a (competitive retail electricity service) CRES. Such unfair, misleading, deceptive, or unconscionable acts or practices include, but are not limited to…(3) Failing to provide in with its advertisements and promotional materials…if applicable, environmental characteristics of the service offered and (9) Marketing, advertising, or claiming that environmental characteristics of any generation service energy source(s) provide an environmental advantage that does not exist." Ohio Admin. Code § 4901:1-21-05(C). Therefore, the proposed rule is duplicative and unnecessary.

B. Proposed 4901:1-42-03(B) Any program or marketing materials being used by an Ohio EDU or CRES that address green pricing programs shall be provided to commission staff for review at least 10 business days prior to the initial distribution to existing or potential customers.

Direct Energy opposes this proposed rule because existing state law and administrative rules provide Commission Staff the opportunity to review any marketing materials upon request:

Amended S.B. 315 provides that "(t)he public utilities commission may periodically review any green pricing program offered in this state as part of competitive retail electric service. At the conclusion of a review, the commission may make recommendations to improve or expand the program subject of the review." Section 4928.70(A), Ohio Rev. Code. Staff's proposed rule goes beyond the scope of "periodic" review required by S.B. 315 by requiring CRES to submit green pricing program and marketing materials to Commission Staff for mandatory review. In addition, the statute gives Staff the authority to review the program to recommend changes for improvement or expansion of the program, not to review marketing materials before a program has begun. While this type of review may be necessary for utility provided green pricing programs, Staff's review of CRES providers' green pricing programs for at least 10 days prior to offering the program to customers does not fit within the statutory framework of S.B. 315. Under the statute, Staff does not have authority to review or recommend changes to a green pricing program until the program is in place and has known results. It is unclear under the proposed rule how Staff will know the successes or failures of the program in order to make recommendations to improve or expand if the review takes place prior to implementation.

Further, the proposed rule goes beyond the scope of existing Staff review of marketing materials: "(a) CRES provider's promotional and advertising material that is targeted for residential and small business commercial customers shall be provided to the commission or its staff within five calendar days of a request by the commission or its staff." Ohio Admin. Code § 4901:1-21-05. Direct Energy also opposes the proposed rule because it does not specify the purpose of staff's review prior to distribution of marketing materials to customers. Requiring CRES providers to submit marketing materials to Commission Staff for at least 10 days before

distribution is a significant administrative burden and is an unnecessary blanket disclosure of competitively sensitive data.

Existing rules already provide the Commission with the authority to investigate and sanction any CRES provider that fails to comply with statutory and administrative requirements. See Ohio Admin. Code § 4901:1-21-15. If Commission Staff requests review of marketing materials that already have been distributed to potential or existing customers and finds that such materials are unfair, misleading, or deceptive, the Commission has the authority to sanction a CRES provider under existing rules. Therefore, Direct Energy urges the Commission to reject this proposed rule on the grounds that it is an unnecessary blanket disclosure of competitively sensitive information and beyond the authority of S.B. 315.

C. Proposed 4901:1-42-03(C) Any Ohio EDU or CRES offering a green pricing program shall semi-annually file details including, but not limited to, the monthly number of participants and the monthly volume of participation measured in renewable megawatt-hours. The commission may prescribe a form for such semi-annual filings. The filing deadlines for this requirement shall be as follows: (1) On July 31st of each year, the monthly participation details for months January through June shall be provided to the commission; (2) On January 31st of each year, the monthly participation details for months July through December shall be provided to the commission.

Direct Energy does not oppose the requirement that CRES providers offering a green pricing program be required to file the details of the program as proposed. However, Ohio Admin. Code § 4901:1-25-02 already contains reporting requirements for similar information. Rather than creating yet another report with different deadlines, Direct Energy recommends that the Market Monitoring rules be amended to include a carve out for the green pricing data sought by the Staff proposed rule. In addition, Direct Energy recommends the existing market monitoring forms be updated to separate green pricing data. The Common Sense Initiative report looked at the affect on business that act as customers receiving these products but ignored

the impact of the businesses which must comply with these rules. It contravenes the Common Sense Initiative to create new reporting requirements when the data sought can easily be obtained by updating an existing report. Another concern is that the existing Market Monitoring report is automatically confidential when filed; Staff's proposed rule requires filing a motion for a protective order in order to protect competitively sensitive data. This is another, unnecessary administrative burden imposed by the proposed rules that should be modified by the Commission. For simplicity's sake the Commission should look to a process that has existed and functioned well for years rather than creating a wholly new process.

D. Proposed 4901:1-42-03(D) Each year the Commission shall initiate a docket in which the required filings covering that calendar year shall be docketed. All filed information shall be treated as public information unless the Company files, and the Commission approves, a motion for protective order pursuant to Rule 4901-1-24 of the Ohio Administrative Code.

The existing market monitoring rules in Ohio Admin. Code § 4901:1-25-02(A)(5)(b) include requirements for confidentiality which are necessary to protect proprietary data; without this protection commercial trade secrets could be disclosed to the public. If a CRES provider offers a single green product, their competitors will be able to see the costs and success of such program through the filing required by the proposed rule. Direct Energy urges the Commission to be mindful of proprietary information when requiring data to be disclosed. In addition, it is a burden on entities to file for a protective order for each filed report and the Commission will be subject to a flood of requests for protective orders each year. Direct Energy recommends that the green product data for CRES providers be treated as confidential information, unless and until the interconnection applicant or customer owner may make, or agree to make, such information public subject to Ohio Admin. Code § 4901:1-25-02(A)(5)(b).

E. Proposed § 4901:1-42-03(E) and (F). (E) Any Ohio EDU or CRES offering a green pricing program shall maintain sufficient documentation to verify that adequate resources were secured and retired to support the product offerings. Such documentation shall be provided to commission staff promptly upon request. (F) Any Ohio EDU or CRES offering a green pricing program shall maintain sufficient documentation to verify that the resources used to support participation in the green pricing program are separate from the resources used for compliance with the state's AEPS. Such documentation shall be provided to commission staff promptly upon request.

Direct Energy supports the rules proposed in subsections E and F but would again recommend that these rules be incorporated into the existing CRES requirements in Ohio Admin. Code § 4901:1-21. In addition to placing all CRES product requirements in a single section this would also create consistent record retention requirements for all CRES products. Finally, CRES providers, like all companies, find it much easier to comply when provided exact timelines. Direct Energy recommends that if this rule is not incorporated into the existing requirements for a 5 day response that the word "promptly" be removed and replaced with "5 business days." This is the same amount of time required for all other requests, including complaint responses, and would facilitate timely compliance.

F. Proposed 4901:1-42-03(G) An Ohio EDU or CRES offering a green pricing program shall not engage in double-counting of resources used to support participation in a green pricing program.

Direct Energy opposes this proposed rule to the extent that double-counting is already prohibited by Ohio Admin. Code § 4901:1-40-04(D)(4): "(a)n electric utility or electric services company may use renewable energy credits (REC) to satisfy all or part of a renewable energy resource benchmark, including a solar energy resource benchmark" and that "(d)ouble counting is prohibited." Double-counting means "utilizing renewable energy, renewable energy credits, or energy efficiency savings to do any of the following: satisfy multiple Ohio state renewable energy requirements or such requirements for more than one state; comply with both the energy

efficiency and advanced energy statutory benchmarks; support multiple voluntary product offerings; substantiate multiple marketing claims; some combination of these." *Id.* § 4901:1-40-01(M). If the Commission finds it necessary to specifically prohibit double-counting of resources specifically used for green pricing, Direct Energy would encourage the Commission to modify the existing rules in Ohio Admin. Code § 4901:1-40-04(D)(4) rather than adopt Staff's proposed rule.

III. CONCLUSION

On January 10, 2011, Governor Kasich signed Executive Order 2011-01K establishing the Common Sense Initiative which states that "(r)egulations should facilitate economic growth, and the goal of regulators should be to help businesses comply" and that "(p)rotecting the public is always first and foremost, and regulatory compliance increases when regulations are easier to understand and to follow." The Common Sense Initiative questionnaire attached to the proposed rules focuses on the impact to businesses which take green pricing and not on the impact to businesses which must comply with the rules. Placing green product requirements within existing CRES provider rules simplifies compliance by not creating another and wholly separate set of rules for a different product. In addition, including reporting in existing market monitoring simply adds to an existing report rather than creating another reporting structure with separate due dates and separate confidentiality requirements. Therefore, Direct Energy encourages the Commission to promote the goals of the Common Sense Initiative and improve efficient compliance by modifying existing CRES provider rules to include green product requirements rather than creating another set of rules specifically relating to green pricing products.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comments of Direct Energy Services, LLC and Direct Energy Business, LLC has been filed with the Public Utilities Commission of Ohio and will be served on those who file initial comments in this case.

/s/ Jennifer L. Lause
Jennifer L. Lause

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Summary: Comments of Direct Energy Services, LLC and Direct Energy Business, LLC electronically filed by Ms. Jennifer L. Lause on behalf of Direct Energy Services, LLC and Direct Energy Business, LLC